Summary of:

Bruce Ziff, *Principles of Property Law*, 3rd ed. (Toronto: Carswell, 2000).

Recommended for LAW 440

CHAPTER 1: THE NATURE OF PROPERTY

CASES:

- *Yanner v. Eaton*
- *INS v. Associated Press*
- *NBA v. Motorola*
- *Victoria Park Racing and Recreational Grounds v. Taylor*
- *Moore v. Regents of University of California*
- *Gould Estate v. Stoddart Publishing Co.*

property = a bundle of legally enforceable rights over land or chattels - includes rights in relation to objects and intangible ideas, and rights *vis-à-vis* individuals.

- Honore's 11 "standard incidents of ownership"
- The most basic right in the bundle is the right to possess and control property to the fullest extent.

(1) THE PROPERTIES OF PROPERTY

(A) PUBLIC AND COMMON PROPERTY

4 Kinds of property
(1) Private Property (2) Public Property (3) Common Property (4) Communal / Collective Property

Private property and **public property** are often seen as contrasting.

- For public property, it is the state that possesses the power of exclusion. However, the rights of enjoyment for public holdings are not entirely the same as those held by a private owner. In principle, the allocation of public goods should be carried out based on an assessment of public interests. Public property is subject to state control and is burdened with public obligations.
- Private owners are not generally constrained in this same way.
- Monopolous control of property is vested in the individual in a private property system. In terms of public property, this control falls to the state.
- State's right of exclusion in terms of public property is tempered by constitutional rights (ie. the right to protest on public property).

Communal/Collective property:

- What these terms mean is not always clear. However, communal property rights are often based on belonging to a certain class or being part of a defined group (ie. aboriginal).

Private vs. **Collective** property:

- Difference between the two can be hard to establish.
- Private ownership does not always mean individual ownership – the law allows two or more people to share property as joint tenants or tenants in common.
- How does shared private ownership (concurrent ownership) really differ from communal property?
- Where communal property rights distinguish between those who are "in" and those who are "out", communal ownership and shared private ownership start to look alike.

(2) THE CASE FOR PRIVATE PROPERTY

It is assumed, according to Canadian social values, that property ownership provides the basis for enhancing the human condition. All arguments for private property centre on this belief.

There are **7 main categories of arguments** for private property:

(A) ECONOMIC ARGUMENTS

(i) the basic law and economics stand:

- Focuses on the promotion of economic efficiency and abundance as a justification for private property.
- Based on the belief that the wealth that we experience in Canada is a result of the right of private property that encourages us to produce more and reap the reward.
- According to the conventional economic position, the principles governing property will tend toward efficiency and wealth maximization if several features are in place:
    1) The law should protect exclusivity of ownership
    2) The law should allow entitlements to be transferable so that they can circulate in the market (this ensures that property interests eventually gravitate to those people who value them most)
    3) The law should make a broad array of items available for exchange. Property should be as universal as possible and should be tenable by as many people as possible (the more players the better)
- With these factors in place the market can work to shift resources efficiently with each trader being assumed to be a rational wealth maximizer.

(ii) The tragedy of the commons

- Parable that assumes that all people who share in a given piece of property will maximize the use of that property in order to get the most for their money (so to speak). The "tragedy" arises when overuse of the finite amount of property by all owners seeking to maximize their use leads to degradation and economic losses for all those involved.
- The theory is that the use of private property would not lead to the same results because the land would be more carefully preserved.
- This parable may be more an argument against *unregulated* common property than an argument for private property.

(iii) Other Critiques

- Arguments based on efficiency and economics lack persuasiveness - they fail to prove that they produce better results than produced by other forms of ownership.
- Economic theories are heavily reliant on the belief that most people are rational wealth maximizers at heart (may be an ethnocentric way of thinking).
- Economics and morality do not always line up (ie ownership of human organs may be seen as immoral even though it accords with the principles of wealth maximization).
- It is possible that too much private ownership may impede economic development (ie if all roads were privately owned).

(B) ARGUMENTS BASED ON UTILITARIANISM (Bentham)

- Wealth is a measure of happiness – people have an acquisitive need that must be satisfied to achieve happiness, and this can be best accomplished in a society that provides a measure of security for property holdings.
- Any rule or conduct is potentially beneficial even if it leads to the extreme suffering of some.
- This theory may be used to argue against private property as much as it can be used to argue for it – ie. one may wish to tolerate the enslavement of a few if society was better for it.

(C) THE PROMOTION OF FREEDOM

- Private property is supposed to promote autonomy and enhance freedom.
- The expansion of freedom should be seen as both the primary end of development and the principal means of achieving development.
- The function of property is to draw a line around public and private power (protects the owner of property from interference by the state) – liberalism.
- In reality, this line is drawn because the state allows it to be drawn.
- Property ownership can confer on some citizens an enormous power to control others – ie. in business or in family - by bequeathing property with conditions such as marrying a certain person or within a certain faith.

(D) PERSONHOOD, MORAL DEVELOPMENT AND HUMAN NATURE (Hegel)

- Private property is connected with human and moral development. In other words, property allows that human will to develop and thrive, bestowing on people the capacity to demonstrate individuality and full self-expression. To achieve proper self-development – to be a person – an individual needs some control over resources in the external environment.
- Property separates moral and political societies from others.
- Assumes that human beings are acquisitive by nature (rather than nurture)
- On the other hand, property ownership may not always be an enriching experience (ie it may foster traits of greed, avarice, selfishness etc.)
- Based on the value of the individual in society as opposed to the group (private vs. collective ownership being the desired end).

(E) LABOUR, DESERT AND CONSENT (Locke)

- Individuals are entitled to those things over which they have laboured.
- The law is not the source of property rights – nature is. The primary function of the legal system and of civil society is to protect the pre-political right to property.

(F) ENTITLEMENTS DERIVED FROM OCCUPANCY

- First in times is first in right (the act of taking possession is treated as the labour that merits the granting of a reward).
- This rule refers to original acquisition in a state of nature, and to the profits.
- Pivotal to aboriginal land claims – also central to colonialism.

(G) PLURALIST ACCOUNT (Munzer)

- Property rights based on (a) utility & efficiency (b) justice & equality and (c) labour & desert

(3) THE FUNCTIONS OF MODERN PROPERTY LAW

(A) RESOLVING NOVEL CLAIMS

- Decide what items should be protected as property.
- Resolve claims involving new types of property.
- 2 factors that have prompted developments in the judicial meaning of property:
  1. Rejection of property as ownership of "things" in favour of the idea that property is a bundle of rights with many abstractions.
  2. Advances in science and technology
- 2 styles of assessing new types of claims:
  1. **"Attributes" approach** – does the right being asserted look like other property rights? – Can be circular - requires a firm definition of property.
  2. **"Functional" approach** – looks at the policy factors – how should property as a social tool be used? Recognizes that property is acontextual – reflects societal values.

Example: Is a University Degree property?

- *Graham v. Graham* – A degree has no resemblance to traditional forms of property (no market value, it is personal to the holder and cannot be sold, it can be earned but not bought etc.)
- *Woodworth v. Woodworth* – involved a wife's claim for the division of her husband's law degree. Court found rejected *Graham* and found that a university degree is property that could be divided (or compensated for monetarily) between the spouses.

Cultural Appropriation

- "the taking – from a culture that is not one's own – of intellectual property, cultural expression or artifacts, history and ways of knowledge"
- Controversial in Canada – aboriginal property rights (ie. stories, traditional motifs, use of ancient medicines for pharmaceutical patents etc.)
- Often beyond the traditional scope of property law, including intellectual property law.

Novel Claims Concerning Land

- Courts maintain a cautious view that the categories of property rights must be carefully controlled – slow to reform.
- Parliament is not as conservative.

5 main functions of property law

(1) Determines the objects of ownership.
(2) Allocates entitlements and provides a context for rights to be exchanged.
(3) Balances the conflicting claims of property owners.
(4) Provides protection, through criminal and civil law, against wrongful action by person with no entitlements.
(5) Serves as a mechanism to ascertain and facilitate the dispositional preferences of owners

- Functions mostly serve to promote economic efficiency through by reducing transaction costs.
- Property law balances the rights of exclusive interest and public interest

CHAPTER 2: THE INSTITUTION OF PROPERTY IN CONTEXT

CASES:

- *Rock Resources Inc. v. British Columbia*

(A) SOURCES OF CANADIAN PROPERTY LAW

(1) ENGLISH FEUDAL SYSTEM

- Gives us 2 main principles of modern property law: **tenures and estates**.
- In this system, land is held of a lord, not owned outright by the subject.
- Recipients do not obtain absolute (allodial) ownership of land.
- Function of this relationship was to create an economic & social network.
- The Crown granted land to tenants-in-chief in return for allegiance, revenue etc.
- Created a contractual relationship – reciprocal obligations between tenant and lord.
- Tenant-in-chief would eventually be able to pass the land on to someone else – modern sale of residential property stems from here.

"Subinfuedation"

- Creates a new layer of tenure like a sublease – puts the tenant in the role of being lord of the grantee.
- New tenant called **tenant in demesne**, tenant-in-chief called **mesne lord**.
- Created a complex social & economic pyramid as the system became more complicated.
- A tenant was compelled to provide tenurial services to the immediate lord designed to satisfy 4 basic needs: (1) security, (2) spirituality, (3) splendour, (4) sustenance.

In addition, there were obligations and entitlements (called 'incidents') that attached to land – vary depending on type of holding. For example:

- Oaths of allegiance given by tenant to lord (homage and fealty)
- The right of the lord to call for financial (aids)
- Transfer taxes (fines)
- Death duties payable on the descent of land to an heir (relief/*primer seisin*)

By 14th Century 3 types of freehold estates were recognized:
(1) **fee simple** (2) **fee tail** (3) **life estate**

End of Feudal System by early 13th Century - today tenures and estates still form the basis of land law in Canada, however most of the feudal trappings have long since disappeared.

2 statutory reforms altered the shape of feudalism drastically:

(a) *Quia Emptores Terrarum* – 1290

- Designated to reduce the complicating problems of subfudeation by prohibiting further subfudeation.
- Did not abolish existing land tenures
- Transfer of the fee simple estate from A to B could no longer be accompanied by obligations of continuing tenurial services or incidents owed by B to A.
- Allowed transfers of land to take place without the consent of the immediate lord.
- Expected that as escheats and forfeitures occurred the pyramid would truncate until the Crown again assumed the position of immediate lord to all tenants.
- Plan was successful – helped along by the plague (deaths).
- Seen as providing the first legislative manifestations of the policy of promoting free alienability – an idea that influences much of contemporary property law.
- *Quia emptores* is not binding on the crown – the granting of new lands and the reconveying of properties reclaimed through escheat has continued.
- After the death of the tenant, the owner of the fee simple is entitled to assume possession of the land.

(b) *Statute of Tenures* – 1660

- Designated to greatly reduce the available forms of tenure.
- Converted tenures by knight service & serjeanty into socage & removed some of the onerous incidents of tenure.
- Decreed that all future grants were to be in free and common socage.
- Opened the door for capitalism

In Alberta today the Crown remains the ultimate and final heir – if an estate in fee simple comes to an end with no person entitled to assume ownership, that land reverts to the Crown. All ownerless land reverts to the Crown.

(2) THE ADOPTION OF ENGLISH LAW

- Accomplished through the general laws of reception (how colonies were acquired – how they acquired a legal regime)
- Canada (except Quebec) derives it law from England's common law.
- Reception can be selective – Alberta chose what laws to receive from England based on which ones were applicable to the condition in the province at the time of reception.
- NWT Act – sets out date of reception for Alberta – July 15, 1870

Huggard Assets (circa 1950)

- Example of the application of reception principles to property law
- Government wanted to levy royalties against the defendant.
- Question was whether the laws governing tenure by free and common socage were in force in Alberta.
- Court held that it was received by Alberta, but not by virtue of the Statute of Tenures.
- Hudson's Bay Charter, 1670 – transaction between the government and the Hudson's Bay company – example of free and common socage in Canada.
- Section 3 of the NWT Act says that Alberta received the law of England (which included free and common socage) which can be changed through subsequent legislation.
- The royalties that the gov't was asking for were covered by legislation and therefore valid.

(2) OTHER HISTORICAL FEATURES

- English Law comes from Nordic, Germanic, Roman influences etc.
- Other sources of post-reception reforms:
    (a) Australia - **Torrens system** of land registration and the basic elements of condominium (strata) title.
    (b) US – **homestead laws**
    (c) Europe – **Matrimonial property laws**

The Doctrine of Marital Unity

- Husband and wife are to be treated as a single legal entity.
- Woman lost her legal identity– affected her rights of ownership.
- Gender-based rule – mostly dead now – husband and wife are now considered separate legal entities.

English Law and Aboriginal Title

- Reception of English laws overlays the pre-existing property rights of Aboriginal communities.
- Aboriginal people retain property rights unless they are taken away by a legitimate act of the state – Canadian law recognizes pre-colonial land rights.

Basic Principles of Canadian Property Law in regards to Aboriginal title:

(a) Sources -

- Rights originally seen as usufructuary (non-possessory).
- Now title is seen as a right to exclusive possession
- Aboriginal title is not exactly a fee simple estate but a class of its own – no particular rule of property law applies to land held under Aboriginal.
- Features of aboriginal title laid out by SCC:
    i. It is inalienable except to the crown – cannot be sold, transferred or surrendered to any other party
    ii. It is held communally by the members of an aboriginal nation.

iii. Differs in source from other kinds of property holdings – 1763 Royal Proclamation affirmed the existence of a *pre-colonial* right (generic common law estates in land arise from grants made *after* sovereignty had been established).

- Use of land not restricted to traditional practices (ie. may exploit mineral rights) but must be consistent with the nature of the group's attachment to the land – see *Delgamuukw v. British Columbia* p.65.

(b) Recognition of title -

- SCC (*Delgamuukw v. BC*) laid out the rules for establishing Aboriginal title (legal recognition of property interests):
  i. Must be shown that land was occupied prior to the assertion of British sovereignty – proof of an unbroken chain of occupation is not necessary – often present occupation will suffice if a link can be drawn between present and pre-sovereignty occupation – that is, a connection with the land has been substantially maintained.
  ii. Occupation relied upon must have been exclusive – supported on 2 grounds: (1) proof it title should be consistent with the property interests acquired, and (2) the requirement of exclusivity prevents the chance of conflicting and adverse claims being recognized in favour of different Aboriginal communities.

(c) Loss or alteration -

- 2 ways in which Aboriginal land rights may be lost:
  (1) Through surrender – such as where lands are ceded to the Crown under a treaty.
  (2) Can result from a valid, yet unilateral, sovereign act (expropriation by the state) – The onus of proof lies on the party asserting extinguishment and requires that parliament show its intentions are "clear and plain".
- Expropriation of land is not always inconsistent with Aboriginal use of the land.
- How the state can affect Aboriginal rights is bracketed in 2 ways:
  (a) The crown owes **fiduciary obligations** to Aboriginal peoples - stems from the Crown's historical obligation to protect the interests of First Nations People – the crown must act in good faith in all dealings and negotiations.
  (b) **Constitutional constraints** –
    a. s.91(24) of the Constitution Act, 1867 gives the federal government legislative competence over "Indians, and lands reserved for them" (provincial laws directed at extinguishing native title are *ultra vires* and therefore void).
    b. S. 35 of the Constitution Act, 1982 - "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed" – designed to protect Aboriginal title against regulation by the federal government
    c. Charter of Rights and Freedoms.

(3) BASIC DIVISIONS IN THE LAW OF PROPERTY

(A) Real and Personal Property

- Real property (realty) – mainly rights in relation to land
- Personal property (personalty) – things other than land

- The line between real property (immovables) and personal property (movables) is grey – especially in regards to contractual promises, stocks, bonds, human capital, patents, copyright etc. – information age.
- **Right in *rem*** – right against the world at large (property rights)
- **Right in *personam*** – a right against an individual (personal rights)

SEE DIAGRAM FOR TAXONOMY

(4) THE SOCIAL CONTEXT: WEALTH, CLASS AND POVERTY

- Property serves as a badge of status – the manner in which property is distributed can be used to describe societies as a whole.
- Relative position of aboriginals, black people is not good in Canada – significant disparities in wealth – gap is growing.
- Gender disparities are becoming less pronounced – however women still earn less than men.

PROTECTION OF PROPERTY

(A) International Context

- *Universal Declaration on Human Rights* talks in terms of a right to not be deprived of property without <u>compensation</u>, but this document is not ratified by Canada > **substantive protection**
- *Covenant on Civil and Human Rights* gives only a **procedural protection** to property – have a right not to be deprived of property without due process > ratified by Canada
- *NAFTA* provides non-resident investors of participating countries substantive (compensation) and procedural (due process) protection of property
- The biggest problem in international law is remedies – protection of personal property is an international norm, but enforcement of this norm is weak

(B) Domestic Context

- **s. 92(13)** gives provinces exclusive jurisdiction over property and civil rights. But, Parliament also has powers that impact property (such as bankruptcy, criminal law, marriage and divorce, aboriginal rights), and Municipalities can make bylaws that impact property… many governments impact land ownership!
- In Canada we have both Federal and Provincial Bills of Rights – extraordinary legislation in that they are superior to any conflicting statute
    1. *Federal Bill of Rights* 1960 provides for enjoyment of property of individuals and rights not to be deprived without due process of law
        a. allowed parliament to avoid Bill of Rights by a statute on avoiding the Bill of Rights
        b. not substantive protection, only procedural
        c. all it basically says is if govt takes property away it must do so with due process; no mention of compensation

    2. *Alberta Bill of Rights* basically the same thing – procedural protection
        - However, the *Alberta Personal Property Bill of Rights* (likely only province that has this) defines personal property to be tangible, capable of being physically touched, seen, or moved. Intangible excluded as is any interest in land > Provides both procedural and substantive protection!

(3) *Charter of Rights* contains no explicit protection of property, mainly due to provincial concerns over the maintenance of social welfare programs, but there is some implicit protection of property rights contained in the Charter:
   (a) **s. 8**: right to be secure from unreasonable search and seizure
   (b) **s. 7**: right to life, liberty, and security of the person as well as the right to not be deprived of these things except in the interest of fundamental justice (* on p.60 CB, Bauman writes that the SCC rejects the notion that s.7 includes economic rights, but says that s.7 would be a good place to insert constitutional protection of property if such an amendment were made)
   (c) **s. 15**: equality guarantee – can be used to protect property interests when attacked in a discriminatory way

- *A note on statutes:* some provide for compensation for government interference with property rights, but no statute says governments must compensate. Rather, it is the common law that shows governments must compensate for the expropriation of property interests unless they have statutory authorization (Rock Resources)
- *Expropriation Acts* (federal + in each prov): provide compensation for the taking of rights and interests in land – problem: nothing says this is paramount legislation.
- *common law* provides protection from legislative interference in two ways: (1) legislation is always interpreted when possible so that it does not impair property rights, and (2) legislation must explicitly state

CHAPTER 3: THE PHYSICAL DIMENSIONS OF OWNERSHIP

CASES:
- *Anderson v. Amoco Canada Oil and Gas*
- *Didow v. Alberta Power*
- *Edwards v. Sims (Onyx Cave Case)*
- *Nastajus v. Edmonton Beach*
- *Lasalle Recreation v. Canadian Camdex Investments*
- *Diamond Neon v. TD Realty*
- *Indian Oil v. Greenstone Shipping*
- *McKeown v. Cavalier Yachts*
- *Gidney v. Shank.*

(1) CUJUS SOLUM EJUS EST USQUE AD COELUM ET AD INFERNOS
- Whoever owns the soil, holds the title up to the heavens and down to the depths of the earth
- The courts do not apply this maxim literally – only a useful point of departure.

(A) AIRSPACE
- Ownership of land usually includes rights to the airspace above it – this must be so or land would mostly be useless (couldn't build on it).
- Balance between the needs of landowners and the needs of the public (to whom the air is common property)
- **How high do ownership rights extend?**
   (a) Some courts use a standard based on ordinary use
   (b) Others define the limits on the bases that an intrusion must not interfere with actual or potential use and enjoyment.
- Airspace rights are generally treated as possessory rather than usufructuary – therefore amenable to protection through an action of trespass.

Anchor Brewhouse v. Berkeley House

- Plaintiff obtained an interim injunction to prevent the oversailing of the defendant's construction cranes.
- Plaintiff had no present use for the airspace being invaded – but there were plans for long-term development
- Court held that an intrusion by a structure located on the defendant's land constituted a trespass to the plaintiff's airspace

Different Approach (suggested by Morgan)

- The law should provide that an entry into airspace that does not interfere with actual or potential uses of the landowner and does not exploit that person's interests is not wrongful.
- An unauthorized entry that results in the appropriation of a benefit from the plaintiff should be actionable. This would allow the landowner to recover for an invasion of airspace if, for example, the defendants were using remote sensing to explore mineral deposits on the plaintiff's land.
- Standard is based on the objectives of the invasion rather than height.

(B) BELOW THE SURFACE

- Little case law – conflicting authorities

(C) ECONOMIC PERSPECTIVE

- Coase theorem – demonstrates that the economic function of law is, in general terms, to influence the prices that are paid for various commodities. This may suggest that legal rules of ownership are irrelevant.
- Deals can be made that are in the best economic interests of both parties.

3 reasons why property rules are critical:

(1) We need to know at the outset to whom a property right has been given so that the bargaining process can begin.
(2) In the promotion of deal-making the law should strive to facilitate the bargaining process – this it can do by reducing transaction costs.
(3) When the market doesn't function as it should the law must try to determine which initial ownership rule is optimal – the law acts as a "market mimicker" – should establish rules of ownership that reflect the likely outcome of market transactions if the market were able to work efficiently.

(D) MINES AND MINERALS

- Ownership of the surface may not include the right to mines and minerals found below – depends on the nature of the initial grant of the land in question.
- Under current law, a Crown grant is taken to reserve mines and minerals impliedly.
- Mineral estate may be severed from the surface (surface vs. subsurface rights)
- Where there are separate subsurface rights - in Alberta, the general rule is that a right of entry to the surface area (which may be needed to extract the minerals) must be expressly granted.

Important legislation:

(1) *Mines and Minerals Act*
(2) *Law of Property Act*
(3) *Surface Rights Act*

What is a mine / mineral?

- A mine is just a space from which you take minerals
- Not based on scientific definition (not according to geologists) but what the industry decides it is – usually refers to some natural substance of value – but definition is very slippery.
- List set out in *Mines and Minerals Act, Law of Property Act* s.56(1).
- What about sand and gravel on the surface? See *Law of Property Act* s. 58
- Diamonds – included as mineral under Mines and Minerals Act (precious stones).

Andreson v. Amoco Canada Oil and Gas

- What is included in a petroleum claim?
- Court says that it depends on what the contract says, timing of the contract.
- Evolved gas is not subject to the law of capture. That is, it does not become your property when you capture it (a la *Pierson v. Post*). This is different from petroleum, which is subject to the law of capture – ownership vested in those who capture it (common law rule that is now regulated) – royalties are paid to the Crown.

Surface Rights Act

- For parties with contracts to extract mines and minerals from land - there is no longer an automatic right of entry to land and right to work land.
- s.12(1) – consent to right of entry is needed from both the owner and occupier of the land. Includes a loose definition of "occupier".
- In addition, there must be specific and separate consideration in the contract for that right of entry (separate and distinct from contract to extract mines and minerals).
- Surface owners / occupiers are in the position to determine the amount of compensation for interference with use and enjoyment of the land.
- **Surface rights board** – where no agreement can be made as to the appropriate amount of compensation to surface owners, the board will decide and impose a contract.

(2) LATERAL BOUNDARIES

(A) LAND BOUNDED BY LAND

- Lateral boundaries of a surface plot are usually easy to define – relatively clear and stable, do not change much over time.
- Difficulty is often in describing the fixed boundary.
- Alberta – system of township surveys – province is divided by 3 vertical meridians – within each meridian there are a number of vertical ranges. Township lines run perpendicular to ranges and create box-like "townships" – further divisions into sections (36 for each township) and quarter sections.
- Descriptions in the cities (ie Edmonton) can be different.

When there is a discrepancy in description the following elements are looked at (in descending order of importance):

(a) natural monuments
(b) lines actually run and corners actually marked at the time of the grant
(c) abutting established boundaries if referred to in the grant
(d) courses and distances

Adverse possession –

- If a person occupies land for a requisite period of time he may be entitled to the land (in Alberta 10 years).

- When one party mistakenly builds on land that belongs to a neighbour, title to the improved land may be affected – ie. the builder may be entitled to a lein on the land to the extent of its increased value – or the builder may be entitled to retain the land.

(B) LAND BOUNDED BY WATER
- Common law distinguished water based on whether or not it is navigable and/or tidal.
- **Non-tidal and non-navigable rivers** – the boundary extends to the middle of that river unless documents of title state otherwise. The Crown owns all riverbeds.
- **Tidal and navigable bodies of water** - ownership extends only to the high water mark – below that line the Crown holds title.
- **Tidal but non-navigable / non-tidal but navigable rivers** – common law seems to turn on the navigability of the river as a focus – if it is navigable it may be used as a means of transportation and therefore can not be privately owned.

(C) RIPARIAN (WATER) RIGHTS
- Riparian owner – property butts up against a body of water.
- The Crown now owns all water and the right to diversion – *Water Act s.3(2)*.
- The *Water Act* includes definition of water – "all water on or under the surface of the ground, whether in liquid or solid state".

At Common Law:
- Land ownership includes a type of entitlements called riparian rights
- These include (a) the right of access to the water and (b) the right to take emergency measures to prevent flooding.
- A riparian owner could use an unlimited amount of water for "ordinary" uses – generally domestic needs. Water could also be used for other non-ordinary uses such as irrigation – but usage is limited to preserve the riparian rights of people downstream.
- At common law, downstream owners are entitled to receive the natural flow of the stream – people upstream must not diminish the quality or the quantity of the watercourse. This creates a simple form of local environmental control.

Rights have now been legislated –
- A riparian owner or occupier has rights to divert water for "household purposes" – see **s.21(1) of the *Water Act*** (ie. human consumption, sanitation, fire prevention, watering animals, lawns, gardens and trees). This use does not require a permit. Limit on consumption is 1250 Cubic meters per year per household – from definition section of the Act – definition of "household consumption".
- Other "extraordinary" uses now require special permission (ie. irrigation, manufacturing) – complicated legislation, complex administrative regulatory infrastructure.
- Can be sued if you interfere with a downstream owner's riparian rights.
- Common law can still result in a law suit but legislation overrides common law.

(E) THE LAW OF ACCRETION
- An element of common law riparian rights that regulates the process of transformation of land and watercourses
- Erosion, encroachment of the water's edge can diminish the size of a freehold. Recession of water, deposit of soils due to upstream changes can increase its size – can be beneficial to the riparian rights of the owner if certain conditions are met:
    1. The *process* of transformation must be **slow and imperceptible** – this may be because the law does not concern itself with trifling matters (*de minimus* theory) – ensures that the change is relatively permanent over the long term.

(2) The granting documents do not expressly or impliedly exclude accretion.

(3) IMPLICATIONS OF OWNERSHIP: EXTERNALITIES

- Owning property does not give the owner absolute rights to do what they want within the boundaries of the land – rights are not absolute. For example, a person may not be able to exclude the police from their land.
- Ownership also has external implications – voting rights, obligation to pay property taxes, rights relating to school attendance. That is, **rights exist outside of the boundary line of a property.**

Right of Support of Land

- Right of support – gives the owner a right to have their land in its natural state and at its normal level.
- Exists because changes to surrounding properties can affect a person's own property.
- For example, excavation on property A leads to subsidence on property B. The owner of property B has a cause of action against the owner of property A regardless of whether or not the work was undertaken with care.
- Also applies vertically – ie. subsidence caused by mining beneath property A may also be actionable.
- Rights to support may be waived by express language or necessary implication.
- Rights to support do not extend directly to buildings on the land – they may cause subsidence themselves. However, if it can be shown that sinking would have occurred even without the buildings, there may still be a cause of action.

(4) ON THE CUSP OF LAND AND CHATTLES: FIXTURES AND CONVERSION

(A) THE TEST FOR FIXTURES

- A chattel that becomes sufficiently attached to land may be transformed into a "fixture", thereby forming part of the realty.
- This is important because the gift, sale, mortgage or lease of a property includes all fixtures (unless the contract of sale expressly states otherwise).
- Also, following the termination of a lease the landlord may become entitled to fixtures placed on the land by a tenant.
- 2 Objective tests for whether a chattel has become a fixture includes:
  - (a) **Intention** – ascertained by determining the degree and object (aka purpose) of the annexation. Was the purpose of the attachment to (a) enhance the land (here it would be a fixture) or (b) to better the use of the chattel as a chattel (example – heavy machinery that must be attached to land in order to use it as a chattel). Problems may arise when the attachment was for both purposes.
  - (b) **Attachment to land -** If a chattel is resting on its own weight on the property it usually remains a chattel. If the chattel is attached to the land, it usually becomes a fixture. But, there is a category for "unattached fixtures" – includes house keys, tools associated with fixtures, dwellings resting on the ground, ornaments that are integral to the architectural design of the property. What is "attached" however, is hard to determine conclusively. For example, is a mobile home a fixture or a chattel? Everything depends on the specific facts of the case. Courts will also consider the amount of damage that removing the item would cause.
- Whether or not a chattel becomes a fixture can not be exclusively controlled by contract – ie. an agreement that stipulates that a chattel shall not by attachment or otherwise be deemed a fixture will not resolve the issue of characterizations.

- Onus of proof where a contract is silent about a particular object that appears to be a fixture lies with the seller to prove that the item is a chattel and not a fixture. How do you do that? – by showing that it was the intention of the affixer that the item remain a chattel. Test is objective – must look at the degree and purpose of affixation (as above).
- Contracts can affect the rights of the parties involved – for example identifying in a contract of sale what fixtures or chattels are to pass on in the purchase can minimize the controversy as to what exactly forms part of the deal.

(B) TENANT'S FIXTURES

- Special rules regulate fixtures attached by leaseholders – fixtures added by tenants may become part of the leasehold property.
- A tenant may reclaim fixtures (return them to chattels) if four conditions are met:
  (1) Items must fall within a set of features protected by common law – includes items attached for the purpose of (a) trade, (b) ornamentation, and (c) domestic convenience. The common law does not see agricultural fixtures as being for trade except if they are for market gardening (however this has been changed by legislation).
  (2) Removal may be precluded if it will cause very serious damage to the property.
  (3) This implied right of detachment may be abridged by contract. Such a waiver should be strictly construed against the landlord.
  (4) There must be timely removal. Normally this means that the tenant must have a right of removal within a reasonable time after the tenancy is actually ended.

(C) THE CLASH OF SECURITY INTERESTS

- The transition from chattel to fixture can also affect third parties (ie creditors). For example, a chattel may be sold on terms subject to repossession if the payments are not made. If that chattel has become attached to land with a mortgage, priority rules are needed to determine which of the creditors prevails.
- Generally, when a chattel becomes affixed to land it falls under the land security or mortgage – this means that the owner of the chattel loses the right to repossession and is left only with an action on the debt against the purchaser.
- This *may* be changed by contract.
- Current trend in Canada is to regulate these disputed by statute.

Important Legislation - *Personal Property Security Act*

(D) THE EQUITABLE DOCTRINE OF CONVERSION

- When there is a legal obligation to convert **realty** (fixtures / land) into **personalty** (chattels), a court of equity will regard this as having been accomplished from the very moment that the obligation comes into force.
- For example, when a court order is made for the sale of land (realty), the property is immediately treated as personalty in the hands of the person entitled to the proceeds. Also, where property is directed to be sold or given to a person by way of a will, the same principle applies.

(5) THE TRANSFORMATION OF CHATTEL OWNERSHIP

- Title to chattels may be affected by:
  (1) The **intermixture** of the chattels of two or more people.
  (2) The **accession** (or joining) of goods.
  (3) An **alteration** under which an entirely new object is created.

(A) CONFUSION (AKA COMMINGLING / INTERMIXTURE)

- From Roman law - Confusion occurs when fungible items are inseparably combined (For example, liquid (owned by A) mixed with dry goods (owned by B) produce a new product that can not be separated). The law must somehow decide the proprietary elements of each of the claimants.
- It is always preferable wherever possible to separate the goods and return each owner to their original position. However, this is not always logistically possible.
- **General rule** – when confusion happens as a result of **intentional wrongdoing** or negligence, the person at fault would suffer the loss and the title would pass to the innocent party. When confusion happens **accidentally** or innocently or consensually, the parties share the combined mass as co-owners and their portions are based on their relative contributions (if known – otherwise they split if 50/50)
- General rule does not usually apply where it would lead to substantive injustice (must always consider fairness).

Commingling vs. Intermixture

- See notes written on midterm CAN

McDonald v. Lane

- The question was who owned some logs that had been intentionally commingled by the defendant.
- SCC found that the plaintiff had title to only those logs that were originally his.
- Departure from the general rule.
- Emphasizes that the point of civil law is to compensate not to punish.

Indian Oil v. Greenstone Shipping

- Case of confusion.
- The D combined its own oil with oil of equal grade belonging to the P.
- The P's claim for the entire amount failed.
- The court put D to the strict proof of entitlement – had to prove that it was entitled to a certain portion of the oil.
- **Purpose** of the law of confusion is not to punish wrongdoers but to restore the parties to their original position. However, when this is not possible the courts will err on the side of the plaintiff.

(B) ACCESSION

- A legal doctrine designed primarily to resolve disputes in which two or more chattels become attached.
- For example, A's paint is applied to B's car – one of the chattels is subsumed by the other.
- Distinguishes between the dominant or "principal" chattel to which the accession is made (ie the car) and the secondary chattel – usually the dominant chattel is the item with the greatest market value. The person with title to the dominant chattel usually assumes ownership of the secondary chattel.

McKeown v. Cavalier Yachts Pty.

- The P owned the hull of a sail boat to which the D had added substantial improvements.
- The D claims that he was unaware that title was vested in the P.
- The hull was valued at approx. $1,700 and the improvements at just over $24,000 – this would lead one to think that title would flow to the D whose chattel is most valuable.

- The court found that the hull was the original chattel and that the additions, which were added over time, increased the value of the original chattel.
- Although the total work was worth more than the hull, no single improvement out-valued the original chattel.

4 suggested tests to determine when multiple chattels have really become "fused":

(1) **The "injurious removal" test –** can the items be removed without serious physical injury to the principal chattel?
(2) **The "separate existence" test** – has the separate identity of the acceded chattel been lost (as when a plank is added to a ship)?
(3) **The "deconstruction of utility" test** – would removal of the combined items destroy the utility of the principal chattel (such as by the taking of tires from a truck)?
(4) **The "fixtures" test** – looking at the degree and purpose of annexation, has an accession occurred?

- Which test is used often depends on the nature of the dispute.

Personal Property Security Act, R.S.A. 1988 c. P-4.05

- Even a minimal attachment falls within the statutory definition of an accession.
- Matters of accession to be dealt with by statute rather than in common law.

(C) ALTERATION (AKA SPECIFICATIO)

- Alteration occurs where A transforms a chattel owned by B into some new item.
- Title is affected by alteration only where the goods are substantially transformed – what is "substantial" is not clear in common law.
- Considers the amount of **labour** involved in the transformation.

Substantial injustice test – where an innocent taking results in a person's chattel being converted, the courts will say that the taker will be able to keep the item but must compensate the party from which he took the item.

Statue example – suppose A trespasses on B's land and cuts down a tree. A then carves the tree and makes a statue. Who is entitled to ownership of the statue? The answer may depend on whether or not A knew that he was trespassing (was his taking innocent?).

Jones v. De Marchant

- A successful claim was made to a fur coat that contained 18 pelts wrongfully taken from the plaintiff that were later combined with 4 others to make the coat.
- Includes elements of **confusion** (the P's pelts were mixed with others), **accession** (the pelts had been inseparably merged) and **alteration** (the work performed to produce the coat was significant, and the pelts were changed into something new.

CHAPTER 4: THE CONCEPT OF POSSESSION

CASES:

- *Popov v. Hayashi*
- *Pierson v. Post*
- *Keefer v. Arillotta*
- *Ties v. Ancaster (Town)*
- *Trachuk v. Olinek*
- *Parker v. British Airways Board*

- *Charrier v. Bell*

Physical vs. Legal Possession:

(a) **Physical possession** – the word "possession" may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called *de facto* possession (or occupation). This is a question of fact rather than law.

(b) **Legal possession** – that possession which is recognized and protected by as such by law. Legal possession requires (1) *Animus possidendi* (the intention to possess) and (2) *Factum* (physical control). The Interpretation of these 2 components can vary substantially.

***De Facto* Possession**

- Legal possession is often associated with *de facto* possession, but legal possession may exist without *de facto* possession, and *de facto* possession is not always regarded as possession in law.
- A person who, although having no *de facto* possession, is deemed to have possession in law is sometimes said to have constructive possession.

Occupation

- Occupier – "an occupant" – one who is in the enjoyment of a thing.
- Occupy – to take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to tenant; to do business in; to take or hold possession. Actual use, possession and cultivation. (Black's Law Dictionary)
- Baron's Canadian Law Dictionary distinguishes between a person with actual possession (such a tenant, or lessee), and a landlord or lessor, who retains legal ownership.

Constructive Possession – A type of legal fiction created when either the physical or mental aspect of possession (*animus* and *factum*) is watered down.

Constructive notice – occurs when you should no about something, even though you don't. Eg., you buy a property thinking you will have full property rights, but your neighbour has a right of passage through the back of your property to get at the laneway.

Custody – Often contrasted with possession. A person may have custody only without having any possessory rights (ie. the case of a car lease – driver has custody but not legal possession)

Nemo dat quod non habet – you can not give what you don't have.

(1) ACQUISITION OF TITLE BY POSSESSION (Adverse Possession / Squatters' Rights)

- First occupancy can serve as a basis for allocating property rights among rival claimants.
- Squatters' rights (aka the law of adverse possession) – the title holder of land may be barred by statute from suing a person/persons who have been in adverse possession of that land for a specified period – 10 years in Alberta – after this time the title of the paper holder is extinguished and the adverse possessor assumes the best claim to the land.
- Favours eradicating claims based on first possession in favour of recent possessors.

GUEST LECTURE

- Alberta is unique when it comes to adverse possession – torrens land titles registration system – state-run land registry that registers all interests in land.
- Adverse possession claims are very rarely registered.
- When land is sold to a bona fide purchaser, that purchaser gets indefeasible title – stops the clock running on the adverse possessor's claim.

- Most adverse possession claims in Alberta don't get very far in the courts because of this system.
- Most cases arise out of situations of ignorance / mistake.

<u>4 THINGS TO LOOK AT:</u>

(a) General Requirements

- Test from *Keefer v. Arilotta* – adverse possessor must be in *actual* possession of the land and their occupation must be exclusive, continuous, open, visible and notorious. Intermittent possession (ie. seasonal use of a hunting cabin) is not sufficient.
- Requires *animus possidendi* – intention to possess.
- Must be adverse to the intended use of the true owner (not stated as an express requirement) – Alberta case law is inconsistent on this point.

(b) Nature of Land

- Different types of land support different types of possession – what is required to show possession.
- In Alberta – cattle grazing is sufficient to establish adverse possession of some land (despite periods of absence – cattle does not graze all year round) – consistent with the type of land.
- Recreational use of property is generally not sufficient to establish adverse possession.
- Some land by its nature cannot be adverse possessed – *Public Lands Act* protects crown land, *Municipal Government Act* protects municipally-owned land, irrigation district land also protected by new legislation.

(c) Owner's Intention

- Low threshold for owner in terms of what is needed to exert control / possession of land – adverse possessor has a much higher threshold in order to say that the true owner has lost possession.
- What is the relationship between the owner and the adverse possessor? – if they are actually joint tenants there can be no adverse possession claim – happens often in cases of divorce where one spouse moves out of the house but no agreement is made – the one living in the house can not adversely possess the other.
- Also, tenants, licensees etc. usually can not show that their use of the land is inconsistent with the owner's intended use – they have been granted permission to be there.
- Where the owner has no clear intention with respect to the use of the land / has no relationship with the adverse possessor / has never been to the land – non-use may also be intentional. It is important to consider the beneficial nature of non-use (contrary to historical way of thinking that for efficiency reasons land should be used).
- Courts have dealt harshly with adverse possessors who have intentionally trespassed on another person's land – but courts are inclined to accept an adverse possessor's claim where the possessor enters onto the land in good faith / honest mistake.

(d) Circumstances of Entry

- Running time period of adverse possession can be stopped by the true owner in a number of ways – for example, the true owner may come back and re-possess the land, adverse possessor may abandon the land, adverse possessor may acknowledge the true owner's title.
- Traps of adverse possessors – for example, offering to buy the land – acknowledging that the owner has a superior claim – stops the clock.

<u>Problems with the current Law in Alberta</u>

- Prior to 1999 the limitation statute was the *Limitation of Actions Act* – limitation period (10 years) started to run when the adverse possessor had dispossessed the registered owner.

- New *Limitations Act* – s. 3(3) provides that a claim is based on a continuing course of conduct – adverse possession is a continuing trespass – therefore you don't have to sue until they actually leave. Essentially the limitation period does not run until the adverse possessor leaves the land – unintended consequence of the new Act.
- Under this provision new claims for adverse possession are essentially eliminated – however claims prior to 1999 are still litigated under the old Act.

Law of Property Act (Alternative to problem with *Limitations Act*)
- s. 69 – used to protect reasonable mistaken beliefs in ownership where adverse possessors have made lasting improvements to the land – when a person has at any time made lasting improvements on land under the belief that the land was that person's own are entitled to a lien on the land…… (forced sale situation).
- "Lasting" means that it must be permanent in the sense that it can not be easily removed. "Improvement" is objectively determined by a judge.
- In Alberta, new buildings are lasting improvements but renovations are not. Roads are lasting improvements but sidewalks are not, nor are fences, retaining walls etc.

(A) THE FUNCTIONS OF ADVERSE POSSESSION
- Time limits placed on the right to commence legal proceedings – adverse possession arises when no action has been commenced against a trespasser for the statutory time period.
- Designed to eliminate delays in claims that can interfere with a defence (ie witnesses may die, evidence may no longer be available etc.)
- Also protects people who live on a piece of land for long periods of time thinking that they hold title (they may have made significant improvements – perhaps the title was fraudulent etc.)
- Torrens (land title) registration – some jurisdictions have abolished adverse possession in favour of Torrens registration – the register tells who owns what.

(B) BASIC DOCTRINAL ELEMENTS
- A person exerting squatter's rights must have an intention to possess (*animus*) and demonstrate physical control (*factum*).
- Adverse Possession must be open and notorious, adverse, exclusive (owner must be dispossessed), peaceful (not by force), actual and continuous in order for adverse property rights to be asserted.
- The nature of the acts required will depend on the type of property (ie level of control needed will vary between scrub land, farmland, residential lot etc.)

(C) CHATTELS
- The right to sue for the recovery of personal property may also be barred by the passage of time.
- Alberta – 2 year time limit to bring action once the cause of an action is discovered. Sunset clause – even absent discoverability, the action must be launched within 10 years of the wrongdoing.

(2) THE RELATIVE NATURE OF FINDERS

(A) GENERALLY
- Unlike land, there is no formal registry for personal property.
- The finder of a chattel acquires a title that is good against the entire world except for the true owner – or those with a continuing antecedent claim.

- Abandoned chattel – if it can be demonstrated that the previous owner intended to relinquish title, the original owner has no rights.
- In addition to the "true" owner, previous finders may also have some property rights to a found chattel (continuing antecedent claim).
- Finder assumes the responsibility of taking reasonable steps to facilitate the return of the found chattel to its rightful owner.
- Rule is important – not having it would mean that no civil or criminal wrong would be committed by taking the object *from* the owner. In addition, there would be no means of ensuring that an item obtained was not previously lost.
- Rule of Finders may protect the rights or wrongful finders (ie a person who finds something while trespassing)
- Property rights to chattel found in the soil of a property will usually go to the owner of that land.

(B) PUBLIC LANDS AND HISTORICAL RESOURCES

- Legislation may require that goods found on public property be handed over to the appropriate authorities.
- In Canada, the crown may claim 'treasure trove' wherever it may be found.

Treasure trove:
Consists of cached gold and silver coin, bullion, or manufactured form, the ownership of which is unknown. Allows the state to seize such goods and put them in museums. Usually the finder or others with interests in the chattel will be compensated by the state based on the value of the treasure.

- Some items that do not fall under 'treasure trove' may also be governed by special finding rules and held by the state (ie items of historical value).
- Claims for rights to aboriginal treasures can be especially complicated – who is the 'true' owner, was the chattel abandoned, is the claimant a band or an individual etc.)
- Area of law in dire need or reform.

(C) THE *JUS TERTII* DEFENCE

- In disputes over property, the law is concerned with ascertaining the relative rights of the parties to the contest. This means that a better claim residing in some third person (*jus tertii*) is immaterial.

(3) TRANSFER OF TITLE THROUGH DELIVERY (Gifts)

Types of gifts:

- *Inter vivos*
- Testamentary Gifts
- *Donationes Mortis Causa*

3 elements to a properly constituted gift:

(1) **An intention to donate -** donor must have the mental capacity to appreciate the nature of the transaction.

(2) **An acceptance** – involves understanding of the transaction & a desire to assume title. A person may refuse a gift – although the law usually presumes that people will accept a gift of something of value.

(3) **A sufficient act of delivery** – revolves around possession. Important difference between contract law and gifts – no exchange of promises in gift-giving. Delivery is seen as a

demonstration that the donor intends to be bound by the act of giving. Intention may also be shown by declaring oneself trustee of a gift for the donee.

- If all 3 elements do not exist, no gift passes and an action undertaken by the donor can be undone. If all 3 do exist, title is transferred to the recipient by way of a contract.
- If the alleged donor is deceased and an estate is involved evidence must be presented to substantiate the claim that a gift was intended.
- What type of evidence is sufficient – see *Alberta Evidence Act s. 11*
- Making gifts to try to avoid creditors is unlawful – is now covered by legislation.

Exceptions to transfer taking place:

(1) When some alternative mode of transfer has been recognized
(2) Where a factual concession seems warranted
(3) Where a gift is made in contemplation of death (*donationes mortis causa*)

Testamentary Gifts

- 2 types of wills recognized: (1) formal wills - in writing, signed by the decedent at the end of the document, witnessed, (2) informal / holograph wills – must still be in writing (of any form), don't require witnesses.
- Property passes on the date of death of the donor – however, creditors must be paid first. In some cases the donee has only a *chose in action* in the form of the right to compel the proper administration of the will.

(A) DOCTRINAL EXCEPTIONS

- Occasionally, a gift may be recognized as valid absent a transfer of possession (ie property given in trust).
- Very fine line between "I am giving you my car" and "I will hold my car in trust for you".

(B) FACTUAL CONCESSIONS

- Transfer of possession (delivery) does not have to be contemporaneous with the expression of the intention to donate – can also happen before or after.
- Physical delivery may be replaced by a transfer of deed.
- A cheque is not money but a direction to the bank – therefore a gift by cheque is not complete until it is presented.
- Symbolic delivery may be acceptable in cases where it is not possible to manually transfer the good (ie it is too big, too heavy etc.)

(C) GIFTS MADE IN CONTEMPLATION OF DEATH (DMC)

- Aka *Donationes mortis causa*
- Resembles both an *inter vivos* donation (a donation from one living person to another) and a testamentary bequest – but the donee must be facing <u>imminent peril</u>.
- Imminent peril includes going to war, going for dangerous surgery etc.
- Gift is automatically revoked if the imminent peril is avoided.
- Delivery is required (although partial delivery may be sufficient).
- Not necessary that a DMC comply with the formalities for the execution of wills.
- Does not become absolute (perfected) until the death of the donor.
- DMCs of land are precluded in Canadian law.

Innes v. Potter (U.S. Case – 1915)

- Warren Potter owned 1370 shares of stock in the Potter-Casey Company valued at $100 per share. Sometime before his death, Mr. Potter left 1000 shares to his daughter (upon his death) in a sealed and indorsed letter which was held in trust by his business partner (Mr. Casey). When Mr. Potter died, Mr. Casey delivered the letter to the defendant. The plaintiff was appointed executor of Mr. Potter's will, which did not include the transfer of stock to his daughter. He commenced an action to recover the stocks from the defendant.
- Trial court found for the defendant – (a) the deceased intended to and did relinquish all control over the stock, (b) he intended that it be given to the defendant, and (c) that he intended that the transfer take place upon giving the letter to Mr. Casey, but that the defendant's use and enjoyment of the stock be postponed until his death.
- Court says that "the owner of personal property may make a valid a gift thereof with the right and enjoyment in the donee postponed until the death of the donor, if the subject of the gift be (a) delivered to a third person with the instruction to deliver it to the donee upon the donor's death, and (b) if the donor parts with all control over it, reserves no right to recall, and intends thereby a final disposition of the property given."
- P argues that this transaction does not fit into the above category – it is not a true gift but testamentary in nature and therefore void.
- Court tries to determine the intention of the giver – is this a fully constituted gift or not? Specifically, it must be determined if the donor intended the gift to take effect immediately or upon his death.
- Court finds that the donor intended that the gift take force immediately, only that the use and enjoyment of the gift be postponed until his death – therefore it is a true gift.
- Judgment for the defendant affirmed – it is an *inter vivos* gift.

Re: Bayoff Estate (Sask. Q.B. – 2000)

- Application by Antionette Simard (executor of the will of Peter Bayoff), applied for a ruling as to the validity of certain gifts made by the deceased shortly before his death.
- Mr. Bayoff had been diagnosed with terminal cancer in 1997 and began to liquidate many of his investments in preparation for the distribution of his estate.
- In September 1997 his will was prepared by his lawyers.
- In the presence of his lawyer, Mr. Bayoff later gave Ms. Simard the key to his safety deposit box stating "everything is yours". Mr. Bayoff signed a paper authorizing Ms. Simard to access the box, however the necessary paperwork was not complete at the time of Mr. Bayoff's death.
- After Mr. Bayoff's death, Ms. Simard became executrix of the will and removed the contents of the box, including $70,000 in bonds and a number of coins.
- Issue: did Mr. Bayoff make a valid gift *mortis causa* or *inter vivos* of the contents of the safety deposit box?
- Court holds that it was a valid *inter vivos* gift.
- **3 elements necessary for *donations mortis causa*:** (1) impending death from an existing peril, (2) delivery of the subject matter, and (3) the gift is only to be perfected upon death and will revert to the donor should he/she recover.
- Court finds that the facts of this case fulfill the first 2 conditions, but not the 3rd – Bayoff was terminally ill and recovery was not possible. Also, Bayoff made it clear that he wanted Ms. Simard to have the contents of the box immediately and not upon his death.
- This is problematic, however – is death ever *absolutely* certain? – this reasoning has been highly criticized.
- **3 elements of an *inter vivos* gift:** (1) an intention to donate, (2) acceptance of the gift, (3) a sufficient act of delivery.
- Court holds that all elements are satisfied – looks specifically at the act of delivery and determines that the giving of the key <u>*and*</u> the attempt to complete the appropriate paperwork (although it was incomplete) is sufficient delivery.

- Court uses principle in Strong v. Bird – not exactly an *inter vivos* gift but a somewhat unique category of gift.
- Bayoff intended to perfect the gift but failed to do so. However, the gift was perfected when Ms. Simard became executrix of the will and was able to access the box – assumed title of the contents.

Strong v. Bird

- If the donor becomes the executor of a will the gift is perfected (sufficient delivery) – when a person becomes executor they assume *title* of the property in the will.

Hoiland v. Brown (B.C.)

- Couple are living together and are not married. Man buys a motorcycle and delivers it to his girlfriend. She uses the motorcycle. They then experience relationship problems – he was kicked out of the house. She decides to register title of the bike in her name. She knows he won't agree so she forges his signature and has ownership transferred. He later sues her for return of the bike and it is discovered that the transfer documents were forged. She argues that the bike was a completed gift.
- This is a gratuitous gift to someone other than a spouse or child.
- This leads to an automatic presumption by the court that the girlfriend only holds the bike in trust for her boyfriend.
- Court finds that this presumption does not apply here and that a gift was made.
- However, the gift failed because in order to complete the gift she would have had to register title of the bike in her name – which is not fulfilled.

(4) RECOGNITION AND PRESERVATIN OF RIGHTS THROUGH POSSESSION

Common Law Aboriginal Title

- Predicated on proof of possession.
- Amenable to recognition and protection under law unless and until that right is lawfully erased.
- Subordinate to the rights of the Crown.

3 part test (S.C.C. *Delgamuukw v. British Columbia*) -

(1) The land must have been occupied prior to sovereignty
(2) When present occupation is relied upon as a way of proving pre-sovereignty occupation, continuity between present and pre-sovereignty occupation must be shown.
(3) At the time of the assertion of sovereignty, the occupation must have been exclusive.

- Definition of occupation in these cases is slippery.
- Form of control necessary should reflect the cultural practices of the people (ie hunting and farming – land use – practices. Settled villages vs. HG societies).
- Proving pre-sovereignty occupation is often difficult – present occupation may serve as proof of previous occupation if continuity can be shown).

Johnston v. McIntosh

- Case concerns a parcel of land that was sold to the plaintiff by an Indian Chief.
- Later the same piece of land was transferred to the defendants by the U.S. Government – essentially there were 2 owners of the same piece of property.
- Issue is whether or not the Chiefs had the authority to sell the indigenous land to the plaintiff. That is, who held the original title of the land – the indigenous people or the government?
- Plaintiffs are seeking an order of ejectment of the other residents.

- Plaintiff's action failed at trial – decision for the defendant upheld on appeal.
- Court holds that the transfer of land by the Chief was invalid. US Government was the true owner of the land and was entitled to sell it.
- Accepted in Canada as one of the principal authorizes in this area of Canadian law.
- In Canada - *1763 Royal Proclamation* – precludes native peoples in Canada form transferring their lands. Rational is to protect first nations peoples from unfair bargaining (as if they can't do it themselves) – aboriginal title does not include the right of disposition.
- s. 35 of the *Constitution Act, 1982* recognized Aboriginal Title – made it more than just a form of occupancy but a constitutionally recognized title – made it much more difficult for governments to acquire indigenous lands.

<u>THE RULE OF FINDERS:</u>
(Where the finder of a chattel is not the owner of the land)

5 rights and obligations of the finder:

(1) The finder of a chattel acquires no rights over it unless (a) it has been abandoned or lost and (b) he takes it into his care and control
(2) The finder of a chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent or in the course of trespassing
(3) A finder of a chattel, whilst not acquiring any absolute property or ownership in the chattel, acquires a right to keep it against all but the true owner
(4) An employee who finds chattel does so on the behalf of their employer, who acquires a finder's right (not the employee)
(5) A person with a finder's right has an obligation to take reasonable measures to find the true owner of the chattel

4 rights and liabilities of an occupier:

(1) An occupier of land has rights superior to those of a finder over chattels in or attached to that land
(2) An occupier of a building has rights superior to those of a finder over chattels upon or in it, but not attached to, that building iff before the chattel is found they manifested an intention to exercise control over the building
(3) An occupier who shows an intention to control a building and the things upon or in it has rights superior to those of a finder
(4) An "occupier" of a chattel (such as a ship or motor vehicle) is to be treated as if he were the occupier of a building for the purposes of these rules

Abandoned objects - whoever finds the chattel first, it's theirs; finders have the greatest property right over all except for the true owner

Mislaid objects - an involuntary divestiture; eg., an independent contractor is repairing a home and finds some money in a wall – the found property belongs to the owner of the house because of finders law

<u>WRONGDOERS</u>

- Even if your possession was derived unlawfully, you acquire possessory rights

CHAPTER 5: THE DOCTRINE OF ESTATES

CASES:

- *Re: Walker*
- *Re: Taylor*

- *Powers v. Powers Estate*
- *Johnson v. McIntosh*
- *Delgamuukw v. British Columbia*

What is an estate?
- An estate confers a segment of ownership, as measured by time.
- *Walsingham's case* – "and estate is a time in the land, or land for a time."
- Estates may be seen as 4 dimensional (defined both by 3 dimensional physical boundaries as well as reference to the time for which the interest will endure.
- Canadian law recognizes 2 types of estates: (1) freehold estates, and (2) leasehold estates.

(1) THE ESTATE IN FEE SIMPLE

(A) GENERALLY
- Fee simple is the closest approximation to absolute ownership
- Fee simple is of potentially infinite duration and confers upon the holder a large bundle of proprietary rights than those attaching to other estates.
- "Fee" – means that the interest is one of inheritance.
- "Simple" – property can descend to the largest range of heirs contemplated by law.
- Fee simple will continue after death so long as it is passed to someone by will or through intestacy – where there are no takers under these routes escheat occurs (the estate ends).
- Precision in language required – phrase "to A and his (or her) heirs" is required. Failure to use this language generally means that only a life estate passes.
- For example, "to A in fee simple" is not enough – only a life estate would pass. Also, simply saying "to A" only creates a life estate.
- "Heirs" originally meant to A and the line of heirs – single (usually male) heir per generation (primogeniture). This indicates that the estate is to last as long as there are heirs – blood line continues. This is why it has the possibility of going on forever.
- "to A" are **words of purchase** – indicate to whom the estate will pass.
- "and his heirs" are **words of limitation** – indicate the duration of the estate granted (tell you what kind of estate that the person is to get).
- Heirs have only an interest in inheriting the property one day – no actual property interests. A can leave his property to another party – not required to pass it on to the heirs.

Modern Rules
- Courts now treat a transfer without words of limitation as conferring a fee simple, unless the instrument suggests a contrary intention – see Alberta *Law of Property Act* s. 7(1). This is a "rule of construction", which provides a presumed intention that can be rebutted by showing that the grantor held contrary intention.
- For example – "To A during his lifetime" would indicate a contrary intention – would confer a life estate.
- This same language is reiterated in the *Wills Act* (s. 26).

Tottrup v. Patterson
- Tottrup Sr. leaves his property "to A (his younger brother) and his heirs, executors and administrators, absolutely and forever.
- By the time Tottrup Sr. dies his brother has pre-deceased him.
- When beneficiary pre-deceased the donor, the gift lapses (fails).
- A's daughter claims that she is entitled to the gift – the words "heirs, executors and administrators" are words of purchase not words of limitation. Therefore the gift only partially

lapsed – one beneficiary has died but other are still around and are entitled to the property in fee simple.

- Daughter would have to prove that Tottrup Sr. intended the property to go to A, to his heirs, to his executors and to the will's administrators – might want to look at who the executor / administrators are to determine whether or not that theory makes sense. If it is a bank or some 3rd party, for example, this theory may not hold up.
- Court says that this is a classic phrase used in drafting wills (has been used for hundreds of years and has been interpreted as conveying a fee simple in A). Daughter loses.

(B) SHELLEY'S RULE

- Exception to the rule of required language in conveying a fee simple (from *Shelley's Case* – 1581)
- This is a "rule of law" rather than a "rule of construction" – means that the rule will hold true even if it is inconsistent with the intention of the person making the transfer.
- A gift "to A for life, *remainder to A's heirs*" (classic wording that invokes Shelley's Rule) – successfully places the fee simple in A.
- What is meant by "heirs"? - In order for this rule to apply, it must be clear that by "heirs" the grantor meant the whole generational line, not just those heirs who are alive at the time of the grantor's death.
- These situations don't come up very often anymore. Besides, nobody really understands Shelley's Rule.
- Late 1980s – issue considered by Ontario Court of Appeal – case dealt with a provision that stated "to A for life, remainder to B for life, remainder to A's heirs". (*Re: Reinhart*)

(2) THE FEE TAIL

- An estate in fee tail devolves only to *lineal* descendants rather than the general class of heirs (as in fee simple).
- Original purpose was to perpetuate family dynasties.
- Classic language - "to A and the heirs of his (or her) body".
- Fee tail estate generally lasted as long as there were lineal descendants of the grantor – included children but excluded nieces and nephews – if family line ends the fee tail reverts to the Crown under the doctrine of escheat (*Ultimate Heir Act*).
- Possible to specify particular line of descent (ie specifically through male or female heirs).
- "Issue" – specific word used to describe heirs – usually refers to lineal descendants - ie. "To A and his issue".
- A donee could transfer his interest in the land to a person outside the line of descent, but only for the *life of the donee* (akin to a life estate – but one that ends at the death of the donee – at which time the estate passes to the donee's lineal descendants).
- Fee tail estates could get very complicated (ie. fragmentation of ownership, line dying out etc.).
- The only way to convert a fee tail into a fee simple is through the complicated process of barring.
- *Law of Property Act* (s. 9) – as of the date of enactment of this section you can not create new estates in fee tail. Any attempt to do so will be construed as a fee simple.

(3) LIFE ESTATES

- Language requirements are not as strict as other estates – but usually the words "To A for life" or some variation are used to create an estate *pur sa vie* – for the duration of the life of A.
- When A dies the property reverts back to the grantor.
- No word "fee" – not an estate of inheritance.
- Does A have a right of alienation? – yes, A can dispose of his estate to B. B acquires an estate *pur autre vie* (an estate for the life of another – measured by the life of A).

- What happens if B dies? – can't pass to B's heirs because it is not an estate of inheritance. A also doesn't own the estate. At common law, it used to be that the first person to take possession of the property could have the estate for the remainder of A's life.
- Today, statutes make it clear that life estates can be estates of inheritance – *Wills Act* s. 3. An estate for the life of another (estate *pur autre vie*) is an inheritable estate.
- Life estates are actually quite common.
- *Dower Act* – one way that life estates are commonly created - pieces of property that are owned by a husband or wife (or both) will generate a life estate on the death of one spouse.

*There are also variations on these types of estates – see cases to follow. (*Christiansen, Walker, Taylor*)

Christiansen v. Martini (p. 255 of Casebook)

- Will-maker prepares his own will during his 2nd marriage – the will contains a "Clause C" – I give to my wife Sharie Raby of Calgary 2203 31 Avenue SW Calgary for her use. When she no longer needs 2203 31 Avenue SW Calgary that she give said property to Sandra and Soyna Christiansen of the city of Calgary.
- No specific legal language – court must decide what kind of interest this clause created.
- Court interpreted clause as creating a life estate – court presumes that the wife will only "need" the estate while she is alive. Once she dies she no longer needs it.
- Is this a proper interpretation?
- Also a problem with the address specified – refers to half of a duplex – whole duplex is co-owned by the will maker and his ex-wife.
- Clause D – "I direct my trustee to distribute the rest and residue of my estate equally amongst my wife Sharie Raby… and a number of charitable organizations."
- Issue over matrimonial property proceedings against ex-wife – commenced before the death of the donor but resolved after – created a *chose in action* that came to be attributed to the estate.

Ultimate Heir Act

- The Crown is the ultimate heir of all property – where there is no named heir, an estate passes to the Crown (escheat).

Law of Property Act

- s. 62 -

Wills Act

- s. 26 – Except where a contrary intention appears by will, a transfer of property without words of limitation is assumed to be a transfer of fee simple – consistent with s. 7 of *Law of Property Act.*
- s. 27 – Definition of "heir". *Interpretation Act* says that this would also include the plural "heirs". This definition applies to words of purchase – to describe *who* gets the property. Does not apply to the word "heirs" at it is used as a word of limitation – ie. in the expression "to A <u>and his heirs</u>"
- s. 28 –

<u>*Re: Walker and Re: Taylor*</u>

- Similar facts, but different interpretation by the courts.
- Litman doesn't think that *Walker* and *Taylor* are distinguishable – thinks that *Walker* is the better decision.
- You never know what kind of an interpretive approach a court will take (*Walker* approach or *Taylor* approach) – usually very fact specific cases. Precedent, therefore, is of limited value.
- Best to be as explicit as possible in the drafting of wills to minimize risk.

RIGHTS, POWERS AND OBLIGATIONS OF THE LIFE TENANT

<u>General Powers of Use and Enjoyment</u>

- Settlement – any grant that creates two or more successive interests in land – "to my wife for life, remainder to my kids" (for example – although these words are a bit obscure).
- Wife holds a life interest – what are her rights and obligations?
- Generally, tenant acquires the right to use and enjoy the property (but this is a qualified right).

Settled Estates Act

- Settled estates legislation was received from England – but is now virtually useless in the modern setting.
- Equitable life estate – a life estate conferred on A but guarded by a trustee (as opposed to a legal life estate in which there is no trustee).

(A) WASTE

- The law of waste serves to limit the extent to which a life tenant may alter the physical complexion of real property – protects against the danger that the life tenant will exploit the property in a way that reduces the value of the remainder.
- 4 categories of waste:
    (1) **Ameliorating** – acts that enhance the value of land. Courts are obviously hesitant to prohibit or punish the commission of ameliorating waste – usually it increases the value of the land for the subsequent title holders. However, there may also be costs with amelioration (ie. property taxes increase). Where amelioration imposes a significant burden on the remainderperson the life tenant may either be prohibited from carrying out the changes or may be held liable for the increased costs – but this is not explicitly clear in the case law.
    (2) **Permissive** – damage resulting from the failure to preserve or repair property. Responsibility for permissive waste is not automatically imposed on a life tenant – the instrument under which the estate is created *must contain such a requirement* and unless this is done the life tenant assumes no obligation to repair buildings on the property.
    (3) **Voluntary** – conduct that diminishes the value of the land in the long run (ie. over-cultivation, destruction of buildings, opening of new mines). However, as a general rule it is not wasteful to clear land for cultivation or to fell trees to make certain types of repairs. General rule is that a life tenant will be liable for voluntary waste unless they have express permission from the remainderperson.
    (4) **Equitable** – severe and malicious destruction.
- A grantor may render a life tenant 'unimpeachable' (exempt from responsibility) – this waiver permits the life tenant to commit all forms of waste *except equitable waste*.
- *Law of Property Act* s. 71 – an estate for life without any impeachment of waste does not confer and shall not be deemed to confer…

Delgamuukw v. British Columbia

- Land under Aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land underscoring the claim.

Powers v. Powers Estate

- What are the rights and responsibilities of a life tenant in regards to certain property-related expenses? (in this case heat, repairs and insurance).
- …

(B) OTHER ISSUES

- As a general rule, the life tenant is liable for all current expenses, including (a) property taxes in an amount up to the annual value of the land, and (b) interest due on a mortgage debt.
- Life tenants can not claim against those holding the remainder for the cost of improvements or repairs that have been undertaken unilaterally, except possibility for repairs done in the name of preserving the property from further deterioration (ie. salvage).

(4) LIFE ESTATES ARISING BY OPERATION OF LAW

- A life estate may be created by either private conveyance or by operation of law (ie. through the invocation of a legal doctrine which, when applicable, automatically confers an estate).
- 2 types of life estates: (1) dower, and (2) curtesy.

Dower

- Designed to provide a shelter for widows (common law rules of inheritance did not contemplate the transmission of land to a surviving spouse).
- Conferred upon the widow a life interest in the freehold lands of her deceased husband.
- At common law, dower took precedence over testamentary transfer.
- Did not apply to certain property interests such as leaseholds, joint tenancies, corporate land, reversionary interests, or remainders.
- Largely inconsistent with modern property law rules.

Dower Act

- Alberta Dower Act comes from a completely different background from common law dower – came form homestead laws that encouraged people to settle and farm unpopulated or under populated areas.
- Under homestead laws a primary residence was exempt from seizure by creditors.
- Problem arose when a lot of men did not make provisions for their wives after they died.
- Dower Act confers a life estate on the surviving spouse.

Civil Enforcement Act

- Regulations that tell creditors how they can go after people's property to enforce civil judgments or debts.
- Under this legislation certain property is exempt from seizure – just like under original homestead laws. For example, s. 37 – in the case of agricultural lands, the quarter section on which the permanent residence is located is exempt from seizure by creditors. Urban homes are exempt from seizure up to the amount of $40,000 – this means that a creditor can seize your home and give you $40,000.

Curtesy

- Referred to a widower's interest in the land of his deceased wife – similar to dower but with somewhat different elements and functions.
- Conferred upon the widower a life estate in all of the realty undisposed of at the death of the wife, as long as heritable issue had been born during the marriage.
- Has been abolished in Canada – replaced by *Law of Property Act* (gender neutral).

Homestead Protections

- Homestead legislation was introduced in Canada after the abolition of Dower to: (a) protect the matrimonial home from seizure from creditors after the death of a spouse, (b)

enable the non-owning spouse to prevent disposition of the home, and (c) confer a life estate in the home on that spouse in personalty.
- Still survives in the 4 western provinces.

ANALYSIS OF THE DOWER ACT

S. 1 - **Definitions**

1(c) - **"dower rights"** means all rights given by this Act to the spouse of a married person in respect of the homestead and property of the married person, and without restricting the generality of the foregoing, includes

(i) the right to prevent disposition of the homestead by withholding consent,

(ii) the right of action for damages against the married person if a disposition of the homestead that results in the registration of the title in the name of any other person is made without consent,

(iii) the right to obtain payment from the *General Revenue Fund* [fund set up for this specific purpose] of an unsatisfied judgment against the married person in respect of a disposition of the homestead that is made without consent and that results in the registration of the title in the name of any other person, - see s. 13 for rules about making these types of claims.

(iv) the right of the surviving spouse to a life estate in the homestead of the deceased married person, and

(v) the right of the surviving spouse to a life estate in the personal property of the deceased married person that is exempt from seizure under writ proceedings; - list of personal property that is exempt from seizure can be found in the *Civil Enforcement Act*.

Can you have a life estate in a live or dead Chicken? Former exam question – What this is really asking is whether or not you can have a life estate in personal property. Would look to *Civil Enforcement Act* and argue that the chicken falls under the "food for 1 year" exemption.

- At common law, you can not have a life estate in consumable goods, but this Act provides a statutory exception.
- Life estates in personal property can also be created by wills – established common law doctrine.

1(d) - A "**homestead**" is defined as a parcel of land

(i) on which the dwelling house [as opposed to vacation property, for example] occupied by the owner of the parcel as the owner's residence is situated, and

(ii) that consists of

(A) not more than 4 adjoining lots in one block in a city, town or village as shown on a plan registered in the proper land titles office, or

(B) not more than one quarter section of land other than land in a city, town or village.

1(b) – **"disposition"**

(i) means a disposition [using word being defined – problematic] by act *inter vivos* that is required to be executed by the owner of the land disposed of, and

(ii) includes

(A) a transfer, agreement for sale, lease for more than 3 years or any other instrument intended to convey or transfer an interest in land,

(B) a mortgage or encumbrance intended to charge land with the payment of a sum of money, and required to be executed by the owner of the land mortgaged or encumbered,

(C) a devise or other disposition made by will, and

(D) a mortgage by deposit of certificate of title or other mortgage that does not require the execution of a document;

S. 3(2) – **Duration of Homestead**

3(1) - When land becomes the homestead of a married person it continues to be the married person's homestead within the meaning of this Act until the land ceases to be a homestead pursuant to subsection (2), notwithstanding the acquisition of another homestead or a change of residence of the married person.

3(2) - Land ceases to be the homestead of a married person
(a) when a [proper] transfer of the land by that married person is registered in the proper land titles office,
(b) when a release of dower rights by the spouse of that married person is registered in the proper land titles office as provided for in section 7, or
(c) when a judgment for damages against that married person is obtained by the spouse of the married person pursuant to sections 11 to 17 [remedies for improper transfer] in respect of any land disposed of by the married person and [when that judgment] is registered in the proper land titles office.

S. 10(1)(d) - **Application to dispense with consent**

10(1) - A married person who wishes to make a disposition of the married person's homestead and who cannot obtain the consent of the married person's spouse
(d) when the married person has 2 or more homesteads,
may apply by notice of motion to the Court for an order dispensing with the consent of the spouse to the proposed disposition.

S. 19 – **Election of homestead by surviving spouse**

19(1) - The rights of a surviving spouse under section 18 in no case apply to more than one homestead, and if a married person dies owning 2 or more homesteads, the surviving spouse shall in writing, signed by the spouse, elect the homestead in which the life estate is claimed.

19(2) - The election shall be addressed to the Registrar of the proper land titles office and shall be in the prescribed form.

19(3) - If a married person dies owning 2 or more homesteads, no homestead belonging to the deceased married person shall be transferred or otherwise disposed of by the executor or administrator of the estate of the deceased married person until the executor or administrator has registered in the proper land titles office the election of the surviving spouse.

19(4) - If the surviving spouse neglects or refuses to make an election, the executor or administrator may, at the expiration of 3 months after the date of the death of the married person, apply by notice of motion to the Court for an order designating the homestead to which the dower rights of the surviving spouse attach.

19(5) - The executor or administrator shall register any order made pursuant to subsection (4) with the Registrar of the proper land titles office.

S. 24 - **Mines and minerals**

24(1) - The dower rights given to the spouse of a married person by this Act apply to mines and minerals contained in a homestead, and no married person shall make a disposition of mines and minerals contained in or forming part of a homestead without obtaining in accordance with this Act the consent in writing of the spouse of the married person.

24(2) -Nothing in this section gives the spouse of a married person a dower interest in mines and minerals contained in any certificate of title registered in the name of the married person other than the certificate of title to the homestead, and no consent or acknowledgment under this Act is required to the disposition of those mines and minerals or any interest in them.

24(3) -Notwithstanding sections 13 to 16, no order may be made directing payment out of the General Revenue Fund of any damages awarded to the spouse of a married person by reason of a disposition by the married person of mines and minerals, whether the disposition was of mines and minerals only or of the homestead including mines and minerals.

24(4) -When pursuant to section 11 a spouse recovers a judgment against a married person in respect of a disposition by the married person of the homestead including mines and minerals and the judgment is not paid, an order made directing payment of the unsatisfied judgment out of the General Revenue Fund shall relate only to that portion of the awarded damages that is based on the value of the surface rights of the homestead excluding the value of the mines and minerals, and shall so relate only to the extent that that portion of the damages remains unpaid.

s. 25 - **Non-application of Act**

25(1) - When a married person is a joint tenant, tenant in common or owner of any other partial interest in land together with a person or persons other than the spouse of that married person, this Act does not apply to that land and it is not a homestead within the meaning of this Act nor does the spouse have any dower rights in it.

25(2) - When a married person and the married person's spouse are joint tenants or tenants in common in land, the execution of a disposition by them constitutes a consent by each of them to the release of their dower rights and no acknowledgment under this Act is required from either of them.

How can you lost dower rights?

- Divorce
- Release (s.7)
- Changing your mind (s.9)
- Through contract (10)(1)(e)

(5) TIMESHARING

- The purpose of entering into timeshare arrangements is to allow enjoyment of an interest in property for a limited period of time each year (ie. one condo divided into 52 one-week shares).
- Aim: reduce the cost of vacationing while securing a proprietary interest in an appreciating asset.
- Possible arrangements:
    (a) Use a series of **discontinuous leases** or licenses to create a recurring right of occupation.
    (b) **Direct ownership** – each party holds an interest in the freehold as tenants in common. Here time slots must still be fixed because otherwise all owners would be entitled to possession of the property at all times.
    (c) **Indirect ownership** – title may be placed in a corporation, co-operative, or trust with individuals receiving a share of that asset.

   (d) Create a series of **recurring, short-term freehold estates** – untested in Canada (would not mesh with orthodox doctrine). For example, X owns Blackacre exclusively and permanently, but only for a set time each year. This approach would still have to consider issues such as waste, taxes, and management matters (such as repairs).
- Timesharing does not mesh well with existing property law (not yet recognized as a valid form of landholding) – usually stitched together from freehold and leasehold rules, general contract principles, basic company law.
- Ontario Law Reform Commission has proposed a *Timeshare Act* designed to regulate the legal structure, marketing, management, registration and termination of timeshare projects.

(6) ESTATES IN ABORIGINAL LAND
- Entitlements to land on a reserve may be granted to individual Band members by the governing Band Council, with the approval of the responsible federal minister – similar right to a fee simple in that (a) it confers exclusive rights of occupation, and (b) it may be devised.
- Land is transferable on the consent of the federal minister – recipients are restricted to the Band or Band members.
- Transfer of aboriginal land is governed by the *Indian Act*.
- Also, provisional grants of 2 years (subject to renewal) may be granted under a Certificate of Occupation.
- All grants are conditional on the holder remaining resident on the reserve. If this is no longer the case, a transfer to the Band or a member must be made, normally within 6 months.

<u>Alberta Metis Legislation</u>
- Adopts some of the Indian Act structures, but does so in a way that provides a more explicit detailing of the incidents of ownership.
- 3 types of Metis title: (1) individual holding, (2) provisional title, and (3) allotment.
- **Individual title** - A person holding Metis title hast the exclusive right to:
  (a) Use and occupy the land
  (b) Make improvements on the land
  (c) Transfer the title
  (d) Grant lesser interests as set out in the Land Policy
  (e) Determine who receives the title on the holder's death.
- Land may not be given as security for a debt, and may not be held under a joint tenancy.
- **Provisional titles** are granted for fixed, but renewable terms – intended as a stepping stone for those wishing to acquire full Metis title
- **Allotments** may be granted for a set time period for the purpose of allowing the holder to use the parcel to operate a farm, ranch or other business.

Delgamuukw v. British Columbia (1997 S.C.C.)
- Case deals with several issues:
  (a) What is the nature and scope of the constitutional protection afforded by s. 31(1) of the *Constitution Act, 1982* to common law aboriginal title?
  (b) Addressed practical problem of dealing with proof of aboriginal title – specifically, the treatment of the oral histories of aboriginal peoples by Canadian courts.
- Court recognizes that aboriginal title is a common law right – not created by s. 35 of the *Constitution Act* but merely protected by it.

<u>**S. 35 –** *Constitution Act, 1982 –*</u> constitutionalizes aboriginal and treaty rights.

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
(3) (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
(4) (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

s. 35.1 – *Constitution Act, 1982*
The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

- In order for something to be considered an aboriginal right it must be a custom, practice or tradition which is integral to the distinctive culture of aboriginal peoples (judged by specific group). These rights arise whether or not the band holds title of the land. This refers to rights to engage in site-specific activities that the group has demonstrated fall into the above category.
- **Title** – the right to engage in activity is parasitic to the underlying title – this means that if you have title you can engage in activities on that land.
- However, *Delgamuukw* says that land under Aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land underscoring the claim. Where you cross the line of "irreconcilability" is not expressly clear.

Why is aboriginal title *sui generis* (unique quasi-property)?
(a) Aboriginal title is inalienable – can only be surrendered to the Crown.
(b) Aboriginal title is communal – no individual title.
(c) Irreconcilable use limitation.

Propositions of the case:
(1) Agrees that title is created through historic occupation of land (same as in McIntosh). Aboriginal title is an example of an aboriginal right discussed in s. 35. Most of the rights protected under s. 35 are rights to engage in site-specific activities.
(2) The purpose of s. 35 is to reconcile previous ways of thinking about aboriginal titles with the Charter.

How do you prove aboriginal title?
-

Justification Theory for infringing on aboriginal title:
- Aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute – they may be infringed by both the federal and provincial governments.
- Test for justification has 2 parts – the answer to both questions must be "yes"
    (1) Is the infringement of the aboriginal right in furtherance of a legislative objective that is compelling and substantial?
        - What is substantial and compelling? – conservation (protection of the environment or endangered species), economic development (agriculture,

mining, forestry, hydroelectric power, general economic development) etc. Ultimately, this is decided on a case-by-case basis.

(2) Is the infringement consistent with the special fiduciary relationship between the Crown and aboriginal peoples?
   - 2 dimensions: **process-oriented obligations** (such as the obligation of the Crown to take reasonable steps to fully brief itself of all relevant factors – including consulting with aboriginal peoples in good faith) and **substantive obligations** (including minimal impairment of the right – take only what is necessary to achieve the aim – and providing compensation for having taken away something of value).

(7) PERSONALTY AND THE DOCTRINE OF ESTATES

- The doctrine of estates is inapplicable to personalty – chattels can be owned outright (different from land which is technically owned under grant from the Crown).
- At common law, an *inter vivos* gift of a chattel for life, or for a specific period of time, is treated as absolute.
- Estates can not be created over consumable items.
- Provisions still need to be made for the state of the title when an owner of personalty dies with no heirs to whom entitlements can pass – at common law such property becomes vested in the Crown as *bona vacantia* (ownerless property).
- There are statutory exceptions to the general rule that there can be no estate in personal property.

CHAPTER 6: THE ORIGIN AND NATURE OF EQUITABLE INTERESTS

CASES:

- *Peter v. Beblow*

- Legal vs. equitable ownership are distinguished in Canadian law.

(1) ORIGINS OF EQUITY

- Early courts of equity were called the Chancery – divided into several branches. Courts of Chancery were thought to cure the rigidity of the common law courts.
- Application of principles of equity was at the discretion of the Chancellor.
- Equity was meant to supplement the common law, not to supplant it.
- Where there is a conflict between law and equity, equity prevails to the extent of that conflict (otherwise its curative function would be limited).
- Over time, equity developed more rigid principles, while the common law became more flexible.
- Fusion of the courts – Judicature Act, 1870s.

Judicature Act

- S. 5 - Superior Courts have jurisdiction over both law and equity.

(2) EMERGENCE OF THE 'USE' AND THE 'TRUST'

Development of the 'Use'

- The emergence of the trust is the main contribution of equity to property law.
- Modern trust arose out of the 'use' – feudal concept.
- A 'use' was a device under which the legal title was granted to one person to hold for the benefit of another.
- Land transferred by A (the **feoffor**) to B (the **feofee**) to be held for the benefit of C (**cestui que use**).

- Goal was to place legal title in B, who was to hold it for uses destined to serve C (separate legal title from the beneficial ownership of property).
- At first, C has no legally enforceable claim in the land – later the Chancery began to recognize C's rights – enforcement of uses became a central function of the Chancery.
- C was thought of as having an 'equitable' interest in land – B's legal interest was seen as being merely managerial in nature.
- B's title included obligations in favour of C, which were considered paramount.

Uses of Uses

(1) Provided a means through which a husband could avoid his wife's dower rights (dower rights only attached to *legal* estates, not equitable interests).
(2) Allowed property to be enjoyed by married women, free from control of their husbands (property of a married woman fell under the husband's control – however this only applied to interests recognized at common law – not equitable interests).
(3) Could be invoked to circumvent restrictions on property holding on corporations and religious orders (who could not actually hold property).
(4) Provided a way for the feudal obligations of tenants to be avoided – used to circumvent feudal incidents like wardship, relief ad primer seisin (which were major sources of Royal income) – uses could be used to avoid taxation by creating joint tenants in uses – this prompted the enactment of legislation (Statute of Uses, 1535) to end uses in England.

The Statute of Uses, 1535

- Statute of Uses reunited legal and equitable title by removing the legal title from the feoffee and placing it in the hands of the *cestui que use* (beneficiary).

- S. 2 (modern language interpretation) – <u>where one person is seized to the use, confidence or trust of another person</u> (including a body politic or corporation), <u>the legal interest of the person seized will be expropriated,</u> and that interest will be <u>given to that other person</u>, but in all other respects that second person will hold the same entitlements as that person would have enjoyed under the use, confidence or trust as originally granted.

- **Before the Statute of Uses** – "to A and his heirs, to the use of B and his heirs" created a separation of the legal title (held by A) from the equitable title (to be enjoyed by B).
- **After the Statute of Uses** – A was deprived of legal title – the estate was given to B (the *cestui que use*), who then held both the legal and the equitable interest in the land.
- Methods were soon developed to avoid the effects of the Statute of Uses.

Ways to avoid the Statute of Uses

- Statute of Uses does not affect all transfers under uses – by constructing transfers in a way not pinpointed by the Statute, a purely equitable interest can be produced (called "trusts").
- Other changes in terminology – feoffor is now '**settlor**', the feoffee is now '**trustee**', *cestui que use* is now '**cestui que trust**', or '**beneficiary**'.
- Today, the words "use" and "trust" are interchangeable.
- 2 primary methods of overcoming the impact of the Statute of Uses:

  (1) **Avoidance** –
    - Involved creating a limitation that does not fit into the four corners of the legislation – Statute applies where a person is seized to the use or trust of another person or corporation.
    - Therefore, the Statute does not apply when:

(a) The trustee holds a *leasehold* estate, seeing as a leaseholder can not be 'seized' to the use of another (only freehold estates). Therefore, a gift "to A for 99 years to hold for the use of C" is not affected by the Statute – instead a trust is created for the benefit of C.
(b) A corporation holds property to the use of someone else. The statute only applies where a person holds property to the use of a person or corporation, not *vice versa*. Therefore, a gift "to A Ltd. to the use of C" creates a trust.
(c) A person is seized of himself – for example "to A to the use of A" – statute only applies where one person is seized to the use of another. However, this language still results in the unification of legal and equitable title – application of statute makes no difference.
(d) Also, the statute does not apply where the deed imposes real responsibilities or active duties on the feoffee. Usually, the feoffee has no obligations except to hold naked legal title – statute still applies in these cases. This may be to distinguish between uses designed just to avoid taxes, and those which are legitimate.

(2) **Exhaustion** –
- Statute of Uses was capable of executing only one fee simple of uses. Therefore, conveyancers could create instruments that triggered the Statute, but also contemplated uses that the legislation was unable to execute.
- "To A (in fee simple) to the use of B (in fee simple) to the use of C (in fee simple)" – The statute applies to the first use (to A to the use of B) and conveys both legal and equitable interests on B. The statute finishes here – it can not execute the second use (to B to the use of C). The second use is therefore void. This is called a "**use upon a use**".
- Today, a use upon a use creates an enforceable equitable title in C.
- "To A, to the use of B, to the use of C" now creates a trust, with B as trustee, and C as the beneficiary.

The following gifts, if contained in an *inter vivos* transfer, create a trust:
(1) To B for 99 years, in trust for C (for 99 years).
(2) To B. Ltd. in trust for C.
(3) To B, to collect rent and profits and invest these to the use of C.
(4) To B, the sum of $10,000, to hold in trust for the benefit of C.
(5) To A to the use of B to the use of C.
(6) To B to the use of B to the use of C.
(7) Unto and to the use of B to the use of C.
(8) Unto and to the use of B in trust for C.
(9) To the use of B in trust for C.

The following transfers will invoke the Statute of Uses and will not produce a separation of legal and equitable title:
(1) To B to the use of C.
(2) To B to the use of C. Ltd.
(3) To B in trust for C.
(4) To B in trust for C for life, then in trust for D in fee simple.

Incidental effects of the Statute of Uses

- The Statute of Uses has affected property law in 3 significant ways:
    (1) **Revolutionized conveyancing practices** – Conveyancing had previously taken place through the ceremony of livery and seisin – this process was eliminated by the Statute – replaced by method of "bargain and sale" (modern transfer system).
    (2) **Enactment of the Statute of Wills** – Statute was thought to remove the power of landowners to make testamentary transfers. This did not prove to be true, but this thinking lead to the enactment of the *Staute of Wills*, which is the basis for modern wills law.
    (3) **Created 'legal executory interests'** – In fusing legal and equitable interests, the Statute created a hybrid form of property (quasi-property) known as a legal executory interest (discussed in next chapter).

(3) THE ESSENCE OF MODERN EQUITY AND THE TRUST

Modern Usage of the Trust

- Trusts can allow property to be held for the benefit of minor children or other dependants.
- Protective trusts can be established to allow a person to enjoy the benefit of trust income while preventing the beneficiary from having full control over the property.
- Trusts can be used in the testamentary context to allow for the management of a decedent's estate.
- Property can be donated to charity by way of a trust.
- Trusts can be used in tax planning in order to minimize tax liability.
- 2 major types of trusts to be covered: (1) resulting trusts, and (2) constructive trusts.

Resulting Trusts

- Resulting trusts may arise:
    (a) When the beneficial entitlement under a trust has not been fully or properly disposed of by the settlor,
        - If, in a grant of property on trust, some element of the beneficial interest is not transferred, it will result back to the settlor.
        - Gift from A "to the Baker Trust Co. (B) in fee simple, in trust for C for life"- Creates a life estate in trust, B is the trustee, statute of uses does not apply to corporations. B holds legal title on trust for C for life.
        - What about the remainder of the equitable interest? – it is not discussed (not given away). The remainder results back to A. If A has no heirs, the interest relates back to the Crown. <u>P. 197-198 – Don't understand this.</u>
        - Resulting trust can also arise if a deed of trust is somehow ineffective, such that it fails totally or partially (ie. if the trust is found to contravene public policy, of if it was created through duress or fraud). In such cases the beneficial interest normally relates back to the settlor.

    (b) When property is gratuitously conferred by A to B, and
        - As a **general rule**, when A buys property and places title to it in the name of B, a resulting trust is presumed to arise in favour of A (same happens when A voluntarily transfers land that he already owns to B).
        - Legal title is in B, and B may even be registered as the owner. However, equity treats that interest as subordinate to the resulting trust held by A – B is regarded as a bare trustee.
        - Equity leans against treating a transfer as a donation – protective function.

- The presumption of resulting trust can be rebutted by showing that a gift was truly intended – if this is proved then the legal and equitable titles are held by the donee (B) and no trust arises.
- **Exception** – in some cases the presumption is reversed, and the presumption is that of a gift – depends on the nature of the relationship of the parties. For example, a gift is presumed where property is transferred from father to child – seen as fulfilling the expectation that the child will eventually receive some benefit through inheritance. This presumption may be rebutted by demonstrating that a gift was not intended. It is not clear in Canada whether the same applies to transfers from mother to child – Canadian law has not caught up to gender parity.

(c) Out of 'common elaboration'.
- Variation on the idea that a trust arises in favour of the party advancing the purchase price – found in cases in which it is shown that the party on title intended some other person (usually the spouse of the legal owner) to share beneficial ownership.
- Usually triggered by an agreement that the non-title spouse should acquire some property right, owing to that person's contributions to the acquisition, preservation or enhancement of the property.
- Designed to reward the non-monetary contributions of one spouse when title was held by the other.
- This function has been overtaken by the emergence of 2 equitable concepts: unjust enrichment and the remedial constructive trust.

Constructive Trusts
- Constructive trust is one imposed by equity, irrespective of an intention to create a trust.
- Arises only in specific situations:
  (a) An express trustee who wrongfully obtains profits from his or her position will hold those monies under a constructive trust.
  (b) A person who unlawfully deals with trust property in circumstances in which that person knew or ought to have known of the trust will be treated as a constructive trustee '*de son tort'*.
  (c) A constructive trust may be imposed to prevent a wrongdoer from profiting from a crime.
- Generally, constructive trusts arise in those instances in which equity wishes to respond to unconscionable conduct. However, constructive trusts may also arise in other situations.
- In Canada, constructive trusts are an effective means of responding to unjust enrichment.

Murdoch v. Murdoch (1974 S.C.C.)
- Involved a claim by a wife to an interest in her husband's ranch properties.
- The wife had worked with her husband as a hired hand on various ranches from 1943 to 1947. During that period, both pay cheques were given to the husband.
- In 1947, the husband and his father purchased a guest ranch, which was sold in 1951. The husband bought another property with the proceeds from that sale, along with some of his wife's money that she had obtained from her mother. Several other properties were also purchased later.
- Mrs. Murdoch worked on the ranch for several months each year while her husband was away, and managed the daily chores.
- When the marriage broke down, Mrs. Murdoch claimed an interest in the ranch. Her action failed.

- Issue concerned whether or not a *resulting trust* arose – majority held that the necessary intention to create a resulting trust could not be found.
- In dissent, Laskin J. concluded that a constructive trust should arise to respond to the unjust enrichment enjoyed by the husband.
- Case became famous and sparked a major reaction.

Rathwell v. Rathwell (1978 S.C.C.)
- Similar in facts to *Murdoch*, but the court held that a constructive trust could be found.
- Court also outlined a general doctrine of unjust enrichment, applicable when the facts display: (a) an enrichment, (b) a corresponding deprivation, and (c) the absence of a juristic reason for the enrichment.
- Court held that one of the ways that unjust enrichment could be remedied was to treat the legal owner as holding part of the legal title on a constructive trust for the party suffering the deprivation.

Sorochan v. Sorochan (1986 S.C.C.)
- Mr. and Mrs. Sorochan lived together (as common law spouses) for 42 years.
- During their time together the pair collaborated on a farming venture.
- Mrs. Sorochan assumed almost all responsibility for raising the couple's children.
- All the lands were registered in the husband's name. In 1971 Mr. Sorochan refused Mrs. Sorochan's request that part of the land be transferred to her.
- Following separation, Mrs. Sorochan sought a remedy in equity in relation to the land.
- All elements of unjust enrichment (from *Rathwell*) were found to exist. However, this does not invariably lead to the imposition of a constructive trust – it is only one remedy – the court may also award monetary compensation.
- Court imposed a constructive trust of a 1/3 interest in the disputed property.

Peter v. Beblow (1993 S.C.C.)
- Domestic labour is sufficient to found a claim for unjust enrichment.

CHAPTER 7: CONDITIONAL TRANSFERS AND FUTURE INTERESTS

CASES:
- *Re: Essex County R.C. Separate School Board*
- *In Re: Macleay*
- *Re: Tepper's Will Trusts*
- *Re: Leonard Foundation Trust*
- *Scurry-Rainbow Oil (Sask) v. Taylor*

- Property rights can be used by present owners to impose restrictions on future ones.

(1) BASIC CONCEPTS

Remainders and Reversions
- Associated with the doctrine of estates in land.
- Reversions - "to A for life" – A gets a life estate. On A's death the property interest reverts back to the grantor.
- Remainders – "to A for life, then to B" – instead of reverting to the grantor on the death of A, the property (the remainder) goes to B.
- Best described as present rights to future enjoyment (rather than just future interests).

Defeasible and Determinable Interests

- **Defeasible interests -** An interest is defeasible if it may be brought to a premature end on the occurrence of a specified event (an interest subject to a condition). For example, to the School Board in fee simple, *on the condition that* if the property shall no longer be needed for school interest, my estate may re-enter". In such cases, if the condition is broken, the grantor can claim its right of re-entry to recover the land.
- **Determinable interests** – similar to defeasible interests. "To the School Board *until* the land is no longer required for school purposes" – produces a determinable fee simple. The Board receives a possessory right, but should the determining event occur, the fee will end and the property will pass to the grantor (or his estate). The interest that is retained by the grantor is called a <u>possibility of reverter</u>. No formal demand for re-entry is required because here the estate *ends* when the determining event occurs.
- Difference between the two interests can be difficult because the language is similar – must look at the intention of the grantor.
- Where no intention can be found, certain phrases have come to be associated with each type of interest.
- Determinable interest – "while", "during", "so long as" "until" – words of duration (usually have a temporal connotation).
- Defeasible interests – "on condition that", "but if", "provided that", "if it happens that" – refer to a condition subsequent.
- Still, language can be confusing – for example: "to A so long as she continues to reside in Canada" – can be taken as either type of construction.

Vested interests, contingent interests and conditions precedent

- Property interests are either vested or contingent.
- **Vested interest** – an interest is vested when no condition or limitation stands in the way of enjoyment. The natural termination of the prior estate is not treated as such a condition.
- For example: "to A for life, remainder to B" – both interests are vested. However, A is *vested in possession*, while B is *vested in interest*.
- The possibility of reverter is treated as being vested at common law.
- **Contingent interest** – an interest is contingent if vesting is delayed pending the occurrence of some condition precedent, the happening of which is not inevitable. A condition precedent is like a bridge that must be crossed before the property can be enjoyed.
- For example: "To the first person to find a cure for cancer" or "to A for life, remainder to B but only if and when B marries".
- **Interpretation by the courts** – courts are loathe to imply contingencies and favour vesting. Also, when it is unclear whether a gift creates a condition precedent, a condition subsequent, or a determinable limitation, the courts prefer the latter 2 options because they lead to an immediate vesting of the interest.

"To A for life, remainder to B for life, remainder to C if he attains 21 years."

- B is vested in interest but not possession – there is a prior estate.
- C – there is a condition precedent of acquisition for C (attaining 21years of age) – interest is not vested in interest or possession (there is a prior estate) – C's interest is **contingent.**

"To A in fee simple, *so long as* she remains in Canada, then to B."

- Potential public policy problem.
- Determinable fee simple.

- Fee simple comes to a natural end when A leaves Canada.

Phipps v. Ackers – discussed in Ziff

- "To A if she attains 25 years of age, but if not, to B."
- What kind of interests do A and B have?
- Court says that A's interests are vested and B's are contingent – although it appears that A's interests are contingent. Court says "A has what B does not have".
- Why? The law favours vested interests – if there is any doubt the law will favour characterizing interests as being vested.
- Rule of construction, not a rule of law.

Precatory words and *in terrorem* conditions

- Terms are considered to be precatory where they fall short of establishing an actual condition or limitation – only wishes or hopes that the donee will refrain from acting in a specified manner – no provision for actual legal consequences should the donee fail to abide by the terms.
- For example, a "request" or an "understanding".
- However, in some cases these words can be interpreted as being binding – called a "precatory trust" – just means that although the words are not explicit, a trust is created anyways. This is a matter of construction and can be very difficult.
- Also, some testamentary conditions may be treated as *in terrorem* – idle threats not intended to lead to a loss of an interest.

Transferability

- Reversions, vested remainders and interests that are vested in possession are fully alienable.
- Contingent remainders may be passed by will.
- The possibility of reverter may be transferable by deed or will.

(2) STATE LIMITATIONS ON PRIVATE POWER

- What are the public policy limits of a person's power to control property by attaching conditions to gifts?
- Policy concerns having to do with property include the promotion of alienability and the need for certainty in property dealings (efficiency concerns), and property freedom.

The effects of invalidity

- Where there is a <u>condition precedent</u> attached to *realty*, <u>a finding that that condition is invalid destroys the gift</u>. The law is not as clear about contingent gifts of *personalty*.
- There are a number of rules that can invalidate all or part of a property transfer.

Public Policy

- Conditions that contravene public policy will not be enforced – one basis for invalidity.
- Leaves judges with lots of discretion – what allows judges to strike down transfers on the grounds of public policy? – <u>this is a vague area</u> – existing categories of public policy are not closed or inflexible. Also, public policy concerns change over time.
- It is generally agreed that public policy should be invoked only when the harm is "substantially incontestable".

Examples of public policy concerns that may invalidate conditional transfers of property:

- Conditions that affect state interests in a direct way, such as by encouraging a recipient to violate the criminal law.
- Many prohibitions relate to conditions that touch on family life in some way – for example, conditions that seek to undermine parental rights and obligations may be found void, especially those directed at separating parent from child. Also, conditions that place restrictions on marriage (ie. to A on the condition that she does not marry) have been found to be invalid for reasons of public policy – however, partial restraints (such as those that denote an age for marriage or rule out a specific partner) have been upheld.
- Conditions based on religion have generally withstood challenge. For example, a condition that X must not marry outside the Jewish faith has been upheld.

Sources of public policy:

- Courts have tended to look beyond case law to other sources such as human rights legislation, international laws and conventions etc.
- The *Charter* also serves as a basis for public policy – *Charter* does not apply to private transactions, however its principles can be used to influence public policy indirectly – for example, the *Charter* promotes equality and prohibits state discrimination on certain grounds such as race and gender.

Leonard's Case

- Demonstrates how public policy pits rights of private ownership against other social values, and how the law patrols the line between permissible and impermissible uses of property.
- Col. Reuben Leonard, an engineer, became a multi-millionaire as the owner of a silver mine. He became one of Canada's most generous philanthropists.
- In 1916, Leonard established a foundation to provide scholarships.
- The trust deed contains a lengthy preamble that was designed to explain the underlying principles of the foundation – starts with a statement about Leonard's belief that the white race is best qualified by nature to be entrusted with the development of civilization and the general progress of the world.
- Only white protestants of British nationality or parentage qualified for scholarships – no more than ¼ of the funds awarded annually could be given to females.
- In 1986, the Ontario Human Rights commission launched a formal complaint, alleging that the foundation was in violation of the Province's human rights code.
- At first instance, the trust was upheld – although the courts acknowledged the deplorable nature of the racism included in the trust's principles.
- Ontario C.A. ordered that the discriminatory elements of the document be excised, but allowed the rest of the trust to stand.
- Court held that the trust was generally public in nature (for the benefit of the public, dealing with public institutions), and therefore its discriminatory elements contravened contemporary public policy.
- What about the validity of other scholarship funds that discriminate on any number of grounds? – court held that discrimination was acceptable if it was directed toward acceptable policy ends (such as to promote the education of women or aboriginal peoples).
- This case is somewhat of an anomaly – base on blatant religious supremacy and racism – most other similar cases are less clear.

Uncertainty

- Conditions attached to property transfers that are too imprecise may be found to be void.

- This does not apply to situations where the court must determine whether a condition should be treated as being imposed before (precedent) or after (subsequent) vesting – in these cases the court will try to make the correct designation by applying rules such as the preference for early vesting (discussed above).
- Also does not apply to cases of evidential uncertainty – where it is unclear whether some relevant event has occurred.
- Problem is with interpretation – documents are subject to conflicting interpretations in the minds of different readers – also, words are bound up in context.
- For conditions subsequent, Courts apply an objective test to determine the meaning of the language in question – try to give a "common sense" meaning to words that are truly ambiguous.

  Sifton v. Sifton
  - A condition requiring the donee to continue to reside in Canada was held to fall below the minimum standard of certainty because there were no adequate guidelines as to what sorts of temporary absences or sojourns would contravene the condition.

- Lower threshold of certainty is demanded for conditions precedent – less vulnerable to invalidity than conditions subsequent - all that needs to be shown is that the condition is capable of being given some plausible meaning.
- For example: "to A if he is tall" will not fail for uncertainty – the word "tall" can be given some reasonable meaning – as long as A can show that he fits within a reasonable definition of the term, the gift can pass.

Restraints on Alienation

- The law promotes alienability and therefore conditional transfers that impose unacceptable restraints on the transfer of property are invalid. For example, "to A on the condition that the property never be sold, leased or mortgaged".
- Restraints are generally held to be invalid if they are inconsistent with an inherent attribute of ownership (such as the right to transfer property freely).
- In some circumstances, restrictions on the right of transfer are found to accord with public policy – for example, restrictions imposed on transfers of the matrimonial home without spousal consent, laws preventing the auctioning of sacred objects etc.

  What types of restraints are possible?
  (1) **Forfeiture restraints** – ones for which a right of re-entry or possibility of reverter may be invoked in the event of a breach.
  (2) **Promissory restraints** – ones that are purely contractual.
  (3) **Disabling restraints** – remove from the owner a power of disposal.

  What is the extent of such restrictions? Powers of disposal may be abridged in 3 ways:
  (1) By restricting the **mode of alienation** – for example, property may not be sold or mortgaged (but may be leased).
  (2) By prohibiting alienation to some **class** of recipients.
  (3) By precluding dealings for a specific **time** – SCC has said that a total restraint for any period of time is invalid (even for 1 day) – Litman thinks they are overreacting.

- Test – in ascertaining whether the combined mode, class and time restrictions is unacceptable, the test is sometimes said to be "does the condition take away the whole power of alienation *substantially*?". If yes, the restraint is unacceptable.
    - Courts are unclear about what "substantially" means.
    - The more encompassing the restraints are, the more likely the courts will be to say that the restraint is substantial and therefore unacceptable.
    - See brief for *In Re: Macleay*.
    - Indirect restrictions may also be struck down – courts will look at both substance and form – for example, making it impossible for someone to sell without expressly stating that they can't sell.

(3) THE LEGAL REMAINDER RULES

The 4 rules of *inter vivos* transfers

- These rules restrict the manner in which future legal interests can be created.
- Historically, the law has not liked future interests in general and contingent remainders in particular – probably because they generate uncertainty and inhibited transfers – the law sought to reduce the number of "fancy" interests that could be created.
- Generally, rules are applied at the outset – must be satisfied at the time the grant is made.

- Rules 1 and 2 are designed to prevent a gap in seisin.

(1) **An estate of freehold is void if it is designed to take effect in the future, unless it is supported by a prior particular estate.**
- Demonstrates the common law's rigid attitude toward the movement of seisin.
- A deed given to A on Day 1, which is stated to take effect on Day 2, is void – gap in seisin (1 day).
- The rule is not violated when the future interest is preceded by the granting of a prior particular estate – for example, "to A for life, remainder to B and her heirs" – the gift to B is supported by the prior particular estate in A, hence there is no gap in seisin – once A dies, seisin passes immediately to B.

(2) **A legal contingent remainder is void unless it vests at or before the termination of the prior particular estate (timely vesting rule).**
- This rule is concerned with the timely vesting of contingent remainders.
- A gift "to A for life, remainder to B if B remarries after A's death" is void from the outset because the marriage requirement will produce an inevitable gap in seisin – B has been given a contingent interest that cannot vest until the condition precedent (the marriage) has occurred. A contingent interest is too inchoate to allow its holder to enjoy seisin.
- In contract, a gift "to A for life, remainder to B if she marries before A's death" is unquestionably a valid remainder, because there is no possibility of a gap in seisin.
- However, a gift "to A for life, remainder to B if B marries" is unclear. The time for marriage is not indicated

- Rules 3 and 4 are designed to prevent a shift in interest before their time.

(3) **A remainder is void if it is to take effect by cutting short a prior particular estate.**
  - Concerns the law's reluctance to recognize new forms of land interests.
  - A gift "to A for life, provided that he does not remarry, but if he does, then to B" gives a valid life estate to A, which is subject to a condition subsequent. The right given to B could cut A's life estate short – therefore this gift is invalid under rule 3.
  - Instead, a gift "to A for life or until A remarries, and then to B" creates a determinable life estate which does not violate rule 3 – the determining event marks the natural end of the estate and does not cut short the life estate or prematurely terminate it.

(4) **A remainder after a fee is void.**
  - In a gift "to A in fee simple, remainder to B in fee simple", the remainder to B is void.
  - Once the grantor has parted with the full fee simple by conferring it on A, there remains to additional interest that can be given to B.

Equitable and legal executory interests

- <u>Equitable interests are not subject to the legal remainder rules</u>.
  - o "To A for life, remainder to B if B marries after A's death"
    - A receives an equitable life estate
    - B gets an equitable contingent remainder
    - During the inevitable interval of time after A's death and before B's marriage it would be presumed as a matter of construction that the equitable title would return to the settlor – this interest is a resulting trust.
    - On B's marriage the settlor would be divested and the right to possession would move forward to B, as a "springing" trust.
    - If no marriage ever takes place, title will remain with the settlor.
  - o "To A and his heirs, but should she remarry then to B"
    - May result in the cutting short of A's interest in favour of B – this would be invalid under rule 4 if it were a legal gift.
    - However, an equitable gift would give B a shifting equitable interest.
- <u>Legal executory interests are not subject to the legal remainder rules</u>.
  - o **One exception** – the rule in *Purefoy v Rogers* - in the "wait and see" situation that comes up under Rule 2, the legal remainder rule does apply to legal executory interests. For example, "to A for life, remainder to B if B marries" – must "wait and see" if B marries before A's death to see whether or not Rule 2 is satisfied.
  - o The impact of rule 2 will only be felt if an executory interest is capable of complying with the legal remainder rules (if it can, it must).
  - o You can get around this rule by applying an inevitable gap in seisin – "to A for life, remainder one day later to B if B is 21".

Not subject to the legal remainder rules:
(1) Springing interests
(2) Shifting interests
(3) Legal executory interests

Testamentary Gifts

- Do the legal remainder rules apply to testamentary gifts of land?

SOME HYPOTHETICALS BY LITMAN

Legal Reversionary Interests

(1) "To A for life" – reversion
(2) "To a for life, remainder to B if she marries" – reversion subject to defeasance
(3) "To A in fee simple, but if she marries B then her interest shall be defeated and I may re-enter the estate" – right of re-entry.
(4) "To A in Fee Simple or until A marries B" – possibility of reverter.

Equitable Reversionary Interests

(1) "To X Corporation to the use of A for life" – resulting trust.
(2) "To X Corp. in trust for A in fee simple or until A marries B" – possibility of resulting trust (regarded at common law as a vested interest, but considered a contingent interest under the law of perpetuities).

(4) THE RULE AGAINST PERPETUITIES

- Modern function of the rule against perpetuities is to promote alienability – contingent interests are targeted as potential fetters.
- The rule establishes a period of time during which contingencies will be permitted to remain unvested – tries to strike a balance between the rights of a prior owner to control the destiny of her or his property, and the autonomy of present owners to act without being controlled by the dead hand of the past.

Rule:
An interest is valid if it must vest, if it is going to vest at all, within the perpetuity period. That period is calculated by taking the lives in being at the date the instrument takes effect, plus 21 years.

Breakdown of the Rule:

(a) **"An interest"**

- The rule applies to almost all contingent interests in property, real or personal, legal or equitable.
- Exemptions from the rule:
  - Possibility of reverter (regarded as a vested interest)
  - Right of re-entry arising from the breach of a condition under a lease
  - A gift over from one charity to another
  - An option to renew a lease.
  - Rule does not apply to invalidate contractual obligations as between the parties – therefore it is plausible that the grant of an option over land may still be enforceable against the parties to a contract.

(b) **"Must vest"**

- Contingent property rights must vest, either in possession or interest, within the perpetuity period.
- Here, the meaning of "vested" is more elaborate – refers to interests that are not subject to a condition precedent ***and*** includes a requirement that the exact size of the interest of the donee(s) be known (for example, in class gifts – all or nothing attitude – one bad apple will spoil the entire barrel).

- It must be known from the outset whether vesting of the interest is impossible – if, looking at the matter from the date the disposition took effect, *however unlikely*, that the interest may vest outside the perpetuity period, the gift is void.
- Lucas v. Hamm –
  - property was to vest 5 years after the probate had been obtained.
  - It is extremely rare, but in some cases the probate can take many years – therefore there is a slim possibility that the gift will not vest within the perpetuity period (in this case 21 years).
  - Remember that even if the condition is fulfilled (that is, probate is obtained after a few months and therefore the gift vests within the perpetuity period), the gift fails because *from the outset* it is possible that vesting will not occur within the perpetuity period.
  - For an *inter vivos* transfer, the completion of the transaction is the crucial moment. For a will, the crucial moment is the death of the deceased.

(c) **"If at all"**

- The rule against perpetuities is completely indifferent as to whether a contingent interest actually does vest.
- Rather, the rule seeks to know merely whether or not a timely vesting will occur.
- Question: "when will we know, one way or the other, whether this contingent interest will vest?"
- If we know that this question will be resolved during the period, either way the rule will be satisfied.
  - For example – a gift "to my first grandchild to marry within 21 years of my death" is valid – even if no marriage occurs, and even if no grandchild is ever born.
  - In this situation it is certain that any vesting that does occur will take place before the perpetuity period expires.

(d) **"Within the perpetuity period"**

- Perpetuity period calculated according to the duration of all "lives in being" plus 21 years.
- Difficulty comes in determining the list of people who are "lives in being".
- Generally, all people who are alive at the date of the gift (including fetuses) *and* are directly or indirectly connected to the gift are lives in being – anyone who can be used to demonstrate that vesting cannot possibly occur outside the perpetuity period.
  - Example – a gift that delayed vesting "until 20 years after the death of the last lineal descendant of Queen Victoria" was upheld in 1921. In this case, there were 120 lineal descendants that were all helpful lives in being.
  - However, gifts that use too large a class may be invalid for administrative uncertainty – for example, a gift in which vesting is postponed "until all currently living persons are dead" would likely fail for this reason.
- In the case of class gifts, if one member might vest outside the perpetuity period, the entire gift fails.
  - This can be avoided by providing that only those members of the class who meet the stated conditions within the period will be entitled to a share, and that latecomers are to be excluded.
  - For example – a gift "to all my grandchildren who marry within 21 years of my death" is valid. Similarly, so is a gift "to all my grandchildren, alive at my death, who marry".

- A testamentary gift "to all my grandchildren who marry" fails – there is the possibility of future grandchildren who will be born. Also, there is the possibility of marriages after the 21 year period has expired.
- Rule in *Andrews v. Partington* – a class will close as soon as one member is entitled to receive a share.
  - For example, in the above gift, if one of the grandchildren had met the requirement when the will took effect (on the death of the grantor), the class of potential takers is frozen.
  - The class now includes the one married grandchild and all those alive at the death of the grantor - afterborn children are shut out.
  - Each person in the class is now a life in being whose interest must vest, if at all, within their own lifetime.

<u>Further Examples:</u>

(1) An *inter vivos* transfer reads "to my first grandchild to turn 21"
  - Grantor has one child – a daughter – age 20.
  - 2 potentially helpful lives in being: (1) the grantor, and (2) the daughter.
  - What if the grantor has another child after the grant is made? – that child would not be a life in being – wasn't alive at the time of the grant (afterborn child).
  - What if then the 2 existing lives in being die? – the 21 year period would begin to run when the grantor dies.
  - Unless the afterborn child has a (grand)child who would turn 21 within the perpetuity period, the gift would most certainly fail – regardless of how remote the possibility.
  - However, the same gift contained in a devise (*a will*) would be valid. In that case there would be only 1 helpful life in being – the daughter.
    - In this case, the testator can not have future children (she is dead).
    - Any child of the daughter would have to turn 21 within 21 years of the daughter's death.
    - The daughter, as a life in being, is used to demonstrate that it is impossible for the gift to vest beyond the perpetuity period.

(2) A testamentary gift effective in 1962 reads "to A for life, remainder to A's widow for life, remainder in fee simple to their eldest surviving child"
  - A was not married when the devise was drafter or when it took effect.
  - Remainder to A's widow is contingent (donor is not referring to a specific person). Whether or not there will be a widow to take the remainder will not be known until A (a life in being) dies.
  - It is the remainder in fee to the eldest child that is vulnerable to a perpetuities challenge- it is void. That interest will vest, if at all, on the death of the widow – only then will it be known who, if anyone, is the surviving eldest child.
  - Consider the following –
    - In 1983 A marries B.
    - A child, C, is born in 1984.
    - A dies in 1985
    - B dies in 2007.
    - C is still alive and is the eldest surviving child.
    - Since the perpetuity period is based on A's life plus 21 years, the period ended in 2006 and the vesting was therefore too remote.
    - Because this was possible from the outset, the remainder is void *ab initio*.

(3) A testamentary gift creating an otherwise valid trust for "A's first grandchild to turn 21"
   - A is 65 years old and has 2 children (B and C).
   - It is unlikely (and not medically probable) that A will have another child – so any grandchildren (children of B or C) who turn 21 must do so within 21 years of the death of B and C (who are lives in being).
   - However, the common law rule against perpetuities does not care about medical improbabilities – it is enough that there is a theoretical possibility that of another child being born. That child may might produce a grandchild that would be the first grandchild to turn 21. Because this might occur outside the perpetuity period, the gift is void.

Reform Measures

- In Alberta, a "wait and see" provision has been implemented.
- Generally, one calculates the perpetuity period in accordance with the common law rule and if the gift satisfies that standard, the inquiry ends and the gift is treated as valid.
- If the common law rule is violated then a perpetuity period is calculated using a statutory definition of lives in being – then one waits to see if a timely vesting results.
- Also, statutory limits placed on a person's capacity to have children (s. 9).
- If all else fails, there is a general power to rewrite the gift to give effect to the general intention of the donor within the limits imposed by the rule against perpetuities.

RULE AGAINST PERPETUITIES - Lecture

- Common law rule – all or nothing approach to contingent interests.
- Reformed by way of statute
  - Each province's statutes are different.
  - Manitoba has eliminated the rule – it has become a perpetuities haven.

<u>Alberta Statute </u>(Perpetuities Act)

- The act becomes effective for any interest created after July 2, 1973 – not retrospective.
- Statute presupposes that you continue to apply the common law rule
  - s. 2 – Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect.
- If an interest if valid at common law, your inquiry stops there (s. 4).
- If it is not, apply the statute as per s. 11.

- S. 11 – "how to" section
  - The remedial provisions of this Act shall be applied in the following order:
    - S.9 – reproductive presumptions
    - S.4 – wait and see
    - S.6 – reduction of age
    - S.7 – exclusion of class members to avoid remoteness
    - S.8 -

"To A's first grandchildren who attain 21 years"

- A is 85 years old.
- A has 2 grandchildren – C1 (1 yr). and C2 (3 yrs).
- Are the common law rules satisfied? Can we say for sure that if vesting will occur it will do so within 21 years?

    - The presumption at common law is that C1 and C2 may die, and that there may be future born grandchildren – we can not say that if vesting will occur it will do so within 21 years (don't know <u>for sure</u>).
- Is there someone alive at the creation of the interest so that vesting will occur within 21 years of their death?
    - Common law says that 85 year old women may still have more children - answer is no.
- If A was dead, there would be no problem (she is unable to have afterborn children).
- Statute s. 9 – a woman is presumed by statute to gain procreative capacity at age 12, and lose that capacity at age 55 – we now know that A is presumed not to be able to have further children.
- This makes the *inter vivos* grant valid.
- Judge is given discretion to fix things up as best as possible if the presumptions set out in the statute are wrong (for example, where an 85 year old woman miraculously does have a baby).
- Adopted children are a potential problem in this situation – what if A adopts? Usually adopted children are treated as natural children.

<u>CLASS EXAMPLES:</u>

Executory interest – an interest that is executed out by the Statue of Uses

<u>Unexecuted</u> *inter vivos* trust (after July 2, 1973) "to A in trust for C for life, then on trust for the first grandchild to attain 21 years".

- Grantor (G) is a male – presumptions of fertility don't help – G is alive at the date of the execution of the trust.
- A (trustee) is also alive.
- C (G's son) is alive.
- W (C's wife) is alive.
- 2 grandchildren – GC1 and GC2

- Who are the lives in being according to s. 5(2) of the statute?
    (1) G (is alive and ascertainable etc...)
    (2) GC1 and GC2 - as per 5(2)(b)
    (3) C (G's son) – as per s. 5(2)(c) – parent of a beneficiary – also under 5(2)(d).
    (4) A (trustee) – as per s. 5(2)(d) – has a legal interest – presume here that A is not wiped out by the statute of uses (unexecuted trust).
    (5) W (wife) – as per s. 5(2)(c) – assuming that she is the mother of the children (GC1 and GC2)

"To T Corp. in trust for G's grandchildren who attain 30 years".

- Day after trust is executed, the G and the whole family get wiped out EXCEPT for GC1 (2years old) and GC2 (1 year old).
- At the day of the execution of the trust, the grant is invalid as per the rule against perpetuities.
- Now we are left with only 2 lives in being – GC1 and GC2. Common law rule is now satisfied.

"To T Corp. in trust for G's grandchildren who marry."

- No GCs alive at the creation of the interest.
- 10 years later, the last life in being has died and we have GC1 – 7 (age 10 – 15) - none of whom had married.
    - Wait and see if any grandchild marries within 21 years.
    - Assume that one child marries –
    - What about all or nothing provision ?– if one member of the class fails the whole gift fails – look to s. 7(2) – exclusion of class members to avoid remoteness.

CHAPTER 8: LEASES, LICENSES AND BAILMENTS

- November 2004 – RTA legislation changed – substance is primarily the same but some section numbers are now different from those in the material.
    - Introduced provisions that address violations under the *Public Health Act*.
    - Changes to record-keeping requirements – landlords now have an obligation to retain inspection reports after the termination of a tenancy. Also, must now maintain specific records of security deposits.
    - Created a "director of residential tenancies" – has the power to compel records mentioned above and the power to go to court to get orders to enter the landlord's premises – power of inspection.
    - Consolidated and clarified existing sections.

CASES:

- *Sundance Investment Corp. v. Richfield Properties*
- *Southwark LBC v. Mills*
- *Highway Properties Ltd. v. Kelley, Douglas & Co. Ltd.*
- *Conley v. Walker*
- *Aslan v. Murphy*
- *Punch v. Savoy's Jewelers Ltd.*

INTRODUCTION

- Chapter concerns the leasehold estate.
- There are really now 2 laws of landlord and tenant – one for commercial property and the other for residential – but they still share a common structure.
- Landlord/tenant law is a combination of property and contract law – leases are both contracts and interests in land.

THE NATURE OF A LEASE

- Lease – a demise of <u>land</u> under which exclusive occupation is conferred by a landlord on a tenant.
- A leasehold estate delimits the duration of the tenant's holdings.
- While the lease continues in force the landlord retains a <u>reversionary interest</u> – the landlord's right to actual possession is suspended during the term of the tenancy.
- Central feature is the right of the tenant to exclusive possession.
- A leasehold is a <u>chattels real</u> – used to be treated as a contract. Today it is treated as both a proprietary and a contractual interest – remedies in both contract and property.
- Specific rules related to its termination (both at common law and by statute).

<u>5 TYPES OF LEASES:</u>

(1) Fixed term

- Lasts for an interval, however irregular or lengthy.
- Terms must be certain as to both its date of commencement and termination. Therefore, a lease to last "for the duration of the war" is invalid.
- However, a lease with a fixed terminal date but which may end prematurely on the happening of a specific event is valid – it is the maximum length that must be certain.

- A lease “for life” is not governed by this requirement because, at common law, it creates a life estate (freehold interest).
- Where no rent is charge, an estate for life is treated as a life estate. However, when rent is charged the interest is frequently described as a lease for life.

(2) Periodic tenancy

- One that is enjoyed for some recurring unit of time (ie. month to month) and continues until terminated by notice.
- Unless otherwise agreed, or altered by statute, the notice required is equivalent to the tenancy period (ie. one month for a month-to-month lease).
- In the case of a yearly lease, 6 months’ notice is the rule at common law.
- Periodic tenancy may arise from inference – such as when a tenant under a fixed term lease remains in possession and pays a rent that is acceptable by the landlord (known as “overholding”). Under the RTA this happens after only one payment.

(3) Tenancy at will

- Has no set period and continues only so long as both landlord and tenant wish.
- Either party may bring the tenancy to an end at any time by notice.
- Usually arise in the context of real estate transactions – there can be times when the purchaser is actually in possession of the premises before the money reaches the seller (usually goes through lawyers etc.).
- The creation of such a tenancy may be implied – for instance, where a tenant remains on the premises after the expiration of a previous tenancy with the landlord’s consent. In such cases, the terms of the original agreement apply in so far as they are compatible with the new arrangement.
- Under certain circumstances the payment and acceptance of rent will convert an tenancy at will into a periodic tenancy – if it can be fairly implied from the circumstances.
- Tenancy may also be ended by implication – notice to terminate does not have to be express (may be demonstrated by the conduct of either party).

(4) Tenancy at sufferance

- Arises when a tenant remains on the premises without permission after the termination of one of the other types of leases.
- Unlike other forms of leases, this type of lease is non-consensual and does not produce a tenurial relationship – classification as a lease is questionable.
- Even though there is no obligation to pay rent, the over holding tenant will be liable to the landlord for use and occupation of the premises.

(5) Perpetual lease

- A lease with no fixed term or stated period, no right of termination on notice and which can last forever is NOT TENABLE AT COMMON LAW.
- An attempt to confer such an interest is treated as creating either a periodic tenancy or an outright sale of the freehold.
- Still, perpetual leases are occasionally found in Canadian law.
- A lease for a term of years may validly provide for a perpetual *right of renewal*.

Life leases

- New phenomenon.

- Interest where the rental agreement allows seniors to occupy for the remainder of their life – created specifically in relation to senior citizens.
- May pay a lump sum in advance or make periodic payments.
- Can terminate in several ways:
    - Usually terminate on the death of the tenant or their surviving spouse (therefore can extend beyond the lifetime of the tenant).
    - Can be terminated with notice.
- Are these really leases of life estates? Key thing with a life estate is that when you die the estate ends – life leases may continue after the life of the original tenant because of the surviving spouse provision. Also, there is the ability to sell your lease interest to someone else – becomes a lease for that person's lifetime.
- Therefore, the key thing you are looking for is when it ends.
- Again, distinction is important because of the application of RTA legislation.

ESSENTIAL AND FORMAL ELEMENTS:

- An unimpeachable legal lease should contain:
  (a) a demise of exclusive possession
  (b) an identification of the parties
  (c) the property to be leased
  (d) the term of the lease
  (e) the amount of rent (if any) to be paid.

- Because a leaseholder cannot be seized of land, the rule prohibiting grants *in futuro* does not apply – a lease can be granted to take effect at some designated later date.
- No formal requirements for the creation of a lease at common law. However, the *Statute of Frauds* requires that a **non-residential** lease of more than 3 years be in writing and signed by the lessor (or an agent).
    - Failing this, the Statute provides that a tenancy at will is created if the tenant takes possession with the landlord's consent.
    - Writing requirement does not apply to leases of less than 3 years if the rent to be paid less than 2/3 of the annual value of the premises.
    - *Alberta Land Titles Act* – when land is demised for a term of more than 3 years (or for life) the owner must execute a lease in the prescribed form and the document must identify the land sufficiently.
    - Minimal statutory interference in non-residential leases – only Statute of Frauds and Land Titles Act. Terms of the contract govern – therefore the contracts are very detailed. Contract prevails over common law.
- **Residential** leases – Residential Tenancies Act
    - **s**. 1 (1)(k) of the RTA defines a residential tenancy agreement as oral, written or implied. Broad enough to include licenses. S. 2(2) – tells you which licenses are excluded.
    - S. 3 – can not detract from the rights and obligations in the RTA (the act prevails), but you can add to them.
    - S. 5 – 11 – statutory termination periods and requirements for periodic tenancies. You can no longer terminate a period tenancy without cause (landlord or tenant) - substantial change to the common law. "Reasons" include things like major renovations, demolition, personal use by the landlord etc.). These were included to stop landlords from terminating for discriminatory reasons – provide some security of tenure.

- In Alberta there is no rent control – no true security of tenure – landlord can hike your rent as much as he wants to try and get you to leave – only requirement is that he give a specific amount of notice.

- Because the strict application of the *Statute of Frauds* may produce injustice, several principles have emerged to mitigate the impact of non-compliance.
  - **Periodic** - if a tenant enters into possession under a void lease and pays rent (which is accepted by the landlord), a periodic or yearly tenancy is presumed by the common law – the term is to depend on the basis on which the rent is paid.
  - **Equity** – principle in *Walsh v. Lonsdale* (part performance) – even a verbal agreement may be enforced in equity as an agreement for a lease if there are sufficient acts of <u>part performance</u> that can serve to protect the existence of the agreement. This doctrine gives rise to an equitable (not a legal) leasehold interest. The finding of an equitable lease is wholly at the discretion of the courts.

<u>LEASES v. LICENSES</u>

Lease
- A lease involves a grant of exclusive possession (this is the major distinguishing feature).
- Creates an interest in land – proprietary right.
- Not subject to LRR – can enter into a lease today to take effect at a later date.

License
- A license does not in itself create an interest in land.
- It is purely contractual.
- A license is merely a permission to do that which would otherwise be trespass.
- Personal right.
- Exception: license coupled with a *profit a prendre*.
- Bare licenses may be revocable at any time without notice. However, there are some exceptions to this at common law.

- Where there is question as to whether an agreement is a lease or a license, the courts will determine whether or not a grant of exclusive possession was conferred.
  - **In England** – distinguishing feature is exclusive possession.
  - **In Canada** – shifts between English approach and one that centers on the more general issue of whether a personal or a proprietary right was intended.
  - In deciding whether or not exclusive possession was granted, the courts will look at the terms of the agreement and also at other attendant circumstances – question of substance rather than form.
  - For example, just because an agreement that says "the tenant shall not have exclusive possession" does not mean that ill will be treated as creating a license.
  - Tenancy always involves exclusive possession, however one may have exclusive possession and not be a tenant (for example, mortgagee, service occupier such as a building superintendent, owner in fee simple – all have exclusive possession but are not tenants).

        - Some provinces have amended residential tenancy legislation to include lodgers (residents who provide services for the living unit – not tenants).

Why does this distinction matter?

- Application of legislation -
    - Some legislation only applies to leaseholds and not to licenses (ie. Land Titles Act).
    - However, our RTA now extends to certain licenses – happened because of issues surrounding rooming houses – do such tenants get protection under the RTA?
    - Generally, a license is included under the RTA unless it is expressly excluded.
- Their binding effect on 3rd parties are different –
    - The terms of a leasehold are binding on subsequent purchasers of the land.
    - A lease of more than 3 years must be registered in the Land Titles system.
    - Licenses at common law are generally not binding on third parties purchasers – however, in equity they might be – at the discretion of the court where there is unjust enrichment
    - Remedied either through proprietary estoppel or constructive trust.
- Available remedies –
    - Some remedies are available to leaseholds and not to licenses (some remedies are dependant on the right of exclusive possession or proprietary interest).
    - Usually licenses are enforceable only in contract law (except where equity steps in).

How do we tell the difference?

- See *Aslan v. Murphy*.
- Difference is a matter of substance, not form. Therefore labels are not determinative – want to get at the true nature of the bargain between the parties. That is, just because something is called a lease doesn't mean that in law it will be considered a lease.
- Look at the wording of the agreements – leases usually contain "words of demise", words like landlord/tenant, lessor/lessee, words indicating exclusive possession. Licenses talk about licensors and licensee, occupation. Remember, however, that these words may be helpful but they are not determinative alone.
- Must ask why the terms limiting possession are included. For example, if a landlord has a key one might argue that there is not exclusive possession – must look at why the landlord has a key. Is it to enter in cases of emergency or is it to come in regularly? Again, looking for the true bargain.
- Is the relationship created a pretense or a sham – created in order to get around something? In order to determine this a court may look at things like the powers of the purported licensor, for example – is it reasonable that they will exercise those powers?

ASSIGNMENTS AND SUB-LEASES

The effect at law and in equity

- At common law, a tenant's interest is freely alienable and may be assigned or sublet as long as there is no term in the lease to the contrary.
- **Assignment** – occurs when the tenant's full interest in the lease is conveyed.
- A transfer of a shorter period less that the full term of the lease creates a **sub-lease**.
- What the parties label the transfer is irrelevant – the extent of the rights granted determines the correct characterization.

Assignments

- An assignee is not privy to the contract with the original landlord – assignee is liable to the original tenant, who is liable to the original landlord.
- Privity of estate – tenurial relationship that exists between an assignee and the original landlord – affects the rights and obligations that obtain between the two.
- Only the "real" covenants of the head lease run with the transfer to an assignee.

- "Real" includes:
    - covenants that "touch and concern" the land or that affect the landlord or tenant (those covenants that relate to the subject-matter of the lease).
    - Obligations to repair and to pay rent.
    - Restrictions on the right to assign and sublet.
    - Doesn't include any covenants of a personal nature.

Equitable interests in assignments

- Equitable interests may be involved either (a) because the assigned interest was initially equitable, or (b) by virtue of the fact that the assignment is enforceable only in equity.
- An assignment of the tenant's interest that is valid only in equity transfers the benefits of the term to the assignee (which can be enforced against the original landlord), but none of the burdens.

Sub-leases

- No direct relationship between the original landlord and the subtenant (either under privity of contract or estate).
- The sub-lessor (original tenant) retains a leasehold interest with part carved out through the granting of a sub-lease.
- Direct tenurial and contractual relationship between the original landlord and the original tenant remains intact.
- A sublease is dependant on the continuation of this relationship – if the main lease is terminated, the common law rule is that the sublease also ceases to exist.

Limits on a tenant's right to alienate

- Leases frequently restrict the tenant's power of alienation. This may take the form of:
    (1) An absolute prohibition
    (2) A right to transfer conditioned on the consent of the landlord
    (3) A right of transfer conditioned on the consent of the landlord that is qualified in some manner (such as a clause that the landlord's consent will not be unreasonably withheld).

International Drilling Fluids v. Louisville Investments (UK)

- Court set out some general guiding principles for the third type of category of limitations:
    - The function of the qualified veto is to protect the landlord from the chance that the premises might be occupied in an undesirable way or by an undesirable tenant.
    - A refusal must relate to the relationship of landlord and tenant and to the subject matter of the lease.
    - The onus of proving unreasonableness lies on the tenant.
    - It is not necessary for the landlord to demonstrate that the conclusions were justified, so long as they might have been arrived at by a reasonable person in the circumstances – therefore, a reasonable mistake will not vitiate the legitimacy of the refusal.
    - A refusal may be upheld even if the proposed use is permitted under the lease.
    - Generally the landlord is entitled to consider his or her own interests exclusively, and not those of the tenant. However, when the benefit to the tenant far outweigh the potential detriment to the landlord, it is possible that a refusal to allow the tenant to assign or sublet will be found to be unreasonable.

OBLIGATIONS OF LANDLORDS AND TENANTS

Sources of obligations

- Come from both the lease document itself, and may be inferred by implication under the common law, in equity or by statute.
- At **common law**, if the parties simply agree to import the "usual covenants" into their lease, this will lead to the incorporation of a standard set of terms that depend on the conventions being used at the time and the nature of the property.
- Similarly, an agreement for a lease which can create an **equitable** term will also be treated as incorporating the usual covenants.
- Typically these "usual covenants" include:
  - (a) A covenant by the landlord for quiet enjoyment.
  - (b) Covenants by the tenant to pay thee rent, keep and deliver up the premises in repair, pay taxes not required by law to be paid by the landlord, allow the landlord to enter and view the state of the property.
- Incorporation by implication under **statute** can occur in 3 ways:
  - (1) Certain clauses may be inserted as rules of law, so that the parties cannot contract out of their application – this approach is common in relation to terms implied in residential leases that are designed for the benefit if tenants.
  - (2) A statute may imply clauses through rules of construction that yield to a contrary intention.
  - (3) Terms may be incorporated by reference under 'short forms of leases' legislation. Such statutes allow for highly abbreviated clauses to be inserted in a lease, and there are infused with an expanded meaning by virtue of the statute.

Quiet enjoyment and non-derogation

- Tenant's right tot quiet enjoyment is almost always conferred in a tenancy – implied through the usual clauses or is often explicitly included.
- Quiet enjoyment involves a right to take possession, and to be protected against direct physical interference. Also, indirect action can produce a breach – such as when the landlord allows carbon monoxide to fill the apartment, rendering it unlivable. Persistent conduct by the landlord to force the tenant out is regarded as patent contravention of this covenant and may even support a claim for punitive damages.
- The covenant is not directed at noise, *per se*, although excessive noise may produce a significant interference with the tenants' use of the premises.
- Dos not protect against the wrongful acts of other tenants.

- Related to this right is the principle that a landlord must not derogate from the lease.
- The lessor must not use the property in a way that renders the demised premises substantially less fit for the purposes for which they were let.
- Covers physical interference with the property, but may also be extended to indirect interference.

Repair

- Central feature of most modern commercial and residential leases.
- The tenant must act in a "tenant-like" manner – that is, the tenant must take certain action to preserve the property (such as trying to prevent damage by frost or infestation by insects). This includes doing what "a reasonable tenant would do" as well as not damaging the property (either willfully or negligently) or allowing guests to damage the property. This does not include fair "wear and tear" on the premises.
- Principles of the law of waste apply to tenancy agreements as well.

TERMINATION AND REMEDIES

- At common law, a fixed term lease expires naturally on the expiration of the stated term.
- If the tenant remains in possession, the acceptance of rent may lead to the implied existence of a renewed periodic term lease.
- The doctrine of frustration (from contract) applies to leases.
- A breach of a lease may lead to **forfeiture** of the tenancy – depends on how the tenant's obligation is set out.
  - The right of forfeiture applies when the tenant has breached an obligation that has been framed as a lease condition and not as a covenant. (using language like "on condition that" in the lease).
  - A lease may also expressly indicate that a breach triggers a right of re-entry.
  - Landlord may choose either to exercise his right to re-entry or to sue on the breach.
  - Also, there is the common law remedy of distress – allows the landlord to impound the goods of the tenant until payment is received. Power of sale has also been added by statute – usually occurs with regard to commercial leases.

- Impact of these available remedies is tempered in several ways:
  (1) Courts do not look favourably on forfeitures and will take advantage of even trifling reasons to avoid upholding them – courts use very strict construction. Landlord must carefully comply with all prerequisites for re-entry under a forfeiture clause.
  (2) Even if the lease states that breaches render the tenancy void, the landlord is not compelled to enter and may waive those breaches that have triggered the right of forfeiture – this is demonstrated by accepting rent with knowledge of the breach – this is like waiver in contract – can be express or implied by conduct.
  (3) Even if there has not been a waiver, the court may grant relief against forfeiture to a supplicating (begging) tenant. Generally, equity is willing to provide relief against forfeiture as long as compensation to the landlord is possible in damages or costs without affecting innocent third parties.

- A breach by a landlord does not give the tenant the right to withhold other obligations under the lease in response – at common law, nothing short of eviction will suspend the obligation of a tenant to pay rent.
- **Eviction** – every class of expulsion or amotion of a grave and permanent character done by the landlord with the intention of depriving the tenant of enjoyment of the premises – includes acts of constructive eviction (conduct of the landlord intended to force the tenant out).

- **Abandonment** – one way in which a lease may be terminated – occurs when a tenant abandons the property and a landlord resumes possession.
- When abandonment occurs, a landlord may pursue one of four options:
  (1) Ignore the abandonment, refuse to bring about a surrender and patiently stand by, suing for the rent as it falls due.
  (2) Choose to accept the surrender and terminate the tenant's interest in the property, all the while retaining the right to sue for past breaches.
  (3) Advise the tenant that the premises are going to be re-let, with the landlord acting as agent for the tenant, and retaining the right to sue for any shortfall in the rent received – this approach works on the fact that the lease is continuing.
  (4) Accept the surrender and serve notice on the tenant that an action may be brought to recover for prospective losses caused by the tenant's repudiation of the unexpired portion of the term.
    - This option was added by the SCC in *Highway Properties* – see case brief.

- Takes leases into the area of contract law – not just treated as interests in land.
- Expanded a landlord's options substantially – allows contractual remedies, but the extent to which contract law is applicable to leases is still uncertain.
- Also unclear what the tenant's rights are under contract law.

REFORM OF RESIDENTIAL TENANCY LAW

- Residential tenancy law was ill-suited to urban tenancies until reforms began to take place in the past 30 years or so.
- 10 major areas of reform:
  (1) Greater security of tenure for tenants and lodgers.
  (2) Increased termination notice periods.
  (3) Fixing of standard obligations to both landlords and tenants in a way that seeks to allocate responsibilities and rights in a rational and fair manner.
  (4) Increase in tenants' remedies.
  (5) Curtailment of landlords' "self-help" remedies.
  (6) Establishment of dispute resolution procedures designed to be informal, effective, expeditious and inexpensive.
  (7) Establishment of prohibitions on the bargaining away of statutory rights.
  (8) Elimination of various anachronisms affecting the general law of landlord/tenant.
  (9) Creation of a landlord and tenant advisory board.
  (10) Rent control mechanisms.

<u>1992 Alberta Residential Tenancies Act:</u>

Landlord's Covenants

- Premises will be available for occupation by the tenant at the beginning of the tenancy.
- Neither the landlord nor a person having a claim to the premises under the landlord will in any significant manner disturb the tenant's possession or peaceful enjoyment of the premises.
  - Subject to the landlord's right to enter the premises if there are reasonable grounds to believe (a) that emergency repairs are needed, or (b) that the tenant has abandoned the premises.
  - Also, the landlord may enter at a reasonable time (after serving written notice) to inspect the state of repairs, make repairs or to show the property to prospective purchasers, tenants etc.
- The premises will be habitable by the tenant at the beginning of the tenancy.

Tenant's Covenants

- Tenant will not in any significant manner interfere with the rithts of either the landlord or the other tenants in the premises, the common areas or the property of which they form a part.
- Tenant will not perform illegal acts or carry on an illegal trade, business or occupation in the premises, the common areas or the property of which they form a part.
- Tenant will not endanger persons or property in the premises, the common areas or the property of which they form a part.
- Tenant will not do or permit significant damage to the premises, the common areas or the property of which they form a part.
- Tenant will maintain the premises and any property rented with it in a reasonably clean condition.
- Tenant will vacate the premises at the expiration or termination of the tenancy.

- Responsibility for repairs is not clearly defined – tenant is responsible for cleanliness, but nothing is said about the landlord's ongoing responsibilities – Ontario Act is much more clear.
- Landlord's self-help remedies have been severely curbed and those of the tenant have been expanded.
    - Breach by a landlord gives a tenant the right to seek (a) damages, (b) an abatement of rent, (c) compensation for the performance of the landlord's obligations, and (d) termination of the tenancy if the breach is significant.
- Created a Landlord and Tenant Advisory Board – provides advice, receives and investigates complaints, mediates disputes, provides education.nal services etc.
- Right conferred for the benefit of tenants by the Alberta RTA can not be waived or surrendered under the lease – if there is a conflict between the lease and the Act, the Act prevails.

THE PROPRIETARY STATUS OF LICENSES

- A license is a permission to do what would otherwise constitute a trespass – may be **expressly conferred** (ie. through a contract to enter a theater to see a show) or **implied** (such as when a shop is open for business to the public at large).
- Several forms of licenses:
    - **Bare license** – one not supported by a contract – fully revocable.
    - **Contractual license** – supported by a contract – revocable subject to the terms of the contract – for example, a ticket holder to a sporting event holds an irrevocable license for the duration of the game, so long as they comply with the terms of the agreement.
- An irrevocable license does not create an interest in land.
- However, in some cases a license may bind subsequent purchasers – may create an equitable interest in land (usually under estoppel or unjust enrichment).
    - For example, when the owner of land requests or allows another to spend money under an expectation, created by the owner of the land, that the other party will be able to remain there – court may respond by granting an irrevocable license (among other possible remedies).
    - *Stiles v. Tod Mountain Development Ltd*. – A purchased a lot in a proposed recreational subdivision from B Ltd. The company encouraged A to develop the property and eventually a cottage was built. B later sold the interest to C Ltd., which acknowledged the rights of A. However, the plan for the subdivision was repeatedly rejected by housing authorities. As a result, there was not distinguishable property for A to claim as his. Despite this, the courts found that A has a contractual license to enter the land before the subdivision approval is granted – arises out of proprietary estoppel due to the detrimental reliance undertaken by A.
- Also, a constructive trust may be imposed to protect a license over land that has been transferred to a third party – this remedy is appropriate where a party acquires title to a piece of land in question, knowing of a license, expressly taking title subject to it, and enjoying a benefit, such as a reduction in the price of land, as a consequence of agreeing that the license will continue.

BAILMENT

- A bailment is a temporary transfer of personalty under which the goods of a bailor are handed over to a bailee.
- In some ways resembles both a lease and a license.
- Law of bailment is also an amalgamation of property law, tort and contract – draws from all three areas but in the end is a unique area of law.

The Nature of a Bailment

- A bailment may be contractual or gratuitous.
  - o **Quasi bailment** – a finder may be deemed to be a "quasi-bailee" on the basis that the true owner would probably agree to the finder taking possession on his or her behalf.
  - o **Involuntary bailment** – when goods are imposed on a party who then assumes control.
  - o **Unconscious bailmen**t – where a person takes possession of goods under the mistaken impression that they belong to them.
- Generally – bailed goods must eventually be redelivered in their original or altered form.
  - o Exceptions – (a) where, for example, an item is sent for repair or to have a part replaced, (b) where the terms of the bailment indicate that the goods are to be delivered to a third party.
  - o A bailment exists where an item is left with a bailee for sale on consignment, to be returned only if it is not sold.
- Where goods are to be intermixed – may be characterized as either a bailment or as a sale / barter. This happens where a bailor hands over goods that are to be intermixed – he cannot realistically expect to get exactly the same goods back – only an equivalent amount.
- Bailments are either for a **fixed term** (such as a lease of machinery) or **at will** (such as a gratuitous loan).
  - o Fixed term (supported by consideration) – the bailor's right to possession is postponed until the term has ended, provided that the bailee has not committed a serious breach that would allow the bailor to retake possession.
  - o Bailment at will – bailor has a right to immediate possession and may demand the item back at any time.
- Characterization of a bailment (as either a bailment or a license) is important because a bailee has a higher duty of care over goods.

Parking lot example:

- Example of why it is important to properly classify a bailment.
- In determining the appropriate classification, courts have considered a number of factors, including whether there is a handing over of keys, whether there is a supervising attendant, the terms contained on the parking stubs, the degree of supervision over the vehicle, the nature of past dealings, the layout of the premises, the proximity of the owner to the vehicle.
- Central question – has there been a transfer of possession?

- Generally, where there is a bailment there will also be a constructive bailment over items that one would expect to be in the principal chattel (such as items normally found inside a car).
- Goods that are not normally expected to accompany a bailed chattel are not generally covered by the terms of the bailment unless the bailee has some notice of their presence.
- Are there any guidelines to determine what one would "normally expect" to find in a car?

Obligations of the Bailee

- A bailee has a higher standard of care for the items that a licensee.
- If a contract requires the chattels to be dealt with in a specified fashion, a deviation from that course gives rise to strict liability (for example, the wrongful delivery of the goods is normally treated as tortious conversion and liability will be imposed even if the mis-delivery was prompted by reasonable mistake.

- A contract of bailment may set out the general level of care required in the care and possession of the bailed items – unless this is done the law will imply levels of responsibility in accordance with the following principles of law:

- Duties of the bailee have evolved in 3 stages:
    - During the first stage, the bailee was strictly liable for just about any conduct that resulted in damage or loss.
    - Second, the implied obligations were defined by reference to calibrated levels of diligence. 3 levels of liability:
        - Bailments for the benefit of the bailor – the bailee assumes a low duty of care and is liable only for gross negligence.
        - Bailments for the sole benefit of the bailee – the bailee is liable for slight negligence and therefore owed a greater duty of diligence.
        - Bailments of mutual benefit – duty of ordinary diligence applies.
    - Third (**modern standard**) – based on modern negligence law – the level of care required of a bailee depends on the goods and, in some cases, on the particular (elevated) skill and knowledge of the bailee.
- Duties imposed on involuntary bailees are minimal – such bailees are treated in law as being good Samaritans (duties are that of a gratuitous bailee).
- A bailee may be held liable for acts of an employee committed in the course of employment by virtue of the principles of vicarious liability.

Onus of Proof in Bailment Claims

- Different from tort liability – here, a presumption of negligence can arise, which the bailee must then rebut in order to avoid liability.
- Presumption contains 3 components:
    - The triggering facts – facts that must be proven by the bailor
    - The short-cut to proof – the facts that are then presumed against the bailee.
    - The escape route – the matters that the bailee must prove in order to overcome the shift in onus – basically the defendant must disprove negligence – must show that the system in place for the care and safekeeping of the bailed goods was up to the standard required by bailment law.
- In order for this presumption to apply, the plaintiff (bailor) must prove that the acts complained of occurred during the course of the bailment (not before or after).

The Bailor's Duties

- Bailor assumes responsibility in relation to the state of a bailed chattel – obligations resemble contractual liability for a seller of goods.
- Bailor must protect against all defects that skill and care can discern and remedy.
- Gratuitous bailment – bailor may be held liable for failing to warn the borrower of known defects that might make the item unfit for its purpose – for example, where A stores B's goods as a favour to B, B must inform A of any defects in the chattel.

Avoiding Liability

- The terms of a bailment contract may alter the responsibilities and rights of each party. For example, liability may be limited through an exemption or exculpatory clause.
- Courts are often skeptical of such clauses.
- An exculpatory clause will only apply if it is accepted by the bailor – in written contracts this may be clear, but not every bailment is created by way of a contract.
    - Example – parking lot situation – signs are often posted – such as "not responsible for loss or damage". These warnings will not apply unless the bailor had either actual

or constructive notice of the clause at the time when the bailment was struck. Things like the location of the sign will play into this finding. Also, repeat customers are more likely to be fixed with notice.

- A bailee may be estopped from relying on the clause by conduct suggesting that it will not be enforced.
- *Contra proferentem* rule – a court may give a narrow reading to very wide or ambiguous exemption clause – for example, where damage occurs outside of the four corners of the bailment agreement, the court may hold that the exemption clause does not apply.
- It is possible to have an exemption that excludes a party from liability for breach of a fundamental term of the bailment contract – however courts will not readily construe an exculpatory clause to have such a sweeping effect. Also, it may be held to be unconscionable because it violated fundamental principles of contract law.

Assignment and Sub-bailment

- A bailee may sub-bail or assign, provided that the terms of the initial bailment expressly or impliedly permit this to be done. Even if not, an assignment or sub-bailment may be later ratified by the bailor.
- Law of sub-bailment has developed different from that of sub-leases.
- Cause of action in tort is available against third parties where permanent injury to the bailor's reversionary interest has been inflicted (including postponement of possession).
- A bailor has a direct right of action against a sub-bailee where:
    - The bailor has an immediate right to terminate the principle bailment, and
    - The sub-bailee accepts the goods knowing that the goods belong to someone else other than the sub-bailor.
        - This means that there is a right to sue even where there is no contractual relationship between the bailor and sub-bailee (no privity).
- See *Punch v. Savoy's Jewellers Ltd.* (case brief).

Bringing Suit

- A breach by a bailee may give the bailor a right to pursue remedies in tort, contract or "in bailment".
    - A bailee who appropriates goods may be liable for conversion.
    - A wrongful withholding may be actionable under detinue.
    - When a bailee acquires possession with the consent of the bailor, an overholding by the bailee is not actionable in tort per se – plaintiff (bailor) must prove the wrongfulness of the bailee's retention (usually by showing that a demand for return of the chattel was ignored or refused).
    - Bailor may use self-help (reception) but this is severely limited (can't use force, trespass).

CHAPTER 9: SHARED OWNERSHIP

CASES:

- …

Four types of shared ownership were recognized at common law:

(1) Joint tenancy
(2) Tenancy in common
(3) Tenancy by entireties
(4) Co-parcenary

- First two remain significant – second two are now functionally extinct in Canada.

Other kinds of shared entitlements:
- Matrimonial property law
- Shareholding in corporations
- Co-operative housing and condominium regulatory schemes

CONVENTIONAL FORMS OF CONCURRENT OWNERSHIP

Joint Tenancy and Tenancy in Common

- Main forms of co-ownership in Canadian law.
- Joint tenancy has a more elaborate set of rules than tenancy in common.
- Tenancy in common has <u>distinct shares</u> in the property – *don't have to be equal*.
- In a joint tenancy each tenant owns the whole (legal fiction) – all owners must have the right to possess the entirety at any time.
- Joint tenancy created by conveying land to you and someone else as joint tenants and not tenants in common.
- We will see that where a husband and wife purchase property together, there is not presumption of joint tenancy – presumption is of a tenancy in common.
- Blackstone – to create a joint tenancy 4 unities must exist. These reflect the need for virtually perfect equality between all joint tenants.
    1. **Unity of interest** – the holdings of each joint tenant must be equal in nature, extent and duration.
    2. **Unity of title** – interests must arise from the same act, instrument or document.
    3. **Unity of time** – interests must arise at the same time.
    4. **Unity of possession** – rights must relate to the same piece of property.

- Exceptions to the unity of time requirement – apply when the interests are created through a will or a deed to uses.
    - For example – "to A for life, remainder to the children of A as joint tenants"
        - Joint tenancy may be created for those children who vest, even if they do so at different times – that is, as each child is born.

- All unities *may* exist where there is a tenancy in common, but they *must* exist for joint tenancy – this is where court looks to intention – see below.
- <u>Right of survivorship</u> – most important characteristic of joint tenancy (in addition to unity). Aka *jus accrescendi* – once a joint tenant dies, his or her interest is extinguished, increasing the holdings of the survivors. The final survivor holds the entire interest.
- Joint tenancy is a good way of keeping property within a certain group – when a tenant dies, rights remain with the survivors instead of passing to the deceased's heirs – good tool for estate planning.
    - Survivorship comes into play before the will – property in question doesn't form part of the estate of the deceased – avoids administrative problems and probate.
    - May also provide insulation from creditors – a joint tenant's interest may be seized by creditors while he is alive, but once he dies there is no interest to seize.

Co-parcenary and Tenancy by Entireties

- These types of co-ownership are demonstrative of sexism in the common law.
- **Co-parcenary** – arose where property devolved on intestacy pursuant to the rules of primogeniture. In the absence of a male heir, land would pass to all the female children who would rand equally ac co-parceners. They were considered to be one heir, equal to the oldest male. Modern intestacy principles has rendered this type of ownership obsolete.

- **Tenancy by entireties** – arises upon a bare transfer of land to a husband and wife. Property could not bee alienated unless both spouses agreed. The husband was solely entitled to any income derived from the property. In some provinces this tenancy has been expressly abolished, in others it has been destroyed as a result of the abolition of the doctrine of marital unity.

METHODS OF CREATION

- Where the 4 unities are present, determining whether a tenancy in common or joint tenancy has been created rests on the intention of the grantor.
- If a document is silent on this point, a rule of construction is required.
  - Common law originally favoured joint tenancy – as a result a rule of construction emerged under which property conveyed "to A and B" created a joint tenancy.
  - Equity did not always agree. Equity presumes a tenancy in common
    (a) for partnership assets, (includes husband/wife)
    (b) in cases where money is advanced and secured under a mortgage,
    (c) when money to purchase property is provided in unequal share, and
    (d) where possession of a co-owned property is shared by individuals pursuing separate commercial enterprises.
- Today, courts still presume joint tenancy, however the slightest indication that the property was meant to be held in common could suffice to rebut this presumption.
  - Presumption may be negated by the following language (called words of severance):
    - "Equally among them"
    - "Equally"
    - "In equal moieties"
    - "Share and share alike"
    - "Respectively"
    - "Between"
    - "Amongst"
    - "to each"

- In Alberta, the *Law of Property Act* has established a presumption in favour of tenancy in common (reverse of the common law).

  s. 8 – When, by letters patent, notification, transfer, conveyance, assurance, will or other assignment, land or an interest is land is granted, transferred, conveyed, assigned or bequeathed to 2 or more persons, other than as executors or trustees, in fee simple or for any less estate, legal or equitable, those persons take as tenants in common and not as joint tenants unless an intention sufficiently appears on the fact of the letters patent, transfer or conveyance, will or other assurance that they should take as joint tenants.

- Common law remains applicable in the case of transfers to executors and trustees – presumption of a joint tenancy continues to apply.
- Generally, in a deed a first direction will generally be regarded as controlling (goes to the intention of the grantor). In a will, a last direction will generally be treated as controlling.
- *Law of Property Act* does not change the common law presumption toward *personal* property – common law presumption still applies to personalty.
- Creation of a joint tenancy now requires the 4 unities plus a sufficiently stated intention.
- Provided that unity of possession is present, a tenancy in common can be created in several ways:
  - **By express creation** – "to A and B as joint tenants and not tenants in common".
  - **Pursuant to a statutory presumption**

- **As a result of a failed attempt to create a joint tenancy** – ie. where the unities are not present.
- **By operation of law** (ie. on intestacy – where a person dies with no spouse but with multiple children – property will be held by children as tenants in common).
- **Through acts/words of severance** (to be discussed later) – words of severance are those that suggest that there are distinct shares – where these words exist there is a tenancy in common (despite what else the document says).

Equity

- It is possible for parties to hold legal title to a parcel of land in one form of co-ownership while holding another form in equity.
- A transfer "unto and to the use of A and B in trust for A and B" - makes both parties tenants in common in equity and joint tenants in law.
- Different titles can also be produced through the imposition of a resulting or constructive trust.
  - For example – A and B purchase property and title is placed in the name of A alone.
  - Absent a contrary intention, a resulting trust will be implied, giving both parties a share in the equitable interest equivalent to the ratio of their respective contribution (ie. 50/50).
  - A (the legal owner) is treated as holding legal title on trust for A and B, who hold the equitable title as tenants in common,.
- Further example: A and B are joint tenants in law and tenants in common in equity.,
  - If B dies, A assumes full legal title by survivorship.
  - B's equitable interest (held in common) passes to B's estate, leaving A to hold legal title as trustee for the beneficial owners (B's estate and A).

SEVERANCE OF JOINT TENANCIES (Conversion to Tenancy in Common)

- At common law, all you had to do was destroy one of the unities.

Williams v. Hensman – a joint tenancy can be severed (converted) in 3 ways:

(1) By one person acting on his or her own share (unilateral action – ie. conveyance).
  - Could not convey to yourself.
  - s. 65 *Land Titles Act* – have to satisfy this section before the registrar can register the transfer. "The registrar shall not register a transfer that has the effect of severing joint tenancy unless…"
    - (a) the transfer is executed by all the joint tenants.
    - (b) All the joint tenants, other than those executing the transfer, give their written consent to the transfer, or
    - (c) The registrar is provided with evidence satisfactory to the registrar that all joint tenants who have not executed the transfer or given their written consent to the transfer have by (i) personal service or (ii) substitutional (constructive) service pursuant to a court order, been given written notice of the intention to register the transfer.

(2) By mutual agreement

(3) By "any course of dealing sufficient to intimate that the intents of all were mutually treated as constituting a tenancy in common".

Severance through Unilateral Action

- Based on the idea that an act that destroys an essential unity must end the joint tenancy.
- Example: where A and B hold as joint tenants, and A conveys to C, the new co-ownership relationship between B and C must be a tenancy in common because the unities of title and time are now absent.

- Where A, B, and C hold as joint tenants, and C conveys to D, A and B continue as joint tenants, but D holds 1/3 interest as a solitary tenant in common – interests of A and B will still pass on survivorship, while D's share will pass to his heirs.
- Granting a life estate – partial alienation – should produce a severance because it leaves the grantor with only a reversion, thus destroying the unity of interest.
- A transfer of an equitable interest results in severance of the equitable title.
- An attempted severance by will fails.
- The granting of an easement or a rentcharge will not sever – does not destroy unity but merely encumbers a tenant's interest with some additional right.
- Whether or not the granting of a mortgage by one joint tenant will produce a severance depends on the applicable law of mortgages. What happens in Alberta?
- An assignment or sub-lease of a leasehold joint tenancy leads to severance of that interest.
- A clear unilateral statement is not enough to sever.

Severance by agreement or a course of dealing

- Severance under the last 2 rules only operates in equity.
- Best seen as equity stepping in to estop the parties, because of their conduct, from attempting to assert a right of survivorship.
- A sale or lease by all of the joint owners does not itself result in a severance – this arrangement is compatible with the continuation of joint ownership in relation to the proceeds of sale.
- 3rd method (course of dealing) – supports a finding of a severance when the dealings fall short of a firm or explicit agreement.
    - Failed negotiations over joint assets can lead to the finding that the owners regarded the joint tenancy as having been severed – usually comes up during negotiations for divorce.
    - *Agro Estate v. CIBC Trust Corp.* – 4 siblings held farm property as joint tenants. Following the death of 2 of them, the survivors began a business venture as partners. It was found that they held the land as tenants in common. Court applied the presumption that partners hold as tenants in common – but this usually applies from the outset and in this case there was no follow-up conveyance.

Severance by other means

- Methods of severance listed in *Williams v. Hensman* does not account for all recognized acts of severance.
- Severance will also occur on <u>bankruptcy</u>, by <u>judicial sale</u>, and probably by <u>seizing the property</u> via lawful execution procedures.
- The murder of one joint tenant by another produces a severance (in equity) <u>by operation of law</u> (based on the principle that a person should not benefit from an illegal act).
- *Law of Property Act* s. 19 – "If the interest in land that is the subject of an order (for partition and sale) is held in joint tenancy, the order on being granted severs the joint tenancy."

RESOLVING CONCURRENT OWNERSHIP DISPUTES

Termination

- Termination can occur through the release of one owner's interest to the other, or by a transfer by all of the co-owners to a 3rd party.
- A co-owner may also invoke the judicial power to order a physical division of the land (partition), or sale - common law provides no remedies of partition and sale to joint tenants or tenants in common.
- *Law of Property Act* – Part 3 – Partition and sale (s. 14 on).
- Judge will try to balance burdens and benefits associated with the land – so, if one tenant has not contributed fairly to certain expenses, the court can compensate the other tenant(s) here.

Financial Issues

- Disputes between co-owners over financial matters are common.
- In settling financial issues that arise on the termination of co-ownership, the court has the discretion to make all allowances that are just and fair under the circumstances.
- General common law rules governing this discretion have been codified in Alberta under the *Law of Property Act.*
  - s. 17 – The court must consider whether:
    - (a) A co-owner has excluded another co-owner from the land.
    - (b) An occupying co-owner was a tenant, bailiff or agent of another co-owner.
    - (c) A co-owner has received from 3rd parties more that a just share of the rents from the land or profits from the reasonable removal of its natural resources.
    - (d) A co-owner has committed waste by an unreasonable use of the land.
    - (e) A co-owner has made improvements or capital payments that have increased the realizable value of the land.
    - (f) A co-owner should be compensated for non-capital expenses in respect to land.
    - (g) An occupying co-owner claiming non-capital expenses in respect of land should be required to pay a fair occupation rent.

- This list is not exhaustive.
- Based on the idea that, all else being equal, each party is liable for capital expenditures (ie. repayment of the principle of the mortgage) and current expenses (ie. taxes, utilities, insurance) in accordance with his or her ownership share. Therefore, payment in full by one tenant will give rise to a claim for reimbursement.
- Joint tenants therefore share all revenues and expenses equally. Tenants in common share based on their relative shares of ownership.
- Look at *Statute of Anne* – a co-owner who appropriates more than his or her just share of any rents or profits issuing out of the land must account to the other(s) – the gist of this statute is now covered by 17(c) above – *Law of Property Act*.
- Ouster – when one party has barred the other from possession. A party may sue for ouster at any time.
- Repairs made to save the premises / salvage situations (ie. termite infestation etc.) – courts will allow for immediate compensation.
- <u>REVIEW THIS SECTION FROM ZIFF</u>

Occupation Rent

- 3 concepts / approaches:
  - (1) Fair market value approach – how to quantify occupation rent – how much would it cost to rent it out based on the market – established by evidence.
  - (2) Wholesale cost approach – cost of rent tends to be the same as the cost associated with the premises (for example, how much does it cost to keep and care for the property).
  - (3) Cost to claimant(s) approach – what does the person not occupying the premises have to pay to rent in the current market.

SHARED OWNERSHIP OF PERSONALTY

- Generally, the same rules apply to personalty as to realty (wit some big exceptions).
- Prerequisites for creating joint tenancies and tenancies in common are the same, but the rules of construction can differ.
  - For example, for chattels a <u>joint tenancy is presumed</u> unless overcome by the insertion of words of severance.

- No basis in law to sever (no unilateral action – no title to disrupt like there is with land) – but parties may agree to sever their interest. Or, if parties can't agree there are equitable means – declaration of trust, for example. Statutory provisions that relate to land do not apply to personalty.
- In most jurisdictions there is <u>no judicial power to order partition and sale</u> of personalty. However, there is authority to unilaterally appropriate property held in a common bulk of equal quality, provided that the share to be taken can be ascertained.
- One co-owner of chattels can not be held liable to the other for conversion unless there has been destruction of the goods or an equivalent act (such as excluding a co-owner from possession).
    - This means that a sale to a 3rd party is not normally actionable – all that a buyer acquires is the vendor's share (*nemo dat*).
    - Recommended that this be changed – but Canadian courts still follow this rule. Has been abolished by statute in England and rejected in New Zealand.
- *Cooper v. Cooper* – common problem.

Joint Bank Accounts

- In the case of joint bank accounts, several common issues arise, including:
    (a) Rights to the capital and interest.
    - Depends on who is the beneficial owner – when both parties contribute to a joint bank account it is presumed that the beneficial interest is do be shared.
    - Interest held by each person is a "fluctuating defeasible asset" – their respective rights are dependent on the balance in the bank account when it rises and falls over time.
    - When just one party makes deposits there may be either a resulting trust in favour of that person, or an advancement, giving each a share. The presumption of a resulting trust can be rebutted by showing that a gift was intended. Likewise, the presumption of a gift may also be rebutted by leading evidence to the contrary.
    - In Alberta, money held jointly is presumptively treated as being jointly owned in equity.
    - On opening an account, rights over deposited money are usually set out in an agreement with the bank (so that the bank can avoid liability). Both account holders are normally afforded separate and unrestricted access absent an agreement to the contrary.

    (b) Applicability of survivorship
    - A right of survivorship in joint bank accounts is a matter of construction.
    - Bank documents may contain instructions or clues as to what was intended, but these documents are not controlling.
    - Some case law suggests that the presumption is that bank accounts are held in common (*Frosch v. Dadd* – Ontario).

    (c) Right to property acquired by using money drawn from the account.
    - Determining ownership of property purchased with the money held in joint accounts can be problematic.
    - *Jones v. Maynard* – money from a joint account was used by a husband to purchase corporate shares. The court held that the shares were owned by both spouses even though purchased solely by the husband. Court refused to look at how money withdrawn in the past had been used in making its determination. Here the court held that the money was meant to be joint savings.
    - *Re: Bishop* – different result. Property bought with money from a joint account was held to belong to the spouse under whose name the money had been withdrawn. Here there were indications that separate purchases could be made by each spouse and there was no indication that the money was to be shared savings.

- *Rathwell v. Rathwell* (SCC 1978) – Court expressed difficulty in understanding the basis upon which it can be said that the joint owner who reaches the bank first can divert jointly owned funds to the purchase of investments upon which the other joint owner will have no claim".

CONCURRENT OWNERSHIP THROUGH MARITAL PROPERTY LAW

- Currently, rules of separate property continue to apply until some even denoting marriage breakdown (such as separation or divorce) occurs.
- Once the triggering event has occurred, parties may apply for a judicial division of property.
  - Generally, there is a presumption of equal sharing (but not a community property regime in which each is entitled to half). This presumption may be rebutted by showing that there has been an imprudent disposal of property or when there has been a sever dereliction of family duties. In such cases an unequal division may be ordered.
- *Matrimonial Property Act* –
  - The value of all property acquired during the marriage is subject to the norm of equal distribution on marriage breakdown.
  - The value of the property acquired before marriage is exempt. So is money acquired by inheritance or ad damages or insurance proceeds from injury to one spouse. However, any increase in the value of these items can be shared.
  - Assets will not be divided equally if it appears unjust to do so (determined based on 13 discretionary factors). However, courts don't like to deviate from equal division – diminishes the predictability of such proceedings.
  - s. 9(2) - Once entitlements are ascertained, courts may: (a) order a sale, (b) grant a declaration of title, (c) order a monetary payment.
- Parties are free at any time before or during the breakdown of the marriage to contract out of the rules governing division on breakdown.

THE NATURE OF CONDOMINIUMS AND CO-OPERATIVES

The Limits of the Common Law

- A condominium exists where 2 or more property owners band together under an arrangement in which there are individually owned units, couples with shared ownership of other lands, all of which is subject to a scheme of management.
- Condominiums are governed by statutory codes but condominium-like arrangements may be created through the use of the common law.
- Common law condominiums raise problems with:
  - Airspace rights – who actually owns what? In a high-rise, each owner has a property interest, but what is it exactly? What happens if the building is destroyed?
  - Creation of a satisfactory mesh of rights and obligations – what rights and obligations will be imposed on condominium owners? Who will ultimately be responsible for taxes? How will changes to the scheme be made? How will disputes be solved?

Styles of Condominium Regulation

- Legislation provides for the creation, registration, regulation and termination of condos.
- Condos become like mini-municipalities – can enact and enforce a type of local law, so long as the rules conform to the general law and the enabling condominium statute.
- **Alberta** – main documents are the by-laws and a condominium plan describing the property.
- *Condominium Act* – contains a set of standard by-laws including provisions concerning the duties of the owners, the creation of the corporation, the constitution of the board and the officers of the

corporation, meetings, notice and voting, general restriction on use of the property. These may be altered through the democratic process of the corporation.
- Participation in condominium projects involves a degree of surrender of proprietary independence – an owner has to obey the rules enacted through the internal decision-making process (for example, can't have pets).
- Right to alienate property can not be abridged.
- Otherwise, there are few restrictions on what can be in the by-laws.

Co-Operatives
- Like condos, designed to create a community comprised of shared amenities and individual entitlements.
- **Get a definition –**
- *Freeborn v. Goodman* –

OTHER VISIONS OF COMMUNAL PROPERTY

- Common law aboriginal title is regarded as communal.
- Other conceptions of shared ownership by aboriginal groups.
- Hutterite colonies.
- English customary rights.

CHAPTER 10: SERVITUDES OVER PROPERTY

- Servitude – term from Roman law to refer to rights of use over property that belong to another. Can be attached to, and pass with, a transfer of realty.

ELEMENTS OF AN EASEMENT

- Easements are considered to be corporeal hereditaments (in the same category as *profits a prendre* and a few other types of property holdings).
- Easements include things like: tenant's use of common hallways of an apartment bldg, pipeline right-of-way, right to walk or drive along a lane, to use a park as a garden, to stroll along a beach, to use a ditch for water run-off etc. etc.
- 4 doctrinal limits to the allowable form of an easement (at common law):
  (1) There must be a dominant tenement (which enjoys the benefit of the easement) and a servient tenement (which is burdened). Where there is no dominant tenement you have an *easement in gross* (generally not allowed, but there are statutory exceptions that we don't have to worry about for now).
  (2) The easement must accommodate the dominant land – some real benefit must accrue to the dominant tenement, making it a better and more convenient property.
    - This also means that there must be a reasonable proximity between the dominant and servient tracts – don't have to be contiguous – exactly how close is not clear – usually look at the type of right involved to make this determination.
  (3) The dominant and servient tenements cannot both be in the hands of the same person – can't have an easement over your own land (makes no sense because your actual ownership gives you greater rights anyways). However, an easement may be granted to a tenant over lands retained by a landlord. See *Wong* case.
    - **Exception** – *Land Titles Act* s. 68 – (1) an owner may grant to himself an easement or restrictive covenant for the benefit of the land that the owner owns and against land that the owner owns and the easement or restrictive covenant may be registered under this act. (2) When the dominant and servient tenements

are registered in the name of the same person, an easement under subsection (1) is not merged by reason of the common ownership.

(4) The easement must be capable of forming the subject-matter of a grant – need for a grant stems from the treatment of easements as incorporeal rights – can't transfer them by possession.
  - **This also includes several sub-requirements:**
    - There must be a capable grantor and grantee
    - Rights under an easement must not be too vague.
    - The easement cannot be a mere right of recreation without benefit or utility. However, Litman thinks this is crap – in most of the cases on point there was not dominant tenement.
    - Apart from fencing easements, the easement cannot require the servient owner to spend money.

(5) Also, to count as an easement the grant cannot confer a right to possession or control of the servient lands to an extent that is inconsistent with the possessory rights of the servient owner (for example, cannot grant exclusive or unrestricted use of a piece of land).

- **Positive easement** – permits the holder to engage in some activity on the servient tenement (ie. using a right-of-way).
- **Negative easement** – restrict activities on servient land (for example, a right to receive light into a window on the dominant land prohibits the servient owner from blocking that window). Not that a right to view can not be protected as a negative easement.
- New types of positive easements are more readily recognized than new kinds of negative ones – may be because negative easements are more likely to impede the productive use of a servient property.

INTERESTS ANALAGOUS TO EASEMENTS

- Several kinds of rights overlap with easements – for example leases, licenses, bailments.
- Negative easements are similar to restrictive covenants.
- A *profit a prendre* is similar to a positive easement – entitles the holder to enter onto the land of another to take some part of the produce (ie. timber, crops, turf, soil etc.). Title to objects under a *profit a prendre* is acquired through capture, not before.
- Public areas like airports, malls, public squares – kind of like easements of free speech.

CREATION AND TRANSFER OF EASEMENTS

Express Grant

- Easements may be acquired through an express grant made by the owner of the servient lands.
- When no words of limitation are recited, the duration of the easement is determined with regard to the surrounding circumstances – usually runs as long as the dominant interest subsists (ie. in fee simple, or for a term of years) – but can be created to last for a shorter period.
- Easement must comply with the formal requirements mandates for valid transfers of land.
- However, easements may be created by equity (for example, verbal agreements may be enforced where there is sufficient part performance) – Ziff talks about the principle in *Walsh v. Lonsdale* but doesn't provide a discussion of the case.

Implied Grant

- An easement may be implied as a necessary incident of a property transaction.

  - For example, an easement of necessity of access will arise in favour of land that is landlocked at the time of transfer (provided that there is some land retained by the grantor over which this access can be exercised).
  - Access based on necessity stems from the implied intention of the parties and is therefore not invoked by operation of law.
- **Intended easements** – type of implied grant – arise by implication to give effect to the common intention of the parties, having regard to the purposes for which the land has been granted. Similar to easements of necessity and often treated as being one and the same.
- *Wong v. Beaumont* – an intended easement for proper ventilation of a basement was found because without it the premises (which were rented to a restaurant) would not have complied with health standards – it would not have been possible for the tenant to use the property in the manner set out in the lease and agreed by both parties.
- Easements may be implied under the rule in *Wheeldon v. Burrows* – "quasi easements".
  - A owns both halves of a duplex and often walks across one half to get to the other – this is not an easement but may be considered a "quasi-easement" because should A sell half of the duplex it may ripen into an easement.
  - For this principle to apply, the quasi-easement must be in use at the date of transfer. Also, it must be reasonably necessary for the enjoyment of the property and/or be continuous and apparent.

Restrictive Covenants

- R.C. involves restricting the use that servient lands can be put to.
- Can take the form of restrictions on size, buildings, set-back requirements for building, kind of materials used, kind of vegetation you have… no end to kinds of restrictions that you may have.
- Restrictive covenants must relate to the land (basic requirement).
- Often used by private developers in community planning (similar to municipal zoning by-laws).
- Must have notice of a R.C. in order to be bound by it – registered in the Land Titles office against both the dominant and servient tenement.
- Must truly be restrictive and not a positive obligation.
- Complex area of law.
- Courts generally do not give effect to positive covenants (but can be created by contract).