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The Nature of Property

Introduction & The “Properties” of Property
C. B MacPherson, “The Meaning of Property”

- Property is a right and not a thing
  o It is an enforceable right
  o The role of the state is enforcing “private” rights

Private Property – Rights held by private individuals

State Property – Rights held by the organized state

Common Property –
  a) Open access – Rights held non-exclusively by the public at large
  b) Communal property – rights held by some sub-group or community

T.W. Merrill, “Property and the Right to Exclude”

Three Schools of Thought on Property

1) **Single Variable essentialism**: a single attribute (the right to exclude) is both a necessary and sufficient condition for the existence of a property right

2) **Multiple variable essentialism**: Multiple attributes or incidents are necessary to the concept of property (e.g. possession, use, disposition, etc.)

3) **Nominalism**: Property is a purely conventional “bundle of rights” with no essential attributes

Yanner v Eaton 1999, High Court of Australia

- Yanner was an aboriginal person that killed and hunted two juvenile crocodiles with a harpoon for private, non-commercial purposes
- Eaton charged Yanner for an apparent violation of the fauna act
- Yanner argues he killed the crocodiles under the Native Title Act, which provides protection for native rights based on the cultural significance of the practice and whether it was traditionally engaged in by the group
- Eaton argued that the right was extinguished because the only native title rights that survive are those that have not been extinguished by valid legislation
The argument is that the native title right is inconsistent with the fauna act, which puts all fauna as the property of the crown outside of hunting season.

- Under Australian law, where an inconsistent right has been granted, that explicitly extinguishes the Aboriginal right.
  - So, this would be an inconsistent right if the crown’s property right over fauna includes the right to exclude.
    - Yanner wins. "Property" in the relevant statute is used in limited sense that does not grant an exclusive interest.

**Harrison v Carswell 1974, SCC**

- *A shopping mall retains a discretionary right to exclude even in "quasi-public" areas to which it has invited the general public.*
- *Key Ideas: Property as a contested concept, the importance of stability of property rights, and updating the common law to accommodate change.*

**Facts**

- A woman was picketing in a labour dispute outside a shopping mall on the shopping mall’s sidewall. She was asked to leave, came back, and was charged with petty trespass.
- Trespass is both a tort and a common law offense, here we are talking about the common law offense.

**Travelling through the courts**

- Provincial court dismissed the charges
- A trial de novo in county court (heard new evidence and did not just review the provincial court’s decision) convicted Carswell
- The Manitoba court of appeal dropped the charges
- The SCC re-instated the conviction of the country court

**Majority Decision**

- By Justice Dickson
- Notes that the court had just dealt with a similar case, which they quickly dismissed with very short reasons (Peters v. R)
- Noted that the property owner has a right to exclude, but extends a revocable license. Ms. Carswell’s invitation to come onto the premises was revoked, and the mall owner exercise its right to exclude
- Argues institutional competence, that this is the kind of thing the legislatures should do, not the courts. Dixon says there have been statutory exemptions applying to picketers before. If there is something that should happen based on the value of picketing, the legislature can do that.
- Speaks about the importance of stability. One of the ways that stability in our society is achieved is through precedent. Property owners need to be able to have stability in order to weight their affairs.

Dissent

- By Laskin (Chief Justice)
- Says that yes, we have precedent, but that the court should innovate and weight the value of the mall owner’s rights with the value of the picketer’s activity
- Argues that the precedent was not far reaching.
- Says that they are not bound by precedent because while mall owners do have a right to exclude in every scenario, it can be a very limited right
  - Refers to shopping malls as a quasi-public space
  - Weighs interests
    - Interests of the picketer in expressing herself with whatever interest the mall owner might have in excluding her
    - Finds that the picketer’s interest in free expression prevails or at least shouldn’t be completely disregarded as the traditional right to exclude would interest
- After the fact, Manitoba amends its legislation to allow communicating in outdoor public spaces where the public is allowed.

The Case for Private Property & Novel Claims

- Happiness / Utility
  - Proponent: Jeremy Bentham
The greatest happiness for the greatest number (utilitarian)

- How property serves that value
  - Security of holdings encourages production of material wealth, which satisfies human needs and desires
  - Redistribution of wealth might seem to increase aggregate happiness/ utility but at the same time it would undermine security and blunt incentives to produce
    - Bentham makes the point that this might undermine production in the first place
  - Argues that secure property rights create an empirical distribution process. Sometimes this might not be true. Sometimes it might not be true that secure property rights are the only way or that those alone will secure property rights for the greatest number
  - Does not address the initial distribution of property
    - The justice of initial distributions of right in society, of property interests
    - The idea of social utility is nevertheless quite present in the jurisprudence

- Wealth / Efficiency
  - Fundamental values:
    - Efficiency in relation to subjective preferences; alternatively, wealth maximization.
      - Whatever it is that people want, we should be looking at ways to satisfy those wants in the most efficient way possible
  - How property serves that value
    - Exclusivity, universality, transferability (Posner)
    - By creating incentives to produce and to not overuse resources (tragedy of the commons)
    - Where property interests are transferable and well-defined, they can readily be sold to those who value them most, and can form the basis for credit markets
    - The most efficient use of resources might be when people get to keep their gains from their respective labour. If you plant crops, you get to keep them etc.
  - Problems
It is sometimes possible for groups to manage common pool resources in the absence of state coercion. If you have close knit groups of people that interact with each other on a regular basis, conventions can develop limiting the use of the resource.

- This problematizes the idea that the only solution is to assign public property interests

- Personal Development
  - Proponents: GWF Hegel, Margaret Radin
  - Fundamental values: Personal development
    - How property serves that value
      - Projecting one’s will onto physical objects is important for human individuality / self-expression (Hegel)
      - Some items of property can be constitutive of personal identity and worthy of special protection (Radin)
        - Think of things like items with particular sentimental value
          - The distinction between object and subject gets broken down because the object is actually part of who you are
  - Problems
    - One of the limits of this justification is that if you say that it is important to one’s development as an agent, then as Waldron argues, everybody needs to have it.
    - Not a comprehensive justification for property; only justifies a special kind of interest. Doesn’t justify the interest we have in commercial enterprises, etc.

- Virtue and Social Flourishing
  - Proponents: Aristotle, Eric Clays, Nestor Davidson
  - Fundamental values
    - Human and societal flourishing
  - How property serves those values
    - Property ownership promotes individual virtues: diligence, productivity, generosity, self-esteem, cooperation, political participation, etc.
    - Property ownership also promotes a flourishing society
    - Protects sphere of autonomy and possible disagreement with the virtues promoted by society – the virtues of liberty and pluralism

- Autonomy / Freedom
- Proponent: John Locke, Robert Nozick, Arthur Ripstein,
Fundamental values

- Individual liberty, freedom, and autonomy

How property serves those values:

- By creating a sphere of non-interference in relation to a person’s things (negative liberty)
- By enhancing the capacity of an individual to make important choices in relation to things (positive liberty)

Justice / Desert

- Proponents: Locke, Nozick
- Fundamental values
  - Justice, Desert (what parties deserve)
- How property serves those values
  - Individuals have a claim in objects that they have acquired through just rules of acquisition or transfer (Nozick)
  - In particular, individuals deserve to keep the product of their labour (Locke)
  - Mixing one’s labour with an unowned object is a way to justifiably acquire it in the state of nature; governments are bound to respect these entitlements (Locke)
  - Labour is good and virtuous so ought to be rewarded
  - Just need to leave enough for others
  - Locke says that when we move into organized societies with governments, you can no longer mix your labour with unowned goods. However, rights previously acquired by this method need to be respected
  - Locke says it is true that maybe some people don’t get property, but that is okay because there will be so many surplus goods that everyone will be okay
  - Nozick: Individuals have a claim to property that they have acquired through a just chain of events. If all of the events in the chain are just, then the property interest itself is seen to be just.
  - Valuable intuition: all things being equal, somebody that has laboured over property has some kind of claim over it. There is some kind of a priori right that you get in something by having done work in it

Problems

- If you pour a can of tomato juice into the ocean, do you automatically get a property right in the ocean?

Pluralist Approaches
Proponent: Hanoch Dagan

Some combination of the above arguments justifies our property system. It could be that certain values predominate in certain areas: e.g. property in a commercial context (individualism, economic efficiency), vs. property in a family context (community, interdependence, protecting reliance interests).

Different values that justify different elements of the property system.

C. Lewis, “The Right to Private Property in a New Political Dispensation in South Africa”

- The associated press was gathering news, which is an expensive activity. The wire service exists to allow the news to be pooled among different providers. The news gets transferred by a telegraph (at this time a new technology) and is susceptible to being copied by people not paying to receive information from the associated press.

- Why do we have Private Property?
  - First Occupancy: Whoever discovers and occupies it first
    - Flaws: Fails to account for transferability of acquisition through inheritance
  - Labour Theory: Everyone is entitled to the produce of her labour
    - Flaws: Most things are created with many people’s labour. Does not account for inheritance/transfer
  - Basis for Individual Freedom
    - (Rights, privacy, property = individual power): Private property creates opportunities for individuals to be free
    - Flaws: Fails to justify private property in resources required by the public
  - Utilitarian Theory: (amounts of land = happiness) – Happiness of society will be greater with private property (particularly means of production)
    - Flaws: Assumes human desires and interests, fails to consider problem of distribution, as long as majority is happy, minority is overlooked
  - Rights Based Approach: Private property promotes certain interests (rights) so it is important to uphold and enforce
    - Locke (Labour), Nozick – interests are special rights – based on individual work, relationships, etc.
    - Locke – Mixing of labour with material resources produced entitlements (rights to it)
Nozick – Theory of historical entitlements – rights to property are acquired over time through people, transactions, etc., justice is realized when property is distributed to those entitled to it

Hegel (personhood) – Interests are general – universal, basic human rights. Moral rights, property needed by everyone for development of freedom and personality
  * More of an argument for meeting peoples’ basic needs

- Waldron: Freedom and Liberty
  * Private property can provide absence of impediments to ones actions (negative freedom)
  * Private property promotes economic security and independence, autonomy, freedom from coercion
  * Promotes stability, discipline, responsibility in exercise of free will
  * Flaws: Could these objectives be met through collective / common property?
    - Homelessness
      * Since homeless individuals can only be in public spaces (because of the right to exclude that typically attaches to private property) then regulation that increasingly bans certain activities from occurring in public spaces increasingly curtails the freedom of homeless individuals

- Pluralist account—Munzer—property law is justified on a variety of bases, including utility and efficiency, justice and equality, labour and desert

**International News Service v Associated Press (1918) US Supreme Court**

A wire service has a time limited “quasi-property” interest in hot news that can ground a claim against other commercial parties who seek to copy the substance of their reports.

**Facts**

- The associated press was gathering news, which is an expensive activity. The wire service exists to allow the news to be pooled among different providers. The news gets transferred by a telegraph (at this time a new technology) and is susceptible to being copied by people not paying to receive information from the associated press.
- The reason why this news is susceptible to being copied is that it comes out first in New York on the East Coast, at which time the INS can quickly acquire the information and put it in their own newspapers to come out later in Western areas. In Western areas, the AP and INS could then release newspapers at the same time
The year is 1918 (WW1), so there is a strong interest in overseas news at this time. A copyright claim can’t succeed because that doctrine doesn’t apply here. It is mentioned in the reasoning, but copyright is laid out in statute where the underlying subject matter has to be something that has been created. In this case, the AP did not create the news, they are just sharing it.

- Additionally, the INS is not copying news stories verbatim and taking them in express form, they are just taking the substance of what has happened and sharing it in their own interest.
- This is why the issue exists about recognizing a novel copyright interest.

The AP is seeking an injunction form the INS, at least for a reasonable amount of time after news has been published.

- Essentially, there are two theories by which the AP could succeed:
  - There is some kind of property interest in the news they are putting out. The INS is also in the same business so within the context of the business model, the delivery of the news means that there is a property interest.
  - There is something inherently tricky here because the AP doesn’t want to claim that ordinary readers cannot pass in the news to friends, it wants a specific right given to those who distribute the news for profit (a right to exclude those people).
    - This is sometimes referred to as a quasi-property interest because it only applies to some people. It has not yet been recognized by the court at this time, but this is what the INS would like recognized.
  - Unfair competition – AP argues that trade secrets are being distributed here and it is not fair since the INS and AP are in direct competition.

**Majority Opinion**

- Justice Pitney holds the majority opinion:
  - The AP is successful. Justice Pitney holds that the AP does hold a quasi-property interest in the news because the two businesses are both competing in a commercial business and that to disallow this property interest would result in the whole trade of newspapers being profitless.
    - The idea is also present that if something is not done to prevent this sharing of information, no one would be willing to undertake the valuable
service of providing the news because there would be no incentive to do so

- Exchange value
  o What the associated press does is create the product of hot or fresh news, and that has an exchange value. There is something about creating something of value that ought to demand protection under the law.
    ▪ The underlying justifications of property is where past case law comes from
    ▪ We ought to protect interests to improve social welfare and protect the value that these interests bring to society

- The unfair competition claim also succeeds
  o The court relies on principles of equity and extends liability on the basis of unfair competitive practices
  o An injunction is granted for a reasonable time after publication of AP newspapers
    ▪ The injunction is only granted for a few hours because there is a balancing of interests taking place. This is a common them throughout intellectual property law, where when a copyright is granted or a patent is given for an invention, the rights that are given are time limited. The statute only grants a monopoly over the product of your creative labour for a limited amount of time. This is because they are balancing the rights of the public that relies on that source material with the rights of the creator
  o The court, in this case, is trying to do the same balancing of rights that legislators do
    ▪ This also goes to the definition of the right that the courts think should be protected. This is not an exclusive right to describe the news forever, but the value that the AP creates is linked to the freshness and the infrastructure that is created to get the news to individuals faster than it would have by word of mouth

Two Dissents

- By Holmes and Brandeis
  o Holmes
    ▪ Is referring to existing law and statute, saying that words cannot be property. He relies on past precedent. Holmes is famous for legal
positivism at a time when the natural law position was in vogue. He believed the role of judges was to say what the law was, and not what it ought to be.

- Makes it clear that in his opinion, property doesn’t come from labour or exchange value, it comes from the law. Property is a creature of the law and something that the institutions of the state say that they will protect.
- The fact that there is labour and that the information being shared is a valuable commodity is irrelevant for Holmes and does not justify finding a property interest when there is no such interest in existing law

  - Brandeis
    - There is a degree of circularity in saying that what the associated press has created is valuable – maybe it is only valuable if the law protects it
    - A failure of the dissent is that it is at last possible for judges to change the law in the copyright system and they have to look somewhere other than the statute book

Novel Claims and Restrictions on New Property Interests

**Victoria Park Racing and Recreation Grounds Ltd v Taylor**

_a racing track does not have a property interest in the “spectacle” it creates. The tort of nuisance does not protect against broadcasting the events from a platform on adjoining land._

**Facts of the Case**

- Victoria park racing and Recreation grounds ltd. Is the plaintiff, Taylor is the defendant.
- Victoria park racing and recreation grounds lt. owns a race horsing business. Angles owns a property nearby. He built a platform up on his property so that he can see very clearly what is going on in Victoria Park’s race track, including being able to read what appears on the notice boards. Angles uses the phone and calls a radio station and vividly describes what is going on in the races. The radio station (Commonwealth Broadcasting Corporation) is properly licensed. Victoria Park wants the broadcasting stopped because it stops people from going and paying for the races when they can just hear them over the radio. Evidence shows some people like hearing about the races more than they like seeing them, so wouldn’t go to see them anyways. Victoria Park says they are losing enough money for there to be a cause of action
- **Plaintiff’s Claims (Victoria Park)**
  o Taylor is interfering with their property right by broadcasting
    ▪ They are referring to a novel or quasi property right
    • They seek to have interest in the quasi property right, otherwise known as interest in the spectacle that the horse racing is creating.

- **Majority Decision**
  o Does not allow the appeal
    ▪ The majority says that there is no property right in a spectacle, and that the rights in question do not exist here and thus cannot have been violated.
    ▪ Looks at recognized property interests in land and notes that there is no property in a spectacle.
    ▪ Notes that at common law, owning land doesn’t give you the right to exclude others from seeing what happens on your land
      • You have the right to build a fence, but the defendant also has the right to build structures on their land
    ▪ Looks at recognized property interests in land and thus decides that there is nothing to be done here
    ▪ On the bottom of page 49, Latham argues that by the expenditure of money, the plaintiff has created a spectacle
      • Says that the vagueness of this proposition is apparent upon its face
      • Indicates that there is no authority in English (not American _ law
      • Chief Justice Latham is really focused on the physical acts that have taken place and not on the abstract idea of creating a profitable entity. Says that what you have is a property interest in land, and that has not been violated
    ▪ Also addresses these nuisance claims, and says that both parties can use the land how they want. He returns similar to the first opinion, that you have rights to do physical things with your land and not some abstract conception of profitable activity.
    ▪ Says that interfering with the profitable nature of an activity is not a nuisance
      • Reminds us that you could do other things that would interfere with the profitable nature of an activity, such as opening a
competing business next door, which would destroy the value that one’s neighbor has created.

- The question, according to Dixon, is what is physically going on.
  - Nuisance is traditionally smoke, smells, noise, or vibrations that are recognized to interfere with the property rights of the plaintiffs.
  - The underlying rights dictate the result, it doesn’t matter if it is profitable or not
  - Just because something is valuable does not mean that it automatically becomes a property right
    - Note that this is the path that has primarily been taken by Canadian courts
    - The US idea of quasi property was for the most part not recognized in Canada, and you see in the materials that there is a strong presumption against the recognition of novel property interests.
    - This does not mean that said recognition cannot happen
    - Many of our existing property interests are the product of the common law evolution, but the courts do not like making new property rights
      - Property rights to intangible things or concepts in Canada tend to be protected under statutory law. Copyright, etc. is all statute based
    - However, one should note that this case contains some of the reasons that you may want to make if you are arguing a similar case

- Dissent
  - Rich
    - Dissent on the grounds of Nuisance. Argues that nuisance is what appears to be an unreasonable interference with the use and enjoyment of land, and that is what has taken place here
    - If you extend nuisance liability to interference with property activities to say that unreasonable interference with your land is interfering with your profit, you redefine the interest of reasonable use and profit.
• This includes not interfering unreasonably with profitable activities
  ▪ The key to this reasoning is that it is not just a case of the defendant opening his eyes and describing what he sees. The defendant has gone to great lengths to undermine the activities of the plaintiff. Justice Rich says the tort of nuisance is broad enough to encompass these activities

MOORE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA (CAL SUP CT. 1990)

A patient does not have a property interest in blood and tissue removed from the body which would ground a claim in conversion for cell lines developed from the blood and tissue.

Facts of the Case

- John Moore is the patient in this case. He was diagnosed with Leukemia. His cells, both from his blood and spleen, were used to create the Mo cell line. He was not informed that this was happening. The doctors filed for a patent of the cell line.
- This is a case where the California Supreme court is deciding which claims can go ahead
- There are 3 main claims
  1) Informed Consent
  2) Breach of Fiduciary Duty
  3) Property
- We will speak first to the property claim
  o The primary idea here is that the materials from the plaintiff were used to create a cell line which can reproduce itself and is valuable for medical resources. The cells are perpetually reproducing, which is the source of their value. They produce bio materials that are potentially useful for research
  o Moore’s blood and spleen were the raw materials from which this cell line was developed
  o The physicians, as well as the University of California got a patent for the cell line
  o Patents are rights that are created under statute for a new device or invention. In the case of patents, individuals get a limited time right to an invention in exchange for making it public.
  o It is possible to patent certain biological materials when they are the product of invention
- He makes this claim on the basis of the tort of conversion
Conversion is a primary tort that protects property interests in personal property (anything other than land). It allows the plaintiff express rights from someone unlawfully taking possession of what they have property rights for.

The usual remedy for conversion is damages (you don't automatically have a presumptive right to get your things back).

The point for our purposes is that the tort is based on a property interest, either a possessory or an ownership interest in the thing in question.

In order for the claim to succeed, they need to establish property interest in tissues after they have come out of his body.

Essentially, the property has been misappropriated.

His property was misappropriated and therefore he ought to have an ownership in the property that his property was used to create.

The property was derived from raw biological material that came out of Moore's body.

The reading touched on the idea that the main obstacle to the conversion claim is the question of whether there is an underlying proprietary interest (If blood and spleen tissue remain property of Moore in a manner that is sufficient to ground the tort of conversion).

Majority (Panelli)

- Panelli confirms that the existing law wouldn't be sufficient to ground the claim in conversion.
- He notes that there is no case law applying the tort of conversion to human cells.
- In terms of statute law:
  - There is no statute saying that you have a right in your cells.
  - There is a public health statute that requires human cells to be destroyed, with exceptions made for research.
    - He holds this statute as inconsistent with an ongoing property interest.
- He makes the claim that what was actually patented is distinct from the materials that were removed from Moore.
- He claims that the cell line was a product of human invention, and that the raw line on which it was based is incidental in this cell.
- So there is no way to ground the action on existing law. He goes further than other judges who have rejected novel claims, because Holmes and others have just said they do not have the authority to recognize it.
This judge says that the California Supreme Court has the authority to create such liability but has chosen not to in this case.

This is because patents are created for invention. The cell line is something different from the underlying tissue. Even if you did have an interest, an interest alone is not enough.

There was some aspect of strict liability that was brought up as well. The majority was worried about causing a lot of problems for future researchers in a public interest way, where allowing that kind of conversion tort would put liability on any researcher that handles this. (Bottom of page 57)

Policy factors are also weighed against the novel interest

The patients rights to autonomous medical decision making is considered

Based on what was allegedly happening to him was not right

There is another policy factor that wasn't hindering socially useful factors like medical research. If you granted this you would possibly place medical researchers under uncertain liability (litigation lottery) and hinder research

Argues that with all of this accounted for, these claims are better left to the legislature

Relies on the fact that the court is allowing the claims based on informed consent and fiduciary duty to go ahead, and thus argues that it is not necessary to recognize conversion in order to serve the purpose of protecting the patients interest. Because of this, other factors like not hindering medical research should prevail. In this case

Dissent

Mosk J

Justice Mosk dissents, saying that the job of our court as the common law is to keep up with technology and objects of value

Argues that destroying resources is not inconsistent with property rights

Says that other sticks might still be in the bundle. You could still contract with other facilities to do research within your property rights.

This echoes the reasoning in Yanner v. Eaton, where taking certain rights away can still mean there is property rights, so long as property is a bundle of sticks and not consisting of something specific

He also addresses policy concerns.

He says it would be easy to create paperwork to show consent was granted, and that it would not be a litigation lottery

Says that even if there is a worry about consent, there are other rights granted
Notes that human dignity is part of our rights, and that part of human dignity is having rights over your own body.

- Relates a lack of human dignity to things like slavery and torture.
- He says that part of our package for respect of individual autonomy and self-ownership entails that we have robust rights to all the products of our body and human tissue.

Restrictions on Novel Property Interests

- There is a strong presumption against the judicial recognition of novel property interests, particularly novel interests in land (the numerus clausus” principle).
- In rem vs. In personam rights.
- Information costs imposed on third parties as one justification for restricting the creation of novel property interests (Merrill and Smith).

B Ziff, “The Irreversibility of Commodification”

- A limited view of the role of the judiciary vis-à-vis the legislature as another reason for courts not to recognize novel property interests (Ziff).

An Introduction to Law and Economics (Plenary Session)

Sturges v. Bridgeman

- There is a confectionary running a mortar that makes a great deal of noise.
  - Next door, there is a doctor who builds an examining room right next to where the mortar already was.
    - The doctor doesn’t like the vibrations of the Mortar.
- Coase said that the court here used very simplistic reasoning.
  - They should have considered efficiency and who uses the land most / best, or who the land is most valuable for.
    - Also who would have the highest cost of moving.
      - Transaction costs weigh into this as well.
Coase, “The Problem of Social Cost”

- Coase Theorem – The initial property allocation will not determine who will ultimately hold the property because users bargain (assuming no transaction costs) regardless of the legal rule applied. Any initial allocation of property will lead to efficient outcome of mutual benefit to the parties involved
  - Qualification: Must have zero transaction costs, and clearly assigned property rules. Initial entitlement will determine final distribution, not final allocation

T. W Merrill & H.E Smith “What Happened to Property in Law and Economics?”

Property in Perspective

Sources of Canadian Property Law: Aboriginal Legal Traditions

- We have a couple of excerpts dealing with traditional indigenous laws. These traditions were in place prior to the presence of European settlers. They are not merely of historical interest, they can form part of the modern day indigenous legal systems that operate within Canada and they can also influence the laws of Canada as a whole in a number of different ways
- We need to be clear about the difference between aboriginal and indigenous law
o Aboriginal law
  ▪ Laws of the Canadian state in relation to indigenous peoples
    • Includes common law doctrines like Aboriginal Rights, and Title, Treaty Rights, Constitutional doctrines under s. 35 of The Constitution Act 1982, and legislation (such as the Indian Act)

o Indigenous Law
  ▪ The law of particular indigenous groups
    • It includes indigenous legal traditions that can often be traced back to before contact with Europeans, but continue to evolve
      o It also includes formal laws, including legislation

Focus here is on Indigenous law
o Indigenous law is the law recognized and applied by a particular indigenous group
o It consists of both the traditional laws and customs of the group, as well as modern legislation and regulations adopted by the group
o The Indian Act regime displaced many of the traditional governance structures of indigenous peoples
  ▪ However, indigenous principles were maintained as part of the customary practices of indigenous groups
o There has been a renewed interest in Indigenous legal traditions in recent years as a basis for reconciliation that respects the traditional values of Indigenous groups
o These groups may wish to apply their own laws within traditional governance structures

Examples of Formal Indigenous laws today
o Band bylaws enacted under the Indian act
o Custom First Nations Band election codes
o Institutions and laws provided for self-government or land claims agreements
  ▪ An example is the Tillingit Peace Maker Court
o Land codes under the First Nations Land Management Act
o Other institutions and laws enacted under asserted first nations authority

Formal indigenous laws may rely on the cultural and legal traditions of the group in question
o This includes the inclusion and establishment of institutions of self-government, which may be preferred

Two ways that indigenous laws are part of the laws of Canada today
1) These groups may apply indigenous laws within their own communities
2) Indigenous legal traditions can be included as part of Aboriginal laws and as part of the law of the Canadian state in relation to aboriginal groups.
   ▪ The content of aboriginal law can be informed by Indigenous perspectives
   ▪ Aboriginal rights to hunt, fish, etc. can be established in part based on customs
   ▪ These are relevant to Canadian Law and doctrines such as aboriginal rights and title
   o One other reason to read and to think about these traditions is to sue them as a basis for comparison, which is what we will do today. We can use them to investigate different ways of thinking about property and compare and contrast that with the common law that we’ve seen so far. This is something to bear in mind throughout the term
   o When trying to understand a particular part of law, it can be helpful to have a comparison and alternative institutional laws to look at

J. BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW


- A case comment on First Nations law
- Pushing back against the idea that there is no such thing as indigenous law – European settlers came into indigenous communities and saw no courts, judges, and lawyers, and thus assumed there was no law
- Borrows is saying that of course these were organized communities and of course they had law, it was just in a distinct or different format
- How is the format different here? How does indigenous law differ from western legal systems?
  o There is the idea of interrelationships between humans in relation to the natural world
  o There is the idea of society as not being hierarchically organized
  o Law is shown as not being a distinct and separate form of normativity (like we see it). In these legal traditions we see that politics, religion, and law all intertwine
  o In these legal traditions, we see supernatural experiential encounters are the guiding force for how people make their decisions and carry them through
Law as a basis for guiding human contact is here sort of fused with other bases of normativity, such as spirituality. It is not completely distinct in the way that we have come to view law in the west.

In the western legal system, of course the common law has been influenced by religious heritage. However, we would not directly take religious texts and use them in deciding law.

**Facts of the Case**

- Nanabush violated a previous principle that talks about how the deer ran away because they were violating them by hunting.
- Nanabush, in behaving this way, tricked the deer, didn't leave tobacco, and failed to show respect for the deer. There is a backstory here.

- The people and the deer are not strangers here, there is a prior history and a prior arrangement, and there are things people are supposed to do in relation to the deer.

- Nanabush messes with these principles!

- Who punished Nanabush?
  
  - We are looking here at natural law, that which does not come from human decree.
  
  - It was nature that punished Nanabush and in part from nature that we get this lesson regarding how humans are supposed to interact.
  
  - Humans don't just decide that the law is however they want it to be, there is a higher law that they have to conform to.
  
  - This focuses on interrelationships, respect for the natural world in terms of deer.
  
  - A specific vision of property relies on this:
    
    ▪ Nanabush didn't have sole and despotic dominion over the deer after he killed at
    
    ▪ At common law, we talked about the rule of capture, that once you've captured a wild animal that there is no rule against you capturing, you are seen to have a property right against the animal that you have captured or killed. A fair degree of autonomy underlies this idea of property.
Here, because of this intermeshed relationship and the prior rules of conduct, etc., Nanabush's rights in relation to the deer are highly contentious. He can eat the deer, but only if he follows certain rules and shows the deer the adequate respect. It is a different kind of vision that is not so much related to autonomy in the thing.

In terms of justification, we might even see it as less oriented around human autonomy, freedoms, utility, and taking a separate view that nature is a separate entity with distinct interests.

The legal relevance of a story like this today lies in the fact that the underlying principles could be used to govern Nanishnabe practices.

The groups could include traditional norms into modern day self-government institutions.

They could also inform details of Aboriginal rights or title.

That said, these are living traditions that the group does not have to adhere to.

Not every aspect of Indigenous legal traditions is seen as relevant or worthy of preservation today, much like Common Law principles. Some are discarded or modified.

- For example, see a long discussion about Gitxsan property systems prior to contact and like many indigenous groups, the used slave holding. That wouldn't be an aspect of their legal traditions they would serve to preserve today.

Communities might also be concerned about other factors, so when you look through land adopted under the First Nations Land Management Act, some do seem to rely on traditional practices and institutions but some are instead highly reliant on economic development.

These groups aren't bound by their traditions, and there are other factors that they might value today.

These are living cultural and legal traditions.
Gitxsan Property Law

- It should be noted as background information that this was particularly interesting at the time of the Delgamukw case because it was brought by the Gitxsan in the names of chiefs of distant clans.
- The purpose of this reading is to give a sense of the traditional legal system which can inform the content of aboriginal title and other aspects of Aboriginal law, but can also serve as a basis for the comparison for the common law
- Let's ask a few basic questions
  - An early question we might ask about this is the nature of property in this group. It is sometimes erroneously claimed that Indigenous groups didn't have a conception of property rights and that rights were communally held by the group as a whole. This was obviously not true as the Gitxsan.
  - In the Gitxsan, there was the idea of life time rights as opposed to indefinite interests. We will see that when you have a fee simple interest in land at common law, it is not just an interest for your life time, it can't be passed down or transferred
  - In other systems, there was more of a focus on rights that are only good for ones life time.
  - So yes, there are clearly property rights, there was a complex land tenure system here
  - It is different for sure, but it is property of some kind
    - It was a land tenure system in which chiefs offered a significant role, akin to that of a trustee. Each clan assigns particular use rights to members and others in their territory
    - Really strict boundary delineation, serious consequences for lone clam members who come into the territory without permission.
    - An interesting question to ask next is how this was administered
      - Historically, was there a centralized Gitxsan state that enforced
the rules for particular clans, or was order enforced in some other way?

- It was not a centralized state like we would conceptualize in western society, but there was a series of steps and actions that had to take place in order for property to be maintained

- Order was maintained in a different way, there wasn't a central state with a monopoly on the use of force
  - Decentralized system
  - Order was maintained in the absence of a state. On pg. 94, towards the to starting on the second or first full paragraph, the author makes an interesting claim.

- From the iterative application of these laws, a complex legal order emerges, with a "deep and sustainable culture" that "stands in contrast to that of the dominant culture in Canada today"

- So the author claims that one can contrast the decentralized nature of the Gitxsan legal order with the centralized Canadian property system that exists today

- This is exaggerated to some extent. There is certainly something to it, it is a valid claim and is true to a great degree. To a large degree, the state recognizes and enforces property rights in our system and there is a sense of regulatory bodies that use complex rules. Another thing we have emphasized is that property rules are embedded going forward.
  - We have property-like interests,
Sources of Canadian Property Law: English Common Law

The Doctrine of Tenures

- The doctrine of tenures is an important idea that is formally still part of the land today. We will look at where the idea of tenures comes from and what it means in an etymological sense.
  - There is this idea of the tenant, which is different from a modern-day tenant in a lease, because it comes from the French word for holding
  - With this idea of holding, you get a hierarchical relationship in relation to the land with obligations in theory going both ways. If you hold the land of a particular Lord, you would owe that Lord certain obligations
    - Examples
      - Military service
        - This was big and the reading links this to the initial emergence of feudalism in Continental Europe, the idea being that in times of disorder parties would seek the protection of a powerful Lord. Part of this was contributing knights to part of the property that was held by the lord
      - Labor
  - It's important to point out that it was not always this simple. Over time, you had these nested relationships that got far more complicated (see page 97 for an example of this) and this shows the nested nature of property rights
    - You see that through this process of sub-infeudation, rather than substituting a particular party or simply transferring the land outright, you could grant an interest to someone below you in the hierarchy with obligations to you. This sort of thing would take place over time
This takes us to an interesting point about how feudalism developed in England. In England, unlike in continental Europe, there was only ever one person who was at the top of the hierarchy and who was premised to have granted all of the interests below him in the hierarchy of English feudalism.

- **The King**
  - There was a presumption that the King at one point owned all of the land in England. We see in the excerpt this description that land tenure was not always feudal in nature, and that it eventually developed when someone from Continental Europe came to England. The Norman Conquest in 1066 is an important turning point in land law. When William the Conqueror conquered England, he confiscated large tracts of land from landowners who hadn't been loyal to him and re-granted these to his own lords. It wasn't the case that all of the land in the country was confiscated. English lawyers adopted that as a fiction, saying that if an interest persisted after the conquest, it was because the land had been surrendered and then re-granted by the king.
  - The doctrine of tenures came to mean that all land in England was at some point granted by the kind and that the king was at the top of the hierarchy
  - The king benefited from certain kinds of tenure:
    - Military tenure
    - Escheat -- in the absence of heirs, the land interest would revert to the king.
    - Escheat is the only remnant of feudalism that remains today

- Another important point is that these nobles in the hierarchy did not just get what we would describe today as a property interest, they got other kinds of power that we would typically associate more with governments than with private land owners.
- This was most acute in the case of manorial interests outside of feudal hierarchy. The lord of the manor had significant power and discretion to grant subsidiary interests, which meant granting interests to peasants in the area to work the land, impose obligations on them including quite onerous obligations of labor. The freedom of tenants was constrained, but the Lord of the manor also had the power to establish a court to deal with disputes in his land, which is something that did not just apply to manorial interests. Even further up the hierarchy, feudal lords could establish court to
deal with land disputes over land where they were the Lord.

- We have the idea here of a fusion between property and sovereignty, and this idea is important to feudal land tenure. The nobles in the hierarchy didn’t just acquire property rights, they also acquired delegated sovereignty from the king that was an incident of land tenure
  - This included the power to govern those who lived within the bounds of their land, and occurred most acutely in the case of manorial interests, which were interests held by peasants under the lord of the manor.

- Feudalism does not persist to the present day. The excerpt you have addresses some of the key shifts away from feudalism towards our modern system of land tenure. One of the really key shifts comes from the statutes by Quia Emptores, pg. 104, second half, so what did this statute do and how did it alter land tenure in England?
  - We talked briefly about different ways in which land could be transferred in principle you could sub someone else for your place in the hierarchy
    - There was another way of transferring interests, which the statute prohibited.
      o Creating new interests below you
        - that’s how we ended up with the situation with seven different nobles each with their own obligations owed to them. Through subinfeudation, creating new obligations below you, that was prohibited by statute Quia Emptores

- There was still a nested relationship of nobles, but it was not allowed to get more complicated from then on.

- around the same time, there was a recognition that it was unclear beforehand whether substitution, required permission of the lord above you in the hierarchy and around this time it was clarified that permission for substitution wasn’t needed and substitution became the default mechanism of transferring land. Interests were presumed to be freely alienable.
  - This was meant to be the default means of land transfer rather than subinfeudation
  - This was accelerated by different statutes in subsequent centuries
  - even without any further intervention this could have tended to simplify things over time because of escheat
  - More and more, this got to a situation where parties owned land directly of the
king. Layers of feudal relationships no longer existed to the same extent. More likely to have one owner per parcel of land which we saw in McPherson tended to make land more marketable.

- With all of these obligations of land interests owed to feudal lords, the confusion of what you were getting was more uncertain, you had to do some investigation to figure out what you were allowed to do and what you owe in exchange for being in the hierarchy (information costs?)
- When you have more standardized interests, one owner per parcel of land, it becomes easier and easier for land to be bought and sold. This is part of the rise of capitalism, fuels the tendency to view land more as a commodity, making it easier to unlock the value in a parcel of land for the purpose of raising capital or to sell land to an investor that may have a more valuable use in the land
  - Went along with the simplification with hierarchical implications that existed in relation to a parcel of land

- With feudal duties diminished, it became easier for the king to rely on taxation as a basis for raising armies, as opposed to wanting people to provide work or knights
  - So, relationships of tenure came to be more and more simplified and indeed the financial elements of these relationships were overtime replaced by taxation. The incidents of tenure, or most incidents of tenure, were abolished in 1660 with one majorly important exception:
    - escheat remained an incident of tenure
      - those that died without heirs would have their land revert to the Lord of whom that person owned or held the land.
      - Because this was increasingly simplified to being the king, it simply came to mean that if you died without heirs, the land would revert to the sovereign

- The final nail in the coffin of feudalism didn’t come in England until law of property act 1922, where copyhold tenure which evolved out of manorial tenure was abolished. All property interests were held by the king and held in standardized forms, both forms that were dictated by hierarchical relationships
  - The final trend to be mentioned, the fusion of sovereignty in property (the idea of property holders as exercising delegated sovereign powers) is something that with moves away from feudalism was no longer present.
  - We draw a distinction now between property and sovereignty.
  - Monarchs came to rely more and more on taxation as opposed to feudal
obligation, and taxation required the permission of parliament

- Manorial courts were replaced by the king’s court
- no longer did you have local lords running own court according to their own system of law
- That is where common law comes from, the law applied in king’s court that was common to the entire kingdom, not local customary law applied by local lords in manorial court

\[\text{▪ So now we have the idea that the King and Parliament are the sole sources of sovereign authority and that sovereign authority wasn’t automatically delegated on the basis of landholding}
\]  
\[\text{▪ they would still delegate like local judges, but these weren’t parties that were instigating sovereign tenure on the basis of landholdings}
\]

- The last point is to address the modern legacy of feudalism in the common law of property
- the big one conceptually is the doctrine of tenure (title of section)
  \[\text{▪ we still maintain this formally, this idea that all land interests are formally held of the Queen.}
\]
  \[\text{▪ The greatest interest you can have in land in common law in Canada or England is the fee simple, we will go into this in great detail later,}
\]
  \[\text{▪ it is essentially the same thing as ownership}
\]
  \[\text{▪ It is a perpetual, exclusive, possessory interest in land}
\]
  \[\text{▪ in formal terms, if you hold a fee simple interest you hold land of the Queen, the crown had the underlying title, and all private interests in land are taken to be derived from grants form the Crown,}
\]
  \[\text{▪ This is true even in England where some land interests actually can be traced to before the Norman conquest}
\]
  \[\text{▪ This position gets complicated when we talk about Aboriginal title, an interest tracing back to before the crown asserted sovereignty. This title, as a matter of historical fact, could not be based on grants from the monarch.}
\]
  \[\text{▪ One of the unique aspects of Aboriginal title as compared with any other interest in land in Canada, which can be traced to either explicit or implicit grants from the sovereign}
\]

- In practical terms the main way that the doctrine of tenures is legally relevant today is escheat. Escheat is the idea where when a land owner dies without an heir, the land reverts to the Lord above you in the hierarchy of tenures. In Canada and England there
is only one such lord left, the queen. So more precisely in Alberta if you die without heirs, the land would revert to the queen in right of Alberta, which is effectively the provincial government,
- this is how it is formally conceptualized, that the land is held of the queen, that if there is a case where someone dies without heir it reverts up the hierarchy. Only one layer in the hierarchy now, the queen is at the top of it.

P. BUTT, LAND LAW

B, ZIFF “WARM RECEPTION IN A COLD CLIMATE: ENGLISH PROPERTY LAW AND THE SUPPRESSION OF THE CANADIAN LEGAL IDENTITY”
- English law was received in common law provinces in dates that are either set in legislation, or where a legislature was first established
  o Of course the idea of wholesale acceptance of English law ignores indigenous systems,
  o However, the reception of English law is the basis of much of our property law today.
- Exception to Reception:
  o Local conditions
    ▪ This exception based on applicability of which geographic features can be one element. The idea that some English laws could be held by courts to be inapplicable in a particular Canadian jurisdiction on the basis that they were not suited to local conditions. These conditions could be geographic, social, or economic in principle
    ▪ in theory this was a potentially broad exception, in practice it wasn’t
- English law was usually found to apply, but in some areas it would have no relevance
  o An example of this is English law in relation to copyhold tenure (land interest held under local lord) not relevant whether that applies in Canada because we never had manorial interests in Canada outside of Quebec. For landholding in early centuries of the colony of new France actually was feudal in nature and there was a transition away from feudalism in Quebec in ways that are somewhat analogous to move away from feudalism in Canada (England?)
    • In terms of common law, some would have no relevance but where it could apply it usually was found to apply
- Why do we think it was the case that Canadian courts tended to find English property law applicable to Canadian jurisdictions? A number of factors.
  o Admin cost, ease and convenience law so in the books you can simply pick up and apply, there are people in Canada, lawyers who are trained in effectively English law, what Canadian legal education was in the early days of Canadian common law jurisdictions you simply learned English law. Elites in these colonies are familiar with English law, why reinvent the wheel. Anything else/ they talked about specifics or lawyers that change was risky and that it was better to know the law that you have and potential problems than try to reinvent the law
  o This idea that there might be unintended consequences that existed if you changed the laws because of the fact that English laws were interconnected. Rules of property were linked to laws of contract, linked to laws of torts, changing one area might have ripple effects.
A belief in the English common law as repository of wisdom developed over centuries and that we shouldn’t mess with it.

Belief in English law among colonial elites, lawyer, and judges that it was fundamentally sound and that even if a particular rule didn’t seem like it ought to apply or we no longer understood the justification, we should apply them anyways. Conservative approach to reception.

Another point relates to legal certainty. This is the idea of upholding expectations. If you have the discretionary party on the part of judges to find English rules inapplicable, you might create uncertainty as to what particularly the nature of those interests was. This concern can be particularly acute in property interests where reliance can be placed in purchasing interests, etc.

The exception exists, you see some discussion of examples where laws were and were not found to apply, these mostly rely on knowledge you don’t have yet on understanding doctrinal details. One examples, or a few relate to the idea. Of future interests that won’t vest for a long period of time, there were complex rules in English law dealing with these, including a rule against perpetuities.

This rule was found to be received in Canada even though the justification didn’t exist to the same degree.

What English courts were concerned about with future interests, was the aspect of nobility trying to keep land in family. The rules existed because they wanted to put limits on family to keep land in the family.

Mostly found to be applicable in Canada even though we didn’t have feudal hierarchy.

English land law was received almost down the line with relatively few exceptions.

R. Chambers, An Introduction to Property Law in Australia
Property Creating Events

- The rights which people bear, whether in personam or in rem, derive from the following events: wrongs, consent, unjust enrichment, and others.
  - Most property rights are created by consent, such as a sale of goods, a bequest in a will, or a grant of a mortgage.
  - Property rights can also be created by wrongdoing. For example, an employer may have a property right to any bribes received by her or his employees.
- Here are property rights created by unjust enrichment, such as the right to recover land or goods transferred by mistake.
- Trust
  - Type of equity
  - Settler (convey property)
    - Trustee (who has the duty to hold the property for some other person, group or thing)
      - Beneficiaries (receivers)
        - Obligation of the trustee to hold it
          - purely the work of equity

- Where do aboriginal rights fit within this structure?
- Pre-existing aboriginal rights may survive, and can and are recognized by Canadian courts.
  - SCC describes these rights as sui generis - a thing of their own - These rights are so different that we can’t assume our rights apply against aboriginal claims

Property, Class, and Poverty

J. Waldron, “Homelessness and the Issue of Freedom”

- The only place these people are allowed to go is public property
- If we limit private property, we are saying they are not allowed go anywhere at all
- Everyone has to be somewhere, and the only way homeless people can exercise any kind of freedom or autonomy is to engage in these activities

R.C. Ellickson, “Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning”

- The idea that there are certain benefits we can only get in public spaces, and certain activities that would prevent the public from accessing these spaces
  - Comedy of the commons
    - Inverse of tragedy of the commons
- Tragedy of the commons happens when too many people are able to access a resource and there is over use
- The comedy of the commons was the opposite idea, the idea that certain types of goods or resources have their value increased with more people using it
  - These are types of resources that can be linked to social interaction
• Your benefit from a park bench or festival might be enhanced from the idea that there are more people using it, giving rise to social interaction
  • Certain types of interests in public spaces that are enhanced by inviting a broad swath of society in

VICTORIA (CITY) v ADAMS 2008

- Relates to the interests that homeless people may have in public property
- Homeless s people in a park building tents in violation of a municipal bylaw against that basis
- The city attempts to get an injunction / court order to have the structures removed
- The homeless people raise a defense that the bylaw is constitutionally invalid
  o Violation of section 7 of the charter
    ▪ People have the right to life, liberty, and security of person, and have the right not to be deprived thereof except in the principles of fundamental justice
- There are some facts that were accepted based on evidence that are necessary to make that claim
  o They are impaired in their ability to protect their right and security of person
  o There was evidence that erecting a tent was important to protecting health and safety when you’re sleeping outside.
    ▪ Insufficient shelter spaces, they don’t have any other options, they will be sleeping outside, nowhere else to go
    ▪ Because they don’t have other options, the bylaw is impairing their ability to protect their own life and
- Struck down under section 7 there is infringement of life liberty and security of the person that the bylaw creates, impairs people’s ability to protect their life liberty and security of person, not in the principles of fundamental justice
  ▪ Principles of fundamental justice are said to include the requirement that laws not be arbitrary (the effects of the law bear some connection with the purpose, and not overly broad in relation to their objective)
    • It was found to be arbitrary on the basis that the damage to the parks that the bylaw was meant to prevent, was not related to the prohibited conduct
    • Overly broad because there were less restrictive approaches that the court could have adopted (allowing structures to be taking
Law was not found to be saved by section 1 of the charter which allows for rights to be subject to reasonable limits. This isn’t case directly about property rights, what is it doing in a property case book?

- The governments hold the land in interests of the public, don’t necessarily own the land and cannot dispense with it the way that private property owners can
- Government decisions in relation to publicly owned property are restrained by instruments like the charter
- Just because a government decision is related to a government property interest doesn’t immunize them from review under the charter
- Because the charter applies only to governments what that means is that public entities in making decisions about property are much more constrained than a private party would be
- We won’t talk about what a private owner would do but it’s true that the mall owner in Harrison v. Carswell wouldn’t be subject to a charter claim if it sought to removed homeless people from sleeping

- An argument made by the city that what the homeless people were asking for in this case amounted to a property right, this is rejected on the grounds that the charter doesn’t protect property rights

- What they were asking for amounted to a property right, right to erect structure on private land
  - Why not property?
    - Not an exclusive interest (although not all property rights are exclusive)
  - In the end, what they end up being allowed to erect is temporary structures
  - What they are asking for is not a right in that park. Just asking for that bylaw to be struck down so in that nature it is not actually a property right
    - If the city of Victoria opens up a 1000 more spaces in homeless shelters, it’s not at all clear that the bylaw would be struck down
    - Homeless people would not be able to say, "we need to sleep here"
    - The right to erect the tent was based on the evidence that given
everything else that’s going on here, in this case their security of the person, their life and their liberty is affected by the rule but maybe if circumstances change that wouldn't be the case anymore

**Protections for Property**

**General Notes**

- We've talked now about a number of different types of protections for property interest, essentially about the government taking away a property interest

  o Different types that could exist

    ▪ **A complete ban on the government’s willingness to take property away**
    ▪ **Restrict purposes for which the government could take property away**
    ▪ **Fifth amendment to us constitution says that where the government takes property it has to be for a public purpose**

- Before you get to any statutes or constitutional provisions, it is important to have a sense of the Common Law backdrop

  o A starting point is that property, except in emergencies, cannot be taken except pursuant to a legislative authorization.

    ▪ In this sense, property isn't unique, but every exercise of government authority has to either be authorized by statute or derived by royal prerogative (executive authority that the crown holds inherently)

  o Usually, only the legislature has the power to take property, which can then be delegated to a branch of the executive, a municipality, an administrative agency, etc.

  o Royal prerogative has been recognized to have a very limited power to take property in the absence of legislation

    ▪ "taking property for the defense of the realm in emergencies"

      • Case law in this area is limited, but it tends to involve situations of
war, where the royal prerogative can grant a power to take property for a limited period of time.

- Common Law interpretative provision
  
  o Taking of property has to be derived from legislative authorization. The legislature will be presumed not to be allowed to take property without legislation.
  
  o In our constitutional structure, legislatures can enact statutory protections for property rights
  
  o There is case law that where property has been taken during war (in England during 1st and 2nd world wars and previously) compensation will be given

- There are two types of statutory provisions that can be enacted to protect property
  
  o Due process requirement
    
    ▪ Canadian bill of rights and Alberta bill of rights are examples of this.
    
    ▪ They provide that property is protected and that people should not be deprived of it except by due process of law
      
      • Authorson case is an interpretation of this. A clear blanket taking away of property didn't work, because due process is not the legislature
    
    o Statutory compensation Requirement
      
      ▪ Expropriation in Alberta and all other provinces provides that where an interest in land is taken by the government, compensation will be provided
      
      ▪ Alberta personal property bill extends this to tangible personal property

- There are also some constitutional protections,
  
  o Aboriginal title, Aboriginal treaty rights, title to or interest in reserve land under a treaty, are all property rights that receive express protection in the constitution
There are also a number of ways in which the constitution bears indirectly on property interests.

- **Division of powers**
  - Federal and provincial legislation has to be *intra veres* (within the provisions of the legislature)
    - Provincial legislation dealing in pith and substance with aboriginal reserve land would probably be *ultra veres*
  - The section 8 right not to be subject to unreasonable search and seizure limits the state's ability to go onto somebody's property and conduct a search
    - In the Adams case we discussed how life, liberty, and security can implicate or relate to property.

- **Equality and Discrimination Protections (s. 15 of the Charter)**
  - There are other Charter protections that bear on property indirectly (e.g. the Right to Freedom of Expression)
  - There is a general sense that all charter rights relate in some way to property rights. So, if the state was seizing a newspaper, which would infringe freedom of information, the charter could potentially provide some protection for property rights

### B. Ziff “Taking Liberties: Protections for Private Property in Canada”

**Constitutional Context**

- If you have a law that deals in pith and substance with the general law of property, you would guess it would fall under provincial jurisdiction (Section 92.13 covers property and civil rights in the provinces)
  - Just about any constitutional head of power could relate to property
- Certain provisions with the federal government have property implications
  - In regulating trade and commerce, that could have property implications
  - Enumerated powers that relate to intellectual property:
- Bankruptcy and insolvency -- a situation where a party is unable to pay its creditors, the distribution of the property that comes to creditors is governed primarily by federal
- Copyright – The copyright act is federal in nature (legislative authority)
- What sort of limits exist on the contents of government actions?
  - Restrictions set out in the constitution on what government can do in relation to property
    - No specific provision for property protection in the charter
    - On that list in most other rights documents, the right to private property, protections for private property, but that was left out
- There are constitutionally protected rights that have implications for private property
  - Right against unreasonable search and seizure by the state
    - Has implications for private property, primarily in the criminal law context
    - The purpose of section 8 relates to the protection of privacy, so not a general right against expropriation but does restrict government actions in relation to property
- Section 7 of the charter, the liberty interest – there could in principal have been broadly defined, although we don’t know the full extent, it might involve property interests
- Section 85 of the Constitution act 1982 – says existing aboriginal and treaty rights are recognized and affirmed
  - Largely property rights in terms of their content
    - Right to reserve land under a treaty, rights to land under aboriginal title, rights to hunt and fish under a treaty or on the basis of cultural significance
    - All understood to be property rights and unlike property rights generally speaking, they receive constitutional protection
    - Government interference has to meet justification test
      - However, an ordinary property interest doesn’t receive protection from state under the constitution
        - That said, that doesn’t mean there aren’t restrictions
- Constitutional Context
  - Charter is a rights instrument. Protects a number of important interests but explicitly leaves out a general protection for property rights – but that is only one kind of protection
Statutory Protections

Canadian Bill of Rights

- An ordinary federal statute
  ▪ If there is a subsequent act of parliament or government action that arbitrarily takes parliament way, the court would look at that and say that is a violation of the Bill of rights
- In theory, the Canadian bill of rights acts as an interpreter rule in relation to subsequent acts of parliament
  - Specific terms
    ▪ Section 2 does a lot of work “every law in Canada unless expressly declared by an act of parliament…” is bound by the bill of rights
      • An interpreter rule in relation to every other statute
      • In principal, if some other act of parliament were to deprive someone of these rights, a court could say we have the Canadian bill of rights and it says that other statutes shouldn’t be interpreted to infringe on the Canadian bill of rights
        ▪ What this means, however, is that if a subsequent act of parliament does say this operates not-withstanding the Canadian bill of rights or is crystal clear in what it is doing in infringing on rights in question, that can trump the bill of rights
          ▪ Unlike a constitutional protection that an ordinary statute can’t abrogate, this can be cast aside
- One weakness in the protection of rights set out
  - Federal legislation
    ▪ As an ordinary act of federal parliament, it cannot take precedence over provincial legislation in provincial areas of jurisdiction
    ▪ It is actually still enforced. The legislation is from 1960 but was never repealed. Relevance has been sharply diminished by the charter. Most rights set out by the bill of rights were subsequently set out in the charter. If you were to challenge gov. actions, you probably wouldn’t frame it under the bill of rights

Alberta Bill of Rights

- Very similar wording, analogue to the Canadian bill of rights
- Has been interpreted in a very similar way
Provincial Expropriation Act and Alberta Personal Property Bill of Rights

- What do these acts do?
  - They are ordinary acts of the provincial legislature, related to different types of property. You will have seen in the definition section that the Alberta personal property bill of rights is restricted to a personal kind of property. In light of the classification act, you can understand –

- What type of rights does it protect?
  - Tangible Personal Property. Crystal clear
  - Included that no interest in land can be interpreted
    - This definition makes it crystal clear that no interest in land, whether it would have historically been a real right or not, is not included
      - No incorporeal rights
    - The legislature wants to be crystal clear here about excluding everything other than personal property
  - Only tangible personal property that is capable of being physically touched, seen or moved. Only talking about physical goods here.

- What type of protection does it provide?
  - Section 2 is the meat of the act. Personal property is owned by a person other than the crown
    - Requirement for compensation. When this was enacted, the expropriation act was already in place. Every province and the federal government have expropriation acts that require that where the government takes title to land that a compensatory status should be protected
    - The Alberta personal property rights acts was established to extend that outside of land
    - Sets up a compensation process if the government is acquiring title to personal property. A long list of exceptions of acts that do not giver rise to this compensation
      - If one day the government wanted to take property or physical goods without compensation, it could pass an amendment adding an extra exception to section 3, unambiguously pass a statute, or repeal this statute
        - The statute requires clarification from the legislature and provides some clarity but doesn't stop a legislature that might be motivated to take property without compensation

- Expropriation act -- another piece of legislation for today
  - Deals with interests in land and essentially every province has one
    - Defined to mean the taking of land without the consent of the owner. Requirement for compensation when there is a taking. Unambiguous subsequent legislation targeting particular property wouldn't necessarily be bound. It's clear that when government does take property that a compensation process will apply.
• The context under which we will consider the broader protections of if this should exist and under what circumstances
• To a significant degree, these statutes replicate common law interpretation that already existed
  ▪ They already apply a fairly strong interpretative approach that says that legislation would be interpreted not to have the effect of taking property without compensation. If it was going to do that it had to state that intention clearly
  ▪ Expropriating authority applies to all public authorities under provincial jurisdiction, including public bodies like municipalities
  ▪ It's true that this legislation couldn't interfere with the legislature setting out clearly to take property without compensation, but all legislative bodies municipally are subject to provincial authority
• We've talked now about a number of different types of protections for property interest, essentially about the government taking a way a property interest
  o Different types that could exist
    ▪ A complete ban on the governments willingness to take property away
    ▪ Restrict purposes for which the government could take property away
    ▪ Fifth amendment to us constitution says that where the government takes property it has to be for a public purpose
  o Section 35 interpretation have been interpreted
    ▪ Restrict reasons for which property can be taken
  o Most common form of restriction of private property. What we are usually talking about with constitutional protection is a requirement that if the government takes property, it has to provide compensation
  o Expropriation act or personal bill of rights, requiring compensation if the government takes property
  o Address either directly or obliquely the question of why these protections exist
  o Why would we want to restrict the power of government to take private property without compensation
    • We can link some of these justifications back to the more general justifications for private property that we talked about earlier in the term and the point made just now was this idea of incentivizing investment in property.
      ▪ One of the utilitarian or economic justifications for private property was that it created incentives for productive use of property and that security of tenure with respect to property was important for creating these incentives
    ▪ One thing you could do would to be say okay you don't own your house anymore, we're going to expropriate and finish this freeway for the greater good.
      ▪ What's wrong with that?
        • It's unfair. It's for everyone's benefit, why should one person have to pay.
- Idea of fairness that where something is for the public benefit it shouldn't only be one party whose property ends up being in the way that has to pay for this
- Distributing the burden across all taxpayers instead of concentrating it on one homeowner.
- Is there a fairness counter argument to taking away property
  - One argument of holdouts is that if we didn't have an expropriation power and there is one house in the way, assuming that the public authority doesn't have the. Power to expropriate, a homeowner could hold out for ten times the value of the house, based on the discretion of whether or not to sell
  - Explains to some degree why expropriation power exists in the first place
  - Counter argument might be that it is mostly the rich who own property and they're the ones who should bear the burden of public projects
    - On its face it’s not a particularly strong argument, compensation would come from tax revenue
- The question of the role of wealthy property interests and the potential need to regulate in the public interest perhaps becomes even more acute when we start talking about regulatory takings where the government seeks to regulate in the private interest in a way that deprives an owner of the value of their property. A few arguments on the table in favour of compensation
  - Fairness. We would be providing disproportionate burdens to people whose property is protected for certain reasons
  - If you're less worried about having your property taken away, you are more likely to improve it
  - Any other arguments that could justify compensation / taking of property
- Thinking back today, general justifications for property. Forces governments to actively consider their actions before taking land/ What are the alternatives they could possibly have if forced to pay for something
  - The idea is that when you force governments to pay for the resources that they take away from members of the public or interests, you force the government to consider the full cost of a measure that it is contemplating. Imagine a situation say a construction of a freeway where you have a house in the way or may be houses on the way to make the cost greater. If the government had the power to take away property interests and bulldoze, it wouldn't pay the full cost of building the freeway
  - By forcing compensation you are forcing the government to consider as part of its bottom line, the cost that it imposing on private parties. If you want them to take advantage of all the government or costs,
Governments will make better decisions if you force them to confront full costs of projects they want to build and don't allow them to offload the cost on private property
- Under the pre-charter understanding, parliament is supreme and to this day parliament measures great discretion in taking or impairing private property interest
- Rights arguments you could make for wanting to have leverage for politically vulnerable communities that might be vulnerable for having property seized
  - Fiscal illusion argument -- forcing the government to pay the full cost of its measures
- Weaknesses in this argument, assumes that governments are motivated to minimize costs or maximize their balance sheets. It could be the case that unlike a private individual or private business, a politician might not naturally be motivated to minimize the cost to government in the same way and individual or business might be
- If the government has to
- Idea of risk, that government compensation provides a function similar to insurance. You can say that we are all under a risk that our property might come to be needed for a public purpose and in general risk is seen as a bad thing. A requirement that government compensate when it takes property asks as insurance for that risk. Potential drawback means that sure it's good to have that insurance, but most of the risks that people have aren't dealt with through government compensation/ typically we require owners to get insurance on the private ownership for their own property. We wouldn't require the government to provide compensation, we could just require homeowners to get insurance that includes the risk of appropriation
  - Be aware of the risk and insurance justification
- Linking back to some of the other justifications for private property in general
  - Make and argument that if you argue that people have natural rights, the government ought not be able to interfere
  - If you argue that people's personality is intertwined with certain objects, those might deserve special protection. All reasons you might want to have protections for private property against state interference. Of course, constitutional protections we've seen are more robust than constitutional protections. On the other hand, keep a free hand for governments to regulate in the private interest
  - Comes up much more acutely talking about regulatory takings, cases where the government regulates in such a way that deprives the owner of some or all of the value

Authorson v. Canada
- Fiduciary duties
  - The plaintiff represented a class of veterans that were similarly situated and deemed not competent to manage the benefits they were receiving, and they accumulated and the fed government was managing the funds on their behalf and was not accumulating any interest. The funds were being allowed to depreciate with inflation
Inconsistent with fiduciary duty
- However, there's a clear federal statute that indemnifies the federal government from any liability prior to the date in relation to the management of the fund, and so the only argument available in the face of the clear federal statute was based on the Canadian bill of rights. No charter provision that this could be construed to violate, no charter interest that protects property interest
  - Framed under the Canadian bill of rights
  - Interpret in light of that (was the argument)
- Section 1a provides people with the right not to be deprived thereof, except by due process of law
- The theory was that a provision of a statute that provided blanket indemnity would deprive the plaintiffs of their funds and assets without
- The Supreme Court interprets the due process protection narrowly to rely only under things made in particular law under particular acts
- So, if something said an adjudicator will decide whether you have a valid claim, you would have to provide access to adjudicators decision making
- The fairness or unfairness of parliament was unreviewable. The only process they can challenge is the process in passing the law that creates the blanket immunity
- The decision is to pass the law that says no claims whatsoever
- Not within the claims of
- Unreviewable -- Canadian bill of rights can't protect against unambiguous legislation
- The way the right is claimed is that it’s a right not to be deprived EXCEPT of due process
- The finding is that the act of legislating is unreviewable or it automatically constitutes due process when parliament or a legislature enacts. A law
- Can't be applied against the act of legislation
- Toothless in the face of unambiguous legislation

Canadian Charter of Rights and Freedoms, ss 7, 8, 15
- Section 7 of charter, the liberty interest there could in principal have been broadly defined, although we don't know the full extent might involve property interests
  - Section 35 of constitution act 1982 -- says existing aboriginal and treaty rights are recognized and affirmed
    - Largely property rights in terms of their content.
    - Rights to reserve land under a treaty, rights to land under aboriginal title, rights to hunt and fish under a treaty or on the basis of cultural significance
    - All understood to be property rights and unlike property rights generally speaking, they receive constitutional protection
Government interference has to meet justification test
• However, an ordinary property interest doesn't receive protection from the state under the constitution.
  • That said it doesn't mean that there aren't restrictions
- Charter as a rights instrument. Protects a number of important interests but explicitly leaves out a general protection for property rights but that is only one kind of protection

**Constitution Act, 1982 s. 35**
- If you have a law that deals in pith and substance with the general law of property, you would guess it is under provincial jurisdiction.
- Section 92.13 of the constitution delegates Property and Civil Rights in the provinces to the provincial legislature
- The majority of statutes we will deal with in this course are provincial statutes for exactly that reason
- Just about any constitutional head of power could relate to property
- Certain that the federal government deals with have property implications:
  • Trade and commerce
    ▪ In regulating trade and commerce, the federal parliament could have implications
    ▪ Enumerated powers that relate to intellectual property
    ▪ Section 91.22 patents an invention and discovery
    ▪ 91.23 copyright
    ▪ Bankruptcy and insolvency -- a situation where a party is unable to pay its creditors, the distribution of the property that comes to creditors is governed primarily by federal
    ▪ 91.24 Indians and lands reserved for Indians
      • This is of course quite important areas
- So that's just a general overview of what areas the federal and provincial legislatures can legislate in in relation to property
- Copyright -- the copyright act is federal in nature
  • That is legislative authority
- What sorts of limits exist on the contents of government actions
  • Restrictions set out in the constitution on what government can do in relation to property
  • No specific provision for property protection in the charter
    • On that list in most other rights documents is the right to private property, protections for private property, but that was left out
There are constitutionally protected rights that have implications for private property
  - Right against unreasonable search and seizure by the state
  - Has implications for private property, primarily in the criminal context
  - The purpose of section 8 relates to the protection of privacy, so not a general right against expropriation, but does restrict government actions in relation to property

**Expropriation Act, ss. 1 (g), 2(1), 3, 42(1)**

- Deals with interests in land and essentially every province has one
- Defined to mean the taking of land without the consent of the owner. Requirement for compensation when there is a taking. Unambiguous subsequent legislation targeting particular property wouldn't necessarily be bound. It's clear that when government does take property that a compensation process will apply.
- The context under which we will consider the broader protections of if this should exist and under what circumstances
- To a significant degree, these statutes replicate common law interpretation that already existed
- They already apply a fairly strong interpretative approach that says that legislation would be interpreted not to have the effect of taking property without compensation. If it was going to do that it had to state that intention clearly
- Expropriating authority applies to all public authorities under provincial jurisdiction, including public bodies like municipalities
- It's true that this legislation couldn't interfere with the legislature setting out clearly to take property without compensation, but all legislative bodies municipally are subject to provincial authority

**Canadian Bill of Rights**

- An ordinary federal statute
- In theory, the Canadian bill of rights acts as an interpreter rule in relation to subsequent acts of parliament
- Specific Terms
- Section 2 does a lot of the work. "every law in Canada unless expressly declared by an act of parliament..." is bound by the Bill of Rights
  - So it is an Interpretive rule in relation to any other statute
  - In principal if some other act of parliament were to deprive someone of these rights, a court could say we have the Canadian bill of rights and it says that other statutes shouldn't be interpreted to infringe the Canadian bill of rights
What that means, however, is that if a subsequent act of parliament does say this operates notwithstanding the Canadian bill of rights or is crystal clear in what it is doing in infringing rights in question, that can trump the bill of rights. Unlike a constitutional protection that an ordinary statute can't abrogate, this can be cast aside.

- One weakness in the protection of rights set out
- Federal legislation
- As an ordinary act of federal parliament, it cannot take precedence over provincial legislation in provincial areas of jurisdiction
- It is actually still enforced. The legislation is from 1960 but was never repealed. Relevance has been sharply diminished by charter. Most rights set out by bill of rights were subsequently set out in charter. If you were to challenge government actions you probably wouldn't frame it under bill of rights, you would frame it as being under more robust protections of the constitution act 1982 and that has actually been given far more robust interpretation
- There is in analogue to the Canadian bill of rights, the Alberta bill of rights. Very similar wording and has been interpreted in a very similar way.

**Alberta Bill of Rights**

**Alberta Personal Property Bill of Rights Act**

- What do these acts do?
  - They are ordinary acts of the provincial legislature, related to different types of property. You will have seen in the definition section that the Alberta personal property bill of rights is restricted to a personal kind of property. In light of the classification act, you can understand

- What type of rights does it protect?
  - Tangible Personal Property. Crystal clear
  - Included that no interest in land can be interpreted
    - This definition makes it crystal clear that no interest in land, whether it would have historically been a real right or not, is not included

- No incorporeal rights
  - The legislature wants to be crystal clear here about excluding everything other than personal property
  - Only tangible personal property that is capable of being physically touched, seen or moved. Only talking about physical goods here.
What type of protection does it provide?

- Section 2 is the meat of the act. Personal property is owned by a person other than the crown
- Requirement for compensation. When this was enacted, the expropriation act was already in place. Every province and the federal government have expropriation acts that require that where the government takes title to land that a compensatory status should be protected
- The Alberta personal property rights act was established to extend that outside of land

Sets up a compensation process if the government is acquiring title to personal property. A long list of exceptions of acts that do not give rise to this compensation

If one day the government wanted to take property or physical goods without compensation, it could pass an amendment adding an extra exception to section 3, unambiguously pass a statute, or repeal this statute

The statute requires clarification from the legislature and provides some clarity but doesn't stop a legislature that might be motivated to take property without compensation

**Constructive Takings**

- With a constructive taking, you do not necessarily have all of the indicia of a forced formal taking, but through the regulation there is some kind of substantial or complete obstruction of a property interest. Nevertheless, it can be found by a court to be a *de facto* interest of expropriation.
- Can be thought of as a constructive taking because it is a legal construction that applies the name of a taking to something that in formal terms is not a taking
- We have 2 US cases here that set the stage for constructive takings because the legal concept of regulatory or constructive taking really emerged in US case law first

**Pennsylvania Coal Co v Mahon**

- Involves a coal company that had reserved rights to mine and granted surface interests to buyers while reserving the subsurface interests. The deed specifically said that the company would be indemnified from any impact that its mining operations had on the surface.
- A statute emerged that prohibited mining that caused land on the surface to subside in areas of human habitation
- This all but nullified the coal company's right to mind the coal underneath the land. It would have to re-purchase the lots on the surface in order to exercise the right to mine
- The coal company challenges this under the 5th amendment of the constitution
- The question that emerged was whether the state was actually taking away the right to mine the coal.
- The state didn’t gain a right to mine the coal, or the title to the subsurface interests
- The issue here is whether 5th amendment protection extends to regulations that don’t actually take property but somehow deprive owners of the value of it. Here, the value of the right to mine has been completely taken away because mining is no longer economically feasible.
  - The answer is yes, that the 5th amendment does extend to cover this. If you take away enough value from a property interest, at a certain point this can amount to a taking just as much as if the government had formally taken away the right to the minerals (Wendell Holmes)
    - Some action of the government is not formally on its face a taking of property but is found by a court to effectively be the same thing
      - Underlying intuition is that governments should not be allowed to do indirectly what they can’t do directly. The government shouldn’t be able to achieve the same result without having to pay anything

**Lucas v South Carolina Coastal Council**

- The case involves a party that had purchased residential lots on the coast and, subsequent to that purchase, the local council prohibited development. They were residential lots and now the developer could not build anything on them. The question raised was if this was a 5th amendment taking that violated 5th amendment rights
- Scalia for the Majority:
  - **This is a constructive taking.** In this decision, Scalia noted that for most regulations, there is no bright line test to decide if it is a regulatory taking or not. There are factors that a court looks at, including the potential economic impact of the state action and the extent to which the state action interferes with investment backed expectation
  - Justice Scalia notes that aside from the balancing test you have two categories that are exempt from having to go into inquiry:
    1) Cases of permanent physical invasion
    2) Cases where a regulation denies all economically beneficial or productive uses of land.
      - In these cases, no balancing test is required and the government action is
assumed to be a legislative taking

- This case falls into the second category, the holding here is that these are residential lots and you are saying you can't build a house, that effectively denies the owner all economic and beneficial predictive interest in land. Renders the interest in land close to value-less and is found to constitute a constructive taking, giving rise to the duty to compensate on the part of government authorities.

- Exception worth noting where what the conduct the state prohibits would have been already prohibited under the state's law of property and nuisance, that doesn’t constitute taking.

- You have a situation where the background private law of the state is providing the constant baseline. If the owner wouldn’t have had the right at common law to do in the first place, legislation prohibiting that action won’t constitute a constrictive taking.

Manitoba Fisheries v. R (Sub case to Mariner Real Estate)

- SCC decision prior to Mariner real estate, it deals with federal legislation that created a crown monopoly for marketing fresh water fish in Manitoba
  - Crown legislation creates crown monopoly but there's already a company doing that, so the effect of the legislation is to put the company out of business
    - Takes away good will company might have built
    - But the legislation does not provide for compensation

- The court ends up holding that in the absence of a provision that explicitly rules out compensation, they will read it in or find it. The court did not have a to link this into the expropriation act, the court read it to mean that were there is a taking they would provide a right of compensation in the absence of statutory language expressly ruling it out
  - However, in Mariner Real Estate, Cromwell says he has no right to read in compensation unless it is statutorily provided for

Mariner Real Estate Ltd. V. Nova Scotia (AG) (1999) (CA)

- Legislation that applied to a beach front property held that no development was allowed.
  - A structure could not be built without the permission of the minister
    - Owners of the property applied for Ministerial permission, which was denied
• This was apparently on the basis of the finding that nothing should be built in the reason for environmental reasons. It was relatively clear that at no point in the foreseeable future was it going to be any different

- The owner had purchased the property to build a structure on it, so this was very significant. The owner argued that this amounted to a constructive taking, rendered the land close to valueless, and should give rise to compensation just as if the government had formally taken away the title to the land.

- **Majority Opinion** (Cromwell)

- Can a court order compensation for a constructive taking in the absence of some statute that requires it? Where does the court get this?

  o The expropriation Act

  o No right to be compensated for the taking of property in the absence of a provision that provides for it. There is a provision in the expropriation act. There is no way that this claim for compensation can succeed if it can't be fit into this provision somehow. That ends up really coloring the analysis for him because the question isn't a matter of pure common law, whether there is a common law right to compensation, the question is whether this fits into the legislative provisions that already exist providing for compensation. So his answer to the question of "can a court order compensation in the absence of a statutory authorization for compensation?" is no.

  ▪ Justice Cromwell uses the terms of the expropriation act that state that for expropriation to occur, the government must obtain an interest in the land. That does not happen with constructive takings.

  • Whatever is taken away has to amount to an interest in land. If the government does not gain an interest in land, and interest in the land cannot have been taken away.

- Does the owner of the beach front property still have an interest in land? If so, what does that entail?

  o Most of the formal incidents of ownership are still their (possession, exclusion, anything other than building a structure)
Conducts a formal enquiry, not an economic one. Value is irrelevant here

**Canadian Pacific Railway Co v. Vancouver (City)**

**Facts of the Case**

- CPR owns a corridor of land that was used for a railway, that railway has gone out of use. They want to sell it to the city, the city won’t buy it, but does pass a bylaw reserving the land for anything other than basically recreation and some transportation. CPR sues the city for a constructive taking, says that the city has now basically made this land available to people for biking, walking, etc., and essentially forced CPR to make a charitable donation to the city.

**Leading case on constructive takings in Canada**

  - Dramatically limits the ambit of constructive takings in Canada
  - The court appears to have been relatively strongly influenced by Justice Cromwell’s influence in Mariner real estate
    - The effect was to virtually get rid of Constructive takings in Canada

**Majority Opinion**

- CPR still had uses left to them.
- At least one branch of the test for constructive taking is that there has to be a removal of all reasonable uses of the property.
  - Echoes justice Cromwell saying that the question isn’t whether the value has been taken away, the question is whether all reasonable uses have been taken away
    - The court relies on the fact that if CPR wanted to start running trains again they could
- The second part of the test that the court establishes is that the city must get a benefit (acquisition of a beneficial interest). CPR makes an argument that the city is getting the benefit of a free transportation corridor
  - According to the courts, this does not satisfy the standard of acquisition of a beneficial interest
    - The city does not have traditional uses or rights. People that go onto this land are trespassers. As a functional matter, maybe there is a benefit that the city is acquiring, but it is not an actual right

**North American Free Trade Agreement**

- Excerpt from NAFTA Chapter 11
Seems like governments are held to a higher standard with respect to regulations that effect the property interests of international investors whose interests are protected. CH. 11 talks about government measures that are tantamount to expropriation. On page 170, similar protections against de facto expropriation are built into the agreement.

**- Subsection 2**

- NAFTA talks about measures that are tantamount to expropriation and it is definitely more rigorous than Canadian jurisprudence.
- Later, they expressly adopt US case law as part of the standard, which is much more welcoming of claims for de facto expropriation.
- Bottom line under Canada’s international agreement and there are quite a few of those, the property interests of foreign investors receive stronger protection than those of Canadians.

**B. Ziff, “’Taking’ Liberties: Protections for Private Property in Canada”**

**Metalclad Corp v United Mexican States**

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UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*
BOUNDARIES

Land: Airspace and Subsurface Rights

*Cujus est solum eius ad coelum et ad inferos*

- Literal meaning – Whoever owned the soil, owns up to the heavens and down the hell
- Functional – no one takes this maxim literally; general rules have been established such as that the surface owner holds entitlement to airspace a reasonable height above the ground

**Subsurface Rights**

**EDWARDS V SIMS**

**Facts:** Edwards develops the Great Onyx Caves as tourist attractions because the entrance is on his property. The Cave reached under Lee’s Land (1/3 of the cave), hundreds of feet beneath. Lee sues Edwards for trespass, and Sims presides over whether a survey of the land could be forced

**Issue:** How far below the surface does entitlement extend? Does equity court have the right to invade ownership of one individual (Edwards) to ascertain truth before it?

**Ratio:** Maxim applies to subsurface rights. Edward’s best use of land doesn’t matter private property allows for owners to be pointlessly selfish

**Reasons**
Maxim – certain limitations on rights to the enjoyment of possession

- Court found little reason to distinguish caves and mines, and since mine owners can be compelled by the court of equity to permit inspection, so too can the court force a survey of the cave if a bona fide claim is made

Dissent: Survey is wrong against Edwards and does not benefit Lee

- Edwards loses valuable rights and may have land destroyed by someone without an interest in the cave, since Edwards spent valuable resources making the cave into an attraction
- Maxim has never been true; should be that he who holds the surface where the entrance is entitled to everything that can be taken from earth and used for profit / happiness – not applicable here
- Mining is not like a cave; valuable aspect cannot be brought to surface, and has no value without Edwards’ investment; cave should belong to owner of the entrance, and should extend to all parts of the cave that was explored
- A guess that the cave extends under Lee’s land is not enough evidence to warrant potential destruction of Edwards’ interests?

- Excerpt from NAFTA Chapter 11
  - Seems like governments are held to a higher standard with respect to regulations that effect the property interests of international investors whose interests are protected. CH. 11 talks about government measures that are tantamount to expropriation. On page 170, similar protections against de facto expropriation are built in to the agreement

B. Ziff “THE GREATONYX CAVE CASES – A MICRO HISTORY”
PUBLIC LANDS ACT, s. 35
- All mines and minerals and the right to work them are, by implication and without the necessity for any express words of exception, excepted from every disposition and notification made under this act
  - Implies holding back of mines and minerals underneath someone’s land

LAW OF PROPERTY ACT, ss 7, 56, 57, 69

SS 7
- In a transfer by owner of land to another, all entitlements are transferred unless expressly reserved or exempted
  - Default rule is the transfer of all rights

ss 56
ss 57, 58
- States that even though a surface owner may not own mines and minerals, he is
deemed at all times to be the owner of, and entitled to: Sand, gravel, clay, and Mari
on the surface of the land and all of those substances as can be obtained by stripping off
overburden or excavation from the surface (or otherwise recovered by surface
operations)

Ss 69

MINES AND MINERALS ACT, ss 1, 10

Subsection 1
Subsection 10

- It is hereby declared that no grant from the Crown, whether relating to minerals in land or otherwise, has operated or will operate as a conveyance of gold and silver unless gold and silver are expressly named in the grant
  o Protects old exchange from commodity loss

Surface Rights Act, s 12

- Must be separate consideration of sum of money to protect farms so that they knew what they were giving up in order to gain right of entry of the surface
- Hypothetical examples
  1. What happens if the crown grants something in Fee simple to A with no mention of mineral rights?
    - Maxim would suggest that A gets minerals, but section 35 of the Public Lands Acts reads that all mines and minerals and the right to work them are excepted from every disposition and notification under this act
      - Reservation of property rights
  2. Crown grants something to A in fee simple including mines and minerals. What are mines and minerals?
    - Can’t we just look for the definition in Mines an Minerals Act s. 10? No gold and silver for A. In general, however, Act specifies “in this act, mines and minerals mean this...” not intended to answer general question, depends entirely on understanding at time of grant
      - You must know what parties meant by mines and minerals at the time for the grant

s12(2)

- Must be separate consideration of sum of money to protect farms so they know what they were giving up in order to gain right of entry on the surface

Airspace Rights

Didow v. Alberta Power Ltd.

Facts: AP Constructs power line along municipal road allowance which runs alongside farm of D. Cross arm conductors overhead hang onto D’s land by six feet. The pole is 50 feet high and has power lines that droop at 34 feet. D alleges it is trespass since they own all of the airspace up to the heavens
**Issue:** What is the extent of D’s rights to own what is above the surface of his land?

**Ratio:** Landowner is entitled to freedom from permanent structures which in any way impinge on the actual or potential use and enjoyment of his land.

**Reasons:** Authorities divided into two groups
  - Permanent and relatively low hanging structures were trespass
  - Transient structures were not trespass (aircraft)

**Held:** in All cases that involve airspace immediately adjacent to the surface of the land, trespass should be limited to a height at which it is contemplated the ownership might make actual use of land.

### Lateral Boundaries: Rights of Support & Land Bound by Land

**Blewman v Wilkinson**
- A New Zealand case, but it alludes to the law as it exists in Canada
  - You have a statement here of what the normal rules are
    - You have a scenario where lot A is owned by a spate party from lot B
      - The owner of lot B starts digging, creates a hole, and causes land to subside
  - The normal rule that would apply is that the right of support is what it sounds like/ The owner of lot A is entitled to lateral support for the land from neighbouring properties and where some action is taken by the neighboring property owners to remove the right of support, the owner of lot B is liable to the owner of lot A for the breach of the right of support
    - Strict liability standards are usually applied – There is no fault liability or element to the liability question, it is simply a matter of causation
  - This case is different
    - At the time the digging takes place, the land is all owned by the same entity
      - We won’t apply this strict liability standards, even if it is ultimately subdivided
    - Clearly, the court does not want a strict liability standard
- We won’t apply strict liability standards where at the time of the excavation it is all owned by one party
- The only justification you could have for having a different standard when it is all one lot, when you’re digging and it might affect someone’s land, it is right that you should be held accountable
**Policy Question**

- We don’t want strict liability to extend too far and deter developers from developing the sloping terrain of New Zealand
- Typically the cases where the land is all owned by one party at the outset

**Robertson v Wallace**

**Ratio:** You cannot have a conventional line become the boundary unless there is an ambiguity

**Erection occurs with gradual changes**

- Deals with a separate but related doctrine dealing with lateral boundaries and the conventional line doctrine
- A doctrine that is meant to govern or can govern where you have an ambiguity regarding the dividing lines between two properties and it essentially holds that if there is an ambiguity and dispute, and there is an agreement between the two owners as to where the property line should be, the boundary reflected in that agreement can be where the formal line is
  - This is so that if you want to transfer a sliver of land from party a to party b, you don’t have to follow the normal formalities that would accompany that process

**Facts**

- Here, you have a boundary that is supposed to run along the banks of the Highwood river, but the flow of the river changed overtime
  - One of the arguments the court has to deal with was that there had been an agreement that a particular fence would be the boundary, even though the fence wasn’t along the river line
    - The court has to determine whether on the facts of the case it had been established that there was an agreement that this would be the boundary
      - The onus to prove this is on the party that wants to say there was an agreement
        - There was no direct evidence to a point in time where an agreement happened, it was all kind of inferenced that over time they had treated it as a boundary so there must have been an agreement in the past
An agreement between two parties cannot be the boundary if it contradicts an unambiguous boundary that is a registered document:

- **Title registries**
  - Part of the reason they exist is to provide a public repository to find out who has what and where the boundary is
    - You can’t come to an agreement that contradicts what the registry says
- Why would the court have wanted to restrict the ability of neighbours to randomly change things?
  - If you have a verbal agreement between two parties and it contradicts something set out in a written document/ title registry, it partly defeats the purpose of having the property
    - Part of why we have that registry is that the delineation of property interests could be relevant to third parties:
      - Future purchasers
      - Adds information costs
        - That is why the court wanted to restrict the scope of the conventional line doctrine to cases where there is an ambiguity and whatever is being agreed upon doesn’t contradict a registered title instrument
        - Torin system – the government guarantees it is correct and acts as an insurer – goes to the question of the certainty of title documents and the interests of third parties
          - Main takeaway is that the interests of the third parties and others in certainty could be undermined if you have agreements that contradict unambiguous title documents

**Section 237(1) Property Act (pg 213)**

- Provision essentially holds that where a party makes improvements on a parcel of land under the mistaken belief that the land belongs to her, she can get a lien on the property for the amount by which the value was accrued

**Lateral Boundaries: Water**
R v. Nikal

- Even if the bed of the stream had gone with the adjacent land, the intention not to grant a fishery would have gone with the adjacent land

Public Lands Act, s.3

- How does section 3 alter the common law in Alberta in relation to bodies of water
  - Alberta legislation says for non-navigable waters we would have presumed that the title to these bodies of water would be allocated along with title to the adjacent land but this section of the public lands act is rebutting that presumption with respect to all permanent and naturally occurring bodies of water as well as all naturally occurring rivers, streams, water course, and lakes
  - Naturally occurring rivers, streams, watercourse and lakes don't need to be permanent
  - Intention may be to exempt artificial bodies of water. Things that might be dug to provide water for animals
  - Section 3(2) says this can be rebutted by clear language in the grant -- just a presumption
    - There is always a presumption that legislation is prospective and does not apply retroactively

Fixtures

- Important background information -- distinction between personal and real property
- When you buy a carpet, it is personal property
  - That can change when you affix it to land
- If something is a fixture of the land or the building or house, it is part of that real property interest
- Why does it matter?
  - In a will
    - The interest in real property being sold presumptively includes all fixtures
      - All the chattels that are considered to be affixed to property in a real sense
        - If something becomes labelled a fixture it becomes part of the real property interest
        - If you sell a house and don’t specify otherwise, presumptively the interest in the house comes along with all the doors in the house
          - Become fixtures, become part of the interest in land
        - Whether a chattel has become a fixture of land can be relevant to lenders, where they have a security interest in a chattel and another lender has a security interest in the real property (mortgage)

Security Interest
- A form of guarantee for a loan
  o Normally, a lender could sue a borrower for what they are owed
  o The problem lenders can face is that they may have lent money to someone who
    many not have enough assets to pay their debts – the debtor may have other
    debts, if there is not enough money to go around
  o One of the ways that lenders can mitigate the risk of something like this
    happening is to get the added protection of a security interest in a particular
    asset
    - A security interest is the right to take possession of the asset by default
      - It takes priority over unsecured creditors in respect to the asset
        o In the event the debtor doesn’t pay, the borrower can
          repossess the house and use the funds to satisfy the debt
        - Those funds will only become available to
          unsecured creditors in the event that anything is
          left over
  - Key piece of information here
    o It is a way for lenders to get added security by
      a) Having a particular asset that they know about that secures the debt
      b) Having priority over unsecured creditors with respect to the same
         debtor
  - Sets up a potential conflict between a lender with a security interest in a house and a
    lender with a security interest in real property
  - Historically, this has been governed by the common law rules related to fixtures – has
    the chattel in question become a legal fixture of the property interest in question?
  - These are the types of scenarios in which it can matter if something is a fixture or not
  - This is the mode of analysis courts use to determine if something is a fixture or not

**La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.**
- Question of priority – who will get paid first out of the value of the carpeting?
  o The mortgagee is the bank, whose loan is secured by a mortgage
  o The carpet vendor who had an interest in the carpeting when it went out the
    door as chattel
- The question of which lender takes priority will be determined as to whether or not the
  carpet becomes a fixture

What is the degree of annexation, and to what degree is the carpet physically incorporated?
The first question is whether the carpet is affixed, even slightly – has it been physically affixed other than by its own weight?

- If it is affixed my a means other than its own weight, it is prima facie a fixture
- If not, it is prima facie not a fixture
  - “Even slightly” is the language that is used in the test

The degree of annexation is the extent to which, in physical terms, the chattel has been incorporated into the land

- In something that is physical affixed to the land or the house that is on the land, it is prima facie a structure – you can still rebut this as a result of the degree and object of the annexation
- The nails that are holding boards together started as chattels, but they have pretty clearly become fixtures
- Is it affixed to such a degree that you would have to do physical damage to the house to get them out?
- In this case, we have a degree of physical connection that is described by the trial judge as slight
  - A slight physical annexation still raises the presumption that it is a fixture – you still have to ask about the degree of annexation, and the object of the annexation

The Object of Annexation is why the chattel was connected to the land

- When you ask about the object, is it the private intention of the person that put it there, or is it something else?
  - It is meant to be an objective test – assessing this objectively, is the object of this annexation to enhance the value of the real property or the chattel?
    - Kind of a legal fiction
    - You are creating a hypothetical third party and asking that third party what it looks like is going on here

It is not just the interests of the person that installs the carpet that can be affected, or the person that he happens to contact with

- This can affect the interests of third parties who rely on their impressions of the property
- If the bank were to issue a mortgage on the land in question, it would assume certain things were fixtures and certain things were not
  - Someone who purchases land would make that assumption as well, unless there is some agreement to the contrary
- **Information Costs**
  - Private intentions aren’t part of what is being advertised to the world as the state of the property
    - Talking about what it looks like to a reasonable third-party observer
      - Whether the chattel was affixed primarily to enhance the value of the land
  - The main thrust of the court’s thinking is that this wouldn’t work as a hotel if you just had the exposed flooring without any covering (wholly unsuitable)
    - The reason the carpeting is here is because it is necessary for the purpose of the building
    - It is slightly affixed, so it is possible that the prima facie assumption could be rebutted
      - It was relatively easy to take the carpet out
- **A different set of rules apply to Tenant’s Fixtures**
  - Fixtures installed by a tenant under a lease agreement
    - A lease agreement is a time-limited right to exclusive possession
      - You have a time limited right to exclusive possession under a lease and a recognition with different things that are installed by the tenant
        - The tenant can have a right to remove things that they install when they leave
        - Right to remove the fixture only applies to fixtures that have been added by the tenant
          - Fixtures for carrying on a trade
            - Pizza oven?
            - At the end of the lease, the tenant could remove the pizza oven – something that was added
          - Ornamental nature or domestic convenience
          - This has been interpreted broadly by the courts
            - A dishwasher might fall under this
            - These are all essentially just presumptions, so you can specify to the contrary in the lease agreement
  - A general tendency in the law is that the law tends to be quite deferential to contractual autonomy when it is only the contracting party’s interest at stake
You get more restrictions when it starts affecting the interests of third parties

The idea of a presumptive right to remove tenant fixtures between a landlord and a tenant

- What distinguishes leases is that they are not perpetual interests — they are by a general rule time limited in some sense
  - You would dis-incentivize tenants from doing useful things if they couldn’t keep their fixtures
  - It gets to the nature and type of interest we are talking about
    - It is time limited, and you want to avoid this problem where people might not want to make useful improvements because they would not want to give them up

Diamond Neon (Manufacturing) Ltd. v. Toronto – Dominion Realty Co.

- This is a case about the limits to contractual autonomy
  - The limits on a party’s ability to determine if something is a fixture or not
    - Two parties can agree among themselves what will be included in a real estate transaction – hot tub might be included, fire place might be excluded, whatever
      - It is only two parties interest at stake, so a landlord and tenant can come to any agreement they want
        - The law gives a presumptive deference to these agreements
  - But what about third parties?
    - Potential lenders that might lend on the presumption that something is a fixture, purchasers might buy on the assumption that something is a fixture
      - In these cases, contractual autonomy is limited

Facts

- In this case, there was a metal pole in a block of concrete with a sign on it
- Diamond Neon had a contract with a tenant
  - In the contract, diamond neon says that this is our sign, and remains our sign, and has not become a fixture
    - TD realty ended up owning the land and the sign that was on it
- TD realty was not a party to the contract where they had specified that the sign remained the property of Diamond Neon
- TD realty goes ahead and sells the sign that remains the property of Diamond Neon
- Diamond Neon sues TD for the tort of conversion (interference with possessory interest of the plaintiff)

Analysis

- The contract said that the sign was not a fixture – does that determine the outcome?
  - TD had no notice of this contract or arrangement. Presumptively, it thinks that it is purchasing land with all the fixtures, and the sign from the perspective of the objective observer was a fixture
    - Third Party Information Cost Problem
      - You get an indication that if TD realty had had notice at the time of the purchase that the sign was not a fixture, things might have been different
      - The onus was not on TD realty to invest resources in finding out what is and isn’t a fixture
      - Notice had to be provided in a more obvious way

- There are two ways in which notice can be given:
  1) Physical state of the property
    - This sends information to the objective observer
    - Absent notice to the contrary, a lender can assume that the real property interest includes fixtures – the physical state of the property contains information
  2) Property Registries
    - There are property registries where interest in property can be registered.

- This leads into an excerpt from Personal Property Security Act (this one is from Ontario), but Alberta legislation tends to be quite similar
- The Common Law has been changed by legislation – it has been seen to be unfair by parties like the carpet vendor – the rules no presumptively say that if you have a security interest in chattel before it becomes a fixture, that interest takes priority
  - But for future purchasers or subsequent lending, the legislation protects their information based on the security interest of the purchaser and what is in the register
    - So register your security interest if you want it protected
    - This goes to the issue of notice
• If you are in a bank and you want to grant a loan secured by a mortgage, the bank ought to be able to rely on information that it can garner from the physical state of the property and the title registry

**Law of Property Act, s. 69**

**The Transformation of Chattel Ownership**

- Now we are no longer talking about chattel. We are talking about real property, how it can be mixed and transformed
  - Like fixtures in the sense that the courts have adopted very malleable tests and approaches to enable their ability to do justice in a wide range of cases with different factors

**Glencore International A.G. v. Metro Trading International Inc.**

**McKeown v. Cavalier Yachts Pty Ltd**

- Facts
  - 3 key parties and two companies
    - Trade in yacht
      - Sale between Cavalier and Spartech
  - Cavalier essentially sells its assets to a separate company, Spartech.
  - Spartech is under the mistaken assumption that the hull in question is part of the assets it has acquired and that the hull belongs to it so it starts making a yacht
    - Spartech puts in substantial work to turn the Hull into a yacht
      - The work that Spartech does is not just made up of the value of the physical items that are attached to the Hull, but also the labour that is put in by Spartech
        - There is accession here, but also transformation
  - McKeown wants to get the yacht at the end of the proceedings
    - He paid for the yacht and paid the amount that he thought he was supposed to pay
      - It seems like the claim could either be specific restitution on the basis of unjust enrichment (the yacht ought to be his or be turned over to him
• Or it could be classified as an action in Detinue to get a proprietary remedy on the basis that McKeown’s possessory interest has wrongfully been interfered with
  - Question is whether the yacht is really his (McKeown’s)
    o McKeown has to establish that what has been made in the end out of his hull ought to belong to him
      ▪ This is a case of accession. The court says it would not make any sense to take the boat apart, remove the hull belonging to McKeown and remove new attachments, because that would be destroying the item
    • You now have a single piece of property to which title must be assigned
      o When you talk about cases of accession, the problem doesn’t really arise if you can still regard the items as separate items of property
        ▪ The issue of title to goods only really comes up if the goods have been fused together
        ▪ The other way of thinking about this is to say that the secondary chattel is attached to the principle chattel
          • The hull was apparently only worth $1700m whereas the work and the goods that Spartech put on it were worth $24000
          • McKeown is arguing that the extra items acceded to the hull to which he had title
          • Spartech is arguing that McKeown’s hull acceded to all these other things that Spartech has title to
            o And thus the principle chattel is all the additional things that have gone onto the hull

**Holding**

- The court here emphasizes the gradual nature of the accessions
  o Every time you put one thing on, that item was always secondary chattel, and it just makes the principle chattel bigger – at each stage the principle chattel belonged to McKeown
- Question about discerning the principle from secondary chattel
  - Maybe less satisfying than an application in the test relating to fixtures
  - Not just a physical question about what was the principle chattel, but a question about what was the principle chattel in each phase
- The court also talks about Spartech’s conduct
  - Spartech wants to be an innocent bystander that didn’t do anything wrong but is now suffering due to a defect in title that it did not know anything about
    - The court said that Spartech really ought to have known that this hull did not belong to them
    - This is based on documents they had access to would have indicated that the document belonged to McKeown and also the existence of an employee that would have known who the hull belonged to
    - The court points to the conduct of Spartech as being not entirely innocent
      - We do get the sense that if Spartech was entirely innocent, the case may have been decided differently
        - The finding is that the plaintiff retains a property interest in the finished yacht, entitling him to have an order from the court to have it turned over
        - Spartech did all of the work, but doesn’t get anything
- Spartech has to turn over the yacht, but in order to get this order, McKeown has to give $4409 to Spartech, or whatever the actual additional value of the yacht was. McKeown also has to turn over and assign his rights against cavalier
  - The court here is trying to do justice among three parties and has a fairly creative remedy
  - McKeown had a contract with Cavalier. McKeown paid for a yacht and cavalier did not provide one
    - McKeown has a right to sue Cavalier on that basis and in order to ensure that justice is done, McKeown has to turn over his right to sue to Spartech
      - The idea here is that otherwise Cavalier will get a windfall
  - In coming up with these remedies, there is a discretionary element
    - One of the overriding things here is to make sure that no one ends up with a windfall
Definite link to section 69 of the law of property act
- Corrective justice
- The court sees its primary role as equalling the ledger

4 Different Standards for determining when accession takes place

1) Injurious removal standard
   - Accession occurs when the chattels cannot be removed without destroying or seriously damaging the chattel
   - There are three other approaches that are sometimes used
2) Separate existence
   - Secondary chattel continues to remain a distinct identity
   - Abstract and conceptual
3) Destruction of Utility
   - Removing the secondary chattel would render the principle chattel no longer useful for its purpose
     o Taking the tires off of a truck might be an example of this
4) Degree and purpose
   o Essentially the same as the test for fixtures. Refers to the degree of annexation, the physical degree of the annexation, and what is the object of the annexation.
   o Is the object of the annexation to enhance the value of the chattel or secondary chattel?
   - It is not clear that any one test is used exclusively in Canada, although injurious removal is the dominant test

GIDNEY v. SHANK (pg. 227)

- Facts
- Case about a Canoe
- Three Parties – Gidney, Shank, and Bowe
  o Shank – Thief
  o Gidney – Buys canoe from Gidney, not knowing it was stolen
  o Furstein – Original owner of canoe
- Plaintiff (Gidney) purchased a rundown canoe and spends time, money, and materials to make it usable
- RCMP say that the canoe was stolen from Furstein and that Gidney needs to take it back to him
- The RCMP did not know what condition the canoe was in when it was stolen

- **Holding**
  - The canoe was ordered to be given to Furstein

- **Reason**
  - The thief never had title, so he could not possibly give title to the next owner, so title was still with Feurstein
    - Gidney had possession of the canoe, but he did not have title to it
  - Gidney could still claim property rights by improvements, saying that the improvements amounted to accession
    - Doctrine of accession was never mentioned in this case
      - True that Gidney never took the title of the boat from the thief, but Gidney may have taken title by Accession
      - Property of canoe was subsumed in the improvements. The court is unaware of this possibility.
      - The court assumes the canoe belongs to Feurstein, even in its improved state
      - Question is whether Gidney can recover anything under the doctrine of unjust enrichment

**Doctrine of Unjust Enrichment**

- Sometimes referred to as law of restitution

- Plaintiff must show
  1) An enrichment of defendant
  2) A corresponding deprivation to the plaintiff
  3) There is no juristic reason for the plaintiff to keep the enrichment

- If these three conditions are satisfied, the defendant does not keep the enrichment.
  
  Applied here:
  1) Making canoe useful on water was an incontrovertible enrichment to Feurstein
  2) Taking the canoe was a deprivation to the plaintiff
  3) But since there was no relation between Gidney and Feurstein and Feurstein and Feurstein had no knowledge that the plaintiff was doing this, there was a juristic reason for Feurstein to keep the enrichment.

- Feurstein never consented to improvements and there was never any communication
  - Unfair to make Feurstein pay for improvements that he never consented to
- Legislative authority over copyright is expressly assigned to federal parliament in section 91(23) of the Constitution Act 1867
- Purely statutory (No common law of copyright)
- Refer to discussion of judicial reluctance to recognize novel forms of property
- Copyright was once a novel form of property
- The English parliament took the initiative to create copyright, and Canada has had its own federal copyright act since 1921

**Théberge v. Galerie d’Art du Petit Champlain Inc.**

- The owner of the tangible physical item (poster) prevails
  - The initial poster was an authorized copy
    - In the absence of a breach of intellectual property rights, we should protect the interest of the owner in the physical property
    - If there is a breach, it does take priority over the interests of the owner with physical tangible assets
      - Distinguishing features
        - On the court’s interpretation of the copyright act, what the copyright owner was doing wasn’t breaching the copyright of Théberge.
        - By contrast, the court is finding in Monsanto that what the farmer is doing on his land with respect to his crops amounts to violation (use of) Monsanto’s patent

- The interests of the owner of tangible assets should prevail as long as there is not some kin of violation of tangible intellectual property rights

**Monsanto Canada Inc. v Schmeiser**

- You can register a gene or a gene insertion process, but not a living organism
- This is genetically modified canola seed created by Monsanto
- Purpose of genetic modification was to make the canola plants resistant to round up
- You could spray the round up right onto your crop and it would kill the weeds but not the canola
- Monsanto didn’t create this new kind of canola seed out of the goodness of its corporate heart, it received a patent
  - Not the plant or the seed
    - The gene, the process of injecting the gene, and the cells that were the result of this product
    - Monsanto charged farmers a licensing fee based on the number of acres under cultivation
Farmer Schmeiser didn't have authorization, didn't pay Monsanto the licensing fee, Monsanto sues him for breach of the patent

In another decision, the supreme court agreed that growing and cultivating genetically modified canola seed constituted a breach of Monsanto's patent

2 Issues

1) Is this a valid patent?
   - In Harvard Mouse, the court found that higher life forms weren’t the statutory definition of a patent
   - Also indicated that plants and seeds were not fair game for a patent
   - You couldn’t have a patent in these items, even if it was genetic modification that took place
     - In this case, the genetic material was patented, not the cell itself
     - Maybe you cannot patent plants or seeds, but you can patent the gene itself
       - Court does not find that the patent is invalid on this basis

2) Did Schmeiser intentional in growing this seed in his field, using the patented gene?
   - Exercise in statutory interpretation on pages 257-258
     - Purpose, context, and past case law should guide the interpretation
       - The court holds that the purpose if the act is to provide the owner of the patent a monopoly on the invention
   - If you allowed the owners to grow seed, you would be depriving the patent holder of the monopoly on the use and enjoyment of its invention
     - The court holds that Schmeiser did infringe the patent
       - This is his land, and maybe some of the seed came onto his land
       - What about the argument that it is his land and he should be able to do what he wants with it?
         - Court deals with this quite summarily (page 261) saying that the issue is not a property right, but patent protection, ownership is no defense to the patent act

Copyright Act, ss 3(1), 14.1, 14.2, 28.2
Patent Act ss 2, 27, 28.3

Trademarks

- Unlike copyright and patent law, which are purely statutory in nature, trademarks have common law origins
Traditionally under the tort of passing off

- It was possible to sue a party that was selling goods and passing them off as yours

Still common law dimension and a federal trademark act

- Trademarks are under federal jurisdiction

  - Section 91 1867 -- federal power of trade and commerce
    - Dealt with in legislative terms by the federal parliament
    - Trademark law deals with the marks that a seller of goods uses to distinguish its goods from the goods of other parties
      - Think of the McDonalds golden arches
        - Distinguishes the goods and services of one company from others
      - Ensuring that a business can have exclusive rights can in principle serve a few related purposes
        - Allow a business to build and benefit from a reputation
        - If a company does good work it can benefit from the reputation it builds by signalling to customers
        - In the absence of this, there might be a perverse absence of incentives -- if anyone could affix their mark to your goods, they could freeloard and potentially undermine your reputation
        - Incentives of market participants of sellers of goods and services, the ability to affix marks that are distinctive and that only one person can use can bring about incentives

**Matel, Inc. v 3894207 Canada Inc.**

- Mattel, the toy company, has a registered trademark in the name “Barbie” that it uses primarily to sell dolls and doll accessories but also to sell backpacks, bikes, and other merchandise
  - This case arises because there is a Montreal area casual dining chain called “Barbies”
    - It tries to register a trademark in the name of “Barbies”
      - Mattel challenges this trademark as being inconsistent with its registered trademark in “Barbie”
      - Standard for establishing this conflict is confusion – will people confuse the restaurant with the Barbie doll?
      - Mattel says the Barbie doll and Barbie brand has achieved such fame and ubiquity that its use in any domain would be confusing
- The Case acknowledge their deference to the trademark review board and discusses the standard of review
  - Court agrees that there won’t be confusion (agrees with trademark review board)
    - Court addresses the argument of the transcendent fame of Barbies
      - The court looks at:
        - Distinct nature
        - Length of time they’ve been in use
        - And nature of goods and services
          - The court holds that the confusion standard is not met here
  - Nature of the trade is industry
    - What a potential purchaser would think, not what a company would imagine
      - The court draws an analogy to trespass
        - The court said if it is affirmatively established that there was an intent to confuse, that could be relevant and make it difficult to establish that there wasn’t confusion
        - The intent is not determinative, it isn’t the standard, but it can colour the court’s perception of the confusion standard
          - Open ended rule
            - Registration creates a presumption in favour of the trademark

TRADE-MARKS ACT, ss. 2-6

The Concept of Possession

Basic Definitions
Possession has a number of different uses in the common law of property. First of all, possession can be used to justify a claim to property, in particular first possession -- aboriginal title
But even the cases for today -- Popov and Hayashi
  - Played a really important role (historically) in proving property claims -- and still does
    - A means of establishing ownership
    - Possession proves a strong signal that something is mine and it is up to you to prove otherwise
    - Possession serves as a signal or way of proving or establishing that property interests exist
      - See particularly next class that possession particularly over a long period of time can give rise to a claim to ownership and a claim to ownership that can give rise over the party that had been lawful owner
      - Claim to priority of different things over same property
• Title is relative at common law -- rather than relying on an absolute conception of ownership there can be different parties with claims for differing strength and the concept of possession plays a role in ordering those claims -- earlier possession generally takes precedence over later possession
• A party that is actually in possession in that item generally has a claim that is good against anyone but the lawful owner
• Relative nature of title -- concept of possession plays a big role in ordering the strength of the different claims
• Start off today with materials going to different uses of possession

**Popov v. Hayashi**

• Equity -- remedy is discretionary -- comes up with this remedy is something that is fair in light of the fact that both parties have a legitimate interest -- clean hands doctrine
• He who comes to equity must come with clean hands
• What were the relevant facts that the trial judge derived from context:

**Facts**

• Popov had the ball in the upper part of the webbing of his glove and at that point was forced to the ground by people pushing
• Would Popov have maintained control of the ball if he was not pushed? We don't know
• Popov was pushed to the ground by third parties (not Hayashi) Hayashi was also pushed to the ground

• The reason possession matters is that the ball is abandoned property
• One of the functions of possession -- it can ground a claim in otherwise unknown items -- in the grounds of a party with a superior claim, simply having something in your possession can ground a claim to the item
• What if party A gets possession, sometimes loses possession, and then B gets it
  ○ A had possession before B had possession, so A has ownership and had a better claim
  ○ If Popov ever had possession, he had it before Popov
  ○ Earlier possession takes priority over later possession
    • Relative nature of title
    • You take priority over later interests not previous ones
    • Not saying B is the owner of the item, just saying B has a better claim than C
    • If a third party D comes along, and D never had possession
      ▪ Doesn't ground a claim against the owner, but does protect against third parties
        • When you see a term "relative nature of title" that is what we are talking about
• The trial judge broadly speaking, sets out the two principal elements of possession at common law.
Physical control

• The judge makes quite clear that the element of physical control, what it takes to manifest physical control will vary from context to context -- what the accepted practice or custom is in this particular context
• Rules are contextual in nature -- the reasons that absolute dominion and control aren't always required is because such a rule would be unworkable and unreasonable
• It is possible to wrap your arms around a baseball in the stands -- fans generally expect it
• Custom and practice of the stands create a reasonable expectation that someone will establish full control
  ▪ Graves Rule
    • The person who catches a baseball that enters the stand is its owner.
    • Popov has not established that he had this absolute and complete control -- it was dislodged before we had established that he had or was about to have absolute or complete control
      • Popov and Hayashi aren't playing baseball -- they're involved in the alternative activity of catching a ball in the stand
      • It is totally possible that the expected practices of

What is the virtue of the absolute and complete control standard
• Clarity of application

Intent to control (intent to possess)

• So using the above standards, Popov didn't have possession -- it's usually binary
• The trial judge identifies a qualified possessory interest that occurs when one is unlawfully interfered with before establishing possession
  ▪ Person takes significant but incomplete steps
    • The court explicitly indicates it is occupying its equitable jurisdiction and coming up with a remedy here
      ▪ They each have a 50% interest -- the ball is sold and it has to be split
      ▪ If Hayashi had been one of the wrongdoers, that would have affected the result
• The customs and practices of the stands don't recognize a qualified pre-possessory interest with someone that doesn't catch the ball -- why does the trial judge depart from that and why don't we apply that standard?
  ▪ It seems unfair
  ▪ Popov may have had the ball but for the unlawful acts of third parties that push him to the ground
  ▪ Highlight the idea that when you have legal ambiguity or a contextual standards, pre-existing customs and standards can be a good starting point but maybe should not be determinative
• Trial judge is motivated by a desire to be fair to Popov

• The standard isn't what people actually do, but it is what people expect to be done

• Where the stakes are higher, it might be worthwhile applying a more complicated rule -- make room for nuance and allow for 50/50 split

• No Canadian cases that recognize a qualified pre-possessory interest
  • Also discuss why the courts might not want to implement this
    • Because it is a complicated standard to administer, it is unlikely that it will form part of customary norms in a field

• Pearson and Post

• Post chasing a fox with dogs, Post is in pursuit but before he has killed or wounded the fox, Pierson enters the scene and takes it

• Post is suing Pearson in trespass to chattels, on the basis that post had a possessory interest in the facts on the basis that he was chasing it
  • Majority
    • Chasing it doesn't constitute possession, even if you've been chasing it for a while or you're likely to kill or wound it
      • Why doesn't the majority accept that that is possession?
        • Uncertain standard
          • Give rise to no end of litigation if just chasing is enough to give you an interest, we don't know how that will apply and neither do parties, end up with litigation because that doesn't send a clear enough signal -- not a clear enough line we can draw
          • At least need to have seriously wounded the fox before you can have a possessory interest

    • Livingstone Dissent
      • An element of outrage that there is an interloper that comes along that hasn't done the work of chasing -- why does justice Livingstone want to reward the party that has done the work of chasing down the fox

    • Economic efficiency argument -- blunting incentive (opportunistic behavior undermines incentives to do a productive and virtuous activity - - hunting foxes)
      • The majority thinks it is most important to have a clear rule or there will be a harder rule to apply, or the dissent that is more concerned about incentives and wants to apply a standard where you have a possessory interest if you have a reasonable prospect of capture

  • General rule is that if you capture a wild animal you have a proprietary interest in it - - wild animals are unowned unless you have some sort of legislation that indicates that they are owned by the crown or something to that effect -- presumptively they are unowned so if you reduce them to possession you will have a recognized interest -- but if it escapes, you will no longer have an interest

  • However, there is an exception for a particular type of wild animal that doesn't have to be in your possession
• A trained hawk, however, can fly away and can be trained to come back -- you can be recognized as having a constructive possession in carrier possession of your carrier pigeons or trained fox
  ○ Flip and Caine -- dead animals escape
    • Seal hunting -- a party where there were two ships, one killed and stacked seals on the ice, ice moved around and then was closer to some other ship and the dissent said no you haven't fully reduced the animals to your possession they can still move around and escaped by the ice moving around
      ▪ The majority holds that once you've killed the seals, you reduce the m
        • Standards are very contextual
        ▪ Wouldn't necessarily want to point to a hard and fast rule even for a dead animal

Acquisition of Title by Possession

Adverse possession
• Relates to possession in long running possession in land or chattels can give rise to a right that is good against the paper title holder -- the party that would otherwise be considered the owner of the title in possession
• Mostly governed in statute -- statutes exist governing the limitations in statutes
• Generally speaking, the general thrust of these acts is to make sure that legal claims are made in a timely manner, otherwise the claim cannot be brought at all
• Claim usually has to be initiated within two years or it is barred by the statute of limitations
• 10 years is the statute of limitations for real property
  ○ Actions for the recovery of land have to be brought within ten years -- this is the basis for the doctrine dealing with adverse possession -- the general idea is that undisturbed possession for a period exceeding the limitation period means that action for the recovery of the property can no longer be brought by the paper title holder and because all actions are barred this extinguishes the right of the paper title holder

Keefer v Arillotta
• By Justice Wilson
• A case about a strip of land between two properties -- lots of facts here, but try to focus in on what is most important
- The nature of the actions taken -- are they sufficient to ground a claim of adverse possession? Time is not in question here, the time is obviously sufficient
  - Parking on the driveway almost exclusively, sometimes by agreement other parties would use it
  - They were using the grass for recreational activities, cutting the grass
  - Put the garage on part of the strip of land
  - Was this sufficient to ground a claim of adverse possession?
    - The use at least for the grass and the driveway was not inconsistent with what the owners intended -- they didn't mind what happened to it
    - The use that was made with the possessors on these two parts of the land was not inconsistent with the grass
      - But the claim succeeds in respect to the garage
- Test that was applied:
  - Before we get to inconsistent use there is a more general three prong test that justice Wilson refers to:
    - Actual possession
    - Intent to exclude
    - Discontinuance of the possession of the owners
- Another way of framing this in terms of animus and factual -- intent and actual physical control -- the standards we referred to last time
- Prong two refers to intent and the other two factors go to this q as to whether as a matter of fact the possessory title claimant was in continuous use of the land, was possessing the land exclusively.
- This is a test that comes from previous Ontario case law
- Just Wilson adds gloss to this by adding the inconsistent use test
  - It has been a contested doctrine ever since then
    - Essentially, in order to succeed in prongs two and three, the use made by the possessor has to be inconsistent with the intended use of the paper title holder
      - In order to constitute discontinuance of possession on the part of the paper title holder and have the finding of intent to possess exclusively, you need to have a use that is inconsistent with what the owner intends to use the parcel for
In this case, that test is essentially what saves the paper title holder in Wilson's analysis
  • The fact that they didn't intend to do much with this land (preserves their interest)
    ▪ For the most part, since they didn't want to do much with the land, whatever it was that the possessors were doing was not inconsistent with what they were doing
    ▪ If you think about it, this raises the bar for claims to adverse possession quite significantly
    ▪ The bar is higher the less the owner wants to do with the land in question
  ▪ One criticism of the inconsistent use test is that when the owner is doing absolutely nothing with the land for a long period of time, hoping perhaps that its value will increase before selling it, there is almost nothing that a possessor could do that would be inconsistent with what the owner wants to do with the land (nothing)
  ▪ The more the owner wants to use a parcel of land, the more susceptible the owner is to adverse possession claims
  • In the next case, Teis and Ancaster, the court restricts the ambit of the inconsistent use test
    o The court first flags Jewitt and Bill, which is introduced in your materials, to reinforce the idea we talked about last time, which is the relative nature of title -- that in the case that you have a party in possession of land with a pretty sketchy paper title, so paper title holder is almost certainly not in valid possession of the land in question, bringing action in trespass of party that hadn't been in possession
    ▪ The defendant said you can't maintain this action because this isn't your land -- how can you initiate a trespass action with me
      ▪ Based on what we talked about last time, that would not be likely to succeed -- we talked about the idea of the relative nature of title and that the party in possession may not have the best claim to a particular object or parcel of land, but their claim is still better than no claim
    ▪ The fact that there is some potential third party out there with a better claim does not diminish the possessory claim that a party in possession has, which is good against any party with a worse claim

**Teis v Ancaster (Town)**

- The farmer, Teis, bought the land adjacent to land that had been previously bought by the town. Both Teis and the town were under the mistaken assumption that the land belonged to Teis.
  - This was not true, the town actually owned the land
- According to his mistaken assumption, Teis farmed the plowed strip and installed a lane way in the other strip to allow him to get his equipment in and out
This went on for more than ten years, and Teis sued the town for possessory title, essentially saying that the interest of the town in the strips of land had been extinguished.

- The crown applied the three-prong test --in applying this test, you get a more detailed account of what possession actually entails.
- On pager 306, it says "possession must be open and notorious, peaceful, adverse, exclusive, actual, and continuous"
- You get a bit of an elaboration on what these standards mean
  - Open and notorious
    - Part of what we are concerned about when we are talking about possession in the law of property relates to the signal that possession sends to the world
      - Possession says to the world that presumptively, this party is the owner
      - A signal of possession cannot be hidden or clandestine
        - There is a requirement that whatever it is, that this possession has to be out in the open so that a diligent owner would be able to notice it and use it to apprise him or herself of it, and then do something about it
  - The next case you have is this Teis V Ancaster case, this is another case about strips of land
    - Essentially the farmer, the Teis bought land adjacent to land that had been previously bought by the town, both they and the town thought the land belonged to the farmers
    - It wasn't true, the town actually owned the land but both parties were under this mistaken assumption
      - Accordingly, Teis farmed the plowed strip and installed a lane way in the other strip to get their equipment in and out
        - this went on for more than ten years, and the Teis sued for possessory title, essentially saying that the interest of the town in the strips of land had been extinguished
  - The crown applied the same three-pronged test
    - in applying this test, you get a more detailed account of what actual possession entails -- this is the first item in the test
      - what does it mean to be in actual possession
        - open and notorious
          - part of why we are concerned about with possession when talking about the law of property relates to the signal it sends to the world that presumes this party is the owner
            - It wouldn't be a signal if possession was hidden or clandestine
              - requires that whatever it is that this possessor is doing has to be out in the open that a diligent owner would be
able to notice, would be able to apprise him or herself of it and then do something about
- Cannot be hidden, reasons for that should be obvious

- **Peaceful**
  - you can’t come into possession through the use of force or violence

- **Adverse**
  - one way of thinking about this is to think about what is the opposite of adverse
    - Can’t be with the permission of the owner -- in possession while at the same time acknowledging the owners right
    - Codified in 3(7) of the limitations act -- when you have an actual acknowledgement that the other party is the true owner that doesn’t count

- **Exclusive**
  - Can’t be shared, particularly with the paper title holder

- **Actual**
  - you have to be physically using the land and in possession
    - Doctrine of constructive possession
      - can apply where you have part of a parcel under the entire parcel -- you can have constructive possession
      - For the most part, this has to be grounded in some physical use

- **Continuous**
  - this merely means that whatever the acts of possession are, they can’t have ceased completely for a particular period of time
    - as the trial judge notes, this doesn’t mean you have to physically stand there for ten years straight
      - depends on nature of land in question and nature of the use being made of it
      - Farmland -- the use it is being not farmed in winter, the nature of the use does not mean it is intermittent
    - Continuity is something that is assessed in light of the context
      - In this case, the fact that the land was only being farmed during growing season didn’t mean that use was not continuous

- The court next addresses the problem of the inconsistent use test from the Kieffer test -- why is the inconsistent use test a problem for cases like this where there is a mistake -- mutual mistake -- where both parties think the boundary line is somewhere else -- what problem does this test pose?
  - This points to a weakness that has been identified in the inconsistent use test
    - essentially you could never succeed in mutual mistake cases where at the same time there is a long body of case law of mutual mistake cases where adverse possession has been established
- If you think about it, mutual mistake is the paradigm adverse possession case
  - The trial judge here makes the point that if you apply the inconsistent use test strictly, including to cases of mutual mistake, you would be putting the wrongdoers in a better position than an innocent good faith party
    - This is a major problem that the judge identifies here and he sees it as something that is inconsistent and not the way the law normally works
  - Strict application of the inconsistent use test would treat a wrongdoer better than an innocent party -- why?
    - We have seen in mutual mistake cases where an inconsistent use test can never be satisfied effectively if the paper title holder has no intent with the land
      - If you don’t believe the land is yours, you won’t have any intended use of the land
        - That means that there is no use that would be inconsistent with that
      - You would never have adverse possession
        - Cases of bad faith, or a knowing trespasser where there is no mistake at all, a party just plants him or herself on the land for ten years going about it intentionally with uses that it knows to be inconsistent with whatever the owner intends, that party is more likely to succeed - you end up with a situation of mutual mistake cases that tend to be good faith cases on the part of the possessor
    - At the same time, you are admitting the cases of known trespassers -- trial judge sees that as a big problem -- that is not something the law aspires to -- the law in fact does allow bad faith possessors to ground title -- the law is applied strictly against them -- the law being applied in ways that tries to snot serve the interest of wrongdoers
    - The judge doesn’t explicitly overrule the inconsistent use test, test but does find that it doesn’t apply in cases of mutual mistake -- inconsistent use test might still be part of the law in Ontario, but not in cases of mutual mistake where the true owner doesn't know the land is his or hers -- the conclusion here is that possession actually was sufficient -- deference to the trial judge on the finding of fact
  - Insufficient use test doesn’t bar the claim -- similarly a finding by the trial judge that there was a right of way for members of the public that was also upheld -- you should know the inconsistent use test has come under a lot of fire -- not clear it was ever part of the law in Albert that you had to establish use inconsistent with the owner’s intent
  - Supreme court decision earlier this year, Mowatt v City of Nelson -- didn’t assign it, but mentioning it briefly
• Held that the inconsistent use test had never been part of the law in BC
  • The court here did not expressly say it wasn't the law in Ontario anymore, but wasn’t clear how you would distinguish the difference
  • So, the Inconsistent use test might be dead
• Two other things are used in light of these factors -- a phrase that is commonly employed in relation to adverse possession
  • You have an excerpt next from Bentley and Poppard on pg. 313
    • The purpose of this excerpt is to distinguish between cases of pedal possession (possessio pedis) and constant possession
      • Definition: Pedal position refers to the foot, it is physically being present on the ground and using the land
      • The constant possession inherent in pedal possession allows the claim to possession to be made even when you are not physically present and using that part of the land
• The distinction between pedal and constant possession relates to when you have the party possessing land with no pre-tensive title -- adverse possession can only be made to the parts of the land that are physically being used in an exclusive way
  • The test gets applied
    • If the possession were farming, you would only have control over what you were cultivating
    • In cases where adverse possession is pursuant to some kind of definitive title -- the possessor believes he or she has legitimate entitlement to the land in question but turns out to be mistaken and defective
      • Nonetheless, the title holder possesses the land
        • If only part of the title is physically possessed or used, you can also have a claim to constructive possession of the land
          • Like a nature parcel
• When might this distinction be made?
  • In cases where adverse possession is pursuant to some kind of definitive title
    • The possessor believes he or she has legitimate entitlement to the land in question but turns out to be mistaken and the title holder possesses the land
• Part of what adverse possession aims to do is to uphold settled expectations
  • The nature of what your expectations relate to would differ based on whether or not you are pursuing relative to defective title or not
    • For pursuing due to longstanding possession, you would only relate to parts you are possessing
      • If your possession is related to defective title and your legitimate expectations relate to the entire parcel
        • Be aware of the doctrine of constructive possession and to a certain degree all possession of land is constructive
        • Last class we talked about different objects of property and how those objects differ in terms of what you can do to possess them (you can't wrap your arms around a whale, nor
can you wrap your arms around an entire parcel of land -- but you could wrap your arms around a baseball)

- To a certain degree, we are not talking about physically occupying land at the same time
  - Regularity of actions and regularity of use -- the intensity of which varies based on the type of land and that type of use that is being made of it
    - This is a nuanced, contextual inquiry but we have this explicit doctrine
      - The point there is that to a certain degree all possession of land is constructive, but we have an express doctrine of possession that applies to constructive title

- In most jurisdictions, we have legislative exemptions -- crown land in Alberta and municipally owned land (land owned by the government) cannot be subject to adverse possession

- Finally, you have some material highlighting how limitation periods apply in relation to chattels (Barbery Case)
  - Tangible personal property
    - Since these are not real property, they are not subject under the AB limitations Act to the special ten-year period of recovery for land, but are instead subject to a two-year period
    - The way the legislation is framed is in terms of a two-year period starting at the time the wrong was discovered
      - In the case of chattels that have been transferred from one party to another, there is case law to the effect that if there is a new party wrongfully detaining your chattels, the limitation period restarts
    - This is different from land, where once a ten-year period has started, a transfer of ownership will not eliminate the possessory chattels

- In terms of the two-year limitation period on chattels, it is not helpful for making sure that possession of chattels is secure

- On the other hand, though, this type of rule can help to add security to the true owners interest, as you see in the Solomon case out of New York, dealing with stolen art
  - So, there are countervailing considerations

- Last thing: Section 10 of the limitations act is added statutory limitation periods, there is an equitable knit on a potential limit on state claims within the discretion of the court
  - This is something that has existed for a long time, and section ten of the limitations act makes it clear that the doctrine of Laches and Acquiescence continues to exist
    - Acquiescence is an equitable doctrine and effectively allows the court in its discretion to bring a claim is there has been an unreasonable delay in
 bringing a claim -- unlike statutory limitation periods where there is a set number of years
  
  - It allows the court to deny enforcing a claim if there has been unreasonable delay or acquiescence

- These doctrines continue to apply in addition to statutory limitation periods and apply in areas where statutory limitation periods are found not to apply
  
  - Can sometimes be found in cases dealing with the interest of aboriginal groups

- We have talked about the doctrine of adverse possession today, but now we are going to debate the merits of it
  
  - In BC, it was eliminated in the 1970s
  
  - It continues to exist in AB today (hands out article on adverse possession) but the government is considering getting rid of it
  
  - In Ontario, as well with respect to land registered under the Torren system, adverse possession no longer applies
  
  - Bill will likely succeed

- Reasons for and against adverse possession:
  
  - For
    
    - Reduces information costs (people know what they own based on what they are using)
    
    - Efficiency -- society will benefit from whoever makes the best use of the land
    
    - In cases of mistake, adverse possession protects the user who may have come to depend on the land
    
    - Encourages owners to take care of and make productive use of their land

  - Against
    
    - Increases information costs -- A potential buyer might have to go scout out a claim to see if anyone is using it that might be able to bring a claim in adverse possession
    
    - Not all socially beneficial interests require "work" -- what about the interest that results from leaving land alone in its natural state (a nature reserve)
    
    - Unfair! Someone paid for the land up front and now has to give it away for free!
    
    - Has the potential to discourage investment in land

Limitations Act, ss 1-4, 7, 10, 13

The Relative Nature of Title: Finders

Occupier has taken constructive possession of the chattel, even without knowing the chattel exists

Possession not title -- it matters who occupies and is factually in possession of the land

Why should the finders prevail where not deliberately placed, but the owner of the land would prevail if it was deliberately stowed
• It’s not clear that objective intent to enhance the value of the land would be relevant -- somehow a part of the land but possessory interest prevails
• 9 principles laid out here:
  1. The finder of a chattel acquires no rights over it unless it has been abandoned or lost and he takes over its care and control
  2. The finder of a chattel acquires very little rights over it if he takes it into his control with dishonest intent or in the course of trespassing
• Party admitted he stole the money but is suing to get it back on the grounds that he had a prior possessory claim
  ○ The court doesn't recognize the possessory interest -- no one should profit from his own wrongdoing
  ○ On the other hand, the case of a trespasser -- the owner of the land doesn't assert a claim but there is potentially this extrupey principal, that the boy was a wrongdoer -- the finder of the chattel acquires very little rights over it -- not that you can never ground a claim but that it's hard
  ○ Most can provinces have civil forfeiture leg -- allows the government to acquire property
    • Since 2000
  3. The finder of a chattel whilst not acquiring any absolute title of the property...
    a. The finder by taking possession doesn't have an absolute right or the right against a true owner
    b. This is the basis for the contractors prevailing in the Trachtoff case
  4. Unless otherwise agreed, any servant or agent who finds a chattel in the course of the employment or agency, and takes it into his care or control, does so on behalf of his employer.
  5. A person having finder’s rights has an obligation to take such matters as in all the matters were reasonable

**Trachuk v Olinek**

**Facts**

- The plaintiff, Trachuk, and the four defendants, Olinek, Fulkerth, Austin and Muntz (the "four defendants"), each claim the right to possession of and title to $75,960 (the "money") which was uncovered by the four defendants from under the surface of a quarter section of farmland near Two Hills, Alberta. After they discovered the money, the four defendants notified and delivered the money to the police. The four defendants base their claim on the basis of being the finders of the money and fortune finders of lost property are entitled to it against all the world except the real owner. Trachuk bases his claim on being an occupier of the property and being in possession of the money by virtue of being in *de facto* possession of the lands which contained the money. He built a fence around the area where the money was found. However, at the
time the money was found he was not the owner of the property, he was a lessee from an oral agreement with the land owner.

Reasons

- Olinek was lawfully on the premises, took possession of money; Trachuk loses because he could not show: de jure (legal title) right to the land where money found, de facto (actual) possession of the land since the fence wasn’t meant to exclude others from the area.

- Because the money had been deliberately hidden under privately owned land, the general rule, that the finder of lost property is entitled to it as against all the world except the real owner, does not apply.

Ratio

- Where a person has possession of a house or land, with a manifest intention to exercise control over it, then, if something is found on or under the land the presumption is that the possession of that thing is in the owner of the location in question.

Charrier v Bell

- Didn’t take possession because the burial items were not abandoned
- Finder cannot prevail against a party with a prior ongoing claim
- What is unambiguous is that the act of abandonment requires an intent to relinquish ones title to an article in question