# Property CAN

## WHAT IS PROPERTY

- **INTRODUCTION**
- **THREE DEFINITIONS OF PROPERTY**
  - Yanner v Eaton
- **CATEGORIES OF PROPERTY**
  - **THE CASE FOR PRIVATE PROPERTY**

## NOVEL CLAIMS OF PROPERTY

- **IN REM AND IN PERSONAM**
  - International News Service v Associated Press
  - Victoria Park Racing and Recreation Grounds Ltd v Taylor
- **NOVEL CLAIMS - OWNERSHIP OF GENETIC MATERIAL**
  - Moore v Regents of the University of California
- **NUMEROUS CLAUSUS**

## HISTORY OF PROPERTY

- **ANGLO-CANADIAN PROPERTY SYSTEM**
  - **Doctrine of Tenures**
  - **Doctrine of Estates**
- **WAYS TO CATEGORIZE PROPERTY**
- **REAL PROPERTY VS PERSONAL PROPERTY**
  - **Real Property**
  - **Personal Property**
  - **Unique Interests**

## PROPERTY AND THE CONSTITUTION

- **CONSTRUCTIVE EXPROPRIATION**
  - Pennsylvania Coal Co v Mahon
  - Lucas v South Carolina Coastal Council
  - Mariner Real Estate Ltd. v Nova Scotia (AG)
  - Canadian Pacific Railway Co v Vancouver City
- **NAFTA AND EXPROPRIATION**
  - Metalclad Corp v United Mexican States
- **SUMMARY CONSTITUTION, EXPROPRIATION, PROPERTY**

## PUBLIC PROPERTY AND HOMELESSNESS

- Victoria (City) v Adams

## BOUNDARIES
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chattels and Fixtures</td>
<td>23</td>
</tr>
<tr>
<td>Fixtures</td>
<td>23</td>
</tr>
<tr>
<td>Stack v Eaton (1902), 4 OLR 335,</td>
<td>23</td>
</tr>
<tr>
<td>La Salle Recreations Ltd v Canadian Camdex Investments Ltd</td>
<td>23</td>
</tr>
<tr>
<td>Diamond Neon (manufacturing) Ltd v Toronto - Dominion Realty Co.</td>
<td>24</td>
</tr>
<tr>
<td>Fixtures in Alberta</td>
<td>25</td>
</tr>
<tr>
<td>Glencore International AG v Metro Trading International Inc</td>
<td>25</td>
</tr>
<tr>
<td>McKeown v Cavalier Yachts Pty Ltd</td>
<td>26</td>
</tr>
<tr>
<td>Tests for Accession</td>
<td>27</td>
</tr>
<tr>
<td>Damages for Transformation of Chattel Ownership</td>
<td>28</td>
</tr>
<tr>
<td>Gidney v Shank</td>
<td>28</td>
</tr>
<tr>
<td>Possession</td>
<td>29</td>
</tr>
<tr>
<td>The Law of Wild Animals</td>
<td>29</td>
</tr>
<tr>
<td>Popov v Hayashi</td>
<td>30</td>
</tr>
<tr>
<td>Adverse Possession</td>
<td>30</td>
</tr>
<tr>
<td>Keefer v Arillotta</td>
<td>31</td>
</tr>
<tr>
<td>Teis v Ancaster (Town)</td>
<td>32</td>
</tr>
<tr>
<td>Adverse Possession of Chattels</td>
<td>33</td>
</tr>
<tr>
<td>Finders Law</td>
<td>34</td>
</tr>
<tr>
<td>Trachuk v Olinek</td>
<td>34</td>
</tr>
<tr>
<td>Historic Resources Act</td>
<td>35</td>
</tr>
<tr>
<td>Abandonment</td>
<td>35</td>
</tr>
<tr>
<td>Transfer of Title – Gifts</td>
<td>36</td>
</tr>
<tr>
<td>Nolan v Nolan &amp; Anor</td>
<td>36</td>
</tr>
<tr>
<td>Re Bayoff Estate</td>
<td>37</td>
</tr>
<tr>
<td>Aboriginal Legal Traditions</td>
<td>38</td>
</tr>
<tr>
<td>J Borrows, Recovering Canada: The Resurgence of Indigenous Law</td>
<td>38</td>
</tr>
<tr>
<td>R Overstall, Encountering the Spirit in the Land: Property in a Kinship-Based Legal Order</td>
<td>38</td>
</tr>
</tbody>
</table>
WHAT IS PROPERTY

INTRODUCTION

- To have property is to have a right of an enforceable claim to some use or some benefit of something. It is distinct from possessing something, and is not a thing.
- Common property is the right of each member of society to use something, however, the claim may not be unlimited.
- The state creates the rights whereas the individual has the rights.
- Corporate property is an extension of individual private property.
- The SCC has said that the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.
- The concept of property extends to both tangible and intangible things (intellectual property).

- Property cannot exist without some institutional structure that stands ready to enforce it. Usually this institution is the state; however, these institutions could also be something like social ostracism.
- Property does also not solely apply to private property:
  - Private: exists where one person or small group of people have certain rights with respect to valuable resources.
  - Common: where all qualified members of a particular group or community have equal rights to a resource.
  - Public property: where governmental entities have certain rights with respect to valuable resources (similar to the rights of private owners).

THREE DEFINITIONS OF PROPERTY

- William Blackstone, two definitions of property:
  - Single variable of essentialism:
    - The right to exclude others is the irreducible core attribute of property.
    - A necessary and sufficient condition of property.
  - The second version of essentialism (or multi-variable):
    - Property is not solely the right to exclude others but there is a larger set of attributes. Namely, free use, enjoyment, and disposal. Others have interpreted these to be rights to exclude, to use or enjoy, and to transfer.

- There is a third school of property theorists: nominalism.
  - Property is a purely conventional concept with no fixed meaning.
  - Each legal system attributes its own values and beliefs to property.
  - Property is what the legal system defines it as.

Yanner v Eaton

(1999) 166 ALR 258 (HCA)

Facts:
- Australian case between Yanner, a member of an aboriginal Australian group, and Eaton, the peace office who charged Yanner with using a traditional harpoon to kill two young crocodiles.
- The skins and meat were for non-commercial uses.
- Yanner was charged under the Fauna Conservation Act 1974, for taking fauna without legal authority.
- Yanner states that he has a native tribal right to hunt as per the Native Title Act 1993.
• That act allows native title holders to exercise and enjoy such rights for personal, domestic or non-commercial communal needs even when a general law prohibits the activity.
• It was the position of the officer that the Fauna act got rid of that right for that particular type of crocodile because it was put on the protected list.
• The act says that all fauna, with the exception of open season fauna, is the property of the Crown and under the control of the state.

Issue:
• Did the Fauna Act make that crocodile property of the crown, and was the Native Title Act unable to revive the right set out in the Fauna Act?
• Did s. 7 of the Fauna Act extinguish the Native Title Act right, and give the State full beneficial ownership?
• Does the Crown have full beneficial ownership or something less, thereby allowing Yanner's right to hunt to stand?

Analysis/Holding:
• The Court says that there are reasons why the property of the crown is not full beneficial or absolute.
  • Does the state only have ownership of the fauna when it resides in the physical boundaries of the state?
  • What is meant by saying the Crown has full or absolute ownership of a wild bird or animal?
  • In common law, wild animals were the subject of only limited property rights. There would only be qualified property.
  • The property rights of the state over fauna come and go according to the exception of open season. There are also references to forfeiture of fauna to the Crown.
  • The rights in the fauna act are less than full or absolute. "The property in the fauna act no more than the aggregate of the various rights of control by the Executive that the legislation created."
  • The quote above is a **nominalist perspective**.
  • Those rights were to limit what fauna might be taken, how, rights to possession and rights to receive royalties.

Dissent:
• Stated that the Crown has property over all fauna.
• Whatever else property may mean, it describes a relationship between owner and object by reference to the power of the owner to deal with the object to the exclusion of all others, except a joint owner.
  • This describes single variable essentialism.
• The Fauna Act reverses the common law and vests the right to catch, kill, and appropriate fauna to the Crown. If property is to have a meaning in this context, it must have conferred those rights to the Crown and take them away from everyone else.

Principle:
• The definition of property is a contentious issue, the High Court of Australia cannot determine what property is (single variable, multi-variable, nominalist).

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**CATEGORIES OF PROPERTY**

• We can say with some confidence:
  • In terms of the law, it is not a thing but a set of rights in relation to some entity (concrete or abstract).
  • Not all bundles of the rights are the same. In Canadian law, having property rights does not mean you have the same bundle of sticks.

• 3 Main Categories of Property:
  • **Private property**
    • Bundle of rights is given to private citizens (or corporations or anyone operating in the private sphere).
      Is not limited to individuals, can have co-owners of a piece of land.
    • **Black acre** is a term used in illustrative example for land ownership.
    • Rights of ownership can be layered on black acre.
    • You may also have sequential ownership of black acre.
• You can have an owner is law and an owner in equity.
• Property rights are relative. So, you may have rights against all except one person.

• **Public property**
  • The ownership belongs to the state: (federal government, provincial, municipal).
  • Does the distinction between public and private matter; or is it simply the title of the owner?
    • An owner of black acre can have trespassers removed but can the government do the same when it comes to constitutional freedoms such as the right to protest?

• **Common property**
  • Everyone has equal access and the right not be excluded.
  • For example, air, the high seas (outside of territorial waters); things in the public domain.
  • Aboriginal title is communal (as stated by the SCC).
  • Everyone has equal and common rights
    • But how does that differ from widely held private property? For aboriginal title, there are people on the inside and people on the outside.

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**THE CASE FOR PRIVATE PROPERTY**

• Why do we have a law that allows for private ownership and private property?
• **Claim 1:** Private property promotes human happiness
  • Bentham and the concept of utilitarianism
  • How do you measure happiness? What metrics are used?
• **Claim 2:** Property is necessary for optimal human development/flourishing/personhood
  • People develop attachment to things which allows them to thrive
  • People individuate from their possessions. Their things are representative of themselves.
• **Claim 3:** Property facilitates freedom
  • Freedom has to 2 dimensions. Freedom from and Freedom to.
  • Property gives you the power to control your own life
  • For some and not others
• **Claim 4:** Private property enhances material wealth
  • Posner's 3 touchstones
    • **Exclusivity:** A system that protects individual entitlements. Respect and enforce entitlements.
    • **Universality:** As many things as possible should be amenable to private ownership.
    • **Transferability:** As few impediments as possible. The lawful transfer of property.
  • Posner tells us these are things we should strive for an economic efficient property system.
  • What does the tragedy of the commons teach us: Everyone keeps acting in their own best interest until the tragedy occurs, where everyone is harmed.
  • It teaches us that private property internalizes the costs of production.
• **Claim 5:** Private property is just, or at least legitimate
  • John Locke: private property is a theory of natural law.
• **Claim 6:** All of these arguments taken together support private property, albeit imperfectly.
  • Most significantly perhaps, the material wealth claim is the driving value (i.e. claim 4)

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**NOVEL CLAIMS OF PROPERTY**

• What should be amenable to private ownership?
• How should private property be distributed?
IN REM AND IN PERSONAN

- Rights between parties: in personam.
  - This is the right under contract law. You only have rights against the other person in the contract.
- Rights against the world: in rem.

International News Service v Associated Press

248 US 215 (1918)

Facts:
- Both parties are companies that gather and distribute news and publications via newspapers in the US.
- Plaintiff: the AP comprises about 950 different newspapers in the United States.
  - Part of the AP's membership is that the news received through its service is exclusively for publication in a particular newspaper, and place specified in the certificate of membership, and that no other use of it is permitted.
  - No member of the AP should allow its employees to supply the news in advance of publication to anyone who is not a member.
  - Each member of the AP is to gather the news of the local area and supply it to the AP.
- Defendant: Is a widespread news-gathering agency.
  - Some members of the International News Service are also members of the AP.

Issue:
- The defendant has been copying news from AP bulletin boards and other early edition newspapers and selling it to their customers in total, or by re-writing it.
- This act is a violation of the plaintiff’s property rights.
  - Is there a property in the news?
  - If there is, does it survive the instant of publication?
  - Is the defendant’s actions unfair competition in trade?

Analysis/Holding:
- News is not copyrighted as it is not within the copyright act.
- The defendant argues that the property right is lost the moment the bulletin board or newspapers are published and the use after that by anyone is lawful.
- The news element is publici juris (public right), as it was not the purpose of the law to grant the writers of the news exclusive rights to the person who first reported an event.
- There are business concerns that the conduct of one party is unfairly injuring its competitor.
- Neither party has no right against the public in uncopyrighted news after publication; HOWEVER, there may be property interest between the two parties.
- There are practical concerns that the defendant’s behaviour would leave publication of the news profitless.
  - The plaintiff puts in skill, labour, and costs into this material, which the defendant appropriates and sells thereby reaping what it has not sown.
  - Regarding the news, as the material the parties use to make profits, the court recognizes for this purpose, between them it must be regarded as quasi-property, irrespective of the rights of either against the public.
  - Quasi-property – not total property, simply a right against each other but not the public.

Notes:
- Can explain the concept of quasi-property by using just the term of property.
  - The commercial value of the property. You have a property right to the commercial value of the information you gather (which is time limited). It is an argument that the commercial value property is right in rem.
  - If they did the information gathering and publication for free then there would be no property right because there is no commercial value.
Victoria Park Racing and Recreation Grounds Ltd v Taylor

(1937), 58 CLR 479 (HCA)

Facts:
• Plaintiff: Operates races and owns a racecourse known as Victoria Park.
• Defendant: Taylor, the owner of land near the race course.
• Australia: defendant has built a platform on his land from which he can watch the races and read the information boards at the races.
• He then, through a phone, communicates the winners and describes the races to the Commonwealth Broadcasting Corporation. The Corporation then broadcasts them.

Issue:
• The plaintiff wants the broadcasting stopped because it stops people from attending the races and paying admission.
  1) It was argued that the spectacle created by the plaintiff is subject to a quasi-property right.
  2) It was also argued that there is a nuisance claim, which is a land based claim. The use and enjoyment of the land of racetrack is being interfered with by the neighboring land owner.

Analysis/Holding:
• The plaintiff fails on both grounds

Principles:
• The court says no rights of the plaintiffs have been violated or any wrong has been done. Anyone has the right to look over the fences and, if they desire, the plaintiff can build a higher fence. Furthermore, they can make their information boards so that no one else can see them.
• A spectacle cannot be owned.
  • They were not prepared to create a new right.

Dissent:
• Defendant rights are related the plaintiff's rights and each owner's rights may be limited by the rights of the other.
  • The plaintiff’s claim is unprecedent but falls within the principles of nuisance.

Concurrence:
• The profit of the plaintiff's enterprise depends on excluding people who do not pay for the spectacle. The use of the plaintiff's land gives it value, and the use of the defendant’s land deprives the plaintiff's land of value and strip its exclusiveness.
• English law has not followed the US law in respect of broadcasting rights and therefore no quasi-property right exists.
• The arguments set out do not justify the introduction of a new doctrine of law.
• APPEAL DISMISSED

NOVEL CLAIMS - OWNERSHIP OF GENETIC MATERIAL

Moore v Regents of the University of California

793 P (2d) 479 (Cal Sup Ct 1990)

Facts:
• Moore, who underwent treatment for leukemia at the University of California at LA medical center.
• Moore visited Golde who confirmed his diagnosis after taking blood, bone marrow, and other bodily substances.
• At this time, Golde and the other defendants knew that some blood and blood components were of significant value in commercial and scientific methods.
• Moore had his spleen removed and signed a written consent based on Golde’s recommendation.
• Prior to the procedure, Golde and Quan made arrangements to obtain a portion of the spleen after it had been removed and take them to researchers.
• Moore did not know that this was their intention.
• Over a period of years, Moore returns to medical center for different treatments where bodily samples were taken.
• Golde established a cell line and a patent was applied for on the cell line where Golde and Quan would share in the royalties and profits.

**Issue:**
• The causes of action were a breach of duty and lack of informed consent.
• Conversion - Moore alleges that he continues to own his cells after the removal from his body, at least for directing their use. The defendants unauthorized use of his cells amounts to conversion.

**Analysis/Holding:**
• This is a matter of *Res Integra* – first impression.
• The conversion action is a right in rem (against the world) whereas the breach of fiduciary is a right in personam.
• To establish conversion (which is a tort), the plaintiff must show that there was actual interference with his ownership or right of possession.
  • If the plaintiff does not have title nor possession, there cannot be conversion.
• **Does he have the right:** California also has statutory laws which limit a patient’s control over excised cells.
• The patented cell line and the products derived from it cannot be Moore's property. The patented cell line is factually and distinct from the cells taken from Moore's body.
• Patent laws allow you to get a permit for organisms that are the product of human ingenuity, and are not naturally occurring.
• **Should he have the right:** Policy argument.
• The plaintiff does not retain sufficient interest in excised cells to support a cause for conversion.
• The court does not want to extend the tort of conversion, and think this is better suited for a legislative solution.

**Notes:**
• There is a difference between this case and the INS/AP case. In that case the economic interest was protected by a property right.
• In this case, property is the issue and would create economic disfunction.
• Enshrining property rights is not always optimal.
• The tragedy of the anti-commons: if you divide something up too much, property rights too fragmented, then you have issues assembling those rights.
• In this case, you don’t want to stifle bio-research by having property rights in the cell-material.

**NUMEROUS CLAUSUS**

• *Numerous Clausus* – means closed numbers.
• It is a principle of property law that there should a limited and carefully control of property interests.
• It is a bottleneck, not a barrier, to the establishment of new rights.
• Why? Limiting rights reduces information costs and makes it easier to transfer land.
  • Limits anti-common problems: fracture property rights and hold outs.
• Pre-cautionary principle: property rights are hard to abolish, so one should be careful when introducing new rights.
• To demonstrate a right is proprietary a party must demonstrate that the interest in question fits into the appropriate legal box.
HISTORY OF PROPERTY

ANGLO-CANADIAN PROPERT SYSTEM

- Established in 1066 with the Norman conquest, where William established land holding system that is the basis for the system today in Alberta.
- The Crown is sovereign and holds title to all lands (imperium and dominium). Land could be granted down but absolute ownership resided with the Crown.

Doctrine of Tenures

- Land is held by a lord and not owned outright by a subject. The recipients do not have absolute ownership of land.
- Land devolved from the Crown in return for allegiance, revenues, and other benefits.
- Tenants in Chief (Tenants in Capite) – the first grants of land from the Crown.
  - The grants had strings attached to them, known as services and incidents of tenure.
- Service of tenure: specified obligations (similar to rent today) that included providing the Crown with an army for a set number of days.
  - Free and common socage (only one that still exists) – sustenance requirements among other obligations that did not fit elsewhere. The granting of pelts on Rupert’s Land.
- Incidents of Tenure: implied elements of the grant that did not have to specified.
  - Oaths, loyalty, aids, relief, primer seisin (death tax), escheat.

- Tenants in Chief could grant portions of their land rights to others, which could continually be handed down.
- These were known as feudal strata and the process was called sub-infeudation.
- This never existed in Canada.
- Mense Lord (mean lord) – an intermediate lord who was granted land by the tenant in chief

- Escheat
  - All of the grants of land were limited to the life of the person who was given the grant.
  - If there was an heir, those rights would continue.
  - If there was no heir, then the land would revert to the original lord (either the intermediate lord or tenant in chief).
  - That is what is known as escheat.
  - In Canada, the land would revert to the Crown.

- In the 1290, sub-infeudation was eliminated and land could only be transferred by substitution.
- Statute of Quia Emptores – in responses to the difficulty of determining the state of existing obligations.
- It abolished the Lord’s power to prevent a transfer, so they could take place without consent.
- Did not apply to the Crown.
- 1660 – Tenures Abolition Act removed the last remaining incidents of tenure, except escheat.

Doctrine of Estates

- Tenures did not address the length at which rights were granted.
- Estates refer to the duration of the holding.
- 3 kinds of Estates:
  - Life Estate (still exists ion Alberta) – property granted as long as he lives.
  - Fee tail – Property given, and it goes to your children, and their children (Not in Alberta)
• **Fee simple** – Lasts forever, this is what you get when you buy a house in Edmonton.
  • For all intents and purposes, it is absolute ownership in Canada
  • Escheat occurs when fee simple comes to an end, if for instance you have no heir to your fee simple in the eyes of the law. It transfers back to the Crown.
  • Granting fee simple means, you do not retain any rights.
  • So, you can grant a life estate but still retain the fee simple.

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### WAYS TO CATEGORIZE PROPERTY

**Land and Goods**
- The most important division in property law is the one drawn between land and other things. These other things are referred to as goods.
- Goods must be tangible, so they do not include money, shares, or copyright.
- Generally speaking land is permanent and stationary, it remains constant while people come and go.
- Goods are more transitory, while a piece of land is subject to the laws of the area in which it resides, goods may become subject to different laws as they move around.

**Real and Personal**
- The difference here is not in the nature of things, but the nature of the right.
- Property rights were considered real because the holder could bring a real action to recover than land from someone in possession of it.
- Other property rights are personal because there was no real action to recover the thing, instead they had a right to be compensated for the loss.
- In general, property rights to land are real and personal covers property rights to goods, however, there rights to land that are not real property (Such as a lease)
- The distinction in current times between real and personal is not as clear since there are real rights available to personal property such as heirlooms or art.

**Legal and Equitable**
- This distinction is similar to the right but was created by legal conditions that no longer exist.
- It is the difference between legal rights and equitable rights.
- The rules of equity were created to fill gaps in the common law and correct perceived injustices.
- The lease of land can be equitable or legal.
- Equitable rights are created with less formality than legal rights
- Equitable rights are less durable and more easily extinguished by competing property rights.

**Tangible and Intangible**
- The distinction is whether the property right entitles the holder to possession of the thing involved. Tangible or corporeal rights include the right to possession something.
- Intangible or incorporeal rights do not.
- A right to a possession of good is called a chose in possession and an intangible right is called a chose in action.

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### REAL PROPERTY VS PERSONAL PROPERTY
• Ziff’s preferred way of property categorization, although as shown above, there are others.

Real Property

• Real property rights are rights in relation to land.
• Can be subdivided into Corporeal and Incorporeal.
  • Corporeal hereditaments – right to possession.
    • Life estate
    • Fee Simple
  • Incorporeal hereditaments – right to use, not a right to possess.
    • Right of way easements – no grant of exclusive occupation.
    • Rights to drill for oil/minerals (*profits a prendre*)

Personal Property

• Personal property is rights in things other than land.
• 1) Chattels Personal
  • Clothes and books
    • 1a) Choses in possession – things that are capable of being rendered into possession or being recovered or being taken into possession.
      • Must be tangible.
    • 1b) Choses in Action – intangible
      • Intellectual property rights, debt (the person to whom the debt is owed has the choses in action)
      • Can be transferred.
      • Enforceable only by Court action, cannot be taken into possession.
• 2) Chattels Real
  • Describes the lease of land.

Unique Interests

• Aboriginal land rights
  • The SCC has these are distinct.
  • Aboriginal rights are *sui generis*, which means unique or of its own kind.
• Aboriginal conceptions of property
  • Property is a more collective ownership and that the owners have a responsibility back to the land
  • The acquisition of property is a spiritual exercise.
  • The chief is like a trustee for the land
• The notion of borders tends to be along natural boundaries.
• Property cannot be parceled up and change size.

• Legal and Equitable Rights
  • Equitable rights are derived on a set of principles as a supplement to the common law principles.
  • Within the fee simple right to black acre you can have a division between a legal title and an equitable title.
  • How? A trust.
  • Legal title is placed in the name of a trustee. The property is held for the benefit of someone else.
  • The beneficiary has the equitable interest (or beneficial interest).
  • Common law would only recognize the legal title and the beneficiary would have no interest. The Chanceries recognized the beneficial interest and enforced it.

• You are the vendor of black acre. Day 1 a contract is formed. At some later date, the closing, the legal title is transferred. This is called Day 2. In between, the person buying has an equitable interest in property.
  • During this time the legal interest and the equitable interest can be in conflict over the property.
  • The Judicature Act: the rules of equity prevail.
  • BUT, Equity recognizes the legal title.
• Equitable interests prevail over legal interests.
• Equity is less durable, however.
• How do we reconcile this?

• We can have 4 different types of conflict in interests:
  • L v L, prior lease and subsequent purchase of the fee simple.
    • First in time is the first in right. Prior legal interest prevails.
  • E v L, Prior E interest and a subsequent L interest.
    • The E is the agreement for sale of the land, prior to the closing of the deal.
    • Then comes someone else and offers a much higher price and the seller enters into that deal too. B then enters the agreement and takes the transfer and registers it at the land titles office, so the rights of B are legal. B had no knowledge of A’s deal.
    • So, we have a prior E and a subsequent L.
    • Who gets the land?
    • The owner of the L interest will win, provided that they are the legal owner and had no knowledge of the prior equitable interest.
  • How does this outcome in this setting square with the Judicature Act s. 15?
    • L prevails because Equity says so. B prevails because in an equitable sense B has a clear conscious. Equity works upon the conscious of the wrong doers.
    • A also has a clear conscious but B has legal interest, so in this case the rules of equity follow the law.

PROPERTY AND THE CONSTITUTION

• Unlike in the US, there is no Constitutional or Charter protection in the right of property.
• There are statutory schemes across Canada to provide compensation for the expropriation of land. They follow a conventional pattern:
  • If land is taken by the state, the erstwhile private owner is compensated accordingly.
  • This contemplates direct expropriation of title to land; however, property could be acquired via less conventional means.
  • Excessive regulation at some point is seen as equivalent to confiscation.
  • If property is a bundle of rights, then state action that removes the ability to exercise those rights leaves something less than property.
• This is known as regulatory taking or constructive expropriation.

• 1) The division of powers and the Constitution Act of 1867
  • Section 92(13) Property and Civil rights are the jurisdiction of the province.
• 2) Constitutional Protections
  • Constitutional Act, 1982 (including the Canadian Charter of Rights and Freedoms)
  • Compare the Charter to the American Bill of Rights (5th and 14th Amendments)
  • There is no direct protection of property in the Charter. There are indirect protections.
    • Search and seizure protections.
    • Discriminatory seizure through equality protections.
  • The Australian Constitution says the government can only acquire property on just terms.
  • S. 35 of the Constitution Act is about aboriginal rights, not part of the Charter, but gives a durable protection to aboriginal property rights.
• 3) Other Sources
  • The Canadian Bill of Rights enacted in 1960.
    • Section 1(a) - "the enjoyment of property and the right not to be deprived thereof except by due process of law."
    • The Canadian Bill of Rights only applies to federal law, however.
    • Alberta has a similar Bill of Rights.

**CONSTRUCTIVE EXPROPRIATION**

**Pennsylvania Coal Co v Mahon**

260 US 393 (1922)

**Facts:**
• Bill in equity to stop the PCC from mining under their property which is causing the ground to sink around their house.
• The deed was given by the Coal Company in 1878, which gave the surface but reserves the right to remove the coal under the surface, and the grantee take the premises with the risk, and waives all claims for damages.
• The Plaintiff’s claim that the Coal Company’s rights were taken by the Act of Pennsylvania in 1921.
• The statute prevents the mining of coal in such a way to cause subsidence (sinking) of any structure used as a human habitation.
• Exceptions include when the owners of the coal own the and the distance is more than 150 ft. from property owned by another person.

**Issue:**
• The statute destroys previously existing rights of property and contract, so the question is can the state power be stretched that far?

**Analysis/Holding:**
• The USSC holds that the act cannot be sustained as an exercise of state power so far as it affects mining in places where the right to mine has been reserved.
• The right to mine is valuable because you can make a profit from it.
• To make the right to mine commercially impracticable has the same effect as appropriating or destroying it.
• This is what the statute does.
• Property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.
• This is a question of degree and there cannot be a general rule applied.
Dissent:
- Restricting property rights to protect the public health, safety or morals from danger is not a taking. The property restriction here is a prohibition of a noxious use.
- The restricted property remains in the possession of the owner.

Lucas v South Carolina Coastal Council

112 S Ct 2886 (1992)

Facts:
- In 1988, the state government passed the beachfront management act, under which a local council can designate land as being unavailable or development.
- No exceptions for this prohibition were made.
- As a result, Lucas could not erect any permanent structures on his land.

Issue:
- Did this statute amount to a regulatory taking of the property rights of Lucas?

Analysis/Holding:
- The USSC recognizes there is no set formula for determining what is a taking and that it is primarily done on an ad-hoc basis.
- There are two discrete categories of regulatory action that is compensable without case specific inquiry:
  - When a regulation forces a property owner to suffer a physical invasion of his property.
    - No matter how small the intrusion the court has order compensation.
  - The second is where the regulation denies all economically beneficial or productive use of land.
  - If the owner of real property has been called upon to sacrifice all the economic beneficial uses in the name of the common good, and to leave his property economically idle, he has suffered a taking.
- The USSC found that the statute was a taking. They cite Pennsylvania Coal and state that Justice Holmes recognized that if the protection against physical appropriation so private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.
- Any limitations must be in the title itself.

Mariner Real Estate Ltd. V Nova Scotia (AG)

(1999), 68 LCR 1, 1999 CarswellNS 254 (CA)

Facts:
- The Beaches Act, RSNS 1989, c 32, preserves the beaches and dune system of NS as an environmental and recreational resource.
- It regulates the private and public beaches, and any developments, from paths to other structures are not allowed unless authorized by the minister.
- The respondents applied to build single family dwellings on a beach and were denied.

Issue:
- The respondents sought a declaration that their land had been de-facto expropriated by virtue of the decisions made under the act.
- The trial judge found that the plaintiffs (now respondents) had been deprived of their land within the meaning of the expropriations act, and were hence entitled to compensation.

Analysis/Holding:
• **De facto expropriation** (is called in the US regulatory taking) is at the time, limited in Canadian law. Few cases have dealt with it.

• There are two governing principles:
  - 1) valid legislation or action taken lawfully with legislative authority may significantly restrict an owner's enjoyment of private land.
  - 2) The courts may order compensation for such restrictions only where authorized to do so by legislation.
    - As a result, the court can only consider whether the action was lawful and whether the expropriation act entitles the owner to compensation for the resulting restrictions.

• The courts cannot pass judgment on the way the legislature apportions the burdens flowing from land regulation.
• In Canada, extensive land use regulation is the norm, and almost without exception the regulation has not resulted in compensable expropriation.
• Regulations of land that decrease the value of land are not an expropriation.
• In the cases, where de-facto expropriation led to compensation the government action went drastically beyond limiting or reducing the value of the owner’s property.
• In order for there to be de facto expropriation there must be a confiscation of all reasonable private uses of land in question.
• So, the question to ask is whether the regulation is of sufficient severity to remove virtually all of the rights associated with the property holder’s interest.
• The effect of the particular regulation must be compared with the reasonable use of the lands in modern Canada, not with their use in some state of nature where land is unconstrained by regulation.
• In Canada, it should not be assumed that ownership carries with it any exemption from regulation.
• The extent of the bundle of rights of ownership must be assessed not only in relation to the highest and best use of the land but having regard to the nature of land and the range of possible uses to which it has been actually put.
• The regulation itself does not result in expropriation since the Minister is the one who denied them permission to building dwellings on the land.
• Did the decisions made under the act result in an expropriation?
  - The loss in the economic value of land is not the loss of an interest in the land.
  - The court does not view that an acquisition within the meaning of the act has occurred, which is required for there to be expropriation.
• APPEAL ALLOWED. NO EXPROPRIATION.

**Canadian Pacific Railway Co v Vancouver City**

2006 SCC 5

**Facts:**
• In 1886, the Crown granted CP a corridor of land for the construction of a railway through the city. In 1999, the CP discontinued the operations on the line.
• Over time, CP indicated that if someone wanted to buy the land, it was willing to sell at a price determined by agreement or expropriation. No one offered.
• The city wanted to keep the corridor for transportation purposes. The City of Vancouver eventually designated the corridor as a public thoroughfare for transportation and greenways.
• The effect was to freeze the re-development of the corridor and confine CPR to uneconomic uses of the land
• CP regards this as unfair and unreasonable.

**Issue:**
• CP is arguing that this amounted to a regulatory taking and the City is obligated to compensated CPR for the land,

**Analysis/Holding:**
CP’s argument is that the by-law is limiting the use of the land and constitutes an effective taking. It cannot use the land for any economically viable purpose.

- It cannot even run the rail way through there according to the by-law, because the track cannot be maintained.
- The Court rejects this. They do not believe that CP wants to use the line rather CP's real complaint is that the by-law prevents it from economically profitable purposes.
- In the court's view, neither requirement of the test is made out.

1) CP has not shown that the city has acquired a beneficial interest in the land.
   - They do not have to show that there has been a forced transfer of property.
   - Acquisition of beneficial interest related to the property suffices.
   - The City has only gained some assurance that the land will be used or developed in accordance with its vision. It is not a benefit that can be construed as a taking.

2) The law does not remove all reasonable uses of the property.
   - This requirement must be assessed not only in relation to the land's potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put.
   - The by-law does not prevent CP from using its land to operate a railway, the only use to which the land has been put to history.

- No compensation can be given because the Expropriation Act requires that there be expropriation, which the court has determined is not the case under the by-law.

**Principles:**

- **For a de-facto taking requiring compensation at common law:**
  - an acquisition of a beneficial interest in the property or flowing from it must have happened.
  - removal of all reasonable uses of the property.

**NAFTA AND EXPROPRIATION**

- Chapter 11, Article 1110 of NAFTA:
  - Provides for mandatory compensation for expropriation that affects foreign investors
  - A taking by Canada that affects Mexican or American investors triggers a right of compensation.

- The signatory cannot expropriate an investment of an investor of another party, unless:
  - Applied-non-discriminatorily
  - Undertaken in accordance with due process
  - For a public purpose
  - Compensation is provided to the affected investor.

- The cause of action is not in the hand of the state, rather in the private investor who was affected. They do not have to seek leave.
- Only about a dozen claims have been filed under article 1110. Only one breach has been found.

- **Compare to the Canada – China FIPA**
  - Contains the Penn Central Ad Hoc test.
  - The test itself is in an Annex to the section of Expropriation.
  - So, the main body of these treaties are typically the same as the NAFTA agreement but then the test is in an appendix.
  - FIPA is the Canada/China free trade agreement. There is a footnote that tries to codify American style takings in Canada for the purposes of foreign investors.
• Given the importance of the annex, why do you think the drafters of the FIPA bothered with an annex, rather than bring it up into the body of the treaty?
  • The body of the treaties FIPA and NAFTA are the same they might be relevant to disputes in the other one.
  • If the annex is moved up to the body, the bodies are not the same and therefore they might not be as persuasive in helping to interpret the other act (in this case NAFTA).

Metalclad Corp v United Mexican States

(2000), 119 ILR 615

Facts:
• Metalclad wants to build a waste facility in Mexico. It obtains state and federal approvals but are blocked by the local authorities.
• They start building assuming they have permission but are blocked locally. A NAFTA claim is filed. Several months later the state government issues an ecological decree for the land.

Issue:
• Did this amount to expropriation and trigger article 1110?

Analysis/Holding:
• NAFTA Arbitration Tribunal
  • Article also covers incidental interference with the use of property, which has the effect of depriving the owner, the use, in whole or in part, or reasonably expected economic benefit of the property.

SUMMARY CONSTITUTION, EXPROPRIATION, PROPERTY

• Imagine no state right of expropriation:
  • Companies could extort the government for land.
• Why provide compensation?
  • Fairness, just because you are unlucky about where you own property you should not solely bear the cost for a project that brings a public benefit.
  • If the government could without cost to them acquire property that may lead to imprudence. Having to pay market cost will lead to prudence.
  • Security for investors.
• Imagine no property entrenched protections?
• American Approach to determine when there has been a regulatory taking:
  • 1. Categorical (or per se)
    • All economic value to the land has been lost (Lucas case). If the regulations drain the property off all economic value.
    • Direct physical occupation of the property (Lucas page 148).
    • In a 2001 case, 90% of the economic value lost was not a per se taking.
  • 2. Ad hoc (Penn Central test) – these are the most common
    • Several factors – economic impact of the regulation, its interference with reasonable investment back expectations, and the character of the government action.
    • It is a hybrid to determine the extent of the interference.

• Canadian Approach
  • Acquisition of a beneficial interest in the property AND the removal of all the reasonable uses in the property.
  • The de facto test out in CP Case: acquisition of a beneficial interest and the removal of all reasonable use in the property.
PUBLIC PROPERTY AND HOMELESSNESS

• Common property is characterized by a right not to be excluded
• Conflict can arise when one person's right to not be excluded has the effect of precluding others from using common property.
• Governments come under pressure to regulate the behaviour of those in public spaces.
• Waldon Article “Homelessness and the Issue of Freedom”
  • Property rules for land provide a basis for determining who is allowed to be where.
  • How does this line up with the concept of homelessness?
    • They have no private property and the more private property that exists, the fewer places that person has the right to be.
    • No public property would mean that they are moving from one trespass liability to another.
    • Every piece of black acre in private hands is a place where a homeless person cannot go.
  • The other issue is the regulation of common property by the government in terms of what you can and cannot do there.
    • The activities done in parks and public places is meant to complement what is done at home (in private property).
    • The poor have to carry out what we do in private in public spaces.
    • This is an issue for people with no private property.

• Elickson
  • how me may control what activities are done in public places.
  • Red, yellow and green zones, with different controls over public property and the activities that can happen on them.
  • In Edmonton, these zones may exist de facto.

Victoria (City) v Adams

(2008), 299 DLR (4th) 193 (SC)

Facts:
• P: Adams (for a group of homeless) and a community organization; D: AG of BC and City of Victoria
• In general, the issue arises from what US Judge Atkins called "an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public places and the responsibility of the government to maintain orderly, aesthetically please public parks and streets.

• The defendants say that the City of Victoria by-law that prohibits the erecting of a temporary shelter on public property infringes on their rights under s 7 of the Charter, namely the right to life, liberty, and security of persons.
  • They are supported by the British Columbia Civil Liberties Association
  • The AG of BC and the City of Victoria say the claim does not fall within s 7, that it does not infringe on s 7 and that that infringement would be justified under s 1 of the Charter.
  • The City claims that the prohibition is necessary to preserve and maintain parks.

• The evidence is that the city does not have enough shelter beds for the homeless population. While sleeping in public is not banned, the by-law effectively has that effect. There are risks to exposure from not being sheltered. Overhead protection is required for protection from the elements.

Issue:
• Can the city of Victoria prohibit the setting up of temporary shelters in public spaces for the Charter reasons listed?
• Court of Appeal affirmed the trial decision of striking down the by-law.
Analysis/Holding:

- In the analysis of s 7 of the Charter, the court looked at the issue of property rights.
  - The Court saw this not as a property rights issue and the issue of whether they have the right to camp in public spaces
- The court recognizes that use of public property for homeless people to sleep on is unavoidable.
  - Whether they can have a temporary shelter does not change the nature of the utilization of the public space.
  - There is no evidence that the competition for the public resource of a park is affected when the homeless people seem to utilize it.
- The SCC has rejected the idea that governments can use property in the same way as a private owner.
  - Public properties are held for the benefit of the public, which includes the homeless.
  - The government cannot restrict certain uses of public land if in doing so they deprive individuals of fundamental human rights, such as the ability to protect one's own body.
- Sleep and shelter are necessary pre-conditions to any security, liberty or human flourishing.
  - The prohibition of temporary shelter constitutes an interference with life, liberty, and the security of person of the homeless.
  - The prohibition is overbroad and arbitrary, and not consistent with the principles of fundamental justice.
  - The infringement is not justified under s 1 of the Charter.
  - The impact is disproportionate to the disadvantages.
- The defendants are not asserting a property right and they do not seek to have public property allocated to their exclusive use. Nor does it amount to an appropriation of public property.
- The by-laws were struck down.

Notes:

- In some ways this is a property rights issue:
  - As the court said, it is not an issue about having public property rights allocated to the homeless' exclusive use. Rather it is about not excluding the rights of the homeless in using the public space.
  - S 7 does not allow the property rights to be restricted.

BOUNDARIES

AIRSPACE RIGHTS

- The origins of boundaries are found in Roman law and the maxim: *cujus est solum ejus est usquw ad coelum et ad inferos*.
  - It means whoever owns the soil, holds title all the way up to the heavens and down to the depths of the earth.
  - It is a useful starting point but has not been applied literally by the courts.
  - Regarding airspace rights, the owner of land has rights to the airspace above the surface, hence Condo owners are given a strata title.
  - These rights to not extend infinitely upwards, as there is a balance to be achieved between the landowner and the public.

**Didow v Alberta Power Ltd.**

1988 ABCA 257

Facts:

- Has the respondent, Alberta Power, trespassed the airspace above the appellants’ land.
- The utility constructed a power line on the municipal road allowance along Didow’s land.
• The center of the pole to Didow’s land is 2 ft., but there are cross arms that protrude 6 ft. into the airspace above Didow’s land. This is the source of the trespass.
• Didow says he cannot plant trees nor can he operate machinery safely.

Issue:
• The issue before the court is whether the rights acquired by Didow to the land extend to the column of air above the boundaries of the land.

Analysis/Holding:
• The appeal is allowed.
• The Court of Appeal cites the Latin maxim, and states there are two groups of trespasses: permanent and transient.
• The authorities have said that the land owner has the right to use and enjoy the airspace of their land but has stopped short of saying that they have ownership.
  • They, however, make it clear that a permanent intrusion into the airspace by a structure is forbidden as a trespass.
• There is a different between the transient nature of airplanes and permeant structures, namely the temporary passage and the height at which the plane travels.
• The test: the landowner is entitled to freedom from permanent structure which in any way impinge upon the actual or potential use and enjoyment of his land.
  • The pole arms constitute a low-level intrusion which interferes with the appellant’s potential if not actual use and enjoyment, and there is trespass.

Notes:
• The Province of Alberta since amended the relevant act to permit airspace intrusions like the one in Didow, without compensation or any other remedy.

PROPERTY RIGHTS AND ECONOMICS LECTURE

• The Coase Theorem
  • In the absence of transaction costs, any initial assignment of rights will lead to an efficient result.
  • This tells the legal system that you do not have to get it right, right away. The law is not that important in terms of who gets the land.
  • The legal rights are factors of production just like anything else. Farmer needs rights against trespass as well as seed and soil.
  • The market will make sure the factors of production in such a way that they end up in the hands of the parties that value them most.
  • There has to be some initial assignment of rights for this to happen.
• Scenario 1:
  • Didow values the airspace at $15 K and Alberta Power values it at $10 K.
  • Didow would get the airspace rights.
  • If Alberta Power gets it, then Didow would make them an offer above $10K. Then he would get the rights.
• Scenario 2:
  • Didow values the airspace at 12K and Alberta Power values it at $25 K.
  • If Didow values the at 12K and gets the rights, then he would sell them to Alberta Power.
  • If Alberta Power gets the rights, they keep them.

• BUT, transaction costs - any impediment to bargaining.
  • Collective action problems
    • Free riding (everyone needs to chip in and one person does not)
    • Holdouts (you need everyone to consent, and one person holds out for money)
- Strategic bargaining
  - Bilateral monopolies
    - Two people refuse to budge, and negotiations break down.
- Non-productive costs
  - Costs of contracting
  - Costs of monitoring and enforcing

- Scenario 3:
  - Didow values it at 15K, Alberta Power at 10K, and the cost of bargaining is 7K.
  - If the right is assigned to Didow, this is still an efficient result.
  - If the right is assigned to AP, this is not an efficient result because someone values it more than AP, but the rights will not flow to Didow because the transaction costs are higher than surplus.
  - So, with transaction costs the legal rights are critical to efficiency.

- Minimizing transaction costs via legal rules
  - The law should mimic the market. Try to accomplish what the market would in a world without transaction costs.
  - Assign property to the likely highest value user. On balance you are more likely to get it right.
  - Who values the airspace at 5m? 50m? 5km?
  - The airspace can be thought of as having a spectrum of interests.
  - Choose a remedy to protect the entitlement.
    - Choose a property rule (injunction) when transactions are likely to be smooth. (trespass by an individual).
      - Parties set the price.
    - Choose a liability rule (damages) when courts are more effective. (i.e. trespass by the government)
      - Courts set the price.
  - Anytime we think the market will get it right we use the property rule. If we think that bargaining will break down or too complicated, then we can choose a liability rule, the courts can sort it out later.
  - However, using the court system costs time and money. The courts setting the price ex post may get it wrong.
  - Didow’s rights were protected by a liability rule and not a property rule.

- Endowment effect – a party is likely to ask more for an item if they currently hold it than one would be willing to pay to acquire the same item.
  - This also suggests that the initial allocation is important.

### SUB-SURFACE RIGHTS
- There are no absolute rules in subsurface rights.
- There are issues with the maxim, as a surface owner’s share of subsurface gets increasingly smaller the further down you go.

### Edwards v Sims – The Great Onyx Cave
Kentucky Court of Appeal 1929
**Facts:**
- Edwards owns a farm above the Great Onyx Cave, and finds an opening on his land.
- He develops the caves for public tours.
- His neighbor Pat Lee sues him claiming that the cave extends under his land.
• There was a preliminary issue about whether the cave should be surveyed, and Judge Sims ordered a survey, after which Edwards sued him (hence, Edwards v Sims).
• Edwards argued that he did not have to allow entry into the cave via his land for the survey.

Issue:
• Can the court invade the right of enjoyment of possession of property for the purpose of ascertaining the truth of a matter before it?

Analysis/Holding:
• The court can issue an injunction to permit a survey if the person applying for the survey (Lee) has a bona fide claim and shows the necessity for the inspection.
• An inspection was ordered on the basis that Lee had a claim based on the Latin maxim of cujus est solum...

Dissent (Logan J):
• The majority is allowing an act that will prove incalculable injury to Edwards without benefiting Lee.
• Logan is relying on his own judgment and says he cannot show any legal precedent for this.
• Edwards is deprived of the rights which are valuable, and his property may be destroyed of value upon the motion of one who may have no interest in that which is taken away.
  • Sims could not subject that what he is taking away to his own dominion or make any use of it.
• The rule should be that he who owns the surface is the owner of everything that may be taken from the earth and used for his profit or happiness.
  • Anything which he may take is subject to his dominion and may said it belongs to him.
  • A cave or cavern should belong to the person who owns the entrance, and ownership should extend to the utmost reaches that he has explored and connect via his entrance.
• The old maxim was never true because there was no reason to test since, since no one could have dominion over the air until recently.
• It should be held that he does not own that which he cannot use, and which is of no benefit to him and which may be benefit to others.
• Edwards owns the cave through right of discovery, exploration development, advertising, exhibition and conquest.

SUB-SURFACE RIGHTS ALBERTA

• In Alberta, most titles do not contain rights to mineral titles.
  • There are some mineral estates in the rights of private hands. Freehold mineral estates.
  • In 2010, there were amendments to the Mines and Mineral Act in Alberta to give pore space to the Crown, and that those have always been the rights, and there is no compensation available.

Pore Space
  • No definition in the Act is given.
  • All that we are told is the spore space is occupied by or formerly occupied by water or minerals below the surface of land.
  • Mines and veins that exist after minerals have been extracted.
  • Water is everywhere in the ground, so how broadly could this be interpreted?
  • They did this because of carbon capture and storage.

Example: Crown grants Black acre to A in fee simple, no mention is made of mines and minerals:
  • Also, could be called a Crown patent.
  • The maxim would suggest that A owns the mines and minerals. (cujus est solum)
• Now in 2017, s 35 of the Public Lands Act:
  • 35(1) 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.
• A grant is different than a reservation. Reservation holds something back from the grant.

• So, what are minerals?
  • Three tests (page 196-201)
  • The Vernacular Test,
    • What is regarded in the vernacular of miners, commercial people, and the landowners at the time the severance took place.
    • Accepted in most Canadian cases.
  • The Purposes and Intentions Test,
    • Not only the words used, but the leading purpose or object that the deed or statute embodies.
  • The Exceptional Occurrences Test,
    • Does not include ordinary rock but rather exceptional or rare substances, that is exceptional is use, character, value, or occurrence.

• There are also definitions in the Mines and Minerals Act, however, those are not necessarily the same as the definition of minerals in a grant. The definition only applies to the act.
• There is also a list in the Law of Property Act (page 23-25 in Statutes) at s 56 and 2 58.

• If A grants Black acre to B in fee simple no mention being made of mines and minerals?
  • Do the minerals pass? See s 7 of the Law of Property Act.
  • If you grant you are presumed to have granted all the rights unless you reserve them.
• You can have a division of the mineral rights and the surface rights. They can be owned by two different people.

• If the mineral rights are sold, there used to an implied easement (right of access) to go on to the surface to get the mineral rights.
• Come Leduc 1, this common law implied right was replaced by the Surface Rights Act (page 52 Statutes) s 12(1) describes the right of entry to land.
  • The act says in 12(2) that you cannot grant access via grant, unless it is express and there is separate consideration for the right of access.
  • This is designed to be a signal to the land owner that you need to consideration to give up right of access.

**LATERAL BOUNDARIES**

• Land Boundaries in Alberta.
  • The 49th parallel to the south, the 4th meridian which forms the border with Sask.
  • Parallel to the meridians are range lines.
  • Horizontal lines are called township lines.
  • The boxes created by the intersection of range lines and township lines are called "townships."
  • A township is broken up into 36 "sections". They are numbered by statute in a particular way. **They are numbered starting in the bottom right corner and head left, then snake up.**
  • Sections can be divided into quarter-sections. Each quarter-section can also be quartered (16 units in a section then, they are called "legal subdivisions."
  • Quarter section is 160 acres.
  • There are other divisions that can be made from there.
  • This is called the Alberta Township System.
• Boundaries set by Water:
  • Section 3 of the Public Lands Act:
    • All permanent and naturally occurring bodies of water and all naturally occurring rivers, streams, watercourses, and lakes is vest in the Crown in right of Alberta.
    • This does not operate if there is an express description of someone else owning title.
    • The language has to be express to override 3(1).

• What if the lake recedes and more of the 1/4 section is exposed as dry land. Who owns it?
  • Depends on **accretion principles**.
  • Accretion to the land is alluvion and recession of the water is dereliction.
  • **The adjacent landowner has a riparian tenement, and has riparian rights including the right to gain from accretion.**
  • **It must be slow, gradual, and imperceptible (cannot be observed in actual progress).**
  • It must result from the action of the water in the ordinary course of the operations of nature, and not by some unusual or unnatural action.
  • Artificial means do not mean they are not true accretion, provided the artificial means are employed lawfully and not with the intention of producing an accretion.

• You own a 1/4 section minus 9 acres, so 151 acres, which belong to a lake.
  • The lake dries up and recedes but does so slowly and imperceptibly.
  • But can accretion be displaced by the grant?
    • Yes, accretion is a normal incident, but a grant can specify that it does not apply.
    • In this case, the grant specifies 151 acres more or less. What does more or less mean?
      • It could mean 151-160 or 0-151.
      • Or it could mean, "about the specified number of acres", as designed to cover such small errors in surveying.
      • Words of abundant safety or caution.
    • So, is the grant held by the 151? Probably not, the statement of the grant is the quarter section. The 151 is a description of the 1/4 not covered by water at the time of the grant.
    • The Courts have said natural monuments are typically preferred over distances. The 1/4 section is mapped out by artificial monuments, so they are preferred over acreage.
    • Although the Crown is able to withhold the right in a grant, they have to do it in clearer terms than this.

• For accretion to benefit a land owner it must be slow and imperceptible.
  • You can gain by accretion or you can lose by accretion. (erosion, flooding would cause you to lose part of the land)
In Alberta, what would happen if there was a sudden flooding of the riparian tenement?
- Would the Crown gain title since it holds title of the beds and shores?
- Public Lands Act 3(1)
- Does the statute do anything to suggest that you cannot lose by sudden accretion in the same way you cannot gain by sudden accretion?
  - Public Lands Act says notwithstanding any other law, such as the law of accretion.
  - Something under water does not simply become a bed or a shore. Sudden flooding does not produce a bed or a shore. But if the flooding is persistent, it might eventually produce a bed or a shore.

CHATTELS AND FIXTURES

FIXTURES

- A fixture is a chattel that has become sufficiently attached to the land and is transformed to become party of the realty.
- The sale of Black acre carries with it all the fixtures on the property except those intentionally excluded.

Stack v Eaton (1902), 4 OLR 335,

- Sets out the principles that govern what a fixture is in Canadian Law:
  - 1) that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
  - 2) that articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue to chattels.
  - 3) That the circumstance necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
  - 4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of annexation.

- The degree of annexation and object of such annexation
  - Annexation - the attaching of the article to the land.
  - Degree of annexation - how fixed is the article to the land.
  - Object of annexation - where the articles affixed to the land for the better use of the articles as goods or for the better use of the land as land (land can also = building).

- There are also special rules for tenant fixtures.
- The rule is a chattel may be attached to become a fixture, but the tenant has a chance to restore the fixture to its chattel status.
- There are some limits as discussed in the reader, timely removal, right cannot have been contracted away from, apply to only some fixtures, cannot have cause significant or severe damage to the freehold.

La Salle Recreations Ltd v Canadian Camdex Investments Ltd


Facts:
- The carpeting was purchased under a conditional sales agreement, which the carpet vendor retains title security until the full price is paid.
The building where the carpet was, also had a mortgage on it. The mortgage was listed in the land titles office, and the conditional sales agreement could have been registered but was not. As a result, it is not binding against subsequent mortgagees of the land.

Issue:
- Dispute between secured creditors over the right to repossess wall-to-wall carpeting.
- As a result of the carpet not being registered, the issue came down to whether the carpet was a fixture.

Analysis/Holding:
- The Court goes through the Stack and Eaton Principles (above)
- The carpet was determined to be a fixture by its nature of having been annexed for the better use of the building as hotel (object of annexation), albeit the degree of annexation was slight due to its ability to be removed without causing damage.

Diamond Neon (manufacturing) Ltd v Toronto - Dominion Realty Co.

[1976] 4 WWR 664

Facts:
- The signs were put on the land under a contract between Diamond and a tenant on the land, Uptown.
- There was a contract between the two that stated the displays remain diamonds property and will not be deemed fixtures. Upon termination of the lease diamond may remove the signs.
- The land was owned by Western Canadian Properties and leased to Uptown. Eventually, Uptown transferred that lease to Dueck along with the contract for the signs. Eventually Dueck entered into a new lease for the signs with Diamond.
- When the lease between Dueck and Diamond expired, and Dueck's lease of the land expired, the signs were left there. Diamond thought another business might use them.
- Then Western Canadian sold the land to TD. TD had no knowledge of any contract relating to the signs.
- The signs were sold by TD to Nettie Holdings.

Issue:
- When the defendants purchased the land, were a metal pole fastened to a block of concrete embedded in the soil, a large sign hanging from that pole, and a large sign attached to the shack on the land fixtures?
  - If so, then when the defendant sold them, it is a conversion of chattels belonging to the plaintiff.
  - If no, the plaintiff can lay no claim to them and the action for conversion will fail.

Analysis/Holding:
- The degree and object of annexation both support the conclusion that the signs had become part of the realty before the defendant bought the land.
  - When was the moment the plaintiff lost its rights to retake the sign?
    - When the lease of the land to Dueck expired (it vacated the land).
    - After Dueck left that land, Diamond Neon had no more right to recoup the signs since they were never in contract with Western Canadian who owned that land.
    - The tenants have the right to restore a fixture to a chattel status. It has to be done in timely manner, after the lease of the land expires, Diamond Neon has not removed the signs in a timely manner.
    - Diamond Neon's right to the land is parasitic to Dueck.

Dissent:
- The signs themselves indicate that they were to show that they were intended to continue as chattels through their object and degree of annexation.
  - A sign bearing the name and business of a former tenant is not necessarily conclusive of the matter as to the intention between landlord and tenant that the signs were to remain chattel, BUT it ought to have put the purchaser of the land on enquiry as to whether the signs were part of the realty.
• The purchaser then subsequently removed the signs and sold them as chattel confirms that the expectation that they might also have remained chattel.

**FIXTURES IN ALBERTA**

• In Alberta, it is the Personal Property Security Act:
  • If you have a security interest or a lease, you can protect your investment by registering your agreement under the PPSA and under the Land Titles Act.
  • This legislation does allow you to register chattel in case it becomes a fixture. Its sole scope is a security interest over a chattel.

**TRANSFORMATION OF CHATTEL OWNERSHIP**

• What happens when goods or labour belonging to two different people are mixed?
  • Goods of two people are confused or admixed, or comingled.
    • See Glencore
    • Has the interaction gone to a stage where the items cannot be separated out?
      • Fungible goods are ones that can be replaced with a good that is the exact same as it.
      • This is a practical question, even if they could be technically separated, if they cannot be practically separated, then they are confused.
    • When you have a wrongful intermixture of fungibles, it used to be the case that the victim would get the entire mixture. (Blackstone)
      • In cases of substantial justice, the court would not follow this rule.
      • This old approach was discarded in favour of the rules from the new case.
    • The new approach is you get back what you put it. Ambiguity is decided on the favour of the plaintiff.
      • This approach functionally puts the onus on the defendant to show much of their property was in the mixture, rather than the plaintiff proving it on the balance of probabilities.

• What happens when two goods are combined and functionally become one thing. (Accession)
  • There is no longer the opportunity to simply cut it in half, or give co-ownership.
  • How attached is too attached?
    • McKeown case.

• The principal contribution from one side is the transformation of the good.
  • Grapes and the labour to make it into wine.
  • Has there been a sufficient transformation?
    • The greater contribution may be entitled to retain the thing.
    • In the case of clear wrong doing, the principle chattel allocation may not be followed.
      • Corn stolen and made into whiskey. The Court said no because there was a wrongdoing, so the whiskey was given to the innocent party.
      • This could also be related to McKeown since the thing added to the yacht was a good portion labour.

**Glencore International AG v Metro Trading International Inc**

[2001] 1 Lloyd’s LR 284 (QB (Comm Ct))

**Facts:**
• Metro buys, mixes, and sells oil. Glencore had a contract for the storage of oil at Metro’s facility in the United Arab Emirates. The oil was co-mingled with oil of similar quality.
Metro also had a subsidiary who was in a contract with Texaco. Texaco gave crude to Metro, who refined it, in exchange for some of the oil.

Metro went bankrupt and was storing 750,000 tonnes of oil, when there should have been 2.5 million.

**Issue:**
- Ownership of the co-mingled oil and ownership of the oil that had been transformed.

**Analysis/Holding:**
- The transfer of goods to a bailee for storage has no effect on the general property in the goods which remains at all times with the bailor.
  - The bailee must redeliver the goods to the bailor in accordance with the terms of the bailment.
  - If the goods retain their original identity, then there is no issue.
  - If they do not retain their original identity by way of mixing into bulk, then issues arise.
- When one person blends his oil with oil of a different grad or specification belonging to another person with the result that a new product is produced, that new product is owned by them in common.
  - The proportions in which each contributor should reflect both the quantity and value of the oil which each has contributed.
  - Means you do not just go by liters, since you are also considering value.
  - Any doubts about quantity or value contributed by the innocent party should be resolved against the wrongdoer.

**Principles:**
- **Unauthorized commingling and blending**
  - Where B wrongfully mixes the goods of A with the goods of his own, which are substantially of the same nature and quality, and they cannot be in practice separated, the mixture is held in common, and A is entitled to the same quantity of goods that they put into the mixture.
    - A is also entitled to damages from B, if suffered, in respect of quality or otherwise as a result of the mixture.
    - This applies when goods of the same nature are mixed, and revolve around being unable to identify one parties goods from another.
- **Property in chattels are not lost simply because they are processed into another form.**
- Whatever the alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material.

- There are two potential considerations:
  - 1) the first is where a wrongdoer takes oil belonging to two or more persons which he then blends for his own purposes.
    - In such a case, there is no doubt that the two contributors become owners in common of the blended bulk.
    - Each can identify his own oil as a constituent of the bulk and as a wrongdoer the blender cannot acquire title.
  - 2) the second case is where a wrongdoer takes oil belonging to another which he then blends with his own oil. The innocent contributor is able to identify his oil as a substantive constituent of the bulk and as a wrongdoer the blender is unable to override his property.

**McKeown v Cavalier Yachts Pty Ltd**

*(1988), 13 NSWLR 303 (SC, Eq Div)*

**Facts:**
- McKeown, the plaintiff, entered into an agreement with Cavalier Yachts (defendant) to complete work on a yacht. The plaintiff gave the defendant a trade in yacht and a down payment of $2,000.
- Cavalier Yachts sold its business to Spartech, however, the contacts of Cavalier’s customers were not assigned to Spartech.
• The plaintiff did not know of this owner change and entered into a new agreement with Cavalier. The plaintiff had to pay $20,000. After that Spartech did $24,409 worth of work. The hull the plaintiff started with was worth $1,777.

• Spartech said it was not paid for the work, and had no contract with McKeown. Spartech assumed control of the yacht saying that the value they added ~$24,000 made the yacht theirs as compared to the value contributed by the plaintiff.

Issue:
• Ownership of a yacht known as Cavalier 30/10.
  - McKeown fulfilled the terms of his contract with Cavalier claimed ownership and asked for a judgment of specific restitution.
  - Spartech claims its theirs because of the work that they completed on it.

Analysis/Holding:
• The judge holds that the yacht is chattel which would be seriously affected if the "accretions" added by Spartech were removed. To remove the additions would destroy the current article so the law of accession applies.
  - This is the injurious removal test.
• The hull was worth $1,700 and the accretions are worth $24,000. Which is the major chattel to which accretions were added (principal chattel)?
  - The judge takes the view that the hull was added to piece by piece, and as those pieces were add they became the property of the hull owner, McKeown.
    - Spartech should have taken the process steps of finding out who the yacht belonged to rather than assuming it was theirs and completing work on it.
• The hull, along with the work completed by Spartech, is the property of the plaintiff.
• Regarding the specific restitution, is the chattel sufficiently unique so that damages are not appropriate?
  - Yes, the yacht should be returned to the plaintiff.
  - Should Spartech be compensated for the improvements?
  - The plaintiff wanted the work done, but thought that his yacht trade-in was sufficient payment.
  - The plaintiff is ordered to pay the difference between the trade-in value and the value of the work done by Spartech $4,409.

Principles:
• If minor chattel can be detached, then it can be ordered to be returned, or it cannot be returned and then compensation can be awarded. If minor chattel cannot be detached, then compensation can be awarded.
• The law of accession:
  - If any corporeal substance receives an accession by natural or artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidery of cloth, the original owner is entitled by his right of possession to the property in its improved state.
  - Similarly, when the goods of one person are affixed to the land or chattel, for example a ship, of another, they may become part of it and so accrue to the owner of the principle thing.
  - It is relevant whether an innocent third party had added to someone else’s chattel without any actual or constructive notice of another’s ownership and cases where there was no such knowledge.

TESTS FOR ACCESSION

• 4 tests for accession (from Thomas v Robinson, [1977] NZLR 285 (SC) page 242):
  • 1. Injurious removal - the added chattel cannot be separated from the principal without destroying or seriously damaging it.
    • If it can be removed without damaging the principal chattel there is no accession even if the chattel is of functional or vital importance.
• **2. Separate existence** - accession only arises if there had been complete incorporation to the point of extinction of the identity (a brick in a house).

• **3. Destruction of Utility** - even though the article can be removed without damage to the principal chattel, would that nevertheless destroy its usefulness as such.
  - An automobile is a functional whole rather than bunch of parts. Additions and subtractions should blend with the principal chattel for the purpose of its existence.

• **4. Degree and purpose of annexation** - articles intended to be permanent parts of the chattel would pass on accession, but others could be treated as mere accessories depending on the facts of each case including the degree of annexation, the nature of the chattel and the intention of the parties.

Another question of accession, is what has acceded to what (Principal chattel)?
- In chattels v fixtures, the chattel becomes part of the land.
- Here it is not so clear.
  - 1. Value test at the time of attachment (this was not the case in McKeown).
  - 2. Which item was auxiliary to which? (functional test, what was added to what?)
    - This is implicitly what is done McKeown.

**DAMAGES FOR TRANSFORMATION OF CHATTEL OWNERSHIP**

• 1. Free acceptance
  - The idea that you saw a benefit was being conferred and you acquiesced to let it continue.
  - The acceptance must be free, you must have had an opportunity to say no.
  - There was no free acceptance in McKeown (the plaintiff though they had already paid to have the work done, they were not going to pay to have it done again)

• 2. Incontrovertible benefit
  - There was a benefit, but it must be incontrovertible.
  - You cannot deny it was a benefit.
  - This is the case in McKeown, because the plaintiff got what he wanted, a total yacht, so it cannot be said that he did not received a benefit.
  - So, the plaintiff had to pay slightly more than they wanted to get the good they wanted.

**Gidney v Shank**

1995 CarswellMan 446, [1996] 2 WWR 383 (CA)

**Facts:**
- Feuerstein was the owner of a canoe that was stolen from him before May 1983.
- Gidney purchased the canoe from a third-party, Hedman in May 1983. It was in poor condition. Gidney repaired the canoe and invested 100 hours and $800.
- In Nov 1983 the police seized the canoe from Gidney. Cam Walker was charged and convicted of stealing it.
- Gidney and Feuerstein both claimed to own the canoe. It was returned to Feinstein and Gidney brought action.
  - Feuerstein, along with the police and AG were sued.
  - The statement of claim demanded return of the canoe or a judgment of $1,900.
  - That amount included the value of the work put into it and loss of enjoyment, and damages for unreasonable seizure.

**Issue:**
- Claim for restitution as a remedy for unjust enrichment. At trial, the claim was allowed in part. $800 was awarded, the value of the time and materials put into the canoe.

**Analysis/Holding:**
• For unjust enrichment there must be:
  1. An enrichment
  2. A corresponding deprivation
  3. The absence of any juristic reason for enrichment
• The Court did not do an accession analysis.
• 1&2) The trial judge, and the appeal judge hold that there was an enrichment as the canoe was returned to Feuerstein in an improved condition. There was also deprivation, as Gidney lost the benefit of his labour and expenditures.
• There was a juristic reason for enrichment, so it cannot be unjust.
  • Gidney and Feuerstein had no relationship and the latter had no idea that the former put in time and money into the canoe.
  • Feuerstein never did not consent or agree to the investment made by Gidney.
• Appeal allowed for Feuerstein.

Notes:
• In this case there would have been no free acceptance. Feuerstein had no idea that there was working being done on his canoe.
• Was there an incontrovertible benefit?
  • Maybe not, Feuerstein may have gotten a benefit, but it is not necessarily incontrovertible.
  • We do not know what Feuerstein wanted the canoe for or in what condition.

POSSESSION

• Possession or the right to possession, not ownership or title per se, determine the ability of an owner to sue in tort in response to a wrongful interference with chattels.
• Two core components:
  • Animus possidendi – an intention to possess.
  • Factum (or corpus) – physical control.
• Constructive Possession – having control of an item but not possession, meaning one of the elements of possession is absent.
• Livery of seisin - transfer of possession, used to be a ceremony that was used to transfer.

The Law of Wild Animals

• See back to Yanner v Eaton.
• In common law, wild animals were the subject of the most limited property rights.
• If you captured the animal, title was yours via possession.
• If the animal escapes title is lost.
  • There is an exception if the intention of the animal is to return (animus revertendi).

• Pierson v Post (1805) 3 Caines 175
  • Post: Original Hunter
  • Pierson: capturing interloper
  • Held for Pierson.
  • Post was chasing the wild animal but that is not enough, you must capture the animal.
  • Pierson had factum, so the rule was followed that he had possession.
    • This rule is softened in two ways, if the beast was wounded and then pursued was counted as close enough for possession. There is enough certainty in this case.
    • This is a leading American case.
• **Law of Capture in Newfoundland and the seal hunt**
  • **Clift v Kane (1870) (NFLD SC)**
  • Ships would kill seals, put them on shore and then continue to hunter other seals.
  • Other people would then take them from shore.
  • There can be abandonment of person property given a subjective intention to abandon them.
  • If you kill an animal your title is absolute.
  • The case of Power v Jackson, established a deemed abandonment:
  • Then, in **Clift v Kane**,
    • They held in majority there was no subjective intention to abandon and the seals where still the first ships. Ship 1 had full title. Ship 2 may have entitled to a salvage fee if the seals were brought aboard.
    • The dissenting judge (Robinson J) however favoured the deemed abandonment issue. Killing it was not enough, if the seal remains unshipped it may be exposed to various casualties.
      • If you cannot recover, they are lost to you, and returned to the common stock.
    • The CJ point was once the seals were killed and marked they were the property of the first ship, unless subjectively abandoned.
      • Gives something to both parties, title and salvage.
    • The salvage fee has issue of how do you know if they were abandoned.

**Popov v Hayashi**

2002 WL 31833731 (Cal SC)

**Analysis/Holding:**

- The definition of possession used by the Court was that full control was achieved once the momentum of the ball and the momentum of the fan catching the ball ceases.
- Popov had intended to establish and maintain possession and almost had control, however, the crowd interfered, and he never maintained full control.
- They were to split the ball because Popov had a pre-possessory interest and Hayashi had possession of the ball, however, there was a cloud on its title.
- Both had a superior claim to the ball against the world, but each has a claim of equal dignity against the other.

**Principles:**

- You can have a pre-possessory interest, prior to possession.
- When actor undertakes significant yet incomplete steps to achieve possession of an abandon piece of property and the effort in interrupted by the unlawful facts of others
- It constitutes a qualified right to possession which can support a cause of action for conversion.

**ADVERSE POSSESSION**

- Gives title to people to had last possession as opposed to first possession.
- If you are on someone's else land for long enough, you will be able to prevail in title even against the true owner.
- What is the requisite period for adverse possession?
  - Limitations Act 3(1):
    • 2 years after which the claimant first knew or ought to have known
    • Or 10 years
    • 3(4) says when you are dealing with land its 10 years.
  - Limitations Act 3(6):
    • (6) The re-entry of a claimant to real property in order to recover possession of that real property is effective only if it occurs prior to the end of the 10-year limitation period provided by subsection (1)(b).
• This means that after the 10-year period the claimant cannot re-enter the property to regain a claim.

• How do you stop the 10 years?
  • You sue them.
  • Re-enter the land so it is no longer exclusive and thereby show one of the elements of adverse possession is defective.

• Why do we have adverse possession?
  • Reliance issue of person who has been using the land.
  • Economic rationale: prior to registration systems, you had to show root of title and the deed to the land before you could sell land. Sometimes it was hard to tell if the paper trail was legit or not. So even if the paper trail was defective they could so they were in possession for 10 years and others were therefore statute barred. It wiped out old, stale claims to the land.

• If we have a title system, why do we need adverse possession today?
  • Section 69 of the law of property act.

• If title is transferred by the adverse possessor, the clock on ten years does not stop.
  • The period is tacked from one squatter to the next.

• The true owner is being adversely possessed but then transfers the title to TO', what is the effect on the 10-year clock?
  • Limitations Act 3(8)
    • If the title is given via gift to a donee, the clock does not start again.
      • Inheritance is a donation.
    • If the title is transferred to a purchaser, the clock starts again (this is implicit in the donee argument).
      • Why? the land title is supposed to be a mirror of all claims, so if you buy land and there is not squatter on the title, they do not have a right.

• What if 10 years have already passed and then it is sold to TO'?
  • The clock resets, because you have acquired a title free of the claim.
  • What can adverse possessor do? Put a notice on the title after the ten years. File a caveat. Once a caveat has been filed, the land titles office has to let the true owner.
  • A caveat is a notice of interest.

**Keefer v Arillotta**

(1976), 13 OR (2d) 680

**Facts:**
• The plaintiff had gained a possessory title to a portion of the defendant’s land subject to an easement remaining in the appellants.
• The land in question runs between the two properties. The defendants (Keefer) who gained the land are to the south whereas the plaintiffs (Arillotta) are to the north.

**Issue:**
• The possession of the plaintiffs and their predecessors in title was open, visible, and continuous for more than the requisite number of years but the question is was there exclusive possession?

**Analysis/Holding:**
• The Court examines the following factors:
  • The nature of the land.
  • The Chain of title:
• Cloy originally owned both pieces of the land and eventually sold the plaintiff’s property to Lynch with a right of way ingress and egress over a portion of his property. This is the piece of land that in the subject of this appeal.
• The deed of the land was amended eventually to include the grant of the right of way to Lynch.
• When it was sold to the defendants the grant was subject to the plaintiff’s right-of-way.
• The conduct of owners:
  • The plaintiff’s property is a residential one and the strip of land in question has been used as a driveway. The plaintiffs had kept a car on it at one point and gravel and kept it free of snow.
  • The plaintiffs when the Cloys were still on the property move the driveway on to the right of way to line of with the driveway.
  • The strip of land originally was used to gain access to some buildings related to the business of the defendants at the back of the lot.
  • The Cloys have never used the driveway but delivery trucks often did.
• The trial judge had said that the possession of the plaintiffs and their predecessor in title was not consistent with the rights accruing from specific grant of right of way but far exceeded them
• The plaintiff has failed in 2 and 3.
  • I do not believe that while the Cloys owned the strip of property in issue, the Keefers ever intended to oust them from the limited use they wanted to make of it.
  • The Cloys were accommodating of the neighbor.
  • The Keefers’ possession was not with the intention of excluding the Cloys from the limited used they wanted to make of the property.
  • The Cloys did no discontinue their possession of any party of the strip of land other than the portion at the rear occupied by respondent’s garage.
    • The owners made such use as they wanted, it was used as an access to the apartment above the store and to the entrance of the addition at the rear of the store.
• The plaintiffs got the garage area because they abused the right of way, but the easement to the lane way gave them a right to pass and there were not excluding the owners.
• Appeal allowed for the defendants, i.e. true owners.

Principles:
• The onus is on the claimant of the possessory right and it is harder for the claimant to discharge that onus when he is on the property pursuant to a grant.
• The person claiming the possessory title must establish (Pflug and Pflug v Collins):
  • 1. actual possession for the statutory period by themselves and those through whom they claim.
  • 2. that such possession was with the intention of excluding from possession the owner or persons entitled to possession
  • 3. discontinuance of possession for the statutory period by the owner and all others, if any, entitled to possession.
• If he fails in any one of these respects, his claim fails.

Notes:
• To claim adverse possession, you must be in actual possession of the land.
  • What is actual in relation to? Keefer case:
    • Constructive possession - The legal possession of an object, even if it was not in a person’s direct physical control.
    • The person must have had knowledge of the object, and as well as the ability to control it.

Teis v Ancaster (Town)
(1997), 35 OR (3d) 216
Facts:
32
• The Teis claimed possessory title of land, a ploughed strip and a laneway, located on the western edge of the town park.
• For more than 10 years they farmed the land, and both the Teis' and Town thought that the land belonged to the Teis. Neither party knew there was adverse possession.

Issue:
• At trial, the Teis' were given ownership by adverse possession.
• The issue on appeal is whether a person claiming possessory title must show inconsistent use, where there is a mutual mistake as to ownership.
• The second issue is whether the Teis' had actual possession for a ten-year period prescribed by the limitations act.

Analysis/Holding:
• The Limitations Act bars the true owner from remedy and extinguishes their title at the end of a ten-year period of adverse possession.
• Possession must be open and notorious:
  • Open possession shows that the claimant is using the property as an owner might.
  • It also shows that the true owner on notice that the statutory period has begun.
  • The doctrine of adverse possession is based on the true owner’s failure to take action within the limitation period.
• The element of adversity means that the claimant is in possession without the permission of the owner.
• If the claimant acknowledges the right of the true owner than the possession is not adverse.
• 1) Continuous use:
  • The Teis possession was seasonal or intermittent and not continuous?
  • The nature of the acts needed to establish possession depend on the type of property.
  • In some cases, intermittent use satisfies the element on continuity.
• Test #2. In a case of mutual mistake, how could the claimant intend to dispose the true owner when they believed that they were the true owners?
  • Occupation under color of right or mistake might justify an inference that the trespasser occupied the lands with the intention of excluding all other which would of course include the true owners.
• Inconsistent use does not apply to a case of mutual mistake and the trial judge did not err in finding of actual possession. Appeal dismissed.

Notes:
• Alberta is the only province with legislation that protects all municipally owned land against claims of adverse possession.
• Municipal land is not crown land, only provinces and federal government can hold Crown land.
• So, can Crown land be adversely possessed?
  • It is possible in other jurisdictions but not in Alberta. See limitations act 2(4)(a) or the public lands act s 4.

Bentley v Peppard (1903), 33 SCR 444:
• If you are entering on to land under colour of title (mistake premised on title), actual possession of part of the land will put you in constructive possession of the described area.
• See 4 note on page 313.

ADVERSE POSSESSION OF CHATTELS

• If property was stolen from you and then sold to someone else, that someone else does not have title because:
  • Nemo Dat Quod Non Habet - You cannot give that what you do not have.
• Could the new owner claim the statute of limitations?
• 2 years after it was discoverable
  • What is the it? - See 3(1), there are three things.
  • 10 years, whichever comes first.

• After the first of these periods, the defendant becomes immune from liability.
• Is your title extinguished after 10 years? You cannot sue but what if you peacefully come back into possession of it?
  • In Barberree v Bilo (1991), 85 Alta LR (2d) 216 (QB), the original owner’s title was not extinguished.
  • So, after the person who stole the bike (A) from (B) and the two years passed, B could no longer sue A.
  • A then sold the bike to C, and B then was able to sue C.
  • The limitation period began anew.

**FINDERS LAW**

• Basic rule: Finder has rights good against the world, except the prior owner or anyone else with a prior right.
  • Could be a previous finder.
• Rationale: If finders did not have rights it would become a free for all against found property.
• As against wrongdoers, possession is title.
• In Canadian property law, title is a relative term.
• Loss of a chattel does not change the right of property (Clark v Maloney).

**Rights of Finders:**
  1. Takes right only if abandoned and under finder care and control
  a. Loss does not change nature of right
  2. Finder acquires limited rights if trespassing or w/ dishonest intent
     a. Even trespasser may acquire rights if no criminality (Bird)
     b. Can’t profit from wrongdoing (Baird)
  3. Finder acquires right to keep it against all those but true owner or one w/ prior right
  4. Unless wholly incidental, employees who find, find for employer.
  5. Obligation to take all reasonable steps to find true owner.

**Rights and liabilities of occupier:**
  1. Superior rights (in land or building) than finder for chattels in or attached, regardless of awareness of the chattel
  2. Superior rights to finder for chattel upon or in, except if, before finding has manifested intention to own or control area in question.
  3. Occupier must take reasonable steps to acquaint owner to chattel
  4. Occupier of chattel, e.g. ship, car, trailer, plane is treated same as building.

**Trachuk v Olinek**

(1995), 177 AR 225 (QB)

**Facts:**
  • Trachuk is the plaintiff, and Olinek, Fulkerth, Austin and Muntz are the four defendants.
  • Each group claims right to possession and title of $75,000 that was found buried.
  • Trachuk is the occupier of the quarter section where the money was found, whereas the four defendants base their claim on having found the money, and having rights against the world except the true owner.
  • Marathon owns the ¼ section, and Amoco leases a portion of it for an oil well site. Three other companies have right of way easements for access to pipelines and the oil well.
  • Signalta is one of those 3 and contracted the four defendants.
• The money was found within 2 feet of the shed that housed the oil well and on the shed side of the fence built by Trachuk.
• Trachuk leases the ¼ section from Marathon and was in negotiations to buy the land but had not yet done so. He built a fence with the permission of Marathon and Amoco, but decided himself where it should be.
• There is no evidence as to who the true owner of the money is.

Issue:
• The parties’ claims revolve around the rights of persons who claim to be in possession or enjoy rights to possession so who has the superior right?

Analysis/Holding:
• Persons who discover money and assume control of it under these circumstances assume the position of a quasi-bailee of the money, where bailment is the rightful possession of goods by one who is not the owner, by mutual consent.
• The finder of a lost chattel has no absolute property or ownership right but has a right to keep it against all but the true owner or one who can assert a prior right to keep the chattel.
• When something is deliberately hidden, the general rule of the finder having a right against all except the true owner does not apply.
• When the chattel is under the land or attached to it, a recoveror has possessory title subject to the rights of the owner or occupier of privately owned land.
• Did Trachuk have de facto possession of the land where the money was uncovered, or had he been granted such a right?
  • De facto possession in this case means occupancy, which requires the intent and the ability to control the use of the land and exclude others from it.
  • The evidence does not support this de facto control of the land by Trachuk since he erected a fence around the land in question to keep his livestock out and he seldom enter the enclosure, and did not intend to exclude workers from the well site.
• The four defendants were on the well site with permission and the implied authority to excavate.
• Trachuk had no right to restrict the four defendants from entering and would have been restricted himself from excavating that portion of the quarter section under the rights of Amoco and the right of way easements.
• The money was not in the possession of Trachuk when uncovered by the defendants, who are given possessory title to the money.
  • Note: A lease is a right in rem, so when you buy a property the lease runs with the land.
  • If an employee finds something during the course of employment, the employer may have rights to the thing if they assert them. The same rights do not, however, apply to independent contractors.

Historic Resources Act
• 30(1) Subject to subsection (2), no person shall make an excavation on any land in Alberta for the purpose of seeking or collecting historic resources unless the person is the holder of a valid permit issued under this section.
• 31 A person who discovers an historic resource in the course of making an excavation for a purpose other than for the purpose of seeking historic resources shall forthwith notify the Minister of the discovery.
• 32(1) Subject to subsections (2) and (3), the property in all archaeological resources and palaeontological resources within Alberta is vested in the Crown in right of Alberta.

ABANDONMENT
• Abandonment relinquishes the entitlements of personal property.
• When is property abandoned?
• **Stewart v Gustafson, 1998 CarswellSask 581 (QB)**
  • It is a question of fact that must be proven by the party relying on the principle.
  • The owner’s action must be shown to clearly manifest an intention to surrender ownership of the chattel in use.
  • Intention in this case is of paramount importance.
  • Consider the following factors:
    • 1) passage of time
    • 2) Nature of the transaction
    • 3) the owner’s conduct.

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**TRANSFER OF TITLE – GIFTS**

• There is a difference between gifts and bargains. Gifts require delivery, signature, or attestation, whereas contracts require offer, acceptance, consideration.
• The legal goal of a gift is to effectuate donative intent and formalities are required to put that intent beyond question.

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**Nolan v Nolan & Anor**

[2003] VSC 121

**Facts:**
• Three paintings by the well-known artist Sidney Nolan are said to have been given from Nolan to his wife Cynthia, and now belong to her estate including Jinx Nolan, Nolan’s adoptive daughter.
• The paintings had remained in Nolan’s possession prior to and after Cynthia’s death, and up until his death.

**Issue:**
• Were the paintings a gift?

**Analysis/Holding:**
• Gift of chattels, there are three recognized methods for making a valid gift of a chose in possession (a thing someone has actual possession of).
• A) a deed; B) declaration of trust; C) delivery
• The plaintiff is not asserting the gift was affected by deed or declaration of trust. They depend on the prior establishment of a valid gift to Cynthia by Nolan.
• Possession is prima facie evidence of property, and the defendants have had continuous, peaceable possession of the paintings for an unbroken period of 27 years.
• The plaintiff has the onus to establish the elements of a gift of chattels effected by delivery. The essential elements are:
  • 1) **intention to make a gift**, usually expressed by words of present gift;
    • The words of present are not required but the intention must be manifest and made with certainty.
    • There must be subjective intention.
  • 2) **intention on the part of the donee to accept the gift**;
  • 3) **delivery (or the method of effecting a gift)**.
    • It is the legal act essential to complete the gift, it transfers both possession and ownership of the chattel to the donee (by perfecting the gift).
    • Valid donation marks the termination of the donor’s dominion.
    • **Delivery may be actual** (manual transfer) or **constructive** (e.g. when the nature of the goods make manual delivery impractical, manual delivery is not required and other acts are sufficient to show change in possession).
    • Unauthorized appropriation by the donee cannot constitute valid delivery.
• In common households, there are issues with delivery because how can you tell whether there is a transfer of possession.
• At any stage until delivery, a donor can validly retract the gift.
• The promise to make a gift, or an expression of gift by words of future intention, however clear and unqualified is not sufficient to establish a perfect gift.
  • It is evidence of donative intention.
• **There was no donative intention and it is a necessary element for a gift, so there is no gift to be found.**
• There was also no evidence of any act of delivery.
• The plaintiff also lost at the High Court because she was passed the statute of limitations and may have granted adverse possession to the person who had the paintings for 27 years.

### Re Bayoff Estate

2000 CarswellSask 25 (QB)

**Facts:**
• The deceased gave the key to a safety deposit box to Simard and said everything in there is yours. This was done in the presence of lawyers.
• In the safety deposit box were a bunch of savings bonds and some deeds to property, which all parties agree are not the subject of the gift and subject to the will.

**Issue:**
• The validity of certain gifts made by Bayoff shortly before his death.

**Analysis/Holding:**
• **The gift was valid *inter vivos* (during his life, as opposed to *mortis causa*, after death).**
  • **Donatio mortis causa** – a gift in contemplation of death. 3 elements that must be present for a transfer to be properly classified as such.
    • 1. Impending death from an existing peril.
    • 2. Delivery of the subject matter;
    • 3. The gift is only to take effect upon death and will revert to the donor should they recover.
  • The third criteria is not met because the gift was intended by Bayoff to be given while he was alive, given that he had just signed his will and then gave the key to Simard and gave them the paper work to retrieve from the bank.
  • **Inter Vivos** – intended to take effect during the lifetime of the donor. 3 elements (cited to Ziff):
    • 1. An intention to donate
    • 2. Acceptance of the gift
    • 3. A sufficient act of delivery
  • Only delivery is an issue in this case since the goods were not retrieved until after Bayoff died due to a paperwork issue.
  • Delivery was made of the key but not of the contents of the box.
  • Where delivery cannot be given physically due to size symbolic delivery suffices. The principle behind this is that the donor must give up control of the gift and do everything possible to vest title in the done.
    • Bayoff did all that he thought he had to do, however, the gift was unfilled because Simard could not retrieve the contents.
  • **An unfulfilled gift will be treated as complete if the donee becomes an executor of the will of the donor.** So as long as the intent to make the gift continues until death, by administering the estate, the done receives control over the donor’s property and can perfect the gift through sufficient delivery (*Strong v Bird principle*).
    • That is what happened here and the Court held there was gift.

**Notes:**
• **Symbolic delivery** – not the same as constructive delivery, when instead of the thing itself, some other object is handed over in its name and stead.
• Constructive delivery – something that is not a delivery is treated as if it were one.
  • 1. Although there is no direct handling over the subject-matter of the gift, the means of getting at it and
    controlling it is conferred to the done.
    • Access may not be enough, there must be power and control to the exclusion of others.
  • 2. There is no change of factual possession but there is a change in the capacity in which that person has
    possession such as where the donee is in possession of the subject-matter of the gift before the making of the
    gift.
• A danatio mortis clausa is not a will.
  • There is no room for a DMC if you know you are going to die, the gift must be given while you are alive or in
    valid will.

ABORIGINAL LEGAL TRADITIONS

J Borrows, Recovering Canada: The Resurgence of Indigenous Law

• Nanabush tricked a deer and then killed it, and roasted it for his eating. The tree above him would screech every
  time he went for a bite, so he attempted to break the branch. He got stuck in the tree and wolves came and ate the
  deer. Nanabush turned into a snake to eat the deer’s brain but then got stuck. He transformed back to his original
  form but had a deer stuck on his head. He was mistaken for a deer and chased.
• The Anishinabek attributed some of their society’s problems to the imbalance of the hunting relationship between
  humans and animals.
• In the case of Nanabush, he failed to respect the dignity and body of the deer.
• How do we know that Nanabush broke the law? The legal significance can only be appreciated by reference to
  previous Anishinabek cases.
• Through trickery and foolish ruse, Nanabush violated the Nation’s oath of honor and respect.
• The resources have an existence without us, we have no existence without them.

R Overstall, Encountering the Spirit in the Land: Property in a Kinship-Based Legal Order

• Gitxsan relationship with stuff of the world: “the ownership of territory is a marriage of the Chief and the land.
  Each chief has an ancestor who encountered and acknowledges the life of the land. The land, the plants, the
  animals and the people all have spirit – they must be shown respect. From such encounters cam power.”
  • This forms the basis for the law.
  • Daxgyet – the name of the above power.
  • The Chief’s duty is to ensure that everyone respects the law.
  • Adaawk – formal oral histories.
• Spirits and animals are seen as members of societies who have intelligence and power and who can use that power
  to influence the course of their interrelationship whit humans.
• By following the law, the power flows from the land to the people through the chief; by using the wealth of the
  territory, the House feeds its chief, so he can properly fulfill the law.
• Yukm (feast) – the institution through which the people formalize their social, political and legal affairs.
  • Hosted by the lineage wishing to conduct the business and is assisted by related lineages.
  • Central in recreating the people’s primary relationship with the world.
• Halayt powers – spiritual relations that are not connect with territory and crest, but function independently.
  • Most powers belong to a specific lineage or chief, and may be referred to as property.
• Naxnox – songs, dance, and masks used in halayt performances.
  • In each performance, the Chief embodies the group’s ability to control negative social forces.
• The historical task of each Gitxsan lineage has been to maintain and recreate its defining power relationship while
  at the same time forming socially and economically viable groups with other lineages.
• Wilp (house) – primary political unit of Gitxsan society.
- Highest ranked chief’s name is a house in the name of the house itself.
- Houses between 50-150 members.
- Clan identity is important in marriage and clan members cannot marry each other.
- A house’s sole possession is its daxgyet.
- In Gitxsan view – there is no such thing as chance or accident.
  - In harm suffered, absolute liability rests with the people on whose land the incident occurred.
- Three types of laws:
  - 1. Simple laws of respect and balance.
  - 2. Secondary laws, rules that enable people to interpret the primary laws.