

Law 440  
Property CAN  
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# Property CAN Winter '18

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### The doctrine of Estates:

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- When the Normans conquered England, the king acquired a radical or ultimate title to all the land in England.
- This radical title was a concomitant of sovereignty – obtained through brute emanation of territorial power, it gave the Crown the political authority to grant interests in the land.
- The occupants of the land therefore occupied the land on some terms of a grant from the Crown.
- The Doctrine of Estates mediated the relationship between the tenant and the land.
- The DOE avoided any absolutist belief that a person could have any direct relation of ownership of physical land.
  - Instead of a tenant owning the land, as only the Crown could, the object of the tenant's ownership was the artificial proprietary construct called an estate.
  - The tenant owned an estate in the land and not the land itself.
  - The estates were grade based on their duration of time.
  - The tenant has an intangible right to the land through the estate rather than ownership of a tangible thing such as the land itself.
- The idea of the Crown's ultimate or radical title does not mean that the Crown was the only true owner of the land.
  - This a more modern idea from the 17<sup>th</sup> and 18<sup>th</sup> centuries rather than the medieval period.
  - It was an expression of a practical principle that held together the theory of medieval land tenures.
- The Doctrine of estates gave expression to the idea that each landholder owner not land but a slice of time in the land.
  - Each estate comprised a time-related segment, or temporal slice of the rights and powers exercisable over the land
  - Given its durability, land invites an intricate layering of rights over time, whereas other forms of property like automobiles do not lend themselves so such a doctrine.

### The old freehold estates of the common law

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#### The estate in fee simple:

- The primary estate in land, one of potentially unlimited duration,
- He who has a fee-simple estate in land ha time in the land without end, or the land for time without end.
- For almost all practical purposes, the fee simple is equivalent to full ownership in the land itself.
- The fee simple estate is capable, more or less indefinitely, of transfer in vivos or of devolution on death.
- The owners of fee simple come and go but the estate remains since it is of potentially infinite span.
- Modern legislation often curtails the fee simple owner's rights of use and enjoyment, for environmental and planning purposes, but there are few limitations on power to dispose of an estate in the land whether by will or alienation inter vivos.

#### The entailed interest:

- Fee tail or entailed interest was an estate in land that endured so long as the original grantee (tenant in tail) or any of his lineal descendants remained alive.
- Designed to retain land within the family.

#### The life interest:

- A life interest in land is plainly coextensive and coterminous with the life of its grantee.
- It was transferable asset but if conveyed to a stranger ranks merely as an interest pur autre vie, it still only endures for the lifetime of the original grantee.

- The doctrine of estates allowed for a range of highly manipulatable constructs which conferred convenience in the management of wealth.

#### The doctrine of waste:

- Because the doctrine of estates recognized the possibility of successive estates in the same land, rules were developed both at common law and in equity in order to restrain the current estate owner from prejudicing the value of the land in the hands of any successor (or remainderman).
- Waste was defined as any action or inaction on the part of the estate owner which permanently altered the physical character of the land.
- The unauthorized commission of waste operates implicitly as a compulsory transfer of wealth from the remainderman to the limited owner.
- Waste can be committed in several ways, but not all forms of waste lead to a legal remedy.
- Only if the terms of his grant so stipulate can a tenant for life be made liable for permissive waste, which comprises defaults of maintenance and repair leading to the dilapidation of buildings situated on the land.
- More serious is voluntary waste, which includes any positive diminution of the value of the land.
- A tenant for life is liable for such waste unless the terms of the grant give specific exemption by declaring him unimpeachable for waste.
- Even if unimpeachable at common law, in equity the tenant can be restrained from the commission of equitable waste in the form of wanton destruction of the land to the prejudice of his remainderman.

#### Notes:

- Ziff, the doctrine of estates is inapplicable to personalty; chattels can be owned outright.
- An inter vivos gift of a chattel for life or even for an hour is treated as absolute.
- The granting of a temporary interest in a chattel – a bailment – is possible.
- Equity will recognize time-limited gifts of personalty contained in a trust.
- It is accepted that the dividing up of the legal title of personalty under a will is valid.
  - If a chattel is bequeathed to A for life then B absolutely, this creates a future interest in B.
  - If the chattel is money, then the interpretation would likely be that A is only entitled to the interest that the money generates.
- Even though personal property can be owned absolutely, provision must still be made for the state of the title when the owner of the personalty dies with no heirs to whom the entitlements can pass.
  - At common law such property becomes vested in the Crown as bona vacantia (ownerless goods).
  - This is similar to escheat, so in Alberta no distinction is drawn between realty and personalty concerning the ultimate fate of property once held by a person who has died with no lawful next-of-kin.

## THE ESTATE IN FEE SIMPLE

### RC Ellickson, Property in Land

- The Fee Simple
  - Perpetual ownership rights greatly simplify land-security transactions.
  - The preeminent advantage of an infinite land interest is that it is a low transaction cost device for inducing a mortal landowner to conserve natural resource for future generations.
  - The key to land conservation is to bestow upon living persons property rights that extend perpetually into the future.
  - The current market value of a fee in the Blackacre is the discounted present value of the eternal stream of rights and duties that attach to the Blackacre.
  - A rational and self-interested fee owner therefore adopts an infinite planning horizon when considering how to use his parcel and is spurred to install cost-justified permanent improvements and to avoid premature exploitation of resources.
  - Aside from utility, the other value is autonomy or dead-hand control.

- Being able to dictate what happens to the land after you die, such as a fee simple in remainder.

## ESTATES LECTURE

- Estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time, for he who has a fee-simple in land...
- The fee simple estate can endure forever. It is divisible into smaller estates, and is fully alienable.
- Statute Quia Emptores, 1290, there would be no sub-infeudation and you can transfer your land without the lord's consent.
- The statute of Wills, 1540, the landowner can appoint any heir of their choosing for their fee simple.
- O acquires an estate in fee simple, then O grants to A in fee simple.
  - Grant is a transfer in vivos.
  - The Crown still technically owns blackacre but A now owns the fee simple.
- "A" devises to "B" in fee simple.
  - Devises means that A is dead and it is being transferred via will.
  - B now owns the estate in fee simple.
- B now grants to L an estate for life.
  - L has the rights to the use and enjoyment of the land for his lifetime, as soon as L is dead, the estate ends.
  - Known as particular estate, a life estate. L is a life tenant.
- Once L dies, B still has the land since his interest is a fee simple, which is forever.
  - B has a fee simple in reversion, meaning that it will revert to him at the end of the life estate.
- B devises to W for life, remainder to C.
  - B is dead. W has a life estate and C has a fee simple in remainder (or a remainder in fee simple).
- C holds the exact interest that O acquired originally.
- Does the fee simple ever end?
  - At common law, if a tenant in fee simple died without an heir, the estate escheated to the tenant's lord.
  - Nowadays, the Crown and this is dealt with by legislation: Unclaimed Personal Property and Vested Property Act, SA 2007.
- Freehold estates:
  - The fee simple, the life estate, the fee tail.
  - Seisin -> the person who has a freehold estate has this. There always must be someone who has seisin or is seized of the land.
- Non-freehold estates:
  - The leasehold estate, and the copyhold estate (not in Canada, no interest in this topic).

## How are estates created?

- By operation of law (e.g. the Dower Act)
- Or by an instrument (a devise or a grant)
- At common law, the type of estate created by the instrument depends on the language used.
  - O: to A and her heirs
    - "To A" = words of purchase
    - "and her heirs" = words of limitation, they measure the duration of the interest.
  - What about A's heirs
    - And her heirs means simply in fee simple
    - Heirs have no right only mere expectancy.
- At common law only the words "his (her) heirs could" normally create an estate in fee simple:

- “To a” -> In a grant inter vivos? -> A acquires a life estate
- And in a will? A still only acquires a life estate.
- “To A in fee simple”
  - In a grant inter vivos? A used to only get a life estate since and his heirs was not included.
- In many jurisdictions, magic words are no longer essential in order to create a fee simple estate. For example, in Alberta, the Law of Property Act s 7(1):
  - “In the absence of words of limitations, the entire estate is transferred unless a contrary intention is suggested by the instrument.”
  - The wills and succession act s 9(2):
  - A disposition of property by will (b) is a disposition of every legal or equitable interest...

## The fee tail

- It only persists in a few jurisdictions still.
- Any devise or limitation that previously would have created a fee tail creates an estate in fee simple or the greatest other estate that the deviser or transferor had in the land.
- The fee tail was formally recognized by Parliament in the 13<sup>th</sup> century. An estate could be entailed generally or particularly based on the language of the instrument:
  - To A and the heirs of his body (tail general)
  - To A and his heirs female of his body begotten (tail female)
  - To A and his heirs male of his body on his present wife Elizabeth begotten (tail male special)

## The life estate

- How to create: expressly, e.g. O: “To A for life”
    - A acquires an life estate and O retains an interest.
  - O: to A for as long as she wishes.
  - O: to A to have and use during his lifetime.
  - By faulty purported grant of an estate in fee simple.
  - By operation of law (e.g. the Dower Act)
  - Whose life?
    - To A for life (pur sa vie)
    - To A for the life of B (pur autre vie)
    - B is merely the measuring life, or cestuis que vie
- ➔ Use timelines to map out the estates so you know who has what and when.
- ➔ Describe the interests fully and accurately.

## THE CASTLE MOVIE

- The ratio of the Kerrigan case is:
  - There is not necessarily a just financial amount to compensate for taking someone’s property, in this case a home.
  - There was a realistic alternative for the airport to build in the quarry, which may have had an impact on the decision.
- There is also an understanding by Darryl of the Aboriginal people’s of Australia issues with having their land taken.
- Life imitating art: Paris v Digital XXX (in NSW Australia): the NSW CA cites the castle’s “the vibe”. Also in the HC of Australia: cites that a man’s home is his castle, is his fortress.

## THE LIFE ESTATE

- A gift of land “To A for life” confers on A what is termed an estate pur sa vie.
- It lasts as long as A is alive and this interest is fully transferable, though the initial designation of the measuring life (the cestui que vie) is fixed at the time the interest is conferred.

### Re Walker

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(1924), 56 OLR 517 (CA)

#### Facts:

- The will of John Walker states: “should any portion of my estate still remain in the hands of my said wife at the time of her decease undisposed of by her such remainder shall be divided as follows ...”
- One party was claiming that there was a portion of the estate earmarked as undisposed of and should pass to them under the husband's will.
- The other party, under the wife's will, claim that the wife took absolute ownership of the estate and the estate should pass to them.
- The trial judge decided in favour of the husband's will.

#### Issue:

#### Analysis/Holding:

- There are two classes of cases: 1) in which the gift to the person first named prevails and the gift over fails as repugnant. (the wife gets everything)
- 2) in which the first named takes a life-estate only, and so the gift over prevails. (life-estate with fee simple in remainder)
- There is a third middle ground in cases which all that is given to the first taker is a life-estate, but the tenant is given power of sale to deal with the remainder of the estate which may be exercised at any time during the currency of the estate. This is not uncommon where property is held in trust.
- Turning to the will before the court, the words “undisposed of” refer to a disposal during her lifetime, which was a fee simple to the wife. The gift to the wife must prevail and the attempted gift over must be declared to be repugnant and void.
- There was a dominant intention, which prevails over the sub-ordinate intention.
  - How do you determine it?
    - There is no clear indication how the court determined that there was a dominant intention for the wife.

### Re Taylor

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(1982), 12 ETR 177 (Surr Ct)

#### Facts:

- The issue is to determine the meaning and intent and effect of the following portion of the will of John Taylor:
  - “I give to my wife all real and personal estate to have and use during her lifetime. Any estate of which she may be possessed at the time of her death is to be divided among my daughters.”
- The wife died and her will stated her estate should be divided and a half go to charity while another half be split among 5 people.

#### Issue:

- Did the wife take absolute ownership under John Taylor's will or only a life interest?

### Analysis/Holding:

- If she took an absolute interest, then any property which she acquired forms part of her estate for distribution according to her will.
- If she only takes a life interest, then any part of the estate remaining in her hands at death passes to the daughters upon gift over under the will of John Taylor.
- The language used evinces an intention on the part of the testator to give to his wife a life interest.
- It was argued that a right to encroach on capital which is not subject to any limitation and which may result in a depletion of the entire corpus of the estate amounts to an absolute interest.
  - The court rejects this.
- **The form of words used by the testator in this case evinces a clear intention to give to the donee a life interest. The words "during her lifetime" operate as words of limitation. They define the size of the estate which the donee is to take.**
  - In their grammatical sense, they qualify the words "to have and to use".
  - The Courts will always look for substance over form.
- **Repugnancy arises because the testator tried to accomplish two things which cannot logically stand one with the other.**
- The court cannot see why a gift over what remains at the death of the donee should have the effect of giving an absolute interest to the donee. Where the testator uses clear words to indicate intention to give only a life interest and then makes a gift over of what remains at death of the donee, the gift over is no more than the logical result of an express intention to give a limited interest.
- The fundamental rule to applied by a court is construing a will is that the intention of the testator is to be ascertained from a consideration of the will taken as a whole.
- There is no logical inconsistency here that requires the court chose between two alternatives intentions which are opposed.
- The testator has used clear words to indicate an intention to give only a limited interest, and the gift over, far from being repugnant, completes the intention of the testator to dispose of all of his property in the event that any should be left when the prior life estate comes to an end.
- In a prior case, the words "to be used and disposed of as she wishes during her lifetime" gave to the sister the whole estate so that nothing remained on which the gift over could take effect.
- In the present case, there is no power of disposition inter vivos attached to **the life interest of the donee. The donee in this case has a power to encroach on capital for purposes of her own proper maintenance**, she has no power to divest herself of corpus of the estate by transfer inter vivos.
- Where the testator uses plain language to indicate intention to give a life interest only, that interest is not enlarged to an absolute interest because the testator has declared that the donee is to have the right in her discretion to encroach on capital for her own proper maintenance.
  - The power to encroach =

### Christensen v Martini Estate

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1999 ABCA 111

#### Facts:

- "I give to my wife the property for her used. When she no longer needs the property that she give said property to the Christensens."

## Issue:

### Analysis/Holding:

- In the trial judge's interpretation of the clause they said that the testator's intent to confer a limited estate upon Martini had been frustrated by virtue of uncertainty of the nature and extent of such estate or interest. The gift over prevails and they are entitled to become the registered owners of the whole of the property immediately.
- The CA's preferred interpretation is that the testator gave Martini a life estate without a power of encroachment in the undivided half-interest he owned at life.
- **Courts will endeavor to reconcile apparently conflicting provisions in a will rather than ignore one of them or finding one of them void for uncertainty.**
- **The most likely interpretation is that the testator intended Martini to have a life estate without a power of encroachment, with a gift over to the Christensens. It is apparent he intended that the Christensens ultimately receive the property.**
- If power of encroachment was given the property could be significantly diminished by the time it comes into the hands of the Christensens.
- The absence of the words such as during her lifetime do not necessarily mean that the testator did not intend to grant his wife a life estate.
- The testator and Martini having lived together in part of the property following the marriage is another factor that makes it likely the testator intended that she have the right to continue to occupy the property after his death for the duration of her life.

### Principles:

### Notes:

- The fee tail was an interest in land impressed with a special rule of descent. It passed to the heirs of the body of the first taker until the particular line of descent became extinct.
- The fee simple in the other hand descended to the heirs of successive owners, whether or not those heirs were of the body of the descendants.
- If a fee tail ends it returns to the original grantor. If a fee simple ends it escheats.

## What can be done under a life estate?

- The life estate can invoke a similar situation with the tragedy of the commons.
- If you are not able to transfer or dispose of the property, the rational profit maximizer would exploit the land as much as possible in order to get what they can from the land, without regard for who comes next.

## Doctrine of Waste

- There are four types of waste:
  - Ameliorative
  - Voluntary
  - Equitable
  - Permissive
- An equitable waste is surely also to be voluntary waste. So why two different designations?

- Just as you can add rights to a life estate, you can also eliminate obligations of waste in document.
  - Give this property to X for life, without impeachment for waste.
  - A testator can do this. The effect is that the person granted the property has no liability for all forms of waste except equitable waste.
  - Law of Property Act s 71.

## Who pays for expense in a life estate

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- There is a distinction between income and capital. There can be separate beneficiaries of each.
- The income beneficiary is entitled to the annual income from the interest of the trust.
- A life estate is analogous to an income beneficiary.
- What expenses fall within those of the life tenant?
  - Annual property taxes.
  - Heating and lighting bills.
  - Assuming there is a monthly mortgage payment, it is likely to involve interest and a principal amount. Who is responsible to pay the mortgage? Both, the life tenant pays the interest and the remainderman pays the principal.

## Powers v Powers Estate

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### Facts:

- An application for a declaratory order respecting responsibility for certain expenses related to a property, in which the applicant has a life interest.
- By virtue of the last will and testament of Gordon Eric Powers, the applicant had received an equitable life interest and the executor was given additional powers to encroach.
- The applicant, the mother of the deceased, may exercise the usual incidents of a life tenant. It is for the life tenant to pay annual taxes and provide utilities to the property.
- Raymond, the brother, also received a life estate with powers given to the trustees.
- The remainder goes to Ronald.
- A trust has been created in which a legal title is given to a manager, the trustee. The beneficial and equitable interest is given to Mom and Raymond.
  - This would be done if there were management issues and it is better for the trustee to do these things.

### Issue:

- There are certain expenses that are at issue. The Court has to determine whether the life tenant should pay them or if the estate can draw upon the capital.

### Analysis/Holding:

- **Heat:** The life tenant
- **Insurance Premiums:** By the life tenant, but it is not an absolute rule.
  - Should be paid by income and not capital
  - Does not hold for every type of insurance. If the insurance is for the replacement of the furnace then it is for the remainderer to pay, but if the insurance is for the upkeep and maintenance of the furnace then it is for the life tenant.
- **Lawn Care:** life tenant

### Principles:

### Notes:

- If you want you will to cover anything, having a basket or residual clause at the end of the will is a good idea.
- If the residual clause is invalid, there is intestacy laws in Alberta that determines where the property goes.

### Can you sell a life estate?

- Yes, it is a fully alienable interest.
- The original measuring life cannot change.
- In *Aho v Kelly* the life estate was worth more than the remainder.
- The method is set out in that case.

## THE LAW OF DOWER

- In common law you cannot have a life estate in chattel. There is absolute ownership. The doctrine of estates at common law does not apply to personal property.
- Trusts are an exception to this. But you cannot have a life estate in a consumable same goes for the will.
- In a will, you can grant a life "estate" in personal property.
- A bailment is a temporary loan in chattel.

### In-class example

- A owns a fee simple and agrees to sell it to B.
- Prior to closing, A receives a better offer from C.
- A wants to back out without liability of the deal with B to take Cs deal.
- Can they? What do you need to know?
  - Who owns the property?
  - Has A's wife signed a dower form?
  - Is it the homestead or is it a parcel of land?
  - Barb is not on title and has not provided her Dower consent. They have live there for many years.
    - What is the effect of this? Under these circumstances the deal is likely invalid.

### The Dower Act, RSA 2000

- The Dower Act applies to married couples, does not extend to adult interdependent relationships.
- It applies to homesteads.
- It has a prior history as a common law concept.
- At common law, dower gave to the widow an interest in 1/3 of her husband's property. It would not matter if he gave the whole thing to the wife because it would be passed to the eldest son.
- The wife's dower interest ran with the land unless barred by the wife.
- Widower had a somewhat similar right called curtesy.
- In 1867, the land titles system was impressed upon the land in western Canada, so dower in common law was abolished. Sections 3 & 4 of something did this.
- Alberta Homestead Legislation Regime
  - 1) Control of dispositions of the home
  - 2) On the death of the owning spouse, the other is entitled to a life estate
  - 3) Protection from creditors, now dealt with in the Civil enforcement act. Any judgment against the spouse who becomes the judgment debtor, but there are some exemptions from seizure for the other spouse.

- A Homestead as per the Dower Act: “homestead” means a parcel of land (i) on which the dwelling house occupied by the owner of the parcel as the owner’s residence is situated,
- Does dower apply when both husband and wife are on title?
  - See section 25 of the Dower Act. The answer is yes. Why? 25 excludes some co-ownership relationships but requires a third party on the title. 25(2) says you don’t need a further consent form, consent as a co-owner is enough.
  - Everything in the Dower act is gender neutral since 1948.
- If they are both on title why do you even need a Dower right?
  - If they own property together as tenants in common, then it is a general principle of law that each party can will away their half.
  - So if Dower still applies, the wife gets to keep it until she dies and the husbands portion that he gave away does not take effect.
- Does it apply when the couple is living on the mobile home?
  - If it is a chattel, does Dower apply to that arrangement? You have to figure out if it is a homestead. Its not the house per se it’s the parcel of land on which the dwelling sits.
- Is a leasehold capable of being the parcel of land in the homestead definition?
  - Its arguable in common law but the legislative intent is that it probably applies to a freehold.
- More than one household?
  - The homestead is both the rental and the house they are living in. There can be more than one homestead. If there is more than one the surviving spouse must choose.
- What if the will gives the homestead to someone else?
  - The Dower act supersede a will.
  - Dower Act section 18 provides a life estate to the land to the surviving spouse. The gift under the will is postponed. This life estate is created by operation of law.
  - With regards to personal property, section 23 gives you a life estate to the personal property but only the things exemption from execution (writ of execution for a sherrif to take your stuff in payment of a judgment debt, that definition is adopted her, to find the list you have to go to the civil enforcement act section 88)
- What if there is no homestead? Or he was living on a lease that expire?
  - He has a mobile home that is up on blocks at his brother’s house. Does the surviving spouse get the mobile home?
  - Personal property exempt form the Civil enforcement act includes a mobile home in s 88(g) but in the example the deceased husband had no homestead at the time of death.
    - Section 23 is conditional on there being a homestead in order to get the personal property.
  - If there is no homestead then you haven’t met the condition.
  - But the location of chattel may not matter, i.e. like a car parked on the street.
- Consent
  - Non-owning spouse signs the form. There is an acknowledgement that a commissioner has to certify that this was done freely.
  - Is the consent always required? And what do you need to consent to?
  - Consent is triggered by a disposition of the homestead, see definitions under Dower Act.
  - Short term leases are not a disposition <3 years.
  - Section 10 contemplates going to court having an order for the dispensing of consent. It is possible to get such an order if you fit within section 10.
    - 10 (1): Spouses who are separate and apart. One is staying in the home with the children and they do not want to sell because the kids are in a good school and neighborhood.

- 10 (1) gets you into court, you need a 10(1) circumstance to get you into court. Its necessary but not sufficient. In addition to 10(1) you have to show that you the request is reasonable under 10(5).
- Scenario 2 the parties are not living apart, but the owner wants to sell but the spouse refuses to sell unless they get something in return.
  - Without a 10(1) consideration you cannot get into court to dispose of consent.
- The consent was signed but there was no acknowledgment made out?
  - Therefore, the consent is no good...
  - There was an SCC case about this.
- S 7 and s 9:
  - S 7(4) says that you can place on the title to the property a release of your dower rights if you are so inclined.
  - Under s 9, you can make an agreement releasing dower rights?
- How are these two provisions different?
  - S 9 is a grounds for going to court under s 10 so you still have to have them declare it reasonable.
  - Getting both 9 and 7 signed allows you to go the land titles office and get sale of the land.
  - Also can just have s 7 signed and go to the land titles office.
- Dower has been abolished in many parts of Canada; under matrimonial property law a spouse on divorce can be ordered to have possession of the house even if they are not on title. This possessory order contains restrictions on the transfer of the home, so this is both in the Dower Act and in the matrimonial property act of other provinces. It is only in the Dower Act in Alberta, so that is its chief purpose in Alberta, the veto power.
- There are many other widow protections: wills, co-ownership so no will needed, life insurance life estate policy; so the Dower act probably does not typically result in a life estate in law.

## ABORIGINAL TITLE AND PROPERTY INTERESTS

- Joint session, January 18, 2018.
- The special status of Aboriginal Groups derives from their prior existence as self-governing communities in the territory that became Canada.
- An important animating principle of Crown-Aboriginal relations is “reconciliation”, in light of the historic wrongs suffered by these groups.
- Three phases of Crown-Aboriginal Relations in North America:
  - War, Diplomacy, and Military Alliances – early settlement period (17<sup>th</sup> and 18<sup>th</sup> centuries)
  - Policies of Assimilation (19<sup>th</sup> and 20<sup>th</sup> Centuries)
    - Much less emphasis on recognizing the prior rights of aboriginals.
  - Recognition of Self-Determination (present)
- Important legal instruments:
  - Royal Proclamation, 1763
  - Historic Treaties
  - Indian Act, RSC 1985, c I-5
  - Constitution Act of, 1982, s. 35
  - Modern Treaty Agreements
- Aboriginal Law vs Indigenous Law
  - Aboriginal law is the law of the Canadian state in relation to Aboriginal peoples

- Includes treaty rights, s 35, the Indian Act
- Indigenous law is the law of particular Indigenous groups.
  - Include legal traditions that often can be traced back to pre-contact.
- Four Categories of Aboriginal Property Interests in Canadian Law
  - Tenure under Statutory Regimes
    - Indian Act (default management)
    - First Nations Land Management Act (allows unique management of land by different groups)
    - Metis Settlement Act (AB)
- Aboriginal Title
  - Common law interest in land that received constitutional protection in 1982
- Tenure under Modern Treaties & Self-Government Agreements
  - Eg Nisga'a Final Agreement provides for fee simple interest in land under Nisga'a jurisdiction
- Customary interest in land within particular Indigenous communities.
  - Cannot be enforced in Canadian courts, so the interest is within the Band Council or traditional governance authorities.
- Forms of Statutory Land Tenure
  - Indian Act
    - Collective beneficial interest of the First Nation in reserve lands (reserve land = crown land set aside for the use & benefit of a first nation)
    - Certificate of possession – perpetual right held by a band member to exclusive use and possession of a parcel of land on reserve
    - Lease – time-limited rights to exclusive use and possession on reserve lands.
  - First nation land management act
    - Unique forms of land tenure set out in a first nation's land code

## ABORIGINAL TITLE

- Doctrine of Discovery
  - A principle of international law under which A European government could claim sovereignty over territory by discovering the territory prior to other European sovereigns (regardless of the prior presence of Indigenous Groups)
  - The title the Crown received under the Doctrine of Discovery was burdened by the prior occupation of Indigenous peoples and aboriginal title.
- Terra Nullius means land belonging to no one.
- Most British colonies in the 17<sup>th</sup> and 18<sup>th</sup> centuries were not treated as terra nullius.
- On this approach, discovery grounded a British claim to sovereignty and the underlying title to land, but it did not automatically give the Crown a possessory or beneficial interest in the land occupied by Indigenous groups.
- Some British territories in the 19<sup>th</sup> century were treated as terra nullius, including BC and Australia.
- The Crown asserted a claim to both sovereignty and full beneficial ownership of the land, despite prior Indigenous occupation of the land.
- Terra Nullius has since been repudiated by courts in both Australia (Mabo) and BC (Calder)
- Aboriginal title has been recognized by a common law courts for around two centuries (see Johnson v M'Intosh, 21 US 543 (1823))
- However, it was recognized prior to that in the colonial practices of the British in North American, in colonial status and imperial legislation (eg Royal Proclamation, 1763)

- These practices were premised on a recognition of an Indigenous legal interest in lands they occupied and controlled – though of course there was often inequality of bargaining power
- Royal Proclamation, 1763 formally recognized an Aboriginal legal interest in part of the territory that became Canada
- It also provided that this interest could only be transferred to the Crown via a treaty (no private sales to settlers)
- As an instrument having the force of imperial legislation the Royal Proclamation is part of the Constitution of Canada (to the extent not subsequently repealed)
- The Royal Proclamation set out much of the basic framework for Crown-Indigenous relations in Canada
- The recognition of Aboriginal title in Canada
  - Land cession treaties were pursued in most of Ontario and the Prairie provinces (eg. Treaty 6)
- In *St. Catherine's Milling* the JCPC described Aboriginal title as a personal and usufructuary right.
- In *Calder* (1973), a bare majority of the SCC held that the doctrine of aboriginal title applied in BC (most of which was not covered by historical treaties), that title had not been extinguished through legislation.
- In 1982, s 35 the Constitution Act, 1982, came into force (recognized and affirmed).
- The issue of Outstanding Aboriginal Title Claims
  - The land claim in *Calder* was ultimately resolved through the Nisga'a Final Agreement, one of the first "modern" treaties between the Crown and an Indigenous group
  - However, a multitude of other potential Aboriginal title claims continue to exist
  - An extensive treaty negotiation process has resulted in some additional resolution of claims through modern treaties, though the large majority of claims remain unresolved
  - In the absence of resolution through agreement, some groups initiated litigation seeking declarations of Aboriginal title from the courts. This is what led to the *Delgamuukw* and *Tsilhqot'in* decisions.

## **Delgamuukw v British Columbia**

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### **Facts:**

- Claims brought by the Gitksan and Wet'suwet'en peoples to Aboriginal Title of a portion of territory in northwestern BC.

### **Issue:**

### **Analysis/Holding:**

- The sources of Aboriginal title
  - Aboriginal title is a unique estate in land (*sui generis*). Its content is informed by both common law and aboriginal perspectives and legal systems.
  - It is based on the occupation by an Indigenous group prior to the Crown's assertion of sovereignty.
    - The Royal Proclamation recognizes this interest but did not create it.
  - Sources: 1) occupation of land; 2) relationship between the common law and pre-existing principles of Indigenous law
  - The Crown holds the underlying title, as with traditional estates in land, on the basis of asserted sovereignty.
- Content of Aboriginal Title
  - Its neither a fee simple interest or practice or specific title.
  - It is inherently collective in nature, held by the Indigenous nation as a whole.
  - Right to exclusive use and occupation, subject to unique features & restrictions:
    - Inalienable except to the Crown.

- Inherent limit on use: uses must not be irreconcilable with the nature of the occupation of land and the relationship that the particular group has had with the land
  - Strip mining a hunting ground
  - Putting a parking lot on culturally significant land.
- It is not alienable.
  - Why?
    - Ensures settlers receive their titles from the Crown.
    - Ensure Indigenous peoples are not dispossessed of their entitlements.
    - Reflects the relationship and connection an Indigenous group has with the land (more than just a fungible commodity)
    - Others: outdated paternalism, ensuring a maintenance of a collective land base as a locus of self-government; many Indigenous legal systems did not traditionally treat land as an alienable commodity.
- Establishing a claim to aboriginal title
  - In order to make out a claim to Aboriginal title, a group must show:
    - 1. Occupation of land at the time the Crown asserted sovereignty over the land. Factors relevant:
      - Indigenous laws in relation to the land
      - Physical occupation (examples, construction of dwellings, cultivation and enclosure of fields, regular use of definite tracts of land for hunting and fishing or otherwise exploiting its resources.
    - 2. Continuity of occupation (if present occupation is relied on as proof of pre-sovereignty occupation)
    - 3. Occupation must be exclusive (there can be co-exclusion)
- Infringements of Aboriginal title
  - Government actions may infringe Aboriginal title in some circumstances, but these infringements must be justified.
  - In order to meet the justification test,
    - The infringement must be in furtherance of a compelling and substantial objective.
    - The infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.
    - There is also a duty to consult.
    -

#### Principles:

- **To group aboriginal title this occupation must possess three characteristics.**
  - **It must be sufficient, it must be continuous (where present occupation is relied on); and it must be exclusive.**
  - In order to make a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria:
    - **1) the land must have been occupied prior to sovereignty,**
      - Land was of central significance to their distinctive culture at the time of sovereignty
      - Sufficient occupation must be approach from both an aboriginal and common law perspective.
      - **In considering the aboriginal perspective for aboriginal title, one must take into account the group's size, manner of life, material resources, technological abilities, and the character of the lands claimed.**
      - The common law perspective imports the idea of possession and control of the lands. Possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effect control is exercise.
      - **It is a context-specific inquiry, and the intensity and frequency of the use may be to look at the land.**
    - **2) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation;**
      - If occupation has been interrupted, maintaining a substantial connection to the land may be shown.

- and **3)** at sovereignty, that occupation must have been exclusive.
  - Intended or attempted to enforce exclusivity.
  - Share exclusivity is possible where groups lived together but excluded others.

**Notes:**

- In dismissing the claim, the Court offered extensive obiter dicta on the nature and content of Aboriginal title, how it may be established, and how it may be infringed by governments.
- At page 401, there is an analogy to the limit on aboriginal title and the concept of equitable waste at common law.
  - Under that doctrine, person who hold a life estate in real property cannot commit “wanton or extravagant acts of destruction” or “ruin the property”.
  - “The description of the limits imposed by the doctrine of equitable waste capture the kind of limit I have in mind here”

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| <p><b>SIMILARITIES BETWEEN ABORIGINAL TITLE AND COMMON LAW ESTATES</b></p> |
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- Similarities:
  - The Crown holds the underlying title.
  - The Crown asserts a right to govern and make law in relation to the land (subject to constitutional restrictions)
  - Like other common law estates, Aboriginal title is enforceable in the courts of the Crown
- Differences
  - Unlike traditional common law estates, which are presumed to ultimately derive from a Crown grant, Aboriginal title is based on occupation prior to the Crown’s assertion of sovereignty, and so is not based on a Crown grant
  - The content of Aboriginal title is unique and distinct from any other common law estate
  - The content of Aboriginal title is based in part on Indigenous legal systems

**Tsilhqot’in Nation v British Columbia**

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2014 SCC 44

**Facts:**

- The jurisprudence establishes a number of propositions that touch on the issue of this case, including:
  - Radical or underlying Crown title is subject to Aboriginal land interest where they are established.
  - Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
  - Governments can infringe on aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown’s fiduciary duty to the group.
  - Resource development on claimed land to which the title has not been established requires the government to consult with the Claimant group.
  - Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.
- The Tsilhqot’in people are semi-nomadic people who traversed and hunted over a territory where there were specific sites that they made camp
- The BCCA said that there has to be a sufficiency of occupation and evidence of intensive land use (farming, structures).
  - This takes a European centric approach to this test, since the farming and structures aspect is far more the common law than aboriginal perspective of land.
- The BCCA said that you can have aboriginal rights without having aboriginal title. So you can have rights to do things on the land without title because Aboriginal title is far more robust.

**Issue:**

- How should the courts determine whether a semi-nomadic indigenous group has title to lands?

**Analysis/Holding (8 judges for the majority):****What does Aboriginal title confer?**

- The aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.
- The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it.
- Aboriginal title is a beneficial interest in the land.
- It is not equated with fee simple nor can it be described with reference to traditional property law concepts. It is sui generis.
- It is a collective title not only held for the present generation but for all succeeding generations. Therefore, it cannot be alienated at will, it can only be alienated to the Crown.
- You can use and develop the land, you are not held to using the land for practices, customs and traditions.
- There is a limit to this (as per Delga.), the use cannot be irreconcilable with the reasons the aboriginal group has the title.

**Justification of Infringement**

- To justify overruling the Aboriginal title-holding group's wishes on the basis of the broader public-good, the government must show that it (1) discharged its legal duty to consult and accommodate, 2) that its actions were backed by a compelling and substantial objective, and 3) that the government action is consistent with the Crown's fiduciary obligation to the group.
- Duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title.
- Where aboriginal title is unproved, the Crown owes a procedural duty imposed by the honour of the Crown to consult, and if appropriate, accommodate the unproven Aboriginal interest.
- Why can there be justification because in s 35 the rights are only recognized and affirmed.
- The Crown's fiduciary duty impacts the justification process in two ways.
- 1) the Crown's fiduciary duty means that the government must act in a way that respects the fact that aboriginal title is a group interest that inheres in present and future generations.
- 2) the Crown's fiduciary duty infuses an obligation of proportionality into the justification process.

**Ziff Aside on General Occupancy**

- The Court continues to make references to common law concepts.
- At page 422, Likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law.
  - A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain.
- The statute of frauds abolished general occupancy in 1677. So why is the SCC making an analogy to this concept?
  - Wouldn't find many cases on this if we needed help.
  - When you are determining occupation for the purpose of determining aboriginal title the outer limits are important for this to show where the boundaries are.
  - The boundaries are proved by occupation, however, in general occupancy the boundaries were already defined and general occupancy does not help define those.

**How can an Aboriginal Title right be lost?**

- Before 1982: Expressly extinguished by legislation (unilateral extinguishment), bi-lateral extinguishment via treaty.
- After 1982: (see page 439) in Van der Peet – Rights cannot be extinguished but only regulated and infringed consistent with the justificatory test laid out by the court in Sparrow.

- Surrender is still possible but here the court is talking about unilateral extinguishment.
- So the difference is between infringement and extinguishment.
  - How much infringement is tantamount to an extinguishment?
  - This could be similar to a regulatory taking (Ad hoc – Penn Central test, Per se, de facto). Which test of expropriation should be used? Sui generis – it would be unwise to use one of the common law expropriation tests.

## CHAPTER 6

### USES AND THE STATUTES OF USES

- The Lord Chancellor established the Court of Chancery and began to fill the gaps of the common law in what came to be known in equity.
- There was the potential for conflict between the principles of equity and the common law.
- Equity: equitable remedies were always discretionary and remain so.
  - There are equitable maxims: those who seek equity must come with clean hands; equity is equality; equity deems as done what ought to be done.
- Equity created the use (trust): a device under which the legal title was granted to one person to hold for the benefit of another.
- The goal of such a conveyance was to place legal title in B, who intended to hold it for uses destined to serve C.
- It separated legal title from the beneficial ownership of property
- Land transferred by O; to X [in fee simple]; for the use of Y [in fee simple]
- O is the feoffor to uses
- X is the feoffee to uses
- Y is the *cestui que use*
- To X in fee simple to the use of Y in fee simple
  - Prior to the statute: X has legal title, Y has equitable title.
  - After the statute: Y has both the legal and equitable title. X is executed out under the Statute.
- To X in fee simple to the use of Y for life then to the use of Z in fee simple
  - Before the Statute: X has legal title, Y has equitable life estate, X has the fee simple in remainder.
  - After: X is executed out, Y holds a legal and equitable life estate. Z holds legal and equitable fee simple.

### Statute of Uses (1535)

- The statute of uses was introduced because the use device was impeding the operation of the incidents of feudal tenure
- Sieson → the **possession of a freeholder** → A lease land to B for a year, A is still siesed, B is a leaseholder
- **Purpose of the statute was** to divest the legal estate from the feoffee (X) to uses and vest it in the *cestui que use* (Y)
- **Operation** → by force of the Statute, the *cestui que use* obtained legal estate corresponding in quantum to the interests which, but for the statute, the *cestui que use* would have taken in equity
  - The main provision of the statute was to “execute the use,” which expropriated the legal title from the feoffee and gave it to the *cestui que use* (i.e. beneficiary)

- **Remainders** -> to F and his heirs to the use of A for life, with remainder for the use of B and his heirs
  - **Pre statute:** legal fee simple to F; equitable life estate to A; equitable remainder in fee simple to B
  - **Post statute:** F took nothing; A took legal life estate; B took legal remainder in fee simple
- **Resulting Uses** → statute executed resulting uses as well as uses expressly created
  - To X and his heirs to the use of Y for life”
    - **Pre-Statute** : X whole estate; Part of the Equitable Life Estate to Y
    - **Post-Statute:** Nothing to X; legal and equitable life estate to Y
- **Active Uses** → Statute did not execute active uses, that is where feoffee had active duties to perform.
  - “To F and his heirs to the use that F should collect the rents and profits and pay them to A and her heirs”
    - Legal fee simple remains in F (feoffee), and A gets equitable fee simple only
    - Statute of Uses only conveys what could have been lawfully transferred before the statute. As long as some obligations (duties) remain, estate cannot legally be transferred under the terms F originally held the land for.
- **Feoffee must be seised** → the statute only applied where the feoffee to uses was seised
  - “To F for 999 years to the use of A and his heirs”
    - Statute did not execute - F is not “seised” of land.
    - Leaseholder had no seisin
- **Not seised to own use** → statute did not apply where the feoffee was seised to his or her own use, only applied where a person was seised to the use of another person
  - To F and his heirs to the use of F and his heirs
    - F held legal fee simple by virtue of common law, not by operation of the statute
  - **Use upon a use** → statute did not execute a use upon a use
    - To F and his heirs to the use of A and her heirs to the use of B and her heirs
      - Originally, statute did not apply in this case. Second use was repugnant to the first, so F takes fee simple, A gets equitable fee simple, and B get nothing.

## From the Statutes of Uses to the Modern-Day Trust

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- Avoiding the statute:
  - To X Co. [in fee simple] to the use of Y [in fee simple]
    - The corporation is the feoffee, and the statute does not apply since the corporation is seized to the use of another.
  - To X for 999 years to hold for the use of Y.
    - X has a leasehold interest for a long time, outside the statute.
  - To X [in fee simple] to hold the property and manage it, and pay the rents and profits to the use of Y [in fee simple]
    - Active use

### Exhausting the statute of uses:

- To X in fee simple to the use of Y in fee simple to the use of Z in fee simple.
  - Triggers the statute
  - X is executed out; Y gets the fee simple; Z...
  - The Statute of Uses is said to only execute only one full set of fee simple, so it wouldn't get invoked from Y to Z.
- To X in fee simple to the use of X in fee simple to the use of Y in fee simple.

- Unto and to the use of X in fee simple to the use of Y in fee simple.
  - Unto and to the use of X in trust for Y
  - To X in trust for Y (both in fee simple) -> back in 1535, this did not create a trust. The statute applies when the something is “trusted”.

## Trusts

- **An equitable or beneficial right or title to land or other property, held for the beneficiary by another person, in whom resides the legal title or ownership, recognized and enforced by courts of equity**
- Trusts are no different that uses, but the term is used to differentiate.
- Settlor – the person who sets up the trust.
- Trustee (feoffee) – holds the trust
- Cestui que trust (beneficiary)
- A trust is an equitable right and is dependent on the availability of equitable remedies.
- Equity will not impose an obligation against a bona fide purchaser for value of a legal interest who had not notice of a prior equitable claim.
- Trusts are mechanisms which can be used for private estate planning and commercial practice.
  - Example: a trust can be set up to allow property to be held for the benefit of minor children or other dependents.
- Protective trusts can be established to allow a person to enjoy a benefit of trust income while preventing that beneficiary from having full control of the property.
- Trusts can be deployed in a testamentary context to allow for the management of a decedent’s estate.
- Under Alberta’ tenancy law a landlord is a trustee for any monies of the tenant held as a security deposit.

## Resulting Trusts

- A resulting (implied) trust can arise in several ways: 1) when the beneficial entitlement under a trust has not been fully or properly disposed of by the settlor; 2) if property is graciously transfer from A to B, a resulting trust may be found in favour of A; 3) common intention.
- Type 1: Incomplete disposal of equitable entitlements
  - From X to Acme Trust Co in Trust for A for life
    - State of title: Statute of Uses does not apply; Company gets legal title, A gets equitable title (equitable life estate); When A dies what happens to the equitable title -> Resulting trust goes back to the settlor (X; or their estate if settlor dead) presumptively.
    - We presume that they get back what they have not given away. In fact, the equitable interest was never given away and they had a resulting trust all along.
  - From X to Acme Trust Co in trust for A for life, remainder in trust for B if and when B marries
    - Assume B dies without having married.
    - Where does the property go: title would go back to the X (settlor). There is a resulting trust for this gap.
    - There is a springing trust for B when he gets married. In other words, B’s trust is then triggered.
    - If A dies before B marries, the resulting trust goes back to the settlor (X).
- Type 2: Gratuitous transfers
  - A purchases property and directs that title be taken in the name of B.
    - State of the title: B had legal title, equity says that b/c its gratuitous transfer A is presumed to hold equitable title (resulting trust).
    - This can be rebutted by proving that a gift was intended.
  - A transfers property to B gratuitously.

- Same as above.

### **Presumptions of advancement and resulting trust:**

- The presumption of a resulting trust (as compared to advancement [gift]) is because a maxim of equity presumes a bargain and not gifts.
- This presumption can be rebutted by showing that a gift was actually intended
- H purchases property in the name of W
  - Presumption of advancement – a gift
- W purchase property in the name of H
  - Presumption of resulting trust.
  - This is a gender asymmetry since H means husband and W is wife.
  - In 1978, Dickson J via obiter poured cold water on the presumption of advancement; it had ceased to embody any credible inference of intent.
  - Since then it is not entirely clear about the Courts idea of the presumption of advancement. Don't know whether it is gone or not.
- See now s 36 of the Matrimonial Property Act of Alberta
  - If the property was acquired before or after marriage (this means after the date they were married), the Courts cannot apply the presumption of advancement to the transaction between spouses.
  - Therefore, the presumption of resulting trusts applies.
  - But the presumption of advancement may not be completely abolished since this only applies when a decision is being made under the Matrimonial Property Act (i.e. hence when there is a marriage breakdown and the assets are being divided up). The act doesn't help in any other context.
- An advancement is presumed when the individual is a parent; so with the presumption of advancement engaged the child will be presumed to get both legal and equitable interests.

### **Pecore v Pecore**

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2007 SCC 17

#### **Facts:**

- Hughes begins to transfer money into a joint account held with his daughter Paula.
- For tax purposes, he writes a letter to the bank saying that he is the sole owner of the assets in the accounts.
- Paula's husband Michael is given some assets in the will of Hughes with the remainder split between Paula and Michael.
- Hughes dies and Paula does not turn over the joint account to the remainder of the estate.

#### **Issue:**

- The joint bank account is alleged to belong solely to the daughter and did not form part of the residual of the estate.
- The Husband argues that it is part of the estate.

#### **Analysis/Holding:**

- **General rule for gratuitous transfers is presumption of resulting trust**
- Exceptions of presumptions of advancement (absolute gift): father to wife and parent to child
  - At common law, when the father provided a gift to a child, there was a presumption of advancement.
  - It was unclear what happened when the mother gave the child a gift. Ultimately this case determined that the presumption of advancement applies equally whether it is a gift from mom or dad.

- **But presumption of advancement does not apply between parents and adult independent children (instead resulting trust)**
- Party claiming transfer is a gift from parent to adult child can rebut the general presumption of resulting trust by bringing evidence to support claim of gratuitous transfer
- In this case, the daughter is still dependent on dad, but the Court does not want to deal with that so they draw a bright line rule based on the age of the child. Hence, they presumed a resulting trust.
- How does she end up with the money? She rebuts the presumption of a resulting trust (proof on the balance of probabilities).
- **What was intended by the father?**
  - Letters written by the father indicated he owned the money but the Court says those only applied during his life.
  - There was evidence that when drafting his will we wanted that money to go to his daughter.
  - The intention question is the intention at the transfer was made.
- The Court finds that daughter is granted the bank account and funds in it.
- The SCC said they can distinguish two periods of time: during the life there is one relationship but on death the survivorship relationship can go a different way. (this was a novel principle)
  - While the father was alive, the state of title to the money in the account: Legal title is in both the dad and daughter, equitable title only he has, so there is a presumption of resulting trust.
  - On death: state of the equitable title is to the survivor, so the equitable title is different on life and death. The right of survivorship is given right away of whatever is left in the account.
  - The problem is that this looks like a testamentary gift, which only kicks in on death, which is like a will that has to meet the criteria of a will.

**Notes:**

- A joint tenancy – if one of the joint tenants dies, the whole property goes sideways to the joint tenants, it would not be impacted by a will.

## CONSTRUCTIVE TRUSTS

- A trust made based on equity responding to unconscionable conduct.
- Conventional or institutional constructive trusts -> certain circumstances where a court of equity will deem, find or construct a trust even though the parties never intended it.
- Usually on the basis of wrongful conduct.
  - In the case of joint tenants (A & B), the doctrine of survivorship gives the surviving tenant the share.
  - If A killed B then equity may place a constructive trust on the deceased's share for the benefit of their heirs.
  - There is no set limit of constructive trusts, the courts can always impose them if they see fit.
- At an agreement for sale of land equitable interest in the land is transferred to the buyer and the legal interest remains with the seller until closing date. The vendor is a constructive trustee and the purchaser is the beneficiary, unless equity asks for the deal to be done in specific performance.
- If the seller tries to back out of the sale, the buyer can sue them and in equity, buyer can get specific performance. The equitable interest before closing date is based on the court's willingness to enforce specific performance (equity), must show why damages isn't good enough, for many years it was said money will not do in place of land (until Sopinka)
  - It's an institutional constructive trust.
  - Buyer can file a caveat to prevent the property being sold to another purchaser. To do this you must have an interest in land.

- You have an equitable interest. The caveat serves as notice to potential purchaser!
  - This relies on the equitable maxim: Equity deems as done, was ought to be done.
  - It will only fail by a frailty of equity, hence why the caveat is given to serve as notice.
- BUT, The SCC in *Obiter* 20 years ago (1996): that the court will not automatically make specific performance remedy unless the property is unique. Show us that damages are unsuitable then the Court will allow specific performance.
  - You have to show that you're entitled to the property rather than monetary damages.
    - In a sense, this is just reiterating the common law that says damages will do unless you can show otherwise before equity stepped in. (Rebuttal performance.)
    - Damages are inadequate if the property is unique.
  - This was the **Semelhago** decision.
    - Is all property on planet earth on unique? This was not enough. Have to show specific characteristics.
    - In damages, the innocent party has to mitigate and find a substitute, and then the defendants have to pay the difference. Ziff does not like this.
    - The SCC has subsequently said that the innocent party will be have found to mitigate if they make reasonable efforts. In this case the innocent party would not get the specific performance or may not find a substitute. They may still get damages.
    - This applies to residential and commercial property.
  - If equity is prepared to award specific performance, then it is a constructive trust.

#### **Murdoch v Murdoch**

- In the throes of marital breakdown, the husband and wife owned a ranch. The title was in Mr.'s name and the wife claimed that she had a share in the property given the work she had put into it.
- The SCC did not accept her claim and Ms. Murdoch got nothing.
  - They found no intention to create a constructive trust
- This case is what prompted the Matrimonial Property Act for married couples.
- The attention then turned to unmarried couples given that there was not institutional constructive trust. The Supreme Court of Canada found that there was a response available in equity:
  - **1) the standalone concept of unjust enrichment**
    - Can happen in any situation between two parties.
  - **2) one possible remedy for unjust enrichment: Remedial constructive trusts**

#### **Kerr v Baranow; Vanasse v Seguin**

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2011 SCC 10

##### **Facts:**

- Both appeals dealt with the claims of the female partner in an intimate relationship for spousal support and for a share of property to which the male partner held title.
- The couples had been together long time but were unmarried and considered to be in domestic relationships.
- In this case, the common law is often the only option available.

##### **Analysis/Holding:**

- The Court considers that it is time to recognize the **common intention approach to resulting trusts has no role in these situations.**
  - Resulting trust arising from gratuitous transfers were applied to domestic situations. They were gratuitous in the sense that there was a transfer of property from one partner to another or the joint contribution of two people to the acquisition of property that is only in one person's name.

- The Court says that **unjust enrichment** is the more flexible and appropriate lens through which to view property and financial disputes in domestic situations because it **carries with it the possibility of a remedial constructive trust**.
- **In order to successfully prove a claim of unjust enrichment, the claimant must show:**
  - 1) Enrichment or benefit to defendant
  - 2) Corresponding detriment to the plaintiff
  - 3) Absence of juristic reason for the enrichment.
    - This means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff.
    - It provides for due consideration of the autonomy of the parties and factors like the legitimate expectations of the parties, and the right of parties to order their affairs by contract.
- The first step of the juristic reason analysis as per Garland, applies the established categories of juristic reasons. In their absence, the second step permits consideration of the reasonable expectation of parties and the public policy considerations.
  - There is no reason to distinguish domestic services from other considerations. They constitute an enrichment because such services are of great value to the family and to the other spouse.

### Remedies for Unjust Enrichment

- **The first is always a monetary award, as in most cases it will be sufficient to remedy it.**
- There are difficulties in determining what will constitute adequate compensation.
  - Have to create a ledger of what each person contributed to the relationship.
  - It must be calculated on the monetary value of unpaid services.
- Where a monetary award is insufficient, a proprietary award may be considered.

### The Remedial Constructive Trust

- An equitable tool to determine beneficial entitlement to property.
- A share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in the plaintiff's favour.
- The plaintiff must demonstrate a sufficiently substantial and direct link, a causal connection or a nexus between their contributions and the property that is the subject of the trust.
  - A minor or indirect contribution will not suffice.
- **They plaintiff must also establish that a monetary award would be insufficient in the circumstances.**
- The extent of the trust should be proportionate to the claimant's contributions. Where contributions were unequal, shares will be unequal.

### Monetary Awards and Joint Family Ventures

- Where unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated **during the course of a joint family venture to which both partners have contributed**, the monetary award should reflect this.
- It should recognize and respond to the reality that there are unmarried domestic partnerships.
- There is no presumption of equal sharing.
- It is first necessary to **identify whether the parties have in fact been engaged in a joint family venture, as there is no presumption of one.**
- The emphasis should be on how the parties lived their lives including:
  - **Mutual effort** – working collaboratively towards common goals (raising children together, pooling effort and team work, the length of the relationship). Pooling resources includes the contribution of domestic labour which freed the other spouse up to pursue activities in the work force.
  - **Economic integration** – integration of finances, joint bank accounts, sharing of expenses, pools of savings.
  - **Actual intent of the parties** – must be given considerable weight (either express or inferred from the conduct). It is actual intent not what reasonable parties ought to have intended.
  - **Priority of the family** – what extent have the parties given to the priority of the family in their decision making.

### **Mutual Benefit Conferral**

- Unjust enrichment in domestic situations has to recognize that there is a mutual conferral of benefits.
- It is straight forward where one party emerged from the relationship with a disproportionate share of assets accumulated through joint efforts.
- Mutual benefit conferral may provide evidence of reasonable expectations and should be used at the juristic reason stage to the extent that it speaks to the parties expectations.

### **Reasonable or Legitimate Expectations**

- They have little role to play in deciding whether the services were provided for juristic reasons within the existing categories.
- In some cases, the fact that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present.
- The parties reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit which does not fall in an existing category.

### **Notes:**

- Burden of proof issue on number 3 of unjust enrichment test: The plaintiff has to show the court that there is not valid reason that this happened such as a contract or deal. This is proving a negative and hard to do comprehensively.
  - In Garland, the court said the plaintiff has to show that there was no gift, contract, other thing, then the defendant can show a unique juristic reason.
  - The burden of proof was then bifurcated.
- If there has been an unjust enrichment monetary awards are the first place that the Court will go. After that, the Court may consider Proprietary awards.
- This case is also the first time that the court has considered the idea of a joint family venture.
- **Value received/fee-for-services vs value survived as ways to calculate the award for unjust enrichment**
  - Value received would be based on what the market demands for such work.
  - Value survived: the amount the value increased owing to the infusion of that labour.
  - The method chosen does not depend on whether it is a monetary award or a share of property.
  - Instead, it turns on the joint family venture criteria that the Court set out in the case.
- **\*\*\* If a joint family venture is found then the value survived method is to be used.**
  - The owning spouse will also likely to have put benefit into the property and that must be taken into consideration. The granular level will be effected by mutual effort among other things.

## **Cultural Appropriation and Property Law**

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- Can be thought of as similar to intellectual property.
- Intellectual property is a non-rival good.

### **Bulun Bulun v R & T Textiles Ply Ltd**

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1998 Australian Federal Court of Appeal

#### **Facts:**

- Bulun was an Aboriginal artist and senior member of Ganalbingu people
- He received permission and his work incorporated sacred and important matter that was important to Ganalbingu people (received permission)
- D manufactured and sold fabric with design that reproduced substantial aspects of Bulun's work
- **Bulun – legal owner of copyright in work** – proceeded against company and its three directors
- Mr. Milpururru joined in proceeding in his own right as senior of all Ganalbingu people and as representative of traditional Aboriginal owners of Ganalbingu country (who he argued were **equitable owners of copyright in work** )
- Company admitted to its copyright infringement and withdrew products from market but Mr. Milpururru continued with claim in order to obtain recognition from Court of rights of Ganalbingu people and injury caused to them by infringement.

#### Issue:

- Do the circumstances give rise to equitable interest for the band?

#### Analysis/Holding:

- Court found that Band had no proprietary interest in the symbol. Also, Bulun had discharged his fiduciary duty to take reasonable steps to enforce the copyright, but Band would have been able to sue had Bulun failed to sue.
- Bulun had legal interest in the symbol because he registered a copyright in the symbol. The court found that the band had no legal proprietary interest in the symbol.
- The court found that there was a fiduciary relationship between Bulun and the band, since Bulun sought and was granted their permission to use the symbol
  - The specific fiduciary obligations come from the Aboriginal customary law. Equity gives the concept of fiduciary duties a place in the law.
- Argument is that Band controls customs regulating use of this image, placing Bulun in position of fiduciary duty either by (a) express trust or (b) constructive trust
  - a) **Express Trust:** requires intention of express trust and for creator to divest himself from beneficial interest in property. Bulun kept proceeds from previous sales, so does not exist on facts. Not a customary practice to create such a trust, and likely fails to want of certainty as to who the trust applies (i.e., all band members? Select members, etc)
  - b) **Constructive trust-** will not be imposed merely on establishment of fiduciary duty. Only will happen to prevent fiduciary from *obtaining unconscionable benefit* such as if they refused to protect copyright from infringement. Not true on facts, so no remedy.
- Ziff: The court would not create a constructive trust if the third party legally acquired the copyrights from Bulun—it is the case that the law of equity will not impose itself against a bona fide purchaser.

#### Notes:

- Does this have anything to do with a constructive trust?
- If Mr. Bulun had disregarded or reluctant to take action on the fiduciary duties, the Court mentions that there may have been a case for equity to create a new institutional constructive trust (see page 525).
- The Court calls it a remedial constructive trust but in Australia, that is similar to a institutional trust in Canada.
- What would it mean if the Court said that they were going to impose a constructive trust?
  - A trust is only relevant if there is property to hold in trust.
  - What would the property be? -> the entitlement enforceable outside to the XXXX people.
  - This would technically be a right in personam, but is more likely a right in rem.

## CHAPTER 7 - CONDITIONAL DISPOSITIONS

### Basic Concepts

- The ways in which qualified (i.e. customized) dispositions of property are created and the limitations on the freedom of transfer that are imposed under the law.

#### Reversions

- To A for life -> the grantor retains a reversion by giving away a lesser estate, the property returns to the Grantor on the death of A.
- The interest granted to A is a part of the fee simple.
- This is a present right to future enjoyment.

#### Remainder

- To A for life and then to B in fee simple -> B is conveyed a remainder interest and not entitled to possession until expiration of the other interest created.
- This is a present right to future enjoyment.

#### Defeasible Interest

- An interest is defeasible if it may be brought to a **premature end** on the occurrence of a specified event.
- DARK CLOUD that hangs over a fee simple.
- To X a fee simple on the condition that **if** it is no longer needed as Z, they estate may re-enter.
- If the stated event comes to pass, the estate has a right of re-entry.
- Fee simple subject to a **condition subsequent**.

#### Determinable Interest

- FENCE POST
- The determining event is like a fence post that demarcates the durational extent of the entitlement.
- To the School **until** the land is no longer required for school purposes.
- The Board a possessory right and if the determining event occurs the fee will end that the property will pass to the **grantor who retains an interest as a possibility of reverter**.
- The possibility of reverter (as in the determinable interest) is treated as being vested at common law since it is considered a natural termination.

#### Vested Interests

- An interest is vested when no condition or limitation stands in way of enjoyment.
- To A for life, remainder to B: are vested interests.
- The life estate is vested in possession, and B's interest is vested since the right to possession is not delayed by any other condition other than the natural termination of the prior estate. B's remainder is vested in interest.

#### Contingent Interests

- An interest is contingent if vesting is delayed pending the occurrence of some condition precedent.
- A BRIDGE that must be crossed before the property can be enjoyed.
- To A for life, remainder to B but only if and when B marries imposes a **condition precedent on B's remainder and creates a contingent interest**.
- Ascertaining whether a gift is vested or contingent is a matter of construction.

#### Courts typically favor vesting, and also have a preference in favor of vesting gifts at the earliest time possible

- When it is unclear whether a gift creates a condition precedent, a condition subsequent or a determinable limitation, the latter 2 options are preferred because they lead to immediate vesting
- The condition is then treated as a basis for termination

- Insulates the gift from rules that vitiate contingent interests, including the rule against perpetuities
- Allow for early distribution of a deceased's estate into the hands of the ultimate beneficiaries
- Promotes the free alienation of property

## Class Notes

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- In a conflict between law and equity, equity wins.
- This is in the Judicature Act.
- Where there is a decision in the title of black acre, equity wins.
- Conditional Dispositions -> transferring property with conditions attached.
- Up until now, we have been talking about the transfer of fee simple absolute (FSA).
- This is relevant today in wills.
- See the Great Canadian Stork Derby and the SCC case where the Court upheld the ability of Millar to make conditional dispositions in his will.

**Example 1:** A grant to Blackacre in fee simple but should the land ever be used for residential purposes then my estate may re-enter.

- What are the legal constructs resulting from this grant?
- **A obtains a fee simple, subject to condition subsequent.**
- Also known as a defeasible interest.
- The full fee simple absolute has not been given.
- The estate retains a right of re-entry.
- The condition is like a dark cloud that hangs over the property.
- Why is this a condition subsequent?
  - The condition is subsequent to A getting the land. You may get possession of the land now but you might lose it subsequently.
  - Its defeasible so you can be defeated later if you breach the condition and then the estate can re-enter.
- These things can be done with all sorts of property interests, not just fee simple.

**Example 2:** I grant blackacre to A in fee simple until the land is used for residential purposes.

- A receives a **determinable fee simple**, it is not a fee simple absolute there is something remaining.
- The estate retains a possibility of reverter.
- It is like a fence post. It is a durational fence post that sets up a termination point for the life of the fee simple. The fence post marks the end.
- As with FS-CS, A receives the land now, but her rights may determine (end) later.

**The difference between example 1 (condition subsequent/defeasible interest) and example 2 (determinable interest):**

- It's a matter of intention of the grant party.
- The **condition subsequent** describes an event that will cut short the estate and will be **denoted by a statement of conditionality** (provided that, but should, upon the condition).
- The **determinable grant** -> look to language that **denotes the duration** of land (so long as, until, when)

Why does it matter (one versus the other)?

- The determinable grant, when invalid: **the ENTIRE gift is invalid.**
- The condition subsequent when invalid: it becomes an ABSOLUTE fee simple (When the cloud is gone, it's a beautiful day).

**Example 3:** I devise blackacre to A in fee simple but if, and only if, she first obtains a degree in environmental studies.

- A has a fee simple to a condition precedent.
- It is like a bridge that first must be crossed.
- **If the condition is a condition in relation to land and that condition is void, the effect of invalidity is the gift cannot take effect and it reverts back to the estate.**

## **Suartburn (Municipality) v Kiansky**

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2001 – MBQB

### **Facts:**

- Under Manitoba election law, in order to hold elected office, a person must be an owner of land or else a tenant.
- Kiansky, who wants to run for office, sold home and moved from relevant district but continued to hold an interest in other Stuartburn real estate
- His entitlement was subject to a prior life estate in favour of his Grandmother (remainder interest expectant on death of his grandmother who held life interest)

### **Issue:**

- Was his remainderman interest sufficient to classify him as an owner of land?

### **Analysis/Holding:**

- The definition of ownership in the act must be taken to mean ownership of a currently existing freehold estate.
- Freehold includes a life interest and a fee simple.
- Kiansky's remainder interest is of a right to a freehold interest/estate in fee simple.
- Remainder interest is a present interest – it co-exists with the life estate even though enjoyment and possession of the real property is postponed until termination of the life interest.
- A grant of a life estate to one person with the remainder in fee simple to another, was and remains a grant to each effective as of the time of the grant.
  - Sesisn did not require actual possession, although it required possession in the sense of title or ownership.
- The remainder interest allows him to be classified as a present owner of freehold estate.

## **Phipps v Ackers**

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- This is a case from the House of Lords in 1842.
- It sets out the preference from early vesting in action.
- When it is unclear whether a gift creates:
  - A condition precedent
  - A condition subsequent
  - Or a determinable limitation
- The latter two options are preferred because these reading lead to an immediate vesting of the interest.
- The condition or limitation is then treated as the basis for termination.
- It is a rebuttable presumption by clear language that shows a contingent interest.

## **McKeen Estate v McKeen Estate**

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1993 NBQB

### **Facts:**

- McKeen's will directed that his entire estate be held in trust for his wife for her life and on her death, to divide residue of estate equally between his sisters if both alive at time of death wife or whichever one is alive.
- Neither sister survived testator and his wife.

**Issue:**

- Whether the testator intended with his wording to make gifts to his sisters, contingent on their surviving his wife?

**Analysis/Holding:**

- If it was contingent on them surviving the wife, McKeen had made no provisions for an alternative gift, and he would intestate with respect to the residue of his estate.
- In that case, the residue would be distributed to the testator's relatives in order of priority determined by legislation.
- If the gifts to his sister vested in interest at the effective date of the testator's will, then the property would pass to their estates.
- **The paramount importance is the actual and subjective intention of the testator.**
- If the words did not express a clear intention, the court could consider what a reasonable person might have intended in the circumstances.
- There is a general presumption against intestacy, i.e. that the testator did not intend to die intestate.

**The Rule in Brown and Moody**

- A gift is prima facie vested if the postponement is to allow for a prior life estate.
- McKeen wanted to provide for his wife during her life and then ultimately deliver the bulk of his estate to his sisters.
- He did not intend partial intestacy.
  
- The residue of the estate is held to have been vested in the sisters equally at the date of McKeen's death, subject to the possibility of divesting the interest of the deceased sister if only one sister survived the life tenant.
- A construction which gives a vested interest is favoured by the courts where there is ambiguity and doubt.

**Notes:**

- Interests that are vested may still be subject to the stipulations that reduce the full ownership rights of the grantee, by providing for the grantee to lose ownership of the interest on the happening of stipulated event.
- Stipulations that are framed as conditions subsequent give the grantor the right to decide whether to terminate the grantee's estate should the identified event occur.

**Caroline (Village) v Roper**

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Alberta Queens Bench 1987

**Facts:**

- Property is donated for site of community hall.
- "shall revert back to the late Thomas Roper estate if used for other than a community center."
- The village wants to sell the land for a commercial purpose.

**Issue:**

- Whether the grantee could retain property once it was no longer being used of a community hall?

**Analysis/Holding:**

- Fee simple determinable with a right of reverter
- Key words in the documents are "This acre...shall revert...if used for other than a community centre"
- Document rectified to show that the transferees received title to the property as trustees for as long as the property was used as a community centre and to be conveyed back to the Ropers at the end of that use; therefore property conveyed back to the Roper.
- The words seem to make the fee simple that was given defeasible if a future event occurs.
- They do not put a condition of the fee simple that it is good so long as a certain use is made of it.

**Notes:**

- The interest the grantor retains is the right of re-entry.
- It is contingent because for this right of re-entry can be exercised, an event (the condition precedent) must occur.
  - In this case, the land is no longer used as a community center.
- As a contingent interest, the right of re-entry is subject to the law against perpetuities.

## UNCERTAINTY AND RESTRAINTS ON ALIENATION

### Public Policy as a ground for declaring stipulations to be invalid

- Courts have the power to refuse to enforce terms in a contract or in transfers of land that offend against public policy, meaning that they are contrary to good moral or public order.
- Examples include prohibitions against carrying out public duties or serving in the military could be voided for such, as could prohibitions against marriage which is supported by public policy.

The effect of invalidity if found to be void:

- (i) condition subsequent: The condition is removed and the gift becomes absolute (cloud floats away)
- (ii) determinable interests: The entire gift fails.
- (iii) conditions precedent: *realty v personalty* (*Unger v. Gossen*)
  - When attached to realty or land: the gift fails/is destroyed (the bridge is burned)
  - When attached to personalty: it is possible it be either destroyed or upheld.

### Unger v Gossen

1996 BCSC

**Facts:**

- Toews leaves her estate to her sister for life and then to her three nephews.
- There is a condition precedent on the nephews i.e they must become residents of Canada in order to receive the money within 15 years of the death.
- Given immigration laws, their age, and education levels, immigration to Canada would have been impossible.
- The testator's intention in the conditions precedent was to keep the money out of the hands of the USSR.
- When the wall fell, she had developed dementia and could not alter her will.
- All the potential beneficiaries of the estate agreed that the given the impossibility of fulfilling the condition, the portions of the estate should be equally distributed immediately.

**Issue:**

- The Court must decide whether to immediately distribute the will.

**Analysis/Holding:**

- It is necessary to consider the intent of the testator.
- Conditions precedent impossible of performance are to be disregarded and the gift upheld or where the condition cannot be upheld because it is contrary to the law, then the bequest is absolute.
  - The impossibility of the condition by reason of law had to exist at the outset in order for the condition to be ignored leaving the gift intact.
- Where the testator grants a bequest subject to a condition which is impossible, the dominant intent must be the gift because to intentionally draft into a will a void condition is an absurdity.
  - Unless it can be shown that the principal concern of the testator was the condition and not the gift, the condition alone must fail.
- In this case, the gift, not the condition was the testator's motivation. The condition was simply to keep the money away from communists.
- She wanted her nephews to have the money ultimately.

- The condition fails and the estate should be distributed at this time.

## Re Leonard Foundation Trust

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Ontario Court of Appeal 1990

### Facts:

- Trust established in 1916 contains numerous “recitals in trust” that restrict the people who qualify as recipients of these scholarships.
- Lengthy preamble of the trust speaks of white superiority, and offered money only to white, Christian, no more than ¼ awarded to females and many other similar restrictions.
- In the event of any dispute, a designed court (Ont. SC) was set out to deal with the matter. In 1986, Ontario Human Rights commission filed complaints against the Trust for violating Humans Rights Code. Should the trust be found to be wholly invalid, beneficiaries (museum and nephew) would received everything.

### Issue:

- Was the trust valid for reasons of public policy?

### Analysis/Holdings (Robins JA):

- Charter deals with public actions and this is private so it is of no help.
- Ultimately the trust is able to stand but the discriminatory elements are severed.
- The recitals cannot be isolated from the balance of the trust and the document must be read as a whole.
- The recitals also do not conflict with the operative provisions as there is reference to them throughout the operations provisions.
- The recitals were intended to give guidance and direction to awarding scholarships.
- While it is a private foundation, it operates in a public sphere, as a charitable trust for education purpose it has acquired a quasi-public character.
- **Public policy should be invoked only in clear cases, in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of judicial minds.**
- The trust is couched in terms so at odds with today’s social values as to make its continued operation in its present form inimical to the public interest.
- The concept of one race or religion being superior in Canadian society runs counter to democratic principles, constitutionally guaranteed rights and the multicultural heritage of Canada.
- The cy-pres doctrine allows for a charitable trust that cannot be carried out according to the terms set out by the settlor to have its terms revised by the court to carry out the settlor’s intentions as nearly as possible.
- The Court strikes out the recitals and remove all restrictions with respect to race, colour, creed, origin, religion and sex.

### Tarnopolsky JA:

- This case should not be taken as authority for the proposition that all restrictions amount to discrimination and are therefore contrary to public policy.
- Attention will have to be paid to the social and historical context of the group concerned.
- Just as not every restriction will violate public policy; not every distinction leads to a section 15 discrimination claim.
- Public policy is determined from a variety of provincial and federal statutes, official declarations of government policy, the Constitution, human rights laws.
- There is wide-spread public policy against discrimination in Canada.

### Notes:

#### Ziff on Unworthy Heirs

- Unworthy heirs can be the donee who kills the donor
- Providing financial interest to terrorist organizations.

- And as was the case in *McCorkill v McCorkill Estate*: The national alliance, a neo-nazi, organization, even though it was a validly incorporated company in the US, was not illegal per se and had never been charged or convicted of a crime in Canada.
- A gift should be invalidated if both of the following are met:
  - 1) at the time the gift takes effect, a core and substantial aim of an organization is to pursue a policy that manifestly violates extant Canadian public policy; and
  - 2) the donee has pursued those policies using illegal means.

## Uncertainty

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- Stipulations cannot be enforced if they cannot be interpreted with certainty.
- In interpreting a stipulation for retaining property one has to know in advance of the event what will bring a grantee's interest to an end.
  - With a condition subsequent, one must be able to state with certainty what events will give rise to the grantor's right of re-entry.
  - With a determinable interest – what will cause the grantee's interest to revert to the grantor.

## HJ Hayes Co v Meade

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1987 NBQB

### Facts:

- The gift requires James, son, to reside on land and cultivate it. If not give to other son and give James 1000.

### Issue:

- Whether testator had intended to create conditions precedent to his son obtaining the disputed property, or a condition subsequent for retaining the property?

### Analysis/Holding:

- If you have an uncertain bridge (CP) then if invalid, then the gift fails entirely (rotten bridge can't cross).
- If you have an uncertain cloud (CS) then if invalid, then the gift is absolute (cloud disperses).
- The Court holds that there is a condition subsequent, which is valid for uncertainty.
- Condition subsequent is consistent with presumption against intestacy and the presumption for vesting.
- The testator did not intend for there to be intestacy.
- Court held that residency and cultivation (not sure what they mean) contained in will are condition subsequent and voided for uncertainty.

## Fennell v Fennel

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2012 New Jersey

### Facts:

- Grandma leaves house to children with the condition that all of the her family could make use of said home without costs provided that they share in the upkeep of the costs.

### Analysis/Holding:

- The Court must look at the entire circumstances and not just the words of the Will itself to determine the testatrix's intention.
- Ultimately, the owners are left without a clear understanding of the scope of the conditions that may affected their entitlements to the property.
- The conditional provision is void for uncertainty.

## Sifton v Sifton

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### Facts:

- Trustees instructed to pay settlor's daughter sum of money annually "so long as she shall continue to reside in Canada" in a separate clause.

### Analysis/Holding:

- Trying to get to grantor's intention.
- Terms reflect durational language, indicative of equitable life estate subject to determinable limitation.
- However, Privy Council holds condition subsequent, but condition was void for uncertainty
  - If determinable limitation and invalidated, entire gift fails vs. if condition subsequent and invalidated, becomes a gift absolute
- **Residency term void for uncertainty, so gift was absolute.**
- Condition subsequent requires high clarity; when a vested interest is subject to a condition subsequent, the condition must be stated in such terms that court must be able to see from the beginning, precisely and distinctly what event(s) will result in divestment (conceptual uncertainty vs. evidentiary uncertainty).
  - If can't tell clearly and distinctly, then void for uncertainty

## KOTSAR v SHATTOCK

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- "To pay the remainder of my residuary estate to Oilme Kotsar...if and when she shall attain the age of 21 years, provided that upon the attainment of such age she shall then be resident in one of the countries of the British Commonwealth of Nations"
- Court says that "being a resident" and "reside" are not inherently imprecise terms, you can see what countries comprise the British commonwealth and where primary residence is; distinguishable from "continue to reside" in Sifton
  - **Condition subsequent was uncertain but not too uncertain**, courts could give it some plausible meaning; not a problem of conceptual uncertainty.

### Test for Uncertainty

- For a condition subsequent: clearly and distinctly
- The rules are different for conditions precedent: a lower standard is required. Its hard to find it void for uncertainty. The test is not well developed in the case law. Some reasonable or sensible reading.

## Restraints on Alienation

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- Excessive restraints on alienation will not be enforced.
- Restraints can be found in contractual terms – promissory restraints.
  - They are not subject to the laws we are talking about here.
- Some restraints are disabling – you don't have the power of sale in your bundle of rights.
- Forfeiture restraints – you try and sell the property and it ends your entitlement.
  
- Rule against direct restraints on alienation goes back to Statute Quia Emptores
- Law promotes alienability and therefore conditional transfers that impose unacceptable restraints on the transfer of property are invalid
- Rules governing restraints on alienation can be described by doctrine of repugnancy: restraints are invalid if they are inconsistent with an inherent attribute to ownership, i.e. right to transfer property freely
  - EG. Any attempt to give a fee simple but remove an essential aspect of the interest is void, i.e. Prohibition to sell, or lease, or mortgage
- **Four objections to restraints on alienation:**

- (1) Makes property unmarketable: prevents it from being put to its most valuable use, goes against the value of efficiency underlying property law
  - (2) Fairness and distributive concerns: restraints perpetuate a concentration of wealth, especially important in feudal times when land was primary source of wealth and power
  - (3) Discourage improvements: less likely to improve land that they can't sell, may be difficult to obtain financing if power to mortgage is removed
  - (4) Detracts from business: disrupt credit market because creditors will know that they can't reach the property to satisfy debt
- **Valid Restraints:**
  - **Forfeiture:** having a right of re-entry or possibility of reverter if a condition is breached
    - Grantor creates a condition subsequent with right of re-entry (executory limitation); "Property to X, but if X tries to resell, may re-enter"
  - **Promissory: limits that are purely contractual**
    - EG. As part of contractual agreement not to transfer, makes party personally liable for damages
  - **Disabling restraint:** remove from the owner some aspect of the power of disposal normally found in the bundle of rights
    - Attempted violation of disabling restraint does not divest holder of the property, merely deprives owner of some aspect of power of transfer normally found in bundle of proprietary rights
    - Makes attempted transaction null because of principle of *nemo dat* (can't give what you don't got)
  - When Validity at issue, the extent of restriction must be examined. Power of disposal may be abridged in 3 ways:
    - **1.** By restricting the **Mode of alienation** (i.e., land cannot be sold or mortgaged, but may be leased)
    - **2.** By Prohibiting alienation to some **class of recipients**
    - **3.** Precluding dealings for a specified **time**- SCC has said that the total restraints for any period of time is invalid (even for 1 day)
  - The law distinguishes between precatory words and precatory trusts
    - Precatory words are toothless.
    - Precatory trusts – are trusts in equity that are enforceable.
  - Not every term in a will is legally binding on a trustee (could go either way)
    - Could be the mere "hopes or wishes" of the testator or → term has "no teeth"
    - Could be binding → creates a "precatory trust"
    - Terms are precatory when they fall short of establishing an actual condition or limitation - usually a "request" or "understanding". In some cases these words may be found as binding and create a precatory trust – this is a matter of construction and is difficult to achieve.
  - *In terrorem* testamentary conditions are idle threats which are not meant to lead to a loss of interest "anyone who contests my will, will be divested"
    - But if phrased as a condition subsequent, court may uphold it "to J but if J contests my will, then to K"

## Trinity College School v Lyons

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1995 Ontario General Division

### Facts:

- At issue here is a term of an agreement signed in 1965 giving TCS (the optionee) the right of first refusal on the lot where Thomas and Mildred Bennet lived, and an option to purchase the lot on the death of the survivor.
- The respondents, the Bennett daughters said that the option was no longer exercisable as their parents had transfer them the lot via inter vivos gift back in 1978.
- There are two interests created:

- 1. One was a right of first refusal (purchase). This is only triggered if the Bennett's wanted to sell the place. Here the school had first dibs if they wanted the land.
- 2. The other was the post mortem option.

**Issue:**

- The first question that must be answered is whether the option for a fixed price was unenforceable or void as an improper restraint on alienation of an estate in fee simple?

**Analysis/Holding:**

- The right of alienation has been an inseparable incident of an estate in fee simple. As a result, the courts have viewed with disfavor any restraint on alienation.

**Re Rosher**

- In this case the English Courts held that requiring the son, if he desired to sell, to do so at 1/5 of the value of the estate was equivalent to an absolute restraint against the sale during the lifetime of the widow.
- A provision where the optionee is required to meet any offer received by the optionor is valid; if however, the optionee only need to pay a fixed price or percentage that will generally be a restraint on alienation.
- If the right of pre-emption at a fixed price substantially deprives the person who granted it of his right of alienation then it will not be valid.
- The right of first refusal was not void as a restraint on alienation, notwithstanding that it specified a fixed price of no more than ~\$10,000. The right of first refusal had not been imposed on the surviving Bennett.
- The right of option triggered the death of the survivor Bennett's was void as an unlawful restraint on alienation.
  - Partly because it was exercisable at the choice of TCS, whether or not the executrix of the will wished to sell.

**Notes:**

- The Post Mortem option – on the death of the Bennett's, TCS had an option to buy the school at a fixed price.
- The fixed price was well below the market value; the court called this a restraint on alienation.
- What about on its face, it is not restraining alienation but instead promoting alienation: Re Rosher is described in this case at page 569.
  - The restriction was a restriction on the fee simple estate, not purely contractual. The fee simple was fettered.
- The parties can always bargain to an efficient result via a Coasian bargain, so there would be no restriction on alienation.

**CHAPTER 8 – LEASES, LICENSES, BAILMENTS**

- It is important to distinguish between commercial tenancies and residential tenancies.
- Commercial tenancies are largely governed by the common law.
  - There are some statutes of influence.
- Up until the 1960s this was true for residential tenancies but they were then reformed.
  - The reforms bolstered tenant's rights.

**TYPES OF LEASES**

- A lease must relate to a given property between ascertained persons (tenant and landlord).
- When the tenancy is for a fixed term, its starting date must be ascertainable and its max duration must be certain or ascertainable at the commencement of the term.

- **BY TERM:**
- **Fixed term lease** (terms must be certain, though it can end prematurely)
  - Can be any fixed duration
  - Can also be prescribed to an event
- **A period lease** (enjoyed for some recurring period of time, i.e. month-to-month)
  - Common law presumption is a periodic tenancy
  - As a result of law, arises by implied consent that when a fixed term season ends and tenant remains on property/pays rent, presume that intended to create a periodic tenancy
  - Occurs again and again, unless terminated by notice
- **Tenancy at will** (which may be terminated at any time by either the landlord or tenant)
  - Tenancy at will can become periodic on payment/acceptance of rent, if fairly implied by circumstances
- **Tenancy at sufferance** (which arises when a tenant overholds after the expiration of a term; tenant remains in possession of property without permission from landlord)
  - Non-consensual: doesn't produce tenurial relationship
- **BY CATEGORY:**
  - **Commercial:** Governed solely by the common law
  - **Residential:** Statutes in place to govern due to unequal bargaining power
    - Residential Tenancies Act, Mobile Home Sites Tenancies Act

## LEASE VS LICENSE

| Lease  | License<br>- Typically an in personam right  |
|--|--|
| <b>Exclusive Possession</b>  | <b>Only a Right to Use</b> (can't sue in trespass)<br>Privilege to occupy with consent |
| Non-Revocable (statutory protection against eviction)  | Revocable at any time  |
| Estate in Land   | Not an Estate – Purely Contractual<br>Not an interest in land.                         |
| Binding to world, i.e. Subsequent purchasers of land bound to existing lease, only has reversionary interest | Landlord can sell without obligation. New owners are not bound to the license.         |

## METRO-MATIC V HULMANN (LIMIT ON TYPE OF USE DOES NOT DETRACT FROM IT BEING A LEASE)

### Facts:

- Metro-Matic operates a laundry room in a residential building; original landlord sells his interest to a landlord that has own laundry company; tenant could install machines, but residents of building had access to laundry room

### Issue

- Is the agreement b/w Metro-Matic and landlord a lease or license? Is the new landlord bound to continue to let metro-matic operate?

### Judgement:

- LEASE
- Form/language used is lease like but Ziff argues that question is substance and not form (whether exclusive possession has been granted is resolved not only by looking at terms of lease but other attendant circumstances)

- Clear description of premises within a specific term
- Minor derogations and restrictions in agreement on the tenant's exclusivity does not destroy the lease in its entirety
- Despite stipulated term that ensures Metro-Matic's free access, when it should be landlord that reserves right to access premises, Metro-Matic is being prudent as a commercial entity
- Occupancy demonstrating possession → Having machines there
- Stipulated term that machines and equipment shall not become fixtures of the Landlord, but shall remain the personal property of the Tenant
- Language used suggests a lease ("rent"; "demise"); clearly indicated duration of the term
- New landlord was bound by the agreement of the Lease

#### Notes

- In favour of a license, 6(b) and (e) give the landlord control over access to the room.
- But the landlords ability to limit access during reasonable times could be argued to just be a restriction to access the common areas that are required to pass through to get to the laundry room. The laundry room itself is still subject to the exclusive possession of Metro-Matic.

## Transfer of leases

- The assignee takes on the responsibility of the real covenants of the lease as well as the benefits.
  - This is the default.
- Under contract law some contractual benefit can be assigned.
  - Such as the assignment of debt.

## SUNDANCE INVESTMENT CORP V RICHFIELD PROPERTIES

1983 ABCA

#### Facts:

- Two tenants (Beaver Lumber and Sundance) lease separate premises in the mall (Richfield is owner)
- Lease says:
  - Consent to sublet or assign the lease requires permission of the landlord, but **the landlord cannot arbitrarily deny an assignment or sublease**
  - If the other major tenant (Beaver Lumber), objects to the "nature of the business", it will constitute reasonable grounds for rejection
  - Landlord shall not object to subletting/assigning for specific types of businesses "appropriate thereto"
- Sundance tried to sublet to Swiss Chalet, but landlord refused to allow it, because Beaver the other tenant did not agree with.
- Claimed that the typical customer spends too much time there and would take away from the parking spots for Beaver Lumber customers.
- If Beaver Lumber loses money because less customers from lack of parking, landlord will too as commercial tenancies are based on tenant's business

#### Analysis/Holding:

- Reasonable to refuse assignment based on apprehension of loss of rental income.
- Third clause is not operative to rescue sublet.
- Terms of lease put the burden on tenant to show that refusal is unreasonable.
- Case law holds that refusal is not unreasonable where the financial interest of the landlord is adversely affected.
- In a sub-lease it is the temporal dimension that is carved out not the physical dimension that is carved out.
  - This determines whether it is a lease or sub-lease.
- If the test of reasonableness is what a reasonable landlord would do in the circumstances, would a reasonable landlord be expected to consent to an assignment of lease which might result in his direct loss of \$80,000 annual rental income. Surely not.

## Dissent

- The phrase “nature of the business” is vague
- If Richfield could not object to an increase in Sundance’s existing business, which would create parking issues, why can it refuse to sublet to Swiss Chalet?
- Objection is not to nature of business but to location of business and parking required by the restaurant as Beaver Lumber would not object to Swiss Chalet if it were at another location
- If landlord’s right to withhold consent were to be upheld on the facts, then Sundance would be restricted to subletting to unsuccessful and even insolvent tenants.

## Notes:

- When there is an assignment privity of contract does not exist between the landlord and assignee.
- What rights does assignee then acquire?
  - The rights and obligations that run with the demised property are that which touch and concern the demised premises. (real covenants)
- In deciding whether the burden has been discharged, the questions in not whether the court would have reached the same conclusion as the landlord or even whether a reasonable person might have given consent; **It is whether a reasonable person could have withheld consent.**
- A probability that the proposed assigned will default in its obligations under the lease, may, depending the circumstance, be a reasonable ground for withholding consent.

## Merger Restaurants v DME Foods Ltd

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Manitoba Court of Appeal 1990

### Facts:

- Merger operates a restaurant in the leased premises of a shopping plaza. It is the assignee of a lease from Brousseau.
- Bonanza operates a restaurant on the neighboring property.
- The common landlord is Lakeview.
- Lakeview does construction and that takes away parking from Bonanza, so a side deal is reached to allow Bonanza to park in non-designated stalls closer to Merger.
- Merger claims under its lease it has the exclusive right to parking in lot 2, the space at issue.

### Issue:

- What is Merger’s parking entitlement under their lease?

### Analysis/Holding:

- There can be no doubt that the extent and availability of parking spaces in a shopping plaza with directly affect the nature and value of the land.
- The passage of time has not affected the rule laid down in **Spencer’s case** that covenants which **touch or concern** the land run with the land and are binding upon successors in title.
- Touching and concerning the subject matter of the lease: to run with the land, covenants must either affect the land itself, that is, the nature, quality or value of the thing demised.
- Merger’s common area rights touch or concern the demised premises. Such rights cannot be considered as merely collateral to the demise.

### Principles:

- The traditional test for a covenant to run with the land is that it must touch or concern the subject matter of the lease (Spencer’s Case)

- To run with the land, covenants must either affect the land itself, that is, the nature, quality or value of the thing demised; or the value of the land at the end of term.

**Notes:**

## TERMINATION AND REMEDIES OF LEASES

- Expiration of the fixed term period.
- Periodic tenancy will continue until timely notice.
- The tenant buys the freehold, then the leasehold and freehold merge.
- The landlord accepts a surrender of the lease. This may arise expressly or impliedly.
- The lease document might list a string of tenant obligations and thereafter recite that a breach of any covenant gives rise to a right of re-entry.
- By breach: the tenant violates one of the terms (doesn't pay rent, doesn't pay the repairs).
  - Used to be a single analysis but that is no longer true.
  - Conventional view – conditions v covenants
    - The promises (covenants) of lease are independent of each other. Breach by the tenant does not absolve the landlord of his responsibilities. Failure to comply would not give the landlord reason to terminate.
    - As a result, landlords would draft them as conditions which breach of gives the landlord right to re-enter.
    - Similar to a condition subsequent (cloud over the lease).
  - 40 years ago in Canada, the SCC decide Highway properties

## Remedies under lease abandonment

- Option 1 – Enforce the lease
  - Sue for arrears and for each rent payment when due
  - Problems: Have to wait month to month before you can sue and risk of empty premises in a shopping mall
- Option 2 – Accept Surrender
  - All rights and obligations are obliterated
  - Sue for arrears only
  - Try and find a new tenant
- Option 3 – Prior to taking possession, provide notice of intent to sublet or assign on their behalf (Goldhar's approach)
  - Sue for arrears and any shortfall/differences when due

## Highway Properties v Kelly, Douglas

**Facts:**

- Supermarket leased a large space in a shopping mall on condition that the business be operated continuously (covenant).
- The business was not successful and within 2 years, tenant abandoned and did not sublet property, repudiates (rejects) the lease.
- The defendant was the majority property in the shopping mall so its closure undermined profitability and viability of the entire plaza, i.e. tenants moved out, vandalism
- Landlord sends notice that going to re-take premises, thus to terminate lease, and to hold tenant liable for all the losses caused to Landlord.

- The date and terms of the November 22, 1963 letter are important.

**Issue:**

**Analysis/Holding:**

- Upon implied surrender, the landlord has choices:
  - 2) Elect to terminate with retaining the right to sue for damages that accrued till this point.
  - 1) They can refuse the surrender and let damages pile up. No duty to mitigate.
  - 3) Not terminating but step in and become the deemed agent to let the property on the tenants behalf but if no SL is found the tenant is still on the hook. Landlord can sue for ongoing and past losses.
- In this case, the landlord did a fourth option: They terminate the lease but wrote that they were going to hold them liable for future losses.
- In the November 22, 1963 letter the landlord wrote to the tenant that it had viewed the lease as repudiated, and intended to take possession of the premises and would attempt to lease them upon the same terms and conditions as set out in the prior lease. The landlord also gave notice that it would hold the tenant responsible for any damages suffered as a result of the breach and wrongful repudiation.
- Laskin says this is now permissible. He applied principles of breach of contract and contract law to lease law because a lease is really a combination of the two.
  - A fundamental breach of a lease, no matter how the term is framed, should give the innocent party a right to terminate the lease regardless of whether it's a condition or covenant.
  - If the landlord is fundamental breach a few cases have said the tenant may terminate.
  - These are the new approach to lease termination that are different than the conventional approach.
- The court does not think that it must follow that an election to terminate the estate as a result of the repudiation of a lease should inevitably mean an end to all covenants therein to the point of denying prospective remedial relief in damages.
- There is a new option 4 for landlords: i) accept the surrender; ii) serve notice on the tenant that an action may be brought to recover for prospective losses caused by the tenant's repudiation of the unexpired portion of the term.
- There is no logic in by electing to terminate the lease, the landlord has limited the damages that he may claim to the same scale that would result if he had elected to keep it alive.
- There is no duty under this option 4 for the landlord to mitigate its losses.

**Principles:**

**Notes:**

- This case shifts the balance towards contractual remedies.
- Harmonizes contract law with leases (Court allowed plaintiff to sue for ANTICIPATORY BREACH)
- SCC decided that it was no longer sensible to preclude a commercial landlord from enjoying the range of remedies available on the breaching of a commercial contract
- You can pursue all the remedies provided that notice is sent
- Landlord can sue for future damages (unpaid rent)

|                 |
|-----------------|
| <b>LICENSES</b> |
|-----------------|

- **License:** permission to do that which would otherwise constitute a trespass
  - May be expressly conferred or implied.
  - Implied would be someone is allowed to walk up your sidewalk and knock on your door.
  - It is not an interest in land.
  - It may be revocable on terms or irrevocable.

- **Bare license:** unsupported by contract and fully revocable
  - It is in the nature of private property that the implied general invitation may be withdrawn at anytime for virtually any reason
    - Today → licensor may be prevented from revoking contrary to the agreement
- Typically licenses are not binding on third parties and are in personam. They do not run with the land the licenses are made in relation to.
- There are instances where licenses will bind subsequent purchasers
  - License may turn into an interest in land in *equity* under the principles of **estoppel** and **unjust enrichment**
    - A license by estoppel may be imposed when the owner of land requests or allows another to spend money under an expectation, created by the owner of a parcel, that the other party will be able to remain there
    - Recognizing the existence of an irrevocable license is one way that a court can respond to unjust enrichment.
- Sometimes it is said that a license coupled with a recognised interest in land such as a profit a prende represents and example of a license that runs with the land, however such a license piggybacks on an otherwise valid property right.
- Davidson v Toronto Blue Jays (1999):
  - In the common law the old law was licenses were revocable.
  - That has not changed: a license may be made irrevocable or revocable only on terms.
  - A ticket is a license for value and is an enforceable right to attend the event in question until its conclusion, provided that the ticket holder complies with the implied contractual condition that he or she behaves properly in accordance with the rules of management.
  - Tickets now-a-days are revocable licenses:

## **Stiles v Tod Mountain Development Ltd**

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### **1992 BCSC**

#### **Facts:**

- Tod Mountain owns recreation property near Kamloops.
- Under an old owner, Stiles paid \$1000 for an unregistered lot in trust for future purchase.
- Each owner was granted a perpetual and transferable right to improve and occupy the selected lot.
- Stiles obtained a building permit and built a cabin.
- The government then denied the subdivision plan for the old owners of the property, so Development purchased it.
- Stiles was allowed to remain on the land with an informal agreement with the head of the company, but there is a new head who wants him to move his house off the property.

#### **Issue:**

- Whether a registered owner of land can reject the holder of an irrevocable un-registerable contractual license to occupy a portion of the land, in circumstances where the owner had actual notice of the license.

#### **Analysis/Holding:**

- Stiles never had a realty interest in his lot, instead he had personal rights arising out of dealings with the owners the preceded Development.
- The personal right was obtained through the doctrine of estoppel.
  - When the parties of a transaction proceed on the basis of an underlying assumption on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow them to do so.
- The Courts have expressed that proprietary estoppel can make revocable license irrevocable.

- If the owner of land request another, or indeed allows another to expend money on land under an expectation created or encouraged by the landlord that the other party will be able to remain there that raises an equity in the licensee such as to entitle him to stay. He has a license coupled with equity.
- In *Inwards*, the equity in the form of an irrevocable license to occupy was found to be binding on the successors of the original owner of the land who took with notice.
- The underlying rationale being that it would be unconscionable in the circumstances for a legal owner to exercise his legal rights.
- The overall result of this is that a contract may be established between the parties, or equity may require that the fee simple be transferred.
- The facts suggest proprietary estoppel was created between Stiles and Highland (previous owners).
- Development took title with notice of Stiles' equity: when it took title Stiles' improvements were in place and he was occupying them, this would have put them on notice.
- The Court holds that it would be unfair to allow Stiles to remain and hinder or block development of the mountain as whole.
  - Development can convey Stiles a lot to which he can move his improvements.
  - Stiles will own the lot in fee simple however since he only had a personal right before, he has to pay the moving costs.

#### Notes:

- Cowper-Smith v Morgan, 2017 SCC 61: on proprietary estoppel.
- To establish proprietary estoppel, one must first establish an equity of the kind that proprietary estoppel protects. An equity arises when:
  - (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property;
  - (2) the claimant relies on that expectation by doing or refraining from doing something and his reliance is reasonable in all of the circumstances; and
  - (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word and insist on her strict legal rights.
- It was important in this case that the third party who acquired the freehold had notice.

## RESIDENTIAL TENANCIES

### Landlord and Tenant Act (*Alberta*) 1992

#### What is covered?

- 2(2)- list of exceptions.
  - Act does not apply to dorms (2(2)(e)), or mobile home site
  - If not excluded in the act then the license is included
- 3(1)- Any waiver or release by a **tenant** of the rights, benefits, or protections under the Act are void. (landlord cannot contract out of the Act)
- 3(2)- Requires all written leases to indicate that if the lease conflicts with the Act, then the Act wins.

#### Periodic Tenancies

- Periodic tenancy continues month to month, year to year, as long as parties want to keep it going
- In common law there is a notice period that must be given to end the periodic tenancy, and this act extends this period in favor of the tenant:
- 5(1) A weekly, monthly or yearly tenancy may be terminated by either the landlord or the tenant on notice to the other.

- (2) The notice (a) must be served in sufficient time to give the period of notice required by section 7, 8, 9, 11 or 12, as the case may be, and (b) must meet the requirements of section 10.
- If you breach, you can be out in 14 days. But what if you are complying with the lease and Landlord wants you out in 90 days, they need a reason!

### Termination and Notice

- Restrictions are in place on landlords right to breach absent a relevant breach
- **S. 6-** If landlord seeks to terminate periodic tenancy, must be for a reason listed in s. 11 or s. 12, or else as prescribed by regulations. Regulations include (see pdf 52 of statutes or page 48):
  - Personal use by landlord or purchaser
  - Major renovations
  - Conversion to non-residential uses
  - Student is no longer a student
- **S. 14-** Rent increases- certain notice must be provided, and pursuant to new regulations, rent increases are limited to once year
  - **Note-** this can be used if you don't have a prescribed reason but want to kick them out – increase the rent like crazy, no rent control in AB

### Obligations

- **S. 16-** Landlords covenants include (in every residential tenancy agreement) (not a closed list)
- Premises must be available for occupation at the start of the tenancy
- Tenant is entitled to quiet enjoyment (neither landlord or any other person having claim to premises under landlord will in any significant way disturb the tenant's possession or peaceful enjoyment of premises (subject to landlord's right of entry pursuant to emergency or abandonment under **s. 23**
  - Subject to landlords right to enter premises if there are reasonable grounds to believe (a) that emergency repairs are needed or (b) that tenant has abandoned premises
- Landlord may enter at a reasonable time (after serving written notice) to inspect the state of repairs, make repairs or show property to prospective purchasers, tenants, etc.
- Premise must be habitable at the start of the tenancy
- **S. 21-** Tenant's covenants (also form part of every residential tenancy agreement)
  - Rent is paid when due
  - Must not interfere with rights of landlord or other tenants
  - Must not carry on illegal acts while on premises (illegal trade, business, occupation)
  - Must not endanger persons or property on the premises
  - Must maintain premises in reasonably clean condition
  - Must vacate premise at expiry or termination of tenancy
  - All these provisions are inclusive of "the premises, common areas or property which they form a part"

### Right of Assignment

- S 22(1)- Overrule common law presumption of tenant's absolute right to assign his/her obligations. Written consent of landlord is required for valid assignment or sub-lease.
  - Rule of construction- landlord can waive this right
- S. 22(2)- landlord must give consent unless there are reasonable grounds for the refusal (instead of common law assumption that landlord could refuse for any reasons)
  - This act is intended to protect the tenant, so the landlord can choose to waive these rights. Tenants cannot waive such rights.

### Remedies

- At common law, the landlord has some self-help remedies.
- The RTA limits these and channels them to court for a court order.
- Landlord Remedies
- **S. 26-** If tenant breaches RTA, landlord has grounds for applying to the court for:
  - Recovery of arrears of rent
  - Recovery of damages for breach of RTA
  - Compensation for use and occupation from tenant who remains beyond expiration or expiry of lease
  - Right to recover possession from tenant who remains beyond expiration or expiry of lease
  - Right to terminate tenancy for **substantial** breach
- **S. 27-** If tenant abandons or gives reason for landlord to suspect repudiation of the tenancy, (in the shadow of *Highways Properties*) the following remedies are allowed:
  - 27(1)(a)- Accept the repudiation
  - 27(1)(b)- Refuse to accept and continue the tenancy
  - 27(3)- If landlord accepts a repudiation, they can recover:
    - (a) Damages from breach prior to the repudiation AND
    - (b) Damages for loss of benefit of the tenancy
  - 27(4)- Landlord must make reasonable efforts to mitigate damages
  - 27(5)- If landlord refuses to accept repudiation, must still attempt to mitigate
  - 27(6)- Landlord who mitigates by re-letting is:
    - (a) deemed to have accepted repudiation of previous tenant
    - (b) May recover damages in same manner as if accepting repudiation
- **S. 29-** Substantial breach- landlord can remove tenant as early as 14 days after breach.
- Tenant can refute this in s 29(4) by contesting it in writing and then going through the Courts.

## BAILMENTS

- **Bailment is the temporary transfer of possession from owner to bailee pursuant to a contract (or gratuitously) with an expectation of reversion back to the bailor in the future;** e.g. borrow a book, rent a DVD, find a ring
- There has to be a transfer of possession.
- Re-delivery can be at will of bailor or set by contract
  - Can be delivered to third party if this is the intention of the bailor.

## OBLIGATIONS OF A BAILEE

- Obligations and duties of care may be set out in the contract or may be implied
- If there is a bailment contract, obligations of parties are set out in contract
- If there is NO bailment contract, 3 possible methods, but #1 and #2 no longer apply
  - **(1) Contractual Approach (Strict Liability)**
    - Bailee was strictly liable for almost any conduct that resulted in damage or loss
  - **(2) Contextualized “Roman” approach**
  - If bailment was for sole benefit of bailor
    - Low duty of care (liable for gross negligence only)
  - If bailment was for sole benefit of bailee
    - High duty of care (slight negligence is actionable)
  - If bailment was for mutual advantage
    - Standard duty of care
  - **(3) Modern Approach – Negligence**
    - Obligation of bailee generally is to take the same care of the goods received as would a prudent owner, acting reasonably, be expected to take of his own goods

- Waiver clauses: Bailee may insert a waiver clause in contract, but a waiver clause in case of bailment will be strictly construed
  - A waiver for negligence must be explicitly made or unambiguously implied

## PROOF OF BAILMENT CLAIMS

- Bailor must show that the acts complained of occurred during the course of the bailment and not before or after.
  - Key to establishing bailment relationship (such as bailee for reward) is the transfer of possession to the bailee. In the absence of actual possession, possession can be inferred when it is a necessary incident to some other function (Letourneau).
- Presumption against bailee, so the bailee must disprove negligence: burden shifted to bailee, once (1) is shown that bailment is established
  - Burden is on the defendant because bailee is in a position to shed light on the facts (res ipsa loquitor type issue)
- Presumption against bailee, so bailee must disprove that his negligence caused the injury. Show either that:
  - Proof of appropriate care: they acted as a prudent owner and undertook reasonable precautions; or
  - No causation: Any failings in that regard were not the cause of the loss or injury
- Bailee may insert waiver clauses in contract, but a waiver clause in case of bailment will be strictly construed
  - A waiver for negligence must be explicitly made or unambiguously implied

## WHEN DID THE TRANSFER OF POSSESSION OCCUR?

### Letourneau v Otto Mobiles Edmonton

2002 ABQB

#### Facts:

- P followed D employee's instructions and delivered trailer to parking lot located to adjacent business premises after normal working hours in order for D to repair trailer following day; no work had been issued.
- The trailer was stolen.
- The place the trailer left was not the defendant's property but they were told to leave the trailer there by the employee of the defendant.

#### Issue:

- Was possession transferred when the keys were placed in the water tank as per the instructions of the employee or was possession not to be transferred until the employees took control of the keys and moved the trailer?

#### Analysis/Holding:

- The defendants argue that for a bailment to be established, constructive or actual possession must be transferred. A bailor cannot thrust bailment on a bailee.
- Court held that the moment the trailer was parked and the key was left, possession was transferred.
- Despite the trailer not being left on D's property and there was no control/possession until the next morning upon pick up, **transfer of possession occurred as P acted pursuant to D's instructions and standard practice.**
- The plaintiffs never physically delivered possession of the trailer by direct delivery of the keys, however, they did comply with the precise instructions of the service manager regarding afterhours drop-offs.
- This established a bailment via a transfer of temporary possession.
- The next step is to examine the duty and standard of care.
  - Historically a high standard of care was placed on a bailee for reward than on a gratuitous bailee, since the latter case had a bailment that was only for the benefit of the bailor.

- The Court says it makes little difference, the obligation of a bailee in either case is to take the same care of the goods received as a prudent owner, acting reasonably, might be expected to take of his or her own chattels.
- Contributory negligence can also be considered in this analysis.
- Waiver of liability - waiver clauses may be inserted by the bailee but will be strictly construed (negligence must be explicitly waived)
  - Tercon Industries (page 689 note 3): can contracts use exculpatory clauses even for fundamental breaches?
    - Does the clause cover the breach at issue? There has to be strict construction.
    - Was it negotiated under unconscionable circumstances?
    - Public policy arguments for non-enforcement.
  - Court says that they are available, but they will not allow generally sweeping waivers of liability.

**Notes:**

- The definition of a bailment as given by the ONCA in another case:
  - ... the delivery of personal chattels on trust, usually on contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or an altered form as soon as a time for which they were bailed has elapsed. It is to be noted that the legal relationship of bailor and bailee can exist independently of a contract. It is created by the voluntary taking into custody of goods which are the property of another.
- A bailee's liability is not restricted to negligent acts or omissions. Bailed goods cannot be dealt with in a manner that falls outside the terms, express or implied, of the bailment.
  - If items are stored in a manner that falls outside of the arrangement, liability is strict if a loss occurs as a result.
- The bailment would cover the contents of the automobile which one would reasonably expect to be in the car and the contents which one might not reasonably expect to be in the car but of which the bailee has knowledge of.

**Punch v Savoy's Jewelers Ltd**

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1986 ONCA

**Facts:**

- Drops off ring for repair at Savoy's; they send it out to Toronto for repair (without asking the owner); Walker (sub-bailee) in Toronto fixes ring and hires CN Rapidex to courier the ring back to Savoy's during Postal Strike; CN Rapidex's agreement had exculpatory clause that only Walker agreed to; Ring never makes it
- Parties and their potential liabilities/claims
- Walker (Sub-bailee in Toronto)
  - Did not pay for the extra insurance because they did not declare the value of the ring
  - Trusted an unfamiliar carrier to transfer it
- Savoy (Bailee)
  - Could be said to have implicitly authorized Walker's actions by sending the ring to them without telling them cost of insurance coverage during transportation
- Punch (Bailor/Owner)
  - Could say there was no agreement between them and Walker as she didn't authorize anything beyond repair by Savoy; nor agreed to exculpatory clause
- CN Rapidex (Sub-bailee/Courier)
  - Claims that liability is limited to what they agreed to (what Walker declared)

**Issue:**

- The trial judge found that Savoy was a bailee and Walker and Cn were sub-bailees of the ring. It was determined that Walker and CN were in breach of the duty they owed to Punch, but savoy was not.

**Analysis/Holding:**

- What gives Savoy the right to sub-bail?

- Savoy is trying to fix the ring no matter what and could not do it themselves so there may be implied authorization for Savoy to sub-bail it to Toronto to have it fixed.

#### **Duty owed by Walker**

- Punch was never given the choice of how to ship it and Walker negligently and falsely fixed the value of the ring at \$100 when it arranged for shipment.

#### **Duty owed by Savoy**

- Savoy without consulting the owner, accepted a method of carriage without inquiring as to the feasibility and cost of obtaining insurance coverage on the goods.
- The court characterizes the provision of insurance as an essential term of the contract. It is a minimal step that a prudent owner would take for goods of this type. Savoy was in breach of its duty.

#### **Duty owed by CN**

- Punch can sue a sub-bailee if she is entitled to immediately retake the goods (i.e not a bailment for a fixed term) because CN is in possession of her goods.
  - The exculpatory clause – Punch is able to rely on the bailment relationship to sue, and any novel aspects of that relationship will not imply to her unless she has expressly or impliedly agreed to them.
  - **She did not impliedly or expressly agree to the exculpatory clause.** (This is a very important take away)
  - CN is liable to Punch.
- Between Walker and CN – the issue that needs to be resolved is the exculpatory clause since, unlike Punch, Walker cannot make the same claim.
  - The exculpatory clause is strictly constructed to exclude theft by the employee, which is what the Court is saying happened.
  - The disappearance of the ring with no explanation where there is a possibility of theft amounted to a fundamental breach of contract.
- Everyone is liable to Punch with Savoy and Walker being indemnified by CN for any loss which they must make to the owner.

## **SHARED OWNERSHIP**

- Two forms of co-ownership recognized by the common law in Canada.
- 1) Joint tenancy – legal fiction underlying is that there is only one tenant and there are no distinction shares held by anyone.
- 2) the tenancy in common – since only the unity of possession is required, different tenants in common can hold different quantum of the title (i.e. 2/3 v 1/3). In condo properties, the common areas are usually held by the condominium unit owners are tenants in common.
- No longer exist: co-parcenary (abolished right as daughters as heirs sharing if there was no son) and tenancy by the entirety.

#### **Joint Tenancy**

- **The right of survivorship applies to a joint tenancy whereas it does not apply to a tenancy in common.**
  - This means that the surviving joint tenants make take the interest of a pre-deceasing joint tenant.
  - The death of a joint tenant does not cause an interest to pass; rather there is ownership with one less person because there are no individual shares.
- There can be as many joint tenants as you want, does not just have to be 2.
- Right of survivorship means when one person dies, it is absorbed by the other joint tenant as opposed to it being taken care of through a will etc.
  - So long as the joint tenancy is intact, the survivors assume the share of deceased.

- Once created, it is possible to change the joint tenancy, even unilaterally.
- What do you need to create a joint tenancy?
  - Requires more than a tenancy in common.
  - **4 unities (necessary but not sufficient): time, title, interest, possession**
  - **Plus -> Intention that is clear to create a joint tenancy.**

### A tenancy in common

- Could also have the 4 unities (only possession is required but the others can present) so the intention has to be clear.
- Tenancy in Common can be created:
  - A failed attempt at a JT
  - An explicit attempt to create a tenancy in common.
  - Statutorily presumed tenancy in common.
  - Implied by statute in Ontario (two adverse possessors together claim squatters right, successful adverse possessors hold as a tenancy in common).
  - Where we transfer a joint tenancy created as such into a tenancy in common, through acts of severance.

## Unities

- **Time** – means that each joint tenant’s title must be vested at the same time.
- **Title** – each joint tenant title must be derived from the same document or occurrence.
- **Possession** – refers to the fact that each joint tenant is entitled, concurrently with the others, to possession of the whole of the land that is subject to the joint tenancy.
- **Interest** – requires the interest of each joint tenant be the same in extent, nature and duration (can’t have an indefeasibly vested interest and a interest subject to a condition subsequent).

### Intention

- **To A and B at common law/equity was presumed to be a joint tenancy** but that has now changed.
- To A and B in **“equal shares”** – **was said to point to tenancy in common**, are said to be words of severance.
- To A and B (A pays the full amount) – presumption of resulting trust in A in equity, legal title is to be in both A and B.
- To A and B (each paying a different amount) – no words of severance but where each paid a different amount, law: joint tenancy; equity presumed tenancy in common.
  - If A dies then what? Legally B owns the whole thing.
- **In Alberta this still represents the law for personal property.**

### Land today in Alberta

- **1) Example will:** to A and B to manage the land and to collect rents and profits on WhiteAcre, and to hold these and the land in trust for my children C and D.
  - Section 8 of the Law of Property Act –
    - **Land held by 2 or more persons:** (8) When, by letters patent, notification, transfer, conveyance, assurance, will or other assignment, land or an interest in land is granted, transferred, conveyed, assigned or bequeathed to 2 or more persons, other than as executors or trustees, in fee simple or for any less estate, legal or equitable, **those persons take as tenants in common and not as joint tenants unless an intention sufficiently appears on the face** of the letters patent, transfer or conveyance, will or other assurance that they should take as joint tenants.
    - A and B are **trustees, so section 8 does not apply to them, therefore they are holding as joint tenants.**
    - They are not executed out by the statute of uses because they are given active duties.

- C and D – equitable title via a trust, hold the fee simple, **have a tenancy in common because the common law is reversed by section 8.**
- **2)** A and B purchase property and title is taken in the name of A alone
  - A holds legal title.
  - Presume resulting trust in equity.
  - If not rebutted, A and B hold equitable title as tenants in common.
- **3)** W purchases real property and places it in the name of H and W as joint tenants.
  - Absence statute the state of title is they both hold legal title, but W holds equitable title via a resulting trust.
  - Considering the effect of **section 36 of the matrimonial property act – there is joint ownership of the beneficial interest, therefore equitable title is held in both names.**
- **4)** W purchases real property and places it in the name of H and W.
  - This does not say that there is a joint tenancy, so now section 36 which makes a presumption of shared beneficial interest upon a joint tenancy is not in play.
    - Note: Sub 2 of s 36 presumes an advancement but is an exception to section 1 which presumes a resulting trust.
    - Section 36 only applies where the MPA is being applied, on marital breakdown.
  - Section 8 of the law of property act therefore presumes a tenancy in common.
- **5)** To A and B as joint tenants, with 1/3 to A and 2/3 to B
  - **This is a tenancy in common because a JT has to have equal shares. So despite the intention, there has to be unity of interest.**
  - The common says that it is a failed attempt to create a JT and it is instead a tenancy in common.

## Severance Basics

- Transferring your interest as a joint tenant to someone else. This is a unilateral action. Even if B transferring to C says it's a joint tenancy, you have destroyed the unity and severed the joint tenancy.
- Unilateral action – see s 65 of the Land Titles Act
  - The registrar shall not register a transfer that has the effect of severing a joint tenancy unless
    - A) The transfer is executed by all the joint tenants
    - B) All the joint tenants other than those executing the transfer, give their written consent to the transfer, or
    - C) The registrar is provided with evidence satisfactory to the registrar that all the joint tenants who have not executed the transfer or given their written consent to the transfer have by
      - Personal service or
      - Substitutional service pursuant to a court order
  - Been given written notice of the intention to register the transfer.
- See also s 12(1)(d) of the Law of Property Act – transfer property you hold as a joint tenant to yourself as a tenancy in common.
  - Would want to do this so that as a tenancy in common you can pass the property along through a will without the right of survivorship.
- 1) A, B and C hold as joint tenants
  - A sells to B?
  - B took A's 1/3 interest as a tenant in common but B's joint tenancy with C in the remaining two third was not affected.

- So there is only one tenant in common (B).
- If B dies then C takes the 2/3 by survivorship, and B's heirs take the other 1/3. There is no longer a joint tenancy.
- In these examples, rupturing a unity leads to a severance.
- 2) A and B are joint tenants, B grants a life estate to C.
- 3) A and B are joint tenants, A unilaterally leases his share to C for ten years.
  - Is there a severance by a lease and what unity is being broken?
  - The joint tenancy fails because
- Agreement
- Course of Conduct
  - Failed negotiations
  - Mutual or joint wills
    - H and W create wills providing that everything goes to the survivor for life, remainder to their children.
    - Is jointly held property included?
- The right of survivorship is NOT immutable – can be severed
- **Responses for severance:**
  - Treat words of severance as revealing an intention to create a tenancy in common
  - To find that subsequence events severed the JT
- **Williams v Hensman:** declares that a JT can be severed in 3 ways →
  - By one person acting on his or her own share
  - By mutual agreement
  - By 'any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common'

## Severance by Course of Conduct

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- The final 2 rules in *Williams v Hensman* are distinct, but can be combined because an agreement must surely also qualify as a course of conduct by which the joint tenants effectively declare that they hold their interests in common
  - Here a severance may result even if the owners are unaware of the attributes of the joint tenancy

### By Agreement

- A sale or lease by all of the joint owners does not itself result in a severance → there can be continuation of the joint ownership in relation to the proceeds of sale
  - An agreement to sell the property at some future time will not transform the nature of the co-ownership until the sale occurs UNLESS there is an agreement to sell and divide the proceeds of sale afterwards
    - Severance cannot be altered *ex post facto* by an abandonment of the plan to sell

### Course of Dealing

- supports finding of a severance when the dealings fall short of a firm or explicit agreement
- 1) This form of severance may be found to have occurred when co-owners execute mutual or joint wills
  - Typically used when spouses wish to establish a common course of succession for their pooled property
  - If the spouses own some property as JTs, their new arrangement *might* be viewed as showing an intention to replace the right of survivorship with the pattern of distribution contained in the will
- Whether these plans actually amount to a severance is always a matter of interpretation
  - As a will does not normally affect a JT it is conceivable that jointly owned property was never meant to be included within the agreed testamentary agreement
  - Co-owners might draw mutual wills to cover JUST the property that would normally be governed by a will
  - BUT – if jointly owned property is expressly mentioned this course of dealing produces a severance

- EX – H and W create wills providing that everything goes to the survivor for life, remainder to the children.
  - Is the jointly held property included? It's a matter of construction.
- 2) Canadian courts have held that failed negotiations over jointly owned assets can lead to the finding that the owners regarded the JT as having been severed
  - This issue arises between spouses in the midst of marriage breakdown
  - It is unclear HOW MUCH haggling must occur to produce a severance
    - Negotiation of *shares* and *separate interests* represents an attitude that shows the nationality unity of ownership under a JT has been abandoned
  - Unfairness → if failed negotiations produce a severance, it may prejudice one of the parties
  - Policy → it would be unwise to allow survivorship rights to continue when the parties have separated
    - Most estranged spouses would no longer want survivorship to govern the fate of their property
- Other means of severance by operation of law:
  - If one joint tenant goes bankrupt, this produces a severance in law.
  - A and B hold as joint tenants, and A kills B. Homicide.

## Sorensen

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### 1977 ABCA

#### Facts:

- The property is leased to the wife.
- Separated couple, wife is terminally ill and wants to sever joint tenancy to sell part of land to provide for her dependant son who has special needs that requires constant care;
- She (1) executes a trust that holds lots in trust for her son with her as trustee;
- (2) executes her last will and testament that appoints her daughters as executors and trustees of her will and gave all of her property to them as trustees to pay income to her son during his life and on his death divide residue between them; and
- (3) brought a motion to partition lots
- She dies before it was heard, husband filed caveats against title to lots claiming that he was surviving joint tenant and thus sole owner by right of survivorship

#### Issue:

- Did the wife sever the joint tenancy as to create a tenancy in common and defeat the right of survivorship?

#### Analysis/Holding:

- As stated in *Williams v Hensman*, there may be severance in joint tenancy “by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common”
- Equitable interest goes to her son (severs joint tenancy → equitable title shared as tenants in common); father has sole legal title
  - Severs the unity of TITLE in title derived from separated documents
- There is a presumption of advancement that arises from equity to allow the beneficial interest to go to the dependent child as an inter vivos gift
  - This destroys the unity of possession, since the beneficial interest flowed to the son, but not legal title of real property
- Declaration by one party of an intention to sever alone without any other act and without acceptance by other joint tenants does not sever the tenancy

- Wife failed at creating an express trust, but if the trust had been successfully created, this would not have worked because she was supposed to communicate that fact to her ex-husband: not allowed to do these thing unilaterally.
- A successfully created trust would have succeeded to sever a joint tenancy if its creation is communicated to the other joint tenant.
- LPA s 19: If interest in land that is the subject of an order is held in joint tenancy, the order on being granted severs the joint tenancy
  - AB → joint tenancy in Law; A + B → tenants in common in Equity
  - B now becomes a trustee and beneficiary is A and B's son

### Principles:

### Notes:

- How many forms of severance are considered?
- Separation agreement: effective as to the matrimonial home?
  - No.
- Lease to wife?
  - No
  - True lease hold and if so what kind? No, this is a life estate, because there is no fixed term that is certain which is required for the lease.
  - Ziff would have argued that the unity of interest was destroyed.
- Charge on the property (such as a mortgage)?
  - Section 103 of the Land Titles Act – a mortgage has effect as security but does not operate as a transfer of the land charged by it, instead it is an encumbrance.
  - At the old common law a transfer of the legal title to the bank to secure a mortgage, would sever the unity of title.
- Will?
  - No but recall mutual or joint wills (Course of Conduct).
  - The survivorship technically kicks in before the will upon death.
- Action for partition?
  - No but now see s 19 Law of Property Act.
  - It was premature because the order had not been granted.
  - S 19 – If the interest in land that is the subject of an order is held in joint tenancy, the order on being granted severs the joint tenancy.
- Inter vivos common law gift?
  - There was no delivery, the documents were held on to by the lawyer.
- Donatio Mortis Claus
  - No, real property cant be transferred this way in Alberta.
- Declaration of Trust?
  - Yes.
  - In equity only, not law.
  - She was holding the property in trust for her son. The equitable interest was conveyed and the equitable title was severed, thereby breaking the unity of interest.

## TERMINATION OF CO\_OWNERSHIP OF LAND

- Partition and sale by court order is not available in Alberta for chattels.
- See part 3 of the Law of Property Act
- Possible Orders re property sub 15(2)

- Financial Issues see s 17.

## LAW OF PROPERTY ACT

### PART 3

#### S.15(2): Partition or Sale

Co-owner may apply to court for terminating of co-ownership

Court shall choose one of 3 options

Physical division of all or part of the land

Sale of part or all of the interest and distribution of proceeds

Sale of part or all of the interest to the other co-owner

Court has no other discretion (even to deny partition/sale) → (unless request for partition unconscionable – *not part of act*)

#### S.17: Accounting, Contribution, and Adjustment

Court may direct an adjustment be made and compensation be paid for an unequal division of the land

Considerations (court can take others into account):

A) Exclusion from land (ouster; can also be a constructive ouster)

B) Status of co-owner

C) If one co-owner receives more than their just share from a third party (Statute of Anne equivalent)

Compensation, if any, be paid for an unequal division of the land (court will make financial adjustments between the parties)

Ex. Lease from mineral rights

However, co-owner is entitled to work the land

D) Waste

E) Improvements or capital payments that increased realizable value (so this is value survived not received).

F) Compensation for non-capital expenses spent

G) If you claim non-capital expenses, you need to be required to pay fair occupation rent (paying for the sole occupation of the property, court might do a wash between F & G).

H) Dower rights

#### S.19: Order severs joint tenancy

If interest in land that is subject to an order is held in JT, the order on being granted severs joint tenancy

As soon as court makes one of three decisions right of survivorship is extinguished

#### S.21: Discretion to stay partition/sale of matrimonial home

Court can defer a decision, notwithstanding section 15(2), to defer on matters going to matrimonial home

Let family law courts make an order, and once that is settled, we can order partition and sale

## Rights and Responsibilities of Co-Owners

- The unity of possession is a characteristic for both the joint tenancy and tenancy in common. Each co-owner has the same right to possession of the whole property.
- It is a rule that co-owners do not have to account to other co-owners for the benefits derived from possession.
- Mere occupation by a co-owner will not impose a liability to account even if the occupation is sole or one co-owner has made more by his or her occupation. This is so because the non-occupying co-owner cannot, by failing to exercise his or her right to occupation, establish a claim for compensation against another co-owner who is lawfully exercising his or her own rights.
- There are exception circumstances in which one co-owner may be required to account to other co-owners for the benefits of occupation – for “occupation rent.”
- Ouster – liability to pay an occupation rent when one co-owner has unlawfully ousted another (due to conduct or made conditions intolerable).
- Agreement – an agreement between co-owners would make one account for the other.
- Statute of Anne - an action for account may be brought by a joint tenant or tenant in common, or his or her personal representative, against a co-tenant for receiving more than the co-tenants share.
- Waste – tenants in common and joint tenants, under statute, could be liable to their co-tenants for waste, or in the event of partition, the part wasted may be assigned to the tenant committing the waste at the value therefore.

- **Expenditures related to property:**
- In certain circumstances, one co-owner can obtain reimbursement from other co-owners with respect to expenditures relating to the property.
  - In numerous cases, reimbursement has been obtained for mortgage payment, improves, taxes, fire insurance premiums, upkeep and repairs, and expenses from litigation with a third party.

## Alternative Visions of Sharing

- Corporations, condos, co-ops, communes.
- Aboriginal title, rights on reserves, Aboriginal concepts.
- Hutterite and other communities.
- Matrimonial Property Act – on break down there is a presumptive right to share the accumulated assets despite who is on title.
- GPL and related issue

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## SERVITUDES OVER PROPERTY: EASEMENTS & COVENANTS

- Servitudes are incorporeal hereditaments

### EASEMENT

- It is a real property interest but is a non-possessory interest in land.
- A lease has a grant exclusive possession.
- An easement cannot by definition have a grant of exclusive possession.
- It is capable of running with the land.
- Servient tenement is subject to the burden of easement.
- The Dominant tenement is subject to the benefit of the easement.
- Must be an interest in land but does not have to be a fee simple, can be a leasehold, life estate.

### Elements of an easement

- **1) A Dominant and a Servient tenement**
    - Dominant tenant enjoys tenement of easement // servient tenement is burdened
    - No easements “in gross” – must be connected (appurtenant) to a dominant tenement (freehold/leasehold estate, another incorporeal hereditament)
      - Exception in LTA S.69(3): utility company can have a right of way over one’s property without owning any land that benefits from easement.
      - There is no dominant tenant in this case
  - **2) Easements must accommodate the dominant tenement**
    - Often said it must “touch and concern” the land.
    - Must make dominant tenement better off
    - Tenements need to be sufficiently close (though not right next door).
    - **The tests is whether the right makes the dominant tenement a better and more convenient property.**
    - Benefit must go towards the land, not the individual (i.e. personal advantage or convenience to owner of dominant tenement)
      - *Hill v Tupper*: easement benefitted boat business, not property
        - Exclusive right to place boats on a lake did not accommodate dominant tenement b/c easement was unconnected to normal use and enjoyment of land
        - Easements are regarded as serving to supply an attribute of ownership normally or frequently associated with land
        - Bundle of rights does not include monopolies
        - P had no proprietary right, only a license that was enforceable against licensor
        - P was trying to invent a property right that comes with exclusivity, this would violate *Numeris Clausis* principle (closed list of property rights)
          - Ont Law Reform Commission offers test: “whether right makes dominant tenement a better and more convenient property?”
  - **3) Dominant and the servient tenement must be owned by different persons**
    - Cannot give yourself an easement because it will be subsumed in fee simple
    - However, a landlord can give one to his tenant (because the dominant tenement is a leasehold interest whereas the landlord owns the fee simple).
    - Exception – LTA S.68
      - S. 68(1) Owner may grant to himself an easement or restrictive covenant for the benefit of the land that the owner owns and against land that the owner owns
      - Allows developers to attach easements to property in subdivision prior to sale of individual lots, eliminating need to grant separate easements on sale of each parcel.
  - **4) The easement must be capable of forming the subject-matter of a grant**
    - Easements are incorporeal rights (non-possessory so a transfer of possession is not possible); it must be conveyed by grant
    - Reasonably defined: Must not be too vague or broad
    - Must not require the owner to spend money (apart from fencing requirements)
    - Non-possessory: Cannot confer a right to possession or control that it would be inconsistent with the owner’s possessory rights
    - Must not be purely for amusement or recreation (must benefit land)
    - (there is no easement that gives exclusive or unrestricted use of a piece of land – would just pass ownership of land)
- Under the land titles, certain types of easements do not have to be registered.

#### Creation of Easements

- 1) Express grant and reservation

- Most effective way. In an express grant, A, the owner or occupier of what will become the servient gives B, who owns or occupies what will become the dominant, a non-possessory right to make use of A's land for the purpose identified in the easement.
- A well drafted easement will identify the dominant and servient tenements, the nature and scope of the easement, the time period during which the easement continues, and any rights and responsibilities of either party with respect to the easement.
- Reservation – original owner holding something back by way of easement such as a right-of-way.
- 2) Implied Grant and reservation
  - Necessity of access (Nelson - Rabbit Hill case)
  - Intended
  - When the property is divided into separate parcels, these quasi-easements may be included as actual easements by implication of grant if they meet the three Wheeldon v Burrows:
    - (i) in use by the owners/occupiers of the whole property at the time of the grant for the benefit of the part to be granted
    - plus (ii) continuous and apparent – there must be some physical evidence of its existence;
    - and/or (iii) necessary for the reasonable enjoyment of the property granted.
    - Criteria does not apply implied reservation here, only a grant, because the grantor is in charge of drafting the grant and should take care in what they say.
- 3) Estoppel
  - When parties to a transaction proceed on the basis of an underlying assumption on which they have conduct the dealings between them neither will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.
  - The claimants would have to establish that there was something in their use of their neighbors land for access to their own that would make it unconscionable for their neighbor to now insist on his or her legal right to deny access.
- 4) Prescription but see s 69(3) LPA – acquisition of rights through prescription has been abolished in Alberta.
- 5) Statute – condominium complexes.
- Long term use – NOT PERMITTED IN ALBERTA

**Necessity of Access**

- A property is otherwise land locked as a result of sale, so the vendor grants a right of way (this is an express grant that resolves the necessity).
- If there is no express grant, then the law will imply a right of way as it is necessary.
- 1) The easement must be necessary for the enjoyment of the alleged dominant tenement, not merely one that would make the use of the property more convenient.
- 2) The owner of the alleged dominant tenement must be able to trace the title to the property back to a grant whereby an owner subdivided the property which had been a single parcel, but failed to include the easement of necessity in the grant.

**Nelson case**

**Facts:**

|       |                             |                    |       |
|-------|-----------------------------|--------------------|-------|
|       | River                       |                    |       |
|       | Parcel A (Nelson)           |                    |       |
| River | Dale Stetler Lands NW (1/4) | Don Stetler NE 1/4 | River |

- Rabbit Hill operates on the NW ¼ under a lease and built a road over the NE ¼, which was greed to by dale when it was completed and the road was included in the lease to the resort.

- Nelson purchased parcel A in 1985, was not a party to the contract for the lease of the road but used it anyways. Dale was aware of this.
- The NW ¼ was bought in 2005 and the new owner attempted to bar Nelson from using the road.
- The lease between Rabbit Hill and NE ¼ ended in 2008 and the owner would not renew it.
- The trial judge declared it a public highway.

**Issue:**

- Did Nelson gain an easement at common law or equity over the road?

**Analysis/Holding:**

**1) Whether or not the road was a public highway?**

- Claim was made on the virtue of the doctrine of dedication.
- There has to be a subjective intention to dedicate. Evidence for this could be gained from long, uninterrupted continuous used of the way by the public.
- Evidence to the contrary included that Dale never gave up the proprietary interest: he testified at trial that that was not his intention, he accepted lease payments for the use of the road which is conduct inconsistent with the intent to give up proprietary interest; and dedication involves giving up the fee simple which is also inconsistent with being able to lease the property out.
  - Could not be found on these facts, no intention.
- There would have also had been acceptance of the public of the road.

**2) Was there an implied easement of necessity?**

- This would be binding on a subsequent purchasers even if they did not appear registered on title.
- A way of necessity can be implied where both the dominant and servient tenements have been in common ownership and one or other of the tenements is disposed of by the owner, rendering it impossible to make any use of the dominant tenement without the implication of the easement.
- Where the circumstances are such that the part of a parcel granted or the part retained is land locked and cannot be approached except over land originally belonging to the grantor, a way of necessity is created upon the severance of title.
- **The land granted must be absolutely inaccessible or useless before a right of way of necessity will be implied.**
- Mere inconvenience is not a sufficient reason.
  - It may not be “absolutely” necessary, however. Where it is completely impractical that is necessity.
  - It can arise to benefit the land sold or the land retained.
  - The land was found to be inaccessible over land by the trial judge and it is doubtful that water access can operate to disallow an easement of necessity.
- **For a way of necessity to be implied, the necessity must have existed at the time of severance of title of the servient and dominant tenements.**
- Have to go back in time and figure out the order when the parcels were transferred.
  - The North East Quarter would have been transferred first before the NWQ for there to be an easement of necessity over the NW ¼.
  - This was the case.
- There was, however, no easement granted on the basis of number 2. Likely because the case was not argued properly.
  - The majority of the court of appeal does not grant an easement because Nelson did have the proper evidence at trial and was not willing to admit the new evidence on appeal.
- Could there be an easement by estoppel? There was likely no representation made or any reliance.

- Ultimately, the Crown (county of Leduc) expropriated the road to make it a public road.

## Notes:

### Intended Easement

- The law will imply an easement where it is necessary to give effect to the purpose of the grant.
- *Wong v Beaumont*: a commercial basement property was leased for the purposes of a restaurant. The restaurant would comply with all the health codes, however, there was a issue with ventilation. So the court implied an intended easement going up to the dominant suite for ventilation to be put in, otherwise the contract would not be able to function.

### Wheeldon v Burrows rule

- Only applies to grant, not to a reservation.
- A quasi-easement can transform into an actual easement upon sale or partition of the dominant land.
- Referred also to an easement of apparent accommodation
- Three criteria: (i) in use at the time of sale; (ii) continuous and apparent; and/or (iii) reasonably necessary for the benefit of the property.

### Estoppel

- Saw estoppel: Licenses that can be protected through the doctrine of proprietary estoppel.
- A representation or assurance is made to the claimant on the basis that they will have some benefit over the property and relies on that assurance in refraining or doing something, and as a result suffers a detriment.
- It would be unfair to not have the claimant be able to rely on the representation.

### Prescription in Alberta has been abolished by section 69(3) of the Law of Property Act.

### Statute

- Condominium property act grants easements to condo owners to the public spaces.

## Transfer After Creation

- #1: A owns Blackacre (dominant) and easement over Whiteacre (servient), owned by B
- Easement is not noted on title
- A sells Blackacre to C
- See s 7 of the Law of Property Act
  - Does C acquire the assessment, which is not noted on title?
  - Section 7 says every transfer is an absolute transfer including easements. C is able to enjoy the benefit of the easement.
- #2 same as above, but B sells to D
- See 61(1)(f) Land Titles Act
  - D didn't know anything about an easement because it was not listed on the title.
  - The register is supposed to be a mirror of all interests on the title. D would not normally be bound by interests not on the title.
  - 61(1)(f) -> list of things that do not have to be registered on the title that will bind the new owner.
  - Implied conditions or overriding interests run with the land even if not registered.
  - (f) right of way or other easement granted or acquired under an Act or law in force in Alberta.

## Shaganappi Case

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- Deals exactly with #2 above.
- Except the party that was fighting against 61(1)(f) won.
- The Court of Appeal said “under an Act or law” was a narrower reading than though. Specifically, by law meant that does not include an express easement created by contract (this would be outside the exception).
- Implied easement would be created by law, but an express one is not.
- An easement by way of Estoppel – it is unclear, equity is not technically law. Does law in the statute act this narrowly?
- The Court wanted to narrow the scope of the exception.

## SCOPE, LOCATION AND TERMINATION

### Lawrie v Winch

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[1953] 1 SCR 49

#### Facts:

- Lot 33 is a private road that runs behind the 32 water-front lot - whoever buys a lot (1-32) gets an easement over lot 33
- “I hereby give John Smith his heirs executors and assigns a perpetual right of way over lot 33. This is binding on my heirs and executors and assigns”
- Originally, Shephard sold land to Smith, who became owner of (1) lot 17 , and (2) farm (east of lot 33, now turned into a subdivision)
- Lot 17 was used as farm lane to get out to lake
- Smith was also granted right of way over lot 33.
- P is owner of three (subdivided) lots west of lot 33 and lot 33 itself
- D is owner of (subdivided) lot east of lot 33, given a right of way over lot 17 and 33
- P wants to restrain D from traveling up length of lot 33 and using it as a right of way to lot 17 to get out of lake

#### Issue:

- Whether there was a valid easement? Can there be an easement, which lies in a grant, when the grant does not expressly identify dominant tenement?
- Whether right-of-way was intended to be granted over entire length and breadth of lot 33 or some lesser part?

#### Analysis/Holding:

- The Court: the dominant tenement intended by the parties to the deed of 1925 was the farm, not lot 17. The fact that that lot was subject to a right of way appurtenant to lot 33 indicated that it could have been intended that the easement created was intended to be appurtenant to a low which was, at that time at least, sterile so far as building upon it was concerned.
- IN the case at bar, while the Smith lands were at the date of the grant being used for agriculture purposes, there was no reason why they might not subsequently be subdivided into building lots as had been the case with the original part of the farm with respect to which plan 103 had been registered.
  - It cannot think to be said that it was within the contemplation of the parties to the conveyance of 1925 that the farm would always remain a farm.
  - Therefore, there is nothing in the circumstances to restrict the plain words of the grant to the use being made of the farm lane at the time.
  - Upon the severance of the dominant tenement into several parts the easement attached to those parts.

- **What is the dominant tenement?**
  - Farm east of lot 33 = dominant // Lot 17 = servient
  - If Farm → newly developed area on farmland has right over the easement
  - If Lot 17 → new development does not have easement over lot 33
  - Dominant tenement not named in these circumstances
  - Court infers one and says it is the farm because lot 17 is itself a property that has an easement over it.
- What is the scope of the easement?
  - Does it extend to every lot in the new subdivision?
  - Yes, the easement granted to D was broad in scope and not limited in purpose
  - Easement was broad in scope and the increased burden was within the rights intended by the parties.
- Holding is consistent with rule of construction that provides an easement is presumed to attach to every part of dominant land (originally farm land, now subdivided lots)

**Notes:**

**Malden Farms Ltd V Nicholson**

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1956 ONCA

**Facts:**

- Malden farms was the plaintiff at trial and owned a parcel of marshy land along the edge of lake erie.
- The plaintiff's predecessors obtained an express grant of a right of way from Barron who owned the adjoining property to the east.
- The grant was for a 20-ft strip of land running towards the lake along the east boundary of Barron's land from a public road then running across the southern portion of the servient tenement to the boundary of the dominant tenement.
- The servient tenement was partially cultivated farm land and beach property.
- This case was considered an excessive use of the easement.

**Analysis/Holding:**

- The defendant is appealing from the judgment that granted the plaintiff an injunction that the defendant, his servants and agents, be and they hereby are restrained from inviting the general public in such numbers that the use by the plaintiff was a way of the lands will be substantially interfered with.
- D present use goes beyond extent of his legal right, use of way constitutes an unauthorized enlargement and alteration in character, nature, and extent of easement
- D is not entitled to increase the legal burden but can increase the amount of inconvenience on servient tenement
  - Ex. Placement of new buildings on the dominant tenement or increasing size of old buildings
- Scope of easement (legal extent of right) must be ascertained from intention of the parties at time when right was created (original scope)
  - Originally, dominant tenements were farmlands and wilderness (used in very limited fashion, low disturbance)
  - Not contemplated that it's use by hoards of people that would ruin duck hunting
- No right to invite public to beach resort
  - Reason #1: When they first took right of way, it was a carefully preserved duck sanctuary and it wasn't intended that a use like this would be allowed.
  - Reason #2: Language in easement: narrowly worded

**Notes:**

- The rule in Harris v Flower (1904 – English CA):
  - An easement over servient lands for the benefit of the designated dominant tenement cannot be used in a colourable way to benefit some property.

- Ex where an easement over lot 1 is for the benefit of lot 2, but the easement hold is in reality using both lot 1 and lot 2 for the primary purpose of accessing lot 3, the use of the easement is colourable.
- Some mere ancillary use of the easement of the benefit to lot 3 is tolerable.

## Termination of Easements

- Natural termination
  - Time limit set for its duration runs its course, e.g. a right of way “for as long as the land is cultivated” ... “for 20 years”
- Unity of ownership and occupation of both tenements
- Express release
- Implied release through abandonment
  - Must be intention to abandon and a sufficient manifestation of relinquishment before right is considered lost
  - *Costa v Jenikas*: Easement extinguished by abandonment cannot be revived by including it in a registered conveyance made subsequent to the abandonment
- Proprietary estoppel
  - Actions of dominant owner may support an estoppel if it would be inequitable for person to insist that easement is still in existence
- For easements of necessity, but when easement is no longer necessary (possibly)
  - Under Alberta legislation, you can apply to the court to modify the easement
- Radical change in use of dominant lands
  - Change produces a substantial increase or alteration in burden on servient lands

## PROFITS A PRENDE

- A right to draw on the natural resources of a piece of land.
- Might get the right from the Crown, or buy the profit with someone with the freehold.
- There is no possessory right to the minerals in place, but once you take them from the ground you do.

## R v Tener

- A profit a prende is defined as a right vested in one man of entering upon the land of another and taking therefrom a profit to the soil.
- A right to make some use of the soil of another, such as a right to mine metals and it carries with it the right of entry and the right to remove and take from the land the designated products or profits and also includes the right to use such of the surface as is necessary and convenient for exercise of the product.
- It is the right of severance which results in the holder of the profit a prende acquiring title to the thing severed. The holder of the profit does not own the minerals *in situ*.
- It may be held in gross, i.e. independent of the ownership of any land.
- A profit a prende in gross are extinguished by unity of seisin, i.e. if the holder of the profit either:
  - (a) releases it in favour of the owner of the land in which the profit subsists; or
  - (b) becomes the owner of the land in which the profit subsists.

## BMO v Dynex Petroleum

[2002] 1 SCR 146

### Facts:

- Dynex has a profit a prende to extract oil and gas.
- In order to carry on the business they needed cash, so they arranged for a mortgage on their property.
- BMO, the appellant, was the secured creditor.

- Dynex also had other obligations including paying a royalty to the person who had “leased” them the minerals. Lease here means profit a prende.
- They had also agree to pay a second royalty to other parties who were involved in the development. It was referred to as an overriding royalty.
- Dynex then goes broke. BMO making good on its security wants to sell some of the companies assets including the profit a prende.
- The problem was that profit was itself incumbered by interests in the favour of two of the respondents (the royalties). They argued that BMO would have to sell the profit along with their rights.
- BMO said no, those royalties are not an interest in land, it is a contract.

### Analysis

- In *Berkheiser v Berkheiser*, the SCC held that the profit a prende which is an incorporeal hereditament is an interest in land.
- This case recognizes the overriding royalty as an interest in land and thereby creates a new interest in land.
  - The Court ignores Numerous Clausus principle and creates a new interest.
- Are all overriding interests, interests in land?
  - No, has to be based on the intention of parties to create this interest in land. It is a question of construction.
- Given the custom in the oil and gas industry and the support found in case law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land.
  - Policy reason – provides some certainty that the oil and gas industry can operate and finance properly without risk (not certain of this).
- Test: a royalty interest or an overriding royalty interest can be an interest in land if:
  - 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land.
  - 2) the interest, out of which the royalty is carved, is itself an interest in land.

## RESTRICTIVE COVENANTS

- **Covenant**- strictly speaking, it is a promise under seal. However, for our purposes, a covenant may be regarded as a valid contractual undertaking made by a convenator in favour of a covenatee.
- **Covenantor** (or)- assumes the burden of the promise
- **Covantee** (ee)- assumes the benefit of the promise
- **Burden** (and servient or burdened land)- Servient tenement is the land burdened
- **Benefit** (and dominant or benefited land)- Dominant tenement is the land benefited
- **Annexation**- benefit is annexed so it will automatically run with the benefitted land
- **Express** (contractual) **assignment**- benefit may be expressly assigned, as any other contractual right can be, in the absence of annexation.
- **Assignee** of the **covenantor** (or')- action enabled when (i) covenant touches and concerns the dominant land and was taken for its benefit, (ii) the assignment occurs contemporaneously with the transfer of the dominant lands, and (iii) land is ascertainable, at least by extrinsic evidence.
- **Assignee** of the **covantee** (ee')- Benefit is allowed to be assigned

### Tulk v Moxhay

1848 English Court of Chancery

**Facts:**

- A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be on which runs with the land so as to be binding upon subsequent purchasers at law.
- The plaintiff is the owner in fee of the vacant piece of ground in Leicester Square.
- The plaintiff sells the surrounding lands with a covenant on the vacant piece of ground that it be restricted as a garden.
- The defendant whose purchase deed contained no similar covenant with the vendor but he had purchased with notice of the covenant in the deed of 1808.
- An injunction was granted preventing the defendant from covering or suing the piece of garden.

#### **Analysis/Holding:**

- The covenant would affect the price and nothing could be more inequitable than the original purchaser should be able to sell the property the next day for a great price in consideration of the assignee being allowed to escape from liability which he had himself undertaken.
- If an equity is attached to the property, no one purchasing with notice of that equity can stand in different situation from the party from whom he purchased.
- **The restrictive covenant runs with the land.**

## **General**

- Covenants may be used to control the types of homes that are built or to preserve the area as purely residential.
- One common commercial uses concerns the regulation of business competition within a development.
- A covenant under which a restriction is agreed to can increase the value of the benefit land. Yet the restriction can diminish the market value of the burdened property because the uses to which that land can be put are limited.
- Equity will enforce a restrictive covenant against a successor in title of the covenanter by preventing the successor from exercising a right which he never had.

#### **The circumstances under which the burden of a covenant will run with the land so as to bind subsequent owners is of importance:**

- Under law, the burden of the covenant will not run with the land.
- Under equity it will.
- It is often the case that the remedy sought for a breach of covenant is a injunction (equitable remedy).
- Damages often will not suffice, though even when monetary compensation is sought, equitable damages may be available.

#### **The Basic Issues**

##### **Issue 1 – The covenantee (EE) sells the land to EE'. Does the benefit run with the land?**

- It can in both law and equity.

##### **Issue 2 – The covenantor (OR) sells the land to OR'. Does the burden run?**

- Only in equity.
- Tulk v Moxhay is the leading case.
- This equitable interest in land is enforceable against subsequent owners of the land. This was a new interest in land.
- There was no privity of contract, so that's why equity stepped in.

#### **Covenants Running with Freehold land**

- 4 main requirements for the running of the burden in equity
  - 1) The covenant must be negative in substance (a restriction; as opposed to form)
    - A covenant is considered negative when compliance is possible by the obliged party doing absolutely nothing.

- 2) It must have been intended that the burden was to run with the covenantor's land.
  - The promise given must be one that was not intended to be applicable only to the covenantor.
  - Equity will not impose a new obligation if the original parties had not intended to do so.
- 3) all general principles of equity apply including notice rules.
  - Notice in Alberta today means notice by registration.
- 4) It must have been made for, and benefit, land retained by the covenantee (touch and concern), which land must be easily ascertainable from the covenant document.
  - There must be a dominant tenement (the property to be benefited) and a servient tenement (burdened property).
  - They need not be contiguous, though proximity is required.
  - It is not necessary for the dominant to be a freehold estate. A lease can support a restrictive covenant.
  - Touch and concern is sometimes said to affect the mode of occupation of the land or affects the value of the land.

### **Sample restrictive covenant on TWEN**

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- Does it satisfy the requirements listed above?
  - This restrictive covenant is designed to stifle retail competition. Safeway when they sold the building put a restrictive covenant that it could not be used for grocery stores.
- 1) Yes it is negative in substance, see para 1 for the restrictions that can be met through inaction.
- 2) Yes, para 5 it says that it was the intention to run with the land.
- 3) On notice – yes it was registered see front page.
- 4) What are the benefited lands and are they easily identifiable – schedule 2 and they are easily identifiable.
  - Do these restrictions benefit this clearly identifiable land? It is not easily answered.
  - The dominant tenements were around 6 to 11 km from the servient tenements. Is that enough of a benefit that they would be competing against the same customers.
  - The core idea is that there is an overlap of the same commercial situations between the two tenements such as traffic patterns, parking availabilities, and amenities.
  - There was one Alberta case that said a dominant tenement in Edmonton and a servient tenement in Calgary, the restrictive covenant could be of no benefit.

#### **How to get rid of a restrictive covenant?**

- You can buy the covenant back.
- Under statute there is a way to modify or dispute a restrictive covenant.
  - Section 48(4) of LTA – prove that it benefits the dominant tenement (helps to fight against blanket tenements and override holdouts); or if it is contrary to the municipal plan (i.e. you are compelled to breach the by-law)
  - AND (both of these) have to be in the public interest.
- Attack them on a base of public policy.
- Government can pass a law and expropriate the land. Would have to compensate and be wary of the NAFTA considerations if there is a foreign company.

### **Restrictive Covenants and Proximity**

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- Swan case: the servient tenement was 3.8 km or 5.2 km away based on route choice.
  - This was held as sufficiently proximate to benefit the dominant land.
  - The scope of the zone is determined by the likely catchment area for the business in question.
- In the Molson Case, the dominant tenement was in Edmonton and the servient tenement in Calgary.
  - The argument was that the two properties as breweries would be competing for the same clients.
  - The competition radius argument failed and the touch and concern requirement failed for proximity.
- A restrictive covenant does very little to prevent competition since it applies only to the name servient tenement.

- Competitive zones are a necessary but not sufficient condition.

## Benefits in Equity

- There are three means by which a benefit can be transmitted:
- **A) Annexation to benefitted (covenantee's) land**
  - The benefit of a covenant can be annexed so as to run automatically with the benefitted land.
  - Run automatically with benefitted land (like a fixture, can annex the covenant into the land and then anyone who buys it also buys the covenant)
  - Intention
  - Touch and concern
  - Ascertainable from the deed itself
    - Court will not infer which land benefits (Galbraith)
    - No annexation by implication (Sekretov v Toronto)
- **B) Assignment**
  - Can show that the original covenantee assigned the benefit to you. Benefit is a chose in action and you can assign it under rules of equity.
  - Only required when annexation does not occur
  - Express or implied
  - Effective against original covenantor; in theory can be effective against a subsequent purchaser provided that burden of covenant has run
    - Very factors that prevent benefit from running, will also mean that burden has not run
- **C) Building Scheme**
  - Common for restrictive covenants to be created en masse within context of either a commercial complex or residential development
    - Widespread assertion of benefit of covenants accomplished through creation "building schemes" (covenant part of building scheme)
    - Building schemes are set of restrictions used in planned communities, subdivisions, condos
    - Creates a "local law" under which each property owner is subject to burdens and entitled to benefits of relevant covenants
  - Sometimes called common plan/development plan
  - Plan with necessary easements and covenants and then sell the land
  - Four requirements for running of benefit (assuming relevant covenants touch and concern land):
    - 1) Common Vendor gives rise to titles to properties in issue
    - 2) Vendor laid out the parcels subject to restrictions that can only be consistent with a general scheme of development
    - 3) Restrictions intended for the benefit of all parcels within the scheme (element of mutuality)
    - 4) Purchased on the understanding that restriction would ensure to the benefit of all other parcels, area of which must be identifiable

## The running of benefits and burdens at law

- Law does not enforce a burden against subsequent landowners, even when it is a negative covenant.
- Benefit transmission was possible as an incident of a transfer of land.
  - Requires: the transferee obtain the same legal estate as the transferor; it was intended that the covenant would pass automatically; and the covenant touches and concerns the land.

## POSITIVE COVENANTS

- Affirmative or positive covenants compel someone to lay out money or do any other act of an active character.
- Positive or affirmative obligations do not run with the burdened land in equity.
- The new owner of the dominant tenement cannot enforce a positive covenant. Why not?
  - Because there was not privity of contract between the new owner of the servient and the dominant tenement. The positive covenant which requires the servient tenement to actively do something, is a contractual obligation.

## Amberwood

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### 2002 Ontario CA

#### Facts:

- Originally parcels 1 and 2 were a single one owned by WHDC.
- WHDC built a condo on parcel 1 and registered it which divided the land.
- It was the intention that the two parcels would share certain facilities and each would have easements for support and access.
- WHDC goes bankrupt and RBC buys the land and assigns the mortgage to Amberwood investments.
- The first condo has recreational facilities that were to be paid for by condos on both parcels.
- The reciprocal agreement provides for the sharing of maintenance costs.
- The agreement specifically says that the provisions of the agreement are to run with the real property benefit and burdened thereby.
- Amberwood assumed ownership of the lands and paid the interim expenses for a few months then refused to continue.

#### Issue:

- Whether a covenant to pay certain interim expenses contained in a reciprocal easement and cost sharing agreement between the owners of adjoining parcels of land is enforceable against the successor in title to the covenanter.

#### Analysis/Holding:

- The court says that positive covenants do not run with the land, so Amberwood is not bound by the covenant to pay the expenses.
  - Any reform would be for the legislature and not the courts because this is a well settled legal principle.
  - Enforcement of a positive covenant lies in contract whereas enforcement of a negative covenant lies in property since it deprives the owner of a right over property.
  - There is no privity of contract so no enforcement of an obligation.

#### Other legal instruments which would cause the positive burden to run?

1) Doctrine of *Halsall v Brizell* – a person who claims benefits of a deed must take it subject to its burdens.

- Charron JA advises against this approach.

2) the conditional grant of easement

- The question is whether or not a conveyance is a conditional grant is a construction of the relevant instrument.
- If the facts establish that the granting of benefit or easement was condition on assuming the positive obligation, the obligation is binding.
- Where the obligation is framed so as to constitute a continuing obligation upon which the grant of the easement was condition, the obligation can be imposed as an incident of the easement itself.
- The positive obligation is enforceable not because it runs with the land but because the condition would server to limit the scope of the grant itself.
- Hence as a matter of construction of the creating instrument itself, if a grant of benefit or easement is framed as conditional upon the continuing performance of a positive obligation, the positive obligation may well be enforceable ...”

3) Statutory exceptions (see below for Alberta case)

## Pass-by options for passing on positive covenants

- **Leases** (not mentioned in the case)
- **Chain of covenants** – a series of contracts to continue the obligation.
  - Contract establish the covenant is made stating that upon sale of the servient land the seller must make a contract with the buyer to enforce covenant and so on.
  - Each subsequent purchaser is liable in contract for the obligation to the its vendor.
- **Rentcharges**
  - Continuing obligation that charges the freehold.
  - Periodic payment annexed to a freehold and is enforceable against the freeholder currently in possession.
  - The rent charge will bind subsequent purchasers of the land even though it imposes a positive obligation and despite the absence of privity of contract.
  - The amount can be variable as long as it is ascertainable.
- **Doctrine of Halsall v Brizell** [disapproved of in Amberwood, but affirmed in English law in 1994]
- **Statute** (Alberta Land Stewardship Act, s 34 – conservation easement [its really closer to a covenant than an easement; Tulk v Moxay was about an environmental conservation]).
  - Section 34 is different than the law in Tulk because it does not require a dominant tenement AND it creates a positive covenant that runs with the land.
- **A conditional grant** – how do we tell one from the other???????? Unless this distinction can be made it does not matter.
  - “If the facts establish that the granting of a benefit or easement was conditional on assuming the positive obligation, then the obligation is binding. Where the obligation is framed so as to constitute a continuing obligation upon which the grant of the easement was conditional, the obligation can be imposed as an incident of the easement itself, and not merely a liability purporting to run with the land.”
  - The actual language from Halsbury’s:
    - “The obligation may ... be framed or construed so as to constitute a continuing condition and to render the easement itself conditional on the dominant owner for the time being complying with an obligation to repair or contribute to repair, and so be determinable or defeasible on non-compliance.”

Halsall v Brizell principle applied to Amberwood

- The owner of dominant tenement may use the easement on the servient tenement but in turn is liable to pay for the use.

Conditional Grant

- The dominant tenement is conditionally granted so long as it pays the maintenance.

## Invalidity and Termination of Covenants

- 1) A covenant may be void for uncertainty because its imposes an unacceptable restraint on alienation
- 2) All else being equal the rights obtained are vested so a covenant is not per se subject to the rule against perpetuities.
- 3) the parties may agree to termination.
- 4) may have been specified to last for a certain time
- 5) equitable remedies will no longer be given if the covenant ceases to have a valid use
- 6) Whim of the benefit party

- 6) Ownership and occupation are the same the covenant will terminate.
- 7) Covenant could be void for uncertainty because it imposes unacceptable restraint on alienation, because it's against public policy, or is contrary to statute (Ontario- can't discriminate on race, etc)
- 8) When benefitted and burdened lands come into hands of single party, covenant is extinguished (except for case of building scheme)
- 9) statute – if not specified in Ontario the covenant is deemed expired after 40 years.

## Conservation Servitudes

- Canadian legislatures have provided for the creation of covenants or easements that bind servient tenements without a dominant tenement to be benefitted.
- A conservation easement or covenant is a legal agreement between landowner and another legal entity such as the government, or non-profit, which becomes the covenantee or holder of the easement.
- Under the agreement, the landowner gives up certain rights such as the right to harvest timber or sub-divide property
- Some of the legislation providing for the creation and registration of conservation easements state explicitly that these run with the land whether they are positive or restrictive covenants.

## MORTGAGES

- A security is a form of property right designed to serve as a financial protection in the event that some primary obligation is not met.
- A wishes to borrow money
- B (bank) wishes to gouge A
- Mortgagor is A, is giving B a security interest in the property.
- Mortgagee is B
- At common law: A in return for the loan convey legal title of Blackacre to B as a security. There is also normally a proviso for reconveyance or some equivalent if and when the loan plus interest is paid off on time.
  - Condition subsequent – in essence, the mortgage had become a conveyance of the legal estate to the mortgagee, defeasible by condition subsequent, namely, payment on the due date.
- At common law, the mortgagor's obligation to repay on the agreed date was enforced strictly. Default deprived the mortgagor of the right to a reconveyance, even where the land was worth more than the amount owing under the mortgage; the mortgagor's rights came to an end and the mortgagee's interest in the land became absolute.
- Enter Equity!
- Foreclosure is a long process whereby eventually equity will not allow repayment of a loan.
- What does the mortgagor retain?
  - An equitable interest; now normally called the equity of redemption.
  - Second mortgage: legal or equitable if conveyed to bank C? At common law, equitable because that's all you have left to grant.
- S 103 of the Land Titles Act:
  - Mortgage as security
    - 103 A mortgage or encumbrance under this Act has effect as security but does not operate as a transfer of the land charged by it.
    - So the borrower has legal title and the encumbrance is bound to that title.
    - A second mortgage under the LTA could be legal.
- Mortgage or not?

- A borrows \$500,000 from C for the express purpose of purchasing a house. A default. \*No mortgage because it is not secured against the house.
- A borrows \$500,00 from C, and provides a Deed of Mortgage to C. \*Mortgage because deed is conveyed.
- 3<sup>rd</sup> ex -Yes B grant mortgage to A to pay the remainder.
- 4<sup>th</sup> ex - Athabasca realty case – Not a mortgage. It's a purchase for sale. The mortgagor has special protections including foreclosure; you are in a privileged position in default, but if its just an agreement for sale, the vendor has more remedies and there are fewer protections available.
  - You cannot have clogs on the equity of redemption, but in that case
- Example: Property was once worth \$2.0 million.
  - It is now worth \$1.3 million.
  - 1<sup>st</sup> mortgage: \$700,000 owing (was once worth \$600,000) – more owed b/c there has been a default and the interest is piling up.
  - 2<sup>nd</sup> mortgage: \$800,000 now owing [typically would be granted for a higher rate of interest, given it's the second mortgage and represents greater risk]
  - 3<sup>rd</sup> mortgage: \$100,000 now owing
  - To have more than one mortgage means that they are ranked in terms of the ordering of the mortgage grant. The best position to be in in case of a default is to be in the first position, since you will get paid out first.
  - The mortgagees could sue the mortgagor for the personal covenant for not paying the money.
    - In Alberta, some of these personal covenants are barred by statute.
- In a default of all three mortgages, the first mortgage takes legal action and begins foreclosure proceedings:
  - If foreclosure (wipes out the equity of redemption) is obtained by the first mortgagee, it acquires the land and the other mortgages are wiped out. [this is unlikely to happen here]
  - More likely, is foreclosure begins and the second mortgagee applies to the court that the property instead be sold. If this occurs, the property is sold and you get \$1.3 million.
  - The first mortgagee is then paid off. The 2<sup>nd</sup> mortgage gets some but not all of their money because it runs out.
  - The third mortgage gets nothing because there is nothing left.
- There is another possibility for the 2<sup>nd</sup> and even third mortgagee, they are entitled to pay off the first mortgagee and step into the persons shoes.
  - If there was a sale, they may only get some of their money back. So they pay off the first mortgage and then hold on to the property until prices improve (redeem by paying off the obligation).
- You foreclose down and wipe out all the other interests below you; or you redeem up and prevent the foreclosure.
  - Redemption is usually sought by the mortgagor, and anyone with a lesser interest can redeem.
  - The second mortgagee then steps into the shoes of the first mortgagee and the debt continues.

## PRIORITIES AND REGISTRATION

- How do we know who is bound by one interest and the priorities of land.
- The Common law has rules as does Alberta's Land Title System.
- The general rule is first in time is first in right and equity usually adheres to the importance of temporal priority (except for in equitable then a legal right)

### Rules that prioritize is based on: RISK

- Who bears the risk that something in the legal transaction is amiss.
- The legal matrix can be understood as one problem, with myriad variations.
  - Two innocent claimants but only one party gets to keep the property. Should it be the party whom it was stolen from or the bona fide purchaser who did not know it was stolen? Who prevails?
  - Depends on circumstances:
  - Common law and equitable priorities
  - Deeds system

- Land Titles System
- Title Insurance

#### 4 Contests:

- Legal v Legal
- Legal v Equitable (i.e. legal followed by equitable)
- Equitable v Legal (i.e. equitable followed by legal)
- Equitable v Equitable

#### Legal v Legal

- A conveys legal title to Blackacre to B
- A then purports to convey Blackacre to C
- Who prevails over B and C?
- B prevails: *qui prior est tempore, potior est jure*
  - First in time is first in right.
- *Nemo dat quod non habet*
  - You cannot give what you do not have.
- The risk of this happening is all on C, since they will lose, so if C is going to buy the property they would need to check the registry.
  - But this did not exist in common law: so C would ask for proof from A of good title. A would have to show past title documents going back 40 years.
- A own Blackacre
- A leases Blackacre to B
- A sells blackacre to C
- C made reasonable inquiries and undertook a reasonable inspection of the premises but is nevertheless unaware of the lease.
- Is C bound by the lease? Yes, the lease was good at law and it preceded the sale at law.

#### Whipp Case (Legal v Equitable)

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##### Facts:

- Company plays A
- Crabtree plays the rogue B
- Mrs. Whipp plays C
- Crabtree borrows money from his company for a mortgage and he shows them the root of title. The company takes the documents and puts them in a safe but then gives Crabtree a key.
- Crabtree then goes to Mrs. W and asks to borrow a money; she says yes, he shows her all the documents except for the first mortgage.

##### Analysis/Holding

- **What type of interest does the Company have?**
  - A legal mortgage
- **What interest does Mrs. W hold?**
  - Equitable; why?
  - That is all that remains of the Crabtree interest after the first mortgage.
- Therefore the contest is **Legal v Equitable**. The rule of priority?
  - **Typically, first in time first in right.**
  - However, **if Mrs. Whip was able to show that the company was fraudulent or estopped, the order would be switched and she would have priority.**

- In modern case law, these facts would likely result in the switched priorities given the carelessness of the company.
- The court will post-pone the prior legal estate for a subsequent equitable estate:
  - (a) where the owner of the legal estate has assisted or connived at the fraud that has led to the creation of the equitable estate without notice of the prior legal estate.
  - (b) where the owner of the legal estate has constituted the mortgagor, his agent with authority to raise money and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.
- But the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.

### **Equitable v Legal**

- Assume B agree to sell Blackacre to A, it's a unique property.
- B then agrees to sell it to C, and transfers legal title.
- A had an equitable interest, C has a legal interest.
- As long as C has no priority knowledge of the equitable interest, it as the bona fide purchaser gets priority.
- If you have ought to have known, you would also lose the contest because its equity.
- Its not first in time, and the purchasers is protected.

### **Equitable v Equitable**

- The Court looks at all the equitable circumstances and if they cant figure it out based on that, it boils down to first in time is first and right.
- Under a registration system, it provides notice to the world of whatever you are claiming; however, does not mean what you have put on the abstract is valid.
- It is put on for what it is worth.

### **Land Titles – 3 Cardinal Elements:**

- Shifts the risk from the purchaser.
- If you are buying property you go down to the land titles office and see what is listed on the title.
- 1) Mirror – you are not bound by the interests that are not on the title.
  - Some exceptions likes easements in some instances.
- 2) Curtain – The government will issue certificate of title, which means its certified by the government that your vendor is the owner.
- A curtain falls on all the prior transactions and you rely on the top title. The risk is shifted to the seller/vendor for mistake or dishonesty.
  - Therefore, you can rely on the top title. If there is a mistake, the purchaser would be protected.
  - Turta case – involved a freehold mineral estate. The land was owned by CPR and sold it to P. CPR reserved the coal and petroleum. A mistake was made at the land titles office and P's title contained the right to the petroleum.
  - The problem emerged with P sold to Turta, and Turta appeared to acquire the petroleum even though P never had it.
  - Goes to SCC, who was entitled to the petroleum: Turta. He relied on P's title which said that P owned the petroleum. The government had issued a certificate of P's title, and Turta was allowed to rely on it.
  - At common law he would have lost.
- 3) Insurance or Net Principle – in the CPR example, they have lost out. A mistake was made. In theory, CPR can make a claim against an insurance fund at the land titles office for the mistake that was made.
  - If you are buying property you are only bound to the things on the title, and you don't want to have to do a long search of title because most of the time it is fine.

- If the land titles system messes up, they will pay. Its an efficiency-based system. 10% of land title fees go to the insurance fund.
- This whole thing is based on the Equitable v Legal principle.
- What if you are going to buy a property but you find you there is a lease on the land but it is not registered?
  - In Alberta, the only notice that counts is notice on the register.
  - Unless you are guilty of fraud, it does not matter whether you are aware or not.
- One of the things you can place on title is a caveat. This is not an interest but is a notice. You can only claim an interest in land, not a license.
- The caveat does not validate the thing listed on title. You register the caveat for what it is worth. If it is a caveat for a restricted covenant but is missing an element, the caveat does not make it so.

**Final exam**

- 2 hours 45 minutes.
- Covers material from both terms but weighted to second term.
- Open book notes.