



# The Nature of Property

## What is Property

### Properties of property

- Property arises from the latin word “proprietas” or “ownership”.
- Property is changing
- Property is a **right**, not a thing
  - What distinguishes property from momentary possession is that it will be enforced by the state
- **Justification** should be rooted by a basic human or social purpose
  - Because: property is a right in the sense of an enforceable claim
  - The enforceability depends upon society's belief that it is a legal right

### Three Main Categories

1. **Private Property** – rights of individuals. Private property is a bundle of rights – which ones are included is debated but one answer: the **right to exclude others** from an asset is the irreducible core. A right held by a private citizen, endorsed by the state.
  2. **Public Property** – rights of the state. (Parliament, Crown, Provincial Rights). State owner but same as private property – except public property might be subject to some obligation of good governance (the obligation is non-justiciable) and the Charter limits state action so the state’s right to exclude may be constrained by the Charter.
  3. **Common Property** – rights common to “us” all (a specified group of qualified members). Common right includes the right not to be excluded. (ex. No claim to the high seas, airspace)
    - Ex. The ocean, space, grazing land, the public domain within the copyright law
    - This is an individual right because individuals are allowed to use it.
- **Communal/Collective** – (Less common) Often based on belonging to a certain class or being part of a defined group (Ex. Aboriginal Title)
    - **Sine qua non**- indispensable and essential action (the right to **exclude** is the **fundamental** stick in the bundle of property rights)
      - Deny somebody the exclusion right and they no longer have property

### Points of Consensus about Property

- Property is not concerned with things (scarce resources themselves) but rights (of persons with respect to such resources)
- Property includes the rights of persons to both tangible and intangible things
- Property rights are different than mere possession – you can be in possession of something and it might not be your property. Property rights trump possessory rights.
- Property rights require the enforcement of a corresponding institutional structure (property is a norm)
- Property can be private, public, or common:

### Three different thoughts for the role of the right to exclude

- **Essentialism**- the search for the critical element or elements that make up the irreducible core of property in all its manifestations
  1. **Single Variable**- right to exclude others is the irreducible core attribute of property, i.e. if you can exclude then you have property that the law respects.
    - Right *in rem* – good against the world
    - Right *in personam* --- individual right good against person(s)
  2. **Multi-variable**- holds that property is defined by free use, enjoyment, and disposal. AKA, possession, use, disposition **AKA**, right to exclude, use, and transfer
    - The list can be more or less, right to exclude is necessary but not sufficient

- Honore identifies the incidents of ownership: rights to possess, use, manage, income of the thing, right to the capital, to security, the incident of transmissibility, incident of absence of term, liability to execution, incident of residuary

**3. Nominalism-** property as a purely conventional concept with no fixed meaning. The right to exclude is neither necessary, nor sufficient as a core of property. (Each legal system fills it with its own beliefs and powers). The bundle of property rights has infinite variations.

## The Case for Private Property

### Three inquiries:

1. **Why** do we have private property? What are the values and goals of the property law system?
2. **When** private property – what objects can be private property and who can own property?
3. To **whom** private property – what are the allocational rules? Why do we confer rights on one type of claimant over another?

### C. Lewis (Justification for private property)

- Property is a right, not a thing. Property is a claim that can be enforced by society or the state.
- Property is the concept of a system of rules governing access to and control of material resources. A material resource = a material object capable of satisfying some human need or want.
- Property is an entitlement whose purpose is to advance allocative efficiency by allowing individuals to reap the benefits and requiring them to bear the costs generated by their activities.
- Property is a public law entitlement to welfare and social security
- Property is something that can be “taken” – deprivation of right to use airspace is not a taking because airspace is not significantly thing-like to be subject to the just compensation rule under the American Constitution (no expropriation without just compensation)
- Distinction based on sanction. Property rules = enforced by injunction or criminal sanctions. Liability rules = enforced by the award of money damages.

### Traditional Theories

- All of these have a purpose and place in Canadian property laws
  - The best approach to trying to understand property is a combination of these rationales is a pluralistic account (and appear in no rational or orderly way)
- **Efficiency** is often used as the driver of these rules
- **First Occupancy** --- whoever discovers and occupies it first, generates expectations. Flaws – fails to account for the transferability or acquisition through inheritance and everything had been discovered.
- **Labour and Desert Theory** – everyone is entitled to the produce of her labour, provides incentive to work and create wealth. Locke: natural right but (i) must still leave sufficient quantity for others (ii) must not appropriate so much as to cause spoilage. Flaws – most things are created by more than one person. Does not account for acquisition through transfer/inheritance
- **Basis for individual freedom (rights, privacy, property = individual power)** – private property creates the opportunities for individuals to be free, engages personhood interests. Flaws – fails to justify private property in resources required by the public — elite may use property for power and poor do not get this power.
- **Personhood Justification** - prosperity is essential for self expression, sense of security, human dev. is influenced by having control over things — psychological/symbolic significance of property
- **Economic Theory** – maximum productivity is promoted by private property. Flaws – the large waste produced by private enterprise, commercial profits tends to be preferred over societal well-being.
  - This is the driver of the case for private property
- **Utilitarian Theory (amount of land = amount of happiness)** – The net happiness of society will be greater with private property (particularly private means of production). Highest quantity of happiness for the greatest amount of

people. Flaw – assumes human desires and interests are quantifiable, fails to consider the means of distribution, overlooks the minority in favour of the majority, futile to try and measure happiness.

- **Rights-based Approach** – Private property promotes certain interests (rights) so it is important to uphold and enforce
  - **Locke + Nozick** – private property interests are special rights based on the individual's work, relationships...
    - **Locke** – mixing of labour with material resources produces entitlements (right to the property).
    - **Nozick** – theory of historical entitlement (rights to property are acquired over time through people, transactions, and justice is realized when property is distributed to those who are entitled to it.)
      - Flaws: Did they deserve the property at the start (followed proper rules to get it)
  - **Hegel** – property interests are general rights that are universal and basic to humans. **Moral rights** – property is needed by everyone for the development of freedom and personality (Free will). It is an argument for meeting basic needs.
  - **Waldron** – private property provides freedom and liberty. Provides negative freedom (no impediments to one's actions), promotes economic security and independence, autonomy, freedom from coercion, promotes stability, discipline, responsibility and the exercise of free will. Flaws – Couldn't these goals be accomplished through common/collective property?
    - ♣ Problem – *Proudhon* said that if property is required for the exercise and protection of one person's liberty then it is required equally for all others' liberty which will lead to the dismantling/redistribution of private property.
      - Every argument for property eventually leads to equality, which is the negation of private property
    - ♣ Problem 2 – *Marx* – concentration of private property rights is inevitable, it is inherent to private property that there is inequality.

## The Dominance of Efficiency in the 21<sup>st</sup> Century

- Private property promotes the efficient use of land.
- Private property creates sets of rules which promote maintenance, the improvement of resources, development of new institutions and resources, quick responses to changes. Regulations can serve to secure property rights, increasing the incentives for individuals to maintain/upgrade their property.
- But, if the regulations are too constraining or the regulating body is untrustworthy or unpredictable, the gains will be limited.

## Economically Efficient System

- Says property laws are most efficient when they include:
  1. **Exclusivity** – (this is essential) protects/identifies/enforces private entitlements. Must protect the true owner
  2. **Universality** – As many things in the marketplace for exchange as possible and as many players able to purchase as possible (This must be tempered slightly, ex. we don't want every roadway for sale)
  3. **Transferability** – As few barriers to exchange as possible (goods can gravitate to those most willing to acquire them)

## The Tragedy of the Commons (Harden)

- The purpose was to show that common ownership led to over consumption and thus rapid ruination of common property — would occur without private property
- There is a pasture open to all and each herder wants to keep as many animals on it as possible. Eventually you get to this point. They keep all the profit from their livestock but are not responsible for any costs required for the commons
- Each herdsman will look to maximize his gain (two components to this). Costs of using is lower than the gains.
  - Positive: he gains grazing area
  - Negative: overgrazing is split amongst all of the people that have access to the land
- Canadian example: open access to fisheries in Newfoundland led to over exploitation of cod industry
- **Arguments Against it**
  - Some would say that the moral is if you own it you will be more prudent with it

- Therefore, you should internalize the benefits and burdens
- The problem is it is not a system of public ownership because the cattle is owned privately. If everything was public would there still be overgrazing?
- Also, this describes a completely open access commons. What if there were regulations on the commons?
- There are commons that exist today that have not succumbed to the tragedy ( *Bettison v. Langston* -- In England, they governed grazing rights through the principle of *levant and couchant* – the number of livestock an owner could support on his own land in the winter)

### The Tragedy of the Anticommons

- The problem that occurs when private property rights are too fragmented – individual entitlements are held so diffusely that significant cooperation among private owners is required to carry out complex commercial activity. Difficult to get cooperation amongst people. = hold out problem, high transactional costs
- Multiple owners have a right to exclude others from a scarce resource and no one has an effective privilege of use.
- In theory, in a world of costless transactions, people could just trade their rights and avoid this problem but in reality the process of collecting rights into useable private property is slow and tedious. Consequently, stifles innovation.
- Ex. Patents and Copyrights , Biotechnology,

### Novel Claims – What things should be amenable to Ownership?

#### International News Service (INS) v. Associated Press (AP) (47)(1918 US)

#### FACTS

- The telegraph introduced a faster way to get news around the world. AP accused INS of free-riding off of their news stories. They are competitors in the news distribution business. INS was wiring AP stories to the west coast so they could publish all their news at the same time.
- AP claimed INS stole their news by (1) bribing AP's employees, (2) obtaining AP's news pre-publication, (3) copying news from AP's bulletin boards and early editions.

#### ISSUE

- Is there property in news? (General property against the public – NO. specific property against a competitor – YES)
- Also, does INS's conduct amount to unfair competition in trade?

#### DECISION: looks at (1) policy (2) precedent (3) attribute analysis

- There is (a kind of) property in news – a head-start injunction for a time period (not specified) ordered
  - **Pitney J (Majority Judgment):**
    - He doesn't grant a monopoly, only a postponement in which AP can make their rightful money
    - Does not say that the news is the property of the associated press
    - The INS is **exploiting the labour, skill and money** of the AP by taking and selling its material (free riding)
    - Injunction granted – INS required to cease and assist until commercial value of the news evaporated
  - **Holmes J (dissenting):**
    - Says the problem is not with property but with unfair trade in which the plaintiffs product is the defendants
      - A suitable knowledge of the source is all that would be required to fix this
      - Having value does not make it property. Property depends on exclusion from interference and you cannot do this with combination of words
  - **Brandeis J (Dissenting):**
    - Thinks it should be up to legislation — ideas and info is entitled to flow freely through society
    - It is not property, and they do not have the means to solve it with a property regime
      - There is no clear line when the laws should be changed by the judges and changed by statutes

#### REASONS

- News is generally common property, but it can be considered quasi-property because the **rights** to it are only good for a short time period and **only against the competitor** (in personam), not against the world (in rem).
- AP has the right to exclude the public from information until it has been released, AP has the right to exclude INS when it affects AP's income for a limited time period.

- **Quasi Property (50)**- : attributes of property: exchange value, transferability, product of time and effort
  - You can describe the right as property: That is an exclusive right to the commercial exploitation of the news gathered (which means regular people can still use it, the exclusion is only for commercial use)
  - property that doesn't share all of the usual characteristics associated with standard forms of property, that is, one or more of the bundle of rights differs from the rights and obligations associated with standard of pure objects of property; all property rights that endure for a limited period of time (life estate, lease, news, wild animals, prescription drugs, found objects)

Reasons there is quasi-property in the news:

- 1) Of the **labor** involved in collecting the stories. (**Labour Theory Justification**)
- 2) News had an exchange value for a few hours (**time limit** = quasi property).
- 3) Not a right **in rem** (not enforceable against the whole world), because only competitors can be (temporarily) excluded.
- 4) After exchange value is done, news has to be disseminated for the public good.
  - The rights of each party must be compared against each other, not against the world.
  - If there is labour in the object, then there is property in the object.
  - Not abandonment: They are not abandoning it because that is not their intention
  - (Dissent – Brandeis J) – The court does not have the resources to define this type of law, should be left up to the legislature; news doesn't have the characteristics of property; no precedent
  - (Dissent – Holmes) – the only thing INS did wrong was commit fraud; not a legal wrong, but plagiarism (ethical)

**COMMENTS**

- Majority was Influenced by moral behaviour of INS, focused on economic disadvantages that AP faces as a result of INS behaviour. If INS's "free-riding" behaviour was permitted then more companies would abuse the system and this could shut down companies like AP as the return wouldn't be as high
- Dissent was more concerned with the threat of monopoly and social policy

**RATIO**

- Establishes a new type of property – quasi property, based on the principle that he who has fairly paid the price should have the beneficial use of the property (you cannot reap what you have not sown)

**NBA v. Motorola, Inc (1997), 105 F3d 841 (CA2(NY))**

**Judicial History**

- Motorola appealed permanent injunction by Judge Presa concerning handheld pager called "sportsTrax" prohibits them from transmitting NBA scores or data
- NBA cross appeals

**Facts**

- Motorola makes SportsTracks paging devices that transmits game info every few minutes received from STATS
- issue is the current mode that has real time updates

NBA's complaints are:

- unfair competition by misappropriation
- false advertising, *Langham Act*
- false representation of origin
- state and common law unfair competition by false ad and false designation of origin
- unlawful interception of communications under *communications act*

Motorola: counterclaimed saying NBA disrupted contracts with teams they were sponsoring

**Decision**

- court dismissed all NBA's claims except the first: misappropriation
- permanent injunction, calculation of damages, stayed execution of the injunction pending appeal
- Motorola and STATS appeal injunction and NBA cross appeals false advertising claim dismissal
- dismissed motorola's counter claim

**Decision** - appeal dismissed

**RATIO:**

- surviving 'hot news' like INS case is limited to cases where :

- plaintiff generates or gathers info at a cost
- the info is time sensitive
- the defendants use is free riding off plaintiffs efforts
- the defendant is in direct competition with the plaintiff
- the ability of other parties to free ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be threatened

- **without being in direct competition with one another, there is no basis for a claim of quasi-property rights**

### **The Legality of SportsTrax**

- the info is time sensitive, and the NBA offers a similar service that will be a competitor of SportsTrax in the future
- NBA claim confuses 3 products: (1) generating info by playing games, (2) transmitting live descriptions of games, (3) collecting and retransmitting factual info about games
  - NBA has not shown any competitive effect on the first and second
  - no evidence people use as a substitute for watching or attending games
  - there is **no free riding** occurring
- use of pagers requires:
  - collecting of game facts, transmission of facts, assembling of them, transmission of facts online
  - motorola is not free riding game stats, they **use their own resources to collect NBA data**
- NOT unfair competition because:
  - the parties are not in direct competition with each other
  - they are gathering their own information so even if they were in competition it wouldn't be unfair

## **Victoria Park Racing v. Taylor (54) (1937 – Aust. HC) (property in a spectacle)**

### **FACTS**

- Taylor built a platform on his property so he could see into the neighbouring racecourse and broadcast the events at the track. Victoria Park sues for an injunction because they say this makes people less likely to go to the track and pay money if they can get it for free through Taylor's broadcasts. Cause of action = nuisance (substantial and unreasonable interference w use and enjoyment of land)

### **ISSUE**

- Is a spectacle property?
- Were Taylor's actions a nuisance? Was the new technology the source of a new tort?

### **DECISION**

- Appeal dismissed -- No nuisance and a spectacle cannot be owned. There is no general right of privacy recognized in Australian law.

### **REASONS**

- None of the plaintiff's rights have been violated – people are allowed to look over their neighbour's fence to see what is going on/describe it. If the P doesn't like it, he can build a bigger fence. The law (through injunction) cannot erect fences the P is not prepared to provide.
- Nuisance is: an interference that is (1) substantial and (2) unreasonable with the use and enjoyment of land
  - The actions of the defendant were substantial, but NOT unreasonable; did NOT impair use and enjoyment of land – only interfered with profitability, privacy, value which are NOT part of use and enjoyment
- There is no quasi-property right in the spectacle created – there is no authority for this action and viewing the spectacle is not an interference with the P's rights. Spectacles cannot be owned.
- The right to exclude the D from broadcasting a description of the occurrences they can see on the P's land is not given by law. It is not an interest falling within any category, which is protected at law or in equity.

### **Rich & Evatt (dissenting)**

- Primary purpose of land is to execute business, there is an unreasonable economic impact on the plaintiff
- Interfered with prime purpose of land, money, which is part of use and enjoyment

### **RATIO**

- There is no property right in a spectacle because it cannot be legally owned.

## COMMENTS

- Looking at INS and Victoria Park – in what way can Victoria Park be distinguished from INS?
  - The two cases: in one, free-riding is prohibited in INS and it is allowed in Victoria.
  - Victoria park case comes after INS by about 20 years and in the VP judgment they quote the Brandeis dissent.
  - The law doesn't put up fences when it is your responsibility to put up the fence (This is about land)
  - VP was about actual land whereas in INS the element of property was more ambiguous
  - There was more proof of economic damages in INS than in VP
  - VP could erect fences and end the situation. INS had no possibility of doing this.
- 2. About a Pittsburgh pirates baseball game
  - a. Says the difference between the cases is that the Victoria Park case did not recognize the doctrine of unfair competition like they do in the States
  - b. The real difference is about judicial activism (These were in different jurisdictions with different ideologies)

## Designation of Beneficiary

- right to money from pensions, RRSPs, RRIFs, insurance and others are property (chose in action) because:
  - there is exclusive entitlement
  - they are alienable (absent legislative impairment)
  - and they are exigible
- BUT if you are transferring property to defeat a creditor it is voidable Designation of Beneficiary — creditors can go after these entitlements, money in RRIF is immune from seizure = property interest
- designation of beneficiary under a life insurance policy creates a property interest
- Bankruptcy Act has a wide definition of property, anything with econ, value

**Profit a prendre** - common law property, gives you the right to take natural substances away from someone's property

SCC held designation of beneficiary under life insurance policy was a transfer of a future contingent interest in that property (*Royal Bank of Canada v North American Life Assurance Co*)

- respondent transferred funds from RRSP to RRIF and designated wife beneficiary
- declared bankruptcy 2 years later, RRIF money was exempt from creditors claims under Bankruptcy and Insolvency Act
- trustee moved to void transfer — courts rules transfer would be held

*Re Sykes* held the decision that the transfer of funds and designation of wife as beneficiary constituted a 'disposition of property' within the meaning of the *Fraudulent Conveyance Act*

- fraudulent transfer of RRSP funds to avoid creditors is voidable, debtors money is available to creditors

**Salulnier Case:** Are fishing licenses which are part of a bankrupt estate distributable to creditors?

- argued that they are not a form of property, just a license to do what you couldn't otherwise
- court holds it IS a form of property because they can be liquidated — anything of economic value is property within the Bankruptcy Act
- AND they are analogous to the profit a prendre property interest
- property ONLY for the purposes of the two acts

## **Property in Ideas, Information, Know How, Skills and Experience**

- generally ideas etc, are NOT the subject matter of property — they are common property because it is not in public interest to confer exclusivity over ideas
  - the interchange of ideas allows generations to pass on skills, promoting societal advancement

*Boardman v Phipps* declined to characterize information as property

- two trustees were negotiating purchases of shares, the beneficiaries of the trust sued the trustees alleging the information was the property of the trust

### Exceptions:

- inventors can patent inventions for years to encourage creativity of others
- precise mode of expression of ideas is protected by copyright (not content)
- confidential information protected by law in some cases, but the leading authority now is *R v Stuart*: held that for the purposes of the theft provisions of the Criminal Code confidential information is NOT property
- non proprietary protection of ideas — transmitted confidential info, can sue for breach of confidence
- special protection for information passed between individuals in specific relationships (fiduciary relationships - doctor, lawyer)
- de facto protection — trade secrets

### Property in Personality and Image

#### *Krouse v Chrysler Canada Limited*

- plaintiff was a pro football player, an action photo was used to promo device without his permission or payment — > impaired his ability to get other endorsements
- questioned whether image was property — being an open ended concept to protect commercial value
- decision reversed on appeal because Chrysler wanted to endorse football, not him as a player

#### *Athans v Canadian Adventure Camps et al*

- there was marketing gain in his personality, image and name that the law entitles him to protect
- in US *Zacchini v Scripps Howard Broadcasting Co*
- broadcasting the plaintiffs act without permission takes away from people who would pay to see his performance

### Notes:

- property rights generated by a spectacle on the basis of image and personality
- property rights in one's professional image may be passed on death
- recognize property in commercial personality
- rewarding time and effort, incentive for public to develop skills and personality that will entertain
- limiting tort of appropriation of personality: free speech, educating and entertaining the public

## **Gould Estate v Stoddart Publishing Co (1996), 30 OR (3d) 520**

### Judge and Court

- Finlayson, Krever and Weiler
- ontario court of appeal

### Judicial History

- action dismissed; appeal dismissed

### Facts

- plaintiff was a pianist interviewed by a magazine multiple times, took photos/notes/tape recordings etc. that were used in the article
- 40 years later the defendant published a book on him using the materials
- he had died and did not authorize its publication or receive royalties
- the interviewer owned copyright of the photos

### Cause of Action

- his estate seeks damages for the use of the photographs (appropriation of personality) and the copyright in oral conversations

### Issue

did Gould have any proprietary rights in his image or personality that were appropriated by publishing a book about him?

### Reasons

- tort of appropriation of personality: liable for appropriation amounting to an invasion of plaintiff's right to exploit his personality
- proprietary right in **exclusive marketing for gain** of his personality/image/name
  - right of publicity: prevent use of image for commercial gain
  - not successful in cases of public interest or newsworthiness
  - protects commercial value of celebrity status
- should **separate sales vs subject** — sales invoking tort of personality appropriation
  - Gould was the SUBJECT matter of the book therefore not appropriation

## Ratio

- if one's personality or image are the subject matter there is no basis for appropriation of personality
- tort of appropriation of personality requires the use of one's personality/image for marketing gain or **commercial value**
  - endorsing a product or service, or making money

## The Numerus Clausus Concept

- Property rights are said to be confined to a closed (or almost closed) set. *The recognition of novel claims is rare.*
- Legislation is sole source of property rights; the courts have no jurisdiction to create new entitlements
- *Keppell v. Bailey*
  - o Says that there would be many problems if parties were able to make new modes of holding and enjoying real property

## Three reasons for numerus clausus

1. Merrill & Smith: **Economic Perspective**
  - i. It reduces uncertainty as to who is claiming what because of consistency between cases, which reduces the transfer costs
  - ii. The fewer the number of moving parts the better. A one size fits all system
2. **Parisi: Dysfunctional Fragmentation**
  - i. Too many property rights can lead to too many rights holders, which can lead to the tragedy of the anti-commons
3. Ziff:
  - i. The reason we limit the creation is because once they are created it becomes heavily imbedded in the system and very hard to remove. Numerus clausus is an example of a precautionary principle.
  - ii. Open endedness destabilizes the core meaning of property in law

## Property in the Human Body

- principle of universality says that human body should be property, the more things that are property the better (economic theory)
- shouldn't have property in bodies because people will be more productive working for themselves (economic theory)
- if recognized as property, we have an exception to the exception of no property in physical objects
- Today, no property in living human beings

## Should the fact of death make any difference to the law's refusal to recognize property in humans?

- look at justification theories: labor theory, personhood theory, dignity, economic theory, public health considerations
- **general rule:** property in body is with the executor of affairs as named in the will – appointed by court = administrators – for the purpose of disposition
  - o exception derived from labor theory: if one is in lawful possession of a corpse and they confer special attributes on the corpse, they acquire property in that corpse (research, education, entertainment)
    - extended to reproductive fluids of living humans (*Yearworth, 2009*)

## Moore v. The Regents of the UCLA (60) (1990 – Cali. SC)

**FACTS:** Moore was diagnosed with hairy cell leukemia and his doctor told him to have his spleen removed. From the excised tissues, the doctors created the Mo cell line and make \$3B off of it.

- Moore says they are his cells and he wants some of the money.

## ISSUES

- is there property in extracted human cells?

Causes of Action:

1. **Conversion** – tort of denying someone's ownership to their property or acting as if you are the owner of said thing; the only thing you can convert is property. Additionally, this is a strict liability tort – if you don't know that it is another's property you can still be liable. *In rem.* (tort protecting property)
2. **Breach of fiduciary duty**– based on the idea that the Doctor did not do his job as would be expected of such a person in a position of trust and loyalty. *In personam.* – doctor was not looking out for patients health interests as he was expected to be (relational wrong)

**3. Lack of informed consent** – doctor had a duty to disclose the purpose of the procedures to the plaintiff (tort protecting person)

**SUPREME COURT DECISION:** This was **not a conversion**, but it was a **breach of Fiduciary Duty** or lack of informed consent;

**Ratio:** A person does not retain a property interest in his bodily tissue once it is removed from his body

- Moore has to go back to trial and prove Fiduciary duty / lack of informed consent

- **Demurrer proceeding:** application to strike a claim, defendants accepted for the purposes of the demurrer proceeding that the facts were agreeable BUT said even if all those things were true, there is still no cause for action/no legal wrong.

- Today ‘application to strike claim’ in Alberta

**\*\* In Alberta, under *Human Tissue & Organ Act* s.3 could Moore have brought a claim? \*\***

no benefits can be acquired resulting from tissue being used in scientific research

**section 2(a)** – exceptions is byproducts used for a purpose other than transplantation, therefore **YES** he could

**REASONS**

**Majority:**

**1. Cluster One:** Did it fit under the current scope of Conversion: no

- For it to be a conversion Moore must have retained an ownership interest in his cells, since he didn’t retain possession
- **3 Reasons** to doubt he retained ownership/property in body parts
  1. No judicial decision supports his claim (**no precedent**)
  2. **Statutory law** severely limits patients continuing interest in cells
  3. The subject matter from the developed cell line cannot be Moore's property because:
    - **It is legally and factually distinct** from the cells that were taken from him – required labor
    - Patents reward inventive effort, not the discovery of natural materials
- Looking at this case as unwanted publicity (**privacy** rights) is wrong

**2. Cluster Two:** Should they extend the definition of conversion: no

- 3 reasons why it would be inappropriate to impose liability for conversion in this case
  1. **Policy considerations** urge against the extension of the tort of Conversion (= strict liability tort)
    - You want to protect the patients right to make medical decisions (this means trusting doctors)
    - Do not want to **threaten doctors** who are helping the common good and think they have done nothing wrong
    - To settle these two policy considerations you need to decide on liability based on existing disclosure, not extended conversion
    - By doing this they say it will put too much cost on the medical research and will **severely hamper research**
  - People will be scared to do research because they don’t know if they are working with stolen property and thus liable
  2. **Legislative solution** is the better fix – can change things if they think the courts were wrong
  3. The **tort of conversion is not necessary to protect patients rights** (there are other patient protections, other causes of action) – protect patient autonomy

**Dissent**

- **Does it fit under the current definition of conversion -yes**
  1. Reasons to doubt he retained ownership
    1. There are no judgements showing he didn’t. **Res integra**- a matter of first impression (this is a new matter for the courts to consider – no past cases support position)
  2. California statute law drastically limits a patients control over their cells
    1. Does not follow that this statute takes away the rights of property or ownership
      - i. Ownership and property is very loosely, if at all, defined
      - ii. He at least had the right to hire researchers to do what the doctors did
  3. The patent cannot be Moore's property
    2. He was a joint inventor in a loose sense because without him it would not have been created

## Reasons not to extend the definition of conversion -no

### 1. Relevant policy considerations

1. Patents actually make it hard for the transfer of research because of the secrecy
2. It is not that hard to ask someone for consent and attach said consent to the sample
3. Everyone should have an interest in their own body and its parts
4. Tragedy of anti-commons: too many property interests means its hard to organize all of the rights.

### 2. Legislature should make the decision

1. Torts is particularly a creature of common law and just because the legislature can fix something doesn't mean it should or will

### 3. There is no need to extend the definition because he can sue for other reasons

- o The reason of nondisclosure fails because it is unlikely to be successful in most cases. Also, Doesn't allow patients to share in proceeds
- 3. May allow actual exploiters to escape liability
  - i. This would be a cause of action against the doctors (it is an in personam claim) this would mean the people down the stream would not get properly punished

**NOTES:** This case shows that property rights do not always establish efficiency, by discouraging property they are encouraging efficiency. This is distinguished from INS as a proprietary rights for property were found in the name of economic efficiency.

### Patents:

- exclusive right to make product x for a certain period of time that the government will protect
- trade off is you have to disclose the invention

## CASEBOOK NOTES:

### *Yearworth v North Bristol NHS Trust*

- men stored sperm due to illness affecting infertility, were improperly stored and ruined
- Issue: is sperm property? If so, upon what basis should damages be assessed? Does damage to sperm constitute personal injury?
  - rejects Moore and holds that sperm is an object of property even if the natural properties of the sperm have not been altered (ex. Finger cut off in factory accident when the surgery goes wrong – surgeon should be liable)
  - men had negative control, property right, has ownership of sperm — similar to corpses: so long as possession is lawful, some labour has been borne, material has utility = property rights
- donors of bodily materials have no property after donation for research (*Greenberg*)
- BUT trend is toward recognizing property rights in body parts
- *Caufield* – embryos are an object of property (poorly reasoned)
- *Davis* – frozen embryos are (*sui generis*) unique – neither property nor human but some hybrid category of rights; gives veto for use of them to either parent

## Chapter 2: Property in Perspective

### The Sources of Canadian Property Law

#### Social Context

- serious inequality in distribution of property correlated with differences in life success in education, health, etc.
- profound impact of inequalities gives rise to revolutions and social unrest
- Redistribution of Wealth:
  - o 1. provide people with the bare minimum – don't want to discourage productivity by providing more than necessities
  - o 2. should help people integrate/realize their full potential (personhood approach)

### The Reception of English Law

**May 2, 1670** – Hudson's Bay Co. was granted Rupert's Land and the tenure was free and common socage. There was a ceremonial grant of 2 beavers and 2 elk that encompassed the services of tenure.

- English (Imperial law) only applies to England unless statute states otherwise

#### 2 Forms of Reception:

- 1. **Settler Theory:** English law was incorporated into Canada through the **laws of reception** – settlers brought the law with them insofar as it was applied to the circumstances of the new colony.

- **2. Conquest:** local law persists unless there is explicit change – want to keep local population satisfied after conquest
  - **After Quebec conquest, French Law continued to apply for a decade**
- **Treaties of Cession:** aboriginals agree to give up traditional ownership of lands in exchange for treaty promises made by the Crown
- **Alberta's (NWT) reception date was July 15, 1870.** The English law was brought in on that day and from that day forward, it was interpreted and added to. ALL English law was received in so far as it was applicable.
  - In so far as applicable – In Canada almost every concept was regarded as received.
  - S.3 recognizes future change in these (base) laws – initially federal and later AB statute and common law became the law of the province
  - Inapplicability: refers to the laws that are not sensible in the context of NWT (refer to institutions that don't exist there, as well as 'legal antiques' – old law that don't make sense in modern 19thC territory)
- Only marked departure from English law was in NFLD – the laws reflected the importance of fishing and fisherman were granted legal privileges so their season wouldn't be interrupted.
- **What remains of English law now** – the doctrine of tenures, fee simple estates and the nomenclature.

### **The Doctrine of Marital Unity**

- at common law marriage the legal personality of husband and wife merged → to deprive married women of a host of rights of ownership
  - wife's property came under husbands control
- husband had duty to support that survived into widowhood of wife – wife obtained protection and support of necessities AND dower rights on husband's death to live on his estate
- Equity: women could use to sidestep doctrine, women could protect rights by placing legal title in hands of trustees to settle for her benefit
- Eliminated by legislation in 19th C, slowly given rights

### **Impact of English Law on Aboriginal Land Rights**

- Radical or sovereign title of land was acquired by Crown, but 'aboriginal title' was retained by aboriginal communities (unclear what the rights of this title are)
- Proving aboriginal title is challenging: have to est exclusive occupation of land prior to British assertion of sovereignty (no written records from hundreds of years ago – oral history was relied on)
- Standard British Law recognized the basis of aboriginal title: English common law protects possessory (occupation) interests
- Recognized in Royal Proclamation (1793), Canadian treaties of Cession, Indian Act, Constitution Act s.35
- Historically the crown conducted itself in a manner inconsistent with aboriginal and treaty title/rights
  - Granting mineral rights, timber and fishing rights, and issuing patent of Indian lands

### **The Doctrine of Tenures (to hold)**

- **Use of legislative and executive power to achieve state aims (raise \$, conscript army, hire police, etc.)**
- technically the correct way to describe things but not much influence anymore (only nominal descriptive power)
- from feudal times, holding land for a period of time 'of a Lord', like lease with no limits on subleases
- Land was held by the Crown it is given in exchange for services. Land was granted down in exchange for 2 things:

#### **1. Services of Tenure**

1. Knight Services
2. Ceremonial Services- Need for splendor (make them a big party)
3. Spiritual Services
4. **Free and Common Socage** – specific monetary payment (still in effect today)
  - a. Mesne (mean) lords

- By these means a socio-economic network began to form that was connected to the devolution of land downward.

#### **2. Incidence of Tenure**

- Implied rights and obligations that the Lord provided. Were incidental to the category of service one was in
- **Homage/Fealty** – Oaths of loyalty to the Crown in exchange for the land and severe consequences for a breach.
- **Relief (Death Duty)** – triggered by the devolution of inheritance downward. If someone acquired the land on the death of the first tenant, the Crown could require rent while the inheritor was a minor for example.

- The Magna Carta (agreement between the king and the tenant in capite) controlled the tax-levying rights of the Crown over tenants. Put limits on the type of aid
- **Escheat** – the right that exists for the Crown/Lord to regain the land once the rights at the tenant level expire. (Like when a person dies intestate with no heirs – property goes back to the state)

### Reduction and Abolishment of Tenures

- Once the Tenants in Capite devolved their land they were called **Mesne Lords** (pron: mean) and their tenants were called **tenants in demesne** (pron: de-mean).
  - The people at the very bottom of the pyramid, holding unfree tenures (outside of the four service tenures) were called **Villeins** and their tenures eventually became known as **copyhold tenures**.
  - The rights became less and less as the land was devolved and the burden to provide upward flowing rights more honourous.
- **PROBLEM:** was that there was interdependent property rights that could lead to failure in the chain resulting in the wrong type of socage (specific obligations)

### Quia Emptores addressed issues:

The introduction of legislation in 1290 called **Quia Emptores** (means “about purchasers”)

- (1) you can no longer **subinfeudate** (2) transferee would have same tenural obligations as transferor (3) free alienation, could pass your burdens to others freely
  - Was meant to stop the fragmenting of property rights. It was hoped that the pyramid would truncate – when estates ended (the bloodline died out) the land would escheat up eventually ending up with only two rungs. (1) Crown and (2) Level below.
- > lead to crumbling of feudal pyramid by: (1) forfeiture of tenure - non performance, escheat, effect of forfeiture (overlord to whom land was escheated would be unburdened by previous tenure) (2) inflation: tenural \$ incidents lost value

### Tenure Abolition Act, 1660

The next important piece of legislation in 1660 called the *Tenures Abolition Act* (An Act to Abolish Military Tenures)

- Like Quia Emptores was prospective and related only to future grants.
- ALL grants from the Crown will be in **free and common socage** because it didn’t make any sense anymore to raise revenue through incidents of tenure.
- The tenurial system (the keystone of feudalism) was abolished by this legislation.
- All incidents of tenure except for escheat became irrelevant. All services of tenure became free and common socage.
  - escheat rules set out in the *Unclaimed Personal Property and Vested Property Act*
  - *Intestate Act* tells you who your natural next of kin is in situations of unwilled property
  - province will hold unclaimed property for 10y before it becomes theirs

### Huggard Assets (circa 1950)

- **attack on the Royalties system – challenges the level of royalties, it was legislation so how?**

- Example of the application of reception principles to property law
- Government wanted to levy royalties against the defendant.

**Question was whether the laws governing tenure by free and common socage were in force in Alberta.**

- **Tenure Abolition Act** – all forms of tenure now have to be based on the free and common socage system: fixed obligation in the form of a money payment (only Tenure = FIXED money payment)
  - o Argued that the royalties were not fixed, thus not valid under legislations

**Hudson’s Bay Charter, 1670** – transaction between the government and the Hudson’s Bay company – example of free and common socage in Canada.

**S.3 of the NWT Act** says that Alberta received the law of England, (which included free and common socage) which can be changed through subsequent legislation.

- **Privy Council** – the royalties are valid because there is a later piece of legislation that overrides the earlier statute permitting variable \$ royalties

**Today:** tenures = not used -- government relies on taxes rather than tenures to raise money – why we consider ourselves owners of land rather than tenants

## The Doctrine of Estates

- The Crown owns land, we own estates in land – a form of property in land with specific bundles of rights
- ONLY applies to land (not personalty)
- **Estate**: a bundle of rights over land exercisable for a period of time, only applies to real property

### Freehold Estates (Time periods for which grants were made – all of uncertain duration)

1. **Life Estate** – A grant to a person for that person's life (most land devolved to the tenants in capite were life estates)
2. **Fee Tail** – (Does not Exist in AB) Had a duration based on a formula which said it can go to immediate offspring, and pass on and on until no more offspring (not broad inheritance, not too illegitimate children). No longer exists.
3. **Fee Simple** – Most important by far. The largest form of ownership known to the law. **Can last forever** – lasts as long as the owner has an heir to pass it down to (heir defined broadly). Everything that absolute ownership would entail. But, if a person dies intestate with no heirs, then **escheat** (. \*think ultimate ownership)

### Leasehold or Non-freehold estates (certain duration)

- fixed leases
- renewable leases

### Non-constitutional Property Protections

- **Expropriation Acts**: federal and provincial statutes re land and other interests in land: authorized agencies can only expropriate for specified purposes, to expropriate must provide market value compensation
- **Canadian bill of rights (1960-Diefenbaker)**: "right to not be deprived of property except by due process of law"
  - The bill of rights only applies federally, this is a provincial matter. It can be overridden by Parliament because it is not in constitution
  - Section 1 talks about individual to life, liberty, security. This arguably includes property rights but is a "toothless tiger" as it is not a supreme law
  - There are provincial ones as well, but they are very ineffective, e.g. AB Personal property bill of rights
- **Authorson v. Canada**
  - Veterans were precluded by statute from suing Canada for the poor administration of pension and disability (basically the government messed up their investments)
    - SCC found that the bill of rights did not work when clear and proper language was used to create the statute, even if it involved expropriation, i.e. no procedure for individual cases contained in the federal statute
    - Since everyone was denied the rights, there was no process, so there is no due process that must be followed
- **AB personal property bill of rights**
  - It would protect us unless legislation declares expressly it operates notwithstanding the property bill of rights
  - Requires to the determination and payment of compensation for the expropriation/takings
  - applies only to a limited class of personal property: tangible personal property (choses in possession)
- **AB expropriation act & Federal expropriation act**
  - Has the power to expropriate without compensation, but not the way they normally operate. There is still some protection
  - E.g. Surface Rights Act –if you have mineral rights on someone else's land and have an issue over access, the Act gives access to the mineral owner and compensates the surface owner
- **Common Law**
  - *Manitoba fisheries v. The Queen*
    - Unless a statute clearly demands it, a statute is not to be construed to take away property without compensation
- **NAFTA, article 11**
  - Protection for private investors against expropriation by another state without fair compensation
  - This is very entrenched, federal govt is liable under NAFTA obligations
    - If the province breaches NAFTA, the feds would be liable and not the province
      - The feds could use their overriding power of disallowance (but it hasn't happened in over 60 years – it is "quasi-constitutionanl")

- Feds could take the costs out of the transfer payments
- Private parties can sue under NAFTA, eg. Metalclad
- Implication: If Canada passes environmental law that essentially “takes” land from foreign investors, Canada will be liable for expropriation to the investors but may not have any obligation to locally owned companies that are also expropriated
- **FIPA, Canada and Peru (2008)**
  - “neither party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent nationalization or expropriation, except for a public purpose...
  - take home, it uses the American template for Ad hoc

## Protections of Property from State Confiscation

### Expropriation Power

- Why does the government need to be able to have expropriation power
  1. Some people may not want to sell to the government
  2. It prevents arbitrary state action by making the govt follow the statutes
- Why do we make the govt pay fair mrkt value
  - Because it helps insure that your land cannot be taken from you without a return
    - Secures reasonable investment backed expectations
  - Since the public is going to benefit from these activities of the govt, it is only fair that they pay for it, not the person who is getting the land stolen
  - It provides incentive for the govt to act prudently (because they now have to bear the costs)
  - Grounds of fairness: government should pay so that the cost is distributed among all people who will benefit from the public good, rather than one individual taking all of the loss (by losing their land)

How do the prov and fed jurisdictions vary in power over property?

-s. 92(13) says property and civil rights are provincial

-Copyright, patents, trademarks are all Federal

### Could the state expropriate property (animals) and not pay anything, and get away with it

- Well who has the **authority** to do this? Feds or province (both have some authority)
- What constitutional provisions exist to deal with this?
- **Charter** does not have a protection of the taking of property BUT it isn't entirely silent
  - It can work indirectly, **s. 35 of constitution act** (1982) provides protection of aboriginal rights, primarily property interests. Gov't can infringe on property rights but can not expropriate
  - Some protection against unreasonable search and seizure
  - Equality legislations: so unequal treatment could be unequal property laws
- **US constitution** says the taking must be for public purpose and there must be compensation

## Property Law Categories

- Distinction between real and personal property is based on the nature of the right
  - **Real** allowed the holder of the right to bring a **real action** to **recover the land** from someone who was in possession of it
  - **Personal** gave the holder a **personal action** to be **monetarily compensated** for the loss caused by the person who wrongly interfered with the right
  - These distinctions no longer accurately indicate whether someone has a right to recover the thing or receive compensation
- All real property rights are to land, but not all land rights are real
- All real property rights are rights to land while most personal are not
  - There are property rights to land which are not real property (ie. A lease)
- Distinction between real and personal property should not be confused with rights in rem and in personam
  - Personal property rights are not personal rights
    - They are property rights because they relate to external things and are enforceable generally against society. However, normally enforced by personal rights

## 1. Real Property (land)

- Property to which **real actions** apply – action for the return of an item as remedy
- Made up of Land and immovable

**Corporeal Hereditaments**– possessory rights, now refers to land estates (ex. fee simple estate). Gives you a right to the physical thing and physical dimension including possession

**Incorporeal Hereditaments** – non possessory (the right to use) these can be inheritable (ex. **Easements** – such as a right of way; **Profit a Prendre** – right to exploit minerals)

## 2. Personal Property (chattels)

- Remedy – damages, don't get the actual thing back. Non-land (**Chattels**)

**Chattels Real** - personal, mobile property that courts would permit a real action to return

- Can bring real actions, to repossess
- Started as a right to enforce the contract. It is so connected with the land, now a days there is not question that a lease **runs with the land**, meaning if you buy black acre in fee simple, and it turns out there is a lease hold on the property, you are bound by that lease.
- Technically leases are a form of personal property
- Can have a real right in irreplaceable things like paintings and family heirlooms

### Chattels Personal

- can still bring a real action for the return of chattels personal
- **choses in possession** – things that are capable of being rendered into possession - The stuff we have (ex. Clothes)
- **choses in action** – a non-possessory right in something other than land (the personal property version of the incorporeal hereditament – ex. Contractual rights, intellectual property, Copyright)
- characterized as rights because it facilitates alienation and transferability – contractual rights often transferred (ex. creditor's rights) – they have exchange value, one party has exclusive rights over the choses in action

## Other Modes of Categorization

**Movable/immovable** (civil)

**Tangible/Intangible** (Corporeal/incorporeal)

- Tangible include the right to possession of something, intangible does not

### Public and Private

- Public law: criminal, land-use bylaws etc.
- Private law: rights and remedies of private owners against each other.

### Legal and Equitable Interests

- **Legal Interests:** Property interests recognized by courts of law
- **Equitable Interests:** Property rights recognized by courts of equity (Equitable were rights that were enforced by the Chancery)
  - Created to fill gaps and correct perceived injustices (not separate courts any more)
- Many things can be either legal or equitable
- **Two main differences**
  1. Most equitable property rights can be created with less formality than the comparable legal right
  2. Equitable tend to be less durable and can be more easily extinguished

e.g. 1) law of mortgage, common law rule: if the payment was late then the bank did not have to re-convey the title.

Courts of equity: if the borrower pays back the money, the bank must re-convey the title. Equity would grant foreclosure if they lose their patience

e.g. 2) trusts, a settler (the one with the money) will convey property on to someone (trustee) for the purposes of providing for the beneficiaries. Common law: legal title is transferred to the trustee. Equity rule: includes the beneficiaries and the responsibilities owed to them.

**Take home**, when law and equity are in conflict, equity prevails

**Sui generis interests (unique interests)** – quasi property, Aboriginal title, pharmaceutical prescriptions, corpses, frozen embryos

## **Brown v R in Right of British Columbia (1980), 107 DLR (3d) 705 (BCCA)**

### **Judicial History**

- trial judge dismissed action of plaintiff arguing she was exempt from the tax because of s 87 of the Indian Act because the electricity delivered to her at her home on the reserve was 'personal property situated on the reserve'

### **Facts**

- Complainant sued because social services tax imposed and collected under the *Social Services Tax Act* on the purchase price of electricity sold to her, an Indian living on a reserve, was unlawful
  - o BC Hydro supplied her electricity on the reserve
  - o She was charged for the electricity purchased and used AND under provisions of the Tax Act for a percentage tax on the purchase price of electricity
- *Indian Act* – can't tax personal property situated on a reserve
- She paid it and Hydro remitted the tax portion to the Crown

### **Issue**

- **Under the Indian Act**, is electricity consumed on a reserve considered personal property?
- is the complainant liable for the social services tax in respect to the electricity she purchased because she is Indian living on a **reserve**?
- SSTA calls electricity personal property, so why is it a question whether it is under the Indian Act?
  - o An object can be property for one statute but not for another

### **Decision**

- Appeal allowed, finding for the plaintiff

### **Reasons**

- IA does not define 'personal property' – obviously electricity is not 'real' property (land)
  - o Precedent was conflicting, but no discussion relating specifically to IA
  - o Illinois case: electricity has valuable commodity, transferrable value
  - o Trend based on past cases toward recognizing electricity as personal property
- s. 87 of the Indian Act states exemptions from taxation on a list of properties
  - o BUT respondents asserted it **did not so exempt electricity** as tangible property in the Tax Act
- **Tax law approach to interpretation of taxing statutes: TCP**
  - o (1) **textual** analysis – no answer in IA (2) **contextual** analysis – reserves are poor (3) **purposive** analysis – what is s.87 designed to do
  - o if doesn't work — interpret legislation in favour of taxpayers bc of presumption against expropriation
- Tax Act: defines purchasers of tangible personal property to include electricity
- provincial legislature could include electricity as personal property
- **indicia analysis** - commodity of commerce, has value
- trial judge found that electricity is personal property BUT not within the terms of the Indian Act because of its explicit exemptions
  - trial judge's conclusions were based on too narrow of a view, provisions should not limit the general words 'personal property'

### **Ratio**

- when interpreting statutes, judge's should not treat exemptions as the end all possibilities, this is too narrow a view
- when a statute is absent of a definition, look to the common law — indicia analysis (indication, assuming when a fact is probable but not certain) or TCP analysis may be helpful

## **Rock Resources Inc v British Columbia 2003 BCCA 324**

### **Facts**

- mineral claims 1-4 located and recorded on July 13 1987, plaintiff acquired under agreement with Ambergate Explorations in consideration of shares and a work program to be done by December 1994
- July 13 1995 the Province enacted **Park Amendment Act** making the Goat Range Park a 'Class A'
  - o prevents plaintiff from exploring or developing minerals in claims 1-2
  - o plaintiff believes economic value in claims
- according to a consulting geologist, mineral discoveries in past found outside the claims

- May 13 1998 Province enacted **Mining Rights Amendment Act** to provide compensation for mineral claims taken for creation of parks
  - spoke only to parks/takings after enactment NOT prior
  - settlement process started for claim holders taken by parks before 1998
- s 5 of **Mining Rights Compensation Regulation** does NOT provide damages for loss of opportunity, consequential damages, pre judgment interest or costs
- plaintiff thought offer was too limited and declined negotiations via arbitration
- CAUSE OF ACTION: tort of taking of property (in a sense)

### Issues

- (1) Whether rock resources had a property interest in the minerals that was taken?
  - **Crown argued:** there are no minerals, there are no property rights, even if there are minerals RR could never exploit them because they need a permit to get them that was not available for mining purposes in Parks Amendment Act; At best RR has a possibility of acquiring property, but not actual property interest
  - **Court: indicia analysis** – RR bought the rights from the government – has exchange value, govt is compensating others as a result of the Parks Amendment Act
    - Looks like common law property interest: **profit a prendre**
    - Statute law (Mineral Act) = ‘chattel interest’ = property interest
    - Many contingent interests that may be valuable
- (2) Was there actually a taking of property?
  - Crown argued there was no taking because there were no proven minerals
    - BUT Crown says they were confusing the 2 forms of property: mineral ownership & right to remove minerals
    - There WAS a taking bc RR was completely deprived of the right to obtain minerals, rendered it worthless – **regulatory taking**
- (3) Characterization of RR’s right, why characterization? If it is property that was taken, why does it matter?
  - **If interest in land** = Mineral Act applies = damages for quantification purposes takes parties into Expropriation Act forum and principles
  - **If personalty** = common law applies to quantify damages
  - Characterization at common law and under Mineral Act
    - Common law = profit a prendre
    - Mineral Act until 1976 = chattel real, equivalent to a lease
    - Mineral Act at 1977 = chattel interest
- (4) Was the taking authorized/lawful?
  - Yes, legislation effectuated the taking
- (5) Assuming an authorized taking of property, are the plaintiffs entitled to compensation from the government?
  - Agree legislation can deny or provide compensation
  - Court says compensation must be paid UNLESS there is clear legislative intent to the contrary
  - Dissent: default rule is that parliament can take property without compensating

### Decision

- the taking of plaintiffs rights in the mineral claims, authorized by legislation requires the Crown to pay compensation – sends to expropriation compensation board for quantification of compensation

**RATIO:** contingent rights can still be property if they have value, and being completely deprived of said rights amounts to a taking; unless a statute clearly expresses otherwise, expropriation must be compensated

\*\* **Alberta Personal Property Bill of Rights** – only protects tangible personal property here it is a chose in action, profit a prendre has no protection under Bill in this case

### Takings Law

- **US Law: per se (automatic) taking** occurs when regulation: (1) gives rise to direct permanent physical occupation of property (2) precludes any economic exploitation of ‘property’ – **ad hoc taking** (no specific rule of taking) consider (1) economic impact of any regulation (2) reasonable investment expectations about the regulated object and (3) purpose of regulation (importance, and overlap with common law)
- **Canadian Law:** regulatory taking occurs when regulation (1) precludes all reasonable uses of property (2) state actor acquires a beneficial interest in the subject property or flowing from it

## Defacto Taking (Constructive Expropriation)

- **American Viewpoint** (5th and 14th Amendments) (**WE PROBS USE THIS NOW (SEE BELOW)**)
  - **Ad hoc**- you do it on a case by case basis
    - (147) **Penn Central Test (Lucas)**- (governs most of the claims in USA) The court will look at the economic impact of regulation, its interference with reasonable investment backed expectations, and the nature of the govt action
    - 3 important factors that are not exclusive
      - (Canada View: The cases don't necessarily add up. It is too hard to do that, we use several factors to try and figure it out)
      - formula for how much is too much
      - Drawback: judges are not going to balance in the same way (rarely protects)
  - **Per se** (categorical) (147)
    - These are the clearest cases, where balancing is not required
    - 1) There is a direct physical **occupation** of ones land (ie. Wires put over land)
    - 2) Or, **draining away the full economic benefit of property**
      - It is hard to find that there is no economic wipeout
  - If the taking is in accordance with the background principles of property and nuisance law, then it is not a taking, it was never in the bundle
    - Compensation unless decree does nothing more than could be done by the court (ie injunction)

### ***Lucas v. South Carolina Coastal Council (US, 1992)***

- P purchases two coastal lots to develop them. After he purchases them, govt passes act designating the land as unavailable for development, this was determined as a taking.
- Uses Penn Central Test. Found compensation for P because owner suffers “physical invasion” and denied economic benefit regardless of the degree of purpose
- **Ratio:** When owner of real property is called upon to sacrifice all economically beneficial uses in the name of common good, he has suffered a taking and is compensable

### ***Pennsylvania Coal Co v Mahon, 260 US 393 (1922)***

- Deed was for the surface but allowed the company to mine underneath for coal, and the grantee takes the premises with risks associated of damages
- Certain Act in place said could not mine that would cause structural damage to homes
- “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”

### ***Metalclad Corp v United Mexican States (2000)***

-even covert or incidental interference with the use of property that deprives the owner can be expropriation under NAFTA

-is environmental policy discouraged as it may be interpreted as an expropriation?

## Canada

### ***Mariner v. Nova Scotia***

- wanted to build on land that has been legislated as “preserved” for environmental reasons, P claimed that the land had been de facto expropriated by the Beaches Act
- Very similar to the *Lucas* case in USA
- When the govt has paid compensation it is because they made property rights meaningless (this was not present in this case). Went beyond limiting use or reducing property value. Previous Canadian case law did not support P

**Ratio:** For court to rule in favour of P, there would have had to have been a physical taking and confiscation of all reasonable private uses of the land. Canada is more amenable to regulation. Compensation could be for “injurious affection”, not the loss of economic value

### ***Canada Pacific Railway Company v City of Vancouver***

- Crown granted CPR land in 1886 to build a railroad, now CPR was willing to sell the land at whatever price determined by agreement or expropriation. City would not buy the land but passed bylaw stating it was a thoroughfare/passage. CPR argues that this is a taking and wants compensation (because they can't use for an economic purpose)

- court says that the City did not require a beneficial interest related to the land, and CPR could run a train there if they wanted

- Test for **De facto Expropriation (CPR Case)**
  1. Acquisition of beneficial interests in property flowing from it-
  2. Removal of all reasonable uses of property- Not best but reasonable
- It would be easier to find defacto in the USA
  - There is no mention of any ad hoc test in Canada.
- Canada enters into many foreign agreements FIPA's (Foreign Investment Promotion and Protection)
  - The Peru example is a codification of Penn Central (ad hoc)
  - **This means we have adopted the American language for our agreements**

## Division of Powers Over Property

- **s.92(13):** provincial governments have jurisdiction over property and civil rights
  - most property statutes are provincial
  - many federal statutes arise that relate to property (crim, intellectual property, Indian lands) many constitutional challenges
- The Charter & Property Rights: can fail to protect property directly, but can so indirectly (eg. Discrimination protection)

## Property Rights Derived From Events

- Wrongs (ie. Right to bribes received by an employee)
- Consent (ie. Sale of goods, will, mortgage)
- Unjust enrichment (ie. right to recover land transferred by mistake)
- Others (ie. creation (destruction) of property rights brought about by physical changes to things)

## Property and Poverty

- **Freedom-** it is hard to be free without private property
- **Personhood-** every individual should have this general right
- What kinds of areas do poverty lawyers involve themselves in?
  - Access to justice
  - Debt and bankruptcy, mortgage foreclosure
  - Landlord and tenant

## The Tragedy of Homelessness

- Homeless are excluded from all the places governed by private property rules
  - Wandering in public places is their only option
- If a person is not free to be somewhere then he is not free to do anything (they are without freedom)
- People need to be somewhere in order to exist
- **Ratio:** We are willing to allow homelessness but not to allow the homeless access to act as free agents in public spaces

## Controlling Chronic Misconduct in City Spaces

-migration of homeless from Skid Row neighbourhoods to downtown areas supposedly results in decrease usage of public spaces

-property response may be to rezone certain areas with different rules

Tragedy of the Agora: a space that all can enter tempts abuse

- solution 1: claim a public nuisance in which the government handles it

- solution 2: label downtown as “red-yellow-green” (Red: very relaxed but likely to see disorderly conduct ~5%, Yellow: chronic panhandling not allowed but episodic is okay ~90%, Green: even episodic is banned ~5%)

## Victoria (City) v. Adams (130)

**Facts:** City bylaw prohibits erecting temporary shelter on public property, homeless unable to protect selves from elements, shortage of beds for homeless in the city

### Issues

- Is the prohibition bylaw against erecting temporary shelter on public property constitutionally valid under s.7 of the charter – right to life, liberty, and security of the person?

- Argued that this infringes the rights of the homeless to life, liberty, and security of the person s. 7
- City claims it does not, and if it did it would be justified by s. 1 (governments ability to limit rights)

**Decision:** Not valid, infringed on s.7 (life, liberty, and security) not saved by s. 1 (appropriate infringement)

**Reasons:**

- Sleep and shelter are necessary preconditions to any kind of security – not allowing shelters was a considerable threat to the lives of those relying on them
- The legislation is arbitrary and overboard and hence not consistent with the fundamentals of justice.
- Infringement not justified by s. 1 (impairs right more than necessary)
- The interference was substantial but NOT unreasonable because no law prevents the actions
  - Activities did not impair reasonable use and enjoyment of land

**Is this case about property rights?**

- HOMELESS ARE NOT ASSERTING A PROPERTY RIGHT (Litmas: partially bc they can't be moved/their shelters taken down)
  - No, the right to use public property is established, the question how it can be used is what is at issue
  - The homeless have a **licence** (a right to do something that would otherwise be a wrong) (ie. Trespass on the land) – licence to go on public lands in the form of parts
  - There is **no claim that the homeless can exclude anyone** from the city property – they are asserting **a right to be free of regulation preventing them from avoiding serious risks to their lives**
- **Property Perspective:** city is giving the public, including the homeless, something they otherwise would not have subject to restrictions OR is there a real deprivation – not clear if s.7 of Charter can be used to compel provision of positive benefits
- **Victoria responded** by creating a new regulation that said the public structure must be taken down after the nights, i.e. they could campout but they had to pack up in the morning (time regulation)
- A big part of the case was that there was significantly inadequate shelter
  - If that had been dealt with adequately, then the city could have the judgement altered

**Ratio:** the homeless are not exercising a property right because they lack the right of exclusion

**Boundaries: Physical Dimensions of Property**

**Giant Carrot Theory** - used to be we owned everything above and below our land; now, how high and low we own is determined by (1) **economic** theory: max of wealth (2) **labour** theory: one's work should be recognized

**Airspace**

**Didow v. Alberta Power Ltd. (176)**

(1988)

**Facts:** Respondent (AB Power) put up a power line along the appellants land. Poles in the air go over the appellants land 6ft, 50ft high in the air

**Issues**

- Did the respondent trespass (unjustified interference the plaintiffs possessory right) airspace above the appellants land?
- Did Didow have possessory rights in the airspace over their surface lands at the level of intrusion of the cross arms?

**Decision:** Appeal allowed (poles over top were on the property and thus trespassing)

**Reasons**

- **Cujus est solum, ejus est usque ad coelum et ad inferos** - The owner of a piece of land owns everything above and below it to an indefinite extent (natural theory, not applied literally)
  - Authorities have fallen short of saying that ownership of land includes ownership of all air space above land
  - Say that intrusion by an artificial or permanent structure into the airspace of another is trespass
  - Cannot object to air traffic
- Respondent argues that trespass only occurs when the intrusion into airspace actually interferes with use and enjoyment of the land (178)
  - Judge says that planes are clearly different than electric wires

- Case law: owner of properties rights to airspace are limited by what he can possess or occupy for the use and enjoyment of his land (179)
- If the invasion is **low enough, and permanent in nature** that it can affect the use of the land itself it is an invasion.
  - **Transient invasions** at a height not likely to interfere with the use and enjoyment of land IS still trespass, but changes the remedy to damages as opposed to an injunction

**Remedy** = sought a declaration, that there was a trespass — which would allow them to pursue damages/ injunction — eventually received damages

- BUT subsequently, Alberta passed an Hydro & Electric Energy Act that made it permissible for the type of intrusions in *Didow* to happen and that no compensation was allowed

**Ratio:** a landowner is entitled to freedom **from permanent structures** which in any way impinge upon the **actual or potential use and enjoyment** of his land (182) – very ambiguous, but the land owner is in the best position to exploit airspace rights

- restricted to permanent, low level intrusions
- **Drones & Airspace Rights:**
  - (1) low level intrusion = trespass —> self-help?
    - self-help** - a defence to allegations of trespass when rightful possessor takes back goods or to battery occurring in recovery of chattel; necessary to balance owner rights with peace and order, limited by reasonableness of force
  - (2) high level intrusion = nuisance? intrusion upon privacy of the landlord — but is it a significant invasion of use and enjoyment? privacy is not included in impairing use and enjoyment (*Victoria Park*)

#### Notes

- You can have trespass that doesn't include permanent structures but that is not what this case is talking about
- Your rights of airspace are **possessory rights**
- **AB Bill of rights** says if it happened by the due process of law, then it is allowed
  - The making of statutes is the due process of law, that is why the bill of rights is so useless
- Surface rights board can allow people to go onto other peoples land if they pay damages
- **the *Didow* Ruling Efficient?**
  - Yes, the rights for air right above the land probably have the most amount of value for the property owner
    - People probably don't value the air way above their property more than airline companies
  - Is the Hydro electric energy act efficient
    - Yes, because the bargaining costs are taken away
    - Law makers wanted to impose the costs on the farmers rather than the power company and that distribution was more important than the public interest of the farmers

***Anchor Brewhouse Case:*** any land based intrusion into airspace of neighbouring land = trespass; if you can use the space from the ground, then the person you are trespassing on can as well

- provides certainty which facilitates alienability of airspace

#### **Airspace Hypotheticals:**

- Driving hovercraft over perimeter of P's land:
  - Low level intrusion, thus could sue in trespass
  - Don't need damage to sue, although it would limit compensation to nominal damages
- Very tall tower has a sign that protrudes slightly into P's land:
  - Likely too high to use by P
  - However *Anchor Brewhouse* said that if the intrusion comes from the ground then it is trespass
  - However that case was at a low height so it might not apply here
  - Remedy would likely be a mandatory injunction
- D flies low over P's land with a plane and the noise bothers P:
  - Could be trespass, likely low enough to fit the *Didow* criteria
  - Would also be nuisance, indirect/consequential interference
  - Remedies: compensation and an injunction
  - If the plane was quiet then nuisance would not apply because you have to prove damages since nuisance is not actionable per se
- D flies high over P's land:

- o Cannot sue for nuisance nor trespass
- o Nuisance: no damages
- o Trespass: too high to use and it's temporary and it's not a ground based intrusion

## Below the Surface

### Edwards v. Sims (The Great Onyx Cave) (184)

#### Facts

- Edwards developed the cave into a tourist attraction (entrance on his land)
- Survey by Turner showed of the cave was below Lee's land (no entrance) — suing Edwards for % of profits as well as injunction
- Sims is the trial judge who ordered a survey done on Edwards land — Edward's counsel called the survey bogus/ hearsay bc Turner was dead so could not verify — Edwards appealed

**Context:** Didow, court refuses to accept maxim — only own airspace rights that you can potentially use and enjoy

**Issues:** Could the judge compel Edwards to allow entry onto his property for a survey? Does the entrance to a cave, or physical boundaries of the surface land give rights to the cave?

**Decision:** Court ruled that a judge could order a survey and found that Edwards was trespassing on Lee's land

#### Reasons

- Analogy: cave is like a mine and mines were already allowed to be inspected to see if minerals were being taken from under someone else's property
  - Said that this was similar enough to looking if someone was trespassing
- Everything below the surface of your land you own, thus there should be a survey (Giant Carrot Theory)
- **Precedent:** analogy to cases where minerals are removed from land and it is unclear whether they were under land A or B have determined a survey should be done to resolve the dispute
  - obvious implication = absolute certainty

#### Dissent (Logan J)

- **Labour Theory:** Said that it is wrong to say whoever owns the land owns everything above and below. Whoever owns the land with the entrance should have full ownership if he takes strides to discover/develop/ put in labour to create tourist attraction, he should have rights to it (occupation and labour theory)
- legal rights that cannot produce benefits should not be allocated, bc Lee can't access cave ought not be recognized as rightist equity bc it would destroy something of value, the tourist attraction (pragmatism)
- Since he cannot access the cave it is of no use to him where as in the case of mines minerals they are of use and value (*Didow* - P could not use and enjoy cave bc didn't have entrance)
  - o Says this distinction means that he should not own it bc he cannot use and enjoy it
- If the majority had their way, flying over land would be a trespass
- Feels that Edwards is being intruded upon — they destroy the cave because the visitors give it value in experiencing the cave as a whole — BUT people kept coming to see the cave after this decision
  - **Coase theorem:** absent unacceptable transitional costs/hold out, the property rights in question would be bargained for and acquired by the party who values them most — tourism would resume (economic theory)
  - property will rise to its best and highest use (tourism) — both parties would benefit
  - should rights still be allocated? or is it irrelevant and should be arbitrary? (litigation = expensive) — YES so as to promote justice and efficiency (still issues such as transactional costs/hold out/negotiations)
- **anti commons concerns:** hold outs and economic fragmentation

#### Ratio

- Maxim applies to subsurface rights. Edwards best use of land does not matter; private property rights allow for owners to be pointlessly selfish
- regarding low level underground property such as caves or minerals, the giant carrot theory applies, no matter who has entrance to cave

#### Notes

- **Economics of allocation:** allocate to those who can most efficiently use the resource
  - **airspace:** low to surface rights owners, high to 'public'

- **subterranean**: (1) Edwards most efficient bc he has the entrance hence minimizing impact of hold out problem/transactional costs of fragmentation (2) Lee bc certainty inherent in Giant Carrot Theory, reduce transactional costs and enhance alienability

- AB legislated the *Carbon Capture and Storage Statutes Amendment Act*
- This act deems all pore space the property of the crown (197)
- Relevant because technology is going to further challenge property law. E.. carbon capture sequestration, a process involving injecting CO<sub>2</sub> into the pore spaces of permeable rock in the earth's crust.
- **American Realism**- Movement that said to think cases are decided purely on legal principles and facts is naïve
- If dissent had won — Whoever owned the entrance to the cave should own it for as far as it goes if he had developed it and made it his (labour theory)
- What if there were two cave entrances?
  - It is a race at that point
  - What if it is a natural cave or if it was forced
- What if the cave had been right beside the surface? — There could end up being both vertical and horizontal split ownership
- Why did Logan use that language? — He was writing for the future judges, lawyers, etc.
- Why did Logan care so much about this case?
  - Logan was from Edmundson county, a county in Kentucky with very few people. He was the founding president of the Mammoth Cave National Park.
- Logan wrote in a strange style, who was his audience?
  - Not certain. But probably wanted to leave an impression as his dissent was very unique. Great nephew assumes he was writing to present and future lawyers. To “you”.
- Is the majority or dissenting opinion preferable from an efficiency standpoint?
  - Essentially, flip a coin because there is no transaction costs
  - But if there was a natural entrance on Edwards property then it goes to Edwards because forced entrances would be inefficient, if there is more than one mouth then there is division of ownership, if it's near the surface then it's a division of surface ownership and there needs to be negotiations.

## Mines and Minerals

### Common Law on Mineral Ownership

- *Blackacre (land) conveyed from A to B... Does B get minerals?*
- **Basic Rule**: everything that is part of A's land goes to B; if minerals part of A's land, whether the Crown/private party, ALL minerals **except** gold and silver are part of the land itself and belong prima facie to the owner of the soil — Crown retains royal minerals unless explicitly grants them to B
  - BUT if A doesn't own the minerals, B doesn't get them
    - **nemo dat non quod habet** - you cannot give what you don't have
- ~1890 Crown started to reserve mines and minerals, by then 15% of AB's land mass was privately owned without M&M being reserved (including land of Canadian Pacific Railways) —> by early 20th C **legislated that the Crown automatically reserved M&M, Public Lands Act s.35** — s.10 of *Mines and Minerals Act* reserves royal minerals when M&M granted by Crown
- Private owners of land can reserve (specific) M&M upon selling land — if seller reserves M&M what does the grantee get? — can have separate titles to land and M&M
  - still have subsurface rights, everything that is not M&M (soil, cave, etc.)
  - if you have M&M attached to your homestead those will become joint property under the **Dower Act** BUT if you make separate titles you can avoid this, today all are split

**Common Law Definition of Mineral** - valuable natural substance found in soil regarded by persons involved in the mineral industry to be minerals

- natural gas in 19th C was not regarded as a mineral, thus was not reserved in grants
- Can Pacific in early 20th C started to reserve coal & petroleum when granting land

### Legislation

- **Law of Property Act**
  - s.56(1): lists substances that are/have always been considered mines and minerals

- 56(2): provisions that say if you are building something removing minerals you are not committing a wrong
- s 57-58: clay and marl, sand and gravel can have 2 owners (owner of M&M and surface owner) — removable from surface operations = surface owner, blow = M&M
- allows people who own surface but not minerals to dig out ground for basement
- surface land owner owns sand and gravel (anything you can remove by digging up the surface)
- **Surface Rights Act** - list similar to Law of Property Act that governs who owns entrance to subsurface part of land
- **Mines and Minerals Act**
  - lists M&M
  - s.2(a) all M&M belong to the crown
  - s.2 governs dealings with the Crown re M&M but also other dealings 'where context permits'
- **Perpetuities Act**
  - defines minerals in s.19 similar to Surface Rights and M&M Act

**\*\* In exam, look at what the mineral is to see what statute applies**

**Dower Act** - says that whenever disposing of family home, must have consent of spouse unless you get the court to waive spousal consent; in terms of alienating M&M are likely to be viewed as 'disposal' of homestead, thus requiring spousal consent — can avoid consent by having a 'split title' (one for homestead and a separate for M&M)

**Accessing Mines and Minerals**

- At common law what rights of access to surface lands exist for owners of 'profit a prendre' over minerals in host lands? = right of entry and right to work the minerals are implied
- **duties:** not to let down surface (liability for removal of subjacent/lateral support) — liability only extends to letting down surface in its natural state — if liability = P compensated for damage to land AND buildings
- Today, **Surface Rights Act** regulates rights of entry:
  - s.12(1) says you need consent to access from the owner and occupant, or go to Board to get consent
  - s.12(2) need to provide compensation for the right of entry, or Board will decide compensation
  - **Principle of quantification of compensation:** for the disturbance of use and enjoyment of land — NOT equality in mineral operation

**Fugacious Minerals** - minerals that move around in the course of nature (gas, oil, tar)

- at common law they are subject to the law of capture (occupancy) — continues to apply today, subject to regulation
- important bc oil & gas fields don't follow surface boundaries
- as long as capture is lawful, may take neighbour's oil and gas

**Pore Space** - underground space in which there are minerals or water or created by removal of subterranean minerals or water

- belongs to Crown, always has, is not an expropriation and no one can sue with respect to effect of s. 15
  - can rent from the Crown
- economic value in owning bc used to store natural gas, carbon capture
- is there a distinction bw expropriation and regulatory or de facto taking? — not really, reg taking = de facto expropriation, doesn't matter bc under s.15 says you cant sue for compensation for takings
- NAFTA applies for American or Mexican investors, FIPA for Peruvian investors: would be considered a taking, would be protected

### Three Tests of Mineral Rights

#### 1. *The Vernacular Test*

- a. Whether it is considered a mineral by the miners, commercial people, etc.
- b. Looks at how the words are used and not the scientific definition

#### 2. *Purposes and intentions Test*

- Mines and minerals are not definite terms. They can be limited or expanded according to the intention they are used

#### 3. *Exceptional Occurrence test*

- Minerals does not include the ordinary rock of the district but rather something **exceptional or rare**

### Secondary Points (200)

1. Question of what mineral means is a question of fact
  - a. It's a matter of intentions of the parties at the time of the grant. Certain things are known, for example, the *Mines and Minerals Act* may tell us
2. Same principles of construction are to be applied equally to deeds, other instruments, crown grants, and a variety of different Acts
3. The person alleging something is a mineral has the onus of proving it is
4. Whether a substance can be worked for profit can be relevant but not a deciding factor
5. Having rights over one type of mineral does not mean you don't have rights to other types of minerals.
  - a. The meaning of minerals is not restricted by the fact that the substance cannot be worked except by destroying the surface and that there is no right to work in that manner
6. Minerals is to be construed in its widest sense if there are no limitations included

### Hypothetical Posed Questions

1. Assume the Crown grants "Blackacre to A in fee simple transaction", no mention is made of mines and minerals, who would own the mines and minerals **based on *cujus est solum*** maxim?
  - A would own the minerals and mines
2. How about according to s. 35 of the *Public Lands Act*?

"all mines and minerals and the right to work them are, by implication and without the necessity for any express words of exception, excepted from every disposition and notification made under this Act"

  - In Alberta, the original owner Crown would still own the mines and minerals
3. What about if crown grants "Blackacre to A in fee simple, including all mines and minerals"?
  - B gets A's mineral estates
4. What about if crown grants "Blackacre to A in fee simple, including all mines and minerals except coal"?
  - Same as above, except coal has been reserved to A
5. What if A transfers Blackacre to B in fee simple with no mention of anything else
  - According to *Law of Property Act*, B owns it. The Act says that you are deemed to convey everything you withheld or else it is included in the transfer
  - This is different then if the Crown makes a grant.
6. A sells all of his mine and minerals to B, for 200,000 K, but retains the surface and all other rights to Blackacre. Is this even possible?
  - Yes, easement of necessity. Common law requires that the law implies an easement out of necessity.

### Evolution of Modern Conveyancing (transferring property)

#### 1. Common Law (pre-literate society)

- accomplished through symbolic delivery of land (livery of seisin)
- grantor symbolically transfers possession by handing over twig/clay/key
- common law evidentiary rule: must be witnessed by community members

#### 2. Deed Based Conveyancing

- delivery of formal writing signed by transferor
- forgery and fraud became an issue, deeds could be lost

#### 3. Deed Registration System

- state became repository for deeds — high transactional costs bc you must find good root of title
- Judicial response: good root of title is est. by 60y or chain of good title

## Torrens System

- historical searches generally not necessary — can assume good root of title, errors paid for by Land Titles System out of Assurance Fund
- Goals (1) protecting Bona Fide Purchaser for Value Without Notice (person who has paid for asset not knowing there was another interest) AND (2) reducing transactional costs of conveying land and interests in land
- **Land Titles Act** Main Concepts: ss.60(1), 61(1), 62(1)
  - you get indefeasible title subject to: (i) any endorsements on title (ii) s.61 'implied conditions' — forgery can undo title, earlier title can affect title, boundary description errors can be rectified
  - **Originally**
  - First in time is first in right
  - If the property is sold to a purchaser, that person is not guaranteed that they own the property if they have acquired a forgery
    1. Original owner is still entitled to the land
    2. He can sue the forger but he cannot get the land
    3. The risk of a bad deal is on the purchaser
  - **Torrens** says
    - If you acquire property and rely on the certificate of title that says Smith is the owner, the govt is certifying it
    - If there turns out to be a mistake (and you were in the right) then the risk is not on the purchaser
    - The original owner now bears the risk
      - The purchaser gets the mud and the true owner gets paid out from the insurance fund

### *3 cardinal principals of the Torrens System*

- 1. The mirror Principal**
  - a. The register should be a mirror on all interests on title — can count on getting what you see in a title
  - b. There is an exception for leases under 3 years
- 2. The Curtain principal**
  - a. Once the certificate of title is issued, a curtain falls on past transactions
  - b. You worry about the top title
- 3. The net principal**
  - a. If a loss is suffered as a result of these principals then the party that is harmed is compensated by the insurance fund

## Lateral Boundaries

### Alberta Land System (Torrens System)

#### Dominion Land Survey (DLS) System

- We have 3 **Meridians** (4,5,6)
    - They run vertical down the map
  - Vertical lines run parallel to the meridians
    - The vertical zones are called **ranges**
  - **Township** lines run horizontal and create **townships** with the range lines
  - Townships are divided into 36 **sections**
  - Sections can then be divided into **quarter sections**
    - **Quarter Sections** can be divided into **Legal Sub Divisions (LSD)**
    - LSD's and Sections are enumerated snaking from bottom right
  - **When grids are not used**
    - The **natural monument** is considered more accurate than the legal writing
    - When there were squatters before the govt got there the govt confirmed their titles (they were usually called river lots)
- > *not responsible for description on exams, may use description to describe boundary bw land and water*

## Re Panther Resources Ltd. and Canadian Northern Railway Co. (1984), 54 AR 305 (QB)

### Facts

- Chain of mineral title re disputed land, the SW parcel
- Zilbert: had mineral and surface title probably acquired through someone else pre-1890 before the Crown reserved title
  - Zilbert Hills sold 2 parcels of land (Railway Right Away and SW) to Northern. No mention of m&m was made in the transfer document – so at common law CNR should have got m&m. However, Railway Act stipulated that railways did not get m&m unless expressly granted in contract — Despite this Land Titles Office mistakenly gave m&m to CNR. They correct it for the SW parcel — title is rectifiable bc there is nothing wrong with correcting a mistake to be what the original transferee and transferor intended & must be reliable for purchaser who is relying on the title
- Later Zilbert gave remaining land to his sons, again no mention of m&m, but common law rule = boys got them
- Northern went broke = feds (CNR) now have m&m. NOT purchaser, volunteer — no consideration for what they acquired, not protected by *Land Titles Act* because they didn't buy the land from Northern
- in 1945 Right of Way parcel corrected by Land Titles = Hills sells rights to 5 people, but SW parcel still owned by CNR and its heirs.
- CNR grants m&m to Panther and court looks back = m&m deemed to be Zilbert's estate's as railway never got them, and sons did not either as land that was given to them did not include SW parcel. — Panther is protected as bona fide purchaser for value without notice

### Relevant Legislation

- Land Titles Act (provincial) Railway Act (federal)
- law of inheritance

### Cormack J

Panther Resources wants to determine the ownership of the mines and minerals under certain parcels of land, they hold oil and gas leases from current registered owners of land — wants to clarify position

### Issues

- Was the Canadian Northern Railway Co subject to the Railway Act in 1946?
- Did Northern acquire an indefeasible title to the south west mines and minerals because of its position as purchaser for value?
- did the CNR acquire ownership of the southwest mines and minerals through adverse possession?

**CNR's Claim** - based on assumption Northern was not subject to the Railway Act in 1946

### Decision

- in this case, Northern WAS subject to the Railway Act, thus could not have acquired the south west mines and minerals through provincial statutes
- even if Northern was exempt from mines and minerals provision of the Railway Act — CNR's claim is unlawful, the law is clear that either the court or registrar has the power to correct title error between original transferor and transferee
- privilege of purchaser for value arises only when the incorrect title **existed at the time the purchaser bought the land** and registered his transfer — here the title to M&M did not initially exist, was erroneously granted after
- any party who purchased from Northern when it held title to the mines and minerals would have acquired an unjustified title of them

### Did CNR acquire south west mines through adverse possession?

- A method of gaining legal title to real property by the actual, open, hostile, and continuous possession of it to the exclusion of its true owner for the period prescribed by state law
- NO; CNR argues adverse possession as squatters: no acts of adverse possession, there was a granting of the lease but that is not enough — no actual acts of possession

### Who owns the M&M?

- Zilbert's heirs because ZH didn't know he owned them and intended to transfer them everything in SW parcel

### Preceding Authorities support the following conclusions:

- holding registered title to an interest in land does NOT establish adverse possession

- it is conceivable that mines and minerals may be adversely possessed, however, to establish that would require actual occupation, exclusive, continuous, open or vision and notorious for 10 years
- the granting of a lease is not adverse possession

### Decision

- adverse possession has not been established, CNR granted an oil and gas lease at some point but there is no evidence any drilling or other acts consistent with mines and minerals has taken place on the land
- this action is an application for declaration of title — dismissed — CNR does not own southwest mines and minerals
- 5 parties own title to a share of right of way mines and minerals
- 5 successors to ZH title are volunteers, stand in no better position than the original title owner to make the claim
- following corrections the mines and minerals were corrected in the sons names to give them title to them
  - thus the present owners claim them
  - in the transfer to his son, it is clear ZH didn't know he owned the mines and minerals and intended to convey everything to them
  - mines and minerals deemed to be of ZH's estate

**Ratio:** one must either have relied on the title description or have exerted adverse possession to make a mistake in a title permanent

### Boundary Disputes Resolutions

- (1) **conventional line doctrine:** parties may agree where the boundary is
- (2) **adverse possession:** being on someone else's land and satisfying requirements of laws, can make claim and clarify title
- (3) **s.69(1)(2)** of the *Law of Property Act* (p 52) sets of remedial regime when A builds on B's neighbouring land
  - (1) must demonstrate that what you put on neighbours land is a 'lasting improvement
  - (2) good faith error, must be a mistake
  - (3) **remedies:** (i) A acquires a **lien** over neighbour's land — makes neighbour obligated to pay A for improvement **OR** (ii) A must purchase the land of B which A built on if it is a just remedy, at market value
  - (4) **BUT** if B brings action, may be able to sue for trespass and get damages or injunction
- (4) **common law of fences:** joint fence = joint expense
- (5) **unilateral fence:** can't compel neighbour to contribute
- (6) *Line Fence Act*
  - (a) ss.1.1(2): s.2 only applies when fence is designed to keep the livestock of an owner or occupier out of the adjoining land
  - (b) s.2(2) neighbour B has a duty to contribute just proportion to cost of fence built by neighbour A as soon as B receives any benefit or advantage from the fence by enclosure of that owner's or occupier's land or any portion of it
  - (c) s.3 arbitration of disputes re fence, quality, location, % of contribution of capital cost or maintenance
- (7) Trees
  - (a) planted on lot A by lot owner but overhanging on lot B — may eliminate trespass in airspace/nuisance by taking reasonable care (self help) but can't keep fruit or branches — may recover reasonable costs
  - (b) on the property line b owner of lot a: prevailing view = planter A's tree unless consented to in which case there is going ownership (*Koenig*)
  - (c) Volunteer tree on property line = joint ownership to % of tree on either side of property line

### Water Law

**Common Law:** ownership of lake and river beds within private land belong to owner of land UNLESS body of water is navigable in which case the Crown owns them; ownership of beds and shores of rivers or lakes adjoining parcel of land, land owner has ownership of shores/beds to the midpoint or non navigable waters

- ***Public Lands Act:*** section 3 The Crown of AB has the right to all beds and shores of *permanent and naturally occurring* bodies of water and rivers
  - Unless decided by a court before 1931
  - It would need to be very specified that the bed belonged to the owner
- Having an adjacent title gives you riparian rights

### Land Bounded By Water

- common law distinguishes among water formations depending on whether they are navigable and or tidal
- **non tidal river** land extends to the middle of that river unless the title states otherwise

- **tidal bodies** of water ownership extends to the ordinary or mean water mark, below which the Crown holds title
- **tidal rivers** are treated as navigable and reserved for general access
- if **navigable** the Crown holds rights generally

### Riparian Rights

- **Common Law:** ownership of lands abutting water carries entitlements: the right of access to the water, cannot indefinitely moor a vessel on the watercourse, can use unlimited amount of water for ordinary uses or extraordinary purposes with the exception that the river cannot be diminished
  - rights have now been legislated to control water resources
  - household purposes do not require a permit, but there is a cap of 1250 cubic meters per year
  - extraordinary uses require special permission

### Other Riparian Rights

- right to capture water subject to limitations: (i) must be lawful (ii) if ground or surface water fully contained in a lot, no limit of abstraction (iii) doesn't matter if your purpose is malicious, right to abstraction is absolute (*Bradford v Pickles*) (iv) when capturing water contiguous with more than one lot (rivers and lakes) rules are more complicated

### Capturing Water for Ordinary and Extraordinary Purposes at Common Law

**Ordinary Purpose:** domestic purposes associated with subsistence = no quantitative limits

**Non Ordinary Purpose:** capture permitted as long as (i) you are using it on your land (ii) can't affect the quantity, quality and flow of the water in a way that can be sensed

- **corollary of continuity rule** - downstream riparian owners have a right to continuity of water for domestic purposes, can sue for interference with riparian rights

### Statutory Modifications of Common Law: Capturing Water

- ownership of and ability to divert water today: water vested in the Crown, *Water Act* s.1(1)(fff)
- right to use water for household purposes in ss. 21(1) for surface water & s.21(2) for ground water
  - No licence required
  - household purposes defined in s.1(1)(x) — sets quantitative limit: the use of a max of 1250 cubic meters of water per year for ordinary domestic purposes
- *Water Act* does not codify riparian rights to use water for non domestic purposes: **requires a licence** for anything
  - Exception: household user or exemption bc before Act was passed the water was used agriculturally
- ss.49(1)(2) = no diversion subject to exceptions
- ss.58(2)(c) = licences run with the land, unless otherwise specified
- *Water Act* doesn't provide licensing for activities that may pollute water
  - *Environmental Protection and Enhancement Act* controls and respond to potentially pollutive activities
- Statutory consequences for violating *Water Act*: (i) officials can impose cessation orders of diversion activities (ii) fines (iii) imprisonment (iv) liability for interference w riparian rights (common law) — cannot be sued if you have a licence

### Common Law of Accretion (220)

- Occurs by the **gradual and imperceptible** deposit of soil or by the permanent recession of water
  - That the result of the process is perceptible is of no consequence, so long as the process is gradual (221)
  - Reason it must be gradual and imperceptible is because boundaries should not be changed based on temporary changes — a larger change can also be permanent, but not covered by accretion
  - **Accretion benefits the riparian owner** (land grows), **erosion benefits the Crown** (gets larger river bed)
- **Rationale:** (1) certainty (ii) economic efficiency (iii) fairness: burden/benefit principle
- When changes are gradual the land title is applicable for how the land has changed
- The party trying to prove accretion bears the burden of proof
- The right of accretion is a natural right but that does not mean it cannot be excluded by a grant
  - Just saying that it contains 151 acres is not enough to exclude from accretion because:
    - It says 151 more or less (this is not a correct answer). More or less probably accounts for just little mistakes in measuring
    - The reason is probably because the law has presumed that the intention of legal description is that the **natural marker or monument** is ranked higher than a statement of acreage
- Just something being underwater for a little bit does not make it part of a bed

s.3(1) of the *Public Lands Act* overrides the rule of accretion so anything that is permanently underwater is the provinces

### Law of Avulsion

- The immediate and noticeable addition to land caused by its removal from the property of another, by a sudden change in a water bed or in the course of a stream — Where a substantial and recognizable change has taken place (**accretion does not apply**)
  - It is considered an **avulsion** and the original boundary remains in affect
- This mitigates the hardship done by the sudden move of a river

### Crown Patent Hypotheticals

1. “To Z ... all that portion of the north-east quarter of Section thirty-three (33) in Township Forty-Five (45) Range Twenty (20) West of the 4th Meridian, Alberta, which is not covered by any waters of the Dried Meat Lake.” Who gets title to the bed?
  - a. Bed seems excluded here by express language in the grant
2. “To Z ... the north-east quarter of Section thirty-three (33) in Township Forty-Five (45) Range Twenty (20) West of the 4th Meridian, Alberta. 9 acres of the quarter section are covered by Dried Meat Lake. What is the effect that *s. 3 of the Public Lands Act*?
  - a. Beds are almost certainly not covered by Dried Meat Lake, see *Milk River v McCombs*
3. To Z ... all that portion of the north-east quarter of Section thirty-three (33) in Township Forty-Five (45) Range Twenty (20) West of the 4th Meridian, Alberta, which is not covered by any waters of the Dried Meat Lake.
  - a. As lake recedes the amount of dry land increases. The effect is depended on accretion principles. Accretion doctrine applies. If the changes are gradual and imperceptible then the land will be augmented. If the changes were sudden and avulsive then the title is not augmented.
4. To Z ... all that portion of the north-east quarter of Section thirty-three (33) in Township Forty-Five (45) Range Twenty (20) West of the 4th Meridian, Alberta, which is not covered by any waters of the Dried Meat Lake, containing one hundred and fifty-one (151) acres, more or less
  - a. lake recedes, it does so slowly and imperceptibly. Accretion is still possible here. Based off of hierarchy of validity, the natural monument is the natural boundary of the lake.

### **Nastajus v Edmonton Beach (1987), 76 AR 87 (QB)**

#### Judicial History

- Nastajus reached agreement with respondents resulting in a const order de registering Reserve Plan registered in the Land Titles Office in favour of the beach
- N agreed to hold his claim for further relief pending resolution of third parties riparian rights

#### Issue

- third parties claim to riparian rights resulting from partial drying up of the lake
- are the lot owners riparian owners, or not? — if so, they get the benefits of the accreted lands

#### Facts

- lake is a popular summer resort near Edmonton
- original surveying was very irregular — not done to facilitate roads or public access between lots to the waters edge
- 1930’s lake started to recede, lower water levels meant there was more dry land between west lots and water ‘the meadow’
- third parties bought 2 lots registered in 1907, boundary is a straight line that does not follow the line of the water’s edge when the lots were sold to them
- when purchased the lake was already receding and the water was away from their property
- they claim they are the owners of the permanent dry land from the receding waters edge to their lot via the doctrine of accretion
- some lots were drawn with boundaries following the shore, others with a straight line boundary

#### Issues

- do the two lots have riparian rights to the accreted lands?
- if they do what will be the boundaries of these lots?

#### Reasons

- property right in AB of owner of land beside water is the right to claim title to any extension of his land arising by accretion when the changes are gradual and imperceptible (**doctrine of accretion**) — *long term ownership inherently subject to gradual change*
- in the case of recession of water the newly exposed land must be connected to the riparian (waterbounded) land to support a claim for accretion
- right to accreted land depends on whether the property runs to the shoreline
- **Test:** whether the land comes to the water's edge under the grant
  - would be wrong to apply today's standards to the plans
- most logically, everyone in these subdivisions was trying to create readily saleable water front lots — nobody likely attended to whether a straight or freehand line was used or what the riparian rights were
  - looking at the lots there was a gap bw the waters edge and the property
- all of the lot owners should be treated the same — ALL entitled to exercise their riparian rights if their lots were originally water front

**Decision:** lots 2 and 3 should be extended to the waters edge at present — the third parties will assume the responsibilities and privileges for the accreted lands similar to the land they already own

### **Nastajus v North Alberta Land Registration District (1989), 76 AT 87 (QB)**

#### **Decision**

- appeal allowed — trial judgment set aside and claim of third parties dismissed = NOT riparian owners, thus no rights to accreted lands

#### **Reasons**

- court of queen's bench appeal for judgment declaring the third parties own the accreted lands at Edmonton beach
- **no evidence** supported the claim that the surveyors wanted the boundary of the land to coincide with the lakeshore except expert evidence that this was sometimes done by freehand drawers
- trial judge was guided by the fact that other subdivisions had lots bordering the water and that in fairness all waterfront owners should have the same
- in the absence of evidence, the registered plan must be accepted as showing the lots did not border on the lake initially, and thus there has been no accretion
  - looking at the **registered plan** there was a gap bw the waters edge and the property = no evidence they were riparian owners, the onus is on them to prove they are

**Andreit:** where there is accretion involving irregular lots and extension of lots to waters edge results in lots intersecting, the size of the enhanced lot will be determined by proportional method and the principle of tater access for all riparian owners based on the same % of original ownership (bigger lots get more of the accreted land)

### **Transmutation of Property Triggered by Physical Acts**

- (i) chattel to land or land to chattel
- (ii) change to physical character of land or chattel

### **Equitable Doctrine of Conversion**

- end result is that land can be treated as personal property, or personal property can be treated as land
- applies when: there is a legally binding direction to convert the property from one form to another
  - will or court order saying land should be sold and proceeds distributed to X's children or creditors OR that money be used to buy land to be transferred to X
  - beneficiaries have personalty, not land
- **Basis:** 'equity deems as done that which ought to be done'
- matters because land and personalty are treated differently in law — different causes of action apply
- Implications:
  - 1. **Ademption:** testamentary gifts fail bc the subject matter isn't in existence as part of the estate
    - if Blackacre is willed to B but then sold before death of A, B will receive nothing BUT if the will instructs the executor to sell Blackacre and give the proceeds to B, if the will maker sells

Blackacre and puts money into an account, the gift will still be valid because the doctrine of conversion says there is a gift of proceeds and can be traced

- 2. **Abatement:** occurs when failure, complete or partial, or testamentary gifts when property is used to pay off debts — when you have to use part of a persons estate to pay off their debts, creditors get first priority over a persons estate
  - what property is used to pay off debts from an estate?
    - for property not specifically disposed of to a given person (residuary property), you liquidate personal property before real property

## **Fixtures**

- When a chattel is affixed to the land it becomes a fixture, it ceases to be personal property and the title to that item is subsumed into that of the realty
- Question is, when you buy blackacre, what comes with it?
- Tenant is given a unique power to turn fixtures back into chattels in certain circumstances
  - One circumstance is that there needs to be timely removal. This means removal before the end of the term of a lease
  - 3rd party complications: ownership, possession, security interests in chattels affixed to land may be in different hands, same is true of land

**Rationale:** Economic: (1) prevents wasteful dismantling (2) protects reasonable expectations and provides incentive for transactions and activities such as purchasing land/financing/mortgages (3) creates transactional efficiency in not having to list everything that stays or goes

- presumption of chattels or figures is important bc it shows who had burden of proof
- **Seller:** must prove intent was to have object remain chattel — must use objective test to protect reasonable expectations of purchaser

## **Test to Establish Fixture**

1. is the item resting on it's own weight? (if yes, chattel)
  2. what is the **degree** of annexation? (stronger = fixture) — measured by difficulty of removal/damage caused by removal
  3. what is the **purpose** of annexation? (better use of land = fixture vs. better use of chattel = chattel)
- > **Problem:** purposes are not mutually exclusive — test provides judicial latitude and gives rise to some unpredictability/irreconcilable decisions — matter of perspective

**Royal Bank v Maple Ridge:** (i) attached items are fixtures except plug ins which are chattels, unless removal of a plug in causes significant damage (ii) attached machinery = fixtures but parts easily removed = chattels unless removal renders machine inoperative

## **Tenant Fixtures**

- A **tenant** has a unique right to remove chattels that would otherwise be considered fixtures IF
- Tenants fixtures may become part of the freehold land (they lose the title), subject to the tenants right to restore the fixture to it's chattel status
  - (i) It is for the purpose of carrying on a trade and (ii) agricultural fixtures
  - (iii) Ornamental in nature or (iv) for the purpose of domestic convenience
  - The removal does not damage the property (substantial, irreparable, material damage)
  - It is removed before the lease term expires if fixed term, if non-fixed within reasonable period after lease terminates
- **Rationale:** initially thought that trade fixtures, if not exempted, will impede commerce — people will not invest and attach things to lands, insulating these fixtures promotes investment and commerce
- **Agricultural Fixtures:** 1851 UK statute applied to Canada, which said that agricultural fixtures are tenant fixtures if (i) notice requirements of act are met by tenant (ii) LL waives right to purchase fixture (iii) there is timely removal — July 15 1870: anything part of English law applies
- no extension beyond term if tenancy terminated prematurely, extension is there is a frustration of rights under the lease that causes premature termination of tenancy

## Stack v T Eaton Co (1902), 4 OLR 335 (Div Ct)

### Facts

- G placed shop and gas and electric light fittings on land he owned — the subsequent purchasers claim he passed them as part of the realty (fixtures) by conveyance of land to them
  - **shop fittings:** shelving made in sections screwed to a bracket affixed to the wall, readily removable without damage
  - **gas and electric light fittings:** chandeliers fastened by being screwed or attached ordinarily to the pipes or wires, removable without damage

### Principles

- that articles not otherwise attached to the land by their own weight are not to be considered part of the land, unless circumstances show they were intended to be
- articles affixed to the land even slightly are considered part of the land unless circumstances show otherwise
- circumstances must be shown to alter the prima facie character of the articles are those which the degree and object of annexation (adjoinment)
- the intention of the person affixing the article is material only so far as it can be presumed by the degree/object of annexation
- even in case of tenants fixtures for purposes of trade, they form part of the freehold with the right to determine between landlord and tenant whether to bring them back to the state of chattels

### Decision & Reasons

- there was nothing that showed the goal was trying to improve the object itself, rather goal was trying to improve the land itself (**shelving enhanced business utility of premises / lighting enhances utility of building**)
- the fittings became part of the land and were passed by the conveyance to the respondents
- = they are fixtures

### Ratio

- if the goal of the objects was to improve the land itself and were sufficiently affixed to the land, they are fixtures and are passed by conveyance to the individual holding title over the land

## La Salle Recreations Ltd. v. Canadian Camdex Investments (225)

### Facts

- The carpeting had been bought and the vendor retained title to it as collateral
- It was installed in a hotel which itself had a mortgage on it

### Issues

- Which security holder had priority over the carpets
- Had the carpet become a fixture. If so, the mortgage had precedent

**Decision:** The carpet had become a fixture. (Not all of the factors point to this result)

### Reasons/Principles

1. Articles not attached to the land are not part of it unless they can be shown they were intended to be
  2. Articles that are attached to the land (even slightly) are part of the land unless it can be shown they were intended to remain a chattel
  3. To alter the prima facie (face value/impression) character of an article must show the degree of annexation and the object of such annexation plainly for all to see
  4. The intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation
    - The purposes of the premises may be regarded and if setting up articles increases the value of the premises or improves its value and if they are even slightly affixed and there is an intention of permanent affixing, they are part of the realty
      - **Permanent** means having the object stay there for as long as it fulfills its purpose
- **Application:** affixation of carpets enhances comfort, safety and esthetics of hotel premises

**Ratio:** The object of the annexation was the better and more effectual use of the building as a hotel and not the better use of the goods as goods — intention was to improve the building, not the good itself, thus the carpet was a fixture

## Diamond Neon v Toronto Dominion Realty (230)

### Facts

- Signs all were attached pretty solidly
- There was a contract saying these were not fixtures and that they could remove them on termination of the lease
  - The lease refers to the lease of the sign, NOT the land
  - There was nothing wrong saying that they could remove the signs after the termination of the lease
- The land was sold to the defendant who did not know about the contract and he then sold the sign/poles

**Issues:** Whether the signs and pole were fixtures

**Decision:** They WERE fixtures and the contract did not bind the third party bc they had no knowledge of it

### Reasons

- The things were fixtures because of the degree and object of the annexation — firmly attached to property
- Defendant cant be held to a contract they did not know about and had no part of
- The nature of the things passed on to the defendant at the date of sale
- sign enhances the land which functions as a business of selling used cars

### Dissent

- A sign is able to speak for itself as to whether it is a chattel or fixture
- These signs did not add to the value of the building/property

**Ratio:** You cannot have a clause that says something will never become a fixture in a contract. Law trumps these clauses.

Parties cannot by contract determine if something is a fixture or not; however, parties can agree amongst themselves in contract that one will have the right of removal of restoring a fixture to its chattel status

### Notes

- The sign became a fixture as soon as it was installed. Once the lease of the land expired Neon lost the contractual right to take back the signs — could have removed the sign prior to lease expiry

### Fixtures and Third Parties

- fixtures doctrine serious threat to 3rd parties whose goods are affixed without their consent
  - Ex. A steals B's chattel and affixes it to land of C (innocent party) = C prevails
- doctrine of fixtures = threat to commercial parties who lease chattels and had over possession to lessees (Diamond Neon) and conditional sellers of chattels who retain title until paid in full (Lasalle)
- Commercial Strategies of unpaid sellers for protecting title:
  - (1) **contractual:** make clear in contract you maintain title until fully paid and include the right to retake possession if not paid according to payment schedule in full (security interest) — legislation requires one to register the security interest
  - (2) **Register Property Rights:** registering sellers security interests as provided for by legislation
- contractual rights valid only against contracting party (NOT other unknowing parties — Lasalle: if they relied on security interests it would undermine the reasonable expectation of the purchaser who didn't know of them AND security interests were not registered with the land title, they were registered in Companies Registry, not Land Titles Registry)
- How could *Diamond Neon* protect itself from fixtures doctrine?
  - provide notice on pole? no
  - Land Titles Strategy: caveat title — statutory notice that is registered against the Certificate of **Title** for land. It serves as a notice that the person lodging the **caveat** ('the caveator') has an interest in the land
  - Sure fire protection = **Personal Property Security Act** — all provinces have one (chattel mortgages, conditional sales, leases of chattels for 1y or shorter)

### Security Interests (233)

- Homeowner borrows money and is the mortgagor
  - They are the mortgagor because they are giving the bank an interest in their home (once the money is paid they get the interest back)
- Bank is the lender and mortgagee
- Chattels can be sold subject to a security interest under which vendor enjoys right of repossession in the event of default payment
- **Common law Rule-** Chattel Affixes = falls under land security. Security holder loses right of possession and is left only with action on debt against purchaser

- **Personal Property Security Act (p.36)**- protects security interests holders under PPSA include: conditional sellers, mortgages of chattels, and lessors of chattels where lease exceeds 1y — If you have chattel that may become fixture, and have ongoing interest in the item, you can register it under this act, as well as land titles office against land involved
  - If security interest is acquired after goods become fixtures, priority if given to land mortgage since they have already become part of the land
  - even without registering security interest anywhere, holder of security interest retains priority to a chattel attached to land over persons claiming an interest in land at the time of attachment
  - but holder of security interest will not have priority against persons acquiring interest in land after affixation or existing mortgages with registered interests making advances after affixation
    - UNLESS security interest is registered on title BEFORE the acquisition of the interest in land
  - PPSA security interest holder gets max protection if: (i) register w Land Titles office and (ii) under Personal Property Registry — *timely registration of PPSA security interest gives holder protect against everyone*

### Enforcing Protected Security Interest

- security interest holder with perfected rights may be able to remove affixed chattel subject to:
  - (i) notice requirement: must prove min. 15d to persons on title of intent to remove
  - (ii) the right of persons who have an interest in the land to purchase the affixed chattels — have to pay either market value of the item at time notice is sent out OR whatever is still owing under the security arrangement (whichever is less)
- removal must be done without causing more damage and inconvenience than is necessary — damage must be compensated for

### Transformation of Chattel Ownership

- Occurs when chattels belonging to two or more people somehow become connected
- Chattel belonging to A is transformed into something else by B

#### Old Common Law rule

- Harsh, punitive rule – if a wrongdoer mixed his chattel with someone else's, the other person would be entitled to the entire combined chattel.
- But, if there is only a little bit of mixing – this might not apply.

#### Modern Approach (More subtle and balanced)

- In the case of wrongful intermingling – you acquire a **proportionate amount** of the mixture according to how much of yours was put in.
- But, if not sure how much was mixed -- shift the burden of showing how much was there to the wrongdoer. The plaintiff does not have to prove how much of their chattel was lost.

#### Starting Point

- How do we even know we have a combined mass? If there is a situation of fluids combining then you have to apply these rules (of proportion etc..) but sometimes there is a grey area where it may or may not be possible to separate the things – that relies on whether or not it is practical to separate them.

### Changes of Chattels: Alteration, Accession, Intermixture & Confusion or Commingling

- the problem: chattels move around and get fused and are physically altered —> solve by restitution: disentanglement if possible and practicle — allocation rules informed by usual considerations of behavioural and economic fairness
  - First choice for resolving problems: restitution (disentanglement)
  - If not possible, allocation rules informed by
    - (i) Fault causing the problem
    - (ii) Relative contribution of the parties to the mix
- **Matrimonial Property Act** creates a rebuttable presumption of equal sharing which applies to most but not all property:
  - o E.g. property brought into marriage, or property received by parties to marriage as gifts not subject
  - Growth on value exempt assets is subject to division

- **Ex.** A owns some apples and they get mixed in with B's apples
  - The intermixture of **fungibles** (objects which are basically interchangeable)
  - These are the easiest to figure out because we can divide the mass
  - How mixed do things have to be before we cannot tell them apart
    - Practicality helps to decide when things are so mixed that they cannot become unmixed (ie. Even if we could physically do it, it is ridiculous to)

**Alteration:** change of form of chattel (adding labour to chattel)

**Accession:**

- (1) artificial — unification of objects
- (2) natural — increase in numbers through procreation (offspring)

**RULES OF OWNERSHIP OF ALTERED/ACCEDED OBJECTS:**

- Owner of the principle object gets acceded or altered object
  - **Exceptions:** (i) principle object rule not applicable to perishables (ii) court may not apply principle object rule if it would give rise to substantial injustice
- **What is the principle chattel?**
  - **Alteration** there is only one chattel = original one
  - **Artificial Accession:** generally more economically valuable is principle object
    - It could also be what is the function and which is principle and which is auxiliary
    - Ex. If expensive add ons are added to a cheap guitar it is still the guitar which is the principle chattel
  - Natural Accession:
- Must once again ask how combined is too combined
- if the owner of the principle chattel is a wrongdoer or willful in the accession they may not get the chattel

**General Rule** - Accession is made to the principle chattel, which is usually the item that has the greatest market value.

Give parties back whatever they originally owned where possible.

**Principle Chattel:**

- **Market value** – at the time of affixing, whichever is worth more
- **Functional value** - add an engine to a car, car will be the principal.

**Intermixture:** where identification of components of an admixture of chattels, belonging to different owners, is possible

- solution = simply separate (where practical)

**Confusion:** where separation not possible bc identification of components is not possible or in cases of intermixture where separation is not possible

- solution: *Indian Oil*

**Indian Oil Corporation Ltd v Greenstone Shipping SA [1988] 1 QB 345**

**confusio** - mixing of goods belonging to 2 different owners so that they cannot be separated

- generally the party gets back roughly what they have contributed

**commixtio** - mixing of goods belonging to 2 different owners that can be separated

- get back your portion

**Facts**

- the claimants mixed crude oil loaded on their vessel with crude oil that was their own property (confusio)
- when the vessel came to discharge the respondents claimed delivery of the whole
- plaintiff argues that the normal rule of proportionality of input should not apply
- the oil was deliberately mixed and used to fuel the ship, wanted compensation for their oil used by the ship
- shortage of oil that was there on arrival caused by: (i) oil used to power ship (ii) evaporation (iii) un-pumpable residue at bottom of the tanks
  - receivers awarded damages based on the shortfall but claim arbitrator erred in that law of confusio would award them more

**Legal Claim to Oil:**

- (i) deliberate confusio on part of shipper either to deprive claimants of oil or make it difficult for them to get all their oil
- (ii) impossibility, arising from shippers conduct, of accurately ascertaining final proportionate ownership of the parties — all benefits of doubt should go to the receivers who were the innocent part
- (iii) Alternatively, receivers entitled to full contribution of oil without redaction for accidental loss due to evaporation

## Decision

- appeal dismissed — arbitrators award confirmed
- entitled only to their contribution of the oil, less their proportionate share of evaporated and un-pumpable oil

## Reasons

- **Restitution:** intermixture is designed to place parties where they would have been without the intermixing
- NOT to punish wrongdoers
- when there is uncertainty, the victim is sided with
- shipper did not deliberately cause confusio to deprive receiver of oil — not unreasonable act bc sometimes things have to be done en route

## Ratio

- intermixing does not intend to punish wrongdoers, thus each party gets approximately what they contributed **BUT** any discrepancies in how much was contributed by each party are erred toward the victim
- **GOAL:** restitution — put parties in the position they would be in if there had not been a confusio

## Considerations:

- (1) Can there ever be an auto forfeiture of the wrongdoer's constitution in the case of confusio? -
  - (1) No, decision suggests only the application of tort law would justify some sort of punitive response
  - (2) cases involving accession by wrongdoing not relevant because...?
    - there is only a single item that cannot be divided
  - (3) **BUT** Indian Oil did not involve deliberate wrongdoing intended to deprive owner of goods
    - one can argue that tif forfeiture doesn't arise from deliberate wrongdoing there is little to lose in attempting to gain by wrongdoing? — NO bc law of torts and criminal law may provide remedy
  - (4) aside from exemplary damages and criminal law any downside to persons who causes intermixture by negligent or deliberate wrongdoing?
    - YES: all ambiguities are found in favour of the innocent party

## Glencore International v. Metro Trading (234)

**Facts:** Glencore was had a contract to store MTI's oil, they stored it with similar oil and it mixed

## Issues

- What do you do when 2 oils (or products) are blended together to produce an oil of different grade from any of its ingredients

**Decision:** Distribute the proportionality based on value (separate the value of the oil rather than the actual physical oil)

## Reasons

- The bailee has the duty to give the goods back to the bailor and the property is at all times theirs.
  - This becomes a bit more difficult when they are mixed and stored in bulk
  - In this case everyone who contributes to the bulk storage **owns the portion they contributed**
  - There is an obligation on the bailee to give back the right proportion of goods deposited
- **Blending-** Where blending has taken place the resultant product is different in nature from both its original constituents

## Ratio

- When 2 items are mixed to create a big pile of the item we separate it by what is proportionate
- When two items are mixed and it creates a distinct 3rd item we look to the portion of **Value** and not the physical mass
- Any discrepancies are erred towards the victim

## Notes

- *Indian oil* says that where they are blended it should be proportionate for what each party put in
  - With the Qualification that: Any discrepancies are erred towards the victim
  - The defendant must show how much is his or hers
- The difference in the *Glencore* case is that the oils were of a different quality
  - The court dealt with this by saying that they look to the portion of **value** and not the physical mass

## McKeown v. Cavalier Yachts

- McKeown wants boat built for him (provides hull, trades in old boat, gives Cavalier Yahts \$20 000)
- Spartech purchases Cavalier and builds new yacht spending \$24 000, isn't aware of the arrangement — didn't get money from sale of old boat or \$20 000

- McKeown wants boat, Spartech wants to get paid for it
- Cause of Action:** detinue (detaining another chattel without right)
- have to prove you have the immediate right to possession
- **Remedy in Detinue:** (i) damages representing the value of the item (ii) the return of the object — if the object is special/unique courts will award **specific restoration**
- both parties assert the right to immediate possession on the basis of the doctrine of accession:
  - (1) McKeown bc the hull is the principle chattel
  - (2) Spartech bc the work done on the boat was the principal chattel **ALTERNATIVELY** even if McKeown's hull was the principle chattel, awarding him the boat would be a substantial injustice given that they contributed 12x the value that he did to the boat

### Was there accession??

- **Test:** serious injury to remove the components

### Reasons

- o The guy who fixed the hull paid more but he did not get the chattel
  - Because it was done slowly and gradually and they were adding accessories to the principle which was the hull
- o The original owner asked for it back and they gave it to him but the owner had to pay something as part of the order to get the yacht back: M had to compensate S for improvements to boat
  - The plaintiff had done no wrong but he was still asked to pay money
  - This was the court **looking at equity** to mitigate harshness of relief (those that seek equity, must do equity)
  - Yacht was worth about 24,000. But principal chattel was the yacht when it only was worth 1700. There was 22,000 input into the Yacht, but each input was about 1500 so the yacht was still the principal chattel
- o it is more accurate to conceive the work in terms of pieces of work done over time than to look at the work in its entirety -- no single addition was worth more than the hull (**incremental approach**)

### Restitution

- Court rules that improver (plaintiff –McKeown) will get paid because of a right to restitution if **two conditions are met:**
  1. The extra work was done and there was **free acceptance**
    - a. If someone does something that you didn't ask for and you accept it then you should pay for it (the acceptance must be free)
    - b. Ex. If someone took your shoes and shines them you have no choice but to put them on so there is no free acceptance
    - c. *Courts said there was **no free acceptance***
  2. **Incontrovertible benefit**
    - a. *There was an incontrovertible benefit*
    - b. The owner wanted the improvements to the yacht and they were made
    - c. This was a benefit to him, it cost more than he wanted but he still had to pay it

### 4 Tests for Accession

1. **Injurious removal test:** removal of added components would destroying or seriously damage property (*McKeown*)
  - i. Test has been cited in several cases — most commonly used
  - ii. Advantage: gives rise to restitution except when it requires wasteful and destructive dismantling of a functioning object
2. **Separate Existence.** Accession arises when there has been a complete incorporation to the point of extinction of identity
  - i. Ex. Brick in a house, plank in a ship
  - ii. This is the least test for accession
3. **Destruction of Utility Test.** Question is: Even though the article can be removed without damage to the chattel, would that nevertheless destroy its usefulness/functionality as such
  - i. This has not been used by any authority
4. **Fixtures Test: Degree and Purpose of Annexation.** Court should be flexible and empirical. Articles intended to be permanent parts would be ruled to have accessed. Others would be treated as mere accessories
  - i. This is just a test made by a prof

**Natural Accession**- owner of the mother of the animal is entitled to the offspring

## **Gidney v. Shank (1996)**

### **Facts**

- Feur was the owner of a boat and it was stolen from him
- Gidney bought the boat from them and fixed it up, police take canoe from G and deliver it to F (Shank = officer)

**Cause of Action:** unjust enrichment

**Decision:** wins at trial, getting award for \$806 contribution to boat

**Is this a property case?** — NO: No allegation of accession or other property based claim, rather the action is an economic claim, equitable claim

### **Reasons**

- idea is that F was unjustifiably enriched at G's expense — indisputably correct

### **3 Requirements for unjust enrichment (249)**

1. An enrichment
  2. A corresponding deprivation
  3. Absence of any juristic reason for the enrichment
    - **Juristic Reason**- if there is an explanation based upon law for the enrichment of one at the detriment of the another, then the enrichment will not be considered unjust and no remedy will be available (250)
- It was found that Feur was enriched and Gidney deprived **so it fell to the question of juristic reason** for the enrichment
    - Court says that **Feur did not consent** or acquiesced to Gidney's investment
    - Therefore, Gidney was not allowed by Feur to do it. **There is then a reason for Feur to be enriched and it is not unjust**
  - F was enriched at the expense of G BUT there was a good reason for him to maintain the windfall:
    - (i) didn't consent to improvements
    - (ii) as owner of canoe up to him, not third party, to make decision about improving his property
    - (iii) NO incontrovertible benefit, did not ask for what G did, did not get benefit he absolutely needed or required to pay for

### **Notes**

- What did the court say about accession? – nothing. Probably because the courts didn't think about it.
- It was not an incontrovertible benefit because he may not have wanted it to be improved
- The court never mentioned accession because it was not argued. If it had, it may have gone another way
- It would have been a different question if Gidney had the canoe still and Feur was trying to get it back (it had been confiscated by the police)
  - The court would probably have just given Gidney the amount of money for the old canoe
- Court could have said that they return it to Feur. It would be unfair if he then went and sold it and made money
  - Also unfair, if they made him pay for the changes that he did not want
  - Could have put a lien on the canoe so if it was ever sold Gidney got the money that he put in and for the work
- Referring to Cavalier Yacht, was there free acceptance? Incontrovertible benefit?
  - Not really “free acceptance” but there was incontrovertible benefit and so to obtain “rough justice” (because both conditions of restitution are not met), court could put a lien on the canoe for the amount of improvements.
  - A lien would be an equitable decision

### **Remedies for Accession**

- Allow the D to keep the goods but pay damages
- Give the new item to the P
- Allow the P to keep the new chattel but pay for improvements
- Must ask whether the D was the principle chattel owner? Was it an innocent, negligent or intentional improvement/change?

## Jones v De Marchant

- 18 beaver pelts owned by Mrs J misappropriated by Mr J
- he contributes 4 pelts and has a coat made which he gives to his lady friend D

**Decision:** finding for plaintiff, Mrs Jones

- prior to the coat being made - who owns the pelts?
  - **Intermixture:** you split the mixture up — Mrs J owns 18 and Mr J owns 4
  - **Accession:** you have to make a choice and the wrongdoer will foresight their contribution
- Mrs P was owner of the principle object, but didn't need to be
  - Mrs P supplied the principle chattel bc she provided 18, he provided 4
  - intentional wrongdoing that gives rise to accession gives rise to forfeiture of wrongdoers contribution even if they supplied the principle object
- what if she hated the coat and just wanted damages?
  - value of the full coat bc doctrine of accession says that the coat is HERS
  - if she were to bring an action in conversion she would get damages for full coat

## 3. Alteration (specification)

- A chattel is fundamentally transformed. Ex. A's iron poles are turned into a wrought iron fence by B
  - May be based on if a new species is created and/or reversibility of the work
- The problems and solutions are generally very similar to accession

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

- Generally speaking, the improver loses. But, there is fluidity (the wrongdoer can keep the principle chattel but pay damages)

**Silsbury & Calkins v. McCoon & Sherman** (Corn stolen and turned into whiskey)

- Majority held that the whisky belonged of the owner of the corn
- Deny the wrongdoer the benefit

## Copyright

- If someone steals copyrighted material and makes lots of copies. The copyright owner says they want their copyright back and the thief argues that it was made with his ink and paper, so he gets to keep the copyrighted material
- *Copyright Act*
  - S.38(1) – Possible for the wronged party (copyright holder) to recover possession of all copyright infringing work or other such matter and the plates intended to be used for other copyrighting
  - S. 38(2) – Owner of ink and paper can choose the order they deem appropriate in the circumstances as to what to do with the wrongfully copied materials (ex. Order the copies destroyed)
- If you look up to see if the copyright has expired on something and then make copies and it turns out it hasn't expired maybe the court will order compensation because you exercised due diligence to find out if it was copyrighted or not. This would be awarded based on the fluid principles in *Cavalier Yacht*.

## Monsanto v. Schmeiser

- Monsanto created plants that were impervious to roundup
- Schmeiser discovered canola plants that would not die from roundup
- He took the plant and grew it, Monsanto found out and sued him
- Schmeiser argued you can't patent a plant
- SCC said the patent was valid
- Genetic material found in other places due to pollination – GMO pollen mixing with non-GMO material
- Implications:
  - **Conflict of rights** – cannot hold title to things that come and go in the wind like seeds, soil etc... but you can hold title when it is an invention (patent)
  - **Innocent infringement** – that is no defence. Schmeiser should have known.
  - **Effect of unconfined release** – you waive your enforcement rights.

# Legal Possession

## Possession

**Livery of seisin**- the possession held by a freeholder

Possession is very flexible, we have fluidity of control over possessions

### Elements of Legal Possession

- **1. Animus possidendi** - the **intention** to control or possess
  - If you have a backpack you intend to control everything in there
  - Unless you have drugs, then the Criminal Law has a tougher definition of possession
  - Can be variable, specific or general, depends on knowledge about existence, attributes, location of object
- **2. Factum (corpus)**- the **physical** act of control
  - You possess your jacket even though you are not touching it
  - depends on size and nature of object, competing elements, possessors strength, skills, tools
  - Test of legal possession is variable (*Pierson*: actual and practically inevitable vs reasonable possibility of control & *Popov*: momentum test, control when all momentum of ball and catcher cease)

### **Factors relevant to Possession**

- Degree of physical control
- Knowledge of existence and nature
- **Constructive Legal Possession**- legally fabricated form of legal possession intended to effectuate policy; protects the integrity of land by supporting control by the landowner;
  - the form of possession in which mandated elements of control and/or intention have been relaxed.
  - Likewise, one might be considered to have the intention to possess the items on one's property even though the presence of those items is unknown
  - ex. metal detector guy finds coins in your yard as legal possession bc he has physical possession and intent to possess BUT has he has interfered w your pre-existing constructive possession of the coin??
    - some case law says yes, particularly if trespass occurs
    - ex. catching an animal, reasonably inevitable? reasonable possibility of getting control?
- Legal possession generates property rights including the right to **retain possession**
  - If rights to use and enjoy chattel are variable (eg. watch repairman: NO vs lessee of car: YES) but all acquire a right to retain possession for a period of time and sue third parties or even owners for torts such as trespass, conversion, etc
- Owners has the right to **obtain** possession (right to possession: an existing right to future use and enjoyment)
- When can you take an item back that you lent?
  - depends on arrangement: was it gratuitous or contractual? if contractual, is term specified? if not, reasonable terms implied
  - if gratuitous, can take back immediately unless it would be unconscionable to do so
- **2 Forms of 'right to possession': Immediate and Postponed**
  - **Immediate right** – when you claim a good back immediately, even if not in your possession (ex. Bailment – temporary loan of chattel – ex. Car in the repair shop)
  - **Postponed Right** – when you cannot demand you good back for certain period of time, deferred right (ex. Life estates or leases)
  - **Prepossessory Right** – one takes significant but incomplete steps to achieve possession of property that were disrupted by unlawful acts of intermediates
- Matters in terms of what torts you can sue for:
  - Can't sue for detinue unless you have immediate right to possession
  - injury to reversionary interest protects postponed rights to possession
- **Importance of Possession and land in chattel disputes:** in both cases possession gives rise to rights of retention
  - With land, possession even if unlawful at the outset, may ripen into title based on the doctrine of adverse possession

- With personalty, relative strength of possessory rights are critical — title not usually mentioned. Why?  
Generally you can't prove title to chattels, receipts and registration are only evidence
- **Sale of Goods Act s.19(1):** when there is a contract for the sale of specific or ascertained goods, the property in them (NOT ownership) is transferred to the buyer at the time that the parties to the contract intend it to be transferred
  - s.19(2) and 20(2) look at terms of contract, conduct of parties, and circumstances to determine intent, default rule is property passes at time contract is made
  - **Generally:** prior possessors have better rights than later possessors (first in time is first in right)
    - exceptions: abandonment, transfer of rights, sale, gifts
    - Statutory Exception: **nemo dat non quod habet** - you can't sell what you don't have; if you try to sell something that you don't own the person you are selling it to acquires NO better title to the goods than the seller
- **nemo dat non quod habet** - you can't sell what you don't have
  - **common law exception:** BFP for V without Notice acquires ownership if he buys from the LEGAL title holder
  - **Statutory exception:** *Panther Resources* got oil and gas lease from non owner based on land titles principles
  - **Statutory exception: Sale of Goods Act**
    - s 23: if goods sold by a person who is not the owner, the buyer has no better title to the goods than the seller UNLESS the owner of the goods's conduct is inappropriate (encouraging buyer to buy from non-owner)
    - 26(1): seller in possession exception, allows a seller to sell something they have already sold
    - buyer in possession exception, if you sell to someone who is paying in instalments, and it is clear you don't get title until all the instalments have been paid, but you give the person possession of the item, if they sell it, the buyer gets title
    - If an employee/servant takes possession (not just custody) that person must be an independent contractor

## Legal Possession of Animals

- first, distinguish bw domestic and wild animals
- **domestic:** originally chattels belonging to owners, not subject to law of capture
  - domestic animals are NON native animals to the area, even if they escape
- **wild:** subject to law of capture, at common law are common property
  - acquisition of rights in wild animals comes through legal possession: physical control and intent to control
- duration of property rights in wild animals?
  - exist only during continued possession of wild animal — 'qualified' or 'conditional' rights
  - in order to protect innocent third parties, and provide incentive to hunt

**Exception:** *animus revertendi* — when the animal has the intention to return to the legal possessor the third party will be liable

- law of capture applies at common law to fugacious substances (oil, gas, tar, sand, water) and subject to regulation, still does
- **Modern rules for wildlife: Wildlife Act**
  - wildlife is NOT common property, belongs to the Crown
  - can acquire ownership by getting a hunting or capture licence OR
  - by ministerial transfer when animal or carcass has been acquired through self defence or accident
  - s 7 (2) ownership of offspring of female animals that are lawfully captive is the owner of the female animal
  - s 7(3) escape of privately owned wildlife gives rise to reversion of ownership to the Crown

## Pierson v. Post

**Facts:** Post was the original hunter and Pierson interrupted and captured the animal

**Decision** was in favour of Pierson, the intervener bc Post didn't have legal possession (Not followed in Popov)

**Issue:** how does one acquire possession of a wild animal?

**Reasons:**

- **Per industriam** (effort) test:
  - **Majority View:** actual physical control OR physical control that is practically inevitable
  - **Minority View:** reasonable prospect of capture
- Pierson gained possession because he took the first possession (manual control)
- Could something less than his **manual control** still have resulted in possession?

- **Mortal wounding** followed by **continued pursuit** also affirms possession
- **Catching** it in a trap (ensnaring an animal)
- What is the better view?? — **dissent** is focused on fairness and encouraging hunting of foxes; **majority** is focused on certainty and an orderly society

### The court gives two notions of what is required for a qualified property right:

- 1) If you have actual (secure) physical control you are good.
- 2) However, they also say that when physical control is practically inevitable you have enough physical control.

—> Pierson was a free rider, who at the last minute took the fox = unmoral; but the issue is one of law.

### Common Law rules governing title to wild animals

- First occupancy can serve as basis for allocation
- When animals nest on private land, proprietor obtains title until they leave (constructive possession)
- Right to hunt on own land (per ratine soli)
- If animals return, animus revertendi, remains property of owner – to induce owners to tame and control
- Title becomes absolute when animal is killed

-we *might* have different rules for what counts as possession for acquisition and retention purposes

## **Animals**

- **General rule:** The qualified nature of property that you have in a wild animal is that if you have possession of a wild animal and lose possession, your title is lost
  - Exception: Title will be retained if the animal escaped but had *animus revertendi* (“with intention to return”)
    - This exception existed because if you train it to return it is like having a big leash on the animal (like a falcon trained to return)
- An animal is **domesticated** if it has become subservient for the uses of human kind

### **Clift v. Kane NFLD Seal Hunt (Textbook)**

- The hunt is a very time limited event
- You would kill, mark, and leave the seals, move on, and then come back and collect them
- Another ship found the dead seals and took them because they thought the seals may be lost at sea
- **Decision:** the animals belong to ship 1, with exceptions.

#### **Reasons**

- Used the generic rule. The animals were captured and killed and therefore, belonged to ship 1. However, if there was a prospect that the pan would be lost, ship 2 was entitled to a salvage fee for saving the pelts (pay a fee to ship 1 to take possession of the seals)

### **Generic Rule**

- the animals were captured and killed by ship 1, therefore, they belong to ship 1, but ship 2 can salvage the animal if there was a prospect that the pan would be lost.

**Rule of Deemed abandonment** - The moment the person abandons the pursuit of the dead animal, (**potentia recuperandi**- the ability to recover), they are allowed to be taken by the ones who find it first

- They are not intending to abandon the animals but they have lost the capacity to find them
- This rule is more economically efficient (it provides more incentive for the efficient use of the seals)

## **Ghen v Rich (1881)**

### **Fact**

- April 9 plaintiff killed with a bomb lance a whale
- April 12 Ellis found on the beach and sold it to the defendant who stripped off blubber and tried out the oil
- April 15 plaintiff heard of finding and sent crew to claim it
- Ellis or defendant didn't know plaintiff killed the whale but they might have known it was killed by someone in the business
- plaintiff claims title to the whale

### **Issue**

- who is entitled to legal possession of a whale carcass?
- is the title to a whale acquired under reasonable local usage possible when only a mark of appropriation is possible?

## Decision

- finding for the plaintiff

## Reasons

- first to harpoon the whale = legal possessor (constructive possession)
  - **Customs:** play a role in defining property rights bc usually based on rational considerations
    - Here: economic reasoning, want ppl to be incentivized to hunt, so if they harpoon the whale and don't get legal possession they would not want to labour
  - **Principle:** if you do everything practicable under the circumstances to gain control, that is usually enough
- past case found that if a whale is killed and anchored and left with marks of appropriation, it is property of captors
- if anyone could reap the fruits of one's labour in this field, there would be no incentive to engage in said labour
- rule of damages is the market value of the oil from the whale less the cost of trying it out and preparing it with interest

## Ratio

- reasonable local usage and CUSTOM gives title to the first taker of the whale who acts of appropriation

## Notes:

- Custom of the area said whalers had distinct harpoons = when whale found a small finders fee would be paid, but the whale would go to the shooter.
- Custom will also help you determine when you have sufficient physical control.
- If you have done everything you can possibly do = you get possession rights (Ghen and Rich). For example anchoring to find lost treasure.

## Conversion- the wrongful exercise of dominion of the personal property of another

- Wrongful withholding can be conversion even when the defendant lawfully acquired the property
- There must be intent
- Wrongful purpose is not a component of conversion
- Can be brought where plaintiff has title, possession, or the right to possession (298)

## Fundamental Concepts of Possession (296)

- Requires **physical control** over the item and an **intent to control** it or exclude others from it
- Possession culminates in an event (moment of time where actual possession is achieved). The process includes the acts and thoughts of the would be possessor which leads up to the moment of possession

## Popov v. Hayashi "Up for Grabs" (294)(2002)

### Facts

- Popov caught it but it was not certain it was secure
- He got tackled and kicked etc. with people trying to get the ball
- At some point he dropped the ball (unintentionally)
- Hayashi also got pushed over by those people, saw the ball on the ground and picked it up
- We do not know when or how he lost the ball

**Issue = Possession:** Popov clearly intended to control the ball but did he have physical exclusive dominion and control? Were his acts sufficient to create a legally cognizable interest in the ball?

- Popov claiming to be prior possessor whose right to retain the ball turned into a right to obtain the ball
  - Why does his possessory claim fail? — he never had true control of the ball, **test = momentum** of ball and person catching the ball must cease
- Hayashi's legal possession indisputable

**Decision:** Each had an equal and indivisible claim to the ball. Therefore, it must be sold and the proceeds divided equally

### Reasoning

- **Momentum Rule:** provides certainty of possession in this context
- Once the baseball was hit it was intentionally abandoned and the first person to come into possession owns it
- Popov showed cases where complete control need not be shown. Only the manifest **intent to control** something (which he did by stopping the ball)
  - Court said these cases were different because of the industry (ie. when Shooting a deer it still runs a little – you are in possession upon the shot) a baseball can be acquired with complete dominion and control and that is in fact the norm

- Popov did not gain complete control but this was not because of incidental contact it was because he was attacked  
**New Principle: Rule relating to possession, fairness, and conversion = pre-possessory right** — the right to catch a ball free of illegal interference
  - "Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally recognizable pre-possessory interest in the property." (299)
    - This **pre-possessory interest** does not establish a full right to possession that is protected from a subsequent claim (299)
    - **Elements of Pre Possessory Right:** (1) illegal interference with attempt to obtain the ball (2) significant but incomplete steps toward obtaining the ball
  - Rational for the rule? (i) discourage wrongdoing (ii) fairness
    - Was Hayashi guilty of illegality? — perhaps, allegedly bites a kid (irrelevant)
    - **Hayashi** has done what seems to be everything necessary to claim full possession of the ball, he did not perpetrate illegality, so why should he be deprived of part of it? — (i) Popov already had a legal pre-possessory claim and (ii) he benefited from the illegality of others
- The judgment implies the finding that Hayashi's biting was not a relevant wrongdoing. There was no provable causal connection between the bite and Popov's inability to recover the ball. Ergo, you have to cause the loss in order to lose your interest in a possession.
- This deals with fairness for Popov, now must deal with **Hayashi**
- **Equitable Division**- where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim
  - transporting a legal doctrine from one context to another

#### Issues with the pre-possessory doctrine?

- uncertainty regarding 'significant steps' and types of illegality
- depriving Hayashi of property rights unfairly bc of conduct of strangers even though P might never have caught the ball
- shouldn't Popov's only right be the right to sue the people who attacked him? why should a propriety right arise when he may never have caught the ball? — he suffered tortious consequences, tort law recognizes loss of chance

#### Notes

- Can an employee of the stadium have possessory in terse in the ball?
- Abandonment of the baseball when it goes over the fence because there is no animus (or intent to control the ball). There was indifference towards the fate of the ball coupled with a physical sense of abandonment of the baseball (factum).
- Hayashi's bite doesn't show up in the judgment at all. This is because the dispute is between Popov and Hayashi
- Why didn't the Giants, MLB, Stadium owners, have possession of the ball?
  - It was considered abandoned property as soon as it was hit by the bat
    - What is necessary for an **abandonment**?
      1. Loss of control (objective question –factum)
      2. Intention from a person to abandon it (subjective question -animus)

**Abandonment:** voluntarily giving up of property rights, requires (i) physical act of dispossession and (ii) intent to give up property rights (indifference to destiny of object)

- opposite of possession taking
- courts are reluctant to inferring intent to give up property rights
- can you abandon land? debatable, conflicting case law, also uncertain who gets abandoned lands
  - **doctrine of tenure theory:** (i) Crown has underlying title therefore abandoned land is Crown land (ii) if you abandon land, the first person to take possession of land becomes owner
    - practically very rare bc mortgages and municipalities usually have rights to seize and sell abandoned land

## Did the person have possession of the object?

**SIGNIFICANCE OF THE QUESTION:** acquiring possession determines whether a person has a relative proprietary interest good against the whole world except the true owner, or whether there is a prior possessor who has not abandoned the property

As per *Popov v Hayashi* ("*Popov*"), there are three criteria of possession:

- 1 - actual physical control;
- 2 - intention to control to the exclusion of others; and
- 3 - the object must be lost or abandoned

*Popov v Hayashi*

### (1) Was the object lost or abandoned?

- Abandonment: giving up control + intention to control (baseball when hit, as in *Popov*)
- Lost: Losing control but keeping intention

### YES, then (2) was there an intention to control (to exclusion of others)?

NO = no possessory right

### YES, then (3) Was there actual physical control?

- Applying **Grey's rule**, did X stop the momentum of the object and maintain the degree of control necessary for that particular object
- What constitutes physical control **varies by type of property**: sometimes you cannot exercise unequivocal dominion and control (e.g. wild animals in *Pierson v Post*, or sunken vessels in *The Tubantia*)
- Look at the **community of practice** in relation to the object as to what constitutes possession

NO = no possessory right

YES = **POSSESSORY RIGHT**: possessor gains possessory rights that are good against all the world except the true owner

NO, then were the sufficient but incomplete steps to possess interrupted by **unlawful acts**?

YES = **PRE-POSSESSORY RIGHT**: When someone takes sufficient but incomplete steps to possess because they are interfered with by an illegal act.  
Partially for equity/policy reasons (note that equity requires clean hands), the court may apply the **doctrine of equitable division**, where the possessor and pre-possessor share the proceeds from the property.

NO = no possessory or pre-possessory right

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## Adverse Possession

- If you are in occupation of someone else's land for long enough, you can (10y in Alberta)
  - Be immune from being sued for your wrongful occupation
  - And, eliminate the paper owners title all together
- **Rationale:** not very persuasive as it allows appropriation of one's property
  - It protects the downstream owners who may have bought property thinking they own that land because it has been held for so long

- make property productive, reward trespassers and penalize owner thereby incentive for owners to make productive use of land
- eliminate/reduce stale claims/old disputes about boundaries and ownership — quiet title; avoid litigation based on old and unreliable evidence
- Fulfill settled expectations of possessors and consequences thereof (endowment effect: connection to the land, encourages investment down the road) — squatters place higher value on the property, promotes personhood and economic values
  - But we have a torrens system which means you are protected (many torrens systems have abolished it)
    - Torrens does not guarantee a proper description of the boundaries though
- Once a new purchaser buys the property they take free of the adverse claim and the clock for adverse possession starts over
- Torrens title: certificate of title is supposed to be a mirror of all interests of the title

### Rationales

- Quiet Title: General concern about allowing stale claims (lost evidence, dead witnesses) to affect proper ownership of property.
  - Potential defects in title are cured by demonstrating their title is extinguished
- Promotion of Productivity- Rightful owner may not have been putting property to good use. Adverse possessor's labour is protected.
- Efficiency of land
  - Ziff- doesn't agree- this means you must be vigilant against trespassers.
- Risk of faulty title used to weigh heavily on shoulders of purchaser; if an unknown interest came forward, they would bear the brunt of it.
  - Must show chain of title for 40 years- this could be inaccurate; purchaser still liable
  - Purchaser sleeps easier with adverse possession; know they possessed for 10 years, so any claim on possessory right has extinguished.

### *Limitations Act*

- effect and purpose of limitations of action legislation? — provides potential defendants with immunity from liability so as to eliminate stale claims in interest of fairness
  - provides potential D's with immunity from liability
- under s.3(1) may sue **up to 2 years** from when P has actual or constructive knowledge that (i) legal injury occurred and (ii) D is responsible for the legal injury and (iii) injury is sufficiently serious that the action is worth bringing
  - is there potential liability forever, in cases where any of the three events have not occurred?
    - should you have known? if you couldn't have known for a good reason, time starts to run only when ALL 3 elements are there. You can sue ultimately up to 10 years.
    - After 10y, unless somebody is conciliating the legal injury, you are out of time to sue
- s.3(3) dispossession: when does legal injury occur in dispossession of land cases? — as soon as you are 'dispossessed' by a trespasser
  - (i) 2 year period triggered by constructive knowledge (ii) sunset clause: can't sue after 10y after claim arises even if 2y period has not begun to run (Exception: if there is fraudulent concealment of injury)

### **Squatting in Alberta**

- How long does a squarer have to adverse possess before he can resist a claim by an owner?
  - **10 years**, s.3(4) says 2 y elimination period has no application when claimant seeks remedial order for possession of real property by default, since its not 2 years, it is 10 years
  - Cannot adverse possess government lands
- Downside? — liability, civil and quasi criminal
- Upside? — squatter can use land without paying forever if you can establish adverse possession, possessory rights that are alienable even before 10y are up — can sell or make gives of possessory rights — if sale/give by adverse possessor, purchaser may tack on possessory period of earlier possessor to get title (**tacking**)
- **after 10y can't be sued and after 10y squatters get ownership**
  - statute doesn't say that squatters get ownership explicitly

- we know owner cant sue after 10y under — Limitations Act 3(6) says after period has run the owner has **no right of re-entry onto the land**
  - since they cant sue or enter the land after 10y the adverse possessor clearly has the exclusive right of possession — must prove they have satisfied all common law and statutory requirements
  - s74(1) of *Land Titles Act*: adverse possessors can get quiet title by getting a declaration you are entitled to exclusive possession and can be then registered as owners under the Land Titles Act s 72(2)
    - how to get declaration? — prove you satisfied all the common law and statutory requirements

### Basic Doctrinal Elements of Adverse Possession

- requirements mediate fairly bw owner and squatter — protect existing property rights and facilitating acquisition of property rights (similar to *nemo dat* rule and its exceptions - protection vs facilitate of acquisition)

What quality of possession is needed to have adverse possession?

#### \*\* Must be in possession for 10 years

- Exclusive Possession:** must use land to the exclusion of all others, including the owner
- Continuous Possession-** can't be broken in any way, depends on context of property, functionally continuous
- Adverse Possession-** can't be allowed there (i.e., lease, easement). Must be hostile (not consensual)
- Actual Possession** - not constructive possession, some real presence on ALL of the land claimed. Depends on nature of land.
  - If only use part of land (say, improper fence placement)- in theory, may only be entitled to part of land you used, but may be deemed as constructive possession of entire premises.
  - Exception:** if you are on the land with colourable right, where you reasonably think you own the land, even if you only occupy a portion of the land, you are still entitled to all of it as an adverse possessor
  - mines and minerals if part of surface title would also be adversely possessed
- Inconsistent use:** use of land must be inconsistent with the rights of the true owner AND also with the uses that the true owner intends to make of the land
  - rationale? inconsistent use is what makes adverse possession inherently adverse; incentive for productive development
- Possession must be **open and notorious** so that a reasonable person ought to have known you were there, but actual knowledge is not necessary
- Possession must be **acquired peacefully** (not by force)

### Test of Inconsistent Use

**Incorporeal hereditament-** abuse easement in a way that you did not have a right to do, such that you took possession as if you were the true owner. Could support claim, but this use is not necessarily against papered owners wishes.

**Test of Inconsistent Use:** Adverse possessor must make use of the owner's property with an intention to exclude the owner from such uses they want to make of their property. If test fails, cannot support a claim of adverse possession.

- Problem with the test: even if I knew you were on my land, couldn't I always claim that my intention was to sell the land in the future? This could always be used to revoke this test, thereby prevent claims of adverse possession.
  - o This is not the case- *Keefe*- squatter was not completely unsuccessful; wins right with respect to garage.
  - o **Problem:** Couldn't owner have claimed garage under fixtures law?

**Note:** HL has held this test is restricted to those cases where squatter is aware papered owner has some special purpose for land, so if squatter doesn't conflict with that use, may show some support that Squatter never intended to possess the land.

### Keefe v. Arillotta (307)

#### Facts

- This is a long case about two families who were neighbours. The Keefe's had a right of way granted to them by the Cloys and they are arguing that they gained possessory rights via adverse possession
- Keefe's used the driveway and parked their cars on it but the Cloys also used it occasionally to do what they wanted and there was little disagreement about it
- Keefe's did move their garage onto the driveway strip and Cloys never complained
- (Keefe is the would-be adverse possessor), Arillotta is the true owner of the land

#### Issues

- Whether the respondents possession challenged in any way the right of the legal owner to make the use of the property he wished to make of it (312)

**Decision:** Adverse possession was **not established**. The Cloys did what they wanted to with the land. Appeal granted in favour of respondent, Cloy (Arilotta).

#### Reasons

- Possession is not adverse to the extent it is referable to a lawful title
  - Since *there was a granted right of way*, them being on it was not adverse (they had an easement to use the land for some purposes)
  - The Keefer's argue that this just allowed them to go back and forth but they were doing more than that they had an easement to use the land for some purposes
  - Though actual use went beyond permitted easement, they did not amount to claim exclusive use by Keeferes that was in consisted w the Cloy's ownership
  - Use was too transient, intermittent over 10 years — Cloys continued to assert ownership rights
  - Adverse possession claims can be disrupted by even mundane use of the property by the owner

#### Possessory title

- Possessory Title- cannot be acquired by depriving him of uses of his property that he never intended or desired to make of it. The "*animus possidendi*" is an intention to exclude the owner from such uses as the owner wants to make of his property
- Acts relied on as dispossessing the true owner must be inconsistent with the form of enjoyment of the property intended by the true owner (313)
- Onus of establishing is on the claimant and it is harder for him to do that if he is on the property pursuant to a grant

#### Test of inconsistent use (status in AB is unclear) (313)

- Person claiming possessory title must establish
  1. Actual possession for the statutory period (10 year period under *Limitations Act*) by themselves and those through whom they claim
  2. That such possession was with the intention of excluding from possession the owner
    - a. The acts must be inconsistent with the form of enjoyment of the property intended by the true owner  
- *ruling was they didn't find Keefers ever intended to oust the Cloys from using the strip of property*
  3. Discontinuance of possession for the statutory period by the owner and all others, if any, entitled to possession
    - What makes something continual depends on the facts (Ex. don't have to use the field during the winter)  
- *a small portion of land where a garage was occupied by the respondent, otherwise no discontinuance by the appellants (Arilotta)*
- If they fail in any of these aspect, the claim fails  
- *They failed on both 2 and 3*
- Possession of part is possession of the whole if the possessor is the legal owner (314)
- **Teis:** the Keefers knowingly trespassed on the owner's land — only when they exceeded the rights they had through the easement (skating, parking)
- The Keefers DID know that they didn't own the strip — thus the doctrine of inconsistent use applies because they know they are making adverse possession claims (vs **Teis** where they thought they owned the land)

#### Notes

- **Jus tertii**- the right of a third person
  - Title is a relative concept. If an action is between X and Y, it is irrelevant that Z has a right that trumps both
    - As long as neither are acting under the authority of Z
- The test of inconsistent user is not so broad as to allow the true owner to say that they were not trying to enjoy the property in that way so it was not adverse possession
  - That is too broad and would mean no one could ever get an adverse possession

- S.69 when someone makes a lasting improvement, the person is entitled to a lien on the land to the extent it has been improved. Or the person may be entitled to buy the land depending.
- Keefer got position of the land that they had a garage on because they did displace actual possession for more than the statutory period
- **Exception** to adverse possession rule: when you enter into land of someone else's land on "**colour of title**", e.g. actual possession of part will be "*The appearance of a legally enforceable right of possession or ownership. A written instrument that purports to transfer ownership of property but, due to some defect, does not have that effect. A document purporting to pass title to land, such as a deed that is defective due to a lack of title in the grantor, passes only color of title to the grantee.*"
- Wasn't completely bad for the plaintiff because the P got the land the garage was on
- Is the effect of inconsistent use to deny all adverse possession claims in Ontario?
  - No, because the claim partially succeeded for the garage area.

## **Teis v. Ancaster (Town) (317) –Mutual Mistake**

### **Facts**

- Teis and the Town both thought Teis owned the land and acted that way for over 10 years until they found out the Town owned it. Trial judge finds that Teis were owners by adverse possession of the land but that the public was entitled to travel over part of the laneway by car and all of the laneway by foot. Teis cross-appeals to delete the part of the judgment granting the public a right-of-way over the laneway.

### **Issues**

- Whether a person claiming possessory title must show inconsistent use when the claimant and title holder mistakenly believe the claimant owned the land

### **Decision**

- The test is not necessary/cant apply in cases of mutual mistake. Because how can the owner have intended a use for the land when they did not even know they owned it?

### **Reasons**

- A) Referring to s 4 of the *Limitations Act*, possession needed to be for a ten year period and the acts of possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous. The town failed to argue that the possession wasn't any of these criteria.
  - Possession must be open and notorious because:
    - Shows the claimant is using the land as an owner might
    - Puts the true owner on notice that the statutory period has begun to run
      - Since the true owner needs to fail to take action time should not begin to run unless the delay can fairly be held against the owner
    - This does not mean that there needs to be knowledge (just that it wasn't hidden)
  - Continuous because this is seasonally dependent, farming is okay because it is intermittent
    - Nature of the acts needed to establish possession depend on the type of property (320)
- B) the test of inconsistent use cannot defeat Teis' claim to a possessory title because the test use focuses on the intention of the owner or paper title holder, not the intention of the claimant. It does not apply to cases of mutual mistake Clearly the owner had no intention of the land because they did not know the land existed for over 10 years!
- C) In cases of mutual mistake, the court may infer the claimants intended to exclude all others, including the title holder
  - Because, How could you intend to exclude the true owners when you believe you are the true owners

### **Comment**

Does the true owner have the defence that they do not know that somebody is squatting on the land?

-No, the test is whether or not a reasonable person knows that somebody is squatting on their land

Was the land Crown land?

-No, land held by municipality is held by municipal corporation.

-Alberta has law that people can not take land by adverse possession on municipal land

Course Connection: Teis differs from Keefer in that there wasn't a mistake by the true owner in regards to owned the land.

## Can Adverse Possession Co-exist with a Land Titles System?

Why not?

- AP is an invisible cloud on title, not recognized by the Land Titles Act as an exception to the requirement of registering an interest in land — if bound by AP a BFPforVwithoutN could be undermined
- Solution? eliminate law of AP, currently the law applies in Alberta but must respect primacy of land titles precepts

Why yes?

- buyer from registered owner gets free and clear of unregistered AP claim

## Adverse Possession of Chattels?

- not clear whether you can adversely possess a chattel — if so, you would be under the Limitations Act and have 2y to sue
- running out of limitation period still allows owner to argue they have title although they have no right to sue —
  - bc no express extinguishment of title in Limitations Act and the no re-entry provision only applies to real property
  - if title is not extinguished owner can retake property through self-help

## Finders Law

**Finder:** someone who takes possession of an object that has been **lost** — (i) unwittingly dropped and (ii) at the time of the finding it is not in anyone else's possession

- **mislaid** objects are objects that are absent mindedly put down or forgotten
- **cached** objects subject to same allocation rules as mislaid objects — go to occupier
  - cached/mislaid objects come 'within the protection of the house'

**Duty of Finders:** exist because ownership rights survive losing or mislaying of property

(i) must take reasonable steps to return to true owner and (criminal liability of theft through finding, or civil liability of conversion)

(ii) must care for item (bc they have assumed responsibility for the item, similar to lower level bailment)

**Finders Rights:** finders acquire the best rights in the world except against the true owner

- except for the rights of owners and antecedent possessors whose rights remain current
- finders rights are relative: between the parties litigating, who has the best rights?

**Basic Rule-** Possession is 9/10 of the law. They have title against everyone except the true owner (or anyone who has a continuing antecedent claim)

- **Rationale:** if there is no law protecting finders then it would produce a free-for-all. If you don't protect the title of the finder then people could continuously steal from all but the true owner.
- **Jus Tertii:** asserting the superior rights of a 3rd party — D's defend themselves by asserting that third party's rights are superior to P's rights
  - usually unsuccessful bc mere existence of superior claim of third party not a defence if they are not the claimants
  - sometimes works; where the D is acting under the authority of the third party w superior rights
- **Why confer rights on finders?** — reward for returning goods to productive use; facilitates return to true owner; prevents free for all
- **Vicarious Finding:** finding on behalf of others (employers and principals in principal/agent relationship)
  - **Limitation:** finding must occur during discharge of duties and the discharge of duties must be the cause of finding (**Parker**)
- Finders that are Wrongdoers
  - trespassers who find objects will lose (**Parker**)
  - against third parties: sometimes wrongdoers will
    - **Bird v Fort Francis:** kid finds \$ in crawlspace under pool hall, police appropriate and can't find owner, kid sues and succeeds (minor wrongdoers can succeed against third parties)
    - police don't have to return "proceeds of crime"

## Constructive Possessor v Finders

- persons in occupation of land or chattels often but not always are the Constructive Possessors of lost items
  - **Trachuck:** was not in occupation no the well site (which was exempted from grazing lease) and hence he couldn't argue that he had a right based on constructive possession to exclude Olinek and crew from area where the \$ was found

- factors favouring claims to lost items based on constructive possession:
  - if finder is wrongdoers (trespassers) land owner prevails
  - chattel imbedded or attached to property
  - manifest intention to control the area, either explicit or implied, to control the area and things on or in the area where the object is found (ex. a sign, private portion of shop, safety deposit room in bank)

### Treasure Trove and Other Things Owned By the Crown

- cached and finished gold and silver, with unknown owner, goes to the Crown under common law
- archaeological and paleontological resources discovered belong to the Crown
- Crown may acquire historic objects through purchase gift, loan, lease
- duty to notify Crown of discovery of historic resources

### Trachuk v. Olinek (329)

#### Facts

- 4 Guys (defendants) found a bag of money on plaintiffs land. Land owner plaintiff said that even though the money wasn't his he had a better claim than the 4 guys
- Defendants claimed jointly so it was not necessary to distinguish between them

#### Issues

- Trachuk bases his claim on being an occupier of the quarter section
- Defendants base theirs on being the finders and that the fortunate finders of lost property are entitled to it as against all the world except true owners

#### Decision

- The Defendants win because Trachuk was found to not be in possession of the property
- They did NOT win because of fortunate finders of lost property. It was not lost property

**Ratio:** A finder of lost articles acquires title good against the world except those with a continuing antecedent claim (like true owner, first finder)

#### Reasons

- There is no evidence who the true owner is. The most either could be granted is
  - **Possessory title**- a right to exclusive possession of the thing except as against one who is able to provide a superior claim (333)
- There is a distinction between something that is lost (**true finder cases**) and something that was intentionally placed on or under privately owned land (**recovery cases**)
  - Lost- you casually and involuntarily part with possession of it (334)
  - *This money was clearly not lost it was deliberately hidden. Nobody would bury money from 1991 eighteen inches below the ground.*
- The money was also not abandoned
  - **Abandoned**- owner is deemed to have relinquished all title or claim (evidence must be shown it was abandoned on a balance of probabilities)
- Because the money was not lost or abandoned the defendants argument does not apply
- The owner or occupier of the land has first right when something is attached or underneath the land IF
  - He has a manifest intention to exercise control over the land and the things which may be upon it
  - *Evidence does not show that Trachuk was in de facto possession of the land (he never intended to exclude workmen and might not have been able to do so)*
- Landlord and tenant is a contractual relationship that permits another to have exclusive possession (*not in this case because of the easements etc.*)
- The onus to make out that he had possession of the premises was on Trachuk and he was not able to

#### Notes

- Amoco had the best claim (they held the lease on the land aka they have possession of the land when the money is stashed there)
- Then probably the finders. General Principle: an employee finds for the employer (Olinek hired the other 3 but Signalta hired Olinek)
  - Probably wouldn't have applied because you can argue that the employees were independent contractors, the general principle doesn't refer to independent contractors

- Legal possession refers to “right to possession; de facto possession refers to “occupation by a person”
- The owner of the easement doesn’t have a claim because it is a non possessory interest
- Owner of black acre would probably have standing at this point
  - Marathon was the owner (but Trachuk had arranged to buy the section (he didn’t have title yet, but he did have equitable title))
    - Equitable title- prevents people from changing the property once the deal has begun to take place (even before the closing of the transaction you have a right)
    - Trachuk probably had a better claim than Marathon
- AB govt made a claim under the **treasure trove** doctrine
  - They have a royal prerogative to gold and silver bullion
  - No court has said bills are part of the doctrine. The doctrine is narrowly construed to exclude bills.
  - **Bona vacantea**- ownerless goods are property of the Crown

### **Parker v. British Airways Board (339) –Leading English decision on finding**

- **Public policy**- wrongdoers should not gain from their wrongdoing, but that could result in a free for all if they don’t have any rights. That is why they don’t have them against the owner of the land or the occupier of the property, this is the obvious result when it is against occupier and trespasser

**Facts:** plaintiff waiting in private airport lounge found gold bracelet, delivered to defendant leaving name and address asking for return of bracelet if true owner did not claim — true owner never claimed, defendant’s sole bracelet, plaintiff sought damages of 850 for value of the bracelet & wrongful interference, conversion and interest — defendant alleged the lounge was private and that they controlled it thus had better title

**Judicial History:** circuit judge found for plaintiff — defendant appealed on the grounds that: where an occupier of a premises had de facto control and he intended to actively possess or prevent others from possessing chattels which might be lost on his premises he has a better title to them than the finder

**Decision:** appeal dismissed — finding for plaintiff

#### **Analysis:**

- common law rule of finding and taking control of lost chattel should be applied — finder has rights
- common law rule that occupier of land has rights over all lost chattel whether they know of existence or not
- common law rule that if attached to realty occupier’s rights are superior to finders
- Precedent:
  - **Bridges v Hawkesworth** - lost notes in store
    - finding for plaintiff (finder of money)
    - **ratio:** the unknown presence of a lost item on the premises of the occupant does not give him any rights or impose any duty in relation to that item
  - **Sharmans** - hired company to clear mud, found lost rings
    - finding for defendant (owner of land)
    - **Ratio:** the possession of land carries with it in general possession of everything which is attached to or under that land
  - **Grafstein v Holme** - defendant found locked box, showed it to owner of store (plaintiff) 2y later opened it and found money
    - finding for plaintiff because he took possession of box and unknown contents when first shown it
    - **Ratio:** possession with manifest intent to control gives title
  - **Kowal v Ellis** - plaintiff saw abandoned pump on defendant’s land
    - finding for the plaintiff — when he took possession of the pump he acquired special property in it

#### **Rights and obligations of the finder**

1. The finder of a chattel acquires no rights over it **unless** (A) it has been abandoned or lost and (b) he takes it into care and control
2. He has very limited rights if he does this with dishonest intent or while trespassing
3. A finder of this chattel acquires a right to keep it against all but the true owner
4. Any agent who finds a chattel in the course of their employ (and not wholly incidentally to) does so on behalf of their employer, who acquires the finder’s right
5. A person who has a finder’s rights has an obligation to take reasonable measures to find the true owner and give it to them, and take care of it for the meanwhile

## Rights and liabilities of an occupier

1. The occupier has rights superior to a finder over chattels in or attached to the land, regardless of whether they were aware of the presence of the chattel
2. Occupier of a building has rights over the finder over chattels in , but not attached to, the building if, before it is found, he has manifested an intention to exercise control over the building and the things which may be in it
3. The occupier has an obligation to take reasonable measures to find the true owner and give it to them, and take care of it for the meanwhile
4. Occupier of a chattel (ie. Ship, car) is to be treated like the occupier of a building

## Application to Case

- plaintiff was not a trespasser, took bracelet into control with honest intentions — prima facie finders rights
- no evidence there was any intention of defendants to exercise control over lost property in the lounge that would give them superior rights

## Bird v. Fort Frances (340)z

- A kid was trespassing when he found a bunch of money. The kid was allowed to keep it because the owner of the land never made a claim

## Baird v. BC

Guy was never criminally charged with stealing money but he admitted to doing it. Crown refused to give him the money (cannot profit from wrongdoing)

## Charrier v. Bell (342)

- The fact that descendants decided to bury someone with certain items does not mean that they were abandoned
- *Res derelictae*- things voluntarily abandoned by their owner with the intention to have them go to the first person taking possession
  - *Does not apply to this case*

## Law of Gifts

- What can be a gift? — anything that is property; NOT perspiration drugs, DMC gift of land

1. **Inter vivos**- Gift given between living persons, — requires all the elements for a valid gift — are non revocable bc donee acquires and donor loses propriety control
2. **Donatio mortis causa**- A gift in contemplation of death between living persons; revocable at will, or automatically if peril is survived, or if death occurs from an unrelated peril
  - It is somewhere between an inter vivos gift and a testamentary gift
  - There is a less stringent standard for the delivery of a DMC than there is for inter vivos (because court recognizes that it can be harder to deliver in the circumstances of the DMC)
  - Why revocable? bc made in anticipation of death, hence are conditional bc absent the threat to mortality they wouldn't have been made — people who make these gifts are vulnerable
  - Usually 'perfected' when the object is handed over — in what capacity does the donee of the DMC hold property until the death of the donor? — as the custodian (trustee) for the donor — once they die, they go from trustee to donee
    - but if trustee no right to use and enjoy? — you can use it so long as you preserve the principle object
- **Heng v Fong**: you acquire the property as an owner and not a trustee, but to become a trustee when there is a revocation of the gift (husband recovered from the peril, the wife became a constructive trustee)
3. **Testamentary gift**- a gift by will, from a deceased person to a living person; property passes on death of the donor OR sometimes even later when the estate is fully administrated (the debts are paid); not revocable by definition BUT wills during the lifetime of the will maker can be altered (wills are ambulatory, alterable until death)
  - You do not need delivery for a gift by will, the will is the method of transfer
4. **Bird v Strong gift**- a gift that perfects a failed inter vivos gift (IV gift that was attempted but failed, takes effect or is rescued on death of the donor); not revocable

**Chose in action**: a right to sue someone for breach of contract. If someone gives you something and then takes it back.

### **To give an inter vivos gift (absolute) you need:**

1. Intention to give a gift
2. An acceptance (can be assumed)
3. The transfer of possession (delivery), i.e. donor to donee
  - The law demands these things because there needs to be a physical manifestation of the act
  - Needs to have all three but in no particular order before death

### **To give an inter vivos gift by way of trust you need:**

1. Intent to create a trust
2. identifiable objects of the trust
3. identifiable property
  - deliver? sometimes yes (trust by transfer) sometimes no (trusts by declaration)

### **Donatio Mortis Causa (DMC) Requirements**

1. gift must have been made in contemplation of impending death
2. must have been made upon the candidate that it is to be absolute and complete only on the donor's death; need not be express, normally implied by illness
3. must have been delivered of the subject matter of the gift which the donee accept, donor must intend to part with dominion over the gift rather than mere physical possession

### **Bird v Strong Requirements**

1. intention and attempt to make a gift during the donors lifetime
2. for some reason the attempt to make the gift is invalid
3. donor assumes right up to death that gift was validly made and the
4. donee is name executor of the estate

**Rationale?** gift is perfected by donee acquiring legal title ('delivery' of legal title)

**Intention:** question of fact aided by legal presumptions — not usually a problem but can be

#### **Presumptions of Law:**

(i) if you have a gratuitous transfer of property from A to B, if B is not the wife or child of the donor (a stranger in law) then you can presume that B held the property on trust for A (NOT a gift) — presumption of a resulting trust (ownership goes back to A) — is rebuttable on the basis of evidence

(ii) If the transferee is a wife or a child, the presumption is that it is a gift, not a resulting trust — is rebuttable

**Pecore:** transfer to a child only gifts rise to a gift if the child is a minor

**Delivery:** (i) actual generally required (ii) constructive, okay if actual is impossible/impractical (iii) symbolic (language, generally not good enough)

- **gift of land?** properly executed transfer forms — who is the owner before title is rectified but after delivery of the properly executed form? — it is a trust
  - if the transferor sells the land before the title has been transferred, the third party gets title, but the seller could be sued for breach of trust
- choses in action (stocks, bonds, IP's, etc.) property executed transfer forms

### **The role of delivery (Nolan)**

- It transfers both possession and (by perfecting the gift) ownership of the chattel to the donee. Accordingly, a valid delivery marks the termination of the donor's dominion, beyond the power of the donee to reclaim it. A continuation of power/control in the donor is inconsistent with a valid delivery, and hence inconsistent with a perfect gift.
- Reasons for the delivery requirement for a gift:
  - o Tangible proof of transfer- can concretely show donative intention
  - o Check on impulse- a cautionary act (compare using credit card for impulse buying v. cash)
  - o Allows donor to change their minds without facing legal consequences
- Delivery can be either (a) active (b) constructive, or (c) symbolic.

### **Constructive v. Symbolic delivery**

#### **Constructive Delivery**

- If goods are unwieldy, or if donor is unable to deliver the gift, something else than actual delivery has been found to suffice.
- Critical elements include whether or not (1) donor has retained the means of control and (2) all that can be done has been done to divest title in favor of the donee
- Transfer of possession doesn't need to occur at the same time as the express intention to donate; delivery may follow intention, or precede it
- 2 factually distinct situations where it may occur:
  - o No direct handling of subject matter- means of controlling subject matter is given to donee- passing keys to property will often pass the test
  - o No change of factual possession, but change in capacity of person in possession (employee receiving property owned by employer)

### Symbolic Delivery

- Some representation of the goods is handed over rather than effective means of control (a picture)
- May be the case when photograph of the item is delivered, or one piece of furniture out of the whole room.
- Very little case law in Canada suggested symbolic delivery is sufficient.

### Alternatives to delivery

#### (i) Deeds

- Performs probably and reflective function perhaps more effectively than actual delivery
- Since a chose in action cannot be delivered, the easiest way to transfer is by a deed
- Gift by deed may not be sufficient when chose in action is represented by its own form of paper, such as bonds or stocks. There must be compliance with special rules associated with the transfer of these rights.

#### (ii) Declarations of trust

- Declaration by donor that property will henceforth be held on trust for donee is binding
- Continued possession of donor is in capacity as trustee for the recipient (beneficiary)
- Courts have not always demanded explicit language of trust law; this line draws very close between perfecting an imperfect gift and a trust

#### (iii) Others

- Gift of cheques- also problematic- it is neither money nor a representation of money, so a gift by cheque is not complete until it clears
- Promissory Estoppel and constructive trust- promise of a gift, when relied on to detriment of putative donee may support a right arising out of estoppels. Gift is treated as perfected, assuming granting an interest in the property is the most suitable means of dealing with the detrimental reliance.
  - o England- resolute promise is made, even without detrimental reliance, court may bind it unconscionable to permit donor to withdraw the gift
- Completion of Delivery via executor- **Strong v. Bird**. Unfulfilled gift will be perfected upon donor's death if intention remains to deliver the gift and donee is named and becomes executor of the estate under the will of the donor.
- Land- in areas where title does not pass until land is registered, providing donee with all documents necessary to obtain registration will satisfy delivery

### Innes v Potter (1915)

#### Facts:

- o Potter owned 1370 shares of stock in his business
- o in his will he left 1000 shares to his daughter to be delivered after his death and gave the envelope to a business associate
- o after Potter died the envelope was delivered
- o Innes, the administrator of Potter's will filed a suit for his estate to regain possession of the stock certificate

**Issue** : was it an inter vivos gift? (between living persons)

**Decision**: finding for the defendant (daughter)

**Reasons**: not DMC bc he wasn't in peril, not testamentary bc not in will, not bird v strong bc gift did not fail

- o therefore must be inter vivos gift

- property passed to Ms Innes when her dad handed her the envelope (last doctrinal element of a gift) — it was hers immediately but her enjoyment was postponed
- the owner of personal property may make a valid gift with the right of enjoyment postponed until his death
- intention was that the stocks were his daughters once he relinquished control, but he did not want her to use them until after he died

**Ratio:** the owner of personal property may make a valid gift with the right of enjoyment postponed until his death

### Re Bayoff Estate (358) – (Saskatchewan case)

**Facts:** Bayoff was a dentist for 55 years, he was dying and had finished making his will and gave a key to his safety deposit box to the executor and said she could have it, this was given in front of solicitors; He drafted the will before giving the gift to her. (I.e. will said he gave everything to X but the next day he gives it to Y)

- The will does not simply govern because if it was given before he died then the will does not affect it because it is not part of the estate, gift goes to Y (the executor) because it was given during his lifetime BECAUSE a will ambulatory and revocable before death. It only works after death.
- **The gift was not a DMC** (a gift in contemplation of death) because he faced CERTAIN death it was intended to be an immediate gift when key was handed over, and not one dependent on the death, BUT there was not sufficient delivery.
  - The idea of a DMC is you can revoke it any time before you die
  - he gave her the key and told the lawyer to complete paperwork immediately
  - his words indicate he wanted her to have immediate ownership, not just upon his death
  - Not DMB bc he faced certain death therefore he could not revoke the gift
- **Was intended to be an inter vivos gift:** problem with the inter vivos claim was that the delivery did not occur
  - (1) there was intention to donate (2) she accepted the gift when she took the key... BUT there was **not sufficient delivery**
  - The key had been transferred but the court ruled that was not enough to constitute delivery because there wasn't clear "constructive delivery"
    - Symbolic delivery is far less likely to suffice than constructive delivery
    - Constructive is trying to give someone the means of control
    - Symbolic delivery- giving something that is a mere symbol of the gift
      - Like giving them a picture of the car you want to give to them
        - Doesn't give possession
        - Highly doubtful as substitute for physical transfer
      - **Exception:** you give the person a deed (document under seal). Then this will normally constitute as a symbolic delivery.
      - How else is is a gift sufficient without delivery?
        - Equitable trust
- **Strong v Bird** principle:

**Ratio:** An unfulfilled gift will be treated as complete if the donee becomes an executor under the Will of the donor. So long as the intent to make the gift continues until death because the donee receives control over the donor's property and can perfect the gift. "Delivery by virtue of appointment of executor."

### What determines category of gift?

- donor's intent with particular focus on whether the donor intended use and enjoyment to be passed to donee immediate or on death
  - EXCEPT for Bird v Strong which takes effect by operation of law and not bc donor intended to make a gift
- IV gift is presumed unless surrounding circumstance make it reasonable to presume otherwise (DMC, testamentary)
- DMC presumed if donor is in peril or reasonable apprehension of peril — no requirement that donor manifest intention to make DMC or conditional gift
- testamentary presumed if donor is going through will process

## Hoiland v Brown (1980)

### Facts

- plaintiff bought a motor cycle which he left in the possession of the defendant
- at the time of purchase the plaintiff gave the impression to many that he was purchasing it for her use, if not for a gift
- they broke up — plaintiff tried to regain possession of motorcycle
- defendant transferred registration to her name by forging the plaintiffs signature
- plaintiff did not have possession of the motorcycle at any time until he was given a replevin order 3 years after he purchased it
- incomplete gift since it had not been perfected by actual registration in Motor Vehicle Act

### Issue

- was the gift incomplete because of failure to complete the registration required by statute and the Motor Vehicle Act?

### Decision

- finding for the plaintiff — defendant must return motorcycle

### Reasons

- o at date of purchase the vehicle was registered under s. 4 in the name of the plaintiff
- o he was registered under statute, and insured the vehicle in his name, and paid tax
- o s. 14 of the act states when there is a transfer of title registration must be completed
- o defendant claims it was a gift and in her possession, but she did not comply with the statute because she was getting social assistance and did not want to explain having an expensive motorcycle
- o she was deceitful and forged the signature of the plaintiffs when she did obtain the transfer of registration
- o plaintiff has the right to revoke the gift before it was perfected
- o statute reads there must be registration of vehicle under s.4 or s.14 in the transfer in order for a gift to pass

### Ratio

- in order for a gift to be passed/completed, it must comply with provisions outline in statutes applying to said gift

## Nolan v. Nolan & Anor

- An art case out of Australia
- The step daughter claims that Sidney Nolan had inter vivos gifted the paintings to her mom and when her mom died they were in her estate. Her reasoning was that Nolan had by convention given his paintings to his mother so this painting would have been given to her mother as well.
- This claim fails, they said they could not prove the intention to gift the paintings.
- The donor and donee lived in a common household
  - When they moved in the husband had said "this is all yours"
  - It is still not gifted
  - There was no transfer of possession because it is about letting the other person have it BUT ALSO about the relinquishment of control
- So what is necessary to transfer the possession: an act or manifestations with an intention and an acceptance.
- **RATIO:** words are not sufficient for delivery. Needs an act., i.e. giving the painting with a bow would be sufficient as a gift.

### Declaration of Trust

- Being trustee and taking delivery of gift

## Law of Property Act

-Hypothetical: suppose you are an adverse squatter and you place a fixture on the land true owners land, is there any way for the squatter be compensated?

Section 69 of *Law of Property Act*. Yes, but the squatter must believe that they own the land

Why is this?

-this was before the *Limitations Act*. There was no registry system so the purchaser couldn't just simply go and check the title, so instead the vendor would be required to prove a good route of title to the purchaser. The only way this could be done was by providing the deed that the title was received and so on and so on... (common law rule was trace back the

deeds for 40 years). The fact that you could prove a good route of title for 40 years didn't mean that the person was absolutely guaranteed (because of risk of a bad transaction on the purchaser).

Commentary: The limitation acts doesn't just apply to land, this is a limitation statute that has a general application of a right to sue. It is considered unfair to a defendant to have to suffer from the prospect of a lawsuit hanging over their head forever for fear of being sued.

-adverse possession could actually be the ally of statutory possession

-**Rationale**: adverse possession's true purpose is to silence title.

- But we now have a land title system, every certificate of title was on the books so why do we still need this system of proving good principle where a general principle is the purchaser can rely on the top title, (doesn't have to rely on a 40 year search).
- Exception to being able to rely on top title. The legal descriptions of the boundaries are not guaranteed under land titles. If there is a boundary error then you do not get to keep the extra land contained in the certificate

### Limitations Act (also in Torts)

- Ikea test: read the instruction, in this case, instruction means refer to the statute
- S.3(1) If a wrong is done, you have 2 years to sue after you *knew* or *ought* to have known (3.1A lists the things that you *ought* to have known), or after they were discoverable OR 10 years after the claim arose
  - This is the rule that covers **chattels** (S.3(4) says that the 2 years **DOES NOT cover property**)
    - S.3(6) says that after 10 years you cannot re enter peacefully anymore, title is extinguished
- S.3(8) If you are given the land as a gift you do not get the clock restarting. It does start again if there is a sale (is what is implied by having this statute)
  - That is because the express mention of one thing excludes the application of others, i.e. clock resets in the case of sales, just not if it is a gift

-What happens if an adverse possessor sells the property?

-the time spent on the property is tacked on. I.e. if they are there for 3 years and the next adverse possessor is on for 7 years then this is sufficient to make the 10 year claim.

-So what happens if someone has adverse possession of a property via 10 years on the property?

-person occupying the land gets adverse possession; no longer true owner

-What happens if the land is now sold without a change of the title (not given as a gift)?

-the title will go back to the true owner unless a change of the Torrens certificate is made

-What could the adverse possessor have done to ensure that they would get the possession?

-by filing the caveat of the interest of the land

### O'Keefe (327)

- A painting was stolen and was found 30 years later, and now the person it was stolen from wants it back
- The court said that the period begins when the first wrongdoing occurs (even if there are different wrongdoers who come along)
- After the expiration of the period, the title of the true owner is extinguished (just like with land)
  - So you can't sue anymore, but can you recover from self help?
- **Barberree v. Bilo**
  - Someone stole motorcycle from true owner and sold it to someone else, true owner orders return of the motorcycle from new owner
  - The motorcycle was transferred to someone else so a new period begins and you can sue that person
  - **Decision**: Limitation period runs two years from the date of refusal to return chattel. Once property is passed onto 3<sup>rd</sup> party, even after 2 years, a new period starts. True owner can retain the chattel back.
    - This is very different from O'Keefe. It would mean that you cannot tack on the period of the original wrongdoer and the title of the true owner would not be extinguished
      - This was under the old limitations act (Probably does not apply to the new one, but it is unsure)

What is the law in Alberta? (328)

-title survives and a new cause of action can be given by a new wrongdoer.