Property Summary

Professor Robb

**Fall**

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# Macpherson

1. The Macpherson reading from our first week (specifically pgs. 1 – 8, using the pagination in our excerpt).

* Misconception #1: property is concerned with things
* Misconception #2: when we talk abt property, only talking abt individual private property held by natural or artificial person
	+ Problematic bc ignore other kinds of property holdings within common law
	+ 1. Individual property = right to exclude
	+ 2. Common property: everyone has a right not to be excluded
	+ 3. State property: held by gov as artificial person, power to exclude in same way individuals do
* In both cases, explained by capitalism. In a free market, we trade things, so property tied to things. Actually, property is relationship with other ppl in the world in respect of that thing
	+ Like Mossman point: property changes over time. Lawyers need to be cognisant of these shifts
* Common law is naturally shifting back to understanding of common property bc of the excesses of capitalism. E.g. environmental. Inability of capitalism to self-regulate such that it doesn’t ruin the oceans/atmosphere. Every person has a right not to be excluded from clean water and air

Macpherson would likely be concerned about my Hohfeldian description of the common law of property on the grounds that it implies there can only be private property, without recognizing the rights to use/right not to be excluded that ‘common property’ confers on individuals. It also fails to capture the notion of state property, which creates a corporate right to exclude, i.e., corporate private property.

Point being, property is not exclusively a right held by private (natural or artificial) persons. Where do the misconceptions that property refers to things, and can only be held by individuals, come from?

In the case of the claim that property refers to things, that likely corresponds to the rise of capitalism… once the marketplace is pervasive, it looks as though we’re transferring things, not rights. In the case of the exclusivity of rights to private property, it simply became the locus of scholarly discussion about property, to the exclusion of common and state property, a focus exacerbated by the rise of capitalism.

What’s challenging these misconceptions? The excesses of capitalism, e.g., air and water are being conceived of as common property. So why, on Macpherson’s account, is property a controversial and shifting subject? Power struggles and social demands change over time. Which, he says, is why any given conception of property needs to be justified by reference to the moral right society believes property is intended to express/protect.

* MacPherson’s recommendation for Indigenous reconciliation: legal education needs to change. Understand how Indigenous groups understand proprietary relationships, and make sure we are accommodating

# Week 1 Notes

**B. The Rule of Law and Complex Modern Societies**

* Lawyers facilitate the functioning of a complex modern liberal democratic society (a society in which the size of the population precludes the possibility that the self-interest of every individual could peacefully coexist with the self-interest of every other).
* Without rules to regulate the behaviour of citizens in their interactions with one another (torts, contract, property) and the State (criminal, constitutional, administrative) a complex democratic society would not be possible.
* ‘Law’ is the mechanism by which social interactions are regulated, something it achieves by guiding individuals to behave in a particular way, sanctioning (most common) or rewarding (less often) them when they fail to, or succeed in, behaving according to the requirements of the rule.

As a lawyer, you’re going to be an expert in respect of those rules.So your expertise is going to allow you to fulfill any one of the following essential social roles (and likely others):

1. Member of judiciary (in which case you’ll be using your legal expertise to interpret the law in particular cases and thereby directly contribute to its step-by-step evolution).

2. Become a legislator (since you’re likely to practice prior to a political career, you’re expertise will help you to recognize problems/ways to improve the legal system, improvements that are most efficiently made as a legislator... which is not to say the process of legislation is efficient; it is efficient only in comparison to making law as a member of the judiciary).

MOST IMPORTANTLY (and most likely)

3. Practice law; serve as the bridge between your client and the rules – since your client will not (in most cases) possess knowledge of the law (at least not the specifics) you’re being hired to represent their interests within the confines of the law.

Your ability to fulfill any of these three roles, however, presupposes you have a clear grasp of the social function of your legal expertise… at the end of the day, your function is to help ensure the rules that define our social organization continue to do so.

“Whereas Canada is founded upon principles that recognize the supremacy of God and **the rule of law**” – Preamble to the *Canadian Charter of Rights and Freedoms*

As a legal expert, you fulfill your function by ensuring that this statement remains true, i.e., Canada continues to recognize the supremacy of the rule of law.

One of the clearest statements of what it means to recognize the supremacy of the rule of law was made more than 20 years before the introduction of the *Charter*, by Rand J:

“That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, **that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty**, would signalize the beginning of the disintegration of the rule of law as a fundamental postulate of our constitutional structure.” *Roncarelli v. Duplessis* (1959) SCR 121 at para 44 – emphasis added.

While this case is addressing the bad actions of a single administrative official, it can easily be generalized; the rule of law is opposed to any arbitrary state action.

If you’re a legislator and you want to change the rules, you need to follow the rules that empower you to do so (e.g., the rules of parliamentary procedure) and not simply make a change according to your personal whims. If you’re a judge making a decision in court, you need to follow the rules empowering you to do so (e.g., *stare decisis*, impartiality), and not base your ruling on, for example, how you feel about the way one of the parties is dressed. And when you’re a lawyer, you need to defend your clients’ interests according to the rules set out, even when you could succeed by breaking them.

The more often that decisions/actions are a product of arbitrary whims, the more each undermines the rule of law, and the greater the danger that presents to stable but free social interactions – It undermines individual trust in the system.

* Variability in law can depend on feelings and personalities
* Reliable predictions abt how judges will likely decide limits
* Legal realism = whatever judges say.

**C. Property Law – The Basics**

Property Law was, historically, the first concern of the common law. That means, in part, that it is an area of private law, and that it is largely ‘judge-made’. It is also, conceptually, a starting point for the other two areas of private law, i.e., torts and contracts.

That’s because the primary concern of property law is definitional… it defines ‘ownership’, a definition which is subsequently vindicated by a cause of action in either torts or contracts.

The primary division of ‘ownable things’ in property law is between ‘personal property’ (or ‘personalty’) and real property (or ‘realty’). Personal property is further subdivided into ‘intangibles’ (or ‘chose in action’) and ‘tangibles’ (or ‘chose in possession’ or ‘chattels’).

‘**Ownership’** of any of these ownable things is most commonly comprised of two basic parts: Title and possession (and as we’ll eventually see, ‘possession’ requires an intent to control, and actual control)… though they can be separated.

What you get as an owner is a basic set of rights in respect of the thing owned:

i. The Right to Exclude (vindicated by torts like trespass to land and trespass to chattels)

ii. The Right to Use (vindicated by the tort of nuisance)

iii. The Right to Transfer by gift, grant, or devise (vindicated by contract law)

This basic outline explains what both Macpherson and Mossman mean when they say that property is about rights, not things… what’s relevant is not the thing that you own, but how ownership positions you in relation to others (the subjects) in respect of that thing (the object).

It is also consistent with Macpherson’s characterization of property rights as ‘enforceable claims’ (pp. 3 – 4)

Notably, ownership does not typically imply a single relationship but instead implies a ‘bundle’ of separate relationships (separate in terms of both the ‘subjects’ of those relationships, and the types of relationships).

**What does it mean to say that you have a right?**

WN Hohfeld **– American Legal Scholar**

The most influential explanation of the concept of a right: came at the turn of the 20th century by Hohfeld:

* early 20th century US lawyers and judges were using the term ‘right’ to ambiguously refer to four distinct legal relationships. So he set out to disambiguate those four relations:

*First Order*

1. A **claim-right** imposes a legal **duty** (or ‘obligation’) **of non-interference** on at least one other person.
	1. primarily (though not exclusively) claim-rights, i.e., they impose duties of non-interference on at least one other person.
	2. they are also *in rem* (i.e., held **against the world**) as opposed to *in personum* (i.e., held against an individual… typically contract rights).
	3. Right to exclude at least one person
2. A **privilege**/liberty/licence/permission allows for an **action**, and at least one other person has **no-right** that imposes a **duty not to so act.**
	1. Right to not be excluded by at least one

*Second Order*

1. A **power** allows a person to **alter** the existing rights, duties, or privileges of at least one person, and that person is liable (or ‘**has a liability**’) to having their rights, duties, or privileges so altered.
	1. Change the right of at least one person
2. An **immunity** **prevents** at least one other person (who ‘**has a disability**’) from **altering your existing rights**, duties, or privileges.
	1. Right to not be changed by at least one person
	2. Not have one of the above change

à To say: I own a parcel of land at common law = I stand in a particular relationship to every other individual in the world such that they have a duty not to interfere with my decisions to exclude them, my ability to use my property in a reasonable manner, and to make decisions about transferring my land/stuff.

* Mere fact that the language of rights is relied upon in this context is not meant to imply that my property rights are ‘absolute’ (e.g., in cases of necessity, I can’t exclude. Similarly, my use of my baseball is limited by the rights of those I might hit by their rights to bodily integrity).
* easiest to think of ‘rights’ and ‘interests’ as synonyms.
* These ‘basic’ elements of the common law understanding of property, have not been without problems… e.g., women and slaves were both considered ‘objects’ of property at one point (i.e., things that can be owned).
* The common law understanding of property is importantly not the only possible understanding: alternate/amended understandings can (arguably) be used to foster social/political change.
* Some have proposed redefining property in such a way so as to promote human flourishing, which would typically require the state to compel redistribution from the wealthy to the less well-off (‘**progressive’** property).
* Others have argued that property ought to be re-conceived in such a way that it provides insight into its influence on social belonging, which could then be used to reshape spaces in such a way that the scope of belonging increases (‘subversive’ property). à intersectional approach

**D. Distinguishing Indigenous Conceptions of Property**

* These conceptions external, evolved independently of the common law. Radically different
* External character presents a significant potential problem for the application of the common law in Canada because s. 35 of *the Charter* requires ‘recognition and affirmation’ of any existing ‘aboriginal and treaty rights’, specifically ‘land claims agreements’
* Read treaties in a way that best preserves Indigenous land values
* Problem: many of these agreements where created between parties (aboriginal groups and the Crown) who had very different (and often inconsistent) understandings of ‘property’, understandings that Canadian courts are constitutionally obligated to reconcile.

How, for example, is a court to resolve the fact that indigenous groups have a largely oral tradition of laws which vary as each is recounted with each application of that law?

* Legal obligations with reference to stories which change every time they’re told
	+ Kinda like how courts interpret common law principles or statutory requirements in different ways
* Humans have no better claim to land than deer or rocks. Humans have no individual claim to land
	+ Stewardship: Ppl are stewards for ensuring the integrity of the land remains in place for all. Distinguished from common law term “dominion” wherein humans reign supreme over the land
* Anishinaabe conception of property, Aaron Mills: each Indigenous group has slight variance on holistic land stewardship notion of property
	+ Legal norms rooted in history – invoking history hitches ur wheel to linear conception of time
	+ Mills talks abt a tree, roots system, degree to which Anishinaabe understanding is rooted in the way the land is as it appears to us. Distinguished from broader Canadian constitutional order as “living tree”, constitution adapts
	+ Mills emphasizes that living tree has no roots; exists only thru sheer force of will. It was imposed on the land, it isn’t rooted in the appropriate historical foundation
* Time is cyclical under Blackfoot – every day the sun rises and the sun sets
* Indigenous Land Claims, Aboriginal Title, Duty to consult read into s.35 of Charter
	+ In each of these cases, 9 justices all show up. Unanimous rulings, hard to dispute
	+ No provision in federal courts act that say exercise of executive legislative authority can be subject to judicial review.
	+ One understanding of property takes priority. Judiciary authoritatively says this is the way the law works in Canadian constitutional order

*First Nation of Nacho Nyak Dun v. Yukon* 2017 SCC 58

* This case succeeds. They brought an action arguing they hadn’t been properly consulted. Yukon gov set up system whereby land granted to the people. Mechanism within the agreement that told everyone what to do when a dispute arose. Court said agreement can’t go into effect, sending back to negotiation procedure set up as part of agreement (contract law)

Leroy Little Bear: The common law conception is linear and individualistic: land is owned for a period of time by a single (or defined group of) individual(s) to the exclusion of all others. Indigenous conceptions are cyclical and wholistic… land is owned by the group as a group, one that existed in the past and will persist into the future.

Indigenous conceptions of law generally, and property in particular, are not identical with one another. Aaron Mills: description of the Anishinaabe conception of a legal system that is rooted in a history emphasizing the interdependence of natural objects, and the significance of the land/earth to that interdependence. The Canadian constitutional order, by contrast, has no explicit connection to land/nature, but is instead a structure imposed on nature by human will

* oral story-traditions that characterize (many) indigenous systems of/approaches to law = clear distinction from the common law system.
* stories do not seek to articulate an authoritative, and therefore uniquely correct, legal response to a specific fact pattern… instead they invite reflection upon/discussion about the degree to which human behaviour is obligated to recognize interdependence with the natural world.
* Some jurisdictions have begun to extend the scope of legal protections to natural entities in the form of rights… e.g., land and a river as ‘subjects’ of property rights, not mere objects.

*Ktunaxa Nation**v. British Columbia**(Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.

à The likelihood of a similar extension of property rights to parts of nature in Canada is low

* Proposed year-round ski resort being built on sacred ground where the Grizzly Spirit lived, turning back after years of negotiation
* P claimed that their right to freedom of religion infringed, Charter ruling
* SCC said u can still think it’s the Grizzly Spirit’s place

# Chapter 1: Concepts of “Property” in Canada

## I. Introduction: Property as a “Relationship” (Not a “Thing”)

à Property = *relationship* one has with a thing; property *in* a thing (rather than declaring the thing as one’s property)

* Property in common law = bundles of mutual rights and obligations between “subjects” in respect of certain “objects”
* Socially defined relationships and morally conditioned obligations

### 1. An Intro to “Property” in the Common Law Tradition

#### a) Property Rights and Obligations: Complex and Dynamic

* Rights, liberties, and duties of ownership
	+ E.g. “Susan owns that Porsche” = proprietary interest *in* the Porsche à She has what Hohfeld called a “claim-right” against everyone else. She also owes duties to other ppl in relation to her vehicle, such as paying damages if it rolls into her neighbour’s fence
* Meaning of property not constant, reflect the needs of society
* Economic shift from feudalism to capitalism: rights in land became more absolute, and parcels of land became more freely marketable commodities
	+ Capitalism focuses on “things” as commodities

#### b) Property: The Evolution of Subjects and Objects

* In the past, some ppl excluded by law from holding (being subjects of) property interests
	+ Married women once considered objects of property relationships
	+ Slavery: human beings considered objects of property
* “subject” of property interests = imp poli significance bc delineation of potential right-holders affects balance of power and distribution of goods within a society
* Imp relationship btwn property law and issues of social and economic inequality
* “new property”: professional licenses, pensions, right to a job, security of housing
1. Philosophical Perspectives about Property
* Role of property in social, economic, and political life
* John Locke: human labour as justification for individual rights to property
* Karl Marx: critique of capitalist accumulation
* Morris Cohen: assertions abt property as power (and its relation to sovereignty)
* Carl Rose: need to focus on “norms and narratives” of ideas abt property in communities, persuasion – what persuades ppl to ease up on self-interest, or to pay attn to the norms that let them manage property regimes as a whole + become more prosperous?
* Gray & Gray
	+ 1. Property as a “fact”: person who’s established physical possession may be legally recognized as having a property entitlement
	+ 2. Property as “Rights” – evidenced in traditional principles abt tenure and estates in land. Approach based on “rights” has been challenged in recent decades re landowner’s unfettered “right to exclude”
	+ 3. Emerging legal approach based on responsibility: stewardship of land (incl in relation to Indigenous conceptions of property), and principles of environmental regulation
1. “A Statement of Progressive Property”
	* Based their principles on “underlying human values that property serves and the social relationships it shapes and reflects”, proposed that among other things **property** **should: promote ability of everyone to obtain material resources needed for full social and poli participation + establish framework for social life appropriate to free & democratic society**
	* Criticism of these proposals: fail to consider race-related acquisition and distribution problems in legal history of property in the USA (esp Black and Indigenous Americans)
2. “Subversive” Property
* Sarah Keenan: potential for “property outsiders” to **create spaces of belonging and “propriety”**
* Goals of social justice in relation to land to consider what it means to have property and to be “properly” oriented in the space – emphasizes “social properties” reflected in identities, incl whiteness and heterosexuality (why do some fit smoothly while others don’t?)
* For property to operate as an instrument of meaningful political change, must pay attention to how propertied subjects come to be constituted and the relationship btwn property and space (Rather than arguing pre—existing propertied subjects should act w greater responsibility)

### 2. Indigenous Conceptions of “Property”/Legal Traditions

à For Indigenous ppl, concept of “property” is a holistic one – recognizes only subjects (humans and also animals, nature). Not all the same ideas among diff groups

* Generally transferred ideas orally from one gen to the next

Jeffrey Warnock

* “property” is a loaded term, and “Indigenous” doesn’t encompass all ppl
	+ Connotations of property: concept rooted in Western liberal values of ownership, exclusion, positive and negative rights
	+ “indigenous relationships with land cannot be translated into common or civil law concepts of property”
* Critical reflection on property by accounting for Indigenous legal traditions/orders
	+ How property law restricts or undermines Indigenous rights
	+ Furthers reconciliation if lawyers explore these legal traditions and question how common law legal traditions may conflict w them

Defining Legal Tradition (Order)

* Deeply rooted, historically conditioned attitudes abt the nature of law, role of law in society and the polity, abt the proper org and operation of a legal system, and abt the way law is or should be made, applied, studied, perfected, and taught” John Henry Merryman
* Legal pluralism: different legal traditions operate in a single state
	+ Common Law, Civil Law, Indigenous Law
	+ Indigenous legal traditions not as fully embraced, but they exist (e.g. ADR for Indigenous communities)

#### a) The Land is Sacred

* In contrast with gen concept of land as a market commodity in common law
* Western linear time = each unit of time is diff and independent of similar units (new days, years, etc)
* Indigenous cyclical view: every day not a new day, but the same day repeating itself (sun is round, moon is round)
* Members of a tribe have an undivided interest in the land; everybody, as a whole, owns the whole. Belongs to past, present, and future generations, and to other living things as well
* Treaties in their view: shared with Europeans in the same way they shared w animals and other living ppl
* The land is not transferable, and therefore inalienable

#### b) Introducing an Anishnaabe “Worldview” and Law – Aaron Mills

* “Worldview” – structure of a tree firmly connected to the natural world
* Concept of Freedom for Anishnaabe people: fundamentally centred on interdependence between ppl and the natural world
* Rule of law used in imagined social contract to justify Canada’s sovereignty over Indigenous lands, ppl, and lifeworlds already present
* “The law is the law” = institutional erasure of distinction between the law and conceptions of law
	+ The law within Canada’s liberal constitutionalism context vs “this is the law in Canada”
* Lifeworld of law: bringing Indigenous law into Canadian system = taking it out of one lifeworld and into another

#### c) Guest Lecture

## Aaron Mills on Revitalizing Indigenous Legal Orders

* Mills wants to empower Indigenous communities to revitalize their own systems of law
* Have Canadian law and Indigenous systems of law enter more of a dialogue so instead of Indigenous ppl having to enter the common law, see a fully empowered and rediscovered legal traditions for these communities
* He points out: all systems of law built on constitutional foundations, an entire world built on value choices, principles, morals
	+ We resolve issues based on this
	+ He worries this isn’t being properly taught in legal education bc it seems so obvious
	+ System of values under the law foreign to what he was taught/what his community believes
* Canada’s constitution as a species of liberal constitutionalism
	+ Primacy of the self
		- Individuals disconnected and choose to engage in social contract
	+ Individual autonomy
	+ The Sovereign and consent of the governed
	+ Social Contract
	+ Liberty (Criminal law matters)
	+ Rule of law = formal obligation not respect rules (rights and duties)
	+ Freedom conceived in terms of autonomy – freedom of community
	+ Non-interference limiting actions of others
	+ Entitlement to specified set of collective goods needed to establish and secure personal autonomy
* Contrast with a conception of *interdependent persons expressing freedom with and thru others* – of individual freedom, freedom of community, and community of other members being mutually constitutive
* Concept of legality built on responsibility instead of obligation liberal constitution rep a series of choices taken amongst other possible choices
* Fundamental divide of moral status between humans and other beings: earth alienation, only humans are persons
	+ Earth alienation = why most Canadians can’t see link between Charter and global warming. View of ppl as autonomous and anthropocentric view that only humans are ppl, worldview irredeemably committed to violence. *Choice* that liberal constitutionalism makes to separates ppl from nature
* If you change the values and principles that live under the system of law, the system of law changes
* Is it possible to make room for indigenous communities to articulate and express their views?

## John Borrows on Indigenous Legal Traditions in Canada

* Famous work abt the Royal Proclamation of 1763
* Canada is a pluralistic state (civil, common, Indigenous legal traditions)
* Diversity of legal traditions – variety and complexity
* Some features of Indigenous Legal Traditions
* Treaty between the Haudenosaunee and Anishinabek near Sous-St. Marine 1701
	+ dish with wood spoon – share hunting grounds in order to share food, no knives/sharp edges allowed to prevent bloodshed
	+ Early examples of maintaining sophisticated treaty tradition, living in peace (referring to all relations – plants, fish, animals, members of other nations)
	+ Recorded on a wampum belt – physical means of recording an agreement
	+ Often orally recorded transactions, articulation of law from ceremony, use of elders and other wisdom keepers
* Obligations/duties to the world, stewardship concepts
	+ Distinction between values choices of liberal constitutionalism – property law regime does not center stewardship. You do what you want with your land within regulations
* Mi’kmaq spark of life – all objects possess this, all life to be given respect
	+ Extend legal personality beyond what’s in Canadian common law
	+ Title/interest in land – own legal entity or piece of property? Owners can be sued, but the land itself can’t be sued

## Whanganui River Case (NZ 2017)

* 3rd longest river in NZ, declared a person in its own rights with all rights, powers, duties, and liabilities of a legal person
	+ River a person, member of their community, ancestor
	+ View it not as smth that someone owns, but that it has a spark of life – responsibility to it, stewardship obligation to protect it for all generations
* We grant legal status to things that don’t exist all the time e.g. family trusts, companies, incorporated societies
	+ Legislation is detailed abt who reps the river on a collective basis
* New status means if someone abused or harmed it, law would see no diff between harming the river or harming the Whanganui iwi Tribe (local Maori tribe)
* Decades of neglect and ignoring how Maori’s interests treated
	+ River one of their ancestors, part of community, living entity
* Christopher Rogers: act declares river to be a legal person, but also recognizes broader metaphysical attributes. Act stands in contrast to private property rights which are a narrow social construct focusing attn on owner’s relationship to other human actors
* Interests will conflict, but resolution will need to be figured out
* A shift from rights to mutual obligations – contrast what happened in this case to what you have learned in Property Law about how you view things like “natural resources” and the focus on individual property rights

From article

* March 20, 2017: New Zealand recognized in law that the Te Awa Tupua—the river and all its physical and metaphysical elements—is an indivisible, living whole, and henceforth possesses “all the rights, powers, duties, and liabilities” of a legal person.
* Based on the Whanganui precedent, 820 square miles of forests, lakes, and rivers—a former national park known as Te Urewera—also gained legal personhood. Soon a mountain, Taranaki, will become the third person.
* Feb 2019: voters in Toledo, Ohio, voted to grant legal standing to Lake Erie. In the wake of these initiatives, the question uppermost in many minds is whether such legislative devices will prove to have teeth in the courtroom. For instance, will nature be able to sue humans for the damage they inflict?
* Primary intent of New Zealand’s statutes is to address long-standing injustice. They arise from the truth-and-reconciliation journey my country has been making during the past 40 years, seeking to remedy a history of broken promises to Maori. Successive governments (known in constitutional shorthand as “the Crown”) have breached the Treaty of Waitangi, the nation’s founding document, almost since the year it was signed.
* The legal framework flows naturally from the recognition of the river as a person and an ancestor. In families, we tend not to focus on rights but on mutual obligations. That nature is family is central to Maori cosmology. They see the living world as an extended relationship network, in which humans are neither superior nor inferior to any other life form. All are linked by shared descent from Earth and sky.
* “I am the river, the river is me” - Te Awa Tupua is an inclusive proposition. Considering where we are globally, environmentally, if my child is standing on a cliff about to fall off, does it matter if I get to grab that child to stop them falling or someone else does? We have a saying: The small streams and the large streams flow together. That’s a metaphor for communities. We’re all responsible for the welfare of the river.”

## Michael Coyle – Indigenous Legal Orders in Canada

* Relational focus: understanding Indigenous law requires sensitivity to the distinct place of relationships within individual indigenous societies
* Accountability and stewardship as part of harmonious relationships
* Indigenous legal orders in Canada are diverse
	+ Oral histories, metaphysical and spiritual beliefs, customary law, deliberative processes, shared stories, ritual feasts, talking circles, etc
	+ Central focus not on individual rights, but on maintaining harmonious relationships
* When studying indigenous legal principles sometimes run the risk they’ll be distorted thru translating them into legal concepts already recognized by the state
	+ Indigenous legal orders continue to exist and evolve
* SCC + Indigenous conceptions of land
	+ Alienating/selling is extremely limited in context of Aboriginal Title; can only alienate back to the Crown
	+ Exclusion is also antithetical – community-based

## II. Defining Common Law “Property” in Different Contexts

### 1. Historical Claims and Contemporary Themes

#### Victoria Park Racing and Recreation Grounds Co Ltd v Taylor

à The right to exclude someone from broadcasting a description of the occurrences they can see upon some else’s land is not given by the law

|  |  |
| --- | --- |
| Facts | P owned racecourse on private land, D owned adjoining piece of land on which he erected a platform. A second D stood on the platform and commented on the races by phone to the broadcasted on the radio. P claimed that he was losing profits bc of popularity of these transmissions and brought an action against D, suing for an injunction |
| Issues | What rights does the owner of a property have in excluding those in plain sight from a spectacle taking place on their land? |
| Held | Judgement for D, **no precedent to support P’s claim. Preferred for legislature to define rights and obligations in new context of broadcasting** |
| Reasoning | * Labour theory vs. free person theory and discovery theory
* Defendant has a right to do what he wants on his own land so long as it isn’t harmful or a nuisance
* Although the defendant may be taking profitable gains away from the plaintiff there is no law against it
* Just because you are damaged financially does not mean an action lies
* If the plaintiff desires to stop the D, he could simply build a higher fence
* The natural rights of the occupier do not include freedom from the view and inspection of neighbouring occupiers
* Courts of equity have not protected intangible elements of value flowing from a business or undertaking the use of ingenuity, knowledge, skill, or labour

Dissent – Rich J.* A man has no absolute right to act as he wishes on his own land
* D had no right to extend the normal use of his land for the purposes of observing the P’s entertainment. One of the prime purposes of occupation of land is the pursuit of profitable enterprises for which the exclusion of others is necessary
* Focused on need for flexibility in the common law – cited D v S “[t]he categories of nuisance are not closed”
 |

#### a) Different Approaches to the Legal Category of “Nuisance”

* Litigated prior to evolution of modern comms industry
* P’s claim must typically fall within a defined legal category in order to succeed
	+ In this case nuisance = interference with the P’s “use and enjoyment” of his land
* “Priority of development”: some1 with prior deve right (who had dev the land for industrial purposes) could arrest a future conflicting use on the part of an adjoining owner

#### b) Private Property, Common Property, and State Property

* In *VP*, rejected P’s argument that by spending $ he’d created a “quasi-property” spectacle (intangible)
* **Common property = avail to all; private property = owner may exclude others from its enjoyment**. By concluding P’s spectacle wasn’t his private property, racecourse appeared to become private property (Gray, “Property in Thin Air”
* **Concept of common property creates entitlement for individuals enforced by the state**
* **State property: parks often owned by gov, similar to private property bc state my grant or withhold access to it**

#### c) The Right to Privacy

* Another unsuccessful P arg in *VP* = D’s actions interfered with their right of privacy
* Dissent: cases that had decided “systematic watching” on part of trade union activists who were picketing an employer (without trespassing on employer’s property\_ constituted nuisance

#### d) Property Claims: Courts vs Legislatures

##### *International News Service v Associated Press* [USSC 1918] (INS v AP)

à While there is property in the literary aspects of a news story, there is **no property in the facts except as between competitors (facts are public interest)**. No copyright in info, facts, or ideas – only in original expression of info, facts, ideas (facts/expression dichotomy). However, there is **quasi-property** to the extent necessary to **prevent unfair competition.**

|  |  |
| --- | --- |
| Facts | P sought injunction to restrict certain activities on part of its competitor in news-gathering biz. Ppl relied almost exclusively on newspapers for info (news reports during WWI). The appellate court upheld an injunction against the appellant on grounds that the appellant’s actions constituted unfair competition in trade. |
| Issues | AP wished to establish concept of “property in news”, sued in part to prevent INS’ practice of “copying” news from early editions of AP newspapers on Eastern Seaboard of USA and then selling to INS cx on West Coast |
| Held | Injunction upheld. |
| Reasoning | * Majority
	+ Reasoning largely economic, centered around the need to sustain incentives to engage in news-making
	+ Court held that there is a **quasi-property interest** in news due to the commercial realities of its production (**property just between these 2 parties and of limited duration)**
	+ **Notion of *unfair competition* doesn’t exist in Canada or some other Commonwealth countries**
	+ AP's labour is a valuable commodity, and INS is benefiting from it for free
	+ Additionally each party is under a duty to conduct its own business so as not to unnecessarily or unfairly injure that of the other party.
	+ It is necessary to distinguish the substance of the information in news from the particular form it is communicated in; the facts themselves contain no property interest, however the expression of the idea does give rights to the owner.
* Dissent: Brandeis J (Dixon relied on this in *Victoria Park*)
	+ Right to exclude -- private property = absolute. Public property = qualified.
	+ Fact that a product of the mind has cost its producer money and labour + that others pay for its value is not enough to ensure it the right to exclude
	+ General rule of law = noblest of human productions (knowledge, ideas, truths ascertained, conceptions) become, after voluntary communication others, “free as the air to common use”
	+ Creations which are recognized as property by the common law = literary, dramatic, musical, and other artistic creations. Also protected by copyright
	+ Extending this rule would curtail free use of knowledge and ideas
	+ More appropriate for legislatures to create “property” in context of societal changes; judges not well-placed to consider such claims
 |

### 2. “Property” in the Context of Scientific Innovation: Human Bodies, Legislative Responses

#### Moore v Regents of the University of California [Sup Ct 1990]

à Patent/cell line case. No proprietary interest in his own body.

|  |  |
| --- | --- |
| Facts | Organ tissue excised from Moore’s body as part of medical treatment for leukemia. Later used to dev a new cell line bc his cells rich in immune system chemicals, which were commercially valuable. Docs obtained a patent for this cell line, assigned it to the uni.  |
| Issues | Moore sued uni: one claim on tort of conversion, action dependent on conclusion that Moore had a proprietary interest in his bodily tissues |
| Held | For the D. |
| Reasoning | No proprietary interest in his body  |

#### Jonathan Yearworth & Ors v North Bristol NHS Trust [2009 UK]

à “The men had ownership of their sperm for the **purposes** of [their claims]”

|  |  |
| --- | --- |
| Facts | 6 men stored their own semen (bc undergoing chemo and feared infertility) sued for negligent damage to property when their frozen samples thawed in storage facility |
| Issues | Ps had to overcome longstanding common law position that a human body and substances generated by it gen incapable of being owned |
| Held | For the Ps |
| Reasoning | * Necessary for common law to keep up w scientific advancements.
* In context of a negligence claim, sperm stored by Ps was property bc 1. **Being stored for benefit and future use of Ps** 2. Generated by their bodies 3. Altho storage facility might have duties re the sperm that could conflict with the wishes of the Ps, no one other than each P had rights in the sperm he had produced
 |

#### JCM v ANA [2012 BCSC]

à Bc sperm had been **purchased or gifted, it qualified as property**

|  |  |
| --- | --- |
| Facts | Parties are lesbians, bought sperm from US donor which they used to have two kids genetically related, however quantity remained unused. Relationship between parties ended. P wanted to have another kid with new partner using unused sperm. D refused to be bought out, and wanted excess sperm destroyed. |
| Issues | Is sperm a commodity that can be owned?  |
| Held | Judgement for P. Sperm should be split between the parties as per their separation agreement.  |
| Reasoning | * Sperm considered property in this circumstance
* Law is developing ownership principles on new topics (i.e. aborted fetuses, removed tumours or limbs, genetically created animals, etc.) – law of personal property is changing
* **Didn’t consider D’s moral arguments**. Clear that the sperm has been treated by property by every1 involved in the transaction: purchased, made use of to their benefit.
 |

#### Lam v University of British Columbia [2015 BCCA]

à Sperm recognized as property under **statute**

|  |  |
| --- | --- |
| Facts | Class action – claimants diagnosed w cancer, stored sperm in a UBC lab freezer before proceeding w radiation treatment. Freezer malfunctioned, sperm inadvertently damaged/destroyed |
| Issues | Is sperm property? |
| Held | For the Ps at trial and appeal level  |
| Reasoning | * Trial judge: sperm property, therefore uni liable for freezer malfunctioning
* Appeal court: reviewed provisions of the *Warehouse Receipt Act*, also agreed it was appropriate to consider both a “strictly literal approach” as well as a purposive/contextual analysis in reviewing the statute
* Uni eventually agreed to compensate 100s of cancer patients, settlement $6.2m
 |

Legislative Responses in Canada

* Creation of the federal Royal Commission on New Reproductive Technologies
* Its report *Proceed with Care* 1993 adopted broad “ethic of care” and 8 guiding principles: individual autonomy, equality, respect for human life and dignity, protection of the vulnerable, non-commercialization of reproduction, appropriate use of resources, accountability, and balancing individual and collective interests
* Fed gov enacted *Assisted Human Reproduction Act* in 2003: s 7 says not allowed to purchase, offer to purchase, or advertiser purchase of sperm or ova from a donor or person acting on behalf of a donor
	+ Several provisions held to be *ultra vires* fed jurisdiction, but s 7 not struck

### 3. Intangible “Property” and a Licence to Fish

#### Saulnier v Royal Bank of Canada

**à Fishing license interest can be characterized as property in context of statutory definition (BIA, NS PPSA)**

|  |  |
| --- | --- |
| Facts | Appellant (Saulnier) held licenses to fish for lobster, herring, swordfish, and mackerel. Signed gen security agreement with RBC 1999 – gave them an interest in “all … present and after acquired personal property including … intangibles”. 2004: Saulnier made an assignment in bankruptcy, and trustees in bankruptcy sought to incl the fishing licenses as property (market value $600k+; his debts ~$400k). Saulnier wished to claim his fishing license within limited characterization as a license (permission to enter someone else’s land for a specific purpose) did not constitute a property interest.Trustee in baTJ: If the thing in question has a recognized commercial value, it’s property. NS CA: Fishing licenses allow rights to a thing – some of these rights are transferable, and to the extent this is true fishing licenses are property. |
| Issues | Are the fishing licenses Saulnier holds property? (i.e. can they be sold to pay his debts?) |
| Held | Fishing licenses qualify as property within the scope of s 2 of the BIA  |
| Reasoning | * License = property of the crown, but licensee has beneficial interest in earnings from use of license à **this interest and rights to earnings pass to trustee in bankruptcy of the license holder**
* Definition of property in statutory context considered re overall purpose of the BIA: regulate orderly admin of bankrupt’s affairs, balance between rights of creditors, give the bankrupt a clean break
* Smth being marketable doesn’t make it property
 |

## III. “Private” Property, the Right to Exclude, and “Public” Space: Shopping Centres

P 37

### *Harrison v Carswell*

**à Role of courts is not to create new legislation. Since no exception in trespass for picketers at the time, owner can exclude picketers from property (case has not been expressly overruled)**

|  |  |
| --- | --- |
| Facts | Employee of a tenant of the mall pickets; owner wants to stop picketing-- cites trespass legislation; (n.b. the Manitoba trespass act as part of reading is the modern version-- quite different than at the time of case). Owner generally has right to exclude; thereby duty on others not to trespass-- issue is does the right to exclude, include picketing |
| Issues | Was the picketer trespassing? If so, exception?  |
| Held | Ruled that the owner could remove the picketer.  |
| Reasoning | * Relies *on R v Peters:* at the time, there was no legislative exception for picketers from the right of owners to exclude; **role of courts is not to create new legislation**
* Dickson (Majority): Polo has right to remove picketer, who is guilty of trespass. *Peters* is precedent. At the time, MB legislation had no exception for picketers (it does now).
* Laskin (dissent): Property rights are never absolute; they must **be balanced against the rights of the other party**. Distinguished this case from *Peters* because Peters wasn’t an employee picketing an employer. *Peters* was about picketing, but it wasn’t about labour. Laskin argued rule of trespass must be adopted to changing social situations. Found in favour of picketer (not guilty of trespass).
* Labour law perspective: right to picket near employer
* Also, makes it easier for mall owners to discriminate
 |

* Right to exclude = gets us closer to core of property than other features: sets outer limits on claims of property, but provides no criteria for justifying such claims on behalf of particular individuals
* Sustained assertion of effective control over access creates a proprietary interest
* **Malls: unresolved tension between public and private dimensions**
	+ Victor Gruen = Jewish Socialist who envisaged malls would contain public facilities, build community. As malls became more popular, reflected interests of mall owners and their investors
	+ For private investors, mall was private property and members of public = licensees whose permission to be there could be revoked whenever, for whatever
	+ Malls drew ppl off streets into privatized spaces; closing off public st and sale of public lands to developers

Eaton centre case: post-charter, held for protesters

Committee for the commonwealth

Bhattie

Michelin

## IV. Property Rights and the Charter

### 1. Government-Owned Property: “Private” or “Public”?

#### Committee for the Commonwealth of Canada v Canada

* Complainant (plaintiff) wanted to distribute pamphlets abt its org at Mtl airport . Fed regulations expressly prohibited advertising or solicitation in the airport
* **If public had no right to distribute leaflets or engage in other expressive activity on gov-owned property, there would be little if any opp to exercise their rights of freedom of exp – only those w enough wealth to own land or mass media**
* Some, but not all, gov-owned property is constitutionally open to the public for engaging in expressive activity
* “contemporary crossroads”

### 2. Parks, Protesters, and “Public” Space

#### Batty v Toronto (City)

à The Courts will take into account the **needs of a community as a whole** when ruling on the justification of a government restricting people from protesting in a **public place.**

|  |  |
| --- | --- |
| Facts | Protesters occupy park as part of Occupy Toronto movement. City issued a trespass warning that prevented them from creating shelters and being in the park from midnight to 5:30 am. Protesters say it violates 2 (a) (b) (c) and (d) of Charter.* Staying in park, advocating in a manner they wanted society to change. Tents, invited homeless to stay too
 |
| Issues | Charter violation? |
| Held | No |
| Reasoning | The Charter offers no justification for the Protesters’ act of taking up a large portion of public space for an indefinite period of time. – Does not permit them to take over public space without asking while excluding the rest of the public.Protesters say they never turn people away. The neighborhood and business owners say they have been effected negatively by the occupation.City is still allowing them to gather in the park (just not in the hours listed). They City wants to return the park to the use of all citizens.The City is infringing section 2. It is prescribed by law, it has a pressing in substantial purpose and it is rationally connected. The restrictions of the City are reasonable with the balancing of rights of citizens to use the park.Saved under section 1. |

* Superior Court decision – Brown’s analysis focuses on 2(b) – doesn’t deny all 4 invoked, but fundamentally abt 2(b) bc engaged in peaceable assembly based on conscience, expressing particular political message
	+ Living in the park in such a way that exp a particular political view
* Oakes – eviction supported by statute
	+ 1. Right is infringed.
	+ 2. S.1 analysis – Is the objective pressing and substantial? Yes – Toronto densely populated city, limited open space
	+ 3. Proportionality
		- Is there a rational connection btwn legislation and objective? Yes
		- Minimal impairment (analysis hinges on this) – Yes
		- Allowed to use the park for 19/24 hrs, just can’t live there. Setting up a society without regard for the people who use the park – taking land that would normally be used by other members of the public. Also, setting up a society without regard for infrastructure, zoning, etc
	+ Peace, order, and good government clause – Constitution Act 1867 s.91
		- Charter not intended to conflict with or overturn this provision
* Hamel thinks too much focus on rights of neighbouring property owners (wealthy private property interests)
	+ Bestowing priority to their rights over right of protestors not to be excluded from common property

#### Michelin v Canadian Auto Workers

* BIBENDUM the stoic and rotund

à **The right to freedom of expression was not restricted because the Charter does not confer the right to use private property (including copyright) in the service of freedom of expression. Parody was not a form of "criticism" under s.29.1 of the Copyright Act, and thus not exempted.**

* At the time, fair dealing exception didn’t specify or include parody as legit basis of defense. **It did allow for criticism. Parody was not criticism.** Must read exception clause *narrowly* bc otherwise, it would infringe on complainant’s right to exclude
	+ Copyright materials must be protected more stringently than land bc with land it’s tangible, can be delineated. With IP, this concrete judgement is more difficult – ought to be given at least same protection w right to exclude as land if not more
	+ **Parody as legit fair dealing exception = 2012 change to Copyright Act** (educational materials, research, parody, satire)

|  |  |
| --- | --- |
| Facts | In a union drive in Nova Scotia, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW) produces leaflets, posters, etc. with unauthorized reproductions of the Michelin name and logo (Bibendum: the Michelin Tire Man). Compagnie Générale des Établissements Michelin (Michelin) holds copyrights in both and seeks damages on the bro nn unds of intellectual property rights violations and a permanent injunction against its use. CAW offers a constitutional defend e: if the relevant sections of the Copyright Act prohibit them from using the symbols in an organizing drive, then the sections are unconstitutional restrictions on their freedom of expression protected by s.2(b) of the Charter. |
| Issues | 1. Is parody a form of "criticism" under [s.29.1 of the *Copyright Act*](http://canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec29.1%7C)?
2. Do the relevant sections of the *Copyright Act* violate the freedom of expression guaranteed in [s.2(b) of the *Charter*](http://canlii.org/en/ca/const/const1982.html#freedoms%7C)?
3. Do the works warrant the title "expression"?
 |
| Held | Found guilty of infringement for some of the reproductions; injunction granted and a hearing ordered to determine damages. |
| Reasoning | 1. The court ruled that parody is not a form of criticism under [s.29.1](http://canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec29.1%7C). Found the American precedent unpersuasive and cites a "longstanding trend to deny parody as an exception". Several reasons why American fair use is not the same as our fair dealing (our list is exhaustive, their definition is open-ended, etc.). So, even if parody could be included as fair dealing, the provision requires the source be cited in order for it to qualify.
2. The court held that the defendant’s right to freedom of expression was not restricted because the *Charter*does not confer the right to use priate property (the plaintiff’s copyright) in the service of freedom of expression. Their leaflets, etc. do constitute expression, but not within the sphere of conduct protected by freedom of expression.
3. The court applied a test for infringement: is the act complained of only an act that the copyright owner could do under [s.27(1)](http://canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec27subsec1%7C), including reproduction of original or substantial part of work? The court held that a "substantial part" of Bibendum has been reproduced – even though mental energy has been spent to change it, it does not become an original work.
 |

* Example of **inconsistent pleadings**: defendant’s position = **they don’t substantially reproduce the man**, and then argue even if there has been a reproduction, it’s a parody
	+ Still permissible – vigorous defence in support of client’s interest means u can say things that contradict each other
	+ Wasn’t a substantial change to the character
* First attempt in Canada by any party to argue a **parody** falls under the fair dealing exception

### 3. Rights to Private Property: Common Law and Charter Protections

#### Manitoba Fisheries Ltd v The Queen

à gov created crown corp to take control of fishing industry, took MF’s “goodwill”. Entitled to compensation.

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| --- | --- |
| Facts | * Legislation to ameliorate circumstances of the fishers: creates a crown corporation that will take control of freshwater fish exporting industry
* Primary fishers are Indigenous who tend to not be well-compensated
* Manitoba fisheries sues the gov, SCC ruling = qualifies as expropriation for which Manitoba Fisheries ought to be compensated
* Pre-charter case
* Test for when gov action counts as expropriation, not under any part of the constitution, but under the Expropriation Act
 |
| Issues |  |
| Held | Legislation establishing a Crown corporation to export freshwater fish (as a means of improving the economic benefits to the largely Indigenous fishers) constituted a taking of Manitoba Fisheries’ ‘goodwill’, which meant they were entitled to compensation. |
| Reasoning | Test: a plaintiff seeking to recover would have to showa. That the legislative measure appropriated an identifiable property interest* Gov needs to have the property

b. That the expropriating authority gains the value of the property taken.* decrease value of proprietary interest
* here the gov has the interest bc now the gov is the biggest exporter, previously was MF. The court hold MF lost proprietary interest of goodwill, an intangible interest that corps hold, includes brand, patents, general reputation
* Thru its regulation, gov’s crown corp filled MF’s roles, interfered with their goodwill
* distinction with Kohler act: the coal mine still there, not taken away, but nonetheless a regulatory taking. Here, they did “take” the goodwill
* rarely the case that when gov makes property regulation that they take your title. They regulate use
* The biggest hurdle to satisfying the elements set out in Manitoba Fisheries is b… most regulations on property limit the way the property can be used, limits that rarely create a property interest for the government. As a result, plaintiff’s seeking compensation for legislation that diminishes the value of their proprietary interest are unlikely to succeed.
 |

* This ruling also likely had an impact on the negotiations leading to the introduction of the *Charter*… Specifically, it reinforced the shared concern of the Provinces that enshrining property in the *Charter* would diminish the power conferred by s. 92 (13), especially with a Supreme Court apparently willing to construe ‘takings’ broadly.
* One argument is property isn’t in the Charter bc Saskatchewan NDP gov at the time into being able to expropriate land
* Other argument is none of the provinces wanted to incl property in the *Charter* bc that would diminish their auth under s 92(13)
* Mossman speculates that Manitoba Fisheries was like a wakeup call to the provinces – how far the court seems to be willing to go

#### Mariner Real Estate Ltd v Nova Scotia (Attorney General) [1998]

Gov designating land as beach, made it so the P couldn’t develop the land à The use of a privately-owned beach does not constitute a taking of land in the context of the *Expropriation Act*.

|  |  |
| --- | --- |
| Facts | The plaintiff owned and wanted to develop beach front area on the northern shores of NS. The land was designated a beach under the Beaches Act, meaning the plaintiff could not obtain the permits necessary to proceed with the development.* Gov doesn’t diminish value by determining property as beach
* If some area designated as beach, subject to building restrictions, approvals for health/building permits have to go thru the ministry. They’re denied approval, source of cause of action
* Regulation causes possible obstacle to using the property in the way they want to
* Succeeded at trial: court held that the regulations ‘virtually extinguished’ the plaintiff’s property interests and increased the value of provincially owned land, meaning the plaintiff was entitled to compensation for the lost value.
 |
| Issues | On appeal, the plaintiff’s position was that the regulations amounted to a *de facto* expropriation.  |
| Held | The use of a privately-owned beach does not constitute a taking of land in the context of the *Expropriation Act*. |
| Reasoning | Majority: maintains that since land use regulations can be severely restrictive in Canada, a *de facto* expropriation can only be deemed to have occurred when the regulation confiscates *all* ‘reasonable private uses.’ This regulatory scheme did **not** extinguish all reasonable uses because designating the land as a beach did not make the impossibility of residential dwellings inevitable… that was merely the product of the minister’s decision in this particular instance.* Still have property rights in beach. Just restricted in how rights can be exercised based on regulation, subject to discretion of the minister as to how it could be used
* couldn’t develop bc protecting sand dunes – Cromwell kinda puts the onus on both parties, gov should have done a better job at negotiating, but still not held liable (neither parties considered a way of development that protects the dunes)
* last point is 2nd part of MF test – must be the case that gov appropriated the interest, which they didn’t, not claiming title to it. Just susceptible to minister’s discretion to protect the beach; doesn’t create any ownership interest in the gov
* Further, economic losses owing to regulation are not a taking, the plaintiff failed to show that that all reasonable uses were precluded, and the Province assumed no proprietary interest in the land… so the plaintiff had no grounds to recover.
 |

# Chapter 3: Fundamental Common Law Principles About Property Interests in Land

## I. Introduction: The Historical Context of Land Law in Canada

* 3 sets of laws relating to land in Canada at the time of Euro contact: Indigenous law, common law, civil law
* Mid-18th century: Euro powers and their Indigenous allies were involved in ongoing war in NA: culminated in English supremacy and the *Treaty of Paris* 1763
* King George III also set out guidelines for settlement of Indigenous lands in ***Royal Proclamation* of 1763**
	+ **Central idea of these provisions = ensure no Indigenous lands in America taken by British subjects w/o consent.** Main measures: colonial gov forbidden to grant any unceded Indigenous lands, British subjects forbidden to settle on them, and private individuals forbidden to purchase them. System of public purchases (by the Crown) adopted as official mode of extinguishing Indigenous title
	+ **King asserts ultimate sovereignty**, but acknowledges their **semi-autonomous** status
* Divergence between Indigenous views and those of settler societies (and the Crown) abt impact of *TOP* on title and sovereignty, and significance of treaties signed in 19th and 20th centuries btwn the Crown and Indigenous communities
* **The *Treaty of Niagara* 1764: confirmed Britain’s recognition of Indigenous rights.** More than 2k chiefs and reps of 24 First Nations assembled to discuss principles governing relationship btwn the Crown and Indigenous peoples
* **Civil law** in Quebec provides a system of property law
* **Common law/land law** in Canada has roots in English history

## II. The Doctrine of Tenure

* Set out the general parameters of landholding (holding an interest in land)
* Pyramid: reciprocal obligations

### 1. Tenure as a Landholding “Relationship”

* **Tenures:** different *methods* of landholding (diff according to req *service*)
	+ Individuals and corporations “hold interests” in land of the crown; *no* *outright ownership at common law*
* Statutory reform in 1920 replaced the feudal ladder with arrangements to create free alienation (transfer of property rights) of land
* Initially: pyramid relationship of reciprocal obligation, either mediately or immediately of the crown
	+ After Norman conquest of England in 1066 by William the Conqueror, King William = owner of all land in England
	+ **Feudalism**: private landholders held rights *of* the Crown. This arrangement reflected system of “**tenure**” (to hold)
	+ System of landholding in return for performance of service to feudal superior (king himself or intermediate baron/lord)
	+ Protection of possession of land and articulation of rights in land became major items in jurisdiction of royal courts, which eventually created common law
	+ Very little reform of common law occurred in ON and other common law provinces in Canada
* Doctrine of tenures delineated: services and duties owed within network of feudal relationships, and the valuable “incidents” or privileges attached to tenure
* **Tenures free (formed part of strict feudal network) or unfree (tenants of lowly status, some of whom *adscripti glebae* - could be sold/transferred with the land)**
	+ Tenures of chivalry incl: tenure of knight’s service // tenure of grand sergeant: personal service e.g. bearing of high office at king’s court
	+ Spiritual tenures of “frankalmoign” and “divine service” (ecclesiastical lands held in return for performance of some sacred office)
	+ Tenures in socage: tenant rendered agricultural services to his lord
	+ **Free and common socage**: distinguishes us from tenures of chivalry
* ***Statute Quia Emptores*** 1290: governs modern fee simple transfers held of the Crown
	+ Feudal ladder: adding rungs in the middle = potentially infinite extension of the feudal ladder called subinfeudation
	+ Pref for freedom of alienation: ~*whenever, wherever~*
	+ Alienating land by substitution: alienee of land simply assumed rung on feudal ladder prev occupied by alienator (less cumbersome than subinfeudation)
	+ ***Free transfer of interests/alienability*: tenant could alienate land w/o consent of his lord, prohibited subinfeudation.** **Every conveyance of land = effect of substituting grantee in tenurial position (no new relationship of lord and tenant)**
	+ eliminated sub-infeudation as a way of feudal social climbing to introduce more middle ppl that owe duties to u
* problem: Lords couldn’t identify who owed them tenurial incidents
	+ same problem that was created by sub-infeudation
* To tackle this, courts created common law remainder rules
* **Common law remainder rules are both an attempt to ensure the continuity of seisin; always someone who holds the interest**
	+ **1. No springing interests**: continuity of interest needs to be **immediate**, cant be a big gap (e.g. to D and his heirs 10 yrs from today, or to E and his daughter, interest would spring up upon birth of daughter)
	+ **2. No remainders after a fee simple**. Can only be reversionary interest/possibility of reverter when a condition is violated
		- **Imposing a condition on it**: interest needs to always revert to the grantor
	+ **3. No shifting interests.** **Cannot** **interrupt** an existing estate. Applies only to defeasible conditions, not determinable conditions
		- Estates where it’s determined by conditional language. “*If* the land is no longer farmed”
	+ **4. Interest must vest before or at the exact moment an estate comes to an end**
		- Law student must finish law school before life estate that it’s contingent on comes to an end. Would be naturally destroyed if the person dies
		- Laws of succession kick in if no other plan (if mom dies and daughter doesn’t complete law degree and she isn’t allowed it at all, even if directly from grantor)

### 2. Reform of the Law of Tenures

* Landowners looked for ways to evade incidents (or taxes) attached to the tenure, monarchs looked to plug conveyancing loopholes
* Historically, most imp tenurial incidents = wardship and marriage, and escheat
	+ Wardship permitted monarch to hold lands of a tenant who died leaving heir under 21, entitled to revenues until heir came of age
	+ Related incident = right of monarch to arrange the marriage of the minor heir to a person of the monarch’s choice. Marriage an incident that could be bought and sold
	+ **Escheat** still part of tenurial relationship: holder of fee simple estate dies leaving no blood relatives. Estate returns to feudal superior (now the Crown)

### 3. Tenure in Canada

* ***Tenures Abolition Act* 1660:** all Crown grants in British North America and later Canada made in **free and common socage** (easily marketable tenure, popular with settlers – not knight’s service etc)
* ***Constitutional Act, 1791***divided old province of Quebec into Upper and Lower Canada. *Stated all lands in Upper Canada shall be granted in free and common socage*

#### Tenurial Title vs Allodial Title

* **Allodial title:** ownership of real property independent of any superior lord
	+ USA rejected tenurial system/monarchy after American Revolution – many state constitutions declared all lands considered to be owned outright in allodial ownership
	+ Arguably encourages holder to think in terms of “absolute” rights over land; stark division between public and private spheres (private = min state interference)
	+ Tenurial (arguably) may encourage/reflect less dichotomous view

### 4. “Reception” of English Land Law

* Each province has a “reception date” (Sometimes established by statute, sometimes by common law) **which declares the law of England as of a particular date to be the law of each colonial jurisdiction** (now province or territory)
* Canadian courts refer to decisions of English courts if they find them persuasive
* All statutes dealing w fundamental principles of land law (QE, TAA) considered suitable under reception doctrine. Some provinces like ON re-enacted some of these statutes for convenience in 19th century

### 5. Seisin

**Seisin** denotes the **legal possession of a feudal fiefdom or fee, that is to say an estate in land**. It was used in the form of "the son and heir of X has obtained seisin of his inheritance", and thus is effectively a term **concerned with conveyancing in the feudal era**. The person holding such estate is said to be "seized of it", a phrase which commonly appears in inquisitions post mortem (i.e. "The jurors find that X died seized of the manor of ..."). The monarch alone "owned" all the land of England by his allodial right and all his subjects were merely his tenants under various contracts of feudal tenure.

* Early common law: seisin meant possession. Tenure relied on seisin to establish who was in possession and thus owed duties (and feudal incidents)
* Late Middle Ages: seisin more technical, limited to freehold estates and connected to now obsolete causes of action called “real action”, litigation to regain possession of freeholds of land. Division of real/personal property – “personal action” if “dispossessed”
* Imp in medieval conveyancing: “feoffment with livery of seisin” was the method of transferring an interest in land. Transfer of land “private” conveyance, but state of the title rendered public (particularly bc literacy rates low)
* Seisin = who holds title

## III. The Doctrine of Estates

* Doctrine of estates described the nature of the interest held; set of rights of landholders (those in possession or with a right to future possession) could hold
	+ Length of it
	+ Immediate or future transfer

### 1. The Idea of “Ownership” and “Estates” Contrasted

* Common law did not identify “owner” of the land (tangible), but what “estate” (intangible) in land an owner held – estate defined as a **bundle of rights** delimiting the period during which the holder was entitled to possession
* Created flexibility in designing arrangements for property interests to be held by diff ppl at diff points in time. Immediate or future transfers possible

### 2. Freehold Estates: Fee Simple, Life Estate, and Fee Tail

|  |  |
| --- | --- |
| Leasehold Estate | Freehold Estate |
| * Often created for a defined term
* Lessees do not have seisin
* Today, senators must be “legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage” within their Province worth $4k
 | * Defined by being uncertain in duration
* **FEE SIMPLE**: lasts as long as there are “heirs” (defined broadly) who may inherit the estate. Duration uncertain
* **LIFE ESTATE:** lasts for the holder’s lifetime, date of death uncertain. Not an estate of inheritance
 |

#### Fee Simple

* Largest estate known to law
* *Creation of fee simple*

à O grants to A and her heirs

* + Estate will pass indefinitely to A’s heirs as long as there continues to be heirs
	+ If B dies w/o heirs or will, A’s interest will escheat
	+ **“To A” =** **words of purchase, indicating *who* is receiving an interest under the grant**
	+ **“and her heirs” = words of limitation, indicating *what* estate A is taking**
	+ At common law, the effect of any other words was to create a life estate (smallest freehold estate) only, reflecting idea that land is valuable and crucial to fam honour so wouldn’t be easily given away.
	+ Legislation reversed this presumption for both grants and wills: ***Conveyancing and Law of Property Act* 1990**says “heirs” not needed, “in fee simple works” (not a will, inter vivos); ***Succession Law Reform Act*** **1990** states that w/o words of limitation the devise passes fee simple
* *Duration: QE* guaranteed free alienation, but transferring land by wills not permitted at common law. *Statute of Wills* 1540 changed this
* *Rights conferred*
	+ **Usus**: right to use and possess the land, incl right of management and control
	+ **Fructus**: right to profit from the land by exploiting it directly or leasing it out. Right to whatever income produced from the land
	+ **Abusus**: right to alter the land physically, even to the point of destruction
		- Subject to restraints imposed by nuisance law in tort, harm to neighbours, public law regulations
		- Key part of exploitation of Canada’s natural resources
	+ **Full right of alienation**, whether by sale or gift *inter vivos* or upon death
		- Incl right to create lesser estates (life estates, leases) and “incorporeal hereditaments” (easements, restrictive covenants, and profits à prendre)
* *Law of succession*
	+ If holder has no will, estate descends according to intestate succession
	+ Before = rules of primogeniture (eldest male son inherited; if none, then daughters)
	+ Modern rules for intestate succession in *Succession Law Reform Act*
	+ *Devolution of Estates Act 1886*: all property of deceased person (real or personal) to be treated as a fund and vested in the personal rep of the deceased (executor if will, administrator if not) for payment of the deceased’s debts and distribution among those entitled according to law
	+ *An Act making Better Provisions for Widows of Intestates in Certain Cases* 1895 (extended to widowers in 1960): widow(er) takes $200k off the top in ON – if intestate’s estate is less, they take all and no other takes anything. If surlus above $200k, spouse shares surplus with children (distributive share – shared equally) etc

#### Life Estate

* Lasts for one human life, “life tenant”
* Limited: grantor either retained “**reversion**” in fee simple, or transferred reversion to a third party: “**remainder interest**” (holder = “**remainderperson**”)
* Life estate essentially an income interest, while remainder or reversion is a capital interest
* E.g. Life tenant A possess building, manages it, keeps net rents each year. Responsible for taxes, expenses, etc. B not entitled to any income while A is alive, but remainder interest = capital value of the property. Can sell or mortgage it even prior to A’s death, subject to A’s life estate.
* *Creation of a life estate*
	+ Needs words of limitation: “to B for his life/for his natural life”

à O grants to A for life

* O has reversionary interest when A dies

à O grants to A for life, remainder to B in fee simple

* O = grantor, A = life tenant, B = remainderperson
* If B dies intestate, land escheats to the Crown
* Rights conferred
	+ *Usus* and *fructus* but not full right of *abusus* bc interests of B and sometimes O could be compromised. Law of waste: designed to protect those whose interests follow the life tenant
		- Responsible for current/ongoing expenses relating to their own occupation (municipal taxes, utilities, snow removal, etc)
	+ Waste is a tort that affords reversioner or remainderperson remedy of injunction if such acts are threatened
		- Rarely required today bc successive interests in land normally held in trust
		- *Three types of waste*
		- 1. **Voluntary**: damage capital value of property in a non-trivial way
		- 2. **Permissive**: fails to maintain property in a passive way, e.g. doesn’t repair leaking roof. Life tenant not liable for permissive waste unless instrument creating the estate imposes obligation
		- 3. **Ameliorating**: alters the property for the better. Unlikely remainderperson would be able to show sufficient harm to justify injunction or damages
		- Equitable waste: grantor was permitted to create a life estate that was **“unimpeachable for waste”** so remainderperson wouldn’t have the normal protection. Court of Chancery didn’t allow this clause to permit acts of “wanton, malicious or unconscientious destruction”. Such extreme acts of despoliation = equitable waste.
* **Life Estates *Pur Autre Vie***(for the life of another)
	+ Can alienate by sale or gift, lease the property, mortgage the interest
	+ O to A, and A grants to B. Limited by the length of A’s life
	+ If A survives B, A already alienated all her rights, so rights to life estate during this period can be passed by B’s will or incl in assets if intestate
	+ If A dies first, interest revers back to O

##### *Re Walker* [1924] ONCA

à TEST: When a testator expresses two repugnant intentions, the court must determine *which intention is dominant* and give effect to it, rejecting the subordinate intention as repugnant.

|  |  |
| --- | --- |
| Facts | John Walker died and provided in his will: “I give and devise unto my said wife all my real and personal property…should any portion of my estate remain in the hands of my said wife at the time of her decease undisposed of by her such remainder shall be divided as follows…” . When the widow died, some claimed under the husband’s will for the “undisposed of” portion of the husband’s estate. Claimants under the wife’s will argue that the widow took the husband’s estate absolutely. |
| Issues | Did the husband’s will convey his estate absolutely, or was it a life estate to his wife? |
| Held | Appeal allowed, gift was absolute, claimants under wife’s will successful. |
| Reasoning | TEST: When a testator expresses two repugnant intentions, the court must determine *which intention is dominant* and give effect to it, rejecting the subordinate intention as repugnant.REASONS FOR JUDGMENT:* When a testator gives property to one, intending him to have all the rights incident to ownership, and adds to this a gift over of that which remains *in specie* (in their present form) at his death or at the death of that person, he is endeavouring to do that which is impossible.
	+ His intention is plain but cannot be given effect to. The court must ascertain which part of the testamentary intention prevails (original gift or gift over), and reject the subordinate intention as repugnant.
* **3 scenarios:**
	+ i) gift to the person first named prevails, and the gift over fails as repugnant,
	+ ii) the first named takes a life-estate only, and so the gift over prevails,
	+ iii) the first named takes a life-estate, but is given a power of sale. *(didn’t happen here)*
* In this case, there was a plain attempt to deal with that which remains un-disposed of by the widow, in a manner repugnant to the gift to her. **The gift to her must prevail and the gift over is declared repugnant and void.** She was thus given a fee simple.
* Typically, once you see a clear intention (i.e. full ownership) you use that, and the rest becomes repugnant (especially if you give absolute ownership (which holds) and qualify it after (repugnant)
 |

##### *Re Taylor*, [1982] Sask (Surr. Ct.)

à Where the testator uses plain language to indicate an intention to give a life interest only, that interest is *not enlarged to an absolute interest* because the testator has declared to have the right to encroach on capital. There is nothing in that provision which can displace the clear intention of the testator.

* Encroachment: using and depleting the resource while you’re alive does not give you a fee simple

|  |  |
| --- | --- |
| Facts | Motion by the executors of Kathleen Taylor’s estate to determine the meaning, intent and effect of John Taylor, her husband’s will. It read “I give, devise and bequeath all my real and personal estate of which I may die possessed to my wife, to have and use during her lifetime. Any Estate, of which she may be possessed at the time of her death is to be divided equally between my daughters.” |
| Issues | Does the testatrix take an absolute interest under the will of John Hillyard Taylor or only a life interest?à If the wife took an absolute interest, her estate is divided according to her will; but if she has a life estate, then part will go to the daughters |
| Held | Wife had a life interest with a power to encroach (she could spend and devalue the property as she saw fit) |
| Reasoning | * Counsel argues that an absolute gift should be presumed from the clause because the power to encroach on capital is given to the wife
	+ Since the right to encroach may result in the depletion of the entire estate, it amounts to an absolute interest and the gift over is void.
		- Judge rejected this reasoning – just because they may come to the same result, does not mean they are the same.
* The words used by the testator “during her lifetime” evince a *clear interest to give the donee a life interest* and must be given effect to
* The donee is not given the power of disposition during her lifetime, but has the power to encroach on capital for purposes of her own proper maintenance
* *When intention is clear, must uphold that* unless they’re trying to do something that’s impossible or transgresses public policy, then the gift is void
 |

#### Fee Tail

à O grants to C and the heirs of his body

* Can no longer be created In ON, but still enforceable
* Shortened type of fee simple. Could descend only to particular class of relatives, in this case children/lineal descendant
* If C dies w/o children, no other fam can inherit the estate
* When “heirs of the body” of C end, possession will return to O/O’s executor if deceased
* Effectively inalienable
* Could be refined such that it would only descend to males
* Can still be created in PEI, but abolished elsewhere

#### Consecutive Interests

 *immediate possession*

 *life estate*

à O grants to A for life, remainder to B and his heirs

*present interest, fee simple. possession postponed. interest can be sold or divised, but transferee won’t be entitled to possession until A’s death*

### 3. Variations on Estates

#### Absolute estates and conditions

* Absolute estate: no conditions of any kind attached to it
* Conditions allow creator of estate to control how estate will be used in future, and provide for eventualities that are unknown at the time the estate is created
* A Condition must refer to an event or state of affairs that may or may not ever happen (no certain events, e.g. death)

#### Conditions of Forfeiture

à Specify that if a certain event happens, the grantee will lose the estate which they received by grant *inter vivos* or by will

##### a) Estates Defeasible on Condition Subsequent

O grants Greenacre to C in fee simple, **but if she ceases to farm the land**, I may *re-enter*

* Grantee takes ordinary fee simple subject to premature termination
* Grantor’s interest: right of re-entry
	+ Right of re-entry if C ceases to farm the land: exercised at the grantor’s option (informing C that estate has ended or commencing litigation). Ceasing to farm the land doesn’t automatically terminate C’s estate
* Condition is *external to the estate* to which it is attached

##### b) Determinable Estates

O grants Greenacre to C in fee simple **until** she ceases to farm the land

* Grantee takes modified fee simple
* Grantor’s interest: possibility of reverter
	+ Automatic: on happening of forbidden event, C’s estate ends immediately and FS reverts to grantor
	+ If C doesn’t vacate immediately, considered a tenant at sufferance only who can be evicted in a peremptory fashion
* Determinable limitation *defines the estate* itself; “until she ceases to farm the land” not a condition

##### c) Defeasible and Determinable Estates Contrasted

|  |  |  |
| --- | --- | --- |
|  | Defeasible Estates  | Determinable Estates |
| Grantee takes | Ordinary fee simple subject to premature termination (defeasible on *condition* *subsequent*) | Modified fee simple |
| Grantor’s interest | Right of re-entry. Exercised at grantor’s option; not automatic | Possibility of reverter. Automatic on happening of forbidden event |
| Condition of forfeiture | External to the estate. Added condition, may on its own be struck out as void.  | Defines the estate itself. Entire estate will be struck down if the limitation is void.  |
| Language | Conditional: “on condition that”, “but if”, “provided that” | Durational: “so long as”,” until”, “during”, “while” |

##### *Re Tilbury West Public School Board and Hastie* [1966]

* Court laid out diff between defeasible and determinable estates.
* Rule against perpetuities applies to right of re-entry in a defeasible estate, but not to the possibility of reverter in a determinable estate
* Essential distinction appears to be:
	+ **The determining event in a determinable fee simple itself sets the limit for the estate first granted**
	+ Condition subsequent is an independent clause added to a complete fee simple absolute which operates so as to defeat it
* Creation of a determinable fee: “while”, “during”, “as long as”, “until”
* Words that form a sep clause of defeasance

##### *Re McColgan* [1969]

|  |  |
| --- | --- |
| Facts |  |
| Issues |  |
| Held |  |
| Reasoning |  |

#### Conditions of Eligibility: Estates Subject to Condition Precedent

à Specify that a certain event must happen before a grantee becomes entitled to receive an estate

O Grants to be in fee simple upon being called to the bar.

* Becoming a lawyer = condition precedent to B’s entitlement to the estate (**contingent interest**)
* Conditions precedent associated w future interests, not present
* May be difficult to distinguish from condition subsequent
	+ *Re Down*: When his son Harold turns 30, provided that he stays on the farm, then all the testator’s property was o go to Harold and his brother Stanley in equal shares
	+ Clause abt staying on the farm could be interpreted as either CP or Cs
	+ If CP: once Harold reached 30 and was residing on the farm, he and bro would be entitled to share father’s property absolutely
	+ If CS: Harold and his bro immediately entitled to father’s property, but if Harold should cease to reside on farm, he (and possibly bro) would lose property
	+ Court decided clause was CS, void for uncertainty. Harold 30, he and Stanley entitled to a fee simple absolute

#### Alienability

Determinable and defeasible estates, contingent interests, rights of re-entry, and possibilities of reverter are all alienable (CLPA s 10 made latter 3 alienable, they initially weren’t at common law)

### 4. Limitations on “Private” Powers over Land: The Role of “Public” Interests

#### Traditional Principles Limiting Private Powers Over Land

##### a) Restrictions on alienation

###### *Blackburn v McCallum* [1903 SCC]

à Restraining alienation impermissibly: dispute between lender who took repossession of the farm, and on selling it saw condition on land such that it prohibited son from using it as security in this instance. Here, the purchaser took good title. According to Justice Davies, the general common law rule is that a condition restricting the alienation of a property held in fee simple is normally void. While there are exceptions, this case is not one of them. Meaning the son had a fee simple absolute, as did the lender; hence the purchaser took good title.

|  |  |
| --- | --- |
| Facts | The testator split and devises his farm to his two sons, specifying that neither is permitted to either sell the land or use it as security for a debt for a minimum of 25 years following his death. 9 years later, one of the sons uses the land as security for a loan, then defaults on the loan. The lender takes possession of the farm and sells it. In the result, the court holds that they did not, given the condition in the will prohibiting using the land as security. The purchaser appeals directly to the Supreme Court. |
| Issues | Did the purchaser take good title? |
| Held | The purchaser took good title. According to Justice Davies, the general common law rule is that a condition restricting the alienation of a property held in fee simple is normally void. While there are exceptions, this case is not one of them. Meaning the son had a fee simple absolute, as did the lender; hence the purchaser took good title. |
| Reasoning | * Father conveyed to the son a fee simple interest – conditions can’t be imposed that alter existing categories of estates
* IF it was allowed to stand that he can’t sell it/use as security for loan for 25 yrs, then it would be unlike any other fee simple. **Impermissible restraint on alienation**, condition void. Lender gained good title when took possession of fee simple in response to default on mortgage; power to sell to third party, who has good title.
* Mills J concurring: conditions restricting alienation of a fee simple have been void since S*QE*. Not within the power of any grantor to alter the nature of the estate transferred.
* there are limits to the sorts of partial property interests that can be created; specifically, grantors cannot alter the accepted categories of estates.
* Restrictions on alienation can be ‘partial’, but not ‘substantial’. Partial restrictions include the mode of alienation, limiting the class of persons to whom the land can be sold, or restricting the price of sale.
* Substantial restrictions that have been (more recently) deemed unacceptable by Canadian courts include total restrictions on alienation in perpetuity or for a period of time, limiting alienation to a small group of persons, and limiting sale price using a declining formula

  |
|  |  |

##### b) (Un)Certainty

###### *Sifton v Sifton* [1938]

à Certainty: if a contingent condition subsequent that might defeat a vested estate, it needs to offer a precisely articulated account of the point at which the condition is satisfied, and the estate forfeits.

à When a **devise is ambiguous** as between a condition precedent and a condition subsequent (as it was in this case, since the will lacks conditional language), courts are to prefer early vesting and thereby deem the condition to be **subsequent**.

* Pick whatever one ensures the interest vests: in this case, subsequent

|  |  |
| --- | --- |
| Facts | Trust set up for daughter, and payments are being made for her. The Condition: Payments will be made to her *for so long as* she continues to reside in Canada. The Wording (“for so long as”) is indicative of a determinable limitation, yet court assumes that they’re dealing with a condition subsequent. If courts want to strike something down for invalidity, it just treats it like a condition subsequent. |
| Issues |  |
| Held  | Lord Romer, writing for the Privy Council, held that a provision requiring the beneficiary to ‘reside in Canada’ to receive income from an estate was void for uncertainty.  |
| Reasoning | Standard with respect to condition subsequent: condition must be such that from the moment of its creation, the court can say with reasonable certainty which events specifically will result in forfeiture. The court says that standard wasn’t met with this clause* Clearly, father didn’t mean that daughter couldn’t set foot outside of Canada; nor could he have meant that she could just keep the land and travel all the time (2 extremes)
* But, father gave no guidance as to what would be permissible (as between the 2 extremes)—therefore, condition was found to be invalid for uncertainty. So gift was transformed into an absolute gift—daughter could do whatever she wanted

The Ontario Court of Appeal had deemed the clause to be binding, specifying that the beneficiary of the trust can leave Canada for up to two continuous months at a time twice in one calendar year, and that a departure for eleven or more months would violate the condition, resulting in a forfeiture of those benefits.Lord Romer asserted that this clarification could not be inferred from the requirement to ‘reside in Canada’ without raising more questions of how that requirement is to be interpreted.Notably, when the condition is deemed to be a precedent, Canadian courts apply the certainty requirement less rigidly (see e.g., *re Tuck’s Settlement Trusts* [1978] Ch 49 (CA)).  |

#### Public Policy and Human Rights Discrimination

##### *Re Canada Trust Co and Ontario Human Rights Commission*

à Trust is void bc it discriminates on the grounds of race, religion, and sex. “the trust is couched in terms so at odds with today’s societal values as to make its continued operation in its present for inimical to the public interest”

* Scholarship for white, Christian people of British nationality or parentage, preference to schools that prescribe physical training for female students/naval training for male students, and no more than ¼ of the $ can go to women
* News articles, school complaints, OHRC complaint against the Leonard Foundation alleging the trust contravened the *Human Rights Code*, 1981
* *Re Millar*: public policy “should only be invoked in clear cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds”
* Tarnopolsky JA distinguished “public” trusts from “private” family trusts
	+ Courts may apply trust property cy-près providing they can discern a general charitable intention
	+ **cy-près doctrine is the idea that, where a charitable trust's purposes are impossible or cannot be fulfilled for whatever reason, the funds should be reapplied to purposes as close as possible to the trust's original goals.**
	+ Court found general charitable intention here and allowed trust to be reconstituted without discriminatory directions

##### *Royal Trust Corp of Canada v The University of Western Ontario*

* Dr. Priebe’s will had provided for “awards or bursaries to Caucasian (white) male, single, heterosexual students in scientific studies” and to “hardworking, single, Caucasian white girl who is not a feminist or lesbian” who is in scientific studies (excluding medicine)
* Court relied on Canada Trust Co to declare this clause void as contrary to public policy
* **Not possible to apply cy-près doctrine here bc will also stated that if awards declared void as contrary to public policy, the charitable trust creating them was to be deleted**

##### *Re Ramsden Estate*

* Ramsden created a trust in her will: half her residuary estate should be paid to Board of Governors of the University of PEI for founding scholarships or bursaries for “protestant students” w pref to students intending to enter ministry
* S 3 of *University Act* 1988: uni secular, and s 4(f) says uni can’t accept gifts that are “prejudicial to its non-denominational character”
* **Held that cy-près power could be used to maintain the trust providing that some entity other than the uni could be found to act as trustee.** There were other scholarships wirh religious requirements that weren’t directly administered by the uni

##### *Spence v BMO Trust Co*

* ONCA granted appeal from Gilmore J decision which had set aside will on basis that it violated public policy against racial discrimination
* Father and one daughter immigrated to ON, wife and other daughter in England
* Daughter claimed positive relationship w her father til 2002 when she told him she’s pregnant and child’s father is white
* Changed his will to benefit other daughter and her children who still lived in England (not much contract w them for many yrs)
* Gilmore J: sole reason for Spence changing his will/disinheriting ON daughter = bc her son’s father was white
* Appeal court, Cronk JA: “no one is entitled to receive anything under a testator’s will”
	+ Testator himself clearly expressed motive for omitting bequest to ON daughter in his will: “she has had no communication with me for several years and has shown no interest in me as her father”, so **daughter’s extrinsic evidence not admissible to contradict the testator’s clearly-expressed motive**

### 5. The Rule in Shelley’s Case: A Problem in the Creation of Freehold Estates

**à An attempt to grant a freehold state to A and in the same grant a remainder in fee simple to the heirs of A will fail.**

**The rule: All references to ‘heirs’ in a conveyancing document creating a life estate and identifying ‘the heirs’ as remainderpersons are words of limitation, not words of purchase, meaning the life estate vests immediately as an estate in fee simple.**

“To A for life, remainder to the heirs of A in fee simple” à w/o rule in *Shelley’s Case*, A life estate, A’s heirs remainder in fee simple.

* Where a freehold form of property is transferred in a grant, “to the heirs of” will be words of limitation (define A’s estate) and not words of purchase granting interest to heirs
* **The two estates are thus “merged” in heir, who takes immediate fee simple. Heirs take no interest pursuant to this disposition**

“To A for life, remainder to B for life, remainder to the heirs of A in fee simple”

à A receives a fee simple after the death of B – heirs receive nothing

* **It is a rule of law, not a rule of construction**, meaning it supersedes the intentions of the grantor or testator; so if the grantee of the life estate wants to sell the land, or devise it to someone other than their heirs, they are entitled to do so.
* Not a rule that tells u how to interpret the conveyance; it applies irrespective of the testator’s intentions
* Life estate only, not fee simple
* If the word “heirs” is invoked as a remainder interest, then that reference to heirs is to be construed as words of limitation, not words of purchase
	+ Used to include “and his heirs” at end of conveyance to symbolize possibly infinite existence of a fee simple estate
* Stopped being a thing in England in 1925 bc revised property law completely; still in effect in Canada (not Quebec or Manitoba)
* The likely original explanation of the rule was to prevent avoidance of the feudal incident of relief… a life estate was not subject to the tax, and if the phrase ‘to his heirs’ was construed as words of purchase, then the heirs merely held a contingent future interest for which no relief was owed (until the interests vests)
	+ Conveyancing document intended to avoid a tenural incident: state coming down on ppl trying to avoid paying (similar to tax evasion)
* The effect of the rule would then be that the individual to whom the life estate had been granted would inherit a fee simple estate, meaning they would have to pay the tax.
* Court relies on standard legal norm: presumption of any conveyance is a life estate, not fee simple. Add words of limitation to secure transfer of fee simple

#### Re Rynard (1980) 118 DLR (3d) 530 (CA).

While the rule has not been tested many times in Canada, is was affirmed as ‘good law’ by the Ontario Court of Appeal in *Re Rynard* (1980) 118 DLR (3d) 530 (CA).

* Kennedy Rynard inherited a life estate in a parcel of farmland from his mother, and ‘his heirs’ were designated as the remainderpersons. Kennedy was, as a trustee of his mother’s estate, seeking to have the rule in *Shelley’s Case* applied, whereby his life estate would be recognized as having vested in him as a fee simple absolute.
* Mother prefers other son, not very confident in Kennedy. Doesn’t think he’ll have the ability to retain any of the farmland she inherited from her father, wants him to be able to pass it on to his children
* Keep the land in the family, doesn’t trust he will
* Wants to get life estate converted to absolute fee simple using rule in Shelley’s Case
* **Rynard got a determinable life estate; subject to a condition** (part of the estate) – no right to sell/mortgage land, can’t alienate his life estate
* In the result, Justice Wilson held that the references to ‘his heirs’ in the devise were not to be read as an invocation of the legal meaning of the rule in *Shelley’s Case* because they did not refer to an indefinite line of heirs, but only those living at the time of Kennedy’s death.
	+ Not an absolute fee simple – no way she meant for him to have one
* First step is to determine whether the rule in *Shelley’s Case* does apply, a determination made by appeal to ordinary rules of statutory construction.
* clear language giving priority to clause 5 over clause 4, a clause which shows that the testatrix devised a determinable life estate to Kennedy, establishes that the testatrix did not intend for his interest to vest as a fee simple absolute; so the rule in *Shelley’s Case* doesn’t apply.
* **claim that s. 31 of the *Wills Act* (now s. 27 of the *f*) to understand ‘heirs’ as words of purchase, not words of limitation did not restrict the rule in *Shelley’s Case*.**
	+ rule in Shelley’s Case doesn’t apply bc of smt at the time known as Wills Acts – now Succession Law Reform Act. Phrases as heirs not to be read as words of limitation anymore; but instead words of purchase
* Court of Appeals said that Shelley’s case does apply despite that law, weird bc statute supposed to trump judicial authority. Wilson writing for unanimous court says one of problems at trial was attempt to use s 31 of
* Don’t say heirs or descendants; say children or name the living ones to get around the rule
* Is that an intentional invocation of rule in Shelley’s case?
* According to Ziff and Littman, a random sample of experts in estate law shows the vast majority would interpret ‘remainder to Jill’s heirs’ as words of purchase. Presumption against the rule in Shelley’s case
* presumption is that any references to ‘heirs’ are to be understood as words of purchase, only to be construed as words of limitation if that is expressed clearly in the language of the devise.

Re Swenson Estate (2012) SKQB 540

* *Shelley’s* rule was applied; by referring to the ‘descendants’ of the either beneficiary of the life estate or those of the deceased parents
* The court held that those references weren’t to specific children but rather the entire bloodline, meaning they were words of limitation, meaning the beneficiary inherited the absolute interest in use of the land.

## IV. “Present” and “Future” Interests

### 1. The Language: A Need for Precision

* **Present interest** = one that *is in existence*, even tho entitlement to possession may be postponed
	+ E.g. grant “to A for life, remainder to B in fee simple” à B has a present interest. Owner of the fee simple, subject only to A’s life estate
	+ B may predecease A and so never enjoy personal possession of the land, but may direct by will who is to have the remainder after their death
	+ Same situation with “From O to A for life” with no remainder: O’s reversion is a present interest, and even if A outlives O, O can direct by will who is to have the remainder after their death
* **Future interest** = an interest that is subject to fulfillment of a *contingency*
	+ “To B when he is called to the bar” à B has no entitlement until he fulfils the conditions of being called to the bar. Future/contingent interest
* **Estate vested in interest and in possession**: an estate for which the holder has both the present title *and* the right to possession
	+ From O to A for life à O has estate vested in interest and in possession
* **Estate vested in interest only**: an estate for which the person has a present entitlement, *but* no current right to possession
	+ “to A for life, remainder to B in fee simple” à A has an estate vested in interest and in possession. B has an estate vested in interest only.

### 2. “Vested” and “Contingent” Interests

**A** **vested estate** satisfies two requirements:

1. **It is held by an ascertained person or persons; and**
2. **It is ready to fall into possession forthwith, subject *only* to the ending of one or more prior estates.**

E.g. A grant “to my first daughter to graduate from law school”

* if the grantor no daughter or no daughter currently a law graduate, estate is **contingent** bc the grantee is not yet ascertained. Daughter who hasn’t graduated law school = future interest. Daughter who has = vested estate, waiting for previous estate to end.
* If this remains to be the case, then the interest will *never vest* and there will be a reversion to grantor or his estate *upon the death of the last surviving daughter*
* **An estate that vests in interest is a present interest, but one in which possession is postponed**

e.g. A grant “to A for life, remainder to B in fee simple”

* B has a fee simple remainder that is vested in *interest* but not, so long as A is alive, in *possession*. When A dies, B will assume possession. If B predeceases A, B’s heirs will be able to assume possession on A’s death
* Vesting in *interest* takes place when the grant takes effect, and vesting in *possession* will take place at a later date
* **A’s death is not a condition precedent to the *existence* of B’s interest, only to its vesting in possession**

Vast majority of interests in land are conveyed as estates vested in possession. Main concern = distinctions between interests that are contingent, vested in interest, vested in possession in grands or, more commonly, in wills creating successive interests. In cases of ambiguity, court will prefer a “vesting construction” (sometimes ref to as “early vesting”) that presumes a vested rather than contingent interest was intended (*British Columbia (Public Guardian and Trustee of) V Engen (Litigation Guardian of)* [2009 BCSC])

**A contingent interest arises in one of the three situations**:

1. Where the interest is subject to **fulfilling a condition precedent** before the interest can come into existence
	1. To A for life, then to B in fee simple if she has graduated from medical school
2. Where **the holder is not yet in existence**
	1. To A for life, then to B’s first child in fee simple. (B has no children, interest must be contingent until a child is born)
3. Where **the holder’s identity is unknown**
	1. To A for life, then to A’s widow in fee simple. (identity of A’s widow will not be known until his death)

Significance of characterization of vested and contingent interests

* Interest that is vested both in interest and possession permits holder of the interest to exercise considerable freedom in relation not the land so vested
* An interest vested in interest only may permit holder to transfer the interest by sale or by will, but not to exercise power in relation to the land itself, and never to do so if the interest doesn’t vest in possession

### 3. The Common Law Remainder Rules

* Created by common law courts to meet the needs of feudalism. Designed to ensure contingent interests vested within appropriate time periods, and there were no “gaps” in seisin
* Relevant in 21st century esp re “springing” and “shifting” interests
* Apply only to “legal” interests (not equitable)

Rule 1: A remainder is void unless, when it was created, it was supported by ap articular estate of freehold by the same instrument (no “springing” interests)

Rule 2: A remainder after a fee simple is void.

Rule 3: A remainder is void if it was designed to take effect in possession by defeating a particular estate (no “shifting” interests)

Rule 4: A remainder was void if it did not in fact vest during the continuance of a particular estate or at the moment of its determination. (“wait and see” component)

### 4. Equitable Estates

* Equity conceived as a corrective system of justice

## V. The Modern Trust

### 1. Creating a Trust

* “to the use of A” creates the cestui que use
* **The ‘use upon a use’ was, following the *Tenures Abolition Act*, the mechanism according to which an equitable interest in the land continued to be able to be separated from the legal interest in the land.**

**à language of the trust introduced instead of feoffee/feoffor**

* If u want to create trust where trustee will be an individual, need to use language “unto and to the use of T for the benefit of A” bc that indicates the double use
* T is trustee, A is beneficiary
* Trustee (CQU), beneficiary is second CQU
* Lawyers try to create a use upon a use
	+ From A to T and his heirs for the use of B for the use of C
	+ B holder of the fee simple, but another use for C = CQU
* TAA – officially ends the feudal system. Crown confident to end it bc created a meaningful tax system, akin to income tax; don’t have to call it tenurial systems, wait for ppl to die.
* 1660: courts recognize use on a use
* Usual formulas are “unto and to the use of T in trust for A” or “to the use of T in trust for A”
* Corporations are exempt from the *Statute of Uses*, 1535: thus trust deeds to corporate trustees do not need to use these formulas e.g. “To Royal Trust to the use of Y”
* By contrast with *inter vivos* dispositions, modern testamentary dispositions are governed in most provinces by legislation that deems the “personal representative” of the deceased (executor if there’s a will, administrator if intestacy) to be a trustee of all the deceased’s assets
	+ ON: *Estates Administration Act* 1990
	+ In provinces with such a provision, may be accurate to say that the *Statute of Uses* has, in effect, been “repealed”
* 290: e.g. of conveyance that creates a shifting interest
	+ X grants to T (words of purchase) and his heirs (words of limitation) to the use of w
	+ Executory interests = equitable analogue to contingent interests in the common law. Future interests: they can have conditions attached
	+ Interests can spring up and shift – refer to them as executory bc they haven’t executed yet. Once they execute, the interest vests
	+ Future interest
	+ Future legal executory interest: created as a result of functioning of statute of uses
	+ Non-executory potentially equitable interest: exist bc conveyancing doc was created in such a way that it didn’t prompt attn of the statute of uses
* Defeasible equitable interest; not defeasible common law interest
* Statute of uses: if u try to convey use of land to T and his heirs in the use of A) – T is gone, A becomes holder of fee simple, pay taxes.
* Prior to statute of uses, “to A and heirs for the use of B and heirs” = A legal fee simple, B equitable fee simple. Statute effect = drop A out of grant and move seisin to B: owner in fee simple of both equitable estate and legal estate (process called **executing the use**). A completely written out; B’s interest increased by the addition of A’s
	+ Makes it legally the case that the person who was designated as holder of fee simple (feoffee) eliminated; first user (A CQU) becomes the title holder and the feoffee. B becomes the last remaining CQU
	+ Converts every equitable interest from a use to a fee simple/life estate
	+ Statute that eliminates this is not sufficient to prevent lawyers from trying to get around it lol sneaky
	+ **If u transfer to a corp or active feoffee, statute of uses doesn’t apply.**
		- Banks came into existence to get around statute of uses
		- Active feoffee: e.g. must collect rents from the land to the benefit of the CQU
		- Passive feoffee: just takes seisin and doesn’t have to do anything
		- This creates inequality, also in 1660 doctrine of tenures abolished so the crown doesn’t have a stake in feudal incidents, don’t need to monitor uses as a means of collecting revenue (they did need it when introduced Statute of Uses)
* After 1536, where a use had been raised the Statute executes the use.
	+ O conveyed to “D and heirs for the use of A and heirs, but if A marries B then to the use of C and heirs” à for a split second D has a legal fee simple, and A has an equitable fee simple subject to C’s equitable shifting executory interest in the fee. The Statute executes à D disappears, and A has a legal fee simple subject to legal shifting executory interest in fee simple in C
* Can have legal shifting and springing interests despite legal remainder rules bc when the Statute turns equitable interests into legal interests, they are not common law remainders but legal executory interests
* After 1536, possible to create three kinds of contingent future interests: legal remainders, equitable executory interests, and legal executory interests. Nearly every common law jurisdiction now has wills legislation, whereby no use need to be raised to create springing and shifting executory devises. In inter vivos transfers, one generally has to raise a use in order to bring the SoU and create springing and shifting freeholds

### 2. The Trustee and Beneficiaries

* Assuming the trust is validly created, **trustee has legal title to all the trust property**, w accompanying rights of disposition, management, administration, and possession
	+ Title to the property the trustee holds in trust is totally distinct from title to the trustee’s own property (so if they go bankrupt, assets aren’t avail)
* Beneficiaries have **equitable title**/beneficial title: mainly the right to enjoy the net profits of the trust property in the proportions set out in the trust document
* Typically, beneficiary will not have possession of the property, but the trust doc may permit or direct the trustee to allow possession of the property
* Unlike corp, trust doesn’t have legal personality
* Main duty of trustee **= fiduciary duty** vis a vis the beneficiary that req trustees to always put trustee’s beneficiary’s interests ahead of their own, never allow personal interests to affect their decisions made in capacity as trustees (eg invest trust money in their own company, even if highly profitable)
* Other main duty = act as **a prudent investor** in investment and management of trust assets: arose from common law, also codified in the *Trustee Act*
* If trustee fails, trust beneficiary has personal and proprietary remedies. Trustee below requisite SoC à beneficiary has personal action against them. Dishonestly dealt w property à action in breach of trust. Equitable ownership: beneficiary may follow the property into the hands of any third party who has acquired it

### 3. Ending the Trust

* Normally ends when trust doc specifies it should end
* Beneficiaries can terminate the trust prematurely contrary to trust creator’s intention if: all beneficiaries of a trust are of the age of majority, of sound mind, and have no conditions attached to their interests, they may together demand the trust be ended and that legal title to trust assets being transferred to them in proportions they are entitled under trust assignment (rule in *Saunders v Vautier*)

### 4. Modern Functions of the Trust

* Protecting minors, incapable, vulnerable parties
* Widely used in investment world (most mutual funds and many pension funds secured as trusts)
* Philanthropy (charitable trust)
* Trusts of land previously favoured, now mainly investments
* Trust’s rationale shifted from conserving a particular asset over time (a landed estate) to managing a fund of constantly changing assets (bonds, stocks, mortgages) to derive best possible income (consistnet with risk tolerance) for the beneficiaries

## VI. The Rule Against Perpetuities

The function of the rule against perpetuities is to prevent land from being made inalienable for long periods of time.

* The rule is**: If it is possible that a contingent or executory interest will not vest within the ‘perpetuity period’, the interest is void from the point of its creation. In other words, the ‘vesting event’ must occur within the perpetuity period.**
* Framed negatively – conveyance/that provision of it fails
* Without it, would be conceivable to create conveyancing docs that meant land couldn’t be transferred in perpetuity. Limit on time period in which an interest will vest
* **Interest doesn’t have to vest. If it does, it has to within perpetuity period.**
* **If interest doesn’t vest, it reverts back to the estate**
* **Prevent dead hand control but also protect familial interests.** Each subsequent gen has to make new will, take active measures to ensure it stays in the family

**Two things have to happen:**

1. **Has to be a vesting event**
2. **Identify the perpetuity period**
* If an interest could vest within the perpetuity period, then it’s acceptable. If any possibility at all that the interest could vest outside the perpetuity period, the interest is void *ab initio* (back to the moment the conveyance is conveyed). Rule of remorseless construction – construe the rule remorselessly.
* The **perpetuity period** is an entire generation, plus the period of minority status of the subsequent generation (i.e., a life plus 21 years).
	+ Age of majority of next gen
	+ Figure out who is the life in being + 21 yrs
* The ‘vesting event’ is, in the case of, e.g., a condition precedent, the point at which the condition is fulfilled (e.g., graduating from law school).
* In the case of a defeasible condition subsequent, the interest vests at the point at which the condition is violated (e.g., when the land is no longer farmed).
* there can be no possibility that the relevant event might not vest within the perpetuity period… if that possibility exists then the rule has been violated and the condition is void *ab initio*.
* Identifying the length of the perpetuity period: varies according to each individual grant, a variance based on the ‘lives in being’ at the time of the grant.
	+ Calculate perpetuity in relation to one life in being; one currently existing person. Any specifiable human/set of humans can serve as the ‘life in being’ for a particular grant. Typically their offspring + 21 yrs, one generation.
	+ The ‘life in being’ need not be specified at the time of the grant

E.g. From O to A for life, remainder to A’s eldest son at 21.

* A is the ‘life in being’. Written in this way, there is no possibility that if the interest vests, it vests outside the perpetuity period
	+ NOT a requirement that the interest ACTUALLY vest; instead, it requires that the possibility of the interest vesting must be guaranteed to occur within the period (if the interest doesn’t vest, e.g., A never has a son, then the interest reverts to O’s estate).

E.g., from A to the first of my great-grandchildren to go for a walk with X (X is 40, A has no children).

* X is the life in being, extend past X’s demise 21 yrs
* Fee simple subject to condition precedent
* By the time A has a great grandchild who walks with X – prob not gonna happen by the time X dies
* Doesn’t violate the rule against perpetuities bc X has to be alive/have capacity to walk for condition precedent to be satisfied. If it is satisfied, it will be within the perpetuity period
* *Will* it be satisfied? Prob not, but it could be
* A doesn’t have to be related to X (e.g. making the royal fam life in being – just needs to be someone identifiable)

### 1. What is the Rule Against Perpetuities?

### 2. Problems with the Rule Against Perpetuities

### 3. Statutory Reform

The problems caused by the rule against perpetuities have been partially addressed by statute in Ontario, specifically in the *Perpetuities Act*, RSO 1990.

That statute introduces three notable reforms:

1. **Presumption that a grant is valid under the rule** (i.e., adopt **a ‘wait-and-see’** approach to determining whether the interest will vest within the period).
	* *Does away with remorseless construction*; presumes the grant is good. Has to be established that the grant would vest outside the perpetuity period
	* Positive not negative
2. **Rely on presumptions that acknowledge the impossibility of the ‘fertile octogenarian’/ ‘precocious toddler’**
	* Life in being has to be relevant to *biological capacities* of humans

**c. Impose a uniform period of 40 years on rights of re-entry and the possibility of reverter (or, if there is a life in being, that plus 21 years).**

* + Can choose bc can ensure interest lasts longer (unless that person dies early)
	+ Grant must specify what they’re invoking as a perpetuity period – if not, interests declared void
	+ Time of the grant = when the person dies. Will specify the 40 yrs thing

The problems with this reform are that it is prospective (it only applies to grants after **1966**), and it remains difficult to determine who the ‘life in being’ is, meaning it remains difficult to pinpoint the period.

Getting rid of the rule entirely, however, would allow the possibility that rights of re-entry and executory interests could remain valid for generations.

## VII. The Fundamental Principles of Land Law and Law Reform

|  |  |
| --- | --- |
| Facts |  |
| Issues |  |
| Held |  |
| Reasoning |  |

# Chapter 6: Transferring Interests in Land: Legal and Equitable Interests

501-535

## 1. Contracts and Conveyances in the Sale of Land

At the most basic level, there are two steps involved every time an interest in land is transferred:

i. The parties to the transfer enter into a contract for the purchase and sale of the land (an agreement of purchase and sale).

ii. The interest in land is conveyed from the vendor to the purchaser.

For example, in Ontario, a combination of sections from the *Conveyancing and Law of Property Act* (1990) and the *Registry Act* (1990) hold that both a deed and registration of the interest are necessary to secure a transfer. Typically, the transfer of an interest in land works as follows:

1. The vendor and purchaser agree on the terms of the sale, sign an agreement of purchase and sale
2. the purchaser provides a deposit that serves as consideration for the contract.

(The reciprocal loss of the vendor consists in their being bound not to sell the interest to a third party and to accept the terms of the agreement, e.g., to effect necessary repairs following an inspection or renegotiate the price, etc.…)

* agreement of purchase and sale will also include **a fixed ‘closing’ date**, i.e., the time at which the vendor will execute a deed conveying the interest and the purchaser will pay the balance owing (and, depending on the jurisdiction, the deed will need to be registered to secure the transfer).
* The legal issues that can arise during the process are typically concerned to articulate/identify the rights and duties of the vendor and purchaser in the agreement for purchase and sale, and the remedies available when either party fails to fulfill one or more of the provisions set out therein.

## 2. Conveying the Legal Estate: Requirements of the Statute of Frauds

The *Statute of Frauds* – Introduced in England in 1677, the basic idea was to eliminate oral agreements as a basis for transfers of estates in land to prevent perjury; it required all such agreements be made in writing and signed by the parties.

The Ontario *Statute of Frauds* (1990) sets out a similar set of requirements; **all interests in land (with the exception of a particular kind of lease) must be transferred by means of a written agreement. Agreements of purchase and sale are only enforceable when they are written and signed by both parties.**

* + agreements for purchases and conveyances in writing: so ppl cant lie abt agreements
	+ ppl used it to commit fraud by making oral agreements and say it didn’t happen à court came up withpart performance

## 3. Agreements of Purchase and Sale: Equitable Interests

### i) *Lysaght v Edwards* (1876) and the Remedy of Specific Performance

* As soon as a contract becomes enforceable, **the buyer has an equitable property right and the vendor has a right to the money.** Therefore, buyer is somewhere between a mere trustee and a mortgagee
* Vendor has the right to possession until they get the money. The vendor holds the estate in trust for the buyer

|  |  |
| --- | --- |
| Facts | A man agrees to sell his mansion to another man, but before the transaction is completed he dies. His will leaves the house to his wife, and his heirs want to prevent the sale. Lysaght sought specific performance of the conveyance of real estate given that the agreement for purchase and sale had been signed, the vendor had died prior to the closing date, and the heirs wished to cancel the sale: said he had an equitable interest. |
| Issues | What is the nature of the interest the purchaser holds, and what is the vendor’s relation to the purchaser once the agreement of purchase and sale has been entered into? |
| Held | For the P. Vendor was required to fulfil the specific obligations greed upon in the contract |
| Reasoning | * Vendor becomes a trustee to the benefit of the purchaser until the transfer occurs and the sale closes. vendor has a responsibility not to destroy the property and to take reasonable measures to ensure it’s not destroyed
* Purchaser has an equitable interest in land: courts of equity distinguished not only in terms of what they look at, but also distinct set of damages. Equitable remedies typically not monetary (common law = damages) – they make u do stuff
* Presumed (most likely) that remedy when vendor violates agreement of purchase and sale is specific performance
* Pretty unique to land, not often applicable to transfers of chattels, personalty. Almost never avail for services (would require supervision and follow-up). Realty conceived as ‘unique’: no two parcels of land are identical.
 |

#### a) Semelhago v Parmadevan: Rethinking Specific Performance?

Sherrif of lawnmowing

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| --- | --- |
| Facts | Market change: house worth a lot more etc. 3rd party not given notice: bona fide purchaser for value without notice rebuts presumption of specific performance |
| Issues |  |
| Held |  |
| Reasoning | * Court reviewed principles of damages at common law, and examined whether damages could be a suitable substitute
* Nothing whatever unique or irreplaceable about the houses and lots
 |

à

à adjusts the test for specific performance (in obiter)

* Presumption of specific performance not eliminated, but waters it down – property is no longer as unique as it once was. Alters the burden on the P when seeking specific performance: adds additional burden of establishing the uniqueness of the property to their interests
* Bolstered by court’s subsequent ruling in *Southcott* (2012) – invokes former claim abt uniqueness being necessary factor in P establishing they are entitled to specific performance instead of damages in lieu of SP
* “in lieu” reflects reality that claim awarding damages for in an equitable claim
	+ Occurred during housing market bubble burst
	+ Days b4 closing, Paramadevan offered 120k more than agreed to in agreement of purchase and sale, went thru with the sale. This is not allowed
	+ Prob thinking damages wouldn’t be beyond value of additional $ he got (bad thinking bc court is gonna say the extra $ is how much you owe)
	+ Introduction of Statute of Frauds – ON act is from 1990. Legal requirement that transfer of land must be made in writing, and also registered; no oral conveyances. Prevent fraud – “you never gave me deposit”
	+ What do we do with bad faith actors? What interest in the land does the purchaser hold?
	+ 3rd party not given notice: bona fide purchaser for value without notice rebuts presumption of specific performance
		- Couldn’t have been expected to know Paramadevan was violating agreement of purchase and sale with Semalhago. Presumption for specific performance is rebutted when you have a valid purchaser who had no idea of other agreement; they can’t be held liable, can’t take their estate away from them bc u have no grounds for complaint against them, only original vendor
	+ Vendor is the person against whom damages in lieu of specific performance will be assessed
	+ Here, court said additional 120k went to Semelhago
	+ Controversial in part bc Semelhago was gonna sell his house to fund purchase of Paramadevan’s house, but Semelhago sold his house for extra 110k so technically only out 10k not 120k

#### b) John E Dodge Holdings Ltd v 805062 Ont Ltd: Specific Performance and Land in a Commercial Context

(Canada’s Wonderland) à Property in question was sufficiently unique to give rise to a remedy in specific performance

|  |  |
| --- | --- |
| Facts | D agreed to sell commercial land to P, close to Canada’s wonderland. Imp to purchaser bc wanted to build a hotel. Vendor was in breach of agreement of purchase and sale, purchaser sought specific performance. |
| Issues | Question of uniqueness in a commercial context. Purchaser sought specific performance. |
| Held | Specific performance.  |
| Reasoning | Property has a quality that cannot be readily duplicated elsewhere, and a quality that makes it particularly suitable for the purpose of which it was intended. |

#### c) Marvost v Stokes: Specific Performance and Land in a Residential Context

(Bridle Path) 2011

|  |  |
| --- | --- |
| Facts | * Wealthy immigrants seeking to purchase house on Bridle Path
* D didn’t wanna sell the property anymore, wanted to back out
* D tried to argue not sufficiently unique interests; P brought 28 criteria
 |
| Issues | Court considered the uniqueness requirement in the context of a residential property. |
| Held | For the Ps |
| Reasoning | * Very specific reasons why they wanted it
* Cant replace that particular piece of land
 |

### ii) A Valid Contract

### iii) Agreements of Purchase and Sale and the *Statue of Frauds*

### iv) *Walsh v Lonsdale*: The “Fusion” of Law and Equity

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| --- | --- |
| Facts | Agreement to lease (not a least; “we will enter into a lease”). Lease itself is never signed, but P moves in and starts doing work. Rules about transfer diff bc leasehold quality less than freehold. Landlord tries to alter conditions of the lease, P seeks an action. Agreement to lease is not a lease. This is why it becomes an equitable issue |
| Issues |  |
| Held | Lease you had postulated in agreement to lease is the lease on those terms |
| Reasoning | Lord Jessel MR held that a tenant who took possession of a property based on an agreement to lease, without finalizing the lease, nonetheless held a lease in equity. * We know what terms of lease are in part bc of offer to lease, and also bc the P starts acting in accordance those terms. One of them was to fix up the property in exchange for good deal
* P starts fixing up property, then D says they owe them more $. Detriment = $ and time spent fixing apartment
 |

## 4. Equity and Part Performance: Beyond the Statute of Frauds

* **Part performance** is not a remedy; it’s a means of identifying parties who are trying to rely on the SOF to engage in fraudulent behaviour (not usually what happens)
	+ Relying on part performance as a means of invoking specific performance
	+ P making a claim is saying: we had an oral agreement, and my actions show that there was a contract in place. My actions further caused me a detriment
* Draw **inferences** based on actions of the parties; P in particular
	+ **Actions consistent with contract claimed,** detriment to the plaintiff, and contract claimed must relate specifically to the land
* According to the SCC in *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725, the **part performance relied upon must be unequivocally referable to the contract asserted.** The acts performed must speak for themselves, and must point unmistakably to a contract affecting the ownership or the tenure of the land and to nothing else.

### *Starlite Variety Stores Ltd v Cloverlawn Investments Ltd*

|  |  |
| --- | --- |
| Facts | Series of meetings btwn variety of ppl who may/may not have authority to enter agreement, all drinking (liquid lunch). Oral agreement for lease in a strip mall; written agreement taken by D and never signed by the CEO who had the signing authority. In the interim, P takes actions like buying shelving for stores, hire ppl to draw up plans for store layout. Takes steps to their detriment, concerning the estate in the land, work starts. Mac’s makes a better offer, Cloverlawn leases to Mac’s irrespective of Starlite’s actions. Owing to delay in court proceedings and inability of Starlite to impose an injunction, Mac’s takes possession  |
| Issues | **Starlite brings action seeking specific performance (remedy) owing to part performance (evidence that there was a contract, just not in writing)** |
| Held | Stark J held that the plaintiff is entitled to recover damages in lieu of specific performance, even though the offer to lease agreement had never been signed by the defendant.* **Damages in lieu of specific performance bc Mac’s already took up residency**
* **Monetary payments not enough for part, has to be actions**
 |
| Reasoning | * Normally, transfer of an estate in land has to be written down according to SOF, but can’t let D off the hook w/o liability.
* Paradigmatic example of part performance
 |
|  |  |

*Taylor v Rawana* (1990) 74 OR (2d) 357 (H Ct J)

|  |  |
| --- | --- |
| Facts | P claimed the defendant agreed to sell the land for $56k, with a down payment of 10% over two years. P moved in/took possession and started repairing the building and surround (lawn etc)D claimed the P was merely a tenant and while a sale was discussed, it was never finalized; had it been, the down payment period would’ve been shorter, and the price higher. |
| Issues |  |
| Held | Court concluded P’s actions were a detriment to them, reflection of the oral agreement entered into, directly related to the land  |
| Reasoning | Hinged largely on the court’s finding of fact. Found P to be a more compelling witness |

The Principles of Part Performance

## 5. Equitable Principles: Recent Developments in Part Performance

*Erie Sand and Gravel Limited v Tri-B Acres Inc* 2009 ONCA 709

* Not on exam
* Tri-B appeals a lower court ruling awarding specific performance to Erie Sand in the form of a forced sale of a 54 acre parcel of land in Essex county. In their result, the unanimous Ontario Court of Appeal dismissed the appeal.
* No longer the case that part performance has to be undertaken by the P
* Tri-B has right of first refusal (match any offer): also a future interest in land. When Erie submits its offer, Tri-B’s right kicks in. everyone knew; no issue of any of the parties being w/o notice
* Erie submits an offer, which explicitly says they’ll give all $ upfront, quick closing date, and part of what was worked out during oral negotiations = unless Tri-B’s offer is identical to Erie’s, the seller will sell to Erie not Tri-B
* No written agreement w respect to identical nature of the offer
* Erie would go out of biz bc not that much aggregate in Essex Country

### Hill v Nova Scotia (Attorney General) [1997 SCC]

* + Why did the farmer cross the road

|  |  |
| --- | --- |
| Facts | Province expropriates strip of land that crosses a farm. P argues even tho no signed agreement, Hill has an easement to cross the highway. Easement: proprietary interest that doesn’t include possession. Agreement has to relate to the land: in this case, easement over a highway. Actions unequivocally concerned w making it possible for farmer to get his machinery, livestock, and ppl over the highway |
| Issues | Would have gotten more $ if he let them build the highway, he wanted an easement.  |
| Held |  |
| Reasoning | Farmer has to suffer a detriment: expropriation award would have been higher. Allowed to cross highway for 27 yrs without easement. Detriment: if no one had allowed easement, would have been entitled to greater compensation. Injurious affectionEvidence there was an agreement, didn’t get anything  |