Property Summary – Table of Contents

[Introduction to Real Property Law 2](#_Toc7270280)

[History of Real Property 2](#_Toc7270281)

[Present and Future Interests 3](#_Toc7270282)

[Present Interests (estates in land) 4](#_Toc7270283)

[Future Interests 4](#_Toc7270284)

[Vesting in interest vs vesting in possession 6](#_Toc7270285)

[Words of purchase and words of limitation 7](#_Toc7270286)

[The rule in Shelley’s case 7](#_Toc7270287)

[Doctrine of worthier title 7](#_Toc7270288)

[Waste and allocation 7](#_Toc7270289)

[Equity and the Statute of Uses 8](#_Toc7270290)

[Origin of Equity 8](#_Toc7270291)

[The Rise of the “Use” Device 8](#_Toc7270292)

[Statute of Uses 8](#_Toc7270293)

[Rule Against Perpetuities 9](#_Toc7270294)

[History 9](#_Toc7270295)

[General statement of the rule: 9](#_Toc7270296)

[Fine grain 9](#_Toc7270297)

[Leasehold estates (also see the *reading* notes for this) 10](#_Toc7270298)

[Nature of a lease 10](#_Toc7270299)

[Types of Leases 10](#_Toc7270300)

[Estate for years 10](#_Toc7270301)

[Periodic tenancy 10](#_Toc7270302)

[Tenancy at Will 10](#_Toc7270303)

[Tenancy at Sufferance 11](#_Toc7270304)

[Essential and formal elements of a lease 11](#_Toc7270305)

[Alienability of tenant’s leasehold interests 11](#_Toc7270306)

[Obligations of Landlords and Tenants (see notes for this especially) 12](#_Toc7270307)

[Termination of leasehold interests 12](#_Toc7270308)

[Incorporeal Hereditaments 12](#_Toc7270309)

[Easement 12](#_Toc7270310)

[Profits a prendre 14](#_Toc7270311)

[Airspace and subsurface rights, fixtures, crops, and water 14](#_Toc7270312)

[Airspace 14](#_Toc7270313)

[Below the surface 15](#_Toc7270314)

[Fixtures and Crops 15](#_Toc7270315)

[Water 15](#_Toc7270316)

[Covenants and Equitable Servitudes 16](#_Toc7270317)

[Boundaries 17](#_Toc7270318)

[Lateral Boundaries 17](#_Toc7270319)

[Water boundaries 17](#_Toc7270320)

[Registration and Priorities 18](#_Toc7270321)

[Aboriginal Title and the Crown 19](#_Toc7270322)

[Indigenous Legal Traditions 23](#_Toc7270323)

[Intersection between Intellectual property law and indigenous culture 24](#_Toc7270324)

# Introduction to Real Property Law

* You do not own property; rather you own rights in property (e.g. fee simple)
	+ Technically the Crown owns the property
* Real property entails land and things affixed to land (e.g. buildings) 🡪 not moveable property
* Constitutional divide regarding property
	+ s 91(24) CA 1867 Federal jurisdiction over lands reserved for Indians
	+ s 92(13) CA 1867 Provincial jurisdiction over land generally (other than that reserved for Indians); property and civil rights
* Freehold versus non-freehold estates
	+ Freehold 🡪 estate of indefinite duration
	+ Non-freehold 🡪 estate ending on a definite date
	+ Actual length of the estate does not matter (rather it is the definitiveness of the termination date)

## History of Real Property

**NOTE**: *DATES* DO **NOT** MATTER!! JUST HAVE SOME SENSE OF THE IDEA

* In the past, land was treated as the basis of *social structure* (feudal system)
	+ You were who you were based on your relationship to land (highly oriented to status)
* **Tension** exists between *the state* (Crown) being able to control the land (e.g. modern zoning laws, subdivision control, environmental laws), and the ability of *the owner* to control what they want to do with it
	+ Huge tension between allowing the owner to do what they want with their property and the interest of the sovereign regarding the term *remoteness of destiny*
	+ Why the Crown was concerned about the status of real property
		- One of the first forms of tenure was military service (knight service)
			* The tenants would receive a parcel of land in exchange for their military service
		- Money (i.e. property tax)
* **Alienability of property interests**
	+ Grant can refer to both testamentary disposition and *inter vivos*
	+ *Inter vivos* = during the life
	+ *Testamentary* = after death
	+ Escheat 🡪 if you die still owning your property and have not left a will and do not have any heirs, then there is no escheat to the state and the government will claim it
* William the Conqueror: became lords of all the realm (all of the lands) 🡪 first reference (loosely) to the feudal system
* Fealty = loyalty to the King (promised not to pick up arms against your lord and be loyal to your lord)
	+ You could get a grant from the King in exchange for your fealty
	+ livery of season involved 🡪 you would go out and take a twig and bow down in the grant of land
* **Incidents of tenure**
	+ What you do in return for the interest with respect to the land you have
		- Most commonly knight tenure (military service)
	+ Frankalmoign/ecclesiastical tenure = people use their properties for religious purposes
	+ Socage tenure / ”free and common socage” = rent for residential purposes
		- The catch all residual category
		- After the statute of tenures (1660), this became the form of tenure that was held
		- socage tenants produced food, fuel and cloth, both to sustain themselves and to fulfil their service obligations to their lords; others paid rent as money with the development of a commercial economy
	+ Tenants *in capite*
		- Highest tenant which took land from the King
		- baron received a set of rights and obligations with respect to the land
	+ *Mesne* tenants
		- middle tenants 🡪 could be a long chain of tenants
		- was not easy for Crown to know who took on obligations of tenure; became complicated
	+ Subinfeudation
		- It was not always easy for the state and the Crown to know who took on the obligations of tenure because there were so much subinfeudation
			* Many layers
	+ **Statute of *Quia Emptores*** (1290)
		- This statute eliminated subinfeudation and put in its place substitution
		- So that the chain of title could easily be determined (and who had feudal obligations)
	+ **Transfer of land**
		- Fines
			* tenants could not transfer their rights and obligations with respect to their land without permission of their lord
				+ To obtain permission, tenants paid the lord a feudal incident called a ‘fine’
		- Relief
			* Tenants could not make a will disposing of their real property
			* upon a tenant’s death, before the lord would accept the eldest son of the deceased tenant in his father’s place the son had to pay the lord a sum called a ‘relief’
		- Statute of Wills (1540)
			* Gave tenants the right to pass their property by will
		- Gifts, devises and bequest
			* O may transfer some or all of O’s rights as a gift (without consideration)
			* Transfer of real property affected by a will is called a devise
			* bequest is the term for a transfer of *personal* property affected by a will
			* *conveyance* is a *general* term for a transfer of *real* property
	+ **Statute of Tenures** (1660)
		- prohibited subinfeudation and converted all free tenure into common socage
	+ *Terra nullius* – “nobody’s land”
		- Idea that before the settlers came here the land was *terra nullius* (land deemed to be unoccupied or uninhabited, or alternatively, no existing law (thus not occupied by a modern society))
		- Not true, the indigenous people occupied the land (and had their own legal systems)

# Present and Future Interests

## Present Interests (estates in land)

* Freehold estates
	+ Estates that do not have a definitive termination date
	+ **Three types**:
		- (1) **fee-simple**
			* (1) Fee simple absolute
				+ Not followed by any future interest (indefeasible)
			* (2) Fee simple defeasible
				+ Followed by a future interest
				+ (1) fee simple determinable

Fee simple followed by some condition

If the condition occurs, the fee simple determinable is automatically defeated and the possibility of reverter automatically takes effect

“so long as” or “while”

Creates possibility of reverter or executory interest

* + - * + (2) fee simple subject to condition subsequent

Fee simple followed by some condition as well

If the condition occurs, the grantor must act affirmatively to retake the property

If they do not act, A’s estate continues

“but if”

Creates right of re-entry/power of termination or executory interest

* + - (2) fee-tail
			* No longer allowed (now obsolete) due to the rule against perpetuities
			* Kept power in families
			* Effect was to disable the owner from disposing of the property (in an attempt to tie-up the real property to remain in the family for generations)
			* This was inconsistent with the commercial reality of land development and was ultimately abolished
		- (3) **life estate**
			* For the duration of a person’s life
			* Note: does not need to be the beneficiary’s life (can give it to someone for the entirety of another person’s life)
* Non-freehold estates
	+ Estates that have a definitive termination date
	+ Leasehold estates

## Future Interests

* Interest in the grantor
	+ **Reversion**
		- Future interest created in the grantor when the grantor conveys an estate lesser than the estate they hold
		- The grantor does not need to reserve the future interest expressly
		- E.g. O🡪A for life
			* A has a life estate, O retains a reversion
	+ **Possibility of reverter**
		- Follows a fee simple determinable
		- If the condition occurs, the fee simple determinable is automatically defeated and the possibility of reverter automatically takes effect
		- “so long as” or “while”
		- E.g. O 🡪 A so long as the property is used as an animal shelter
			* A has a fee simple determinable
			* O has a possibility of reverter
		- If the possibility of reverter is transferred to the holder of the fee simple determinable, there will be a merger into a fee simple absolute (rule in Shelley’s case)
	+ **Right of re-entry / power of termination**
		- Follows a fee simple subject to condition subsequent
		- If the condition occurs, the grantor must act affirmatively to retake the property
			* If they do not act, A’s estate continues
		- E.g. O🡪A, but if the property is not used as an animal shelter, then O may re-enter and retake the property
			* A has a fee simple subject to condition subsequent and O has a right of re-entry/power of termination
* Interest in someone other than the grantor
	+ **Remainder**
		- A remainder is a future interest capable of creation over to a grantee that may become a present/possessory estate upon the **natural termination** of the preceding estate
		- Remainder can only follow a life estate or term of years because it cannot cut short the preceding estate
		- Construction between vested and contingent remainders: law favours early vesting
			* If there is ambiguity courts will attempt to ascertain the intention of the grantor. If ascertaining this intention is not possible, courts will tend to favour early vesting
		- (1) **Vested remainder**
			* A vested remainder is created in an ascertainable person and is not subject to a condition precedent
			* There is *no possibility of a break in the continuity of the seisin* at the time of the termination of the supporting estate
			* (1) Indefeasibly vested remainder
				+ O🡪A for life and then to B and his heirs
				+ B has an indefeasibly vested remainder because B is an ascertainable person and there are no conditions attached on the remainder
				+ During A's life, B does not hold seisin
				+ B's remainder will follow A's life estate without any possibility of a break
				+ B has an interest that is vested in interest, but not vested in possession
				+ On A’s death, B’s interest also becomes “vested in possession” and B is said to be “seised” of the land.
			* (2) Vested remainder subject to condition subsequent (defeasance)
				+ In this case the holder of the remainder is ascertainable, but the occurrence of a specified condition could subsequently extinguish the remainder
				+ E.g. O 🡪 A for life, then to B and his heirs; but if B dies before A, then to C and her heirs
				+ A has a life estate; B has a vested remainder subject to divestment because the occurrence of his death before the end of A life estate extinguishes B remainder. C's interest would be contingent because it is subject to a condition precedent
			* (3) Vested remainder subject to partial defeasance (subject to open)
				+ the holder of the remainder is a class, for example, “children” or “grandchildren,” but additional members that are not yet ascertainable may be added (and *reduce* the share of the holder’s remainder)
				+ e.g. O 🡪 A for life, then to A’s children issue in equal shares

if A is alive and has two children: A has a life estate; his two children have a vested remainder subject to open, because as long as A is alive, the class of his issue is still open

* + - (2) **Contingent reminder**
			* remainder is contingent if the person is not ascertainable or the remainder is subject to a condition **precedent**
				+ note: no subsequent condition; like the vested remainders may have
				+ A condition precedent is an event that must take place before the remainder becomes a present estate
				+ A contingent remainder is subject to the Rule Against Perpetuities as it raises potential problems with respect to the time of its vesting in interest
			* e.g. O 🡪 A for life, then to B and his heirs if B reaches the age of 18
				+ Assume B is living and 10 years old. While B is an ascertainable person, B must nonetheless satisfy a condition precedent—reaching age 18—before the interest could become possessory
				+ At the time of the grant, we do not know whether B will have met the condition during A's life (therefore it’s not vested but rather contingent)
			* E.g. 2: alternative contingent remainders: O 🡪 A for life, then to B and his heirs if B reaches the age of 18, but if B does not meet the condition at the time of A's death then to C and his heirs
				+ “a fork in the road of seisin”
			* **Impossibility**
				+ If the condition is impossible to perform due to the operation of law, the condition is stricken and the gift over becomes absolute as without the condition
			* **Destructibility of confident remainders**
				+ O🡪A for life, then to the heirs of B
				+ If A dies before B, we cannot ascertain the identity of the holders of the contingent remainder so there will be an abeyance (gap) in seisin
				+ So the remainder is deemed destroyed under the strict common law rules
				+ Note: there are other (less typical) ways that life estate could end prematurely (forfeiture, surrender to holder of remainder), when this occurs, any dependent contingent remainder is swept away with the defunct life estate
	+ **Executory interests**
		- An executory interest, unlike a remainder, is a future interest capable of creation in the grantee that **cuts short** (which divests) the preceding estate
		- Statute of uses made this possible
		- (1) **Springing**
			* A springing executory interest cuts short the interest of the grantor
			* O🡪A and his heirs if he graduates from law school
		- (2) **Shifting**
			* A shifting executory interest cuts short the interest of another grantee
			* O🡪A and his heirs, but if C gets married, then to C and her heirs
			* C’s shifting executory interest will become possessory if she gets married in which case A’s interest is cut short

## Vesting in interest vs vesting in possession

* Vesting in interest 🡪 your interest has vested but you do not necessarily have possession
* Vesting in possession means you have possession of the property

## Words of purchase and words of limitation

* Words of purchase indicate who the recipient is
* Words of limitation indicate the nature of the interest being taken
* At common law, O 🡪 A “and his heirs” were words of limitation
* The old common law rule stated O🡪A created a life estate in A and reversion in O
* But the modern rule regarding the requirement of formal words of limitation has been relaxed (O🡪A creates a fee simple absolute in A)
	+ i.e. O 🡪 A and O 🡪 A and his heirs are equivalent (O does not retain any future interest)

## The rule in Shelley’s case

* Rule of law
* If in a conveyance or a will, a freehold estate is given to a person, and *in the same conveyance or will*, a remainder is limited to the heirs of that person (or to the heirs of the body of that person), then that person takes BOTH the freehold estate AND the remainder
* O🡪A for the life, then to A’s heirs
* This creates a **merger** (life estate + vested remainder = fee simple absolute) which essentially means this: O🡪A
* An intermediate interest will block the merger
	+ E.g. O 🡪 A for life then to B for life, then to A’s heirs

## Doctrine of worthier title

* Rule of construction
	+ Since this is a rule of construction, you may adduce evidence to manifest intention to overrule this rule
* provides that a remainder cannot be created in the *grantor's* heirs (at least not by those words)
	+ important that this is only for the grantor
		- e.g. does not apply for the following: O🡪A for life then to B’s heirs
		- But recall words of limitation
	+ e.g. O🡪A for life, then to O’s heirs
	+ this purports to create a contingent remainder in O’s heirs
	+ But this will be construed as a reversion in favour of O
* This doctrine can be avoided by naming specific people instead of using the phrase “my heirs”

## Waste and allocation

* Relationship between the life tenant and holder of the remainder or reversion
* **Waste**
	+ is an act that causes injury or damage to the land (to the detrimental of the holder of the future interest)
	+ Four types:
		- (1) Permissive Waste: failure to act (i.e. allowing building to fall into disrepair)
		- (2) Ameliorating Waste: changes character of property even if beneficial
		- (3) Voluntary waste: an affirmative action (cutting timber, depleting a mine, demolishing a structure)
		- (4) Equitable waste: a severe form of malicious or wanton destruction
	+ Waste is a question of fact and the terms with regard to what is permitted/required can be controlled by the grantor
* **Allocation**
	+ Who must bear the costs of repair, upkeep, and other expenses (e.g. taxes, insurance)
	+ Detailed allocation rules can be set in the grant, but generally the life tenant is responsible for current expenses

# Equity and the Statute of Uses

## Origin of Equity

* Historically equity developed separately from the traditional common law
* the two systems developed side-by-side
* The common law was rigid:
	+ (1) to seek relief you had to come within a particular form of action or writs
	+ (2) inability to devise land by will until 1640
	+ (3) Strict legal rules restricting remainders (i.e. no gaps in seisin)
* With changing conditions, the inflexibility of the common law courts gave rise to the need for special petitions, which were presented to the Crown and delegated to the Lord Chancellor and later Court of Chancery
* Modern trust law was first developed on the equity side, a creature of the chancery

## The Rise of the “Use” Device

* Why was it used?
	+ (1) Common law was rigid (see above)
		- Prior to the statute of wills, land could not be devised
			* With feofees to uses, the landowners could convey to feoffees to uses to hold the land for uses for their benefit during their life AND then as specified in the will (e.g. children, etc.)
	+ (2) Owners wanted to evade burdens of feudal incidents
		- Usually set up in groups as joint tenants (if one died, the legal estate would pass to the others through survivorship)
			* As the holder of the legal estate, they would be subject to feudal obligations
			* Using *feoffees to uses* avoided those feudal obligations upon inheritance
	+ (3) various formalities avoided through easier process
* Owners turned to equity, especially the device called a “use”
* Instead of O🡪A and his heirs, a use was raised: O🡪F to the use of A and his heirs
	+ F own the legal fee simple (became the *feofees to uses*)
		- *Feofees to uses* were seised (in legal possession of the freehold estate), but would admit to beneficiaries in possession
			* Thus avoiding feudal obligations
	+ A holds an equitable fee simple (became *cestui que use*)
* Could also be split in time (e.g. O🡪F to the use of A for A’s life and then to B and his heirs
	+ F owns legal the legal fee simple (*feofee to uses*)
	+ A holds an equitable life estate and B holds an equitable fee simple absolute
* *Cestui que use* would turn to the court of chancery (courts of equity) for relief in case the *feoffee to uses* breached any duty (because common law courts would not grant relief unless it fell into a specified form)
	+ This was not in rem, but rather in personam because equity acted in personam

## Statute of Uses

* Crown wanted to increase its revenue from feudal incidents because it had fallen
* **Rule**: Where any person is ***seised*** of lands *to the use, confidence or trust* of any ***other*** person or corporation, the *latter person or corporation shall be deemed in lawful seisin, estate and possession* of the lands for the same estate as he or it had in the use confidence or trust
	+ The effect was to make the *cestui que use* the legal owner (by executing the use)
	+ Note: requirement that the person be “seised” so it would not apply to an estate for years (only freehold estates)
* **Exception: Not applicable to active uses**
	+ Statute of uses did not execute active uses
	+ E.g. O🡪F to the use of A and his heirs such that F *and* their heirs shall *collect rents and profits* for the benefit and use of A and his heirs
		- Forerunner for the modern trust
* Statute of uses made *executory interests* possible 🡪 see above for information about this
	+ Because earlier no gaps in seisin were allowed (strict legal rules)

# Rule Against Perpetuities

## History

* Arose because families wanted to tie up land to remain in the family (since land equalled wealth and power)
* this desire to maintain “dead-hand” control impeded modern economic development and the “best use” of the land
	+ Restraints on alienation were in conflict with the realities of modern economies (*Duke of Norfolk’s Case*)
* This was increasingly a problem after
* Remoteness of vesting was an even larger issue after Statute of Uses, which permitted the creation of more flexible future interests)
* Important distinction:
	+ Vesting in interest
		- Interest could be vested in interest even if it would have to wait a long time for the natural termination of various earlier estates
	+ Vesting in possession
		- Not an issue

## General statement of the rule:

* No interest is good unless it **must** *vest*, if at all, *within 21 years* of *some life in being* at time of the creation of the interest
* This rule does ***not*** apply to reversions, possibilities or reverter, or vested remainders
* But applies to contingent remainders and executory interests
* In order to constitute a life in being, the measuring life must be a human alive at the time of creation of the interest
	+ Okay if it’s a group, but must be fully ascertained (cannot increase in numbers sequentially)
	+ If the group is too large, it may not be considered ascertainable
* “must” indicates initial certainty at the time of creation (*not* “may”)

## Fine grain

* RAP strikes out the interest that violates the rule
	+ Does not strike out the entire grant (only the parts (interests) that violate it)
* This creates some practical implications if “so long as” or “while” (limitation language) is used as compared to “but if” (conditional language)
	+ e.g. O🡪A and his heirs but if liquor is sold on the premises, then over to B and his heirs
		- O🡪A and his heirs ~~but if liquor is sold on the premises, then over to B and his heirs~~
		- Fee simple absolute in A and his heirs
	+ e.g. 2: O🡪A and his heirs so long as liquor is not sold on the premises, but if it is, then over to B and his heirs
		- O🡪A and his heirs so long as liquor is not sold on the premises~~, but if it is, then over to B and his heirs~~
		- Fee simple determinable in A and possibility of reverter in O
* See examples in worksheet 4b

# Leasehold estates (also see the *reading* notes for this)

* A leasehold interest gives the tenant the right to possession of property

## Nature of a lease

* Lease is a demise of land under which the right to ***exclusive*** possession is transferred by a landlord to a tenant
* The landlord’s right to possession is suspended during the tenancy but the landlord retains a reversion
	+ the landlord remains “seised” of the land even though possession has been transferred to the tenant
* a tenant’s leasehold is considered an interest in land, a **non-freehold estate** that conveys the right to exclusive possession
* **license** is a form of permission to do something with the land that would otherwise constitute a trespass
	+ A lease differs from a license in that a **lease *is* an interest in land**, **a license *is not***
		- Licence = purely contractual (in personam)
		- Lease = property interest (in rem) and also contractual (in persoanm)
	+ Essential distinction: whether tenant has **exclusive possession**
		- Court will take into account the intention of the parties and surrounding circumstances
	+ A resident can be considered a “lodger”
		- modern residential tenancy acts may include “lodgers”. But, that does not extend to hotel guests, who are clearly not tenants

## Types of Leases

### Estate for years

* Lease exists for a **fixed term**
* Any interval is sufficient, but start and end date (**maximum duration**) must be certain
	+ But, the estate for years can be cut off before the maximum duration end date upon the occurrence of a specified condition (e.g. O 🡪 A for 10 years so long as A cuts the grass once a week)
* e.g. O 🡪 A for 10 years
	+ A has an estate for years (10 years)
	+ O has a reversion

### Periodic tenancy

* Tenant’s leasehold is based on a recurring period of time
* E.g. O 🡪 A on a month to month basis
* Leasehold terminates upon giving notice by either landlord or tenant
* **Notice period** is typically the same as the recurring period **but** at common law, for a yearly periodic tenancy, the notice period is six months
* If Estate for Years expires, leasehold becomes a periodic tenancy if tenant remains in possession and landlord accepts rent in periodic intervals

### Tenancy at Will

* **No set period or terms**
* Continues so long as **both** the landlord and tenant *wish it to* (at will)
* Creation may be **implied** (tenant remains on premises after expiration of previous tenancy with the consent of landlord)
	+ Payment and acceptance of rent may convert this to a periodic tenancy
* Termination may also be by implication

### Tenancy at Sufferance

* Tenant on premises after termination of a tenancy without the consent of the landlord
* No obligation to pay rent, as tenancy is terminated, but **liability for value of use and occupancy to landlord continues**
	+ **Note**: liability for value of use and occupancy of land can be ***higher*** than rent (it is fair market value)
* Technically, not really a tenancy interest as there is no longer a “tenurial relationship”

## Essential and formal elements of a lease

* Formally, the lease should describe the premises to which the tenant is given *exclusive* possession, the date of commencement, and the amount of the rent
* *Estate for years*: maximum duration (even though it may be subject to defeasance upon the occurrence of a condition)
* No gap in seisin because tenant cannot be seisec of the land
* A lease has a right to *exclusive* possession (otherwise it’s likely a licence)

## Alienability of tenant’s leasehold interests

* The general *common law* rule is that the tenant’s interest is alienable and may be *assigned* or *sublet* absent an agreement to the contrary
	+ Limits on right to alienate fall into three categories:
		- Absolute prohibition
		- Right to transfer subject to the consent of the landlord
		- Eight to transfer subject to the consent of the landlord where the landlord’s consent is further conditioned (e.g. cannot be unreasonably withheld)
	+ Note: under Residential Tenancies Act (“RTA”), the leasehold cannot unreasonably withhold consent
* **Assignment** = where the tenant’s full interest in the lease is conveyed to an assignee
	+ An assignee gets the same estate held by the tenant
	+ But an **assignment** **does *not* in itself destroy the contractual relationship between the original tenant and the landlord** (unless there is a novation)
	+ While there is **“privity of estate” between the Landlord and Assigned**, there is **not** “**privity of contract**” unless the parties so indicate (see above, does not destroy contractual relationship between original tenant and landlord)
	+ Rule in *Spencer’s case*: only “**real covenants**” contained in the lease will run with the transfer from tenant to assignee
		- “Real Covenants” must “**touch and concern**” the land
			* real covenants relate *affect the nature and quality of the land* and which would lose most of their value if no longer connected to the land
			* Obligations to repair or pay rent are examples of real covenants that run with the land
		- Covenants of a personal nature do **not** “touch and concern” the land
* **Sublet** = transfer of less than the whole of the tenant’s interest to a sublessee
	+ i.e. can be less in time, less in space, etc.
	+ there is neither privity of contract nor privity of estate between the *landlord* and the *subtenant* as the tenurial relationship between the landlord and original tenant remains in effect

## Obligations of Landlords and Tenants (see notes for this especially)

* May be set by terms in a lease, by implication under the developing common law, by equity, or by statute
* Reference can be made to “usual covenants” which typically includes the covenant of *quiet enjoyment*, covenant to *pay rent*, covenant for the tenant to *keep and deliver up the premises in repair* and covenant to all the *landlord access to view the property*
	+ Varied by modern statutes
* Covenant of **Quiet Enjoyment** (or non-derogation) = peaceful occupation of the premises
	+ right to be protected against substantial interference by landlord
	+ While breach *can* be indirect, it is not directed at noise *per se*, acts of other tenants, or pre-existing defects in the premises prior to tenancy (but this may all trigger the covenant, just not directed at it)
* Rule against derogation means L cannot use retained premises in a way that renders demised premises less fit
* Obligation to repair under common law falls on tenant to act in a **“tenant-like manner”**
	+ Modern statutes provide for additional obligations on the part of the landlord to maintain the fitness
* **rules of waste** applying to life tenancies *apply to tenancies* as well

## Termination of leasehold interests

* at common law, fixed term lease naturally terminates at end of stated term although can end earlier through the happening of a condition
* Periodic tenancy terminates by timely notice
* Covenants in leases have traditionally been thought to be independent (breach of one term does not excuse other party’s performance) but modernly, dependant covenants may be applied under some conditions
	+ Especially for premises unfit for habitation under RTA modernly

# Incorporeal Hereditaments

* Rights in land that constitute less than an estate in land
	+ e.g. O can transfer a lesser interests and retain their same estate, only subject to some limitation
* **incorporeal hereditament** = interest in land, it is capable of being inherited, but there is no exclusive possession (right to use land)
* Two types of incorporeal hereditaments:
	+ (1) profit a prendre
	+ (2) easement
* more than just a mere licence
	+ licences are merely personal rights 🡪 e.g. pertain to the use of land (such as land owner providing permission o car owner to park their car on their land)

## Easement

* **basic characteristics**
	+ capable of being inherited
	+ right of use of real property but **no** right of possession
	+ right of use is granted by a land owner over their land to the owner/occupant of other land
	+ dominant tenement is the land that enjoys the benefit (appurtenant to the dominant tenement)
	+ servient tenement is the land that is subject to the burden (subject to easement)
	+ Easement must accommodate/benefit the dominant tenement
		- Dominant and servient tenements usually adjoin, but they must be close enough that the easement can serve the dominant tenement
		- Note: Some jurisdictions (i.e. in U.S.) also have easements **in gross**
			* no dominant tenement required, and use is attached to a person
	+ Dominant and servient owners must be different
	+ easements can be positive or negative
		- positive
			* allows dominant owner to do something on or to servient land (that without the permission could be a trespass)
			* less than permanent occupation
			* no rights to removal (of crops, trees, minerals, etc. 🡪 that would be a profit a prendre)
		- negative
			* servient owner prevented from using servient land in a certain way
			* e.g. building so as to obstruct sunlight for dominant tenement
	+ can be registered (formally created) or informally created
	+ Easements require certainty
	+ Easements require **no** *positive* obligation on *servient* owner
	+ Easements require No joint occupation (it is a right in interest greater than incorporeal hereditament
* **Creation of easement**
	+ easement can be *created* by grant or reservation (inter vivos or testamentary)
		- expressly or implied
		- implied
			* e.g. part sale of land in single ownership
			* Implied ***grant*** on sale of dominant land
			* Implied ***reservation*** on sale of servient land
			* Need to show:
				+ (1) necessary for reasonable enjoyment
				+ (2) Continuous use
			* Generally to avoid inaccessible lots
	+ Easement *created* by prescription where:
		- Use is open (not clandestine)
		- Hostile (no permission, but not violent)
		- For certain period of time (20 years)
* **Changed purpose/scope of use**
	+ Court will not necessarily restrict the scope and use of a right of way to the uses reasonably required at the date of grant
	+ Change of use can be permitted in some circumstances:
		- If terms of grant are unrestricted (if terms of easement expressly restricts it, cannot change use)
		- If the change not “excessive” / not unreasonable
		- Test is *whether the new use will amount to an imposition of an increased burden on servient owner so as to materially alter their position regarding the land*
	+ E.g. changes in technology (horse-drawn carriages 🡪 cars), intensification through development (single occupancy cottage on dominant tenement is demolished and replaced by mult-unit structure)
	+ Limits on use of easement
		- While change may be accommodated, it cannot be excessive or unreasonable:
			* E.g. excessive excavations or works on right of way, excessive speed over right of way, trucks on residential driveway right of way, Using right of way to access land owned by dominant owner, but which is **not** the dominant land
* **Modification/extinguishment of easement**
	+ Modification
		- By consent / agreement in the same manner as created
		- By the court if clear case argued that better reflects intentions of parties, and no party is significantly disadvantaged
	+ Extinguishment
		- By consent/agreement
		- By surrender
		- Long evidence of disuse and *intention* to abandon proven
		- Where land comes into common ownership (merger); but if one owner acquires lease of other, then merely ‘suspended’ for duration of lease
* ex: right of way, drainage easement, footpath, utility, negative scenic

## Profits a prendre

* similar concept to easement
* dominant tenement **not** required
* Right to enter land of another to harvest natural products
* E.g. a right to sever and take some part of the land; e.g. soil, clay, minerals, oil & gas, produce, timber, hunting/fishing (but ***not* water**)
* Usually sole profit(exclusive), but can be non-exclusive
* May be “appurtenant” to dominant tenement **or** “in gross”
* transferable interest in landand may be registered/formally created as ‘legal’ interest
* there is **no** right to possession

# Airspace and subsurface rights, fixtures, crops, and water

* General information:
* While a transfer of land will typically be very explicit about the surface boundaries of what is being conveyed, there is less certainty about the extent of property rights above and below the surface
* At common law, the rule was **whoever owns the soil holds title all the way up to the heavens and down to the depths of the earth**
	+ Ad coelum principle
	+ This ***view is largely discredited*** especially in light of technological changes
	+ Even though this old doctrine is limited, owners of land still have ***some*** rights in airspace and below the surface

## Airspace

* Ownership of land includes ownership of airspace above the surface
	+ Such interests are severable and can be conveyed separately
* Contrary to old maxim, rights do **not** extend upwards indefinitely
* strike a balance between the rights of landowners’ and society’s needs
	+ conflict between private property and public property
* The owner of land owns the airspace **up to a certain point**
	+ generally that which can be reasonably used
	+ courts use standard of ordinary reasonable use: what can be used or occupied
* **two situations:**
	+ (1) cases involving permanent structural projections into airspace (protrusions across a property boundary)
		- In this case, courts may likely find a trespass where it is an unjustified direct interference with possession
	+ (2) invasions which are transient at a height not likely to interfere with owner’s use
		- In this case, there is less likelihood of a direct and substantial interference
* cases are fact-dependant, the balancing between different interests can be subjective, airspace issues are highly volatile with emerging technologies and subject to specific legislation

## Below the surface

* historically old doctrine ad coelum applied to beneath the surface as well
	+ but limited in modern times
* severable: an owner could carve up the fee simple in the subsurface and separate it from the surface
* Generally the subsurface goes with the fee simple **unless** the grantor *specifically* reserved some the interest
* Crown reservations
	+ Owning title to the subsurface did not automatically mean ownership that lies there (i.e. minerals) because the crown was considered the owner of precious metals and treasure troves at common law
	+ Many Crown grants have expressly reserved mineral rights
* the extent of an ownership interest must take into account and balance the rights of others
	+ Adjacent owners generally have the right to have their land supported (**lateral support**)

## Fixtures and Crops

* **Fixture**: When title to personal property becomes subsumed into the realty
	+ which is attached to the soil becomes part of the soil
* In the case of **fixtures**, the issue is whether personal property has become so mixed in with realty so as to lose its status as separate personal property and become subsumed into the land
	+ A building on the land is generally considered part of the realty
	+ **Test**: is there sufficient attachment to become a fixture
	+ The characterization of property as real or personal is a question of fact
* best practice to specify the intention of the parties in contracts which can specify whether something should be removed upon transfer or whether the property includes a particular item
* deed might describe the boundaries of the land, it likely won’t describe all of the structures
* **Crops** are not considered fixtures even though they are attached to the land because the attachment is temporary
	+ Legal term for crops: emblements
* owner can transfer ownership of the crops before they are harvested
* Generally a transfer of land would include crops still in the field (unless transferred or excluded)
* **Trees** are rooted in the land longer than emblements and are generally considered part of the land
	+ Note that generally a neighbour has the right to cut overhanging branches

## Water

* **Owner of property abutting tidal waterways**
	+ Common law rule was a presumption of ownership extending to average high-water mark
* **Riparian rights**
	+ Land adjoining a river is called riparian land
	+ Common law distinguished between tidal and non-tidal waterways
	+ For non-tidal waterways, the riparian rights were presumed to extend to the bank of the river including the riverbed
	+ Where river flowed between two adjacent properties, each owned to the middle of the river
* **Navigable *v* non-navigable rivers**
	+ Common law presumption in England was that tidal rivers were navigable and non-tidal rivers were non-navigable
	+ In **Canada**, the importance of river travel (including interior rivers beyond where they were tidal) led to an **abandonment of the tidal/non-tidal distinction**
	+ Instead the relevant distinction is between the **navigable /non-navigable**
		- the distinction is not always precise
		- a river can be considered “navigable” even if it is interrupted by a falls or rapids at some point
	+ Relevance of navigable /non-navigable distinction:
		- If the river is non-navigable, then a Crown grant of land will be presumed to grant ownership to the middle of the river. Note: Generally superseded by legislation
* **profit a piscary:** Note that ownership of the riverbed gives the riparian owner the exclusive right to fish over that part
* **usufructuaryryrights**: important to distinguish between rights to use the water and ownership or the water
* Riparian owners have use rights but **do *NOT* own the water itself**.
	+ Have right to extract water for ordinary uses
	+ Have right to take steps to prevent flooding
	+ Distinction between right to use and outright ownership can be elusive

# Covenants and Equitable Servitudes

* A promise made by a landowner to do, or not to do, something in relation to his or her land
* E.g. not to build over a certain height (restrictive covenant), to maintain a drain or hedge (positive covenant)
* Created by contract so enforceable between original parties (but also subject to privity, but can run with the land if it meets certain conditions)
* **Requirements for covenant to run with the land** (bind successors)
	+ (1) the covenant must be **negative**(there are other mechanisms to create enforceable positive obligations, i.e. easements, statutory requirements)
	+ (2) the covenant must **touch and concern**the land
		- Distinct from conferring a personal benefit to the covenantee
		- affects the value of the land or the method of its occupation or enjoyment
		- it must benefit the land
		- Development plan or building scheme may suffice 🡪 i.e. subdivision
	+ (3) Person being bound must have **notice** of restrictions
* Covenants in gross possible (i.e. does not benefit the land of the covenantee) do not run with the land (though they are enforceable as between the parties)
* Positive covenants also possible but do not run with the land (though they are enforceable as between the parties)
* Not enforceable *at common law* by/against successors in title
	+ BUT *restrictive* covenants are *enforceable* in equity against successors in title: ***Tulk v Moxhay***
* Has a dominant tenement (enjoys benefit) and servient tenement (subject to burden)
* Covenantor: person who makes the promise and assumes the obligation (“person bound”)
* Covenantee: person for whose benefit the promise is made (“person entitled”)
* **Negative/restrictive covenant**
	+ Prevents certain use of land
	+ E.g. not to build above a certain height or within certain boundaries, not to keep sheep or cattle on land, not to build more than one residential dwelling, to use land for purposes of a retail business only
	+ Important: **servient owner (covenantor) can comply by doing nothing!**
	+ Enforceable between successors in titleas held in *Tulk v Moxhay* (so long as other requirements are met)
* **Positive covenant**
	+ requires covenantor to do something
	+ e.g. to maintain a fence, to take steps to prevent the servient land from becoming infested with rabbits, to contribute to cost of maintaining drain
	+ Servient owner will have to take some positive actto comply (i.e. expend money or effort to comply)
	+ Not normally enforceable between successors in title
* Tulk v Moxhay
	+ Facts: Tulk sold vacant land to Elms
		- Elms covenanted that he and his assigns would keep and maintain the garden in an “open state” uncovered by any buildings
		- Elm’s land passed to defendant who had notice of the restrictive covenant, but who wanted to build on the land nonetheless
		- Tulk asserts Moxhay is bound by the promise in equity
		- Moxhay asserts he is not bound by the restrictive covenant so he can build on the land
	+ Held: Ultimately, the court granted relief to plaintiff on the basis that it would be “***inequitable***” to allow the covenant to be ignored
* **Modification/extinguishment**
	+ By agreement between the parties
	+ Merger (unity of ownership) of both dominant and servient land
	+ In Modern day through statutory provisions. Criteria can include:
		- a *change* in *nature of extent* of user of land, or in *character* of the neighbourhood
		- continuance would *impede the reasonable user* of the servient tenement in a different way/to a different extent than could have been originally foreseen
		- all occupiers of the benefited (dominant) land *consent*; or
		- right has been *abandoned* or *waived*
		- it will *not substantially injure* the benefited party

# Boundaries

## Lateral Boundaries

* Deed for a plot of land will contain a *legal description* of the property
* In case of ambiguity, the general rule is to try to ascertain the intent of the drafter of the instrument
* order of what **factors** should be held in highest regard in resolving ambiguities: (highest to lowest)
	+ (1) natural boundaries
	+ (2) lines actually drawn and corners actually marked
	+ (3) extend the lines if they are established
	+ (4) measurements
* **Conventional Line Doctrine**: When neighbours are unable to determine their boundary, they may make an agreement under the Conventional Line Doctrine (this may be different from the deed)
	+ Elements:
		- Land owners must be adjoining
		- must have been a dispute or uncertainty about the location of the boundary
		- must have been an **agreement** about where the boundary would be
		- was a recognition of the boundary by subsequent acts
* This doctrine is the nature of an estoppel or protection against detrimental reliance

## Water boundaries

* The boundaries between two properties is often marked by a body of water
	+ Given the dynamic (changing) nature of waterways, there are some special issues that may arise
* English Common Law Rule: the Ad Medium Filum Aquae presumption (to the centre thread of the stream):
	+ The owner of land through which a non-tidal stream flows owns the bed of the stream *unless* it has been reserved
	+ and if the stream forms the boundary between two owners, each owns Ad Medium Filum Aquae (and if same owner on both sides then through merger the stream itself is owned as private property)
* if the course of the water shifts, Land mass may be reduced by erosion or flooding or there may be an addition to the land mass through accretion or receding of water
* **Accretion doctrine**: through a *gradual* deposit of soil or receding of water where the changes are *gradual* and *imperceptable*, the boundary shifts with the waterway --- based on convenience and fairness
	+ **Exception to Accretion doctrine**: here the changes are *sudden*, substantial and recognizable
		- In this case the boundary is not going to shift
		- issue of whether a change was sudden versus gradual is a question of fact

# Registration and Priorities

* registration serves two functions:
	+ (1) determines the ordering of rights
	+ (2) assists a vendor in demonstrating a valid title on sale
* **System of priorities under common law** (there was no general system of registration)
	+ Essentially: legal interest wins if they are bona fide purchaser
	+ (1) there are two legal interests (**legal-legal**)
		- priority is based on chronology (person first in time is preferred by the law)
			* qui prior est tempore, potior est jure
	+ (2) an equitable interest is followed by a legal one (**equitable-legal**)
		- Legal interest gets priority if they are a bona fide purchaser for value of the legal title who buys land without notice of an equitable interest will not be bound by that interest
	+ (3) a legal interest is followed by an equitable one (**legal-equitable**)
		- Legal interest wins out; but equity can give rise to estoppel if fraud
	+ (4) two equitable interests (**equitable-equitable**)
		- the first in time will prevail (both parties will be scrutinized for “clean hands”, aka no fraud)
* **Types of notice**
	+ Actual notice 🡪 real knowledge of the circumstances
	+ Constructive notice 🡪 facts / circumstances that ought to have been appreciated or understood (legal fiction to promote care on the part of the buyer)
	+ Imputed knowledge 🡪 attributed to a principal through an agent acting within the scope of authority
* **Registration systems**
	+ History
		- Livery of seisin before Statute of Uses
		- ‘bargain and sale’ device was employed to avoid formalities of livery of seisin ceremony
			* Raised an equitable interest which was executed by the Statute of Uses (legal title thereby transferred without a formal livery of seisin)
		- Statute of Enrolments provided that a bargain and sale was not effective to pass the legal estate unless it was enrolled in a court-based register
		- Land Transfer Act required registrations in London; then reformed into the Land Registration Act
	+ Two models of land registration systems: (1) **deeds registration** and (2) **title registration**
		- **Deeds registration**
			* creates a record and repository of all documents about a given parcel
			* records become a matter of public record (instead of privately held by the owner)
			* **Three types of systems:** (to determine priorities)
				+ (1) **race** (to register)

Order of registration determines the priorities

Order of actual transaction and presence/absence of notice generally not relevant

* + - * + (2) **notice**

Whether the subsequent transaction was undertaken with notice of the prior one

* + - * + (3) **race-notice** (most common)

Priority to a party who acquires a subsequent interest without notice of the previous one **and** who registers before that prior interest is laced on title

If either element is missing, the first interest will prevail

* + - * Note: ***none*** of these systems purports to guarantee the authenticity of anything contained in the registry (validity of any document is subject to challenge)
		- **Title Registry** (Torrens System)
			* Seeks to certify titles and minimize the need to second-guess the public records as to the validity of the rights listed in register
		- Ontario uses both systems
		- **Effect of registration on Aboriginal land claims:**
			* questions have arisen regarding the status of these interests within the existing land registration systems
			* Bands have sought to file a caveat to record the claim of an Aboriginal right or have filed a notice of pendency of action
		- **Title Insurance**
			* widespread/common use in U.S. and slowly gaining traction in Canada
			* offer policies that seek to complement land titles protections
			* commonly involves protection against defects in title or in title documents (e.g. boundary misdescription)
			* Protects purchasers and mortgagees

# Aboriginal Title and the Crown

* **Royal Proclamation of 1763**
	+ After war between French and English, the British issued the Royal Proclamation of 1763 which reserved a large area in North America for the exclusive use of Aboriginal peoples
	+ States that Aboriginal people would be reserved all lands not ceded by or purchased from them
	+ Only Crown can purchase aboriginal lands
	+ Never conquered First Nations (only French)
	+ Referred to in s 25 CA 1982
	+ What does it mean?
		- Acknowledge that you are here and you get to keep part of it but that you are subordinate (language clearly establishes this)
	+ Why was it drafted this way?
		- British drafted it, not First Nations; This may not reflect what they actually agreed to
	+ Burrows: not British assertion of sovereignty; actually is part of the treaty where Frist Nations had a lot of input that was not reflected in the Royal Proclamation; positive guarantee of self-government in peaceful co-existence with the British
* **Treaty of Niagara**
	+ One of the largest gatherings of European and Indigenous leaders up to that point in time
	+ Written text of RP doesn’t fully reflect consensus of the parties
	+ Representations and promises made, belts of wampum exchanged
	+ Promises of a respect for First Nation’s sovereignty
	+ creation of an alliance
	+ free and open trade and passage, etc.
	+ Burrows: *need to look at subsequent treaties with this in mind*
	+ Relevance today: The Proclamation’s Inclusion in the Constitution
	+ Part of a treaty between First Nations and the Crown which **stands a positive guarantee of self-government**
	+ Still in effect: promises made at Niagara and echoed in the RP never abridged, repealed, or rendered nugatory
* St Catherine’s Milling (no longer good law!)
	+ company cut timber pursuant to federal licence; Ontario said land belonged to them
	+ Their conclusions were overturned later:
		- Royal proclamation affirms aboriginal title but it’s not the source
		- Aboriginal title is title; not merely a personal right
		- Aboriginal title is not dependent on the Crown’s will
* Terra nullius 🡪 idea that land is free (without established legal systems) and open for the taking
	+ This does not apply to Canada (*Tsilhqot’in*)
* Calder
	+ Action for a declaration that the aboriginal title to territory in Northwestern British Columbia had never been lawfully extinguished
	+ court’s acknowledgment that the Royal Proclamation of 1763 is *not* the exclusive source of aboriginal title
	+ Aboriginal title a legal right derived from historic occupation and possession of lands
* Guerin
	+ Band surrendered surplus reserve lands to the Crown for lease to a golf club
	+ Terms obtained by the Crown much less favourable than those approved by the Band
	+ Crown breached fiduciary duty
	+ **Conclusions:**
	+ Indigenous peoples have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown
	+ Their interest does not amount to beneficial ownership nor is its nature completely exhausted by the concept of a personal right
	+ It is a true sui generis interest which they have in the land, which is personal in the sense it cannot be transferred but that upon surrender gives rise to a fiduciary obligation on the part of the Crown
		- General inalienability coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered
	+ The Royal Proclamation is not the sole source of Aboriginal title (citing Calder)
* **Degamuukw**
	+ Claim to 58,000 sq. kms in British Columbia – aboriginal title in the land
	+ Aboriginal title a right in land
	+ Confers the right to use land for a variety of activities, **not** all of which need be aspects of practices, customs, and traditions which are integral to the distinctive cultures of aboriginal societies
	+ **However** the protected uses must not be irreconcilable with the nature of the attachment to the land which forms the basis of the title **\*\*\***
	+ A **sui generis** right which is distinct from a fee simple (cannot be completely explained by reference to either common law rules of real property or to rules of property found in aboriginal legal systems)
	+ Inalienable – Lands held pursuant to Aboriginal Title cannot be sold, transferred, or surrendered to *anyone other than the Crown*
	+ Although Aboriginal title was recognized by the RP, it *arises from the prior occupation of Canada by aboriginal peoples* **\*\*\***
	+ Another source of aboriginal title: the *relationship between the common law and pre-existing systems of aboriginal law*
	+ Held communally
		- It is a collective right to land held by all members of an aboriginal nation (Cannot be held by individual aboriginal persons); Decisions with respect to the land are also made by that community
	+ Aboriginal title at common law is protected by s 35(1)
	+ Aboriginal title versus rights
		- Some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights protected by s 35(1) including site specific rights to engage in certain activities
	+ **Proof of title**
		- The land must have been occupied prior to **sovereignty**
			* Sovereignty more certain than contact
			* Circumstances subsequent to sovereignty may still be relevant
			* MORE INFO ON THIS
		- ***If*** present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation
			* Can use existing occupation as evidence
			* There can disruptions 🡪 no need to establish an unbroken chain
				+ Requires substantial maintenance of connection
			* Nature of occupation can change
				+ As long as it’s consistent with continued use of it for future generations
		- At sovereignty, that occupation must have been **exclusive**
			* Intention and capacity to retain exclusive control
			* May have “Shared exclusivity”
				+ Somewhat flexible approach 🡪 e.g. share with another group, or allow other groups to harvest occasionally, that’s all fine as long as you retain exclusive control
	+ Aboriginal title is not absolute
	+ **Infringements of aboriginal title**
		- 2 part test:
			* (1) Infringement must be in furtherance of a legislative objective that is compelling and substantial
			* (2) the infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples
* **Tsilhqot’in**
	+ Tsilhqot’in Nation, a semi-nomadic grouping of 6 bands living in a remote valley in central BC
	+ BC granted a commercial logging license on their land. Band objected sought a declaration prohibiting commercial logging and a claim for aboriginal title to the land
	+ Held: Appeal allowed, declaration of Aboriginal title over the area requested granted. Declaration that BC breached its duty to consult also granted
	+ Three part test reaffirmed from Delgamuukw
	+ (1) Sufficient occupation pre-sovereignty
		- one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation
		- must show that is historically acted in a way that would communicate to third parties that it held the land for its own purposes
		- Evidence of a strong presence over the land manifesting itself in acts of occupation that could reasonable be interpreted as demonstrating that the land belonged to, was controlled by, or was under exclusive stewardship of the claimant group
		- Aboriginal title not confined to specific village sites or farms
			* Not only intensively occupied areas are sufficient to show aboriginal title
		- Can apply to semi-nomadic group
	+ (2) continuity (where present occupation relied on as proof of occupation pre-sovereignty)
		- Does not need to be unbroken – needs substantial maintenance of connection
			* present occupation must be rooted in pre-sovereignty times
	+ (3) exclusivity
		- Must have intention and capacity to retain exclusive control
		- Other groups being there doesn’t negate it
	+ **Scope of aboriginal title**
		- Reiterates Delgamuukw: Aboriginal title encompasses the right to exclusive use and occupation for a variety of purposes including non traditional purposes
		- At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province
		- Crown title burdened by the pre-existing legal rights of Aboriginal people
		- Terra nullius never applied in Canada
		- Aboriginal title confers ownership rights similar to those associated with fee simple
			* right to decide how land will be used; right to enjoyment and occupancy; right to economic benefits, etc.
			* Also has restrictions – collectively held for succeeding generations; cannot be alienated except to the Crown; interests of future generations
	+ Justifying infringement
		- On way: Get consent
			* If no consent from titleholders, government must justify the infringement
		- Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s 35
		- To justify overriding Aboriginal title:
			* (1) That it discharged its procedural duty to consult and accommodate
				+ arises from honour of the Crown even prior to confirmation of title
				+ The degree of consultation and accommodation required lies on a spectrum.

In general the level of consultation or accommodation proportionate to (1) strength of the claim and to the (2) seriousness of the adverse impact the government action would have on the claimed right

* + - * (2) that its actions were backed by a compelling and substantial objective
				+ the broader public goal asserted by the government must further the goal of reconciliation
			* (3) that the governmental action is consistent with the Crown’s fiduciary obligation to the group
				+ Government must act in a way that respects the fact Aboriginal title is a group interest that inheres in present and future generations
				+ Incursions can’t be justified if they would substantially deprive future generations of the benefit of the land
				+ **Proportionality** in the justification process

Rational connection: incursion necessary o meet the government’s goal

Minimal impairment: Government is going no further than necessary to achieve it

Overall Proportionality: Benefits that may be expected to flow from the goal are not outweighed by adverse effects on the Aboriginal interest

# Indigenous Legal Traditions

* **Legal tradition**: is a set of deeply rooted, historically conditioned attitudes about the *nature of law*, about the *role of law in the society* and the polity, about the *proper organization and operation of a legal system*, and about the *way law is or should be made*, *applied*, *studied*, *perfected*, and *taught*
	+ John Burrows citing John Henry
* Aaron Mills: Revitalizing Indigenous Legal Orders
	+ About indigenous people learning about their own law, not how Canadian law or International law regards them
	+ all systems of law are built on constitutional foundations, and they have a world beneath them that is made of values, principles, and choices (and those choices/principles may differ between people)
	+ Canada’s constitution as a species of liberal constitutionalism
		- Focus on a person’s freedom and the sanctity of the autonomous self (central role of individualism)
		- Also Focuses on: social contract, rule of law, etc.
		- This is fundamentally different from indigenous perspective because indigenous culture is a **communal** culture
	+ Divide in moral status between humans and other natural beings
		- He states alienating perspective of the world around you
		- To separate humans and other natural beings, it justifies a lot of harm (e.g. pollution, global warming, etc.)
		- Whanganui River case: In New Zealand they made a river a legal person
* John Burrows: Indigenous Legal Traditions in Canada
	+ Canada already has a pluralistic society – civil and common law
		- Third pillar: aboriginal law?
	+ (from here not super important)
	+ Aninshinabek
		- Regulating relationships among one another; stewardship over the land; etc.
		- Non-human things: Active nature gives them an agency and role in society (e.g. rocks: relationship with land)
	+ Mi-kmaq
		- Legal traditions are stories
			* What their stories are and how they guide conduct (the law extracted from it)
	+ Iroquouis Confederacy
		- Legal code and law of peace that bind different groups together under confederacy
	+ Two Row Wampum
		- Early example of constitutionalism
	+ Métis
		- Etc.
	+ Thoughts on aboriginal law
		- He thinks that “special treatment” is not appropriate
			* Not out of sympathy, but rather contracts made with indigenous people
		- equality is not the same thing
		- Applicability: who will this apply to?
			* Must start considering indigenous peoples with cultural designations
			* E.g. what percent Metis do you need to be to be Metis? This is flawed; instead look to *community*; they will tell you who their members are
* Whanganui River Case
	+ river in New Zealand was declared a legal person in its own right with all the rights, powers, duties and liabilities of a legal person
	+ New status means if someone abused or harmed it the law would see no differentiation between harming the river or harming the Whanganui iwi Tribe
	+ Founded on two principles:
		- Recognising promoting and protecting the health of and wellbeing of the river
		- Recognising and providing for the mana and relationship of the indigenous Whanganui Iwi in respect of the river.
* Michael Coyle – indigenous legal orders in Canada
	+ revitalizing Indigenous legal traditions can be a vital component to the process of reconciliation
	+ Indigenous relationships with land cannot be translated into common law or civil law property concepts
	+ Sources of indigenous legal orders
		- Stories, languages, etc.
	+ The role of languages in shaping Indigenous Law
		- Underlying language 🡪 principles at play
	+ Literature does not set out universal legal principles, but some general concepts emerge
		- Maintaining harmonious relationships between communities, the land and other life-forms
		- Include accountability to the natural world, a steward-ship life concept (guide it, save it, etc. 🡪 this was reflected in the decision in the SCC cases 🡪 cannot use it in a way that deprives future generations of benefit)
		- Relationship incudes accountability of the natural world
		- Non human entities as kin
		- Extending legal responsibilities to past and future generations
		- Difficult to reconcile with common law conceptions of property

# Intersection between Intellectual property law and indigenous culture

* Main questions:
	+ (1) What are the values/principles at the center of our intellectual property system?
		- Novelty, private ownership, exclusivity, monopoly, assets, bargain, public domain
	+ (2) Why might the current intellectual property system be unable to protect the interests of indigenous peoples and their communities?
* Traditional knowledge
	+ Knowledge systems that developed in indigenous communities prior to European contact
		- They already had done things on animal husbandry, medicine, transportation, governance, etc.
	+ Communicated through stories/orally
	+ Why is IP law not well suited to protect it?
		- Traditional knowledge is collectively owned by the community and IP law is intended to protect individual works
			* Authors are not easily identifiable (shared broadly and the original author is not easily identifiable)
		- Lacks novelty component (existed for many years)
		- Not fixed in a medium
* Case studies
	+ Dene use of spruce gum
		- Used to treat cuts and sores; companies began mass producing it; Indigenous people do not want a statutory monopoly for instance but by commercializing it, it is insulting to them (they see it as a spiritual giving)
	+ Igloolik floe edge boat case
		- Patent law fails to account for indigenous designs
		- Canada developed a patented design for an enhanced boat in conjunction with the indigenous community
			* But some company had already patented it
	+ Zia sun symbol
		- Symbol appropriated for commercial enterprises
		- They are open to others using it but want to control it
* **Takeaway:** These communities want to be meaningfully engaged when these things are used
* Case studies
	+ KTZ Garments
	+ The Maliseet Tapes
		- 70s elders told professor a bunch of stories who tape-recorded it
		- They wanted to publish them but professor had copyright
	+ The Cameron Case
		- Went out west, took stories, put them into picture books
		- Again issue of exploitation and not the community that owns them
* Criticism from Indigenous communities
	+ (1) IP laws represent a profit-based proprietary system protecting the individual, whereas ATK is collectively owned and is not part of an entrepreneurial system
	+ (2) IP laws require novelty, whereas ATK is passed down through generations
	+ (3) IP laws require full disclosure to stimulate “innovation,” whereas ATK is a community held resource that can only be disclosed on community terms
	+ (4) IP laws do not protect “public domain” knowledge
* UNDRIP
	+ Set out individual and collective rights to culture, identity, language, employment, health, etc. for indigenous people
	+ Current government said it would support a bill to implement it
	+ Content of UNDRIP
	+ Article 11
		- (1) the right to maintain, protect and develop the past, present and future manifestations of their culture
		- (2) states shall provide **redress** with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs
	+ Article 33
		- right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions
	+ Article 31
		- (1) also have the right to maintain, control, protect and develop their **intellectual property** over such cultural heritage, traditional knowledge
		- (2) States shall take effective measures to recognize and protect the exercise of these rights