

LAW 130 PROPERTY LAW
DOUGLAS HARRIS
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BY

ILIA VON KORKH

Note: The materials here may not be in the same order as in the syllabus, but are arranged in the way that makes sense to me. I'm sure that you can work this out.

THE MEANING OF PROPERTY

8

The Definitions of Property**Justifications of Property****Yanner v. Eaton [1999] AU HC**

Australian court finds that the nominalist approach to property is most justified.

Harrison v. Carswell [1976] SCC

The owner of a mall has enough possessory interest in common areas of the mall to claim trespass

International News Service v. Associated Press [1921] US

Publishing news releases it into the public domain and relinquishes copyright, but the fact that there is labour invested in publishing the news, makes it a quasi-property, to which the publisher has limited rights.

Victoria Park Racing v. Taylor [1937] AU HC

Court refutes labour theory. Creation of something of value does not, in itself, give the right to exclude.

Moore v. The Regents of UofC [1990] CAL SC

The entrenchment of private property in the field of science will hinder future research by restricting access to appropriate raw materials.

PROPERTY IN CANADA

12

Basic Divisions in Property Law

PROTECTION FOR PRIVATE PROPERTY

13

Statutory Protection**Constitutional Protection****Expropriation****Protection for Private Property in the US****Pennsylvania Coal v. Mahon [1922] US**

Property may not be taken w/o just compensation. It may be regulated to a certain extent, but if regulation goes too far it will be recognized as a taking.

Lucas v. South Carolina Coastal Council [1992] US

There are two categories of regulatory taking that are compensable under Fifth Amendment w/o case-specific inquiry into public interest. Regulations that compel property owner to suffer physical invasion of his property, and the regulation denying all economically beneficial or productive use of land.

PROTECTION FOR PRIVATE PROPERTY IN CANADA

15

Mariner Real Estate Ltd v. Nova Scotia [1999] NSCA

Where land use regulation limits the use of property, the holder must establish that the regulation virtually eliminates or extinguishes the property interest. The loss of economic value is insufficient.

BC v. Tener [1985] SCC

Lack of access to a mineral claim amounts to de facto expropriation

C.P.R. v. City of Vancouver [2006] SCC

De facto expropriation is concerned with the current and on-going economic use of the land - not the future opportunities.

NAFTA And Protection of Private Property**Metalclad Corp v. Unites Mexican States [2000] Arbitration Tribunal**

Regulatory taking protection under NAFTA

BOUNDARIES

17

AIRSPACE AND SUBSURFACE RIGHTS

17

Land Title Act BC*139**141**145***Didow v. Alberta Power Ltd. [1988] ABCA**

The Maxim has no literal effect. Airspace interference by a permanent fixture is a trespass. The landowner is protected from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land.

Edwards v Sims [1929] Kentucky CA

Upholds the Latin Maxim in majority, but has a kick-ass dissenting judgment.

Land Act BC*50***Canadian Law of Mining**

LATERAL BOUNDARIES

19

Land Bound By Land**Robertson v. Wallace [2000] AB QB**

Establishment of the conventional line doctrine.

Support of Land**Land Bound by Water and Riparian Rights****R v Nikal [1996] SCC**

Rights to fishing are not included in property rights. The ad medium filium aquae principle does not apply to navigable rivers. The correct test for navigability is to consider the entire length of the river, w/o rapids, falls, etc.

FIXTURES

21

La Salle Receptions v Canadian Camdex [1969] BCCA

Objective Intention test at work

Re: Davis [19??] BCCA**Diamond Neon v TD Realty [1976] BCCA**

Objective intention test and the “timely manner” condition in the tenant fixture removal.

TANGIBLE AND INTANGIBLE RESOURCES

22

Theberge v. Galerie d’Art du Petit Champlain [2002] SCC

The difference between moral and economic rights over a work of art. Fixation and reproduction.

Monsanto v. Schmeiser [2004] SCC

Copyright patent to an essential element of something applies to the whole.

ABORIGINAL TITLE

24

St. Catherine’s Milling Lumber v. Queen [1888] PC

Aboriginal Title is a “personal and usufructory right” over the land

R. v. Sparrow [1990] SCC

Regulatory infringement of aboriginal rights can be justified under certain circumstances

R v. Gladstone [1996] SCC

Full priority principle applies only to aboriginal rights with inherent limitations

Delgamuukw v. BC [1997] SCC

130 PROPERTY LAW

The establishment and meaning of Aboriginal Title

R v. Bernard; R v. Marshall:

Tsilhqot'in Nation v. BC [2007] BCSC

Difference between aboriginal title and hunting and fishing rights

Haida Nation v. BC [2002] BCCA

Crown has a fiduciary duty to consult and accommodate the natives where aboriginal title is asserted but not proven.

ESTATE AND TITLE 28

THE ESTATE IN FEE SIMPLE 28

Thomas v. Murphy [1990] NB QB

The intent of the will takes precedence over the necessity of “word magic” and “rule of law”

Land Title Act BC

186 Implied covenants

Wills Act BC

24 Devise without words of limitation

ESTATE IN FEE TAIL 29

Property Law Act BC

10 Certain interests prohibited or permitted

LIFE ESTATE 29

DOCTRINE OF REPUGNANCY 30

Re Walker [1925] ON CA

Dominant intention is important. Which of the clauses seems more powerful?

Re Taylor [1982] ON CA

Overall intention is important. In this case, overall intention leads to life estate with power to encroach.

Christensen v. Martini Estate [1999] ABCA

The court will try to reconcile conflicting provisions. Strict transfer language not required

Rights, Powers and Obligations of a Life Tenant

Powers v. Power Estate [1999] NF

Division of duties between life tenant and future fee simple holder.

INTRODUCTION TO EQUITY 33

Origins of Equity

TRUSTS 34

Resulting Trusts

Property Law Act BC

19

Pecore v. Pecore [2007] SCC

Presumption of trust in father/daughter transfers.

Constructive Trusts

Peter v. Beblow [1993] SCC

Remedial constructive trust for housekeeping

CONDITIONAL TRANSFERS AND FUTURE INTERESTS 36

Qualities of Interest

Future Interests**Present Interests****Rules of Construction****Stuartburn (Municipality) v. Kiansky [2001] QB**

A remainder interest is vested, and thus a valid freehold estate

McKeen Estate v. McKeen Estate [1993] QB

Presumption against intestacy and inclination to vesting.

Caroline (Village) v. Roper [1987] QB

If the termination event is external to the limitation, then the interest is defeasible

State Limitations on Private Power**Unger v. Gossen [1996] BCSC**

Unless if it can be shown that the dominant intent was the condition, and not the gift, then the condition alone must fail

Hayes Co. v. Meade [1987] ABQB

In the cases of ambiguity, courts read a condition as subsequent, as it allows for immediate vesting.

Re Leonard Foundation Trust [1990] ONCA

State policy applies to any trust with a significant public element.

Trinity College v. Lyons [1995] ONCA

Option for when/if someone decides to sell more likely to be upheld than upon death.

Rule Against Perpetuities**Duke of Norfolk's Case [1681]**

An interest is valid if it must vest, if it is going to vest at all, within the perpetuity period. That period is calculated by taking the lives in being at the date the instrument takes effect, plus 21 years.

NATURE OF A LEASE

42

Elements of a Lease**Leases and Licences****Factac Ltd v. Commissioner of Inland Revenue [2002] NZCA**

Substance and not wording determinative of license or lease.

Metro-Matic Services Ltd v. Hulman [1973] ONCA

"Quiet enjoyment" implies exclusive possession.

OBLIGATIONS OF LANDLORDS AND TENANTS

43

Southwark LBC v. Tanner [2001] HL

"Quiet enjoyment" is only applicable to the actions of the landlord - not other tenants

Petra Investments Ltd v. Jeffrey Rogers Place [2000] LD

Using the retained land in a way that undermines the profitability of a tenant's business is not derogation.

SHARED OWNERSHIP

45

Four Unities of Joint Tenancy**Property Law Act BC**

11 Tenancy in common (reverses the presumption of a joint tenancy)

18 Rules for transfer and ownership to oneself

Re Bancroft Eastern Trust Co. v. Calder [1936] NSSC

If no express intention, then common law presumes a joint tenancy.

Re Sorensen & Sorensen [1977] ABCA

Severance of joint tenancy

Co-Ownership Through Family

Braglin v. Braglin [2002] ABQB

Rules for establishing entitlement to occupation rent are different in family law context

CONDOMINIUMS AND CO-OPS 47

2475813 Nova Scotia Ltd v. Ali [2012] NSCA

The mechanics of property relationship within condos are ruled by statute.

Alternative Conceptions of Shared Ownership

SERVITUDES OVER PROPERTY 49

EASEMENTS 49

COVENANT 49

Tulk v. Moxhay [1848] UK

Covenants run with the land and are binding on the new owners.

Berry v. Indian Park Assn. [1999] ONCA

Restrictive covenants for purpose of development can be created through a building scheme.

COMMON LAW PRIORITIES 51

Overview

Chippewas of Sarnia Band v. Canada AG [2000] ONCA

Aboriginal title is sui generis and does not equate to legal title, therefore the subsequent legal title takes priority

REGISTRATION 53

Title Registration (Torrens System)

Lawrence v. Wright [2007] ON

Deferred Indefeasibility is preferred for policy reasons, and should be the proper reading of ON LTA

Notice and Fraud

Holt Renfrew & Co. v. Henry Singer Ltd. [1982] ABCA

Notice may be evidence of fraud but is not sufficient. Something additional required.

AB Ministry of Forestry, Lands and Wildlife v. McCulloch [1991] ABQB

In AB's LTA notice alone is not fraud. For fraud to happen, notice must be used for an unjust purpose.

Szabo v. Janeil Entreprises Ltd. [2006] BCSC

Notice will only constitute fraud for s.29 if there is an element of dishonesty on the part of the transferor.

Fraudulent Transfers

Credit Foncier Franco-Canadien v Benett [1963] BCCA

Registered owners of a charge acquired through fraud, or having its root in fraud, is subject to the claim of the person wrongfully deprived of the interest.

Canadian Commercial Bank v. Island Realty Investments Ltd. [1988] BCCA

Priority of charges depends on the order of their registration.

Gill v. Bucholtz [2009] BCCA

The LTA preserves the Nemo Dat maxim when it comes to charges.

LAND TITLE ACT BC 58

20 Unregistered instrument does not pass estate

23 Infeasible title is evidence that the person registered as an owner holds the title in fee simple

- 25.1 Void instruments do not acquire interest, unless if it is a fee simple acquired in good faith*
- 26 Registration of a charge entitles the owner to the estate, interest or claim*
- 27 Notice given by registration of charge*
- 28 Priority of charges is established based on order of their registrations*
- 29 Notice of unregistered interest has no effect on the purchaser, except in cases of fraud*
- 37 Registration effective from time of application*
- 296 Remedies of person deprived of land*
- 297 Protection of purchaser in good faith and for value*

THE MEANING OF PROPERTY

- Property is a right, not an object. To have property means to have a right in the sense of an enforceable claim to some use or benefit of something;
- Mere possession does not denote property;
- Concept of property deals with both tangible and intangible resources;
- Property is a claim that will be enforced by the society, state, custom, convention or law - the importance of the authority to grant and enforce;
- Property has to be justified by the society - the legal right must be grounded in a public belief that property is a moral right;

The Types of Property

<u>Private Property:</u>	The individual has the right to exclude others from the use or benefit of the property
<u>Common Property:</u>	The individual in a community has a right not to be excluded from the use or benefit of the property
<u>Public(State) Property:</u>	The State creates and enforces the right to exclude individuals from the property

The Definitions of Property

Single-variable essentialism:

The right to exclude others is both the necessary and sufficient condition of property

To the World: Keep off X unless you have my permission which I may grant or withdraw.

Signed: Private Citizen

Endorsed: The State

This statement combines the public and private aspects of property-ownership, as it includes the need for the private property to be legitimized by the society (*The State*). A property right is a capacity to enforce a claim, and this enforcement is usually done with the consent and endorsement of the society.

Multi-variable essentialism:

The definition of property lies in multiple attributes, the right to exclusion being one of them. These may include some or all of the following:

- right to possess
- right to use
- right to enjoy
- right to manage
- right to income from a thing (royalties)
- right to the capital
- right to security
- incident of transmissibility (transference)
- the duty to prevent harm
- liability execution

The “bundle of sticks” theory - the definition is made up of several components which can be interchanged and replaced with time.

Nominalism:

There is no irreducible core element or attribute to property; rather property is that which the law decided must fit that label. Property is a purely social conventional concept with no fixed meaning - an empty vessel that can be filled by each system in accordance to the social zeitgeist.

Justifications of Property

The right to private property is the root of all liberties, and at the core of classical liberalism.

Utilitarian:

- Jeremy Bentham: Property and law are born together and die together. Before laws were made there was no property, take away laws and property ceases.
- Private property is necessary because it maximizes happiness of the society and the efficiency in the economy
- What is good is what makes people most happy
- Since people want to acquire things and have security around keeping these things, private property is good.
- Total, or average, happiness of society will be greater if resources, particularly the means of production, are owned and controlled by individuals. (Closely allied to Economic Theory.)
- Utility determined by calculating pleasure and pain. Computation influenced by the ability of a society to promote equality, security, subsistence and abundance.
- Wealth is a measure of happiness.
- A utilitarian might want to know if taking a million dollars from the very wealthiest people in Canada and handing it to the poorest among us would produce a net gain in happiness. If it would, the hardcore utilitarian thinkers should be in favour of it.
- But:
 - This theory takes human interests and desires as given, assuming the fulfillment of a desire has a positive value and that they are quantifiable.
 - It also takes no heed of the problem of distribution.
 - Equality and justice are not important considerations in this.

Economic:

- Three elements assist the market in working efficiently:
 - Exclusivity: The law should protect exclusivity of ownership.
 - This marks a huge difference between us and the developing world, because their property interests are less secure.
 - Transferability: Entitlements should be transferable.
 - Universality: Many things should be available for exchange and to as many people as possible.
- As much “stuff” should be property as possible.
- With these three necessities, the market should be able to allocate property most efficiently because those who derive the highest benefit from property will be willing to pay the most for them. The market will allocate where wealth will be maximized.
- The ability to transfer and universality makes trade and barter more efficient, as all possession becomes units of currency
- Hernando De Soto: Exclusivity for economic efficiency: argument that private property acts as a generator of wealth throughout society, problem in many developing countries is that the majority of people do not have legal claims to their land and property and they can't leverage this property against loans to develop business or education. if property is not exclusive then you can't use it as collateral.
- Hardin: Tragedy of the Commons : if property is communal in situation where costs are distributed evenly but profits are reaped individually then each co-owner will attempt to maximize their usage resulting in over-utilization and eventual destruction of commons. However, this can be remedied not just by private property, but by regulated common property (as commons in England actually are). Note possible issue with private property is “tragedy of the anti-commons”(where property ownership is so fractured that it cannot be used effectively due to high transaction costs, thus end up being under-utilized).
- Market can sometimes be imperfect so legal regulation is sometimes needed to establish efficient allocations.
- But:
 - Theory relies on the belief that we are rational wealth maximizers at heart.
 - Inherent sources of waste in a regime of private property
 - Many things (land) are increased in number by making them private property.
 - Private property in industry may be argued to sacrifice the interests of society to commercial profit.
 - Privatization of common resources can cause them to be used before they are ready.
 - Unhealthy tendency to look only at the short-term; spread the cost over to the next generation.
 - Private property rights built into an economic efficiency model produce inequalities of condition.
 - Even if all allocated evenly, the ability to bargain and trade would produce differences.

Labour Based:

- Private property is the product and the impetus of labour
- We begin in a state of nature where everything is common property.
- We each have a property interest in our body and therefore in our labour; by mixing our labour with the material world, we establish rights that amount to a claim of property. (Specifically agricultural labour.)
- The interest is one which people have only because of what they have done or acquired from someone else. “special right” (i.e. arising from a transaction between individuals and the corresponding obligation is limited to the other party to the transaction or relationship)
- Locke: the right to property precedes the state; it is innate in each of us. (contrast to Bentham)
- Locke: productivity increases substantially when we allocate common goods to private use.
- There are limitations. There must be as much and as good for others. And you can't take so much that what you take would spoil.
- But...
 - Very few things are produced by the labour of one person alone.
 - The theory does not account for inheritance and transfer.

Rights-based Argument:

- Individuals have an interest in owning things which is sufficiently important to command respect and to restrain government action.
- As long as there is an interest derived from the use of property by the individual, there is justification for property;
- Not enough to give all the opportunity to hold property.
- Waldron: “Freedom requires PP and freedom for all requires PP for all. Nothing less will do.”
- But:
 - Freedom of the property holder's right to dispose of the property would defeat the achievement of the liberty allowed for by property.

Personhood and Identity:

- Property is essential to the development of personal identity through the exercise of the Will
- Draws link between identity of self (or group) and its possessions, notably land.
- Hegel: To be actualized as person, one must impose one's will over the material world. The capacity and need to exercise Will is fundamental to human nature. Thus property can be seen as an extension of this Will. In less strict terms, property is associated with human and moral development.
- Stresses the importance that people seem to place on security and privacy.
- This implies a hierarchy of property based on the degree of necessity to exercise/infringe on Will
- But:
 - Weak correlation between objective measures of wealth and subjective perceptions of happiness.
 - Property-ownership may not always be enriching.

Promotion of Freedom Theory

- Private property (for those who can get it) promotes independence by giving individual “exclusive rights” to make own decisions free from state interference.
- Can result in decentralization of power from state, but on flip side can result in power in hands of wealthy private few (oligarchy).

Yanner v. Eaton [1999] AU HC

Australian court finds that the nominalist approach to property is most justified.

Facts: Two legislations: the Native Title Act, which gives Aboriginal peoples the right to traditional activities, and the Fauna Act, which extinguishes the right to hunt crocs. PL is Native accused of killing crocs illegally.

Issues: Is property, as defined in Fauna Act interpreted as being exclusive right of State to control over its fauna (and hence extinguishing PL's right to hunt in Native Title), or is it represented as something less absolute?

Discussion:

- property does not imply that state has absolute exclusive rights
- nominalist view of property
- the Crown really has more of a duty to take care of the land for every one
- there is no reason that the two acts cannot co-exist
- Dissent: single or multi variable essentialism is necessary to the working of the Fauna Act

Ruling: Judgement for PL

Harrison v. Carswell [1976] SCC

The owner of a mall has enough possessory interest in common areas of the mall to claim trespass

Facts: Employee of the business is picketing on the property of the shopping mall; the owner of the mall is trying to enforce his right to exclude.

Issues: Is the mall private property of public property?

Discussion:

Dickson J. - the mall owner has a remedy in trespassing

- this is a clear-cut case of trespass because extenuating circumstances should not be considered;
- the court's business is in the legal side of things, not venturing into the public and social debate;

Laskin J. - (dissenting) there is no act of trespass because:

- the questionable nature of precedent (*Peters v. R.* [1971]) and reliance to *stare decisis*;
- in the context of the *Peters* case, the question was very specific: "whether the trespass did occur", with no regard to other circumstances;
- If one considers the circumstances, one will realize that a shopping mall is a new sort of private property with public characteristics (private/pubic space), because it functions only when there is public on premises;
- the setting for the act is new to the precedents - the old laws of trespass need to be reviewed to fit better to the new settings
- *Harrison v. Carswell* has been referenced several times and has not been overturned, but has been diminished in its scope. However, in present time, the code responsible for dealing with such situations is the Labour Code that is concerned with picketing and strike rights.

Ruling: Judgement for PL

International News Service v. Associated Press [1921] US

Publishing news releases it into the public domain and relinquishes copyright, but the fact that there is labour invested in publishing the news, makes it a quasi-property, to which the publisher has limited rights.

Facts: INS was using news published by AP to compile its own news, undercutting AP's business. INS claims that published news are public domain. AP claims that news are its property.

Issue: Can the plaintiff exclude the defendant from copying news that the plaintiffs have already published?

Discussion:

- AP puts labour into collection and publishing of news, which should qualify the news as its property. The costs justify an expected profit - if INS can take away from the profit w/o paying costs, then the economic incentives of the business are undermined.
- While publishing the news does put it into the public domain, the rival news agency has a different status, since it is also involved in news publishing.
- Labour Theory: INS endeavouring to reap where it has not sown.
- Economic Efficiency: News wouldn't be profitable if anyone could take it and we need news. Reward them for doing it by recognizing what they do as their property.
- News is quasi-property: with a limited right to exclude
- AP has quasi-right over the news, which prevent rival news agencies from re-publishing it for 3 hours.

Ruling: Ruling for D

Victoria Park Racing v. Taylor [1937] AU HC

Court refutes labour theory. Creation of something of value does not, in itself, give the right to exclude.

Facts: PL hosts races and their neighbour D has set up a tower on his property, from which he broadcasts the races. PL wants protection of their property.

Issue: Is spectacle a property to which the racecourse owner has a right?

Discussion:

- There is no precedent for protection of spectacles
- There is no protection in this case, neither in property theories, or in law of nuisance
- Any person is entitled to look over the plaintiff's fences and to see what goes on in the PL's land.
- The law cannot by injunction erect fences that PL is not prepared to provide - it is his job to do so.

130.1 INTRODUCTION

- A man's rights on his property are lawful only when they are reasonable having regard to his own circumstances and those of his neighbour. Each owner's rights may be limited by the rights of the other.

Ruling: The law does not assume any responsibility in excluding D from viewing and broadcasting the event.

Moore v. The Regents of UofC [1990] CAL SC

The entrenchment of private property in the field of science will hinder future research by restricting access to appropriate raw materials.

Facts: PL went to UCLA Medical Centre for treatment of leukemia. On advice of a doctor, he consented to removal of blood and tissue samples over time. Unknown to him, UCLA developed a cell line from his cells and Regents applied for patent of cell line. PL makes claim of action for using his cells for lucrative purposes without his consent in two areas (a) breach of fiduciary duty and (b) tort of conversion.

Issue: Are your cells your property after they are removed?

Discussion:

- Three reasons that tissues are not property under existing law:
 - There is no precedent
 - Health and Safety Code drastically limits patients control over excised cells. The statute takes away so many property attributes that cells can no longer be called property
 - The patent itself is factually and legally distinct from cells taken.
- Tragedy of anti-commons: too much private property will hinder the advancement of science.
- Labour theory: doctors turned the cells into something of value by their labour.
- compartmentalizing the field of research will create tragedy of anti-commons and inhibit research process.

Ruling: Judgement for D.

PROPERTY IN CANADA

- Canadian landholding is tenurial: land is owned by Crown but 'held' by tenants
- All tenure is free (obligations are fixed) and in common socage
- Escheat:
 - If land in BC escheats to the government because the person last seized or entitled to it dies intestate and without lawful heirs, or forfeits to the government, the AG may take possession of the land in the name of the government.

Assertion of Sovereignty

Crowns acquisition of radical title not immediately an absolute exclusionary interest; pre-Conquest rights continued, e.g. Proclamation of 1763 and aboriginal title

Laws of Reception

Conquest or Cession

- Pre-existing laws remain in force until altered, e.g. Quebec and Treaty of Paris, 1763; retention of French civil law which allows for absolute ownership.

Settlement

- General rule, English laws apply unless inapplicable due to local circumstances, e.g. Upper Canada, B.C. Reasons for adopting English common law: convenience, conservatism; continuity, normative.
- Law and Equity Act (B.C.); English law applies as of November 19, 1958

Basic Divisions in Property Law

Land/Goods

- Land is both permanent and stationary.
- Goods are things other than land which are tangible.

Real Property / Personal Property (Chattel)

- Real:
 - All real property rights are rights to land.

130.1 INTRODUCTION

- Successful plaintiff will have land returned.
- When owner died intestate land devolved to the lawful heir.
- **Personal** (Chattels):
 - Things other than land.
 - Successful plaintiff will be compensated by the award of damages.
 - When the owner died personalty passed to the personal representative for distribution.
 - The modern law acknowledges that there is a personhood element to personal property that may justify an order for the return of some objects.
- The end of the real property actions (replaced by ejections which were more practical) removed the distinction between real and personal property.

Legal / Equitable

- Legal rights are enforced by the courts through Common Law and Statutes
- Equitable rights were enforced through Courts of Equity and rules of fairness. In regard to property, these are less formal and less durable.
- Now the two are merged in one

Tangible / Intangible

- Tangible (Corporeal) rights include the right to possession of something
 - “chose in possession”
 - These are essentially freehold estates
- Intangible (Incorporeal) rights do not include the right to possession, just right to benefit
 - “chose in action”
 - These include easements, covenants, rent charges, equitable interests, bonds, stocks, etc.

Chattel real: is lease of land. It is not considered ‘real’ property because one could not bring real action to recover it but a new remedy called ‘ejectment’ developed that allowed tenant to recover possession. This became more efficient means of recovery than real action and has to some extent replaced it.

Chattel personal:

- Chose in possession
- Chose in action

Right in rem: is a property right against the world.

Right in personam: is a property right against an individual.

PROTECTION FOR PRIVATE PROPERTY

Statutory Protection

Bill of Rights, 1960

- Federal legislation, therefore rights enumerated restrict only the actions of the federal government.
- Provides protection against expropriation and gives simple enjoyment of use
- Pg 139 1(a) “right to life, liberty, security of person and enjoyment of property, and the right not to be deprived thereof except by due process of law...”
- Applies to the rights of a human (not a corporation).

Expropriation Act

4(2) *A person may not, in any proceedings under this Act, dispute the right of an expropriating authority to have recourse to expropriation*

14

(1) Subject to section 11, the inquiry officer must hold a public hearing for the purpose of inquiring into whether the proposed expropriation of the land is necessary to achieve the objectives of the expropriating authority with respect to the proposed project or work, or whether those objectives could be better achieved by

(a) an alternative site, or

(b) varying the amount of land to be taken or the nature of the interest in the land to be taken.

(2) The necessity for the project or work for which the expropriation is sought must not be considered at the inquiry.

30(1) *Every owner of land that is expropriated is entitled to compensation...*

31

(1) *The court must award as compensation to an owner the market value of the owner's estate or interest in the expropriated land plus reasonable damages for disturbance but, if the market value is based on a use of the land other than its use at the date of expropriation, the compensation payable is the greater of...*

Constitutional Protection

- Property doesn't enjoy any specific protection in the constitution (except s.35 for aboriginal rights), but property rights derive from the common law and various statutes dealing with property.
- Property not included in a list of protected rights in the Constitution because:
 - Uncomfortable about the range of rights which might be sheltered under the umbrella of property.
 - There had been successful attempts to protect enjoyment of property in the Constitution so feeling was that it didn't need to be protected in the Charter.
 - Some rights that relate to property were included in the constitution.
 - Several provincial governments were opposed.
 - Controversy over property as a fundamental right.

Charter of Rights and Freedom

8. *Everyone has the right to be secure against unreasonable search or seizure.*

Expropriation

Expropriation: the taking of land by authority under an enactment without the consent of the owner
Regulatory Taking - regulation that deprives the owner of the land of "all economic benefit" that can be derived from the land. This is a big one in the States.

- Land cannot be taken away without due process and compensation
- The principle is that an individual should not bear the entire cost of a benefit to the community.
- Although Canada has no Constitutional guarantees for private property (in contrast to USA) there are protections in law regarding expropriation and also regarding the simple enjoyment of use (e.g. *Bill of Rights*, Common Law).
- One of those is that land cannot be taken away without due process and appropriate compensation as per the *Expropriation Act*. Under this Act you have certain rights:
 - You can request an inquiry into whether this expropriation is necessary. In BC, where there is a linear or widening taking, there is no inquiry available. Where there is an inquiry, the inquiry officer has to hold a public hearing into whether the proposed expropriation is necessary, or whether the objectives could be better achieved by an alternative site or varying the amount of land. But the inquiry officer's decision is non-binding. The expropriating authority has the final say. The necessity for the project or work for which the expropriation is sought must not be considered at the inquiry.
 - Request compensation. How much? The greater of:
 - The market value of the land plus reasonable damages
 - The market value of the land based on the highest and best use at the time of expropriation.
- Zoning regulations do not count as expropriation and are not subject to compensation. If your property gets down-zoned or otherwise regulated, even if you suffer great economic loss, you just have to live with it.

Protection for Private Property in the US

- In the USA, the 5th Amendment to the Constitution states that no "private property shall be taken for public use without just compensation"

Pennsylvania Coal v. Mahon [1922] US

Property may not be taken w/o just compensation. It may be regulated to a certain extent, but if regulation goes too far it will be recognized as a taking.

Facts: Statute forbids any mining of coal that would cause the subsidence of any house, unless the house was the property of the owner of the coal and was more than 150 ft from the improved property of another.

130.1 INTRODUCTION

Issue: Is there was a legitimate exercise of police power?

Discussion:

- Any regulatory taking restricting the rights of the property owner (not a police action) has to be compensated
- Dissent: regulatory taking when it is for the purpose of protection of public health and well-being should not be compensable.

Ruling: PL awarded compensatory damages.

Lucas v. South Carolina Coastal Council [1992] US

There are two categories of regulatory taking that are compensable under Fifth Amendment w/o case-specific inquiry into public interest. Regulations that compel property owner to suffer physical invasion of his property, and the regulation denying all economically beneficial or productive use of land.

Facts: An Act bars the erection of permanent structures on PL's sea-side property.

Issue: does the Act render property useless and therefore compensable under the Taking Clause?

Discussion:

- Regulations that deny the property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint.
- Total deprivation of beneficial use is the equivalent of a physical appropriation.
- Leaving the owner of land without economically beneficial or productive options for its use - typically by requiring land to be left substantially in its natural state - risk private property being pressed into public service under the guise of mitigating serious public harm.
- When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Ruling: Judgment for PL

PROTECTION FOR PRIVATE PROPERTY IN CANADA

Test for De Facto Expropriation:

- Complete taking or total extinguishments of the owner's rights
- A corresponding benefit to the authority.
- Without payment of compensation.

Mariner Real Estate Ltd v. Nova Scotia [1999] NSCA

Where land use regulation limits the use of property, the holder must establish that the regulation virtually eliminates or extinguishes the property interest. The loss of economic value is insufficient.

Facts: Real estate company plans to develop beach area, but is denied by the province because of the new Beaches Act. PL claims de facto expropriation on the basis that the new Act effectively deprives them of the economic use of the land. PL won in lower courts.

Issues: Is this de facto expropriation? Does the province have to compensate the owner?

Discussion:

- Canadian Test for de facto expropriation is established
- Thus, only loss of rights constitutes de facto expropriation
- Loss of economic value is insufficient.
- As long as some reasonable enjoyment of the property remains, there is no expropriation.

Ruling: Appeal denied.

BC v. Tener [1985] SCC

Lack of access to a mineral claim amounts to de facto expropriation

Facts: D is a company that holds lands for the purpose of mining. They are denied a permit to mine the mineral claim, when the land becomes a provincial park.

Issues: Is this regulatory taking?

Discussion:

- This is somewhat of a special scenario, because it involves Crown land

130.1 INTRODUCTION

- Thus, the property right of the owner is not merely extinguished, it is re-vested to the Crown, who have given it away to the owner in 1930's
- Enhancing the value of public lands it is not acquisition of interest in the land.
- Original grant was to the minerals themselves. Company still owns minerals but cannot get at them.
- One of the very few cases in Canada, where de facto expropriation was acknowledged and the D was compensated for the loss of his property interest

Ruling: D is compensated.

C.P.R. v. City of Vancouver [2006] SCC

De facto expropriation is concerned with the current and on-going economic use of the land - not the future opportunities.

Facts: City of Vancouver limited the use of the Arbutus Rail Corridor to non-elevated rapid transit (no Sky Train), and CPR, which intended to develop the land residentially or commercially applied for de-facto expropriation.

Issues: Is this de facto expropriation?

Discussion:

- The new regulations do not prevent CPR from doing anything that it was doing in the last decades
- This does not amount to any significant loss of property interest
- Thus, there is no de-facto expropriation here
- Also, the Charter specified that property affected by a by-law is not expropriated property and therefore there is no reason to turn to the Expropriation Act.

Ruling: Appeal dismissed

NAFTA And Protection of Private Property

NAFTA Ch.11

- creates general prohibition for discrimination
- establishes certain standards for the treatment of foreign investors
- prohibits expropriation without compensation - directly or indirectly, or through any other action that is tantamount to nationalization
 - except for public use, where compensation is required.
 - this is much closer to the US 5th amendment, then to any Mexican or Canadian regulations.

Metalclad Corp v. Unites Mexican States [2000] Arbitration Tribunal

Regulatory taking protection under NAFTA

Facts: PL, a U.S. waste disposal company accused Mexico of breaches of NAFTA Articles 1102-1111. It asserts that Mexico wrongfully refused to permit PL's subsidiary to open and operate a hazardous waste facility that PL had built in Mexico, despite the fact that the project was built in response to an alleged invitation of certain Mexican officials and met all Mexican legal requirements. One of the items in question is a new environmental regulation passed by the state after the beginning of the construction, which prohibits the operation of the plant.

Issue: Does NAFTA Ch.11 over-rule the local property laws that do not have protections against regulatory taking.

Discussion:

- PL: the refusal of the BP and the issue of the new environmental regulation are in essence regulatory taking, as it takes away all the reasonable economic benefit and use of the property.
- Tribunal finds that environmental regulation is more of a federal jurisdiction.
- indirect expropriation is found due to:
 - improper jurisdiction
 - insufficient and untimely issue of the stop-order and env. regulation

Ruling: The PL is awarded damages.

BOUNDARIES

Efficiency is the dominant justificatory theory relied on in contemporary debates about property systems.

AIRSPACE AND SUBSURFACE RIGHTS

Latin Maxim: “*Cuius est solum eius est usque ad coelum et ad inferos*” - whomever owns the piece of land owns everything above and below it to an infinite extent”

- Ownership of a tract of land use confers rights in the airspace above the surface
- However property rights to air don't extend forever upwards.
- Law seeks to find balance between realistic needs of landowners and the public for whom air is common property.
- Courts have found a trespass to airspace can occur even when landowner not using airspace but could potentially use the space.
- Injunctions is used as remedy instead of damages, otherwise wrongdoer would be purchasing and unilaterally expropriating the right to trespass simply by paying amount ordered.
- Courts generally treat airspace rights as possessory (right to control and exclude by someone who may not be owner), making them amenable to protection through actions in trespass without proof of damage
- In cases where there is a disruption of a right to use, generally one would bring an action in nuisance
- Trespass to land claims can be maintained to protect only a direct interference with possession
- Must prove there has been an unreasonable interference with the enjoyment of the PL's property
- Today reasonable use of airspace determined on case by case basis; common law somewhat conflicting.

Land Title Act BC

139

Air space constitutes land and lies in grant.

Covenant to grant easements or to convey restrictive covenants not implied

141

(1) *An owner in fee simple whose title is registered under this Act may, by the deposit of an air space plan, create one or more air space parcels separated by surfaces and obtain indefeasible titles for them.*

(2) *The air space parcel created by the plan devolves and may be transferred, leased, mortgaged or otherwise dealt with in the same manner and form as other land the title to which is registered under this Act.*

(3) *An air space parcel may be subdivided in accordance with the Strata Property Act.*

145

An estate or interest in an air space parcel, if separately owned, must be separately assessed for taxation for all types of rates, assessments and taxes authorized to be assessed against land and improvements by any Act.

Didow v. Alberta Power Ltd. [1988] ABCA

The Maxim has no literal effect. Airspace interference by a permanent fixture is a trespass. The landowner is protected from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land.

Facts: Power poles trespass into the property, but D claims that PL has no use for the space above.

Issues: Is the airspace a part of PL's property? Is there trespass, even though the PL is not using the space.

Discussion:

- The right to use land includes the right to use and enjoy the air space above land.
- *Kelsen v. Imperial Tobacco*: invasion of airspace is a trespass, even though there is no nuisance > trespass can stand on its own
- *Lacroix v. R.* : landowner's right is limited to what he can possess and occupy
- *Bernstein v. Skyview* : action in trespass; landowner has a right to enjoy the use of airspace above his land without limitation except as to height: aircraft are too high to trespass
- The maxim has no literal effect.
- Interference with airspace with a permanent fixture is a trespass.

Ruling: The action is a trespass.

130.2 BOUNDARIES

Nuisance: Imposes harm or interference in the use of the property from something not necessarily on your property. PL must prove there has been an unreasonable interference with his enjoyment of his property.

Edwards v Sims [1929] Kentucky CA

Upholds the Latin Maxim in majority, but has a kick-ass dissenting judgment.

Facts: Lee owned land under which lay caves. The entrance to the caves lay on PL' property. PL explored the caves, then developed a walkway through them and began selling tours through the caverns. Upon learning of this, Lee sought equitable relief to permit a survey of the caves. From an order allowing the survey, PL appeals.

Issues:

Discussion:

- Majority upholds the Maxim
 - The right to enjoyment and possession of property is limited in so far as the state has a right to infringe upon those rights when it believes that those rights are being used to the detriment of other private citizens. Court cited a similar decision involving the determination of trespass in a sub-terranean mine.
 - distinction between the public nature of air, but the private nature of sub-terranean
- Logan, J dissents:
 - You only have rights to underground property which you can exploit, and since the cave opening was on PL's land, there was no way that Sims could exploit the cave, and so he should have no rights. This is based on the social utility theory.

Ruling: PL and Lee have to share the ownership of the cave.

Coase's Theorem: if transactions are costless, the initial assignment of property will not affect the ultimate use of the property. Efficient use of land will eventually result if there is no outside interference, as the land will end up in the hands of those who value it the most.

Land Act BC

50

(1) A disposition of Crown land under this or another Act

(a) excepts and reserves the following interests, rights, privileges and titles:

- a right in the government, or any person acting for it, to resume any part of the land that is deemed to be necessary by the government for making roads, canals, bridges or other public works, but not more than 1/20 part of the whole of the land, and no resumption may be made of any land on which a building has been erected, or that may be in use as a garden or otherwise;
 - a right in the government, or any person acting for it or under its authority, to enter any part of the land, and to raise and get out of it any geothermal resources, minerals, whether precious or base, as defined in section 1 of the Mineral Tenure Act, coal, petroleum and any gas or gases, that may be found in, on or under the land, and to use and enjoy any and every part of the land, and its easements and privileges, for the purpose of the raising and getting, and every other purpose connected with them, paying reasonable compensation for the raising, getting and use;
 - a right in any person authorized by the government to take and occupy water privileges and to have and enjoy the rights of carrying water over, through or under any part of the land granted, as may be reasonably required for mining or agricultural purposes in the vicinity of the land, paying a reasonable compensation to the grantee, the grantee's successors and assigns;
 - a right in any person authorized by the government to take from any part of the land granted, without compensation, gravel, sand, stone, lime, timber or other material that may be required in the construction, maintenance or repair of a road, ferry, bridge or other public work,
- (b) conveys no right, title or interest to:
- geothermal resources as defined in the Geothermal Resources Act,
 - minerals and placer minerals as defined in the Mineral Tenure Act,
 - coal,
 - petroleum as defined in the Petroleum and Natural Gas Act, or
 - gas,
- that may be found in or under the land.

So, a Crown grant in BC reserves the Crown rights to minerals, coal, oil, and gas as an exception to the Maxim

130.2 BOUNDARIES

Canadian Law of Mining

Minerals, except for gold and silver are part of the land itself and belong *prima facie* to the owner of the soil - the owner of the land. It is presumed that the proprietor has rights to the land and to the minerals in the land. But this is a *prima facie* rule, not an absolute rule.

Vernacular Test

To decide whether the substance is a “mineral” it is necessary to establish whether it was so regarded in the vernacular language of miners, landowners and commercial people at the time when the severance took place.

The Purposes and Intentions Test

In construing a reservation of mines and minerals, regard must be had not only for the words employed to describe the things reserved, but also to the leading purpose of object that the deed or statute embodies.

The Exceptional Occurrences Test

The word “mineral” does not include all ordinary rocks, but rather exceptional or rare substances

LATERAL BOUNDARIES

Land Bound By Land

- In Canada, government surveys divide land into large areas and smaller sections, which are further divided into sub-sections. The exact system of divisions is different from province to province.
- Another system of land divisions is “metes and bounds”. This involves a detailed recitation of the perimeter of the land, using bearings and distances, as well as a fixed reference point.
- It is also possible to use various land markers and terrain features as reference points.

If there is a conflict between various descriptions, the true objectively determined intention of the parties will be sought. There is also a ranking system for description elements.

- a. natural monuments
- b. lines run and corners marked at the time of the grant
- c. abutting neighbouring boundaries
- d. courses and distances

In re-establishing the boundaries that have been misplaced due to missing markers:

- a. natural boundaries
- b. original monuments
- c. fences or possessions that appear to relate back to the original survey
- d. measurements stated in the plan or a metes and bounds description

Lasting improvements mistakenly made on someone else’s land may entitle the builder to a lien on the land to the extent of the increased value, or to receive the property rights.

When parties are unsure of the boundary, it may be settled by the conventional line doctrine, which runs with the land and is binding to the successors. Also, adverse possession and acquiescence play a major role in such cases.

Conventional Line Doctrine:

- upon a dispute, two parties meet together and agree upon a line to serve as a boundary
- one of the parties builds to that line, which estopps the other party from denying that this is the true boundary
- the recognition can be oral, written or conduct, but the evidence in support must be clear and definite
- onus of proof is on the party claiming ownership by the virtue of the conventional line

Robertson v. Wallace [2000] AB QB

Establishment of the conventional line doctrine.

Facts: The boundary between the two estates is marked by a river and a fence, which is on the D side of the property. The river has changed its course, leaving a wider swath of land between the fence and the river. This has created an overlap in property rights, since nobody knows where the boundary should be.

Issues: Where is the boundary?

Discussion:

- For the last 50 years, the fence was the de facto boundary for grazing cattle, and was maintained by both parties.
- the fence does not follow the present course of the river; it is built on high ground where it was safe from the river's original course
- there is no written or verbal evidence of the agreement to the boundary, however, over the past 50 years there were no major disputes over it
- thus, the conduct of the parties can allow the court to infer an earlier agreement.
- PL bears the onus of proof as per conventional line doctrine
- without direct evidence of the agreement, court finds the conduct of parties insufficient enough to infer an agreement, rather "an uneasy truce"

Ruling: There is not enough to prove acquiescence. The river, and not the fence is the boundary

Support of Land

- A property owner has a right of support for land in its natural state.
- This right does not extend naturally to support of structures. The onus is on PL to prove that removal of support to structures was caused by the removal of support to land.
- Removal of soil reduces later pressure against adjoining lands, and may lead to loss of support on them.
- Any excavation by neighbours that causes structural damage to structure on one's property is liable.
- This right also applies to mining operations under one's property.
- This doctrine is rendered largely useless by actions in negligence.
- The right of support is absolute - the culprit cannot raise due-diligence defence
- But in *Blewman v. Wilkinson* the NZ court appears to have incorporated a standard of negligence into the determination of liability for support. After this decision, it appears that in some circumstances (NZ hillside subdivisions), due diligence may give rise to a defence.

Land Bound by Water and Riparian Rights

Common law distinguishes water formations depending on whether they are navigable and/or tidal.

Non-tidal rivers have the boundary running in the middle of the river (*ad medium filium aquae*). When the body of water is tidal, the ownership extends to the high water mark. Land below the high water mark belong to the Crown. This strip of land is called the foreshore and is considered public land.

If the body of water is considered navigable, then in belong to the Crown.

Riparian Rights:

- right of access to the water
- right to take emergency measures to prevent flooding
- right to appropriate limited amount of water for 'ordinary' uses (husbandry and domestic needs)
- right to access limited amount of water for 'extraordinary' uses (manufacturing and crop irrigation)
 - the right is limited by the need to conserve water for riparian tenements downstream. The flow of the river cannot be diminished in its quality or quantity.

Accretion

- As the contours of the body of water change, the legal effects of the boundaries are regulated by the law of accretion. For the owner to acquire the benefit of accretion, the process must be gradual and imperceptible in action.
- If the boundary moves by avulsion (suddenly) then the boundary remains as it was.

130.2 BOUNDARIES

Fisheries

- Under common law, fish is not owned until caught. Also, there is a presumption that owner of the *solum* held the right to fish.
- Crown held the right to fish in navigable waters, and distributed a public right to fish.

R v Nikal [1996] SCC

Rights to fishing are not included in property rights. The *ad medium filium aquae* principle does not apply to navigable rivers. The correct test for navigability is to consider the entire length of the river, w/o rapids, falls, etc.

Facts: AC - a native - was caught fishing w/o a provincial license adjacent the reserve.

Issues: Does the reserve have property rights to the river? Does this right convey the right to fish?

Discussion:

AC:

- Fed has granted an exclusive fishery right when it allotted the reserve
- under *ad medium filium aquae* presumption, the reserve extended to mid-point of the river, which is not navigable due to rapids at this point
- licensing regime infringes upon native rights to fish.

CROWN:

- Fed has no control over fisheries, thus no power to grant exclusive fisheries to natives
- if the river is navigable in parts, then it is to be considered wholly navigable
- the regime does indeed infringe on the native rights

Ruling: Appeal dismissed, due to infringement of the aboriginal rights.

UN Convention of the Law of the Sea

Canada ratified and brought into force with the *Oceans Act*

Internal Water

Territorial Sea

- 12 miles

Contiguous Zone

- 12-24 miles

Exclusive Economic Zone

- 200 miles (right to harvest the resources, and a limited right to protect them)

FIXTURES

A chattel that becomes sufficiently attached to the land may be transformed into a fixture, becoming part of the property.

One can recover rights to real property, but can only recover damages for chattels.

To determine whether something is land or personal property, the test is objective intention. The goal of this doctrine is to allow third parties to observe and establish the intent of the primary parties involved.

Objective Intention Test

Degree of Annexation

- is the object attached. If yes, then it gives presumption that the object is a fixture
- degree of attachment, strengthens the presumption that it is a fixture

Object of Purpose of Annexation

- if the object is attached to enhance the land, it is a fixture
- if it is attached or for the better use of chattel as chattel, then it is more likely not to be a fixture

But there are also unattached fixtures, such as house keys, tools and items associated with other fixtures, appliances etc.

130.2 BOUNDARIES

A leaseholder tenant may usually retain fixtures that he attached, restoring them to the original chattel status. The restoration is subject to several common law conditions.

- the tenant has attached the items for trade, ornamentation or domestic use
- the tenant can remove the items without serious damage to the property

La Salle Recreations v Canadian Camdex [1969] BCCA

Objective Intention test at work

Facts: PL sold the carpets to Villa Motel under a conditional sales agreement, where the goods remained as the property of PL until the payments are complete. D gave a mortgage to VM, under a floating charge, under which the property of the borrower is security against the loan. VM goes bankrupt and the carpets become contested between PL and D.

Issues: Are carpets fixtures or chattel?

Discussion:

- under *Conditional Sales Act*, if the goods have become affixed to the land, then they have to be registered with the land registry office. Under s.15 of CSA, failure to do so makes the agreement null and void.
- PL did not register with the land registry office
- PL claims that the carpets are not affixed to the land, and does not need to register.
- the degree of attachment is slight - the carpets sit on the nails
- carpets are required for the hotel, thus the intent is to improve the use of the property.

Ruling: the carpets are a fixture.

Re: Davis [19??] BCCA

Facts: Something to do with a dispute over a bowling alley equipment

Issues: Are bowling alleys in the property fixtures or chattels? If they are fixtures, one third of their value would immediately go to the widow. If they are chattels, they would go to the estates creditors

Discussion:

- presumption is created that the bowling alleys are fixtures, as a result of their being affixed, but the presumption is rebuttable.
- bowling alleys were not for the better use of the building, but for the better use of bowling.

Ruling: the alleys are chattels.

Diamond Neon v TD Realty [1976] BCCA

Objective intention test and the “timely manner” condition in the tenant fixture removal.

Facts: Uptown Motors, a tenant leases a sign from PL. There is a clause in the K that the sign is to remain property of PL and not be considered a fixture. Dueck takes over the lease from Uptown Motors and re-signs the K with PL. The K subsequently expires and Dueck vacates the premises. The land is sold to TD. PL informs D that it is still the owner of the signs. TD was not aware of the clause prior to the purchase and sold the sign. PL sues in tort for conversion.

Issues: Were the signs fixtures or not?

Discussion:

- the clause in the K still holds
- as far as TD Realty is concerned, it was not aware of the clause at the time of purchase
- the whole point of the objective intention test,
- the right of the tenant to extract a fixture is only valid as long as the fixture is removed in a timely manner. PL should have claimed the fixture prior to the expiration of the lease, and prior to Dueck vacating the premises

Ruling: The signs are fixtures and TD is entitled to sell.

TANGIBLE AND INTANGIBLE RESOURCES

Theberge v. Galerie d’Art du Petit Champlain [2002] SCC

The difference between moral and economic rights over a work of art. Fixation and reproduction.

130.2 BOUNDARIES

Facts: PL allowed poster reproduction of his art to D. D began making canvas backed posters. PL objected and lower courts found a copyright infringement, seizing the works. D appealed.

Issues: How much copyright does the owner of intellectual property have over his work, once the tangible expression of it has been sold?

Discussion:

- Copyright Act provides the artist with both economic and moral rights to the works
- economic rights deal with the distribution of profit from the sale and re-sale of the tangible expressions of the work
- moral rights treat the idea of the work as possessing dignity and integrity, that is to be preserved
- PL is w/o question the owner of the intellectual rights to the works.
- D, as purchaser, has economic rights to the work.
- s.3(1) of Copyright Act gives PL right to “produce or reproduce the work in any material form”
- the rights are distributed between the artists and the purchaser - the balance is intricate
 - too many right to the artist would limit the free flow of ideas
 - too little rights to the artist would discourage artists from their work
- PL: he is not interested in the economic aspect and is concerned with the moral infringement of his work
- LC: the process (moving the ink onto a new substrata - canvas) that D used to reproduce the works equals fixation and is thus an infringement of copyright per s.3(1)
- J: this wide reading of the section gives too much copyright to the authors
 - there is no process of reproduction involved - the image stays the same
 - examples of classical works undergoing restoration - no change in the image
 - thus, there is no moral infringement, since the integrity of the work remains unchanged

Ruling: There is no moral infringement, and D has economic rights to the work. Appeal allowed.

Monsanto v. Schmeiser [2004] SCC

Copyright patent to an essential element of something applies to the whole.

Facts: A strain of patented gen. eng. herbicide resistant canola was blown onto D’s property, and D unwittingly continued to cultivate it as it took over his fields. PL holds patent to the genes in the canola and sells the seeds to farmers, under the condition that they use it for a year and do not sell the crops to a third party, nor keep any for replanting. PL sued for copyright infringement.

Issues: Is the use of the plant that contains the patented gene an infringement?

Discussion:

- the patent is applied to the genes, and is valid and uncontroversial
- D: the patent only applies to the gene and cell, not to the plant as a whole
 - example of Harvard Mouse, where patent was denied because the end product was a “higher life form”
- s.42 of Patent Act gives patent owner the exclusive right to “making, constructing and using” the invention
- D did not “make” nor “construct”
- did D “use” the invention?
 - J: stat interpretation reads “use” as derive advantage from
 - case law points that if a patented object is a source or an integral element of something else, then the “use” of the final product infringes on the patent.
 - D actively cultivated the plants for an economic benefit depriving PL of their benefit - this constitutes “use”
- the onus to rebut the presumption off possession was on D - he did not do well enough of a job
- if D really had no intent to use the patented plants, then he could have gotten rid of them - instead his actions point to being aware of the situation and proceeding nonetheless
- Harvard Mouse is not applicable here, since agriculture has always relied on genetical engineering, and the modern cultivated plants are inseparable from the work put into their cross-breeding. They are more of a human creation than natural higher form
- The “stray bull” doctrine, where the farmer gets rights over anything that comes onto his land is not applicable here, since the question is not classical property rights, but patent protection.

Ruling: There was a patent infringement. Appeal allowed in parts (to split costs) (5/4 ruling)

ABORIGINAL TITLE

- In 1846, the border of the 49th parallel is extended to the coast, cutting the existing Oregon Territory into two.
- In 1849, the colony of Vancouver Island is established by HBC, as a proprietary undertaking under the British Crown
- The formation of the Colony revolves around the process of treaty making
- The first 14 treaties are known as the Douglas Treaties (1850-1875).
 - these are based around Victoria, Saanich Peninsula, Nanaimo and Port Hardy.
 - these treaties are essential land deeds - delineating the property, transferring the rights to the colonists, and naming the price paid.
 - the treaties are assembled in pieces - the conference with the tribes produces the signatures, which are later attached to drafts of other NZ treaties that are sent to Douglas by the Crown.
 - what is the property interpretation of these treaties?
 - is treaty wholly contained in written text or does it include the oral agreements that preceded them.
- After 1927 House of Commons Committee, it was illegal to hire a lawyer to deal with Aboriginal and Treaty rights, without an approval of the Indian Council. This was meant to protect unscrupulous lawyers taking advantage of natives, but in fact resulted in the freezing of status quo for almost 50 years.
- The White Paper of 1969 proposed the abolition of the *Indian Act of Canada*, the rejection of land claims, and the assimilation of FN people into the Canadian population with the status of other ethnic minorities rather than a distinct group. This lost momentum by 1973, especially in the *Calder v. AG BC* [1973] SCC, which acknowledged that Aboriginal Title existed prior to colonization and was not extinguished.
- This led to the renewal to the negotiation and re-settlement of the treaties in 1970's and 1980's in other provinces. BC refused to participate.
- In 1982, s.35 of the Constitution has acknowledged and enshrined Aboriginal Title.
- In 1990's BC began the treaty process.

Nisga'a Treaty

- The only treaty that has been concluded so far.
- Aboriginal title rights are defined as treaty rights
- The tribe holds the land in fee simple
- One of the main exceptions is that the land is essentially unalienable - foreigners can hold land within the claim, but Nisga'a has the ultimate ownership.

St. Catherine's Milling Lumber v. Queen [1888] PC

Aboriginal Title is a "personal and usufructory right" over the land

Facts: From 1670-1870 HBC had Crown rights to Rupert's Land. In 1870 Fed purchased it from HBC and granted a timber lease to PL. Fed claims that it had acquired the land from the Ojibwa Treaty 3, and it was in their power to give timber rights. ON claimed it was Crown land, and it was provincial jurisdiction allocating the timber rights.

Issues: What rights did the Fed acquire from Ojibwa in Treaty 3?

Discussion:

- FED: Ojibwa held the land in a fee simple sort of a thing, and were free to give it to the Fed in the treaty
- ON: Ojibwa did not have fee simple, they merely occupied the land, and they did not have a right to give property rights to anyone, since they did not have them to begin with. Treaty 3 was merely political.
- PC: aboriginal have a "personal and usufructory right" over the land - occupation and use (hunting and fishing) of the land, not an exclusive possession.

Ruling: Natives did not have possession rights, thus were not able to give them away. The land is Crown land.

R. v. Sparrow [1990] SCC

Regulatory infringement of aboriginal rights can be justified under certain circumstances

Facts: Natives were caught fishing with a net that exceeded the allowed size. Upon being charged, they claimed that the restriction infringed on their aboriginal rights of s.35(1)

Issues: Is this an infringement, and is it justified?

Discussion:

- Crown: Federal *Fisheries Act* extinguishes FN rights
 - SCC: for extinguishment to happen, the law must be clear and plain that it intends to extinguish

130.3 ABORIGINAL TITLE

- this is not the case here
 - PL: s.35(1) denies Fed the right to regulate FN fishing under s.92(24) and 92(12)
 - SCC: no
 - What does “existing aboriginal and treaty rights” mean?
 - These are to be interpreted in a liberal way
 - BCCA found Musqueam to have an existing right to fish in the area
 - The right is to food, social and ceremonial fishery based on their tradition use of the land
 - Thus the restriction is an infringement of the aboriginal right
 - Crown has a fiduciary duty towards FN
 - S.35(1) is to be interpreted in a way that doubt is resolved in favour of FN (*Norwegjick v. R.* [1983] SCC)
 - Fairness to FN is the governing concern (*R. v. Agawa* [1988] SCC)
 - Rights that are recognized are not absolute: infringement can be justified
 - The onus is now on the Crown to justify the infringement
 - The infringement is justified if there is
 1. Compelling and substantial objective
 2. The action is not a breach of the fiduciary duty of the Crown
 - The conservation of salmon fisheries is a compelling and substantial objective
 - Though conservation is a valid objective, it breaches the fiduciary duty, since the regulation results in commercial fisheries getting the fish.
 - The priority principle that emerges here is: Conservation > Aboriginal food, social and ceremonial fishery > commercial and sport fisheries.
 - Aboriginal Title has no inherent limitation, thus the courts do not apply the full extent of the priority principle
- Ruling:** The infringement is unjustified. Judgment for AC.

R v. Gladstone [1996] SCC

Full priority principle applies only to aboriginal rights with inherent limitations

Facts: Natives establish a commercial fishery, and are charged with selling fish caught under a FN licence.

Issues: Is this an infringement, and is it justified?

Discussion:

- Aboriginal right to a commercial fishery is “without inherent limitation”: it could be extended indefinitely.
- Aboriginal right confers priority, but is not exclusive
- The application of the priority principle:
 - In *R v. Sparrow*, the aboriginal right had priority, since it was a right for food fishing and had an inherent limitation (one could catch only as much fish as was needed for food)
 - In this case, the right is an economic right, and has no inherent limitation (there is no limit to how much fish one could catch) thus it does not fall under the full blown conception of the priority principle
- The capacity of the Crown to infringe the aboriginal rights in expanded to:
 - Substantial and Compelling Interest
 - An objective is valid if it is aimed at preserving s.35(1) rights aimed at the preservation and conservation of a natural resource.
 - An objective is valid if its aimed at promoting a significant interest (fairness) in the society
 - Fiduciary Duty of the Crown
- In the context of commercial fisheries, the pursuit of regional and economic fairness is a compelling and substantial objective for infringement of FN rights

Ruling: the infringement is justified. AC is convicted.

Priority Principle: who gets the first claim on the resource that is left over after the regulation?

- FN rights with inherent limitations get first priority after conservation. Those without inherent limitations can be moved down the list. Then Crown must demonstrate that allocation is respectful of aboriginal priority. (*Gladstone*)
- Aboriginal Title has no inherent limitation.

Justification of Infringement Test:

1. The onus on the complainant to show that the right been restricted?
2. The onus is now on the Crown to justify the infringement if there is:
 - a. Compelling and Substantial Objective
 - Preservation and conservation of a natural resource (always pressing as per *Sparrow*)

130.3 ABORIGINAL TITLE

- A significant interest to the regional and economic fairness (*Gladstone*)
- b. The action is not a breach of the fiduciary duty of the Crown

Delgamuukw v. BC [1997] SCC

The establishment and meaning of Aboriginal Title

Facts: In 1984, the chiefs file a collective claim for recognition of their ownership and jurisdiction over their territory. In appeal to SCC, the claims changed to ownership and jurisdiction and self governance. This sent the case back to the trial court. Lower courts dismissed the claim, and it went to SCC.

Issues: What is the validity of Native oral histories? What should Aboriginal Title amount to?

Discussion:

- PL: AT should amount to the highest claim possible - fee simple
- Crown: AT is a bundle of rights restricted to traditional uses

SCC

- the lower courts did not give sufficient attention to the oral histories
- the determination of the AT will depend on both common law and native law, which requires oral histories
- AT is a right in land - a property interest - and as such, is more than a right to engage in specific activities
- it is not restricted to a set of traditional uses, these do not define AT, but are included in it.
- the difference of AT right in land from fee simple is that it precludes uses that will destroy the right.
- Once this has been established, the Crown can justify its infringement of the aboriginal title
 - this case confers an exclusive right to FN, thus the *Gladstone* analysis of commercial aboriginal fisheries applies here
 - the compelling and substantial objectives that allow infringement on the aboriginal title to land are:
 - general economic development (e.g. agriculture, forestry, mining, hydroelectric, etc.)
 - settlement of foreign population
 - but govts have to accommodate the participation and prior interest of FN in the development of land and resources
 - there is always a duty of consultation: its nature and scope will vary case by case, in some cases this may provide a veto
 - compensation is relevant to the question of justification.

Ruling: the case has to be negotiated outside of court.

Requirements for Aboriginal Title:

Underlying title lies with the Crown. The onus is on FN to prove title (*R. v. Delgamuukw*)

1. Was the land occupied pre-sovereignty (in BC the landmark is the 1846 Oregon Treaty)
2. Were there Aboriginal laws that govern the land (based on oral histories)
3. Was there physical occupation and effective control of the land? (construction of dwelling, cultivation of fields, other exploitation of the resources) (seasonal occupation is not enough) (no need for acts of exclusion)
4. Is there continuity of occupation?
5. Can the Crown justify the infringement of AT based on the Justification of Infringement test? (*Sparrow, Gladstone*)

Features of Aboriginal Title:

- It is closely related to a fee simple
- It is a property right (not personal and usufructory)
- It amounts to exclusive use and occupation of the land
- It is inalienability except to the Crown (based on Royal Proclamation)
- It is *sui generis* (unique in origin) based on the history of the natives on the land and their prior occupation of it
- It is held communally - no private ownership
- It has a restriction - the uses of the land do not have to be traditional, but should not be repugnant to them - that is, they should not preclude the possibility of the traditional use of the land.
- But for the purposes of the Priority Principle, it has no internal limitation

130.3 ABORIGINAL TITLE

R v. Bernard; R v. Marshall:

- these two cases further explore the meaning of aboriginal title
- In establishment of aboriginal title, the use of the territory has to be regular enough to confer ownership in common law - seasonal use will merely confer the rights to hunting and fishing
- The acts of exclusion are not required as evidence - what is required is effective control of the land.

Tsilhqot'in Nation v. BC [2007] BCSC

Difference between aboriginal title and hunting and fishing rights

Facts: Natives seek a declaration that they hold aboriginal title to their area.

Issues: Is there aboriginal title or hunting and fishing right?

Discussion:

- The judge finds about half of the disputed area to be aboriginal title
- The other half is seen as a hunting and fishing rights area
- There is no "postage stamp" approach to title (scattered panoply of small sites)
- A proper approach is that of a blanket coverage of the area: village sites, cultivated fields, and everything covered by a network of trails and waterways.

Ruling: The judicial opinion gives aboriginal title, but the matter goes back to trial again on a technicality.

Haida Nation v. BC [2002] BCCA

Crown has a fiduciary duty to consult and accommodate the natives where aboriginal title is asserted but not proven.

Facts: Haida seek judicial recognition of aboriginal title. MacMillan Bloedel is given a tree-farm license on the disputed land. The license has to be renewed every once in a while, and in 1999 the company tries to transfer the license to Weyerhouser. Haida object to the renewal of the license, the transfer of it, and wants to be consulted.

Issues: Does the province and Weyerhouser, have the duty to consult and accommodate the Haida?

Discussion:

- the duty rests in the Honour of the Crown - the Crown is bound to act honourably in its relations with aboriginal people, where the aboriginal title is asserted but not proven
- The Honour of the Crown obliges the Crown to consult and accommodate the Natives where the title is asserted.
- Crown cannot fuck around if there is a treaty process with a fee simple or aboriginal title in question.
- if the Crown contemplates an activity that may infringe on the not-yet-resolved title claim, the Crown has a duty consult and accommodate:
 - if the potential infringement is high, and the claim is strong, then the duty is extensive - up to a veto
 - if the potential infringement is slight, and the claim is weak, then the duty is minimal

Ruling: The Haida have a say in things. How.

130.4 ESTATES AND TITLE

ESTATE AND TITLE

- Under tenurial landholding, absolute ownership of land, in theory is unavailable, as the Crown holds the absolute rights and the landholders are considered mere tenants.
- Holding an estate to land is equivalent to holding the rights and status that the land provides

Several different estates exist under Common Law, ranging on the duration that the estate has, and the amount of rights that it provides:

Freehold:

- Fee Simple - most closely associated with absolute ownership;
- Fee Tail - same as fee simple, but can only be passed on to lineal descendants, and not sold. Virtually extinct in Canada;
- Life Estate - lasts for the life span of the tenant, then reverts to fee simple of the owner

Leasehold:

Inter Vivos Transfer - transfer of land between living parties

Testator - the person who makes the will

Beneficiary - the person who benefits from the will

Deed - the method of transferring title to estate

Indenture - the legal contract between two parties. It is used for any kind of deed executed by more than one party, in contrast to a deed poll, which is made by one individual

Residuary estate - any portion of the estate that is not specifically devised to someone in the will. If there is no residuary clause to direct this estate, it will pass on to the heirs by intestacy

THE ESTATE IN FEE SIMPLE

- Fee simple is the closest approximation to absolute ownership in Anglo-Canadian landholding
- Potentially of infinite duration and conveys the largest bundle of property rights
- Upon the death of the owner, the estate passes on to someone by will or through intestacy (statutory entitlements without will). If there are no takers, then the estate ends and escheat occurs.
- There are very stringent requirements for the wording of the transfer documents:
“to A” [words of purchase] “and his heirs, and assignees” [words of limitation]
- This strict approach is called the “rule of law”
- In recent decades, there has been less stringency, and many laws now assume that the estate is passed on in fee simple, unless if there is evidence to the contrary
- This is usually enacted by a statute, such as “Property Act” and is this called the “rule of statute”

Advantages of Fee Simple

- Encourages investment and development
- Encourages stewardship, as people are more likely to care for something that will be passed on to their children.
- Greatly simplifies land-security transactions
- On death, the owner can provide for the well being of family members

Thomas v. Murphy [1990] NB QB

The intent of the will takes precedence over the necessity of “word magic” and “rule of law”

Facts: PL retained lawyer D to act on his behalf for a purchase of property. D undertook to report on the title, and must be seen as having assured PL that they have acquired the title. The title originated by deed from residuary beneficiaries, and was given to “grantees and their successors”. PL claims that the estate is thus not in fee simple, and can not be disposed - his purchase is defective and must be repaired. PL wants costs and damages.

Issues: Was the grant in fee simple?

Discussion:

- Did the grantee in the trust receive fee simple that they could convey?
- Grantors held estate in fee simple as residuary beneficiaries under a will

130.4 ESTATES AND TITLE

- Grantors intended to give “good and sufficient” title to grantees
- Grantees had power of sale
- PL: since title was conveyed to the trustees as “grantees, their successors, and assigns” and not to “grantees, their heirs, successors, and assigns” it did not amount to fee simple, and interest remained with the grantors
- The use of the word “heirs” constitutes words of limitation, which is omitted, making the whole transfer void.
- Other jurisdictions have adopted an open approach, where absence of words of limitations presumes fee simple, unless the intent is contrary
- The court looks at the intent, not the strict wording of the document: the intent was to pass on fee simple
- So fee simple it is.

Ruling: Action is dismissed.

Grant Deed - a document transferring the estate to a grantee, guaranteeing that the estate is clear

Quitclaim Deed - a document where the grantor disclaims any residual interest in the estate and passes the claim to the grantee in its entirety

Land Title Act BC

186 Implied covenants

(5) Subject to subsection (8), if the transfer does not contain express words of limitation, the transfer operates to transfer the freehold estate of the transferor in the land to the transferee in fee simple.

(6) Subject to subsection (8), if the transfer contains express words of limitation, the transfer operates to transfer the freehold estate of the transferor in the land to the transferee in accordance with the limitation.

Wills Act BC

24 Devise without words of limitation

Unless a contrary intention appears by the will, if real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate that the testator had power to dispose of by will in the real property.

ESTATE IN FEE TAIL

Fee tail or entail is an obsolete term of art in Common Law It describes an estate of inheritance in real property which cannot be sold, devised by will, or otherwise alienated by the owner, but which passes operation of law to the owner's heirs upon his death.

Traditionally, a fee tail was created by words of grant in the deed: "to A and the heirs of his body." The crucial difference between the words of conveyance and the words that created a fee simple, "to A and his heirs," is that the heirs "in tail" must be the children begotten by the landowner. It was also possible to have "fee tail male," which only sons could inherit, and "fee tail female," which only daughters could inherit; and "fee tail special," which had a further condition of inheritance, usually restricting succession to certain "heirs of the body" and excluding others. Land subject to these conditions was said to be entailed or in tail. The restrictions themselves were entailments.

Property Law Act BC

10 Certain interests prohibited or permitted

This section essentially prohibits conversion of fee simples into fee tails, and abolishes that kind of title in BC.

LIFE ESTATE

Life estate is the least of the freehold estates. It is

- not inheritable
- only sellable for the duration of the original measuring life's
- often introduced with obligations and duties to maintain the value of the estate

130.4 ESTATES AND TITLE

Creating a life estate is the simplest:

- “to A [measuring life] for life” - *pur sa vie* - for the duration of the holder’s life
- “to B [donee], for the life of A [measuring life]” - *pur autre vie* - for the duration of someone else’s (not the holder’s) life

Reversion:

- Under the devise “From G, to A for life”, G is the grantor
- The interest reverts to G when A dies

Remainder:

- “To A for life and then to B in fee simple”
 - Upon the death of A, the remainder of the estate is transferred to B in fee simple.
- “to A with power to encroach, and then to B”
 - Life estate with power to encroach, giving A power to transfer in fee simple to third party.
 - power to encroach gives power of appointment and transfer, but does not give the right to dispose of the property by will
- Under common law, if holder of life estate *pour autre vie* dies before estate, could not give property in will; changed by statute *Will’s Act* s.2 allows holder of interest *pour autre vie* to will his interest as long as estate holder is alive.

Power to Encroach: A life estate holder can appoint or transfer the estate while they are alive (but not dispose of it by deed). So, all of the rights of fee simple, besides for testamentary disposition.

DOCTRINE OF REPUGNANCY

What happens if in will the testator transfers same interest to more than one party?

Note that the verb ‘devise’ refers to real property, and the word ‘bequeath’ refers to chattel; in wills often see “give, devise and bequeath” to cover all basis.

Re Walker [1925] ON CA

Dominant intention is important. Which of the clauses seems more powerful?

Facts: Testator gave to his wife “all of my real and personal property ... should any portion of my estate still remain in the hands of my said wife at the time of her death, the remainder shall be divided as follows...”

Issues: What is the dominant intention? Is the gift a fee simple to the widow, or a life estate with a remainder?

Discussion:

- There are three possible interpretations: fee simple for widow, life estate for widow, remainder is repugnant, life estate with power to encroach for widow
- Courts try to give effect to wishes of the testator based on the apparent intent
- Testator had two goals in mind: (a) to provide for his wife and (b) to leave something for other beneficiaries
- It would be more consonant with his desires to diminish his widow's share rather than to exclude the other beneficiaries completely, as a fee simple would do.

Ruling: this is a fee simple for the widow

Re Taylor [1982] ON CA

Overall intention is important. In this case, overall intention leads to life estate with power to encroach.

Facts: Testator give his estate “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: Is this a fee simple, or a life estate?

Discussion:

- The intention of the testator is to be ascertained
- The intention of the first clause reveals the creation of a life estate

130.4 ESTATES AND TITLE

- The option of life estate with power to encroach relieves repugnancy, as it balances the interests according to the intent of the testator
- Distinguished from *Walker*. There dominant intention gift took preference. Here is it overall intention.

Ruling: this is a life estate with a power to encroach

Christensen v. Martini Estate [1999] ABCA

The court will try to reconcile conflicting provisions. Strict transfer language not required

Facts: Martini left property to widow as long as needed, then to Christensen sisters, who were long-time friends and neighbours. “I give my wife ... the [house] for her use. When she no longer needs [the house] that she gives said property to Sandra and Sonya Christensen.”

Issues: How does one interpret this clause of the will?

Discussion:

- There are five interpretations:
 - A fee simple to widow.
 - A determinable fee to widow, with a gift over when she no longer needs it.
 - A conditional fee with the gift over being conditional upon widow’s need for the property.
 - A life estate with or without the power to encroach, with a gift over on death.
 - A licence of occupation to widow with a gift over to the Christensens: note that license is personal contract to use but gives no interest in property; licenses don’t attach to property, whereas easements do; easements are interests in property
- Interpret the language of the clauses trying distribute interests in property according to the intent of the testator.
- The intention was for all three to benefit.
- No mechanism to transfer during her life.
- Therefore widow has life estate without power of encroachment and remainder in fee simple to Christensen’s

Ruling: life estate *pur sa vie* to widow

Rights, Powers and Obligations of a Life Tenant

The creation of life estates imposes the problem of rights and duties distribution between the temporary and subsequent owners of the land. The rights of a life tenant are:

- to use
- to transfer (*pur autre vie*)

The doctrine of waste preserves the integrity of the life estate and prevents the tragedy of the commons. There are four distinct categories of waste:

- c. ameliorating** - acts that enhance the value of the land, but may interfere with the “personhood” interest of the subsequent owners, who may have other values than the monetary increase in the estate.
- d. permissive** - damage resulting from a failure to preserve or manage the estate
- e. voluntary** - conduct that diminishes the value of the land
- f. equitable** - severe and malicious destruction

Not every life tenant is necessarily required to comply with the limitations on land use imposed through the law of waste. A grantor may render the life tenant “unimpeachable” (though this is usually inapplicable to equitable waste)

- Life tenant is responsible for all current expenses, including property taxes and mortgage interest (not payment to capital)

Powers v. Power Estate [1999] NF

Division of duties between life tenant and future fee simple holder.

Facts: The testator left life estate to mother then to brother A then full fee simple to brother B, and gave executor property in trust until final transfer including responsibilities to maintain.

Issues: Who is responsible for paying the expenses associated with a property - the life tenant (taking them out of the income) or the future holder (taking them out of the capital)?

Discussion:

- heat is generally the responsibility of the life tenant, and the will does explicitly overrule that

130.4 ESTATES AND TITLE

- repair is divided:
 - major/structural repairs are to be paid from the capital, as they preserve the value of the capital
 - minor expenses are the responsibility of the tenant
- insurance: in common law there is no duty for either to pay insurance. But in tort law, the trustee may be liable for negligence (as in US). Thus, the court divides the insurance responsibility equitably (with the majority going to income)

Ruling: as above.

130.4 EQUITABLE INTEREST AND GIFTS

INTRODUCTION TO EQUITY

In property there is a fundamental dichotomy between “legal” and “equitable” ownership, which arose from two parallel developments of property and jurisprudence in England.

Equity is third important concept of property, after twin pillars of estates and tenures.

Equity is a concept of rights distinct from legal rights, i.e., "the body of principles constituting what is fair and right (natural law)." It was the system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called 'law' in the narrower sense) when the two conflict. In equity, a judge determines what is fair and just and makes a decision as opposed to deciding what is legal.

Equitable Title: a title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title

Equitable Interest: an interest held by virtue of an equitable title or claimed on equitable grounds, such as the interest held by a trust beneficiary. The equitable interest is a right in equity that, if violated (suffers a harm), is subject to satisfaction by an equitable remedy.

Trustee: a holder of property on behalf of a beneficiary - the one to whom the property is given. Trustee has a legal interest (power of attorney) in the trust.

Beneficiary: *cestui qui use / cestui qui trust* - the persons who are entitled to the benefit of any trust arrangement - the one who gives the property. Beneficiary has the equitable interest in the trust.

Conveyancing: transfer of title or property from one person to another.

Origins of Equity

Seisin: the legal possession of such an estate in land as was anciently thought worthy to be held by a free man.

Use: recognition of the duty of a person, to whom property has been carried out for certain purposes, to carry out those purposes. It developed from equitable interest in land. From the concept of use developed the concept of trust.

- In order to avoid paying land taxes and other feudal dues (leftover incidents of tenure, such as feudal military service) lawyers developed a primitive form of trust called ‘the use’.
- This trust enabled one person (who was not required to pay tax) to hold the legal title of the land for the use of another person.
- The effect of this was that the trustee (feoffee) owned the land and held legal interest under the common law, but the beneficiary (*cestui qui use*) had a right to use the land and equitable interest under the law of equity.
- Henry VIII enacted the *Statute of Uses* in 1535 in an attempt to outlaw this practice and recover lost revenue. The Act effectively made the beneficiary of the land the legal owner, and liable for feudal dues.
- There were two ways to go around the Statute:
 - ‘use upon a use’. The Statute recognised only the first use, and so land owners were again able to separate the legal and beneficial interests in their land.
 - avoidance: the statute does not apply to corporations and life estates/leaseholds
- In 17th century, the notion of use was converted into the concept of trust
- Courts of Law and Equity are fused into a single structure in the 19th century.
- The *Statute of Uses* was abolished in England in 1925, but may still be law in Canada.
- There is still a need for proper semantic approach to the wording of express trusts.

Valid	Invalid
To B for XX years, in trust for C (for XX years) (valid as a leasehold) To B Ltd., in trust for C (valid as a corporation) To A to the use of B to the use of C (use upon use) To B to the use of B to the use of C (use upon use) Unto and to the use of B in trust for C (use upon use)	To B to the use of C To B to the use of C Ltd. To B in trust for C

130.4 EQUITABLE INTEREST AND GIFTS

TRUSTS

- In a trust, the legal interest goes to the trustee, equitable interest remains with the beneficiary
- One can divide up equitable interest in as many ways as one can divide legal interest
- Trustee may transfer their interest to another party
- Where there is any conflict between the rules of equity and those of common law, equity prevails
- A right in equity is dependent upon the availability of equitable remedies.
- Most trusts are express, but there are two ways that a trust can arise: resulting trusts and constructive trust.

Resulting Trusts

There are three ways that a resulting trust can arise:

1. If the interest has not been fully disposed of under a trust document, this will give rise to a resulting trust
 - “from G, a gift to B, in trust to C for life”
 - once the life estate for C ends, the remainder of equitable interest in fee simple reverts to the G (settlor)
 - “from G, to B, to hold in trust until child C turns 21”
 - until C turns 21, G holds the equitable interest
 - if the deed of trust is ineffective (fraud/against public policy), then the equitable interest reverts to settlor
2. A resulting trust may arise when property is transferred as a gift (no consideration involved)
 - follows the maxim that “Equity prefers bargains, not gifts”
 - if A buys property and places title in the name of B, the presumption is that A holds equitable interest as a result of a trust
 - the presumption can be rebutted by showing that the gift was intended
 - the exception to it creates a presumption that it is an advancement, not a trust. It happens in cases of:
 - from father (parent) to a child
 - from husband to wife (except where the spouses are cohabiting)
3. A resulting trust may arise when there is a common intention (not an explicit intention) to create a trust
 - Property held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are entitled to own the property as joint tenants (includes money on deposit in both names)
 - Parties have to have show and or implicit common intention that the beneficiary is to be entitled

Property Law Act BC

19

(3) *A voluntary transfer need not be expressed to be for the use or benefit of the transferee to prevent a resulting trust.*

So, unless otherwise stated, a gift passes legal and equitable title, abolishing the presumption of the resulting trust.

Pecore v. Pecore [2007] SCC

Presumption of trust in father/daughter transfers.

Facts: Father and daughter hold a shared bank account. Upon the death of the father, the daughter assumes the share of the deceased party (the legal interest). Her brother-in-law claims that the equitable interest was held by the deceased and passed on to him.

Issues: Did the father intend that daughter hold the beneficial interest in the account, or did he withhold it to be distributed upon his death? Did the shared account give rise to a resulting trust or an advancement?

Discussion:

- Difference between joint/common tenancy: joint goes to the other tenant upon death, common is passed to heirs.
- If a gift is made, the presumption is that there is resulting trust
- But, if
 - husband transfers to wife, or
 - parent transfers to a child, law will presume an advancement
- But what about independent adult children, as the daughter was when the account was opened?
- Presumption of advancement only applies to minor children
- However, presumptions are mere guidelines, the will of the deceased is the ruling factor
- There is sufficient evidence to rebut the presumption of resulting trust in favour of an advancement.

130.4 EQUITABLE INTEREST AND GIFTS

Ruling: the daughter holds both equitable and legal interest.

Constructive Trusts

- A constructive trust is one imposed by equity, most commonly as a remedy for unjust enrichment.
- It is situation based: it arises in a number of established specific instances, usually for common law couples.
- “Remedial” constructive trust has been developed to respond to situations of unjust enrichment
- In *Murdoch v. Murdoch* [1975] SCC, PL claimed an interest in the property of her husband, which was bought and developed on her blood, sweat and tears: partly on the financial contributions to the purchase of original property, partly on the indirect contributions through her work. Majority of SCC dismissed the claim and said that it was a mere loan to be repaid, but a dissent by Laskin CJ advocated a constructive trust imposition, to respond to unjust enrichment by PL’s husband.
- From *Rathwell v. Rathwell* [1978], which had similar fact to *Murdoch*, SCC found a resulting trust based on common interest, but has accepted that one of the ways to remedy unjust enrichment is by creating a constructive trust in favour of the one who suffered from the unjust enrichment.
- A finding of unjust enrichment does not always result in a trust, sometimes monetary compensation is an option.

Unjust Enrichment Test:

1. There is an enrichment
2. There is a corresponding deprivation
3. There is an absence of juristic reasons for enrichment
 - PL must first show that no previously recognized juristic reason to deny recovery applies at present case
 - D then bears an onus to establish that a juristic reason exist.

Remedial Trust Test:

1. There was unjust enrichment
2. Monetary compensation is inadequate
3. There is a connection between the services done and the property in dispute.

Peter v. Beblow [1993] SCC

Remedial constructive trust for housekeeping

Facts: PL and D cohabit (common law) for 12 years, with PL doing domestic work in D’s property, which allowed D to save \$350 a month on housekeeper fees, pay off the mortgage, and get some swag and bling. After a breakup, PL claimed interest in the property. Lower court found that D unjustly enriched over PL, and due to the extent of her contributions, the entire property went to her.

Issues: Is there unjust enrichment and what is the remedy?

Discussion:

- There is unjust enrichment:
 - Housekeeping was enrichment to D
 - The work was uncompensated, thus a deprivation to PL
 - There is no plausible reason to deny compensation
- SCC thinks that D’s suggestion that domestic services cannot found a claim is BS
- What is the appropriate remedy?
- SCC: for a constructive trust to be ordered:
 - monetary compensation has to be inadequate
 - a link should exist between the services and the property in dispute (the nature and strength of the connection is vague?)
- If so, PL is entitled to a constructive trust based on “value survived” approach.
 - Value survived: amount by which property has been improved. This will capture the increase in value of the property due to the work of PL, including interest and all that. How did PL’s contribution enhance the assets?
 - Value received: value of D’s services. Will not capture the increase in property.
- What about the fact that PL did not pay rent?

Ruling: PL awarded 50% equitable interest in the property.

130.4 EQUITABLE INTEREST AND GIFTS

CONDITIONAL TRANSFERS AND FUTURE INTERESTS

Qualities of Interest

Vested Interest:

- An interest is vested when no conditions or limitations stand in the way of enjoyment
- Natural termination of a prior life estate is not treated as such condition
- In “to A for life, then to B in fee simple”, both interest are vested.
- A is said to be vested in possession and B is said to be vested in interest. Being vested in interest means having a right to future enjoyment.
- An interest vested in possession can be divested if it is determinable or defeasible.
- All vested interest are fully alienable and can be sold or transferred in any way.

Contingent Interest:

- A contingent interest is one where vesting is delayed pending the occurrence of a condition precedent, the happening of which is not inevitable.
- A right of re-entry is contingent, because it is subject to a condition precedent.
- Courts dislike contingent interest and favour vesting whenever such interpretation is available.

Determinable Limitation: terminates a determinable interest and is a part of words of limitation. If it is void, then the entire transfer is void.

Condition Subsequent: terminates a defeasible interest. It is not a part of words of limitation. If it is found void, then the gift is a fee simple.

Condition Precedent: vests a contingent interest (the conditions precedent and subsequent can be the same event)

Future Interests

Guaranteed future interest are of two types. They are both considered interests in land, vested in interest and are fully alienable.

Reversion:

- “From G to A for life”
- Property reverts to G on the expiration of A’s life

Remainder:

- “From G to A for life, and the to B in fee simple”
- Property goes to B on the expiration of A’s life

There are also two types of future interest that are not guaranteed per se:

Possibility of Reverter:

- “From G to A until X, then to G”
- The future interest created by a determinable title
- G has a possibility of reverter - it may never happen (as opposed to a full reverter after a life estate, since a life estate will always end at some point), but once it happens, G automatically receives the title, with no formal demand necessary
- Possibility of reverter is an interest in land, vested in interest and is fully alienable

Right of Re-Entry:

- “From G to A on condition that if X, then to G”
- The future interest created by a defeasible title
- G has a right of re-entry, which is different from possibility of reverter, as the title is not received automatically and a formal demand is needed - essentially condition X gives G a cause of action to recover the title
- A right of re-entry is not an interest in land.
- It must be exercised within six years of the condition (per *Limitations Act*)

130.4 EQUITABLE INTEREST AND GIFTS

Present Interests

There are three types of present interests. All present interest are vested, but only indefeasible is vested unconditionally

Indefeasible title:

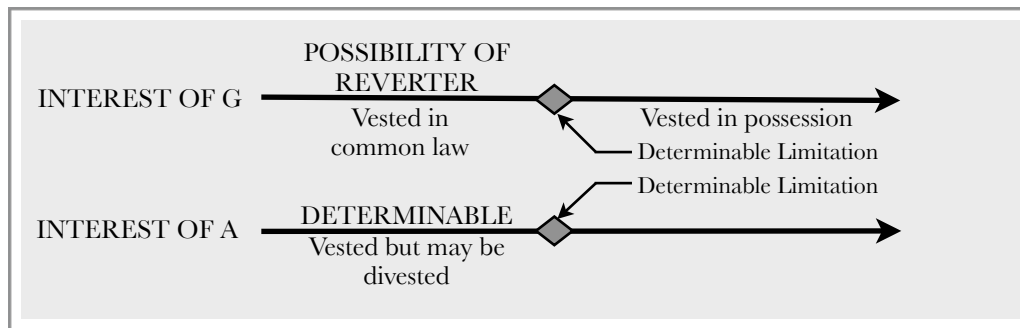
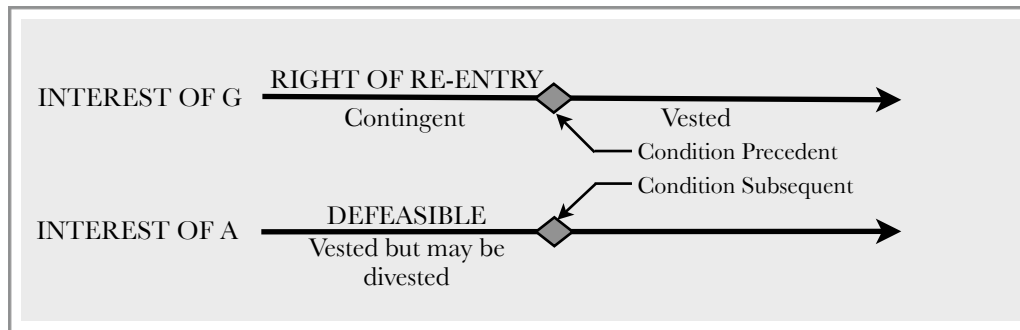
- “From G to A”
- A is unconditionally vested in possession and cannot be divested.
- This is the most concrete form of interest

Defeasible title:

- “From G to A on condition that if X, then to G”
- A has a defeasible title, and is said to be vested with a possibility of divestment subject to condition subsequent X, upon which A is divested and the title goes to G.
- Created using words “on condition that”, “but if”, “provided that”, “if it happens that”, “but when”

Determinable title:

- “From G to A until X, then to G”
- A has determinable title, which is vested, but upon the determinable limitation X, A is divested and the title will automatically revert to G.
- Created using words “while”, “during”, “so long as” and “until”



Rules of Construction

- Courts favour vesting or ‘early vesting’ and are loath to imply contingencies, where a vesting can happen instead.
- A rebuttable presumption in favour of early vesting arises, which can be overcome by language showing contingent interest.
- *Browne v. Moody* [1936] establishes that a gift is vested if the postponement is only to allow for a prior life estate
- *Re Francis* establishes that unless, the reason for the postponement of the gift is one personal to the recipient, then prima facie the gift is contingent
- *Phpps v. Ackers* [1842] establishes a rule that “To A if or when her attains an age of X” is a condition subsequent, not precedent. So, A gets immediate defeasible interest, subject to divestment if he dies before reaching age X
- So, where the facts allow it, the court will prefer a determinable limitation or a condition subsequent over a condition precedent.
- There is also a presumption against intestacy

130.4 EQUITABLE INTEREST AND GIFTS

Stuarthurn (Municipality) v. Kiansky [2001] QB

A remainder interest is vested, and thus a valid freehold estate

Facts: D is an official in the city, under the condition that all officials are owners of land. D sold his property, but has a remainder interested to a life estate of his grandmother.

Issues: Does the remainder interest qualify as being a current owner of land?

Discussion:

- freehold estate can be interpreted to mean freehold right, title or interest in land
- remainder interest is a vested interest, though it is an interest vested in interest, not in possession
- thus it allows D to be classified as a present owner of a freehold estate

Ruling: Ruling for D

McKeen Estate v. McKeen Estate [1993] QB

Presumption against intestacy and inclination to vesting.

Facts: Testator dies and leaves estate in trust for his wife for her life, and on her death divided in fee simple “equally between his two sisters, if they are both alive at the time of death of said wife”. Both sisters die before the wife.

Issues: Was the intent to make sisters’ interest contingent them surviving the wife, or vested in interest?

Discussion:

- The first thing to look at is the intention of the testator
- If it is unclear, the court will decide what a reasonable person might have intended
- There is a presumption against intestacy
 - Where the construction of the will is doubtful, the court assumes that the testator did not intend to die wholly or partially intestate
 - If there is a clear intention that the testator intended to fully dispose of the property, but it is ambiguous as to how, the court prefers a reading that will effect a complete disposition of the whole.
- There is an inclination in favour of vesting. See rules in *Browne v. Moody* and *Phipps v. Ackers* on previous page
- A that makes no reference to the time of vesting should always be held to take effect at the testator’s death, and lead to vesting in interest.
- Here, the testator did not intend for intestacy
- Court disagrees with the suggestion that the gift was accompanied by a condition that both sisters are alive
- The interest in fee simple, as a remainder vested in interest, is vested equally in both sisters, subject to being divested if one of the dies.

Ruling: Ruling for the estates of the deceased sisters.

Caroline (Village) v. Roper [1987] QB

If the termination event is external to the limitation, then the interest is defeasible

Facts: D transfers a piece of his property to be used as a community hall, retaining title to the land. After his death, community hall reps asked for a transfer of the title, to help them build some extra amenities on site. A conditional deed was signed, with a clause “shall revert back to D if used for other than a community hall”. Some years later, it burns down, and the city wants to use the land for commercial development.

Issues: Is the grant a determinable fee simple subject to a right of reverter, or a fee simple subject to condition subsequent?

Discussion:

- D: the trust in the deed is void and unenforceable
- PL: the trust offends the rules against perpetuities, and is unenforceable
- If the terminating item in the clause is an integral and necessary part of the formula from which the size of the interest is to be ascertained, then the result is the creation of a determinable interest.
- If the termination event is external to the limitation, it is a divided clause from the grant and the interest is upon condition
- The words of the deed “this acre... shall revert... if” are in future tense and depend on something that may or may not occur. Thus, the fee simple is defeasible if a future event occurs.
- This is an offence against the rule against perpetuities
- But the intention of the parties was that the land reverts after it ceases to be used as a community centre
- So the deed is rectified, and D gets the property back.

Ruling: Judgement for D.

130.4 EQUITABLE INTEREST AND GIFTS

State Limitations on Private Power

- The following applies to real property.
- An invalid condition subsequent is severed from the grant, destroying grantor's right of re-entry, and turning the transfer into an absolute fee simple
- An invalid determinable limitation destroys the entire grant: both the determinable interest and the right of reverter are destroyed, putting the interest back to the grantor.
- An invalid condition precedent is destroyed, possibly taking the whole grant with it
- Conditions subsequent are held to a higher standard of certainty than conditions precedent. As the recipient must be able to see clearly which actions will lead to the loss of the interest.
- Compare the two:
 - "To A in fee simple provided that she does not sell to an Irishman"
 - This is a defeasible interest with a condition subsequent. The condition subsequent is restricting the nature of the fee simple. As it is external to the words of limitation, it contradicts the interest and is found invalid and struck down.
 - "To A in fee simple as long as she does not sell to an Irishman"
 - This is a determinable interest with a determinable limitation that describes the limit of the interest. It is intrinsic to the interest and is perfectly valid.

Grounds for violation:

Efficiency Policy:

- The condition is too vague or too imprecise may be void. Requires practical level of clarity, not precision.
- Restrictions on alienations, as it limits the free flow of property and prevents efficiency.
- Examples of restrictions on:
 - The mode of alienation (cannot be leased etc)
 - The class of recipients (cannot be sold to X)
 - The time of alienation (cannot be sold for X)
 - The law allows some restraints but not blanket prohibitions
 - Transferor can restrict time and mode of alienation, and the class of recipients, but too severe of a condition can take away the power of alienation substantially enough to render the condition invalid.
 - When the whole power of alienation is taken away substantially, it is sufficient for the courts to intervene

Social Policy:

- Conditions that are against the accepted social beliefs of a just and democratic society
 - Prohibits marriage or requires the commission of a crime

Unger v. Gossen [1996] BCSC

Unless if it can be shown that the dominant intent was the condition, and not the gift, then the condition alone must fail

Facts: Testator bequeaths the estate to her three nephews, who at the time of the will (1980) lived in USSR. The condition of granting is that they immigrate to Canada, or their children do so. Only the ones in Canada have a right to the estate. Testator dies in 1994, when all the nephews live in Germany, except for one of their daughters (D), who is in Canada. Under the new immigration rules, none of the nephews can immigrate to Canada.

Issues: Does the residency clause apply, even though it is impossible?

Discussion:

- The intent of the will was that the money is not confiscated by USSR
- Only D is qualified as a resident, but as long as the nephews are alive, she cannot claim the estate until 2009 (15 years after the death)
- This is based on the possibility that the nephews can gain the estate if they immigrate to Canada (condition precedent)
- But the condition precedent is impossible, due to new immigration rules
- Where a gift is subject to impossible condition, the dominant intent must be the gift
- Unless it can be shown that the dominant intent was the condition, not the gift, then the condition alone must fail
- Here, the condition is secondary to the bequeathing, and must be struck down

Ruling: The estate goes to D.

130.4 EQUITABLE INTEREST AND GIFTS

Hayes Co. v. Meade [1987] ABQB

In the cases of ambiguity, courts read a condition as subsequent, as it allows for immediate vesting.

Facts: A will bequeaths property to an elder son, under the condition that he “reside on the land and cultivate it.” In the opposite case, the property is given to the younger son, but only after he pays his older brother \$1000. The older son left to work in US, and returned 40 years later, to build a house and live there. During his absence, the younger son was living on the land.

Issues: Is the clause a condition precedent or a condition subsequent?

Discussion:

- If a condition subsequent is uncertain, it is voided for uncertainty and the transfer is considered an absolute fee simple
- If the condition is precedent, then older son is not vested at the time of father’s death and this reading fails the whole transfer
- Courts prefer to see a condition as subsequent
- If the condition is subsequent, then the older son is vested with the possibility of divestment
- Court reads it to be the case here
- But the clause does not specify the time period that the son should “reside on the land and cultivate it”
- The condition must be such that the courts can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate is divested.
- This is not the case here
- The condition subsequent is void for uncertainty

Ruling: The condition subsequent is failed, and older son gets absolute ownership at the time of his father’s death.

Re Leonard Foundation Trust [1990] ONCA

State policy applies to any trust with a significant public element.

Facts: Colonel Leonard (d.1930) was a white supremacist billionaire who used his fortune to establish a Foundation that gave bursaries to WASPs of British descent. He regarded his money as a public trust, and wanted to perpetuate the glory of the British race by educating the youth (75% male 25% female bursary allocation). The fund operated under these terms for over 60 years, but the Ontario Human Rights Commission sought to alter the terms of the trust, claiming that it was in violation of the Province’s Human Rights code.

Issues: Since the trust is private, does the public policy of non-discrimination apply to it? Can the provisions be severed, or does the whole trust collapse?

Discussion:

- Lower court found the trust to be solely private, and free to choose the terms.
- CA:
 - This trust exist to provide funding for the public to attend publicly funded institutions, and ought to be considered public, or quasi-public.
 - A public trust based on notions of racism and white supremacy is against public policy and beliefs of a just and democratic society
 - Similar exclusive trust exist that give bursaries to females, aboriginals, blacks, etc.
 - But these things should be contextualized in regard to purpose and effect of the restrictions.
 - It’s OK to discriminate against those who are privileged; in this case WASP males.
 - This only applies to trust with a public dimension.
 - Family trusts are excluded from this ruling
- Some subsequent scholarships with severe limitations (Protestants only) are upheld, since *Leonard* is different, as it is distinguished on the grounds that it “was based on blatant religious supremacy and racism”

Ruling: the discriminatory elements of the document are to be struck down, but the rest is allowed to stand.

Trinity College v. Lyons [1995] ONCA

Option for when/if someone decides to sell more likely to be upheld than upon death.

Facts: PL brought an application to court to enforce an option to purchase adjoining land. The land belonged to Bennets. In 1963 they sold some of the land to PL, and decided that if the rest of the land was to be sold, then the PL would get the first dibs. PL was also to pay all the taxes on all of the property, and if the land was sold to a third party, then the Bennets would compensate the school for the taxes. Later on, PL acquired an option to purchase the rest of the land upon the death of Bennets for \$9,000. In 1991, one of the Bennets dies, and PL sought to exercise its

130.4 EQUITABLE INTEREST AND GIFTS

option to purchase the land (now worth \$125,000) for the set price. But it turns out that at some point before, the Bennets gifted the property to their daughters D.

Issues: Is the option to purchase at the fixed price at the death of the survivor unenforceable or void as a restraint on alienation?

Discussion:

- It is an improper restraint on alienation
- The 1963 note that “should they decide to sell, PL would have first dibs” is fine, since it gives freedom of choice
- The next agreement that gives a fixed price option purchase is invalid, as it restricts the right to alienate the land
- It essentially creates a life estate from a fee simple
- A term will only be implied when there is an evidentiary foundation for finding that both parties would have agreed to it and it is necessary for the business efficacy of the contract.

Ruling: The land goes to D

Rule Against Perpetuities

Balance between the rights of a prior owner to control the destiny of his estate, and the rights of the future owners not to be controlled by the dead hand of the past owners.

Duke of Norfolk’s Case [1681]

An interest is valid if it must vest, if it is going to vest at all, within the perpetuity period. That period is calculated by taking the lives in being at the date the instrument takes effect, plus 21 years.

“Interest”:

- This applies to almost all contingent interest in property (real or personal, legal or equitable)
- If an interest offends the rule, there remains no personal covenant or contractual term that can be enforced in its place

“Must Vest”:

- Only applies to contingent interests
- They must vest, either in possession or interest, within the perpetuity period.
- This also applies to the exact size of the interest: it has to be determined within the period
- If there are multiple donees, even one of them having an unvested / unclear interest, will destroy all of the gifts.
- If there is even the remotest possibility that the interest will not vest, the gift will be void.

“Within the Period”

- Duration of all lives in being, plus 21 years
- This involves all individuals who are directly or indirectly connected to the gift
- Also, someone alive at the time of the gift and who can be used to demonstrate that vesting cannot possibly occur outside of the period
- This includes children in utero (?)

Reform measures:

- Many jurisdictions have overridden the rule by either:
 - Confined it to certain kind of transfers
 - Set a limited period (instead of the life+21 years). This varies from 90 to 360 years.
 - Opted for outright abolition

130.5 LEASES AND SHARED OWNERSHIP

NATURE OF A LEASE

Leases blur the boundaries between contract and property law.

Lease: a demise of land under which exclusive occupation is conferred by a landlord to a tenant. While the lease is in force, the landlord has a reversionary interest, but the right to actual possession is suspended during the term of the tenancy.

There are five kinds of leases:

Fixed Term:

- The term is certain s to both its date of commencement and termination
- A lease with a fixed termination date, but which can be ended prematurely is valid.
- The maximum length must be certain.

Periodic Tenancy:

- In the normal course, continues until terminated by notice
- Unless otherwise agreed to or specified by statute, the notice is the length of the tenancy period.
- In case of yearly period, a six months notice is common law.
- May arise from inference

Tenancy at Will

- Has no set period or term and continues only so long as both landlord and tenant wish
- May be implied
- The notice of withdrawal need not be express and the conduct of either party may demonstrate the the tenancy is being treated as over.

Tenancy at sufferance

- Arises when a tenant remains on the premises without permission after the termination of one of the other types of tenancies

Perpetual lease

- With no fixed term or stated period, no right of termination on notice, this can last forever, and is technically not tenable at common law.

Elements of a Lease

- Lease should contain a demise of exclusive possession, identification of the parties, the property, the term, the date of commencement and the rent (if any)
- The common law does not establish any formal requirements for creating a lease
- According to *Statute of Frauds*, leases must be in writing
- If a tenant enters into possession under a void lease and pays rent, the common law presumes a periodic tenancy
- An oral agreement for a lease is treated as an equitable demise, if there are acts or part performances that can serve to prove the existence of the agreement.
- The lease runs with the land and can be sold and re-sold.

Leases and Licences

- A lease is a grant in exclusive possession - an interest in land
- A licence is merely a permission to do that which would otherwise amount to a trespass.
- Thus, a licensee does not have standing to sue in trespass, and is deprived of a number of statutory provisions that apply to tenants
- A lease is binding on the world (it is transferred with the land), a licence is not (it is an agreement between the parties that is non transferrable)
- A lessee can bring an action to recover his interest, a licensee cannot recover interest, only damages.
- If exclusive possession is given, then a tenancy s presumed: this is the main approach of Commonwealth law
- It is not enough to simply label an arrangement as a licence or a lease - the question is not of form but of substance.
- A licensee cannot sell his licence due to privity of contract.

130.5 LEASES AND SHARED OWNERSHIP

Factac Ltd v. Commissioner of Inland Revenue [2002] NZCA

Substance and not wording determinative of licence or lease.

Facts: In 1991 company granted Atlas the right to operate a quarry for 12 years with the right to renew for a term of 3 years; the company then sells the property to Mt. Wellington

Issues: Who is responsible for the GST payments? Is the agreement a licence or a lease?

Discussion:

- How do we determine whether an agreement is a licence or a lease?
- Intent and labeling are an important factor, but the content is most important.
- The distinguishing feature of the lease is the right to exclusive occupation; a license only provides that the licensee can merely enter onto the land for a specified purpose;
- Rent is not required but can be evidence of a legally binding K (either license or lease);
- Limitations on the use of property do not disqualify the land as a lease; i.e. exclusive possession is not synonymous with unqualified use.
- The courts says that even in cases where exclusive possession is the substance of the agreement, an interest is not a tenancy if it can be terminated for reasons outside the agreement;
- If the right to exclusive possession is to a small area where a much larger area is being used by the occupier, then it may be found to be a license;
- In this case, Atlas had a relatively small area to quarry; the owner was still free to go anywhere in this area and process almost all the materials;
- The agreement was called a license agreement (can be evidence of intent).
- From the facts, Atlas is there as a licensee with no rights of exclusive possession.

Ruling: This is a licence

Metro-Matic Services Ltd v. Hulman [1973] ONCA

“Quiet enjoyment” implies exclusive possession.

Facts: Previous owners had lease agreement with PL to operate coin laundry in building; owners sold to new owners (D). D knew about the lease agreement and accepted rent checks from PL; but then they got another company to provide the laundry services and excluded PL from the premises (removed their machines).

Issues: Did the agreement (called “lease agreement”) create an interest that runs with the property?

Discussion:

- If it’s a lease, it binds the next owner; if it’s a license, it’s only binding between the original parties.
- Language used is that it is a lease;
- This is not determinative but shows intention of parties, and amounts to a presumption in favour of a lease;
- CA says this presumption will stand unless rebutted by the terms of K but in this case there is nothing to say exclusive possession is not granted;
- Clause “quiet enjoyment” implies exclusive possession

Ruling: This is a lease

OBLIGATIONS OF LANDLORDS AND TENANTS

- The relationships between landlords and tenants are generally considered contractual and are governed by the lease
- But terms may be inserted by implication under common law, in equity, or by statute
- Parties often agree to import the usual covenants: a standard set of terms
 - These depend on current conventions and the nature of property leased
 - A covenant by the landlord to quiet enjoyment
 - A covenant by tenant to pay rent, keep and deliver premises in repair, pay some taxes (varied), and allow landlord to enter premises to view state of repair
 - Parties may waive the application of terms implied under common law
- Quiet enjoyment:
 - The right to quiet enjoyment is fundamental to a tenancy and is often explicitly included or implied
 - It means peaceful occupation of premises and protection against substantial interference
 - Persistent conduct by landlord aimed to force the tenant out is a contravention
 - This is not directed against noise per se, but excessive noise can be a contravention

130.5 LEASES AND SHARED OWNERSHIP

- This does not protect against wrongful acts of other tenants

Derogation: is a partial revocation of a law.

- Non-derogation from the lease
 - Lessor cannot use the property in a way that renders the premises substantially less fit for the purposes for which they were let.
- Repair
 - A central feature of most modern commercial and residential leases
 - Tenant must act in a tenant-like manner
 - Principles of waste apply

Southwark LBC v. Tanner [2001] HL

“Quiet enjoyment” is only applicable to the actions of the landlord - not other tenants

Facts: Tenants of the building complain that due to lack of soundproofing, they can hear everything that their neighbours do, including loud shagging and such. The neighbours are not excessively noisy, but the building is just too shitty.

Issues: Are the landlords responsible for soundproofing as a part of “quiet enjoyment” covenant?

Discussion:

- There are no clauses regarding obligation to soundproof in the lease
- There is no implication of such warranty under the law
- Does this fall under covenant of quiet enjoyment?
- Literal reading of the covenant would suggest so
- But the wording of the covenant is steeped in tradition and has a technical meaning different from the literary one
- It is to be read as protecting the tenant from any action of the landlord or those acting for him
- Other tenants are not parties to this
- Landlord is also not responsible for the soundproofing, as the thin walls are an extant structural feature

Ruling: Appeal dismissed

Petra Investments Ltd v. Jeffrey Rogers Place [2000] LD

Using the retained land in a way that undermines the profitability of a tenant’s business is not derogation.

Facts: D owns a small shopping centre in London. PL entered into a 25 year lease in 1988. In 1996 D converted a part of the centre to a store for Virgin. During the period of construction, PL’s business suffered. D offered a “service charge holiday” until the work was completed, as long as they do not sue him for disturbance of “quiet enjoyment”. When Virgin opened, PL’s business did not improve: they blamed it on the new store and closed down. D sued for unpaid rent. PL claimed derogation of grant.

Issues: Is the interference sufficient to be considered a derogation?

Discussion:

- PL claims that the landlord was obliged to create a high end women’s fashion centre. This philosophy changed when the GAP was introduced, then Virgin.
- The test is whether the action complained of rendered the premises “unfit or materially less fit to be used for the particular purpose for which the demise was made”
- If business operation of one tenant in a mall significantly interferes with the retail trade of another, it is derogation
- But merely the retained land in a way that undermines the profitability of a tenant’s business is not derogation.
- In this case, the landlord was free to use the retained land to construct another store for a new tenant
- However, the terms of the lease produce an implied obligation on the landlord not to alter the common area so that they would lose their character as a retail shopping mall.

Ruling: Judgement for D

130.5 LEASES AND SHARED OWNERSHIP

SHARED OWNERSHIP

Allows two or more people to have equal interest in the same land at the same time.

Joint Tenancy:

- Shared ownership that includes right of survivorship
- Leaves the estate in one piece, and narrows interest to one owner
- All tenants hold equal rights to the possession and use of the entire property

Common Tenancy:

- Shared ownership that allows the owner to sell their share of property, and to pass it on by will
- Divides the estate into pieces

Right of Survivorship:

- On the death of a joint tenant, his or her share goes to the surviving co-owners
- This does not apply if the tenancy is common

JOINT TENANCY	COMMON TENANCY
<ul style="list-style-type: none">• Wording “as joint tenants”• If there is no direction, <u>common law presumes a joint tenancy</u>.• In BC this is reversed by Property Law Act s. 11(2). So if there is no direction, <u>there is a presumption for common tenancy</u>.	<ul style="list-style-type: none">• Wording “as tenants in common”• the common law presumption of joint tenancy could be rebutted with words of severance in transfer instrument:<ul style="list-style-type: none">• “in equal shares”• “share and share alike”• “to be divided between”• “to be distributed in joint and equal proportions”• “equally” “severally”• “jointly”• missing one of the four unities.

Four Unities of Joint Tenancy

1. Unity of Possession: all entitled to concurrent possession of the whole land (applies to both joint and common)
2. Unity of Interest: each interest has to be of the same extent, nature (vested/contingent) and duration
3. Unity of Time: all interests must be vested at the same time. This is subject to the same vulnerabilities as the rule against perpetuities.
4. Unity of Title: title must be derived from the same document or occurrence

Joint Tenancy ends if

- If A and B are joint tenants, and A sells a portion of her estate to C, as A and C hold less than B
- If A and B are joint tenants, and A sells all of the estate to C, as C came into possession at a later time
 - This applies if A sells land to himself.

Three situations which result in a tenancy in common in the common law:

- Partnership
- Two or more persons advance money to a mortgage.
- If the purchase price is divided unequally.

Property Law Act BC

11 Tenancy in common (reverses the presumption of a joint tenancy)

(2) *If, by an instrument executed after April 20, 1891, land is transferred or devised in fee simple, charged, or contracted to be sold by a valid agreement for sale in which the vendor agrees to transfer the land to 2 or more persons, other than personal representatives or trustees, they are tenants in common unless a contrary intention appears in the instrument.*

130.5 LEASES AND SHARED OWNERSHIP

(3) If the interests of the tenants in common are not stated in the instrument, they are presumed to be equal.

18 Rules for transfer and ownership to oneself

- (1) A person may transfer land to himself or herself in the same manner as to another person, and, without restricting that power, a joint tenant may transfer his or her interest in land to himself or herself.
- (2) A trustee or personal representative may transfer land to himself or herself in his or her personal capacity.
- (3) A transfer by a joint tenant to himself or herself of his or her interest in land, whether in fee simple or by a charge, has and is deemed always to have had the same effect of severing the joint tenancy as a transfer to a stranger.
- (4) A registered owner may make a transfer directly to himself or herself jointly with another, and registered owners may make a direct transfer to one or more of their number either alone or jointly with another.
- (5) An owner in fee simple or an owner of a registered lease or sublease may grant to himself or herself an easement or a restrictive covenant over land that he or she owns for the benefit of other land that he or she owns in fee simple, or of which he or she is the owner of a registered lease or sublease, but a grant under this subsection must be consistent with the interests held by him or her as grantor and grantee at the time of the grant.
- (6) A corporation that owns land in fee simple and is a member of the class of persons named in section 218 of the Land Title Act, may grant or reserve a statutory right of way over the land to itself.
- (7) Common ownership and possession of the dominant and servient tenements does not extinguish an easement.
- (8) Common ownership and possession of the burdened and the benefited land does not extinguish a restrictive covenant.

Re Bancroft Eastern Trust Co. v. Calder [1936] NSSC

If no express intention, then common law presumes a joint tenancy.

Facts: Samuel dies. Beneficiaries under his will are his wife, 2 sons, 1 daughter, and 2 grandchildren (Paul and Jean). Half share of Samuel's estate to be invested during life of widow, the income to be divided into 4 equal shares (2 for sons, 1 for daughter, and 1 for grandkids together). Paul dies.

Issues: Does the interest left in a will to Paul and Jean create a joint tenancy or a common tenancy?

Discussion:

- If the interest is joint, then it goes to other co-owners, (Jean) if it is common, then it is passed on to Paul's estate
- If there is any indication of an intention to divide property it must be held to be a tenancy in common.
- However in this case there are no explanatory words.
- Nothing in the will to indicate an intention to divide the income and create a tenancy in common.
- The court decides that here a joint tenancy relationship was created.

Ruling: The income now goes to Jean.

Severance: The termination of an existing joint ownership relationship, turning it into a common tenancy

Re Sorensen & Sorensen [1977] ABCA

Severance of joint tenancy

Facts: Marrian and Marshall divorce. Property which they held as joint tenants include the home and an adjoining lot. In settlement agreement spouses divided title to the lot. Marshall leases his share to his wife. She is diagnosed with cancer, and creates a trust deed, holding the property in trust for her son, then a will, leaving interest to her son. She then files a notice of motion to partition the lots (sever the joint tenancy). On the day of the hearing she dies. Marshall files caveat against the lots, claiming right of survivorship.

Issues: Has there been a severance of the joint tenancy prior to Marrian's death?

Discussion:

- Joint tenancy can be severed in three ways:
 - 1) Act by one of joint tenants operating on his/her share; Act can be:
 - If one transfers their interest to another person or to themselves
 - Mortgaging of interest
 - Granting of a lesser estate (e.g. life estate)
 - Does not require consent of agreement of other parties: joint tenant can do whatever they please with their interest, as if they were the sole owner
 - 2) Mutual agreement among joint tenants to sever the interest
 - 3) Any course of dealings which indicate that the interest of all were mutually treated as tenants in common
 - No explicit agreement, but shown through conduct
 - Each had separate mutual intentional

130.5 LEASES AND SHARED OWNERSHIP

- Did any of Marrian's unilateral acts sever the tenancy?
- Lease agreement does not sever joint tenancy, at least not lease agreement between joint tenants.
- Mortgage does not affect right of survivorship. No severance because mortgage made between the 2 joint tenants, even though mortgage can usually sever joint tenancy in common law.
- Execution of a will is not allowed if not severed, so the will cannot be used to sever.
- Execution of partition would have been a unilateral declaration of intention to sever had she acted on it. But she died before she could complete it.
- Execution of the trust deed? Marrian remains legal owner but transfers beneficial interest to son.
- The gift to son, although only of equitable title, does sever joint tenancy.

Ruling: Judgement for son.

Co-Ownership Through Family

- Common law treats marriage as economic partnership
- Rules governing property rights between spouses are the same as applicable to all property owners, with some exceptions
- But this has been experiencing significant reform
- Under *Ontario Law reform Act* most assets accumulated during marriage are treated as property to be divided equally between spouses, regardless whether they were family or business assets.
- The parties are entitled to walk away from the marriage with an equal share of the accumulated property, unless one of them can establish that an equal division would be inequitable.

Occupation Rent: A matrimonial or joint tenant property compensatory claim based on an allegation that one spouse or joint tenant ought to be debited the value of her or his exclusive occupation of the family or jointly-held home.

Ouster: A cause of action available to one who is refused access to their concurrent estate. Can be constructed based on actions of one owner.

Braglin v. Braglin [2002] ABQB

Rules for establishing entitlement to occupation rent are different in family law context

Facts: Wife did not make a claim for occupational rent when she filed for divorce. She does not contribute to the mortgage payments. Husband is paying child support under the guidelines. It seems likely that husband assumed responsibility for matrimonial debts.

Issues: Can the wife get occupational rent?

Discussion:

- Usually occupational rent is awarded in cases of ouster
- But courts have been willing to grant it even in cases of voluntary departure.
- Awarding occupation rent in a domestic dispute is a discretionary remedy which depends on all of the circumstances of the case
- Rules for establishing entitlement to occupation rent are different in family law context.
- In a family law situation, a departing joint tenant who does not and has not been asked to contribute to the financial support of the property is not prevented from bringing a claim of occupation rent
- Does this apply to common law marriages? Sounds like not - to get deferred sharing, one has to be legally married, otherwise you get a constructive trust.

Ruling: It is improper to award occupational rent in this case.

CONDOMINIUMS AND CO-OPS

Co-Op: each resident owns a share in the property corporation, and the share gives them a title to the lease, which is an interest in land. The shareholder does not actually hold any property, but all the property is owned by the corporation, who is also responsible for the property taxes etc. This also includes a right to collective self-governance.

- Equity co-ops allow shares to be bought and sold on the market.
- Social Housing Co-ops have shares that are not up for sale, or up for sale at a fixed price.

130.5 LEASES AND SHARED OWNERSHIP

Condominium: allows for a fee simple ownership of land, while use of and access to common facilities in the piece such as hallways, heating system, elevators, and exterior areas is held as tenancy in common. This also includes a right to collective self-governance.

2475813 Nova Scotia Ltd v. Ali [2012] NSCA

The mechanics of property relationship within condos are ruled by statute.

Facts: PL is the condo developer who owns 80% of the empty units in the building. They are not selling well, so he uses his majority to try to force a sale. The remaining owners objects.

Issues: Can PL rely on his ownership of the empty units to force majority quorum?

Discussion:

- Common feature of all condos are the need for balance and possibility of tension between individual and collective interest.
- Condos are created by provincial statutes.
- Under s.40 of the NS statute, the condo complex can be terminated as a condo and sold as a whole property. This requires 80% of the tenants' approval.
- Condo owner has two fiduciary duties:
 - By virtue of being the owner and controlling mind of the developer and having voting control of the corporation, he has a fiduciary duty to all the unit holders not to use that voting control to authorize the sale of the property, where their interests conflict.
 - By virtue of his position as the director of the corporation, he has a fiduciary duty to the corporation.

Ruling: It is improper to award occupational rent in this case.

Alternative Conceptions of Shared Ownership

Hutterite

- Different mode of ownership held by some crazy cult. It interacts with the canadian property law in a weird way.
- While you are within the community, everything is held in common, but once you leave, you get fuck all.
- This notion is not in conflict with public policy: more of a live and let live relationship between the state and the cult

Aboriginal Title

- This is a communal interest with limitations on use and alienation

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- General public licenses that allow people to take something and use it for whatever purpose they want, but not to remove it from the commons. So there is no right to exclusive possession.

130.6 SERVITUDES AND REGISTRATION

SERVITUDES OVER PROPERTY

EASEMENTS

Servitude (Incorporeal Hereditament): a limited real right to the land of another, which confers on the owner of the dominant tenement, in principle, permanent and defined entitlements of use and enjoyment with regard to the servient tenement.

Easement: a non-possessive interest to use someone else's property for a stated purpose. It is similar to a license in the limited usufructory interest, but is much more challenging to terminate. Also, benefits of most easements flow to the adjacent parcel of land. An easement is considered as a property right in itself under common law, and is treated as a type of property.

Dominant Tenement: the ownership of the easement

Servient Tenement: the ownership of the land subject to the easement

- There are two broad categories of easements:
 - Positive easements allow the dominant tenement holder easement to enter the land subject to the easement for his benefit.
 - Negative easement does not give the right of entry, but merely restricts the use of the servient tenement.

There are four main pillars to easements (as outlined in *Re Ellenborough Park* [1956] UK) :

1. Easements have to be attached to an estate on both ends: the benefit from it should flow into an estate, and the detriment should be taken from an estate. This is derived from economic efficiency doctrine - a detriment to one property is only justified by a benefit to another.
2. Easement must accommodate the dominant tenement (must be reasonably necessary for better enjoyment of that tenement) (except for statutory Right of Ways as per *LTA* s.218)
3. Both dominant and servient tenement cannot be owned by the same person (*PLA* s.18(7) is an exception)
4. The easement must be capable of forming the subject-matter of a grant, as it is originally given as one. Because the easements are incorporeal, the transfer of possession is not possible, and a grant is required in order to pass ownership.
 - It may not be too vague
 - It may not amount to a mere right of recreation
 - It may not extinguish the possessory interest of the servient tenement.

Profit a prendre: the servitude to take the profits of the soil from someone's land: extract minerals or other natural products.

- *Profits a prendre* are transferable interests in land that run with the land and encumber the land (as opposed to licenses, which are purely contractual and are not transferable); owner of land can't unilaterally revoke the *profit a prendre* as they can with license;
- Don't have title to the resources until have actually taken possession of it;
- Don't need a dominant tenant; can hold a *profit a prendre* without owning any land (in gross)
- Can restrict quantity and type of resources that can be extracted;
- In *BC v. Tener* Tener was found to hold profit a prendre.

COVENANT

Covenants over land can be used to create rights enforceable by one landowner against the other, even in the absence both of privity of contract and estate between the parties. Covenant are similar in function to zoning regulations, but are grounds-up made and have legal consequences.

- Covenants are essentially promises under seal. They are regarded as valid contractual undertaking made by a covenantor (who assumes the burden of the promise) and the covenantee (who obtains the benefit).
- The language of servient/dominant tenement applies to covenants too.

Uses of covenants:

- Restricting the type of development available on land
- Conservation and preservation of sites

130.6 SERVITUDES AND REGISTRATION

- Restricting the form of business available

Tulk v. Moxhay [1848] UK

Covenants run with the land and are binding on the new owners.

Facts: A covenant is entered into to maintain a parcel of land in central London as a public park. A purchaser of the property who is aware of the covenant tries to escape his obligation by claiming that he is not privy to the contract and is thus not bound by it.

Issues: Does the obligation to covenant run with the land?

Discussion:

- Prior to this case, for covenants to run, the original agreement had to be made by a landlord and tenant at the time that they entered into the lease, that is, there had to be privity of estate, also called "horizontal privity."
- If the agreement had been a contract instead of a covenant, it would have been enforceable
- The Court decided that the covenant was enforceable at equity, that is, when PL seeks an injunction as opposed to damages
- The result does not turn on whether the covenant runs with the land.
- Horizontal privity (privity of estate) is not required for the burden of a covenant to run at equity.
- If equity is attached to the property by the owner, no one purchasing with awareness of the equity can ignore it.

Ruling: The covenant is binding.

Benefits in Equity and Law:

1. Annexation

- The benefit is attached to the land - it must touch and concern the land
- Intended that the benefit run with the land
- Transferee must acquire entire interest of the original holder

2. Assignment

- The benefit can be transferred from one parcel to the other

3. Building schemes

- See following case:

Berry v. Indian Park Assn. [1999] ONCA

Restrictive covenants for purpose of development can be created through a building scheme.

Facts: D - a planned community Association - imposes a restrictive covenant on the use of lands that it controls. It later acquires a neighbouring development, upon which it imposes a similar covenant of by-laws, also charging the residents membership fees. They don't like it much and tell the Association to bugger off. The Association claims that they are a part of a building scheme.

Issues: Does the obligation to covenant run with the land?

Discussion:

- There is no privity of contract, so the only way this will work is under the restrictive covenant a-la *Tulk v. Moxhay*
- Such is not the case here
- There is another exception: that of building schemes, which allow a restrictive covenant for the purpose of development to be enforceable despite lack of privity.
- The prerequisites for a building scheme come from common law and statute
- *Elliston v. Reacher* [1908] CA:
 - Both PL and D get title from same vendor
 - Prior the sale, the covenant is imposed in a uniform manner (consistent with the general development scheme)
 - The covenant is for benefit of all lands in the scheme
 - The lands must have been purchased on the understanding that restrictions would enure to the benefit of all the parcels
- *Land Titles Act*:
 - The covenant on use is to be registered with the land
 - It may be modified or discharged by the order of court on proof that the modification is beneficial to the persons interested
- In this case, the Association fucked up on pretty much every count
- So the new acquisition is not part of the building scheme, and the by-laws have no effect.

Ruling: The Association can bugger off.

130.6 SERVITUDES AND REGISTRATION

There are four main pillars to covenants:

1. The covenant must be negative in substance: only restrictive covenants are enforced, where compliance is possible by the owner doing nothing.
2. It must have been intended that the burden was to run with the servient land, and that land must be sufficiently described in the covenant.
3. The covenant must be taken for the benefit of dominant lands, and that those lands must be sufficiently identified in the document.
4. All general limitations imposed on the availability of equitable remedies apply.

LTA s.222 says that a covenant that restricts the alienation or use of the land based on sex, race, nationality etc. is void and has no effect.

Conservational Covenants: for the purposes of conservation, a covenant can be imposed upon land, where the dominant tenement is replaced with a government agency, ministry, trustee, charity etc. This allows the covenant to be held in benefit for the public.

COMMON LAW PRIORITIES

Overview

The deed was the primary device for transferring property in common law; it was the instrument that the transferor uses to give title to the transferee. Question is where does the law allocate the risk if there is a defective transfer (something goes wrong) and end up with competing claims to the same interest in land.

Law has moved from protecting just the owner (common law principle of first in time is first in right) to protecting interest of purchaser and market transactions (through statute);

- This change occurred to encourage economic transactions (economic theory);
- In order for market to work effectively there must be certainty and security, which the registration system provides;
- Land has changed from being seen sociologically as a special, fundamental possession of a person to being seen economically as a transferable market commodity;
- *Nemo dat quod non habet*: one cannot give that which they do not own - this was the original principle of common law.
- Common law and equity priorities were changed by the registration system
- Thus, title is relative.
- Registration determine the ordering of rights.

Transfer of property is a two step process: the agreement to transfer gives rise to equitable interest for the purchaser, and the finishing of the sale transfers the legal interest.

Mortgaging property transfers title (legal interest) to the mortgagee, while maintaining equitable interest (Equitable Right of Redemption) in the hands of the property owner. This remaining interest can be mortgaged out to another party in an "equitable mortgage".

There are four scenarios of possible conflicts between common law and equity:

1. Prior legal interest and subsequent legal interest

- Prior legal interest takes priority.
- For example, A transfers to B and then also to C. In this case B has better claim based on first in time is first in right and *nemo dat*. Burden lies entirely with purchaser to verify that A has proper title to transfer.

2. Prior equitable interest and subsequent legal interest

- This is the interesting case; subsequent legal interest takes priority so long as purchaser paid money and did not have notice of prior equitable interest.

130.6 SERVITUDES AND REGISTRATION

- For example, A agrees to sell to B; A gets a better offer from C and goes through with transfer to C. In this case, B get equitable interest based on a constructive trust; who gets title depends on whether C had notice of the prior transfer; if C was a bona fide purchaser for value without notice of the prior equitable interests, then law favours the good-faith purchaser; C gets everything and B gets nothing but B retains a cause of action against A;
- Another example, A agrees to sell to B, but A gives as gift (legal interest) to C. In this case B definitely wins because it was a gift and not a purchase for value;
- Another example, B is long-time tenant of owner A; A agrees to sell to B; C offers a better price which A accepts and A completes transfer to C. B has prior equitable interest and C has subsequent legal title. In this case, question is whether C had notice or should he have known (constructive notice). Fact that B is in possession implies C should investigate, at least in terms of understanding terms of existing lease agreement. Law makes a strong presumption of constructive notice where one party is in possession.
- Three categories of notice:
 - a. actual notice
 - b. imputed notice: notice through an agent (someone operating on your behalf)
 - c. constructive notice: when purchaser ought to have made further inquiries and would have known if had made proper inquiries
- One more example based on a real case: elderly woman transfers title to boarder (B) and agree orally that he will hold in trust for woman; B sells to C without saying anything about the trust; C investigates property but assumes old woman is wife of B; who gets title?
 - In this case woman has equitable fee simple (based on oral agreement) and C has subsequent legal title. Is C a purchaser without notice or does constructive notice apply? Court decides that C should have made more inquiries. Again illustrating strong presumption of constructive notice where one party is in possession.

3. Prior legal interest and subsequent equitable interest

- Prior legal interest takes priority.
- For example, A mortgages interest in land to B; A then mortgages remaining interest to C; in common law first mortgage is legal mortgage and second mortgage is an equitable mortgage; if A defaults and value of land is not enough to repay both lenders then who has better interest in land?
 - The prior legal interest has priority in this case and almost any case where there is prior legal interest. First loan paid off before second.

4. Prior equitable interest and subsequent equitable interest

- Prior equitable interest takes priority.
- A transfers equitable interest to B and then to C; first in time prevails regardless of notice;

Chippewas of Sarnia Band v. Canada AG [2000] ONCA

Aboriginal title is sui generis and does not equate to legal title, therefore the subsequent legal title takes priority

Facts: A portion of reserve land was transferred from Chippewas to Cameron back in XIX cent. In 1853 Crown issued title grant (“letters patent”) to Cameron for that land. But it turns out later that Chippewas never formally surrendered their land to Crown as is required under rules of aboriginal title (Royal Proclamation 1763). Therefore PLs are arguing that the letters patent are void and they should have full title back;

Issues: Did the Chippewas wait too long, or can they reclaim title to the land?

Discussion:

- PLs claim that since the original transfer was flawed, then the title is still in the hands of the tribe. The Crown was not able to legally transfer the title to anyone, because it was not theirs to begin with.
- It is true that there was a fundamental flaw in the original transfer such that it was not legally effective; but based on equitable doctrine of laches PL have waived their right to sue by waiting so long - over 150 years.
- But, also based on the bona-fide purchaser without notice principle, the subsequent purchaser’s legal interest have priority over the prior equitable interest of aboriginal title; but is aboriginal title equitable or legal?
- Court says that aboriginal title is not exactly a legal interest – it is *sui generis* in nature; it has elements of both legal and equitable interests;
- Court concludes that because it has elements of an equitable interest, it is subject to the subsequent legal interests of the bona fide purchasers for value without notice.
- Aboriginal title is *sui generis* and does not equate to legal title, therefore the subsequent legal title takes priority. Otherwise the prior title would have taken priority.

Ruling: PL’s claim fails.

REGISTRATION

There are two possible approaches to registration:

- A deed registration system:
 - The actual deeds are held in a central registry;
 - Removes problems with private ownership of deeds;
 - But says nothing about the validity of those deeds: a registered deed can be inauthentic.
 - The deed registration system merely encourages registration.
 - Most common system is the “race-notice” system, where priority is accorded to an otherwise valid subsequent interest if (a) the second interest is acquired without notice of the first and (b) the subsequent interest is registered first.
- A title registration system:
 - The essence of this is the concept of indefeasible title;
 - It provides conclusive evidence that the person in the register is the owner;
 - One need not investigate chain of title or question validity of interests;

Title Registration (Torrens System)

- First appears in Australia in 1850s; BC is one of first places to adopt it in 1860's
- It is a system that guarantees title
- MN, SK, AB and BC use Torrens system; ON is converting; Maritimes and USA largely still use deeds registration; thus in States, where no guarantee, purchasers acquire title insurance; could even be used in BC if cheaper than legal fees of registration.

There are four main features;

1. Registration Principle:
 - Transfer does not occur until registered (s.20 *LTA*)
 - Title that is registered has priority over title that is not registered;
 - In BC, registration is not mandatory but there is strong incentive to do so;
 - Transferor is still bound by transfer even if not registered, but an unregistered interest is vulnerable to anyone else;
 - Only leases over 3 years are supposed to be registered;
2. Indefeasible Principle:
 - An indefeasible title is conclusive evidence at law and equity that the person named has title of property (s. 23(2) *LTA*);
 - registration means title cannot be revoked, defeated or voided despite any flaws in instrument or claim;
3. Abolition of Notice:
 - Except in case of fraud, registration is not effected by notice (express, implied or constructive) (s.29(2) *LTA*);
 - Therefore bona fide purchaser gets title even if they have notice of a prior interest. Notice of a prior interest is irrelevant.
 - Note that this is not so black and white in case law
4. Net Principle (Assurance Fund):
 - Establishes an assurance fund to compensate individual that are wrongly deprived of land through registration system (part 20, s.295 *LTA*);
 - In case of fraud, if one would have had claim in common law (priorities) to recover that property, then the assurance fund will compensate that person (s.296(2) *LTA*)

There are two variations of the indefeasible title:

- Immediate indefeasibility: the buyer holds indefeasible title even if they acquire their interest in fraud, but bona fide. So if B buys title from rogue R who pretends to be owner O, B has the interest, and O is liable to compensation.
- Deferred indefeasibility: the title is delayed until the buyer acquires interest from the person who is the lawfully registered owner, and is this at least one step away from fraud. So if B buys title from rogue R who pretends to be owner O, O gets the title back and B is compensated. But if B sells to C before fraud is discovered, then C holds the title, and O only gets compensation.

130.6 SERVITUDES AND REGISTRATION

Lawrence v. Wright [2007] ON

Deferred Indefeasibility is preferred for policy reasons, and should be the proper reading of ON LTA

Facts: PL owns a house, which is mortgaged from TD Bank for \$100,000. A rogue pretends to be her, sells the house to his buddy D for \$300,000. D mortgages the house to Maple Trust (MT), pays off the TD mortgage, and tries to bugger off with some \$250,000.

Issues: MT in good faith acquired registered legal interest in the house. Is the mortgage then valid and enforceable against the true owner of the property, even though it was acquired by fraud?

Discussion:

- PL:
 - Only the true owner of the land can grant an interest: *nemo dat* principle
 - D became the registered owner through fraud, so his granting of mortgage to MT was bullocks
- MT:
 - Immediate Indefeasibility: they are the bona fide purchaser victim to fraud.
 - So the transfer of mortgage was valid. They hold the title, and PL is to be compensated through s.296(2)
- ON
 - Deferred Indefeasibility: only a purchase twice removed from fraud (deferred) is safe in its title.
 - MT is not the deferred owner, as it is only once removed from the fraud, and has no claim on the title.
 - MT was only once removed from the fraud, and had a chance to investigate.
- Court:
 - Both interpretations can be inferred from the wordings of the LTA:
 - Immediate: s.78(4) says that an instrument is deemed valid on registration, which overrides s.155 which renders fraudulent transfers void, but “subject to provisions of the act” (which s.78(4) is)
 - Deferred: s.68(1) says that only registered owner can transfer land. D was not the registered owner, since he obtained the title by fraud (s.155). So his transfer to MT is void. But MT registered bona fide, and is the registered owner. So if they were to transfer it to a third party, then by s.68(1) and s.78(4), the third party would have full title.
 - But, deferred indefeasibility is preferable for policy reasons, as it places the burden not on the innocent homeowner who has no chance of knowing that they are victimized, but on the money lender who has a chance of investigating the title.
 - Also, the only remedy available to homeowner who gets evicted under immediate indefeasibility is the money from the fund, which only recognizes the monetary value of the house. What about personal value?
 - So, according to deferred indefeasibility, MT get fuck all.

Ruling: PL gets to keep her house.

Notice and Fraud

Holt Renfrew & Co. v. Henry Singer Ltd. [1982] ABCA

Notice may be evidence of fraud but is not sufficient. Something additional required.

Facts: The Edmonton Holt Renfrew has registered a lease under a caveat. After several renewals, they sign a 17 year unregistered lease. D enters into negotiations to purchase the building, subject “only to the encumbrances noted on the certificate of title”. After the purchase, D filed a caveat with an intention of defeating the unregistered lease. PL filed one back in response. During investigation, it was discovered, that D considered buying the company owning the building, until he discovered that the lease is unregistered - thus it would be much easier for him to buy the property and override the lease by registering a caveat.

Issues: Was this fraud?

Discussion:

- What is the proper interpretation of s.203 of AB LTA?
 - What type of notice is required to establish fraud? Express or constructive?
 - When did the purchaser have notice?
 - Is notice of a prior interest sufficient to amount to fraud, or is some additional act required?
- S.203 posits that except in cases of fraud, no person is bound by duty to inquire into the nature of the title.
- Knowledge of an unregistered interest and that it will be defeated by concluding the transaction are insufficient to constitute fraud. There must be an additional element.
- Therefore bona fide purchaser gets title even if they have notice of a prior interest. Notice of a prior interest is irrelevant.

130.6 SERVITUDES AND REGISTRATION

- The intention of the transferor may not be definitive in determining what was transferred.
- Misrepresentation may constitute fraud if there is reliance on the statement.
- Timing of notice may be important. Notice before entering K is worse than notice after but before transfer.
- In this case, there is no fraud.

Ruling: Judgement for D, though there is a significant dissent.

AB Ministry of Forestry, Lands and Wildlife v. McCulloch [1991] ABQB

In AB's LTA notice alone is not fraud. For fraud to happen, notice must be used for an unjust purpose.

Facts: Svedberg acquires fee simple but Crown retains right to repurchase at a fixed price. Svedberg goes into receivership and receiver sells land to D for \$62,000. The right to repurchase had been registered as a caveat but in the transfer to D the caveat was accidentally discharged. D realizes this and quickly transfers the fee simple interest to a numbered company (presided by D), to avoid the caveat from being reinstated. The government reregisters the caveat.

Issues: Did the transfer by which the numbered company acquired the title from D amount to fraud?

Discussion:

- BC LTA s.29(2) abolishes notice but does not indicate that notice itself is not fraud.
- AB LTA explicitly requires notice and an additional act.
- Might be rationalized on the grounds that the transferee knew the D was breaching a K with the Province by transferring title to the company when the province had a right of purchase.
- In this case, the company had notice, since it was owned by D.
- Notice alone is not fraud. For fraud to happen, notice must be used for an unjust purpose.
- Notice plus an act done explicitly to defeat the unregistered interest may be considered fraud.
- Using knowledge of an unregistered interest for an unjust or inequitable purpose may constitute fraud.
- In this case, the fact that D transferred the interest to his company as soon as he found out that his interest was encumbered, indicates he was deliberately trying to evade his obligations to Crown.
- So this is clear fraud.
- When transferor and transferee are the same person, notice of a prior unregistered interest may be considered more than mere knowledge.

Ruling: Judgement for PL

Caveat: a registered charge that warns the future purchaser of the fact that someone else's interest already has priority. The Registrar cannot deal with the property without first notifying the caveator.

Charge: any interest in the land, which is less than a fee simple.

Szabo v. Janeil Enterprises Ltd. [2006] BCSC

Notice will only constitute fraud for s.29 if there is an element of dishonesty on the part of the transferor.

Facts: PL holds fee simple to Lot A. Some wench has fee simple to neighbouring Lot B. There is a pipe that runs from B to A, but there is no easement. In 1991 the previous owner of B gave PL a "water easement" in exchange for a "hydro easement", but forgot to register it. It remained unregistered when the wench bought Lot B. PL wants specific performance of the easement agreement.

Issues: Can the unregistered easement be upheld even though there was notice?

Discussion:

- Wench claims benefit of s.29 of LTA that protects purchaser from previous unregistered interests.
- Is mere notice sufficient to bring a purchaser within the fraud exception of s.29, or is some further participation required?
- Actual notice of a prior unregistered interest may be sufficient to bring a purchaser within the fraud exception, but only if there is an element of dishonesty in the conduct of the purchaser.
- Wench had constructive notice
- But fraud cannot be presumed, it must be explicit.
- Knowledge of previous dealings on the matter may lead to a finding of constructive notice.

Ruling: Finding for D

130.6 SERVITUDES AND REGISTRATION

Three steps to work through to establish notice:

1. What type of notice is required to establish fraud? Express or constructive?
2. When did the purchaser have notice?
3. Is notice of a prior interest sufficient to amount to fraud, or is some additional act required?

According to *Szabo*, to claim protection under s.29 of BC LTA one must answer two questions:

- (a) whether the suspicions of the petitioner were aroused, and
- (b) whether the petitioned did all which was appropriate in the circumstances.

But *Szabo* is just suggesting that we are moving in the direction, as it is a BCSC case and can be overturned.

*There is a difference of what fraud means in the context of notice, and in the context of charges and fee simples. In notice, fraud has a much smaller threshold of dishonesty, and is much simpler to find.

Fraudulent Transfers

Credit Foncier Franco-Canadien v Benett [1963] BCCA

Registered owners of a charge acquired through fraud, or having its root in fraud, is subject to the claim of the person wrongfully deprived of the interest.

Facts: D are registered as owners of estate in fee simple. Their land is fraudulently mortgaged out to Todd Investments by Allen, one of its employees. This mortgage is then resold to Stuart, who passes it on to PL. PL contacts D notifying them of assessment, but Ds ignore it as a mistake. No payments are made, and PL brings an action against D for foreclosure.

Issues: What happens?

Discussion:

- PL is a second bona fide purchaser of the property, they claim that their mortgage is valid.
 - They rely on s.26(1) saying that every registered owner of a charge is deemed entitled to the estate or interest
 - Thus, the mortgage is a valid charge
 - There is owing, according to the instrument, the amount of \$7,400 and interest.
- The validity of this depends on the words “shall be deemed”, which means “rebuttably presumable”
- And D are guaranteed their rights under s.23(2), which says that registration is “conclusive evidence” of their ownership
- So s.23(2) overrides s.26(1)
- Either way, mortgage is only a security for the money owed, and Ds did not actually get any loan.

Ruling: Ds get the land

Canadian Commercial Bank v. Island Realty Investments Ltd. [1988] BCCA

Priority of charges depends on the order of their registration.

Facts: Park Meadows is the registered owner of land in Kelowna. Imperial Life holds a first mortgage on the land. PM grants a second mortgage to D (Island Realty) for \$240,000. After this, PM approached PL (Almont Mortgage) to take a third mortgage on the land, on the understanding that the one to D will be discharged. This was agreed and registered. The D mortgage was then registered as discharged, but the discharge was a forgery. The owner of PM takes off with the money, and PM goes into bankruptcy. The land is sold, but is insufficient to cover both mortgages to D and PL.

Issues: Who gets dibs on the money?

Discussion:

- Trial judge found that since the discharge was a forgery, then D holds the older mortgage, and gets priority
- D asserts that their charge was valid, and only they could discharge or transfer it away. The charge to PL was invalid, as it was based on forged documents. Ergo, D gets the dibs on the mortgage.
- But PL was a bona fide purchaser for value, and it would go against the principles of the registration system if they got shafted.
- Furthermore, PL did not have to get the charge from D, but from PM who was the registered owner.
- The *Credit Foncier* principle does not apply here, since PL got their charge directly from the owner, not through a series of transactions rooted in fraud.
- So apparently once D’s mortgage was discharged, it no longer affected the land (s.227) and PL’s mortgage became the second mortgage.

130.6 SERVITUDES AND REGISTRATION

- Even though the discharge was fraudulent, it was still legit, and PL moved up from being the third mortgage in the registry to the second one.

Ruling: PL gets dibs.

Gill v. Bucholtz [2009] BCCA

The LTA preserves the Nemo Dat maxim when it comes to charges.

Facts: A rogue is acting in conjunction with PL pretends to be a property owner and fraudulently transfers the property to PL. The transfer is registered. Then PL registers a mortgage against the land with D. Following this, PL executes a second mortgage with an investment company IL. Neither of the two knew of PL's fraud in acquiring the title.

Issues: Are the mortgages enforceable as they are bona fide for value?

Discussion:

- The trial judge decided on immediate indefeasibility: PL was a party to a fraud, but he was still a registered owner, so anyone receiving interest from him received valid interest
- Trial judge recognized that a registered charge is not of the same value as a registered fee simple, but he did not apply this to his decision.
- CA thinks otherwise.
- It is unclear in BC whether we have deferred or immediate indefeasibility
- S.23(2) gives a registered owner indefeasible title in fee simple, subject only to the rights of one deprived of land to show forgery and fraud.
- On the face, it does not apply to any lesser interests.
- S.26 says that a registered owner of a charge is deemed to be entitled to the interest
- *Credit Foncier* principle shows that “deemed” is subject to “conclusive evidence”
- The *LTA* preserves the *nemo dat* rule in respect to chargers - even where the holder of a charge relies on a registered interest, and deals bona fide, if the person they deal with is fictitious, then their interest is void.
- So the mortgages in this case did not get any interest, as they dealt with someone who had no such interest to give.
- The *LTA* appears to have adopted the policy that the cost of frauds perpetuated against mortgagees and other chargeholders should be borne not by the public (as the holders of the Assurance Fund), but by lenders themselves.
- So now (at least when it comes to charges) BC is in agreement with ON as per *Lawrence v. Wright*.

Ruling: The mortgages are not enforceable.

So something like this emerges:

Bona fide purchaser after fraud in immediate indefeasibility
ORIGINAL TITLE > FRAUD TITLE > VALID TITLE

Bona fide purchaser after fraud in deferred indefeasibility
ORIGINAL TITLE > FRAUD TITLE > VOID TITLE > VALID TITLE

Credit Foncier:
ORIGINAL TITLE > FRAUD MORTGAGE > VOID MORTGAGE

Gill v. Bucholtz and *Lawrence v. Wright*
ORIGINAL TITLE > FRAUD TITLE > VOID MORTGAGE

LAND TITLE ACT BC

Section Summaries:

20(1)	Transfer does not occur until it is registered.
23(2)	A registered title is conclusive evidence that the person is the owner
23(2)(i)	A person fraudulently registered is subject to the rights of the real owner
25.1(1)	A void instrument does not acquire any interest
25.1(2)	A bona fide purchaser for value in fee simple is deemed to acquire the title even through a void instrument
26(1)	A registered owner of the charge is deemed entitled to the estate
26(2)	A registered charge does not constitute evidence that it is an interest in land that is enforceable
27(1)	A charge is notice of interest on the registered title
29(2)	Except in cases of fraud, a notice of an unregistered interest is of no consequence on the buyer
37(1)	An instrument is deemed registered when it is submitted to the registrar
296(2)	A registered owner deprived of interest in land by fraud through conclusiveness of the registrar and who would have had a cause of action under common law, may proceed in court for the recovery of damages
297	s.296(2) is only available to the original owners, not to subsequent purchasers from fraud

20 Unregistered instrument does not pass estate

- (1) *Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.*
- (2) *An instrument referred to in subsection (1) confers on every person benefited by it and on every person claiming through or under the person benefited, whether by descent, purchase or otherwise, the right*
- (a) *to apply to have the instrument registered, and*
 - (b) *in proceedings incidental or auxiliary to registration, to use the names of all parties to the instrument, whether or not a party has since died or become legally incapacitated.*
- (3) *Subsection (1) does not apply to a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement.*

23 Indefeasible title is evidence that the person registered as an owner holds the title in fee simple

- (2) *An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:*
- (a) *the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown;*
 - (b) *a federal or Provincial tax, rate or assessment at the date of the application for registration imposed or made a lien or that may after that date be imposed or made a lien on the land;*
 - (c) *a municipal charge, rate or assessment at the date of the application for registration imposed or that may after that date be imposed on the land, or which had before that date been imposed for local improvements or otherwise and that was not then due and payable, including a charge, rate or assessment imposed by a public body having taxing powers over an area in which the land is located;*
 - (d) *a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement;*
 - (e) *a highway or public right of way, watercourse, right of water or other public easement;*
 - (f) *a right of expropriation or to an escheat under an Act;*
 - (g) *a caution, caveat, charge, claim of builder's lien, condition, entry, exception, judgment, notice, pending court proceeding, reservation, right of entry, transfer or other matter noted or endorsed on the title or that may be noted or endorsed after the date of the registration of the title;*
 - (h) *the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title;*
 - (i) *the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree;*
 - (j) *a restrictive condition, right of reverter, or obligation imposed on the land by the Forest Act, that is endorsed on the title.*

25.1 Void instruments do not acquire interest, unless if it is a fee simple acquired in good faith

- (1) *Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument.*
- (2) *Even though an instrument purporting to transfer a fee simple estate is void, a transferee who*

130.7 LAND TITLE ACT

- (a) is named in the instrument, and
(b) in good faith and for valuable consideration, purports to acquire the estate,
is deemed to have acquired that estate on registration of that instrument.
- (3) Even though a registered instrument purporting to transfer a fee simple estate is void, a transferee who
(a) is named in the instrument,
(b) is, on the date that this section comes into force, the registered owner of the estate, and
(c) in good faith and for valuable consideration, purported to acquire the estate,
is deemed to have acquired that estate on registration of that instrument.

This section is problematic. On the one hand, it shows immediate indefeasibility, as one who is registered in good faith is the owner, even through fraud. On the other hand, he is only “deemed” to have the interest. In *Credit Foncier*, “Deemed” was found to mean “rebuttably presumed” in the context of the *LTA*. So, there still may be circumstances when a bona fide purchaser per s.25.1(2) is subject to the claim of the original owner.

26 Registration of a charge entitles the owner to the estate, interest or claim

- (1) A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.
- (2) Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.

27 Notice given by registration of charge

- (1) The registration of a charge gives notice, from the date and time the application for the registration was received by the registrar, to every person dealing with the title to the land affected, of
(a) the estate or interest in respect of which the charge has been registered, and
(b) the contents of the instrument creating the charge so far as it relates to that estate or interest,
but not otherwise.
- (2) A payment made by a mortgagor under a registered mortgage, or by a purchaser under a registered agreement for sale or subagreement for sale, is not a dealing with the title to the land affected.
- (3) A transferee of a mortgage, or of a vendor's interest in an agreement for sale, takes subject to the equities and to the subsisting state of accounts between, respectively, mortgagor and mortgagee, or vendor and purchaser.

28 Priority of charges is established based on order of their registrations

29 Notice of unregistered interest has no effect on the purchaser, except in cases of fraud

- (2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner
(a) a transfer of land, or
(b) a charge on land, or a transfer or assignment or subcharge of the charge,
is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than
(c) an interest, the registration of which is pending,
(d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement, or
(di) the title of a person against which the indefeasible title is void under section 23(4).

37 Registration effective from time of application

- (1) An instrument or application so registered is deemed to have been registered and to have become operative for all purposes in respect of the title, charge or cancellation claimed by the application for registration, and according to the intent of the instrument or application, as of the date and time when the application was received by the registrar.
- (2) An indefeasible title stored by electronic means, when entered in the register, other than as a pending application, is deemed to be registered and take effect as of the date and time when the application for the title was received by the registrar.

296 Remedies of person deprived of land

- (2) A person, in this Part referred to as the "claimant",
(a) who is deprived of any estate or interest in land
(i) because of the conclusiveness of the register, in circumstances where, if this Act had not been passed, the claimant would have been entitled to recover the land from the present owner, and

130.7 LAND TITLE ACT

- (ii) in consequence of fraud or a wrongful act in respect of the registration of a person other than the claimant as owner of the land, and
- (b) who is barred by this Act or by any other Act, or otherwise precluded from bringing an action
- (i) for possession, or any other remedy for the recovery of land, or
- (ii) for rectification of the register,
- may, subject to subsections (3) and (4), proceed in court for the recovery of damages against the person by whose fraud or wrongful act the claimant has been deprived of the land.
- (5) If
- (a) final judgment has been given against the person liable for damages under subsection (2) in a proceeding in which the minister has been joined as a party defendant, and
- (b) the court, on the application of the plaintiff supported by evidence satisfactory to the court, certifies to the minister charged with the administration of the Financial Administration Act that the plaintiff has taken all reasonable steps to recover the amount of damages and costs awarded by the judgment from the person so liable, but the plaintiff has been unable to recover all or part of them,
- on receipt of a certified copy of the judgment and the certificate of the court, the minister charged with the administration of the Financial Administration Act must
- (c) pay the amount of the damages and costs so awarded or the unrecovered balance of them, as the case may be, on account of the person liable for the damages or the person's personal representatives, and
- (d) charge the amount to the assurance fund.

Note: there is a 3 year limitation period to this claim.

297 Protection of purchaser in good faith and for value

- (2) Despite anything to the contrary in this Act, no transferee is subject to a proceeding under this Part in respect of an estate or interest in land of which the transferee is the registered owner, for
- (a) recovery of land,
- (b) deprivation of land, or
- (c) damages in respect of land
- on the ground that the transferor
- (d) may have been registered as owner through fraud, error or a wrongful act, or
- (di) may have derived title from or through a person registered as owner through fraud, error or a wrongful act.