**Table of Contents**

nature of property 3

Should Property Rights Be Granted In The Moon? 4

Yanner v. Eaton (1999) Australia HC (p. 12) (Fauna Act) 4

Harrison v. Carswell (1976) SCC (p. 19) (picketing outside of shopping mall) 4

Novel Claims to Property & Redefining Property 5

Ziff “The Irreversibility of Commodification” 5

McCallum “Sacred Rights to Property: PEI” 1999 5

Moore v The Regents of the University of California (1990, California SC) pg 60 (are cells property) 6

JCM v ANA (2012, BCSC) (are sperm straws property) 7

Sources of Property Law 7

Anishinabek Nation – J Borrows 7

Nanabush v Deer, Wolf et al. 7

Gitxan Nation – Richard Overstall 8

Feudal Europe – J cribbet & cw johnson 8

Property, Class & Poverty 9

J Waldron “Homelessness and the Issue of Freedom” (pg 119) 9

RC Ellickson “Controlling Chronic Misconduct in City Spaces” (pg 123) 9

Victoria (City) v. Adams (2008, BCSC) 10

Protection for Property (Expropriation) 11

Ziff “Taking Liberties” (pg 140) 11

Constructive Expropriation/Regulatory Takings 11

Marine Real Estate Ltd v Nova Scotia (AG) (1999, NSCA) pg 152 (De facto expropriation test) 11

CPR v City of Vancouver (2006, SCC) pg 163 12

Physical Boundaries of Property 13

Airspace 13

Didow v Alberta Power Ltd (1988, ABCA) pg 173 (What is Trespass) 13

Ford v Zelman (2005, BCPC) 13

Note: Crane Swing Easements 13

Subsurface 14

Mineral Rights 14

Op-Ed Article: Dawn Hoogeveen “Outdated mining rules trump privacy in BC” 15

Lateral Boundaries - LAND 15

Conventional Line Doctrine 15

Robertson v Wallace (2000, QB) pg 204 (failed Conventional line doctrine test) 15

Right of Support 15

Lateral Boundaries - WATER 16

Presumption: Ad medium filum aquae – “To the centre thread of the stream” 16

R v Nikal (1996, SCC) pg 213 17

Law of Accretion 17

Copyright 18

Intellectual Property (IP) 18

Property Rights in Ideas 18

Desney v Wilder (1956) (ideas can’t be property) 18

Property Rights in Information 19

International News Service v Associated Press (1918, US) (information is not protected) 19

CCH Canadian et al v. LSUC (2004, SCC) 19

Copyright – Economic Rights 20

Step 1: What are the conditions for the subsistence of copyright in works? (S. 5) 20

Step 2: Copyright Infringement? 21

Step 3: What was the purpose of the dealing (does it fit into one of the 8 categories)? 22

Step 4: Was the dealing fair? 22

Théberge v Galerie d’Art du Petit Champlain (2002, SCC) (reproduction = additional or new copies) 23

SOCAN v. Bell Canada (2012, SCC) 23

Copyright – Moral Rights 23

Snow v Eaton Centre (1982) (first moral rights case brought before Canadian Court) 25

Prise de Parole Inc. v. Guérin, Éditeur Ltée (1995) (Infringement on integrity not found) 25

Personality as Property 25

Krouse v. Chrysler Canada (1973, Ont CA) (first case to recognize the tort of misappropriation of personality) 26

Athans v. Canadian Adventure Camp (1977, Ont High Ct) (affirms existence of the tort in Canada) 26

Gould Estate v. Stoddard Publishing Co (1996, Ontario Ct) (public interest and freedom of expression) 27

Fixtures 28

Application: La Salle Recreations Ltd 28

Application: Diamond Neon 29

Possession 30

Concept of Possession 30

Pierson v Post 31

Clift v Kane (1870) NFld SC 31

Popov v Hayashi (2002, California SC) 31

Animals 32

Nakhuda v. Story Book Farm Primate Sanctuary, 2013 ONSC 5761 32

Adverse Possession 32

Carrozzi v Guo (2002, ONSC) 34

Keefer v Arillotta (1976, ONCA) 34

Mowatt v. British Columbia (AG), 2014, BCSC 988 35

Finders 36

Trachuk v Olinek (1996, Alberta) 38

Graftstein v Holme & Freeman 38

Parker v. British Airways Board (UK) 38

Bird v. Town of Fort Frances (1949) ONHC 38

Baird v British Columbia (1992) 39

Charrier v Bell (1986) 39

Trusts 40

M Conway, “Equity’s Darling?” 40

Role of Trusts 40

Types of Trusts 40

Resulting Trusts (Pecore v Pecroe) 41

Pecore v Pecore (2007, SCC) 41

Madsen Estate v. Saylor (2007) SCC (Nov. 15) (p. 476) 42

Constructive Trusts (Kerr v Baranow & Vanasse v Seguin) 42

Gifts 44

Nolan v. Nolan & Anor (2003) Australia 45

Thomas v. The Times Book Co Ltd. (1960) UK 46

Re Bayoff Estate (2000) SaskQB 46

The National Trustees Executors and Agency Company Limited v. O’Hea (1905) UK 46

Re Cole (a Bankrupt) Ex. p. The Trustees v. Cole (1964) UKCA 46

nature of property

**Property as a right:** to have property is to have a right in the sense of an enforceable claim to some use or benefit of something. While its enforceability is what makes it a *legal* right, the enforceability itself depends on a society’s beliefs that it is a *moral* right.

*William Blackstone*: There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe (Commentaries on the Laws of England, (1765))

**What kinds of rights exist?**

* Adopting conception of property as: bundle of rights and responsibilities with respect to a given object – can be a helpful metaphor to use in thinking about property itself
* What types of rights might make up this bundle? Right to exclude, to transfer, consume or destroy, use, protection, possession, to management, to control, to an income/capital, to expect the state will actually enforce rights
* Duties and liabilities exist in the context of property rights: responsibility not to consume or destroy; duty to act within the scope of the law;

Merrill suggests the essential condition of property is the **right to exclude** (necessary and sufficient right)

**Three schools of thought** (critical element or elements that make up the irreducible core of property) (Ziff):

* **Single-variable essentialism (SVE):** (*Harrison v Carswell*) posits that the right to exclude others is the irreducible core attribute of property.
  + E.g. Merrill suggest the essential condition of property is the right to exclude
  + E.g. Blackwell’s definition “sole + despotic dominion”
* **Multiple-variable essentialism (MVE):** posits that the essence of property lies not just in the right to exclude others, but in a larger set of attributes or incidents, of which the right to exclude is just one (it is necessary, but not efficient). These other rights include the right to exclude, to use or enjoy, and to transfer.
* **Nominalism:** (*Yanner v Eaton*) views property as purely conventional concept with no fixed meaning – an empty vessel that can be filled by each legal system in accordance with its peculiar values and beliefs.

**Types of Property:** (Ziff) (p. 43-44)

* Common 🡪 right not to be excluded
* Private 🡪 right to exclude
  + Can be owned by “natural persons” or “artificial persons”, e.g.: corporations
* State
  + Owned by state, an “artificial person”E.g. CBC

**Justifying Theories of Property:**

* Purpose – these are useful at three different times:
  1. Justify initial choice as to whether to grant property rights in a specific thing
  2. Justify type of property rights created (e.g. private, common, state)
  3. Justify how these rights, now created, are distributed
* Theories
  + Economic theory 🡪 private property will gain most out of property
  + Labour theory 🡪 people have right to products of their own labour
  + Utilitarian theory 🡪 create most X by providing people with property
  + Rights based theory
  + Personality theory 🡪 development of person requires owning property
  + Having private property leads to values desired by society
  + Autonomy of person requires property
  + Mixed theory 🡪 uses parts of other theories

**Class discussion**: What interests should property rights be balanced against?

* The rights of non human creatures, the rights to a clean/healthy environment, the rights of current persons property rights against future individuals property rights, the rights of life/human values, the rights/needs of the state, the interests of the public domain (to foster creativity and innovation)

Should Property Rights Be Granted In The Moon?

First, should property rights be granted in the moon?

* Common property regime could be the way to go – to protect and preserve it because of its impact on what could happen on earth and its esthetic and spiritual reasons as well.
* The utility of granting the property rights – could it be put to any good use?
* Do we even have the capability to develop a system of property on the moon?
* Could grant common or global social rights to the moon. Look to Antarctica (used for science – not owned by anyone, but there are regulations)
* Consider its impact on earth i.e. The tides
* The utility of granting property rights. Why run an expensive rights system on the moon.

Second, should private property rights be granted in the moon?

* If the property rights promote human flourishing, then go ahead and sell it: but perhaps limit it to certain individuals (for example, to those who’s current lands are sinking/disappearing)
* \*Note: no reason to think these rights would be inheritable – creates a host of creative ideas we could use to figure out how to grant private property rights on the moon
* Is it inevitable that problems we currently have with property rights on earth would automatically transfer to the moon – or do we have a new opportunity to try something new

And third, assuming that you conclude that property rights should be granted in the moon, and that those rights should take the form of private property rights, to whom should those rights be allocated?

* Alberts group:
  + Physical presence,
  + Locke’s labour theory – when you put labour into something, it’s yours
  + Utilitarian theory – maximizing the utility for society as a whole
  + Robots as just another tool ex. Use your hand or a robot
* Bishop group:
  + Esthetic/spiritual value of the moon to them – put so much effort and ‘love’
  + The moon as it exists is important to them as individuals

Yanner v. Eaton (1999) Australia HC (p. 12) (Fauna Act)

**Facts:** P was part of an Aboriginal band + charged under the Fauna Conservation Act with taking fauna without holding a licence.

**Issue:** Where P’s rights under the Native Title Acts extinguished by Fauna act?

**Ratio:**

* **Majority:** “Property” should be defined using the nominal approach
  + Bundle of rights were defined under the Fauna act
* **Dissent** : “Property” should be defined through multiple-variable essentialist approach

**Analysis:** P’s rights under Native Title Act weren’t extinguished by Fauna act

Harrison v. Carswell (1976) SCC (p. 19) (picketing outside of shopping mall)

**Facts:** D picketing on a sidewalk outside of a shopping mall operated by P. Sidewalk is private + owned by shopping mall. D started picketing on a city sidewalk, but it was too far from the store so she moved to the mall property. P asked her to leave, but she came back several times. P charged D under “The Petty Trespasses Act of Manitoba”, though strike is legal action

**Issue:** Did D have rights to sidewalk?

**Ratio (Dickson J):** “Property” should be defined using single-variable essentialist approach

* Property rights are *absolute*

**Dissent (Laskin CJ):** “Property” should be defined using nominal approach – property rights should be *balanced* with other interests

* 🡪 Definition should evolve with time + take into consideration of public interest
* Property is a right, not a thing. There are many ways to define or conceive property. The way in which property is defined depends on how you view the relation of property rights in relation to other interests and values. It does matter how you define property and it can play a significant role the decision of the case – *good example of an attempt to persuade.*

Novel Claims to Property & Redefining Property

It’s important to know whether something is considered property because:

* Determines whether property rights can be attached
* Statutes frequently mention property
  + E.g. Bankruptcy 🡪 includes figuring out value of “property” of person
* Examples of property
  + Sperm straws (*J.C.M v. A.N.A*)
  + Personality of person (*Moore v. Regents of the University of California*)

People don’t own their own bodies, just their personalities (*Moore v. Regents of the University of California*)

Ziff “The Irreversibility of Commodification”

***Numerus Clausus* Principle**:

* “[P]roperty rights … [are] comprised of a stable, rigid or fixed set of entitlements. A party wishing to demonstrate that a right is proprietary must … show that the interest in question fits … into the appropriate legal box” (Reader, 78-79)
* There is a closed set of things that are considered to be strictly property – there is a reluctance in court to see something new as property
* If you want something new to be recognized as property, phrase your claim to be viewed as not a new property right, but a minor extension of an existing property right

Is this principle a good idea? Is it beneficial to the BC property law system?

* Makes sense economically and channels legal change to legislature (courts cant do it, so the legislature should)
* This limits the cases of dysfunctional fragmentation – courts could just go create property rights all the time and problems arise as to how to bring these rights together
* Irreversibility to property rights – once property rights are created, you can never go back (not necessarily accurate)

**The irreversibility of commodification (Ziff)**

* The common law is reluctant to create new property rights – once property rights have been granted, they are extremely difficult if not impossible to roll back.
* Examples today of where property rights were first granted then dismantled

McCallum “Sacred Rights to Property: PEI” 1999

**Facts**: Absentee landlords on PEI. Overtime, the landlord’s rights became almost unenforceable because the tenants helped each other and the law wasn't always a big help. Over time, there was a big movement by tenants to reverse the property rights so they could own the land instead of paying rent.

**When should property rights be redefined?**

1. Property rights only exist to the extent that the state is willing to enforce them
   1. Landlords found it difficult to get courts to enforce their rights through evictions
   2. If the rights aren’t being upheld by the state, do they really have property rights?
   3. Absence of social recognition of the legitimacy of the landlords claims
2. The act of conferring property rights on a person makes that person a better citizen.
   1. Ownership of property works magic giving the owner a stake in the community
   2. Owning property, owning a farm gives them societal benefits
   3. Property as freedom
3. Sweat of the brow (labour) theory
   1. Land should belong to those who make it productive
   2. The tenants cleared the land, they planted the crops, the landlords have done nothing so they should lose the rights they hold on the land
   3. Used in the context of absentee landlords
4. When private rights impede the public good, private rights must give way
   1. A great public wrong can be fixed only by public action
   2. Property rights are created by the state and can also be reallocated/dismantled by the state

**Class Discussion:**

What compensation should be given to landlords in this instance? How do you value it?

* Look at what the landlords paid to acquire the land
* Look at land that’s been sold in the context of PEI and other colonies on the East Coast
* Look to the value of the rents – how much is the rent per year and what is the arrear in rent
* What is the value of the rent if it is not being paid? Led to downward pressure on the ultimate price given

Are there any property rights that currently exist in society that you argue should be redefined? Is this likely to occur?

* Absentee landlords in Vancouver
* Vancouver taxi license secondary market
* Unceded First Nations land
* IP rights (copyright)

Moore v The Regents of the University of California (1990, California SC) pg 60 (are cells property)

**Facts**: P was treated by D for leukemia + his cells tested to be useful for research. D took additional samples of P’s body + created a new cell line without P’s

**Issue**: In order for a conversion to be found, there has to be an interference with the ownership of his cells. Does Moore own his own cells? Are the cells his property?

**Ratio**: Cells are not property. A claim for conversion does not lie for the use of a plaintiff’s bodily tissue in medical research without his knowledge or consent.

* To establish conversion, plaintiff must establish an actual interference with his ownership or right of possession. Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.
* **Majority**: No uniqueness. The analogy to personality doesn’t hold because these are just cells and at the fundamental level, cells (T-lymphocytes are the same) are just the same.
* **Majority**: Look at regulations in place that deal with cells – Health and Safety Code section eliminates so many rights that deal with ownership of cells that what is left attached to it just cant be seen as property anymore
  + **Dissent**: by taking away some of the rights, doesn’t mean there are no rights whatsoever
  + How applicable are these regulations (Health and Safety Code)
* **Majority**: Moore’s cells are distinct from the cells in the patented cell line, therefore they are not his cells

**Majority policy arguments**:

* 1. Policy consideration: the need for certainty – uncertainty with the respect to ownership of legal cells would harm the biotech industry.
* 2. This would destroy the economic incentive to create research.
* 3. This will hinder research generally because it will make it impossible to collect the property rights in each instance
* 4. This really is the role of the legislature, not the courts.

**Dissent policy argument:**

* Profound ethical imperative to respect the human body
* Pg 74 “Our society values fundamental fairness in dealings and condemns the ***unjust enrichment*** of one person over another.”

JCM v ANA (2012, BCSC) (are sperm straws property)

**Facts:** P + D, were a lesbian couple, purchased sperm. P + D later broke up + couldn’t agree on how to divide up remaining sperm. P met new partner + wanted to use remaining sperm for more children. D refused + wanted to destroy remaining sperm.

**Issue:** Who has rights to remaining sperm?

**Ratio (Russell J):** Sperm straws are property.

* The parties had the right to use the sperm straws for their benefit; this is a cardinal feature of ownership; so the parties have an ownership interest
* “[T]he court is ill equipped to handle moral or philosophical arguments”
* The sperm straw is property because it has been treated as property
* “[A] person can own property he/she is not entitled to sell”

**Analysis:** Remaining sperm will be divided between parties

**Quotable:** Once something is treated as property, it becomes property

Person can own property that person can’t sell

Sources of Property Law

What do the property rules in existence in the following legal systems suggest about the society in which they developed? 3 concepts of property in 3 different systems

1. Anishinabek
2. Gitxsan
3. Feudal

Anishinabek Nation – J Borrows

What can you glean of the Anishnabek concept of property from this case?

* Establishes that relationship of respect between people and animals (person and property) – requires caretaking of the land
* It is the responsibility of the community as a whole (the responsibilities that individuals owe to the community) and the intergenerational bonds
* Note the use of precedent in this case
* Strong sense of balance
* The value of using the word property allows Europeans to understand the terms that exist
* Helping individuals become acquainted with property concepts but recognizing the limitations and differences that exist between communities

Nanabush v Deer, Wolf et al.

**Facts**: Nanabush violates First Nations Law when he defiles a deer.

**Main issue:** In what ways did he violate his relationship of respect between humans and animals?

**How is this issue determined?** We need to look to previous Anishinabek cases. One cannot understand first nation law without an appreciation of how one story relates to another. Crow Case – sets up the rule that Nanabush violated. Shows the agreement between the deer and the people that they would have to respect the bodies of the deer (and tobacco leaf).

**What is the ultimate determination in the Nanabush case?** Nanabush violated the nations bonds of honours and respect.

Gitxan Nation – Richard Overstall

What can you glean of the Gitxan concept of property?

* More similar to ours with the right to exclude
* Communal ownership, with a weight to chief
* Infringe on property rights through disrespect or disrupting the social fabric can result in the loss of the territory
  + Disrespect e.g. → not able to maintain property through feasts, using the property without proper authority to do so
  + Disrupting the social fabric e.g. → murder, incest
* Property rights flow through the maternal line, the paternal line dissolves after the death of the father
* The land has a legal status equivalent to that of its human counterparts. It has standing to exact remedies or at least consequences to breaches of the duty of care owed to it under the originating tryst. Individuals using the land have to be known to it. They have to be related to the original human partner, and they have to behave such that the original spiritual partner in the land can recognize them as kindred entities.

Feudal Europe – J cribbet & cw johnson

Canada: Tenurial in form, allodial in substance (the structure of this system is tenurial in that the Crown has the underlying title to land – but in substance, you are commonly perceived to be the owner of rights in the land)

* Allodial land-holding system: Individual is owner of the land
* Tenurial system: Individual holds land of some superior

Purposes of the tenure system? Bond of obligations between the tenant and the lord – fundamentally a system governing relationships

**Types of feudal tenure**, associated with need, usually done by nobility

* Security → knight service
  + 40 days of personal service, then paid someone else to fulfil the service, then just pay a task
* Splendor → serjeantry tenure (grand + petty)
  + E.g. → duty to hold the king’s stirrup, stick of maple of roast the king’s meat, provide hose to earl
* Spirit → frankalmoin tenure
  + Service in the form of priests, etc.
* Subsistence → free + common socage

**Unfree tenure (copyhold)**

* Held by vassal-labourers (cf. free tenure, aristocratic)
* Limits of nobility was custom
* Other obligations attached to land (incidents of tenure)
  + Homage + fealty
  + Aids → help to pay for downy of lord’s oldest daughter, help pay for knighting ceremony of lord’s eldest son, ransom for lord
  + Relief → payment of decedent to keep land after parent dies
  + Customary dues
  + Escheat + forfeiture → e.g. treason
    - Escheat → lord regains land after death of tenant/treasonous behaviour

Property, Class & Poverty

J Waldron “Homelessness and the Issue of Freedom” (pg 119)

🡪 Defines property through single-variable essentialist position – focusing on private property as having the right to exclude

Waldron tended to focus on:

1. The right to exclude;
2. The fact of exclusion (of those who are homeless);
3. The consequences of exclusion (for those who are homeless);
4. The necessity of common property (a space from which one cannot be excluded)

**Focus of article**: “everything that is done has to be done somewhere”

* Homeless are excluded from all private property, thus, common property is necessary to give them a place to act
* Property is a perquisite for freedom (Autonomy of person theory)

*“For [people who are homeless] the rules of private property are a series of fences that stand between them and somewhere to be, somewhere to act. The only hope they have so far as freedom is concerned lies in the streets, parks, and public shelters, and the fact that those are collectivized resources made available openly to all*”

**Class Discussion:**

Does the issue of homelessness cause you to re-evaluate/re-consider the theories and justifications for property discussed thus far in this course? If so, how?

* Homelessness allows us to view the inverse of private property and how it generally seems like “anti-freedom”
* Public/private divide/split is very interesting
* Might want to be weary before granting too many property rights because of the possible impact – granting of rights means excluding of others from those rights
* Connection between common property and freedom and the state and freedom and the meaning of freedom itself
* How do we distribute property

RC Ellickson “Controlling Chronic Misconduct in City Spaces” (pg 123)

**Thesis**: Destitute street users have not only rights, but also responsibilities to behave themselves. Few urbanites seek antiseptic cities – if city dwellers cannot enjoy a basic minimum of decorum in downtown public spaces, they will increasingly flee from those locations to other places. We need to weigh the constitutional arguments for street people vs. the future of cities.

**Focus of article**: common property is valuable + vulnerable to nuisance

* Common property should be divided into 3 zones: red, yellow, green
  + Yellow + green zones shouldn’t allow for chronic street nuisance, which is behaviour that violates prevailing community standards of behaviour + cumulative annoys reasonable person using the space
* Reasons that explain how trivial harms can amount to severe aggravation:
  + Can affect hundreds/thousands of people everyday
  + Nuisance will cause people to avoid area
  + Broken Window Syndrome
* Test for chronic street nuisance: *A person perpetuates a chronic street nuisance by persistently acting in a public space in a manner that violates prevailing community standards of behavior, to the significant cumulative annoyance of persons of ordinary sensibility who use the same spaces*

**Rationales for open-access space**

1. Market failure arguments – no way to charge for individuals to use those spaces efficiently
2. Democratic Ideas – people should be able to use common space without being disturbed by nuisance behaviour

* It’s important for democracy to have sights where people are able to rub elbows, etc.
* Idea that there needs to be a certain level of safety so these communication can take palace

Victoria (City) v. Adams (2008, BCSC)

Found a section 7 limit on City’s ability to regulate property: temporary structures allowed during night and/or inclement weather.

Protection for Property (Expropriation)

Ziff “Taking Liberties” (pg 140)

The Charter of Rights and Freedoms does not explicitly protect property.

🡪 However, the Charter does impact property rights:

* Section 1 🡪 rationales for infringement of charter rights
  + Property can be used as rationale
* Section 2 🡪 freedom of expression
  + Impact commercial advertising
* Section 8 🡪 protection against unreasonable search + seizure
* Section 15 🡪 equality provision
  + Used to attack discriminatory property rights

Other countries (US, Australia, South Africa) provide Constitutional protection for property rights.

The Bill of Rights:

* Property does receive protection under the Bill of Rights – right to enjoyment of property and the right not to be deprived thereof except by due process of law
* The Bill of Rights doesn’t override other statutes – no Constitutional status
* In actual practice, it has been a very narrow protection for property rights

**Class Discussion:**

* Should Canada amend the Charter to provide protection for property?
  + **Yes**: would define it in such a way that would make it less arbitrarily used by the government. Property is the basis of our society’s economic foundation – it’s a fundamental value. Protect it to prevent the tragedy of the commons. Protects against tyranny and the power of the state.
  + **No**: might limit the government’s ability to regulate and preserve land for future generations. Further, the process of amending it would be difficult. The Charter was created with a lot of thought and property wasn’t included in it for a reason.

Constructive Expropriation/Regulatory Takings

* The province of BC cannot take away your property at will, but it can modify the regulatory structure in a way that the value of your property decreases: (ex. building a highway through a residential area, changing bylaws to prevent landowners from building homes on beaches).
* What are the justifications that underlie protection of property in the US?
  + Fairness (if there is going to be a burden, it should fall equally on all taxpayers), Internalisation (if the government is going to take certain steps which would result in a public benefit, the government should internalize those costs) and Assurance (providing property owners with general assurance that their property wont be taken away – also promotes investment)

Marine Real Estate Ltd v Nova Scotia (AG) (1999, NSCA) pg 152 (De facto expropriation test)

**Facts**: Owners of beachfront properties were planning to develop/build houses. However, when they applied for permits, they were denied. Felt that their land had been *de facto* expropriated

**Issue**: Was the action lawful and should P be compensated?

* **Fee simple**: the greatest possible estate in land (largest bundle of rights) – when you own property, you are said to have a fee simple in the property

**De facto expropriation**: all reasonable private uses of the land as been eliminated

* Constrained by two principles:
  + Valid legislation may significantly restrict an owners enjoyment of private land
  + Courts are restricted, they can only order compensation where they are authorized to do so under legislation

**De facto expropriation test**:

1. **Was the regulatory action lawful/valid?**
   1. Regulation is the norm in Canada, government can modify the regulatory structure in a way that decreases property's value
2. **Did the government acquire a beneficial interest in the property or flowing from it?**
   1. “Not necessarily a forced transfer of property, acquisition of beneficial interest related to the property suffices.” (*CPR v City of Vancouver*)
3. **Removal of all reasonable uses of the property**
   1. NOT its potential/highest best use, but in regards to the nature of the land and the range of reasonable uses to which it has actually been put
   2. What is the actual use of the land and what is the actual application of the regulatory regime
4. **Does the ‘expropriation’ act entitle the owner to compensation for the resulting restrictions?**
   1. If *all* of your incidents of ownership are taken away, you have expropriation and can be compensated according to *Expropriation Act*. (*CPR v City of Vancouver*)
   2. Courts are constrained by legislation in terms of when they can order compensation.

**Conclusion**:

* 🡪 Decline in value of land (even when it is drastic) is not the loss of an interest in land
* 🡪 For an expropriation, there must be both a taking away of land from the owner; and the acquisition of land by the expropriating authority
* There hasn’t been a taking because Marine hasn’t shown that they have been denied ownership to the reasonable and appropriate use of the land
* Further, the province of NS has no title to the land (there has to be an acquisition

CPR v City of Vancouver (2006, SCC) pg 163

**Facts:** Vancouver designated corridor as a place for transportation only, but didn’t want to buy property + prevented CNR from developing land after they discontinued transportation line

**Issue:** Was the regulation lawful?

**Ratio:**

* Regulation only approaches expropriation when all economic uses of land are eliminated
* No transfer of interest if government doesn’t buy the land
* Definition of “taking” is defined by bylaws

**Analysis:** Regulation was lawful because CNR can still use it as a transportation corridor, no transfer of interest as Vancouver is only regulating use, bylaws doesn’t define Vancouver’s actions as “taking”

Expropriation Act, RSBC 1996, c. 125

* Province can’t take property without compensation
* Province can modify regulatory structure in such a way that changes the value of a person’s property without compensation
  + How much change is allowed before it becomes expropriation is gray zone

Physical Boundaries of Property

* Real property = Land
* Personal property (no real action available to recover the thing itself) = Goods / things
* Chattel = Personal property
* Chose in possession = Right to possession of goods (personal property right to a tangible thing)
* Chose in action = personal property right to an intangible thing
* **Trespass** = unjustifiable interference with possession

**Latin Maxim**: *“Cujus est solum, ejus est usque ad coelum et ad inferos”* 🡪 The owner of a piece of land owns everything above and below it to an indefinite extent (own the land from the centre of the earth up to the heavens)

Airspace

The Latin maxim is *not* the current common law rule with respect to airspace property rights.

Why? Policy considerations:

* Advent of air travel and air planes
* Low flying aircraft might be considered a trespass

Didow v Alberta Power Ltd (1988, ABCA) pg 173 (What is Trespass)

**Facts**: Protrusions from power lines went about 6 feet into the airspace of an owner’s property

**What Constitutes Trespass (Test):**

**Trespass**

* **Transient invasion** if low enough to interfere with ordinary use and enjoyment of the landowner’s land
* **Permanent structural projection** constitutes a trespass if it – in any way – impinges on the actual or potential use and enjoyment of the landowner’s land

**Not trespass**

* **Transient invasion** at a height not likely to interfere with the land owner
* Or if reasonably expected, e.g. next to an airport.
* Or e.g. it's for national security purposes that might negate property rights

What remedy did the plaintiff seek in this case?

* **Declaratory relief** – statement of the legal rights and interests of the parties
* Doesn't make an order as to what should be done

**Conclusion**: Trespass found – damages awarded

Ford v Zelman (2005, BCPC)

**Facts**: Ford has a prized tree that was growing on the property line between the two parties. Zelman said the tree was dropping things on his property and wished to trim it. Zelman said he had permission to do so and proceeded to cut the tree and botched it so much so that the tree died. Ford said no permission was given – sued.

**Did a trespass occur?**

* Did the tree trespass? – Tree’s cannot trespass (just a nuisance)
* Yes – Zelman trespassed when he went over the airspace of Ford’s land (sceptical that Zelman could reach over to cut the branches)

**Decision**: Court found for Ford – awarded high damages (but there is a limit on the damages that could be awarded)

Note: Crane Swing Easements

When you want to build a condo tower you can ask for easements to allow a crane to extend over into the airspace of another property.

**Easements**

* Allows you to do something on someone else’s property
* Nowdays, a developer has to request a crane swing easement, and a soil works easement.
* Have to be registered at the Land Title office. Would run with the land, and spring up when you want to do a project.
* Sometimes perpetual, sometimes for the duration of the project; party granting an easement can ask for the easement to be discharged at the end of the project.

*Land Title Act,* RSBC 1996, c. 250

**(Part 9) – the ability of individuals to pocket parcels of air space**

|  |  |
| --- | --- |
| **S 139** | Airspace is Land |
| **S 138** | Airspace Parcel: means a volumetric parcel, whether or not occupied in whole or in part by a building or other structure, shown as such in an air space plan |
| **S 140(2)** | Unless expressly granted, the title to the air space above the upper limits and below the lower limits of an air space parcel remain in the grantor. |
| **S 141** | How you subdivide a land into airspace parcels |
| **S 143** | More details about the airspace plan |

Subsurface

Latin maxim does not apply. Why? Advances in technology (including mining technology)

In BC, you own the surface (including 3 feet of soil, subsoil and gravel), **NOT** deeper subsurface

* Eg 1: Pipelines = trespass, because at 3ft and interferes with reasonable use of property. Authority to **expropriate land for pipeline** given in s. 34(3) and (4) of the *Oil and Gas Activities Act*, SBC 2008, c. 36
* Eg 2: *Austin v. Rescon Const (1984) Ltd, 1987 CanLII 2455 (BCSC)* – putting in the rods = trespass

Subsurface rights are generally excluded. **See s. 50**, *Land Act*, RSBC 1996, c. 245:

* Sets out what the crown holds or holds back
* Crown disposes of land but it holds back the things set out in s.50

Mineral Rights

*Land Act*, RSBC 1996, c. 245

|  |  |
| --- | --- |
| **S. 50** | Subsurface rights generally excluded from grant of property in BC |

*Mineral Tenure Act*, RSBC 1996, c. 292

|  |  |
| --- | --- |
| **S 1 - Definitions** | "**free miner**" means a person who holds a valid and subsisting free miner certificate issued under this Act or any of the former Acts;  "**mineral**" means an ore of metal, or a natural substance that can be mined, that is in the place or position in which it was originally formed or deposited or is in talus rock, and includes: …  "**mineral lands**" means lands in which minerals or placer minerals or the right to explore for, develop and produce minerals or placer minerals is vested in or reserved to the government, and includes Crown granted 2 post claims  "**mining activity**" means any activity related to  (a) the search for a mineral or placer mineral,  (b) the exploration and development of a mineral or placer mineral, or  (c) the production of a mineral or placer mineral,  and includes the reclamation of a previously mined area and the monitoring and long term protection, control and treatment of a previously mined area |
| **S 8** | Free miner certificate information |
| **S 9** | Recreational hand panning information |
| **S 11** | The right to enter mineral lands and the limitations of that right. |
| **S 19** | The right of entry on private land – must serve notice in the prescribed form and manner. |

Op-Ed Article: Dawn Hoogeveen “Outdated mining rules trump privacy in BC”

* It is time to overturn the free entry mineral-taking regime and reform the Mineral Tenure Act
* Our mining scheme in a nutshell

Lateral Boundaries - LAND

Conventional Line Doctrine

When **boundaries are ambiguous**, can give weight to things about which men are least liable to mistake:

1. Natural boundaries (then)
2. Lines run and corners marked at time of grant (then)
3. Extend boundaries to lines and courses of adjoining tract if sufficiently established (then)
4. Course or distances depending on the circumstances

When neighbours are unable to determine their boundary, can use the **Conventional Line Doctrine**:

* **Conventional line**: one on which adjoining parties agrees. If you are not sure about a boundary, if a conventional line exists, if another party builds up that boundary, then they are estopped form arguing that the line is not the boundary

**Conventional line doctrine** (necessary elements): (*Robertson v Wallace*)

1. Adjoining land owners
2. Dispute or uncertainty about location of dividing line between the properties (lack of clarity about where the dividing line actually is)
3. Agreement between these parties on a dividing line
4. Recognition that this is a common boundary (oral, writing, conduct)

* Onus of proof: The party claiming ownership by virtue of the conventional line has the onus of proof
* Policy justifications? Reduces expenses; Responds to historical reality that not many surveyors were around

Robertson v Wallace (2000, QB) pg 204 (failed Conventional line doctrine test)

**Facts**: River divides two lands and there is also a fence. After the river changed its course, the surveyor redistributed new titles, which caused problems.

**How to apply the test**:

* We have adjoining land owners, and a dispute
* No agreement between the parties on a dividing land (Fence was found to be simply a convenient way to divide the cattle)
* Therefore, the doctrine could not apply in this case

Right of Support

**Right of Support: *(Blewman v Wilkinson*, 1979 NZLR*)***

“If an excavation on the adjacent (next to) or subjacent (below) land causes damage by subsidence (caving in, sinking of land), the landowner whose land was damaged has a right of action”

🡪 Can be **quantified**: economic value of the land prior to subsidence

🡪 What if **buildings** are damaged?

* If due to the weight of the buildings, no luck
* If establish that due to the excavation, compensation would be given.

🡪 Arises **when damage is actually suffered**

**🡪 Waiver:**

* Can be waived by agreement (ex. make agreement with neighbor)
* Can be waived by necessary implication (***Fuller v Garneau,* SCC 1921 – *subjacent property***)
  + Not waived simply because mining rights have been reserved; powers conferred; generous compensation provided (i.e. more than adequate to cover any damage) – even in these circumstances, waiver of support cannot be implied
  + Where the mines cannot be worked or the minerals extracted without resulting in subsidence/destruction, an express order to work the mines necessarily implies the right to cause subsidence/destruction
    - Only implied when there is no way you could take the minerals out of the ground without causing subsistence of the property
  + You have to look at all of the circumstances: state of technology, type of terrain, etc.

🡪 Bring action against **original excavator**

* But *Blewman v Wilkenson [1979]* (New Zealand) said only law of negligence will apply, no strict non-k duty to a subsequent owner of a section on which subsidence occurs because of the excavation
* And CF dissent in *Vecchio v. Pinkus* (Texas) (duty runs with the land – could sue future owners of the land on which the excavation took place)
  + Some say: Duty of support runs with the land and subsequent purchasers should hold responsibility (new purchaser should have realized the risk of subsidence and paid less for the property)
  + Others say: should only be able to sue the original excavators
  + Evidence issues: what if subsidence occurs after a long period of time?

Lateral Boundaries - WATER

Presumption: *Ad medium filum aquae* – “To the centre thread of the stream”

**(1) Is the river navigable?**

* Definition:
  + Navigable rivers: rivers through which vessels can pass
  + Non-navigable rivers: rivers through which vessels cannot pass
  + **Rule**: As long as the river is substantially navigable throughout, then it is a navigable river
* In **Canada**: this doctrine does not apply to navigable waters 🡪 Applies to non-tidal, non-navigable waters
  + The idea of importance of non-tidal navigable rivers to the country as a whole (certain ideas of nation building) – these laws would have been contrary to the whole community.

**(2) If non-navigable, then the presumption applies**

* If water forms the boundary between two properties – one owned by A, one owned by B – it is presumed that each owns the bed of the river to the centre thread of the stream
* What rights flow from the possession of the riverbed?
  + Right to fish (but note, *right can be severed*)
  + Crown can retain the right to fish or it can be transferred to another party

**(3) How might this presumption be rebutted?**

* Look to the grant of land – was there an intention to exclude the river-bed or fishery
* If there is a title to the fishery, presumption that it carries with it the rights to the river bed
* E.g. *R v Nikal*: if the presumption could be said to apply, it was rebutted in light of evidence that the Crown never intended to grant, nor did it grant, the bed of the river to the band

R v Nikal (1996, SCC) pg 213

**Facts:** D lives on a reserve, which has land on both sides of Bulkley River. D was caught fishing in the river and charged with fishing without a licence.

**Issue:** Is the river navigable waters?

**Ratio:** Applied *Ad medium filum aquae*

* Applied Navigability Test 🡪 concerned with entire length of river, not just the section in contention
* Crown reserves bed and shores unless expressly granted

**Conclusion:** Crown had rights to fish because Bulkley River overall is navigable and they didn’t expressly give this right up, thus, D had no right to fish in it.

Land Act, RSBC 1996, c. 245

|  |  |
| --- | --- |
| **S. 55(4)**  BC Crown gets all the bed and shore, unless specifically granted | Despite a rule of law to the contrary, if Crown land bordering on a lake, river, stream or a body of water is or has been granted by the government, in the absence of an express provision in the Crown grant to the contrary, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the land, and the Crown grant must be construed accordingly. |

\*\* 🡪 This rebuts our presumption and makes it clear that the crown is accepting or reserving title. Unless it specifically stated otherwise, assume that the right is reserved by the crown.

Water Act, RSBC 1996, c. 483

|  |  |
| --- | --- |
| **S. 2(1)**  BC Crown gets all the water column, unless specifically granted | The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act. |

Law of Accretion

“[W]here land is granted with a water boundary, the title of the grantee extends to that land as added to or detracted from by accretion, or avulsion” (Lord Wilberforce, *Southern Centre)*

**Accretion**: If change is slow, boundary changes with the river

* If a change is gradual and generally imperceptible, if that water boundary is a boundary between properties, then title would change as well 🡪 Title would shift to accommodate the current location of the river

**Avulsion**: If change is rapid, the original boundary remains

* If the change is rapid, the original location of the river defines the boundary (not the location post-rapid change)

Copyright

**Copyright**: set of exclusive rights that relates to expression

Copyright is a creature of statute – the rights and remedies provided in the ***Copyright Act*** are exhaustive.

Intellectual Property (IP)

Property Rights in Ideas

Property rights do not protect ideas; only the **expression of ideas** is protected. (*Desney v Wilder*)

* This is not straightforward 🡪 complicated by **non-literal copying** (taking of elements from one work, without taking the actual expression itself)
* Courts have decided that you can infringe copyright not just through literal copying, but through non-literal copying

**Idea-expression Dichotomy** (*INS v Associated Press*)

* If the purpose of property rights is to protect authors and individuals who take nothing and produce something, then you would fall on one side of the idea-expression dichotomy
* If we think it is encouraging creation and sharing – then you might think we fall on the other side of the line

Why aren’t ideas protected? (*Desney v Wilder*)

* All sentient beings can conceive and evolve ideas
* Property implies something which may be owned and possessed to the exclusion of all others
  + Ideas are non-exclusive
  + Ideas are non-rivalrous (numerous people can use the idea at the same time without diminishing the enjoyment of it)

Desney v Wilder (1956) (ideas can’t be property)

**Facts**: Desney called Wilder’s office to pitch an idea for a movie based on the life story of a real person. Desney gave broad idea of movie itself and had a 3-4 page synopsis and was told to call back and tell receptionist about it. Some talk about getting paid for the idea.

**Analysis and conclusion**:

* Ideas not usually regarded as property
* Court didn't dispute that ideas take money and labour to develop is not enough to grant or justify a property right 🡪 tried to find another way to protect the effort of the plaintiff without framing it as property right
* **Framed it as a contracts issue**: No copyright and no contract based on the first conversation
  + Desire to be paid: if studio used the synopsis, an implied contract would have been formed

**Class Discussion:**

Why might we want to grant property rights in ideas?

* First define what do we mean by property rights? The ability of one party to exclude all others from the idea within the limits set by the legislation
* Encourage sharing of ideas – foster innovation and communication, research and development
* Allows individuals to become creators and have financial security of a return on their investment of time
* **Labour** – people spend so much effort and time thinking about ideas and to reward that labour, should grant a property right
* **Personality** – when you come up with an idea, it is not totally separate from you – there is a part of you that is intimately connected to and related to that idea
* **Efficiency** – if our goal is to have these ideas spread as widely as possible, we should grant a property right

Why might we want to refrain from granting property rights in ideas?

* It can restrict innovation – its hard to actually assume a world with no transaction costs so this could be a reason to not grant property rights
* Compulsory licensing could help in some of these situations
* **Problem**: patent holder “evergreening” – slightly change the patent to extend it
* **Evidence issues**: how do you determine what the boundaries of an idea might be in the context of a court case
* **Freedom of speech and expression**: should the ideas be available for all to use and all to build upon

Property Rights in Information

🡪 There is a lot of economic wealth attached to information.

Currently, there are no property rights in **information**.

* There are no property rights in **facts** (*INS v AP*)
* Granting property rights in information could negatively impact speech, knowledge, the flow of information (*INS v AP*)

**Expressions** of ideas and information are protected **if they are original**:

**Test for originality in Canada** *CCH Canadian et al v. LSUC*

1. Originate from the author
2. More than a mere copy
3. Exercise of skill and judgment that is more than trivial (not a mere mechanistic exercise)

🡪 Don't have to have creativity – no novelty or creative spark to have you work declared as original

Ways to protect data not involving copyright?

* Contract law? (but 3rd parties?)
* Tort of unfair competition? (not recognized (Cda); interpreted narrowly (US))
* Criminal law? (but can’t steal information)
* Database right? (no leg support)

International News Service v Associated Press (1918, US) (information is not protected)

**Facts**: INS was barred from using allied telegraph lines to report the news. They decided to get access in some other way to news (from AP) that was being transferred – they bribed employees to get information and they induced employees to violate their bylaws and they went to the first edition. They didn't copy the works word by word – took the facts.

**Analysis and Conclusion**:

* Court focused on **unfair competition** (trying to protect AP without using property rights)
* Hot News Doctrine: gather of news have right to first printing of news, competition must wait before printing
  + Created a **quasi-property right:** not against the world (trad. prop. right), but between competitors, has a time restriction.
* Can’t copyright on news/idea, can copyright on way idea/news is expressed
* AP’s arguments for their property rights were putting the money and effort into getting this news. INS didn’t put the labour into it. They are benefiting from it.
* The granting of the property right is something that needs to be done by the legislature, not by the courts

CCH Canadian et al v. LSUC (2004, SCC)

**Facts**: Library at Osgoode provided photocopying services where they sent material to visiting lawyers and had on site photocopier.

**Analysis and Conclusion**:

* SCC affirms that individual facts will not receive copyright protection. A thin bundle of rights around a compilation.
* In Canada it needs to be original to be copyrighted. (LSUC was ok, because fair dealing defence worked)

**Class Discussion**

Should property rights exist in information or information products?

* Businesses have tried to protect their products through property rights, specifically through property rights in information
* It takes time and effort to acquire that information, and without the protection there might not be incentive to do the work
* Property rights can be seen as good against the world – they are more certain

Is there an argument to be made for granting property rights in information?

* **First occupant theory** – the person who is the first to discover or find this information should have the rights
* **Property rights lead to freedom** – if conceptualize freedom as economic freedom of the ability of companies to engage in certain activities that they wouldn't otherwise be able to
* **Personhood theory** would be difficult to establish

Would negative consequences flow from protecting information through property rights?

* It could have such a great impact to large number of people
* Market inefficiency – increasing in transaction costs

Copyright – Economic Rights

Copyright is a bundle of exclusive rights in works, performers’ performances, sound recordings and communication signals. If you have a copyright in a work, you can prevent other parties from engaging in specific actions with respect to that work for a certain period of time.

Types of works: literary, musical, dramatic, or artistic (set out in **s. 5** of the Act)

* + Literary work: work expressed in print or writing
  + Artistic works: Works which find expression in a visual medium – used by courts

Two sets of rights exist in relation to works:

* **Economic rights** (set out in **s. 3** of the *Copyright Act*) – relate to the ability of the author to profit from or receive the economic benefit from that work
  + Sole right to produce or reproduce the work, to perform the work, etc.
  + Sticks in the bundle of exclusive rights given to the copyright owner
* **Moral rights** (set out in **ss. 14.1, 14.2** of the Copyright *Act*)

**The purpose of copyrighting**: (look to common law)

* Balance between promoting the public interest in encouraging and disseminating works of the arts and intellect and obtaining a just reward for the creator (*Theberge*)
* Reward given in order to incentivize creation of expression (*Cinar Corp v Robinson*)
* Grant reward because of the incentive effect that granting those awards has on the creation of expression
* Only the federal government can pass laws in relations to copyright (**Charter**)

Step 1: What are the conditions for the subsistence of copyright in works? (S. 5)

* Citizenship of treaty country,
* Original work (*CCH*) (sweat of the brow)
  + *1) Originate from the author*
  + *2) Be more than a mere copy*
  + *3) Be an exercise of skill and judgment that is more than trivial.* (vs US spark of creativity)
    - Not a high threshold, though more than correcting grammar and spelling
* Fall under definition of work – literary, musical, dramatic, artistic – work that finds expression in a visual form. Artistic merit does not matter, eg a stick figure counts
* Capable of being copyrighted – not ideas/facts,
* Must be fixed (i.e. paint on a canvas, ink on a page) 🡨 judicially imposed requirement
* \*\*No registration requirement (as long as all the other elements of subsistence are satisfied)

**Length of term of copyright (Ss. 6-12)**

* **S. 6** – Life of the author plus 50 years from the end of the calendar year in which the author died
* Has increased over time in different jurisdictions
* This may be extended to 70 in current negotiations with Europe etc. Duration is result of that balancing of two interests. Except interest of author may be front for interest of industry – eg so-called “Mickey Mouse Protection Act” of 1998

**Jurisdictions relating to Infringement**: Where did the infringement take place? What happens if it happens in multiple jurisdiction or online? As long as there is a substantial relationship in Canada, then Canadian law will apply. You can bring a copyright lawsuit in Canada if the infringement takes place in Canada.

**Ownership of copyright (S. 13)**

* **S. 13(1)** – The author is the first major owner of the copyright in the work
* NB: employment exception (**13(3)**) – if an employee creates a work in the context of employment, then the employer is the owner of the copyright

Step 2: Copyright Infringement?

It's an infringement to do anything that only owner is allowed to do without consent (**S. 27(1)**)

* Right to produce or reproduce work or “any substantial part in “any material form” (**S. 3(a)**)
  + Make a new copy (*Theberge*)
    - A reproduction means an increase in the number of copies (if you start with one copy and you arrive at two) (*Theberge*)
  + “Substantial part” relates to quality more than quantity.
    - I.e. how important the taken part is to the work? E.g. in music, taking even a few bars would count, if it's the hook
  + “Any material form” (doesn’t need to be in human readable form as long as there is some way to compare the alleged copy w. the original) (ex. reproduction from 2D to 3D)
* Right to perform work or any substantial part in public (**S. 3(a)**)
* Right to publish work or any substantial part (**S. 3(a)**)
* Right to authorize others to your copyright (**S. 3(j)**)

**Defences to Copyright Infringement**

1. Copyright does not subsist in the work (onus on D, **s 34.1**)
   1. **(1)** Defendant must rebut presumption that copyright exists in the work, and that the plaintiff is the author (defence)
   2. **(2)(a)** Where there is no registered copyright, if a name is indicated in the usual manner on the work, the named will be presumed author
   3. **(b)** If no name or not the author’s true name or common name, and there is some other name on the work, that other name is presumed the author
   4. **(c)** Cinematographer presumed author if name appears in usual manner in work
2. The copyright has expired
3. P doesn’t own the copyright (onus on D, see **s. 34.1**)
4. No infringing act took place
5. Defences set out in the CR Act (ie **s. 32.2**)
   1. **(1a)** Can use a copyrighted work if you don’t imitate the “main design”
   2. **(1b)** To reproduce sculpture or art that is in a public place
   3. **(1c)** To publish for news purposes public lecture unless banned
   4. **(1d)** To read in public reasonable extract of published work
6. **Fair Dealing Defence:** (onus on D, **Ss. 29, 29.1, 29.2**)

* Allows individuals to use a substantial portion of copyright-protected expression without first receiving the permission of the copyright owner, for certain purposes, provided the use is fair and, in certain cases, various criteria are satisfied.
* The term “fair dealing” is not defined in the Copyright Act; left to judicial interpretation based on the facts of each case (*CCH* & *SOCAN*)
* User’s right and must not be interpreted restrictively (*CCH*), reaffirmed in *SOCAN*
  + Used to be seen as a limitation on copyright holder's right – interpreted restrictively
* Broadest and therefore the most important defence that exists

**Fair Dealing Test** (*CCH*) 🡪 Balance the rights of owners and users

* Fair dealing is a user’s right; must not be interpreted restrictively
* **First ask**: What was the use? Defendant has to prove these two steps – if they do prove it, then the dealing is not a copyright:

**Step 1:** Does the dealing fit into one of the fair dealing categories – *shows purpose*?

**Step 2**: Was the dealing fair? **Fairness factors**: purpose of dealing; character of dealing; amount of dealing; alternatives to the dealing; nature of the work; effect of the dealing on the work

Step 3: What was the purpose of the dealing (does it fit into one of the 8 categories)?

**Categories**: research, private study, education, parody, satire (**s 29**), criticism or review (**s 29(1)**), and news reporting (**s 29(2)**). (Education, parody, satire brought into the act in 2012)

* **s29.1:** fair dealing for purpose of criticism, review, (**29.2**) or news is not infringement if source and author mentioned
* **s29.21:** non-commercial user-generated content based on CRed material (creating a new work based on old one) is permissible given use is non-commercial, the source is attributed, the use or dissemination of new work doesn't affect old work.
* *CCH*: research under s 29
* *SOCAN*: should be analysed from perspective of the consumer/user. In this case the research was what music to purchase. It need not be for creative purposes only

Step 4: Was the dealing fair?

* **Character**: how many copies and how were they used
  + *CCH*: single copy to individuals
  + *SOCAN*: streamed previews, they cannot be copied/disseminated
* **Amount of dealing**: how much is taken form the work, how important to the work was it
  + *CCH*: used whole cases but that was necessary, cases are like poems, you need the case in it’s entirety for legal research
  + should not be assess by how many streams. Instead, look to proportion of the preview to the whole work. A few seconds of streaming isn’t enough
* **Alternatives to the dealing**: was there a non-CRed work that could have been used? Was it necessary to use the CRed work to achieve purpose? Are there any equally effective alternatives?
  + *CCH*: no realistic one
  + *SOCAN*:nope. Short low quality previews don’t compete with, or adversely affect, downloading of the works themselves
  + Garfield: is Garfield essential to the message about loneliness in suburban America?
* **Nature of the work**: private/public, would disclosure be unfair?
  + *CCH*: type of work that SHOULD be disseminated for public interest/justice
* **Effect on the work**: is reproduction likely to compete with original work? Regardless of whether new work makes money!
  + *CCH*: dealing did not function as a commercial competitor; Didn’t show any effect on profits from the photocopies. (interesting because the onus is on D to prove fair dealing, but P didn’t present anything)
  + *SOCAN*: INCREASED the sale and dissemination of CR musical works
  + Garfield: prob not a lot of overlap in consumers – ergo no effect on work; but money is being made here – but court doesn't consider this to have effect on work

Théberge v Galerie d’Art du Petit Champlain (2002, SCC) (reproduction = additional or new copies)

**Facts**: Theberge granted D limited reproduction rights for his art. D copied the reproductions through a method that allowed for unlimited copying without damaging the canvas

**Issue:** Was D infringing on Theberge’s copyrights in his art?

**Majority:** Reproduction is increase in number of copies

**Dissent**: Reproduction is increase in re-fixation

**Analysis:**

* Theberge’s desires fall within moral rights, not economic rights. D wasn’t infringing on Theberge’s copyright since no new reproductions were created
* Purpose of copyright is balancing rewarding author and promote public good

SOCAN v. Bell Canada (2012, SCC)

**Issue**: Does it infringe copyright to set up a system where individuals can stream small portions of songs? Is it fair dealing?

**Analysis**:

* Step 1: Does copyright exist in the work in question? Yes – musical work
* Step 2: Was this 30 seconds considered a substantial part?
  + Could argue that it is a substantial part of the work – depends on which part of the song is used (chorus)
* Are there any defences? Fair dealing?
  + (Step 3) Does it fall within any of the fair dealing categories?
    - Research: fair dealing shouldn't be interpretive restrictively, it's a users right and we need to give these categories a large interpretation
    - Yes, it would satisfy this part of the test
  + (Step 4) Was the dealing fair?
    - The effect of the dealing on the work could be to increase sales
    - Character of the dealing: technological measures in place that prevent the entire work from being taken or being sent to a third party
    - No real effective and efficient alternatives to the dealing

Copyright – Moral Rights

**Moral rights**: Take a “more elevated and less dollars and cents view of the relationship between an artist and his or her work” (Binnie J., *Théberge)*

* Based on the idea that an author’s work is an extension of the author…
* Any assault or attack on the work is an attack on the author themselves
* **Canada** provides protection for moral right. Other jurisdictions provide them to varying degrees:
  + **France**: very strong protection for moral rights
  + **US**: didn't provide this protection until relatively recently

In Canada, moral rights are protected under the ***Copyright Act***.

* Both **authors** (**s 14.1**) and **performers** (**s 17.1**) have moral rights
* Two rights are protected: attribution & integrity

**1. Attribution** (association or anonymity) where “reasonable in the circumstances”

* Right to be associated with the work as its author/performer by name or under a pseudonym and the right to remain anonymous (where reasonable in the circumstances). (**s. 14.1(1)/17.1(1)**)
* What does “reasonable in the circumstances” mean?
  + Ex. If there are a large number of authors that contributed and to a small amount – courts might say it isn’t reasonable
  + Generally thought to have been added to provide flexibility and to deter trivial complaints

**2. Integrity**

* See **s. 14.1/17.1/28.2**
* Infringed in **two situations**:
  + Where the work is either distorted, mutilated or otherwise modified to the prejudice of the honour or reputation of the author
  + Where the work is used in association with a product, service, cause or institution to the prejudice of the honour or reputation of the author.

**Test for Infringement of Integrity** (*Snow* & *Prise*)

**Step 1**: Must be a **work** within the meaning if the Copyright Act (**s. 5** literary, musical, dramatic, artistic)

* *Snow:* sculpture
* *Prise:* book

**Step 2**:

**A)** The work was either distorted, mutilated or otherwise modified to the prejudice of the honour or reputation of the author (**s 28.2(1)(a)**)

* **Deeming provision, (28.2(2)):** in case of painting, sculpture, or engraving, prejudice deemed to have occurred as a result of any distortion, mutilation, or modification
* **Exception, (28.2(3)):**
  + **(a)** Change in location, physical means of exposure, or containment, or
  + **(b)** Restoration or preservation in good faith,
  + **Do not** by themselves constitute violation of integrity
* E.g. *Snow:* very minor distortion found to violate integrity
* E.g. *Prise:* obviously, large chucks were taken out

**B)** The work is used in association with a product, service, cause or institution to the prejudice of the honour or reputation of the author

* Similar to the right of association

**Step 3**: Is it to the **prejudice** of the honour or reputation of the author?

* Canadian courts say that this is both a subjective and objective test

1. **Subjective**: Does the author feel the distortion is prejudicial?
2. **Objective**: Is this objectively supported by economic harm or public/expert opinions?

* *Snow:* prejudice because others in the field agreed
* *Prise:* no economic harm (no decrease in lectures)/no ridicule by others

**Step 4**: **Defences**

* Consent is a defence
* Fair dealing is NOT a defence
* Public policy embedded in Objective part of test

**Note**: **s. 28.2(2)** the deeming provision: The burden shifts 🡪 the person who created the distortion has to prove that it was not prejudicial to the author

**Attributes of Moral Rights in Canada**

* Last for the **same term** as copyright in the work/performance – **Life + 50** (**s. 14.2(1)/17.2(1)**)
* **Cannot be** assigned (**s. 14.1(2)/17.1(2)**)
* **Can be** inherited (**s. 14.2(2)/17.2(2)**): rights pass on death to specifically (a) bequeathed or (b) to who the CR was bequeathed or (c) inheritors (if not a then b if not b then c)
* **Can be** waived (**s. 14.1(2)/17.1(2)**) (can agree to waive the rights completely or in a very limited fashion)

Snow v Eaton Centre (1982) (first moral rights case brought before Canadian Court)

**Facts**: Eaton Centre bought art piece of geese. During Christmas time, Eaton put ribbons on the geese. Snow said it was a prejudice to his honour/reputation.

**Issue**: Did the addition of ribbons constitute a distortion, mutilation or modification of Snow’s work?

**Analysis and Conclusion**:

* Yes – distortion or modification made.
* **Integrity Test: Subjective:** he thought it made is art look ridiculous, didn’t want to be associated with advertising. **Objective:** other well-respected artists and knowledgeable individual in the field agreed.
* Had **s. 28.2(2)** (deeming provision) been in effect, it would have helped Snow’s claim – onus would had shifted to Eaton Centre to prove it wasn't prejudicial

Prise de Parole Inc. v. Guérin, Éditeur Ltée (1995) (Infringement on integrity not found)

**Facts**: The author Guerin wrote a book about teens in northern Quebec that sold quite well in high schools. Eventually, another company creates a book with a bunch of short stories within which was a highly edited version of his story. After, his sales decreased but it didn't seem that his reputation was affected.

**Issue**: Right of integrity

**Analysis and Conclusion:**

* There was a modification/distortion/mutilation.
* He met the subjective test but could not make out objective test.
* Objective test failed because he was still giving the same amount of lectures, he hadn’t been ridiculed or mocked, or suffered economically. DIFFERENT criteria than Snow where they went to other artists, here they looked at other factors.

Personality as Property

* **Personality**: idea of commercial value in your name/likeness
* People can receive protection for personality in the courts through defamation, or passing off (torts)
* Canadian courts have recognized another tort through which personality can be protected: **misappropriation of personality**

**Test for Appropriation:**

**1. Sales vs. Subject** (*Gould Estate*)

* Key Question: is the personality being used to simply sell a product or is it being used in a work that they are the subject of
* Subject: personality is used to say something about the person = no tort
  + Focus on the person
  + In *Gould,* the pictures were used to say something about Gould, not to endorse a product. Therefore no tort
* Sales: personality is used for sale of product, e.g, endorsement, = tort
  + Focus on the product
* Must balance public and private interest.
  + *Gould:* free expression of creative talent, and contribution to public debate are immune
* Survivability of right: This case suggests that the right for protection of personality could survive after death (at least 14 years because that is the time between Gould’s death and the time of the publication of the book). This right would descend to the person that was specifically named in the will or would pass to heirs.

**2. Personality must be Recognizable:** some kind of known personality

* *Krouse:* football player, yes
* *Athans:* water-skier, known in circles
* Other factors: tattoo, scar, etc.

**3. Endorsement or Unjust Enrichment**

1. **Krouse Test**: Would somebody who was looking at the ad think that the person was endorsing it? Ground for suit is loss of potential future opportunity/profit

* Focus is harm to person
* *Krouse:* people would not think he’s endorsing the product, so there would be no loss of potential to endorse other products. No tort

1. **Athans Test**: Has the user of the personality been unjustly enriched by not paying compensation? The person has exclusive rights to market his image.

* *Athans:* his personality is worth money, so the camp was unjustly enriched by not paying. Tort
* Chances for future endorsement irrelevant

**ALL THREE** cases argue that you’d be able to recover is your personality is used in ads, without your consent if

* 1. You’re recognizable
  2. Public would assume you’re endorsing
  3. As a result your ability to market yourself would be reduced.
* ***Krouse*:** Suggests **only** successful if the public would assume you are endorsing the product **&** the damages are **only** awarded if you cannot endorse a competing product.
* ***Athens*:** Suggests you might be successful even when there was no implied endorsement, but the defendant tried to use you for their commercial benefit and as a result, was enriched in so doing
  + (They used a personality for free that they otherwise would have paid for – that in itself is enough to satisfy this)
* ***Gould*:**
  + Establishes limits as to how broad or how narrow the application might be
  + Unsuccessful attempt to use misappropriation of personality to protect privacy
  + Concerned about the possible impact of a broad tort on **freedom on expression**
  + **Sales v subject distinction** – Is the personality being used to sell a product or is the person actually the subject of the work and attempts to offer some sort of insight on them
  + Survivability of right? Suggested could extend at least 14 years after death (potentially up to 50)

Krouse v. Chrysler Canada (1973, Ont CA) (first case to recognize the tort of misappropriation of personality)

**Facts**: P is a football player. D used his picture on a spotter. Spotters were used to help identify players on field. Pic was used not because of him specifically, just to show football players in action. His number was identifiable as was the colour of his jersey. P argued that his pic was being used to commercial advantage of D. As a football player he had ability to make money of endorsements, and therefore was injured

**Issue**: Did Chrysler misappropriate Krouse’s property right in his personality?

**Conclusion**:

* No-one looking at the spotter would think that Krouse was endorsing the cars. His ability to get other endorsements is not lessened.
* No harm was caused – doesn't matter that Chrysler may have benefited.
* Court held that as there was no damage, the tort wasn't successful.

Athans v. Canadian Adventure Camp (1977, Ont High Ct) (affirms existence of the tort in Canada)

**Facts:** Athans is a well-known (within the subculture) water-skier. Had characteristic and distinctive photo of himself water-skiing HE USED COMMERCIALLY. A stylized version of pic was used in an adventure camp brochure. His name was not there BUT those in the know (subculture) would know it was his.

**Issue**: Did the camp misappropriate Athan’s personality?

**Conclusion**:

* No-one that was looking at the brochure would think that Athens was endorsing the camp and there was no affect on his future endorsement ability
* BUT, there was commercial value in the picture itself
* No damage so we would expect no violation of the tort, BUT the court does order the payment of damages – there was an impairment on his exclusive right to use his photo
* Court shifted from compensation for harm done to unjust enrichment
* No deterrence because damages was just the amount D would have had to pay to use the image in the first place

Gould Estate v. Stoddard Publishing Co (1996, Ontario Ct) (public interest and freedom of expression)

**Facts**: Publishing Company went on a trip with Gould and took lots of pictures and had a lot of conversations – after Gould’s death, used all of that to publish a book about Gould. The estate claimed that their use of the photos in the book amounted to a misappropriation in Gould’s personality.

**Found:**

* Court concludes that the tort of appropriation of personality is restricted to endorsement-type situations.
* Must be mindful of public interest and freedom of expression.
* Being the subject of a work isn’t included in the tort.
* The tort of misappropriation of personality should not be interpreted too broadly. In determining the scope of the tort, take account of the public interest: freedom of expression. Public had interest in knowing more about one of Canada’s musical geniuses.
* Suggests that the right could survive after death and pass to heirs.

Privacy Act, RSBC 1996, c 373

**Unauthorized Use (s. 3)**: statutory version of our common law tort of misappropriation of personality

(1) In this section, **"portrait"** means a likeness, still or moving, and includes

(a) a likeness of another deliberately disguised to resemble the plaintiff, and

(b) a caricature.

(2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

(4) A person is not liable to another for the use, for the purposes stated in subsection (2), of his or her portrait in a picture of a group or gathering, unless the plaintiff is

(a) identified by name or description, or his or her presence is emphasized, whether by the composition of the picture or otherwise, or

(b) recognizable, and the defendant, by using the picture, intended to exploit the plaintiff's name or reputation.

**Action does not survive death (s. 5)**: An action or right of action for a violation of privacy or for the unauthorized use of the name or portrait of another for the purposes stated in this Act is extinguished by the death of the person whose privacy is alleged to have been violated or whose name or portrait is alleged to have been used without authority.

Fixtures

**Law of transformation**: something begins as one thing and transforms another (something that starts as chattel transforms to become a fixture)

* Governs the process through which a chattel becomes a fixture
* Significance? It can transfer ownership from one person to another – a sale of property generally caries with it all of the fixtures of the property BUT chattel does not pass with sale of property
* When a lease ends, a landlord might be entitled to fixtures placed on the property by the tenant

**Test for Chattel vs. Fixture**:

* Look at the intention of the parties
* Test is **objective**, not subjective: looks to what a reasonable person would conclude in the circumstances
  1. **Degree of Annexation** = presumptions
  + Strength of presumption varies in direct proportion with extent of attachment
  + **a)** Chattel **attached** to the land **by more than its own weight** = *prima facie* fixture
    - E.g. Carpet held to the ground with carpet nails = presume fixture
    - How weakly or strongly is the chattel connected to the land? The weaker the connection, the easier the rebuttal of the presumption
  + **b)** Chattel **not attached** = *prima facie* chattel
  1. **Purpose of Annexation** = ground for **rebuttal** of presumptions
  + Onus on party claiming contrary to presumption
  + **a)** Purpose to **enhance** the land = fixture.
    - E.g. Carpet’s purpose was to enhance the hotel = confirms presumption
  + **b)** Better use of the **chattel as a chattel** = chattel
  1. How much **damage** would result from the removal of the item?
  + If significant, likely to be a fixture
* Hard to find consistency in case law in this area – this test can be applied in a variety of ways
* **Whether or not a chattel becomes a fixture can’t be conclusively controlled by contract**
  + **Why not?** It might outlive the parties to the contract – it protects third parties that might be dealing with the land at a future point. The parties should have to search for contracts that apply to the chattel/fixture.
  + Contracts can be used to bind two parties to the contractual arrangement

**Tenants’ fixtures**: right to reclaim fixtures (*Diamond Neon Manufacturing Ltd v Toronto-Dominion Realty co [1976]*)

1. Tenant installed for
2. the purposes of carrying on a trade
3. ornamental in nature
4. purpose of domestic convenient
5. Possible to remove without causing significant damage
6. Must be exercised before tenancy expires
7. Might be limited/precluded by landlord/tenant contract

Application: La Salle Recreations Ltd

**Facts**: Hotel had carpets that were stated in the contract to simply be on lease from the carpet manufacturer. Fight about whether or not they were fixtures between the mortgage holders and the carpet manufacturers.

**Analysis**:

* Carpet was fixed to the ground
* Purpose of annexation: The purpose was to make better use of the hotel as a hotel, not to make better use of the carpet of a carpet

**Decision**: Carpets were fixtures

Application: Diamond Neon

**Facts**: sign manufacture that manufactured signs that were on the property. Had contract with property owners that the signs were chattel and belonged to the manufacture. New owner didn't know of contract and sold the signs thinking they belonged to them as fixtures on the property

**Analysis**:

* Degree of annexation was quite strong
* Object of annexation was for the better use of the land, not for the better use of the sign as a sign

**Conclusion**:

* Majority found the signs to be fixtures
* Dissent would have found the signs to be chattels – looked at the intention of the parties and the name on the signs

Which view – majority or dissent – do you think is correct?

* Dissent – strong point that the subsequent owners sold the signs as chattels points to the fact that they should be viewed as chattels all along
* Both sides can be argued well.

Possession

🡪 Look to ***Heritage Conservation Act***

Concept of Possession

**Test for possession**

1. Physical control
2. Intention to possess

Why does it matter whether someone can be said to possess something?

🡪 It is important in terms of your ability to recover an item or recover damages for an item that was taken

**Constructive possession**:

* Legal fiction, arises in instances where the physical or mental elements of possession are watered down
* Person with constructive possession treated the same way, at law, as a person with actual possession

Is the **flexibility** inherent in the concept of possession a good thing?

* Pg. 296 in book – benefits to flexibility: A stable economic environment requires rules of conduct that are understandable and consistent with the rules and customs of the industry that they regulate. Because each industry has different practices, we cant establish a single meaning of possession without creating a rule that would not have consistency across different industries

**Abandonment**: the giving up of a thing absolutely

* Sufficient acts of abandonment – the owner has to show that they have clearly given up their rights to the property
* Intention to abandon – you have to demonstrate that the intentionally/knowingly relinquished control over the item

**Custody**: keeping, guarding, taking care, watching over something

* Possession includes custody; custody does not necessarily include possession
* Example: If you hold goods that belong to your employer, you are holding something for someone else – you are holding on behalf of your employer who is the party that retains possession of your item

**Factors that impact how the test for possession is constructed in various contexts:**

* **Public policy concerns** (efficiency, economic considerations, resource conservation, labour)
  + Fox hunting: *Pierson v Post*
    - **Policy reasons** instead of **industry customs**: certainty, and keeping peace and order. Giving possession to pursuers will give rise to too many quarrels. Need to also bring the animal under your control.
    - **Dissent**: hot pursuit should be good enough. Labour theory.
* **Custom and practice of the industry**
  + Seal fishery: *Clift v Kane*
    - Original seal ship didn’t lose possession when ice drifted away, because of the customs of the industry. 2nd ship didn’t have the right to take the seals, but could have done salvage fee.
  + Baseball: *Popov v Hayashi*
    - Plaintiff unsuccessfully argued only intent to acquire control + all suitable efforts have been taken (as in salvage cases)
    - It is possible, and expected, to take complete possession of baseball, so that’s the standard. Supplemented by **concepts of fairness and justice**
* **Concepts of fairness and justice**
  + Baseball *Popov v Hayashi*
    - **Pre-possessory interest:** Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the *unlawful* acts of others**;** not full *right to possession* can support a cause of action for conversion.
    - **Equitable division**: where more than one party has a valid claim to a piece of property, the court will recognize undivided interests in the property in proportion to the strength of the claim. Equitable = needs **clean hands**.

Pierson v Post

**Facts**: Post was in hot pursuit of the fox. Pierson intervened, killing the fox and took possession of it.

**Issue**: Did Post acquire possession in the fox by virtue of his hot pursuit?

**Ratio**: Pursuit enough isn’t enough to bequest a property right in the hunter

**Analysis**:

* Preserving peace and order in society – if pursuit was enough for possession, it would lead to a flood of new cases within the courts
* Pursuit would be declining the animal of its liberty

**Conclusion**:

* Post does not have possession of the fox
* Majority: public policy 🡪 if first seeing/pursuit without depriving animal of liberty was enough for cause of action, then too many potential lawsuits
* Dissent: foxes are wild, obnoxious beasts and it is in the public interest to encourage people to go out and hunt them

Clift v Kane (1870) NFld SC

**Facts:** P + D were competing commercial ships. 1000 seals were killed and scalped by P, left lying on ice, gradually drifting towards D. D started dragging the seals onto their ship.

**Issue:** Was constitutes physical control in the context of the seal fishery?

**Ratio:** Seals having being killed and marked, were to be treated as property in precisely the same manner as any other kind of inanimate personally

**Analysis:** P didn’t lose possession even though ice shifted

**Dissent**: carcass, in a functional sense, could still escape

Popov v Hayashi (2002, California SC)

**Facts**: Dispute over possession of a home run ball. Evidence did not show whether Popov was able to retain possession of the crowd as he descended into the crowd. Court also didn’t know if he would have been able to retain possession of the ball if the crowd didn't interfere

**Issue**: Did Popov have possession or the right to possession? What constitutes physical control in the context of a baseball hit into the stands?

**Ratio**: Possession occurs when person has complete control of ball. Where more than one party has a valid claim to a piece of property, court will recognized undivided interests in property in portion to strength of claim .

**Analysis**:

* The ball was abandoned property after it was hit out of the grounds (home run) – the first person to possess it would be the owner after
* **Gray’s Rule**: A ball is caught if the person has achieved complete control of the ball at the point in time that the momentum of the ball and the momentum of the fan while attempting to catch the ball ceases. A ball, which is dislodged by incidental contact with an inanimate object or another person, before momentum has ceased, is not possessed. Incidental contact with another person is contact that is not intended by the other person. The first person to pick up a loose ball and secure it becomes its possessor.
  + This rule is ultimately accepted in this case
* Judge creates rule of pre-possessory interest because Popov didn't have a fair chance to catch the ball – was interrupted by the unlawful conduct of the crowd
* Court recognizes that Hayashi was not part of the crowd of wrongdoers
* **Pre-possessory interest**: Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession, which can support a cause of action for conversion.
  + Therefore, both Popov and Hayashi have a claim of equal dignity to each other and the concept of equitable division applies
* **Equitable division**: where more than one party has a valid claim to a piece of property, the court will recognize undivided interests in the property in proportion to the strength of the claim.

Animals

Nakhuda v. Story Book Farm Primate Sanctuary, 2013 ONSC 5761

1. **Is the animal wild?** If yes, can only be owned while possessed.
   1. Nature of the animal that determines it, not how it's treated.
   2. Here: no history of domestication, and she had trouble training him.
2. **Possession test** = strict physical control.
3. **Exceptions**:
   1. **Animus revertendi**: does the animal have a habit of returning home? Would indicate that she has physical control.
   2. **Immediate pursuit** (by owner of animal)
4. Does the animal have to **regain its natural liberty** before the owner loses ownership?
   1. Does this happen when it first escapes though? Case history doesn’t suggest this.
   2. Here: monkey cannot regain your natural liberty unless in its natural habitat.
   3. Hard to apply in this case.

Adverse Possession

**Adverse Possession/Squatter Rights**:

* Based on a divergence or split between legal right to possession (by O, paper title holder) and actual possession (by S – squatter)
* If S remains in possession of O’s land for specific period of time, provided other requirements are satisfied, O’s paper title extinguished and S acquires a new title by effect of Limitations Act s.28
* S’s interest is said to be an overriding interest that overrides O’s paper title
* ***Don’t take these general principles to be the law in BC today***

**Class Discussion**: Why permit adverse possession? (Policy reasons)

* In the past, if you had landowners with huge estates, there could be very little land in which ordinary people could occupy. Mechanism through which land is settled – encourages the settlement of land
* Efficiency arguments 🡪 absentee landlords who weren’t settling the land
* PEI case arguments – ideas about the importance of labour on the land – we want to reward those who labour on the land. The magical power of property to make somebody into a better citizen.
* Encourages the productive use of land, especially when Canada was being developed
* Historically: If we permit adverse possession, it will encourage settling in the West which will prevent the US expansion
* Idea that law reward the vigilant, not those who sleep on their rights – what it means to be a productive member of society

**Nature of adverse possessor’s interest**

* Squatter has an **inchoate interest** (future interest in a piece of real estate) – imagine the squatter having an invisible title with a ‘dotted line’ around it
* The amount of time it takes to establish squatter rights is dependent on the province (the general time is 20 years for an individual, 60 years for crown – BC)
* If the squatter leaves before 20 years, there is no effect on the owners title; but even thought the squatter is only seen as having an inchoate interest, they still have rights associated with it and it can be transferred
* S has something that can be transferred:
  + S1 possesses adversely O’s land for 10 years
  + S1 sells to S2
  + S2 continues in possession for 10 years
  + At end, S2 has title via **“tacking”**
* Doesn't even have to flow through a sale – if S1 decided to leave and S2 moves in after S1 leaves, S2 can benefit from the squatting time that was accumulated by S1
* Possession has to be ‘continuous’ – can mean different things

**TEST: Requirements for claim**

1. **Intentional exclusion of true owner**
   1. Somebody’s fence is two feet over onto the neighbours property line, in putting the fence onto the neighbours property, you are intentionally excluding them from that space
2. **Effective exclusion of true owner**
   1. The owner has to actually be effectively excluded (ex. instead of putting up a fence, you put up pylons – that wouldn't be enough)
   2. Much higher standard than mere presence
3. **Act which starts the clock**
   1. The event which starts the clock could be the moment you put up the fence
4. **Possession for statutory period with certain *characteristics***

* ***Open and notorious*** 
  + Must have openly used the property in question, in a manner observable to the general public, in particular to the previous owner
  + Doesn't count unless its susceptible to being noticed by a reasonably diligent owner
  + The occupation can’t be clandestine or secret.
  + The owner doesn’t actually have to be aware that an adverse claim has begun
* ***Continuous and uninterrupted***
  + Occupation won’t suffice for an adverse possession claim if it’s just occasional or used for limited purposes (for the most part)
  + In some circumstances, intermittent use will be seen as meeting the requirements of continuity – depends on the property in question
  + Idea of ‘tacking’ – (one squatter transfers rights to another squatter and together, the total amount of time would meet the requirements)
* ***Exclusive of O*** 
  + The property must be used to the exclusion of the paper owner – the owner must be absent
  + If the owner comes back and uses the property or they kick the squatter out, the clock would reset
  + You don’t have to physically exclude others from the land to claim "exclusive" use, but during this period, you have to be the only person who treated the land the way an owner would
  + This requirement won’t be satisfied if one person shares possession in common with the public.
* ***Adverse***
  + The squatter must not have been in possession with the permission of the owner
  + If you were given permission to be there for a specific period of time and someone decided to continue to use it, there would be a certain point where you shift from having permission to not having permission
  + If the squatter expresses interest in buying the property from the registered owner, that could be seen as the squatter is recognizing the true owners superior rights and therefore would not be adverse
* ***Peaceful (not by force)*** 
  + Adverse possession does not apply if force is used to gain the property
  + If a person is forcefully evicted from a house in order for a squatter to come in, this would not fit the characteristic of being peaceful

**Common defences to adverse possession**

* **Permissive use** – if the actual owner granted permission to use the property
* **Insufficient acts** – if the acts didn't actually constitute a claim of ownership
* **Non-exclusive use** – the claimant may have engaged in some use of the property, but the owner also used the property in a manner that a land owner would normally
* **Insufficient time** – 15 years instead of 20 – until you hit the 20 year mark, it is still seen as an inchoate interest in the property

🡺 Most common type of adverse possession cases in Canada are fence post disputes

Carrozzi v Guo (2002, ONSC)

**Facts**: Dispute over fence line

**Issue**: Does Guo have a case for adverse possession?

**Analysis**:

For Mr. Guo to succeed in his claim for adverse possession, he must prove that:

1. He has been in actual possession for more than 10 years 🡪 Yes
2. He had the intention of excluding the true owner from possession 🡪 Yes
3. He has effectively excluded the owner 🡪 Yes, the position of the fence did not permit the P to use the land. She never challenged the placement of the fence and she had it repaired when her agents inadvertently damaged it. **She conducted herself as it were a boundary line**.
4. His possession has been visible, open, notorious, and continuous.--> Yes

Keefer v Arillotta (1976, ONCA)

**Facts**: Boundary dispute case. Strip of land between properties used as a driveway. Keefer’s used it as a driveway regularly. The Cloy’s owned the land and used it occasionally when it was free for deliveries.

**Issue**: Whether the Keefer’s (squatters) had an intention to exclude the owners from such uses that the owner wants to make of the property

**Analysis and Conclusion**:

* Judge held that they never fully intended to stop the owner from using the property except when moving the garage
* Judge said adverse possession was made out for this land and the owners rights were extinguished for this strip of land
* **Principle**: Application of our test and specifically the characteristic of intentional exclusion

**BC Legislation severely restricts the ability of individuals to gain rights through adverse possession**.

* Squatter rights in Canada have been minimized through legislation – the extent to which they are still available varies by the province. Although it is minimized in Canada, around the world squatter rights (and squatters’ communities more generally) are of great importance to many individuals globally.

Land Title Act, RSBC 1997, c 245, s 8 & Limitation Act, SBC 2012, c 13, s 28

**British Columbia**

* Limitation period for a claim in adverse possession (AP) is 20 years in the case of an individual, 60 years where you’re adversely possessing land owned by the Crown (**Statute of Limitations, R.S.B.C. 1960, c. 370, ss. 16, 41, 48**)
* **Limitations Act, 1975** abolished acquisition of title by adverse possession on July 1, 1975 (doesn’t apply where right was acquired pre-July 1, 1975)
  + As of that date, you could not acquire title to property in BC through adverse possession
  + Doesn't apply where the rights was acquired before that date
* ***Limitation Act,* 2012**: **s. 28(1)**, **28(2)** [echoes 1975 provisions]
  + **S. 28(1)** Further states that land acquired before 1975 is okay
* Other relevant legislative provisions: **ss. 23(2), (3), and (4),** ***Land Title Act***:
  + Possible to bring a claim for AP in BC where the land isn’t protected by **indefeasible title**; or where the claimant (arguing for AP) is challenging the first indefeasible title registered under the ***Act***
  + If the land has been registered into the land title registration system and it is said to be protected by indefeasible title, then that effectively blocks out what could have been the existing right to adverse possession
  + This further limits the potential instances where you could acquire title through adverse possession
* It is possible to use AP to gain title as long as the right was acquired before 1975 AND that the land is not protected by indefeasible title

Mowatt v. British Columbia (AG), 2014, BCSC 988

**Main issue**: The issue in this case is whether the petitioners have established the required elements for a claim of adverse possession over the Disputed Area for a 20 year period before it became Crown land or, alternatively, for a 60 year period prior to May 1, 1970, per the Land Act, or July 1, 1975, per the Limitation Act.

* + Whether the requirements for AP were established. Issue is about continuance

**Analysis and Conclusion:**

* In order for a claim based on AP to succeed, it has to be continuous
* Case failed because there is an evidentiary gap 🡪 No evidence of continuity of one squatter’s adverse possession with the other squatter’s
* Although you don't need perfect evidence, judge was not satisfied that the evidence was as satisfactory as could reasonably be expected, having regard to all the circumstances
* Where a party has had the intention to possess property and has in fact possessed it for the period of time that the limitation statute stipulates, the true owner will be barred from bringing an action to recover the land– over that period of time a person who was otherwise a trespasser, now has tittle

**Quotable**:

* A claim of adverse posession is still possible in British Columbia where, as here, no indefeasible title has been raised to the subject land, or where the claimant is challenging the first indefeasible title registered. That is the effect of ss. 23(2), (3) and (4) of the Land Title Act
* The limitation period for a claim in adverse possession is 20 years in the case of an individual and 60 years with respect to the Crown.
* To succeed, the acts of possession must be open and notorious, adverse, exclusive, peaceful (not by force), actual (generally), and **continuous**.  If any one of these elements is missing, at any stage during the statutory period, no rights against the paper owner can be successfully asserted. …
* In general, the squatter must actively use the property as an owner might.  Looked at another way, the adverse use must be such as to put the paper owner on notice that a cause of action has arisen.  After all, the doctrine is based on the failure to bring suit within the limitation period, and therefore time should not run unless it is fair to hold a delay against the owner.  Hence, the occupation must be open and notorious, and not clandestine.  The adverse possessor must send out a clarion call to the owner, who, if listening, should realized that something is awry.
* The possession must have been continuous, but need not have been by the same person.

Finders

**1. True owners over all**. If they did not abandon the property, that is.

* Obligation on finders to take reasonable measures to take care of the chattel and inform the true owner of the finding? *Parker vs British Airways* says so but not necessarily the law, might be a good policy consideration.
* If can show abandonment – finder gets the stuff. Stuff in **graves** is not abandoned! Even if they relinquished immediate possession (*Charrier v Bell*).

**Class Discussion**: Can conferring property rights on a finder – someone lucky enough to find an object that belongs to someone else – be justified? (Policy reasons)

* It can put objects back into good use that would otherwise be left in disuse
* Can facilitate the return of an object to its rightful owner
* Could be problematic to not give title – could lead to the possibility that no civil or criminal wrong could be committed by taking an object from a finder
* Efficiency argument
* The law rewards the diligent

**2. Finder’s over strangers.** The finder of personal property acquires a title that is good against the entire world except for the true owner or someone who with a continuing prior claim (*Armory v Delamirie (1722))*

* Main point from this case is that the finder of the jewel does not have an absolute claim to the property, but they do acquire a better claim than anyone else

**3. Finder vs. Owner/Occupier**

**a) Occupier over Finder:** cases where the good is embedded in the soil/underwater (“recovery” cases)

* **Rule**: Where a person has possession of land **with the intention to exercise control over it and the things which may be embedded within it**, then, if something is found attached to/under that land, the presumption is that the owner has possession
* This presumption can be rebutted by showing that the person didn’t intend to exercise control over the land i.e. did not have *de facto* possession (e.g. *Trachuk v Olinek, 1996, Alberta*)
* Courts have found that it is harder to rebut this presumption in cases where the good is embedded in the soil
* Generally, **if the chattel is found embedded in the soil, the occupier of the premises will prevail over the finder**.

**b) Finder over Occupier:** Cases where the good is on the land/in a house (unattached) (“true” finder cases)

* **Rule**: Where a person has possession of land **with the intention to exercise control over it and the things which may be upon it**, then, if something is found on that land, the presumption is that the owner has possession. (*Graftstein v Holme & Freeman)*
* **Spectrum of control** with respect to the intention of the occupier to assert control over articles lost on their premises: (*Parker v British Airways*).  
  [**Bank vault/house**] ---------------------------------------------------------- [**Park**]
* If item found in **bank vault** – manifest intention to exercise a high degree of control over everything and anything that was found in that room
* If item found in a **house** – a house owner would almost invariably possess any items found in the home

**VS.**

* **Park** to which the public has unrestricted access and use during daylight hours – no manifest intent on the part of the park to exercise any such control
* E.g. British Air asserted control over who enters the lounge, but not over lost articles, so Parker wins.

**4. Trespassing finder is okay** (Bird v Fort Frances). **Felonious finder is bad** (Baird v BC).

* Look at the degree of criminal/moral culpability
* ***Ex terpi causa***: No cause of action may be founded on an illegal or immoral act

What are the **obligations on finders to** take reasonable measures to take care of the chattel and **inform the true owner of the finding**?

* Common law has generally not stepped in and articulated a set or responsibilities on the part of the finder
* *Parker*: There is an obligation on the part of the finder to take care of the object and take steps to inform the true owner of the finding

**Treasure**: most could be encompassed under the ***Heritage Conservation Act*** or under our common law finder’s rules.

*Heritage Conservation Act*, RSBC 1996, c. 187, ss. 1, 13, 19, 34, 36

**s. 13(1)** Except as authorized by a permit issued under section 12 or 14, a person must not remove, or attempt to remove, from British Columbia a heritage object that is protected under subsection (2) or which has been removed from a site protected under subsection (2).

**s. 1** **"heritage object"** means, whether designated or not, personal property that has heritage value to British Columbia, a community or an aboriginal people;

**"heritage site"** means, whether designated or not, land, including land covered by water, that has heritage value to British Columbia, a community or an aboriginal people;

**"heritage value"** means the historical, cultural, aesthetic, scientific or educational worth or usefulness of a site or object;

**s. 13(2)** Except as authorized by a permit issued under section 12 or 14, or an order issued under section 14, a person must not do any of the following:

(a) damage, desecrate or alter a Provincial heritage site or a Provincial heritage object or remove from a Provincial heritage site or Provincial heritage object any heritage object or material that constitutes part of the site or object;

(b) damage, desecrate or alter a burial place that has historical or archaeological value or remove human remains or any heritage object from a burial place that has historical or archaeological value;

**s. 19 (1)** A public museum, archive or other heritage conservation organization that has possession of an object that it does not own, or is uncertain as to whether it owns, may apply to the Supreme Court for an order vesting ownership of the object in the museum, archive or organization if one of the following applies:

(a) a reasonable attempt has been made to locate the owner of the object and

(i)   at least 25 years have passed since the making of a written agreement with the owner of the object for custody of the object, or

(ii)   at least 10 years have passed since the making of an oral agreement with the owner of the object for custody of the object and there is no known written custody agreement;

**s. 34** (1) The minister may apply to the Supreme Court for an injunction restraining a person from committing, or continuing to commit, a contravention of this Act or the regulations.

(2) The minister may apply to the Supreme Court for a restoration or compliance order if a person

(a) fails to comply with or contravenes the requirements or conditions of a permit issued under section 12 or 14,

(b) fails to comply with or contravenes an order made under section 14 or 21,

(c) removes property, or attempts to remove property, from British Columbia in contravention of section 13 (1),

(d) moves, removes, damages, desecrates, alters, excavates or digs in property, or removes objects from property in contravention of section 13 (2), or

(e) contravenes a regulation made under section 23 (2) or 37 (2) (e).

**s. 36**  (1) A person who does any of the following commits an offence:

(a) contravenes section 13 (6), 14 (1) or (8) or a provision of the *Park Act* referred to in section 23 (2) as it applies to a Provincial heritage property;

(b) fails to comply with or contravenes a requirement or condition of an order or permit under section 12 (2) (a), 14 (2) or (4), 16, 19 (2), 23 (2) or 34 (3);

(c) contravenes a regulation made under section 23 (2) or 37 (2) (e);

(d) contravenes section 13 (1) or (2).

Trachuk v Olinek (1996, Alberta)

**Facts**: 4 people trying to dig up a bag of money on the grounds of the Plaintiff. There was a fence around the well, which may have led to the conclusion that the P wasn't intending to occupy that area of land

**Court held**: the bag of money went to the finders – P can’t be said to have a continuing prior claim

**Rule**: Where a person has possession of land with the intention to exercise control over it and the things which may be upon it, then, if something is found on that land, the presumption is that the owner has possession.

**Application**:

* Rule didn’t apply in this case
* P couldn’t show that he exercised dominion of the parcel of land that the money was found
* He himself could have been prevented from entering the land & he didn't actually occupy the land

Graftstein v Holme & Freeman

**Facts**: Employee found box locked with padlock in the basement of the building and gave it to the owner of the building. The owner left the locked box on a shelf for two years. Holme and Freeman eventually broke the lock and found money inside. Graftstein (owner) claimed it was his because it was it was found on his property.

**Issue:** Did Grafstein have possession of the box?

**Analysis**:

* Graftstein came into possession of the box when Holme found it and gave it to him. When Graftstein told Holme to put it on a shelf and leave it there, he exerted his rights over the object and became a finder.
* **General rule**: If you possess a container, you are presumed to possess all of the contents of the container
* Rebutted by looking at the facts 🡪 is it reasonable to presume that this is the type of container that would have contents

**Court found**: Graftstein was entitled to both the box and the contents of the box.

Parker v. British Airways Board (UK)

**Facts**: Parker found a bracelet in lounge – gave it to BA and said if owner didn’t claim it, to give it back to him. BA didn't give it back to him, but sold it instead. Passenger sued. BA controlled who could get into the lounge – this wasn't relevant to an intention to assert control over lost articles.

**Issue**: Did BA have intent to exercise control over the lounge and everything inside it? Who has the stronger claim?

**Ratio and Conclusion**:

* A party who serves a gatekeeper function over who enters and exits a room does not in itself show there was an intention to assert control over lost articles.
* **Spectrum of control:** Court asks where does the lounge fall in this spectrum? In the middle – there was **NO** sufficient manifestation to exercise control over lost property that would give BA a better claim than the passenger. Therefore, passenger had a better claim.

Bird v. Town of Fort Frances (1949) ONHC

**Facts:** P found a stash of money on private property while he was trespassing. No claim was made for money by owner of land on which money was discovered, nor by any alleged true owner

**Issue:** Can P profit from his law breaking? Who has a better claim – the boy who is the finder or the town who is the third party?

**Ratio:** Doesn’t matter if finder is trespassing when they come across the chattel

* *Armory Case*: finder’s rights trump anyone except the true owner
* Even in situations where someone is committing a property tort when finding an object, it wont bar their claim

**Analysis:** P retains money

Baird v British Columbia (1992)

**Facts**: Baird stole money. VPD arrested him. Money and cheques were left in the possession of the VPD. Baird brought action to recover the money. (In today’s context, likely wouldn't be talking about finder’s rights, but instead about civil forfeiture)

**Main defence**:

* *Ex terpi causa*: No cause of action may be founded on an illegal or immoral act
* Based on this, Baird’s application was dismissed and this dismissal was upheld at the court of appeal

Charrier v Bell (1986)

**Facts:** P is an amateur archaeologist, who found a burial site of Tunica Village + spends 3 years excavating artifcats, believe P had permission of owner. Afterwards, P discovers person was just caretaker. P couldn’t sell artefacts without title rights, given by owner. P tried to establish a right to own artefacts through a lawsuit against true landowners.

**Issue:** Who is the true owner, P or the descendants of Tunica?

**Ratio:** Objects interred with dead aren’t abandoned, such objects are intended to remain in ground

* Objects may be buried with a descendent for any number of reasons. Relinquishment of possession normally serves some spiritual, moral or religious purpose of the descendant/owner, but is not intended as means of relinquishing ownership to a stranger

**Conclusion**: These goods were not abandoned and Charrier did not acquire ownership of these goods

Trusts

**Title can be split**:

* **Legal title**: recognized by common law courts (person with legal title is true owner)
* **Equitable title**: recognized by courts of equity
* Trustee (has legal title) holds to the use of/in trust for/ for the benefit of the person with equitable title (beneficiary) 🡪 Person with the legal title (trustee) is said to hold title to that property to the use of or in trust for or for the benefit of the person with equitable title (beneficiary).
* **Key**: Split between legal title and equitable title 🡪 Even though the legal title is in someone else’s name, the beneficary of the trust is really the legal owner of the property and will be the person who acquires the benefit from the property

M Conway, “Equity’s Darling?”

Equity was developed in order to remedy the harshness of the common law

* Married women
  + **Blackstone quote**: By marriage, the husband and wife are one person in law, the very being of the woman is suspended during the marriage or incorporated and consolidated to her husband.
  + Coverture = upon marriage, a woman’s identity was merged with that of her husband
  + **Conway notes** – “a married woman could not own property in her own right”
  + How did equity impact upon the position of women within marriage with respect to property?
    - Women from wealthy families could have their property protected by trustees and specified to be for their sole and separate use so that a husband could not have access to the property or use it to settle their debts
    - Equity provides assistance to women in this sense
* Historically, could women inherit property under the common law? In what contexts?
  + Where a family had no sons but a daughter, the daughter had a common law right to inherit
* How did equity impact upon this aspect of the common law?
  + Equity would deprive women of their common law right to inherit by recognizing “the strict settlement”
  + Property would be placed into a trust and the trustee would hold the property for the father for life, then the eldest son for life, and the son’s son for life.
  + The result was to privilege male heirs over females
  + As ‘the strict settlement’ became more popular, many individuals would make provisions for daughters, but you cant forget the fact that the individuals for whom these provisions are being made would have inherited under the common law had these trusts not come into play
* What did common law dower provide to widows?
  + Concept of dower: 1/3 of the income of any real property that ones husband had owned during their life
* What was the impact of equity on this right?
  + Equity deprived women of property interest because dower could not apply to properties that were held in trust

Role of Trusts

* Organize management of family property + its transmission to the next generation
* Minimize tax liability
* Quietly acquire land necessary for a major development
* Protect land from development

Types of Trusts

Resulting Trusts (*Pecore v Pecroe*)

* Arise by implication: “These trusts are called resulting trusts, because the beneficial or equitable interest in the property results back to the settlor [the person that created the trust] or that person’s estate [if the settlor has died].”
* Beneficial owner of property is “the real owner even though it’s in someone else’s name”
  + E.g. if settlor dies, this property is not included in his will

**Recognized in three main circumstances:**

1. Where a trust document does not dispose of all of the beneficial interests in the property (We don't worry about this one)
2. Common Intention resulting trust (replaced with constructive trust)

* Where there is no financial contribution, you can only have a resulting trust where there is a common intention on the part of the parties to share the beneficial interest (*Murdoch, 1975*)
  + Issues: Difficult to establish a common intention
* “The time has come to say that the common intention resulting trust has no further role to play in the resolution of domestic cases” (*Kerr, 2011*)
  + For reasons it was abolished: (Cromwell)
    - It is doctrinally unsound – it is inconsistent with general principles of a resulting trust. In the context of a resulting trust, it is generally only the intention of the grantor that matters. Intention is determined at the time that the property is acquired.
    - The notion of common intention can be highly artificial.
    - It evolved from a misreading of imprecise language.
    - We have a **better approach**: unjust enrichment coupled with a constructive trust

1. **Gratuitous transfers**

* **General presumption of resulting trust**: “[W]hen A purchases property and asks that title be placed in the name of B, equity assumes that A intended to retain the equitable interest by making B a trustee, holding legal title for A’s benefit”
  + E.g. between spouses
  + E.g. **from parents to adult children**, both dependant and independent (presumption of advancement does not apply in these cases)
  + **Policy reasons**: keep up with society. Elderly parents add assisting children onto joint accounts to help out with finances. It would not be good to assume that these are always gifts
* **Exception! Presumption of advancement (gift)**: A buys property, asks that title be placed in the name of B – the presumption of advancement, should it apply, states that B has both the legal and equitable title, and A has nothing
  + **From parent to minor child**
  + **Policy reasons**: parents have a moral obligation to advance their children in the world. Parents generally intend to make gifts to their children and the law should reflect this.
* **Both are rebuttable**:
  + By opposing party on balance of probabilities based on specific facts
  + Look to elements of gift: intention, acceptance, delivery
* Without evidence **establishing on the BOP** that the gift was intended, equity will presume a resulting trust

Pecore v Pecore (2007, SCC)

**Facts**: Edwin (E) was the father and a retired miner with savings. He transferred funds into bank accounts held jointly with his adult daughter (P). P had a spouse, M (who had disability). According to E's letters, he retained 100% ownership in the deposited funds and the deposits were not gifts. E controlled accounts. E died with a will. His will included specific bequests: most to P, some to M. The residue was to be divided equally between P and M. P and M divorced. M argues the account is part of the residual estate. The wife of E argues that it is a right of survivorship account.

**Issue**: Is the account a part of the residual estate or part of the right of survivorship?

**Conclusion**: Wife retains the account.

**Analysis:**

* In this case, there is a presumption of resulting trust. This presumption can be rebutted (BoP)
* **Judge**: Found that the intention was for the transferor to place his assets into a joint account with the transferee with the intention of retaining control until his death at which time P would take the balance through survivorship
* **Was this a gift?** **Test**:

1. Intention
2. Acceptance
3. Delivery

* When the joint account was set up, delivery occurred at that point in time, but didn’t take effect until death
* What facts were significant?
  + Lawyer understood that this gift would take effect on the father’s death
  + The father preferred P over her siblings
  + His wife was ill and was not expected to outlive him
  + The father showed concern about providing for P after his death
* Note: *Madsen Estate v Saylor* (2007, SCC)
  + Similar facts, but slightly different – as a result there was a different outcome

Madsen Estate v. Saylor (2007) SCC (Nov. 15) (p. 476)

**Facts:** Father of wife creates a joint account in his + her names. Father retained control of account + used solely for his benefit during his lifetime. After his death, his other 2 children contested that this account was part of estate, rather than hers

**Issue:** Is the account a part of the estate?

**Ratio:**

* Transfers between parent to adult/independent children in cases of Gratuitous Transfers → Resulting Trust.
* Presumption can be contested by contesting party on balance of probability

**Dissent**: All transfers between parent to adult/independent children in cases of Gratuitous Transfers → Presumption of Advancement

**Conclusion:** Account is part of the estate

Constructive Trusts (*Kerr v Baranow* & *Vanasse v Seguin*)

* **Institutional constructive trust**:
  + “Imposed in circumstances in which a person has acquired property for his or her own benefit, at the expense of another to whom the person owes a fiduciary duty”
* **Remedial constructive trust**:
  + “Used to provide a remedy in situations in which a title holder of property would be unjustly enriched unless equity compelled him or her to share the property with someone who contributed to acquiring or improving the property”

**Constructive Trusts are a remedy for the tort of unjust enrichment**

* **Unjust enrichment**: “the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship”

###### Go through 3 elements of **unjust enrichment,**

###### See if **fee-for-services monetary award** is good enough,

###### If not, see if contributions can be linked to **specific property = constructive trust**

###### If not, see if it's a **joint family venture [NOT EXAMINABLE]**

**Step 1: 3 elements of unjust enrichment**

1. Enrichment or benefit to the defendant
2. Corresponding deprivation of the plaintiff

* Provision of unpaid domestic services = find both enrichment and deprivation

1. The absence of a juristic reason for the enrichment (is there any rule of law or reason why this enrichment should be allowed to exist)

* **(i)** Can D justify enrichment via established categories (intention to make a gift, contract, disposition of law, other valid legal/equitable/statutory obligations)
* **(ii)** If not **(i),** then D can establish that there are other reasons to deny recovery: look to reasonable mutual expectations of the parties; public policy reasons (i.e. autonomy)

🡪 If unjust enrichment is made out, look at the **remedies** of monetary awards or proprietary awards)

**Step 2:** Is **fee-for-services monetary award** good enough?

* Monetary value of unpaid services: “Fee for services” approach (taking into account mutual exchange of benefits)
* Not always sufficient, so go onto Step 3

**Step 3**: Can the contributions be linked to **specific property**? (Proprietary award 🡪 **Remedial Constructive Trust**)

* Get a share of the **specific piece of property**. Have to show:
  + Sufficiently substantial and direct link between the Plaintiff’s contributions and the acquisition and maintenance of the specific property
    - If you have one property in question, and you can show work towards the reservation, maintenance and improvement.
  + Yay, **remedial constructive trust!** I.e. proprietary award
  + Extent of a parties interest must be proportionate to their contributions

Gifts

**Gift**: Gratuitous transfer of the ownership of property (*Re Bayoff Estate*)

* Giver = **donor**; recipient = **donee**
* **Donor must have good title** – a person cant give something to someone else (transfer ownership) if they don't actually have title to the object in the first place
* **Some gifts prohibited by statute** – regardless of the desire or the actions of the donor, certain gifts you might just not be able to make according to statute (ex. matrimonial property legislation sets out specific restrictions)
* **Legislation may also impose certain requirements with respect to gifts** – might impose requirement to legally complete the gift (ex. **copyright**: if you want to make a gift of copyright from one person to another, it has to be in writing and it has to be signed by the person who is assigning the right – set out in the ***Copyright Act*** itself)

**Three types of gifts (only first two are examinable):**

1. **Testamentary gifts**

* Transfer property from donor to donee at the donor’s death; recorded in will; legislation governs this type of gifts
* Gifts made in the context of wills

1. **Inter Vivos Gifts**

* Gifts made “during life” from one living person to another living person
* Verbally or through writing – however they are made, there are three elements that have to be satisfied for a gift to be perfected
* Three elements of a perfected gift:
  1. **Intention to make a gift**
  2. **Acceptance of the gift**
  3. **Sufficient act of delivery**
* *Until these three elements are in place, no gift is conferred*
* Once elements in place – the gift is **irrevocable** – that gift becomes locked in and the rights in the property transfers from one party to another
* **Intent** and **delivery** are the areas that are contested most often in this process

**(1) Intention to give a gift**

* The desire to divest ones self of title voluntarily to **give up control** or **give up dominion**
* Donor must have the mental capacity to appreciate the nature of the transaction
* **Words of gift** are usually necessary to demonstrate intention (but are not always required) (*Nolan*) – you don't always need to have words of giving to have a perfected gift, you can demonstrate it through intention
* If no words of gift, **need to show** “the existence of a present, unequivocal donative intention, attended by the requisite certainty as to object, extent and whether the gift would take immediate effect” (*Nolan*)
  + E.g. if documents afterwards show the donor believed he had made a gift

**(2) Acceptance of the gift**

* Requires the person:
  + **Understand the transaction** – what is actually taking place
  + Have the **desire to assume title**
* Acceptance is presumed to exist, but it can be rebutted
  + E.g. if the gift is rejected by the donee
  + E.g. if you’re under the impression that you’re just holding it for someone
* The donee doesn't actually have to know about the gift at the time that it is given, once they become aware of it then at that point in time, it can be rejected

**(3) Delivery**

* Must be effective delivery of the property or some accepted substitute from the donor to the donee. At any stage until delivery occurs, the donor can retract the gift (*Nolan*)
* Delivery is said to transfer both possession and ownership
* For a gift to be delivered, **must be shown that the owner parted with dominion and control over the gift**
  + E.g. Once it’s sent, not when it’s received in situations like shipping.
  + Unauthorized appropriation by giftee cannot be a delivery (*Nolan*)
* Courts will not perfect an imperfect gift, but courts have treated the delivery requirement **flexibly**
* **Two kinds of exceptions** (situations where less than perfect delivery suffices to establish delivery):
  + **(A)** Exceptions based on **rules and principles** (i.e. rule in *Strong v. Bird*: “An unfulfilled gift will be treated as complete if the donee becomes an executor under the Will of the donor.”)
  + **(B)** Exceptions based on **factual concessions** – looking at the facts of the case and saying “we hold that delivery was successfully done in this instance” (i.e. *Thomas v The Times Book Co Ltd* – gift was perfected when he found the manuscript with the permission from Thomas)
    - Delivery may follow or precede the intention to give – the elements do not have to occur in a 1, 2, 3 type of order
    - Can be effective even if the donee originally held the property in a different capacity
* **Constructive delivery**
  + Accomplished where donor effectively transfers the means of obtaining possession, control of the property to the donee (e.g. keys to a safe)
  + **Critical elements**
    - Has the donor retained the means of control?
    - Has the donor done all that can be done to divest title in favour of the donee?
  + Have to do everything you must do, not just what you ***think*** you have to do (in *Re Bayoff Estate* key was not enough because had to sign a form)
  + **But!** Has the donor retained the means of control for herself / kept key / password? Might be the case that the actual item isn’t transferable.
  + ***How do you give the gift of a safe to someone?*** Courts have found if you transfer the keys to a safe, then that will be enough to constitute delivery. When you give someone the keys to something, if those are the only keys to it, then the original owner has no way of accessing the safe, so delivery can be said to be complete and gift would succeed. If there were multiple keys to a gift, the gift wouldn’t succeed.
* Delivery in common establishments – tough issue
  + Hard to do, so try **symbolic delivery** – picture of a horse or riding boots. Eg in *The National Trustees Executors and Agency Company Limited v O’Hea, 1905* there was disbelief on the part of the court that coachman was to get the coach.
  + May be **policy reasons** against this (*Re Cole, 1964* – “It’s all yours” husband)

1. **Donatio mortis causa (DMC) [NOT EXAMINABLE]**

Nolan v. Nolan & Anor (2003) Australia

**Facts:** P claimed that her adopted mother was given paintings by D. Paintings weren’t delivered before D died.

**Issue:** Were the paintings successfully gifted to P?

**Ratio:** Inter Vivos gifts has 3 elements

1. Intention to make a gift
2. Acceptance of gift
3. Sufficient act of delivery

* Until deliver occurs, the donor can retract the gift
* Words of gifts are usually necessary to demonstrate intention (but aren't always required)
* Intent couldn’t be proven – a donative intent hadn’t been proven
* The inability to prove one of the three elements of a gift is fatal to the gift being given

**Conclusion:** P doesn’t have rights to paintings as there was no delivery

**Policy Reasons** to ensure delivery requirement isn’t watered down too much:

* Court argues is that a greater harm might result from undue relaxation. Might lead to a proliferation of claims between many parties (cohabitants, trustees, bankers) that could bring uncertainty into many of these claims.
* Court considers: What is the level of access, who has control, who has dominion?
* Idea that unauthorized appropriation by the purported donee can’t constitute delivery

Thomas v. The Times Book Co Ltd. (1960) UK

**Facts:** P wrote poetry and short stories. His estate wanted to regain manuscript of a story, which D alleged P had gifted to them. D alleged P had given them a list of pubs where the manuscript might be and that they could have it if they found it.

**Issue:** Was there sufficient delivery to gift the manuscript to D?

**Ratio:**

* Delivery may follow/precede the intention to give
* Delivery can be effective even if done originally held the property in a different capacity
* D had onus to prove it was a gift
* For intention, court had to rely on the words of the D – court found that it was unlikely that D lied because D made the claim before Thomas died.

**Conclusion:** Court found there was sufficient delivery. When D walked into the pub, found the manuscript and picked it up, that was sufficient delivery and the gift was given in that instant.

Re Bayoff Estate (2000) SaskQB

**Facts:** Bayoff had terminal cancer and gave Simard key to his safety deposit box, telling her to have it. At bank, paperwork was needed, but Bayoff was already dead. Simard was executor of his estate

**Issue:** Does Simard have possession of safety deposit box?

**Ratio:** Gift is a gratuitous transfer of the ownership of property

* Affirmed Strong v. Bird (1874) UK Eng. Ch. Div. (p. 363) rule that imperfect gifts can be perfected if done becomes an executor under Will of donor + intent to make gift continues until donor’s death

**Conclusion:** Wasn’t DMC because it didn’t fulfill criteria of conditional upon death, gift was meant to be immediate, thus, it’s an **Inter Vivos gift**. Simard gets the safety deposit box because she was the executor of Bayoff’s will.

The National Trustees Executors and Agency Company Limited v. O’Hea (1905) UK

**Facts:** Deceased when close to death clearly stated that coachman had custody of horses + coach. No doubt intention to gift, but no change in possession actually occurred

**Issue:** Does the coachman now own the coach + horses?

**Ratio:** Words of gifts, but no change in possession, isn’t sufficient delivery

**Analysis:** Coachman doesn’t own coach + horses

Re Cole (a Bankrupt) Ex. p. The Trustees v. Cole (1964) UKCA

**Facts**: Husband took his wife to a new home, after the tour the husband declared “It’s all yours”. Later, husband went bankrupt and the contents of the home were claimed by the bank. Wife made a motion to show that the gift was hers, and they shouldn't be allowed to take it

**Issue**: Was “it’s all yours” considered a gift?

**Ratio:** Public policy reasons to ensure delivery requirement isn’t watered down. Balance between lesser harm of not gaining genuinely given gifts and greater harm of increased uncertainty in determination of such claims in cases such as cohabitants, trustee, and bankruptcy.

**Conclusion**: No gift because there wasn't delivery