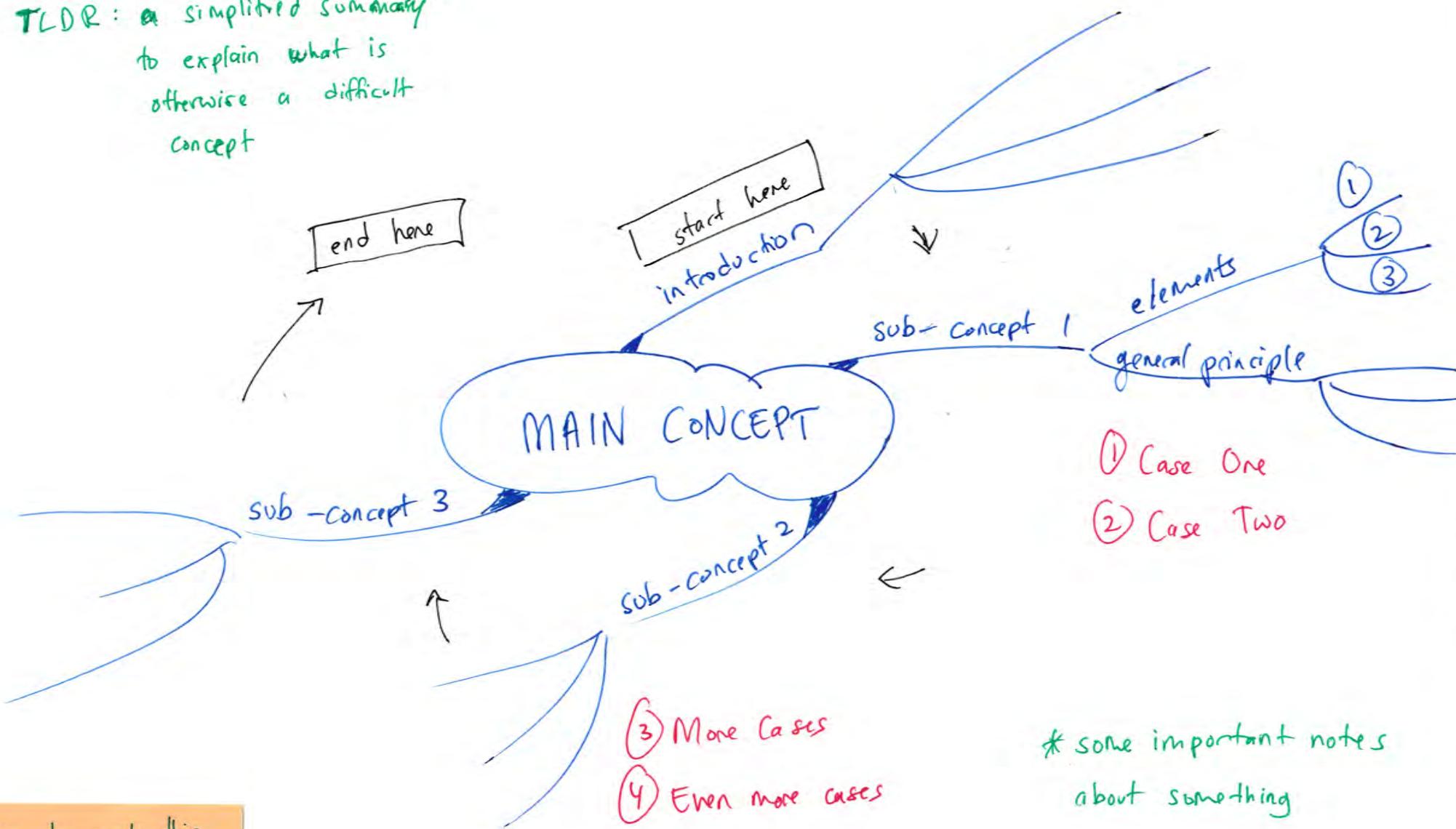


**TLDR:** a simplified summary to explain what is otherwise a difficult concept



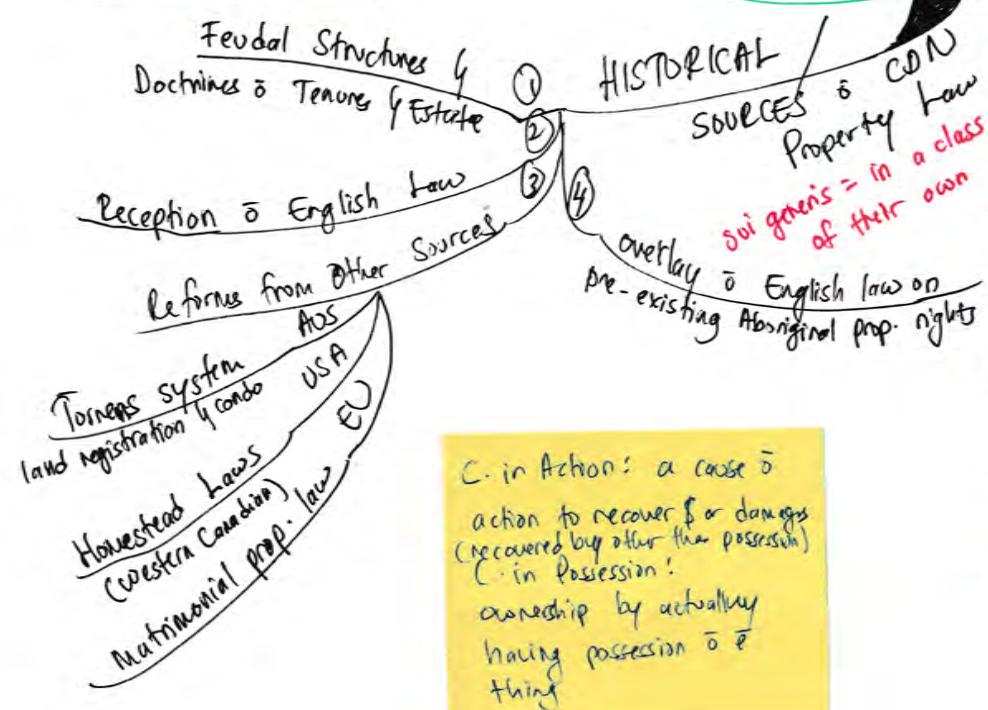
how to read this  
mindmap: Clock-  
wise. Start at  
1 o'clock and end  
at 11 o'clock

\* some important notes  
about something

## Basic Divisions in Property Law



\* historically different rules apply to different types of property, but in modern times, there is less hard division since wealth is more than land holding, laws governing real & personal property have started to merge



## INTRODUCTION TO PROPERTY LAW



- interest is shared right of use conferred on all, so no exclusivity
  - eg public domain of intellectual property
  - eg where legal protection has expired
  - balance required to protect private creativity vs allow more use of past creations
  - legal rules that pertain to public property applies to state action and limits the way states' right of exclusion can be used
  - transactions on public property that were ill-conceived or against good governance will not be invalid. Just becomes a factor affecting voter preference.

first creations  
if sometimes which property is (1) public  
(2) common is hard to distinguish

## Lateral Boundaries

### A. Land bounded by land

#### i. Legal Descriptions

- test for boundaries

- intention

- natural boundaries

- lines and corners marked at time of grant (Survey lines)

- if uncertain, boundaries to be determined by:

- natural landmarks

- fences, original surveys

- description

- if still uncertain, Conventional Line Doctrine  
eg neighbors can agree - binding on future parties  
AP will kick in once parties agree/assume

#### ii. Mistaken Improvements

Law Property Act S. 69

Remedies: demand survey  
may agree (CLD)  
damages  
occupational rent

⑦ Mildenberger v Prpic

⑧ Matrychuk v Kuchernowski

#### iii. Lateral and Vertical Supports

- Cujus est Solum Ejus est Usque Ad Coelum et ad Inferos*
- starting point application Courts have qualified the application of this maxim quite a bit
- ① Anchor Brewhouse v Berkeley House
- ② Didow v Alberta Power Ltd
- ③ Edwards v Sim
- BOUNDARIES a conceptual map**
- Mines & Mineral Ownership
- Common law grant of land by the Crown includes rights to all mines and minerals except gold & silver
- general application will follow C.L. unless expressly reserved
- Modern application guided by statutes see statutes determined by parties intention
- ④ Seymour Management Ltd v Kendrick
- ⑤ Anderson v Amoco Canada Oil & Gas
- ⑥ Alberta Energy Co v Goodwell Petroleum
- B. Land bounded by Water
- ⑪ R v Nikal
- C. Fixtures
- (i) doctrinal elements
- ⑫ La Salle Recreations Ltd v Canadian Canidex Investments Ltd
- (ii) tenants' fixtures
- ⑬ Diamond Neon Manufacturing Ltd v. Toronto Dominion Realty Co.

Some cases:**① London Borough v Tower Hamlets***Hamlett v Barrett*

- possession of tenant of the squatter can serve to run the clock on the squatters behalf

**② Maher v Bossey**

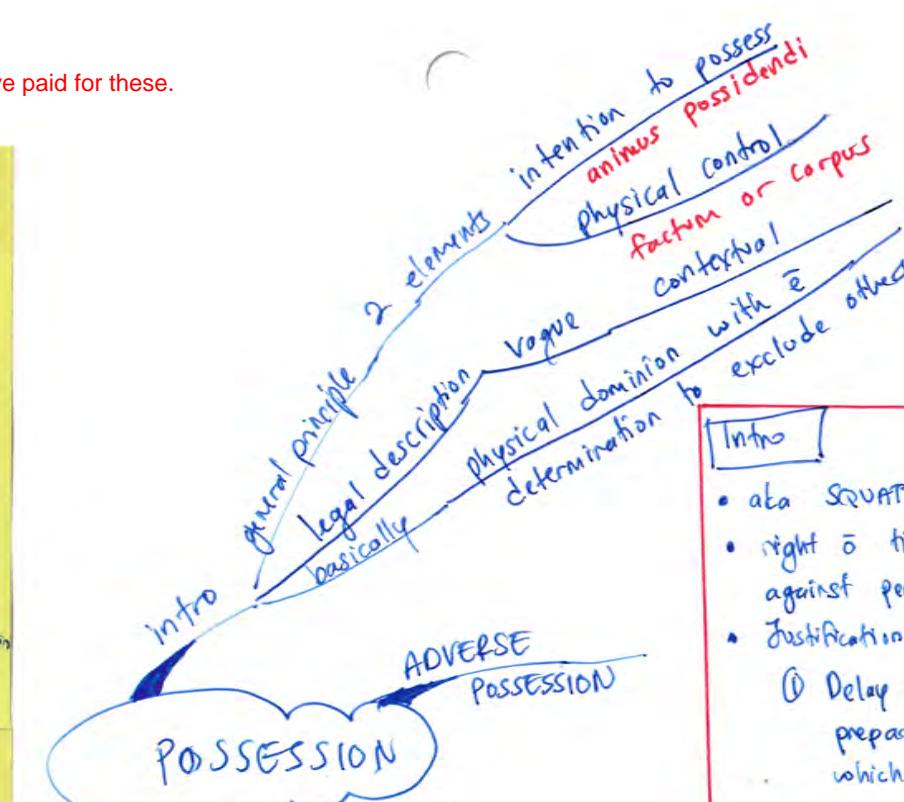
- fencing by squatter shows evidence of possession but not necessary or sufficient to demonstrate actual possession

**③ Robertson v King Estate**

- AP will not be established if squatter is in possession with the permission of the owner

**④ Leigh v Jack**

- AP does not arise unless the squatter is using the land inconsistent w/ the rights of the owner and the owner's intended use of the land

**⑥ Keefer v Anillota****⑦ Teis v Ancaster (Town)****① Popov v Hayashi****[Intro]**

- aka SQUATTERS RIGHTS
- right of title owner to sue is statute-barred against person in adverse possession
- Justification for A.P. laws:
  - ① Delay of action by title owner prejudice the preparation of Defence - Placing time limit to which a person can pursue action = fairness to the DF
  - ② Promotion of productivity. Title owner may not have been putting property to good use.
  - ③ Corrects boundary errors/discrepancies in a timely manner.
  - ④ Avoids stale claims w/ evidence lost / no witnesses.

**[Doctrinal Elements]**

- ① Squatter must have physical control and intention to possess (factum + animus).
- ② Possession must be open and notorious. It should not be hidden / undiscoverable by owner.
- ③ *Lundrigan v. Prosper*
- ④ *Newfoundland v. Collingwood*

## ① Popov v Hayashi (2002) Cali. SC

- a Major League Baseball home run ball was caught by P before he dropped it in the ensuing mob
- H pocketed it in the chaos
- P sued H for conversion

HELD: ball was MLB's before it became "abandoned property" after the hit, P acquired it legally but H did so as well, ct held: proceeds of the ball to be split evenly

RATIO:

① Possession is defined as

- (a) physical control + intent to control and exclude others
- (b) actual power/ability to hold and make use of it with obvious intent to

② Both P + H fulfill this criteria, thus decided they both have valid claim and court split.

NOTE: Very controversial, eg: if Popov dropped the ball by himself and not due to the unlawful mobbing, then Hayashi would get 100% possession. Conversely, if Hayashi had been part of the mob, then his acquisition would be illegal, and Popov would have retained 100% possession.

## ② Lundrigans Hd v. Prosper & Brake (1991) NFCA

- Df built fishing & hunting cabins on wilderness land held in title by Pl.
- CA held: no AP. the AP as claimed was not open or notorious
  - evidence showed cabin was hidden due to wilderness & Pl had no knowledge
  - referred to McConaghay v Denmark (1990) possession must be ACTUAL, VISIBLE and CONSTANT

## ③ Newfoundland v Collingwood (1996)

NFCA

- Crown (NFF) commenced action against C and seek C to remove buildings on what it claims as Crown land.
- C purchased from a J. Lethbridge land which J used to set traps and build a tilt for approx. 46 years
- CA: TJ correct to hold Lethbridge had AP which he then transferred to C.
- CA: TJ too narrowly defined the area

held, area to be as per L's evidence of one acre (no live boundary eg fence necessarily as the circumstances of the land render fencing a useless exercise)

## ④ Fletcher v Storschuk (1982) ONCA

- strip of land b/w Pl & Df's land
- Pl's fence is outside the strip Pf planted trees, extended buckwheat into, and attended to weed cutting
- TJ: Df had AP
- CA: TJ erred - Df's acts on the strip posed no challenge to Pl's use of land - was not inconsistent w/ intended use by title owner - at most seasonal, intermittent and failed the test of Open, Notorious, Constant, Continuous and Peaceful

## ⑤ Sherrin v Pearson (1887) SCC

- lands claimed were wild, unframed lands
- possession claimed was isolated acts of trespass (cutting of trees over a # of years)

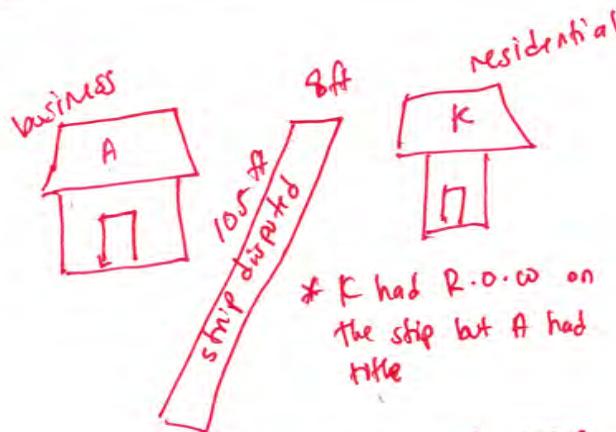
HELD: the cutting of trees were acts of trespass ≠ possession which is exclusive and open

ANIMUS FURANDI - intent to steal

ANIMO DOMINI - intent to possess

(6)

## Keefer v. Arillata (1976) OPCA



- used by K as a driveway, at some point built a garage at the end of the strip
- A. also used it to access back of his store and occasionally, customer parking
- K did gravel upkeep and snow clearance, A winter in Florida and closes his shop

HELD: A's title extinguished only to the part of land occupied by the garage. K failed to show (2) and (3) of the test to ~~show possession~~ claim title by possession

\* K's possession/use of the strip was not w/ the intention to oust A, as evidenced by the working relationship prior to dispute. Even if K's acts go beyond reasonable rights, A's allowance of it is because it is not inconsistent w/ A's intended use of the strip ie to access the back.

- ① actual possession for the statutory period
- ② possession w/ intent to exclude possession of owner
- ③ discontinuance of possession by owner

(7)

## Tewis v. Anceaster (Town) (1997) ONCA

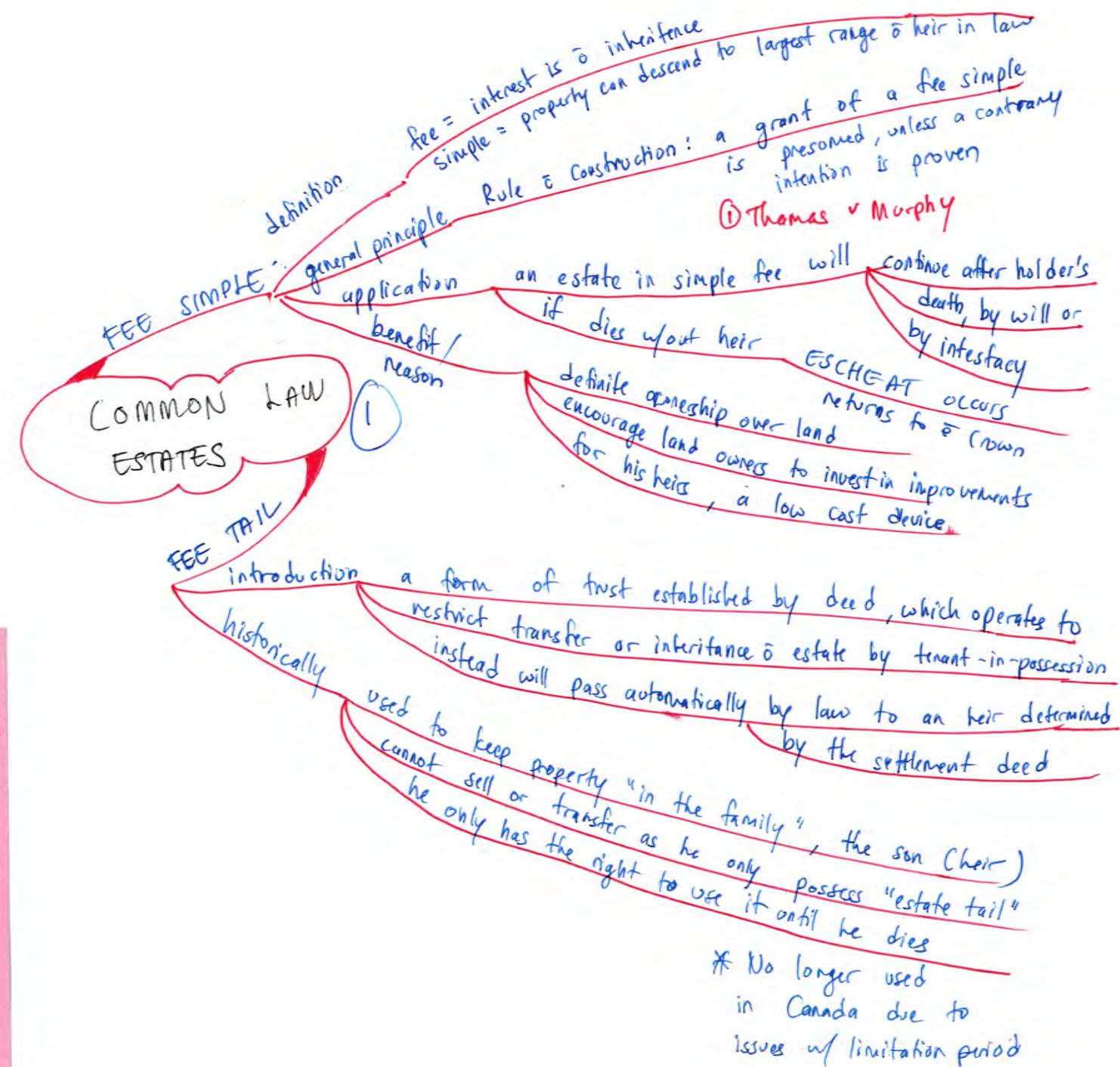
- both T family & town mistakenly believed T owned property in a public park
- TJ awarded T title by AP but easement for public use on foot and cars
- Town appealed ownership award and T appealed easement

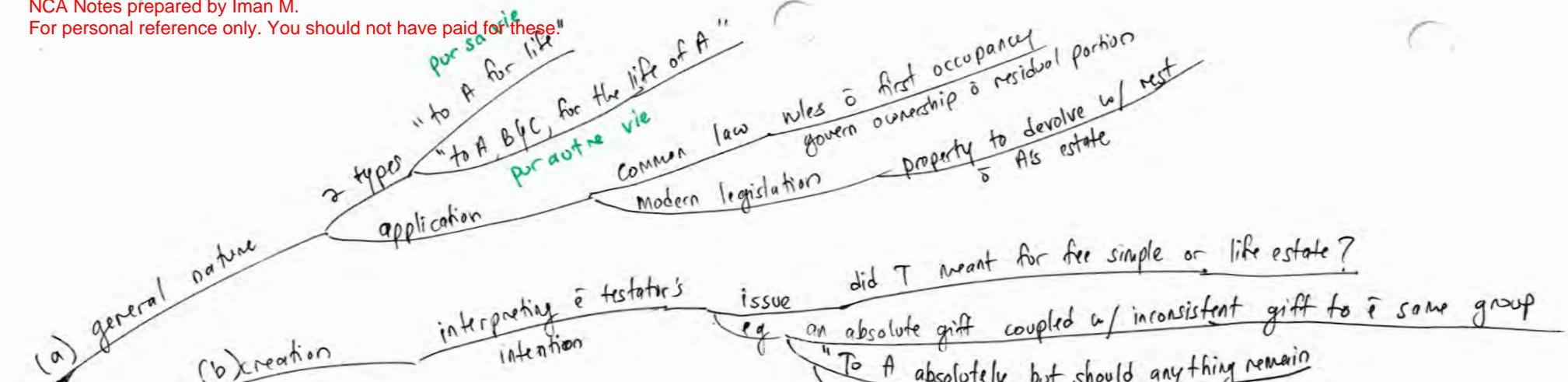
HELD: appeals dismissed for both

RATIO: Inconsistent use does not apply in cases of mutual mistake

AP requires:

1. Actual possession for statutory period
  2. Open, notorious (possession discoverable)
  3. Peaceful
  4. Adverse (no permission from owner)
  5. Exclusive (title owner discontinued)
  6. Continuous (actual possession w/ intent of excluding others with claim to possession + discontinuance)
- TJES fulfilled all requirements





## THE "LIFE" ESTATE

### COMMON LAW ESTATES (2)

(1) Read first gift as absolute (fee simple) and discard subsequent stipulation as being repugnant

**① f v Walker**

(2) Cut the absolute gift to life estate, with the remainder going to the donee of the second gift.

**② Christensen v Martini**

(3) Called life estate with the power of encroachment - a life estate to the first party but w/ power to deal w/ the remainder. The power to mortgage the whole property or to sell it during lifetime.

**③ Re Taylor**

### (c) Powers & Obligations

(d) Life Estates arising from operation of law  
Historically: operation of

Estate  
courtesy and dower  
Western  
Modern: Canada has  
homestead legislation to  
protect matrimonial home  
from seizure from creditors  
of one spouse

Features:

- (1) exempt family home from seizure by creditors
- (2) confer life estate on the spouse to prevent disposition of home
- (3) confer life estate on spouse after death of the owner

Other rights on non-owning spouse including sanctions and rights of action

entitled to income  
entitled to use possession  
+ "right" to control  
entitled to sell

obliged to do what is reasonable to ensure parties get remainder  
cannot intentionally damage property

look into document granting L.E.  
use rights by "law of waste"  
make a deal w/ remainder parties  
junction to prevent apprehended waste  
damages as compensation

waste is a question of fact and  
pl have to prove

**④ Powers v Powers Estate**

4

## Powers v Powers Estate (1999) NL SC

**Facts:** Powers inherited an equitable life estate with power of encroachment on the property. There is a question

**Issue:** Who should pay for expenses related to operating the house - Powers (life tenant) or should it come from the capital Powers Estate (therefore, out of the remainderman's share)?

### Analysis/Conclusion:

- Heating costs to be paid by life tenant

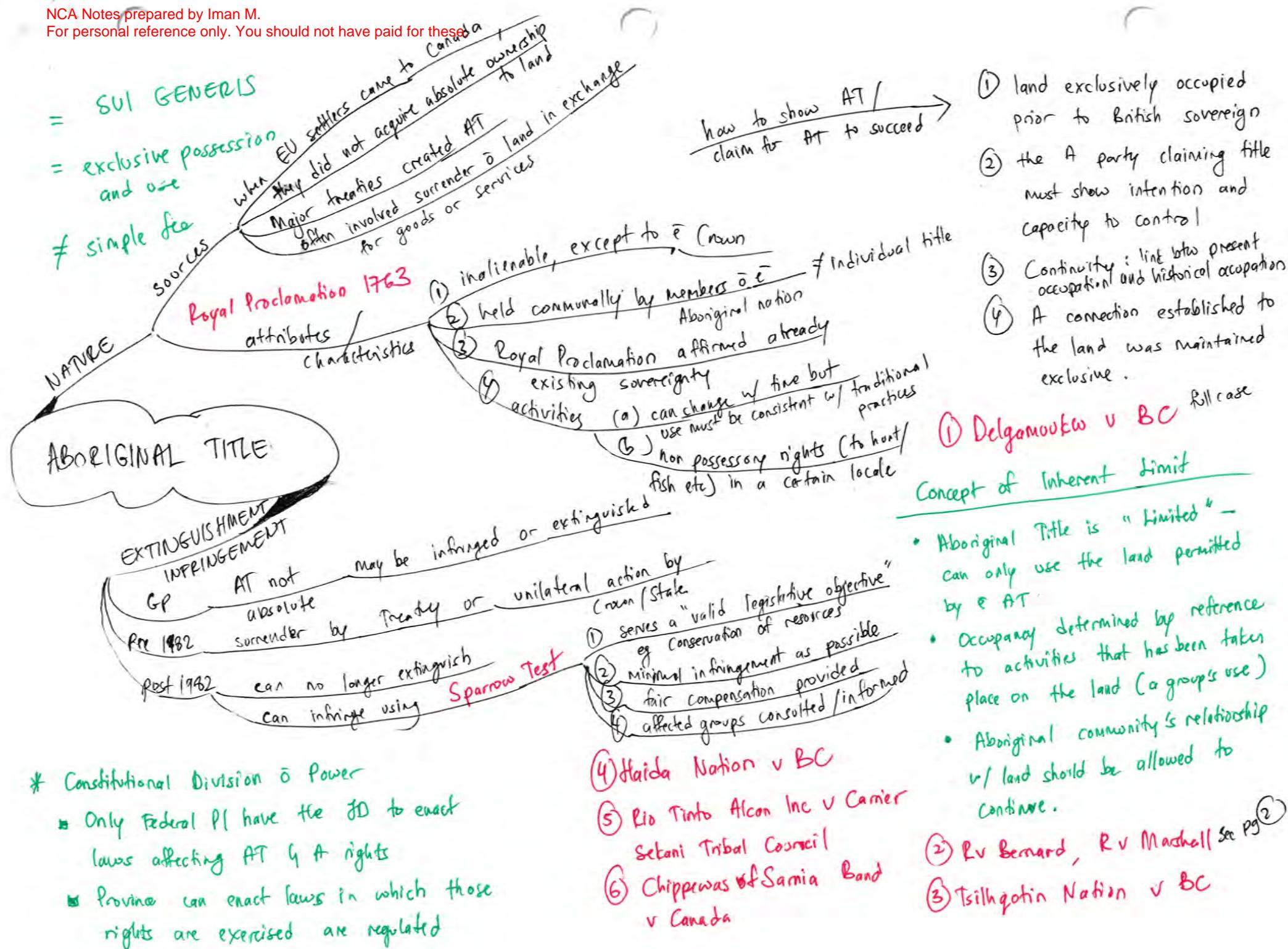
- Repairs:
  - Serious structural repairs (restoring heating apparatus, re-shingling roof, cutting tree that endangers property, replacing furnace) to come out of capital, paid by remainderman
  - Regular upkeep (ex: lawn care) comes out of income, paid by life tenant

- \*But presumption that no requirement of upkeep by life tenant

- Insurance:
  - Generally no common law obligation on tenant to insure the property
  - Trustee has duties - if trustee didn't insure property, likely liable for negligence
  - Depends on type of insurance - if for benefit of property as a whole, paid out of capital (remainderman); insurance for contents of house - paid out of income (life tenant)

- Taxes: to be paid by life tenant

- Mortgage:
  - to be paid by life tenant
  - But some mortgages call for blended payments of interest plus capital - if life tenant making these payments, entitled to reimbursement from remainderman of capital payments



## RIGHTS OF SHORT TITLE

### ABORIGINAL TITLE (2)

#### RESERVES

#### introduction grant

a type of special property  
under Federal Control

may be granted to individual  
Conditional band members

holder must remain on land  
transfer allowed w/ Minister's approval

restricted to band members

Similar to FEE SIMPLE  
but held under a Certificate of Possession

non-passory, site-specific  
exclusivity not required  
f Land title, which is right to land itself  
① must be an integral & significant  
part of culture at the point  
of FIRST CONTACT w/ Europeans

INTEGRAL  
DISTINCTIVE  
SIGNIFICANT

You need to read

Delgamuukw !

Key points:

- ① Test for proof of AT
- ② Test of justification for infringement of AT

SCC upheld trial court decision that

① No treaty right to harvest trees for commercial purposes

② Aboriginal title not established at the location in question

→ Mi'kmaq convicted

(1) ABORIGINAL TREATIES  
Required Case Reading

(2) Aboriginal Title Not Established

- test as per Delgamuukw
  - exclusive occupation
  - continuity of occupation
- exclusive occupation ≠ exclude others but "effective control", and ABILITY to exclude if chosen
- Continuity = group has maintained a substantial connection to the land since Crown's assertion of sovereignty

① No treaty right to commercial timber harvest

- although treaty rights are not frozen in time and evolve, a claim to a modern treaty trading right must represent a logical evolution from a traditional activity at the time the treaty was made.

- in fact commercial logging would interfere with fishing, a key traditional activity of the Mi'kmaq

### ③ Tsilhqot'in Nation v BC (2014)

- SCC issued a declaration of AT
- Onus to establish AT is on claimant, to show:
  - sufficient occupation of land claimed at the time of EU sovereignty
  - continuity of occupation
  - exclusive historic occupation
- AT extends to tracts of land regularly used for hunting/fishing/exploiting resources
- rejects that it is "stamp-sized"

### ⑥

#### Chippewas of Sarnia Band v Canada (2000) OR CA

- Court found in 1800s the Crown had invalidly granted fee simple interests in land set aside for Chippewas to private parties
- Held: private parties not responsible for compensating First Nation, but it is the Crown's responsibility

- Equity protection of good faith purchaser for value
- Delay in asserting rights - equitable doctrine of laches & acquiescence.
- claim dismissed, the initial grant may have been invalid but the passage of time give rise to equity rights of current title owners

Syndicated Nation v. BC (Minister of Forests  
2004)

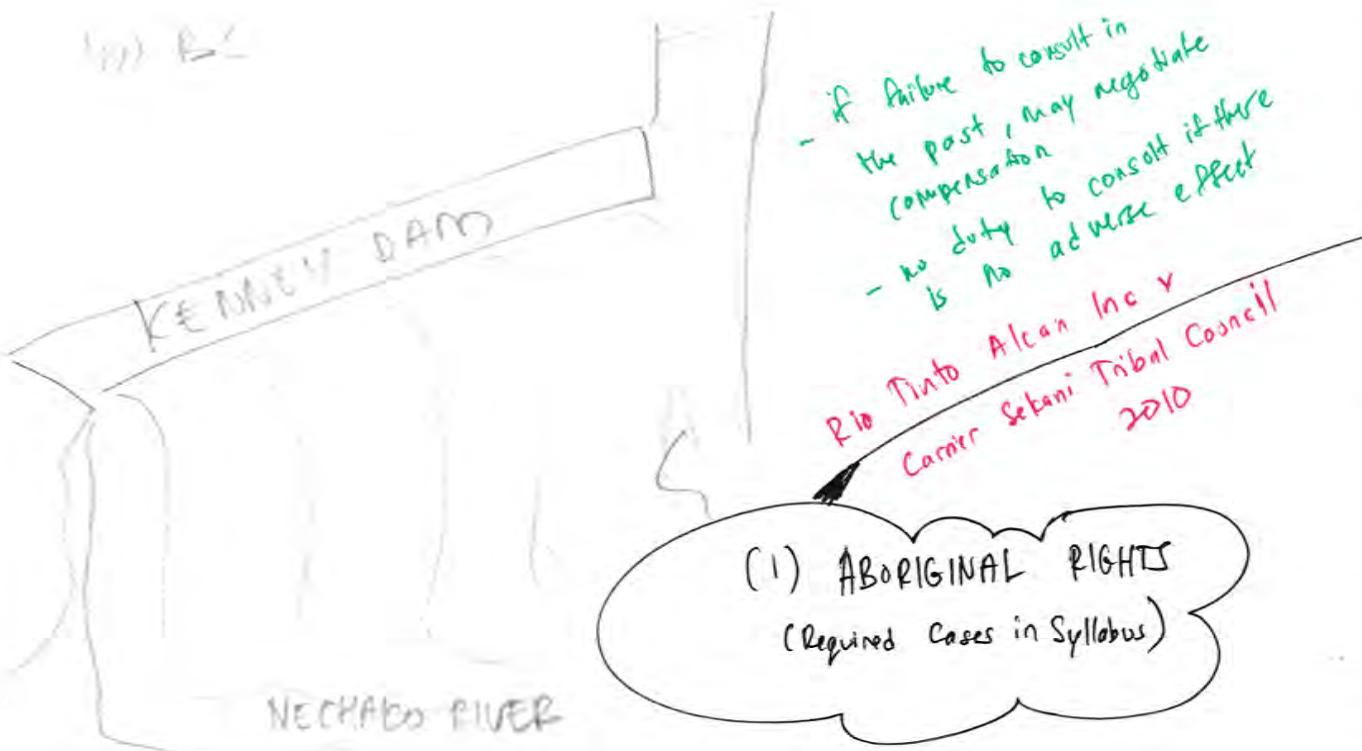
fundamentally altered the analysis  
of whether Crown behavior complies  
with the Rule of Law

Principle that

- (1) honour of the Crown is always present in Crown - Indigenous relations
- (2) in assessing whether infringement of an aboriginal right is justified, the court should consider whether the Crown consulted with affected aboriginal people

i.e. the honour of the Crown required the Crown to consult with potentially affected indigenous communities when authorizing an action that could affect a known, or likely to be proven, aboriginal right = a significant degree of consultation and accommodation is required

"Duty to Consult" case



- if failure to consult in the past, may negotiate compensation
- no duty to consult if there is no adverse effect

#### FACTS:-

- 1950's B.C. gov granted license to Alcan use of water from Nechako River on a permanent basis (hydropower dam)
- CSC was not consulted about the dam project
- The dam significantly affected the amount and timing of water flows, impacting fisheries on CSC claimed lands
- In 2007 Alcan entered an Energy Purchase Agreement with BC Hydro (crown corp.) to purchase excess power and establish a Joint Operating Committee to advise on operation of reservoir
- CSC applied to BC Utilities Commission to review the sale under the 2007 EPA to consider whether it is in public interest
- Commission decided that (1) while it had power to decide on question of adequacy of consultation, (2) there is no duty to consult as the 2007 EPA would not adversely affect any aboriginal right
- Upon appeal to BCCA, the Commission's orders were reversed and the case remitted to the Commission
- Alcan & BC Hydro appealed to the SCC

(C) JUSTIFICATION for Crown to act without consent

Crown must show

- ① Procedural duty to consult and accommodate is discharged
- ② That its actions were backed by a **COMPELLING** and **SUBSTANTIAL** objective
- ③ That its actions are consistent with the Crown's fiduciary duty to the group

per **Delgamuukw**: Aboriginals and non-aboriginals "ALL HERE TO STAY" and must of necessity move forward in a process of reconciliation.

To constitute a Compelling and Substantial objective, the broader public goal asserted by the Crown must further the goal of **RECONCILIATION**, having regard to both Aboriginal interest and the broader public objective.

d) ALSO cannot substantially deprive future generation from benefiting from the land

(C) Aboriginal title holders of modern times can use their land in modern ways

D) the Crown and others must obtain consent from Abor. title holders - Without consent, Crown only recourse is to establish JUSTIFICATION.

(B) Where title is established, what rights?

- ① Ownership rights similar to those associated with fee simple including right to decide how the land will be used, of enjoyment and occupancy of land, to possess the land, to the economic benefits of the land and to proactively use the land

(2) Restrictions:

- A) Cannot be alienated except to the Crown
- B) cannot be developed or misused in a way that would deprive future generations  
Note: does not exclude permanent change.  
Whether a particular use is irreconcilable w/ future generations to benefit from the land will be case by case basis

(D) ↗

TSILHQOT'IN NATION v. B.C.

2014

- Historical landmark case where SC issued a declaration of Aboriginal title
- (A) Establishing title, how?
  - onus of establish Aboriginal title is on the Claimants
  - general requirement to prove Aboriginal title:
    - ① "sufficient" occupation of the land claimed to establish title at the time of assertion of European sovereignty
    - ② continuity of occupation where present occupation is relied on
    - ③ exclusive historic occupation
  - held that occupation sufficient to establish Aboriginal title is not confined to specific sites of settlement but extends to tracts of lands regularly used for hunting, fishing, or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European Sovereignty

\*rejects occupation to be only those with intensive occupation which would be "stamp sized"

Continued.—

D) Reach of Provincial and Federal Laws onto Aboriginal Title lands

Held: may apply, as long as any infringement passes the Sparrow test as modified (i.e. Justification requirements (1)-(3) above)

4. Where affected Indigenous peoples have squarely raised concerns about Crown consultation, the NEB must usually provide written reasons. What is necessary is an indication that the NEB took the asserted Aboriginal and Treaty rights and interests into consideration and accommodated them where appropriate. In this case, the NEB's written reasons are sufficient to satisfy Crown's obligation."

■ Compare to the companion case of *Clyde River (Hamlet) v. Petro-Canada Geo-Services Inc. (2017)*

= "significantly flawed" process of the NEB vs. "manifestly adequate" key differences are SCOPE OF PROJECTS, NATURE OF RIGHTS involved and NEB process undertaken.

(2) NEB have taken processes that were sufficient to satisfy Crown's duty to consult - Reasons:

1. Provided adequate opportunity to participate in the process.

2. Sufficiently assessed potential impacts on Indigenous rights and found the risk minimal and able to be mitigated.

3. In order to mitigate, NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

SCC Decision:-

Appeal dismissed

(i) The process and decision of an independent regulatory body can trigger the Crown's DUTY TO CONSULT and in some cases, even fulfill it.

Thus

A. NEB have the procedural powers to engage in consultation and the remedial powers to, where necessary, accommodate affected Aboriginal and Treaty rights

B. Crown can rely on NEB to fulfill its duty to consult.

Chippewas of the Thames First Nation v.  
Enbridge Pipelines Inc. (2017)

Facts:-

■ National Energy Board (NEB) a federal administrative tribunal and regulatory agency was a final decision maker on a pipeline modification project

■ NEB issued notice to Indigenous groups, including the Chippewas, informing them of the project, NEB's role and NEB's hearing process

■ Chippewas was granted funding to participate, they filed evidence and delivered oral arguments highlighting their concerns of increased risk of spills that would adversely impact their use of land.

■ NEB approved the project, holding:

- potentially affected Indigenous groups had received adequate information and given opportunity to share their views
- potential adverse impacts are minimal and would be adequately mitigated

■ Chippewas appealed to the Federal Court and appeal was dismissed. Further appeal to the SCC.



UPDATED!

■ SCC affirmed and rejected further appeal by Mikisew in Mikisew Cree First Nation v Canada (2018)

■ TDR: Duty to consult imposed on executive & legislative, but when legislative undermines S-35 rights, Aboriginal groups are not left without a remedy. Judges agree to dismiss appeal on grounds that JR under FCA is not available for actions of federal ministers in the parliamentary process.

■ See Reasoning of Mikisew 2018. Judges disagree on whether legislative limb had a duty to consult, therefore giving entitlement to a declaratory relief.

(3) Legislative regime with no duty to consult is not immune from a constitutional challenge; "good politics" for legislature to engage Aboriginal groups on legislative initiatives. (2)

(4) Any challenge on a new policy that didn't sufficiently account Aboriginal concerns, one determining factor of WHETHER INFRINGEMENT ON A RIGHT IS JUSTIFIED will be whether consultation occurred before legislation adopted - but judicial scrutiny will only come into the picture AFTER LEGISLATION ENACTED



FCA decision

Held:-

(1) Federal Courts Act did not permit a JR of the matter; legislative decisions are outside the Act's purview.

(2) Court's inability to intervene in a legislative process includes any sort of declaratory order with respect to that legislative process. Also, imposing a duty to consult would result in a restrain on the Parliament and slow or even halt the legislative process.

Facts :-

■ Federal govt. introduced two OMNIBUS Bills C-38 and C-45, repealing and replacing the Canadian Environmental Assessment Act and a few other statutes on environment and natural resources

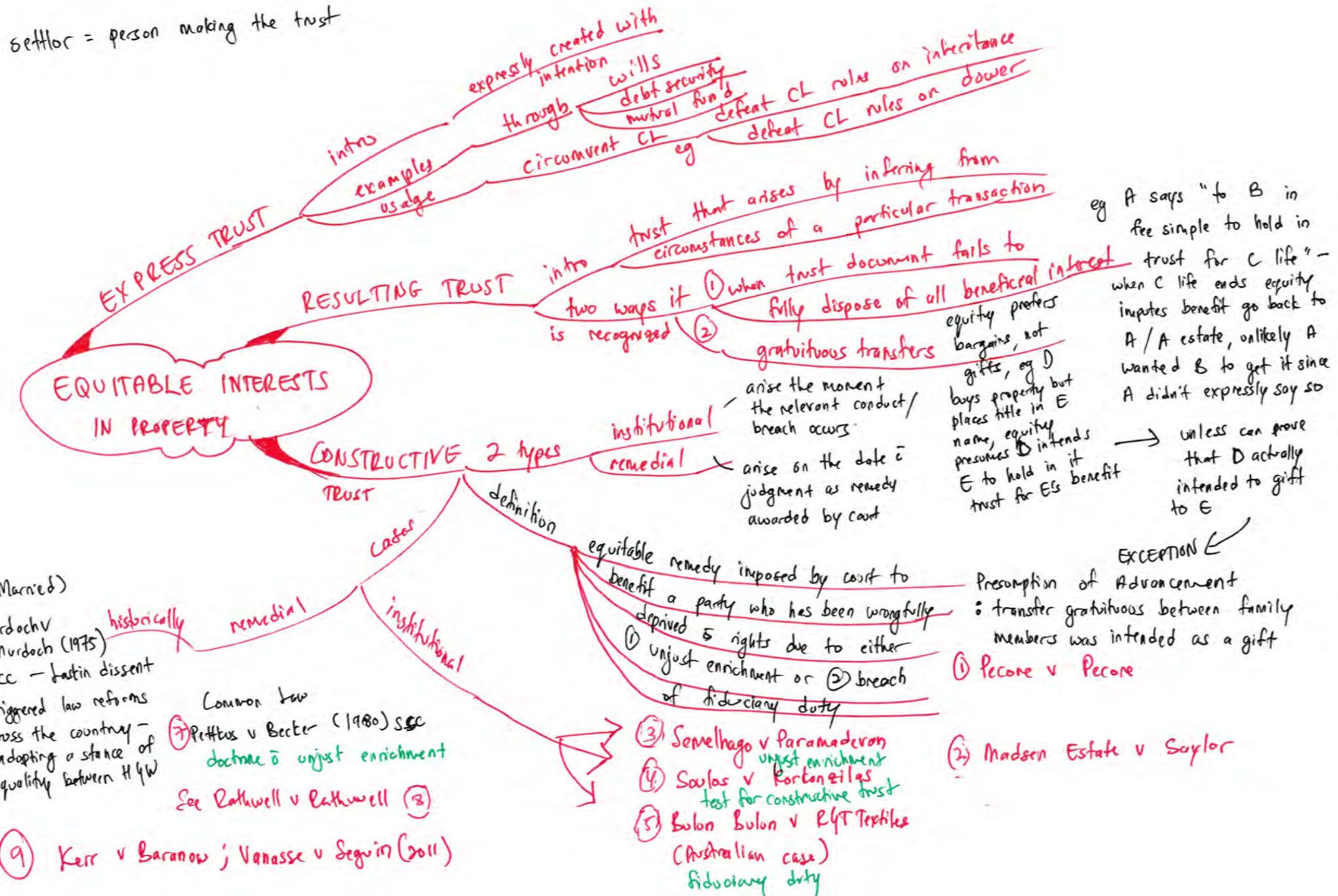
■ Mikisew claims the bills adversely affects their treaty rights, and the Crown breached their duty to consult

■ Applied for the court (FC) a declaration to this effect and an injunction.

■ FC held (1) Judicial Review is permitted in the matter (2) Legislators owe Mikisew a duty to consult while preparing the Bills and (3) Injunctions would be 'intervening' in the legislative process and therefore not approved but a declaration of duty to consult allowed by Crown, although 'useless' in the face of already enacted bills, would have some value for "parties' future obligations"

Crown appealed to the FCoA

settlor = person making the trust



### Pecore v Pecore (2007) SCC

An ageing father gratuitously placed the bulk of his assets in joint accounts with his daughter P, who was closest to him of his three adult children. Unlike her siblings, who were financially secure, P was not and had a quadriplegic husband, M. P's father helped P and her family financially, including buying them a van, making improvements to their home, and assisting her son in university.

P's father alone deposited funds into the joint accounts. He continued to use and control the accounts, and declared and paid all the taxes on the income made from the assets in the accounts. In his will, P's father left specific bequests to P, M and her children but did not mention the accounts. The residue of the estate was to be divided equally between P and M.

Upon the father's death, P redeemed the balance in the joint accounts on the basis of a right of survivorship. P and M later divorced, and a dispute over the accounts arose. M claimed that P held the balance in the accounts in trust of her father's estate and the assets formed part of the residue and should be distributed according to the will.

The trial judge held that P's father intended to make a gift of the beneficial interest in the accounts upon his death to P alone, concluding that the evidence failed to rebut the presumption of advancement. The Court of Appeal dismissed M's appeal, but found that it was not necessary to rely on the presumption of advancement because the presumption is only relevant in the absence of evidence of actual intention or where the evidence is evenly balanced.

*Held:* The appeal should be dismissed. In this case, the trial judge erred in applying the presumption of advancement. P, although financially insecure, was not a minor child. The presumption of a resulting trust should therefore have been applied. Nonetheless, this error does not affect the disposition of the appeal because the trial judge found that the evidence clearly demonstrated the intention on the part of the father that the balance left in the joint accounts was to go to P alone on his death through survivorship. This strong finding regarding the father's actual intention shows that the trial judge's conclusion would have been the same even if he had applied the presumption of a resulting trust.

### Rathwell v Rathwell [1978] SCC

Mrs. Rathwell had made a direct financial contribution to the acquisition of the disputed farmland and the majority were content to use a resulting trust analysis to award a one-half interest to the wife. Dickson J. (as he then was) held that Mrs. Rathwell could succeed on the basis of either a resulting trust or a constructive trust.

*The constructive trust ... comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason -- such as a contract or disposition of law -- for the enrichment.*

### Semelhago v S Paramadevan and B Paramadevan (1996) SCC

In August 1986, the SP agreed to buy a house under construction in the Toronto area from SP for \$205,000, with a closing date of October 31, 1986. To finance the purchase, S was going to pay \$75,000 cash, plus \$130,000 which he was going to raise by mortgaging his current house. S negotiated a six-month open mortgage, so that he could close the deal on the new house and then sell his old one at an appropriate time in the six months following closing. Before the closing date, the SP reneged and in December 1986 title to the house was taken by BP.

S remained in his old house, which was worth \$190,000 in the fall of 1986, and \$300,000 at the time of the trial. S sued the appellants for specific performance or damages in lieu thereof. At the time of trial, the market value of the property to be purchased was \$325,000. S elected to take damages rather than specific performance and the Ontario Court (General Division) awarded him \$120,000, being the difference between the purchase price he had agreed to pay and the value of the property at the time of trial.

BP and SP appealed on the ground that the assessment was a "windfall" because S was benefiting not only from the increase in the value of the new house, but also from the gain in the value of the old house. The Court of Appeal allowed the appeal, deducting from the amount awarded at trial the carrying costs of the \$130,000 mortgage for six months, notional interest earned on the \$75,000, and legal costs on closing. S cross-appeal against the disallowance of legal and appraisal fees was also allowed.

*Held:* The appeal should be dismissed.

*Per* Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: While specific performance should not be granted as a matter of course absent evidence that the property is unique, this case was dealt with by the parties throughout on the assumption that specific performance was an appropriate remedy, and this appeal should thus be disposed of on that basis. A party who is entitled to specific performance is entitled to elect damages in lieu thereof. Damages are normally assessed at the date of breach in the case of breach of contract for the sale of goods. The rationale for this rule is that if the innocent purchaser is compensated on the basis of the value of the goods as of the date of breach, the purchaser can turn around and purchase identical or equivalent goods. Given the flexibility of the rule at common law

as to the date for the assessment of damages, it would not be appropriate to insist on applying the date of breach as the assessment date when the purchaser of a unique asset has a legitimate claim to specific performance and elects to take damages instead. It is not inconsistent with the rules of the common law to assess damages as of the date of trial. The rationale that the innocent purchaser is fully compensated if provided with the amount of money that would purchase an asset of the same value on the date of the breach no longer applies where the claim for specific performance has been maintained until the commencement of the trial. Moreover, the claim for specific performance revives the contract to the extent that the defendant who has failed to perform can avoid a breach if at any time up to the date of judgment, performance is tendered. In the circumstances of this case, the appropriate date for the assessment of damages is the date of trial. The increase in value of the respondent's residence which he retained when the deal did not close should not be deducted from the amount of damages awarded. If the respondent had received a decree of specific performance, he would have had the property contracted for and retained the amount of the rise in value of his own property. Since there was no cross-appeal with respect to the deductions made by the Court of Appeal, they are not at issue here.

Unjust enrichment? → to use value at date of trial instead of date of breach?

Reason: he was entitled to SP but elected for damages — it should be date of trial — windfall doesn't hold as if he got the house and kept his old house he would have that value

(4)

**Soulos v Korkontzilas [1997] 2 SCR 217**

<b>Case</b>	<b>Comments</b>
<p>Facts:</p> <ul style="list-style-type: none"><li>• D was a real estate agent acting on behalf of P</li><li>• D did not relay an offer that P had and instead had his wife purchase the house</li><li>• P did not claim damages as the value of the house decreased and D paid market value for property</li><li>• P suing for a constructive trust in the absence of damages</li></ul> <p>Issue:</p> <ul style="list-style-type: none"><li>• Can a constructive trust be imposed in the absence of damages?</li></ul> <p>Holding:</p> <ul style="list-style-type: none"><li>• Judgment for P</li></ul> <p>Ratio:</p> <ul style="list-style-type: none"><li>• Constructive trust may be imposed when good conscience requires</li></ul> <p>Reasoning:</p> <ul style="list-style-type: none"><li>• <b>Test for an institutional constructive trust</b><ol style="list-style-type: none"><li>1. D must have been under equitable obligation in relation to activities giving rise to the assets in his hands</li><li>2. Assets of the D must be shown to have resulted from activities of D in breach of equitable obligation to P</li><li>3. P must show a legitimate reason from seeking a proprietary remedy<ul style="list-style-type: none"><li>▪ Can be personal or related to ensuring that people like D must remain faithful to their duties</li></ul></li><li>4. Must be no factors that would render a constructive trust unjust<ul style="list-style-type: none"><li>▪ E.g. may be unjust to hurt third-party creditors</li></ul></li></ol></li></ul>	<p><b>Constructive trust may be imposed when good conscience requires</b></p> <p><b>Test for an institutional constructive trust</b></p> <ol style="list-style-type: none"><li>1. D must have been under equitable obligation in relation to activities giving rise to the assets in his hands</li><li>2. Assets of the D must be shown to have resulted from activities of D in breach of equitable obligation to P</li><li>3. P must show a legitimate reason from seeking a proprietary remedy<ul style="list-style-type: none"><li>▪ Can be personal or related to ensuring that people like D must remain faithful to their duties</li></ul></li><li>4. Must be no factors that would render a constructive trust unjust<ul style="list-style-type: none"><li>▪ E.g. may be unjust to hurt third-party creditors</li></ul></li></ol>

### John Bulun Bulun & M\* v. R&T Textiles

[The source of this case summary is *Australian Indigenous Law Reporter* (1998) 13 (4). References to M\* are to an Aboriginal artist and elder who is now deceased. To write his name would be culturally inappropriate.]

In 1996, the artist Johnny Bulun Bulun's work *Magpie Geese and Water Lilies at the Waterhole* was again the subject of unauthorised copying, this time on imported fabric. Bulun Bulun commenced action against the company, R & T Textiles, for breach of copyright. A senior clan elder, M\*, as representative of the Ganalbingu people, also brought proceedings in his own right, claiming an equitable right in the copyright subsisting in the artistic works.

Bulun Bulun painted the artistic work in 1978 with permission of senior members of the Ganalbingu people. Bulun Bulun sold the work to Maningrida Arts and Crafts Centre, where it was sold to the Northern Territory Museum of Arts and Sciences. The work was reproduced with Bulun Bulun's consent in a book by Jennifer Isaacs, *Arts of the Dreaming - Australia's Living Heritage*.

When proceedings were served, R & T Textiles admitted infringement of copyright in the artistic work, pleading that they were unaware of copyright ownership by Mr Bulun Bulun. The respondents immediately withdrew the infringing fabric from sale. Approximately 7600 metres of the fabric had been imported and approximately 4231 metres had already been sold. In settlement of the infringement claims, the company consented to various orders and declarations and the case proceeded on a series of legal arguments aimed to explore issues of communal ownership in artistic works.

The artwork incorporated traditional ritual knowledge belonging to the Ganalbingu people. Mr Bulun Bulun gave evidence that it is his duty to create such works as part of his traditional land ownership responsibilities in accordance with Ganalbingu custom and law. Further to this role, Mr Bulun Bulun stated that he was obliged to consult with other traditional owners on certain kinds of reproductions of the painting. Mr Bulun Bulun gave evidence that reproduction that was not subject to proper consultations threatened the framework of Ganalbingu society. On the basis of this relationship, M\*, a co-applicant to the proceedings, claimed an equitable interest in the copyright of the artistic work that entitled him, on behalf of the Ganalbingu people, to claim relief for unauthorised reproduction of the artistic work.

The court dismissed M\*'s claim for equitable ownership, stating that unless the artistic work is a 'work of joint ownership' (within the meaning of the *Copyright Act*) where one or more artists created the work, there is no communal ownership in an artistic work. In this case, von Doussa J considered that there was no evidence to suggest that any person other than Mr Bulun Bulun was the creative author of the artistic work.

**The Court did consider, however, that Mr Bulun Bulun owed a fiduciary duty to M\* and the Ganalbingu people to protect the ritual knowledge which he had been permitted to use under customary law. Further, while Mr Bulun Bulun had the right to depict the designs, he had a fiduciary obligation to the rest of the clan group to ensure that the image would only be reproduced in ways that would preserve the integrity of the culture and the knowledge. In the event of a breach of obligation by the artist, the group had a right to bring an action 'in personam' against the artist to enforce the obligation. The court considered that Mr Bulun Bulun had fulfilled his obligation by taking legal action against the company and therefore there was no reason for the Court to provide any additional remedy to the Ganalbingu people.**

(6)

### Murdock v Murdock (1975) SCC

F: Wife is Alberta rancher claims half  
of ranch property held in H name -  
25 years of contribution

SCC: held that W did "routine work  
that can be "expected" of a  
rancher's wife - no resulting trust

Kastin dissent.

Later W in divorce proceedings (<sup>separate</sup>)  
managed to get 65k lump sum in place of  
monthly maintenance.

(7)

### Petticus v Becker (1980) SCC

F: PGB never got married but lived  
together as a couple for 19 years.  
All income went into H bank acct,  
and when money used to buy property,  
it was registered on his name. At  
the breakdown of relationship - they had 2  
valuable pieces of land, a house built  
upon one, a thriving bee-keeping biz.

Law at this: common law marriage  
not recognized - no  
entitlement - W had to

fully rely on doctrine of constructive  
trust and unjust enrichment.

Dickson J:

3 requirements for finding  
a constructive trust:

- (1) an enrichment
- (2) a corresponding deprivation
- (3) absence of any juristic reason  
for the enrichment

Held: W entitled to assets

Note: Despite the judgment, H  
avoided paying to W, when H  
finally liquidated, most of the payout  
went to paying legal cost. W tragically  
committed suicide in 1986.

(8) Rathwell v Rathwell,

See (1)

### Kerr v. Baranow, 2011 SCC

This is a joint decision released on two appeals, the eponymous case from British Columbia and *Vanassee v. Seguin* out of Ontario.

Facts: Kerr v Baranow

- Common law couple living together for 25 years, Ms Kerr has been paralyzed for the past 15 years
- Legal title to resident is in Mr. B name, Ms. K argues it is in trust - he would be unjustly enriched to keep property to himself
- Mr. B argues Ms. K unjustly enriched by his performance of housekeeping and caretaking of her the last 15 years of their rship

Facts Vanasse v Seguin

- Ms. V gave up employment so Mr. S can pursue job and entrepreneurship. Housewife cared for their 2 children. Home registered in both their names as joint tneants.
- Most of Mr. S networth (8.5m) is in his holding company which he withdraws from for investment and business
- Ms. V claims for full interest in family home and half in business assets
- Mr. S claims its balanced by him granting her  $\frac{1}{2}$  interest in the home and providing her with 44k RRSP. He claims constructive trust not appropriate as her contributions to housework and childcare is not linked to the prosperity of his company

### **The Law since *Pettkus v. Becker***

The legal underpinnings of unjust enrichment and the constructive trust were first set out in *Pettkus v. Becker*, decided in 1980. The law has evolved somewhat over the past 31 years. The *benefit* received by a party must be tangible even though it may not be permanent. A benefit can be positive, in the sense of goods or services received, or negative, in the sense of an expense avoided. The *loss* must relate to the benefit. A loss will be irrelevant and incompensable if there is no corresponding benefit.

The law on the *absence of juristic reason* issue is where the action is. The courts have refused to confine juristic reason to a narrow definition. In the mid-80s, juristic reason was found to encompass moral issues and policy questions. In the early-90s, juristic reason included the parties' reasonable

Held: *Findings to TJ for K to get 1/3 to the shared home cannot stand, needs to be done on a joint family venture analysis - new trial ordered*

expectations. In 2004, in a case called *Garland v. Consumers' Gas Co.*, the court developed a two-stage test:

1. the person claiming unjust enrichment must show that there is no established category of juristic reason to deny the claim, and
2. the person opposing the claim may then argue that the parties' expectations were such that the claim should be denied or that the claim should be denied for public policy reasons.

### **Compensation for Unjust Enrichment**

When unjust enrichment is proven, the court first tries to provide compensation through a cash award. When a cash award would be insufficient or can't be paid, the court will provide compensation by giving the non-owner an interest in the property.

### **The Decision in *Kerr v. Baranow***

In this case, the court took the opportunity to clarify three issues which have become controversial:

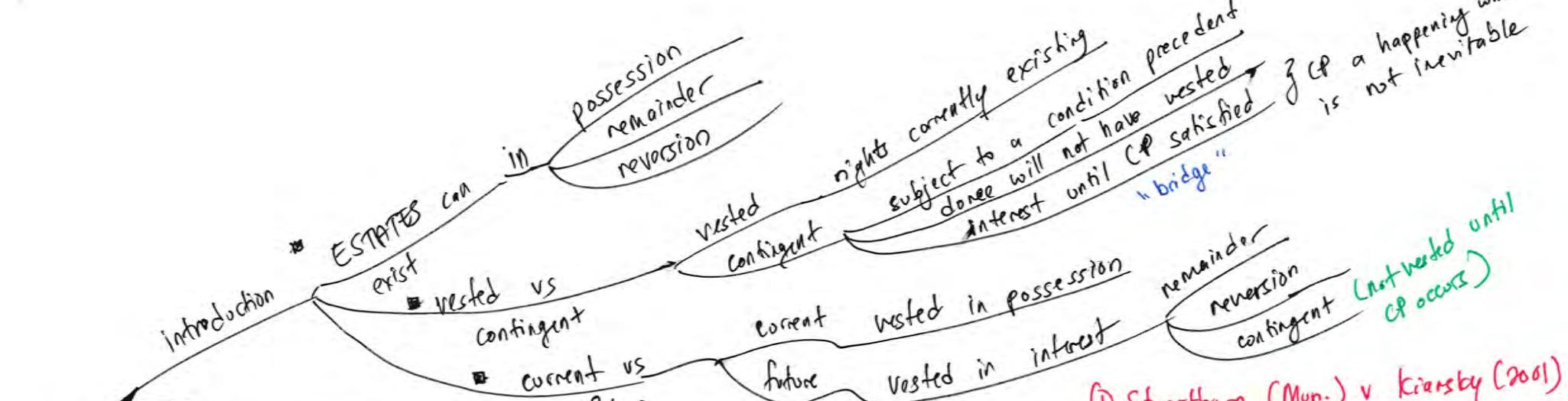
1. how should cash awards be calculated when unjust enrichment is proven,
2. how to address mutual benefits, and
3. how the parties' expectations should be considered when addressing juristic reason.

On the first issue, the court held that no calculation method should be preferred. A court should choose the method which best suits the circumstances and the claimant's loss:

On the second issue, the court held that mutual benefits can be taken into account either as a juristic reason against a finding of unjust enrichment or as part of calculating the compensation due when unjust enrichment has been found. Mutual benefits should not be considered when arguing about whether there was a benefit and corresponding loss.

On the third issue, the court held that the parties' reasonable expectations should be considered in the second stage of the juristic reason test, and that it is each party's expectations which must be considered not just those of the claimant.

Held: *JFV and limit b/w Mr V's contribution to Mrs S accumulation of wealth - TJ's award to unjust enrichment during & period children were born - half to wealth S accumulated by that time only*



- (1) Stuartborn (Mun.) v Kiersby (2001)  
 (2) McKee Estate v McKee Estate

## CONDITIONAL TRANSFERS

### FUTURE INTERESTS

- Determinable
  - "vested interest that might come to an end on the happening of an expressed event"
  - "fence post", not a condition, but a limit in time - defines the duration
  - words such as "while, during, until"

### Defeasible ② condition subsequent

- "dark cloud"
- received land now but may lose it later
- words use "provided that, but if,"

### ③ Caroline (Village) v Roper

- interest grantor retains the right to re-enter contingent upon an event
- subject to law against perpetuities

type of  
fee simple can  
be 1, 2, 1 or 3

### ① Absolute

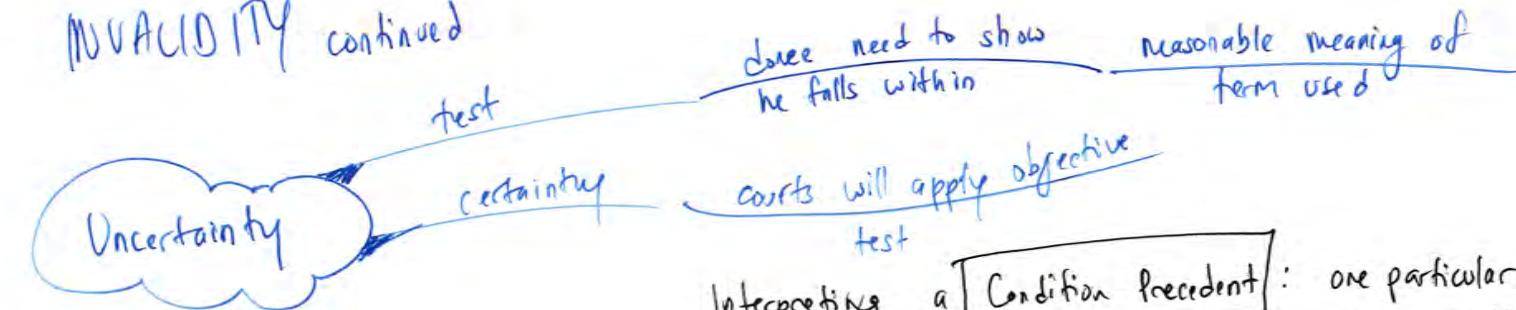
- \* When not absolute, grantor have either
  - ② Right of Re-entry
  - ③ Possibility of reversion

## INVALIDITY

### Effects

① Defeasible CP (dark cloud)	condition removed - gift becomes absolute
Determinable CP (fence post)	the entire gift fails
Conditions Precedent (bridge) <ul style="list-style-type: none"> <li>① When attached to the land (realty)</li> <li>② When attached to the personality</li> </ul>	<ul style="list-style-type: none"> <li>- the gift is destroyed</li> </ul>
④ Unger v Gossen	<ul style="list-style-type: none"> <li>- gift can be destroyed or upheld</li> </ul>

## INVALIDITY continued



one particular claimant  
has met the condition

**Stipulation for  
retaining Property**:

must know in advance  
of the event which will  
bring interest to end

**Condition Subsequent**:

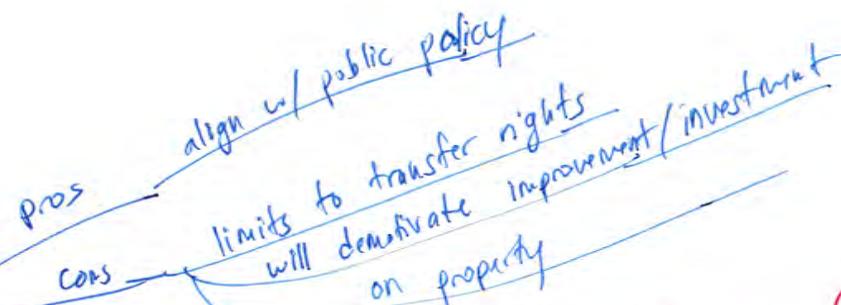
must know in advance  
what events give rise  
to grantor's right of  
re-entry

⑤ *Hyl Flayer Co v Mendel*

## ⑥ Re: Leonard Foundation Trust

\* have to find balance between state disapproval  
of discrimination versus the freedom/right  
to use one's property as he chooses

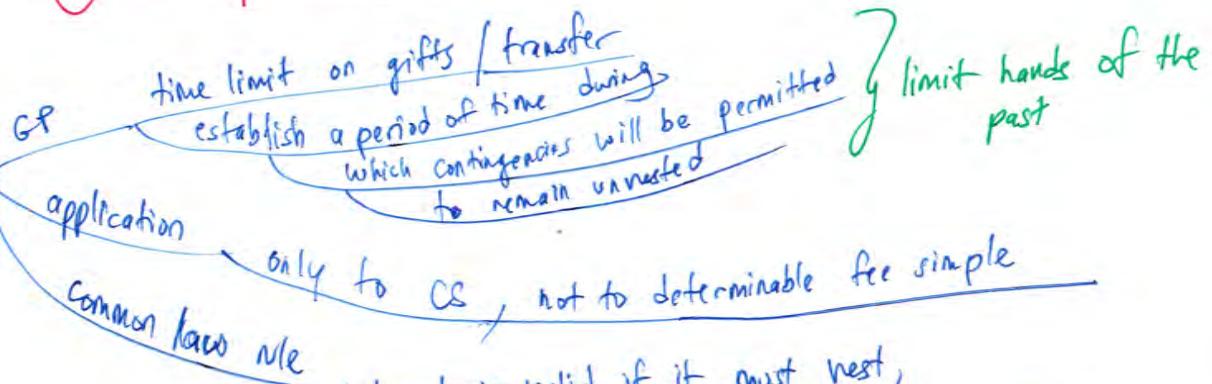
Restraints on alienation



⑦ Trinity College School v Lyons (1995)

LIMITATION  
RESTRAINT

Rule Against  
Perpetuity



Interest is valid if it must vest,  
if it is going to vest at all,  
within perpetuity period

} limit hands of the  
past

⑧ Re Crow (1984) ONSC

### STUARTBURN (MUNICIPALITY) V. KIANSKY (2001)

- **Facts:**
- Application brought to determine whether Kiansky, Reeve of Stuartburn, was entitled to hold that office
- Under Manitoba election law, in order to hold elected office, a person must be an owner of land (s. 5 of the Local Authorities Election Act)
- Kiansky sold his home and moved from the relevant district, but he continued to hold an interest in other Stuartburn real estate, the entitlement to which was subject to a prior life estate in favour of his grandmother (therefore, a "remainder interest")
- **Issue:**
- Did this land interest satisfy the ownership requirements of the election laws? Does a remainder interest in a life estate constitute being an "owner"?
- **Decision:**
- Kiansky's remainder interest allows him to be classified as a present owner of a freehold estate (right to freehold interest in fee simple) in the Municipality, which meets the election laws - application dismissed

At all times, Kiansky was recorded in the land titles office in relation to the land as "registered owner of an estate in remainder expectant upon the decease of [the grandmother]"

The land is and was assessed in the latest revised realty assessment roll

Court looked at two things: the context of the meaning of "owner" and the nature of the remainder interest

Owner: must be the present owner of a freehold estate in land (so, Kiansky's remainder interest must be identified as a freehold estate owned by him)

Freehold estate:

Freehold is a measure of the nature and degree of a person's interest in land

Includes a life interest and a fee simple, both of which are for an indeterminate period

Estate is synonymous to "right", "title", and "interest"

- In a similar case it was found that "seisin" is more than ownership, it is actual possession; therefore, an owner with a vested interest does not have seisin and therefore, cannot be a Senator

### MCKEEN ESTATE V. MCKEEN ESTATE (1993)

- **Facts:**
- The testator Harry McKeen dies, and his will directs that his entire estate be held in trust for his wife for her life, and on her death, the trustees were directed, after completing several specific legacies (gifts of money) and a devise (gift of real property), to divide the residue of the estate "equally between my sisters, or to the surviving sister if one dies"
- Neither sister survived the testator and his wife
- **Issue:**
- Did the testator intend with his wording to make the gifts to his sisters contingent on their surviving his wife, or were they vested in interest at the effective date of the testator's will?
- **Decision:**
- The residue of the estate of Harry McKeen vested in his sisters equally at the date of his death, subject to the possibility of divesting of the interest of the deceased sister if only one sister survived the life tenant
  - The reason for postponement of the distribution is simply that a life interest was previously given to the widow, so that the residue could not be paid until her death
  - The testator did not contemplate an intestacy
  - These were not condition precedents
- **Ratio:**
- The determination of the actual and subjective intention of the testator are important – the court should determine this intention from the words used in the will, but if the words do not express a clear intention, then the court can consider what the reasonable person might have intended in the circumstances
- The presumption against intestacy – where the construction of the will is doubtful, the court acts on the presumption that the testator did not intend to die either wholly or even partially intestate, provided that on a fair and reasonable construction there is no ground for a contrary conclusion
  - The court inclines a construction that the will affects a complete disposition of the whole rather than the will leaving a gap
- Construction in favour of vesting
  - A contingent interest is one that is subject to the prior happening of an event which may never happen (i.e. the birth of a child)
  - When the words are not clearly contingent, the courts are inclined to call a gift that is *prima facie* contingent, "vested"
  - The courts are inclined to hold a gift vested rather than contingent wherever the words used and the will as a whole show of a construction that will result, as is said, in "early vesting"

3

### CAROLINE (VILLAGE) V. ROPER (1987)

ABQB

- **Facts:**
- Thomas Roper allowed a community group to build a community hall on an acre of his land; he retained title, and there was a strict understanding that it would be used for community purposes only
- He died and Rosina Roper (wife) inherited his land
- In 1949, representatives of the Community Associations told Mrs. Roper that they wanted to build a basement and it would assist them to do so if the title was transferred to them; the title was transferred, and a document was prepared that kept the condition
- In 1961, Rosina died and her son, the respondent, succeeded to her Estate
- In 1982, the community hall burned down and the Village now wants to sell the land to be used for a commercial purpose
- **Issue:**
- Village claims that the document is void and unenforceable, because if it is a trust, it is one which by its wording offends against the rule against perpetuities
- **Decision:**
- The document in its present form is void and unenforceable
- The key words are in the future tense and the future actions depends on something occurring which may not occur or may occur in the indefinite future, thus offending against the rule against perpetuities
- The words seem to make the fee simple that was given that day defeasible if a future event occurs, rather than putting a condition on the fee simple that it is good only so long as a certain use is made of it
- The document should be rectified to show that the transferees received title to the property as trustees for as long as the property was used as a community centre and to be conveyed back to the Ropers at the end of that use
- Application dismissed
- **Ratio:**
- It must be determined first if the grant in question was a determinable fee simple subject to a right of reverter or a fee simple subject to a condition subsequent
- The essential distinction appears to be that the determining event in a determinable fee itself sets the limit for the estate first granted, whereas a

condition subsequent is an independent clause added to a complete fee simple absolute which operates so as to defeat it

- Words such as "while", "during", "as long as", "until", etc. are perfect for the creation of a determinable fee
- whereas words that form a separate clause of defeasance, ex. "provided that", "on condition that", "but if", or "if it happens that", operate as a condition subsequent
  - *St. Mary's Indian Band v. Cranbrook (City)* - because of the *sui generis* nature of Aboriginal rights, interpretive devices used to distinguish between a condition subsequent and a determinable fee normally should not be determinative
  - Court must go past the usual restrictions and look at intentions of parties
  - "Common law real property concepts" do not apply to native lands because court wants to prevent native intentions from being frustrated by an application of formalistic and unfitting CL rules
  - It would be fundamentally unjust to force inflexible and technical land transfer requirements upon these unique actors
- **Summary:**
- A grantee can get a fee simple absolute, a fee simple determinable, or a defeasible fee simple
- When the fee is not absolute, the grantor has 1 of 2 rights:
  - Right of re-entry if the fee is defeasible (with condition subsequent)
  - Possibility of reversion if the fee is determinable
- "fence post" vs. the "dark cloud"
  - A determinable interest is an internal limitation of the grant, it is a "fence post" in the grant – look for the word "until", which defines the end
  - The defeasible conditional interest is separate from the grant, like "dark cloud" – look for the words "but if", which shows a possibility

Held : TJ found evidence undisputed that intention of condition was to preserve Roper's rights. Document to be rectified to show that "transferees received title to the property as trustees for as long as the property was used as a community centre and to be conveyed back to Ropers at the end of that use"

(4)

### Unger v Gassen (1996) BCSC

- 3 G siblings left equal shares in their aunt's estate on condition they moved to Canada
- they have not moved to Canada nor is it possible for them by the time of distribution

Court considered motive, found that aunt did not want funds to go to a beneficiary in a communist state.

- G siblings in Germany now  
Soviet has collapsed
- condition fails and gift should be distributed as if absolute

Obiter: it must be shown that the condition was not the sole motive for the bequest

(5)

### Hayes & Co v Meade

Will - property goes to son J on condition he resides & cultivates, should J not do that then to son H - H to pay of £1k

- Principles :
- CP must be met before property vests in the benef.
  - CS allow for immediate vesting, subject to loss if CS is not subsequently met
  - If a CS is uncertain, it is said to be VOID for uncertainty

### Sifton v Sifton

"Where it is doubtful whether a condition is a CS or CP the court prima facie treats it as CS" - presumption in favour of early vesting  
\* unless it is contrary to testator's intention - effect must be given to testator's intention

- Held:
- both conditions are CS
  - intention to benefit both sons, but J to get either land or £1k
  - as CS, 1st condition on J FAILED due to uncertainty - no time limit

Decision: J takes absolute title at father's death as CS is invalid, also his claim for adverse possession fails as he didn't fulfill AP requirements

## RE LEONARD FOUNDATION TRUST

- changing social values should be reflected in CL doctrine of public policy
- **Facts:**
  - Leonard develops scholarship based on race, religion, citizenship, ancestry, ethnic origin, and colour of the class
    - Only White, Christian Protestant, British nationals/heritage are eligible
    - maximum of 1/4 of the award can go to women
    - Preamble language to describe the motivations behind these requirements (overtly racist, elitist)
    - Public opinion had rallied against this scholarship (media, letters, etc.)
    - Universities started to stop publicizing scholarship, complaints to Human Rights Commission, held "not in keeping" with Charter values & today's societal values
    - Recommendation that the offensive terms are "read out" – keep awarding trust on modified criteria
- **Decision:**
  - Robins J.A. (majority)=
    - Preamble can't be isolated and disregarded from the rest of the trust document, "must be read as a whole"
    - Operative provisions usually prevail over recitals, but in this case, they can't be separated because the terms in the recital give meaning to the operative terms, "inextricably interwoven"

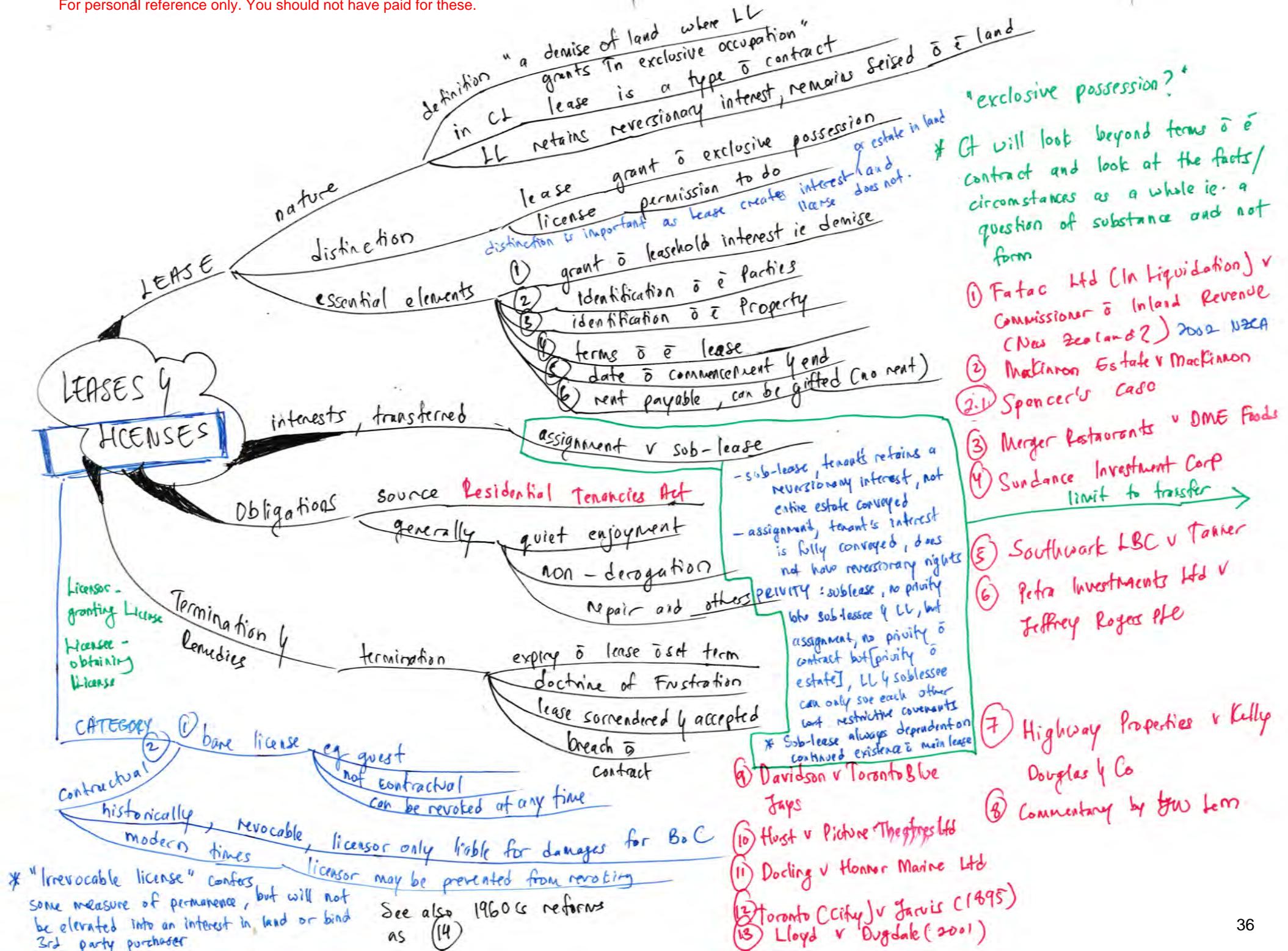
- No contradiction in terms between operative and recital section, not the problem here
- Language in preamble is too instructive, not just fluff that can be disregarded
- Even if preamble was simply to give motive, in this case, it would still be problematic from a social policy view
- Even though privately created, it had a public purpose, "quasi-public character"
- "Court cannot close its eyes" to this trust
- "Public policy is an unruly horse," and should only be invoked in "clear occasions," when "harm to the public is substantially incontestable, and does not depend on idiosyncratic inferences of a few judicial minds"
- Freedom to dispose of one's private property as they choose is an important social interest, which has long been recognized (not in this case though)
- Two problematic propositions:
  - The White race is best qualified by nature to progress civilization
  - Attainment of peace is best promoted by educating White, Protestant Brits
- "Notions of racism and religious superiority contravenes contemporary public policy"
- "At variance with the democratic principles governing our pluralistic society" Widespread public criticism serves to demonstrate this "Cy-pres doctrine" allows for charitable trust to be revised as to carry out the settlor's intentions as closely as possible, simply must advance a valid charitable purpose to qualify
- Trust was practicable when created, but not anymore = therefore it should not fail, but should rather be amended to benefit minorities
- Strikes out preamble and removes all restrictions related to race, colour, creed/religion, ethnic origin, and sex

(9)

RE CROW, 1984 *ONHC* *ONSC*

- **Facts:**
- testator had intended the life estates of Robert and William to be held as tenants in common with and should William or Robert die without children, the remainder should go to their nieces or nephews
- William died with no children in 1944 – no nieces or nephews at this point
- Robert died with no children in 1983 – nieces and nephews had been born
- Nieces and nephews were entitled to Robert's half interest
- For William – was there no one whom the interest could have vested in interest before Williams died?
- **Held:**
- Fourth rule of rules governing legal remainders – remainder fails unless it is vested during the continuance of the particular estate or at the moment it determined
- At time of Williams' deaths, no nieces or nephews – gift to them was invalidated

*W's portion fell into residue*



## ① Fatac Ltd. (In liquidation) v Commissioner of Inland Revenue (2002) NZCA

F: Owner granted right to use land under a 12 year lease, renewable for a further 3 years. Used the terms "tenanted".

H: terms used by the P's irrelevant, will look at whether there is EXCLUSIVE POSSESSION

- also there will be no tenancy when the occupier's right to possession may be terminated for reasons not related to the land.

## ② Mackinnon Estate v Mackinnon (2010) ONCA

- made a distinction between license and tenancy - important as license does not create interest in estate while a tenancy (even tenancy-at-will) does
- refers to English cases Errington v Errington, Cobb v Lane, and SCC case Ocean Harvesters Ltd (1974)

GP: occupier in exclusive possession is prima facie a tenant, unless there are evidence that show intention to negotiate creating a tenancy

- words or terms not material, but court will look at conduct of the parties and the particular circumstances

## ②.1 Spencers case (1582)

F: A tenant under a lease covenanted to build a wall on his land. He assigned his tenancy to another person, without having built the promised wall. Landlord took action against the new tenant to compel him to build the new wall.

H: Despite no contract b/w LL & new Tn covenant in lease enforceable against the successor in title, provided that:

- ① it was intended to bind successors in title
- ② it "touched and concerned the land"
- ③ there was privity of estate b/w the parties

## ③ Merger Restaurants v DME Foods Ltd (1990) NBCA

F: Merger claims granted exclusive right to parking by the lessor before takeover, who is also lessor for DME, Takeover says it has power to assign property to DME

H: whether a covenant runs with the land, it must "touch or concern" subject matter of lease (nature, quality, value) of land - follows Spencer's Case rule

Decision: Parking essential to well-being of business cannot be considered collateral

Upheld TJ's decision on Merger's claim

## ④ Sundance Investment Corp v Richfield Properties Ltd (1983) ABCA

F: Sundance wants to sublet part of its lease to Swiss Chalet. Richfield (LL) refused as Swiss Chalet will bring "static parking" and congest parking, which will affect business of Beaver, another tenant, and will affect Richfield financially

H: Burden is proof on tenant to show LL's refusal is unreasonable - it is not unreasonable if the LL financial interest is affected

See Also ↓

## 1455202 Ontario Inc v Welbow Holdings Ltd (2003) ONSC

with

When is consent unreasonably held:

- burden on tenant to prove
- information available to LL and reason for refusal is what matters
- LL don't have to prove refusal is justified, as long as LL's decision is "reasonable"
- LL can uphold if transfer diminishes the value of LL's rights
- likelihood of proposed assignee to default may be reasonable ground
- past precedents don't dictate, but question of reasonableness is one of facts

### **SOUTHWARK LBC V TANNER [2001] 1 A.C. (H.L.)**

- **Facts:**
  - Appellants live in 2 flats owned by London Boroughs of Southwark and Camden.
  - Can hear all sounds made by neighbours because the flats have no soundproofing.
  - No guarantee from landlord promising sound insulation, only to keep 'in repair'
  - Appellants try to claim under the CL covenant for quiet enjoyment. Both agreements contain words like "right to enjoy the quiet occupation of".
- **Issue:**
  - Does the sound from other tenants constitute a breach of the covenant?
- **Held:**
  - No breach
- **Reasons:**
  - **Test:** What should have been reasonable expected by the appellants at the time of signing the lease
    - The lease must be construed against the background facts which would reasonable have been known to the parties at the time it was granted.
    - The cause of the noise was fairly within the contemplation of the parties when the lease was signed (i.e. there was a terrace on the roof implying that there would be people walking around up there)
  - **Obiter:**
    - Court admits regular excessive noise could constitute a substantial interference. (disagreeing with some of the case law mentioned below)
    - **What is an interference?**
      - *Browne v. Flower* (1911): physical interference, personal annoyance arising from noise or invasion of privacy is not enough.
      - *Owen v. Gadd* (1956): "some physical or direct interference"
      - *Jaeger v. Mansions Consol* (1903): 'physical not metaphysical nature'
      - *McCall v. Abelesz* (1976): not confined to direct physical interference...extends to any conduct...that interferes with the tenant's freedom of action'
    - **Who does it apply to?**
      - Doesn't apply to parties with better claim than landlord (title paramount)
      - *Albamor Construction & Engineering v. Simone* (1995): other tenants causing a disturbance which landlord could have stopped but didn't.
      - *Curtis Investments Ltd v. Anderson*: held that actions of other tenants do not constitute a breach.
      - *Woodfall's Landlord and Tenant* (article): must be consent or active participation on the part of landlord to be liable for breach of covenant

### **PETRA INVESTMENTS LTD V. JEFFREY ROGERS PLC, 2000**

- **Facts:**
  - Landlord of a large building wanting to rent out to a few ladies' fashion retailers.
  - Lease included a clause listing things the landlord was entitled to do (including alteration of the building, the renting for any purpose etc.)
  - Landlord wanted to bring in a Virgin Megastore.
  - Knew of the proposal, the tenant agreed to accept a reduction in service charge as a settlement of any claim that it may have had regarding 'the creation of the unit'.
- **Issue:**
  - Does the reduction in service charges settlement negate or limit the tenant's ability to bring an action?
  - What constitutes a derogation
- **Held:**
  - For the landlord.
- **Reasons:**
  - 1. The settlement excludes actions regarding the creation of the megastore, but can bring action regarding the way the landlord has allowed Virgin to do business (i.e. signage and monopolization of entrance way), but found that this is not a breach, its only poor commercial judgement, which the landlord is entitled to make.
  - 2. If there hadn't been a settlement, claimant's proposal to rent to Virgin "risked being in breach" of the obligation to build a retail shopping centre.
  - **Test:** whether the action complained of rendered the premises unfit or materially less fit to be used for the particular purpose for which the demise was made (*Browne v Flower*)
  - *Chartered Trusts v Davies*: derogation from grant when a landlord leased out adjacent spaces to a pawnbroker who attracted clientele that deterred the tenant's customers; and the landlord had the power to do something about it.
  - **Ratio:**
  - When establishing what is implicit, must consider purpose of the transaction:
    - Look at context, including, but not limited to the obligations expressly agreed by the parties, but can't be responsible for everything that might cause a negative effect, foreseeable or not.

### **(1) HIGHWAY PROPERTIES V KELLY, DOUGLAS & CO. (BC SC, 1971)**

- **Facts:**
- A major tenant in a shopping centre ends an unexpired lease; landlord resumes possession with notice that tenant will be held liable for damages suffered because of wrongful repudiation of the lease
- Clauses in the contract which P alleged D breached
- Sent letter to D stating landlord treating the tenancy as over but reserving right to sue for prospective loss
- P claiming damages for loss suffered of rescission of the contract AND for prospective loss resulting from the D' failure to carry on a supermarket business in the shopping centre for full term of the lease
- **Issue:**
- What is the measure and range of damages that landlord may claim for repudiation by the tenant?
- **Held:**
- In favour of the landlord—same damages as repudiation of a contract
- **Ratio:**
- A commercial is a contract and has the full armoury of remedies ordinarily available to remedy repudiation of covenants
- Damages are not limited to accrued rent to date of termination
- **Reasoning:**
- Although by covenant or by contract the parties can add/modify/subtract from the CL, the "estate" element is still the pivotal factor in leases
- **Three courses of action for landlord when tenant is in fundamental breach:**
  - 1. Do nothing to alter relationship and insist on performance and sue for rent or damages
  - 2. Choose to terminate lease, retaining right to sue for rent that is due, or for damages to the date of termination for previous breaches of covenant
  - 3. Advise tenant that landlord wants to re-rent property on tenant's account and enter into possession
- Commercial contract that does not involve an estate in land, innocent party has an option to terminate the contract which results in its discharge when election is made and communicated to wrongdoer
- Still may have a right to damages for prospective and accrued loss
- Parallel situation in leases: principles of surrender
  - Surrender: On material breach or repudiation of a lease, the innocent party does an act inconsistent with the continued existence of that lease
  - Goldhar case: held that surrender where landlord re-let premise was not only a termination of contract, but also the obliteration of all terms of the lease that supported claims for prospective loss
  - Doesn't apply to cases where both parties showed intention in the lease to recognize a right of action for prospective loss upon repudiation
- Artificial barriers to relief have come from overextension of doctrine of surrender
- Election to insist on lease or terminate it simply goes to measuring damages

### **(2) JW LEM, "ANNOTATIONS: UNISYS CAN. INC. V YORK THREE ASSOCIATES INC"**

- Many academics and practitioners don't like decision is Highway Properties
- Argue landlord in a commercial lease should not to have the right in face of tenant repudiation to do nothing to alter relationship and insist on performance
- there is an obligation of landlords, like any other contract, to mitigate losses
- Highway Properties has been reaffirmed: *607190 Ontario Inc. v First Consolidated Holdings Corp.* (Ont Div Ct., 1992)
- *Unisys Canada Inc. v. York Three Associates* (Ont SC, 1999) almost overturned
  - Held landlord had duty to mitigate damages by not only finding a replacement tenant, but by also renegotiating with the repudiated tenant
- Overruled by ONCA that trial judge made error in penalizing landlord for its failure to mitigate
- CASE QUESTIONS/NOTES
- Since Highway Properties, held that a fundamental breach of the lease by the landlord triggers right of termination on part of the tenant (*Shun Cheong Holdings BC Ltd. v Gold Ocean City Supermarket Ltd*, BCCA, 2002)
- Letter is key - Highway Properties—courts require notice if landlord wants to claim prospective damages - have to give sufficient and timely notice (*Langley Crossing Shopping Centre Inc v. North-West Produce*, BCCA, 2000)

### DAVIDSON V. TORONTO BLUE JAYS 1999

- No right of management to revoke patron's licence to attend a game (he hadn't broken any laws) and contract terms were strictly construed against the party that drafted the terms (i.e. management)

### HURST V. PICTURE THEATRES LTD

- Ticket purchaser has right to remain and attend performance: licence granted included clause not to arbitrarily revoke the licence during performance (implied behavioural standards)
- Forced to leave wrongfully may allow for damages for assault + false imprisonment  
*license is proprietary, almost personal property*

### DORLING V. HONNOR MARINE LTD

- Summary:**
- Benefit may be capable of assignment (depending on terms of contract)
- A licence mixed with a recognized interest in land (i.e. profit à prendre) is added on the valid real property right

### TORONTO (CITY) V. JARVIS 1895

- Facts:**  
Landowner (Severn Sr.) gave permission (conveyance) to Toronto to build drain through his land. Sold land to his son in 1879 and died in 1880. George (Severn Jr.) knew about father's agreement with city. Conveyance was registered.
- Question:** did registry laws apply to the City's interest?
- Severn Sr. made mortgages under which Jarvis Sr. became a purchaser of the property for valuable consideration: land later became vested in respondent (Jarvis Jr.) who registered his title.
- Jarvis then brought action to recover for trespass against the City when they entered property to perform certain works in connection with the drain as well as damages for maintaining the drain.
- No City by-law to authorize taking of land for drain
- Held:**  
City of Toronto's interest was an interest in land that could be registered
- Ratio:**  
If intention found to give either title or easement for the drain, then agreement must have been for interest in land
- Since City acted on agreement by installing drain, court of equity would say specific performance of a lease for interest in land.
- If deemed licence rather than lease, then the interest would be deemed irrevocable as soon as money spent on the drain by the City
- However, Court concluded Jarvis Jr. was not bound by the appellant's interest because he didn't have sufficient notice (dismissed) – Court doesn't make determination re: if it is a licence or lease

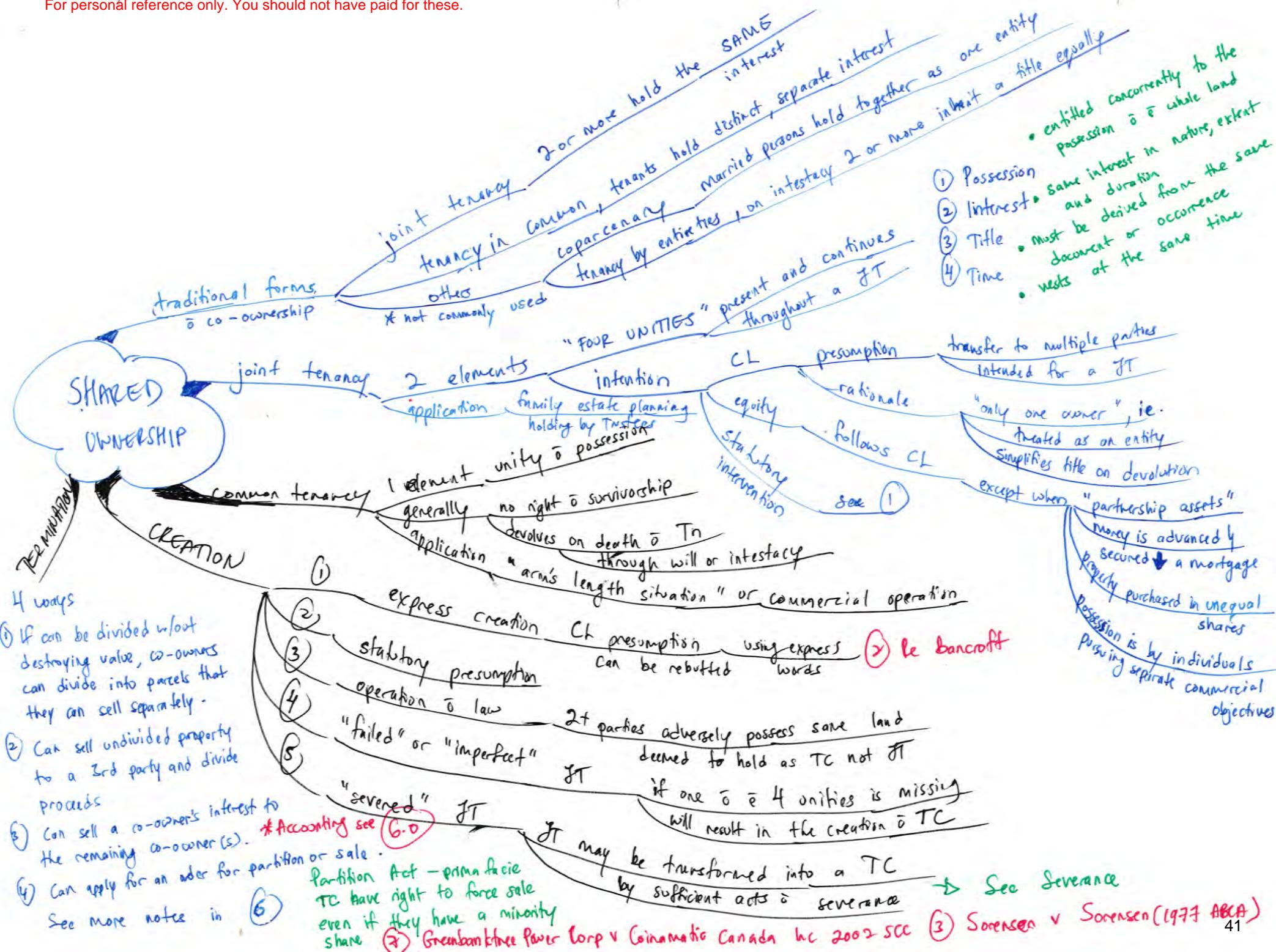
### LLOYD V. DUGDALE 2001:

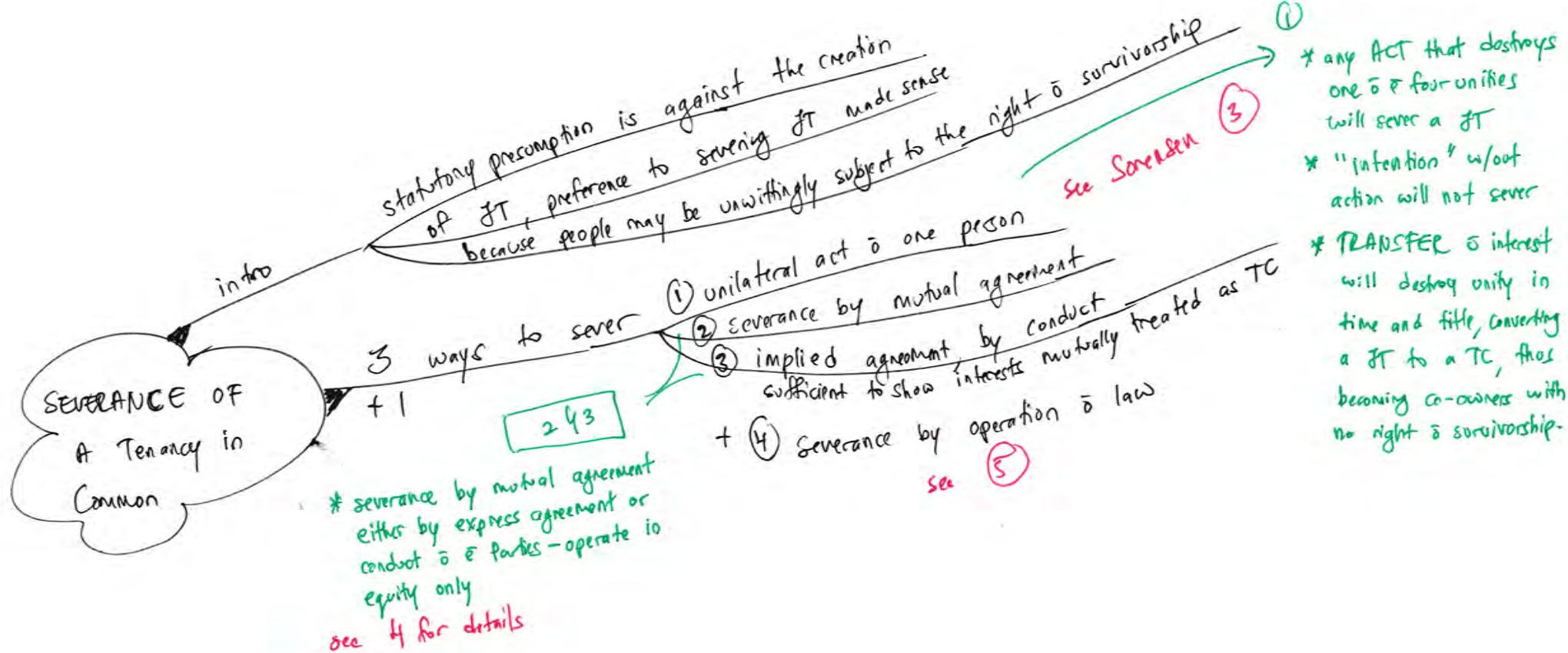
- Summary:**
- No general rule that court will impose constructive trust on a purchaser to give effect to possible encumbrances or prior interests made known by a vendor
- Stating possible encumbrances prior to a sale satisfies a vendor's duty

- Court won't impose constructive trust unless satisfied that the conscience of the estate owner is affected such that it would be inequitable to allow the estate owner to deny a claimant an interest in the property
- Whether it is "inequitable" is determined by questioning whether new estate owner has undertaken a new obligation to give effect to the relevant encumbrance or prior interest
- Only if so will a constructive trust will be imposed
- A contractual licence is not to be treated as creating a proprietary interest in land to bind 3rd parties who acquire the land with notice of it, on notice alone
- Must show proof that a purchase price has been reduced with agreement that new owner would give effect to relevant encumbrance/prior interest may indicate transferee has undertaken a new obligation to give effect to it

## 6. Residential Tenancy Reform: General Principles

- Reasons:**  
Up to the 1960s, most of the law was CL.  
Reason for reform was the major power imbalance between landlords and tenants  
recognition that to landlord, residential unit is an investment and going concern.  
To the tenant, it is a home and the tenant has privacy and human interests that must be balanced against the landlord's economic concerns.
- Areas of Reform:** 10 major areas:
  - more security of tenure
  - increased notice periods for tenants to leave their homes
  - fixing of standard obligations of both landlord and tenant (tries to share responsibilities and rights in a fair and rational way)
  - increase in tenant's remedies;
  - limitation of a landlord's self-help remedies
  - establishment of special judicial procedures (informal, quick, and cheap)
  - prohibitions on the bargaining away of statutory rights;
  - removal of various relics affecting the general law of landlord and tenant;
  - the creation of advisory boards; and
  - rent control mechanisms
- Human Rights legislation intended to protect against discriminatory rental practices, (*Individual Rights Protection Act* (s. 4) – "One cannot be denied housing on the basis of discrimination")





## STATUTORY INTERVENTION

- (1)
- *Law of Property Act*, s. 8: reverses the CL presumption and says that with transfers to multiple parties, presumed that a TC is created absent contrary intention (rebuttal).
    - CL presumption still applies to *executors* and *trustees*.
    - *Wills Act*, s. 26: need to clear intention and the four unities to rebut the presumption of a TC.
  - *Matrimonial Property Act*, s. 36(1): presumption of advancement will not apply to a transaction between the spouses in respect to property acquired by either party. Still need four unities and intention for joint tenancy. Only applies on marriage breakdown

### ON. LAW REFORM COMMISSION, REPORT ON BASIC PRINCIPLES OF LAND LAW

- CL there was a presumption of JT so that a transfer of title to co-owners produced a JT if the four unities were satisfied and an intention to create a tenancy in common was not established
  - This presumption does not apply to personal, movable property
  - There is a statutory override of this presumption (i.e. legislation presumes TC unless an intention to create JT sufficiently appears on the face of the letters patent, assurance or will (s. 11 Property Law Act))
- 3 types of circumstances there is an equitable presumption in favour of TC:
  - Partnership assets
  - Mortgages
  - Where the purchase price for the property is provided unequally
- Where 2 individuals purchase property and contribute equally, property is put in the name of one person
- Registered owner treated as if they hold legal title on trust for both parties, and parties would own the equitable interest as TC

(2)

### RE BANCROFT, EASTERN TRUST CO V CALDER (1936, NS SC)

- **Facts:**
  - Sam Bancroft: testator
  - Widow: Clara Bancroft
  - Children:
    - Percy (m)
    - Aubrey (m)
    - Florence (f)
    - Minnie (f) (deceased)
      - Jean (f)
      - Paul (m) (deceased)
        - John, Hugh, Edward, Paul
- Eastern trust is the sole trustee under the testator's will
- Testator divided his will into two shares:
  - 1st share given to wife for her life.
  - 2nd share divided into four equal shares divided between Percy, Aubrey, Florence and the last, split between Minnie's kids (Paul deceased)
- **Issue:**
  - Should the share that had been given to Paul prior to his death, go to his surviving sister, to his estate, or to his children? And, were Paul and his sister JT or TC?
- **Held:**
  - JT was created. Nothing in will that shows intention to divide the income between Paul and his sister (i.e. no words of severance) and thus create a TC.
- CL presumption of a JT applies
- **Reasoning:**
  - dealing with movable property, so s. 11(2) of the Property Law Act doesn't apply.
  - Presumption at CL of a JT, unless there is intention (words of severance) to divide the property and create a TC
  - Word 'equal' is used in the will, this is not one of the words of severance listed as creating a TC (but 'equally' is)
  - Just because the testator said that he wanted to benefit both of Minnie's children following his wife's death in another part of the will, doesn't mean that he intended to create a TC during her lifetime.
  - Testator was dealing with the apportionment of the income at two entirely different periods - one before and the other after his wife's death.
  - No indication in will of intention to divide income between the children of Minnie

③

### Re Sorensen v Sorensen (1977) ABCA

F: H & W divorce, they had JT on some lots of land, W ill w/ terminal illness and wanted to sever JT to she can pass property to her son, she made several attempts to sever including the creation of a trust where she held it in trust for her son

H: the trust severed the JT, but her other attempts did not (eg put it in her will, since survivorship crystallized upon death).

The trust applies the presumption of advancement, thus there was a valid gift of beneficial interest in the property to the son. Even though the son's title was equitable, it severed the JT.

④

## MUTUAL SEVERANCE

### i) agreement

- A sale or lease by all JTs does not result in a severance because this arrangement is consistent with the continuation of JT in proceeds of sale or in the new property
- agreement to sell in the future will not transform the nature of co-ownership.
- If there is an agreement to sell and thereafter divide the proceeds of sale, this would result in severance (cannot later be changed by abandoning a plan to sell)
- There is severance when the dealings stop short of a firm/explicit agreement

### ii) by a course of conduct/dealing

- **Wills:** course of dealing severance may be found when co-owners do mutual or joint wills
  - Usually a family arrangement; wish to give things to children, is the jointly held property held within the mutual/joint will regime.
  - JT is not normally determined by the will; survivorship is the main.
  - Cases of mutual wills, did they mean to embrace joint tenancy within it, or will the joint tenancy operate outside of the will?
  - Question of fact of how parties wished to handle their interests. What difference does it make?
  - affects gift to children if there is a mutual will, then survivor only gets it for life, but if one gets property by survivorship, ownership is absolute.
- **Court Proceedings:** per s. 19 of *Law of Property Act*, if an interest in land is subject of a court order and it is held as a JT, granting of that order will sever it and create a TC
  - Partition; *Law of Property Act*, s. 15(2) and 17 Three types of orders:
    - a) a physical division of all or part of the land: between the co-owners,
    - b) sale of all or part of the interest of land and the distribution of the proceeds of the sale between the co-owners, or
    - c) the sale of all or part of the interest of one or more of the co-owners' interests in land to one or more of the other co-owners who are willing to purchase the interest.
- **Others:**
- **Inter Vivos Gift or DMC:** did not work in *Sorensen*; as they were never delivered
- **Statement of Intention:** won't work in Canada
- **Action for partition:** On granting of order, the property is deemed severed.
- **Declaration of Trust:** valid in *Sorensen*, produced a severance in equity, husband gets legal title.
- **Lease:** assignment of lease or assignment - severance

6-D

5

**(d) severance by operation of law**

- Severance will occur on bankruptcy.
- Severance will occur by judicial sale
- Severance will likely occur by seizing of property via lawful execution procedures
- Murder by one joint tenant by the other produces a severance in equity (based on principle that one should not be permitted to profit from an illegal act)
- Ownership break down: Note: partition and sale by court order is not available in Alberta for chattels (see Part 3 of *Law of Property Act*). Possible orders re: property (sub. 15(2)) On what ground may a court refuse an order of partition and sale under part 3? If an order is made, there are financial issues to be resolved. See s. 17, especially subsection 2.
- *Law of Property Act*, s. 15: (1) a co-owner may apply to the court for an order terminating the co-ownership of the interest in land for which he is the co-owner; (2) the court shall make an order directing: (a) order a physical division; (b) order a sale, followed by distribution of the proceeds; (c) order the sale of the interests of one or more of the co-owners to one or more of the other co-owners who are willing to purchase the interest.
- On what grounds may a court refuse an order of partition?
  - *Law of Property Act*, s. 16: Notwithstanding s. 15(2), if an order is made under section 15(2)(b) and the highest amount offered for the purchase of the interest in the land is less than the market value of the interest, the Court may: (a) Refuse to approve the sale, and (b) Make any further order it considers proper.

**(b) accounting between co-owners****• General Rule:**

- Unity of possession: (i.e. each co-owner has same right to possession of the whole property)
- a co-owner does not have an obligation to account to the other co-owners for the benefits derived from possession.
- Non-occupying co-owners cannot make a claim (for compensation) against another co-owner who is lawfully exercising his/her rights

**ON. LAW REFORM COMMISSION, REPORT ON BASIC PRINCIPLES OF LAND LAW**

- 5 Exceptional situations where one co-owner may be required to account to other co-owners for benefits of occupation:
  1. Ouster
    - Liability to pay occupation rent when one co-owners unlawfully "ousted" another
    - Includes expulsion, violent or threatening conduct, making conditions for JT intolerable
  2. Agreement
    - Co-owners must agree to having sole possession
  3. "Statute of Anne"
    - Action against co-tenant for receiving more than just share
    - Must account for what he receives from 3rd party, not what he takes from the soil of his own exertions
    - Ex. *Henderson v. Eason* (1851): co-owner in sole occupation farmed property. Not liable for profits because of exertions rule
  4. Waste
    - Tenants in common are liable to their co-tenants for waste
  5. Equitable Accounting
    - What is just/equitable depends on circumstance of each case
    - If one tenant has made improvements which have increased selling value of property, other tenant cannot take advantage of increased price without submitting to an allowing for improvements (*Mastron. v Cotton*)
- Claiming for Expenditures Related to Property
  - Reimbursements have been obtained for: mortgage payments, improvements, taxes, insurance premiums, upkeep/repairs, expenses from litigation with 3rd party

6

### "ANNOTATION" BY J.W. LEM AND B.G. CLARK (2002)

- Partition Act governs co-ownership arrangements where there is no K
- Act provides where co-owners cannot agree on how to govern, one co-owner can demand the co-ownership relationship be ended by court order - "partitioned"
- "Partitioned": divided up, with portions of fee granted exclusively to each co-owner
- If impossible (ex. single building) court can order it be sold & proceeds divided
- Consequences of forced sale are not always equitable
- Very small minority co-owners force sale against others' wishes because they have *prima facie* right to force a sale (*Greenbanktree Power Corp*, 2002)
- Judicial attitude is hesitant to enforce when seemingly malicious intent (*Greenbanktree Power Corp*, 2002)

#### (a) partition and sale

- Occurs with the release of one co-owner's interest to another, or by transfer by all.
- CL provides no remedies of partition and sale to JTs or TCs.
- The power to order a partition was conferred by statute in the mid-19<sup>th</sup> century. The courts had to grant a partition however inconvenient or undesirable partition may be. The power of sale, added in the 19<sup>th</sup> century, allowed a court to order a sale in lieu of partition. But the court did not have the power to refuse an order altogether.*
- In those CL provinces that do not rely on the received English law, it's assumed that courts have discretion, to refuse to grant an order (in interests of fairness & justice) but *recognized that co-owner has prima facie right to partition or sale*.
- These same criteria apply to commercial relationships, but courts seem less inclined to stop one co-owner from bringing these property relationships i.e., those motivated solely by profit potential – to an end. Parties may wish to contract out of the right to seek partition & sale
- Modern Canadian cases hold that a contractual bar will normally serve to convince a court that it should exercise its discretion not to grant partition/sale.*

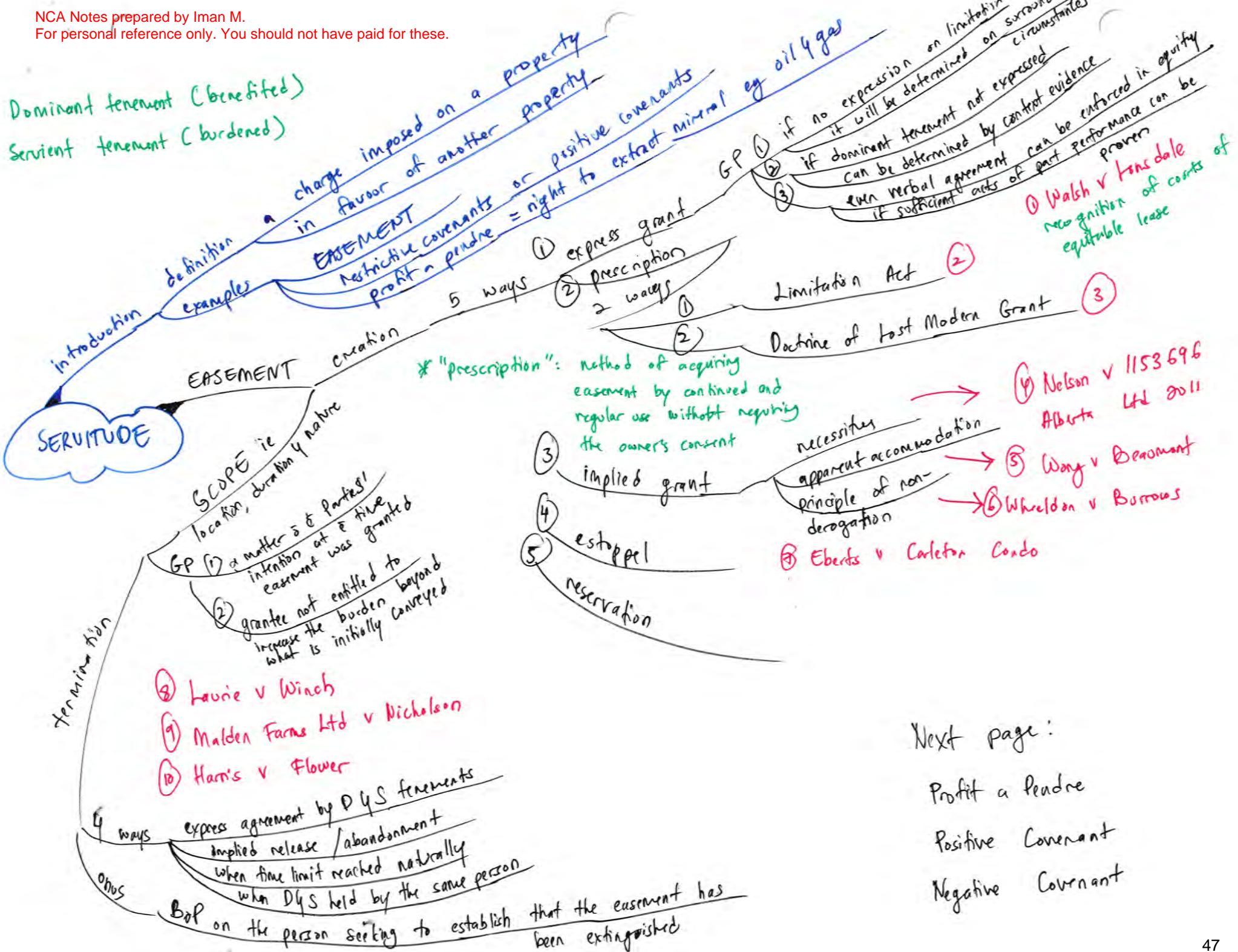
7

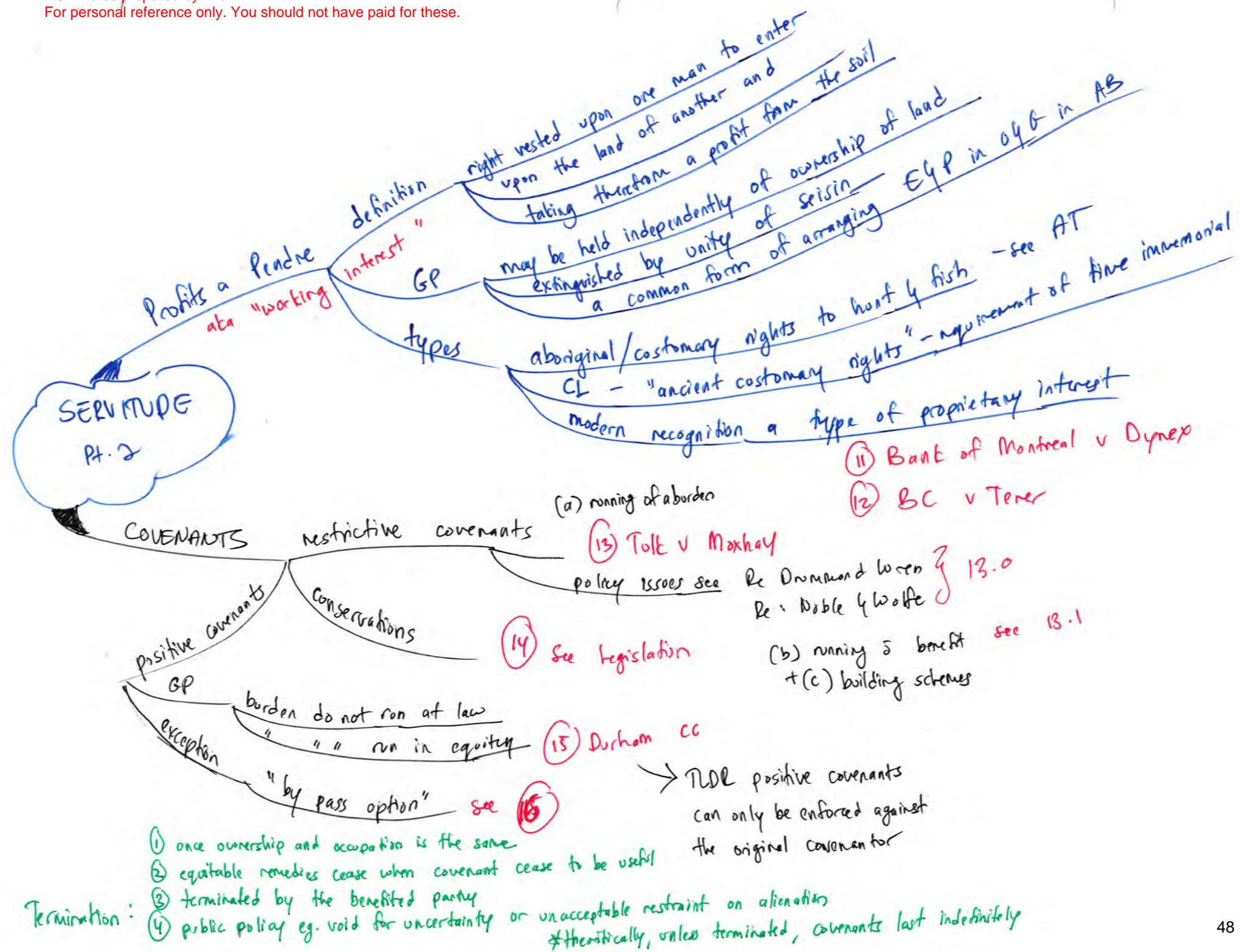
### GREENBANKTREE POWER CORP. V. COINAMATIC CANADA INC. (SCC, 2002)

- Facts:**
- Applicant company held small percentage interest in 5 properties, held as TC w/ other owners.
- In 2001, respondent, Metcap paid \$107 million for interest of all co-owners except GBT, which rejected the offer as being too low.
- After sale closed, GBT applied under ON's Partition Act for order for sale of properties & division of proceeds.
- Metcap argued that the order would cause him undue hardship (as a co-owner)
- Issue:** Can the Court under the Partition Act, compel sale of the co-owned party against the wish and with ultimate prejudice to the majority co-owner?
- Held:**
- Court has limited discretion to intervene & deny a company with shared interest in land their *prima facie* right under *Partition Act* to force a sale of the land.
- Sale ordered

Dominant tenement (benefited)

Servient tenement (burdened)





## (2) Limitation Act, requirement:

- ① use of enjoyment ~~must~~ is right & way under a claim of right
- ② continues, uninterrupted, open and peaceful for a period of 20 years prior to the claim
- ③ if enjoyed for 40 years, the claim is absolute and indefeasible

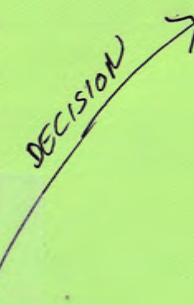
### EXCEPTION:-

- ① If enjoyed by some express grant, agreement or written consent.

- ② There was interruption and the person interrupted:
  - (a) had notice
  - (b) acquiesced
  - (c) for one year

## (3) Doctrine of lost Modern Grant

- Same requirement as L.A., except the 20 years does not have to be immediate
- Additional requirements
  - ① enjoyment must not be permissive
  - ② nature of user cannot be changed by owner of dominant tenement



## (4)

### Nelson v 1153696 Alberta Ltd 2011 ABCA

- Nelson & Stelar owned adjoining lands. S constructed road and leased the road to a resort. Nelson later purchased land only accessible using that road. Stelar knew but they not able to settle a formal agreement. Stelar sold and new owner will not let Nelson use the road

Two issues:

- ① Have the road been dedicated to the public?
- ② Is there an easement of necessity?

- ① Lease inconsistent with intent to dedicate for public use - No proof of intention to dedicate for public use and relinquish all proprietary value
- ② Easement granted on the basis of necessity - if property when severed is inaccessible without easement over another's property, it will be granted to ensure use of land.

### Analysis on ①

- public highway can be created by statute or common law, by proof of dedication and acceptance by the public of the land
- 2 conditions of dedication (1) intention on part of owner to dedicate and (2) intention was carried out by way of being thrown open to the public

### Analysis on ②

- easement of necessity can be granted when the implied R.O.W is Absolutely Necessary for the use of the property ie. without easement the land would be rendered useless and unusable
- Necessity must have also existed at the time of the severance of title of the servient and dominant tenement

### ⑤ Wong v Beaumont Property Trust Hd (1965) QB Eng.

- W leased a basement for his Chinese restaurant. The lease said he should control all smells, comply with health regulations and not cause nuisance to the landlord or other occupiers.
- The rent was inadequate, a larger fee was needed but the landlord rejected it: an easement should be implied so that W could comply w/ the terms of his lease.

TDR: "common intention" as the lease of the basement was for the Chinese restaurant.

### ⑥

### Wheelton v Burrows (1879) Eng

- workshop next to a land, sold separately, new owner of land built building blocking light into the workshop

Held: implied grants should pass down and continue but require

- ① must be used at the time of transfer
- ② must be reasonably necessary for enjoyment of property

However in this case, land sold separately and no stipulation was made wrt light.

### ⑦ Eberks v Carleton Condominium Corp. No. 396 (2008)(ONCA)

set out three part test to establish

#### ESTOPPEL:

- ① Owner of land induces, encourages or allows claimant to believe he will enjoy some benefit or enjoyment over the owner's property.
- ② In reliance of ①, the claimant acts to his detriment to the knowledge of the owner.
- ③ The owner then seeks to take unconscionable advantage of the claimant by denying him of the benefit he expected to receive.

**LAURIE V. WINCH SCC 1953**

- **Facts:**
- Farmland (dominant tenement) was subdivided into residential lots. The easement, which was granted as a perpetual right-of-way over a thin lot near the farm, was split into many easements, one of these being attached to each new lot.
- P, owner of thin lot, wants to get rid of right away, which was granted years ago.
- P argued the use of the thin lot, when the easement was granted, ...as for farm access only, and was no intended for the type of residential use that occurs today.

- **Held:**
- The SCC ruled in favour of the D and allowed the easement to remain:

- **Reasoning:**

- Nothing to suggest that when the grant was given, the parties contemplated that the lands would always be used for agricultural purposes, or that changes in the use of the dominant lands would affect the continued existence of the easement
- The original easement of access remained available to the owners of the dominant lands, even though now there were a number of owners using the land as residential property, not as farmland.
- This holding is consistent with the rule of construction that provides than an easement is presumed to attach to every part of the dominant lands

**MALDEN FARMS LTD. V. NICHOLSON**

- **Facts:**
- P owned a parcel of marshy land used primarily for duck hunting. P's predecessors obtained an express grant of a right of way from Barron, who owned an adjoining property to the east.
- The grant gave the predecessors, "their heirs and assigns and their agents, servants and workmen, a free uninterrupted right of way ingress and egress for persons, animals and vehicles through along and over" a 20-foot strip of land running toward the lake along the easterly boundary of Barron's land from a public road called the Lake Shore Road, and then running across the southern portion of the servient tenement to the boundary of the dominant tenement.
- The owners of the dominant tenement were also granted the right to "maintain a gate at each of the said way with the privilege of having the said gates opened or locked, whichever they desire".
- Barron later sold land on the servient tenement on both side of the right of way to predecessors in title to the D, Nicholson, together with a right of way over the right of way already granted to the P.
- The P later obtained the rest of the Barron's land, including the right a way. The P is now suing the D for making excessive use of the right away, contrary to the terms of the easement granted to the D's predecessors in title and using the southern portion of the original right of way for picnic-tables and other purposes connected with the operation of a beach resort.
- Essentially – easement now has increased traffic from a commercial business, when it was granted for just private use.
- **Held:**
- Court found the D's use of the way "constitutes as unauthorized enlargement and alteration in the character, nature and extent of the easement."

- A grantee cannot increase the original burden, unless the increase was intended at the time of the grant. It was not here, different from Laurie.
- \*\*Ziff says at one-point easements were owned by same people. This should have destroyed the easements, as dominant and servient owners cannot be the same.
- **Laurie vs. Nicholson:**
- In both cases, the use of the dominant tenements changed (farm>houses, hunting>recreation centre)
- However, the servient tenements were much different. In Laurie, it was a thin piece of land that looked exactly like a lane with no other purpose. In Nicholson, it was a marsh used extensively for hunting.
- Servient properties aren't supposed to be full time servants of the dominant party, they are supposed to have a purpose themselves.

10

c) **the rule in Harris v. Flower**

- Easement over servient lands for the benefit of the designated dominant tenement cannot be used in a clever way to benefit some other property. (*Harris v Flower*)
  - Ex. Easement over Lot 1 for benefit of Lot 2, but easement-holder is really using both Lot 1 & Lot 2 for main purpose of gaining access to Lot 3.

(11)

**BANK OF MONTREAL V. DYNEX**

- **Facts:**
- Dynex had gone bankrupt and had given overriding royalty and net profit interest in oil and gas mines (PROFIT A PRENDRE) to other companies. This means that Dynex was giving a share of the profits from resource extraction to other companies in exchange for money or services.
- Later, Dynex defaulted on a loan from the Bank of Montreal, which had a security claim to the property of Dynex and was petitioned into bankruptcy.
- The bank brought an action against Dynex and the other companies claiming that it had priority to gain access to liquidated assets because of its security claim to the property of Dynex.
- **Held:**
- other companies' actually had proprietary interests in the royalties and therefore, their interests came before the banks non-proprietary interest.

(12)

**BRITISH COLUMBIA V. TENER (1985)**

- Wilson J "It is important to note that it is the right of severance which results in the holder of the profit à prendre acquiring title to the thing severed."
- *The holder of the profit does not own the minerals in situ.* They form part of the fee simple What he owns are mineral claims and the right to exploit them through the process of severance. This may be significant when attempting to answer the questions: what constitutes the expropriation of a profit à prendre? (...)
- *Profits à prendre may be held independently of the ownership of any land, (i.e., they may be held in gross).* In this they differ from easements. Alternatively, they may be appurtenant to land as easements are, i.e. they may be a privilege which is attached to the ownership of land and increases its beneficial enjoyment. In this

case the respondents would appear to have a profit à prendre in gross since they do not own any land to which the profit is appurtenant.

- Profits à prendre in gross are extinguished by unity of seisin, (i.e. if the holder of the profit either: releases it in favour of the owner of the land in which the profit subsists; or becomes the owner of the land in which the profit subsists)
- The extinguishment arises from the fact that if the ownership of the profit and the ownership of the land in which the profit subsists devolve on the same person, the profit can no longer exist as a separate interest in the land. The profit merges in the fee and is extinguished.

(13.0)

**Policy issues**

- **Re: Drummond Wren** (CB, 883-884)—SCC granted an order to hold a stipulation that the land not be sold to "Jews or persons of objectionable nationality" invalid for reasons of uncertainty and public policy
- **Re: Noble & Wolfe**—court decided that a restriction on selling to persons of the "Jewish, Hebrew, Semitic, Negro or coloured race or blood" was valid in that its intent was to create a uniform community and there was no reason to extend public policy to invalidate this.

(14)

**6. Covenants and Conservation**

- **Environmental Protection and Enhancement Act, s. 24**
  - Can grant for this benefit to enforce an environmental protection on private land; so it is private land conservation
- **S. 24: Effect of registration 24(1)**
  - An agreement referred to in section 21 that is registered under section 23 and a conservation easement in an agreement that is registered under section 23 run with the land and may be enforced whether they are positive or negative in nature and notwithstanding that the person wishing to enforce the agreement or conservation easement does not have an interest in any land that would be accommodated or benefitted by the agreement or conservation easement. (2) Subject to subsection (3), sections 21 to 23 apply notwithstanding section 48 of the *Land Titles Act*. (3) A conservation easement granted under section 22 is deemed to be a condition or covenant for the purpose of section 48(4) and (6) of the *Land Titles Act*.

(13)

**TULK V. MOXHAY 1848**

- **Facts:**
- Agreement to leave green space in the heart of a Leister Square for people to enjoy.
- plaintiff was the initial owner and sold the land to Elms, who sold the land on to Moxhay. Moxhay wants to build on the green space.
- **Issue:**
- Can a covenant restrict subsequent purchasers of the land?
- Discussion:
- A covenant between vendor and purchaser on the sale of land will be enforced in equity against all subsequent purchasers with notice, independent of whether the covenant runs with the land
- A party cannot use the land in manner that is inconsistent with the contract entered into by vendor (given he knew the terms of contract when he bought it)
- The covenant would likely reduce the price of the land, so it would be inequitable to allow the land to be sold for a higher price than it was
- If an equity is attached to the property by the owner, any person purchasing the property with notice of the equity is bound to the same extent as original buyer.
- Held:
- Unjust to allow a buyer, who knows about covenant, to break it.

a) **the general requirements**i. **the covenant must be negative in substance**

- covenant must be negative in substance; only restrictive covenants are enforced
- Restrictive use, rather than requiring performance
- Test is: can I comply with this covenant by doing nothing, if yes, then it is a restrictive covenant

ii. **covenant must be made for the benefit of land retained by the covenantee**

- Must have intention to run with the land.
- Shouldn't be personal and should involve two parties (dominant and servient).
- Must be capable of benefitting. ("touch and concern"), which land must be easily ascertainable from the covenant document

iii. **the covenant must have been intended to run with the covenantor's land**

- All principles of equity apply (including notice rules)
- Covenant will run only if clear it was intended to run NOT as a personal obligation of the covenantor
- This is one that runs with the land of the covenantor
- Looking at the deed or conveyance, you have to be able to tell which land is subject to this covenant

iv. **general equitable principles apply; including the requirement of notice**

- **including the requirement of notice:**
- \*\*WITHOUT NOTICE, THE COVENANT CANNOT RUN
- It must have been made for the benefit of land retained by the covenantee (touch and concern), which land must be easily ascertainable from the covenant document (*Spencer's Case*)

15

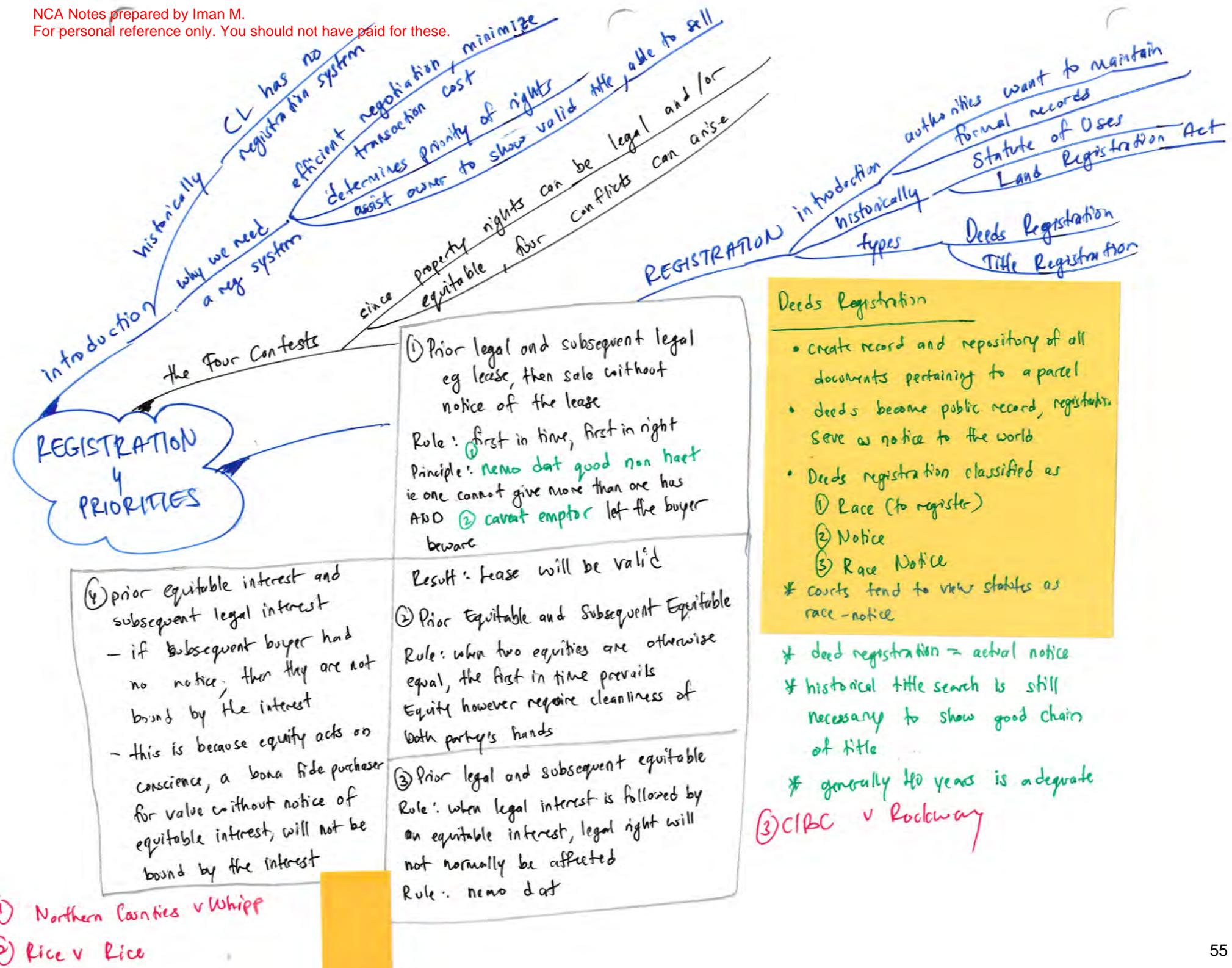
**AMBERWOOD INVESTMENTS LTD. V. DURHAM CC NO. 123 (2002) ONTARIO C.A.**

- **Facts:**
  - Covenant forced condominium owners (not the unit owners) to pay expenses and share costs.
  - Phase 1 is built and the people of Phase 2 can share it. The company responsible for phase 2 has to pay interim costs until everything is up and running (such as for a security guard, air conditioning maintenance, water running)—trustee of something like \$50,000/year.
  - Had to put its hand in the corporate pocket; is the covenantor have to satisfy those conditions? Yes, of course. They made the promise.
  - If the benefit is transferred, the new owner of the benefit can enforce a positive covenant against the original covenantor Phase 2 began to falter; ownership of the phase 2 lands changed hands; one of the new owners of the phase 2 lands said "stuff it"; we personally never agreed to make these payments, we have land subject to them and we knew of them; but we have also read such as
- **Issue:**
  - Whether a covenant to pay certain interim expenses contained in a reciprocal easement and cost sharing agreement (the "Reciprocal Agreement") between owners of adjoining parcels of land is enforceable against the successor in title to the covenantor?
- **Held:**
  - Amberwood is not bound to pay the interim expenses on the basis of the positive covenant contained in the Reciprocal Agreement.
- **Reasoning:**
  - Court declined to abolish the rule against the running of positive burdens because:
    - (i) the complex problems at play could not be easily solved through the necessarily incremental processes of case law development; and
    - (ii) the retrospective effect of a common law ruling could adversely affect existing property rights. In sum, these concerns illustrate the judicial reluctance to create fancy new interest (the *numerous clauses* policy)
  - Upheld the H.L. decision of *Rhone v. Stephens* that affirmed the basic prohibition of the running of positive covenants.
    - "enforcement of a positive covenant lies in contract... enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property."

16

**b) by-pass options**

- **Statutory remedy** - ex. condominium laws, conservation, heritage legislation. Under contract law, burdens can be made to run by creating a chain of covenants
- **Chain of covenants** - you want to put a covenant on servient land; guy you are contracting with; when you sell, you have to get the same covenant and terms.
  - Under this approach, when a party purchasing a property agrees to positive duties, that party might also promise to (i) remain liable for breaches even when these occur after the land is sold by the original covenantor; and (ii) extract similar promises from any party who later acquires the property.
  - this is somewhat problematic.
- **Doublure of Halsall v. Brizell** - Ancient doctrine that a person who is named in a deed and takes benefit under it will be bound by its burdens even if that person did not sign the deed was extended to mean that the benefits of easements could not be enjoyed without also assuming the burdens of the maintenance payments (called the benefit/burden principle)
  - **Four requirements:**
    - (1) The adoption of the benefit must be made conditional on the assumption of the burden;
    - (2) benefit and burden must relate to each other in some way;
    - (3) A subsequent owner will be bound to accept the burden only when there is some means of rejecting/accepting the benefit;
    - (4) The benefit must be one enjoyed as right under agreement
- **Rent charges** - Create a charge that runs with real property, which is called rent charge; It can be variable; What if they create a rent charge to be variable by the amounts of those expenses every year?
- **Austerberry v. Corp of Oldham** (1885) If the parties had intended to charge this land for ever, into whosoever hands it came, with the burden of repairing the roads, there are ways and means known to conveyancers by which it could be done with comparative ease; all that would have been necessary would have been to create a rent-charge and charge it on the tolls, and the thing would have been done. Seasoned real estate lawyers in Upper Canada hadn't heard about this. Why it wasn't used in the Amberwood case? Because no one had heard of it.



### ① Northern Counties & England Fire Insurance Co v Whipp (1884)

F: Appellant executed a legal mortgage to their company, put deeds in a safe which he had keys to. Eventually removed the deeds and gave everything except the mortgage to Whipp - Whipp having no idea the land was earlier encumbered.

H: Court will postpone a legal mortgage to a subsequent legal interest when the legal mortgagee had participated in fraud

Ratio: mere carelessness is not enough, but in this case there is evidence of active fraud

### ② Rice v Rice (1853)

Vendors sold a house for a sum

- They conveyed the title to the Purchaser before the sum is paid in full.

- the purchaser absconded and mortgaged the property to C who had no idea

Issue: Vendors had equitable interest of vendor's lien while C had equitable interest as mortgagee perfected by deposit of title deed.

### ③ CIBC v Rockway Holdings (1996)

- Rockway had license right to remove gravel but did not register it until 18 months later
- Bank registered charge and wants priority over license

Held: bank failed to make inquiry into a prior instrument  
Rockway has priority for the purposes of Registry Act

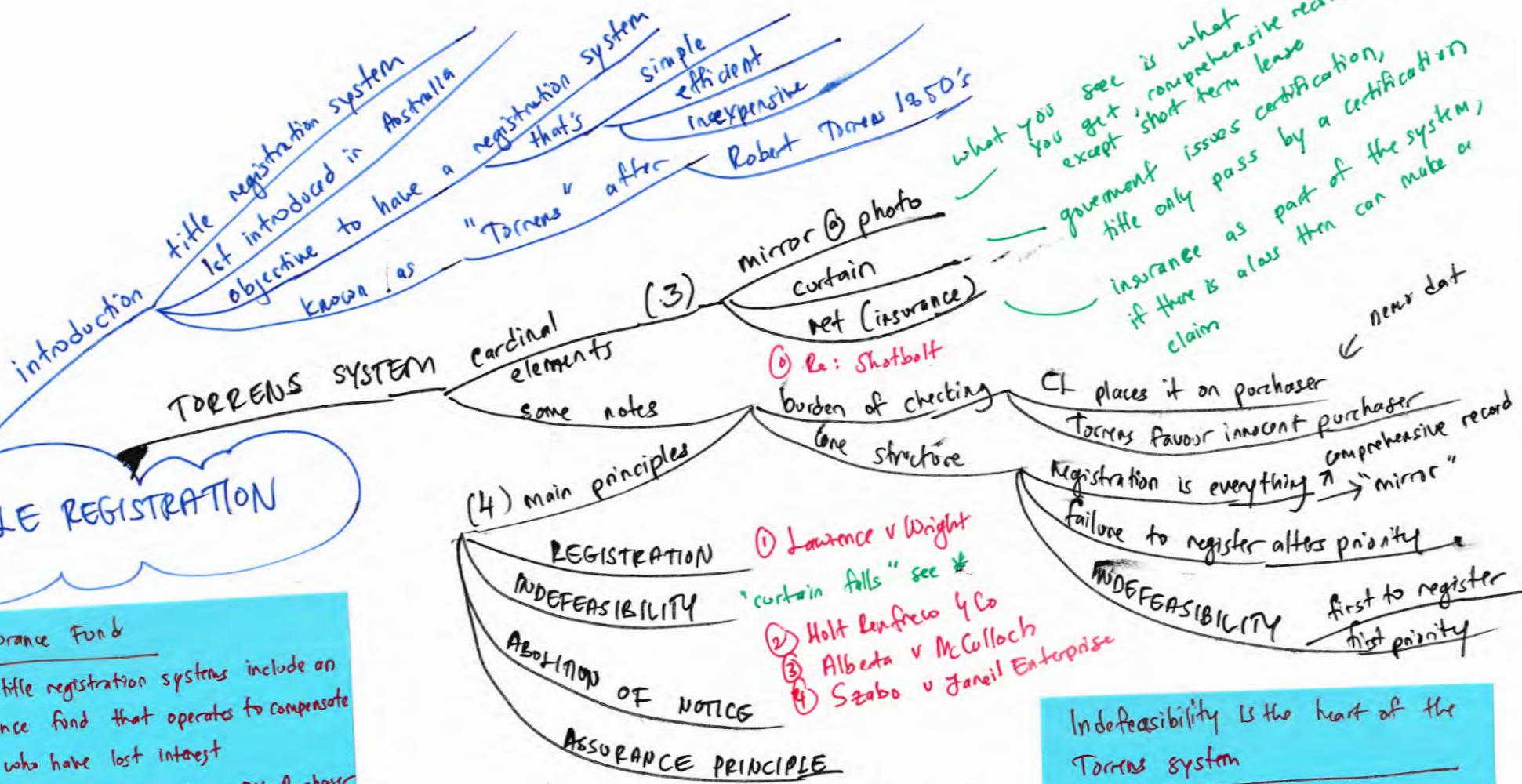
Held: usually time would give priority to the earlier equitable interest.

In this case however, C is mortgagee bona fide while A was the one who "granted" the purchaser by giving him title before full sum is paid.

## TITLE REGISTRATION

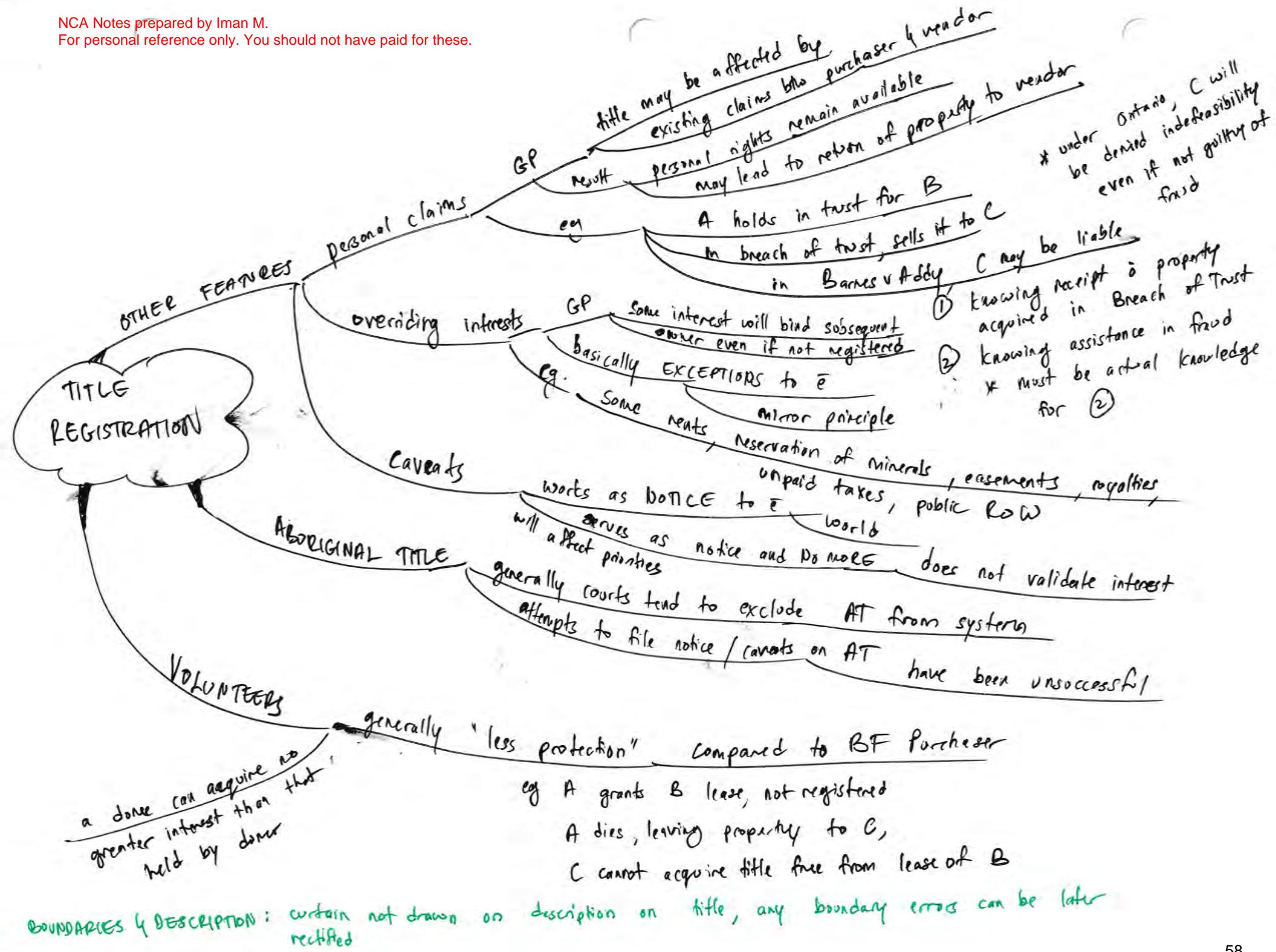
### The Assurance Fund

- Many title registration systems include an assurance fund that operates to compensate those who have lost interest
- Ind. = title means that *Bona Fide Purchaser* may take interest in a property at the expense of the prior owner who was wrongfully deprived
- may seem inadequate to those who want to keep land, but prior owner limited to compensation since system designed to protect interest of *Bona Fide Purchaser* and promote transferability of land
- can make claim if owner deprived due to fraud, mistake or maladministration



Indefeasibility is the heart of the Torrens system

- title indefeasible: cannot be vitiated by some antecedent act
- state registration provide safe harbour from defects in title
- involves "lowering the curtain" on past transactions



### ⑥ Re: Shotbolt (1888)

- in an instructive judgment on the origin and operation of statute, points out that "clearly the intention of the Statute is in gradually perfecting titles by registration"
- also "Registrar has to determine the point of law and validity of documents"
- TLOP: gov. resp to issue title

### ① Lawrence v Wright (2007) ONCA

- Lawrence's home was fraudulently sold to Wright by a fraudster - who registered and took out a mortgage in favour of Maple Trust
- Maple did DD and checked register Tg: overturned the land transfer but held the mortgage as valid

CA: Ontario promotes "deferred defensibility" which means since title was registered fraudulently, then Maple who relies on this

information CAN have their title defeated by original owner, BUT noted if Wright actually sold to BFP then new owner would take good title

⑦

### Holt Renfrew Co v Henry Singer

Hd

- D had a registered lease under a caveat which was renewed a few times
- A 17 year lease was agreed to but not registered
- D negotiated to buy building subject "only to encumbrances noted on certificate of title"
- After purchasing, D filed a caveat with the intention to defeat the unregistered lease.

- It was found that D was considering buying the company who owned the building, but when he found out about the unregistered lease, decided to buy the property instead in order to defeat the lease

HELD: knowledge of unregistered interest and that it will be defeated by concluding transaction is not sufficient to constitute fraud = no fraud, but there is significant dissent

⑧

### Szabo v Janeil Enterprise (2006)

BCSC

- Pl gave previous owner of neighbouring lot "water easement" in exchange for "hydro easement" unregistered
- Pl seeks specific performance of ē easement with new owner
- New owner claims s.29 of LTA that protects purchaser from previous unregistered interests

Held: court found new owners have had constructive notice of ē easement - however fraud is not presumed with mere knowledge - no element of dishonesty  
\* to claim protection under s.29:

- whether suspicion aroused
- whether petitioner did all which was appropriate

(4)

Alberta (Ministry of Forestry) v  
McCulloch ABQB 1991

- Land was sold by S to Df - in fee simple but Crown retains right to repurchase at a fixed price. Interest is registered as a caveat but during transfer to D, the caveat was accidentally discharged. Df learns of this and quickly transferred the land to a company in which he has control and interest in
- Held: AB LTA requires fraud to have notice and an additional act - new company was owned by D so deemed to have notice, transfer was obviously D's attempt to evade his obligation = clear fraud, judgment for