ARTICLE

"THERE'S A MOMENT WHEN ALL OLD THINGS BECOME NEW AGAIN":[1] THE CANADIAN OIL AND GAS ROYALTY – A MODERN RENT CHARGE

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ABSTRACT

While American law recognizes the oil and gas royalty as a real property interest, Canadian law, although based on the American experience, is not as clear. This Article argues that the oil and gas royalty, an integral part of the investment necessary to the operation of the Canadian oil and gas industry, represents a modern example of the rent charge, a proprietary interest in land with origins in medieval common law. The Article makes this claim for two reasons: one is pragmatic, the other theoretical-pedagogical. First, pragmatically, as the value of oil and gas rises precipitously in response to the global supply crunch created by the Russian invasion of Ukraine, exploration for and production of Canadian reserves will expand. Therefore, the owners of those oil and gas reserves will seek to ensure their share in the resulting revenue; recognition as a rent charge provides that security. And second, theoretically-pedagogically, while the oil and gas royalty may be representative of a dying industry in the midst of a world transitioning from fossil-fuel dependency into a clean renewable energy future, the analysis that demonstrates it to be a proprietary interest in land is valuable for what it reveals about real property: its ability to adapt to changing circumstances. Outlining this analytical method provides important guidance as to the flexibility and organic development of the law of real property in accommodating future novel legal relationships. In

[1] BOB DYLAN, THIS DREAM OF YOU (Columbia Records 2009).

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demonstrating this analysis, the Article provides a framework within which to consider the legal characterization of the oil and gas royalty interest in both Canadian and American law. But more importantly, the Article is prospective, providing a methodology capable of use in considering the proprietary status of new legal relationships which may emerge as part of a clean energy future.

I. INTRODUCTION

As the world transitions to a renewable and clean energy future, and the United Nations Climate Change COP27 Conference warns of the risks associated with the failure to mitigate the consequences of climate change,[2] it might not be immediately apparent why the proprietary status of the Canadian oil and gas

2. *See Delivering for People and the Planet*, UNITED NATIONS https://www.un.org/en/climatechange/cop27 [https://perma.cc/7UH2-MFNZ] (last visited Jan. 11, 2023).

royalty requires a fresh look. But two reasons exist for doing so—one pragmatic and immediate, the other theoretical and longer-term. The 2022 Russian invasion of Ukraine provides the immediate and pragmatic reason. The unprovoked and unjust war has created a global supply crunch, with the value of "just about everything [the Canadian prairie provinces] produce[] in abundance. . . shoot[ing] up . . . . This includes . . . wheat and oats . . . as well as newer crops like rapeseed, pulses (lentils, chickpeas and the like) and mustard;" but, of all the commodities produced, "most important of all is what lies beneath the earth: oil [and] gas."[3] With the value of its oil and gas skyrocketing due to this increased global demand, the exploration for and production of those reserves will expand, at least in the short term; the owners of the oil and gas reserves will seek to ensure their share of the resulting revenue. This Article argues that the oil and gas royalty is a proprietary interest in land. Viewed from an American perspective—which treats the oil and gas royalty as a real property interest—this may no longer seem exceptional.[4] Yet while Canadian law draws upon American law and practice to analyze the oil and gas royalty,[5] its proprietary status remains unclear. That lack of clarity, combined with recent developments in the Supreme Court of Canada and at least two provincial appellate courts, warrants this Article's fresh look at the oil and gas royalty.

But in addition to the doctrinal import, the second, theoretical and longer-term reason for taking another look at the Canadian royalty involves its pedagogical value. While the oil and gas royalty may be representative of a dying industry in a world transitioning away from fossil-fuels, analyzing its proprietary nature reveals something important about real property: it's ability to adapt to changing circumstances. This Article claims that the Canadian oil

3. Saskatoon, *A Remote Canadian Province Luxuriates in the Global Supply Crunch*, THE ECONOMIST (Aug. 18, 2022), https://www.economist.com/the-americas/2022/08/18/a-remote-canadian-province-luxuriates-in-the-global-supply-crunch [https://perma.cc/T6LC-WQ7S].

4. *See* PATRICK H. MARTIN ET AL., OIL AND GAS LAW, § 202.3, § 303.3 (2012); *see also* Dan LeFort et al., *Legal Characteristics of U.S. Oil and Gas Interests and the U.S. Oil and Gas Lease*, PILLSBURY WINTHROP SHAW PITTMAN LLP, https://www.pillsburylaw.com/images/content/6/5/v2/650/Article201308ShaleInvestmentEnglishtranslation.pdf [https://perma.cc/RHN4-N2E9] (last visited Jan. 28, 2023).

5. JOHN BISHOP BALLEM, THE OIL & GAS LEASE IN CANADA 106–08 (4th ed. 2008).

and gas royalty is in fact a modern example of an ancient proprietary interest in land, the rent charge.[6] Outlining an analytical method that allows this conclusion provides important guidance about the flexibility and organic development of the law of real property for accommodating novel legal relationships. And that applies to relationships that parties might create and courts must interpret in the future, including those that will result from a sustainable clean energy future. Thus, in its death throes, the oil and gas royalty may yet give birth to a clean energy future; one which we cannot now envisage or foresee, but which an adaptive real property law will be well placed to accommodate as proprietary. And the lessons learned through this methodology can be applied to any legal system that uses the common law of real property tracing its origins to English law, including American and Canadian law.

This Article recognizes that demonstrating how a central element of our fossil-fuel past can be treated as proprietary may be an unwelcome suggestion. Yet it argues that setting out the approach that would allow for such a conclusion, in relation to an existing and well-known legal relationship, provides useful guidance regarding the flexibility and organic development of common law and equity in accommodating similar novel relationships in the future. The medieval real property law, including the rent charge, is not some dusty historical find on a long-forgotten bookshelf that offers nothing to our modern world. Rather, it provides an infinitely flexible product of another era, the principles of which are useful not only to the oil and gas industry, but to any endeavor undertaken by humankind seeking the fundamental security associated with property. David Johnston, in his inaugural lecture as University of Cambridge Regis Professor of Civil Law, said that the modern study of historical law seeks "not . . . the recovery of the old but . . . its renewal, not . . . an archaeological

6. There is no uniformity in the terminology. Some authors use the single word "rentcharge," while others separate the two, as "rent charge." We follow Pollock and Maitland, who use the latter form—rent charge: FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 135 (2nd ed. 2010). On rent charges, *see also* WILLIAM HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 97–98 (1927); A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 77 (2nd ed. 1986); ROBERT MEGARRY & H. W. R. WADE, THE LAW OF REAL PROPERTY 820–30 (5th ed. 1984).

attempt to recover ancient remains but . . . the attempt to build on ancient foundations. [One seeks] the nourishment which we have derived, or can today derive, from the past."[7] Or perhaps Bob Dylan put it better when he sang "[t]here's a moment when all old things [b]ecome new again."[8] This Article seeks to show how the ancient medieval rent charge can be new again, not only now with the oil and gas royalty, but also looking ahead to a time when fossil fuels have ceased to hold sway and we pursue new ways to power our world. Existing real property interests will be important for both the minerals necessary for electric vehicle ("EV") batteries,[9] and for the vast areas of land surface needed to produce solar or wind power.[10] Perhaps more far-fetched, the real potential for off-earth mining,[11] or potential nuclear fusion energy[12] may require the use of immoveable resources in ways which we cannot yet imagine. This Article's analysis demonstrates how and why understanding the way real property can adapt to the old opens the same possibilities for the new—all old things become new again.

The Article contains five parts. Part II provides the theoretical rationale for our claim, which is two-fold: (i) that the *numerus clausus* principle in real property law, which restricts the unlimited proliferation of proprietary estates and interests in land, contains sufficient flexibility to allow the entry of novel relationships into the existing members of that restricted class; and (ii) that the policy matters which a court must consider in deciding whether to admit a novel interest to membership of the *numerus clausus* are satisfied in relation to the oil and gas royalty. Part III considers the nature of the oil and gas royalty. While our focus is on Canadian

7. DAVID JOHNSTON, THE RENEWAL OF THE OLD 2 (1996).

8. Dylan, *supra* note 1.

9. *The Key Minerals in an EV Battery*, MINING.COM (May 2, 2022), https://www.mining.com/web/the-key-minerals-in-an-ev-battery/ [https://perma.cc/B9E9-WEE9].

10. Bonnie McBain, *Renewables Need Land – and lots of it*, THE CONVERSATION (Mar. 1, 2021), https://theconversation.com/renewables-need-land-and-lots-of-it-that-poses-tricky-questions-for-regional-australia-156031 [https://perma.cc/N5B8-BY8B].

11. Neil Martin, *8 Things You Never Knew About Mining on Mars, the Moon . . . and even Asteroids!*, UNSW SYDNEY (May 12, 2022), https://newsroom.unsw.edu.au/news/science-tech/8-things-you-never-knew-about-mining-mars-moon-and-even-asteroids [https://perma.cc/5ZW3-CMYH].

12. Kenneth Chang, *Scientists Achieve Nuclear Fusion Breakthrough with Blast of 192 Lasers*, N.Y. TIMES (Dec. 13, 2022), https://www.nytimes.com/2022/12/13/science/nuclear-fusion-energy-breakthrough.html [https://perma.cc/U77W-RRAB].

law, this Article provides a brief comparison with the American legal experience with oil and gas royalties. Part IV establishes the nature of the common law rent charge. Part V analyzes the legal nature of the oil and gas royalty. Drawing upon both the conceptual nature of the rent charge and the existing jurisprudence, this Article argues that it is possible to conclude that the oil and gas royalty constitutes a rent charge. As such, it is capable of inclusion in the *numerus clausus*; more importantly, as such, it is registrable as a legal interest pursuant to Canadian Torrens Title legislation. The final part offers reflections on whether the oil and gas royalty is a rent charge capable of Torrens registration, and explains how that conclusion is reached. The analysis provides useful pedagogical guidance on this ancient and often overlooked proprietary relationship.

II. THEORETICAL RATIONALE

This Part offers a theoretical justification for the admission of the oil and gas royalty into full proprietary status. This argument turns on two points. First, it is possible to admit novel relationships into the *numerus clausus* principle—that closed set or numbered class of legal relationships concerning land recognized by law as proprietary—as it operates in respect of real property. Second, the relevant factors to which a court must advert in reaching a decision about entry to the *numerus clausus* can be satisfied in the case of the oil and gas royalty.

A. Numerus Clausus

The immediate question facing oil and gas owners involves our primary concern in this Article: what security exists for the holder of that interest?[13] The question is not insignificant, for greater security in the financial returns flowing from royalties ensure that the oil-rich Canadian provinces can continue to meet increased demands brought on by dwindling global supply. Answering the security question involves an exploration of the

13. BALLEM, *supra* note 5, at 2–3; W. H. Ellis, *Property Status of Royalties in Canadian Oil and Gas Law*, 22 ALTA. L. REV. 1, 2-3 (1984)..

nature of proprietary interests in land.[14] Yet, while the issue in respect of the oil and gas royalty is not new, it has been neglected for some time. A fresh look is necessary given the immediate concerns of oil and gas owners; this also allows an examination of those instances when a novel arrangement might be recognized as an interest in land. Further, answering the question allows us to see a modern example of an ancient proprietary interest in land.

Whether a novel arrangement is capable of recognition as a proprietary interest in land confronts the debate over the *numerus clausus* principle. The *numerus clausus* defines the numbered class or closed set of proprietary relationships that a legal system recognizes in relation to a particular resource.[15] Borrowed from the civil law, which typically applies the clause rigorously, the *numerus clausus* has garnered a great deal of theoretical interest over the last thirty years.[16] Increasingly, common law systems use

14. The last sustained examination of the royalty agreement in Canadian oil and gas law came almost thirty years ago. *See* Ellis, *supra* note 13. And before Ellis's consideration, twelve years had passed since G. J. Davies, *The Legal Characteristics of Overriding Royalty Interests in Oil and Gas*, 10 ALTA. L. REV. 232 (1972).

15. It was first brought to prominence in the common law world by Bernard Rudden, *Economic Theory v. Property Law: The* Numerus Clausus *Problem, in* OXFORD ESSAYS IN JURISPRUDENCE: THIRD SERIES 239 (JOHN EEKELAAR & JOHN BELL eds., 1987).

16. *See generally* Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L. J. 1163 (1999); Henry E. Smith & Thomas W. Merrill, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L. J. 1 (2000); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373 (2002); Ben Depoorter & Francesco Parisi, *Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes*, 3 GLOB. JURIST FRONTIERS Art. 2 (2003); Brendan Edgeworth, *The Numerus Clausus Principle in Contemporary Australian Property Law*, 32 MONASH UNIV. L. REV. 387 (2006); Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597 (2008); Sarah Harding, *Perpetual Property*, 58 FLA. L. REV. 285 (2009); Leah Marie Theriault, *A User Innovation Theory of the Numerus Clausus,* U. TORONTO (2011), https://tspace.library.utoronto.ca/bitstream/1807/35743/3/Theriault_Leah_M_2011June_SJD_thesis.pdf [https://perma.cc/5HWS-5BRC]; Peter Sparkes, *Certainty of Property: Numerus Clausus or the Rule with No Name?*, 20 EUR. REV. PRIVATE L. 769 (2012); Meredith M. Render, *Complexity in Property*, 81 TENN. L. REV. 79 (2013); Anna Di Robilant, *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 AM. J. COMP. L. 367 (2014); Chad J. Pomeroy, *The Shape of Property*, 44 SETON HALL L. REV. 797 (2014); Yun-chien Chang & Henry E. Smith, *The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275 (2015); Bram Akkermans, *The Numerus Clausus of Property Rights, in* COMPAR. PROP. L.: GLOB. PERSP.'S 100-20 (Michele Graziadei & Lionel D. Smith eds., 2016); Lutz-Christian Wolff, *The Relationship Between Contract Law and Property Law*, 49 COMMON L. WORLD REV. 31 (2020).

it to define the proprietary relationships available in respect of land,[17] denying such categorization to all but a handful of corporeal and incorporeal estates and interests.[18] Even a cursory examination shows that the common law jealously guards entry into the class of proprietary relationships in land:[19]

> "not all arrangements relating to land confer proprietary interests in relation to that land. As well as the freehold and leasehold estates, the principal proprietary interests in land recognized by the common law (and/or equity) are mortgages, rent charges, *profits à prendre*, easements and restrictive covenants. To determine whether an arrangement confers a proprietary interest, the arrangement must be examined to see if it satisfies the definition of any one of the recognized proprietary interests."[20]

Why does the common law do this? Sir William Holdsworth, quoting Lord Brougham, wrote that "'incidents of a novel kind cannot be devised, and attached to property, at the fancy and caprice of the owner'; because, if that were permitted, owners could impress on the holding of land 'a peculiar character which would follow the land into all hands however remote.'"[21] This broad concern encompasses four dimensions. First, allowing an ever-expanding number of proprietary relationships would "sterilize the use of a parcel of land permanently; in principle it is not at all clear that a private landowner ought to be allowed to do this without public control of his activities. Whatever their merits [novel interests] can have a very detrimental effect on the free development of land, which is not in all cases in the public interest."[22] Second, limiting the available proprietary interests makes "it . . . easier to determine what interests encumber a given parcel of land if the range of rights is restricted" which, in turn,

17. *See* BRUCE ZIFF, PRINCIPLES OF PROPERTY LAW 66–67 (7th ed. 2018); JAN JAKOB BORNHEIM, PROPERTY RIGHTS AND BIJURALISM: CAN A FRAMEWORK FOR AN EFFICIENT INTERACTION OF COMMON LAW AND CIVIL LAW BE AN ALTERNATIVE TO UNIFORM LAW? 206 (2020).

18. *See* ZIFF, *supra* note 17, at 66–67.

19. *See id.*

20. ANTHONY MOORE ET AL., AUSTRALIAN REAL PROPERTY LAW 1.205 (7th ed. 2020).

21. HOLDSWORTH, *supra* note 6, at 273 (quoting *Keppell v. Bailey* 39 Eng. Rep. 1042 (Ch. 1834)).

22. SIMPSON, *supra* note 6, at 257.

promotes ease, or efficiency, of transfer.[23] Third, "one should be careful about the *introduction* of new property rights because it is difficult to reverse that process. Even legislatures, though not as affected by *numerus clausus* as are courts, need to be cognizant of these reversibility barriers when creating new forms of property."[24] And, finally, excessive fragmentation among many holders may lead to the "tragedy of the anticommons" in which "multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to underuse."[25]

Notwithstanding the *numerus clausus* principle, there exist rare instances in which the common law and equity admit new interests into the elite status of proprietary interests in land, typically drawn from contractual relationships. The most recent addition came almost 200 years ago, with the 1848 recognition of the proprietary status of the restrictive covenant in *Tulk v. Moxhay*.[26] Even so, the restrictive covenant did not receive full membership in the *numerus clausus* and enjoys enforceability against third parties only in equity.[27] Some question *Tulk*'s persuasiveness for recognizing the restrictive covenant as a proprietary interest in equity; still, the fact remains that Lord Cottenham's reasons in that case relate to the social and economic conditions in which the relevant covenant arose and the

23. ZIFF, *supra* note 17, at 67.

24. *Id.* (emphasis in the original).

25. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation?: The Anticommons in Biomedical Research*, 280 SCI. 698 (1998); MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008); Michael Heller, *The Tragedy of the Anticommons: A Concise Introduction and Lexicon,* 76 MODERN L. REV. 6 (2013). *See also* James Buchanan & Yong Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J. L. & ECON. 1 (2000).

26. *See Tulk v. Moxhay* (1848) 41 Eng. Rep 1143 (UK). *See also Keppell v. Bailey*, 39 Eng. Rep. 1042 (Ch. 1834) (UK); *Bristow v. Wood* (1844) 63 Eng. Rep. 508 (UK); *Whatman v. Gibson* (1838) 59 Eng. Rep. 333 (UK); *Mann v. Stephens* (1846) 15 Sim. 377 (UK); D. J. Hayton, *Restrictive Covenants as Property Interests*, 87 L. Q. REV. 539 (1971); H. W. R. Wade, *Covenants: "A Broad and Reasonable View,"* 31 CAMBRIDGE L. J. 157 (1972).

27. On this, *see* Bruce Ziff, *Positive Covenants Running with Land: A Castaway on Ocean Island*, 27 ALTA. L. REV. 354 (1989). He writes on the important, but overlooked, decision of the English Chancery Division in *Tito v. Waddell* [1977] 3 All ER 129 (Ch. 106) (UK).

consequences for successors in title if its enforceability were denied. In short, in Lord Cottenham's view, changes in social and economic conditions necessitated the addition of an interest to the *numerus clausus*.[28] Similar treatment in equity is found in relation to estate contracts and the mortgagor's equity of redemption.[29]

However, not every attempt at addition succeeds. Thus, a strong push in the 1980s and 1990s to recognize the contractual license as an equitable interest in land ultimately failed.[30] Moreover, along with the work of the courts, legislatures can also add to and subtract from the class of proprietary interests in land not otherwise known to the common law or equity.[31]

Can the oil and gas royalty gain admission into those categories of relationship already recognized as proprietary interests in land, and therefore members of the *numerus clausus*, either in law or in equity? This Article argues that it can. Canadian oil and gas law provides the conditions necessary for such recognition; "a jumbled collection of rights, grants, concessions, and obligations between the owner of minerals and the would-be developer of them",[32] it is

> a derivative legal subject. It does not identify a body of unique legal principles. Rather, it involves application of doctrine from a wide range of traditional private and public law categories to interests, operations and relationships developed by the oil and gas industry in its exploration for and exploitation of oil and natural gas resources. These traditional areas of law include property, contracts, and torts, as well as administrative and constitutional law as they apply to

28. SIMPSON, *supra* note 6, at 256–60.

29. MEGARRY AND WADE, *supra* note 6, at 122.

30. *See Street v. Mountford* [1985] AC 809, [1985] 2 All ER 289 (UK); *Ashburn Anstalt v. Arnold* [1988] 2 WLR 706 (UK); *Willman v. Ducks Unlimited* (2004) 187 Man. R. 2D 263 (Can.); *Klewchuk v. Switzer* [2003] 330 A.4. 40 (Can.); *Chartrand v. Abil-Mona* [2002] N.W.T.S.C. 69 (Can.). On the background to attempts to add the licence to the *numerus clausus*, *see* MEGARRY & WADE, *supra* note 6, at 798-817; ZIFF, *supra* note 17, 354–58.

31. *Taff Vale Railway Co v. Amalgamated Society of Railway Servants* [1901] AC 426, 429–30 (UK); *Sevenoaks, Maidstone, and Tunbridge Railway Company v. London, Chatham, and Dover Railway Company* (1879) 11 Ch. D. 625, 635–36 (UK). *See* ANDREW G. LANG, CROWN LAND IN NEW SOUTH WALES: THE PRINCIPLES AND PRACTICE RELATING TO THE DISPOSAL OF AND DEALINGS WITH CROWN LAND PURSUANT TO THE CROWN LANDS CONSOLIDATION ACT, 1913; WESTERN LANDS ACT, 1968; RETURNED SOLDIERS SETTLEMENT ACT, 1916; WAR SERVICE LAND SETTLEMENT ACT, 1914; CLOSER SETTLEMENT ACTS & RELATED LEGISLATION para. 405 (1973).

32. BALLEM, *supra* note 5, at 5.

> government regulatory requirements and taxation aimed at the oil and gas industry. Much of what defines oil and gas law as a special legal category stems from the unique difficulties in applying traditional contract and property law principles to migratory substances located deep in the earth, difficult to detect with certainty, and requiring expensive and sometimes complex technical operations for production, processing and transportation.[33]

In short, extracting oil and gas is costly, and the surface holder who may own the minerals *in situ* is rarely in a position, economically or physically, to expend the resources necessary to do so. While the minerals could be sold as a stratum of land to those who engage in the extraction, what developed instead was the oil and gas lease as the principal means of conferring the right to produce oil and gas.[34] An amalgam of English and American real property law as applied to Canadian conditions,[35] the oil and gas lease constitutes a proprietary interest in land, but not, as the name would suggest, an accepted common law leasehold estate. Rather, given the fugacious nature of the substances involved, the oil and gas lease confers upon its holder rights analogous to a *profit à prendre*.[36] This is so whether the minerals over which the rights were granted were owned by the surface holder or by the Crown.[37] Still, given their historical inclusion in the *numerus clausus*, whether it is a leasehold properly so called or a *profit à prendre*, it is unexceptional to include the oil and gas lease in the elite category of proprietary interests in land.

But what of interests carved from the oil and gas lease? It seems that equity has been willing to recognize the proprietary status of some novel interests carved from the oil and gas lease, most notably the gross royalty trust agreement.[38] Yet, as with the oil and gas lease itself, there is nothing new in the recognition that a trust constitutes an equitable proprietary interest. Of course, as

33. ALASTAIR R. LUCAS & CONSTANCE D. HUNT, OIL AND GAS LAW IN CANADA 1 (1990).

34. *See* BALLEM, *supra* note 5, at 3–25; LUCAS & HUNT, *supra* note 33, at 7–11.

35. On the importance of the American law in interpretation, *see* LUCAS & HUNT, *supra* note 33, at 1–4.

36. *See* BALLEM, *supra* note 5, at 3-25; LUCAS & HUNT, *supra* note 33, at 7–11. "A right to take something out of the soil of another is a profit à prendre, or a right coupled with a profit", *Profit à prendre*, BLACK'S LAW DICTIONARY (9th ed. 2009).

37. *See* LUCAS & HUNT, *supra* note 33, at 7–11.

38. *See* BALLEM, *supra* note 5, at 178–81.

it may only exist in equity, it can never be registered under the Torrens system and thus can only be protected by a caveat. This Article argues that not only is the oil and gas royalty capable of recognition as an equitable interest in land, and so is caveatable, but also that it can exist in law, and so be registered, bringing with it indefeasibility of title as a legal interest in land. We argue that the oil and gas royalty can exist, not as a novel interest in land, but as one of the less well-known and even less understood incorporeal hereditaments (non-possessory or subsidiary interests in land): the rent charge. Our argument is based upon those factors that a court must consider in deciding whether a novel legal relationship can be admitted to the *numerus clausus*. In other words, one must ask: what is it about a novel relationship that allows a court to conclude that it is property?

B. What is Property?

Theory informs this Article's argument. When a court considers whether a novel legal relationship can be categorized as property, it can take one of two approaches, both identified by Bruce Ziff. Using the first, an "attributes approach," the focus of "the enquiry hinge[s] on whether the right being asserted looks like property: one searches for a strong family resemblance."[39] The second, a "functional approach," looks at the function that property serves in a society and involves "'[l]ook[ing] . . . at the policy factors at play.' It takes account of how property should be used as a tool of social life. This approach recognizes that property is not an acontextual entity that demands conceptual purity, but a purposive concept, to be used to meet social needs."[40] Judges often use the attributes approach in tandem with the view that property is a relationship between persons and things, as popularized by the High Court of Australia in *Yanner v Eaton*, which wrote that "'property' is a comprehensive term [which] can be used to describe all or any of very many different kinds of relationships between a person and a subject matter."[41]

39. ZIFF, *supra* note 17, at 60 (citations omitted).
40. *Id.* at 61 (citations omitted).
41. *Yanner v Eaton* (1999) 201 CLR. 351 (Austl.).

If property, as a concept, is a short-hand way of describing legal relationships, then it is an impossibility for a person to have a relationship with an inanimate subject-matter, or thing, whatever it might be. Consider the three main rights said to constitute the core of ownership (the "liberal triad"[42]): use of a scarce resource, exclusivity, and alienability. People exercise each of those rights—legal relationships—against other *people*, not things. One does not protect one's use as against another thing, or seek exclusion as against other things, or seek to alienate whatever is the subject-matter of property to another thing. Rather, one enforces one's use (or decision-making authority,[43] or agenda-setting,[44] or preference-satisfaction[45]) as against others who attempt to interfere with it; one seeks to enforce one's right to exclude other people from the use of a thing said to be the object of my property (think of cases in which courts have found that there is no legal means of preventing others viewing what one is doing on one's land[46]); one alienates the object of one's property—the thing—to other persons, not to other things. Joseph William Singer and Nestor M. Davidson state this fact succinctly: "property concerns legal relations among people regarding control and disposition of valued resources. Note well: property concerns relations *among people*, not relations between people and things."[47]

The functional approach identified by Ziff makes sense when used with the relationships between persons in respect of things view of property. A focus on the thing for which proprietary status is sought, and not the relationship that exists between persons in respect of that thing, produces anomalous outcomes. It holds a new relationship hostage to those things which have come before which courts have recognized as property—the court attempts to

42. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L REV. 1667, 1668–69 (1988).

43. *See* C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742-43 (1986).

44. *See* Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275 (2008).

45. *See* Paul Babie, *Magna Carta and the Forest Charter: Two Stories of Property*, 94 N.C. L. REV. 1431 (2016).

46. *See* Detroit Base-Ball Club v. Deppert, 27 N.W. 856 (Mich. 1886); *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR. 479 (Austl.).

47. JOSEPH WILLIAM SINGER & NESTOR M. DAVIDSON, PROPERTY 2 (6th ed. 2022) (emphasis in the original).

analogize the thing before it to other things that have gone before, and that means that growth in what constitutes property becomes restricted, if not impossible. The flaw in the attributes approach when combined with the person-thing view of property is that it allows for nothing new to be recognized as property unless a court is willing to step outside the existing framework of recognized proprietary interests. And doing *that* calls for a court to take a functional approach.

If a court considers the functions that property is intended to serve—the policy factors at play in the relationship between persons—and whether those functions are evident in a given novel relationship between persons, a very different outcome can follow, one not tied to analogizing things to other things like it. Clearly some courts *have* been willing, historically, to take a functional approach combined with the relationship between people in respect of things view; if it were otherwise, property would long ago have ossified into a rigid system in which innovation was incapable of protection by property. In novel claims, then, looking at relations between persons in respect of things, it is entirely possible that a given novel relationship may constitute property, quite irrespective of whether the object of that relationship, a thing, looks like other things recognized as property in the past.

The function or role played by the relationship governs the recognition of property, and not the things treated as property in the past. One sees property as active, the other as rigid and lifeless. In other words, if we look at the functions that a given set of relationships serve in respect of a given thing, what we might see is that those functions constitute property even if the thing itself may not satisfy some arbitrary list of attributes drawn from previously decided cases or legislation, reified and applied to the thing before the court.[48] Or, put another way, when we focus on the thing, we lose sight of what property is: an active, living relationship between persons in respect of a thing. It is the relationship—use, exclusivity, alienability—that matters, not the thing the object of those relations (rights). The shift in perspective—from thing to relationship—makes all the difference.

48. The *Ainsworth* indicia, so beloved of courts in cryptocurrency cases, are just that sort of arbitrary list: *see National Provincial Bank v. Ainsworth* [1965] 2 All ER 472 (UK).

Thus, when viewing the social function served by the oil and gas royalty, it is clearly property. The easiest category available for achieving that end is the rent charge, with some modification to take account of modern socio-economic conditions in the oil and gas industry. This outcome follows from a review of the substantive criteria of the rent charge, of which the oil and gas royalty satisfies all but one. This Article will show, using a functional approach, that the current limitation on arriving at this conclusion is based on an outdated and inapplicable doctrine that need not limit our analysis. Instead, the current paradigm has been forced by the inadvertent mischaracterization of the oil and gas lease itself.[49]

A pedagogically useful outcome also follows from this practical approach. If the oil and gas royalty can be treated as a rent charge, it provides an important modern example of an interest in land often overlooked in considerations of the *numerus clausus*. This Article argues that the oil and gas royalty can serve as a modern invocation of the rent charge, thus providing an example of this interest in contemporary law, as opposed to long-since forgotten examples from feudal history. This has the salutary effect of providing a model for the application of the rent charge as a means of allowing other novel legal relationships into the restrictive club of the *numerus clausus*.

III. OIL AND GAS ROYALTY

This Part contains two sections. First, it provides a brief outline of the freehold oil and gas lease. A full analysis of the technical components of the freehold oil and gas lease is beyond the scope of this Article;[50] rather, this Part focusses on its treatment as a *profit à prendre*, which in turn affects the legal characterization of the oil and gas royalty, either as merely contractual or as a proprietary interest in land. Second, this Part considers the nature of the royalty itself, as typically contained in an oil and gas lease. Again, the primary concern here involves the legal content of the royalty. This, along with the analysis of the common law rent charge in Part IV, sets the background for the

49. *See* A. R. Thompson, *A Perspective on Petroleum Law*, 1 CAN. LEG. STUD. 152 (1966), *cited in* Ellis, *supra* note 13, at 1.

50. S*ee* BALLEM, *supra* note 5, at 105–77.

analysis in Part V of the oil and gas royalty as a common law rent charge.

A. Lease

While variability continues to exist in both American and Canadian law, over time, greater standardization has marked the form of the oil and gas lease. In the United States, the standard form is the Producers 88 or Producers 88-revised;[51] in Canada, it is the CAPL standard form, first introduced in 1988. Nonetheless, whether bespoke or standard form, every oil and gas lease contains broadly similar terms dealing with a number of matters: "what rights are granted, the obligation to drill, royalties, the length of the primary term, and numerus other points that must be spelled out between the lessor and the lessee."[52] Beyond that, however, with different agreements in use,[53] "it is impossible to generalize, and in each instance it is essential that the wording of the individual lease be examined before any conclusions are drawn."[54]

As a preliminary matter, every oil and gas lease, in both the United States and in Canada, stipulates, as any lease does, the parties to the agreement, the lands leased, and the consideration paid.[55] The lessor is "described as the owner of the leased substances 'within, upon or under' lands, which are set forth in their full legal description, including the Certificate of Title number."[56] In other words, the lessor, lessee, and the demised premises—the corporeal leased substances—are set out in the agreement.

Taking the Canadian lease as a representative example, two primary clauses form the heart of the agreement. First, a grant or lease of the relevant substances; this grant clause is representative:[57]

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51. *See* MARTIN ET AL., *supra* note 4, at §§ 202.1, 202.3.

52. BALLEM, *supra* note 5, at 105. *See also* Lorne Rollheiser, *Guide to Doing Business in Canada: Oil & Gas*, GOWLING W.L.G. (Oct. 15, 2021), https://gowlingwlg.com/en/insights-resources/guides/2022/doing-business-in-canada-oil-and-gas/ [https://perma.cc/7D9W-W455].

53. On the American and Canadian jurisprudential background to the forms used, *see* BALLEM, *supra* note 5, at 106-16; MARTIN ET AL., *supra* note 4, at 19–194.

54. BALLEM, *supra* note 5, at 106.

55. *See id.* at 116–18; MARTIN ET AL., *supra* note 4, at ch. 6.

56. BALLEM, *supra* note 5, at 116.

57. *See id.* at 118.

> DOTH HEREBY GRANT AND LEASE unto the Lessee all the petroleum, natural gas and related hydrocarbons (except coal and valuable stone), all other gases, and all minerals and substances (whether liquid or solid and whether hydrocarbons or not) produced in association with any of the foregoing or found in any water contained in any reservoir (all hereinafter referred to as "the leased substances"), subject to the royalties hereinafter reserved, within, upon or under the lands hereinbefore described and all the right, title, estate and interest, if any, of the Lessor in and to the leased substances or any of them within, upon or under any lands excepted from, or roadways, lanes, or rights-of-way adjoining, the lands aforesaid, together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of the leased substances and for the said purposes to drill wells, lay pipelines and build and install such tanks, stations, structures and roadways as may be necessary.[58]

John Bishop Ballem emphasizes the difference between a conventional lease of commercial premises, in which the demised premises are returned following the termination of the lease, and the oil and gas lease, in which it is expected that the substances leased will be produced and depleted *in situ* following termination.[59] In both cases the lease confers a corporeal thing, rather than an incorporeal interest. Moreover, the words "grant and lease" result in the conferral of exclusive rights to the exploration for and production of those subsurface substances[60] without any rights to the land's surface.[61] The rights described permit the holder to be reduced into actual possession substances that migrate between subsurface reservoirs—in other words, the rights encompass the rule of capture.[62] Typically, modern leases also embrace all minerals.[63] Taken as a whole, the grant of

58. *Id.*

59. *See id.* at 119.

60. *See id.* at 140–41.

61. *See id.* These rights are dealt with by legislation, *e.g. Alberta Surface Rights Act*, R.S.A. 2000, c. S-24, s. 12 (Can.).

62. *See* BALLEM, *supra* note 5, at 140–47; *Borys v. Canadian Pacific Railway and Imperial Oil Limited*, [1953] 2 WLR 224 (Can.); [1953] A.C. 217, 7 W.W.R. (N.S.) 546 (J.C.P.C.); Robert E. Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391 (1935).

63. *See id.* at 119–40.

exclusive rights to the exploration for and production of subsurface substances which can be reduced into possession reveal a similarity between the conventional lease and that for oil and gas: the grant of exclusive possession of a corporeal thing. This is known as the "working interest."[64]

The *habendum*—containing the primary term and provisions related to production—constitutes the second key clause of the oil and gas lease. As with the grant, a great deal of uniformity exits in the form of the primary term. Many leases allow for extension of the primary term if the relevant substances are produced.[65] As such, the *habendum* spells out what is meant by production,[66] and in every case the leased substances not explored or produced by the lessee revert to the lessor at the expiry of the term. Again, as with the substances granted by the lease, the term mirrors that of the conventional lease, which requires certainty ascertainable at the time of creation. Both the hallmarks of the conventional common law lease—exclusive possession for a term of years—are therefore present in oil and gas leases.

Yet judicial analysis rejects a straightforward characterization of the oil and gas lease as an estate in favor of treatment as a subsidiary, non-possessory interest. The origin of this anomalous interpretation can be traced to A.R. Thompson, one of the founders of modern Canadian oil and gas law, who said during a conference in 1966 that:

> I ventured the opinion that a *profit à prendre* may be suitable for the categorization of the rights conferred by the oil and gas lease because in English and Canadian common law the *profit à prendre* is a relatively empty vessel. There is so little law about the subject that it can all be summed up in two pages of Halsbury's Laws of England. . . . An empty vessel is surely an invitation to fill it with a content which will be appropriate, and therefore Canadian courts have the opportunity to develop the nature of the property interest conferred by the oil and gas lease in sensible response to the exigencies and

64. Ellis, *supra* note 13, at 2.
65. *See* BALLEM, *supra* note 5, at 149–70.
66. *See id.*

> requirements of a thriving petroleum industry adequately responsive to the public interest.[67]

Canadian courts, no doubt relying on argument of counsel colored by Thompson's influence, adopted this view.[68] Most American states, with the exception of Louisiana, take the same approach.[69] This type of academic or scholarly influence is not unknown to the development of real property law. The common law of easements, for instance, developed largely during the 19th century through the influence of Gale and his influential text, *Gale on Easements*, which drew heavily on the Roman law of servitudes.[70] Counsel, relying on and sometimes expressly adopting *Gale*, argued as such before courts which, in turn, adopted *Gale*.[71] Sir William Holdsworth wrote that:

> The industrial revolution, which caused the growth of large towns and manufacturing industries, naturally brought into prominence such easements as ways, water-courses, light, and support; and so [*Gale on Easements*][72] became the starting point of the modern law, which rests largely upon comparatively recent decisions.[73]

Indeed, during the 19th century it is generally well-known that lawyers played a significant role in the reform of the land law, both judicially and legislatively.[74]

Thus, facing a fork in the road as to the characterization of the oil and gas lease, and using Thompson's "ventured opinion" as a map, both the scholarship and judicial authority set out on what today might be considered the wrong road. The Supreme Court of Canada decision in *Berkheiser* characterized the oil and gas lease as a *profit à prendre*.[75] Justice Rand's judgment encapsulates the Court's position:

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67. Thompson, *supra* note 49, at 152, *cited in* Ellis, *supra* note 13, at 1.

68. On the nature of the freehold oil and gas lease, *see* BALLEM, *supra* note 5; LUCAS & HUNT, *supra* note 33, at 7–9.

69. *See* MARTIN ET AL., *supra* note 4, at § 202.1.

70. *See* J. STUART ANDERSON, LAWYERS AND THE MAKING OF ENGLISH LAND LAW 1832–1940 (1992).

71. *See* Berkheiser v. Berkheiser and Glaister, [1957] S.C.R. 387, 392 (Can.).

72. CHARLES JAMES GALE & THOMAS DENMAN WHATLEY, GALE ON EASEMENTS (1839). It is now in its 18th edition. JONATHAN GAUNT & THE HONOURABLE MR JUSTICE MORGAN, GALE ON EASEMENTS (18th ed. 2008).

73. HOLDSWORTH, *supra* note 6, at 266.

74. *See* ANDERSON, *supra* note 70.

75. *See* LUCAS & HUNT, *supra* note 33, at 6–9.

> The idea suitable to the partial use of the surface of lands as a necessary means of seeking for and drawing off these fluid substances, apart from the influence by analogy of existing concepts related to different substances, is that of operations to reduce to possession something by its nature generally ready for flight, which, as embodying a property interest, is adequately symbolised by the general term incorporeal right. The word "grant", then, not being-significant of title and the word "lease" not carrying with it the possession with which it is ordinarily associated, we look to the detailed description of the acts authorized for the true intendment of the instrument and doing that here I interpret it as either a *profit à prendre* or an irrevocable licence to search for and to win the substances named.[76]

Scholarly opinion followed this lead.[77] Still, some uncertainty remains. Lucas and Hunt point out that "Rand J.'s reference to the words "grant" and "lease" . . . underlines the fact that the nature of the interest granted will depend on the particular instrument and its language of conveyance. The Court clarified that the substance of the instrument, and not its form or title will be determinative."[78] In *Berkheiser*, the substance of the agreement created a *profit à prendre*, although different circumstances have produced different outcomes.[79]

Whatever the characterization of the oil and gas lease—conventional common law lease properly so-called, as in Louisiana,[80] or *profit à prendre*, as in most other American states and in Canada[81]—what is clear is that in Canada it may be recorded or registered within a Torrens system. Most leases contain a clause with respect to a lessee's caveat, used to record the lessee's interest in the lessor's title.[82] This might lead to the conclusion that the oil and gas lease is an unregistrable interest and, therefore, incapable of forming a legal estate or interest in land. A standard clause,

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76. Berkheiser v. Berkheiser and Glaister, [1957] S.C.R. 387, 392 (Can.).

77. *See* BALLEM, *supra* note 5, at 15–17; LUCAS & HUNT, *supra* note 33, at 8–9.

78. *See* LUCAS & HUNT, *supra* note 33, at 8.

79. *See id.* at 8–9 (citing *Can. Export Gas & Oil Co v. Flegal*, [1978] 1 W.W.R. 185, 80 D.L.R. (3d) 679 (Can.); *McColl-Frontenac Oil Co. v. Hamilton*, [1953] 1 S.C.R. 127, [1953] 1 DL.R. 721 (Can. Alta. Q.B.); *Re Heier Estate* (1953) 7 W.W.R., [1953] 1 D.L.R. 792 (Can. Sask. C.A.); *Hayes v. Mayhood*, [1959] S.C.R. 568, 18 D.L.R. (2d) 497 (Can.)).

80. *See* MARTIN ET AL., *supra* note 4, at § 202.1.

81. *See id.*

82. *See* BALLEM, *supra* note 5, at 172.

however, demonstrates that while the choice remains the lessee's to record by caveat or registration, the lease itself is registrable, and thus capable of existence as a legal interest in land, and therefore of gaining indefeasibility:

> REMOVAL OF CAVEAT
>
> In the event of the lessee having registered in the Land Titles Office or Registry Office for the area in which the lands are situated, this lease or any caveat or other document in respect thereof, the lessee shall withdraw or discharge the document so registered within a reasonable time after termination of the lease.[83]

Thus, by way of protecting the interest obtained, a lessee may register the lease itself, or lodge a caveat in respect of it. This analysis of the oil and gas lease allows for a consideration of the operation of the royalty clause, to which we now turn.

B. Royalty Clause

In both American and Canadian law, an oil and gas royalty may take one of three forms: (i) the perpetual nonparticipating royalty; (ii) the landowner, or lessor's royalty; and (iii) the lessee's royalty. The perpetual nonparticipating royalty—created by a mineral owner in the absence of a lease—is perpetual in the sense that it survives the creation of any lease, and is nonparticipating, meaning that its holder does not share in the benefits of any leases created; in American law, these are sometimes also called overriding royalties. The landowner, or lessor's royalty—carved from a lessor's interest at the time of creating a lease—constitutes the landowner's most significant retained economic interest and ceases with the termination of the lease from which it is carved. The lessee's royalty is carved from the lessee's working interest at the time of the creation of the lease; in American law these, too—along with the perpetual nonparticipating royalty—are sometimes

83. *See id.* at 173.

called overriding.[84] The issue of characterization applies to all three forms of royalty, although most are of the latter two types.[85]

John Bishop Ballen wrote that "both the concept and the word 'royalty' originated in England, where it designated the share in production reserved to the Crown in grants of mines and quarries."[86] The oil and gas lease, as we have seen, is a grant of the producing strata of land, which, at the discretion of the parties, may be charged with such a royalty, "accomplish[ing] its purpose by providing that a certain portion, normally expressed as a percentage, of the production shall be deliverable or payable by the lessor."[87] As such, the royalty constitutes a usufructuary interest as opposed to a grant of possessory rights.[88] Whatever its form, though—lessor's or lessee's—a standard royalty clause will:

> (a) grant to the lessor a share or participation in the production of the leased substances;
>
> (b) specify the rate of such share;
>
> (c) provide that any sale by the lessee will include the royalty share;
>
> (d) require the lessee to account for and remit payment for such share on or before a specified date; and
>
> (e) allow the lessee to use a portion of the production required for operations under the lease without payment of royalty.[89]

This Article argues that so conceived and conferred, the oil and gas royalty, in either form (lessor's or lessee's), constitutes a common law rent charge.

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84. *See* Ellis, *supra* note 13, at 2–3; BALLEM, *supra* note 5, at 178–83; MARTIN ET AL., *supra* note 4, at § 202.3.

85. The law surrounding Crown oil and gas leases and royalties is a separate topic, beyond the scope of this Article. *See generally* LUCAS & HUNT, *supra* note 33, at 9–142.

86. *See* Ballem, *supra* note 5, at 178.

87. *Id.*

88. *See* Ellis, *supra* note 13, at 1.

89. *See* BALLEM, *supra* note 5, at 183. For further detail on the terms of the royalty, *see id.* at 184–223.

IV. RENT CHARGE

This Part examines the common law definition and content of the rent charge and its modern existence in Canadian Torrens legislation.

A. Common Law

At common law, "a rent is . . . a sum of money which issues from or is charged upon land."[90] A subsidiary interest in land or incorporeal (non-possessory) hereditament, "rent" traces its origins to the feudal sources of English land law, and occurs in one of three feudal relationships: rent service, rent charge, and rent seck.[91] The first was tenurial, while the latter two were not.[92] Thus, as part of the doctrine of tenure, the "rent service" was a periodical payment made in respect of land paid by a tenant to a lord where the two stood in tenurial relationship. By virtue of the tenurial relationship between lord and tenant, the rent service carried an automatic right of distress "of common right" for the payment of the rent.[93] While the rent service has long since vanished in the case of fees simple (its use in conjunction with the fee tail and life estate was rare), its remaining modern vestige is the rent annexed to a leasehold reversion upon the grant of a lease for a term of years.[94]

The non-tenurial rents "c[a]me into being by virtue of a grant . . . [pursuant to which] [t]he holder of land imposes such a rent upon his land in favour of some other person."[95] Two forms exist—seck and charge—distinguishable from service on the basis of the right of distress.[96] While the availability of distress applied automatically to the tenurial rent service, the common law denied this right to non-tenurial relationships. Thus, the rent seck exists in the case of a periodical payment attached to land and

90. HOLDSWORTH, *supra* note 6, at 99.

91. *See* MEGARRY & WADE, *supra* note 6, at 828–29.

92. *See* POLLOCK & MAITLAND, *supra* note 6, at ii.135.

93. *See* SIMPSON, *supra* note 6, at 77.

94. *See* POLLOCK & MAITLAND, *supra* note 6, at ii.135; MEGARRY & WADE, *supra* note 6, at 818-19.

95. *See* POLLOCK & MAITLAND, *supra* note 6, at ii.135.

96. *See id.* at ii.135-36. On the remedies generally available to the owner of the rent charge, *see* MEGARRY & WADE, *supra* note 6, at 823–26. *See also* Ellis, *supra* note 13, at 9–10.

unsupported by a right of distress for its payment; this is known as a "dry rent."[97]

The rent charge, however, describes a non-tenurial periodical payment supported by the power of distress, given either by the instrument creating it or by statute.[98] As with any estate or interest, the rent charge is capable of existence both in law and in equity, upon the usual principles for creation, by deed in common law, or, in equity, typically, by contract for the creation of a rent.[99] In Part IV.B, below, this Article shows that a legal rent charge can also be created by registration in a Torrens system.[100]

While rents charge were "things," "the governing idea is that the land is bound to pay the rent," and historically "the assize of novel disseisin enables the rent-owner to coerce the tenant of the land into paying the rent as it becomes due. It also protects him as against the world at large in the enjoyment of his incorporeal thing."[101] In other words, the rent charge, in the hands of the party entitled to its payment—its owner—is an incorporeal, but proprietary (*in rem*, good against all the world) thing, and that enjoyment is enforceable by the common law actions for recovery of possession of land. The rent charge, then, is treated as an incorporeal thing because it is not a possessory right in the owner.[102] Moreover, such an interest "may exist in gross, and no necessary connection with any land owned by the beneficiary need be proved."[103] Sir William Holdsworth summarized the historic position concerning the rent charge as an interest in land in this way:

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97. POLLOCK & MAITLAND, *supra* note 6, at ii.135; MEGARRY & WADE, *supra* note 6, at 818–19.

98. *See* POLLOCK & MAITLAND, *supra* note 6, at ii.135; MEGARRY & WADE, *supra* note 6, at 819.

99. *See* POLLOCK & MAITLAND, *supra* note 6, at ii.138; MEGARRY & WADE, *supra* note 6, at 819, 822-23. On Torrens registration in Australia, *see* MOORE ET AL., *supra* note 20, at 17.480-17.495; R. T. J. STEIN & M. A. STONE, TORRENS TITLE 46-47 (1991); DOUGLAS J. WHALAN, THE TORRENS SYSTEM IN AUSTRALIA 173 (1982). For representative Australian legislation, *see Real Property Act 1900* (NSW) s 56(2) (Austl.); *Real Property Act 1886* (SA) s 128B (Austl.). For Canadian, *see Land Titles Act*, R.S.A. 2000, c. L-4, s. 102(1)(b) (Can.).

100. *See* MOORE ET AL., *supra* note 20, at 17.480–17.495; STEIN & STONE, *supra* note 99, at 46-47; WHALAN, *supra* note 99, at 173.

101. POLLOCK & MAITLAND, *supra* note 6, at ii.136-37.

102. *See id.* at ii.136-37.

103. MOORE ET AL., *supra* note 20, at 17.485.

> A rent was one of the services in return for which land might be granted. It issued out of the land. It could be distrained for by the lord in whosoever's hands the land was. It was treated as a thing—a tenement—just like the land. Such rent service ceased to be rent service if the lord granted it to another. It became rent seck. The grantee, not being the lord, could not distrain; but, for all that, the rent was still regarded as a thing. The grantee to complete his title must get seisin; and if he had got seisin he was protected by the real actions. The effect of the statute *Quia Emptores* was to make a reservation of a rent service on a grant in fee simple impossible. Instead, the grantee charged his lands with the payment of rent to the grantor, and gave him expressly a power of distress. Hence we get the rent charge, the grantee of which was, so far as remedies by action went, in the same position as the grantee of a rent seck.[104]

At common law, therefore, because distress applies only to an interest in the physical land, a rent charge was possible only in respect of a corporeal hereditament; put another way, a rent charge upon another rent charge or upon an incorporeal hereditament is impossible.[105] This has come to be known as the "no rent on a rent" prohibition.[106] More recently and significantly, in the United Kingdom "this technical obstacle was removed both for the past and for the future by the Law of Property Act 1925 (UK), which validates rent charges charged on other rent charges and provides special machinery for enforcing payment."[107] Section 1(2)(b) of the Law of Property Act 1925 (UK) provides for "a rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute."[108]

Like the rent service, rents seck disappeared from English law long ago,[109] leaving the rent charge as the sole remaining form of

104. HOLDSWORTH, *supra* note 6, at 97-98 (footnotes and citations omitted).

105. *See* MEGARRY & WADE, *supra* note 6, at 819 (citing Co.Litt. 47a; *Earl of Stafford v. Buckley,* 2 Ves. Sen. 170, 178 (1750); *Re The Alms Corn Charity,* [1901] 2 Ch. 750, 759). *See also* Ellis, *supra* note 13, at 9–10.

106. *See* MEGARRY & WADE, *supra* note 6, at 819.

107. *Id.* at 819, 826 (citing the *Law of Property Act 1925*, s. 122 (UK)).

108. *Law of Property Act* 1925, s. 1(2)(b) (UK).

109. *See* MEGARRY &WADE, *supra* note 6, at 819.

rent as an incorporeal hereditament.[110] Capable of extinguishment by release, merger, lapse of time, or statutory redemption,[111] the rent charge was for the most part abolished in the United Kingdom by the Rentcharges Act 1977.[112] It lives on, however, in both Canadian[113] and Australian[114] land law, largely as a means of evading the limited enforceability of positive covenants,[115] or as a method of registering restrictive covenants against Torrens land, which remain unregistrable in their own right as merely equitable interests.[116] For present purposes, this outline of the historical rent charge proves invaluable for understanding its substantive legal content, and for our analysis of the oil and gas royalty in Canadian Torrens land. Before turning to that analysis, however, the next section considers the relevant Torrens legislation.

B. Torrens Title

In American law, the creation and existence of a legal lease—and this appears to be true of the oil and gas lease as well — depends upon a valid deed executed by the parties.[117] This forms the major difference between American and Canadian real property law. In the Canadian context, the existence of any legal estate or interest depends not upon the execution of a deed, but the registration of an instrument pursuant to a system of title by registration known as Torrens title. Established by provincial legislation, Torrens title provides that the existence of legal estates or interests depend upon registration.[118] Unlike a system of deeds registration, which merely records the state of title as established by deeds and other instruments for the creation of estates or

110. *See* POLLOCK & MAITLAND, *supra* note 6, at ii.135; MEGARRY & WADE, *supra* note 6, at 818-19.

111. *See* MEGARRY & WADE, *supra* note 6, at 826–28.

112. *See Id.* at 820-22.

113. *See* ZIFF, *supra* note 17, at 420 and 472–73.

114. *See* MOORE ET AL., *supra* note 20, at 17.480-17.495.

115. *See* ZIFF, *supra* note 17, at 420, 472–73.

116. *See* Brian Hunter, *Equity and the Torrens System*, 2 ADEL. L. REV. 208 (1964). *But see Deguisa v Lynn* (2020) 268 CLR 638 (Austl.).

117. *See* MARTIN ET AL., *supra* note 4, at §§ 205–07. The authors note that "deed and lease[] do not in fact describe different kinds of instruments. An oil and gas lease is a "deed" as such term is usually employed." *Id.* at § 207.

118. *See* LUCAS & HUNT, *supra* note 33, at 1–37; BALLEM, *supra* note 5, at 1–25.

interests, systems of title by registration, such as Torrens, provide that a legal estate or interest only comes into existence once it has been registered pursuant to the relevant legislation.[119] As such, if the Canadian oil and gas royalty is to find recognition and protection within any of the provincial Torrens titles systems as a legal interest, the issue of its registrability arises.

In Canadian law, a preliminary matter therefore arises: has any provincial Torrens legislation made express provision for the registration of the royalty in its own right as an interest in land, as opposed to it simply falling under the general provisions relating to registration of estates or interests in land? In other words, has legislative reform elevated the oil and gas royalty to a legislatively stipulated legal interest in land? While the list of registrable estates and interests contained in most Torrens statutes is typically large,[120] covering those recognized at law,[121] no Canadian provincial legislation, either the principal Torrens statute itself or any other overriding legislation, has reformed the treatment of the

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119. *See* MOORE ET AL., *supra* note 20, at 4.80, 4.125.

120. *See* ZIFF, *supra* note 17, at 547. In Saskatchewan, *e.g.*, *Land Titles Regulation 2001*, s. 36(2) and (3) define registrable interests:

(2) For the purposes of clause 50(1)(c) of the Act, the following are designated as registrable interests:

(a) any right or interest in land based on an agreement in writing between Canada and Saskatchewan;

(b) a Registrar's notice made in accordance with subsection 106(2);

(c) an interest held by a personal representative in his or her capacity as personal representative for the estate of a deceased person;

(d) an interest held by a trustee in bankruptcy in his or her capacity as trustee in bankruptcy of the bankrupt's estate;

(e) a notice pursuant to clause 46(2)(b) to lapse the registration of an interest;

(f) a postponement of a registered interest;

(g) a revocation of a power of attorney;

(h) an assignment of rents;

(i) a mortgage of a lease;

(j) an assignment of a lease as security;

(k) a sheriff's notice of seizure of a security interest pursuant to *The Enforcement of Money Judgments Act*;

(l) a sheriff's notice of seizure of an interest in land pursuant to *The Enforcement of Money Judgments Act*.

(3) For the purposes of clause 50(1)(c), a mineral commodity agreement is designated as a registrable interest.

A Mineral Commodity Agreement is defined in s. 67.

121. *See, e.g.*, *The Land Titles Act*, S.S. 2000, c. L-5.1, s 50(1) (Can.); *Land Titles Regulation 2001*, s 36(2)-(3) (Can.).

oil and gas royalty to allow for its registrability in its own right. Accordingly, if the royalty is to gain registration, it becomes necessary to find a place for it within one of the estates or interests recognized at law, and so registrable within the Torrens system. The most obvious candidate for that is the rent charge. This section considers the place of the rent charge within the Torrens system, before turning to the question of whether the oil and gas royalty is capable of recognition as that legal interest.

Two questions emerge, then, which this section also considers: (i) the protection afforded the rent charge by a caveat; and, given the limited nature of the caveat's protection, (ii) the registrability of the rent charge. Since the vast majority of Canadian oil and gas production occurs in British Columbia, Alberta, Saskatchewan, and Manitoba,[122] this Article restricts its analysis to those Torrens systems.

1. Unregistered (Equitable)

Registration alone provides indefeasibility, the paramount protection afforded by Torrens title.[123] As noted above, interests capable of registration are typically the estates and interests recognized at common law, or what might also be called legal (as distinguished from equitable) estates and interests.[124] These include the freehold and leasehold estates as well as the subsidiary or incorporeal hereditaments, including the rent charge.[125] Torrens systems typically exclude from registrability estates and interests enforced only in equity; these are known either as equitable interests or simply unregistered or unregistrable rights.[126] Still, the mirror principle inherent in any title by registration system seeks to ensure that any "tenable rights appear on title, so that the mirror can reflect each and every entitlement that might pertain to a parcel."[127] The caveat represents the vehicle

122. *See* LUCAS & HUNT, *supra* note 33, at 1–37; BALLEM, *supra* note 5, at 1–25.

123. On the Torrens system and the protection afforded by registration, *see* Paul Babie & John V. Orth, *The Troubled Borderlands of Torrens Indefeasibility: Lessons from Australia and the United States*, 7 PROP. L. REV. 33 (2017).

124. *See generally id.*

125. ZIFF, *supra* note 17, at 547. *See also* STEIN AND STONE, *supra* note 99, at 126–27; WHALAN, *supra* note 99, at 227–28.

126. *See generally* Babie & Orth, *supra* note 123.

127. ZIFF, *supra* note 17, at 547–48.

used in most Torrens systems to ensure accurate reflection in respect of unregistrable rights.

A caveat, though, is really nothing more than a form of notice, "a warning . . .. It preserves the status quo, recording the presence of some extant interest in land, but does not on its own create new rights."[128] The Torrens caveat acts as notice in two ways. "First, it acts as a warning to prospective dealers with the title against which the caveat is lodged [possibly] "operat[ing] as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat." Secondly, . . . [it] acts as an alarm signal for the caveator. If a dealing is lodged for registration [s]he receives notice of such lodgment."[129] Thus, "a caveat protects a *bona fide* purchaser for value from interests not on title."[130]

Caveating carries the same effect in every Western Canadian province,[131] although each system has its own idiosyncrasies. In some systems, such as those found in British Columbia and Manitoba, the caveat is only temporary, "freez[ing] the title situation on the register until a claimant of an interest [can] take legal steps to protect the claim."[132] In Alberta, "it is widely used as a means of recording interests of all kinds for an indefinite period."[133] This "virtually decides priority of interest and almost effects a provisional registration."[134] Still, provisional registration is not registration, so most systems limit the ability to caveat

128. ZIFF, *supra* note 17, at 548 (footnote omitted).

129. WHALAN, *supra* note 99, at 226 (citing *Butler v Fairclough* (1917) 23 CLR 78, 91 (Austl.)); STEIN & STONE, *supra* note 99, at 127–29.

130. ZIFF, *supra* note 17, at 548 (citing *Stephens v. Bannan* [1913] 14 D.L.R. 333 (Can.); *Banque d'Hochelaga* [1914] 8 Alta. L.R. 125 (Can.)).

131. *See Land Title Act*, R.S.B.C. 1996, c. 250, Part 19, s. 288; *Land Titles Act*, R.S.A. 2000, c. L-4, s. 130; *The Real Property Act*, C.C.S.M. c. R-30, ss. 148, 153. *And see Kadyschuk v. Sawchuk*, (2006) 201 Man. R. 2d 256 (Can.); *Willman v. Ducks Unlimited* (2005) 192 Man. R. 2d 39 (Can.); *Jacques v. Alexander (District)* (1996), 116 Man. R. 2d 164 (Can.).

132. ZIFF, *supra* note 17, at 548 (internal quotation marks removed) (citing ALBERTA LAW REFORM INSTITUTE, TOWARDS A NEW ALBERTA LAND TITLES ACT 7 (1990)). *See Land Title Act*, R.S.B.C. 1996, c. 250, s. 288; *The Real Property Act*, C.C.S.M. c. R-30, ss. 148, 153.

133. ZIFF, *supra* note 17, at 548 (citing *Land Titles Act*, R.S.A. 2000, c. L-4, s. 130, ss. 1(v), 134, 135). Due to significant reforms adopted by *The Land Titles Act*, S.S. 2000, c. L-5.1, it is no longer a simple matter to describe the caveat in the Saskatchewan system; but prior to those reforms, the caveat operated in much the same way as that found in Alberta: *see* GEORGINA R. JACKSON, MANUAL OF LAW AND PROCEDURES, SASKATCHEWAN LAND TITLES OFFICES 185-225 (1988).

134. WHALAN, *supra* note 99, at 231 n. 34.

estates or interests in land.[135] In other words, the caveat is effectively an intermediate step, for the simple reason that registration could be effected for the estate or interest claimed under a caveat. As such, while "[c]aveats affect priorities . . . they do not purport to validate the interests being claimed."[136] Instead, the interest being claimed must stand or fall on its own merits, and the caveat adds nothing that either law or equity fails to confer.

This creates a complication for the holder of an interest incapable of registration. Equitable interests, for instance, may look like their legal counterparts, but as F.W. Maitland wrote, it "is not equivalent to a legal right; between the contracting parties an agreement for a lease may be as good as a lease . . . . But introduce the third party and then you will see the difference."[137] Protection in the sense of creating a full proprietary, legal, estate or interest requires registration. This becomes obvious in the case where a party may fail to caveat. In that case, there is no enforceability of the interest in land. And whatever effect the interest might have relies upon the operation of equitable principles, as supplemented by caveats. Registration, however, ensures protection against all the world. The distinction lies in the difference between an equitable and a legal interest in land. The former is one which can have no greater security than that which comes with a caveat, while the latter has security against all the world irrespective of the caveat or the principles of equity. Concluding, then, that an interest is "an interest in land capable of protection by caveat" is really nothing more than saying that the claimed interest is equitable and which on—the principles of equity, and most importantly, the doctrine of notice—may, but need not, bind third parties. As Maitland says, introduce the third party and then you will see the difference.

This Article seeks to demonstrate that an oil and gas royalty is a registrable, and so a legal, interest in land, as opposed to one simply noted on title by way of caveat. Perhaps those in the oil and

135. On the difficulties created in Alberta by allowing for the caveat to have this effect, and supporting the proposition that the caveat is not tantamount to registration, see D. J. Thom, *The Caveat in the Torrens System*, 2 CAN. B. REV. 327 (1924).

136. ZIFF, *supra* note 17, at 548.

137. FREDERIC WILLIAM MAITLAND, EQUITY: A COURSE OF LECTURES 158 (A.H. Chaytor, W.J. Whittaker, & John Brunyata eds., 2nd ed. 1936) *cited in Chan v Cresdon Pty. Ltd.* [1989] 168 CLR 242 (Austl.), and in *Williams v Frayne* [1937] 58 CLR 710 (Austl.).

gas industry are content to rely upon a caveat and the concomitant expectation that others will know and honor a right pursuant to that imperfect form of protection. This Article claims the technical position that unregistered and unregistrable rights fail to gain the full protection of Torrens indefeasibility. To advance that claim, it is necessary that a rent charge be a registrable interest within the Torrens system.

2. Registered (Legal)

Registration brings the benefits of indefeasibility of title, a protection and enforceability against subsequent title holders superior to the warning or notice that caveating provides. Yet, "'[r]egistration' giving rise to the issuance of a Torrens-guaranteed title is available only for a defined (often large) set of interests . . . the list varies with each statute."[138] Torrens legislation typically admits to registrability any estate or interest in land capable of existence at law prior to the existence of the Torrens system.[139] The rent charge falls within the class of registrable estates and interests.[140]

In Australia, for instance, all jurisdictions other than Victoria, Queensland, and Western Australia, allow for registration of the rent charge properly so-called.[141] In Victoria and Western Australia, a rent charge may be registered as an annuity.[142] In Canada, Alberta and Manitoba allow for registration of the rent charge by name,[143] while Saskatchewan allows for its registration

138. ZIFF, *supra* note 17, at 547.

139. *See* WHALAN, *supra* note 99, at 97–98; STEIN & STONE, *supra* note 99, at 33–44; Ziff, *supra* note 17, at 547.

140. *See* STEIN & STONE, *supra* note 99, at 46–47; WHALAN, *supra* note 99, at 173. In all jurisdictions, the fee simple constitutes the registrable estate par excellence. Other registerable interests include the life estate, the leasehold, mortgages, easements, and profits à prendre. *See* LUCAS & HUNT, *supra* note 33, at 1–37; BALLEM, *supra* note 5, at 1–25.

141. *See Real Property Act 1900* (NSW) s. 56(2); *Real Property Act 1886* (SA) s. 128B; *Land Titles Act 1925* (ACT) s. 92(2); *Land Title Act 2000* (NT) s. 4 "mortgage', 74–75; *Land Titles Act 1980* (Tas.) s. 72(b).

142. *See Transfer of Land Act 1958* (Vict.) s. 4(1); *Transfer of Land Act 1893* (WA) s. 4(1).

143. *See Land Titles Act*, R.S.A. 2000, c. L-4, ss. 102(1), and 58(1); *The Real Property Act*, C.C.S.M. c. R-30, ss. 96(1), and see ss. 77 and 134(1).

through inclusion in the definition of a mortgage,[144] and British Columbia permits it as a covenant.[145] In every jurisdiction, the legislation provides no express definition of the rent charge and, as such, "it presumably has the same meaning as at common law."[146] The common law rent charge, as defined in Part IV.A, therefore enjoys existence as a legal subsidiary interest through Torrens registration. Can the oil and gas royalty, however, gain admission to characterization as a rent charge so as to open the possibility of registration?

V. MODERN RENT CHARGE

This Part argues that contemporary developments in oil and gas law confirm that the oil and gas royalty is capable of recognition within the *numerus clausus* as a legal rent charge, capable of Torrens registration and, thus, the protection of indefeasibility. Our argument turns on the contemporary rejection of the no rent on a rent prohibition and on the inapplicability of requiring the possibility of distress as the only remedy of enforcement. We argue that the common law is capable, as part of its organic development of the English law, of achieving, indeed, in the case of the no rent on a rent prohibition, has achieved, these outcomes. But even if the argument advanced is wrong about the potential of the common law to develop in this way, it suggests that legislative reform offers another means of achieving that outcome.

A. Common Law Development

Whether one characterizes the oil and gas lease as a common law leasehold properly so-called or a *profit à prendre* affects the possible conclusions concerning the nature of the royalty. As argued in Part II, aside from A. R. Thompson's "ventured opinion" on the matter, there is no compelling and obvious reason for treating the oil and gas lease as a *profit à prendre*. A leasehold estate is generally not prevented from being recognized in a stratum of land, other than the difficulty surrounding the depletion

144. *See The Land Titles Act*, S.S. 2000, c. L-5.1, ss. 2(1)(n), 75(2), 125(1), 125-132, and Form R.

145. *See Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(6).

146. MOORE ET AL., *supra* note 20, at 17.485.

of that stratum consequent upon exploration and production of the leased substances subject to the rule of capture.[147] Indeed, there is some authority for this in American law.[148] In any case, "the choice makes all the difference",[149] for treating the lease as a *profit à prendre* renders difficult the potential for any royalty based upon it to be characterized as a proprietary interest in land. This perverse outcome cannot be the intention of the parties to oil and gas leases and royalties; instead, "it may not be going too far to say that no one in the oil and gas business, who thought about what he was doing, would intentionally create a royalty that was merely a contract."[150] And, for that reason, recent judicial analyses demonstrate a shift in approach to the royalty.

Using the outline of the common law rent charge from Part IV.A, it seems clear that the substantive content of the oil and gas royalty can satisfy the substantive criteria of a rent charge in every particular, with the sole exception of the medieval prohibition against a rent on a rent. Any treatment of a royalty as a rent charge must, therefore, begin with the "no rent on a rent" prohibition. The prohibition carries devastating consequences for the oil and gas royalty carved from a lease characterized as an incorporeal interest—a *profit à prendre*—rather than a possessory leasehold estate. Treating the oil and gas lease as a subsidiary interest renders it incapable of having a proprietary royalty in the form of a rent charge carved from it, or at least from the lessee's interest. In other words, the conclusion that the lease is a subsidiary interest means that the royalty becomes a rent on a rent, or a rent on a subsidiary incorporeal interest. If, though, the oil and gas lease takes its conventional and well-understood common law form as a corporeal estate—a physical interest in land—the prohibition is not violated and a rent charge becomes possible. Thus, the conclusion that the freehold oil and gas lease confers a corporeal interest in the entire stratum of land[151] clears a path to characterizing the royalty as a rent charge.

147. *See* BALLEM, *supra* note 5, at 181; *see generally* Davies, *supra* note 14.

148. *See generally* MARTIN ET AL., *supra* note 4, at § 202.1.

149. Ellis, *supra* note 13 at 3.

150. *Id*.

151. *See* LUCAS & HUNT, *supra* note 33, at 9 (citing *Langlois v. Can. Superior Oil* (1957), 23 W.W.R. 401, 12 D.L.R. (2d) 53, aff'd 23 W.W.R. 415, 12 D.L.R. 2d 53 (Can..)).

It may be too late to reverse the well-worn path to the *profit à prendre* characterization. But at the very least, the potential ambiguity surrounding the nature of the lease, and the tenuous origins for its treatment as a *profit à prendre*, ought to give us pause as to how the courts might treat the royalty carved from it. Put another way, even if the lease is a subsidiary interest, the courts may, taking a flexible approach to the application of the historical common law position, dismiss the no rent on a rent prohibition as inappropriate in the modern setting so as to reach a new conclusion concerning the royalty. American law contains ample support for doing just that,[152] and Canadian law itself seems to be following that lead in two contemporary developments: (i) the rejection of the no rent on a rent prohibition; and (ii) the rejection of the requirement that distress be available as a remedy.

1. No Rent on a Rent Prohibition

Consider, first, the landowner's or lessor's royalty. Such a royalty seems entirely capable of satisfying the requirements of a rent charge even in the face of the no rent on a rent prohibition. Creating a rent charge carved from the physical corporeal minerals or substances held by the lessor in an underlying freehold interest seems to avoid the prohibition. While three recent Alberta decisions confirm this position, it is unclear whether the interest is a rent charge or some other category of interest capable of supporting a Torrens caveat.[153] And early judicial analysis produced mixed results.[154] Some suggested that the lessee's or overriding royalty was incapable of surviving the no rent on a rent

152. *See* MARTIN ET AL., *supra* note 4, at §§ 202.1, 202.3, 214, 303.8.

153. *See* BALLEM, *supra* note 5, at 178–81 (citing *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 8 Alta. L. R. 3d 225, [1993] 4 W.W.R. 454, [1993] A.J. No. 227 (Alta. Q.B.); *Scurry-Rainbow Oil Ltd. v. Galloway Estate*, 23 Alta. L.R. 3d 193, [1995] 1 W.W.R. 316, [1994] A.J. No. 669 (Can.); leave to appeal dismissed [1994] S.C.C.S. No. 475 (S.C.C.); *Scurry-Rainbow Oil Ltd. v Kasha* (1993), 143 A.R. 308, [1993] A.J. No. 579 (Can. Alta. Q.B.); *Scurry-Rainbow Oil Ltd. v. Kasha* (1996), 39 Alta. L.R. 3d 353, [1997] 1 W.W.R. 41, [1998] A.J. No. 381 (Can. Alta. Q.B.); varied [2000] A.J. No. 870, [2001] 2 W.W.R. 442 (Can.); *sub nom Stoney Tribal Council v. PanCanadian Petroleum Ltd.*, 86 Alta. L.R. 3d 147, [2001] 2 W.W.R. 442, [2000] A.J. No. 870; *Guaranty Trust v. Hetherington* (1987), 50 Alta. L.R. 2d 193, [1987] 3 W.W.R. 316, [1987] A.J. No. 148 (Can. Alta. Q.B.); *Guaranty Trust v. Hetherington* (1989), 67 Alta. L.R. 2d 290, [1989] 5 W.W.R. 340, [1989] A.J. No. 472 (Can. Alta. Q.B..)).

154. *See Vanguard Petroleum Lid. v. Vermont* (1977) 12 W.W.R. 66 (Can.); *Fuller v. Howell* (1942) 1 D.L.R. 462 (Can.).

prohibition, and therefore failed to satisfy the common law criteria for a rent charge.[155] Ellis, however, argued that "no Canadian court has held that overriding royalties cannot be created as a property interest on the grounds that a rent cannot be created out of a rent. In fact, some of the cases that might appear to support the argument that property-right overrides cannot be created do not involve overriding royalties at all."[156] Yet, the jurisprudence contained an influential view, around which the modern law seems to be coalescing: Justice Laskin's dissent in *Saskatchewan Minerals v Keyes*. There, Justice Laskin would have held that the overriding royalty was capable of existence as a rent charge.[157]

Saskatchewan Minerals v Keyes[158] involved the interpretation of two mining leases subject to an oral arrangement or agreement which contained "a royalty of twenty-five cents (250) per ton on all anhydrous salt produced and sold from the said [lease]."[159] The lease was assigned to a third party and the holder of the royalty claimed an interest in land enforceable against that third party lessee.[160] At the trial the royalty was ruled enforceable.[161] That result was overturned on appeal, because the agreement was contractual rather than proprietary.[162] The Supreme Court affirmed by a narrow 3-2 majority.[163] In dissent, Justice Laskin followed the accepted characterization of the Canadian oil and gas lease as a *profit à prendre*.[164]

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155. BALLEM, *supra* note 5, at 181–83 (citing *Emerald Resources v. Sterling Oil*, (1969) 3 D.L.R. 3d 630, [1969] A.J., No. 2 (Can.); *Bensette and Campbell v. Reece*, [1973] 2 W.W.R. 497, 34 D.L.R. 3d 723 (Can. Sask. C.A.); *Montreal Trust Company v. Gulf Securities Corporation Ltd. Et al.*, [1973] 2 W.W.R. 617, 36 D.L.R. 3d 57, [1973] S.J. No. 61 (Can. Sask. Q.B.); *Canco Oil & Gas Ltd. V. R. of Saskatchewan* (1991), 89 Sask. R. 37, [1991] 4 W.W.R. 316, [1991] S.J. No. 22 (Can. Sask. Q.B.); *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, [1972] 2 W.W.R. 108, 23 D.L.R. 3d 573, [1971] S.C.J. No. 136 (S.C.C.)).

156. *See* Ellis, *supra* note 13, at 5.

157. *See Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, 717 (Can.).

158. *See id.*

159. *Id.*

160. *See id.*

161. *See id.*

162. *See id*. at 637.

163. *See id*. at 703. Ellis argues that because the Supreme Court dealt with the issue on a narrower ground, not including the rent charge question, the *Saskatchewan* Court of Appeal's finding that the royalty is a rent charge remains good law in Saskatchewan. *See* Ellis, *supra* note 13, at 6–7, 10.

164. *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, 718 (Can.).

But rather than treat the royalty as incapable of satisfying the substantive criteria of a rent charge, Justice Laskin characterized the royalty "not in the sense of a vested interest in mineral deposits, or in oil or gas, as the case may be, *in situ,*[165] but rather in the sense of a share in or a return on production for permission to exploit certain property or in respect of such exploitation. This is the sense in which it is spelled out in the agreement."[166] Thus, if the royalty in *Keyes* was to be a rent charge, it was necessary to find that such an interest could exist in an incorporeal interest in land. Having reviewed English law on the question of rent charges generally, and American law on the application of the concept to minerals specifically,[167] Justice Laskin concluded: "The language of "corporeal" and "incorporeal" does not point up the distinction between the legal interest and its subject-matter. On this distinction, all legal interests are "incorporeal," and it is only the unconfronted force of a long history that makes it necessary in this case to examine certain institutions of property in the common law provinces through an antiquated system of classification and an antiquated terminology."[168]

In other words, in Justice Laskin's view, even a freehold estate in land is an incorporeal interest in the sense that it does not confer absolute ownership of the land itself, but of an incorporeal "estate," or bundle of rights held of the Crown (the state). Laskin J could therefore find:

> That the unaccrued royalty in such case is regarded as an interest in land, and remains so although transferred separately from the fee simple in the surface and the "reversionary" interest in the minerals or in the oil and gas, appears to be the prevailing view in the United States. I agree with this characterization because I do not think that there should be any distinction between the foregoing situation and that which would exist if the devisee had an interest in reversion in the strict sense.[169]

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165. Which has sometimes been attributed to them, particularly in a line of American cases. *See id*.

166. *Saskatchewan Minerals v Keyes*, [1972] S.C.R. 703, 720 (Can.) (internal citations and footnotes omitted).

167. *See id*. at 723–28.

168. *Id.* at 722.

169. *Id.* at 723 (internal citations and footnotes omitted).

And, more importantly, "whether th[e] interest [from which the royalty was carved] was a leasehold in the strict sense or a *profit à prendre* for a term . . . the royalty, unaccrued, was an interest in land, analogous to a rent-charge, and, in the circumstances, binding on the [subsequent holder of the lease]."[170] Put another way, Justice Laskin found that the common law contained sufficient flexibility as to allow its concepts, notwithstanding seemingly rigid historical rules to the contrary, to adapt and apply to new circumstances.

While almost 30 years passed before the Supreme Court would examine it again, Ballem speculated whether "the result of the overriding royalty cases might have been different" had a group of cases related to another form of royalty (the gross royalty trust agreement) been decided first.[171] In those later cases, the courts proved more receptive to a flexible application of existing law to allow for proprietary outcomes. Indeed, the judicial trend now seems to be moving in Justice Laskin's direction, recognizing necessary modifications to the common law in response to changing circumstances. Such an approach allows for change while maintaining the structure of the common law. As Justice Brennan of the High Court of Australia put it in another context:

> In discharging its duty to declare the common law . . . [c]ourt[s] [are] not free to adopt rules . . . if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian [Canadian] law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of [English] courts . . . .[172]

And Justice Brennan went on:

> It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence . . . . If a postulated rule of the common law expressed in earlier cases seriously offends . . . contemporary values, the question arises whether the rule should be maintained and applied. Whenever

170. *Id.* at 728.
171. *See* BALLEM, *supra* note 5, at 183.
172. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 29 (Austl.).

> such a case arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.[173]

The question arises whether the no rent on a rent prohibition constitutes a skeletal legal principle of the real property law of Canada to the extent that it's overturning would go beyond organic development and fracture the skeleton of the received English law. Certainly, both American[174] and Australian[175] authority supports Justice Laskin's rejection of the prohibition and treatment of the oil and gas royalty as an interest in land. And, in the last twenty years, Justice Laskin's flexible approach to skeletal legal principle has allowed for the organic development of oil and gas law, allowing for a shift in judicial approach to the royalty without fracturing the skeleton of legal principle.

The Supreme Court adopted Justice Laskin's view in *Bank of Montreal v. Dynex Petroleum Ltd*[176] ("*Dynex*"), in which it considered the proprietary nature of an overriding royalty.[177] Justice Major summarized the dispute at issue as "pit[ting] [an] ancient common law rule [the no rent on a rent prohibition] against a common practice in the oil and gas industry."[178] The Court took the position that an agreement creates an interest in land if: (i) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and (ii) the interest out of which the royalty is carved is an interest

173. *Id.* at 30.

174. *See* Ellis, *supra* note 13.

175. *See* Gerald L. J. Ryan, *Petroleum Royalties*, 23 AUSTRL. MINING AND PETROLEUM L. ASS'N Y.B. 328, 328–67 (1985); Geoffrey Compton, *The Proprietary Nature of Overriding Royalties in Petroleum Agreements in Australia*, 21 AUSTRL. MINING AND PETROLEUM L. J. 152, 152 (2002).

176. *See Bank of Montreal v. Dynex Petroleum Ltd*, [2002] 1 S.C.R. 146 (Can.) *See also* David Legeyt et al., *Let's Talk About Royalties: The Continued Uncertainty Surrounding the Creation and Legal Status of the Overriding Royalty*, 57 ALTA. L. REV. 335 (2019); J. Forbes Newman, *Can a Gross Overriding Royalty Be an Interest in Land,* INSIGHT EDUC. SER.'S, OIL & GAS AGREEMENTS UPDATE (1989).

177. *See Bank of Montreal v Dynex Petroleum Ltd*, [2002] 1 S.C.R. 146, 149, [3] (Can.).

178. *Id.* at 149, 4.

in land. The Court held that both elements were satisfied in *Dynex*, and its decision sought to bring the common law into line with industry practice, holding that an overriding royalty was capable of recognition as an interest in land. In addressing the no rent on a rent prohibition, Justice Major wrote that:

> The effect of Laskin J.'s reasons [in *Keyes*] was to render inapplicable, at least insofar as overriding royalties, the common law rule against creating interests in land out of incorporeal interests . . . [T]he intentions of the parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only.[179]

This shifted the emphasis of the analysis from a strict reading of the grant to the intentions of the parties. Specifically, the focus turns to the "grantor's intentions [which] can only be determined in the context of the entire agreement."[180]

Two subsequent cases have adopted, supplemented, and applied the *Dynex* test. In *Third Eye Capital Corporation v. Dianor Resources Inc.*[181] ("*Dianor*"), the Ontario Court of Appeal adopted the *Dynex* test, but added an important component, stating the test as one in which a court must "examine the parties' intentions from the [agreements] as a whole, along with the surrounding circumstances"; if an agreement "give[s] the [holder a] right "to enter the property to explore and extract" minerals, it would constitute an interest in land, notwithstanding the fact that it may be "expressed . . . as only a right 'to share in revenues produced from . . . minerals extracted from the lands.'"[182] This established a dual intention-surrounding commercial context test.[183] Thus:

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179. *Id.* at 152, 11–12.

180. Legeyt et al., *supra* note 176, at 342.

181. *See Third Eye Capital Corporation v Dianor Resources Inc.*, 2018 ONCA 253 (Can.).

182. *Id.* at 66-67. *See also* Olivia C. Dixon et al., *Recent Judicial Decisions of Interest to Energy Lawyers*, 56 ALTA. L. REV. 479, 559 (2018). The British Columbia Court of Appeal has also accepted the intention of the parties as relevant to the recognition of an interest in land. See *McDonald v Bode Estate*, 2018 B.C.C.A. 140 (Can.).

183. Some commentary confirms that it is not subjective intention alone, but objective intention as gleaned from the totality of the circumstances that is determinative. *See* Elisa Stewart & Joel Henderson, *A Tale of Two Interests: Reframing Dynex to Account for Surrounding Circumstances in Determining Whether a Gross Overriding Royalty is an Interest in Land*, 18th ANN. REV. OF INSOLVENCY L. 187 (2020). *See also* Nigel Bankes, *Ontario Court of Appeal Decision Provides Guidance on the Application of* Dynex, ABLAWG: THE UNIV.

> the actual purpose of the agreement at issue must be considered . . . based on the surrounding circumstances known to the parties at the time the agreement was entered into, in addition to the words of the agreement itself. This . . . test accords with general principles of contractual interpretation while still reflecting the unique circumstances of the oil and gas industry and the opportunity to create unique contractual arrangements.[184]

Re Manitok Energy Inc.[185] ("*Manitok*") involved a production volume royalty agreement which was expressly stated to be an interest in land. Justice Horner of the Alberta Court of Queen's Bench concluded that the parties "intended the producing Royalty to be an interest in land"[186] and, applying *Dynex-Dianor*, that royalties "in respect of produced substances, representing a fixed quantity of production per day" may constitute an interest in land if the parties' intention to make it so is sufficiently clear.[187] Additionally, the intentions of the parties remained paramount "despite the absence of, or significant limitations on, a right to entry."[188]

The importance of the *Dynex-Dianor* test cannot be overstated, although not always for positive reasons. The emphasis on the intention of the parties creates new uncertainty for courts attempting to determine that intention from either the grant's language, the surrounding circumstances, or a combination of both.[189] Any recourse to the parties' intention is inconsistent with

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OF CALGARY FAC. OF L. BLOG (Apr. 3, 2018), https://ablawg.ca/2018/04/03/ontario-court-of-appeal-decision-provides-guidance-on-the-application-of-dynex/ [https://perma.cc/8EZU-4YRU].

184. Stewart & Henderson, *supra* note 183; Dixon et al., *supra* note 182, at 559–60. *See also* Edward D. Brown, *What is an Interest in Land and Why Does it Matter?*, CANLII CONNECTS (Feb. 21, 2019), https://canliiconnects.org/en/commentaries/65973 [https://perma.cc/G56H-MUVL]; Bryan Walker & Lucy L'Hirondelle, *Recent Judicial Decisions of Interest to Energy Lawyers*, 57 ALTA. L. REV. 503, 531–33 (2019); Nigel Bankes, *Alberta Court Follows Third Eye Capital v Dianor in a Royalty Characterization Case*, ABLAWG: U. OF CALGARY FAC. L. BLOG (June 28, 2018), http://ablawg.ca/wp-content/uploads/2018/06/Blog_NB_Third_Eye_Capital_v_Dianor.pdf [https://perma.cc/59AD-3MW7].

185. *Manitok Energy Inc (Re).*, 2018 ABQB 488.

186. *Id.* at 5.

187. *Id.* at 22.

188. *Id.*

189. *See* Stewart & Henderson, *supra* note 183, at 193.

the *numerus clausus* principle, which ensures that it is not the parties' intention, but rather the substantive content of the relationship that determines whether an interest in land can be recognized in law or in equity. And, for that reason, in the view of some, the Dynex-Dianor test may, paradoxically, in its attempt to bring clarity for the industry, nonetheless inject a large dose of uncertainty into the law concerning whether oil and gas royalties can be treated as interests in land.[190]

This Article, however, takes the position that the *Dynex-Dianor* test remedies the uncertainty surrounding the characterization of the oil and gas royalty. That uncertainty stemmed from a set of "indicia that courts developed and applied. . . in a constant state of flux" by judges who "consider[ed] new factors or ignore[d] factors previously relied upon" leaving "commercial lawyers . . . to discern which language and provisions would best establish an interest in land as determined by the shifting common law."[191] *Dynex-Dianor* "reorient[s] the inquiry to focus primarily on the intentions of the parties"; thus, "if the underlying hereditament is capable of supporting a royalty interest in the land and the parties intend to create one, why [should] that intention not be enough?"[192] That being so, it then becomes the task of the court to:

> 'examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words.' This approach, however, should be tempered by Justice Major's approval of Justice Laskin's comments in *Keyes*: '[T]he intentions of the parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only.' The Ontario Court of Appeal's decision in *Dianor* indicates that this was the Supreme Court's ultimate holding in *Dynex*.[193]

Put another way, *Dynex-Dianor* is nothing less than an example of the functional approach for determining which legal relationships may be admitted to the *numerus clausus*. In focusing

190. *See* Legeyt et al., *supra* note 176, at 347–49.
191. *Id.* at 347.
192. *Id.* at 348.
193. *Id.* at 351.

on the parties' intentions and the surrounding commercial context (which may include the tax incentives and liabilities associated with freehold production[194] or the subsequent insolvency of the royalty grantor[195]), the *Dynex-Dianor* test redirects the inquiry concerning the oil and gas royalty. Rather than a strict focus on similar relationships and the no rent on a rent prohibition known to medieval law, this new focus considers the nature of the relationship between the parties as expressed between lessor and lessee and understood within the commercial context of the oil and gas industry. The source of the difficulty, of course, was A. R. Thompson's misdirected approach to the oil and gas lease, which led in early interpretations to the application of the no rent on a rent prohibition. But Justice Laskin's dissent in *Keyes* as adopted in *Dynex-Dianor* sweeps aside this misdirection, using a functional approach and the flexible application and organic development of the medieval English law. This provides a path to the recognition of the royalty as a rent charge. In short, understanding the functional nature of property allows admission to the *numerus clausus,* not because a novel legal relationship looks like other legal relationships that have come before, but because the relationship between the parties, as informed by commercial circumstances, serves a function that is proprietary in nature.

This Article's conclusion is not merely to confirm that *Dynex-Dianor* rejects the no rent on a rent prohibition as a bar to recognizing the oil and gas royalty as an interest in land capable of supporting a caveat. The caveat provides a weak protection for this ostensibly valuable interest. While *Dynex-Dianor* may provide that the royalty remains only an unregistered or equitable interest in land capable of supporting a caveat, its reasoning can be extended further. In fact, the *Dynex-Dianor* dual intention-commercial context test is revolutionary, for if both elements of that test are satisfied the result is a full, legal, rent charge capable of Torrens registration and so indefeasibility.

This conclusion carries significant implications for the holders of oil and gas royalties. By expanding the Torrens protection through recognition as a registrable rent charge,

194. *See* BALLEM, *supra* note 5, at 222–23; MARTIN ET AL., *supra* note 4, at § 213; Jason P. Brown et al., *Spatially Variable Taxation and Resource Extraction: The Impact of State Oil Taxes on Drilling in the US*, 103 J. ENV'L. ECON. & MGMT. 102354 (2020).

195. *See* Legeyt et al., *supra* note 176, at 338–39.

holders of these interests enjoy both flexibility in the use of the interest and security against successors in title in ways that go beyond the protection of mere contractual or equitable rights protected by caveat alone. Recognition of the oil and gas royalty as a legal interest in land capable of registration provides the full benefit and security of indefeasible title. Still, until this conclusion is expressly judicially affirmed, this aspect of the "royalty question remains alive in the courts."[196]

2. Role of Remedies

Surrounding commercial circumstances provide the second reason for the courts to take a flexible approach to the development of the common law regarding oil and gas royalties. Importantly, those circumstances reveal that it is unnecessary to require distress as a remedy for enforcement in order to recognize a rent charge. Historically, the reason for the no rent on a rent prohibition was that without it the legal interest in land would be left without a remedy for its enforcement.[197] At common law, distress was the only available remedy for the payment of the rent; that involved seizing the physical subject-matter of the property. That, of course, required a physical subject-matter to seize. But a rent on a rent, being an interest in an incorporeal thing, made that impossible, there being no physical thing to seize.[198]

Two responses meet this objection in the case of the oil and gas royalty. First, even in the case of a royalty reserved in respect of a fee simple absolute in the minerals themselves, one searches in vain for a case which provides for distress as a remedy for enforcement.[199] "Nor," Ellis writes, "would one expect to find one. The idea that royalty owners could summarily seize drilling and producing equipment worth millions of dollars, especially in fields where drainage might be going on, is unthinkable. It would be putting a pistol in the hands of royalty, or alleged royalty, owners."[200] Instead, there exists no need for a "summary right to seize personal property. [The royalty's] status as a property

196. *Id.* at 354.
197. *See infra,* Section II.A.
198. *See* POLLOCK & MAITLAND, *supra* note 6, at ii.134–40; Ellis, *supra* note 13.
199. *See* Ellis, *supra* note 6, at 10.
200. *Id.*

interest in the minerals in place gives owners entirely adequate remedies while protecting *bona fide* purchasers. It is unthinkable that any court would ever extend the remedy of distress to a royalty owner."[201]

The second reason relates to the surrounding commercial circumstances. Denying the existence of the oil and gas royalty as a common law rent charge fails to take account of the circumstances in which it operates. On this view, Justice Laskin's dissent in *Keyes* demonstrates the flexible approach to the common law, drawing upon the rent charge principle, but adapting it to modern circumstances: no distress is necessary for the enforcement of the oil and gas royalty and so, the ancient common law prohibition of no rent on a rent ought not to stand in the way of adapting a useful medieval concept to modern commercial circumstances. In short, the prohibition no longer serves a useful purpose in the oil and gas setting, new circumstances having supplanted it. As Ellis concludes, in adapting the rent charge to the oil and gas royalty, "why bring the corporeal estate requirement, which is based upon distress, along with the analogy? . . . The analogy between rent and royalty does not include distress."[202] Put another way, while the prohibition militates against the recognition of the royalty as a rent charge as matter of the strict application of the common law, it does not damage the flexible application of the concept as part of the organic growth of the English law in the oil and gas setting.

But even if the common law is unable to overcome the limitations imposed by the no rent on a rent prohibition, and the concomitant requirement of distress as a remedy, simple legislative reform can.[203]

B. Legislative Reform

Given the uncertainty which some commentators suggest *Dynex-Dianor* leaves in its wake, the reform necessary to achieve full recognition of the royalty as a legal, registrable, rent charge may be beyond the capacity of the common law. The solution?

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201. *Id.*
202. *Id.*
203. *See Law of Property Act 1925* s. 1(2)(b) (UK).

Legislative reform. Legislatures, too, can add to the class of proprietary interests in land.[204] Notwithstanding the fact that individuals may not create entirely new forms of property through private dealings (as opposed to recognizing a novel relationship as satisfying the criteria of an existing proprietary estate or interest in land[205]) nor the courts accept them,[206] Parliament may exercise its sovereign power to create proprietary interests unknown to the common law. Parliament (the legislature), as in most legal systems, common and civilian, enjoys a paramount power to create, modify, or eliminate both new and existing forms of property.[207] Jessell MR, in *Sevenoaks, Maidstone, and Tunbridge Railway Company v London, Chatham, and Dover Railway Company*, put it this way: "[a]n Act of Parliament has power to create interests which were unknown to the common law, and which could not be created between individuals by contract."[208] Farwell expanded:

> Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The

204. *See* LANG, *supra* note 31, at para. 405.

205. *See supra*, Part II.B.

206. On that, *but see* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

207. *See* Merrill & Smith, *supra* note 16, at 60–68; Paul Babie, *A Never-Ending Story: Torrens Title in South Australia and the 2015-2016 Amendments to the Real Property Act 1886 (SA)*, 6 PROP. L. REV. 219 (2017); Paul Babie, *Completing the Painting: Legislative Innovation and the 'Australianness' of Australian Real Property Law*, 6 PROP. L REV. 157 (2017). One sees the negative reflection of this power in the principle of legality: *see* AUSTRALIAN LAW REFORM COMMISSION, TRADITIONAL RIGHTS AND FREEDOMS—ENCROACHMENTS BY COMMONWEALTH LAWS (INTERIM REPORT 127) 189 (2015); Dan Meagher, *The Common Law Principle of Legality in the Age of Rights*, 35 MELB. U. L. REV. 449, 453–61 (2011).

208. *Sevenoaks, Maidstone, and Tunbridge Railway Company v. London, Chatham, and Dover Railway Company* (1879) 11 Ch. D. 625, 635–36 (UK).

> Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature.[209]

The point is that Parliament may do what the courts and common law may not.

The reform necessary in relation to the oil and gas royalty would be minor, and the model already exists in English law. If one takes the technical obstacle to recognition of the oil and gas royalty to be no more than the no rent on a rent prohibition in conjunction with the unavailability of distress, then simple legislative reform easily overcomes it.[210] In the United Kingdom, for instance, "this technical obstacle was removed both for the past and for the future by the Law of Property Act 1925, which validates rent charges charged on other rent charges and provides special machinery for enforcing payment."[211] Section 1(2)(b) provides for a "a rent charge in possession issuing out of or charged on land being either perpetual or for a term of years absolute."[212] Such a reform in Canadian law could easily be effected in the provisions of Torrens legislation dealing with the registration of the rent charge itself by defining that interest as capable of existence notwithstanding the no rent on a rent prohibition.

VI. CONCLUSION

The rent charge appears as a shadowy, distant memory of the common law of real property, relevant long ago as part of the medieval doctrine of tenure. As it developed in ancient law, restrictions placed on its creation and operation were sensible in the world of tenurial incidents and feudal landholding. But in the modern Canadian law of real property, the relevance it once had seems lost and the prohibitions on its creation both restrictive and meaningless. Attempts to shoehorn modern legal relationships into this product of a bygone era are doomed to result in an ill-fit, at best. That seems the fate of the Canadian oil and gas royalty—

209. Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, [1901] AC 426, 429–30 (UK).

210. *See* MEGARRY & WADE, *supra* note 6, at 819 (citing Co.Litt. 47a; *Earl of Stafford v. Buckley,* (1750) 2 Ves. Sen. 170, 178 (UK)); *Re The Alms Corn Charity,* [1901] 2 Ch. 750, 759 (UK).

211. MEGARRY & WADE, *supra* note 6, at 819, 826 (citing the *Law of Property Act 1925* s. 122 (UK)).

212. Law of Property Act 1925, Section 1(2)(b) (UK).

while it may at first appear to be well-qualified as a type of rent charge, and so capable of admission into the modern *numerus clausus*—the strictures of the ancient law distort first appearances. But need that be the case?

We argue in this Article that the rent charge, as part of the received common law of American and Canadian real property, can accommodate the oil and gas royalty in any of its forms, overriding, lessor's, and lessee's. The Canadian *Dynex-Dianor* test allows for the rigidity of the historic common law to be overcome through the application of a wider acceptance of the parties' intentions as understood within the commercial context of the oil and gas industry. This overcomes the no rent on a rent prohibition, and its attachment to distress as the only remedy of enforcement, through recourse to the parties' understanding of their bargain and its enforcement mechanisms. This allows for the organic development of the common law from its English source, with courts using a functional approach to determine admission into the *numerus clausus*.

Moreover, this analysis views the oil and gas royalty not merely as an anomalous "interest in land" capable of protection within the Torrens system by caveat, but as a rent charge, a full member of the category of legal estates and interests capable of protection through registration and indefeasibility. Even if this is not possible as a matter of common law development, simple legislative reform can achieve this end by recognizing that the royalty is, substantively, a rent charge.

This Article's conclusion has broader theoretical and pedagogical appeal, revealing the modern application of the rent charge concept, and providing an example of this interest in land as it operates in contemporary real property law, as opposed to the long since forgotten examples from feudal history. Yet even if one rejects that conclusion, the analysis itself allows consideration of this important aspect of the received common law of Canada. That is important because, while climate change means that the oil and gas royalty will eventually go the way of the medieval rent charge, we ought nonetheless to recognize it now for what it is: a proprietary interest in land, and a modern example of that medieval interest. The analysis, then, has practical import in demonstrating that the ancient law can be adapted to suit modern needs.

Moreover, our analysis is intended to do more than simply support the acceptance of the oil and gas royalty as a rent charge, or to demonstrate how courts may use a functional approach in determining the admission of novel legal relationships into the *numerus clausus*. Instead, it affirms the vitality of real property law, both ancient and modern. A functional analysis reminds us that property is an active, living, relationship between persons in respect of things and, therefore, that it need not be relegated to the distant past in the face of distinctly modern problems.

And just as the economic, social, and political exigencies created by oil and gas exploration can propel real property law forward, so too can the transition to the clean energy future, if we acknowledge that these are not merely policy considerations but issues *for* and *of* the totality of property law, both ancient and modern. The medieval property law provides guidance in characterizing the oil and gas royalty, true, but just as much, it shows a property future when not fossil fuels, but renewable clean energy sources power our world—the minerals which must be extracted for the production of EV batteries, the vast areas of land surface used in producing wind and solar energy, the potential for off-earth mining of the Moon or Mars, and possibly even nuclear fusion energy. Showing how the rent charge can be used and regulated when applied to the old—fossil fuels—demonstrates how it may be re-purposed for the new of a clean energy future. There is, indeed, a moment when all old things become new again.