# Property Law December Exam CAN

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# Chapter 1 – The Legal Concept of Land

## Introduction

What makes a thing property is the relationships and cluster of rules surrounding that thing

**Key Concepts:**

* Property is relations between human beings mediated by things
* **Dimensions of Interests in Land**
	+ Ius utendi fruendi et abutendi/disponendi – right to use, enjoy and dispose
		- Use: manage and control things
		- Enjoy: enjoy the benefits of management
		- Dispose: transfer or consume if possible
	+ Time: bundles exist for a particular period of time
		- If end is unspecified → freehold
		- If end is specified → leasehold
		- **Freehold estates** (fee simple, fee tail, life estate) vs. leasehold estates
			* In fee simple: use and enjoyment for indefinite time (disposal too)
			* In fee tail: use and enjoyment as long as you had defined heirs (no disposal to non-heirs)
				+ **Fee Tail is no more**
* “Nemo dat quod non habet” – you can’t give what you don’t have
	+ purchase of a possession from someone who has no ownership right to it also denies the purchaser any ownership title

**Types of Rights on property**

* **Real:** Proprietary. Avails against the world: you can enforce against anyone.
* **Personal**: Non-proprietary. Can only be enforced against individual(s)

# A. Cujus est solum ejus est usque ad coelum et ad inferos

## 1. Ad Coelum

### (a) Common Law

Common Law Rule: whomever owns the title to the soil also holds title all the way up to the heavens and down to the depths of the earth.

Owners and leasors who have possessory interests in the land can also have possessory interests in the airspace above the land (Kelsen). Airspace rights extend only up to the “ordinary use and enjoyment” of the plaintiff (Bernstein). Owner has no property right or legislative jurisdiction in relation to airspace above his land – **Conflict possibly bad law** (*Manitoba*).

Old conception: **Physicalist –** You have rights in land only to the physical “thing” of land.

In the cases below we see the courts move past this, defining property rights as extending to non material things (space and time).

Kelsen v. Imperial Tobacco Co. (1957) (1.1)
**F**: P owns leasehold on building. Freeholders=IID. D got consent from IID to put up sign in airspace above building. P renewed lease after this. D extended sign. P asked D to remove sign. P suing for trespass: seeks injunction to have it removed.

**I**: Does P have proprietary right over airspace?

**A**: Interference with usable space above property is trespass and injunction may be lawfully sought as remedy. D had *licence* with IID. License is personal right, is **trumped** by P’s real right to the airspace above his land. *Shelfer*: damages in this would be purchasing right to invasion of property.

**R:** Interests in land extend to the airspace above that land.

#### Bernstein (Lord of Leigh) v. Skyviews (1978) (1.7)

**F**: D took single aerial photo of P’s house. P argues D trespassed into airspace and invaded privacy. D says photo was taken when plane was flying over adjoining land or if they did fly over P’s land to take photo they had implied permission to do so.

**I**: To what extent (height) does an owner have a right to the airspace above her property?

**L**: *Civil Aviation Act, 1949* negates action of trespass/nuisance arising from plane passing through air above land.

**A**: P relies on ad coelum maxim. Arguments against giving land rights to the heavens in *Pickering v. Rudd*, *Saunders v. Smith*, *Comr for Railways v. Valuer-General* – literal application of maxim would be absurd/impractical. Trespass by plane only committed if they fly so low as to come within area of “ordinary use” – puts limits on maxim. Even w/o limitation on maxim, *Civil Aviation Act* gives D civil immunity. If issue is photo (fear of terrorism), someone could take photo of P’s house from neighbouring airspace or from the ground…

**R:** Ad Coelum rights extend only to “ordinary use.”

#### Manitoba v. Air Canada (1980) (1.11)

**F**: Manitoba (P) invoked s 92(2) to levy tax for airplane operations “within Manitoba” (which they said included the airspace above). TJ held that airspace above MB was not within MB. Court of Appeal held air/airspace is incapable of delineation/demarcation.

**I**: Is the airspace above Manitoba the “property” of Manitoba?

**A**: Ad coelum maxim only has authority at common law insofar as it has been adopted by decisions. Follows *Bernstein* re: ordinary use and enjoyment of land. Airspace belongs to everyone, you can’t really delineate it (this doesn’t mesh w/ previous decisions, int’l law). Airspace refers to space, not air itself, the potential of that space for buildings etc. What is a ‘reasonable height’ is determined case by case.

**C**: MB has no property right/legislative jurisdiction in relation to airspace over its territory. Cannot tax what is in airspace above province.

R: Airspace cannot be owned, but limitations can be put on who can occupy it.

Comment: Pavlich thinks this is potentially bad law, thinks the justice confused air (which is communal) with airspace.

###  (b) Legislation

#### Land Title Act, ss. 138-143 (1.16)

Recognizes air space parcels and air space plans

S. 138: **air space parcel** is volumetric parcel and **air space plan**= plan that consists of 1 or more air space parcel.

S. 139: title to airspace is recognized (can be transferred)

S. 140: (1) a grant of an airspace parcel doesn’t create/convey and easement to the grantee. (2) the grantee of a parcel does not get automatic right to airspace above.

**S. 141: an owner of an air space plan can subdivide it into air space parcels (each with an indefeasible title)**

S. 142: Minister of Transportation can grant airspace parcels above highways for power lines, billboards, Skytraintm etc.

S. 143: Air space plans cannot be registered unless land to which they are attached is registered and shown as a single parcel on a plan

Title: Fee simple owner of airspace parcel receives a separate title. Does not normally appear as a charge on the surface landowner’s indefeasible title(document), but will appear as an easement if that is required to access the airspace.

#### Strata Property Act (1998) (1.18)

Allows you to define volumetric airspace parcels and put them up for sale (e.g. condos), in a standardized fashion that prepackages the necessary rights for the creation of a strata (don’t need to specify easements).

Must submit a strata plan in which different parcels are identified, set up what unit entitlement of each user is and value of each unit upon dissolution of strata. Grants a strata lot owner an airspace unit. Each strata lot owner gets a series of rights (access, support, services; **Implied Easement**). **Bare land strata plan** permits the subdivision of the horizontal plane only. Building strata plan allocates strata lots to individual owners (vertical).

Title: strata owner’s title includes both the condo (**strata lot**) and a part-interest in the common area. No separate title for the land on which the condo building sits. Provides for a form of gov’t for strata dev’t: all owners are members of corporation w/ deals w/ common areas, members elect council.

**Note:** Leasehold stratas are different. A developer builds building on land they lease. The freeholder has the title for the land on which it is build, and there are subordinate leases listed on that title to the individual parcels of land.

*Strata Property Act* increases and advances flexibility of ownership. People who wouldn’t otherwise be able to own land are able to get benefits of ownership by buying smaller parcel. Land can be divided up as just raw land; raw land and airspace parcels; raw land and strata titles; or a combination of the three.

## 2. Ad Inferos

Subsurface rights are subject to (1) certain prerogative rights in the Crown (2) terms and reservations, if any, in the original Crown grant and (3) very extensive statutory restrictions. In BC Crown grants have traditionally expressly reserved precious metals, base minerals other than coal since 1897, coal and petroleum since 1899, natural gas since 1951. *Geothermal Resources Act* provides that right, title and interest in all geothermal resources in BC are vested in and reserved to the gov’t.

# B. Fixtures

***Quicquid plantatur solo, solo cedit***

**Common Law Rule: whatever is affixed to the soil belongs to the soil. Plants and vegetation are part of land.**

**To determine whether chattels are part of realty, consider (1) degree of annexation – how attached are things that would otherwise count as chattels; (2) object of annexation – if to advance purpose of the property as a whole, then the item is a fixture; if for the purpose of improving the use of the item, then it’s a chattel (*Re Davis*).**

**Rules for what constitutes fixture: (1) Fixtures must be attached to land by something other than their own weight (unless otherwise intended); (2) Items attached to land even slightly are fixtures (rebuttable if purpose was for them to continue as chattels); (3) In order to rebut *prima face* category, look at object and degree of annexation, which is lying open for all to see (objective test); (4) Intention of affixer is drawn from looking at the item/annexation itself, not what the affixer says (5) Tenant’s fixtures are fixtures, but the tenant has ability to return it to chattel status (*La Salle* followed in *Zellstoff Celgar Limited v BC*).**

#### Re Davis (1954) (1.21)

**F**: P’s husband died. Dower only includes real property and fixtures, not chattels. Husband had bowling alleys fixed to the property with bolts and clips.

**I**: Were the bowling alleys fixtures or chattels

**A:** Alleys were easily attachable. *Prima face* chattels. Applied rule below.

**C**: Finds that alleys were chattel. Not affixed for better use of the building, but so that bowling can be better carried on.

**R**: If object of affixing of chattels is to improve the freehold, then they may well become part of the realty, but if object of affixing chattels is the better enjoyment of the chattels, then affixation does not make them part of the realty (*Haggert*)

*Zellstoff Celgar Limited v BC (1.23)*

**F**: P purchased Pulp Mill. If machines in Mill were fixtures, high taxes; if chattels, low taxes. P argued machines=chattels, most of the machinery could be dismantled and removed and there is a market for it.

**I**: Were machines l fixtures even though much of it is portable?

**L**: *Haggart v Town of Brampton*: **intention of permanency** determined to be important in whether or not something is fixture. A safe was determined to be a fixture because it was put in a place structurally adapted for it, and could not be taken out without destroying a part of the realty. It was determined to be intended to be permanently there and was thus a fixture.

*La Salle Recreations*: carpets in hotel = fixtures even though degree of affixation was slight relative to size. Object of affixation was for the better use of the building as a hotel, and not the better use of the goods as goods. Permanent **does not** mean infinite/indeterminate, it means staying there so long as it serves it’s purpose.

*Stott Timber v Cape Breton:* equipment in saw mill determined to be fixtures

**A**: P argues that annexation was for better use of the equipment as chattels rather than for the better use of the land. *La Salle* test (above): Purpose was to improve the land as a mill, and they were intended to be there permanently (they had been there for a long time).

**R:** must take into account both the degree and object of annexation (including purpose of the building), as well as the intent of permanency

#### CMIC Mortgage Investment Corp. v. Rodriguez (2010) (1.30)

**F:** P has mortgage over D’s property. D purchased tent 1 to serve as barn – footings secured to concrete blocks buried in ground – clearly fixture. D took delivery but did not pay for tent 2 (tent company retains ownership until fully paid) – concrete blocks not buried in ground; D wanted it to be portable. P started foreclosure against D and claimed tents as part of land. During proceedings, tent company repossessed tent 2 – claimed it was chattel.

**I**: Should Cover-all #2 be regarded as a fixture or a chattel?

**A**: For tent 2 being fixture: clearly permanent; closeness to tent 1 indicates likewise permanency, breezeway connected the 2 tents, on land to enhance business, large and not obviously portable. For tent 2 being chattel: tents designed to be portable, D (testified that she) wanted it to be portable, could have been affixed like tent.

**R:** Even if something is installed to enhance the property’s purpose, an expressed intention for *portability* overrides this.

Comment: Pavlich believes taking D’s subjective (reported) intention is absurd – problem of manufactured evidence

#### Elitestone Ltd. v. Morris (1997) (1.32)

**F**: Bungalow (constructed on the property) rests on concrete pillars, in place since 1945. Rent Act of 1977 protected those inside fixtures, which were part of the realty. If one resided in a chattel, one would not be protected by the act and therefore could be evicted. Convention dictated that chalets were owned separately from land (therefore chattels).

**I**: Is the structure a fixture or chattel?

**L**:

**A**: Test is objective: only look at the thing itself to determine (1) degree and (2) object of annexation. Degree of Annexation**:** Although not affixed, common sense dictates something like a fucking house is **Part & Parcel of the land**. Object of Annexation: If constructed in a way that it cannot be removed without being destroyed, purpose clearly for permanence

**R**: Houses are part and parcel of the land (it’s a fucking house – common sense); Intention only relevant to the extent it can be seen in degree and purpose of annexation itself; if something can only be removed through destruction, it cannot be a chattel.

#  C. Water

## 1. Riparian Rights

### Sources of Water Rights:

Common Law:

* Cannot own water, but if you have land that abuts water, you have rights to the water.
* Rights to:
	+ Flow
		- Right to the natural flow
	+ Quantity
		- Right to remove as much as is needed for regular purposes but no more
		- Cannot draw water to give to some non-riparian owner
		- Only have action against upstream riparian owners if they were using more than what riparian rights gives
	+ Quality
		- Right to non-polluted water
* Subordinate to statutory rights after *Water Act*
	+ still applies to percolating groundwater and water which is unrecorded.

*Water Sustainability Act*: use of flowing water (must be licensed, unless s. 42 exceptions show that the water is unrecorded) (previously *Gold Fields Act* – created to address scarcity of water in BC)

• *Water Protection Act*: purpose is to foster sustainable use, property in and the right to use and flow of water is vested in BC government, private rights must be approved under *Water Act*

• *Land Act*: water bed rights

• *Land Title Act*: Rights upon accretion or erosion

In BC, the *Water Act* governs riparian rights. Riparian rights can only exist for a person lawfully using the water. The only way to acquire the right to use and flow of water in any stream in BC is under the provisions of the *Water Act*

#### Water Sustainability Act, ss. 1-2, 4-6, 93, (1.36)

S. 1: Definitions: **Aquifer** (geological formation that bears groundwater) **ground water**(water naturally occurring underground) **recorded water** (water to the diversion of which is licensed) **stream** (natural watercourse/source of water supply, does not have to contain water); **unrecorded water** (water whose right is not held under license or under an Act)

S. 2: **domestic purpose** (use of water for household purposes, sanitation and fire prevention, watering of domestic animals and poultry and irrigation of garden not exceeding 1,000 m2\* adjoining and occupied w/ a dwelling house)

an interest in water cannot be acquired via use; original right to use flowing water is vested in the Crown

S. 5: (1) Water is owned by British Columbia, except where private rights have been established by license (2) groundwater also owned by BC (3) No rights to water from being there for a long time (no squatter’s rights to water).

S. 6: (1) Mustn’t divert water unless you have a license (see exceptions) (2) Can divert the water for an emergency (like a fire) even without a license, must undivert right after **(3)** You don’t need a licence divert **unrecorded water** from a stream for **domestic use/**prospecting a mineral**,** from an aquifer for prospecting minerals **(4)** You don’t need a licence to divert **groundwater from an aquifer** for domestic use.

S. 7: License – you can do most things with the quantity of water specified in your license

S. 22: (7) **Rank**: Domestic>Waterworks>Irrigation>mineralized water (1) **Time:** First in time within the same use rank trumps next in time (2) **Rank>Time**

S. 25: License belongs to the land; you need to sell the land *with* the license. Can’t detach them.

\* for your own reference 1 acre = 4046.86m2

Water Protection Act ss. 2-3 (1.40)

S. 2: Purpose is to foster sustainable use of BC’s water resources in continuation of objectives of conserving and protecting environment

S. 3: Water is vested in gov’t

###  (a) The Development of British Columbia Law

### H.A. Maclean, “Historic Development of Water Legislation in British Columbia”

* Before 1859, law w/ regard to use of water was common law – law of riparian rights.
* 1859 *Gold Fields Act* – beginning of *Water Act* in BC – centralized water rights in Crown. Gold Commissioner could grant exclusive rights to use of defined Qs of water. Water use pays rental to state. Neglect to use water/wasting water = cancellation of privilege. License holder could sell water. *Water Privileges Act 1892*: right to use of water in streams vested in Crown. 1897 consolidation of law dealing w/ water: water licenses attached to land where water used. *Water Act 1914* put end to rights of riparian owners who did not hold licenses. Riparian law still exists in gaps left by legislation.
* *Cook v. City of Vancouver 1912*: City’s water license held to override Cook’s alleged riparian rights. Right to continuance of flow undiminished taken away by Water Act.
* Principle features of *Water Act 1948:* original right to use of water vested in Crown, right to use water dependent on license, license not used subject to cancellation, priorities between licenses determined by date, holder of license has right to expropriate land on which to construct pipe lines/other works, disputes re: mechanics of diversion settled by engineers.
* To obtain water license: post Notice of Application near point of intake, notify adjacent owners, Water Comptroller holders hearings. Licensee pays rental to Crown.
* Water license (right to use and flow) gives security of tenure for farmers/industry which was not possible under riparian law. Gives right to water for non-riparian owners.

Common Law - Law of Riparian Rights
At common law, **riparian owner** has proprietary rights in flowing water and percolating water (groundwater), even if they don’t own the land below the water. Acquisition of an interest in water is not based on prescription (right to use)- must be registered.

(1) Right to make use in certain specified ways of water flowing by the land.

(2) Right to continuance of flow undiminished.

• Water flow, quantity and quality in its natural state

• Rights remain whether exercised or not

• Entitled to make certain uses of water; not exclusive right, but subject to similar rights of other riparian owners

o No material injury to fellow riparian owners

o Not for uses unconnected to riparian property

o If supply exhausted through ordinary use, cannot complain

o Domestic purposes only

o Restrictions on irrigation – "amount adjudged reasonable" and returned with "no diminution other than that caused by evaporation and absorption"

o Cannot grant use to another

• Obligation to not cause injury to other riparian owners by diminishing the flow, quantity or quality of their water

###  (b) The Conjunction of Common Law and Statutes

#### Johnson v. Anderson (1937) (1.45)

**F**: Ds diverted stream from P’s property. P had no water license – used water for domestic purposes. D had license for water, but it did not authorize diversion.

**I**: Can P sue in nuisance for fact that water was being diverted? What happens when there are 2 unlicensed water users?

**L**: *Water Act* – can use unrecorded water for domestic purposes

**A**: Not all water has been licensed out. Riparian owners still have rights to unlicensed water. Riparian owner still has remedy against unauthorized diversion of stream which deprives him of rights to water unless legislation clearly takes away this right and remedy. D went beyond what water license granted – violated riparian law.

**C**: P can continue to use water, protect this right against another unlicensed user. Injunction granted against diversion of water.

**R**: Act preempts riparian rights but does not remove them. Crown (unrecorded water vested in Crown) -> Licenses under *Water Act* -> Common law riparian rights -> Non-licensed/non-riparian users

#### Schillinger v. H. Williamson Blacktop & Landscaping Ltd. (No. 2) (1977) (1.49)

**F**: Water on Ds land flows onto Ps land. P diverted water for fish hatchery. P did had license but not to divert *this* water. Ds company altered course of water flow – resultant silt caused Ps fish to die. P is claiming damages for negligence and nuisance.

**I**: Can P claim damages from D if P was not entitled to divert water?

**A**: Ps diversion of water was unlawful under s 41 of *Water Act*. Common law doesn’t apply here – has been taken out by statute. Riparian rights only exist under exception for domestic purposes. Fish hatchery does not fall under domestic purposes.

**R**: Riparian rights, if any, can exist only for a person lawfully using water and only way to acquire right to use water is under provisions of Water Act.

#### Steadman v. Erickson Gold Mining Corp. (1989) (1.51)

**F**: P piped water into his house from small, spring-fed dugout on his land. Used for domestic purposes and diamond saw. D built a road immediately up the hill from P’s land, causing silt and mud to contaminate his water system. P sued D for nuisance, claiming he was entitled to use of the water and that his use, notwithstanding the Water Act, was lawful.

**I**: Does P have riparian right to use of this water for domestic use/diamond mill?

**A**: *Water Act* licensing requirement does not apply to groundwater, therefore riparian rights still apply. But if this is not groundwater, P can still sue as it is unrecorded water. But was his use outside of what riparian rights allow (a la *Schillinger*)? No, use for diamond saw did not take his use beyond domestic use.

**R:** riparian owners have the right to the domestic use of unrecorded water and are able to claim an action in nuisance against someone who pollutes that water, so long as no one holds a license for that water.

## 2. Percolating Water

* Riparian rights never applied to percolating water
* It *was* owned by whoever drew it to the surface
* Now has been affected by *Water Sustainability Act* and *Water Protection Act –* all vested in the crown

## 3. Ownership of the Beds of Watercourses, Lakes and Ponds

Land Act, ss. 55-56 (1.56)

In BC, riparian owners have no rights to the navigable or non-navigable river bed shore (55) unless specifically granted; and in the future all Crown grants must be construed to imply the Crown owns the waterbed (56). Sub-water land is owned by the Crown.

**Ad Medium Filum –** To the medium line

* Old concept, abutting owners owned waterbed up to the middle line
* New Rule (1961) *Land Act* - Unless grant says you own water bed, then abutting owner owns none of it

## 4. Accretion and Erosion

**Accretion**: land bordering on tidal water body is increased by silting up of soil, sand, or other substances

**Erosion**: land bordering on tidal water body is decreased by permanent withdrawal/retreat of water

**Avulsion:** unlike accretion, sudden change in land **does not** give rise to land rights.

**Doctrine of accretion**: where land is granted w/ water boundary, title of grantee extends to that land as added to/detracted from by accretion, or diluvion, and this is so whether or not grant is accompanied by map showing boundary, or contains parcels clause stating that area of land, and whether or not original boundary can be identified.

Riparian owners are entitled to an increase by accretion, or may suffer a decrease by erosion (*Land Title Act, ss. 94-96*). A new plan must be registered to show change in boundaries.

*Yukon Gold v. Boyle Concessions Ltd*: where erosion is sudden and not imperceptible, ownership of eroded area remains unchanged.

*BC (A.G.) v. Neilson*: gradual raising of riverbed by alluvial deposit is vertical process and therefore different from gradual retreat of waterline

#### Southern Centre of Theosophy Inc. v. South Australia (1982) (1.57)

**F**: A owns land abutting lake which has receded due to accretion. Crown (R) argues that new land is theirs. R contends that when A built fence it demarcated the property line, and the doctrine of accretion(DOA) cannot apply. R also argues that accretion does not apply to a (perpetual) lease.

**I**: Does the doctrine of accretion apply to proprietor?

**A**: DOA: when land is added through gradual/imperceptible receding of water, ownership of new land goes to riparian owner. It **does** apply in this case. The grant did not specifically exclude the doctrine and therefore it must apply. Fences do not necessarily demarcate property lines and cut off proprietary rights. Leasehold doesn’t matter DOA applies to all forms interest.

**R**: DOA applies unless Crown grant explicitly excludes it. Applies to all land interests.

## 5. Access by Riparian Owners

#### North Saanich (District) v. Murray (1975) (1.64)

**F**: A’s were riparian owners, each built wharfs on the foreshore of the water. Lessee of the foreshore from the crown (R - North Saanich) claims in trespass, won in trial.

**I**: What are riparian rights to the foreshore?

**A**: Members of the public (including riparian owners) *do* have right to access the shoreline. In exercise of this right, riparian owner must not interfere with public right of navigation or build anything on the foreshore. Riparian owners do have specific right to anchor their vessels.

**R**: Riparian owners have right to access across the foreshore, but cannot erect structures that interfere with public use of the foreshore.

# D. Support

**Common Law Rule**: an owner of land is entitled to have his land left in its natural plight and condition w/o interference by the direct or indirect action of nature **facilitated by the direct action of the owner of adjoining land** (or subsurface owner) (*Cleland)*

* An absolute right exists independent of any claim in negligence (*Rytter*).
* Should obtain support agreements for buildings – easements for lateral supports on buildings are advisable, as no automatic right.

**Incident**: something appertaining or attaching to something else. Support is an incident to the land itself.

**Lateral support**: right of support between adjoining surface owners

* No one can interfere with the land by removing lateral support (*Rytter*)
* Loss of lateral support can occur even where the movement is vertical (digging down)
* The right of support does not extend to actual title in dirt (*Bremner*) (don’t own the sand)
* Limited to land in its natural state- does not include support for the additional weight of any structures which have been on the land (*Gillies v Bortoluzzi*) unless obtained by easement (*Dalton v. Angus)* or prescription or unless it can be shown that subsistence would have occurred even absent the buildings on that parcel (*Gillies)*

*Prescription Act* (NOW DEFUNCT **1974**): a right to lateral support from adjoining land (for a building proved to have been newly built) may be acquired by 20 years uninterrupted enjoyment, so long as it might be known that some support is being enjoyed by the building.

**An *easement* is a nonpossessory interest in another’s land that entitles the holder only to the right to use such land in the specified manner.**

**Vertical/ Subjacent support**: subsurface owner’s duty to support surface owner – recognized as new CL rule in *Rytter* and *Gillies*

• Limited to land in its natural state

• *Rytter* confims that lateral + vertical support (in combination) are owed to a structure on a neighbouring property as an incident to land. If you disturb the lateral + vertical support, your neighbour has a valid claim against you.

• Excavator cannot escape liability for loss of lateral support by pointing to building on P’s property. In some cases where no prescriptive right exists, buildings and the land may not be entitled to the same lateral support, but are entitled to vertical support. (*Gillies, Rytter)*

#### Cleland v. Berbarick (1915) (1.66)

**F**: P and D neighbours on beach. D drew sand from his land as did his wife on lot next to him. Storms washed sand from P’s beach onto D’s land.

**I**: Is D legally responsible for damage done to P’s land?

**L**: *Dalton v. Angus*: right of owner of land to have land left in status quo.

**A**: If your neighbor excavates in their property, and this causes yours to subside, then this is a grounds for actions. (1) Sine quo res ipsa haberi non debet - support is part of the land itself, must remain with the land, even without an easement (2) Sic utere tuo, ut alienum non laedas - **You must use your thing in a way that doesn’t hurt others**. (3) Need for neighbours to help support each others property in its natural plight and condition.

**R**: You must not interfere with your neighbour’s use and enjoyment of their land. **Support is an incident to land itself.** Right of owner of land is to have land left in natural plight and condition w/o interference by direct/indirect action of nature facilitated by direct action of owner of adjoining land.

#### Bremner v. Bleakley (1924) (1.68)

**F**: A’s dug holes on land. R claims holes prevented sand blown away by wind from being blown back onto Rs land. As selling sand from their property, sand is being replenished into holes by wind. R is claiming

**I**: Do R’s have cause of action due to appropriation of sand by A’s? Does sand retain its character as soil when it moves or become a chattel?

**L**: *Cleland v. Berbarick –* narrowed in this decision (support only, not loss of soil)

**A**: The digging of holes did not in any way cause or contribute to the movement of the sand from the respondents’ beach. Wind moved sand as natural process ***not*** facilitated by a person. When the sand is settled it is a part of the property but when it is moved by natural forces, you lose title. It would be absurd (and impossible) to try and distinguish your grains from others when they are moved onto another’s property. For this to be actionable, the loss of sand needs to involve a loss of support.

**R**: Right of support does not extend to actual title in dirt. Chain of causation must be direct, and must be to loss of *support.*

#### Gillies v. Bortoluzzi (1953) (1.72)

**F**: D entered an oral agreement with the co-defendant Benjamin Bros Ltd (BB) to excavate a basement. Following the excavation, the east wall of the building standing adjoining the excavation (leased by P) collapsed into the excavated basement. As a result of the collapse, a large quantity of the P’s goods was damaged or destroyed. P’s sue for damages.

**I**: Are the defendants liable for the collapse of the plaintiff’s wall?

**A**: In itself, the removal of lateral support for P’s building is not actionable. However, evidence of the defendant's’ negligence during the excavation is enough to warrant damages.

**R:** Person is entitled to lateral support for its land in its natural state but not entitled to support when there is superimposed upon the land the weight of a building

**O**: the excavation extended under the bottom of the wall and resulted in a loss of vertical and lateral support of the wall. Maybe this would be a violation to remove vertical support from structures?

#### Rytter v. Schmitz (1974) (1.77)

**F**: P’s building partially collapsed due to excavations carried out on D’s property; Chimney and wall of P’s building (stood for 26 years) collapsed. P pleaded a right to lateral support and sued D for damages. P claim D dug across property line. D said didn’t cross property line before the collapse, claimed P could not claim for lateral support.

**I**: Is the plaintiff entitled to lateral and vertical support of their property? If so, can P sue D for the removal of that support?

**L**: *Prescription Act*, 1832, c. 71

**A**: In itself, removal of lateral support of wall would not give P cause of action (except the prescription act is still applying). BUT excavation extended under bottom of wall – ***vertical and lateral*** support of wall removed which caused wall to collapse. Collapse not caused by P’s negligence, D removing lateral + vertical support gave rise to action.

**R**: An owner has a right to vertical + lateral (combo) support from adjacent properties to their land even with structure.

Comment: in an urban setting, removing lateral support under building will often give rise to actions (e.g. negligence) under various other practical considerations of construction standards (everyone expects you to shore up).

# Chapter 2: The General Principles of Land Law

**Sources of Real Property law**

* 1066 - common law began in Europe (William the Conqueror is the first owner of everything, his babies still own it)
* 1858 - Reception of English Law into BC occurred (*Law and Equity Act*, s. 2)- all British statutes and case law in existence before 1858 are of legal force and in effect in BC
* 1870 - BC passed the *Land Registry Ordinance*, giving it the Torrens Land Registration System
* 1871 - BC joined Confederation

**Property rights are under provincial jurisdiction via the common law, equity and statutes:**

* *Land Act* deals with Crown land, Crown grants (s. 50), ~~the 7 land districts and surveying~~
* *Land Title Act* sets up the BC Torrens land registration system and require that all transfers be made on the prescribed form (Form A) and on a single page (s. 185). However, s. 185 does not apply if another statute allows a different form, or the Registrar accepts the different form
* *Property Law Act* deals with everything else (statutory provisions with land issues)
* *Land Transfer Form Act* (4.12) deals with the meaning to be given to words in prescribed forms

# A. Real and Personal Property

In a real action the P recovered the actual subject matter of the dispute. In a personal action the P obtained money as remedy. Realty is fixed and static, personalty is susceptible of being moved. Law of real property requires individual treatment. Rights in torts and contracts are **personal rights** – rights between 2+ parties. A property right is a **real right** – it avails against the world – *in rem* rights allow you to get property back when it is taken away, rather than have a remedy in its place (injunction instead damages)

# B. Reasons for Studying the Law of Real Property

Land law attempts to control the use and disposition of land.

## 1. Dispositions

Property owner can dispose of property inter vivos or on death.

* **Inter vivos** property may be sold or disposed of by gift.
* **On death** property may be disposed of by will or pass according to rules for intestate succession in *Estate Administration Act*.

Important for any transfer of property to be effectively carried out – doc of transfer must transfer what party intends to transfer, subject to qualifications parties intend to impose.

## 2. Use of Land

Restrictions on the use of land arise out of :

1. Common Law
2. Private Arrangements
3. Legislation

### (a) Common Law

Mainly through law of torts. Law of nuisance controls noise, smells and other discomforts. Law of trespass and negligence impose restrictions on land use.

###  (b) Private Arrangements

**K law**

Later development of law of **restrictive covenants** in 19th and 20th Cs enabled private land owners to exercise greater measure of control over neighbour’s use of land w/o direct public intervention.

 **Restrictive Covenant:**

* + Agreement restricting the type of use of the land
	+ Binds all successors in title (**real right**)
	+ Very important for predictability in era without land zoning regulations

### (c) Legislation

e.g. *Agricultural Land Commission Act* (agricultural land reserve in BC), *Water Protection Act*

Municipalities control land use by using powers conferred by provinces e.g. zoning.

# C. Some Basic Principles of Land Law

## 1. Tenure

**Historical background**

* William the Conqueror took land unto himself, parceled it out among followers, who then parcelled it out amongst tenants, sub-tenants, etc. - **sub-infeudation**
* King never parted with absolute ownership – this remains theoretical basis in land law today that Crown is an absolute owner and that an individual cannot own land; instead, he can only have an interest in land
* Land was the most convenient medium w/ which the monarch could both reward his chief supporters and at the same time bind them to provide further services.

**Tenure**

* Two types of tenure: freehold and copyhold. Will only focus on freehold
* **Freehold** tenure divided into four types:
	+ knight-service (soldiers)
	+ socage (agriculture)
	+ seargentry (divided into grand seargentry, equivalent of knight service and petty seargentry, equivalent to socage)
	+ frankalmoin (religious)
* These tenures eventually united into single tenure, **socage**
	+ The lord’s duty became more about taxes, so the Lord would only want people to reap the *fruendi*
* ***Statute of Quiz Emptores*** 1290 prevented further sub-infeduation and required interests be transferred
* ***Tenures Abolition Act*** 1660 abolished all incidents connected with socage except:
	+ Forfeiture – right for Crown to claim land of person guilty of high treason (disallowed under CC)
	+ Escheat – right of lord to claim land of tenant who died without anyone to succeed his interest (= modern intestacy) or who committed a felony (covered by CC and *Escheat Act* 1996)
* "Although the doctrine of tenure embodies the rules for allocating land rights and corresponding obligations, it does not describe their duration. That is the function of the doctrine of estates."
* Under our current system we have **allodial** (no lord above you)as opposed to feudal ownership – subdivision in the form of **abuttals** – no obligation to lords.

## 2. Corporeal and Incorporeal Interests in Land, and the Doctrine of Estates

### (a) Corporeal Interests

**Corporeal interest**: can you physically possess the thing around which the interest arises? In context of land: do you posess the land?

* If yes, corporeal, either freehold or leasehold.

 

* Freehold
	+ Absolutely no benchmark for time
		- Fee Simple
			* Fee=estate is inheritable
			* Simple=no restrictions on who can inherit
			* *Statute of Quia Emptores* 1290 *–* allowed everyone to dispose of land *inter vivos* without lord’s permission
			* *Statute of Wills* 1540 – allowed everyone to transfer by will
				+ These two statutes made Fee Simple essentially like absolute ownership
		- Fee Tail
			* Inheritable only by heirs
			* Extinguished by Property Law Act
	+ Time determined by life
		- Life Estate
			* A’s interest expires when A dies
		- Estate Pur Autre Vie
			* A’s interest expires when B dies
* Leasehold Estates
	+ Time in land of fixed duration and in respect of which tenant usually pays rent to landlord. Developed outside feudal system. Originally common law did not treat leases as interests in land – regarded as type of personalty – personal right against landlord. Today lease is interest in land, but duration must be fixed at time of creation (vs. freehold estates).
* Future Interests
	+ holder of fee simple make create number of estates in succession.

### (b) Incorporeal interests

Entitle person to some rights in respect of piece of land that fall short of claim of possession e.g. right of way. Party gaining benefit of easement is dominant estate/dominant tenement, party granting burden is servient estate/servient tenement.

List of the ones know of:

* Restrictive Covenants
* Easements
* Mortgages
* Profits a pendre
* Future interests
	+ Reversion/Remaineders

## 3. Legal and Equitable Interests

**Legal interests** come through the common law (CL) and avail against the world: upon completion (registration) in BC, you receive the legal interest.

**Equitable interests** originally came from the Court of Equity. Upon signing of the Contract for Property Sale (CPS), you receive the equitable interest (as you have entered into a binding contract).

* **Legal title** refers to the duties and responsibilities of maintaining and controlling some property.
* **Equitable title** refers to the benefits and enjoyment of that property.

###  (a) Origin of Equitable Interests

Common law was very rigid. People appealed the harsh decisions to the King, who delegated them to the Chancellor. Developed into the Court of Chancery (later =equity). Court of Chancery decided based on equitable doctrines instead of common law. They would give judgements based on fairness which developed into standardized remedies which formed **equitable interests**.

### (b) Development of the Use

Equity developed the Use to compel the holder of a legal interest to hold that interest for the benefit of a 3rd party (who held the equitable interest). Dev’t of use recognized that fragmentation could take place not only in time and space, but you could also fragment use and enjoyment. Holder of the legal title held the interest not for his own benefit, but for the benefit of another. Process known as “feoffment”. Modern version: trust

* Example: A transfers fee simple in Blackacre to B “to the use of C”. A is feoffor. B is feofee to uses. C is cestui que use (“he to whose use” the land is held) – C has **equitable interest**. Legal interests shift from A to B. B has **fiduciary duty** to act in interest of C.
* Why? Allowed someone to dispose of property after death before that right was legally recognized. To hold land for religious bodies. To provide for family before going to fight in Crusades. To avoid feudal taxation and other feudal burdens - if A transferred his interest to X and Y to the use of A, when A died, X and Y would take absolute title by right of survivorship and thus there was not succession of the legal title- no estate tax.

### (c) The Statute of Uses

*Statute of Uses*, 1535, eliminated the Use.

**Executing the use:** converted equitable title of cestui que use into legal title, thereby removing feofee. In the above example, the fee simple would go from A to C and B would be removed. Statute did not apply where a person was seised to his own use (i.e. if land

was transferred to “B in fee simple to the use of B in fee simple”- B had both legal and beneficial ownership, i.e. was both the beneficiary and the trustee). If there were two Uses, the Statute did not eliminate the second Use, “use upon a use” (i.e. A holds interest for B for the use of C for the use of D- legal title would move to C). Also did not apply to personalty and active uses (where feofee has active duty to perform).

### (d) Emergence of Modern Trust

Short summary, people passed on the equitable interest one extra time and problem solved

The Modern Trust emerged out of the Use

* A transfer to A in fee simple to the use of B in fee simple to the use of C in fee simple
	+ C given enforceable use became standard way of creating trust. Legal title remains in the trustee who holds the land in trust for the beneficiary (who holds the equitable interest). As the legal owner, the trustee can transfer ownership to a 3rd party as long as benefits go to beneficiary. BUT if 3rd party pays and does not know of trust, or does not know transfer was in breach, then beneficiary cannot enforce trust. The beneficiary can deal with his equitable interest just like any other interest in land. Trust comes to end when beneficiary ends it. In trust, legal title always remains with the trustee. Interests that can be created in Equity correspond to those that can be created at common law.

Example: A transfers fee simple in Blackacre “**unto and to the use of** B in trust for C”. A is the sellor. B is the trustee. C is the beneficiary (cestui que trust)

Equitable interest is vulnerable against bona fide purchaser for value w/o notice that a transfer is in breach of trust, and in this respect differs from legal title (where nemo dat applies).

**Equitable doctrine of notice:** Express or actual notice (what the transferee really knows); implied notice (what the transferee’s agent knows); constructive notice (what a transferee ought to have known if he had made the type of inquiries that a reasonable person ought to have made) -> Offers protection to equitable interest.

## 4. Freedom of Alienation

English land law has aimed to make land freely alienable.

3 modern requirements:

(1) Owner must have technical freedom of disposition

(2) In disposing of property, owner must not have power to impose excessive restraints on freedom of alienation

(3) Mechanics of transfer must be simple.

### Freedom of Disposition

Pavlich: Freedom of Alienation became more necessary the more mercantilist the economy became.

1290 - *Statute of Quia Emptores:* Fee simple became freely alienable inter vivos under the provisions of the (did not allow tenants-in-chief who held land from the Crown did freely alienate – had to pay fine). Fine abolished in 1660.

1540 *- Statute of Wills* gave total testamentary powers in relation to all lands held in socage tenure, and two-thirds of the land held in knight-serve (previously only personalty could be disposed by will).

1660 - *Abolition of Tenures Act* converted knight-service into socage tenure (so all were covered by the *Statute of Wills*). Freedom to alienate inter vivos fully established – free alienation of fee simples.

A widow’s right to dower (i.e. a life interest in one-third of deceased husband’s realty) imposed some restriction on married man’s right of alienation. *Dower* Act 1833 reversed equitable position. Dower was abolished in 1925.

1845 - *Law of Property Act*: Alienability of future interests established.

### Restraints on Alienation

4 Types

* **Direct Restraints:** clause in a transfer which places restraints on new interest holder’s right of disposition. All gone today except for lease reassignment (prevention of subletting).
* **Fee Tail:** To A and the heirs of his body, and then his body, and then his body… Eventually whittled down to nothing.
* **Future interests:** Long series of future interests (His son will get it, and then his son) could prevent alienation. But this was restricted by:
	+ 1) courts making a series of life estates running within a family impossible;
	+ 2) the Statute of Uses and the rule against perpetuities (prevents a person from putting qualifications and criteria in his/her will that will continue too long after death).
* **Strict Settlements**: NOPE.

### Mechanics of Transfer

By what means does the intended transferee ascertain precisely what interest in the land is held by the intended transferor (establishing a good root of title)? b) By what methods or documents (conveyancing) is the actual transfer of an interest in land effected?

**i) Establishing good root of title**: Landowner’s docs inspected by purchaser to see if they confer on transferor interest which was subject matter of sale. Usually search back 60 years. Has to be repeated every time land is transferred.

**ii) Methods of transfer**

* **Livery of seisin** – public, physical delivery of property
* *Statute of Uses* 1535 moved legal title regardless of whether there had been livery of seisin (lease and release, enabled gifts between relatives – **covenant to stand seised**)
* *Statute of Frauds 1677* made written evidence compulsory
* *Statute of Enrolments 1677* required that written agreements be enrolled in the King’s Courts of Record at Westminister or in the country where the land was situated (ways to get around it)
* Formal replacement of livery of seisin by *Real Property Act* of 1845
* **Modern System -** Registration of documents**:** introduced in BC in 1861**;** all documents relevant to a parcel of land are on file**;** *Land Registry Ordinance 1870* established system of title registration; *Land Titles Act* tries to ensure title in as costless a way as possible; Title registration: BC has Land Registry (Torrens) system**;** Torrens system protects purchaser**;** "Mirror principle": register of title reflects accurately and completely allestates/interests that may affect the land**;** "Curtain principle": registry is auth source of information for aprospective purchaser.

# D. Relationship Between Real and Personal Property

## 1. Tenure

Tenure never applied to personalty and is now of no significance in relation to realty.

## 2. The Doctrine of Estates

In theory personalty operates on basis of absolute ownership – not estates. This is applied strictly for fungibles (consumables). But relationships corresponding to legal estates in land can be created in personalty (e.g. leasing cars). Courts have allowed equitable interests in personalty (e.g. trusts of shares/bonds). Have given effect to succession of legal interests in personalty – essentially estates.

#### Re Fraser (1974) (2.25)

**F**: Deceased left will and appointed R as executor and trustee. Left life interest in estate and property to widow and all the rest and residue (remainder) of estate and property, both real and personal, to charity. The more the widow's estate was worth, the less estate duty that would have to be paid, and the less her portion. The life interest relationship on the realty depreciated its value (5 years left), R didn’t want it to depreciate the personalty too. R contended that life estate could not apply to the personalty.

**I**: Can there be life estate in personalty? Does widow have right to encroach upon personalty during term of life interest?

**A**: Court says widow does not have absolute interest in personalty. Instead charity has received vested interest in remainder of estate but its enjoyment of remainder postponed due to widow’s life interest. Widow may receive revenue from corpus. Deceased intended widow to enjoy income from corpus during her lifetime, w/ corpus going to charity upon her death. Equity imposes on widow and trustee obligation to preserve personalty in entirety for ultimate recipient: the charity.

**R**: “Life interest” when used in a will in relation to personalty: the recipient of the life interest does not own personalty absolutely. They may enjoy the revenue derived from the personalty and no more unless the testator (dead guy) has expressly or impliedly indicated an intention that the recipient of the life interest should have the power to encroach.

## 3. Alienability

Personalty must be freely alienable. Rule against perpetuities applies to personalty to curb excessive creation of future interests. Modern selling techniques have seen the rise of registry systems for personal property security interests. Transferors did try to impose direct restraints on alienation and found the courts treated them as they did restraints on land.

## 4. Devolution on Death

On death, property may pass by will or in **intestate** succession (no will). This is usually codified in a statute (*Wills, Estates and Succession Act*).

* W/o a will, transfer is **intestacy**. Ownership of real property escheats to Crown, personal property passes to Crown bona vacantia (*Escheat Act*).
* Will-maker’s freedom to disinherit spouse/child subject to judicial review.

# E. The Relevance of English Law

#### Law and Equity Act, s. 2 (2.29)

In theory at least, English statutes and decisions of English courts apply in BC today – modified/altered by all BC legislation.

*Statute of Quia Emptores* and the *Statute of Uses* remain part of the theoretical foundations of land.

# Chapter IV: Acquisitions of Interests in Land

If at time of making will or making inter vivos dispositions the maker lacked mental capacity, they are void. Inter vivos transfer by minors can be taken back when they reach age of majority. Provincial statutes relevant to dealings with property on behalf of persons suffering from mental disability:

* *Patients Property Act* – committee of estate
* *Power of Attorney Act*
* *Adult Guardianship Act*
* *Representation Agreement Act* – management of financial affairs
* *Public Guardian and Trustee Act*

An alien may own land despite lack of citizenship.

# A. Crown Grant

*Land Act, s. 50 (4.3)*

When granting a Crown Grant, Crown has:

(1)

Right to take up to 1/20 of property (unused land) for public works

 Cannot take part on which building stands

All subsurface rights: oil, gas, minerals

Right of someone with a valid water license to come onto land and exercise rights under that license

Right to take certain materials (e.g. grave, stone, timber) for use in public works

(3-4)

 Crown can do things beyond this if explicitly in grant

(5)

 Subsection 1 exceptions are in the grant automatically

(6)

Right to grant right of way

# B. Inter Vivos Transfer

4 stages

1. The Listing
2. The Contract (Interim)
3. The Transfer (In BC, Form A)
4. Registration (certificate of indefeasible title)

## 1. The Contract

There will not always be a contract prior to transfer (e.g. gift). Validity and enforceability of contract determined by general law of contract, supplemented by rules that apply specifically to contracts relating to interests in land. Contract transfers equitable title. Transfer transfers legal title.

#### Law and Equity Act, s. 59 (4.4)

Does not apply to leases of land of 3 years or less.

s. 59(3) A contract respecting land or a disposition of land is not **enforceable** unless:

(a) there is, **in writing** by the party being sued (or their agent) both the content of the obligation and that they intend to do it.

(b): the party being sued has partly performed in a way indicating that the K exists – includes payment/acceptance by party or on party’s behalf of deposit or part payment **(59(4))**

(c): the transferee has relied on the promise of transfer in such a way that makes not enforcing it inequitable

s. 59(5): power of Court to order **restitution** or **compensation** if transfer cannot be enforced

s. 59(6): guarantee/indemnity not enforceable unless evidenced by writing or alleged guarantor/indemnitor has done an act indicates that the alleged guarantee exists.

s. 59(7): writing can be sufficient even though a term is left out or wrongly stated.

Based on court’s interpretation of the *Statute of Frauds* (predecessor to *Law and Equity Act*), the following propositions probably still hold true w/ respect to s 59:

* K must be valid;
* Writing can take any form;
* Writing must be signed by the party to be charged or that party’s agent;
* Writing doesn’t need to precede or coincide with K
* Two documents, if they expressly or impliedly refer to each other, may be combined to satisfy the requirements of the section.
* Concerned w/ enforceability of contract rather than its existence.

## 2. The Transfer – Form

Completion: carries out the binding contract reached at the Executory State, and transfers the legal interest from the vendor to the purchaser.

Under Land Title Systems completion = Form A registration. Before transfer, buyer must scrutinize title to ensure that there is a good root of title. All interests in land in respect of Blackacre should be clear at *Land Title Office*.

### (a) Writing and Sealing

Initially Livery of Seisin

 GONE NOW

A **deed** is a transfer doc under seal. W/o seal, there would be no transfer w/ regard to land. But *Land Title Act* has reduced requirements for formality of transfer.

**Form A:** Deeds are somewhat varied, cumbersome and expensive. Standardization lowers costs, but also reduces flexibility. Transfer forms now act as deeds in BC.

Transfers today must comply w/ the following statutory provisions:

#### Property Law Act ss. 15-16 (4.8)

s. 15(1): Land may be transferred in freehold only by an instrument expressed to transfer the land, but it is not necessary to use the word grant or any other term of art

s. 16: Instrument need not be executed under seal

### (b) Registration – Prescribed Forms

#### Property Law Act ss. 4-7 (4.8)

General requirement is that a transferor deliver to a transferee a registrable transfer. To determine what is registrable, look at *Land Title Act.* (also need it for lease of >3 years)

#### Land Title Act ss. 39, 185, 186 (4.10)

s. 39: instrument sufficient to pass or create an estate or interest in land is registrable unless the use of a prescribed form is required

s. 185- Transfer must be in writing, in prescribed form and on a single page (Form A)

s. 185(2)(a)(b): **Registrar has discretion** **to accept alternate forms** and/or historical documents for registration (other forms)

s. 186(2): Words of Form A deemed to be words in Part 1 of Land Transfer Form Act with the meaning given in Column 1 of Schedule 2 (meaning of words)

s. 186(4): Form A legally transfers the interest even without express words of transfer (i.e. X transfer to Y)

 Doc transferring freehold estate must be in Form A as prescribed in *Land Title (Transfer Forms) Regulation*. Other sections of the *Land Title Act* also provide for prescribed forms.

### (c) Standard Forms

Many of the clauses found in transfers are standard clauses. Imply full floaty English phrases.

#### Land Transfer Form Act ss 2-4 (4.12)

Simplifies transfers by it making unnecessary to set out in each transfer some of the most common standard form clauses. If transfer is made pursuant to Act, then inclusion/deemed inclusion in transfer of a number of specified words/phrases found in Column 1 of Schedule 2 of Act means that it will be read as if it contained the longer and more complicated clauses set out in Column 2 of Schedule 2.

## 3. The Transfer – When Is It Operative?

This area is normally dealt with under contract law (becomes significant for gifts).

Under common law, deed takes effect immediately after “signed, sealed, and delivered” (intention given, not physical delivery).

Under Land Registry System, you must physically deliver, because you can’t register otherwise (registration is final step).

#### Land Title Act ss 20-22 (4.17)

s. 20 (1) Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act

(Interest in land is not transferred until registered)

"Except as against the person making it" – only that as between transferor and transferee, registration is not necessary for interest to pass

Example: A (registered owner) -> B (doesn't register) … A then -> C (does register)

Under common law - B is protected by doctrine of nemo dat (A couldn’t give to C what A didn’t have)

Under Land Registry System: C's interest prevails. B is vulnerable to a third party. May have claim against A, but no claim against C.

**Nemo Dat does not rule absolutely in Land Registry**

### Registration through the example of “Gifts”

* Transfer by gift is rarely preceded by contract – you don’t look a gift horse in the mouth.

#### Ross v. Ross (1917) (4.18)

**F**: Gma went to lawyer’s office to prepare deed conveying property to gson. Deed stated “signed, sealed, delivered”. Deed was executed, witnessed, but not recorded in Land Title Office. Gma did not tell anyone other than lawyers about deed, and did not record it. Did not physically deliver it to gson. Deed found in purse after she died. Gma had clear intention to transfer property to gson.

**I**: Was there delivery of deed? If not, is transfer still valid?

**A**: There was effective delivery. Deed did not express intention of taking effect after death. Transfer of property was complete and immediately operative. Implied intention that she wanted to stay in house until death. Retention of deed after signing and sealing =/ defectiveness. She had opportunity to destroy the deed if she didn’t want it to be binding.

**C**: There was delivery on date of execution. No evidence that justifies setting aside deed for non-delivery.

**R**: In the case where a deed is signed and sealed but not physically delivered, proper execution of a deed is a sufficient evidence of delivery **unless there is proof of contrary intention**. You do not need to hand over the deed in order to execute a transfer of an estate/interest. Grantee need not be aware of gift.

Comment: See MacLeod v Montgomery for BC rules

#### Zwicker v. Dorey (1975) (4.23)

**F**: Father Z conveyed land to D in deed stating “signed, sealed, delivered” but w/ clause it was not to be registered until F’s death. Deed was not handed over but was executed. F then conveyed same lands to himself and his 4th wife P through a deed. F also deeded some lands to D again, and some to 3rd parties. F died and P claims F said he would give her everything.

**I**: Who were lands conveyed to? Was there effective transfer of land to D?

**A**: Does not appear that F intended to be unconditionally and immediately bound by deed to D. F continued to occupy and use lands and made several grants of same land. F’s deed must be classified as a will because it was not to have effect until his death. Did not comply w/ *Wills Act*, therefore has no effect in law.

**C**: Deed w/ D was testamentary and ineffective. Title passes to P.

**R**: If no intention for deed to pass title, that deed is invalid. Test for delivery is that there was intention on part of transferor to be immediately and unconditionally bound by terms of transfer. A doc operative upon death is not a deed but a testamentary doc, which puts docs into legal category of will/testament.

#### MacLeod v. Montgomery (1980) (4.26)

**F**: D’s Gma executed transfer in favour of D – gift, no consideration. Gma reserved for herself life estate in fee simple, D was getting reversion in fee simple. Transfer doc delivered to D as soon as executed. Duplicate title promised to D, but never handed over. Gma’s lawyers had duplicate title. D unable to register transfer w/o duplicate title. D then leased land to Gma. TJ found that D had interest in lands and ordered duplicate title be delivered to her or registrar register transfer w/o duplicate.

**I**: Does execution of transfer w/ its delivery to D in circumstances of present case but w/o delivery of duplicate title, although delivery was promised, constitute a complete/incomplete gift?

**A**: Legal estate did not pass to D because there was no registration under *Land Titles Act*. In jurisdictions w/ land registration requirements, no transfer/ownership passes estate unless registration has taken place. To complete a gift effectively, donor is obliged to do what can be done. Gift must be complete to be enforceable. To be complete there must be intention, acceptance, delivery and registration. Transfer form must be delivered and duplicate must be made available.

**C**: No transfer – not a complete gift.

**R**: Equity will not force a volunteer to complete that which is incomplete. Delivery of transfer, as well as duplicate certificate of title, required to complete gift. No delivery until recipient has all docs necessary to register transfer.

Comment: This is how it works in BC – need all docs for registration

## 4. Transfer to Volunteers

#### Property Law Act s. 19 (4.33)

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

**Example**

If A makes a transfer of title to B, a volunteer.

* **Volunteers:** transferees who have not provided consideration to those who made/caused the transfer to be made
* In a land title jurisdiction, transfer by way of gift requires you to actually deliver the transfer form.
* **presumption of resulting trust**: In transfer of personalty, Equity presumes that B holds the legal title for A, and A has the equitable title
* Initially the same presumption applied in case of land. Equity assumed that people did not go around giving their property away voluntarily. **This presumption still exists here but is now more rebuttable.**

\*\* Presumption that equitable interest remains w/ transferor when transferring land as a gift even in land registry system. Onus on transferee to prove transferor intended to give absolute rights.

### (a) Pre Statute of Uses

* The presumption was more iron-clad
* Volunteer needed to prove transferor intended full legal and equitable interests be transferred
* Loophole
	+ A transfers “unto and to the use of B”
	+ A is feoffor, B is feofee to uses AND cestui que use, therefore same effect as transfer in fee simple

### (b) Statute of Uses

* Loophole remained the same
* Only difference is that the presumption now meant that A received the equitable ***and*** the legal title (essentially getting everything back)

### (c) The Trust

* The loophole phrase is now of ambiguous intent
* *Property Law Act* s. 19 (4.33)
	+ This now simplifies the rebuttal process
	+ Any indication of intent to fully transfer (legal *and* equitable) to a volunteer is now sufficient to affect the transfer
* **Presumption of Advancement**
	+ The presumption is the opposite for considerationless transfer from parent to child
	+ Also rebuttable if evidence that they intended trust

# C. Wills and INtestacy

Living owner declares while she is still alive who is to get the property under *WESA*. *WESA* defines a will: will testament, codicil or other testamentary disposition other than the designation of beneficiary. Maker may then supplement a will by a codicil. Will does not operate until death of maker. Will may be revoked/replaced. When you die w/o a will, *WESA* sets out who will get your land – intestation succession. Title to property vests in deceased’s personal representatives, who are then charged w/ admin of estate. Interests in land pass to personal representatives by transmission. Representatives appoint by will are executors, appoint by court are administrators. Financial assets pass directly to beneficiaries.

#### Wills, Estates and Succession Act ss. 37, 39, 40, 58, 162 (4.35)

To create a will you must be 16 years of age, put your intentions in writing, sign the instrument, have 2 adult witnesses (neither of which can be beneficiaries). Will is deemed to be signed if will-maker intended to give it effect w/ their signature. If court determines that a record represents testamentary intentions of deceased, intentions will be given effect.

Personal representative to whom land devolves holds land as trustee. Beneficiary has same power as person beneficially entitled to personal property to require transfer from personal representative. Legal title vests in legal representatives and equitable title is there waiting to go to heirs.

# D. Proprietary Estoppel

**Where it would be inequitable for the defendant to assert his rights, the plaintiff can claim proprietary estoppel as a cause of action. The following conditions must exist (*Clarke v Johnson*):**

**1) The owner induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the property**

**2) In reliance upon his belief, the claimant acts to his detriment to the knowledge of the owner**

**3) The owner then takes unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive**

#### Clarke v Johnson. (1997) (4.38)

**F**: In-laws owned island property; son in law (R) built/maintained camp on site. R and R’s wife separated; R continued maintaining property with in-law’s permission. R’s son wants to use camp. Tension grows between them, R attempts to bar son. Mother-in-law (A) is sole owner of property, barred R unless he allowed son to use the camp. R sought court to declare equitable interest

**I**: Does R have any interest in land

**A**: lays out 3 part test for proprietary estoppel (see below). R met these conditions. R also had substantial emotional connection with the property

**C**: R was granted an exclusive, irrevocable license for the use of the property for his lifetime or as long as he was capable of using the camp. Judge says he will NOT address the question of what happens to the license if the property is sold to a 3rd party while R is still alive.

R: Three-part test for proprietary estoppel:

1) The owner induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the property

2) In reliance upon his belief, the claimant acts to his detriment to the knowledge of the owner

3) The owner then takes unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive.

# E.Intellectual Property

## Copyright

* **Copyright (CR)**: Bundle of exclusive rights in works, performers’ performances, sound recordings, and communication signals (we focus on **works** - literary, musical, dramatic, artistic)
* CR prevents other parties from engaging in the specific actions with respect to the work for a period of time
* CR lasts 50 years after death in Canada
* Courts have had to articulate what the purpose of CR is:
	+ Former - to protect and reward authors
	+ Current - balance between: 1) promoting the public interest in the encouragement of dissemination of arts and intellect and 2) to provide a just reward for the creator
* In order for CR to apply to a work, there is citizenship/residency requirement:
	+ in order for CR to exist in Canada, person does not have to be a citizen, protection applies if the person is a citizen or subject of, or a person ordinarily resident in, a treaty country at the time of making the work
* For a work to be considered original and therefore protected by CR the work's creation must have involved the exercise of **skill** and **judgment**:
	+ **skill:** the use of one’s knowledge, developed aptitude or practiced skill in producing a work
	+ **judgement**: the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work
* RULE: cannot have CR for an idea, only the expression of that idea
* RULE 2: cannot have CR in facts, only in the way facts are presented

#### Copyright Act

#### **S.3**: discusses the rights of CR owners- sole right to:

#### Produce, reproduce the work or any substantial part of the work in any material form; right to reproduce is the core right here - a reproduction can involve the whole work or just a part of the work; Perform the work in public; Produce any translation of the work; Communicate the work to the public by telecommunication ; etc

#### **S.13**: discusses ownership of CR

#### **S.27(1)**: discusses CR infringement (basically if anyone does anything from section 3 without owner's consent)

#### Théberge v Galerie d’Art du Petit Champlain

#### **F**: Specific store (D) bought a number of Theberge’s (P) prints (posters). D removed the ink from each poster and put it on a canvas so he could re-sell them for a higher price.

#### **I**: Is this a reproduction and therefore an infringement of P's CR?

#### **A**: To reproduce a work means to increase the number of copies. Moving the ink from the poster to the canvas does not increase the number of copies. CR protects economic rights, not moral interests and P is asking for protection of his moral interest in the guise of CR in this suit.

#### **R**: To reproduce a work means to the increase the of number of copies.

### Defences to CR

Defence's to CR are exceptions to owner's expansive rights. They are known as **user rights**.

#### Society of Composers, Authors and Music Publishers of Canada v Bell Canada

#### This case tells us that defences to CR are known as user rights and they are tools employed to achieve the proper balance between protection and access

## Moral Rights

* **Moral Rights (MR)-** to protect the author's honour and reputation
	+ A work is seen as an extension of the author and so an attack on the work is an attack on the author
* MR protected in Canada:
	+ **Attribution:** Right to be associated with the work as its author/performer by name or under a pseudonym and the right to remain anonymous (where reasonable in the circumstances). (s. 14.1(1)/17.1(1))
	+ **Integrity:** infringed in two situations when the work is distorted mutilated or otherwise modified to the prejudice of the honor or reputation of the author (s. 14.1/17.1/28.2)
	+ **Association:** where the work is used in association with a product, service, cause or institution to the prejudice of the honour or reputation of the author (s. 14.1/17.1/28.2)
* MR rules in *CR Act*:
	+ Cannot be assigned (s. 14.1(2)/17.1(2))
	+ last for the same term as CR (50 years after death) in the work/performance (s. 14.2(1)/17.2(1))
	+ Can be inherited (s. 14.2(2)/17.2(2))
	+ Can be waived (s. 14.2(2)/17.2(2))
* In order to determine whether the author's honor and/or reputation has been affected, Canadian courts apply both a subjective and an objective test:
	+ Subjective**:** does the author feel the distortion, etc is prejudicial?
	+ Objective**:** is the author's view objectively supported?

#### Snow v Eaton Centre

#### **F**: Flightstop = sculpture of Canada geese described as “forever poised to land” in a shopping centre (D). As part of a holiday advertising, the centre that purchased the sculpture attached decorations (eg ribbons) to it. Snow (P) was pissed.

#### **I**: Did this affect the honour/reputation of P's sculpture?

#### **A**: The fact that the ribbons were not permanent did not mean it was not a distortion of the work. Subjective test satisfied by P's testimony and the fact that he brought the case forward. Objective test satisfied because other artists testified that they shared P's opinion that the decorations were a distortion

#### **R**: Even temporary changes can be a distortion/modification of a work and therefore can infringe moral rights.

#### Prise de Parole Inc. v. Guérin, Éditeur Ltée.

#### **F**: Guérin (D) published a collection of stories for schools including segments of a copyrighted work by an author Doric Germain (P - represented by his publisher Prise de Parole). D argued that this was a distortion of his work and therefore an infringement of his MR. P argued that D published a clumsy adaptation because D only published parts of P's work.

#### **I**: Did D infringe on P's MRs?

#### **A**: Subjective: yes, the author subjectively thought this modification was prejudicial. Objective: court looked at the fact that he was still asked to do just as many guest lectures before as after D's publication. Court looked at whether he had been ridiculed by the press. Neither the amount of guest lectures nor his reputation in the press were affected.

#### **C**: MR not infringed.

#### **R**: Economic factors (eg did he still get paid as much for guest lectures before and after) may be used to see if MR have been infringed.

## Personality as Property

* **Personality**: commercial value in your name/likeness (can include voice, even the way you stand)
* The law responds to unauthorized use of one's personality in different ways:
	+ **Defamation**
	+ **Passing off** (IP term): unauthorized use as a misrepresentation associated with a specific good
		- ie if you are in the business in producing a product and someone makes a similar product to link them in the eyes of the consumer
	+ **Misappropriation of personality** - broader tort

### Misappropriation of Personality

#### Krause v Chrysler Canada

#### **F**: Case involves a professional football player's image being used in a way that it could be seen to be advertising for Chrysler.

#### **I**: Did D infringe P's personality rights by using his photo?

#### **A**: Even though Krause was not the super star of the team, his personality has some commercial value and this means he does have a right to his personality. But, no one looking at the image would think Krause was endorsing Chrysler. His ability to get other endorsements was not lessened.

#### **C**: No damage; tort not successful.

#### **R**: Misappropriation of personality should be viewed from the damage suffered by the P, not the benefit gained by the D.

#### **Comment**: This is the first Canadian case to recognize this tort. BUT Athans (below) overturns when this tort is engaged.

#### Athans v. Canadian Adventure Camp

#### **F**: Summer camp asked Athans (P), a famous water-skier, if they could use his picture for its brochure. He declined. The camp used it anyways. Athans sued.

#### **I**: Is this a misappropriation of P's personality?

#### **A**: The picture would not make anyone think P was endorsing the camp. His ability to endorse other water ski camps is not affected. Even so, court rules misappropriation of personality. Camp used P's picture in hope of commercial advantage and this is an invasion and impairment of P's exclusive right to market his personality.

#### **R**: Even if P is not harmed, D can be charged with misappropriation of personality because of unjust enrichment.

#### Gould Estate v Stoddard Publishing Co

#### **F**: D had interviewed and taken images of Gould before he died. D made this into a biography after Gould died. Gould's Estate (D) sued.

#### **I:** Is this a misappropriation of P's personality?

#### **A**: there is a difference between sales and subject when using someone's personality. If someone's personality is used predominantly to serve a social function = immune from liability (subject). To include this in the tort would be contrary to freedom of expression interests. The tort only applies if the personality was used to advance commercial sales (sales). A biography is included in the subject category and falls outside the ambit of the tort of misappropriation of property.

#### **R**: the tort of misappropriation of tort only applies when someone's personality was commercially exploited, not when it is used to give the public information or in a creative work.