# Latin Maxims

* **Nemo dat quod non habet –** “no one can give what he does not have”
* **Cuius est solum eius est usque ad coelom et ad inferos –** “for whoever owns the soil, it is theirs up to Heaven and down to Hell
	+ *Ad coelom* limited by common law and legislation
	+ *Ad inferos* limited by Crown land grants (Crown expressly reserves right to precious minerals, oil and natural gas) & legislation (*Land Act & Federal Real Property Act*)
* **Clausum fregit -**  “breaking the close”
	+ Origins of tort of trespass
	+ Fundamental legal maxim for protection of individual ownership
* **Sic utere tuo ut alienum non laedas -**  “use your property so as not to damage others”
	+ Origins of the tort of nuisance
* **Iura in personam** VS  **iura in rem –** “rights in person” vs “rights in rem”
	+ Personal rights avail against individuals / property rights avail against the world
* **Quicquid plantatur solo, solo cedit -**  “whatever is affixed to the soil belongs to the soil”
* **De minimis non curat lex –** “the law does not concern itself with trifles
	+ Law will not remedy injuries that are minimal
	+ Underlies the Doctrine of Accretion – small, imperceptible changes stay with the owner
* **Ius utendi, et fruendi, et abutendi –** “right to use, enjoy the fruits, and dispose of”
	+ Legal and equitable estates
* **Res Nullius** (Things that belong to no one)
* **Quid pro quo** Something for something

# What is property?

Property is defined by the social and political (ideological) processes in play and what they mean.

Property is not things. Property is "the social relationships between individuals that is mediated by things and protected by the law."

Slaves were "things." For millennia we defined human beings as "things" that could be sold, bought, punished. That is the outcome of a social process. The civil war was a social process. Humans can no longer be things as an outcome, that speaks to a system of property.

The process defines and controls how we use these things and property.

• For something to be property in the eyes of the law it must be capable of being appropriated.

• Property rights are real rights (in rem) as opposed to contract and torts, which are personal.

• Allows holder to attain the property from anyone who does not hold the real right

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

• Concept of property has expanded as society has progressed

Three Forms of Holding (Complex societies have measures of all 3, which one is dominant?):

1. **Common** ownership of property
2. **Collective** agreement on how property is used
3. **Privately** owned by and entitled to legal persons (individuals or corporations)

If you are about purchase the land, it is important to consider:

* The contract (price, terms, etc)
* The use
* Structural, geological infrastructure
* Boundary, and the spatial aspect of land
* Fixtures, what is physically in the land?

# The Legal Concept of Land

## Airspace/Ad Coelum

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 HOWEVER, **an owner has a right in the air space above his land *only in the enjoyment of that land* (*Bernstein (Lord of Leigh) v Skyviews*), and *in preventing anyone else from acquiring a right in that air space.***

**Owners and leasors who have possessory interests in the building can also have possessory interests in the airspace above the building (Ad Coelum)** – have the same in rem rights (*Kelson v Imperial Tobacco C*).

**Airspace rights extend only up to the “ordinary use and enjoyment” of the plaintiff** (*Bernstein (Lord of Leigh)*).

**Owner has no property right or legislative jurisdiction in relation to airspace above his land** (*Manitoba v Air Canada*).

Bullet passing through airspace is not trespass (*Pickering v Rudd)*

### Kelson v Imperial Tobacco Co, [1957] 2 All E.R. 343

Facts: P’s landlord allowed D to display advertisements on top of building that protrudes by 8 inches. P alleged trespass (rights in rem), sought injunction

Analysis: **Trespass is only conceivable if you can show the airspace belongs to P**, P estate in land is a lease (transfer of possession) - has a real right to all the property

Ratio: Maxim holds true. Test for damages as a substitution of an injunction:

* Injury to P’s legal rights is small
* Injury can be estimated in money
* Injury can be compensated by small monetary payment
* Would be oppressive to D to grant injunction

### Bernstein (Lord of Leigh) v Skyviews, [1977] 3 W.L.R. 137 (Q.B.)

Facts: Skyviews took aerial photos of Bernstein’s property and offered to sell them to him. Bernstein gets mad about this and claims trespass of his airspace and invasion of privacy.

Analysis: **rights of airspace over property don’t continue at an unlimited height**, they are limited where it might be contemplated that the owner might be expected to make use of that airspace as part of use and/or enjoyment of the land. Above that height he has not greater rights than the general public.

* Doesn’t overrule ***Kelsen***

Ratio: maxim holds, however, it is limited. Above expected use/enjoyment, airspace is public.

### Manitoba v Air Canada. [1980] 2 SCR 303

Facts: Province of Manitoba wanted Air Canada to pay taxes on value of aircraft and repair parts of any plane that flew INTO or even OVER Manitoba. Trial Judge ruled that Manitoba cannot tax because airspace is “not within the province”.

Analysis: **Air and airspace is not subject to *ownership* by anyone (belongs to the Crown)** since it is incapable of demarcation or delineation (wrong) – cites *Bernstein v Skyviews*: airspace protection/rights are not to an unlimited height

Ratio: airspace can’t be owned, **but you can put limits on who can occupy it.**

## Legislation

### Land Title Act, 1996, ss 138-143

**Recognizes air space parcels and air space plans**

**S. 138**: air space parcel is volumetric parcel and air space plan consists of 1+ air space parcels

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

**S. 140**: a grant of an airspace parcel to a grantee does not allow that grantee to interfere with that grantor’s interest in land or remaining airspace parcels

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

**S. 142**: Minister of Transportation can grant airspace parcels above highways for power lines, billboards, Skytrain 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 in question, but will appear as an easement if one is required to access the airspace

Not contradictory to CL cases; for sake of creating “air space parcels” for apartments.

### Strata Property Act, 1998

Permits a person to acquire fee simple ownership in multi-unit building on land he/she doesn’t own

* Grants a strata lot owner an airspace unit
* Each strata owner gets a series of rights
* Bare land strata plan permits the subdivision horizontally only
* Building strata plan allocates strata lots to individual owners vertically in fee simple
* Title: strata owner’s title includes both the condo and a part interest in the common area

### Civil Aviation Statutes

Recognize airspace rights by parties other than the owner

## Ad Inferos

**Quicquid plantatur solo, solo cedit -**  “whatever is affixed to the soil belongs to the soil”

All mineral rights go to the Crown, same as ad coleum where you have rights into the ground so far as you are expected to use and to enjoy the land

### Fixtures

### *Re Davis,* [1954] O.W.N. 187 (H.C.)

Facts: calculating a widow’s claim to husband’s real property – the home included 6 bowling alleys – should these be included in the calculation of dower interests?

Analysis: the bowling alleys are only affixed so that bowling can be more efficiently carried out, not for the better enjoyment of the building/realty.

Ratio: the fixture/chattel test is derived from *Haggers v The Town of Brampton et al* – the object in question is the overriding consideration

* Consider (More details see :
	+ **Degree of affixation** - If the object is to improve the freehold, even if only slightly affixed, it becomes part of the realty
	+ **Object of affixation** - If the object is affixed for the better enjoyment of the object, then it is a chattel and is not part of the realty
	+ **Permanency** - How long is the object meant to be there? The object is "permanent" until the end of its purpose or natural life-time (can be 2 years for carpets or 10 years for bricks).

### La Salle Recreations Ltd v Canadian Camdex Investments Ltd (1969), 4 DLR (3d) 549

Facts: the hotel (villa) installed carpets on a payment plan (did not received title to the carpets yet – conditional sale), defaulted on payments.

Issue: are the carpets chattels or fixtures?

Analysis: law says that La Salle only has rights to the carpets if they were registered, which they weren’t. It was reasonable for the buyer to assume they were part of the property.

Holding: the carpets were clearly well-attached for the better use of the building as a hotel building and so, the carpets become fixtures and the carpet company has no rights to them.

Ratio: the test in La Salle adopted from ***Stack* v *Eaton***:

* **If not attached to land**, except by its own weight, then it is not a part of the land unless it is intended to be
* **If even slightly affixed**, then it is a fixture, unless it is intended to be a chattel
* Intention is important only so far as can be presumed from the degree and object of annexation

### *Zellstoff Celgar Limited v. British Columbia* [2014] BCCA(1.30)

Facts: Mill is from 60s, machine and equipment from the 90s, it is used to produce bleached paper-grade market kraft pulp. Some of this machinery and equipment is very specialized: big in size and value. Almost all of the machines could be dismantled and removed relatively easily, and resellable.

Issue: Was the affixation of the fixture/chattel permanent or temporary?

Analysis: Permanent means so long as it serves its purpose, not forever. Objectively (test) speaking, when you put large equipment into the land, it's not meant to be removed next week. In this case, machinery had been affixed since the 90s, which means it was a permanent fixture in the building, There is clear evidence of permanent affixation. Permanent: barring unforeseen circumstances, the machines were meant to be there until the end of their useful life

Holding: Machines were fixtures.

Ratio: Factors to be considered in distinguishing the feature from a chattel 1) Mode and degree of annexation (permanent v. temporary, etc.) 2) Object and purpose of annexation

### CMIC Mortgage Investment Corp v Rodriguez, 2010 BCSC 308

Facts: Rodriguez has a mortgage w/ CMIC and bought Cover-All #1 with a buried foundation in 2004. In 2006, got Cover-All #2 with the foundation resting on the ground since she wanted it to be portable. She didn’t pay for it – she wanted to lease it. In April 2008, agreed couldn’t pay so Cover-All took it away. CMIC wanted to foreclose on #2 as well.

Analysis: Articles not affixed to land are chattels and therefore, Cover-All #2 is a chattel. Doesn’t matter that she intended for it to be portable though.

Ratio: Test from **Royal Bank v Maple Ridge Farmers Market**:

* Unattached items, save by their own weight – prima facie CHATTEL
* Unplugged or removed without damage or alteration – prima facie CHATTEL
* Any attachment, even minimal – prima facie FIXTURE
* If essential character lost when removed – prima facie FIXTURE
* If premises left in original condition, tenant’s fixtures may be removed

### *Elitestone Ltd v Morris*, [1997] 2 All ER 513 (HL)

Facts: Elitestone purchased the freehold to the land on which Mr. Morris’s bungalow (and 26 others) was situated. Elitesone wished to demolish the properties on the land with a view to redevelopment. Elitestone brought proceeding against all the residence seeking possession of the land. Mr. Morris defended the action claiming protection under the Rent Acts. The Rent Act would only protect Mr. Morris if the bungalow formed part of the realty. Elitestone argued that the bungalow was separate from the land since it rested on its own weight on concrete pillars and was not physically attached to the land.

Analysis:

* **An object brought onto land may be categorized as 1) a chattel; 2) fixture; 3) part and parcel of the land**
* Materials for house were brought onto the land as chattels, but put together became a fixture
* **Objective intention matters in determination of fixture/chattel**

Holding: Considering both the degree of annexation and the object of annexation, the bungalow was a fixture.



# Water: Riparian Rights

## Sources of Water Rights

* Common law: percolating groundwater, unlicensed water. **Every owner of real property bordering a stream has a proprietary right to have the water flow to him in its natural state of flow and make certain uses of this while it is on his property.**
	+ Right to use the water
	+ Right to allow water to flow in its natural state (quality and quantity)
* ***Water Act***: use of flowing water – must be licensed, unless **s42** exceptions show that water is unrecorded
* ***Water Sustainability Act:*** purpose to foster sustainable use, property in and the right to the use and flow of water is vest in the BC government. Private rights must be approved by the ***Water Act.***
* ***Land Act***: water bed rights
* ***Land Title Act***: rights upon accretion or erosion

## Development of BC Law

* **Common law:** riparian owner – rights in flowing water and percolating around water. Getting interest in water through registration, not prescription (right to use)
	+ Water can be used for irrigation, domestic use, but it must not be sold or given to another.
	+ Water flow, quantity and quality in its natural state
	+ Use water for domestic purpose while on your property, even if the use affects the rights of other ROs (downstream ROs can’t complain if water is exhausted)
	+ Obligation not to cause injury to other ROs by diminishing flow, quantity, or quality of their water
	+ Use of water must be connected to property where the water exists
	+ Limited irrigation purposes – “reasonable” amount & returned with “no diminution other than evaporation or absorption”
* **Statutory modifications: BC** – ***Water Act*** governs riparian rights: can only exist for person lawfully using the water, only way to get the right to the use and flow of any stream in BC is through the ***Water Act***
	+ **S2:** original right to use of flowing water is vest in the Crown
	+ **S3:** percolating water is governed by common law, not ***Water Act***. Owner is entitled to flow, quantity and quality of water on his property in its natural state (***Steadman v Erickson Gold Mining Corp* (1989), 35 BCLR (2d) 130**)
	+ **S5:** license is required to get an interest in water bordering riparian lands
		- To divert and use, To store water, Construct, maintain and operate the works authorized under license for diversion, storage, carriage, distribution and use of water or power from it, Alter/improve stream or channel for any purpose, Construct fences, screens or fish/game guards across stream
	+ **S42:** no license required for water use if firefighting, domestic purposes or prospecting for minerals

**The *Water Sustainability Act* (WSA**) was brought into force on February 29, 2016 to ensure a sustainable supply of fresh, clean water that meets the needs of B.C. residents today and in the future. This is the principal law for managing the diversion and use of water resources. The WSA provides important new tools and updates B.C.'s strategy for protecting, managing and using water efficiently throughout the province:

***Water Sustainability Act****, ss. 1-2, 4-6, 93, 42 (1.36)*

**S. 1**: Definitions: **ground water; stream** (natural watercourse/source of water supply, does not have to contain water); **recorded water** (the right to the diversion or use of which is held under an authorization or another enactment)

**S. 2**: **domestic purpose** (use of water for household requirements, sanitation and fire prevention, watering of domestic animals and poultry kept for household use or as pets and irrigation of garden not exceeding 1000 m2 adjoining and occupied w/ a dwelling);

**S. 5(1), (2)** **All rights are vested in the government unless it has been authorized by the government**

**S. 6(2):** Not an offence to divert water from stream for extinguishing fire

**S. 6(3), (4) except for domestic purposes,** person not registered under *WPA* must notdivert, extract, use or store water from stream without license

**S. 7**: Rights acquired under licenses - license is required to acquire an interest in water bordering riparian lands

* ***The Water Act and Water Sustainability Act*** doesn’t completely cancel out common law riparian rights – Riperian Owners maintain common law right to clean, flowing water on his land until Crown issues a license removing those rights. If water is used contrary to license granted under ***Water Act***, no enforceable rights exist.

### *Johnson v Anderson,* [1937] 1 DLR 762 (SC)

Facts: D diverted stream from P’s property, which he used for domestic and stockwatering purposes. P had no license for the water and D had license but it did not have right to divert the water.

Ratio: ***Act*** preempts riparian rights but doesn’t remove them; Crown’s has the original right > licenses under ***Water Act*** > CL riparian rights > non-licensed/non-riparian users. **Court determines that the plaintiff still has standing to sue despite not having a license. Because not all recorded water rights have been licensed out and P still has Riparian rights.**

### Schillinger v H Williamson Blacktop & Landscaping Ltd (No. 2) (1977), 4 BCLR 394 (SC)

Facts: P diverted water for fish hatchery and he holds a license, although the license is for a different stream that converges with the stream that he has a license for. D’s company altered water with silt and sediments which caused the fish to die.

Holding: P doesn’t have a right to divert the water- this diversion of water was unlawful (Water Act makes it an offence to divert water without a license/ riparian rights) so to the extent that his claim is based on the consequences of that diversion, it must fail and cannot claim damages D

Ratio: **Riparian rights, if any, can only exist for a person lawfully using the water and only way to get those rights to use water is under the *Water Act*.**

### Steadman v Erickson Gold Mining Corp (1989), 35 BCLR (2d) 130

Facts: P had groundwater piped to his house. D built a road that caused contamination of that water.

Analysis: You can use water, but can’t pollute it. D was polluting for industrial purposes, P was using it for domestic purpose (distinguishes from ***Schillinger*** where P was using for non-domestic purposes AND didn’t have a license).

Holding: P had CL riparian right to use for domestic purposes – can claim damages.

Ratio: Ripa**rian rights exist except where explicitly stated they don’t (if there’s a license). P has a right to use and enjoy the water until a license is issued for that water and P is entitled to claim that D shouldn’t make the water unusable.**

## Percolating Water

Common law:

* **Rules applicable to ROs didn’t extend to water that percolates, flows through soil or in an unascertained channel – became property of first person to draw it to the surface.**
* Effect of CL in BC – affected by ***Water Act*** and ***Water Protection Act***

## Ownership of Waterbeds, Lakes and Ponds

* If surface water straddles land, who owns the land beneath the water?
	+ Usually determined by surveys and legal description of the land parcel
	+ In absence of such – “**ad medium filum**” (to the middle line) applies. Divide waterbed in half unless there is enough in circumstances description of instrument to show that was not intention of parties. (Test was held in Rotter v Canadian Exploration Ltd. (SCC))
	+ Still applies even though ***Land Title Act*** purports to make conclusive whatever is on the title

## Accretion and Erosion

**Accretion:** process where land bordering tidal waters is increased by silting up of soil, sand, etc

**Erosion:** opposite

* Both applies to ROs, leaseholders and to inland lakes
* Accretion must be gradual and imperceptible
* Human action, except by the owner, can be accretion
* Accretion can only be produced by natural substances, not necessarily carried by water though
* ROs may enjoy increase or suffer decrease (***Land Title Act, ss94-96***)
	+ New plan must be registered to show changes in boundaries

## *Land Act*, RSBC 1996, c 245

* **S55:** All land is vested in the Crown – granted out for private ownership
* **S56:** Sub-water land (waterbed) is owned by the Crown unless it has been given to you in your grant

### Southern Centre of Theosophy Inc v South Australia (1981), 56 ALJR 606

Facts: SCT was the registered proprietor of a perpetual lease. A claims the high-water mark is the eastern boundary of its land – over 20 years, water receded. SA claims original boundary stands, accretion doesn’t apply to lakes and the land exposed is the Crown’s.

Analysis: Land granted to SCT. **Doctrine of accretion (gradual and imperceptible) applies to inland lakes**, but can be excluded by clear use of words. If the change is sudden, avulsion, then the doctrine doesn’t apply.

## Access by Riparian Owners

* ROs have a right of access (private right, actionable per se) that stems from his ownership of land which abuts water. Right of access is different from the public right of navigation and doesn’t depend on ownership of waterbed.
	+ Right to anchor vessels on shore
	+ Must not interfere with public right of navigation and can’t impede access by building structure on foreshore (area between high and low tide – always owned by Crown)
	+ Pier/causeway: acceptable access as long as not interfering w/ foreshore owner’s rights

### North Saanich (District) v Murray (1975), 54 DLR (3d) 306

Facts: Murray owns land that fronts upon the sea. M constructed a wharf on and across the foreshore adjacent to his land. NS says trespass as they have a lease on the foreshore in front of M’s lot.

Analysis: **RO can exercise right of access, so M can access the water through the foreshore, but can’t interfere with navigation or disturb foreshore by building an improvement without consent**

Holding: RO doesn’t have right to construct wharf if it disturbs the foreshore and the owner can claim trespass

# Support

**Common Law Rule:** ***Sine quo res ipsa haberi non debet*** an owner of land is entitled to have his land left in its natural plight and condition without interference – right to support from neighbouring land (***Cleland v Berbarick* (1915))**

* Soil below surface is a form of support for the stability of the land mass – a person can excavate so long as it does not cause damage (a landslide) to a neighbour
* An absolute right exists independent of any claim in negligence (***Rytter v Schmitz***). Properties need not share a common border to have a duty of support.
* Should obtain support agreements – easements

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

* No one can interfere with the land by removing lateral support (***Rytter v Schmitz* (1974)**)
* Loss of lateral support can occur even where the movement is vertical
* The right of support does not extend to actual title in dirt (***Bremner v Bleakley***)
* Limited to land in its natural state – does not include support for the additional weight of any structures which have been on the land, unless obtained by easement or prescription (abolished) or unless it can be shown that subsistence would have occurred even absent the buildings on that parcel (***Gillis v Bortoluzzi***)

## Vertical/Subjacent support: subsurface owner’s duty to support surface owner

* Limited to land in its natural state
* **But can be extended to vertical support for a building by applying the rules of trespass rather than the support doctrine** (because removal of vertical support requires trespass underneath the soon-to-collapse building)
* As with lateral support, a surface landowner has the right, at common law, to have his or her land remain in its natural state without subsidence caused by the subsurface owner’s withdrawal of the subjacent support.
* The withdrawal of subjacent support is an absolute liability, meaning the excavating landowner, if found liable for damage, is liable *without regard to negligence*. The damages awarded would not be altered in any way by a showing that the landowner did not intend to damage his neighbor’s property. The damage done is the damage awarded.

### *Cleland v Berbarick* (1915), 25 DLR 583

Facts: D drew a large quantity of sand from his adjoining lot, D’s wife who owns the lot on the other side also drew sand from her lot. Lots of sand washed away from P’s beach, making it of little use.

Analysis: **D has a duty of horizontal support to his neighbours’ land**. The right of the owner of land is to have that land left in its natural plight and condition **without interference by the direct or indirect action of nature facilitated by the direct action of the owner of the adjoining land.**

Ratio: Court determines that the right of the owner of land is to have that land left in its natural plight. Each land-owner must use his own land in a way that he shall not interfere with or prevent his neighbour enjoying their land in its natural condition.

### *Bremner v Bleakley*, [1924] 2 DLR 202 (Ont CA)

Facts: P complains that the removal of sand from his property was occasioned by the making of holes on D’s land – the sand was driven by the wind and waters from P’s land and the existence of the holes prevented the sand from being driven back. P seeks damages and an injunction against making holes

Analysis: distinguished from ***Cleland***, **the digging of holes did not cause (but, for) or contribute to the movement of the sand**, no action can therefore be founded on it, sand is a chattel - it’s the property of whose land it lies on, does not stay P’s property after it has been swept away by the wind. This would be absurd to think of it as still P’s property since it can be swept away and still incorporate into whatever land it rests on, even if there had been no holes

Ratio: Excavation is allowed so long as it does not cause a lack of horizontal/vertical support to the adjoining land. Sand is no longer your property if it has left your land due to natural forces. **Keeping what naturally comes onto your property is not a withdrawal of support and therefore legal.**

### Gillies v Bortoluzzi

Facts: B excavated a basement, went below the footings of the adjacent building, didn’t shore up and excavated so close to the property line. G’s building collapses and G sues in negligence.

* Ratio: P 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 the building. D would be liable for lateral support sufficient to maintain the soil on the adjacent property in its natural state. P had a prescriptive right to easement of **vertical support** – **legislation taking that away was not quite in place yet.**
* **D would be entitled to excavate on its own premises up the west boundary of P’s property and would be liable in connection with such excavation for lateral support sufficient to maintain the soil on the adjacent property in its natural state** (Dalton v Angus)
* Incorporeal possession (easement) is needed from the building owners to prevent neighbouring parties from excavating laterally and vertically.

### Rytter v Schmitz

Facts: S dug along the property line between the two lots. Removal of the soil caused a subsidence by loss of lateral support for R’s property, allowing the subsoil to fall away and so leaving no support under the western side of R’s building – a chimney and a wall collapsed. P alleges trespass and claims damages

Ratio: Time may create a **prescriptive right** to lateral support which includes the weight of the building. **Reaffirmed that buildings are entitled to vertical support.** Where excavation crosses property line – it’s trespass!

# Basic Principles of Land Law

## Tenure

* Feudalism underlies theoretical basis of modern land law - land parceled out to tenants, lord with tenurial rights (subinfeudation)
* Estates held according to certain conditions/tenures **=** knight service, socage, sergeantry, frankalmoin 🡪 merged into socage (agricultural)
* *Statute of Quia Emptores 1290* prevented further sub-infeduation and required interests be transferred
* Today- allodial system = clear boundaries, fragmentation, ownership independent of superior landlord
* Ownership is still subject to governmental authority; Crown owns all the land (Land Act)
* Escheat – if owner dies without heirs, title reverts back to the Crown in the Province

## Corporeal and Incorporeal Interests

Corporeal interests: ***Lura in re propria –“ right over the property”*** *–* those which entitle a person to possession of land

* Through this possession, you are able to exercise your rights to use, enjoy and dispose
* **Fee Simple:** freehold interest in land where the time is indefinite; includes *inter vivos (Statute of Quia Emptores 1290)* and disposition upon death (Statute of Wills 1540).
	+ “fee” indicated that the estate was inheritable and did not die with the present owner
	+ “simple” indicated that there was no qualification on the type of heir who could inherit (descendents, ascendants, or collaterals)
* **Fee Tail:** Freehold interest that cannot be sold, willed, or otherwise alienated “To A and the heris of his body” – *PROPERTY LAW ACT ABOLISHED THIS AND WILL CHANGE IT INTO A FEE SIMPLE*
* **Life Estate:** freehold interest for duration of an individual’s life; right to use & management
* **Estate Pur Autre Vie:** freehold interest for the duration of another’s life
* **Freehold estates:** Indefinite, uncertain (almost forever) time period / exclusive possession / ex: fee simples, life estates
* **Leasehold:** interest in land for a defined period of time; regarded as an interest in land
	+ A lessee usually pays rent to a lessor for a fixed duration
	+ Tenant only has a personal right against the landlord
	+ Lease treated as personalty originally, now is an interest in land and realty
	+ Duration of a lease must be fixed at the time of its creation

Future Interests: some dispute as to whether these are corporeal or incorporeal interests

* **Reversions:** future interest kept by a person who transfer property to another
* **Possibilities of reverter:** estate returns to the grantor if a condition is violated, can only follow *fee simple determinable*; reverter is automatic if the condition is broken
* **Rights of Entry (Power of Termination):** right to resume possession of land or future interest that follows a *fee simple subject to a condition subsequent*; grantor has discretion over whether estate reverts when condition is broke – ex: A grants blackacre to B, on the condition that B doesn’t drink

Incorporeal interests: those which entitle a person to some rights in respect of a piece of land that falls short of a claim to possession (e.g. easements- right of way)

* Property right that is less than possession – may come out of contractual agreements
* **Easement:** right to use property of another without possessing it
* **Profits a prendre:** “right of taking” – right to take natural resources from the land of another
* **Covenant:** conditions tied to the use of the land
* **Mortgage:** encumbrance (restriction) on the right of property; fee simple defeasible on a condition subsequent

## Legal and Equitable Interests

* Fragmentation:
	+ **Interests are fragmented based on space, time and use** (land is a bundle of rights)
	+ Allows multiple people to enjoy/manage/use one piece of land
* Equity:
	+ Grew out of **Court of Chancery** afterdisappointed litigants appealed to the King
	+ Recognized that rigorous application of common law could lead to unjust results
	+ Equitable estate holds right to enjoyment, use and benefit of administration, but not to the administration itself
	+ Equity follows the law
	+ Will do as far as can be done, what the parties intended
	+ Court of Equity was created

## Development of the Use

* Originated in the **Court of Chancery** – recognized separate of ***utendi and fruendi*** (control/management and enjoyment of the land)
* Holder of legal interest was compelled to hold interest for the benefit of another
* Process known as “**feoffment**” Modern version: trust
* EG: A unto B for the use of C

A -------------------------------🡪 B -----------------------------🡪 C

Freeholder in New freeholder, gained Gains benefit,

Fee simple legal estate from A equitable estate

Feoffor Feoffee to Use Cestui que use

(Grantor) (Trustee) (Beneficiary)

## Statute of Uses

* Equitable estates were created to evade paying the death tax
* Henry VIII tried to eliminate the Use (feoffment) – only one full legal title could exist, joined legal and equitable title to the beneficiary
* 3 exceptions:
	+ Active uses
	+ Where person seized to own use – A to B for B’s use
	+ Where two uses existed – the *Statute* didn’t execute the second
* Led to the creation of the modern trust – A unto and to the use of B *in trust for C*

## Emergence of Modern Trusts

* Legal title remains with the trustee – B’s use is in title and control, not necessarily actual use
* Equitable interests correspond to those in common law
* Trustee may transfer legal title to third party (B to D), but C can still enforce equitable rights
* All transfer are subject to ***nemo dat*!**
	+ If B sells to D, but doesn’t tell D about the trust:
	+ If no consideration given by D, C can assert equitable estate and get it
	+ If D gave value, but knew/should’ve known about the trust, C can get it
	+ If D is a *bona fide purchaser for value without notice*, D can get clear title and C has a breach of trust in personae action against B
* **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 applies in the case outlined above.

## Freedom of Alienation

Main aim of English land law was to ensure land was freely alienable (sell and dispose of land whenever we want) – **facilitated by:**

**Freedom of disposition**: power of the current holder of property to dispose of it

**Limitations on restraints of alienation**: limit power of owner to impose restraints  on the freedom of alienation of a transferee

**Mechanisms of transfer**: simple and straightforward transfer process

**Fee simple became freely alienable *inter vivos* with the *Statute of Quia Emportes*, 1290**

Testamentary power of disposition recognized by the *Statute of Wills,* 1540

## Restrains on Alienation

Restraints fall along a continuum; the more far-reaching, the more difficult to hold up in court. Fee tails, future interests and direct settlements are limited by the court or by legislation.

**Direct Restraints**

Clauses that prohibit disposition are void. But there are some exceptions, including restraints on the assignment of a leasehold interest (*Mildmay’s Case 1606)*, and see *Residential Tenancy Act*, 1996.

**Fee Tails**

This type of estate arose as a transfer “A and the heirs of his body” (intent was that on the death of the owner for the time being of the estate, it should always pass to direct descendants- land stayed in the family). Abolished in 1833

**Future Interests**

A long series of future interests could prevent alienation- especially if conditions are for the benefit of unborn people. 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

**Strict Settlements**

A strict settlement can only be created over land and it was a device which was used by a landowner to keep the land within his family. Ownership of the property was divided over time by using limited freehold estates. Most common example occurs where a landowner provides in his will that the land is to go to his eldest son for life and then the remainder is to pass to his son’s eldest son in fee tail. Provisions would be made for the widow and younger children by giving them a capital sum on reaching a certain age or getting married (secured by charging them on the land). Effectively made land inalienable

## Mechanics of Transfer

1. 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)?
2. By what methods or documents (conveyancing) is the actual transfer of an interest in land effected?

Establishing Good Root of Title

* Search of all documents relating to the property, going back 60 years (*Statute of Limitations*)- could involve an analysis of transfers, mortgages, wills, evidence of births, deaths, marriages...
* Had to be repeated with each subsequent transfer

## Methods of Transfer

**• Livery of seisin – public, physical delivery of property**

* *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)
* *Statute of Uses* moved legal title regardless of whether there had been livery of seisin (lease and release, enabled gifts between relatives)

**Modern System**

**Registration of documents**

* Introduced in BC in 1861
* All documents relevant to a parcel of land are on file

**Title registration**

* BC has quasi-Torrens system
* Torrens system protects purchaser
	+ - **"Mirror principle":** register of title reflects accurately and completely all estates/interests that may affect the land
		- **"Curtain principle**": registry is only source of information for a prospective purchaser; all estates/interests that do not appear on title are irrelevant

### Re Fraser, [1974]

Facts: deceased left a will which revoked all former wills, appointed R as executor and trustee and gave his widow a life interest in his estate and property and the rest and residue of the estate and property he gave to a Society. Could there be a life estate in personalty? Does the widow have the power to encroach upon the personalty during the term of her life interest?

Ratio: **it is necessary to ascertain from the whole of the will what was the true intention of the testator**. The charity named in the will upon the death of the testator received a vested interest in the remainder of the estate but enjoyment of the remainder was postponed by reason of the widow’s life interest. During the currency of that life interest she would receive the revenue derived from the *corpus.*

* **“Life interest” when used in a will in relation to personalty: the recipient of the life interest may enjoy the revenue derived from the corpus and no more unless the testator has expressly or impliedly indicated an intention that the recipient of the life interest should have the power to encroach**
* But equity imposes upon the widow and the trustee an obligation to preserve the personalty in its entirety for the ultimate recipient

## Alienability of Personalty

* Personalty is freely alienable.
* Transferors tried to impose direct restraints on alienation and the courts treated them as they did restraints on land.
* The rule against perpetuities was applied to personalty to curb the excessive creation of future interests.
* Modern selling techniques have seen the right of registry systems for personal property security interests

Devolution on Death

On death, property may pass by will or in default of a will, according to general rules of law (**intestate** succession) usually codified in a statute (**Wills, Estates and Succession Act**). 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.

# Acquisitions of Interests in Land (4 Ways)

## Crown Grant

* Allodial title belongs to the Crown in right of the Province – 94% of BC is Crown land

***Land Act,* RSBC 1996, c 245**

* Right to take up to 1/20 of property (unused land) for public works
	+ Hence why they can build roads through your property
* All subsurface rights: oil, gas, minerals
* Right of someone with a valid water license to come onto land and exercise license rights
* Right to take certain materials (e.g. grave, stone, timber) for use in public works

## Inter Vivos Transfer

* May be preceded by a contract or transferred as a gift with no consideration

**Law and Equity Act, RSCS 1996, c 253 (previous the Statute of Frauds)**

**S59: contracts about land must be in writing, must identify the subject matter**

* This does not apply to contracts for 3 years or less
* The “writing” can be in any form, writings can also be combined
* Writing must be signed by the party to be charged, or their agent
* Some sort of written assertion that there was a verbal agreement can suffice: must include all the material terms – price, property, parties etc
	+ For the enforceability of the contract, not the validity
* If writing does not exist, an oral agreement may be enforced in cases of part performance or unjust enrichment, or if detrimental reliance has occurred
* Replaces s.1(1) of the Statute of Frauds

## Transfer

* Historically, freeholds could only be transferred by livery of seisen or under seal
* ***Statute of Uses* – transfer freehold interests in possession by grant**
* ***Statute of Frauds* – all transfers had to be evidenced in writing and signed by the transferor/agent**
* ***Real Property Act* – all interests in land could be transferred by grant**

### Stages of Transfer

1. **Listing Agreement** (contract of agency)
2. **Interim Agreement** (contract of sale) – signed by buyer and seller/owner
3. **Conveyance**/Transfer Documents/Indenture stage – parties will get together in future and *execute* the contract
	* Prior to the transfer form, it was called a deed or grant, done under a seal, but no longer with the *Land Title Act*
	* Replaces livery of seisin
4. **Registration of Title**: until registered, title does not transfer

***Property Law Act*, RSBC 1996, c 377**

* **S4:** seller must deliver registerable instrument to buyer
* **S5:** Person transferring land (gift) in fee simple must deliver registrable instrument
* **S6:** Vendor and transferor must first register their own title
* **S7:** transferor must provide registrable description of the parcel of land so that it is registrable under *Land Title Act*
* **S15:** land may be transferred in freehold only by an instrument expressed to transfer land
* **S16:** instrument **doesn’t need to be executed under seal**

## Land Title System (BC/Torrens)

* Transferee must be on title a transfer form must be **delivered**
* **There is a certificate of title**
	+ Prepped by government official
	+ Reflects any charges bearing upon EIFS
		- Right of way
		- Mortgage
* Government/LTO checks title for buyer, guarantees indefeasibility of title
	+ The EIFS holder can get a signed formal duplicate indefeasible title to understand
	+ Duplicate is very important; thief can do shit with it
	+ Duplicate needs to be in the LTO in order to record new charges
	+ s 20 will block and freeze any interest

Registration of transfer forms for the purpose of registering title

**Transfer form = indenture = deed = grant = conveyance = Form A**

## Recording System:

* Execution of transfer form + intention to be immediately bound = transfer effective --- don’t need to deliver transfer form (*Ross*)
* Delivery is much more significant because it is the final process.
* Need to lodge deed with a government office.
	+ There is a bin for each land parcel where transactions need to be recorded, and they are filed
	+ No certificate of title: must pore over documents to find out who has what interests
	+ The solicitor can evaluate documents in the bin to get an abstract in the title
		- Abstract is not a legal document, like the certificate of title
		- It's just solicitor's opinion
* Buyer gets solicitor to check history of title: read through all related documents

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

* Sets up simplified, standard form (**Form A**) as the instrument of registration
* Documents transferring a freehold estate must be by Form A
* **S20: interests in land, either in law or in equity, does not transfer unless the instrument (transfer form/deed) is registered in compliance with the Act**
* **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)
* - Can see that the *LTFA* is incorporated into the transfer form - This statute basically assigns to short phrases long legal meanings (don't need to know it)
* **s. 186(4):** **Form A legally transfers the interest even without express words of transfer** (i.e. X transfer to Y)

***Land Transfer Form Act, RSBC 1996, c 252***

* Simplifies transfer - Unnecessary to spell out the most common standard form clauses
* If transfer expressly made or deemed pursuant to the Act, it will be read as if it contained the more complicated, longer clauses
* **Form A** includes: ID of applicant, ID of property, market value, consideration, transferor, freehold estate transfer (e.g. fee simple, w/ or w/o conditions), transferees, execution

### Required Steps for Completed Gifts

* **Intention:** Donor must have mental capacity to appreciate the nature of what they are doing (parting with ownership). Words, or actions, must be unequivocal or unambiguous: must clearly point to intention to part with ownership. Matter of evidence: circumstances, donor-donee relationship, size of gift, relation of gift’s to donor’s total assets.
* **Acceptance:** the donee must accept the gift. Anything short of outright refusal equals acceptance. Usually assumed that the donee is accepting, but sometimes donee might not want obligations tied to gift. Must decide within reasonable time if they don’t want to accept
* **Delivery:** **transfer of possession** (or its equivalent) of the gift from donor to donee is required to complete the gift. Delivery is both evidence of intention/acceptance, but also a required element of the gift on its own.
* **Registration (LTA, s.20):** the donor must have **done everything that needs to be done** in order for the transfer to take place. This includes both **delivery of deed and registration**. A written Form A is required to transfer an interest in land (no oral gifts). Donor must provide Form A (PLA, s. 5). Unregistered gifts are valid between original parties, but not against subsequent beneficiary-plaintiffs (s. 20 of LTA)

### Ross v Ross, 1977

Facts: Grandmother went to lawyer’s office to prepare a deed conveying property to grandson; deed executed, witnessed, but not recorded. Didn’t do it through a will because wills can be disputed. Grandson not made aware until deed discovered in grandmother’s purse after her death.

Ratio: Physical delivery and recording not required, execution “signed, sealed and delivered” is delivery, as long as all requirements for being valid are met (**intention to transfer and be immediately and unconditionally bound**). The transfer of property was complete and immediately operative, although the grandson was not aware. Court will attempt to fulfill intention of grantor (based on the circumstances, their behavior)

### *Zwicker v Dorey* (1975), 58 DLR (3d) 317

Facts: Zwicker transferred a large piece of land to Dorey. Deed: “not to be recorded until my passing”. Over the next ten years, before he died, he made a number of transactions/other transfers with that deed: transferring parts to himself, parts to Dorey, transferred parts to other people including other wives and kids.

Analysis: Deed was not executed properly under the formalities

* Zwicker did not intend for the land to be immediately transferred, but rather upon death
	+ **Didn’t intend to be immediately and unconditionally bound**
	+ Trying to make a will – trying to make it a testamentary transfer
* There has to be evidence that the deed was executed with the intention to be immediately and unconditionally bound

Ratio: when a deed is contingent on death, it is a testamentary disposition and therefore subject to formalities of the *Wills & Estates Act*. The court looked at intention at the time of transfer.

### *MacLeod v Montgomery* (1980), 108 DLR (3d) 424 (Alta CA)

Facts: Grandmother executed transfer to granddaughter as a gift, with life estate reserved for herself. R was basically getting a reversionary interest. Transfer document (deed) given to MacLeod and duplicate indefeasible title promised, but never actually turned over. The indefeasible title is something that the person who owns the land can hold and the registrar will not execute a transfer/register without it.

Ratio**: Incomplete gift. Equity cannot force a volunteer to complete that which is incomplete, she must do all that is possible herself.** You need the duplicate title to register your gift (statutory requirement) to pass the title. To be complete there must be intention, acceptance, delivery and registration. Transfer form must be delivered and duplicate must be made available.

## Transfer to Volunteers

Transfer where someone tries to get legal title, but hasn’t given consideration

***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.**

* Court assumes the beneficial title stays with the transferor and that title is given to the transferee in a **resulting trust –** possession, control, and administration are exercised for the benefit of the initial owner
* **Presumption of resulting trust:** A transfers legal title, retains equitable title. B holds in trust for A. Onus on transferee to prove transferor intended to give absolute title.
* **Presumption of Advancement:** A transfer title absolutely if it is to spouse/children/family
* The transferee has onus of proving that both legal and equitable title were intended to pass
* Certain voluntary transfers between family – the presumption is that both titles were to pass – rebuttable
* **S19 – *Property Law Act* -**  doesn’t abolish rebuttable presumption of the resulting trust

## Will or Intestancy

**Wills:** dispose of property, both real and personalty, upon death. May be revoked and replaced up to the date of death. Must comply with *Wills Act.*

* Property may be disposed of by will
* Testamentary documents can be changed up until death
* To be valid, it must comply with the *Wills Act*
* If no will exists, estate passes into intestacy and will be dealt with by the *Estate Administration Act*

***Wills Act,* RSBC 1996, c 489**

* **S3:** to be valid, must be in writing
* **S4:**
	+ must be signed by the **testator** or another in his presence by his direction
	+ at least 2 witnesses must be present at same time when testator makes or acknowledges signature and must sign

***Estate Administration Act,* RSBC 1996, c 122, part 10**

**Distribution of Intestate Estate**

* **S77:** upon death, title goes to the executor/trustee
* **S78:** trustee must hold for the person by law who is beneficially entitled
* **S79:** trustee then transfers property to beneficiary
* **s. 83**: if intestate dies leaving a spouse but no issue, estate goes to spouse
* **s. 84**: if intestate dies leaving issue, subject to the rights of the spouse, if any, the  estate must be distributed *per stirpes* (= based on lines of descent) among the  issue
* **s. 85**: if intestate dies leaving a spouse and issue  (3) if net value of the estate is not greater than $65,000, estate goes to spouse (4) if net value of estate is greater than $65,000, spouse is entitled to $65,000  (5) after payment of $65,000, the residue of the estate goes as follows:
* a spouse and one child, 1/2 goes to spouse
* a spouse and children, 1/3 goes to spouse

## Proprietary Estoppel

Equitable remedy, developed by the Court of Chancery

Parties will be held responsible for representations they make that induce another to act in detrimental reliance. **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:

1. P must have made a mistake to his legal right
2. P must have expended money or act on faith of his belief
3. D must know of his legal right and that it is inconsistent with P’s claimed right
4. D must know of P’s mistaken belief of right
5. D must have actively encouraged P in expenditure of money or other actions either implicitly or by abstaining from asserting his legal right
6. D’s actions were unconscionable, inequitable, or unjust equitable fraud

## Clarke v Johnson (2014) (4.38)

Facts: Johnsons' recreational home, on island in Ontario, bought by family Son in-law (Clarke) maintained land for 20 years: built all kinds of fixtures on land. Clark made camp very habitable on a permanent basis - borrowed money, put own money, lot of effort. Grandson Wesley has mental health issues: impossible to live with Clark forbade Wesley to enter unless he complied with Clark’s rules. Johnson asked Clark to leave, wanted court action. Clark claims it is unconscionable to exclude him from land given the time + money he committed to land

Issues: Johnsons bring action. Clark seeks to have title based on Proprietary Estoppel and Unjust Enrichment.

Ratio: Respondent/plaintiff entitled to equitable relief in the form of an exclusive license. Court sets out elements for **proprietary estoppel**:

1. The owner of the land induces, encourages or allows the claimant to believe that s/he will enjoy some right or benefit over the property
2. In reliance upon her/his belief, the claimant acts to her/his detriment to the knowledge of the owner; and
3. The owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit to which he expected to receive.

**Unjust enrichment:** The court does not have to use UE, it can use discretion

1. Enrichment
2. Corresponding deprivation
3. Absence of a juristic reason to explain the mismatch between the two.

Both PE and UE are established. **Constructive trust** (alternative is monetary compensation) is provided to Clarke and provides legal and beneficial title in the form of a license to occupy: subject to terms that it is exclusive, cannot be transferred or assigned, and would terminate on Clarke’s death. Martha has legal estate in fee simple, gives you authority to manage and control. The equitable estate is split between you and the person who was the victim of your unjust enrichment

### *Zelmer v Victor Projects Ltd* (1997), 147 DLR (4th) 216 (BCCA)

Facts: Z wished to develop his land. Needed to build a reservoir on land at a higher elevation, VP owned adjoining lands at a suitable elevation. VP orally agreed that the reservoir could be built at a specified location (where it was in fact installed), and said that he would not require compensation for the land which would be subject to the easement. VP then argued that the reservoir was in the wrong location.

Ratio: Equity comes in. The words or conduct of VP taken as a whole, led Z to believe that they had the approval of VP to construct the reservoir and would be granted an easement. **Proprietary estoppel has been established.**