**PROPERTY LAW CHECKLIST/MINI CAN**

**Airspace Issue**

* D will argue the ad coelom doctrine – **Kelsen** – own the land, then you own up to the heavens and you own airspace
  + Context: sign sticks out 8 inches from the wall – hangs 40-50 ft above P’s building – deemed trespass
  + May also argue from **Air Canada** – you cannot own airspace at all
* P will argue that the landowners’ rights’ in airspace above their land is restricted to such a height necessary for the ordinary use and enjoyment of the land structures upon it. Above that height, they have no greater rights than the general public
  + Context: **Bernstein** – Plane flying over property and taking photos – not deemed trespass
  + Counter-argument to **Air Canada** – but this was in a specific airplane context, what it simply means is that airspace refers to the space, not air itself, and what is a reasonable height will be determined on a case by case basic

**Airspace parcels/Strata plan issues**

* **Land Title Act**: air space constitutes land and thus can be transferred (139); owner can subdivise land (141); Minister can grant airspace parcels above highways for power lines, billboards, Skytrains, etc. but must obtain consent if possession is vested in municipality (142); air space plan cannot be registered unless land to which they are attached is registered and shown as a single parcel on a plan (143)
* **Strata Property Act**: 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. Each condo owner gets series of implied easement rights (69); Strata corporation must repair and maintain common property and common assets, unless stated otherwise by bylaw (72)

**Fixtures/Chattel issues**

**Test for fixtures:**

1. Item attached to land by weight and removable without damage to the item and land is prima facie a chattel (**RBC v Maple Ridge**)
2. Item even minimally attached (eg. Excluding electrical plugging) is prima facie a fixture (**RBC v Maple Ridge**)
3. Prima facie characterization may be rebutted where item is
   1. A tenant’s fixture
   2. Object or purpose (intention? Objective?) suggests that the putative “attachment”
      1. Of an apparent fixture-item that is really a chattel – shows purpose behind affixation was for the better enjoyment of the item as a chattel (**Re: Davis – bowling alley – easy to remove**)
         1. **Turismo** – factory equipment deemed chattel – equipment only slightly affixed, was moved from previous location to current one
      2. Of an apparent chattel item that is really a fixture – obvious purpose is to enhance the value of the premises or improve its usefulness (**Haggert v Brampton**)– such that slight attachment (securing bolts to stabilize item or weight) shows “intention for it to be there for the use of its lifetime” (**LaSalle - carpet**) – is it intended to be permanent **(Zeltsoff**)
         1. **Zeltsoff – pulp mill –** significant affixation, but equipment there for over 50 years, it’s a pulp mill
         2. **Haggert** – **safe** – realty must be destroyed to take it out, object of permanence
   3. The item is a building. A structure, portable or otherwise, is treated as being part of the land (**Elitestone – bungalow resting on own weight on concrete pillars**).
      1. Subjective intention of the parties cannot affect the question whether the chattel has, in law, become part of the freehold (**Elitestone**)
      2. Role of cultural expectation
         1. Stones in house formation resting on land by own weight = fixture vs. stone blocks in box formation, resting by own weight = chattel (**Holland v Hodgson)**

**Context/example cases:**

* Same CoverAll but one deemed fixture (installed on buried foundation) and other a chattel (portable, purposely installed on above-ground foundation) – **CMIC – Pavlich thinks both should be fixtures**

**Issues with Riparian Rights**

**Common law riparian rights (in place when dealing with un-recorded water)**

* H20 rights are attached to ownership of land **+** right to natural flow and percolating water (diminished in neither quantity or quality, no diversion for others, cannot injure other users)
* Right to use for ordinary and domestic purposes; Irrigation permitted as long as amount adjudged is reasonable \_ no diminution other than that caused by evaporation and absorption
* Rights remain whether exercised or not

**Water Sustainability Act**

* S. 1 definition of stream – includes natural source of water supply, lakes, ponds, rivers, creeks, springs, ravines, wetlands, glaciers
* S.2 – domestic purpose – use of water for household purposes – drinking water, food preparation and sanitation, fire prevention, providing water to animals or poultry kept for household use or pets, irrigation of garden not exceeding 1000 m2 that is occupied within dwelling

**Dealing with recorded water – RO maintains common law right until Crown issues license removing those rights (Johnson v Anderson, Steadman)**

1. If neither A or B has **proper** license for diversion, then:
   1. Important to look at what is authorized under the license
   2. A proper license pre-empts riparian rights but does not remove them
   3. Riparian owners still have common law rights to unlicensed water and thus will have remedy against unauthorized diversion of stream, unless it was covered under a license
   4. Diversion must also comply with **s. 6(1) of WSA 🡪** person must not divert H20 from a stream or an aquifer unless authorized by license or under regulation
      1. **S.6(3)** – unless provided otherwise, authorized to use unrecorded water from a stream for domestic purposes
   5. **Johnson v Anderson –** D 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. P wins.
   6. **Schillinger -** Water on Ds land flows onto Ps land. P diverted water for fish hatchery without license. Ds company altered course of water flow – resultant silt caused Ps fish to die. D wins – P’s diversion was unlawful (commercial purpose) 🡪 Riparian rights can only exist for a person lawfully using water
   7. **Steadman -**  P had ground water piped to house to use for domestic purposes – no license. D built road and caused contamination, no license. P wins – right to use water as long as no license revoked this right.
2. If both A and B has proper license for diversion/use then apply **s.22 of WSA** 
   1. Precedence of rights in general determined by which right came first in time
   2. If same date, then precedence based on the water use purposes authorized by the license:
      1. Domestic use
      2. Waterworks
      3. Irrigation
      4. Mineralized water
   3. If rights have precedence from same date + same purpose 🡪 equal precedence
3. If only one of A or B has proper license for diversion/use, then:
   1. Then the person who has license will win according to **Johnson – WSA pre-empts riparian rights. Crown > licenses under WSA > common law RR > non-licesed/non-riparian**

**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

**Doctrine of accretion**: where land is granted w/ water boundary, title of grantee extends to that land as added to/detracted from by accretion, 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

1. Accretion must be gradual and imperceptible (does not apply to avulsion – sudden changes in land)
2. Human action (except intentional action of the owner) can produce accretion
3. Accretion can only be produced by natural substances, though those substances need not be carried by water

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

Riparian owners are entitled to an increase by accretion, or may suffer a decrease by erosion (**Theosophy**)

**Access by Riparian Owners**

Riparian owners have the right to anchor vessels on the shore (**North Saanich**)

* Riparian owners have right of access but must not interfere w/ any public right of navigation and cannot impede access by building a structure on the foreshore.
* Crown owns the foreshore

**Support issues**

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| --- | --- | --- |
| ***Case*** | ***Facts/Conclusion*** | ***Ratio/Rules*** |
| ***Cleland v. Berbarick 1916*** | P blamed D for the destruction of his property when D excavated sand and bank from his own property, which greatly facilitated the action of wind and water on P’s property. D responsible for intrusion | 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  *Sine quo res* maxim: Support is part of the land itself, must remain with the land, not an easement  *Sic utere* maxim: The right of the owner of land is to have that land left in its natural condition without interference by the direct or indirect action of nature. Neighbours must not interfere with or prevent this enjoyment. |
| ***Bremner v. Bleakley 1942*** | D dug holes on his property. Wind blew sand from P’s property into D’s holes. It was unable to be returned to P’s original property. D started selling the extra sand. P wanted it back | Owner of land is entitled to all the natural advantages belonging to that land ∴ to all things which in the course of nature may be deposited thereon- **cannot be facilitated by person**  - *Reductio ad absurdum* argument: it is ridiculous to designate every grain of sand as R’s chattel  Excavation is allowed so long as it does not cause a lack of horizontal/vertical support to the adjoining land |
| ***Gillies v. Bortoluzzi 1953*** | D didn’t shore up the side of the excavated hole to protect the adj bldgs from collapsing. P’s grocery store got trashed, and he sued for damages. D accused P of negligence in overloading the wall and floor of his store. D blamed the collapse on heavy winds, and began a counter-claim. D guilty of trespass. Determined that excavation extended under the bottom of the wal 🡪 resulted in vertical + lateral support being removed  Also found that wall was well-constructed 🡪 did not fall due to weight of building or wind | - Landowner entitled to lateral support for land in **natural state** but not entitled to support for weight of a 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 (**now abolished)  -if you want to excavate your property and it is going to affect the neighboring property, then you have to protect the natural integrity of the neighboring property ; applied only to lands without structures  -**Lateral support** doesn’t include support for additional weight of any structures on the land unless: a) obtained by easement or prescription, or  b) it can be shown that subsidence would have occurred even without those structures  **duty of care owed; not to trespass or be a nuisance**  **-removal of vertical support= trespass** |
| ***Rytter v. Schmitz 1974*** | -Removal of the soil caused a subsidence loss of lateral support for the P's property, allowing the subsoil to fall away and so leaving no support for the western side of the Ps building  -for the P; liable for negligence, trespass, rights of lateral and vertical support had been ascertained, (had been obtained prior to amendments to the *LTA*, which now does not allow you to acquire easements by prescription) | -Right to vertical support and lateral support of your own land in its natural state  - No one can interfere with the land by removing lateral support  -Though an owner is entitled to have his soil supported in its 'natural state', if he artificially imposes upon it additional weight by the erection of a building he is not entitled to the lateral support of the adjacent land of another owner to sustain that artificial weight unless he has acquired a right thereto by an easement or otherwise |

**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
* 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) (*Rytter*)
* 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)*

**Inter Vivos Transfer**

**Contract for sale of property – Bilateral, with consideration:**

* Validity and enforceability of contract determined by general law of contract, supplemented by rules that apply specifically to contracts relating to interests in land. In order for contract to be enforceable, must have one of the following:

1. Contract respecting land or disposition of land must be in writing to be enforceable (**s. 59(3) of Law and Equity Act**)
   1. Writing can be informal 🡪 obligation that you are undertaking must be in writing
2. **S. 59(3)(b)** - Party to be charged has done an act indicative of the alleged contract (eg. Payment/acceptance of deposit or part-payment of purchase price)
3. **S. 59(3)(c)** - Person alleging contract relied on contract to their detriment and changed the parties positions inequitably such that enforcing contract would relieve the inequity

**Other points about contract:**

* Contract transfers equitable title. Transfer transfers legal title.
* It is possible that A can enforce contract against B but B can’t enforce it against A – whoever puts their obligations into writing are bound by it
* Two documents can be combined to fulfill requirement for a signed writing (eg. Cheque + receipt)
* Writing may come into existence after contract has been entered into

**Property Law Act:**

* **S. 15** – Transfer instrument need not use the word “grant” and must be by instrument
* **S. 16** – Transfer instrument does not need to be under seal

**Land Title Act S.20(1):**

Means that an instrument dealing with land does not operate to pass an interest, either at law or in equity, unless registered in compliance with the Act

* If it only pertains to relationship between transferor and transferee, then registration is not necessary for interest to pass

**Transfer of a gift – test from Macleod**

1. Intention and mental capacity from donor to appreciate nature of parting with ownership
   1. Must be unequivocal or unambiguous; matter of evidence: look at particular circumstances, donor-donee relationship, size of gift, relation of gift to donor’s total assets
2. Acceptance
   1. Anything short of outright refusal equals acceptance. Donee must decide within a reasonable time if they don’t want to accept.
3. Delivery
   1. Transfer of possession (or equivalent) of the gift from donor to done is required to complete the gift. Delivery is both evidence of intention/acceptance, but also a required element of the gift on its own.
   2. Common law (**Ross**) – physical delivery is not required
      1. In **Ross,** Gma executed deed signed, sealed and delivered, in front of her lawyers. However, this was not recorded in land title office. Transferee, gson, didn’t even know about it and it wasn’t physically delivered to him. She passed away.
   3. For delivery, there must be intention to be immediately and unconditionally bound (**Zwicker**)
      1. In **Zwicker,** it was deemed that this intention didn’t exist because he continued to occupy and use the lands, made several grants of the same land.
4. Registration (**LTA – s.20**)
   1. The donor must have done everything that needs to be done in order for the transfer to take place (**Macleod**). This includes both delivery of transfer form and registration. This needs to be in writing.
   2. Unregistered gifts are valid between original parties, but not against subsequent beneficiary-plaintiffs (**s.20 of LTA**)
   3. Duplicate title is necessary for effective transfer of gift and must be made available (**Macleod**)
5. The transferee is the legal title of the owner but there is a presumption of resulting trust. Equity presumes that the transferee holds the legal title for the transferor, and the transferor still has the equitable title. The onus then shifts on the transferee to prove that the transferor intended to give absolute rights. It is not required for the voluntary transfer to be expressed to be for the use/benefit of the transferee to prevent a resulting trust because there is legislation under **s. 19.3 of the Property Law Act** that rebuts this presumption. Thus, in order to rebut this presumption, you would need to examine all the evidence about whether the transferor truly intended to transfer absolute rights.

**Proprietary Estoppel (Clark v Johnson)**

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

**Clark v Johnson – relevant factors**

* Clark spent significant amount of money on the property and this was known to and consented by Johnson
* He spent lots of time and occupied the land for the most part – unjust enrichment
* He had strong emotional connection to the land and property; to deny him of the use of this land would be unconscionable

Remedy: Gives him an exclusive license to the land, but not an interest in land; minimally intrusive