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# Overview of Property Law

## *Cujus est solum ejus est usque ad coelum et ad inferos*

* Ownership of the soil carries with it ownership of what is above and below it …*up to heaven and down to hell*

## Relationships between people mediated by things

#### One only holds an interest in land according to time = estate

# Air Space – “*Ad Coelum”*

#### Kelsen v Imperial Tobacco Co. (1957) UK QB “Kelsen wins”

#### 🡪 Tobacco’s overhanging sign trespass on airspace of tenants property = tenants also get air space rights

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| **Facts:**   * Kelsen, a leasehold store owner of “407”, sues Imperial Tobacco for trespass of overhanging sign; wants an injunction to remove sign * 1st sign: During Kelsen’s first lease, IT puts sign on neighbouring building that protruded 4 inches from wall. NO objection from Kelsen * 2nd sign: IT gets permission from freehold owner’s of Kelsen’s place to but a bigger sign = “Players Please”, **8 inch protrusion**, 20 feet wide by 8-10 feet high. IT pays owners of neighbouring “409” money for sign. * **Kelsen’s airspace extends to 40 or 50 feet** * Kelsen allowed employees of IT to access the sign using his shop * **Sign there for three years before Kelsen began to object ..implied permission?**   **Issue:**   * *Did the overhanging sign constitute a trespass by invasion of air space, or just a nuisance?* * *Does the lease holder also have airspace rights?*   **Decision:**   * P-Kelsen wins. Yes was a trespass on the leaseholder’s rights * Judge Considers:   *Pickering v Rudd*: D had a board that hung several inches over P’s garden = NO trespass (gun shots fired over not trespass unless hits land)  *Gifford v Dent:* **sign projected 4ft 8” was a trespass on tenants**  *Wandsworth District Board of Works v United Telephone*: a telephone line running across a street was not a trespass on the city b/c city only had rights to air space required to use street as a street.  Judge follows reasoning from *Gifford* and *Wandsworth*  **RATIO**   * In a leasehold situation, a tenant can bring an action in trespass against the person who overhands a sign over his demised land |

#### Bernstein (Lord of Leigh) v Skyviews (1977) UK QB aerial photographs not a trespass = P loses 🡪 air space rights only to a height of “reasonable use”

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| **Facts:**   * Skyviews took an aerial photograph of Bernstein’s house as part of their business to take such photographs and offer to sell them to the homeowner. * Skyviews offered to sell photograph to Bernstein. This angered him. * Bernstein wrote letter accusing invasion of privacy, demanding destruction of negatives. * Letter did not reach Skyviews manager * Bernstein sues for trespass * Skyviews claim photographs taken from adjoining land   **Issue:**   * *Is this a trespass or a nuisance? How high do a landowner’s air space rights extend?*   **Decision:**   * D wins; judge does not adopt *accursium maxim –“up to heaven”* * Judge found D did fly over land to photograph Ps house; done w/o permission. * no support in authority that landowner’s rights in the air space above his property extend to an unlimited height. * Kelsen does not apply because that was height at a low level * Applies rule in *Wandsworth Board of Works v United Telephone Co*: owner “can cut and remove a wire placed at any height above his freehold” subject to any statutory limitations.   **RATIO**   * Owner’s rights to airspace above land are limited to the height as is **“necessary for the ordinary use and enjoyment of his land and the structures on it.”** from *Wandsworth Board of Works v United Telephone Co* |

#### Manitoba v Air Canada (1980) SCC

#### 🡪 Air Canada not required to pay tax for use of Manitoba’s airspace

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| **Facts:**   * Air Canada flies over Manitoba, sometimes lands * Manitoba sees their airspace as lands and wants Air Canada to give it sales tax.   **Issue:**   * *Does Manitoba have legislative authority over the airspace above it in order to levy a tax in connection with the operation of aircraft within such airspace (whether the aircraft lands in Manitoba or travels above Manitoba without ever landing)?*   **Decision:**   * NO, Air Canada wins * Judge disagrees with conception of airspace from the Manitoba CA: air space is the same as air which is “*res onmium communis”* – “thing held in community” * 3 Main ideas on airspace   Airspace is not land (Lord Ellenborough- *Pickering v. Rudd*)  Airspace as land (*Pickering v. Dent)*  Airspace can be land but only to the reasonable use: Bernstein case and *Commissioner for Railways et al. v. Valuer-General*  Case took a stab at “ad coelum” maxim. UK case but influential |

**Ordinary Use** **TEST**

* One argument is the area of restriction by the municipality. Municipality zoning restrictions only really regulates what is close to the surface.
* BUT municipality restrictions may not be adequate due to privacy reasons.
* Personal use and enjoyment VS. general height based on standard zoning

## Air Space Parcels

#### Land Title Act: provides for air space parcels

* **Air space plan:** will be part of the land title of the property. Air space plans are granted serial deposit number and registered with new indefeasible titles to the air space parcels.
* owner may “subdivide land into air space parcels”
* air space parcel can be utilized like ground land: ex) transferred, leased, mortgaged
* can be subdivided in accordance with Strata Property Act.
* Air parcels over highways, municipalities involved

#### Strata Property Act

* Deals with condominiums etc.
* Common law recognizes that owner can subdivide surface of land and also air space. Units to be owned under freehold by different ppl.
* Allows for subdivision of freehold & leasehold
* Under a strata title each person owns their personal space and jointly owns with other owners things like hallways etc.
* Strata plans registered in Land Title Office
* Describes phy. Dimen of strata lots, jointly owned facilities, financial contributions required
* Form of gov created as strata creates a corporation
* Strata members can make amendments to their strata
* **Generally owners of a strata can deal with their personal space like a conventional land owner (sell, lease etc.) but not the shared space.**

# Sub-Surface – *“Ad Inferos* rightstocertaindepth*”*

* Not applicable b/c Earth is round
* This 13th C doctrine no longer applies: owning the depths down until hell
* No reasonable depth of restriction b/c we don’t build that far down
* Depth only important for **Mining**
* Crown now reserves all minerals below (metals, oil & gas = owned by state for benefit of all)

The general idea does NOT apply in BC = the person who owns surface owns the minerals below

Crown gives mining leases to the sub-surface

could be multiple: one company has oil rights; another has mineral

# Fixtures & Chattels

### quicquid plantatur solo, solo credit - whatever is affixed to the soil belongs to the soil

* Issue of what is “part” of property imp. In sale or foreclosure (mortgage)
* First included only plants actually “ceded” on soil
* Now includes things “planted” on soil naturally and artificially

Chattels can be included in the sale if specified

#### Fixture: “of the land”

#### Chattel: “on land, but not of the land”

1. Removable, separate, item that continues with an identity separate from the land.

#### Re Davis (1954) Ont. HC TEST: 2- part Fixture vs Chattel “Bowling-Alleys as chattels” 🡪 only mildly affixed; purpose of annexation was not for the better use of the building; designed to be portable

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| **Facts:**   * Bowling-alleys installed in deceased husband’s building- before the testator purchased the building. Bowling-alleys installed using bolts, raised about 6 inches above floor and could be dismantled and moved.   **Issue:**   * Had the bowling- alley changed it’s status from a chattel to a fixture?   **Decision:**   * NO = Bowling-alleys were chattels.   Method of Annexation: Although it was affixed, it was a mild form of fixture; not permanent.  Object of Annexation: They were not affixed for the better use of the building; constructed for the purpose of being portable.  **RATIO: TEST** *Fixture or Chattel* ? |

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| **TEST** *Fixture or Chattel* ?   1. Method of Annexation: “how” it is affixed   If very permanent = fixture   1. Object of Annexation: “why” – purpose/intention  * If for the better enjoyment of the “thing” = chattel * If it is affixed to improve the freehold = fixture * Custom made = fixture   (you don’t usually know the intention – so must use test)  - must weigh both principles to decide: usually “object/purpose” holds more weight  - BUT if something is very affixed indicates purpose to remain there |

#### La Salle Recreations v Canadian Camdex (1969) BCCA “Hotel Carpets as fixtures” 🡪 carpets affixed for the better enjoyment of the building as a “hotel” not for enjoyment of carpets

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| **Facts:**   * Company purchases carpets from La Salle Recreations on a conditional sale b/c don’t have enough money * Company will only become owner when pays for carpets in full * Canadian Camdex is the mortgagee which began foreclosing on hotel; which was bought by White Spot – who assumed the carpets were part of building * La Salle did not register the conditional sale agreement   **Issue:**   * Were the goods (carpets) affixed to the building for the better use of the goods as goods or for the better use of the building as a hotel building?” * Add the “adjective” in front of the test: “is it for the better use as a hotel (not building)”   **Decision:**   * Carpets were “fixtures”   **RATIO:**   * Went through test: carpet predominantly resting on it’s own weight, BUT object of annexation better indicates that carpets were there to improve better enjoyment of the hotel building – not for enjoyment of carpets |

* Requirement of Conditional Sale: if want it to be effective against innocent third-parties, must register cond. Sale in Land Title Office

Only need to register “fixtures”

If you want to continue your right in the thing of “conditional sale” you must register

#### CMIC Mortgage Investment Corporation v Rodriquez (2010) BCSC

#### 🡪 “Cover-All’s - #1 is a fixture; #2 is a chattel” 🡪 thing affixed presumed fixture unless ev shows affixed for purpose of making better use as a chattel 🡪 thing not affixed presumed chattel unless ev shows it’s presence to be integral + enhance property

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| **Facts:**   * Cover-All #1: secured to concrete blocks buried in the ground – considered a fixture * Cover-All #2: metal arches were secured on concrete blocks resting on ground; Owner intended this be portable * Cover-All #2 attached by walkway to Cover-All #1 * CMIC began foreclosure on Rodriguez and claimed Cover-All #2 as part of the land for mortgage; but Rodriguez had not paid in full for Cover-All #2 so the Cover-All company took the Cover-All back – CMIC disputed this.   **Issue:**  Were the Cover-All’s fixtures or chattels?  **Decision:**  Applies Royal Bank test  Cover-All one is a fixture (concrete blocks slightly submerged – Part of the Land)  Cover-All two is a chattel (concrete blocks on ground)  **RATIO:**  Intention of land owner considered BUT with caution – b/c subjective  A thing affixed to the real estate presumed a fixture unless the evidence shows it was affixed for purpose of making better use of it as a chattel as opposed to being an integrated part of the property as a whole;  A thing not fixed to the real estate will be presumed a chattel unless ev shows that its presence on property was intended to make it an integral part or an enhancement of property as a whole |

#### Royal Bank v Maple Ridge Farmers (1995) BCSC TEST 6 part - Fixture or Chattel ?

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| **RATIO:** Provided 6-part test for determining between Fixture vs. Chattel |

**TEST** **6 part - Fixture or Chattel ?**

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| 1. Chattel = unattached to property except by its own weight, and can be removed w/o damage or alterations to the fixtures or land that will need repair 2. Chattel = any item which is plugged in and can be removes w/o any damage 3. Fixture = any item attached even minimally (ie. Cannot simply be unplugged) 4. Fixture = if a piece of equipment attached to a structure can be removed, but would be useless without the attached part – entire thing fixture Chattel = item can be detached without damage or alteration, retains its essential character w/o attached part 5. Tenant fixture = if item is determined to be a fixture, can still be removed if shown to be a tenant’s fixture – as long as tenant leaves conditions as the were initially 6. If falls in none of the above – use the purpose test – intention of landowner (should only be used for large expensive items). Ex. mobile home may be resting on land by its own weight but it is clearly est. that it was intended to be a fixture. [size, value, nature of object are factors in rebutting the presumption] |

#### Elitestone Ltd v Morris ( 1997) UK TEST 3-fold “Bungalow = part and parcel of land” 🡪 an object brought onto the land can be a chattel, fixture, or part and parcel of the land

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| **Facts:**   * A bungalow rested on concrete pillars for about 50 yrs. * If the bungalow is a fixture, then the defendant (Morris) is protected by the *Rent Act* of 1977 and can’t be evicted. * Landlord wanted it as a Chattel so can increase rent * Common assumption that the bungalows were owned separately from the land, since each occupier purchased his own chalet from the previous occupier.   **Issue:**   * Did the bungalow become part and parcel of the land itself (fixture) or not (chattel)?   **Decision:**   * The bungalow cannot be removed at all w/o being demolished 🡪 part and parcel of the land (fixture) * Morris had the wood for the bungalow delivered to the land site and assembled there – indicates part and parcel of the land   **RATIO:** Applied 3-fold test  **Other:**   * **Tenant fixtures:** fixtures that are part of the land but may be removed by the tenant in the course or end of the tenancy. These are often confused with chattels which have never become fixtures at all. |

* “the unlawful binding of a house by A, with the bricks of B, on the land of C, results in title to the bricks, as fixtures, residing in the freeholder, C.”
* *dos Reis v Ring* (2012 BCSC) – to improve his property homeowner A built a stone wall w/o permission on neighbour’s B’s lot. Wall held to be a chattel owned by A. A had to pay for removal

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| ***Elitestone*  TEST 3-fold**  An object brought onto the land could be:  1) chattel  2) fixture  3) part & parcel of the land itself  - looking at commonsense is a chattel but then becomes part of the land through your intention  - Objects in (b) or (c) are treated as being part of the land. |

# Water

## Riparian Rights

* At common riparian owners had special rights:
  + - livestock watering, domestic purposes, drinking, washing
    - if you drain water course it is OK
    - Irrigation: you can draw as much water as you want, as long as don’t inhibit water from returning
    - **Can use almost to point of exhaustion BUT can use for other purposes besides those assigned to you**
    - Can’t Pollute
* **Now Riparian owners can only use unrecorded water for domestic purposes.**

#### Water Act “all water to Province”

* Ownership in all waterways vested in Province of BC (not as much water like Britain – needed water to colonize the province – esp w/ mining)
* This was crucial to protecting water
* Alters the common law riparian rules imported from Britain (the natural geographic set up in BC diff. from Britain)
* **S 2**: Vests all property in the province of BC, except if private rights have been established under licenses issues or approvals given under this or a former Act.
* **Domestic purpose (s. 1):** use of water for household requirements, sanitation and fire prevention, the watering of domestic animals and poultry and the irrigation of a garden not exceeding 1 012m2 adjoining and occupied with a dwelling house.
  + Domestic animals = *Animus revertendi* “intention to return”, may wander but come back as know who owner’s are
* **Unrecorded Water:** water that is not held under a licence or under a special or private Act
* **Stream**: natural watercourse or source of water supply, whether usually containing water or not, and a lake, river, creek, spring, ravine, swamp, and gulch.
* **Prohibition (s**. **4)**: it is an offence to divert, extract, use or store any water from a stream, except for “domestic purposes”
  + - **S. 42 Defence** to s. 4 Prohibition = **“Right to use Unrecorded Water”**

42 (1) Not an offence to divert for extinguishing a fire, but must return stream to original flow was fire extinguished

(2) Not an offence to divert unrecorded water for domestic purpose or for prospecting mineral, but if prosecuted – it is your responsibility to prove water is unrecorded.

#### Water Protection Act

* Purpose is to preserve the water in BC
* All stream water for gov except if private rights or licence established under *Water Act*
* S. 3(2) vests ground water in the government

#### MacLean article “history of BC water”

* Riparian law works well in countries where supply is plentiful – But it is not plentiful everywhere in BC due to drought and industry use: mining, fruit farmers
* *Water Privileges Act* of 1892 – confirmed what was implied – that all water was vested in the Crown 🡪death of old *riparian law*
* *Water Act* of 1914 – definite end of riparian law
* First test of the BC water act came with ***Cook vs. City of Vancouver****,* 1912: City’s water licence held to override Cook’s alleged riparian rights to Seymour Creek
* Today: all rights to water are vested in the Crown except only in so far as private have been est under special Acts or under licences; the right to use any water, even for domestic purposes, is subject to the statute. However, it is not an offence to use un-recorded water for domestic purposes.

**Trilogy of Water Cases:**

#### Johnson v Anderson (1937) BCSC “ D diverted P’s water for construction upstream = P wins” 🡪Riparian rights prevail for unrecorded water; unauthorized diversion of water cannot negatively impact riparian owner’s right to use unrecorded water

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| **Facts:**   * Both parties don’t have a licence to the water * D diverted flow of a stream that naturally flowed through P’s property. * P exercising common law riparian right to use water from stream for domestic and stock-watering purposes * P sued for damages and an injunction from construction upstream by D * P had no water licence * D had a licence but did not authorize diversion in question.   **Issue:**   * Do the rights of a riparian owner prohibit unauthorized diversion of water flowing through their land?   **Decision:**   * YES 🡪 P is granted his order for the diversion and construction by D to stop, but this is subject to a future licence that D could be granted. * **There was still some unrecorded water on the stream – so riparian law prevails for this water.**   **RATIO**   * One cannot divert water from a riparian owner’s land and negatively impact the riparian’s use of the water for domestic purposes   **Other:**   * Court wants to respect the common law. There is probably a good reason for this common law. |

#### Schillinger v H Williamson Blacktop & Landscaping (1977) BCCA 🡪“P sues D b/c D’s construction impacted P’s fish farm water that P took w/o a licence = P loses” 🡪“riparian rights only exist for lawful use”

#### 🡪“Suggests Riparian law no longer applies”, “Fish Farm not domestic animal”

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| **Facts:**   * P claims damages from D’s construction upstream that resulted in silt being added to the stream used by P in his fish farm * P was granted a licence to divert water from Hairsine Creek. * P diverted water from Barres Creek (unrecorded) w/o a license, this was the creek where the silt came from D’s operation and entered P’s fish farm, killing fish   **Issue:**   * Was P entitled as riparian owner or alternatively as a licensee of the stream to have the benefit of spring water from the lands of D, and to divert said water for purpose of fish cultivation? * If no to above, is P entitled to recover damages for deterioration of water quality assuming P can prove this resulted from D’s actions?   **Decision:**   * NO, D wins b/c P’s actions were unlawful, violated *Water Act*   **RATIO**   * Riparian rights to use water no longer exist per se in BC. The only rights that exist are for those that lawfully use the water by first acquiring the right to the use and flow of water governed by *The Water Act* * Salmon farm is not a “domestic” use in BC, is an industrial use |

#### Steadman v Erickson Gold Mining Corp (1989) BCCA

#### “D’s road construction impacted P’s use of unrecorded water for domestic purposes = P wins 🡪 If both P & D unlawful🡪P fails, P lawful🡪P wins [reconciles w/ Johnson (P lawful), Schillinger (P was unlawful + lost)

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| **Facts:**   * D built a road immediately uphill of P’s land. The construction contaminated P’s water, piped to his house from a small, spring-fed dugout on his land, * P mainly used unrecorded water for “domestic purposes” * P sued for nuisance   **Issue:**   * Was the water the plaintiff was using governed by the *Water Act*?   **Decision:**   * + If GW can exhaust, can’t pollute (if riparian law applies P wins – No Water Protection Act yet)   + If flowing water 🡪 *Water Act* applicable – must reconcile *Johnson Case, Schillinger*.   **RATIO**   * + If both P & D unlawful 🡪 P fails, If P lawful 🡪 P wins   + Reconciles *Johnson* case (P lawful) and *Schillinger* case (P was unlawful) |

## Percolating Water/ Ground Water “use requires license”

* At common law, percolating water (watering flowing through the soil or through an unascertained channel) became the property of the first person to draw it lawfully to the surface
* **Now this common law principle to percolating water is governed by the *Water Act* and the *Water Protection Act,* which requires you to have a license**

## Ownership of the Beds of Watercourses, Lakes & Ponds

### *ad medium filum* “to the middle line”

* Common law rule
* applies when there is a question which parcel of land owns the land under the water.
* The owner of a parcel of land that abuts a water body may own the ground underneath the water up to the middle line of that water
* **No longer applies in BC after 1961 based on the *Land Act*, c 245, s. 55**
  + Now nobody owns the bed of the stream unless the crown explicitly gives you this on the land grant.
    - 2 exceptions in section: *ad medium filum* can apply if 1) there is an express provision in the grant to the contrary or 2) the minister endorses a declaration on the plan (of the property) under s. 58
    - *Adf* can apply to the registered owner of land to whom an indefeasible or absolute title has issued before March 27, 1961 that specifically includes the bed of the body of water coloured […{ on the map or a plan attached to a Crown grant (s. 56)
      * Also applies to land in subdivision

#### Land Act

### Accretion and Erosion

* Doctrine of accretion will apply to gradual accretion over time = riparian owner gains property.
* Doctrine of accretion does not apply to a sudden change
* If a land owner loses land by erosion or diluvion (advance of water) then he loses it
* **For doctrine of accretion to apply to your property – the land grant must indicate on the map or have a parcel clause that your property abuts the water**

#### Southern Centre of Theosophy v South Australia (1981) “Lake George receded w/ accretion, P wants this new land to b part of his waterfront property = P wins” 🡪 if you lose land from erosion, can gain from accretion as long as its gradual

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| **Facts:**   * P owns land on that abuts a lake George in Australia. Lake has receded over time exposing an area of about 20 acres between the water line and Ps original property line. P wants this new land as his own. He wants his land to still have water frontage. * Crown argued: a term in the lease excluded the doctrine of accretion from being included   + - They were inferring this from a covenant: a covenant was placed on the plaintiff to actually have a fence at the old property line     - This fence meant that the property line was delineated   **Issue:**   * *Can the doctrine of accretion apply to increase the land of this owner?*   **Decision:**   * Yes, plaintiff wins * Court says:   Looks to  Reverse of Crown’s argument regarding fence would lead to an absurd result of the fence actually being in the water if water advanced by erosion  Clearly the question of a fence was not there to delineate  You can’t infer from the fence to determine the land boundary  Distinguishes from *Trafford v Thrower*: accretion does not apply to stagnant water like a lake – only applies to sea shore, rivers.  Lake George is different b/c it has an opening to the sea and is tidally influenced.   * + - 1) If you lose land by erosion surely you should acquire it by accretion (principle of *quid pro co*)     - 2) Sites another old maxim – “imperceptibility” = slow; according to the judge it forms the basic accretion maxim   **RATIO**   * Can gain land from accretion as long as it is gradual (can’t be from avulsion – sudden) * Accretion is: from currents in a lake, channel to the sea, long shore drift, wind and sand dunes |

### Access by Riparian Owners

**Common Law:** Riparian owner had a right of access to the **foreshore** (between high water & low water mark), but no right of ownership

**Riparian owners have a private right to access and regress to and from water abutting their land but cannot put down anything which disturbs the foreshore and interferes with the foreshore owner’s rights (in this case north saanich owns the foreshore). WATER ACT DOESNT APPLY TO OCEAN *North Saanich***

***Hals* States Law in BC (stated in *North Sannich*)**

**1)   General rights of riparian owners:** a riparian owner is entitled to access and regress to and from the water adjacent to his land

**2)   Nature of rights access**: riparian owner’s right is private & not a public right and interference is actionable without proof of damage; does not depend on ownership of bed of river or other water in question and is distinct from public navigation rights

**3)   Exercise of rights access**: in exercising his right a riparian owner must not interfere with any public right of navigation in the water *or* ***put anything down that disturbs the foreshore***. If there is something erected, must be used as a means of access

**4)   Incidental rights**: riparian owner’s rights include: right to land, or pass over shore at all states of water for the purpose and right to moor vessels adjacent to land for period as necessary to load or unload them and keep them there till complete.  Must not moor vessel to interfere with another owner’s right to access or to interfere with any public right of navigation

**Today in BC:** Foreshore is owned by Provincial Crown. Riparian owners have rights to high water mark, which is marked by change in vegetation. Federal Crown owns water beyond foreshore, and the foreshore in 6 harbours: Victoria, Esquimalt, Nanaimo, Alberni, Burrard Inlet and New Westminster.

#### North Saanich (District) v Murray “Wharves across foreshore not OK w/o permission = City wins”

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| **Facts:**   * Riparian owner built wharf/dock that allowed for access to sea shore * Dock was a permanent construction * North Saanich District objected   **Issue:**   * Can Riparian owner build a wharf across the “sea shore” to ensure they have an easy access to the tidal water?   **Decision:** Yes, but need permission from Government.  **RATIO**   * Riparian owners need permission to construct wharves across foreshore * Complicated as a riparian owner has a general right to access the water * Owner must not interfere with any public right of navigation * Riparian owners have the right to pass over the shore to access the water and to store a boat to unload. |

# Support

#### Cleland v Berbarick (1924) Ont. CA

#### “D removes his beach sand to increase beach🡪P looses his sand’s = P wins, NOT OK to violate natural support

#### 🡪 You must provide subadjacent support to your neighbour’s property

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| **Facts:**   * D drew sand away from their lots on the lake so that the currents would take sand from Ps nice sandy beach and deposit it on theirs. * P claims Ds actions facilitated the actions of wind and water   **Issue:**   * *Can you be responsible facilitating the natural processes of wind and water to the detriment of another?*   **Decision:**   * Verdict for P. * Judge relies on two common law principles: *subsurface land is held in strata – all connected and held together*   1. **lateral support** (land is entitled to support from neighbouring land)  *sine quo res ipsa haberi non debet* = support is part of the land itself, must remain with the land, not an easement  2. **latin principle** : *sic utere tuo ut alienum non laedas* = you may use your property as long as you don’t hurt another through this use 🡪lies at the heart of nuisance principle   * You are not responsible for natural changes so long as you do not affect the status quo of the land * The D affected the subadjacent support afforded to his neighbour by sand removal   **RATIO**   * Yes you can be held responsible for using the natural process to your advantage, therefore creating a detriment to another’s property * **You must provide subadjacent support to your neighbour’s property** * Each landowner’s use and enjoyment of his land must not interfere with that of his neighbour’s either directly or indirectly |

* Reconcile these two cases, the rule in ***Cleland v Berbarick***does not apply to ***Bremner v Bleakley***because it would create a *reductio ad absurdum*

#### Bremner v Bleakley (1924) Ont. CA “Van Wagner’s Beach = holes OK; P loses” 🡪 Owner of land entitled to all natural advantages of that land - can’t alter natural processes though

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| **Facts:**   * D dug holes on his land and P alleges that he did this so the wind would blow sand from P’s land to D’s land so D could sell this extra sand he was gaining. B/C of the holes the sand failed to be blown back.   **Issue:**   * *Does the principle of subadjacent support apply to this case?*   **Decision:**   * D wins * Judge relies on *reductio ad absurdum* argument: if find for P, I am saying that one owns all the component parts of land (ex. soil), and natural deposit of soil on another’s would be a liable nuisance * Judge distinguishes this case from *Cleland v Berbarick*   + - Unlike in *Cleland v Berbarick*, the D’s digging of holes did not cause the sand to be deposited on his land. It only trapped it there * There can only be an action if damage was done to the plaintiff * D’s actions were unneighbourly but not liable as a wrongful act. * Sand is either soil or will become a chattel = ***analogy to wild animals****, they roam like soil, and if you catch it, its yours* * It cannot be shown that the sand is a chattel and therefore no claim   **RATIO**   * Owner of land entitled to all natural advantages of that land. Natural accretion on your land is fine as long as you were not affecting the forces of nature. * Trapping sand is different than removing it to gain more. |

#### Gillies v Bortoluzzi (1953) Man. QB “building excavation = P wins”

#### 🡪common law right to both vertical and lateral support

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| **Facts:**   * D excavated a basement below his building then P’s wall of his building collapsed into the excavated basement. P was the adjacent building tenant * P claims that D removes the vertical and lateral support for his building   **Issue:**   * *Is D liable for removal of support?*   **Decision:**   * Judgment for P, D was negligent * D’s excavation below the level of P’s adjacent building removed its lateral and vertical support.   **RATIO**   * You must do anything to remove the lateral and vertical support of an adjacent building. |

* you can ask permission to drill anchors in the adjacent property. If you are not given permission you need to leave enough room between your excavation and the adjacent building
* By taking away the lateral support (through an excavation) you also lose the vertical support for the footings on the adjacent structure
* To maintain a lateral support to the soil which in turn provides vertical support to the building you must either
  + 1) give a setback (a space between the two buildings), or a stable cutslope angle to prevent bearing failure of the adjacent footing OR
  + 2) drill anchors into the area below the adjacent property with their permission

#### Rytter v Schmitz (1974) BCSC “excavation North Vancouver = P wins”

#### 🡪 common law right to both vertical and lateral support w/ qualifications

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| **Facts:**   * D while preparing to construct a building, excavated and removed lateral support for P’s property * D excavated too close the P’s property and even unto their property * D attempted some shoring but it was not sufficient   **Issue:**   * *Should the plaintiff win for negligence or also b/c of loss of vertical support*   **Decision:**   * P wins * When D dug under P’s property, P lost the vertical support that they were entitled to. * D liable b/c of negligence and trespass of digging underground into the plaintiff’s property: we know from airspace that even a minor intrusion into airspace is a trespass   **RATIO**   * Right to vertical support and right to lateral support of your land in its natural state * **Vertical:** duty to give vertical support to buildings next to you if you excavate below level that the neighbour’s building goes to. * **Lateral:** common law right to lateral support BUT when you put a building on this you are no longer entitled to support by the adjacent land unless you get an easement. |

* Landowners do not own percolating water underneath their land but can extract from it even if this may deprive the neighbouring landowner from his current use of it.
* A burst water pipe by an owner that affects the neighbour’s vertical support will be held liable for trespass.

# Principles of Land Law

## Basic Principles Overview

Nemo dat quod non habet: you cannot give what you don’t have

* 2 types of property
  + 1) land or real property
    - “realty” = fixed and static
    - land law attempts to a) control the disposition/arrangement of land b) control the use of land
  + 2) personal property (not land)
    - “personalty” = moveable
* Real Property
  + A) Dispositions
    - Property owner can dispose of property:
      * Inter vivos (between living persons)
        + Contract of sale, by gift
      * Death
        + Will or in absence of will according to the *Estate Administration Act*

A document called a “transfer” details the transfer of realty

* + B) Use – 3 categories for restrictions on use
    - 1) Common Law – ex) nuisance from neighbours
    - 2) Private arrangements ex) restrictive covenants
    - 3) Legislation –
      * ex) statutory restraints on the use of land – *Agricultural Land Commission Act* (A.L.R.)
      * municipalities zoning

## 4 Basic Principles: tenure; corporeal & incorporeal interests, legal and equitable; freedom of alienation

* 1) Tenure
  + not applicable to modern law
  + sub-infeudation: parcelling out the land
  + only the Crown is absolute owner of land (used to be King)
  + land tenants granted “estates”, these were held according to tenures (conditions)
    - 2 types of tenures 1) freehold 2) copyhold
      * 4 types of freehold tenure
      * all lands, mines and minerals belong to the BC Crown in fee simple
* 2) Corporeal and incorporeal interests, estate
  + Corporeal Interests (entitle possession of land)
    - Land owner owns a time in land only = “estate” – so we should say “estate owners not landowners”
    - A) Fee Simple: time in land determined by continuity of

heirs, basically absolute ownership

* + - B) Fee Tail: not possible in BC today
    - C) Life Estate: a time in land for lifetime of the holder
    - D) Estate Pur Autre Vie: type of life estate measured by some life other than the owner of the estate. Ex) holding an estate in “trust”
    - E) Leasehold Estates: time in land for a fixed duration (renting)
    - F) Future Interests: estates can be granted in succession

Incorporeal interests (rights to land – but not possession)

“right of way” = can walk through land

easements, covenants, profits a prendre, mortgages

* 3) legal and equitable interests
* 4) freedom of alienation

### Legal & Equitable Interests

* “use”: holder of legal title holds the use of land for the benefit of another person
* A shifts the legal interest in Blackacre to B (common law consideres B the new freeholder in fee simple) but the Lord Chancellor would compel B to hold the freehold interest for C.
* C is described as *“the cestui que use”* meaning “he to whose use” the land is held.
* Reasons for the transfer to go to another person who holds it in use for another, instead of making a direct transfer to the user (C):
  + Religious influence: ex) insured monks had property for monasteries but would retain their vow of poverty.
  + Avoiding feudal taxation
  + \* it allowed a person to dispose of property after death before that right was in fact legally recognized
* The courts resurrected the “use” 100 yrs after Henry VIII set to execute it. It became what is today known as a “trust”
* Modern Trusts
* A) legal title always remains with the trustee
* B) the interests that can be created in equity correspond to those that can be created at common law
* C) trustee can transfer legal title to a third party

### Freedom of Disposition & Restraints on Alienation

* Principle of land law is to have land be alienable (can be freely passed between owners)
* Three requirement for alienability:

1) owner to have freedom of disposition

Can dispose of land inter vivos or upon death

2) owner not to impose excessive restraints on alienation

generally restraints on disposition are not valid except that restraints on the assignment of a leasehold interest are valid

fee tails are no longer

future interests: courts tried to hinder them

strict settlements- tried to tie up land

3) Mechanics of transfer to be simple as poss.

Two questions:

1) by what means does the intended transferee determine what interest in the land is held by the intended transferor?

“finding good root of title”

2) by what methods or documents will the actual transfer of land be effected?

Private documentary transfers

“covenant to stand seised”

today there is a land title registry and previous dealings with the land are irrelevant

Our liberal capitalist system likes to ensure that our land is freely alienable: that we can sell & dispose of our land whenever we want. The ***Quia Emptores, 1290*** allowed free disposal of land (except that which reverted back to the Crown). The ***Statute of Wills, 1540* and *Tenures Abolition Act, 1660*** also allowed land to be freely willed. Direct restraints on alienation could be voided by the courts. But rich folks tried to restrict alienation by imposing fee tails (***Statute De Donis Conditionalibus*)** and future interests (barred by ***Whidby v. Mitchell; Statute of Uses***) and strict settlements (broken by ***BC Land (Settled Estate) Act*)**so that the owner couldn't freely dispose of his land inter vivos or by will.

### Relationship Between Real & Personal Property (& English Law)

**The Doctrine of Estates**

* For personal property – usually considered “absolute” ownership – esp for “fungibles” – property consumed in use – like a case of beer. You must give the whole use to someone.
* Legal estates in land can also be created in personality ex) leasing a car
* Courts allow estates to be created in personality through trusts

#### Re Fraser (1974) BCCA “Man gives personalty to senior society in Creston, BC = Charity wins”

#### 🡪 A holder of a life estate in personalty owes a fiduciary duty to preserve the estate for the ultimate recipient (widow-can't-encroach-on-personalty-if-not-granted-that-right).

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| **Facts**   * Man gave life interest in his estate and property to his wife. The rest was given to Senior Society * side against wife argued that wife had a legal duty to preserve the personalty for the charity named in the will (senior society)   **Issue**   * + *Can there be a life estate in personality*   + *Does the widow have the power to encroach upon the personality during the term of her life interest*   **Decision**   * + Charity wins   + 2 possibilities that the will could allow     - 1) charity got vested interest in the estate, but this was postponed by life interest of widow     - 2) widow got absolute interest in the personality subject, but to an executory bequest to the charity when she dies   + Conclusion: widow was given a life interest “**life estate”**   + Life interest used in a will in relation to personalty:   + - recipient of life interest may enjoy revenue derived from corpus and no more unless said by testator that individual can encroach   + nothing in will indicates testator intended widow to have power to encroach   **Ratio**   * + Person given life estate has a fiduciary duty to the ultimate beneficiary (ex. Charity) |

# Acquisitions of Interests in Land

* **4 ways that a person may acquire interest to land:**
  + A) Crown grant
  + B) *Inter vivos* transfer
  + C) Will or intestacy
  + D) Proprietary estoppel

## The Crown Grant

* Crown grants are governed by Part 5 of the *Land Act*
* Crown grants are the root of the Land Title system

## Land Act s. 50

* S. 50 **Land Act:**

**a**. Crown reserves these interests:

* 1. Resume any part of the land deemed necessary by the gov for public works (roads etc), but not more than 1/20 of the whole land
  2. Government agents have right to enter property to appraise for minerals
  3. Government has water privileges – carry over water or under your land for mining and agriculture
  4. Gov can take part of the land such as gravel, lime, timber that may be required for maintenance of public works such as (bridges

b. Crown retains all geothermal, mineral and energy interests

c. Crown gives no right or interest to any highways that existed through or over land at time of disposition

d. Government can also create a right of way through your property if it is necessary to a government undertaking

## Inter vivos Transfer

**B Inter Vivos Transfer**

* Usually occurs with a contract for sale
* Also can occur from a gift
* *Law and Equity Act*
* Must be in writing
* But also could be oral
* Must provide buyer with a “registerable instrument” so land can be registered with the Land Title Office = **Form A**
* Land lord must deliver to their tenant a lease agreement

## The Contract

## Law and Equity Act s. 59 (“Statute of Frauds”)

## THE TRANSFER

### Writing and Sealing

* **Sealing was regarded as the most “solemn moment possible in law”**
* Seal no longer required for a land transfer
* Seal can be used by a company or just sign
* Deed no longer used

### Property Law Act ss. 15 and 16

## REGISTRATION

### Property Law Act (ss 4 – 7)

### Land Title Act 9ss 39, 185 – 186)

* **S. 185** requires that you use **Form A** (not a deed)

### STANDARD FORMS

### Land Transfer Form Act ss. 2 – 4 SELLER MUST USE FORM A, b/c s.4 requires it in order to be in compliance with the Land Title Act

* A proper land transfer requires estate/interest be in registered form: FORM A
* Form A is embedded with requirements from the *Land Transfer Form Act*
* Form A transfer stage - historically called deed, transfer, conveyance, indenture(original deeds had an indenture on them)
* Form A is a document between seller/transferor and buyer/transferee

## The Transfer – When is it Operative

### Land Title Act s. 20: failure to comply with Act🡪possibility to forfeit land. Exception: if dealing w/ person giving you transfer form ie. seller

* **S. 20 If you do not register in compliance with this Act, you stand to forfeit land**
  + Unless you secure registration (have your name on title) you don’t get the interest in land except against the person making it
    - Exception: can be ok if dealing with the person you are in contract to transfer to. You can compel seller/transferor/grantor to put it in the registerable form.
  + If seller holds on to form that has you as the new buyer, but then fraudulently sells to another, at common law you would get land if took action against seller due to *nemo dat*, but not now with s.20
  + **Action can only be against the transferor – if the transferor is no longer on the IT document then the rights of the transferee are of no consequence (you are out of luck)**
* Indefeasible Title “IT” document is kept in the Land Title Office

### Land Transfer Steps

* in a Land Title System (vs. a Recording System)

**1. Listing agreement:** made between the seller and an agent.

purpose of this is to bring about the interim agreement

**2. Interim agreement signed:** the contract of sale = promise to do something in the future.

seller and buyer enter into an **IA**, set a completion date for **IA**. Ex. in two months

**Investigation:** buyer checks to make sure seller has the estate in fee simple, and any charges on the land have been disclosed in the interim agreement

**3. Form A transfer stage:** Seller gives buyer the “Land Transfer Form”:

At Common Law:

if seller gave another form A/indenture form to another buyer and that buyer had it registered at Land Title Office, at common law first holder of Form A would prevail to get the land.

In Land Title System:

**S. 20 *Land Title Act*, requires use of Form A.**

Form A is so important because it is the only way to get to the Register Stage

**4. Register Stage:** (if you have done Form A properly, you can get here)

Buyer goes to land title office with Form A to register.

Stage says you don’t get the estate or interest in land unless you are registered as the owner of it.

**Running Document called Indefeasible Title “IT document” kept in the Land Title Office**

specifies who holds the estate in fee simple, a description of the land, and any charges on the land (summarizes the bundles of “real rights” on a parcel of land).

**Duplicate Title (of the IT) is an official copy**: also kept in the Land Title Office unless holder of estate in fee simple wants it. Register can provide this official copy.

Owner cannot get Duplicate if there is a financial charge like a mortgage on the property. Owner must get permission to access Duplicate Title from the mortgagee.

## Registering Land Transfer: *Cases*

#### Ross v Ross (1977) NSSC “Grandmother puts signed deed in her purse w/o telling grandson then dies” = successful transfer in “Recording System” [Grandson wins land] person arguing should get land will cite this case but likely not applicable to Land Title system

#### 🡪 ev. that transferor intended to be immediately and unconditionally bound – at common law physical delivery of a deed to the grantee is not necessary to constitute effective delivery

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| **Facts:**   * Grandmother(the grantor) had a deed drafted to give her home to her grandson Donald Wayne Ross. The deed was signed and sealed in witness of the solicitors. She expressed her fondness for her grandson. Grandmother said she would record the document herself and put it in her purse at end of meeting. She told nobody about the deed. Not even grandson. She then died 20 months later. * Daughters and grandson now fighting for property * Daughters argue that: grandson didn’t know, not recorded, no physical delivery of the doc.   **Issue:**   * *Whether or not there was delivery of the deed?*   **Decision:**   * Grandson wins: Grandmother intended to be immediately and unconditionally bound by deed: there was no ev. That she didn’t want her grandson to be owner of prop. * Deed and comments indicate her intentions: **sealing the deed was the most solemn act indicating her intention** * The transfer to the grandson was immediately operative (not just when he died) even though he didn’t know about it. **(ev. That rebutted presumption of a resulted trust)** * Perhaps kept deed in her possession so could remain in house   **RATIO**   * **If the transferor intended to be immediately and unconditionally bound by the deed then physical delivery of a deed to the grantee is not necessary to constitute effective delivery** |

#### Zwicker v Dorey (1975) SC “stepson loses b/c ev of subsequent deeds suggest step-father did not intend to be immediately and unconditionally bound” = unsuccessful transfer in “Recording System”

#### 🡪 subsequent deeds that overlap the property indicated transferor did not intend to be immediately and unconditionally bound

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| **Facts:**   * Deed by the man gave certain properties to D, but later deeded parts of the property to others, including granting other deeds to D that dealt with same property as that in the original deed * Deed had clause: “the Deed is not to be recorded until after my passing away.” * D knew of the original deed to him and even gave him one dollar at man’s request * Both D and man knew that man wished to remain in his home until his death   **Issue:**   * *Was there delivery to make this original Deed effective?*   **Decision:**   * NO, P wins: The deed to D was “testamentary and ineffective”. Title will pass to the plaintiff under the later deeds. * The clause prohibiting the recording of the Deed is of no great significance * There is no requirement that a deed must be recorded to be effective * Grantor continued to occupy and use the lands and made several grants on the same land after the original deed to D including one to P   **RATIO**   * Physical delivery of a deed to the grantee is not necessary to constitute effective delivery * subsequent deeds granting the same properties that were in the original deed, indicate that the grantor did not intend to be immediately and unconditionally bound |

#### MacLeod v Montgomery (1980) Alta. CA “granddaughter loses b/c doesn’t have duplicate title” unsuccessful transfer in Land Title System

#### 🡪 In land title system, transfer of land requires the duplicate title

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| **Facts:**   * D, the grandmother and owner, gifts P, the granddaughter a transfer doc (Form A) * D had not given P the duplicate title doc * P could not register the transfer doc b/c the duplicate title doc was in possession of D’s lawyers * P and D had a falling out * P sued for the land; D died after trial heard * D argues: that legal estate never passed to P b/c transfer was not registered. Common law principle doesn’t apply in jurisdictions governed with a land title system   **Issue:**   * *Should the granddaughter get title to the property even though she was not registered as the owner?* (remember s. 20 exception *“except against the person making it”*   **Decision:**   * D wins: gift of land transfer was not completed * Granddaughter would have won at common law: a transfer is binding w/o registration if the transfer document was executed with the intention that it should take effect immediately. * BUT in systems of land registration: there is no transfer or passing of ownership unless the registration has occurred. * A gift does not need consideration, but it can help ensure transfer is effective * Some cases show: a title given in equity only until registration, then legal * Had the duplicate been lodged at the Land Titles Office, delivery of transfer would have completed the gift, **as the donor would have done everything that could be done to perfect the gift.** * **No ev. Of presumption of advancement**   **RATIO**   * If under land title system, in order for a transfer to be registered, that transfer has to be accompanied by a duplicate certificate of title, unless the title is already lodged at the Land Title Office; or, alternatively, unless there is proof that the duplicate certificate of title has been lost or destroyed. |

**Recording System:** deed (form A) + intention to be immediately and unconditionally bound – would transfer the interest of land from transferor to transferee even if transferee not registered on title **THIS NOT OK IN LAND TITLE SYSTEM**

## Exceptions to Improper Transfer: *sales, have Form A + Duplicate*

* If consideration (sale situation) can go to court; court will require specific performance so you get title

Ex) if Interim Agreement and seller refuses to get you Form A – can sue for it.

If evidence that transferor has done everything possible for an effective transfer to take place: has given you the **Form A + Duplicate** 🡪now very simple process = all that is required is to go to Land Title Office with documents and register will put your name on the IT. (*MacLeod v Montgomery* = if MacLeod had “duplicate” she would have won title)

## Significance of Form A

* In Common law the deed is the method of conveyance, in Land Title system, the transfer form is the substitute for the deed.
* S. 20 requires Form A
* S. 20 is the key difference between the recording system and the Land Title System: under s. 20 one must be on title in order to get the interest in land – only exception is where you are dealing with the person who transferred it to you.

## Gifts of Land Transfer

* **In a gift situation**: law only gives effect to gift if your name is put on title or if you have the total means to be able to get yourself on title=

#### Presumption of Advancement

* Exception to requirement for “transfer form” to secure title
* Law will regard gift as taking place under certain less formal acts:

Historically from a husband to wife, father to child.

*MacLeod* argued using *Royal Trust Co v Eldridge* – that she should get land b/c of “presumption of advancement” but situation between grandma and granddaughter did not fall under “presumption of advancement”

TODAY: SCC declared “presumption of advancement” only for:

**Father or mother to young child, except also for adult child if disabled.**

### Transfers to Volunteers

* Volunteers provide no consideration for the gift of valid legal title
* Volunteer is someone not related to the transferor

#### Presumption of resulting trust

* Equity has created certain presumptions b/c they assume ppl do not go around giving away their title voluntarily, in the absence of ev to contrary
* **Presumption of resulted trust:**
  + - Presumption that transferor intended to hold the official title for themselves and volunteer would hold “Blackacre” for owners/transferor’s benefit
      * **the transferee holds the property on resulting trust** (presumption that transferee is holding the property for the benefit of the owner) = *equitable title will jump back to owner*
      * **Legal & equitable title fragmented**
        + Transferee = legal title
        + Transferor = presumed equitable title
    - **Rebutting the presumption:**
      * Onus on transferee to prove that transferor intended to give them absolute title (legal & equitable)
      * *Ross v Ross* = evidence that rebutted the presumption of a resulting trust.
        + Common law: presume that Grandma only wanted to give grandson legal title
        + BUT ev of declared intent to give to grandson beneficially: clear she wanted him to have both equitable and legal.

### Property Law Act s 19

* Section 19(3) **Includes presumption of resulting trust unless there is evidence that the transferor intended it to be a gift (onus on transferee).**

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

* Presumption of volunteer transfer of land:

Historical:

* + - pre-statute = “to B to the use of B”/ “unto and to the use of B” 🡪B had absolute title
    - Statute: now needed to say if wanted B to have absolute title: “unto and to the use of B”
    - No separation of legal and equitable interest allowed

Trust: **resurrected the possibility of an “equitable” interest**

“unto and to the use of B on trust for C”

but debate what “unto and to the use of B” now meant – absolute or is equitable reserved for A

## Proprietary Estoppel

* Can also apply to land to stop against inequitable remedies: Denning says proprietary estoppel can give rise to a cause of action (but not promissory estoppel)

#### Zelmer v Victor Projects (1997) BCCA

#### 🡪 “P wins with proprietary estoppel on water reservoir dev. On D’s land”

|  |
| --- |
| **Facts:**   * P negotiated with D for a water supply reservoir to be built on D’s land to supply P’s development * D’s owner said they would not ask for compensation * D’s owner argues that he consented to the reservoir in a different location that it was in fact constructed. * D owner contacted municipality stating he would not sign necessary documents * TJ granted P an easement in respect of the reservoir * D appeals   **Issue:**   * *Can P use proprietary estoppel as an action against D?*   **Decision:**   * Yes, proprietary estoppel can be used by P and was established. Judgment for P (easement granted on D’s land).   **RATIO**   * One can use proprietary estoppel as a cause of action if you relied upon the word of another |

Now a more broader approach to proprietary estoppel:

* *Tretheway-Edge Dyking District v. Coniagas Ranches Ltd.* (2003) BCCA:

“the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief.”

* *Sherbinen v Jackson* (2011 BCSC)

The court must ask 3 questions when assessing a claim for PE:

1. Is there an equity established? P must believe in a right he was granted by D, and it would be unconscionable and unjust to allow D not to grant this to P.
2. What is the extent of the equity? Court must provide “minimum equity to do justice to the plaintiff as a right either as an easement or licence upon the terms to be agreed,”
3. What is the relief appropriate to satisfy the equity?

## WILLS

* **Wills are governed by the *Wills Act***
* Testamentary documents become operative and transfer interests when the death of the will maker
* The testamentary documents and real and personalty pass according to the ***Estate Administration Act*** –

If a person does not dispose of his property via testamentary documents then the estate passes according to the *Estate Administration Act*: to any surviving spouse and children in portions, if no such survivors then to other relatives in priority order

Despite any testamentary provision to the contrary, on death, title to a deceased’s property vests not directly in those beneficially entitled, but in the deceased’s personal representatives 🡪 they now in charge of orderly administration of the estate (taxies, debts, etc)

***Wills Act* RSBC 1996**

* **3** will only valid if in writing
* **4** will not valid unless
  + A-at end signed by testator or in his name by some person in his presence and by his direction
  + B-testator makes or acknowledges signature in presence of 2 or more witnesses at same time
  + C-2 or more of witnesses subscribe the will in presence of testator
* **5** exceptions for military members

**S 77 of estates and administration act—deals with appointment of personal representatives [will be in new act]**

## Equity

Developed through the **Court of Chancery**

1. **Equity follows the law**
2. **As far as it can, equity will do what the parties intend to do**

* Mortgages & Agreements for sale developed through equity

## MORTGAGES Redeem Up, Foreclose Down

* Mortgagee = Bank
* Mortgagor = individual
* **Equity of Redemption =** The mortgagor always historically got the equitable right to retain Blackacre even though he had not payed the loan.
* Modern Mortgages

A transfer of fee simple to the mortgagee defeasible upon a condition subsequent: full payment of the loan.

Mortgagor gets:

**Right of entry**: can stay in property

**Equity of redemption** (will redeem land in f/s once pays off mortgages): this can never move

**Financial equity**: how much they have paid to mortgage + appreciated value of property

Mortagee/lender gets value from the interest

Process of Mortgages

**1.** **Stuart** gets a mortgage on Blackacre from **BMO**

* **BMO** = 1st mortgagee. Currently holds f/s until full payment of loan
* **Stuart** = has an equity of redemption, and a right of entry

**2.** 2nd Mortgage from **Royal Bank**

* **Royal Bank** now takes an equity of redemption that Stuart has w/ **BMO** (this is an equitable interest in land)
* **Stuart** gets an equity of redemption in respect to the 2nd Mortgage
* [if **Stuart** gets a third mortgage – he is selling his equity of redemption with respect to Royal Bank to the third mortgagee]

**3.** Third mortgage with **Bank of Commerce**

* **Bank of Commerce** gets an equity of redemption for 2nd mortgage

Process of Failure to Pay Mortgage

Initiates: *redeem up, foreclose down*

* **Ex 1. Stuart** has not paid **Bank of Commerce**
* If **Bank of Commerce** wants to be the f/s owner of Blackacre it must:

Foreclose Down: **Bank of Commerce** forecloses on all people below = **Stuart**

Redeem Up: **Bank of Commerce** must “payout” all the people above it in priority = **Royal Bank**, **BMO**

* **Ex. 2 Stuart** has not paid 2nd Mortgage to **Royal Bank**

**Royal Bank** (in order to be absolute owner) must “redeem up” **BMO,** and “foreclose down” on **Bank of Commerce**, **Stuart**

* + - * + Principle of *Nemo dat* is connected b/c of the “redeem up, foreclose down” – this is required because you cannot give what you don’t have.

**2 Key Maxims**

*Nemo dat quod non habet* = you cannot give what you do not have

*Qui prior est tempore potior est jure* = Person who is the first in time is preferred in law 🡪 priority is determined by the time that you developed an interest in the land (**BMO** has 1st priority 🡪does not “redeem up” anyone)

# ESSAY

## Property Law = *relationships between people mediated by things*

- water mediates the way ppl use land: it is the mediating thing

- a series of rules develop because of this

- riparian owner has rights

- state parcels out the water through the “recording of water” process

Ad Inferos - Mineral Rights

- tests are important because they are the “rule of law”: people need predictability. Conclusion that follows from a situation must be governed by pre-set rules

- can’t place too much emphasis on property owner’s intention in the fixture vs. chattel test – b/c it is so subjective

- once we apply your facts to the rules, we should get an obvious and clear outcome 🡪this is the ideal.

- William the conqueror declaring all land for himself is mirrored in Canada as all land and percolating water belongs to the Crown.

**-** even though the world consists of things, and property law is around the legal regime that applies to things…should think of the thing as significant in terms of mediating, describing, organization relations between individuals in society.

- rules around land reflect its pivotal arrangement and its permanence in society – one can expect a greater number of strict rules that have emerged to govern relationships with regard to it .

- ex. no body would ask for specific performance of a delivery of a orange but they would do it in respect to land

- because land is complex, limited and permanent- results in a bigger web of rules

- land not easily dividable because of air issues, water, and soil issues

-law is a system of rules that allows for predictability

- form A signifies importance

- land title system is clear – tells you that interests in land don’t transfer unless they are actually registered (compared to recording system – which doesn’t have a s. 20)

- s. 20 represents a very significant shift from thw common law rule of nemo dat

-*livery of seisin* was the earliest form of transfer, and it is no longer possible anymore in this jurisdiction

- courts reluctant to enforce “gifts” of land (unless done in compliance) – indicates a social copncept that we are a society of commodity, talk is cheap …cultural assumption that we are not generous, except maybe to children or spouses

- formalities of the Land Title System – ensures the integrity of the system

- How did Equity change the law: through **equity of redemption**

- land impacts other people than fee simple owner due to the “in rem rights”