**LAW 130—PROPERTY CAN**

**CHAPTER 1**

***Cujus est solum ejus est usque ad coelum et ad infernos***—“To whomever the soil belongs, that person also owns to the sky and to the depths.”

***Ad Coelum***

***Kelsen v Imperial Tobacco Co*, 1957 (UK QB)**

* Facts:
  + Kelsen had a leasehold interest in 407/407b
  + Imperial tobacco puts up a sign that extends 8 inches into the airspace above 407/407b
  + the owner of the 407/407b gave Imperial tobacco permission for the sign
  + sign was there for 3 years before Kelsen went to court asking for injunction (removal)
* Issue:
  + Is the overhanging sign a trespass on land (i.e. is airspace above land part of the land) or should it be considered a nuisance?
* Law:
  + *Usque ad coelum*—whoever owns the soil owns the sky above
  + airspace is land, and is therefore the subject of real rights (not *in personam* rights)
* Analysis:
  + the implied license was not an in rem right, no estoppel because no detrimental reliance
  + due to the nature of property, the appropriate remedy was an injunction, not damages
* Conclusion:
  + Court granted an injunction to have sign removed

***Bernstein (Lord of Leigh) v Skyviews*, 1977 (UK QB)**

* Facts:
  + Skyviews business was taking arial photographs of property and then trying to sell them to the property owner
  + Skyviews tries to sell photo to Bernstein, Bernstein wrote angry demanding destruction of photo/negatives
  + Owner of company never got letter, Bernstein claims that Skyviews was trespassing
  + Skyviews claims that photo was taken from adjoining land.
* Issue:
  + How high into the airspace over land do property rights extend?
* Law:
  + maxim limited to the height necessary for the ordinary use and enjoyment of the land
* Analysis/Conclusion:
  + Skyviews was not trespassing, even though they were found to have been flying above Bernstein’s land

***Manitoba v Air Canada*** (BAD LAW)

* Facts:
  + AC files over and sometimes lands in Manitoba
  + Manitoba sees the airspace above the province as being their property, wants AC to pay taxes for the aircraft and everything consumed in it, etc
* Ratio:
  + You don’t own the airspace, “air” belongs to everyone collectively
  + this judgment is wrong, don’t use

Legislation Regarding Air Space:

***Land Title Act*** (s 138-143)

* air space is land, an air space parcel does not have implied covenants/easements
* owner in fee simple can create air space parcels separated by surfaces and get duplicate titles
* provincial/municipal government can create air space parcels over highways

***Strata Property Act***

* boundary of strata lot is midway between the two surfaces (walls, etc.)
* implied easements for each strata lot and for each area of common property for support, passage of services, and shelter
* owner(s) may remove walls between adjoining lots with approval of the strata corporation
* strata corp can’t change common property unless resolution by 3/4 vote

***Ad Infernos***

A landowner may own elements below the surface to an undefined depth, subject to:

* prerogative rights of the Crown (i.e. right to gold and silver, other resources)
* terms/reservations in the original Crown grant (if any)
* extensive statutory restrictions

**FIXTURES**

***Quicquid plantatur solo, solo cedit***—“Whatever is affixed to the soil belongs to the soil.”

***Re Davis*** (1954 Ontario)

* Facts:
  + dower rights availed at this time—widow had rights to life estate of 1/3 of real estate of her deceased husband (chattels not included)
* Issue:
  + whether bowling alleys (owned by someone else) were considered part of the land
* Ratio:
  + Two part test—**degree of annexation** and **object of annexation** (if to improve freehold, then fixtures, but if for better enjoyment of the chattel, then chattels)
* Analysis:
  + object of annexation not a reasonable dichotomy, not mutually exclusive
* Conclusion:
  + bowling alleys were chattels

***La Salle Recreations v Canadian Camdex*** (1969 BCCA)

* Facts:
  + Hotel purchases carpets from La Salle in a conditional sale (will get title to carpets when paid in full)
  + Canadian Camdex is mortgagee who is foreclosing on the hotel
  + hotel bought by White Spot, assumed that carpets were included because not registered
  + *Conditional Sale Act*—seller could retain title of fixtures if registered at land title office (today, different legislation with same effect)
  + La Salle trying to say that the carpets are chattels and not fixtures
* Ratio:
  + went through test—degree of affixation is very slight, but the **object of annexation** was for the **better enjoyment of the hotel building**, not for enjoyment of carpets

***CMIC v Rodriguez*** (2010 BCSC)

* Facts:
  + CMIC has mortgage on Rodriguez’s property, on property are two coverall bldgs.
  + coverall 1 was secured to concrete blocks buried under ground—considered a fixture
  + coverall 2 was secured to concrete blocks resting on the ground—owner intended them to be portable
  + Coverall 2 is not paid for, Coverall wants it back, but not registered at land title office
  + if chattel, coverall can have
* Ratio:
  + if affixed, then presumed a fixture unless affixed to make better use of chattel (6 part test)
  + if not fixed, presume chattel unless owner’s action show that was **intended to be/used** **as** a fixture

***Elitestone Ltd v Morris*** (1997 UK)

* Facts:
  + a bungalow, clearly meant to be portable, rests on land by its own weight for 50 years
  + if it is a fixture, then defendant tenant is protected from eviction by legislation
  + if it is a chattel, landlord can increase the rent
* Issue:
  + is the bungalow a fixture or a chattel?
* Ratio:
  + three criteria—degree of affixation, intention of object, whether treated as part of land (this applies mainly to larger structures
  + absence of attachment doesn’t prevent house from forming part of the land, houses are part and parcel of the land (new category)

**WATER**

**Riparian Rights**

Common Law

**Riparian owner**, someone whose land is adjacent to water, has following rights to:

* domestic use—drinking water, washing clothes, etc, if diminish flow, lower riparian owner SOL
* use for irrigation—have to let water flow back to stream after
* entitled to undiminished flow

Riparian owner not entitled to pollute water

Legislation

***Water Act***

* **domestic purpose**—use for household requirements, sanitation/fire prevention, watering of domestic animals/poultry, irrigation of garden not exceeding 1012 square meters adjoining and occupied with a dwelling house
  + except for domestic purpose, if not registered must not divert, extract, use or store water
* **ground water**—water below the surface of the ground
* **stream**—includes natural watercourse/source/supply, whether usually containing water or not, and lake, river, creek, spring, ravine, swamp, and gulch.
* **unrecorded water**—the right to use is not held under a license (or private special Act)
  + can use unrecorded water for domestic purpose or mineral prospecting, but if prosecuted must prove water is unrecorded
  + not an offence to divert water from stream for extinguishing a fire, but flow must be promptly returned
* right to use and flow vested in government, except under license
* licences entitle holders to:
  + divert and use beneficially only for purpose and quantity and time specified by license,
  + store water
  + construct works, alter improve stream, conduct fences/screens to conserve fish/wildlife
* rights subject to **rights of prior licencees**
* creates many offences and gives penalties (p 1-38 to 1-39)

***Water Protection Act***

* property in, right to use and flow of water in stream in BC vested in the government
* property in, right to use, percolation and flow of ground water in BC vested in government

“*Historic Development of Water Legislation in BC”* Article by Maclean

* 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

***Johnson v Anderson*** (1937 BCSC)

* Facts:
  + Plaintiff was a riparian owner with no license to the water
  + plaintiff was using stream for domestic and stock watering purposes
  + Defendant had a licence but it did not authorize the diversion in question
  + Defendant had works that diverted the flow of water from plaintiff’s property
* Issue:
  + with legislation in place, do riparian rights still prohibit unauthorized diversion of water flowing through their land
* Ratio:
  + riparian law still prevails for unrecorded water

***Schillinger v H Williamson Blacktop & Landscaping*** (1977 BCCA)

* Facts:
  + plaintiff is riparian to Barres river and has a water license to use water from the Hairsline for purpose of “industrial fish culture”
  + plaintiff is instead using unrecorded water from Barres River, that flows into the Hairsline downstream of where the water license specifies,
    - (i.e if he had been using the water he was legally allowed to use, no pollution death.)
  + defendant was polluting water upstream of where it was diverted for the fish farm, causing all of the fish to die
  + plaintiff is suing for damages for negligence and nuisance
* Issue:
  + court says issues are (1) whether plaintiff is entitled as riparian owner or under license to use/divert flow of Hairsline and (2) if he wasn’t, could he recover damages
  + not mentioned in decision but emphasized in class: what is domestic?
* Analysis:
  + statutes point to conclusion that since 1939 riparian rights have ceased to exist, but judge refused to decide that matter
* Ratio:
  + “riparian rights, if any, can exist only for a person lawfully using the water and the only way to acquire the right to use and flow . . . [is under provisions of] the *Water Act*
  + ^this implies that the fish farm was not a domestic purpose, further suggesting that fish are not “domestic animals”

***Steadman v Erickson Gold Mining*** (1989 BCCA)

* Facts:
  + defendant built a road uphill of plaintiff’s land, which contaminated water in plaintiff’s dugout, which was spring-fed and ground water, that the plaintiff used for domestic purpose
  + defendant says even if plaintiff can lawfully take unrecorded water he does not have riparian rights
* Analysis:
  + a person has the right to use ground water and nuisance law says that a person is entitled to the use of ground water in unpolluted form
  + court says a person must have similar rights with streams of water
  + reconciles *Johnoson*  and *Schillinger*  by saying *Schillinger*’s use was unlawful and *Johnson*’s use was lawful
* Ratio
  + riparian rights are fragile but still prevail for unrecorded water

Ownership of Beds of Watercourses, Lakes, and Ponds

***“ad medium filum”***—common law rule that if you were given property as a riparian owner and nothing was said about the boundary and the water was non-tidal, then you owned up to the middle line

***Land Act***

Makes it clear that *ad medium filum* no longer applies, and that all sub-water land is owned by the Crown unless:

* there is a grant that specifically says otherwise, or if a court found otherwise regarding a grant from the government before March 27, 1961
* the registered owner has an indefeasible or absolute title issued before March 27, 1961 that speficically included the bed of water
  + this also applies to a subdivision, if subdivision plan was deposited before date

**Accretion and Erosion**

***Southern Centre of Theosophy v South Australia*** (1981)

* Facts:
  + Plaintiff owns land that abuts a lake, lake has been opened up to the ocean
  + lake became quasi-tidal, water mark is much lower, creates 20 acres of dry land
  + crown argued that a term in the lease that allowed plaintiff to put a fence at old water line excludes the doctrine of accretion because this meant the property line was where fence was
* Issue:
  + can the doctrine of accreation apply in this situation?
* Analysis:
  + accretion does not apply to stagnant water like a lake, only flowing/tidal water
* Ratio:
  + can gain land from accretion so long as it is gradual and imperceptible

**Access by Riparian Owners**

***North Saanich (District) v Murray***

* Facts:
  + There were private riparian owners on the shoreline, built docks along the foreshore
  + North Saanich leased the foreshore (area between high tide boundary and low tide boundary) from the crown for “recreational purposes in the public interest”
* Issue:
  + does a riparian owner have the right to construct structures upon the foreshore?
* Ratio:
  + private riparian right: can go backward or forward over the foreshore to get to the water
  + cannot interfere with the right of public access and cannot build a structure on the foreshore
  + owner must not interfere with public right of navigation
  + riparian owners have the right to access the water and store a boat briefly to unload it safely

**SUPPORT**

***Cleland v Berbarick*** (1915 Ont CA)

* Facts:
  + defendant and his wife had separate lots, they removed lots of sand from their lots, and sand from the plaintiff’s lot was moved by nature (wind/water) from plaintiff’s lot to fill the void on defendant’s lot, plaintiff’s beach was left with gravel, plaintiff sued
* Ratio:
  + *sine quo res ipsa haberi non debet*—support is part of the land itself, must remain with the land, is not an easement
  + *sic utere tuo ut alienum non laedas*—you cannot use your property in a way that would hurt another (nuisance principle)
  + owner has right to land in natural condition without interference by direct/indirect action of nature facilitated by direct action of owner of adjoining land

***Bremner v Bleakley*** (1924 Ont CA)

* Facts:
  + defendant excavated large holes on his property, removed sand and sold it
  + wind would sweep plaintiff’s sand into defendant’s holes
  + plaintiff sued, trial judge followed *Cleland* (supra)
* Analysis:
  + distinguished from *Cleland* by saying that the removal of sand was a separate event from the wind blowing the plaintiff’s sand
  + in *Cleland* excavation is close to the property line and disrupts the strata
  + holes in this case is too far from property line, support is not disrupted by the digging
  + to rule in favour of plaintiff would make excavation difficult for people in future (policy)
  + sand is not a chattel, otherwise absurdity (how do you tell which grains of sand are yours, you could potentially be liable for trespass of your sand onto other person’s land)
* Ratio:
  + judge likens the trapping of sand to accretion—if sand forms by gradual accumulation into holes on the property, the same rule would apply.

***Gillies v Bortoluzzi*** (1952 MB QB)

* Facts:
  + defendant was excavating for a basement on land next to land where plaintiff tenant operated a grocery store
  + the wall of the plaintiff’s building collapsed and plaintiff’s belongings fell into hole, were damaged
* Issue:
  + is defendant liable for removal of support
* Analysis:
  + plaintiff is entitled to lateral support for land in natural support fir land in its natural state, but not entitled to lateral support when there is superimposed upon the land the weight of a building
* Ratio:
  + removal of lateral support by itself would not give cause of action (because of weight of bldg)
  + defendant was entitled to vertical support underneath a building, defendant wins

***Rytter v Schmitz*** (1974 BCSC)

* Facts:
  + defendant is excavating his own property near the boundary of his neighbour’s property
  + part of plaintiff’s building collapses, plaintiff sues
* Ratio:
  + now even without prescription there is a common law right for vertical support, principle of support extends beyond land in its natural state to buildings as well

**CHAPTER 2**

**Two types of property:**

**real property (land)**—comes from the idea that a “real action” is a type of litigation where successful plaintiff recovered the actual subject matter of dispute (land)

**personal property**—in personal action, plaintiff recovered money from defendant (judgment against a person)

**Land law mediates:**

**disposition**—*inter vivos* by sale or by gift, on death by will or by intestacy

* technically nobody owns land, only an interest in land
* interest can be owned singly or jointly, third parties could have lesser interests in same land

**use**—limitations on the use of land, three types:

* common law—nuisance (smell, noise), trespass and negligence
* private arrangements—by law of contract and later by law of restrictive covenants
* legislation—statutory restraints on use of land—designating different parts of land different purposes
  + municipal zoning, designated agricultural land, etc

**Tenure:**

**feudalism**—system of government that came about in Western Europe after fall of Roman Empire

**WILLIAM THE CONQUEROR**—conquered England in 1066 and took all the land for himself, and then parceled it out to his followers

* (Crown as absolute owner is theoretical basis for all land law!)
* **sub-infeudation**—William’s followers parceled out their land to people, who parceled out that land even further
* tenants were granted **freehold estates**
  + knight service—had to supply soldiers (later money)
    - grand sergeanty is similar
  + socage—performed agricultural service (later paid money)
    - petty sergeanty is similar
  + frankalmoin—had to perform religious duty
* these types of tenure were later united under **socage** and the obligation disappeared, because of:
  + *Statute of Quia Empotores* (1290)—prohibited further sub-infeudation, required substitution instead
  + *Tenures Abolition Act* (1660)—converted knight service and seargeanty into socage, and abolished all incidents except for:
    - escheat—right of lord to claim land of tenant who died without heirs or who committed a felony
    - forfeiture—Crown can claim land in case of high treason

**Corporeal Interests (interests that entitle a person to possession)**

**fee simple**—a time in land

* “fee” means inheritable and “simple” meant by any type of heir
* after granting rights of disposition (by *Statute of Wills* and *Statute of Quia Empotores*), almost identical to absolute ownership

**fee tail**—still a “fee” so inheritable, but “tail” (from French “to cut”) means the heirs who could inherit were cut down (“to A and the heirs of his body”)

* *Property Law Act* section 10 makes it impossible to create a fee tail

**life estate**—a time in land for the lifetime of the holder of the estate

**estate pur autre vie**—a life estate measured by the life of someone who is not the owner of the estate

**leasehold estate**—today, an interest in land with a fixed duration, (parties have more freedom in determining the terms of lease than do grantor/grantee in freehold)

* historically was seen as personalty, tenant could recover possession if evicted from landlord, but if evicted by third party could only recover damages from landlord

**future interests**—when there are a number of estates in succession, a person who has ownership but does not have possession due to life-estate (for example) has a future interest in property

* still has right to dispose of their interest, so still an owner

**Legal and Equitable Interests**

12th-13th century—common law courts developed, operated within the confines of rules regardless of how fair the outcome was

* disappointed litigants had to petition the **lord Chancellor** for fair outcomes
* over time the **Court of Chancery (Court of Equity)** developed

The **use** was created by the Court of Chancery

* use—created when the holder of a legal title was compelled by the Chancellor to hold the interest, not for his own benefit but for the benefit of aonther person
* **feoffor** transfers (by **feoffment**) to the **feofee** (who holds the legal title) for the benefit of the ***cestui que use*** (he to whose use the land is held)

Purpose of the use was either/both to provide for family in a time of war (by allowing a friend to hold title) or to **avoid feudal taxation**

* transfer legal title to a group of friends for the use (equitable title) of yourself, this way when you die the legal title would not be passed and taxes would not have to be paid
* common law courts refused to recognize equitable title, only cared about legal title
* **equitable interest**—the type of right held by the *cestui que use* that could only be enforced by the Court of Equity

**The *Statute of Uses***

King Henry VIII forced parliament to pass the statute of uses because he wasn’t receiving any tax money. The method of the statute was to **execute the use**:

* the legal title moves from the feofee to the *cestui que use* who would then have both titles
* this turns the equitable title into legal title and eliminates the feofee

**Frustration of the Statute:**

* did not apply to active uses (where feofee had active duty like collecting rent)
* did not apply where a person was seised to his own use (land transferred “to A in fee simple to the use of A in fee simple,” still had both titles, but by virtue of common law, avoiding the elimination of the equitable title)
* where there were two uses (a use upon a use) the Statute did not execute the second use
  + A transfers fee simple to B to hold to the use of C (executed) to hold to the use of D (not executed)

**Emergence of Modern Trust**

Title would be transferred to A in fee simple to the use of A in fee simple to the use of C in fee simple🡪A transfer would be made “unto and to the use of A in trust for C”

* legal title still remains with trustee, beneficiary still relies on courts to enforce this
* same interests that exist in common law can exist in equity (eg equitable life estate)
* third party volunteer could never refuse to recognize trust, however, when a third party who purchases legal title from trustee and doesn’t know about trust, beneficiary cannot enforce trust
  + in common law *nemo dat quod non habet*, in equity this is not true here
* **doctrine of constructive notice**—if purchaser ought to have known if he had made the investigation a reasonable person would, then the beneficiary could still enforce the trust as though the purchaser had actually known
* **seisen**—possession of a freeholder

**Freedom of Alienation**

One goal of land law is to **ensure freedom of alienation**, this is done by:

* present owner must have technical freedom of disposition
* in disposing of property, an owner must not have the power to impose restraints on freedom of alienation of transferee
* actual mechanics of transfer must be as simple as possible

**Historical Struggle for Freedom of Disposition**

* *Statute of Quia Emptores* 1290 made fee simple alienable ***inter vivos***, did not bind Crown, tenants-in-chief got no benefit (by 1327 they could if they paid a fine)
* Originally realty could not be disposed of by will, the use was used to get around this because the rule against testamentary disposition didn’t apply to equitable interests
* *Statute of Wills* gave testamentary poswers to dispose of lands in socage, but not all land in knight-service
* ***Abolition of Teunures Act* (1660)**—complete free alienation of fee simples was recognized
* in theory, a widow’s right to dower created some restriction on a married man’s right to alienation,
* free alienability of life estate and leasehold interest were just always assumed

**Subsequent Restraints on Alienation**

**direct restraints**—by a clause in a transfer, law now declares these clauses invalid (not true with leasehold estates)

**fee tails**—*Statute De Donis Conditionalibus* (1285) said that fee tails should be honored and not interpreted by common law courts as a fee simple subject to the condition precedent of an heir being born.

* caused a land crisis, common law courts allowed conversion of fee tail to fee simple by either **common recovery** or by **the fine**—each had slightly different results and they didn’t bar the fee tail entirely—broke the stranglehold on the market
* 1833 this was abolished by a different statute that did same thing but more simply

**future interests**—long series of future interests could prevent alienation

* courts made series of life estates running through families impossible
* rule against perpetuities

**strict settlements**—entirely within the law, based on custom and social pressure

* on marriage land would be settled on husband for life (life estate) and then remainder given to first and then every other sun in successive fee tails
* when son turned 21, he and father together would convert land into fee simple (eliminating future interests) and then immediately re-settled it again
* this went on for generations, created another land crisis
* legislation gave life tenant increasingly wide powers of selling (etc.) the land, and would transfer the rights of those with future interests in land to rights to profits of sale

**Establishing Good root of Title**

This became difficult given all the different types of interests in land, had to go back 60 years

**Relationship between real and personal property**

**fungibles**—property that is consumed on use (i.e. food) operates on basis of absolute ownership

Otherwise, relationships corresponding to legal estates in land can be created in personalty.

Courts allow equitable interests in personalty🡪most trusts are in shares and bonds, not land

***Re Fraser***

* Facts
  + man died, will said, “I give and bequeath to my wife a life interest in my estate and my property”
* Issue
  + Can there be a life estate in personalty? Can the widow encroach upon the personalty during her life?
* Ratio
  + a person can be given a life estate in personalty, person has fiduciary duty to the ultimate beneficiary, cannot encroach upon the personalty

**Alienability of Personalty**

Never really been a problem, **direct restraints** considered invalid by courts, **successive creation of future interests** was dealt with by rule against perpetuities. On death, can be disposed of by **will** or by **intestate succession.**

Application of English law in BC

***Law and Equity Act*,** section 2 says the laws of England up to **Nov 19, 1858** apply to BC, and will be subject to change by BC laws.

**CHAPTER 4**

The four ways of acquiring land include **crown grant**, ***inter vivos* transfer**, **will/intestacy**, and **proprietary estoppel**.

**Crown Grant**

***Land Act*,** section 50 says:

* a Crown Grant reserves the right of the crown to:
  + take back/use up to 1/20 of the land for public works (does not include part of land used as garden or has building)
  + enter land and extract resources, paying compensation
  + take and occupy water priveleges for mining/agriculture, paying compensation
  + take any soil/gravel/lime/timber/etc to use for public work, without compensation
* a crown grant does not give right, title, or interest to any natural resources underneath land
* crown grant does not give right/title/interest to highways on land
* a crown grant can have express terms that alter these rights, giving more or less to government

***Inter vivos* Transfer**

**Step 1—The Contract**

The *inter vivos* transfer usually is proceeded by a contract, especially in the case of a sale. If transfer is made by a gift, then there is no need for a contract.

***Law and Equity Act***, section 59 says:

* (doesn’t apply to interests under trust, testamentary disposition, or a lease < 3 years)
* the only way a contract respecting land is **enforceable** is one of the following:
  + there is, **in writing** signed by the **party to be charged** (the would-be defendant) an **indication of the contract** and an indication of the **subject matter**
  + the party to be charged has done an act that is indicative of the alleged contract (i.e. payment/acceptance of deposit or part-payment of purchase price
  + the person alleging the contract has relied on the contract to their detriment, and changed the parties positions inequitably, such that enforcing contract would relieve the inequity
* if contract can’t be enforced, court may order restitution or compensation
* signed writing is sufficient even if term is left out or wrongly stated

Section 59 only deals with enforcement of contract, but there has to be a valid contract to enforce.

Two documents can be combined to satisfy the requirement for a signed writing.

**Step 2—The Transfer**

Transfer Form**—**used to be by livery of seisen, then it became possible to do in document under seal. Now transfers today have to comply with these statutes:

* ***Property Law Act***—says:
  + land can be transferred by **instrument**, doesn’t have to be called a “grant,” doesn’t have to be under seal, and transfer of possession doesn’t require entry
  + vendor or transferor must deliver **registrable instrument** that contains a **legal land description**
* ***Land Title Act***—says:
  + instrument must be in a **prescribed form** on a single page **unless registrar decides otherwise**
  + deed confers everything stated by *Land Transfer Form Act* unless:
    - transfer contains express words of limitation, reservation, or condition
    - *nemodat*—cannot give what you do not own
* ***Land Transfer Form Act***—says:
  + this is the form where a simple phrase (column 1) is said to include a very complex and complete version of the phrase (column 2)
  + this act is not meant to prevent a deed from taking effect, only to help it

**When is Transfer Operative?**

**Currently in BC:**

***Land Title Act*,** section **20**:

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

section 22:

* the instrument passes the estate/interest **at the time of registration**, regardless of the date of its execution

**Under old common law system:**

***Ross v Ross*** (Nova Scotia)

* Facts
  + an elderly lady who has children decided to pass on her house to grandchild
  + if she does this by will, the children might be able to contest this, so instead she executes a deed under seal
  + instead of having lawyer record the deed she said she’d do it herself, but instead the deed stays in her purse until she dies
* Issue
  + did the failure to physically hand over the document prevent her from transferring her estate in fee simple to her son (“delivery”)?
* Law
  + you do not need to hand over the transfer document, it is sufficient that it is formally executed (Also, it was clear she intended to be immediately bound—important.)

***Zwicker v Dorey*** (Nova Scotia)

* Facts
  + Defendant was the son of Mr. Zwicker’s 3rd wife, plaintiff was Mr. Zwicker’s 4th wife
  + When defendant’s mom died, Mr. Zwicker executed a deed under seal to transfer his large acerage to stepson, did not hand deed over
  + deed had clause: “this deed is not to be recorded until after my passing away”
  + Mr. Zwicker then remarried, and made other deeds that dealt with the land originally in the deed to the defendant
* Issue
  + Was there delivery of the first deed? (I.e. was the interest in land effectively transferred?)
* Ratio
  + The party who creates the deed must by words or conduct, expressly or impliedly acknowledge his intention to be immediately and unconditionally bound
* Conclusion
  + It was clear that Mr. Zwicker meant the deed to be testamentary, not immediately binding, plaintiff wins

***MacLeod v Montgomery*** (Alberta case w/ **land title system like BC**)

* Facts
  + grandmother (defendant) gifts transfer document to granddaughter (plaintiff), but keeps **duplicate indefeasible title** with lawyer
  + there was a falling out and, plaintiff tried to register land but couldn’t without duplicate, plaintiff sued (grandmother died later)
* Issue
  + Should granddaughter get title to the property even though she was not registered?
* Ratio
  + in order for a transfer to be registered, the transfer has to be accompanied by the duplicate, unless the duplicate is already at the Land Title Office
* This is a change to the common law by the statute, not explicitly in the statute, the transfer form is an application to register

**Transfer to Volunteers**

***Property Law Act***, section 19 (3):

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

When property is transferred to someone who didn’t give any consideration for it, equity says that while legal title is vested in the transferee, equitable title “jumps back” to (either the transferor, or the person who gave consideration to the transferor) as a resulting trust.

Section 19 does not prevent resulting trusts, it just **allows the volunteer to rebut the presumption** of resulting trust by offering evidence of the circumstances around the transaction and the words of the transferor, proving his donative **intention**.

**Will or Intestacy**

According to the ***Wills, Estates and Succession Act (WESA)***:

* will has to be in writing, signed by the will-maker and in the presence of two witnesses who also have to sign
* witnesses have to be 19, can still witness if receiving a gift, but the gift would be void
* a court can order that a record that doesn’t comply with *WESA* is a valid will or revokes a will
* **legal title** always vests in the executor/administrator, **equitable title** held by beneficiary
* beneficiary can require a transfer from the administrator/executor

**Proprietary Estoppel**

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

* Facts
  + plaintiff negotiated with defendant for a water supply reservoir to be build on defendant’s land to supply plaintiff’s development
  + defendant said they would not ask for compensation
  + defendant argued that he consented to a different location than where it was built
  + defendant refused to sign documents approving the reservoir
* Issue
  + Can plaintiff use proprietary estoppel as a cause of action against defendant?
* Ratio
  + “When A, to the knowledge of B acts to his **detriment** in relation to his own land in the **expectation, encouraged by B, of acquiring a right over B’s land**, such expectation arising from what B has said or done, the court will order B to grant A that right”
  + If someone, to their detriment, relies on the promise of another person with regard to a right use of their land, a court will grant that right