LAW 130 Property – December Exam CAN

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# Chapter 1 – The Legal Concept of Land

## Introduction

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

- Various groups/sources have contributed to our current system of laws: the Bible (value beliefs), the Romans (autonomous system of law), the Greeks (logic and reason)

- Law is *relatively* autonomous due to ambiguities in the common law and hegemony

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

Stages of society: hunter gatherer (recognition of private property over small things; slaves as property); pastoral/stock-tending; agricultural; commercial.

- Recognition and enforcement of things as socially protected items is what makes them property

- Concept of property has expanded as society has progressed

- Ability to transfer and dispose of property is a key element of recognizing property and ownership – developed in Middle Ages

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

“To whomever the soil belongs, that person owns alto to the sky and to the depths”

## 1. Ad Coelum

### (a) Common Law

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

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

#### Kelsen v. Imperial Tobacco Co. (1957) (1.1)

F: P leasing land (#407) from IID who owns the site in fee simple. D had previously asked for permission from IID to hang a sign from a neighbouring property that would hang over P’s land and permission was granted. Sign is 20 ft by 8/10 ft and sticks out 8 inches from wall, 40-50 ft about P’s building. There was a contract between D and the owner of the neighbouring property – D was paying $ to hang the sign. P had asked D to remove the sign, then changed his mind. Now P claims sign is trespass on his airspace and seeks an injunction to have it removed.

I: Is invasion of airspace by a sign an action in trespass (injunction) or nuisance (remedy – requires proof of harm)?

A: Implied license between P and D because P had previously agreed to sign – bare license which P can revoke. Tenant lease between P and IID. Contract between D and IID. Both P and IID have real rights in #407. If there is no statement about dimensions of land being leased, then ad coelum doctrine applies. *Gifford v. Dent* held that sign above building was trespass on airspace. *Pickering v. Rudd* held that sign was not trespass because does not engage w/ actual land, same view in *Clifton v. Viscount Bury* which found that bullets were a nuisance rather than trespass. *Wandsworth District Board of Works v. United Telephone Co. Ltd* suggest that this would be trespass. *Civil Aviation Act* exempts aircraft from trespassing when flying over private property. Test for damages as a substitution of an injunction: Injury to P’s legal rights is small; injury can be estimated in money; injury can be compensated by small monetary payment; would be oppressive to D to grant injunction.

C: Trespass created by invasion of P’s airspace by sign. Injunction forcing D to remove sign.

R: Airspace is land, since it is land it has property right. An infringement on airspace is trespass.

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

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

I: Is P owner of airspace above land, or at least does he have right to exclude any entry into that airspace?

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

A: P relies on ad coelum maxim for claim. Arguments against giving land rights to the heavens in *Pickering v. Rudd*, *Saunders v. Smith*, *Comr for Railways v. Valuer-General* – literal application of maxim would be absurd/impractical. Trespass by plane only committed if they fly so low as to come within area of ordinary user – puts limits on maxim. Reductio ad absurdam argument – e.g. satellite, P had helicopters fly over England and take pics for educational video. Even w/o limitation on maxim, *Civil Aviation Act* gives D civil immunity. If issue is photo (fear of terrorism), someone could take photo of P’s house from neighbouring airspace.

C: No trespass.

R: Rights of landowners in airspace above their land is restricted to such a height necessary for ordinary use and enjoyment of land and structures upon it – above that height he has not greater rights than the general public.

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

F: P claimed that D was liable to pay tax on value of aircraft and repair parts used by carrier in connection w/ operations within MB, including aircraft which landed in MB or flew over w/o landing. TJ held that airspace above MB was not within MB. Court of Appeal held air/airspace is incapable of delineation/demarcation.

I: Does MB own airspace above the province?

L: *Constitution Act* 1867 allows provinces to enact laws for direct taxation within province.

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

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

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

### (b) Legislation

Gov’t has tried to supervise dev’ts in air space through air space parcels. *Land Title Act* amended to define property according to its surface – 2 dimensional – allows subdivision of volumetric airspace.

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

Recognizes air space parcels and air space plans

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

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

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

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

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

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

Title: Fee simple owner of airspace parcel receives a separate title. Does not normally appear as a charge on the surface landowner in question, but will appear as an easement if one is required to access the airspace

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

**Common law: owner may subdivide into smaller parcels not only the surface of his land but also buildings on or the airspace above it.**

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

Allows you to define volumetric airspace parcels and put them up for sale (e.g. condos). Must submit a strata plan in which different parcels are identified, set up what unit entitlement of each of users is and value of each unit upon destruction. Grants a strata lot owner an airspace unit. Each strata lot owner gets a series of rights (access, support, services). **Bare land strata plan** permits the subdivision of the horizontal plane only. Building strata plan allocates strata lots to individual owners (vertical). Title: strata owner’s title includes both the condo (**strata lot**) and a part-interest in the common area. No separate title for the land on which the condo building sits. Provides for a form of gov’t for strata dev’t: all owners are members of corporation w/ deals w/ common areas, members elect council.

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

## 2. Ad Inferos

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

# B. Fixtures

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

**To determine whether chattels are part of realty, consider (1) degree of annexation – how attached are things that would otherwise count as chattels; (2) object of annexation – if to improve freehold, then fixtures, if to improve enjoyment of chattels, then chattels (*Re Davis*).**

**Rules for what constitutes fixture: (1) Fixtures must be attached to land by something other than their own weight (unless otherwise intended); (2) Goods attached to land even slightly are fixtures (unless otherwise intended); (3) Consider the prima facie character – object and degree of annexation, which is lying open for all to see (objective test); (4) Intention of person is only important in sense of what it appears to be by looking at annexation (*Stack v. Eaton*, followed in *La Salle*).**

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

F: Husband died. Under rules at the time, dower rights prevailed. Widow had under rights of dower right to life estate of 1/3 of husband’s estate. Husband’s estate included bowling alleys.

I: Should calculation of dower include fixtures on husband’s property?

L: *Haggert v. The Town of Brampton et al.*: if object of affixing chattels is to improve freehold, then even fi chattels are only slightly affixed to realty they become part of realty. If object of affixation is better enjoyment of chattels, then affixation does not make them part of realty.

A: Considered degree and object of annexation. Degree was slight – easy to take bowling alleys apart. Affixed for better enjoyment of chattels.

C: Not part of realty.

R: Degree and object of annexation should be considered in order to determine whether a chattel is part of the realty. Object is overriding consideration.

#### La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd. (1969) (1.23)

F: V built and ran hotel. V borrowed money to finish hotel and took out mortgage w/ D (lent on **real security** – D could seize property if V defaulted). P sold and installed carpeting to V, V did not pay full amount – agreement said P could take back carpets if V didn’t pay – **conditional sale**. V defaults on all personal rights. Hotel sold to another owner. P claims it is owner of carpeting and files claims against new owner for damages for converting carpeting – says carpets are not fixtures. New owner and D say carpets are fixtures. TJ says carpets are chattels, so D has to pay P.

I: Is carpeting fixtures or chattels?

L: *Conditional Sales Act* says seller can retain ownership over goods sold in condition sale as long as they are registered in land title office. Test from *Stack v. Eaton*. *Haggert v. Brampton* re: object.

A: P did not register carpets under *Conditional Sales Act*. Appeal judge finds degree of annexation slight. Object was better and more effectual use of building as hotel. Permanent = so long as it serves its purpose (carpet will not remain forever). Reasonable for buyer to assume carpet is fixture.

C: Carpets are fixtures so damages are not owed.

R: Object attached for purpose of improving use of property is fixture unless it is registered w/ land title and declared otherwise in contract.

D: False dichotomy for object of annexation – could be for better use of both land and chattels.

***Royal Bank of Canada v. Maple Ridge Farmers Market Ltd.* rules: i) Unattached except by own weight = chattel; ii) Plugged in and removable without damage = chattel; iii) Attached even minimally = fixture; iv) If loss of essential character upon removal = fixture; v) If fixture, can be removed if it is tenant’s fixture; vi) In very exceptional circumstances not covered by these rules the court should have resort to the purpose test. (Considered in *CMIC*)**

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

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

I: Was tent 2 a fixture or a chattel?

A: For tent 2 being fixture: clearly permanent; closeness to tent 1 indicates likewise permanency, breezeway connected the 2 tents, on land to enhance business, large and not obviously portable. For tent 2 being chattel: tents designed to be portable, D wanted it to be portable, could have been affixed like tent 1 but wasn’t. Degree of annexation is minimal.

C: Tent 2 was chattel.

R: In circumstances not covered by normal tests for fixtures, court should determine whether object is fixture or a chattel by looking at its purpose.

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

F: Bungalow rested on concrete pillars since 1945. Intended to be portable when built. If part of realty, D protected in possession by *Rent Act*. If not part of realty, P can evict D. P lost at trial but won at Court of Appeal.

I: Is bungalow part of realty? When bungalow was built, did it become part of land?

L: *Woodfall Landlord and Tenant release* 3-fold classification. *Reid v. Smith*: absence of attachment does not prevent house from being part of realty. *Snedeker v. Warring*: thing may be affixed to land by clamps/cement. *Goff v. O’Connor*: houses are part of land.

A: Houses are clearly part of land. Everything that forms house is house, even if they can be easily removed. House is affixed to land unless it is clearly a mobile home and seen culturally as not part of land. *Melluish (Inspector of Taxes) v. BMI (No 3) Ltd*: terms agreed between fixer of chattel and owner of land cannot affect determination of Q whether chattel has become fixture – it is an objective test. Doesn’t matter that D pays separate fees for the bungalow and use of the land. Case by case – what is a chattel in 1 case may be a fixture in another.

C: Bungalow is part of realty.

R: Object which is brought onto land may be classified as (1) chattel; (2) fixture; (3) part and parcel of land itself. Objects in categories (2) and (3) are treated as being part of land.

# C. Water

## 1. Riparian Rights

### Sources of Water Rights:

• Common Law: percolating groundwater, water which has never been licensed

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

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

• *Land Act*: water bed rights

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

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

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

S. 1: Definitions: **domestic purpose** (use of water for household requirements, sanitation and fire prevention, watering of domestic animals and poultry and irrigation of garden not exceeding 1 012 m2 adjoining and occupied w/ a dwelling house); **ground water; stream** (natural watercourse/source of water supply, does not have to contain water); **unrecorded water** (water the right to use of which is not held under license or under an Act)

S. 2: an interest in water cannot be acquired via use; original right to use flowing water is vested in the Crown

S. 4: except for domestic purposes, person not registered under WPA must not divert, extract, use or store water from stream

S. 5: Rights acquired under licenses - license is required to acquire an interest in water bordering riparian lands

S. 6: All rights are subject to act

SS. 93/94: General and high offences under act and possible penalties

S. 42: Not an offence to divert water from stream for extinguishing fire, for domestic purpose or for prospecting for mineral

#### Water Protection Act ss. 2-3 (1.40)

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

S. 3: Water is vested in gov’t

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

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

Before 1859, law w/ regard to use of water was common law – law of riparian rights.

1859 *Gold Fields Act* – beginning of *Water Act* in BC – centralized water rights in Crown. Gold Commissioner could grant exclusive rights to use of defined Qs of water. Water use pays rental to state. Neglect to use water/wasting water = cancellation of privilege. License holder could sell water. *Water Privileges Act 1892*: right to use of water in streams vested in Crown. 1897 consolidation of law dealing w/ water: water licenses attached to land where water used. *Water Act 1914* put end to rights of riparian owners who did not hold licenses. Riparian law still exists in gaps left by legislation.

*Cook v. City of Vancouver 1912*: City’s water license held to override Cook’s alleged riparian rights. Right to continuance of flow undiminished taken away by Water Act.

Principle features of *Water Act 1948:* original right to use of water vested in Crown, right to use water dependent on license, license not used subject to cancellation, priorities between licenses determined by date, holder of license has right to expropriate land on which to construct pipe lines/other works, disputes re: mechanics of diversion settled by engineers.

To obtain water license: post Notice of Application near point of intake, notify adjacent owners, Water Comptroller holders hearings. Licensee pays rental to Crown.

Water license (right to use and flow) gives security of tenure for farmers/industry which was not possible under riparian law. Gives right to water for non-riparian owners.

#### Common Law - Law of Riparian Rights

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

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

(2) Right to continuance of flow undiminished.

• Water flow, quantity and quality in its natural state

• Rights remain whether exercised or not

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

o No material injury to fellow riparian owners

o Not for uses unconnected to riparian property

o If supply exhausted through ordinary use, cannot complain

o Domestic purposes only

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

o Cannot grant use to another

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

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

**The *Water Act* does not completely cancel out common law riparian rights. A riparian owner maintains the common law right to clean flowing water on his land until the Crown issues a license removing those rights (*Johnson v. Anderson, Stedman*). But if the water is used contrary to the license granted under the *Water Act*, no enforceable rights exist (*Schillinger*). Only riparian rights existing after the *Water Act* are those related to domestic purposes (*Schillinger).* Percolating water governed by common law, not WA. Owner entitled to flow, quantity and quality of percolating water on his property in its natural state (*Steadman*).**

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

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

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

L: Under *Water Act* not an offence to use unrecorded water for domestic purposes. *Embrey v. Owen*: flowing water is public and common, all may reasonably use it who have a right of access to it.

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

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

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

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

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

I: Did P have right to divert water under riparian law or as licensee? Can P claim damages from D if P was not entitled to divert water?

A: Ps diversion of water was unlawful – offence under s 41 of *Water Act*. Common law doesn’t apply here – has been taken out by statute. Riparian rights only exist under exception for domestic purposes. Fish hatchery does not fall under domestic purposes. If there are 2 illegal acts, neither can rely on riparian law to conclude a conflict.

C: P did not have right to divert water – not entitled to recover damages.

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

A **private nuisance** is a civil wrong; it is the unreasonable, unwarranted, or unlawful use of one’s property in a manner that substantially interferes w/ the enjoyment/use of another individual’s property, w/o an actual trespass/physical invasion to the land. Usual remedy is damages, whereas usual remedy for trespass is injunction.

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

F: P had ground water piped to house to use for domestic purposes – did not have water license. D built road and caused contamination. P claimed nuisance and sought injunction.

I: Can P claim damages from D, despite not having license?

L: Nuisance is act/omission whereby a person is annoyed/prejudiced/disturbed in enjoyment of land. *Water Act* does not apply to ground water – but you cannot contaminate ground water. *Ballard v. Tomlinson*: no one has right to use land in way that is nuisance to neighbor.

A: If water is ground water then P can sue in nuisance, but unclear whether water is ground water. Law of nuisance not based exclusively on rights of property. Distinguishes *Schillinger* by saying that fish hatchery was industrial, not domestic use. Affirms *Johnson v. Anderson*. Ps use constituted domestic use. *Water Act* should be interpreted to allow works for diversion for domestic purposes.

C: P had right to use of water so long as no license covered it. P can claim against others who interfere w/ that right w/o authority.

R: Riparian rights exist except where explicitly stated that they do not (where there is a license). P has right to use and enjoy water until Crown issues license in respect of that water. Until license has been issued, P is entitled to claim that D must not make water unusable.

## 2. Percolating Water

**Common law did not extend riparian law to water that percolates, flows through soil or flows in unascertained channel. Becomes property of first person to draw it lawfully to surface.**

BUT this is affected by *Water Act* and *Water Protection Act* in BC.

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

Usually Q of who owns land beneath water determined by survey/legal descriptions of land parcels.

**When this is not the case, common law rule of ad medium filum (to the middle line) applies: divides water beds in half unless there is enough in circumstances/description of instrument to show that was not intention of parties.**

This rule was held to apply in BC in *Rotter v. Canadian Exploration Ltd.*

#### Land Act, ss. 55-56 (1.56)

In BC, riparian owners have no rights to the navigable or non-navigable river bed shore (55) unless specifically granted or where those rights were never taken away (56). Sub-water land is owned by the Crown.

## 4. Accretion and Erosion

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

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

Accretion/ Erosion applies to both riparian owners and leaseholders, and to inland lakes as well.

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

• Accretion must be gradual and imperceptible.

• Human action (except that of the owner) can produce accretion.

• Accretion can only be produced by natural substances, though those substances need not be carried by water

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

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

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

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

F: A is registered proprietor of perpetual lease from Crown of land along lake. High-water mark has receded since when lease was granted – accretion due to deposit of sand and retreat of waters from lake due to construction. A still wants water frontage – wants doctrine of accretion to apply. TJ decided in favour of A – doctrine of accretion applies. Appeal court reversed.

I: Who owns land between current high-water mark and old high-water mark?

A: Doctrine of accretion applies to inland lakes. Crown did not exclude possibility of applying doctrine of accretion by requiring delineation on maps. Doctrine not excluded by terms of lease. Doctrine of accretion should apply when natural causes cause addition/detractions to land. Impossible to determine why the accretion happened. Doctrine may be excluded by clear terms.

C: Doctrine of accretion applies.

R: Riparian owners are entitled to increase by accretion where it is gradual and imperceptible.

## 5. Access by Riparian Owners

**Riparian owners have a right of access that stems form his ownership of land which abuts water. This right of access is distinct from the public right of navigation and does not depend on ownership of the water bed.**

• Riparian owners have the right to anchor vessels on the shore

• Riparian owners must not interfere with any public right of navigation and cannot impede access by building a structure on the foreshore

• A pier/ causeway is an acceptable means of access as long as it doesn’t interfere with foreshore owner’s rights

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

F: Each of As owns land that fronts upon sea. R is lessee of foreshore from Crown and is subject to existing rights of riparian owners. Each of As constructed wharf on and across foreshore adjacent to land. R claims trespass. Wharfs on pilings driven into soil and posts on concrete footings.

I: What rights does a riparian owner have to foreshore?

A: Water Act does not apply because not a stream.

C: Riparian owners doesn’t have right to construct wharf, R can claim trespass.

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

# D. Support

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

• An absolute right exists independent of any claim in negligence (*Rytter*). Properties need not share a common border to have a duty of support.

• Should obtain support agreements- easements

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

• No one can interfere with the land by removing lateral support (*Rytter*)

• Loss of lateral support can occur even where the movement is vertical

• The right of support does not extend to actual title in dirt (*Bremner*)

• Limited to land in its natural state- does not include support for the additional weight of any structures which have been on the land (*Linnell v. Reid*) unless obtained by easement (*Dalton v. Angus)* or prescription or unless it can be shown that subsistence would have occurred even absent the buildings on that parcel (*Gillies)*

*Prescription Act*: a right to lateral support from adjoining land may be acquired by 20 years uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time and it is so acquired if the enjoyment is peaceable and w/o deception or concealment and so open that it might be known that some support is being enjoyed by the building.

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

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

• Limited to land in its natural state

• But can be extended to vertical support for a building by applying the rules of trespass rather than the support doctrine (because removal of vertical support requires trespass underneath the soon-to-collapse building) (*Rytter*)

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

*Welsh v. Marentette:* landowners right to lateral support does not extend to soil brought onto land to raise it.

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

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

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

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

A: Ds are preventing P from using his property properly. If your neighbor excavates in their property, and this causes yours to subside, then this is a grounds for actions. (1) Sine quo res ipsa haberi non debet - support is part of the land itself, must remain with the land, not an easement (2) Sic utere tuo, ut alienum non laedas - You must use your thing in a way that doesn’t hurt others. (3) Need for neighbours to help support each others property in its natural plight and condition.

C: In favour of P – D is legally responsible.

R: Right of owner of land is to have land left in natural plight and condition w/o interference by direct/indirect action of nature facilitated by direct action of owner of adjoining land.

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

F: As dug holes on land. R claims holes prevented sand blown away by wind from being blown back onto Rs land. As selling sand from their property, sand is being replenished into holes by wind. R is claiming injunction. TJ ruled in favours of Rs.

I: Do Rs have cause of action due to appropriation of sand by As? Does sand retain its character as soil when it moves or become a chattel?

L: *Smith v. Thackerah* and *Bonomi v. Backhouse*: excavation upon a person’s own land gives no cause of action. *Brew v. Haren*: ownere of land entitled to all natural advantages belonging to land, to all things deposited by nature on land.

A: No evidence that sand would have blown back onto Rs land w/o presence of holes. In *Cleland* excavation was close to property line – resulted in collapse of property line. Excavation is in middle of As land. *Salt Union Ltd. v. Brunner, Mond & Co*: D not liable for pumping brine from land which contained salt from P’s land. If sand is chattels then their sale might = conversion, but this is a stretch. Sand/soil is not your property until you capture it. If Rs have and retain property in sand, then it is trespass when it blows onto As land. Legitimate for As to dig hole on their own land – to hold otherwise would be absurd.

C: Rs have no property in sand after it is driven from their land. Appeal allowed.

R: Right of support does not extend to actual title in dirt.

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

F: D entered into oral agreement w/ BB to employ BB to excavate for building. Following excavation, E wall of building standing on land adjoining W of excavation collapsed into excavated basement. Building that collapsed owned by P. BB went below footings of P’s store in excavation.

I: Are Ds liable for collapse of P’s wall?

L: [*Prescription Act* – grocery store had existed for 20 years.]

A: In itself, removal of lateral support of wall would not give P cause of action. BUT excavation extended under bottom of wall – vertical and lateral support of wall removed which caused wall to collapse. Collapse not caused by P’s negligence.

C: Collapse caused by negligence by Ds.

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

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

F: Ps own lot which has concrete building on it. D constructed building on property next to Ps. In process of excavating for D’s building, removal of soil caused subsidence by loss of lateral support for P’s property. Chimney and part of wall of P’s building collapsed. D tried to fix problem by shoring, which aggravated the problem. D agreed to look after P’s property after collapse, but did not. P claims trespass.

I: Should D be liable for damages to P’s property?

A: Damages were direct result of D’s actions. Right to lateral support for building under *Prescription Act*. Ps were deprived of lateral and vertical support to which they were entitled for land and building.

C: [In favour of trespass in alternative]. Ps deprived of lateral and vertical support to which they were entitled for both land and building.

# Chapter 2: The General Principles of Land Law

**Sources of Real Property law**

• In 1066, common law began in Europe

• First Nations in BC have occupied land since before 1790s when the Europeans came

• Reception of English Law into BC occurred in 1858 (*Law and Equity Act*, s. 2)- all British statutes and case law in existence before 1858 are of legal force and in effect in BC

• In 1870, BC passed the *Land Registry Ordinance*, giving it the Torrens Land Registration System

• In 1871, BC joined Confederation

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

• *Land Act* deals with Crown land, Crown grants (s. 50), the 7 land districts and surveying

• *Land Title Act* sets up the BC Torrens land registration system and require that all transfers be made on the prescribed form (Form A) and on a single page (s. 185). However, s. 185 does not apply if another statute allows a different form, or the Registrar accepts the different form

• *Property Law Act* deals with everything else (statutory provisions with land issues)

• *Land Transfer Form Act* (ch. 4-12) deals with the meaning to be given to words in prescribed forms

**Ways to look at property rights**:

1. Ius utendi fruendi et abutendi/disponendi – right to use, enjoy and dispose

2. Space – hinges on tenure on feudal system; lessening of tenure in allodial system

3. Time

* Corporeal and incorporeal interests can exist at same time in respect of some land
* Nemodat quod non habet – you cannot give more than you have
* Freehold estates (fee simple, fee tail, life estate) vs. leasehold estates
  + In fee simple: 1 in respect of 2 for indefinite time
  + In fee tail: 1 in respect of 2 as long as you had defined heirs

# A. Real and Personal Property

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

# B. Reasons for Studying the Law of Real Property

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

## 1. Dispositions

Property owner can dispose of property inter vivos or on death. Inter vivos property may be sold or disposed of by gift. On death property may be disposed of by will or pass according to rules for intestate succession in *Estate Administration Act*. Important for any transfer of property to be effectively carried out – doc of transfer must transfer what party intends to transfer, subject to qualifications parties intend to impose.

## 2. Use of Land

### (a) Common Law

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

### (b) Private Arrangements

Later dev’t of law of restrictive covenants in 19th and 20th Cs enabled private land owners to exercise greater measure of control over neighbour’s use of land w/o direct public intervention.

### (c) Legislation

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

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

# C. Some Basic Principles of Land Law

## 1. Tenure

**Historical background**

• William the Conqueror took land unto himself, parceled it out among followers, who then parcelled it out amongst tenants, sub-tenants, etc. - **sub-infeudation**

• King never parted with absolute ownership – this remains theoretical basis in land law today that Crown is an absolute owner and that an individual cannot own land; instead, he can only have an interest in land

• Land was the most convenient medium w/ which the monarch could both reward his chief supporters and at the same time bind them to provide further services.

**Tenure**

• Two types of tenure: freehold and copyhold. Will only focus on freehold

• **Freehold** tenure divided into four types: knight-service (soldiers), socage (agriculture), seargentry (divided into grand seargentry, equivalent of knight service and petty seargentry, equivalent to socage) and frankalmoin (religious)

• These tenures eventually united into single tenure, socage

• *Statute of Quiz Emptores* 1290 prevented further sub-infeduation and required interests be transferred

• *Tenures Abolition Act* 1660 abolished all incidents connected with socage except:

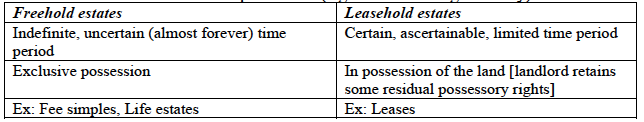
- Forfeiture – right for Crown to claim land of person guilty of high treason (disallowed under CC)

- Escheat – right of lord to claim land of tenant who died without anyone to succeed his interest (= modern intestacy) or who committed a felony (covered by CC and *Escheat Act* 1996)

• "Although the doctrine of tenure embodies the rules for allocating land rights and corresponding obligations, it does not describe their duration. That is the function of the doctrine of estates."

• Under our current system we have **allodial** as opposed to feudal ownership – subdivision in the form of **abuttals** – no obligation to lords.

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



Estates can coexist, but each is treated as object of property.

### (a) Corporeal Interests

Entitle a person to possession of land – right to use, enjoy and dispose. Landowners own a time in the land – estate – Crown is absolute owner of land.

When you hold a fee simple and you’re not in possession, your fee simple is a **reversion**. If a reversion is sold to someone else, they get a **remainder** (future interest).

**Seisin** = ability to possess and occupy.

**i) Fee simple**: originally time in land determined by continuity of heirs, fee = inheritable and simple = no qualification on type of heir. *Statute of Quia Emptores* conferred on holders of interests in land freedom to dispose w/o lord’s consent. Freedom to dispose of property by will on death formally granted by *Statute of Wills* 1540. Fee simple became much more like absolute ownership w/ rights to grant inter vivos and on death. -> Basis of modern land law.

**ii) Fee tail**: inheritable only to descendants of holder of estate; no longer possible to create in BC (*Property Law Act* s. 10).

**iii) Life estate**: time in land for lifetime of holder of estate, and upon death of holder estate comes to end.

**iv) Estate pur autre vie**: type of life estate, but measure by life of person other than estate owner.

**v) Leasehold estates**: time in land of fixed duration and in respect of which tenant usually pays rent to landlord. Developed outside feudal system. Originally common law did not treat leases as interests in land – regarded as type of personalty – personal right against landlord. Today lease is interest in land, but duration must be fixed at time of creation (vs. freehold estates).

**vi) Future interests**: holder of fee simple make create number of estates in succession.

### (b) Incorporeal interests

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

## 3. Legal and Equitable Interests

**Legal interests** come through the CL and are good against the world: upon completion (registration) in BC, you receive the legal interest. **Equitable interests** originally came from the Court of Equity, but were not as secure as legal interests: upon signing of the CPS, you receive the equitable interest (as you have entered into a binding contract). Legal title refers to the duties and responsibilities of maintaining and controlling some property, while equitable title refers to the benefits and enjoyment of that property.

-> CPS = contract for property sale

### (a) Origin of Equitable Interests

Royal courts in UK stole jurisdiction from local courts by giving more predictable decisions – relied on common law. Exchequer, Common Pleas and King’s Bench developed. Common law courts were very rule bound. Disappointed litigants might appeal directly to King to seek justice. Petitions dealt with by the Chancellor (Keeper of the King’s Conscience). Court of Chancery (aka Court of Equity) and rules of equity grew out of this.

### (b) Development of the Use

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

• Example: A transfers fee simple in Blackacre to B “to the use of C”. A is feoffor. B is feofee to uses. C is cestui que use (“he to whose use” the land is held) – has **equitable interest**. Legal interests shift from A to B. B has **fiduciary duty** to act in interest of C.

• Why? Allowed someone to dispose of property after death before that right was legally recognized. To hold land for religious bodies. To provide for family before going to fight in Crusades. To avoid feudal taxation and other feudal burdens - if A transferred his interest to X and Y to the use of A, when A died, X and Y would take absolute title by right of survivorship and thus there was not succession of the legal title- no estate tax.

### (c) The Statute of Uses

*Statute of Uses*, 1535, eliminated the Use. **Executing the use:** converted equitable title of cestui que use into legal title, thereby removing feofee. In the above example, the fee simple would go from A to C and B would be removed. Statute did not apply where a person was seised to his own use (i.e. if land

was transferred to “B in fee simple to the use of B in fee simple”- B had both legal and beneficial ownership, i.e. was both the beneficiary and the trustee). If there were two Uses, the Statute did not eliminate the second Use, “use upon a use” (i.e. A holds interest for B for the use of C for the use of D- legal

title would move to C). Also did not apply to personalty and active uses (where feofee has active duty to perform).

### (d) Emergence of Modern Trust

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

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

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

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

## 4. Freedom of Alienation

English land law has aimed to make land freely alienable. 3 requirements: (1) Owner must have technical freedom of disposition; (2) In disposing of property, owner must not have power to impose excessive restraints on freedom of alienation; (3) Mechanics of transfer must be simple.

### (a) Freedom of Disposition

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

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

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

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

Alienability of future interests established in *Law of Property Act* 1845.

### (b) Restraints on Alienation

Transferees attempted by types of transfer they made to curtail freedom of alienation of others.

**i) Direct restraints**: Clause in transfer prohibiting disposition – law declares such clauses void. But restraints on assignment of leasehold interest valid.

**ii) Fee tails**: On death of owner for time being of estate, estate should pass to heir of body of owner – owner for time being had no power to dispose. Courts construed it as a conditional fee simple. *Statute De Donis Conditionalibus* 1285 said will of donor should be observed and fee tails should be interpreted as intended. Land crisis developed. Courts then barred conversion of fee tail to fee simple. Abolished in 1833 and replaced by simpler statutory procedures.

**iii) Future interests**: Long series of future interests could prevent alienation. But this was restricted by: 1) courts making a series of life estates running within a family impossible; 2) the *Statute of Uses* and the rule against perpetuities (prevents a person from putting qualifications and criteria in his/her will that will continue long after death).

**iv) Strict Settlements**: Device used by a landowner to keep the land within his family. Ownership of the property was divided over time by using limited freehold estates. The usual form of marriage settlement gave a life interest to the husband with remainder (after provisions for the wife during widowhood and for younger children of the marriage) to the first and other sons in tail, a further remainder to any daughters as tenants in common in tail, and a final remainder to the husband in fee simple. The beneficiaries under a strict settlement have equitable interests in the land. Effectively made land inalienable – produced land crisis.

*Settled Estates Act* 1877 and *Settled Land Act* 1882 attempted to correct problems of alienability.

### (c) Mechanics of Transfer

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

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

**ii) Methods of transfer**

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

• *Statute of Frauds 1677* made written evidence compulsory

• *Statute of Enrolments 1677* required that written agreements be enrolled in the King’s Courts of Record at Westminister or in the country where the land was situated (ways to get around it)

• *Statute of Uses* 1535 moved legal title regardless of whether there had been livery of seisin (lease and release, enabled gifts between relatives – **covenant to stand seised**)

• Formal replacement of livery of seisin by *Real Property Act* of 1845

• **Modern System -** Registration of documents**: i**ntroduced in BC in 1861**; a**ll documents relevant to a parcel of land are on file**;** *Land Registry Ordinance 1870* established system of title registration; *Land Titles Act* tries to ensure title in as costless a way as possible; Title registration: BC has quasi-Torrens system**;** Torrens system protects purchaser**;** "Mirror principle": register of title reflects accurately and completely allestates/interests that may affect the land**;** "Curtain principle": registry is only source of information for aprospective purchaser

# D. Relationship Between Real and Personal Property

## 1. Tenure

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

## 2. The Doctrine of Estates

In theory personal property operates on basis of absolute ownership – no estates. This is applied strictly for fungibles. But relationships corresponding to legal estates in land can be created in personalty (e.g. leasing cars). Courts have allowed equitable interests in personalty (e.g. trusts of shares/bonds). Have given effect to succession of legal interests in personalty – essentially estates.

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

F: Deceased left will and appointed R as executor and trustee. Left life interest in estate and property to widow and all the rest and residue of estate and property, both real and personal, to charity.

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

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

C: Appeal allowed.

R: It is necessary to ascertain from whole of will what was true intention of testator. “Life interest” when used in a will in relation to personalty: the recipient of the life interest may enjoy the revenue derived from the corpus and no more unless the testator has expressly or impliedly indicated an intention that the recipient of the life interest should have the power to encroach.

-> Corpus = capital/principal amount, as of an estate/trust

## 3. Alienability

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

## 4. Devolution on Death

On death, property may pass by will or in default of a will, according to general rules of law (intestate succession) usually codified in a statute (*Wills, Estates and Succession Act*). W/o a will, transfer is **intestacy**. Ownership of real property escheats to Crown, personal property passes to Crown bona vacantia (*Escheat Act*). Will-maker’s freedom to disinherit spouse/child subject to judicial review.

# E. The Relevance of English Law

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

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

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

# Chapter IV: Acquisitions of Interests in Land

If at time of making will or making inter vivos dispositions the maker lacked mental capacity, they are void. Provincial statutes relevant to dealings with property on behalf of persons suffering from mental disability:

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

An alien may own land despite lack of citizenship.

# A. Crown Grant

1866: Provincial Crown of BC created and acquires ownership of all land in BC

1870: *Land Registry Ordinance Act* (*Land Title Act*) sets up present system of land ownership

As a result, all lands in BC are owned by the Provincial Crown, except:

• Federal Crown lands (e.g. public harbors, national defense lands, Indian reserves, some railway lands)

• Privately owned lands (though Crown still “owns” fee simple lands)

• Aboriginal title lands (granted via treaty, or lands contingent on settlements)

Crown grants normally given for leases/ right-of-way/ licenses of occupation (*Land Act*).

If you get a fee simple Crown grant (rare), *Land Act* s. 50 establishes what rights the Crown still holds to your land.

#### Land Act, s. 50 (4.3)

When granting a Crown Grant, Crown has:

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

• All subsurface rights: oil, gas, minerals

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

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

• Right to grant right of way

# B. Inter Vivos Transfer

Four phases: (1) Agency agreement (2) Contract of purchase and sale (interim) (3) Transfer (4) Registration. In a lease the lease is the transfer – has to be registered if it is for a term of 3+ years. In the interim agreement, the completion date is set – date of transfer.

## 1. The Contract

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

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

**Enforceability of Contracts**

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

(3) A contract respecting land or a disposition of land is not enforceable unless: (a) there is, **in writing** signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter OR…

• s. 59(3)(b): extension of doctrine of part performance – liberal basis for enforcing oral disposition of land – includes payment/acceptance by party or on party’s behalf of deposit or part payment (59(4))

• s. 59(3)(c): part performance and estoppel – makes oral dispositions more enforceable.

• s. 59(5): power of Court to order restitution or compensation

• s. 59(6): guarantee/indemnity not enforceable unless evidenced by writing or alleged guarantor/indemnitor has done an act indicates that guarantee consistent with that alleged has been made.

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

Based on court’s interpretation of the *Statute of Frauds* (predecessor to *Law and Equity Act*), the following propositions probably still hold true w/ respect to s 59: Contract must be valid; Writing can take any form; It must be signed by the party to be charged or that party’s agent; It need not have come into existence to satisfy the statute and it may come into existence after the contract has been entered into; Two documents, if they expressly or impliedly refer to each other, may be combined to satisfy the requirements of the section. Concerned w/ enforceability of contract rather than its existence.

## 2. The Transfer – Form

Completion: carries out the binding contract reached at the Executory State, and transfers the legal interest from the vendor to the purchaser. Under Torrens, completion = Form A registration. Before transfer, buyer must scrutinize title to ensure that there is a good root of title. All interests in land in respect of Blackacre should be clear at *Land Title Office*.

### (a) Writing and Sealing

Livery of seisin was modified by 3 statutes: (1) *Statute of Uses* 1535 (transfer freehold interests in possession by grant – part of BC law); (2) *Statute of Frauds* 1666 (all transfers of interests in land must be evidenced in writing – repealed in 1985); (3) *Real Property Act* 1845 (all interests in land could be transferred by grant – repealed in 1978). Livery of seisin officially abolished in BC, replaced by e.g. seals – less formal methods.

A **deed** is a transfer doc under seal. W/o seal, there would be no transfer w/ regard to land. But *Land Title Act* has reduced requirements for formality of transfer. Deeds are somewhat varied, cumbersome and expensive. Standardization lowers costs, but also reduces flexibility. Transfer forms now act as deeds.

Transfers today must comply w/ the following statutory provisions:

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

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

• s. 16: Instrument need not be executed under seal

### (b) Registration – Prescribed Forms

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

General requirement is that a transferor deliver to a transferee a registrable transfer. To determine what is registrable, look at *Land Title Act.*

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

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

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

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

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

• s. 186(4): Form A legally transfers the interest even without express words of transfer (i.e. X transfer to Y) (no express words of transfer)

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

### (c) Standard Forms

Many of the clauses found in transfers are standard clauses.

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

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

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

This area is normally dealt with under contract law (becomes significant for gifts). Under common law, deed takes effect immediately after “signed, sealed, and delivered” (intention given). Under Torrens system, there must be a physical act.

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

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

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

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

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

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

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

### Gifts

**Gift:** A voluntary and intentional transfer of property from the owner (donor) to another (donee) without consideration, and is normally not enforceable by the donee. Can be transferrd inter vivos, upon death or as donation mortis causa. Testamentary gifts are always revocable, up until death/ completion.

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

**Required steps for a completed gifts** (note: personal property gifts don’t require registration):

1) **Intention:** donor must have sufficient intention to donate. Donor must have mental capacity to appreciate the nature of what they are doing (parting with ownership). Words, or actions, must be unequivocal or unambiguous: must clearly point to intention to part with ownership. Matter of evidence: circumstances, donor-donee relationship, size of gift, relation of gift’s to donor’s total assets.

2) **Acceptance:** the donee must accept the gift. Anything short of outright refusal equals acceptance. Usually assumed that the donee is accepting, but sometimes donee might not want obligations tied to gift. Donee must decide within a reasonable time if they don’t want to accept

3) **Delivery:** transfer of possession (or its equivalent) of the gift from donor to done is required to complete the gift. Delivery is both evidence of intention/acceptance, but also a required element of the gift on its own. At common law, physical delivery is not required (*Ross*). For delivery, there must be intention to be immediately and unconditionally bound (*Zwicker*).

4) **Registration** (LTA, s.20): the donor must have done everything that needs to be done in order for the transfer to take place (*MacLeod*). This includes both delivery of deed and registration. A written Form A is required to transfer an interest in land (no oral gifts). Donor must provide Form A (PLA, s. 5). Unregistered gifts are valid between original parties, but not against subsequent beneficiary-plaintiffs (s. 20). Duplicate title is necessary for effective transfer of gift (*MacLeod*).

Next two cases (Ross and Zwicker) are in jurisdictions w/o the *Land Title Act* – common law.

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

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

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

L: *Edwards v. Poirier* – very strong evidence required to justify court in setting aside on ground of non-delivery a deed which is on its face valid.

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

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

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

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

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

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

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

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

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

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

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

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

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

C: No transfer – not a complete gift.

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

## 4. Transfer to Volunteers

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

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

e.g If A makes a transfer of title to B, a volunteer. **Volunteers** are persons to whom there has been a valid transfer of legal title, but who have not provided consideration to those who made/caused the transfer to be made. In a land title jurisdiction, transfer by way of gift requires you to actually deliver the transfer form. In transfer of personalty, Equity presumes that B holds the legal title for A, and A has the equitable title – presumption of **resulting trust**. Initially the same presumption applied in case of land. Equity assumed that people did not go around giving their property away voluntarily.

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

### (a) Pre Statute of Uses

Equity presumed B held to use of A – resulting use. If B wished to claim absolute interest the onus was on B to prove that was A’s intention. Absolute interest could be transferred by ‘unto and to use of B’ or ‘to B to use of B’.

### (b) Statute of Uses

Use executed and legal title back w/ A. Still necessary to state ‘unto and to use of B’ if intent was to make an absolute gift to B.

### (c) The Trust

Unto and to the use of B on trust for C. A **resulting trust** (from the Latin 'resultare' meaning 'to jump back') is the creation of an implied trust by operation of law, where property is transferred to someone who pays nothing for it; and then is implied to have held the property for benefit of another person. The trust property is said to "result" back to the transferor (implied settlor). Never settled what effect of ‘unto and to the use of B’ was.

S. 19(3) of *Property Law Act* does not prevent rebuttable presumption of resulting trust from applying to gratuitous transfers of land (*Perasso v Perasso*).

In case of some voluntary transfers of realty/personalty, presumption of gift – **advancement**. Presumed that transferor did intend to confer both legal and equitable title on transferee and onus on transferor to prove otherwise. E.g. Father to child

# C. Will or Intestacy

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

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

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

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

# D. Proprietary Estoppel

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

**1) P must have made a mistake to his legal right**

**2) P must have expended money or act on faith of his belief**

**3) D must know of his legal right and that it is inconsistent with P’s claimed right**

**4) D must know of P’s mistaken belief of right**

**5) D must have encouraged P in expenditure of money or other actions either implicitly or by abstaining from asserting his legal right**

**6) D’s actions were unconscionable, inequitable, or unjust equitable fraud**

#### Zelmer v. Victor Projects Ltd. (1997) (4.38)

F: P wished to develop his land. Needed to build a reservoir on land at a higher elevation, D owned adjoining lands at a suitable elevation. D orally agreed that the reservoir could be built at a specified location (where it was in fact installed), and said that he would not require compensation for the land which would be subject to the easement. D’s agent confirmed arrangement by fax. D then argued that the reservoir was in the wrong location.

I: Does proprietary estoppel apply?

L: Proprietary estoppel does give rise to cause of action. *Crabb* test: 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 on such terms as may be just.

A: Words/conduct of D, including those of his agent, taken as a whole, led Ps to believe that they had approval of D to construct reservoir and would be granted easement.

C: Proprietary estoppel established. Appeal dismissed.

#### Trethewey-Edge Dyking District v. Coniagas Ranches Ltd. (2003) (4.47)

True test for proprietary estoppel is that 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 legal rights, and the wrongdoer must have acted to his prejudice in that belief.