

## Property Law

### Syllabus:

#### Topic #1: Property in Context

##### 1. The Sources of Canadian Property Law

- a. Indigenous traditions
- b. English law
  - i. feudal structures and the doctrines of tenures and estates
  - ii. origin and rationale
  - iii. forms, especially free and common socage
  - iv. incidents of tenure
  - v. truncation and decay of the feudal structure: *Statute Quia Emptores*, 1290 and the *Tenures Abolition Act*, 1660
- c. reception of English law and overlay of English law on existing Aboriginal property rights

##### 2. Basic Divisions in the Law of Property

- a) Private, public, shared, and open-access property
- b) Real and personal property
- c) Legal and equitable interests
- d) Other categorizations

##### 3. The *Numerus Clausus* principle

##### 4. Property and the State

- a) Limits on executive power and the federal division of powers over private property
- b) The Charter and other direct protections of private property
- c) Constructive taking of property
- d)

#### Topic #2: The Boundaries of Property

##### 1. Land: Airspace and Subsurface Rights

- a) The “Latin Maxim” *cujus est solum ejus est usque ad coelum et ad inferos*
- b) Mines and minerals

## 2. Land Bounded by Land

- a) legal description
- b) rights of lateral and vertical support

## 3. Land Bounded by Water

- i. legal description
- ii. riparian rights
- iii. accretion

## 4. Fixtures

- a) The fixtures tests
- b) Tenants' fixtures
- c) Fixtures and security interests *corpus* and *animus possidendi*

## Topic #3: Possession

### 1. Possession, generally

- a) corpus and animus possidendi
- b) possessory title (The Tubantia)
- c) pre-possessory interest (Popov v Hasyashi)

### 2. The Relative Nature of Title: Finders

(Parker v British Airways; Trachuk v Olinek; Stewart v Gustafson)

- a) rights of a finder as against the true owner; an occupier; a prior possessor
- b) rights and obligations of the finder
- c) rights and obligations of an occupier

### 3. Abandonment

### 4. Transfer of Title through Delivery: Gifts inter vivos

- a) rationale for delivery requirement
- b) doctrinal elements of a gift
- c) doctrinal elements of donatio mortis causa

## 5. Bailment

- a) what constitutes a bailment and its various forms
- b) breach of bailment
- c) sub-bailments

## Topic #4: Estates

### 1. The Fee Simple

- a) creation at common law (“magic words” required)
- b) statutory reforms: in most (but not all) provinces, “magic words” are no longer required.

### 2. The Fee Tail

- a) historic development
- b) abolition

### 3. The Life Estate

- a) general nature
- b) creation
- c) powers and obligations of the tenant for life (encroachment; waste)

### 4. Interpretation

(Re Walker; Re Taylor; Christiansen v. Martini Estate)



## Topic #5: Indigenous Rights in Land

### 1. Nature of Aboriginal Title

- a) sources
- b) attributes/content
- c) limits

### 2. Proof of Aboriginal title

### 3. The Role of Consent and the Infringement (*Tsilhqot'in Nation v. BC*)

### 4. The Duty to Consult and Accommodate prior to Recognition of Aboriginal Title

## 5. Rights Short of Title

- a) nature
- b) test for recognition

## 6. Reserves under the Indian Act and the Framework Agreement on First Nation Land Management Act

- a) Certificates of Possession
- b) Land Codes

## 7. Self-Government and Indigenous Tenure under Modern Treaties

- a) Nisga'a Final Agreement

## Topic #6: Equitable Interests

### 1. Historic Development of Equity

- b) the development of equitable property interests in the Court of Chancery
- c) administrative fusion of land and equity
- d) the relationship between legal and equitable principles

### 2. The Statute of Uses

- a) purpose
- b) effect

### 3. Creating a Modern Trust in Real Property after the Statute of Uses

- a) avoidance: leases, personalty, active duties
- b) exhaustion: "unto and to the use of"

### 4. The Nature of Modern Equitable Interests

- a) express trusts
- b) resulting trusts, and the presumption of advancement (*Pecore v. Pecore*)
- c) constructive trusts: institutional forms (*Soulos v. Korkontzilas*)
- d) the remedial constructive trust i) historical development in Canada
- e) the Joint Family Venture (*Kerr v. Baranow et al.*)

## Topic #7: Conditional Transfers and Future Interests

### 1. Vested and Contingent Interests (*Stuartburn (Municipality) v. Kiansky*)

### 2. Determinable and Conditional Estates

### 3. Invalidity

- a. the effects of invalidity
- b. uncertainty (*H.J. Hayes v. Meade*)
  - i. various contexts in which certainty is relevant ii) test of certainty for conditions subsequent iii) conditions precedent
- c. conditions that seek to interfere with marriage (*MacDonald v. Brown Estate*)
- d. conditions contrary to 'public policy' (*Leonard Foundation; McCorkill v. Streed*)
- e. restraints on alienation (*Blackburn v McCallum*)

### 4. The Rule Against Perpetuities

- a. origins and rationale
- b. elements of the common law rule
  - i. an interest
  - ii. must vest
  - iii. if at all
  - iv. within the perpetuity period
- c. the perpetuity period
  - i) lives in being or 'en ventre sa mere' (measuring lives) ii) plus 21 years

## Topic #8: Leases And Licences

### 1. The Nature of a Lease

### 2. The Nature of the Landlord's and the Tenant's Interests

- a) assignment versus sublease
- b) assignment of the tenant's interest: generally
- c) the rule in *Spencer's case* (*Merger Restaurants v. D.M.E. Foods*)
- d) limits on the tenant's right to alienate (*Richfield Properties Ltd. v. Sundance Investment Corp.*)
- e) Obligations of Landlords and Tenants
  - i. rent
  - ii. the covenant for quiet enjoyment
- f) Termination and Remedies (*Highway Properties v. Kelly Douglas & Co.*)
- g) The Proprietary Status of Licences
- h) Residential Tenancy Reform: General Principles

## Topic #9: Shared Ownership

### 1. Traditional Forms of Co-ownership

### 2. Joint Tenancies

- a. the four unities
  - i. possession
  - ii. interest
  - iii. title
  - iv. time
- b. intention
  - i. the presumption as to intention at common law
  - ii. equity's attitude
  - iii. statutory intervention

### 3. Tenancy in Common

- a) requirements and general nature
- b) express creation and “words of severance”
- c) statutory presumption

### 4. Severance of a Joint Tenancy

- a) the starting point – the *dictum* in *Williams v. Hensman*
- b) means of severance
  - i. an act by a joint tenant
  - ii. agreement to sever
  - iii. course of conduct

### 5. Resolving Concurrent Ownership Disputes

- a) the basic position (the courts will not police the relationship)
- b) termination by partition or sale
- c) accounting and financial adjustments between co-owners

## Topic #10: Servitudes Over Property

### 1. The Nature of Easements

- a) the basic concept
- b) the requirements for a valid easement dominant and servient tenements
  - i. accommodating the dominant tenement
  - ii. different ownership and occupation of the tenements
  - iii. the easement must be capable of forming the subject matter of a grant
- c) positive and negative easements

### 2. Creation of Easements

- a) express grant
- b) implied grant
  - i. necessity
  - ii. intended easements
  - iii. the rule in *Wheeldon v. Burrows*
- c) reservations
- d) estoppel
- e) prescription

### 3. Scope, Location, and Termination

- a) general principles
- b) application (*Laurie v. Winch; Malden Farms*)
- c) the rule in *Harris v. Flower*
- d) termination of easements

### 4. Covenants Running With Property (Restrictive Covenants)

- a) the running of covenants in equity, generally
- b) the running of the burden: the historical starting-point (*Tulk v. Moxhay*)
- c) the general requirements
  - i. the covenant must be negative in substance
  - ii. covenant must be made for the benefit of land retained by the covenantee
  - iii. the covenant must have been intended to run with the covenantor's land
  - iv. general equitable principles apply; including the requirement of notice
- d) the running of the benefit
  - i. express vs. implied annexation
  - ii. assignment
  - iii. building schemes (*Berry v. Indian Park Assn.*)

### 5. Positive Covenants (*Durham C.C. No. 123 v. Amberwood Investments*)

- a) the basic rule
- b) by-pass options

### 6. Invalidity and Termination

- a) generally
- b) public policy and other bases of invalidity

### 7. The Profit a Prendre

## Topic #11: Priorities and Registration

### 1. Priorities at Common Law and in Equity

- a) the four contests
  - i. prior legal vs. subsequent legal
  - ii. prior equitable vs. subsequent equitable
  - iii. prior legal vs. subsequent equitable
  - iv. prior equitable vs. subsequent legal
- b) application of common law priority rules
- c) providing a sufficient root of title

### 2. The Advent of Registration

- a. deed registration systems
  - i. race
  - ii. notice
  - iii. race-notice
- b. relationship between registration system and priority rules

### 3. Title Registration

- a) the three cardinal elements of title registration systems – the curtain, the mirror and the net
- b) land titles and fraud
- c) the curtain
  - i. immediate indefeasibility
  - ii. deferred indefeasibility
- d) the mirror: title registration and prior unregistered interests
- e) the assurance fund