



Syllabus

Property

(Revised for November 2020)

Candidates are advised that the syllabus may be updated from time-to-time without prior notice.

Candidates are responsible for obtaining the most current syllabus available.



Property

GENERAL DESCRIPTION AND LEARNING OBJECTIVES

This syllabus is designed to facilitate the self-study of the fundamental principles of the Canadian property law, as applied in Canadian common law jurisdictions. The focus is on real property. Core concepts are presented through the use of a standard property law textbook and a property law casebook.

The syllabus is organized around the following 11 major topics:

1. Property -- history and categories
2. Boundaries
3. The concept of possession
4. Common law estates
5. Aboriginal property rights in land
6. The origin and nature of equitable interests
7. Qualified transfers and future interests
8. Leases and licences
9. Shared ownership
10. Servitudes over property
11. Priorities and registration

By the end of the course, NCA candidates should be able to:

1. understand the legal doctrines, principles and rules applicable to the possession and ownership of property and the policies that underlie the law;
2. synthesize the various doctrines, principles, rules and policies covered in the assigned readings;
3. apply those various doctrines, principles, rules and policies to solve problems involving conflicting claims to property; and
4. critically evaluate elements of the law of property having regard to the policies that inform the rules.

NCA candidates will be tested on their ability to achieve these objectives.



LEARNING RESOURCES

a) Prescribed Materials

B. Ziff, *Principles of Property Law*, 7th ed. (2018), referred to below as the **Textbook**.

B. Ziff *et al.*, eds., *A Property Law Reader: Cases, Questions, and Commentaries* (4th ed., 2016), referred to below at the **Casebook**.

b) Other Reference Materials

i) *Canadian Texts*

Anger & Honsberger's Canadian Law of Real Property, 3rd ed. (Aurora, ON: Canada Law Book, 2005)

M.L. Benson *et al.*, *Understanding Property: A Guide to Canada's Property Law*, 2nd ed. (Toronto: Thomson Carswell, 2008)

M.E. McCallum & A.M. Sinclair, *An Introduction to Property Law*, 6th ed. (Toronto: Butterworths, 2012)

ii) *Texts from Other Jurisdictions* (noting candidates will be examined on Canadian property law)

P. Butt, *Land Law*, 6th ed. (Sydney: Thomson Reuters Australia, 2010) (Australia)

R. Chambers, *An Introduction to Property Law in Australia*, 2nd ed. (Pymont, NSW: Law Book Co., 2008) (Australia)

K. Gray & S.F. Gray, *Elements of Land Law*, 5th ed. (Oxford: O.U.P., 2009) (England)

R.E. Megarry & H.W.R. Wade, *The Law of Real Property*, 8th ed. (London: Sweet & Maxwell, 2012, C. Harpum *et al.*) (England)

R. J. Smith, *Introduction to Land Law*, 2nd ed. (Harlow, Eng.: Longman, 2010) (England)



TOPICS AND READINGS

The following syllabus contains a listing of the prescribed readings. It also includes headings describing key concepts, and references to some of the assigned cases. These are designed to provide general guidance.

HOWEVER, PLEASE TAKE NOTE OF THE FOLLOWING -- YOU ARE RESPONSIBLE FOR EVERYTHING COVERED IN THE PRESCRIBED READINGS, WHETHER OR NOT THERE IS A REFERENCE IN THE FRAMEWORKS SET OUT BELOW.

When learning a given topic, it is recommended that you first read the textbook. It will provide you with an overview of the subject, and help in understanding the significance of the materials covered in the casebook.

TOPIC #1: PROPERTY -- HISTORY AND CATEGORIES

This topic deals with two fundamental matters -- the origins of the Canadian law of real property, and the main bases for categorizing property interests. With regard to the latter, pay closest attention to the divisions within the law of real property. But notice also the curious way in which leases are classified -- as chattels real, a hybrid category. As you will see, there are different ways in which one might establish a taxonomy of property rights.

At the completion of this topic, you should be able to (a) understand and explain the historic development of Canadian property law, and (b) place property entitlements within the categories of property.

Prescribed Readings:

Textbook: 1-11 and 71-93 (top two lines)
Casebook: 96-106; 110-15

1. The Sources of Canadian Property Law

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



2. Basic Divisions in the Law of Property

- (a) real and personal property
- (b) other categorizations

TOPIC #2: BOUNDARIES

This topic is concerned with the ways in which one discerns and describes land boundaries. Land is a three-dimensional concept. Hence the law must define not just the surface boundaries, but also the upper and lower limits, that is, airspace and subsurface rights. An important element of subsurface rights involves title to mineral estates.

A number of surface boundary issues are covered. These include the following: methods of description, water boundaries, mistaken improvements on another's land, the right to support, and adverse possession. In addition, the boundary between real property and personal property is addressed by reference to the law of fixtures. Here the question is this -- at what point does a chattel associated with land come to be treated as part of the land, and hence fall under the title of the realty?

At the completion of this topic, you should be able to: (a) understand the basic approaches to spatial delimitation of property; legal descriptions; fixtures; and mistaken improvements, and (b) apply and evaluate the rules studied in this topic.

Prescribed Readings:

Textbook: 109-43

Casebook: 173-188 (top three lines); 196-201; 222-31

1. Land: Airspace and Subsurface Rights

- (a) *cujus est solum ejus est usque ad coelum et ad inferos*
- (b) above the surface (*Didow v. Alberta Power Ltd.*)
- (c) below the surface (*Edwards v. Sims*)
- (d) mines and minerals

2. Lateral Boundaries

- (a) land bounded by land
 - i) legal descriptions
 - ii) mistaken improvements
 - iii) lateral and vertical support
- (b) land bounded by water



3. Fixtures

- (a) doctrinal elements (*La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.*)
- (b) 'tenants' fixtures
- (c) contractual terms relating to classification and detachment (*Diamond Neon (Manufacturing) Ltd. v. Toronto-Dominion Realty Co.*)
- (d) fixtures and security interests

TOPIC #3: POSSESSION

Possession, or a right to possession, gives rise to rights and can also lead to the acquisition, and extinguishment, of real property rights. Possession is a concept that pervades Canadian property law. This is demonstrated in this topic through the law of adverse possession. As will be seen, possession also plays an important role in proving Aboriginal title (Topic #5) and in determining whether a licence or a lease has been created (Topic #8). Unity of possession is also an essential feature of shared/co-owned property (Topic #10) while other forms of property interest, such as an easement, are not validly created if they involved the transfer of possession (Topic #9)

Despite its importance, Canadian property law does not recognize a single, exhaustive definition of possession. While there are basic components at the core of possession, it is best understood in the legal and factual context in which it operates. In relation to land, possession may serve as a source of title by virtue of the law of adverse possession provided various doctrinal elements are satisfied.

At the completion of this topic, you should be able to: (a) understand the basic definitions of possession; (b) understand the claims as to function (or purpose) of adverse possession and its basic doctrinal elements; (c) understand the relative nature of title and the role possession plays in relation to finders; (d) understand the role that possession plays in the transfer of title through deliver in relation to gifts; and (e) apply and evaluate the rules studied in this topic.

Prescribed Readings:

Textbook: 153-95
Casebook: 283-351

1. **Basic Definitions** (*Popov*)
2. **Acquisition of title by possession: Squatters** (*Keefer v. Arillotta; Teis v. Ancaster (Town)*)
 - (a) claims as to the function(s) of adverse possession
 - (b) doctrinal elements
 - (c) test of inconsistent use



3. **The Relative Nature of Title: Finders** (*Tracheuk v Olinek; Parker v British Airways; Charrier v Bell; Stewart v Gustafson*)
 - (a) doctrinal elements
 - (b) rights of a finder as against the true owner; an occupier; a prior possessor
 - (c) rights and obligations of the finder
 - (d) rights and obligations of an occupier
 - (e) abandonment

4. **Transfer of Title Through Delivery: Gifts** (*Nolan v Nolan; Re Bayoff Estate*)
 - (a) rationale for delivery requirement
 - (b) doctrinal elements of a gift
 - (c) doctrinal element of donatio mortis causa

TOPIC #4: ESTATES

As noted in Topic #1, one of the features of England land law that forms part of the bedrock of Canadian real property law is the doctrine of estates. Its key function is to determine the temporal limits of landholding. This topic is concerned with freehold estates. (Leasehold estates, i.e., leases, are covered in Topic #8.)

In Canada, there are two freehold estates -- the fee simple, and the life estate. A third form, the fee tail, is now extinct and so receives only brief treatment. The focus here is on two main points. One concerns the means of creating and transferring an estate. The second involves a balancing of rights and duties, etc., when there are sequential owners of the same property. That may occur, for example, where property is devised to the testator's widow for her life, with the property then passing to the testator's children on the death of the widow.

At the completion of this topic, you should be able to (a) understand the temporal limits of freehold property rights as determined by the doctrine of estates; (b) recognize and distinguish among the various types of freehold estates, namely the fee simple, fee tail, life estate, and the means by which such interests are created and transferred; (c) understand the rights and responsibilities applicable to life tenants; and (d) apply and critically analyze the principles relevant to the above.

Prescribed Readings:

Textbook: 197-221
Casebook: 353-90

1. **Fee Simple**
 - (a) creation at common law (*Thomas v. Murphy*)
 - (b) statutory reforms



2. Fee Tail

- (a) historic development
- (b) abolition

3. The Life Estate

- (a) general nature
- (b) creation (*Re Walker; Re Taylor; Christiansen v. Martini Estate*)
- (c) powers and obligations (*Powers v. Powers Estate*)
- (d) life estates arising by operation of law

TOPIC #5: ABORIGINAL PROPERTY RIGHTS IN LAND

This topic is primarily concerned with the law governing the recognition of Aboriginal title. To a lesser extent, attention is paid to rights on reserves. Aboriginal property rights in land are now of considerable importance in the Canadian law of real property. Among the many SCC decision relating to Aboriginal property rights, the *Delgamuukw v BC*; *Haida Nation v BC*; and *Tsilhqot'in Nation v BC* are of primary importance. An understanding of the protection provided by section 35 of the *Constitution Act, 1982* is also essential.

By the end of this topic, you should be able to: (a) understand the requirements to prove Aboriginal title, and Aboriginal rights short of title; (b) understand the content (the rights and obligations) of Aboriginal title once proven (c) understand the limits on the Crown's ability to interfere with Aboriginal title rights and its obligations before doing so, both before and after formal recognition of Aboriginal title; and (d) apply and evaluate the governing principles.

Prescribed Readings:

Textbook: 221-42

Casebook: 391-449 (up to and including Questions and Comments note 3)

1. Nature of Aboriginal Title (*Delgamuukw v. B.C.*; *Tsilhqot'in Nation v. B.C.*)

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

2. Proof of Aboriginal title (*Delgamuukw v. B.C.*; *Tsilhqot'in Nation v. B.C.*)

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

*Students should pay attention to what the SCC says in *Tsilhqot'in Nation* regarding consent **and** be aware that, absent consent, the infringement test for proven Aboriginal title is



established by the SCC in *Tsilhqot'in* and it is **not** the same test as the Sparrow infringement test for Aboriginal rights

4. **The duty to consult and accommodate prior to recognition of Aboriginal title (*Haida Nation v BC*)**
5. **Rights Short of Title (*Delgamuukw v. B.C.*)**
 - (a) nature
 - (b) test for recognition
6. **Reserves and Metis title**

TOPIC #6: THE ORIGIN AND NATURE OF EQUITABLE INTERESTS

Equitable interests in land form a central feature of Canadian real property law. The origins of equity are covered in this topic, with the primary focus being on the evolution of the modern trust in its various forms. Most of the law here is similar to that which exists elsewhere in the common law world. The area in which there is the greatest difference is in relation to the Canadian law governing the remedial constructive trust, which serves as one means of responding to unjust enrichment.

At the conclusion of this topic, you should be able to (a) describe the evolution of equity, including the nature of the 'use' and its role in feudal England, the effect of the *Statute of Uses*, (b) understand the rules governing the creation of trusts; and (c) understand the evolution of the remedial constructive trust in Canada, including the current law relating to remedies for unjust enrichment; and (d) apply and evaluate the basic rules governing the creation of express, resulting, and constructive trusts.

Prescribed Readings:

Textbook: 245-77

Casebook: 461-517

1. **Historic Development of Equity**
 - (a) the development of the Court of Chancery
 - (b) administrative fusion of land and equity
 - (c) 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

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
 - ii) current principles (*Kerr v. Baranow et al.*)

TOPIC #7: CONDITIONAL TRANSFERS AND FUTURE INTERESTS

This topic is concerned with the means of creating future interests in real property, and the principles that regulate the allowable forms of such interests. The kinds of transfers considered here arise mainly (but not exclusively) in relation to wills.

The focus will be on three types of conditional transfers -- gifts subject to (i) conditions subsequent; (ii) determinable imitations; and (iii) conditions precedent. As part of this analysis, the rule against perpetuities will be studied. There have been a number of reforms measures introduced in Canada concerning this rule over the last 50 years. In some provinces, the rule has been abolished altogether. In this topic, the common law version of the rule only is to be studied. For testing purposes, you are not responsible for statutory reforms.

At the end of this topic, you should be able to: (a) comprehend and distinguish the terminology and concepts of determinable, conditional and contingent gifts; (b) state and analyze the effect of invalidity of conditional, contingent and determinable interests; (c) understand the nature of the doctrine of public policy as it affects property transfers, as well as other grounded for invalidity; (d) understand the policies governing, and the elements of, the common law rule against perpetuities; and (e) apply and evaluate the rules studied in this topic.

Prescribed Readings:

Textbook: 279-321
Casebook: 527-63; 565-72; 579-91

1. Types of Future Interests

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

3. Determinable and Conditional Estates (*Caroline (Village) v. Roper*)

4. 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 contrary to 'public policy' (*Leonard Foundation Trust* case)
- (d) restraints on alienation (*Trinity College School v. Lyons*)

5. 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

The main focus of this topic is the law governing *commercial* leases. Fundamental principles are addressed pertaining to the substantive requirements of leasehold estates, the rules governing the transfer of leasehold rights, and the principles governing the termination of leases, especially those relating to termination for breach. Residential tenancies, which are protected by specific legislation in most jurisdictions, are dealt with only in passing.

One of the key divisions in this area is that which exists between leases and licences. Hence, the topic considers that fundamental distinction (see, e.g., the *Fatac* case cited below), as well as the proprietary status of licences.

At the end of this topic, you should be able to (a) recognize, define and distinguish leases and licences; (b) identify and differentiate between the various types of leases, distinguish and define assignments and subleases, understand the limits imposed upon a tenant's ability to assign or sublet, the obligations of landlords and tenants under a lease, and the rights and remedies of the parties upon termination of a lease; (c) understand the common features of residential tenancy reforms; (d) identify and distinguish the types of licences; and (e) apply and evaluate the principles covered in this topic.

Prescribed Readings:

Textbook: 323-58

Casebook: 605-34; 639-61



1. **The Fundamental Nature of a Lease** (*Fatac Ltd (in Liquidation) v. Commissioner of Inland Revenue*)
2. **The Nature of the Landlord's and the Tenant's Interests**
 - (a) assignment v. 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.*)
3. **Obligations of Landlords and Tenants** (*Southwark LBC v. Tanner; Petra Investments Ltd v. Jeffrey Rogers plc*)
4. **Termination and Remedies** (*Highway Properties v. Kelly Douglas & Co.*)
5. **The Proprietary Status of Licences**
6. **Residential Tenancy Reform: General Principles**

TOPIC #9: SHARED OWNERSHIP

At the common law, there were four forms of co-ownership: joint tenancy, tenancy in common, tenancies by the entireties, and co-parcenary. Only the first two of these remain -- the joint tenancy and the tenancy in common. The means of creating these two kinds of shared arrangements differ. However, once created, there is one critical difference between the two: a joint tenancy gives rise to a right of survivorship. This means that when a joint tenant dies, that person's interest is absorbed by the other joint tenant(s). It does not devolve to the estate of the deceased joint tenant.

In addition to the means of creating shared ownership arrangements, the rules governing the dissolution of such relationships is considered in this topic.

At the end of this topic, you should be able to (a) understand the elements of a joint tenancies and tenancies in common, and the rules governing their creation; (b) understand the means by which a joint tenancy can be severed; (c) understand the remedies available to co-owners *inter se* on partition and sale of co-owned property; and (d) apply and evaluate the law governing the forms of co-ownership covered in this topic.

Prescribed Readings:

Textbook: 375-98 (top two lines)
Casebook: 691-718



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" (*Re Bancroft*)
- (c) statutory presumption
- (d) tenancies in common arising by operation of law
- (e) "failed" or "imperfect" joint tenancy
- (f) "severed" joint tenancy

4. Severance of a Joint Tenancy

- (a) the starting point -- the *dictum* from *Williams v. Hensman*
- (b) acts by one joint tenant (*Re Sorensen & Sorensen*)
- (c) by two or more joint tenants
 - i) agreement
 - ii) by a course of conduct
- (d) severance by operation of law

5. Terminating Co-Ownership

- (a) partition and sale
- (b) accounting between co-owners

TOPIC #10: SERVITUDES OVER PROPERTY

This topic is concerned with non-possessory interests in land. Two main forms are considered -- easements and covenants. Passing reference is also made to the interest known as a *profit a*



prendre. The main focus will be on the doctrinal requirements for creating these interests, as well as issues pertaining to the construction of grants, and invalidity and termination.

Take note: there is quite a bit of special terminology in this area of the law. It is advisable that attention be paid to the terms given to the various elements discussed throughout this topic.

By the end of this topic, you should be in a position to (a) understand the nature of easements, covenants, and *profits a prendre*; the rules for the creation, transfer and termination of these interests; (b) solve problems involving servitude interests; and (c) evaluate the law governing servitudes, especially those relating to the running of the burden of positive covenants.

Prescribed Readings:

Textbook: 419-82

Casebook: 751-83; 794-842

1. The Nature of Easements

- (a) the basic concept
- (b) dominant and servient tenements
- (c) accommodating the dominant tenement
- (d) different ownership and occupation of the tenements
- (e) the easement must be capable of forming the subject matter of a grant
- (f) positive and negative easements

2. Creation of Easements (*Nelson v. 1153696 Alberta Ltd.*)

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

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. Profits a Prendre (*British Columbia v. Tener*; *Bank of Montreal v. Dynex Petroleum Ltd.*)

5. Covenants Running With Property (Restrictive Covenants)

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

6. Covenants and Conservation

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

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

8. Invalidity and Termination

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

TOPIC #11: PRIORITIES AND REGISTRATION

Given that different interests in the same parcel of land may be created, it is important to determine which of these interests is superior should a conflict emerge. The basic common law rule is that the first legal interest created prevails over subsequent legal ones. But once equitable interests are involved, the combined effect of common law and equitable principles resulted in a more complex set of principles for determining priority. In the case of land, these legal and equitable priority rules were supplemented by statutory registration systems that affect priority between competing interests and reallocate risk.

The materials below introduce the common law and equitable rules for determining priority. These rules are important to understand because the registration systems – deeds registration



and later, title registration - that followed made different policy choices about which rights are given priority. In order to understand the differences, you must first understand the common law and equitable rules. The materials then introduce you to deeds registration system and some key elements and features of title registration systems.

By the end of this topic, students should be able to: (a) understand the legal and equitable rules governing priority disputes; (b) distinguish between the various deeds-systems models; (c) understand the fundamental elements of title registration; and (d) apply and evaluate the rules considered above in resolving priority disputes.

Prescribed Readings:

Textbook: **7th edition:** 517-54
Casebook: 876-83; 905-42

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 (*Northern Counties v. Whipp.*; *Rice v. Rice*)
- (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 (*C.I.B.C. v. Rockway Holdings Ltd.*)

3. Title Registration

- (a) the three cardinal elements of title registration systems – the curtain, the mirror and the net
- (b) land titles and fraud (*Holt Renfrew v. Henry Singer*)
- (c) the curtain (*Lawrence v. Wright*)
 - i) immediate indefeasibility
 - ii) deferred indefeasibility
- (d) the mirror: title registration and prior unregistered interests (*Holt Renfrew v. Henry Singer*; *Alberta v. McCulloch*)
- (e) the assurance fund



- (f) other features
 - i) personal claims
 - ii) overriding interests
 - iii) caveats
 - iv) Aboriginal title and claims relating to land
 - v) volunteers (i.e. gratuitous transfers)
 - vi) boundaries



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Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada (www.canlii.org). That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts.

Your registration fee also includes free access to the Quicklaw resources of Lexis Nexis. Your ID and password will be arranged and emailed to your email address on file a few weeks after the end of the registration session.

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