Federation of Law Societies of Canada

NCA National Committee on Accreditation

Syllabus
Property

Revised for October 2025

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 self-study of the fundamental principles of the Canadian property law, as applied in Canadian common law jurisdictions.. The core concepts are presented through the use of a standard Canadian property law textbook and selected case law.

The syllabus is organized around the following 11 major topics:

1. Property in context
2. The boundaries of property
3. Possession
4. Common law estates
5. Aboriginal Title and other Indigenous interests in land
6. Equitable interests
7. Qualified transfers and future interests
8. Leases, licences
9. Shared ownership
10. Servitudes over property
11. Priorities and registration

After reading these assigned materials, NCA candidates should be able to:

1. explain the context in which Canadian property law is situated, including its sources and constitutional setting;
2. understand the legal doctrines, principles and rules applicable to the possession and ownership of property and the policies that underlie the law;
3. synthesize the various doctrines, principles, rules and policies covered in the assigned readings;
4. apply those various doctrines, principles, rules and policies to solve problems involving conflicting claims to property; and
5. 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. Candidates are strongly advised to consult all available NCA resources and guides, including “How to Answer Fact Based Law Exam Questions”.

LEARNING RESOURCES

1. Prescribed Materials

a. Kaplinsky, Lavoie & Thomson, *Ziff's Principles of Property Law*, 8th ed. (2023) [the Textbook]
b. Cases and materials assigned for each topic below.

2. Supplemental Reference Materials

a. *Anger & Honsberger's Canadian Law of Real Property*, 3rd ed. (Aurora, ON: Canada Law Book, 2005)
b. M.E. McCallum & A.M. Sinclair, *An Introduction to Property Law*, 7th ed. (Toronto: Butterworths, 2017)
c. D. C. Harris et al., *A Property Law Reader:* 5th ed. (Toronto: Thomson Reuters, 2022)

TOPICS AND READINGS

The following syllabus contains a list of topics in property law. For each topic, a list of prescribed readings from the textbook and key case law is provided. For each topic, there is also a brief outline organizing the key concepts. This outline is designed to offer general guidance, but please take note of the following: you are responsible for all the prescribed readings, whether or not there is a specific reference to it in the frameworks set out below.

TOPIC #1: PROPERTY IN CONTEXT

This topic deals with three fundamental matters: the origins and sources of Canadian property law; the main bases for categorizing property interests; and protections of private property from state intervention. Pay close attention to the reception of English property law into territories already inhabited by organized societies of Indigenous peoples. Pay attention also to the different classifications and categorizations of property interests: private property versus shared or public property; real property versus personal property; possessory versus nonpossessory interests; legal versus equitable interests; etc. Reflect on the *numerus clausus* principle and its implications. Lastly, common law rights, including the right to property, may be regulated or abridged by the state. But which order of government has jurisdiction over property, and to what extent?

At the completion of this topic, you should be able to (a) understand and explain the historic development of Canadian property law; (b) place property entitlements within the categories of property; (c) explain the scope of protections of private property in Canada, including under the law of constructive taking.

Prescribed Reading:

1. Textbook: 1-12; 63-64; 69-86; 89-94; 99-109
2. *PrairieSky Royalty Ltd v Yangarra Resources Ltd*, 2025 ABCA 240 (CanLII), paras. 29-34.
3. *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 (CanLII), [2022] 2 SCR 772

Outline of Key Concepts:

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

TOPIC #2: THE BOUNDARIES OF PROPERTY

This topic is concerned with the ways in which one discerns and describes land boundaries. Land is three-dimensional. 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 the latter involves mineral estates, which can be conceived as a discrete interest.

Key concepts include: the primary methods for describing the lateral boundaries of land; riparian boundaries and the legal effects of accretion; the degree to which rights in land extend upwards and downwards (pay close attention to the application of the so-called "Latin Maxim"); and rights of support. The legal boundary between real property and personal property is addressed through the law of fixtures. Here the main question is at what point does a chattel associated with land come to be treated as part 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 Reading:

1. Textbook: 111-148
2. *Didow v. Alberta Power Limited*, 1988 ABCA 257
3. *Blewman v Wilkinson* [1979] 2 NZLR 208, available on Lexis Quicklaw and online: https://www.nzlii.org/nz/cases/NZCA/1979/45.html
4. *R v Nikal,* [1996] 1 SCR 1013
5. *MacKenzie v Alberta (Registrar, North Alberta Land Registration District)*, 2022 ABCA 277, paras. 30-33
6. *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.*, 1969 CanLII 740 (BC CA)
7. *Scott v. Filipovic*, 2015 BCCA 409

Outline of Key Concepts:

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

TOPIC #3: POSSESSION

Possession, or a right to possession, gives rise to rights and can also lead to the acquisition or extinguishment of title. Possession is a concept that pervades Canadian property law. This is demonstrated in this topic largely through the laws that govern rights to unowned chattels, found chattels, and abandonment of chattels by their true owner. 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.

This section also explores the important concept of bailment, a temporary transfer of possession for a specific purpose, as well as the rights and duties bailees and bailors have against each other and third parties. Possession and possessory title are also important common law concepts in relation to land, but a claim of adverse possession is no longer tenable in most provinces due to statutory reforms and is not covered.

At the completion of this topic, you should be able to: (a) understand the basic definitions of possession; (b) understand the different tests employed by Canadian courts to determine who has the strongest claim to a chattel under a variety of different scenarios; (c) understand and apply the law of bailment; (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 Reading:

1. Textbook: 155-163; 177-186; 186-197
2. *The Tubantia* [1924] All ER Rep 615, available on Lexis Quicklaw
3. *Trachuk v. Olinek*, 1995 CanLII 9251 (AB KB)
4. *Parker v British Airways Board* [1982] QB 1004, [1982] 1 All ER 834, available on Lexis Quicklaw
5. *Popov v Hayashi,* 2002 Cal. Super. LEXIS 5206, available on Lexis Quicklaw

6. *Thomas v Times Book Company* [1966] 2 All ER 241, [1966] 1 WLR 911, available on Lexis Quicklaw
7. *Stewart v. Gustafson*, 1998 CanLII 14001 (SK KB)
8. *Re Bayoff Estate*, 2000 SKQB 23 (CanLII)
9. "The Pioneer Container", [1994] UKPC 9 (available online from BAILII, on https://www.bailii.org/)
10. *Punch v. Savoy's Jewellers Ltd. et al.*, 1986 CanLII 2759 (ON CA)

Outline of Key Concepts:

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

As noted in Topic #1, one of the features of England's 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, are covered in Topic #8.)

Canadian property law recognizes two common law freehold estates – the fee simple, and the life estate. A third form, the fee tail, has been abolished and so receives only brief treatment. The focus here is on two main points. The first concerns the means of creating and transferring

an estate *inter vivos* or by will. Which words of conveyancing, at common law and as modified by provincial statute, successful convey a fee simple or a life 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. On an exam, you may be asked to interpret a will or some other instrument and to explain its likely legal effects. Alternatively, you may be asked to draft an instrument to create specific interests in property.

Prescribed Reading:

1. Textbook: 199-210, 210-215
2. *Re Walker* [1925] O.J. No. 159, available on Lexis Quicklaw
3. *Re Taylor*, 1972 CanLII 591 (ON SC)
4. *Martini (Estate) v. Christensen*, 1999 ABCA 111 (CanLII)

Outline of Key Concepts:

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.

Note: For the purpose of the NCA exam, a grant or devise will be presumed to create an estate in fee simple, unless a contrary intention appears from the instrument. However, it is important to check the provincial conveyancing legislation where you intend to practice to ensure that you are using the correct language to describe the nature of the estate in a conveyance.

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

This topic is concerned with Aboriginal title and other forms of Indigenous land tenure in Canada. The question of the rights of the Indigenous peoples of Canada to land and natural resources is of critical importance to Canadian property law. 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, but only the latter is assigned. An understanding of the protection provided by section 35 of the *Constitution Act, 1982*, is also essential.

Understanding statutory regimes and modern treaties is also pre-requisite to the practice of property law in Canada. To that end, candidates should familiarize themselves with the provisions of the *Indian Act* relating to Certificates of Possession, and the provisions in the Nisga'a Final Agreement embedded in federal and provincial legislation (1999) designed to create property rights in lands under self-government.

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; (d) compare Aboriginal Title, statutory regimes, and modern treaties in terms of the rights of possession, use, enjoyment, and alienability they confer; and (e) apply and evaluate the governing principles.

Prescribed Reading:

1. Textbook: 224-245; 245-250
2. *Indian act,* RSC 1985, c I-5
3. *Nisga'a Final Agreement Act,* SC 2000, c 7, ss 4, 7
4. *Nisga'a Final Agreement Act,* RSBC 1999, c 2, ss 3, 6; and chapter 3, ss 3-4
5. *Tsilhqot'in Nation v. B.C.,* 2014 SCC 44 (CanLII), [2014] 2 SCR 257
6. *K'omoks First Nation v. Thordarson and Sorbie*, 2018 BCPC 114 (CanLII)

Outline of Key Concepts:

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)**
   *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**

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

Equitable interests form a central feature of Canadian 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. Canadian property law stands apart from other common law jurisdictions in its unique application of the remedial constructive trust, which serves as one means of responding to unjust enrichment. The remedial constructive trust evolved largely as a remedy for unjust enrichment between unmarried couples. More recently, some Canadian provinces have granted such couples the same rights on the dissolution of the relationship as married partners. For the purposes of this exam, "family property" or "matrimonial property" legislation will be ignored.

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 as well as the effect of the *Statute of Uses* on modern day trust law in Canada; (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 Reading:

1. Textbook: 253-286
2. *Pecore v. Pecore*, 2007 SCC 17 (CanLII), [2007] 1 SCR 795
3. *Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 SCR 217
4. *Pettkus v. Becker,* 1980 CanLII 22 (SCC), [1980] 2 SCR 834
5. *Kerr v. Baranow,* 2011 SCC 10 (CanLII), [2011] 1 SCR 269
6. *Moore v. Sweet*, 2018 SCC 52 (CanLII), [2018] 3 SCR 303

1. Historic Development of Equity

(a) the development of equitable property interests in 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

(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
  ii) the Joint Family Venture (*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: interests subject to (i) conditions subsequent; (ii) determinable imitations; and/or (iii) conditions precedent. This topic looks closely not only at the *form* such a condition might take but also its nature. Some attached conditions may be deemed invalid as too uncertain, or as illegal restraints on alienation, or contrary to public policy. In addition, the Rule Against Perpetuities polices against conditions that may be resolved too far in the future. There have been a number of statutory reforms to the

rule in Canada over the last 50 years, and 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.

You will be expected to identify and characterize conditional transfers, to assess their validity, and to explain what consequences follow a voided condition with respect to the subject property. As part of this analysis, the rule against perpetuities will also be studied.

At the end of this topic, you should be able to: (a) comprehend and distinguish the terminology and concepts of determinable, conditional and contingent interests; (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 grounds 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 Reading:

1. Textbook: 287-331
2. *Stuartburn (Municipality) v. Kiansky*, 2001 MBQB 94 (CanLII)
3. *McKeen (Beatrice) Estate v. McKeen (Harry L.) Estate*, 1993 CanLII 8203 (NB KB)
4. *Canada Trust Co. v. Ontario Human Rights Commission* (C.A.), 1990 CanLII 6849 (ON CA) [*Leonard Foundation*]
5. *McCorkill v. Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased, 2014 NBQB 148*
6. *Spence v BMO Trust*, 2016 ONCA 196
7. *MacDonald v. Brown Estate*, 1995 CanLII 4552 (NS SC)
8. *Hayes (H.J.) Company Limited v. Meade et al*., 1987 CanLII 7479 (NB KB)
9. *Fennell v. Fennell*, 2011 CanLII 93932 (NL SC)
10. *Blackburn v. McCallum*, 1903 CanLII 68 (SCC), 33 SCR 65
11. *Ottawa (City) v Clublink Corp*. ULC, 2021 ONCA 847

Outline of Key Concepts:

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

The main focus of this topic is the law governing *commercial* leases, which, for the most part, remain governed by the common law in Canada. The leasehold is an estate in land – not a freehold estate, but an interest in land nonetheless. Fundamental principles are addressed pertaining to the substantive requirements of leasehold estates, the rules governing the transfer of leasehold rights by the tenant or the landlord, and the principles governing remedies, especially those relating to termination for breach. Residential tenancies, which are governed by provincial and territorial statutes, are dealt with only in passing.

One of the key divisions in this area is that which exists between leases and licences. This topic considers their fundamental distinction as well as the (limited) 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; (c) distinguish and define assignments and subleases including 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; (d) understand the common features of residential tenancy reforms; (e) identify and distinguish the types of licences; and (f) apply and evaluate the principles covered in this topic.

Prescribed Reading:

1. Textbook: 333-386
2. *Merger Restaurants v. D.M.E. Foods Ltd.*, 1990 CanLII 7997 (MB CA)
3. *Sundance Investment Corporation Ltd. v. Richfield Properties Limited*, 1983 ABCA 33 (CanLII)
4. *London Borough of Southwark and Another v. Mills and Others (A.P.),* available online at https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd991021/mills-1.htm

5. *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, 1971 CanLII 123 (SCC), [1971] SCR 562
6. *Stiles v. Tod Mountain Development Ltd.*, 1992 CanLII 2340 (BC SC)

Outline of Key Concepts:

1. The Nature of a Lease
Pay attention to the dual nature of the lease, which is both proprietary and contractual.

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.*)

Pay close attention to the specific language of the lease in *Richfield Properties*. Remember that the default position at common lawis that the tenant has the right to assign the lease, but that if the tenant gives up that right, the landlord may withhold consent even arbitrarily and unreasonably .

(c) Obligations of Landlords and Tenants
(i) rent
(ii) the covenant for quiet enjoyment

(d) Termination and Remedies (*Highway Properties v. Kelly Douglas & Co.*)

(e) The Proprietary Status of Licences

(f) Residential Tenancy Reform: General Principles

TOPIC #9: SHARED OWNERSHIP

The focus of this unit is on two forms of co-ownership: the joint tenancy and the tenancy in common. Other sharing arrangements, such as condominiums, will not be part of the exam. The means of creating a joint tenancy or a tenancy in common 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) and does not devolve to the estate of the deceased joint tenant. One caveat to the right of survivorship is the "severance" of a joint tenancy in law or in equity, which converts the relationship to a tenancy in common and obliterates the right of survivorship.

In addition to the means of creating shared ownership arrangements, the rules governing disputes between co-owners as well as 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 Reading:

1. Textbook: 387-409
2. *Robb v. Robb*, 1993 CanLII 1381 (BC SC)
3. *Jansen v Niels Estate*, 2017 ONCA 312
4. *Hansen Estate v Hansen*, 2012 ONCA 112

Outline of Key Concepts:

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

This topic is concerned with non-possessory interests in land (recall the classification of property interests in Topic #1). 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 easements and covenants, 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. Pay close attention to two traditional doctrinal requirements still insisted on in Canadian property law. First, an easement or a covenant cannot be held "in gross" but must be attached to some dominant or benefitting *land*. Second, only restrictive covenants are enforceable in Canada against a successor in title: Canadian courts have so far resisted enforcing positive obligations in a covenant.

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 Reading:

1. Textbook: 429-493;
2. *Bairn Corporation v Gabert,* 2022 ABKB 668 (CanLII)
3. *Wong v Beaumont Property Trust, Ltd*., [1964] 2 All ER 119, [1965] QB 173 (Court of Appeal), available on Lexis Quicklaw and on BAILII at https://www.bailii.org/ew/cases/EWCA/Civ/1964/4.html
4. *Barton v. Raine et al.,* 1980 CanLII 1932 (ON CA)
5. *Laurie v. Winch*, 1952 CanLII 10 (SCC), [1953] 1 SCR 49
6. *Malden Farms Limited v. Nicholson*, 1955 CanLII 117 (ON CA)
7. *Kaminskas v. Storm,* 2009 ONCA 318 (CanLII)
8. *Tulk v Moxhay,* [1848] EWHC Ch J34, [1843-60] All ER Rep 9, available on Lexis Quicklaw and on BAILII at https://www.bailii.org/ew/cases/EWHC/Ch/1848/J34.html
9. *Berry v. Indian Park Association,* 1999 CanLII 1294 (ON CA)
10. *880682 Alberta Ltd. v. Molson Breweries Properties Ltd.*, 2002 ABQB 771
11. *Swan Properties Ltd. V Irving Oil*, 2004 NLSCTD 206

12. *Durham Condominium Corporation No. 123 v. Amberwood Investments Limited*, 2002 CanLII 44913 (ON CA)

Outline of Key Concepts:

1. The Nature of Easements

(a) the basic concept
(b) the requirements for a valid easement
  i) dominant and servient tenements
  ii) accommodating the dominant tenement
  iii) different ownership and occupation of the tenements
  iv) 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

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 the reallocation of 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 the 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 Reading:

1. Textbook: 529-568
2. *Chippewas of Sarnia Band v. Canada (Attorney General)*, 2000 CanLII 16991 (ON CA)

Outline and Key Concepts:

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

Canadian Publishers

Thomson Reuters
(also **Carswell** and **Canada Law Books**)
19 Duncan Street,
Toronto, ON M5H 3H1

Tel: 416.609.3800 or 1.800.387.5164
Email: CAPTeam@thomsonreuters.com
(ask about the 10% NCA discount code)
URL: **https://store.thomsonreuters.ca/en-ca/home**

Irwin Law Inc.
(University of Toronto Press)
14 Duncan St.
Toronto, ON M5H 3G8

Tel: (Canada & U.S.) 416.862.7690 or 1.888.314.9014
Fax: 416.862.9236
Email: contact@irwinlaw.com
URL: **http://www.irwinlaw.com/**

Emond Montgomery
60 Shaftesbury Ave.
Toronto, ON M4T 1A3

Tel: 416.975.3925
Fax: 416.975.3924
Email: info@emp.ca
URL: **http://www.emond.ca/**

LexisNexis Canada Inc.
(For printed material only)

Contact: Customer Service
Tel: 905.415.5823 or 1.800.668.6481
Fax: 905.479.4082 or 1.800.461.3275
Email: Customerservice@lexisnexis.ca
URL: **http://www.lexisnexis.ca/en-ca/home.page**

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 exam registration fee also includes free access to the Advance Quicklaw resources of LexisNexis. 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.

Sign in to Advance Quicklaw via **http://www.lexisnexis.com/ca/legal.** The first time you sign in you will be asked to change or personalize your password. Remember your User ID and password are personal, and should not be shared with anyone.

If you forget or lose your password to Advance Quicklaw you may retrieve it by clicking on the "Forget Password?" link on the sign-in page. Any other issues please Email **ftang@flsc.ca**.

Please review and abide by all Terms of Use when you receive your Advance Quicklaw credentials, otherwise your LexisNexis account will be closed without any prior notice.

LexisNexis Advance Quicklaw customer support is available via **service@lexisnexis.ca**, or calling 1.800.387.0899.