

# PROPERTY

## Course Syllabus: 2011-2012

Professor Howell

### Recommended Reference Sources

1. B. Ziff, *Principles of Property Law*, 5<sup>th</sup> ed., Carswell, Scarborough, Ont. 2010 [Earlier editions are also suitable for the matters of general principle covered in this course.]
2. G.W. Hinde, D.W. McMorland, P.B.A. Sim, *Land Law*, Butterworths, Wellington, N.Z. 1978 (2 volumes) (On Reserve). [Note the second edition, (G.W. Hinde and D.W. McMorland with N.R. Campbell and D.P. Grinlinton), was published in 1997 and presents more recent N.Z. cases and N.Z. developments, but these are not directly applicable to our course.]
3. Megarry & Wade, *The Law of Real Property*, 6<sup>th</sup> ed., Stevens, London, U.K. 1999. [Note the 5<sup>th</sup> and 4<sup>th</sup> editions are still suitable with respect to the historical dimensions covered in this course.]
4. The *Wills, Estates and Succession Act, 2009*, SBC 2009 c. 13 (WES) was passed in September 2009. It is not yet proclaimed in force, but may be proclaimed during the current academic year. This enactment reforms various statutory provisions to which reference is made in this course. It also consolidates the following enactments that have some relevance to this course:

*Wills Act*  
*Estate Administration Act*  
*Wills Variation Act*

A chart correlating WES with the current provisions will be provided.

**Assigned Readings: All material is assigned unless otherwise stated – for example, by a “Not Assigned” or a “see generally” notation. Examinations will cover assigned material and, additionally, any information provided by class lecture.**

1. **What is property?**

Chapter 1, Lawson and Rudden, *The Law of Property*

2. **Classification of Property**

Lawson & Rudden, ch. 2

3. **The Dimensions of Land**

**(A) Air space and subterranean areas (CB pp 1-31)**

- (i) *Kelsen v. Imperial Tobacco Co.*, [1957] 2 Q.B. 334 (Q.B.)
- (ii) *Bernstein v. Sky Views and General Ltd.*, [1977] 3 W.L.R. 137 (Q.B.)
- (iii) See generally extracts from *The Queen in Right of Manitoba v. Air Canada* [Not Assigned]
- (iv) *Hashem v. Nova Scotia Power Corporation* (1980), 43 N.S.R. (2d) 150
- (v) *Attorney General of Manitoba v. Campbell*, (1983) 26 C.C.L.T. 168 (Man. Q.B.) and the case comment by McLaren, 26 C.C.L.T. 326-332 (Casebook, p. 18). For subsequent proceedings see (1985), 32 C.C.L.T. (Man. C.A.).
- (vi) See generally *Didow v. Alberta Power Ltd.* (1988), 50 R.P.R. 31 (Alta. C.A.). [Not assigned reading].
- (vii) *Lewvest v. Scotia Towers Ltd.* (1981), 126 D.L.R. (3d) 139 (Supp. Casebook, p. 10). (C.f. the approach taken in *Woollerton and Wilson Ltd. v. Richard Costain Ltd.*, [1970] 1 All E.R. 483 (Ch. 1969))
- (viii) *Edwards v. Sims* (1929), 24 S.W. (2d) 619 (Ky.C.A.)
- (ix) *Hammonds v. Central Kentucky Natural Gas Co.* (1934), 75 S.W. (2d) 204 (Ky. S.C.)

**(B) Fixtures (Casebook pp. 32-50):**

- (i) *Re Davis*, [1954] O.W.N. 187 (Ont. H.C.)
- (ii) *La Salle Recreations Ltd. v. Canadian Camdex Investment Ltd. Ltd.* (1969), 4 D.L.R. (3d) 549 (B.C.C.A.). [This leading case in British Columbia was applied most recently in *Boxrud v. R.* (1996), 12 R.P.R. (3d) 163 (F.C.T.D.). (not assigned)].
- (iii) *Diamond Neon (Manufacturing) Ltd. v. Toronto Dominion Realty Co. Ltd.*, [1976] 4 W.W.R. 664 (B.C.C.A.)
- (iv) *L&R Canadian Enterprises Ltd. v. Nuform Industries* (1984), 34 R.P.R. 1 (B.C.S.C.)
- (v) *Lichty v. Voight* (1977), 80 D.L.R. (3d) 757 (Ont. Co. Ct.)
- (vi) [See *Alberta v. Hansen* (1998), 21 R.P.R. (3d) 126 (Alta. Q.B.) re a hydro dam (not assigned)].

**(C) Water (Casebook pp. 51-106):****(i) Riparian Rights**

- (a) Extract from *Water Act*, R.S.B.C. 1996, c. 483 (as amended) esp. s. 2 and s. 42.

- (b) *Johnson v. Anderson*, [1935-37] 51 B.C.R. 413 (B.C.S.C.)
- (c) *Steadman v. Erickson Gold Mining Corp* (1987), 43 DLR (4<sup>th</sup>) 712 (BCSC)
- (d) Note in *Bryan's Transfer Ltd. v. Trail (City)* (2010), 11 B.C.L.R. 289 (BCCA) at para. 26 Kirkpatrick, JA noted (in *obiter*):

“(t)here is no dispute that it is within the legislative competence of the Province to modify, alter or abolish common law property rights. Thus certain riparian rights, such as the use of water, have been abrogated by statute: *Water Act* R.S.B.C. 1996, c. 483 [section 2(1) and (2) is cited]”.

**(ii) Percolating Water**

- (a) *Bradford v. Pickles*, [1895] A.C. 587 (H.L.)
- (b) Note, the cases of *Penno v. Government of Manitoba* and *Pugliese v. National Capital Commission*, to be considered under the heading "support", relate directly to percolating water.
- (c) *Steadman v. Erickson Gold Mining Corp.* (1989), 35 B.C.L.R. (2d) 130 (B.C.C.A.).
- (d) Extract from *Water Protection Act*, R.S.B.C. 1996, c. 484.
- (e) Note generally, *Drinking Water Protection Act*, SBC 2001, c. 9 (in effect from November 1, 2004)

**(iii) Ownership of Beds of Streams, Lakes and Ponds**

- (a) *Micklethwaite v. Newlay Bridge* (1886), 33 Ch. D. 133, 145 (CA)
- (b) *Canadian Exploration Limited v. Rotter* (1960), 26 D.L.R. (2d) 133 (SCC)
- (c) Sections 55 and 56 *Land Act*, R.S.B.C. 1996, c. 245
  - (d) See generally, *R. v. Lewis* (1996), 19 B.C.L.R. (3d) 244, 265-267 (S.C.C.) (Not Assigned)

**(iv) Access by Riparian Owners**

- (a) *District of North Saanich v. Murray* (1975), 54 D.L.R. (3d) 306 (B.C.C.A.)
- (b) *Welsh v. Marantette* (1983), 44 O.R. (2d) 137 at 148-153 (Ont. H.C.) *affd* (1985) 52 O.R. (2d) 37 (Ont. C.A. - majority); Leave to Appeal S.C.C. denied 54 O.R. (2d) 800. This case will also be considered in the context of "support")

**(D) Support (Casebook pp. 107-136)**

- (i) *Cleland v. Berberick* (1915), 25 D.L.R. 583 (Ont. H.C.) *affd.* (1916) 29 D.L.R. 72 (Ont. C.A.)
- (ii) *Bremner v. Bleakley*, [1924] 2 D.L.R. 202 (Ont. H.C.)
- (iii) *Gillies v. Bortoluzzi*, [1953] 1 D.L.R. 335 (Man. Q.B.)

- (iv) *Rytter v. Schmitz* (1974), 47 D.L.R. (3d) 445 (B.C.S.C.). [For a recent example see *Bullock Holdings Ltd. v. Jerema*, [1998] 15 R.P.R. (3d) 185 (B.C.S.C.) (not assigned)]
- (v) *Welsh v. Marantette* (1983), 44 O.R. (2d) 137, pages 142-148. [Appeal to Ont. C.A. did not involve right of support]
- (vi) *Pugliese v. National Capital Commission* (1977), 79 D.L.R. (3d) 592 (Ont. C.A.) The Supreme Court of Canada affirmed but on different grounds see (1979) 97 D.L.R. 631.
- (vii) Recent cases include:
  - support/trespass – *Lau v. Rai* (2010), 2 B.C.L.R. (5<sup>th</sup>) 119 (BCCA)
  - considering the application of *Pugliese* – *Stinson v. Lenehan* (1989), 8 R.P.R. (2d) 45 (N.B.Q.B.).
 [These cases are *not* assigned.]

**(E) Accretion (Casebook pp. 137-161):**

- (i) *Southern Centre of Theosophy Inc. v. State of South Australia*, [1982] 1 All E.R. 283 (P.C.) (This recent short case contains a good general and modern discussion from an authoritative source as to the nature of accretion).
- (ii) *Attorney-General of British Columbia v. Neilson* (1956), 5 D.L.R. (2d) 449 (S.C.C.)
- (iii) *Re Bulman* (1966), 57 D.L.R. (2d) 658 (B.C.S.C.)
- (iv) *Re Monashee Enterprises Ltd. and Minister of Recreation and Conservation for British Columbia* (1981), 124 D.L.R. (3d) 372 (B.C.C.A.) [followed recently in Ontario in *White v. Rosseau (Village)* (1995), 49 R.P.R. (2d) 88 at 91-92 (Ont. Div. Ct.)]. See also *Johnson v. Alberta* (2001), 203 D.L.R. (4<sup>th</sup>) 476 (Alta. Q.B.) [*White* and *Johnson* are not assigned].
- (v) Note, in *Bryan's Transfer Ltd. v. Trail (City)* (2010), 11 B.C.L.R. (5<sup>th</sup>) 289 the Crown contended that ss 94-96 of the *Land Title Act* constituted a complete code for the determination of accretion. An element of “in the public interest” would then have been included. The BCCA rejected this interpretation, finding the legislation to concern only an assessment of whether it is in the public interest that a plan be filed in the LTO to reflect the accretion. The position concerning the filing of such a plan was left open. (This case is NOT assigned.)

**4. Basic Principles of Land Law (Casebook pp. 162-203)**

<u>Subject</u>	<u>Reading</u>
The Doctrine of Tenure	Casebook pp. 162-170
The Doctrine of Estates	Casebook pp. 170-180
Equitable Interests <ul style="list-style-type: none"> <li>• Use</li> <li>• Statute of Uses 1535</li> </ul>	Casebook pp. 181-188

- Use on a Use
- Trust
- The Nature of Equitable Rights

Relationship of Real and Personal Property (successive Interests) Casebook pp. 189-195

- *Re Swan*
- *Re Fraser*

Marital Unity: Common Law and Equity Casebook pp. 196-202  
Separate Property Regime/Claims Upon a Breakdown of Marriage

## 5. Issues in Aboriginal Title (Casebook pp. 204-257)

- (i) Introduction
- (ii) *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4<sup>th</sup>) 193 (SCC)
- (iii) *R. v. Marshall; R. v. Bernard* (2005), 255 D.L.R. (4<sup>th</sup>) 1 (SCC)
- (iv) Comment will be made on other cases and developments, including aspects of Cultural Property or Traditional Knowledge

## 6. Issues of Indefeasibility (Casebook pp. 258-298)

- (i) *Land Title Act*, RSBC 1996 c. 250  
(as amended – in particular by the *Miscellaneous Statutes Amendment (No. 2) 2005*, SBC 2005, c. 35, s. 14 effective November 24, 2005 (RA))
  - s. 23(2) generally
  - s. 23(2)(i)
  - s. 25.1
  - Repeal of s. 297(3)
- (ii) General principle – *Creelman v. Hudson Bay Insurance Company*, [1920] AC 194 (PC)
- (iii) *Gibbs v. Messer* [1981] AC 248 (PC)
- (iv) [C.f. *Lawrence v. Wright* (2007) 51 RPR (4<sup>th</sup>) 1 (Ont. C.A.) (Not assigned)]
- (v) *Frazer v. Walker*, [1967] 1 AC 569 (PC)
- (vi) *Pacific Savings and Mortgage Corp v. Can-Corp Developments Ltd.* [1982] 4 WWR 239 (BCCA)
- (vii) [Note the limitation of the indefeasibility principle to “fee simple” estates – see *Gill v. Buckholtz* (2008), 85 B.C.L.R. (4<sup>th</sup>) 170 (BCCA) and *Oehlerking Estate v. John Doe* (2009), 92 B.C.L.R. (4<sup>th</sup>) 234 (BCCA) – Not Assigned]

- (viii) [Some areas of Ontario are subject to title registration (or the gaining of title by registration) similar to that in a Torrens system, but based on English legislation. The principle of *deferred indefeasibility* is followed. See *Lawrence v. Wright* (2007), 51 RPR (4<sup>th</sup>) 1 (Ont. CA) – Not assigned]
- (ix) **Notice of Unregistered Interests**
  - (a) Section 29, *Land Titles Act*, R.S.B.C. 1996, c. 250
  - (b) *Central Station Enterprises Ltd. v. Shangri-La Estates Limited* (1979), 14 B.C.L.R. 1 (BCSC)
  - (c) *Me-N-Ed's Pizza Parlour Ltd. v. Franterra Development Ltd.*, [1975] 6 W.W.R. 752 (B.C.S.C.)
  - (d) See generally *Woodwest Developments Ltd. v. Met-Tec Installments*, [1982] 6 W.W.R. 624 (B.C.S.C.) (On Reserve). [This case provides a useful reference source to many of the precedents in this context. It is not assigned].
  - (e) *Nicholson v. Riach* (1997), 34 B.C.L.R. (3d) 381 (B.C.S.C.)
  - (f) With respect to law reform proposals, see *Report on Section 29(2) of the Land Title Act and Notice of Unregistered Interests*, BCLI (January 1, 2011) at <http://www.bcli.org/bclrg/projects/real-property-review> (Not assigned)

## 7. **The Fee Simple (Casebook pp. 299-302)**

- (i) "Words of Limitation" and "Words of Purchase"
- (ii) Section 19, *Property Law Act*, R.S.B.C. 1996, c. 377
- (iii) Section 24, *Wills Act*, R.S.B.C. 1996, c. 489
- (iv) *Re Ottewell* (1969), 9 D.L.R. (3d) 314 (S.C.C.)
- (v) Interpretation of wills – see generally *Smith Estate* (2010), 3 B.C.L.R. (5<sup>th</sup>) 93 (BCCA) (Not assigned).

## 8. **The Life Estate (Casebook pp. 303-353)**

### (A) **Repugnancy – A fee simple or a life estate?**

- (i) *Re Walker* (1925), 56 O.L.R. 517 (Ont. App. Div.)
- (ii) *Re Richer* (1919), 50 D.L.R. 614 (Ont. App. Div.)
- (iii) *Re Shamas* (1967), 63 D.L.R. (2d) 300 (Ont. C.A.)

- (iv) See generally *Re Tremblay and Township of Tay* (1984), 45 O.R. (2d) 521 (On Reserve) (re interpretation of *inter vivos* deed)

**(B) Creation**

**(i) By Act of the Parties**

- Life of holder
- *pur autre vie*

Note:

Section 19, *Property Law Act*, R.S.B.C. 1996, c. 377

Section 24, *Wills Act*, R.S.B.C. 1996, c. 489

**(ii) By Statute**

- *Land (Spouse Protection) Act*, R.S.B.C. 1996, c. 246
- Section 96, *Estate Administration Act*, R.S.B.C. 1996, c. 122

**(C) Rights of Relationship Between Holders of Life Estates and Remainders and Reversions**

**(i) Waste**

**(a) Legal**

- *Hiltz v. Langille* (1959) 18 D.L.R. (2d) 464 (N.S.S.C.)

**(b) Equitable**

- *Vane v. Lord Barnard* (1716) 23 E.R. 1082
- *City of New Westminster v. Kennedy*, [1918] 1 W.W.R. 489 (B.C. Co. Ct.)
- Section 11, *Law and Equity Act*, R.S.B.C. 1996, c. 253

**(ii) Liability for Taxes and Remainder Interests:**

- (a) *Mayo v. Leitovski*, [1928] W.W.R. 700 (Man. K.B.)
- (b) *Morris v. Howe* (1982), 31 R.P.R. 51 (Ont. H.C.) (Supp. Casebook, p. 155).
- (c) See also *Aho v. Kelly* (1998), 57 B.C.L.R. (3d) 369 (B.C.S.C.) (not assigned).
- (d) Note generally the *Trust and Settlement Variation Act*, R.S.B.C., 1996, c. 463

**(D) Family/Spousal Issues**

- Historical

- Doctrine of Marital Unity
- Dower
- Curtesy
- Modern Statutes and Case Law: Family Relations
  - See chart, Casebook p. 341
  - *Walsh v. Bona* (2002), 221 DLR (4<sup>th</sup>) 1 (SCC)
  - *Tataryn v. Tataryn Estate* [1994] 2 SCR 807
  - Note re *Howard v. Howard Estate* (1997), 32 B.C.L.R. (3d) 1 (BCCA)
  - *Picketts v. Hall (Estate)* (2009), 95 B.C.L.R. (4<sup>th</sup>) 83; 2009 BCCA 329 (July 16, 2009) – [You should be aware of this case to the extent covered in class]
  - [Note the earlier case *Saugested v. Saugested* (2008), 77 B.C.L.R. (4<sup>th</sup>) 170 (BCCA) – Not Assigned]
  - Comment will be made in class concerning *Mawdsley v. Meshen* (2010), 9 B.C.L.R. (5<sup>th</sup>) 106 (BCSC) with respect to:
    - Wills variation (paras. 310-334)
    - Potential use of the *Fraudulent Conveyance Act*, RSBC 1996, c. 163 (paras. 201-208) with respect to a pre-death *inter vivos* conveyance. *Mawdsley* itself is *not* assigned. It goes well beyond the scope of this course. However, you need to be aware of the broad issues pointed out in class.
  - Read paras. 19 to 62 of *Austin v. Goerz* (2007), 74 B.C.L.R. (4<sup>th</sup>) 39 at 45 to 57 (2007)
  - Recent discussions of “marriage-like” relationships can be found in *L.E. v. D.J.* [2011] BCJ No. 951, 2011 BCSC 671 and *Gosbjoir v. Krompocker* (2008) 82 B.C.L.R. (4<sup>th</sup>) 147, 163-177 (BCSC) (On Reserve) (Not assigned).
  - For a recent typical matrimonial property proceeding see *Foster v. Foster* (2007), 64 B.C.L.R. (4<sup>th</sup>) 259 (BCCA) (On Reserve) (Not assigned)

## 9. Co-Ownership - Concurrent Estates (Casebook pp. 354 - 450)

### (A) Types of Co-ownership

- (i) Tenancy by Entireties  
- Section 12, *Property Law Act*, R.S.B.C. 1996, c. 377
- (ii) Coparcenary
- (iii) Tenancy in Common
- (iv) Joint Tenancy

### (B) Creation of Joint Tenancies and Tenancies in Common

- (i) *Re Bancroft Eastern Trust Co. v. Calder*, [1936] 4 D.L.R. 571 (N.S.S.C.)

- (ii) *Winchester v. McCullough* (2000), 30 R.P.R. (3d) 5 (NBQB)
- (iii) Section 11, *Property Law Act*, R.S.B.C. 1996, c. 377 - See *Robb v. Robb* (1994), B.C.L.R. (2d) 7, at 12-13 (B.C.S.C.) (On Reserve)
- (iv) Section 18, *Property Law Act*, R.S.B.C. 1996, c. 377
- (v) Role of Equity
  - Interpretation – favours a Tenancy in Common
  - Remedial: *Bull v. Bull* [1955] 1 QB 234 (CA)
  - Substantive
    - Land purchased by two or more persons with unequal contributions will be regarded in equity as a Tenancy in Common, even if a joint tenancy at law
    - Commercial transactions, such as a partnership, resulting in co-ownership are presumed to be Tenancies in Common in equity
    - Mortgagees (lenders on security of land) are presumed to be Tenants in Common in equity

**(C) Relations Between the Co-Owners**

- (a) Ownership and Possession
- (b) Equitable Waste
- (c) Share of Profits
  - (i) *Spelman v. Spelman*, [1944] 2 D.L.R. 74 (B.C.C.A.)
  - (ii) Section 71 *Estate Administration Act*, R.S.B.C. 1996, c. 122
- (d) Share of Expenses
  - (i) Sections 13, 14 *Property Law Act*, R.S.B.C. 1996, c. 377
  - (ii) *Leigh v. Dickeson* (1884), 15 L.R.Q.B. 60 (C.A.)
  - (iii) *Bernard v. Bernard* (1987), 12 B.C.L.R. (2d) 75 (BCSC)
- (e) With respect to proposed law reform, see *Consultation Paper on Accounting and Contribution Between Co-Owners of Land*, BCLI (May 27, 2011) at <http://www.bcli.org/bclrg/projects/real-property-review> (Not assigned).

**(D) Severance of Joint Tenancies**

- (a) Destruction of one of the unities
  - (i) *Stonehouse v. Attorney General of British Columbia*, [1962] S.C.R. 103 (S.C.C.). [Cf. *Alberta (Public Trustee) v. Felske Estate* (2007), 63 RPR 276 (Alta. QB) (Not assigned)].
  - (ii) *Lyons v. Lyons*, [1967] V.R. 169 (S.C. Vict.)

(iii) *North Vancouver v. Carlisle*, [1922] W.W.R. 812 (B.C.C.A.). [See *Maimets v. Williams* (1997), 11 R.P.R. 276 (Ont. C.A.) for an interesting recent illustration. Not assigned.]

(iv) *Public Trustee v. Mee*, [1972] 2 W.W.R. 424 (B.C.C.A.)

(v) *Foort v. Chapman*, [1973] 4 W.W.R. 461 (B.C.S.C.)

(vi) *Re Sorensen and Sorensen* (1977), 90 D.L.R. (3d) 26 (Alta. App. Div.)

(vii) [For an illustration of an alternative legislative provision in Saskatchewan see *Royal Bank v. Oliver* (1991), 18 R.P.R. 2d 115 (Sask. Q.B.)]. [Not assigned reading]

**(b) Agreement between the parties**

*Flannigan v. Wotherspoon*, [1953] 1 D.L.R. 768 (B.C.S.C.)

**(c) Unilateral Intention of a single joint tenant**

(i) *Walker v. Dubord* (1992), 67 B.C.L.R. (2d) 302 (B.C.C.A.)

(ii) *Re Sorensen and Sorensen* (1977), 90 D.L.R. (3d) 26 (Alta. App. Div.)

**(d)** With respect to proposed law reform, see *Consultation Paper on Joint Tenancy*, BCLI (June 28, 2011) <http://www.bcli.org/bclrg/projects/real-property-review> (Not assigned)

**(E) Partition and Sale**

**(1) General/History**

*Partition of Property Act*, R.S.B.C. 1996, c. 347

**(2) Who may apply**

(i) *Morrow v. Eakin and Eakin* (1953) 8 W.W.R. (n.s.) 548 (B.C.S.C.). For a recent similar case see *Ferrier v. Civiero* (2001), 42 R.P.R. (3d) 89 (Ont. C.A.). (*Ferrier* is not assigned.)

**(3) Nature of the jurisdiction**

(i) *Rayner v. Rayner* (1956) 3 D.L.R. (2d) 522 (B.C.S.C.)

(ii) *Bradwell v. Scott* (2000) 36 R.P.R. (3d) 70 (B.C.C.A.)

(iii) [For interesting recent cases see *Davies v. McLaren* (1992), 29 R.P.R. (2d) 127 (B.C.S.C.) and *Lougheed Enterprises Ltd. v. Armbruster* (1992), 73 B.C.L.R. (2d) 353 (B.C.C.A.)] (not assigned).

(iv) Note generally the impact of family legislation: See also *Aleksich v. Konradson* (1995), 5 B.C.L.R. (3d) 240 at 249-50 concerning non-monetary contributions in assessment of value (not assigned).

(v) See *Simpson v. Ziprick* (1995), 10 B.C.L.R. (3d) 41 (B.C.S.C.) (noting that the Act does not apply to Reserve Land under the *Indian Act*, R.S.C. 1985, C. I-5) and *Caple v. Dolman* (1999), 70 B.C.L.R. (3d) 325 (B.C.S.C.) illustrating the application of the Act with respect to “sale”. (N.B.: Neither *Simpson* nor *Caple* are assigned).

(4) [Cf. *Sherk v. Smith* (2007) 61 RPR (4<sup>th</sup>) 126 (BCSC) – Comment will be made in class (On Reserve) (Not assigned)]

(5) With respect to proposed law reform, see *Consultation Paper on Partition of Property Act Reform*, BCLI (June 28, 2011) at <http://www.bcli.org/bclrg/projects/real-property-review> (Not assigned)

## 10. Future Interests (Casebook pp. 451-485)

### (A) Nature of Future Interests

See earlier material re Estates in Expectancy/Remainders and Reversions – Casebook pp. 172-180.

### (B) "Vested" and "Contingent" Interests

(Incorporating "Conditions Precedent" and "Conditions Subsequent")

*Brown v. Moody*, [1936] A.C. 635 (P.C.)

*Re Squire* (1962), 34 D.L.R. (2d) 481 (Ont. H.C.)

*Re Carlson* (1975), 55 D.L.R. (3d) 616 (B.C.S.C.)

*Phipps v. Ackers* (1842), 8 E.R. 539 (H.L.) - Handout

*In re Barton Estate*, [1941] S.C.R. 426

*Festing v. Allen* (1843), 152 E.R. 1204 (Exch.)

### (C) Types of Future Interests

#### (a) Common Law

(i) Reversions

(ii) Remainders

(iii) Rights of Entry and Possibility of Reverter: See Casebook p. 477 – Examples include:

*Re Tilbury West Public School Board and Hastie* (1966), 55 D.L.R. (2d) 407 (Ont. H.C.)

*Re McKellar* (1972), 27 D.L.R. (3d) 289 (Ont. H.C.).

*Westsea Construction Ltd. v. British Columbia (Registrar Land Title Office)* (1995), 44 R.P.R. (2d) 42 (B.C.C.A.)

(b) **Legal Executory Interests (Casebook, p. 478-484)**

(i) Executory Limitations

(ii) Executory Devices

(c) **Equitable Future Interests**

(D) **Types and Validity of Conditions and Qualifications [Comments in Class]**

(i) **Restraints on alienation**

(a) *Blackburn and Cox v. McCallum* (1903), 33 S.C.R. 65

(b) *Re Brown*, [1954] Ch. 39 (Ch.D.)

(c) Note *Re Porter* (T&M 10-9)

(d) *Re Leach*, [1912] 2 Ch. 422 (Ch. D.)

(e) See generally re options to purchase and pre-emptive options - *Trinity College School v. Lyons* (1995) 47 R.P.R. (2d) 95 at 100-105 (Ont. G.D.).

(ii) **Uncertainty:**

*Re Messinger Estate* (1968), 66 W.W.R. 377 (B.C.S.C.)

**11. The Rule Against Perpetuities**

**Introduction**

Assigned reading for this section of the course is from the New Zealand treatise - G.W. Hinde, D.W. McMorland and P.B.A. Sim, *Land Law* (Vol. 1) (Wellington, New Zealand: Butterworths 1978).

The various paragraphs reflect the salient features of the Common Law/Equity. In British Columbia we have the *Perpetuity Act*, R.S.B.C. 1996, c. 358. However, a knowledge of the common law rule known as "the modern rule against perpetuities" is still essential, as that rule is expressly preserved by Section 2(1) of the Act, in the following terms:-

"6(1) Except as provided by this Act, the rule of law known as the

modern rule against perpetuities continues to have full effect".

The overall scheme of the Act is to "save" (i.e. validate) gifts that would otherwise fail. In the light of Section 6(1) the necessary approach is to enquire:-

- (a) Whether the particular gift is valid under case law (Common Law/Equity). If so, the enquiry ends; and
- (b) Whether - if the gift is *invalid* under case law - it is "saved" by the statute?

In most instances the Act will "save" the gift, so in practice there is usually no problem. However, you must understand why the gift failed at common law/equity, and by what means (and there are several options available) the Act "saves" the gift. An understanding of this process distinguishes the professional from the technician; the lawyer from the legal executive. In addition, some situations of invalidity are not reached by the provisions of the Act.

The description of the common law rule as the "modern rule" distinguishes it from an earlier rule known as the "old rule against perpetuities" or, more popularly, the rule in *Whitby v. Mitchell*. Section 6(2) of the *Perpetuity Act* abolishes the rule in *Whitby v. Mitchell*.

[For an interesting recent case see *Van Hees v. Higgins* (1993), R.P.R. (2d) 80 (B.C.C.A.) (not assigned).]

### **Assigned Reading**

- (1) The *Perpetuity Act* R.S.B.C. 1996, c. 358 – Sections 1-15.
- (2) G.W. Hinde, D.W. McMorland and P.B.A. Sim, *Land Law*.

### **Paragraphs**

### **Topic**

4.025	Social origins of the rule
4.026	Rules against perpetuities, past and present
4.027	The "old rule against perpetuities" or "the rule in <i>Whitby v. Mitchell</i> "
4.028	The modern rule against perpetuities
4.029	Application of the rule
4.030	Reason for the continued existence of the rule
4.032	The rule against perpetuities is concerned with the commencement of interests, not their duration
4.033	When the perpetuity period starts to run
4.035	The requirements of vesting

- 4.036 Vesting in interest
- 4.037 The courts lean in favour of vesting
- 4.038 Under the general law: no "wait and see"
- 4.043 The perpetuity period
- 4.045 The importance of ascertaining the date from which the perpetuity period begins to run
- 4.049 "Lives in being": must be human lives
- 4.050 Periods of gestation
- 4.051 The number of lives
- 4.052 Measuring lives expressly designated
- 4.053 Measuring lives not expressly designated
- 4.061 Possible not actual events: The Presumption of Fertility: The "fertile octogenarian" and the "precocious toddler"
- 4.063 Improbable Possibilities: "The Unborn Spouse"
- 4.064 Improbable Possibilities: Administrative Contingencies: "The Magic Gravel Pits"
- 4.072 Class gifts: The Nature of Class Gifts
- 4.073 Class gifts: The all or nothing rule
- [Note: In this course we are not directly concerned with "class closing rules" (known compendiously as the rule in *Andrews v. Partington*). These rules developed in the context of the administration of trusts and were independent of the rule against perpetuities. However, as their effect is to artificially "close" a class by fixing a certain moment in time and precluding a potential class member after that moment from entering the class, their application naturally often meant that a gift otherwise invalid under the "all or nothing" rule, became valid under that rule, because of the artificial limitation of the size of the class]
- 4.065 to Effect of an infringement of the rule against perpetuities.  
4.068 Note: Read these paragraphs to acquire simply a  
inclusive general knowledge of the position (or the difficulties!) at common law.

## 12. Incorporeal Interests (Casebook pp. 491 - 532)

### A. Easements (Casebook pp. 491 - 500)

**(1) Characteristics****(a) Common law**

*Phipps v. Pears*, [1965] 1 Q.B. 76 (C.A.)

*In re Ellenborough Park*, [1956] Ch. 131 (C.A.)

See generally *Dukart v. Surrey* (1978), 4 W.W.R. 1 (S.C.C.)

**(b) Statutory Easements (Casebook pp. 531-532)**

*Land Title Act*, R.S.B.C. 1979, c. 219:

s. 29

s. 221

*Property Law Act*, R.S.B.C. 1996, c. 340: Section 18(5) – 18(8)

**B. Profits a Prendre – No assigned reading – See generally the following cases (Not Assigned):**

*Cherry v. Petch*, [1948] O.W.N. 378 (Ont. H.C.)

*Cameron v. Silver Glen Farms Ltd.* (1983), 144 D.L.R. (3d) 544 (N.S. App. Div.)

*Re The Queen in the Right of Manitoba and Senick* (1982), 134 D.L.R. (3d) 586 (Man. C.A.)

**C. Covenants (Casebook pp. 501-532)****(i) Common law**

*Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500 (C.A.)

*Austerberry v. Oldham Corporation* (1885), 29 Ch. D. 750 (C.A.)

*Halsall v. Brizell*, [1957] 1 Ch. 169 (Ch. D.)

*Parkinson v. Reid*, [1966] S.C.R. 162

**(ii) Equity**

*Tulk v. Moxhay* (1848), 41 E.R. 1143 (Ch.)

*London County Council v. Allen*, [1914] 3 K.B. 642 (C.A.)

[Selected BCCA cases include – *Kirk v. Distacom Ventures Inc.* (1996), 4 R.P.R. (3d) 240, 247-254 (B.C.C.A.), *North Vancouver v. Lunde* (1998), 60 B.C.L.R. (3d) 201 (B.C.C.A.), and *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.* (2009), 88 B.C.L.R. (4<sup>th</sup>) 348 (BCCA) – Not assigned]

- (iii) **Modification of Easements and Restrictive Covenants** - see generally s. 35, *Property Law Act*, R.S.B.C. 1996, c. 377 and *Kirk v. Distacom Ventures Inc.* (1994), 45 R.P.R. (2d) 313 at 321-323 (B.C.S.C.) (Not assigned), *Vandenburg v. Olson* (2010), 2010 BCCA 204 (BCCA) – s. 35 is to be read as a code [Not assigned].
- (iv) With respect to law reform see *Consultation Paper on Restrictive Covenants*, BCLI (upcoming) <http://www.bcli.org/bclrg/projects/real-property-review> (Not assigned).

**D. Licences (Casebook pp. 533-545)**

*Hounslow London Borough Council v. Twickenham Garden Developments Ltd.*, [1971] 1 Ch. 233

*Errington v. Errington & Woods*, [1952] 1 K.B. 290 (C.A.)

**E. An Easement? A Covenant? A Licence?**

See *Imperial Oil Limited v. Young* (1996), 8 R.P.R. (3d) 214, 229-285 (Nfld. S.C.) for an interesting factual pattern and recent analysis. This case is lengthy and is **not** assigned.

**13. Personal Property**

**A. Finders (Casebook pp. 546 – 570)**

1. The following four leading modern cases must be read carefully:  
*Grafstein v. Holme and Freeman* (1958), 12 D.L.R. (2d) 727 (Ont. C.A.)  
*Cranbrook v. Brown* (1998) BCJ No. 1144  
*Kowal v. Ellis* (1977), 76 D.L.R. (3d) 546 (Man. C.A.)  
*Parker v. British Airways Board*, [1982] 1 All E.R. 834 (C.A.)
2. Note the following cases of historical interest – Not Assigned:  
*Armory v. Delamirie* (1722), 93 E.R. 664 (Q.B.)  
*Bridges v. Hawksworth* (1851), 21 L.J.Q.B. 75 (Q.B.)  
*South Staffordshire Water Co. v. Sharman* (1896), 65 L.J.Q.B. 460 (Q.B.)  
*Elwes v. Brigg Gas Co.* (1866), 33 Ch. D. 562 (Ch. D)  
*Hannah v. Peel*, [1945] 2 All E.R. 288 (K.B.)

**B. Bailment (Casebook pp. 571 - 631)**

**(1) Definition of Bailment**

*Lesson v. Jones* (1920), 52 D.L.R. 523 (N.B.C.A.)

*Newman v. Bourne & Hollingsworth* (1915), 31 T.L.R. 209 (K.B.)

Extract from *Morris v. C.W. Martin & Sons Ltd.*, [1965] 2 All E.R. 725 (C.A.)

Extract from *Martin v. Town N' Country Delicatessen* (1963), 45 W.W.R. 413 (Man. CA)

**(2) Bailment versus sale**

*Crawford v. Kingston & Johnston*, [1952] O.R. 714 (C.A.)

**(3) Bailment versus Licence**

*Appleton v. Ritchie Taxi*, [1942] O.R. 446 (C.A.)

*Palmer v. Toronto Medical Arts Building*, [1960] O.R. 60 (C.A.)

*Bata v. City Parking Canada Ltd.*, [1974] 2 O.R. (2d) 466 (C.A.)

*Heffron v. Imperial Parking Co.* (1974), 3 O.R. (2d) 722 (C.A.)

*Martin v. Town & Country Delicatessen* (1963), 45 W.W.R. 413 (Man. C.A.)

**(4) Duties of the Bailor**

*MacTague v. Inland Lines Ltd.*, [1915] O.W.N. 182 (H.C.)

**(5) Duties of the Bailee**

*Coggs v. Bernard* (1704), 92 E.R. 107 (K.B.)

*MacDonald v. Whittaker Textiles Ltd.* (1976), 64 D.L.R. (3d) 317 (N.B.S.C.A.D.)

*Townsend Air Services v. Hansen* (1974), 7 O.R. (2d) 41 (Ont. Co. Ct.)

**(6) Note re The Shifting Onus of Proof**

**(7) Sub-Bailment**

*Morris v. C.W. Martin & Sons Ltd.*, [1965] 2 All E.R. 725 (C.A.)

*Punch v. Savoy's Jewellers Ltd.* (1986), 35 C.C.L.T. 217 (Ont. CA)

See generally N.E. Palmer & J.R. Murdoch, *Defining the Duty of the Sub-Bailee* (1983), 46 M.L.R. 73 (not assigned)

See generally *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1992), 73 B.C.L.R. (2d) 1 (S.C.C.) (not assigned).

**C. Gifts (Casebook pp 632 - 647)**

**(1) "Inter vivos"**

*Cochrane v. Moore* (1890), 25 Q.B. 57 (Q.B.)

*Hardy v. Atkinson* (1908), 9 W.L.R. 837 (Man. C.A.)

*Re Cole*, [1963] 3 All E.R. 433 (C.A.)

**(2) Donationes Mortis Causa**

See *Chauvel v. Adams Estate* (1998), 56 B.C.L.R. (3d) 37  
(B.C.S.C.). Contrast *Thompson v. Mecham*, [1958] O.R. 357 (Ont. C.A.). (On  
Reserve)

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