**Property Law – Fall Quicksheet (Legal Rules)**

Physical Dimensions of Property

**The Latin Maxim**: *cujus est solum ejus est usque ad coelum et ad inferos* - whoever owns the soil, holds title all the way up to the heavens and down to the depths of the earth. – NOT APPLIED IN CANADIAN LAW.

**Ownership of Airspace**:

“The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. …The fact that he does not occupy it in any physical sense-by the erection of buildings and the like – is not material.” – Griffiths J (*Bernstein v Skyviews*) – Adopted by Haddad J in *Didow*.

Takeaway: A land owner is entitled to freedom from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land. This amounts to trespass.

**Limitations on Use of Airspace**:

“Until the issues in the action have been determined, concern for the public in the air and the public on the ground must prevail over the possible right of a disgruntled citizen to imperil public safety by indulging in a frustrated tantrum”. – Scollin J (*Manitoba (AG) v Campbell*).

As per decisions in *Commonwealth of Pennsylvania, et al v Von Bestecki* and *United Airports Co of California, Ltd v Hinman*, the courts decided that any structure which served no purpose other than a menace to safety were nuisances.

Takeaway: Property rights are not infallible. Property rights can lead to causing a nuisance towards another person’s property or towards the safety of the general public or government, and this can be unlawful.

**Ownership of Subterranean Land**:

“The rule should be that he who owns the surface is the owner of everything that may be taken from the earth and use for his profit or happiness.” – Logan J (dissenting in *Edwards v Sims*)

“He owns nothing which he cannot subject to his dominion.” – Logan J (dissenting in *Edwards v Sims*).

This is the law in Canada.

**The Right to Lateral Support**:

“The owner of land has against a neigbour the right to have his or her soil supported in its natural state by the soil of the neighbour.” – Ralph J (*Bullock Holdings v Jerema*) quoting the HOL in *Dalton v Hengry Angus &Co*.

“Such right does not, however, extend to having the adjoining soil remain in its natural state.” – Ralph J (*Bullock Holdings v Jerema*) quoting the HOL in *Dalton v Hengry Angus &Co*.

Lateral support is protected only in its natural state, it is not protected in some artificial state. (*Welsh v Marantette)*

* In Canada, you have the right to lateral support of your property.
* Loss of lateral support + damages = right to compensation
* Loss of lateral support and no damages = no right to compensation

**Boundary Lines:**

The principles set out in these cases (*Kaneen v Mellish*, *Piers v Whiting*, *Phillips v Montgomery*, *Flello v Baird*) illustrate the necessary elements to prove a convention boundary line:

* There must be adjoining land owners.
* They must have a dispute or uncertainty about the location of the dividing line between the properties.
* They must agree on a division line.
* They must recognize it as a common boundary.

-Nation J (*Robertson v Wallace*)

* Key thing on conventional boundary lines: the court requires clear evidence that the parties did agree on that boundary line.
* *Bea v Robinson* à if there is no inquiry into the boundary line, then there is no conventional boundary line.

**Riparian Rights:**

Riparian Rights: (From La Forest’s *Water Law in Canada*)

1. The right of access to water;
2. The right of drainage;
3. Rights relating to the flow of water;
4. Rights relating to the quality of water (pollution);
5. Rights relating to the use of water; and
6. The right of accretion.

“Where land that borders a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.” -  *Beds of Navigable Waters Act*

*Ad Medium Filum Aquae* – a presumption at law that an owner of a property that is adjacent to a **non-navigable** body of water has riparian rights to the center of the water.

*Application of The Presumption of Ad Medium Filum Aquae*

*Barthel v Scotten* – Land bound by the bank of a navigable river or an international waterway does not extend *Ad Medium Filum Aquae*.

*Re Provincial Fisheries* – Gwynne J said that the rule that riparian proprietors own *Ad Medium Filum Aquae* does not apply to the great lakes or navigable rivers.

*The Test for Navigability:*

* Must have characteristics of a highway and the capability of use by the public for purposes of transportation and commerce. (*Welsh v Marantette*)
* The entire length of the body of water must be considered for navigability. (Cory J, *R v Nikal*, adopting Anglin J in *Keewatin Power Co v Kenora (Town)*)
* Thus, the whole of a river or lake may be regarded as navigable even though at some point navigation may be impossible or possible. (Henry J in *Re Coleman and Att-Gen for Ontario*, *Re State Reservation at Niagara Falls, Water Law in Canada – The Atlantic Provinces*)
* Navigability exists until navigability “entirely ceases”.
* Navigable bodies of water do have right to launch boats, but no riparian rights since owned by the Crown (*Welsh v Marantette*).

Random note on watercourse: To constitute a watercourse, must be a definite and distinct channel with margins confining the water *(McGillivray*). A watercourse affords riparian rights (*Welsh*).

Estates

* Fee Simple Absolute:
  + **Example**: O à A
  + **Interest of Grantee**: Vested in possession
  + **Future Interest**: none
  + **Future Interest Held by**: no one
* Fee Simple Defeasible:
  + Fee Simple Subject to Condition Subsequent:
    - **Example**: O à A + signaling words.
    - **Examples of signaling words**: provided that, on condition that, but if, if, it happen that. (*Re McKellar*).
    - **Interest of Grantee**: Vested in possession
    - **Future Interest**: Right of re-entry (contingent interest)
    - **Future Interest held by**: Grantor
  + Fee Simple Subject to Condition Precedent:
    - **Example**: O à A + signaling words.
    - **Examples of signaling words**:if, if and only if, on the condition that.
    - **Interest of Grantee**: Contingent interest
    - **Future Interest**: Contingent interest
    - **Future Interest held by**: Grantee
* Fee Simple Determinable:
  + **Example**: O à A + signaling words.
  + **Examples of signaling words**:While, during, till, as long as, until. (*Re McKellar*)
  + **Interest of Grantee**: Vested in possession.
  + **Future interest**: Reversionary interest (Automatic, vested in interest)
  + **Future interest held by**: Grantor
* Life Estate:
  + **Example**: O à A for life, O à A for life then to B
  + **Future Interest**: Reversionary interest (vested in interest), Remainder interest (vested in interest)
  + **Future Interest held by**: Grantor, Third Party

**Interpreting Wills**

*Thomas v Murphy*: The court applied the **Rule of Construction** which ascertains the intention of the testator. The instrument must be construed as a whole. Additionally, the use of the words “his heirs” in granting a fee simple is archaic and unneeded.

*Re Walker*: The court must allow the **dominant intention of the testator** and reject the subordinate intention as being tainted by the dominant intention. It is repugnant to grant someone a fee simple and add a remainder person in the case of their death.

*Re Taylor*: A gift may be **a life estate with power to encroach for maintenance**, but this does not amount to an absolute interest. The intention of the testator is key here.

**Conditional Transfers and Future Interests**

*Re McKellar*: The words “but only so long as” were used in the recital and not the main deed. Those words would have been indicative of a fee simple determinable if they had been used immediately after the granting clause and after the habendum. The operative part of the deed prevails over the recital.

*Re Tilbury West Public School Board and Hastie*: The earlier direction of the will governs the condition. The language that is used most overall signifies the intention of the grantor.

*Note*: Courts favour early vesting. Courts are reluctant to imply contingencies.

*McKeen Estate v McKeen Estate*: The proposition is that a gift is *prima facie* vested if the postponement is to allow for a prior life estate (*Brown v Moody*). The vesting takes place at the testator’s death (*Re Stillman*). Devises are to be held to be vested unless there is a clear condition precedent (early vesting). There is also a presumption against intestacy, the court will interpret the will that discriminates against intestacy (*Canadian Law of Wills*).

**Validity**

*HJ Hayes Co v Meade*: When it is unclear whether a condition should be precedent or subsequent, the court *prima facie* treats it as being subsequent for there is a presumption in favour of early vesting (*Sifton v Sifton*).

If a condition subsequent is found to be void: condition drops off and gift still passes.

If a condition precedent is found to be void: the entire gift fails.

There are 5 ways a condition may be found void:

1. Void for vagueness (*Re Down, Teppers*).
2. Restraint on alienation.
   1. Courts are hesitant to do this.
   2. TEST: Whether the condition takes away the whole power of alienation substantially (*Macleay, McEachern*).
3. Against public policy (*Leonard Foundation*).
   1. White superiority, others less worthy.
   2. Commission of a crime.
   3. Interference with parental obligations.
   4. Encourages separation of married parties.
4. Void for remoteness (Rule Against Perpetuities).
5. Repugnancy (*McEachern*).

*Re Tepper’s Will Trusts*:

Test for uncertainty for a **condition subsequent**:

* Where a vested estate is to be defeated by a subsequent condition, that condition must be such that the court can see from the beginning, precisely and distinctly, what needs to be met to keep the estate (*Clavering v Ellison*).

Test for uncertainty for a **condition precedent**:

* The test of certainty is satisfied if the condition is sufficiently clear so that the grantee is able to ascertain whether he/she did or did not come within the language of the condition (*Re Allen*).

*McEachern v New Brunswick Housing Corp*: A condition that restricts alienation completely is repugnant to the absolute estate given (Feeney in *The Canadian Law of Wills*).

*Re Leonard Foundation Trust*: Public policy is violated if the interests of the public are at stake because of the promotion of racism and discrimination. Courts may apply the Cy-pres doctrine if they can discern a general charitable intention from the trust. This doctrine considers the intention of the donor as possible where literal compliance with the donor’s stated intentions cannot be affected.

**Registration Systems and Modern Conveyancing**

Registration serves two functions:

* It determines the ordering of rights.
* It assists a vendor in demonstrating a valid title on sale.

Common Law rules for an Equitable Interest followed by a Legal Interest. Equitable Interest may prevail, especially if proof of occupation or possession.

Two Systems:

* Torrens System:
  + Once a fee simple interest is registered, that is conclusive evidence that the person named on the Register is the owner of the interest.
  + Used in most western provinces.
  + Main goals of Torrens system:
    - A system that facilitates transfers.
    - Allows for simplicity.
    - Reduces the cost of conveyancing.
* Deeds System:
  + All important instruments which relate to the common law title to parcels of land are registered on a government-maintained register.
  + Ontario uses an English system of electronic registration which is not a Torrens system, but it has similar purposes:
    - Electronic registration that covers almost all land.
    - Past deeds registration still governs some issues.

**Indefeasible Title:** is not able to be annulled or declared void. This can be obtained simply through registration.

**Immediate Indefeasibility**: An innocent purchaser of land who registers an instrument that is void through forgery obtains an indefeasible title simply through registration. Example: Imposter for Owner A conveys to B. B gets good title by registration.

**Deferred Indefeasibility**: The registration of a void instrument cannot cure its defect. However, a void instrument, when registered to an innocent purchaser, can form the root of good title. This, indefeasibility is deferred to the second purchaser. B does not get good title, however a mortgage or transfer given by B to C is valid.

*Lawrence v Wright*: The underlying theory of the *Land Titles Act* is that of deferred indefeasibility.

*Walcer v Shmyr*: Where you have 2 unregistered interests the interest supported by time and equity wins out. Whereas if you have one registered and one unregistered, the unregistered can win if they can prove some sort of occupation.

**Easements**

*Re Ellenborough Park* (cited Dr. Cheshire’s *Modern Real Property*).

The 4 requirements for an easement are:

1. there must be a dominant and servient tenement;
2. an easement must "accommodate" the dominant tenement (the use of the land in question must be "connected" to the use of the dominant land - merely adding to the property value is not enough to satisfy this);
3. the dominant and servient owners must be different people; and
4. the right must be capable of being the subject matter of a grant.

There are three sub conditions under condition 4:

1. The grant cannot be too wide or too vague.
2. The grant cannot be inconsistent with the servient owner’s proprietorship.
3. The right has to be one of “utility and benefit” as opposed to mere recreation and amusement.

Notes:

* Easements run with the land.
* Easements can be positive (dominant owner to do something on servient owner’s land) or negative (prevents servient owner from doing something on their own land).
* Easements can be created:
  + Expressly
  + Implicitly
  + Through Prescription

*Shelf Holdings Ltd v Husky Oil Operations Ltd*:

“There is no easement known to law which gives exclusive and unrestricted use of a piece of land.” (*Reilly v Booth*). An easement cannot give exclusive and unrestricted use of a land, otherwise it is no longer an easement.

**Equity**

Note: A claimant must bring an action for equity in either the Ontario Court of Appeal or the Provincial Superior Court of Justice.

Presumption of Resulting Trust: a rebuttable presumption that is the general rule for a gratuitous transfer. Arises when title to property is in one party’s name but because he/she gave no value to the property, it must be returned to the original owner.

Presumption of Advancement: a rebuttable presumption that is a gratuitous transfer from **parent to child**and is limited in application to transfers by **parents to minor children**. Adult dependents do not benefit from this presumption (*Pecore v Pecore*, Abella J’s dissent sates otherwise.)

The presumptions will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities. (*Pecore v Pecore*)

*Unjust Enrichment*

An action for unjust enrichment arises when three elements are satisfied:

1. An enrichment.
2. A corresponding deprivation.
3. The absence of a juristic reason for the enrichment.

The remedy can be one of two things:

1. Monetary award (quantum meruit).
2. Constructive trust. – Can be awarded if the monetary award is insufficient or if there is a low probability it will be paid (*Lac Minerals*). Additionally, the contribution to the property must be sufficiently substantial and direct as to entitle the plaintiff to a portion of the profits realized upon sale of the property. (*Petkus v Becker*). Must use the “value survived” approach and balance the value survived and value received. A “nexus” is required (correlation between the contribution and the property claimed).

*Juristic Reason Analysis*

Two-step analysis for the absence of juristic reason:

1. Does the juristic reason for the enrichment fall into (all from *Pettkus v Becker*):
2. A contract.
3. A disposition of law.
4. A donative intent.
5. Other valid common law, equitable or statutory obligations.
6. In absence of those reasons, a *prima facie* case is made out. Through a consideration of the reasonable expectations of the parties and public policy, should recovery be denied? Here consider reasonable or legitimate expectations of **both** parties to show that the retention of the benefit was just.

**Index of All Cases**

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*McKeen Estate v McKeen Estate*, (1993) 132 NBR (2d) 181 (QB)

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