UBC SAUDER SCHOOL OF BUSINESS

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CHAPTER 3

# WHAT THE PURCHASER BUYS: ESTATES AND INTERESTS IN LAND

## Learning Objectives

After studying this chapter, a student should be able to:

- ☑ Describe the evolution of real property law in British Columbia
- ☑ Explain the concept of an “estate” in land and describe the fee simple, life estate, and leasehold estate
- ☑ Explain the difference between an estate and an interest in land that is less than an estate
- ☑ Explain what it means to say an interest “runs with the land”
- ☑ Describe the scope and extent of ownership of land
- ☑ Define and be able to apply the tests that determine whether an item is a fixture or a chattel
- ☑ Describe the two methods of co-ownership of land and the distinctions between them
- ☑ Discuss three types of torts that affect individuals who hold interests in, or possession of, real property

## INTRODUCTION

This chapter provides an introduction to the various interests in land that can be acquired and transferred. The chapter first considers the kinds of estates that can be held in British Columbia, including the fee simple, life estate, estate pur autre vie and leasehold estate, and the nature of the rights conferred by those estates. Next, the chapter discusses interests in land that are less than estates. After introducing these estates and interests, the chapter addresses the extent to which "ownership" of one of these estates extends to the airspace, water and soil within the boundaries of the land, as well as to the objects that are affixed to the land. Then, the chapter discusses the concept of co-ownership of real property interests, and the two main types of co-ownership in British Columbia. Finally, the chapter finishes with a discussion on the law of trespass, nuisance, and occupier's liability.

While licensees should never give legal advice as to the nature, extent, or validity of an estate or interest in land, they are expected to be knowledgeable with respect to the various concepts discussed throughout this chapter and to be able to impart this knowledge to the people whom they work with in a professional capacity.

## THE EVOLUTION OF REAL PROPERTY LAW AND THE DOCTRINE OF ESTATES

There is an important distinction between real property and personal property. Real property generally consists of land and whatever is erected, growing upon or affixed to the land, as well as the rights that are related to or derived from the land. Personal property is everything else, and generally includes any right or interest that one has in moveable objects. Historically, "real" actions could be brought in the courts in respect of land, whereby a person could recover or obtain the land itself. "Personal" actions could be brought in respect of other types of property, whereby a person could obtain judgment against another person but could not recover the property itself. The distinction between real property and personal property was developed early in English law.

The law of real property in British Columbia is based on the law of England. The *Law and Equity Act* provides that English laws, as they existed on November 19, 1858, became the laws of British Columbia "so far as the same are not from local circumstances inapplicable". The application of this English law can be modified or altered by provincial or federal statutes. In British Columbia, there have been many statutory modifications to the English laws of real property as they stood in 1858. As a result, our property law today is different in a number of important respects from that in England. Perhaps the most significant difference is our system of land registration known as the "Torrens System", which is dealt with in detail in the next chapter.

Real property law in Canada continues to have strong British roots. In particular, Canada maintains the British model of land ownership whereby the Crown is the only absolute owner of land. In other words, the Crown (i.e., the provincial and federal government) retains the underlying title to all land. When we speak of private "ownership" of real property, what we are really talking about is the ownership of an *estate*. An estate is a right to possess and use land for a period of time, during which time the estate holder has the full "bundle of rights" respecting the land. This model of land ownership is known as the "doctrine of estates". It is important to remember that an estate is an abstract legal concept that has no physical existence. As readers proceed through this chapter, they should be aware of the distinction between absolute ownership and the ownership of an estate in land. Readers should also be aware of the distinction between an estate, an interest in land that is less than an estate (such as an easement), and a contractual right to use land (known as a "license", which is not an interest in land at all).

**estate**
a right to possess and use land for a period of time. The period of time could be indefinite (e.g., a fee simple estate) or predetermined (e.g., a life estate or a leasehold estate)

While it may seem theoretical, the concept of underlying Crown title continues to have important practical effects. Such effect can be seen, for example, in the Crown's prerogative power to expropriate land. Though rarely exercised, *expropriation* is the act of taking away privately held land without the consent of the owner. Usually (though not necessarily) the government has an obligation to compensate parties whose land has been expropriated. Another practical aspect of the Crown's underlying title can be seen in the doctrine of escheat. Under this doctrine, if an owner of an estate in fee simple dies without providing for the transfer of their property by way of will, and if there are no known heirs, the property will revert or "escheat" back to the Crown.

**expropriation**
the act of taking away a private owner's interest in land without consent, typically carried out by the government or a party authorized by the government

Why should a licensee be concerned about these things? Licensees may be dealing with clients from different legal systems or cultural backgrounds, so it is important that licensees accurately understand the British Columbia system. From a practical point of view, it is important to understand the concepts presented in this chapter for the purposes of listing property for sale, understanding title searches and writing an accurate and binding contract of purchase and sale.

## FEE SIMPLE ESTATE

A fee simple estate is what we ordinarily think of as outright ownership of real property. However, the owner of the estate in *fee simple* is not the absolute owner. The owner of the estate in fee simple has rights to the land only for so long as they have heirs. A fee simple owner has the greatest bundle of rights over their land that can possibly be held in Canada, including the right to freely use and enjoy it; to sell it; to rent or lease it; to grant mortgages or easements or other interests in land; and to dispose of it under the terms of a will. If the owner of the estate in fee simple does not transfer it while alive or dispose of it by will, then the owner's heirs will inherit the estate in fee simple, the priority of the heirs being determined by the laws of intestate (i.e., dying without a will) succession. Originally, the word "fee" meant that the estate could be inherited, and the word "simple" meant that there was no qualification on the type of heir that could inherit. An heir is simply a blood relative.

**fee simple**
the legal term for the greatest estate in land known to Canadian law. It is held from the Crown, as only the Crown is the absolute owner of the underlying title

### *Historical Perspective*

From a historical perspective, when William the Conqueror conquered England in 1066, he claimed all of the land as his own. From that day forward, all of the land was owned absolutely by the Crown. The Crown parcelled out the land to its followers through the doctrine of tenure, whereby the person who was granted possession of a parcel of land owed feudal dues or services to the Crown (such as the supply of soldiers or agricultural services). The word "tenure" comes from the Latin word "tenere," meaning "to hold." Tenure showed the terms under which land was held. The doctrine of estates, in contrast, described the duration for which the land was held under a particular tenure. Over the centuries, the doctrine of tenure decreased in importance, until tenures were finally abolished. However, the notion of an estate – the idea that one holds their property from the Crown for a time period – has survived.

In early days, a fee simple estate could not be disposed of without the consent of a feudal lord. However, the notion of "freedom of alienability" came to be of great importance in English law, and the fee simple ultimately became capable of being transferred while one was alive or upon death by way of will and with no restrictions as to who could take or inherit under these transfers or wills.

### As a Licensee...

The document used to transfer a fee simple estate from one party to another is known as a "Freehold Transfer Form" (Form A). A sample Freehold Transfer is shown in Appendix 3.1.

## LIFE ESTATE AND ESTATE PUR AUTRE VIE

### Description

A life estate is an estate in land that lasts for the lifetime of the holder, who is called the life tenant. A *life estate*, like a fee simple estate, is also a freehold estate. It endures for an uncertain period of time, being the lifetime of the life tenant. The life tenant is entitled to all of the rights of use and possession of the land, and to receive any revenues. This type of estate is registered as a charge on the fee simple title of the real property. A fee simple estate holder can create a life estate while alive or can create it pursuant to a will, the latter being far more common. If a fee simple estate holder, A, creates a life estate in favour of B, then B will have all of the rights to the property during their lifetime. A is known as the "reversioner" because upon B's death, the property will "revert" to A. As the fee simple holder, A is entitled to the property "for so long as

**life estate**
an interest in land to be enjoyed during a person's life, and which ends on that person's death

they have heirs". If A predeceases B, the fee simple reversion will pass under the terms of A's will, or if there is no will, to A's heirs according to the statutory rules of intestate succession.

Alternatively, A can create a life estate in favour of B, with the remainder of A's fee simple interest going to C. C now holds the fee simple subject to B's life estate. A has no further rights to the property. C would appear on the certificate of title as fee simple owner, and B's life estate would appear as a charge. C is known as the "remainderman".

***Example***

Jones wishes to leave his home to his wife for her lifetime and then to his only child in fee simple. His will contained this clause: "To my wife, Clara Jones, for life, with remainder to my son, John Jones". The result of such wording is that upon Jones' death, his wife inherits a life estate, and his son has a fee simple estate in remainder – i.e., after Mrs. Jones' death, the son obtains the fee simple estate in the property.

What happens if, after the death of her husband, Mrs. Jones remarries and decides to live in the home of her second husband? If she disposes of her life estate in the first property to another person (say, Mrs. Smith), then Mrs. Smith obtains what is known in law as an estate pur autre vie, or, in other words, an estate based on the life of another person, namely, Mrs. Jones. When Mrs. Jones dies, her son will still inherit the property in fee simple, and Mrs. Smith will be forced to vacate because her estate ended on Mrs. Jones' death. Mrs. Smith could only receive the estate that Mrs. Jones held. Needless to say, life estates are difficult to sell for value because of their uncertain duration. As a result, estates pur autre vie are not very common today.

## Rights and Obligations of the Life Tenant

The life tenant is liable for all yearly operational expenses, including electricity, water, heat and taxes, and for the payment of interest (but not the principal amount owing), if the property is encumbered by a mortgage. The life tenant is also liable for waste, discussed next.

Naturally, the life tenant has the right to use and occupy the real property during their life. A life tenant may sell or otherwise dispose of their life interest (creating an estate pur autre vie) and is entitled to the annual profits that are produced by the land or that the life tenant cultivates. The life tenant may also use the timber, etc., on the property to make necessary repairs. In short, a life tenant may provide for themselves by using the annual fruits of the property, but must not do any acts that would injure the inheritance permanently.

**Waste.** The doctrine of waste places certain limitations on a life tenant's ability to change or damage a property. Common law recognized three categories of waste: voluntary, permissive, and ameliorating. The courts of equity developed a fourth category known as equitable waste.

**FIGURE 3.1: Categories of Waste**

| | |
|---|---|
| Voluntary Waste | Direct, positive acts that result in damage to property beyond the use to which a life tenant is entitled, as explained above. The life tenant is liable to the remainderman or reversioner for this type of waste.<br>**Example:** demolishing a separate garage on the property. |
| Permissive Waste | Allowing a property to deteriorate without any positive acts of the life tenant. A life tenant is generally under no obligation to repair or compensate for permissive waste.<br>**Example:** failing to keep the house's roof in good repair and maintenance. |
| Ameliorating Waste | Direct, positive acts which improve rather than destroy the property. A life tenant is liable, but usually no damages can be awarded, as the property has been improved.<br>**Example:** constructing a deck in the backyard of a house. |
| Equitable Waste | The waste caused by a life tenant who, although they are not responsible for the three types of common law waste, flagrantly or maliciously damages or destroys the property.<br>**Example:** burning the house down so that the remainderman or reversioner receives a property with significantly less value than when the life tenant took it. |

Often, the person who creates the life tenancy will expressly provide that the life tenant is not liable for any waste committed, using the phrase, "without impeachment for waste". This phrase is deemed to excuse the life tenant for the three types of common law waste, but not equitable waste. To excuse the life tenant from equitable waste, the instrument must expressly say so, using a phrase such as, "without impeachment for waste, including equitable waste".

### Rights and Obligations of the Remaindermen or Reversioners

The remaindermen or reversioners are the people that are entitled to the fee simple estate once the life estate has expired. These people have the right to receive the fee simple estate in essentially the same condition as it was originally granted to the life tenant, subject to the doctrine of waste.

To protect their fee simple estate, the remaindermen or reversioners must pay the principal on any outstanding mortgage and any insurance premiums. Generally speaking, their rights correspond to the obligations of the life tenant and their obligations become the life tenant's rights.

### Why are Life Estates of Interest to Licensees?

A life estate is important to a licensee listing and selling residential property because a life estate is registered on the title to property and must be dealt with on the sale of the property. The remaindermen or reversioners will be unable to convey an unencumbered fee simple estate (which a buyer would normally want) unless the life tenant agrees to release their life estate. The licensee should not list the property for sale until that agreement (including financial terms) has been concluded. In this case, the life tenants and remaindermen or reversioners must all be parties to the listing.

The existence of a life estate will be of obvious importance to those involved in mortgage financing. A borrower seeking to mortgage their estate in land will find that mortgage brokers and financial institutions will be reluctant to provide loans secured by the borrower's life estate. If, after obtaining such a loan, the borrower dies, the lender will be left without any security for the debt, as the life estate will "disappear" when the life tenant dies. If a loan is made, the lender will normally require that the borrower provide life insurance on the life tenant, equal to the value of the loan.

Property managers will be interested in any life estates registered against the lands under their control, as a life estate may affect a property manager's duties and liabilities with respect to the property.

## LEASEHOLD ESTATES

Historically, the three estates of freehold – fee simple, life estate and fee tail (no longer possible in Canada) – were the only estates in land known at law. Terms of years (leases) were not originally regarded as real property, but merely personal contracts, binding only between the parties. Eventually, leases came to be regarded as leasehold estates, binding on successors in title, but inferior to freehold estates. In modern times, leases have great economic value, and grant important rights to land. Leases are discussed in detail in the chapter on commercial and residential tenancies. Licensees need to ascertain whether a property is encumbered by a lease, and if so, determine whether the lease is commercial or residential. The licensee will also need to make inquiries as to the nature of the lease, e.g., fixed term, periodic or otherwise. The licensee should advise the potential buyer to seek legal advice concerning the lease, including procedures and notices for possible termination. While many leases are registered on title, section 23 of the *Land Title Act*, discussed in the next chapter, provides that a certificate of title is subject to unregistered leases for terms of three years or less. In other words, if an owner has leased their property to someone for two years, the buyer will take their interest subject to that lease, even though the lease does not appear on title and the buyer may not otherwise be aware of it. Therefore, appropriate investigations must be made to ensure that the buyer gets what they expect.

#### *Aboriginal Title*

Aboriginal title, discussed in detail in the next chapter, may be legally established either by court declaration or by way of contractual agreement between the Crown and an Aboriginal group. Aboriginal title is a unique concept that cannot be properly described in terms of traditional property law concepts such as "estates" and "fee simple". Rather, aboriginal title is a communal right to land that is derived from aboriginal use and occupation of land prior to the assertion of Crown sovereignty in Canada. Licensees should be aware that aboriginal title is not an "estate" in land and it cannot be alienated (i.e., sold) to anyone but the Crown; however, aboriginal title, if established, confers a broad set of rights on the holders.

# INTERESTS IN LAND LESS THAN ESTATES

## Introduction

As you will learn in the chapter on the Law of Contract, the doctrine of privity of contract states that only the parties to a contract can enforce the rights and obligations under it. For example, if Anton pays Bob $150.00 for five piano lessons for his son, and Bob does not provide the lessons, only Anton can sue to enforce the contract; Anton's son cannot sue to enforce the contract, even though he was the beneficiary of the contract. It is important to note that this doctrine does not apply to contracts that create an interest in land. Therefore, if André owns a fee simple and grants an easement over his property to Bernice and then sells his property to Camille, Camille is bound by André and Bernice's agreement. As a result, interests in land are said to "run with the land". In British Columbia, the interest will only run with the land if it is registered under the *Land Title Act*.

There are three main classifications of interests in land that do not amount to estates, namely:

1. easements;
2. restrictive covenants; and
3. profits à prendre.

These three interests will affect the market value of a property and may be of importance when appraising land for the purposes of a listing or mortgage qualification.

## Easements

**Description.** An *easement* is a right, acquired by a landowner, to use a neighbouring property in a specific way (without possessing it) for the benefit of the holder's land. The land receiving the benefit is called the dominant tenement, and the land over which the right is exercisable is called the servient tenement. Examples of easements include rights of way, rights to light and rights of support. Figure 3.2 illustrates how a typical easement operates.

**easement**
a right to use a neighbouring property in a specific way (without possessing it) for the benefit of the holder's land. The land that benefits from the easement is called the dominant tenement and the land over which the easement is exercised is called the servient tenement

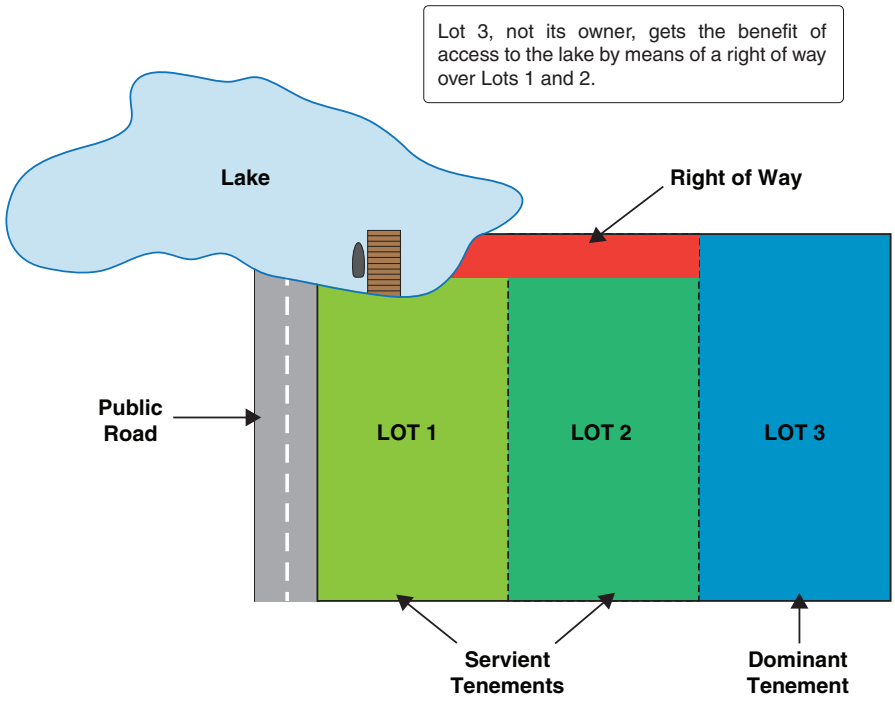
**dominant tenement**
land to which the benefit of an easement or restrictive covenant is attached

**servient tenement**
land bearing the burden of an easement or restrictive covenant

In order to constitute a valid easement, three requirements must be met:

1. **There Must be Both a Dominant and a Servient Tenement.** Simply put, this means that there must be at least two parcels of land affected by every easement. The dominant tenement enjoys a right of use over the servient tenement. In Figure 3.2, Lot 3, the *dominant tenement,* has the right to use the *servient tenements*, Lots 1 and 2, to gain access to the lake. While the dominant tenement does not have to be adjacent to the servient tenement, it must be close enough to be able to benefit from the easement over the servient tenement. An "easement in gross" where there is only a servient tenement without a dominant tenement to benefit, is not a valid easement but operates merely as a licence, and therefore does not run with the land.
2. **The Easement Must Accommodate the Dominant Tenement.** It is the land that must benefit from an easement and not merely the land owner. If the owner alone obtains the benefit, then the right created is not an interest in land. The right would be a contractual licence, not an easement, and the doctrine of privity of contract would apply (meaning that it would not run with the land and could only be enforced by the parties to the contract). The test employed by the courts to determine whether an easement or a licence has been created is whether or not the right makes the dominant tenement a better and more usable piece of property. For example, a right-of-way may give better access to the dominant property.
3. **The Easement Must Be Capable of Forming the Subject Matter of a Grant.** The easement must be capable of reasonably exact definition (i.e., one must be able to identify its boundaries). Furthermore, the person granting the easement and the person whose land receives the benefit of the easement must have the necessary capacity to be grantor and grantee. For example, a tenant cannot grant an easement that binds the property after the tenancy expires.

**FIGURE 3.2: Easement**




**Creation of an easement.** Easements may be granted for any length of time; however, an easement of a very short duration (e.g., six months) runs the risk of being classified as a licence. Easements may be created by statute, express document, implication of law, or prescription (commonly called "squatter's rights"). Prescription has been abolished in British Columbia, although it does exist in other jurisdictions. Section 218 of the *Land Title Act* allows the Crown, municipalities or other designated persons to create easements without dominant tenements. These are often called "statutory rights of way", and they do not have to comply with the common law requirements discussed above. BC Hydro and Power Authority uses this power to acquire rights of way for the transmission and distribution of power even though they do not own the land to be benefitted by the easement. This also applies to highways, pipelines, etc.

Easements are usually created in a document between the grantor, being the owner of the servient tenement, and the grantee, being the owner of the dominant tenement. In older transactions, easements were sometimes "reserved" in the deed of transfer of the fee simple. The licensee should review the easement to ascertain the extent of the rights granted. The rights may, for example, be as simple as a right of foot passage, or as complex as foot and vehicular passage with rights of parking and construction of structures. The licensee should also review the explanatory plan, as the location of the easement area can have an impact on the value of the properties involved. A potential buyer should be provided with a copy of the easement and plan for review and approval. As well, the licensee should encourage the potential buyer to seek legal advice concerning any easement issues.

The easement will be registered as a charge against title to the servient lands. On the title for the dominant lands, the easement will appear under the section "Legal Notations". In either case, the buyer needs to be made aware of the burden or benefit of the easement, its terms and location.

An implied easement may result if the intention of the parties granting the easement has not been sufficiently explicit. Implied easements may arise in a number of situations. For example, an implied easement may arise in the case where one of two commonly supported houses has been sold and no mention was made of any easement of support. Also, an easement may be implied in order to better enjoy a right granted expressly. This would be the case if the use of a well was granted, but no mention was made of the access to and from it. Lastly, an easement of necessity may be implied, for example, where one building is physically

divided from another and shared stove-pipes interconnect both buildings. However, because the cost and time involved in a lawsuit to establish an implied easement can be substantial, and the outcome uncertain, anyone in such circumstances ought to make an explicit written agreement at the outset.

**Release of an easement.** An easement may be released by an express agreement between the present owners of the dominant and servient tenements. Otherwise, an application under section 35 the *Property Law Act*, discussed next, may be made.

## Restrictive Covenants

**Description.** A *restrictive covenant* imposes a restriction on the use of one person's land for the benefit of another piece of land. The restriction must be negative in nature (i.e., the restriction must require that something not be done). It does not matter whether the wording of the covenant is positive, if it is negative in effect. The person who imposes the restriction is called the covenantee and the person who agrees to be bound by the restriction is called the covenantor.

**restrictive covenant**
a covenant restricting the use of the land of the covenantor (the servient tenement) for the benefit of land belonging to the covenantee (the dominant tenement). An example would be a restriction on the height of a building on one piece of land so that adjacent land is not in shadow

### *Example*

Jerome owned a large lot in West Vancouver. He subdivided the lot into Lots A and B. He built a house on the higher lot, Lot A, with a beautiful water view. When he encountered financial problems, Jerome decided to sell vacant Lot B. However, he was concerned that a house of more than one storey on Lot B would block the view from Lot A. Therefore, he registered the following restrictive covenant on the title of Lot B before he sold it: "No structure higher than 15 feet shall be erected on Lot B."

Since a restrictive covenant is an interest in land, it can be registered at the Land Title Office. Once a valid restrictive covenant has been registered, it binds subsequent owners of the property (i.e., it "runs with the land").

There are five essential requirements that must be established before the courts will find that a restrictive covenant is valid and will run with the land:

1. it must be negative in nature; in other words, an owner must be able to comply with the restrictive covenant by *not* doing something. Covenants that require action are "positive" covenants and, while they might be contractually binding between the original parties, such covenants do not run with the land;
2. it must benefit or enhance the value of the covenantee's land in some way;
3. both the benefited and burdened land must be precisely identified in the agreement or document creating the restrictive covenant;
4. the burden of the restriction must have been intended by the parties to bind the land. It cannot be merely a personal promise. This intent is usually stated in the contract by words such as "this agreement is to be binding upon the covenantor, their heirs and assigns"; and
5. if the original covenantor has transferred their land, the new owner must have had notice of the agreement before acquiring the land.

With respect to the fifth requirement, in BC's Torrens system, a registered covenant constitutes notice. If an agreement does not satisfy these requirements, it does not run with the land and will not bind subsequent buyers of the land. Instead, it is a personal agreement between the two parties, and such agreements may still be enforceable under contract law (discussed in Chapter 10: "The Law of Contract").

**Release of a restrictive covenant.** Like an easement, a restrictive covenant may be released by an express agreement between the present owners or by court order pursuant to section 35 of the *Property Law Act*, discussed next.

## ALERT

Unlike restrictive covenants, positive covenants (i.e, covenants that require someone to do something) are only enforceable against the owner who originally agreed to the covenant (i.e., the original covenantor). As such, positive covenants do not "run with the land" and pre-existing positive covenants cannot bind subsequent owners, even if the subsequent owners had notice of them.

There are many positive covenants that may be negotiated between property owners. For example, a positive covenant may require one property owner to contribute towards maintenance expenses incurred by the owner of a second property, in exchange for use of the second property's facilities.

This is exactly the type of positive covenant that was dealt with by the Supreme Court of Canada in the case of *The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation*, 2020 SCC 29 ("*Crystal Square*"). In *Crystal Square*, the prior owner of an office tower entered into a positive covenant requiring them to make maintenance payments to the owner of an adjacent parking garage, in exchange of use of the stalls. Later, a strata corporation was formed to take ownership of the office tower from the prior owner. After the strata corporation was formed, the strata corporation failed to formally enter into any new contract requiring it to make maintenance payments to the parking garage owner (the requirement to make maintenance payments was a pre-existing positive covenant, because it first arose before the strata corporation took ownership of the office tower). Despite this, the strata corporation voluntarily made maintenance payments to the parking garage owner, and used the parking stalls for many years. Then, a dispute arose between the strata corporation and the parking garage owner. After this, the strata corporation refused to make further maintenance payments. The strata corporation argued that it was not bound by the pre-existing positive covenant to make maintenance payments because positive covenants do not run with the land.

The Supreme Court of Canada confirmed that pre-existing positive covenants generally do not run with the land. However, in *Crystal Square*, despite never formally adopting the pre-existing positive covenant, the strata corporation voluntarily paid maintenance fees to the owner of the parking garage for many years, in exchange for use of parking stalls. For that reason, the Supreme Court of Canada decided that the strata corporation entered into a new contract with the parking garage owner, which included the obligation to pay maintenance fees. As such, the maintenance fees were ordered to continue.

*Crystal Square* shows us that, while pre-existing positive covenants are not usually enforceable against subsequent owners, there are ways in which those obligations may become enforceable. One way is if the subsequent owner does something or behaves in a way that suggests that they intend to be bound by the pre-existing positive covenant, which is what happened in *Crystal Square*. Another way is if the subsequent owner formally adopts, or assumes, the pre-existing positive covenant. If your client wants to buy a property that may be affected by a positive covenant, you should alert them to the existence of the covenant and advise them to seek legal advice about its enforceability.

### Building Schemes

**Description.** A *building scheme* refers to a set of restrictive covenants imposed on two or more lots within a particular subdivision. Section 1 of the *Land Title Act* defines "building scheme", and sets out that for a building scheme to validly come into existence, all initial buyers or lessees of the development must receive their title from a common vendor or lessor. If valid, the scheme will then run with the land, passing to the successors in title of each of the original buyers or lessees. This type of scheme is often used by a developer who is selling lots in a residential subdivision and wants to maintain uniformity of the lots to protect their value. A building scheme can restrict things such as the size, type, style, colour, and number of buildings located on land that is subject to the scheme.

**building scheme**
a scheme of development that imposes restrictions on land that is laid out in two or more parcels and is intended to be sold to different buyers or leased (or subleased) to different tenants. Each buyer or tenant enters into a set of restrictive covenants with a common vendor or landlord, agreeing that the buyer or tenant's particular parcel will be subject to certain restrictions

Building schemes are now enacted through a statutory framework established by section 220(1) of the *Land Title Act*. Section 220(1) provides that a registered owner who intends to sell or lease (or a registered tenant who intends to sublease) two or more parcels of land may "impose restrictions consistent with a general scheme of development". To impose such restrictions, the owner or tenant must register a Declaration of Creation of Building Scheme as a charge against the land defined in the declaration of building scheme. As with all restrictive covenants, a building scheme must meet three basic requirements to be registrable:

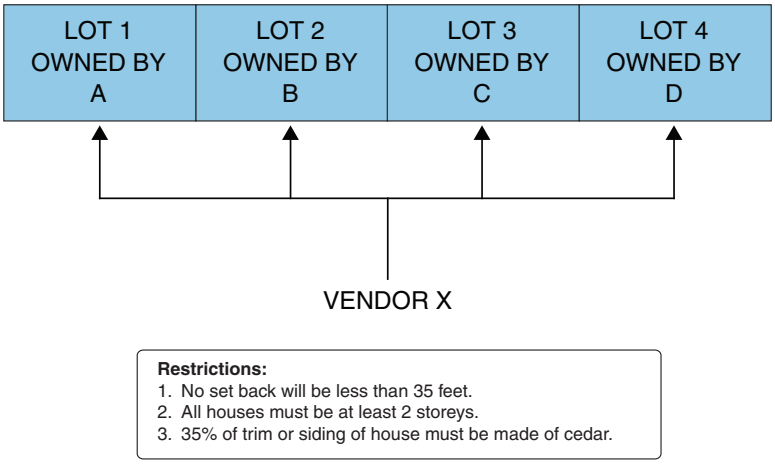
1. the obligations imposed by the covenant must be negative in nature. Note that some restrictions may be stated positively, but their effect must be negative;

2. there must be land which benefits from the building scheme and land which is burdened by it, both of which must be precisely defined in the instrument creating the covenant. In a building scheme, each lot is burdened by the restrictions imposed on it and benefitted by the restrictions imposed on the other lots; and
3. the title to the land affected by the covenant must be registered under the *Land Title Act*.

Once the declaration of building scheme is endorsed by the registrar, the restrictions created by the declaration will run with the land. This means that all current and future owners and tenants of the land will be subject to the restrictions imposed by the building scheme and have the benefits created by it conferred to them, subject to any exemptions included in the declaration of building scheme.

Figure 3.3 provides an illustration of a simple building scheme. These kinds of restrictions are intended to create a development scheme so that the houses built by the four buyers will be of a certain quality. Some building schemes are very detailed: licensees should ensure that a buyer receives a copy of the building scheme restrictions and acknowledges having read and approved the document.

**FIGURE 3.3: Building Scheme**




**Release of a building scheme.** The restrictions imposed by a building scheme may be modified or discharged by an express agreement between all of the current owners of the lots subject to the scheme. It should be noted that if the land is subject to a charge, like a mortgage, it may be that the building scheme cannot be modified or discharged without either the consent of the charge holder or the approval of the registrar. Sometimes, building schemes are poorly enforced, and subsequent buyers may not be able to enforce provisions that have been previously ignored. See also the discussion of the *Property Law Act*, next.

## As a Licensee...

Licensees should be aware that it is common for developers of bare land strata developments to register a building scheme against the individual strata lots. This ensures that all structures built on the bare lots will be uniform or follow a consistent theme/style. When a licensee, in the course of acting for a buyer, discovers a building scheme on title, they should inform the buyer of the particular restrictions imposed by a building scheme and explain that non-compliance with the building scheme may have consequences. Because building schemes can be complex, licensees should recommend their clients obtain legal advice.

### Profits à Prendre

A profit à prendre is a right to enter onto the land of another person and to take some profit from the land (e.g., minerals, oil, stones, trees, turf, fish, game, etc.) for the use of the owner of the right. Unlike an easement, it does not need to accompany a dominant tenement (another piece of land) but may be held as a right in gross. It does not need to be granted for a definite period of time. A good example of a profit à prendre is the grant of "all the gas, petroleum, and other petrol products in and under the following described premises" as

was set out in the case *Cherry v. Petch*, [1948] OWN 378 (HC). A profit à prendre cannot be implied by law as in the case of an easement.

### *Property Law Act* – Discharge of Interest

Under section 35 of the *Property Law Act*, a person can apply to the BC Supreme Court to cancel or modify certain interests in land such as easements, statutory rights of way, statutory building schemes and restrictive covenants. The Court may make an order cancelling or modifying a registered interest based on a number of reasons listed in section 35(2), including the following:

- The interest has become obsolete because of changes in the neighbourhood, the character of the land, or other circumstances.
- The reasonable use of land will be impeded, without practical benefit to others, if the registered interest is not modified or cancelled.
- The person who is entitled to benefit from the charge (the "covenantee") has expressly or impliedly agreed to it being modified or released by virtue of their conduct. For example, with a restrictive covenant this may occur where the land has been used for many years in a manner inconsistent with the covenant, and the covenantee has not raised any objections during this time.

The discharge of restrictive covenants, easements, and other charges under section 35 has been the subject of many cases and licensees should not advise on the section. However, the licensee should be aware of this section and advise their clients to seek legal advice if they think that the provisions of this section might be relevant to their client's interests.

### As a Licensee...

Licensees will encounter encumbrances such as easements, restrictive covenants and building schemes when they search the title to properties. When taking listings, advertising property and drafting contracts of purchase and sale, licensees must ensure that the wording used reflects the true state of title. For example, if the property is subject to an easement, do not describe the property as "clear title", unless the easement will be discharged prior to completion.

### Licence

A licence is not an interest in land and cannot be registered at the land title office. Rather, a licence is a contractual right or privilege to do something that exists between two or more persons or legal entities. In the context of real property, a licence may entitle a person to enter upon and use the grantor's land in a certain manner or for a certain purpose; for example, an agreement to dump topsoil on the land for a short period of time. A licence does not create an interest in land; therefore, it does not bind nor benefit subsequent buyers (i.e., it does not run with the land).

#### *Example – Licence or Easement?*

Will Waterfront and Larry Landlocked each own property close to a lake; Will owns Lot 1 and Larry owns Lot 2. A pipe runs under Will's property bringing water from the lake to Larry's property, where he purifies it and uses it to service several vacation homes that he rents out for a profit. In 1956, Will and the previous owner of Lot 2 (who were great friends) agreed that the owner of Lot 2 could lay a pipe under Will's property, use it to draw water from the lake, and make any necessary repairs or replacements to it. Larry recently started to experience problems with the water running from the pipe and he discovered that the pipe needs to be repaired and possibly replaced. When Larry entered onto Will's property to replace the pipe, Will objected, stating that Larry was trespassing. Furthermore, Will insists that Larry remove the pipe altogether and make the necessary repairs to his land. Larry refuses and Will sues.

In this case, a court will be asked to determine whether the agreement between Will and the previous owner of Lot 2 was a licence (which would not run with the land and which Larry could not enforce against Will) or an easement (which would run with the land and which Larry could enforce against Will). In order for such an agreement to "run with the land" and be enforceable by subsequent owners such as Larry, it would need to meet the requirements of an easement, and in British Columbia be registered under the *Land Title Act*, as set out earlier in this chapter. In this particular case, it is likely that a court would find that Will merely granted a licence rather than an easement; therefore, Larry could not enforce this agreement. For a similar case, see *Mihaylov v. 1165996 Ontario Inc.,* 2017 ONCA 116.

# THE EXTENT OF "OWNERSHIP" IN LAND

## Introduction

As explained above, "ownership" of land means ownership of one of the estates or interests in land that have been described. A fee simple estate is the greatest estate a person can have in land. What rights to the physical attributes of the land are gained when someone becomes a fee simple owner? There are two aspects to this question. First, what rights does a fee simple owner have to the surface of the land, the air above, the ground below, and the water that is on, flows through, or is adjacent to the land? Second, since land includes fixtures (things that are affixed), but does not include chattels (things that are not affixed), what differentiates a fixture from a chattel?

## Airspace, Subsurface, Water and Support Rights

### *Airspace*

Early in the common law, a landowner's rights were said to extend down to the centre of the earth and up to the heavens. That was long before balloons and airplanes! This concept has been modified by modern case law so that a landowner now owns or has rights in the *airspace* above their property only to the extent that the landowner can make effective use of it. Even this principle may be altered by statutes. For example, the federal *Aeronautics Act* allows an aircraft to pass through the airspace without liability for lawsuits, if no physical damage results.

**airspace**
historically, one owned the airspace above a parcel of land "to the heavens". Today, airspace refers to the legal concept that a person who owns land also owns as much of the airspace above the land as they can effectively use

In British Columbia, airspace can now be subdivided under the provisions of the *Land Title Act*, just like land can be subdivided. The most common use of the airspace subdivision provision is in condominium developments. The developer may wish to have both residential and commercial strata lots in the same building and keep the two components separate. The developer constructs the building, then files an airspace plan carving out a portion of the building for the residential or commercial area. That is a separate legal parcel within which a strata plan will be filed to create strata lots. The remainder of the building and the property will also be a separate parcel within which a strata plan will be filed. These can be complex arrangements involving numerous easements for support, elevators and the passage of sewer, water and other utilities. Air space parcels have even been used to create a separate legal parcel for parking.

The ownership of airspace acquired by filing airspace subdivision plans is very different from density rights. Under zoning bylaws, a person is limited to how many square metres of building that can be built per square metre of land. That is often referred to as the density or floor space ratio ("FSR").

### *Subsurface*

The subsurface rights of a landowner are greatly limited by the provincial government. When granting Crown land, the Province reserves all minerals, coal, gas, fossils and petroleum products for its own use. In British Columbia, a landowner must trace the title deeds back to the original grant from the Crown (and review the subsequent applicable legislation) in order to determine the exact rights in the subsoil. For example, gold and silver were originally reserved in favour of the Crown and, since 1897, base minerals other than coal have been expressly reserved. Coal and petroleum have been reserved since 1899 and gas since 1951. The statutory authority for making these reservations is set out in section 50 of the *Land Act*. The licensee should also note that the Province now claims all rights to geothermal resources under the *Geothermal Resources Act*, and should advise persons planning to use those resources to make the appropriate government inquiries.

In addition to reserving rights to various minerals, the Crown reserves other rights for itself. For example, the Crown has kept wide powers to make further "reservations" under the *Land Act*. Under section 55 of the *Land Act*, the beds under bodies of water are owned by the provincial government unless there is an express provision to the contrary in the Crown grant. Because the Crown reserves many rights to itself, a landowner's property rights can be greatly limited.

### *Water*

On February 29, 2016, the *Water Sustainability Act* replaced the *Water Act* in British Columbia. The purpose of the *Water Sustainability Act* is to manage the use of water in a manner that addresses climate change, population growth, and increasing pressure on water resources to ensure a sustainable supply of water that meets the needs of British Columbia's residents. The *Water Sustainability Act* introduced a number of changes to the way in which water is regulated, the most significant being the requirement for groundwater users to obtain a water licence. Under the former *Water Act*, a water licence was not required to use groundwater.

According to the *Water Sustainability Act*, the right to the use and flow of all water, whether surface (e.g., a stream or lake) or ground (e.g., well water), is vested in the provincial government. As the provincial government has property rights in water, a landowner or tenant wishing to use water on their property must first obtain a water licence and pay annual fees. The *Water Sustainability Act* provides an exception to this licensing requirement for those using water for domestic purposes only (e.g., household use, lawn and garden watering, and water for domestic animals).

The landowner or tenant wishing to acquire a water licence must submit an application to the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), which can be done online through FrontCounter BC. The application must include the legal description of the property and water source, proof of the applicant's title to the property (or a copy of the lease, if the applicant is a tenant), purpose of the water use, quantity of water used, and a map or diagram of the proposed use area. The applicant must pay an application fee and yearly water rental fees. Yearly water rental fees are charged according to the *Water Sustainability Fees, Rentals and Charges Tariff Regulation*. Once the application is submitted to the Ministry, it is reviewed and must be approved by a Water Manager. A water licence will typically show, among other things:

- the maximum amount of water that can be used;
- the purpose for which the water must be used; and
- the time of year when the water can be used.

It is important to note that while water licences are not recorded in the Land Title Office, they can be found on the BC Water Rights Databases (which can be searched online).

Water licences may be cancelled by the Ministry. The two most common reasons for which water licences are cancelled are:

- failure to use the water for the licensed purpose for three consecutive years; and
- failure to pay the licence fees for three consecutive years.

#### As a Licensee...

Upon the sale or transfer of a property subject to a water licence, the rights and obligations under the licence pass with the conveyance and become the responsibility of the new property owner. Any outstanding annual fees also become the responsibility of the new property owner. Therefore, where water rights exist, you should advise your seller or buyer to check for outstanding charges and fees, including unpaid annual rental fees, late payment charges, and licence amendment fees. You should also check the terms of the current water licence to ensure that they match with both the seller's representations of water use as well as the buyer's planned water use.

Furthermore, the *Water Sustainability Act* requires that sellers of property that have a water licence attached give written notice of the change of ownership to the Regional Water Manager or the Comptroller of Water Rights (Ministry of Environment, Water Stewardship). This is fulfilled by completing and submitting a Change of Water Licence Holder form (which may be completed by either the buyer or seller). More information can be obtained from the Water Stewardship Division's website at *www.env.gov.bc.ca/wsd*.

### *Right to Support*

Every parcel of land has a natural legal right to receive both vertical and lateral support from the adjacent soil. Therefore, if a neighbour excavates up to the boundary line and, as a result, the adjoining lot subsides or collapses, the neighbour will be liable in damages for depriving the adjoining owner of the right to support. However, buildings on the land do not have the natural right of adjacent support at law given to the land itself, so it is necessary for an owner to acquire an easement of support in order to protect the buildings.

### *Other Limitations*

Further limitations can be imposed by municipalities, as discussed in the chapter on local government. For example, municipalities have the right to require a person subdividing land to provide for and construct roads and other amenities, such as public parks, street lights and drainage systems. This power is not, of course, as wide as that retained by the Crown because the power of the municipality only arises where there is a subdivision of land.

## Fixtures and Chattels

One common issue that tends to arise in real estate transactions is which items are included in the purchase price (that will remain with the property once the seller moves out) and which items are excluded from the purchase price (that the seller is entitled to take when they move out). To resolve these disputes, the courts have developed a variety of legal tests to distinguish between fixtures and chattels. Items that are deemed to be fixtures are considered part of the land and will belong to the buyer upon completion, while chattels remain the personal property of the seller.

### *Example*

John agreed to sell his home to Annika. In the backyard, John placed a tool shed upon a number of semi-buried concrete blocks. When Annika viewed the property, she assumed that the tool shed was included in the purchase price. John, on the other hand, always assumed that the tool shed was his personal property, particularly because he placed it on the property after he purchased it. When John moved out, he removed the tool shed from the property. When Annika discovers this, she is furious and threatens to sue John.

The tests developed and applied by the courts to distinguish between fixtures and chattels are largely fact dependent and very difficult to apply. Furthermore, the process of getting to court to resolve the issue can be stressful, expensive, and time-consuming. To avoid ever having to consider these tests, it is always best to expressly deal with included and excluded items in the contract of purchase and sale. The parties are free to mutually agree as to what is included and excluded in the purchase price. In fact, standard form contracts for the purchase and sale of real estate in British Columbia (see Appendix 11.2) contain express terms about included and excluded items, with blank spaces to fill in the particular items of a given property. It is important to note that a licensee who fails to draft the contract to properly reflect which items are included and excluded may find themselves the recipient of a letter demanding compensation, sometimes by way of a commission reduction.

As mentioned above, in the absence of express terms in the contract of purchase and sale dealing with whether a particular item is included or excluded in the purchase price, the issue will be left to the courts to decide. The legal test most commonly applied by the courts was established in *Stack v. T. Eaton Co.*, [1902] 4 OLR 335 (Div Court). The test has two key elements:

1. Articles that are not attached to the land (except by their own weight) are presumed not to be part of the land, unless the circumstances show that they were intended to be part of the land.
2. Articles affixed to the land even slightly are presumed to be part of the land, unless the circumstances show that they were intended to remain as chattels. This presumption may be overturned based on: (a) the degree of affixation (i.e., how well is the object affixed, and how easily can it be removed?); and (b) the object (purpose) of affixation.

When evaluating the purpose of affixation, the courts in British Columbia have applied the "better use test", which looks at whether an item that was affixed to the real property was affixed for the better use of the item as an item, or whether it was affixed to improve or better use the real property (*La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.*, (1969), 4 DLR (3d) 549). If an item is affixed for the better use of the item itself, the item is more likely to be deemed a chattel. If, however, the item is affixed to improve the land, the item is more likely to be deemed a fixture.

In British Columbia, the test for distinguishing between fixtures and chattels has been summarized as follows:

> Simply put, the test requires first determining whether an item is "slightly attached" and therefore presumed to be a fixture; and second, if it is slightly attached, to consider whether the presumption is defeated by the intended use of the item, ascertained by reference to the degree and object of the annexation (*Royal Bank of Canada v. Maple Ridge Farmers Market Ltd.*, 1995 CanLII 896 (BC SC)).

Let us consider an example of how these rules would be applied.

### *Example*

Smith, an owner of real property, agrees in writing to sell his property to Jones. No mention is made in the agreement concerning the two valuable pictures hanging on wires from screws in the living room wall. When Smith vacates, he takes the pictures with him. Jones thinks that these pictures were included in the selling price and wants to sue Smith for wrongfully removing them. In deciding who is entitled to the pictures, a court hearing the matter would consider the issue as follows:

1. The pictures were barely attached to the wall and were merely hung on wire attached to screws. The degree of affixation is extremely slight; however, because they are affixed, the first presumption is that these pictures are fixtures.
2. Was the purpose of affixation to better enjoy the pictures as pictures or were the pictures affixed in order to enhance the real property as such? In this case, the purpose of the affixation is probably to better enjoy the pictures as chattels, rather than to improve the real property.

Another factor considered by the courts is the effect that removal of the object would have on the real property. Here, the pictures could be removed simply and with virtually no damage. As a result, the conclusion would be that the pictures are chattels and would not form part of the real property of the seller; therefore, Smith was entitled to remove the pictures.

It is clear that these tests can be difficult to apply and the cases dealing with the distinction between chattels and fixtures are often difficult to reconcile. Therefore, it is always prudent to specify in writing in the contract of purchase and sale whether or not any questionable items will pass with the property. By expressly agreeing between themselves, the parties can avoid these common law principles and decide the matter conclusively. Some licensees, at the time that they prepare a listing agreement, walk around the property and ask the seller if an affixed item which enhances the property will be "going" with the seller. Similarly, some licensees, when showing prospective buyers through the premises, take notes with respect to those items which catch the buyer's eye. These items are then dealt with in the offer that is presented to the seller.

### *Monical v. 0793545 B.C. Ltd.*, 2013 BCSC 25

In *Monical*, the plaintiffs sold their ranch to the defendant. The plaintiffs and defendant came to a disagreement about whether certain items were included in the purchase; among these were a number of cattle troughs and a Hi-Hog (a machine used to immobilize cattle). To resolve the dispute, the Court had to determine whether the items were chattels or fixtures and, consequently, whether the items belonged to the plaintiff or the defendant. Applying the test from *Stack v. Eaton*, the Court found that the troughs were not affixed to the land and there was no evidence that they were intended to be part of the land; therefore, the troughs were chattels and belonged to the plaintiff. With respect to the Hi-Hog, while it was affixed slightly with several welds and a bracket, the Court held that the purpose of affixation was to make better use of the Hi-Hog by stabilizing it while the cattle moved through it rather than to make better use of the land; therefore, the Hi-Hog was also found to be a chattel.

The *Monical* case demonstrates the risks to the parties (and consequently, their licensees) if certain items are not specifically dealt with in the contract of purchase and sale.

## As a Licensee...

To avoid the confusion that may arise with respect to the property rights of a seller and buyer upon completion, a prudent licensee may wish to adopt the following procedures:

1. Tell the seller and buyer that certain items on the property may or may not be included in the sale unless the parties specify in writing in the contract of purchase and sale that those items will or will not be included. For example, items such as some light fixtures, satellite dishes and "built in" appliances (e.g. microwaves, dishwashers, etc.) should be expressly identified in the contract of purchase and sale as being either included in or excluded from the sale.
2. Give the seller and buyer ample opportunity to identify those items which they wish to be either included in or excluded from the sale.
3. Draft the contract of purchase and sale to accurately reflect the mutual understanding of the seller and buyer with respect to what is excluded and included, and allow the seller and buyer an opportunity to read the contract of purchase and sale to confirm that it reflects their mutual understanding.

# CO-OWNERSHIP OF LAND

All of the estates discussed above (i.e., fee simple, life estate, estate pur autre vie, and leasehold) may be owned by more than one person under a form of co-ownership. While licensees should not advise prospective buyers as to how co-ownership of land should be registered on title, they should understand the differences between the two types of co-ownership.

## Joint Tenancy

**joint tenancy**
where two or more persons hold an undivided estate or interest in a property. When one person dies the survivor or survivors continue to own the whole – the right of survivorship being known as *jus accrescendi*

**Description.** In a *joint tenancy*, each co-owner owns an undivided interest in the whole of the estate. Joint tenants may have separate rights amongst themselves; however, as against everyone else, they are viewed as a single legal owner. The essential feature of this type of ownership is the right of survivorship. When one joint tenant dies, the entire estate automatically vests in the surviving joint tenants. The result is that the surviving joint tenants acquire the whole of the estate, and this continues until there is a sole survivor. Therefore, joint tenants cannot leave their interests to anyone in their wills.

At common law, four "unities" had to exist and be maintained in order to create a joint tenancy and to have it continue:

**Unity of Time.** All joint tenants must receive their interests at the same time.

**Unity of Title.** All joint tenants must receive their interest from the same document (e.g., a will or a deed).

**Unity of Interest.** All joint tenants must have the same estate or interest in land (e.g., fee simple, life estate, leasehold estate, or even a one-half interest in a fee simple). The extent, nature and duration must be identical. For example, one joint tenant cannot have a fee simple estate and another life estate.

**Unity of Possession.** Each co-owner is entitled to possession of the whole of the estate. No joint tenant can hold possession of any part separately and to the exclusion of the others.

### *Example*

Abraham had two sons, Isaac and David. Because Isaac worked very hard, Abraham transferred one-half of his fee simple estate in Blackacre to Isaac. When Abraham died, he left the other half to David in his will. Are David and Isaac joint tenants? No. They cannot be joint tenants because, even though they have identical, undivided, one-half estates in fee simple, they received their estates from two separate documents and at two different times.

Historically, the common law preferred joint tenancy. It was often used to avoid feudal dues or taxes. In modern times, joint tenancy is often used as a tax planning tool for married people or people in close relationships. Outside these relationships, joint tenancy can lead to harsh results; therefore, in modern times, the law will only recognize a joint tenancy if it has been expressly created. If a document transfers property to two co-owners without saying how they will hold the property, the *Property Law Act* says that the co-owners will be presumed to be tenants in common, not joint tenants, each as to an equal share, to which the right of survivorship does not apply.

### *Example*

Abraham left Blackacre to his sons Isaac and David in his will. The will said "I leave Blackacre equally to my sons, Isaac and David". The law will presume that Isaac and David are tenants in common, even though the four unities are present.

## Termination of a Joint Tenancy

A joint tenancy may be terminated by:

1. severance of the joint tenancy by operation of law (e.g., a joint tenant sells or mortgages their estate);
2. partition by mutual agreement of the joint tenants; or
3. partition by a court order under the *Partition of Property Act*.

### *Example*

**Termination of a Joint Tenancy – Operation of Law**

A joint tenancy depends on the continuance of the three unities of title, interest and possession. If any of these unities are destroyed, the joint tenancy is severed and a tenancy in common is created. The unity of time of vesting only applies to the original creation of the joint tenancy and cannot, therefore, be affected by any subsequent act.

Destruction of the unity of title is the most obvious and common way in which a joint tenancy will be severed. In particular, the sale, mortgage or attachment of one joint tenant's share will destroy the unity of title and create a tenancy in common so far as that person's share is concerned. For example, if Xavier, Yasmin and Zeb are joint tenants and Xavier sells his interest, Yasmin and Zeb remain, as between themselves, joint tenants of a two-thirds interest in the property, but they become tenants in common with the new co-owner of Xavier's one-third interest. Many people do not realize that a joint tenant, like a tenant in common, may freely sell, mortgage, lease, etc., their own interest, without requiring the consent or knowledge of the remaining co-owners. If the joint tenant does so, the joint tenancy could be severed, even though the other joint tenant(s) may be unaware of their action.

Finally, it should also be noted that a severance may be effected by one joint tenant executing and registering a transfer to themselves. In such a case, the joint tenants will become tenants in common. There is no requirement that a joint tenant give notice to the other tenants before severing the joint tenancy.

## Tenancy in Common

In a *tenancy in common*, each co-owner holds a separate ownership share in the property. A tenancy in common requires only one unity, that of possession. Therefore, tenants in common may have different shares in their property. For example, two may own a ¼ interest in the property and one may own a ½ interest in the property.

**tenancy in common**
where two or more persons hold estates or interests in a property and each has a separate share. Each may sell or bequeath their interest. In the event that the interest has not been sold at the time of death, their interest passes as a part of their estate

A tenancy in common may be terminated by:

1. an agreement between the parties to sell one tenant's interest to the other;
2. an agreement between the parties to sell the whole interest to a third party; or
3. a court order under the *Partition of Property Act*.

Note that a tenancy in common, unlike a joint tenancy, is not terminated merely because one party chooses to sell their own estate or interest. The buyer will simply become the new tenant in common. Because there is no right of survivorship in a tenancy in common, a tenant in common

may leave their interest by will to whomever they wish and without notifying the other tenants. For this reason, in business relationships where the co-ownership of property is involved, ownership will usually be a tenancy in common, not a joint tenancy. However, in most jurisdictions, a transfer of a deceased joint tenant's estate or interest into the name of the surviving joint tenant is a simpler procedure than the transfer to an heir when a tenant in common dies, so a joint tenancy may be used by people in a close relationship who would want the right of survivorship to be the result. Their heirs will enjoy a simpler, less costly transfer procedure on death.

### As a Licensee...

When dealing with co-owners (both tenants in common and joint tenants) as buyers or sellers, a licensee should ensure that each co-owner signs any documentation. For example, if Bob and Elaine as joint tenants are selling their family home, both of their signatures will be necessary on the listing agreement and on the contract of purchase and sale.

#### *ter Borg v. Morris*, 2012 BCSC 554

The *Partition of Property Act*, which has been discussed above, applies to both joint tenancies and tenancies in common. The following case illustrates how a partition might occur in the context of a tenancy in common.

In *Morris*, two friends, the petitioner and the respondent, purchased a property as tenants in common. They lived together in the shared property for three years until the petitioner and his partner, expecting a child, moved into another home that they felt was more suitable for their family. Subsequently, the petitioner attempted to arrange a buyout of the shared property either by himself or by the respondent. Unable to form a consensus, the petitioner petitioned the Court for a sale and distribution of proceeds with respect to the property. Under section 6 of the *Partition of Property Act*, a co-owner or group thereof may request a court-ordered sale and distribution of proceeds with respect to their property. The court must order the requested sale provided that the petitioning party owns at least 50 percent of the property interest and there is no good reason for the court to refuse the sale. In this case, the Court gave the petitioner exclusive conduct of the sale, with directions on how the sale proceeds should be distributed. A minimum listing price was set, and the petitioner was required to provide the respondent with copies of all documentation with respect to the sale. The Court also allowed either party to purchase the property themselves, directing that no commission was to be payable in the event of a sale to either party.

In *Morris*, the petitioner applied for a court ordered sale by relying on section 6, which requires a petitioner to hold a minimum of 50 percent of the property interest. However, the *Partition of Property Act* also allows joint tenants or tenants in common to request a partition or sale despite not holding a majority interest in the property.

The *Morris* case serves as an example of how a co-owner may unilaterally obtain a court ordered sale of a property, even without the consent of the remaining co-owner(s). Those seeking to purchase property as a co-owner should consider entering into a written agreement with the other co-owner(s) to govern their relationship, including how and when the property can be sold.

## INTRODUCTION TO TORT LAW

*Torts* are civil wrongs (in which the state is not involved) for which the courts will grant a legal remedy. Some common examples include assault, defamation of character, and false arrest. Deceit and negligence, which will be discussed in Chapter 5: "The Professional Liability of Real Estate Licensees", are also types of torts. The following sections discuss certain torts under the common law and statute which affect individuals who hold interests in, or occupy, land. It is useful for licensees to have a general knowledge of these torts, given their frequent dealings with real property interest holders.

**tort**
a private wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of damages

### Trespass

Trespass consists of either (i) wrongfully entering, (ii) remaining on, or (iii) placing something on another's land (including the airspace or subsurface relating to that land). An injured party whose land has been trespassed upon has various remedies, including damages (compensation for any decrease in the land's value resulting from the trespass), injunction (a court order requiring someone to do or stop doing a particular act, including an order to stop the continuance or repetition of a trespass) and self-help (a person in possession of

land can forcibly remove a trespasser if they have first asked the trespasser to leave and uses no more force than is reasonably necessary in the circumstances).

In certain circumstances, a person will have a lawful excuse permitting them to enter, remain upon or place something upon another's land, thus relieving them from liability in trespass. Such circumstances include, for example, express or implied permission to enter, entry under a statutory authority or lawful exercise of an easement.

## Private Nuisance

A private nuisance occurs when an owner or occupier of land substantially and unreasonably interferes with the reasonable use and enjoyment of a neighbouring property. "Substantial" means that interference experienced by the injured party must be non-trivial. "Unreasonable" means that interference experienced by the injured party is unreasonable in light of all of the circumstances, including the nature of the harm, the character of the neighbourhood, the sensitivity of the injured party, the defendant's conduct and the frequency and duration of the interference. Common uses of land which would constitute nuisance include activities which produce smoke, unpleasant smells, noxious fumes, noise, heat, vibrations, electrical interference, or allow the escape of germs, animals or water.

There are two types of harm into which private nuisance cases are sometimes categorized: (i) unreasonable interference with another occupier's use and enjoyment of property (sometimes called "loss of amenity"), and (ii) unreasonable interference which causes physical damage to the property (sometimes caused "material injury"). Where the alleged nuisance involves loss of amenity (with little or no physical damage), the interference will be carefully scrutinized to determine if it is unreasonable, with regard to the factors set out above. However, where the alleged nuisance has caused physical damage to land or property located on the land, it will usually be easier to establish that the interference is unreasonable.

The two remedies of damages and injunctive relief are both also available for nuisance. A third remedy is abatement, which is the peaceable prevention of a nuisance, for example, by removing a dangerous wasps' nest in a neighbour's tree. This remedy is available without recourse to the courts, but, as with the remedy of self-help in regard to a trespass, caution should be exercised because abatement has certain restrictions. It can only be applied if (i) the abatement is a reasonable method of preventing the nuisance, (ii) the abatement does not endanger the lives or property of others, and (iii) notice has been given to the occupier before abating a nuisance on their property, unless the danger created by the nuisance is imminent and a situation of emergency exists.

### *Segal v. Derrick Golf & Winter Club,* 1977 CanLII 656 (AB QB)

The plaintiffs' house was adjacent to a golf course belonging to the defendant club. Golf balls from the golf course were driven in great number onto the plaintiffs' property. The danger resulting from the flying balls resulted in the plaintiffs and their children being unable to use their backyard during golf season. The plaintiffs sued in trespass and nuisance.

The court held that the club was not liable for the trespasses (the golf balls driven onto the plaintiffs' property) committed by its members. However, on the head of nuisance, the court found in favour of the plaintiffs. The court stated that the golf balls amounted to a "serious and substantial" interference with the plaintiffs' use and enjoyment of their property, and that the club was responsible for the continuance of that interference by its failure to take reasonable steps to prevent the nuisance. The plaintiffs were awarded a sum of money and the courts granted an injunction to prevent the continuance of the nuisance.

## Liability of an Occupier

### *Common Law*

At common law, the general rules of negligence (which will be covered further in Chapter 5, together with the concepts of "duty of care" and "standard of care") imposed liability on an occupier for injury suffered by visitors entering the occupier's premises. Over the years, the courts developed special categories so that the standard of care owed by the occupier varied according to the type of visitor: invitee, licensee, trespasser or children. For example, an occupier owed a higher standard of care to someone who entered the premises for the occupier's economic interest (e.g., a customer) than to someone without an economic interest (e.g., a friend). Similarly, an occupier owed a trespasser a limited standard of care, whereas a more onerous standard of care was owed to child visitors.

It became confusing and difficult to determine which standard of care to apply to a visitor because a visitor could fall into more than one category. For example, what if the visitor was both a child and a trespasser? To address these concerns, in 1974, the British Columbia Legislature enacted the *Occupiers Liability Act* (the "OLA"). Now, occupiers liability is governed by the OLA rather than the common law. The common law has been replaced by legislation in most of the provinces in Canada.

### *The Occupiers Liability Act*

Section 1 of the OLA defines "occupier" as follows:

> 1. In this Act "occupier" means a person who
>  (a) is in physical possession of premises, or
>  (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
>
> and, for this Act, there may be more than one occupier of the same premises;

Section 3 of the OLA sets out the statutory duty of care owed by an occupier:

> 3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
>  (a) condition of the premises,
>  (b) activities on the premises, or
>  (c) conduct of third parties on the premises.
>
> (3) Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to
>  (a) create a danger with intent to do harm to the person or damage to the person's property, or
>  (b) act with reckless disregard to the safety of the person or the integrity of the person's property.
>
> …
>
> (4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person.

There are a few key points to take from the excerpts from the OLA above. Firstly, the OLA states that there may be more than one occupier of the same premises. The following parties, if they fall within the definition of occupier in the OLA, could be subject to liability under the OLA: registered owners, tenants, house-sitters, real estate licensees when hosting open houses, property managers, and strata corporations. Secondly, the duty of care imposed by the OLA on an occupier is to take such care as in all the circumstances is reasonable to see that persons coming onto the property will be reasonably safe. There is no mention of the categories of visitors that developed under the common law. However, it is clear that both the type of visitor and the circumstances under which a visitor has entered the premises, whether an invited guest or a trespasser, would be relevant in determining what an occupier must do to provide for the safety of the visitor.

Section 3(3) provides that an occupier has no duty of care to a person in respect of risks willingly accepted by that person other than to not intentionally harm or act with reckless disregard towards the visitor or the visitor's property. The OLA further explains when a visitor is deemed to have willingly assumed all risks, including:

- A visitor who is trespassing while committing or having the intention to commit a criminal act.
- A visitor who enters categories of premises as outlined in section 3(3.3), such as certain agricultural or rural premises, while the visitor is
  - trespassing; or
  - entering for the purpose of a recreational activity and the occupier receives no payment and is not providing the visitor with living accommodation on the premises.

Finally, section 3(4) notes that the standard of care imposed on occupiers by the OLA does not relieve occupiers of a higher standard of care that may be imposed on the occupier by other statutes, such as the *Residential Tenancy Act* and the *Workers Compensation Act*.

## CONCLUSION

The material in this chapter acquainted the reader with the various estates and interests that can be held in land today. The law regarding fixtures and chattels was also briefly examined, and the chapter concluded with a discussion of how estates can be owned by multiple parties. The chapter concluded with a brief overview of various civil torts that relate to land. Licensees must have a strong grasp of the terms and concepts discussed in this chapter in order to properly understand the property that is being listed, purchased or managed. While licensees should never give legal advice regarding the validity of any estates or interests that they may encounter, they will be expected to understand the significance of these terms and alert their clients when legal advice should be obtained.

# APPENDIX 3.1
## Form A – Freehold Transfer

FORM_A_V23

**LAND TITLE ACT**
**FORM A (Section 185(1))**
**FREEHOLD TRANSFER Province of British Columbia** LOCK PAGE 1 OF 1 PAGES

Your electronic signature is a representation that you are a subscriber as defined by the Land Title Act, RSBC 1996 c.250, and that you have applied your electronic signature in accordance with Section 168.3, and a true copy, or a copy of that true copy, is in your possession.

1. APPLICATION: (Name, address, phone number of applicant, applicant's solicitor or agent) Import Profile

Deduct LTSA Fees? Yes ☑

2a. PARCEL IDENTIFIER AND LEGAL DESCRIPTION OF LAND:
[PID] [LEGAL DESCRIPTION]

No PID NMBR

STC? YES ☐
Pick up STC?

Use 30 Parcel Schedule Use 3 Parcel Schedule

2b. MARKET VALUE: $

3. CONSIDERATION: $

4. TRANSFEROR(S): Use Schedule

5. FREEHOLD ESTATE TRANSFERRED: **Fee Simple**

6. TRANSFEREE(S): (including occupation(s), postal address(es) and postal code(s)) Use Schedule

BRITISH COLUMBIA
CANADA

Joint Tenants ?

7. EXECUTION(S): The transferor(s) accept(s) the above consideration and understand(s) that the instrument operates to transfer the freehold estate in the land described above to the transferee(s)

Officer Signature(s) | **Execution Date** Y M D | Transferor(s) Signature(s)