

**PROPERTY LAW 231**  
**Section 003 / Professor Douglas Harris**

**SYLLABUS—2020/21**

**1. THE NATURE OF PROPERTY (5 classes)**

- 1.1 What is Property?
- 1.2 Why Private Property?
- 1.3 Novel Claims to Property

This unit introduces the idea of property, asks why rights to private property exist, and investigates how various justifications for property are deployed in novel claims to private property. In doing so, it introduces ideas about the nature and function of the institution of property that recur throughout the course. At times, these ideas appear explicitly in the written reasons of a judgment, the argument in a lawyer's brief, the considerations of a policy paper, or the reflections of a legal scholar, but other times they form part of a background set of assumptions about what property is and what it should do. Whether explicitly engaged or implicitly present, the contested notions of property and its justifications form the backbone of this course and, more importantly, of the institution of property itself.

At the end of this unit, students should be able to:

- Identify the different categories of property and explain the principal characteristics of each;
- Describe and classify the different understandings of the idea of property;
- Explain common property as well as the ideas of the “tragedy of the commons” and “tragedy of the anti-commons”;
- Describe the idea of *stare decisis* and the role of precedent in the common law;
- Recognize different elements in a judgment, including the decision of the majority, concurring decisions, and dissenting decisions;
- Describe and evaluate the different justificatory traditions for private property;
- Recognize when decision-makers are using one or more of the justifications for private property in their determinations about property rights;
- Evaluate claims for rights to private property based on the various justifications for private property;
- Explain the principal features of the tort of nuisance;
- Build connections between particular property rules and their social context; and
- Describe the doctrine *numerus clausus* and provide some of the explanations for it.

In addition, students will have an opportunity to:

- Consider what it means to be an owner;
- Work collaboratively to draft functional definitions of various forms of property;
- Analyze and evaluate majority and dissenting opinions; and
- Reflect on the institutional roles of courts and legislatures in a common law system.

### 1.1 What is Property?

Cheryl Harris, "Whiteness as Property" (1993) 106 Harvard Law Review 1707, at 1709-24  
*Property Law Reader 4<sup>th</sup>*, iii-v, 1-29  
 MacPherson, "The Meaning of Property"  
 Merrill, "Property and the Right to Exclude"  
*Yanner v Eaton*  
*Harrison v Carswell*  
[Labour Relations Code](#), s 66

### 1.2 Why Private Property?

*Property Law Reader 4<sup>th</sup>*, 29-41, 449-459  
 Lewis, "The Right to Private Property"  
 Graben, "Lessons for Indigenous Property Reform"  
[Nisga'a Final Agreement](#), Chapter 3, ss 1-5 (pp. 31-32)  
[Nisga'a Lands Designation Act](#), NLGSR 2000/14, s 1  
[Nisga'a Village Entitlement Act](#), NLGSR 2000/13, ss 1-4  
[Nisga'a Nation Entitlement Act](#), NLGSR 2000/12, ss 1-4  
[Nisga'a Land Title System Considerations and Challenges](#) (17 January 2007), p 1  
[Nisga'a Landholding Transition Act](#), NLGSR 2009/02, ss 3-4  
*Nisga'a Landholding Transition Act* [press release](#) (n.d.)

### 1.3 Novel Claims to Property

*Property Law Reader 4<sup>th</sup>*, 41-74  
*International New Service v Associated Press*  
*Victoria Park Racing and Recreation Grounds Ltd. v Taylor*  
*Moore v The Regents of the University of California*  
[US Patent No. 4,438,032](#)

## 2. PROPERTY IN PERSPECTIVE (5 classes)

This unit considers the sources of property law in Canada, investigates the conflicts over public space between those who have homes and those who are homeless, and analyzes the various constitutional and non-constitutional protections for private property in Canada.

- 2.1 Sources of Property Law
- 2.2 Property, Class, and Poverty
- 2.3 Protections for Property

At the end of this unit, students should be able to:

- Explain the multiple sources of Canadian property law in the common law jurisdictions;

- Identify some of the principles within certain Indigenous societies that govern human relationships with the non-human world;
- Describe the basic categories within the law of property in the common law;
- Explain the doctrine of tenure and its continuing relevance in Canadian property law;
- Explain the doctrine of reception and identify the date of reception in British Columbia;
- Assess the different ways in which those with, and those who are largely without, private property use public land;
- Specify various constitutional and non-constitutional protections for private property in Canada;
- Explain the differences between expropriation and constructive expropriation (regulatory takings); and
- Recognize possible effects of international trade agreements on the future development of constructive expropriation doctrine in Canada.

In addition, students will have an opportunity to:

- Share examples of the issues that arise from conflicting uses of public spaces; and
- Consider different constitutional provisions that protect private property and different approaches to the public regulation of private property.

## 2.1 Sources of Property Law

### A. Indigenous Legal Traditions

*Property Law Reader 4<sup>th</sup>*, 75-80

Borrows, *Recovering Canada*

[Te Urewere Act 2014](#) (NZ) 2014 No 51, ss 3, 11(1), 12(1), 13, 16-17

[Te Awa Tupua \(Whanganui River Claims Settlement\) Act 2017](#) (NZ) 2017 No 7, ss 3, 10, 13-14, 18

Jacinta Ruru, "[In New Zealand, this river and park are legal persons](#)" TEDxChristchurch 16 November 2017 [14:32 video]

*Nulh Ghah Dechen Ts'edilhtan* ("[Tsilhqot'in Nation Wildlife Law](#)"), Preamble, ss 1-7

### B. English Common Law

*Property Law Reader 4<sup>th</sup>*, 96-115

Butt, *Land Law*

Ziff, "Warm Reception in a Cold Climate"

Chambers, *Introduction to Property Law in Australia*

[Law and Equity Act](#), RSBC 1996, c 253, s 2

[Wills, Estates and Succession Act](#), SBC 2009, c 13, ss 20-23, 60

[Escheat Act](#), s 1

## 2.2 Property, Class, and Poverty

*Property Law Reader 4<sup>th</sup>*, 115-137  
 Waldron, “Homelessness and the Issue of Freedom”  
 Ellickson, “Controlling Chronic Misconduct in City Spaces”  
*Victoria (City) v Adams*  
 City of Vancouver Park Board, [“Parks Control By-law Updates – Temporary Shelter in Parks”](#) (7 July 2020)  
[International Covenant on Economic, Social and Cultural Rights](#), Article 11.1  
[Here at Home: Evicted](#) (National Film Board of Canada, 2012), 4 mins.

## 2.3 Protections for Property

### A. Constitutional Protections

*Property Law Reader 4<sup>th</sup>*, 137-142  
 Ziff, “Taking Liberties”  
*Constitution of the Republic of South Africa, 1996*, s 25

### B. Compensation

*Property Law Reader 4<sup>th</sup>*, 142-169  
*Pennsylvania Coal v Mahon*  
*Lucas v South Carolina Coastal Council*  
*Mariner Real Estate Ltd v Nova Scotia (AG)*  
*Canadian Pacific Railway v Vancouver (City)*  
 Harris, “A Railway, a City, and the Public Regulation of Private Property”  
*North America Free Trade Agreement*, Article 1110  
*Metalclad v United Mexican States*  
 UNCTAD, *World Investment Report 2015*  
[Expropriation Act](#), ss. 1, 4(2), 6(1), 10(2), 14, 18, 30(1), 31(1), 32  
[Canada-United States-Mexico Agreement](#), Article 14.8 and Annex 14-B

## 3. BOUNDARIES (5 classes)

This unit introduces the spatial dimensions of interests in land, including the height and depth to which an interest in land extends, as well as some of the issues that arise around boundaries between adjoining owners. It then turns to the law of fixtures, which marks the boundary between land and chattel.

- 3.1 Airspace
- 3.2 Subsurface
- 3.3 Lateral Boundaries – Land
- 3.4 Lateral Boundaries – Water
- 3.5 Fixtures

At the end of this unit, students should be able to:

- Specify the extent to which ownership of an interest in land extends above and below the surface;
- Identify the statutory mechanisms for subdividing airspace and multi-unit developments;
- Explain the law of support;
- Describe the history, nature, and limits of Crown grants in British Columbia;
- Specify the different spheres and levels of state sovereignty over ocean spaces;
- Understand the nature of riparian rights at common law and explain how they have been modified by statute;
- Explain and apply the test that distinguishes fixtures from chattels; and
- Outline the different requirements to establish the torts of trespass and nuisance.

In addition, students will have an opportunity to:

- Analyze a case using the “IRAC” method;
- Identify the ratio of a case, formulate a rule based on the ratio from one or more cases, and apply the rule to a new fact scenario;
- Practise identifying narrow and broad ratios from cases; and
- Apply the doctrine of reception.

### 3.1 Airspace

*Property Law Reader 4<sup>th</sup>*, 173-181

*Didow v Alberta Power Ltd*

[Land Title Act](#), ss 138, 139, 141, 145

[Strata Property Act](#), s 239

[United Nations Convention on the Law of the Sea](#), Article 2(2) 1 & 2

### 3.2 Subsurface

*Property Law Reader 4<sup>th</sup>*, 181-196

*Edwards v Sims*

Ziff, “The Great Onyx Cave Cases”

[Land Act](#), ss 11, 50

[Sample Crown Grant](#) (British Columbia)

[Mineral Tenure Act](#), ss 19(1-2), 20 (repealed)

### 3.3 Lateral Boundaries - Land

*Property Law Reader 4<sup>th</sup>*, 201-210

*Blewman v Wilkinson*

[Trespass Act](#), RSBC 2018, c 3, ss 1, 2(1), 3, 4(1), 10(1)

[Offence Act](#), RSBC 1996, c 338, ss 2, 4

[Strata Property Act](#), SBC 1998, c 43, s 68

### 3.4 Lateral Boundaries - Water

*Property Law Reader 4<sup>th</sup>*, 213-222

*R v Nikal*

[United Nations Convention on the Law of the Sea](#), Articles 1-5, 8, 33, 55-57

[Oceans Act](#), SC 1996, c 31, ss 4-6, 10, 11, 13, 14

[Law and Equity Act](#), RSBC 1996, c 253, s 2

[Water Sustainability Act](#), SBC 2014, c 15, ss 5-7

[Land Act](#), RSBC 1996, c 245, s 55

### 3.5 Fixtures

*Property Law Reader 4<sup>th</sup>*, 222-231

*LaSalle Recreations Ltd v Canadian Camdex Investments Ltd*

*Diamond Neon (Manufacturing) Ltd v Toronto-Dominion Realty Co*

[Personal Property Security Act](#), RSBC 1996, c 359, ss 36(2)-(5)

## 4. POSSESSION (3 classes)

Unit 4 introduces the concept of possession, highlighting its importance in the common law with a case about a famous baseball. It then turns to the doctrine of adverse possession, known colloquially as “squatters’ rights”, before investigating the law of finders. Finally, the unit reviews the particular requirements associated with the gifting of property.

- 4.1 The Concept of Possession
- 4.2 Adverse Possession
- 4.3 Finders
- 4.4 Transfer of Title through Delivery: Gifts

At the end of this unit, students should be able to:

- Explain the concept of possession;
- Identify the requirements of a successful claim to adverse possession;
- Outline the rights of finders;
- Specify the required elements of a contract for purchase and sale of land; and
- Describe the important elements in a gift of property.

In addition, students will have the opportunity to:

- Review a template contract for the purchase and sale of an interest in land;
- Review the standard forms for transferring interests in land in British Columbia;
- Re-visit the doctrine of tenure; and
- Apply the statutory rules to determine when a contract for the transfer of an interest in land is enforceable.

### 4.1 The Concept of Possession

*Property Law Reader 4<sup>th</sup>*, 283-295

*Popov v Hayashi***4.2 Adverse Possession**

[Downey v Nova Scotia \(Attorney General\)](#), 2020 NSSC 201  
[Limitation Act](#), SBC 2012 c 13, s 28  
[Land Title Act](#), RSBC 1996 c 250, s 23  
[Land Title Inquiry Act](#), RSBC 1996 c 251  
[Property Law Act](#), RSBC 1996, c 377, s 36

**4.3 Finders**

*Property Law Reader 4<sup>th</sup>*, 316-328  
*Trachuk v Olinek*

**4.4 Transfer of Title through Delivery: Gifts**

*Property Law Reader 4<sup>th</sup>*, 332-344, 350  
 Baron, “Gifts, Bargains, and Form”  
*Nolan v Nolan & Anor*  
[Law and Equity Act](#), RSBC 1996, c 253, s 59  
[Property Law Act](#), RSBC 1996, c 377, ss 4, 15  
[Land Title Act](#), s 185  
 BC Land Title & Survey Authority, [Transfer Forms A, B & C](#)

**5. FREEHOLD ESTATES (3 classes)**

The doctrine of estates is another foundational feature of real property in the common law system. Tenure (introduced in Unit 2) permitted what may be described as a vertical division of interests in land between people within a social hierarchy, with the Crown at its apex. The doctrine of estates permits a horizontal division of interests in land—a division of interests over time. Unit 5 introduces the two principal categories of estates—freehold estates and leasehold estates—and then focuses on the two remaining types of freehold estate: the fee simple and the life estate. We turn to the particular characteristics of leasehold estates in Unit 10.

- 5.1 The Fee Simple
- 5.2 Life Estates

At the end of this unit, students should be able to:

- Explain the doctrine of estates and the distinctions between freehold and leasehold estates;
- Describe the primary features of the different freehold estates, particularly the estate in fee simple and the life estate;
- Differentiate between words of purchase and words of limitation in the transfer of interests in land, and understand what each do;

- Specify the differences between a rule of law and a rule of construction;
- Explain the statutory modification of the common law rules regarding the language required when transferring interest in land;
- Describe in general terms the powers and obligations of life tenants; and
- Explain the doctrine of waste as a mechanism for balancing different interests.

In addition, students will have the opportunity to:

- Revisit the doctrine of tenure;
- Compare common law and statute-based rules; and
- Practice determining a rule from case law and applying the rule to different scenarios.

### 5.1 Fee Simple

*Property Law Reader 4<sup>th</sup>*, 353- 365

Gray & Gray, *Elements of Land Law*

Ellickson, "Property in Land"

*Thomas v Murphy*

[Property Law Act](#), RSBC 1996, c 377, s 10, 19

[Land Title Act](#), s 186(4)-(8)

[Wills, Estates and Succession Act](#), SBC 2009, c 13, s 41(3)

### 5.2 Life Estates

*Property Law Reader 4<sup>th</sup>*, 365-382

*Re Walker*

*Re Taylor*

*Christensen v Martini Estate*

Ontario Law Reform Commission

[Property Law Act](#), RSBC 1996, c 377, s 19(2)

[Law and Equity Act](#), RSBC 1996, c 253, s 11

[Wills, Estates and Succession Act](#), SBC 2009, c 13, s 41(3)

## 6. EQUITY (3 classes)

There is what appears, at first encounter, an odd, yet utterly fundamental distinction in the common law between rules of law and rules of equity. The oddness comes from the peculiar disjunction between some rules that are legal and others that are equitable. However, the common law evolved with these two separate streams of rules co-existing within it. The different streams were the preserves of entirely separate courts, but in the nineteenth century the separate courts were fused into a single structure with jurisdiction over law and equity. This unit introduces the common law and equitable courts, and then focuses on some aspects of equitable doctrine that have been particularly important in the development of the law of property. It does so through a foray into the origins of equity, and then with a brief look at how equity dealt with mortgages, before turning in more detail to the emergence of the use and the

trust. It pays particular attention to the resulting trust and to the constructive trust as a remedy for unjust enrichment.

- 6.1 Origins of Equity
- 6.2 Resulting Trusts
- 6.3 Constructive Trusts

On the completion of this unit, students should be able to:

- Identify the courts of common law and equity;
- Explain the emergence of the Court of Chancery;
- Enumerate some of the equitable maxims and connect one or more maxim to one or more equitable remedy;
- Provide a brief explanation of the equitable remedies of redemption and foreclosure;
- Describe the role of the “use”, its demise, and the rise of the trust;
- Identify the circumstances that produce a resulting trust;
- Identify the circumstances that create a presumption of advancement;
- Explain the rise of the constructive trust as a remedy for unjust enrichment, and how its importance has been modified by statute; and
- Define the different ways in which the term “common law” is used.

In addition, students will have an opportunity to:

- Explore the connection the historical development of the common law and contemporary doctrine;
- Revisit the justifications for property;
- Consider the policy choices that underlie common law rules; and
- Practice applying common law rules to sample problems.

### 6.1 Origins of Equity

*Property Law Reader 4<sup>th</sup>*, 461-470

Butt, *Land Law*

List of the “[Maxims of equity](#),” Wikipedia

[Law and Equity Act](#), RSBC 1996, c 253, ss 4, 5, & 44.

### 6.2 Resulting Trusts

*Property Law Reader 4<sup>th</sup>*, 476-487

*Pecore v Pecore*

[Property Law Act](#), RSBC 1996, c 377, s 19(3)

### 6.3 Constructive Trusts

*Property Law Reader 4<sup>th</sup>*, 487-517

*Kerr v Baranow*; *Vanasse v Seguin*

*Soulos v Korkontzilas*  
 “Murdoch v Murdoch: The Sign” Radio Drama  
[\*Family Law Act\*](#), SBC 2011, s 25, ss 1, 3, 81

## 7. LEASEHOLD INTERESTS (4 classes)

Leasehold interests are among the oldest in the common law, pre-dating the freehold interests which emerged out of the tenurial relationships—the landlord and tenant relationships—that lay at the heart of a feudal system. Although ancient in origin, many of us experience our first formal interaction with the law of real property through the signing of a residential tenancy agreement. Statutory reforms have substantially modified the common law so far as it applies to residential tenancies, and we turn to some of these reforms in the final topic. The other topics—on the nature of a lease, the interests and obligations of parties to a lease, and the proprietary status of licences—deal primarily with commercial leases.

- 7.1 The Nature of a Lease
- 7.2 Leasehold Interests and Obligations
- 7.3 The Proprietary Status of Licences
- 7.4 Residential Tenancies

On the completion of this unit, students should be able to:

- Recognize, define, and distinguish leases and licences;
- Identify the essential elements of a lease;
- List the “usual covenants” in a lease;
- Describe the distinction between the assignment of a lease and a sub-lease;
- Explain the concept of “privity of estate”;
- Describe the nature of the landlord’s covenant to provide “quiet enjoyment”;
- Explain the doctrine of proprietary estoppel; and
- Outline the principle elements of statutory reform in residential tenancies.

In addition, students will have an opportunity to:

- Derive principles from case law and apply them to interpret the text of a lease;
- Revisit the debate over the respective roles of courts and legislatures when matters of law and public policy intersect; and
- Consider some of the public policy behind residential tenancy reform.

### 7.1 The Nature of a Lease

*Property Law Reader 4<sup>th</sup>*, 605-615  
*Fatac Ltd. (in liquidation) v Commissioner of Inland Revenue*

### 7.2 Leasehold Interests and Obligations

*Property Law Reader 4<sup>th</sup>*, 615-639

*Merger Restaurants v DME Foods Ltd*  
*Sundance Investments*  
*Southwark LBC v Tanner*  
*Petra Investments Ltd. v Jeffrey Rogers plc*

### 7.3 The Proprietary Status of Licences

*Property Law Reader 4<sup>th</sup>*, 648-659  
*Stiles v Tod Mountain Development Ltd*

### 7.4 Residential Tenancies

*Property Law Reader 4<sup>th</sup>*, 659-661  
[Residential Tenancy Act](#), ss 1-6, 12-13.1, 17-20, 26-34, 42-45, 46-47, 49, 51.2-51.3, 91  
[Residential Tenancy Regulation](#), ss 4-5, 7, 11-13.1, 22-23, Schedule  
[Residential Tenancy Agreement Form](#) (2019/11)

## 8. TITLE REGISTRATION (5 classes)

Title registration is the dominant system for recording interests in land in the Canadian common law provinces. The particulars of each title registration system vary from province to province, but the basic structures are similar. In this Unit, we draw on cases from several jurisdictions to develop the foundational principles, but the focus is on British Columbia's title registration system as an example of how title registration systems operate. One of the recurring issues in this unit is the extent to which title registration systems displace the rules at common law. We begin with an analysis of the common law priorities and the principles of title registration.

- 8.1 Common Law Priorities & Title Registration
- 8.2 Indefeasible Title & Fraud
- 8.3 Registration of Charges
- 8.4 Title Registration and the Abolition of Notice
- 8.5 The '*in personam*' exception

On the completion of this unit, students should be able to:

- Classify the priority rules at common law;
- Describe the origins and recount the history of title registration in Canada;
- Identify the general principles of title registration and correlate the principles with sections of British Columbia's *Land Title Act*;
- Explain how title registration departs from a common law deeds system;
- Identify the place of the fee simple interest in title registration systems;
- Explain the fraud exception to indefeasible title and the differences between immediate and deferred indefeasibility;
- Describe the interaction of statutory provisions that create a system of immediate indefeasibility in British Columbia;

- Explain the assurance principle and when someone is entitled to compensation from the assurance fund in British Columbia;
- Define “charge” in British Columbia’s title registration system and explain how they are treated differently than fee simple interests;
- List and explain the different categories of notice;
- Explain some of the different ways in which the doctrine of notice has been modified in title registration jurisdictions;
- Predict the effect of notice of a prior unregistered interest in British Columbia; and
- Identify circumstances in which indefeasible title is only a rebuttable presumption.

In addition, students will have an opportunity to:

- Consider the development of title registration in its historical context;
- Practice applying rules to different fact scenarios;
- Analyze the interaction between the common law and statute-based systems;
- Revisit the circumstances that give rise to resulting trusts; and
- Return to the justifications for property.

### 8.1 Common Law Priorities & Title Registration

*Property Law Reader 4<sup>th</sup>*, 875-881, 894-897, 902-904  
 Levmore, “Good-Faith Purchaser”  
*Northern Counties of England Fire Insurance v Whipp*  
*Rice v Rice*  
 Youdan, “The Length of a Title Search in Ontario”  
 Harris, Review of *The Law of the Land*  
[Land Title Act](#), RSBC 1996, c 250, ss 20, 23(2), 29(2), 37(1), 296(2)

### 8.2 Indefeasible Title & Fraud

*Property Law Reader 4<sup>th</sup>*, 905-914  
*Lawrence v Wright*  
 Harris, “[Indefeasible Title in British Columbia](#)” (2006)  
[Land Act](#), s 54  
[Land Title Act](#), ss 20, 23(2), 25.1, 25(2), 43, 296(2)-(3)  
 Land Title Survey Authority, [Electronic Form Templates](#)

### 8.3 Registration of Charges

[Land Title Act](#), ss 1, 23(2), 25.1, 26, 27(3), 197, 297  
*Credit Foncier v Bennett* (1963) 43 WWR 545 (BCCA) (edited)  
[Gill v Bucholtz](#), 2009 BCCA 137, 1-5, 17-19, 26-28  
 Harris & Mickelson, “[Finding Nemo Dat in the Land Title Act](#)” (2012)

### 8.4 Title Registration and the Abolition of Notice

[Jaeger the Cleaner Ltd. v Li’s Investments Co. Ltd.](#), 1979 CanLII 329 (BC SC)

[Woodwest Developments Ltd. v Met-Tec Installations](#), [1982] 6 WWR 624, 625-28, 634-36 (paras 1-11, 26-29)

[Szabo v Janeil](#), 2006 BCSC 502

[Land Title Act](#), s 29

Harris & Au, [“Title Registration and the Abolition of Notice”](#) (2014)

### 8.5 The “*in personam*” exception

*Property Law Reader 4<sup>th</sup>*, 931-934

[Modonese v Delac Estate](#), 2011 BCSC 82, paras 1-13, 72, 130-142, 151-154

## 9. INDIGENOUS INTERESTS IN LAND: TITLE LANDS, TREATY LANDS & INDIAN RESERVES (4 classes)

The defining feature of a tenurial system is that all interests in land arise from the Crown. In Canada, the important exceptions are Aboriginal and treaty rights. Aboriginal rights, including Aboriginal title, arise not from a Crown grant, but from the presence of Aboriginal peoples, their laws and traditions, long before those who came from elsewhere arrived. Treaty rights arise out of the formal agreements between Aboriginal peoples and Britain, and later with Canada. This unit introduces the basic characteristics of Aboriginal title lands and of treaty lands as they are defined in modern treaties in British Columbia. However, before doing so, it considers the land pre-emption laws, their role in displacing Indigenous peoples from settlements, and the attempts to redress this displacement through the Specific Claims Tribunal. It then turns to Aboriginal title and treaty lands, and to the relationship between Aboriginal title and title registration, as well as the Nisga’a efforts to create a registration system for interests in their treaty lands. Finally, the unit explores the nature of Indian Reserves and of the different interests in land on Indian Reserves.

- 9.1 Colonial Land Policy: Land Pre-emptions, Indian Settlements and Specific Claims
- 9.2 Aboriginal Title Lands & Treaty Lands
- 9.3 Title Lands, Treaty Lands, and Title Registration
- 9.4 Indian Reserves and Property on Indian Reserves

On the completion of this unit, students should be able to:

- Identify the features and content of Aboriginal title in Canadian law;
- Point to the statutory basis for caveats and certificates of pending litigation in British Columbia’s title registration system, and explain their roles; and
- Describe how the courts have responded to attempts to include Aboriginal title in title registration systems.

In addition, students will have an opportunity to:

- Reflect on the history of relations between Aboriginal and non-Aboriginal peoples in Canada;
- Consider different models of treaty interpretation;

- Revisit Aboriginal peoples understandings of the relationship between humans and the non-human world; and
- See the potential impact of the duty to consult and accommodate on resource development in British Columbia.

### 9.1 Colonial Land Policy: Land Pre-emptions, Indian Settlements and Specific Claims

Colony of British Columbia, *Pre-emption Proclamation, 1860*

*Land Act*, RSBC 1960, c 206, s 12

Specific Claims Tribunal Canada – [A Brief History of Specific Claims Prior to the Passage of Bill C-30: The Specific Claims Tribunal Act](#)

[Williams Lake Indian Band v Canada \(Aboriginal Affairs and Northern Development\)](#),

2018 SCC 4, paras 1-24, 39-70

### 9.2 Aboriginal Title Lands & Treaty Lands

*Property Law Reader 4<sup>th</sup>*, 428-434

*Tsilhqot'in Nation v British Columbia*, “VI What Rights Does Aboriginal Title Confer?”

[Nisga'a Final Agreement](#), Chapter 3, ss 1-27 (pp. 31-36)

### 9.3 Title Lands, Treaty Lands, and Title Registration

*Property Law Reader, 4<sup>th</sup>*, 936-938

Bankes, Masher, and Hamilton, “The Recognition of Aboriginal Title”

[Land Title Act](#), ss 31, 37(1), 215(1), 216, 282(1), 288, 293

[Nisga'a Land Title Office](#)

[Nisga'a Land Title Act](#), NLCSR: 2010/06, Part 3 – Registration and Its Effects

### 9.4 Indian Reserves and Property on Indian Reserves

Harris, “[Property and Sovereignty: An Indian Reserve and a Canadian City](#),” (2017) 50:2

UBC L Rev, 321-340

Woodward, “16 Types of Aboriginal Interests in Land that May Be Encountered by Lawyers and Notaries in BC,” (2016) 25:4 *The Scrivener* 65

*Nicola Band et al v Trans-Can. Displays et al*, 2000 BCSC 1209 (excerpts)

[First Nations Land Management Act](#), SC 1999, c 24, ss. 6(1), 18(1), 20(1) & (2)

[Musqueam Land Code](#), Preamble, ss 3-6, 30

[Musqueam Land Use Plan](#), ss 1 & 2.1

## 10. QUALIFIED TRANSFERS (3 classes)

This unit focuses on various mechanisms developed in the common law to place conditions on and, in effect, to extend individual control over, private property. The recurring issue in the area of conditional transfers is to find an appropriate balance between private power and other public policy considerations. The unit begins with an introduction to some of the basic concepts and distinctions, including those between vested and contingent interests, and between

defeasible and determinable interests. It then turns to a number of cases where the appropriate balance between private power and public policy is central.

### 10.1 Basic Concepts

#### 10.2 State Limitations on Private Power

On the completion of this unit, students should be able to:

- Describe the difference between reversionary interests and remainder interests;
- Distinguish between vested and contingent interests, and between defeasible and determinable interests;
- Explain the effects of a finding that a condition subsequent, a condition precedent, and a determinable limitation is invalid;
- Point to some of the common sources that provide content for the public policy doctrine;
- Describe the different standards that apply when determining whether a condition is void for uncertainty;
- Explain the different modes of possible restraints on alienation and the degree to which the common law will countenance such restraints; and
- Recognize when a rule against perpetuities issue may arise.

In addition, students will have an opportunity to:

- Revisit the doctrine of estates;
- Apply rules of construction to the interpretation of provisions in a testamentary disposition or will; and
- Consider the interaction of common law and statutory rules.

### 10.1 Basic Concepts

*Property Law Reader 4<sup>th</sup>*, 527-539  
*Stuartburn (Municipality) v Kiansky*  
*McKeen Estate v McKeen Estate*  
*Caroline (Village) v Roper*  
[Property Law Act](#), RSBC 1996, c 377, s 10

### 10.2 State Limitations on Private Power

*Property Law Reader 4<sup>th</sup>*, 543-572  
*Re Leonard Foundation Trust*  
 Ziff, "Welcome to the Newest Unworthy Heir"  
*H.J. Hayes Co. v Meade*  
*Fennell v Fennell*  
*Trinity College School v Lyons*  
[Perpetuity Act](#), RSBC 1996, c 358, ss 6-13  
[Human Rights Code](#), RSBC 1996, c 210, s 9

## 11. SHARED OWNERSHIP (3 classes)

To this point in the course we have seen how the bundle of rights and obligations that comprise ownership can be divided into various estates and that different people may have different rights and obligations with respect to the same land at the same time. Examples include the grant of a life estate to one person with the remainder in fee simple to somebody else, or the grant of a lease to a tenant with the reversion in fee simple remaining with the landlord. In this unit, the focus is on the rights and obligations of people who share the same interest in land at the same time or, as in condominium, combine an individual interest with a shared interest.

- 11.1 Basic Concepts and Creating Shared Interests
- 11.2 Severing Joint Tenancies
- 11.3 Condominium

### 11.1 Basic Concepts and Creating Shared Interests

*Property Law Reader 4<sup>th</sup>*, 691-701  
 Alexander, "Governance Property"  
 Ontario Law Reform Commission  
*Re Bancroft Eastern Trust Co. v Calder*  
[Property Law Act](#), RSBC 1996, c 377, ss 11(2), 12

### 11.2 Severing Joint Tenancies

*Property Law Reader 4<sup>th</sup>*, 701-709  
*Re Sorensen & Sorensen*  
[Feinstein v Ashford](#), 2005 BCSC 1379, paras 1-19  
[Property Law Act](#), RSBC 1996, c 377, s 18(1) & (3)

### 11.3 Condominium

*Property Law Reader 4<sup>th</sup>*, 726-734  
 Harris, "Condominium and the City: The Rise of Property in Vancouver"  
*Metropolitan Toronto Condominium Corporation No. 747 v Korolekh*  
 Harris, "Embedded Property" in *Condominium Governance and Law in Global Urban Context* (2021)

## 12. SERVITUDES (2 classes)

This unit focuses on non-possessory interests in land, or proprietary interest that do not include a right to possession. More specifically, we look at three non-possessory interests in land: easements, profit à prendre, and covenants. Each of these forms of property provides their holders with some capacity to use or to restrict the use of land that belongs to somebody else. In addition, easements and covenants are two mechanisms that enable the private regulation of multiple properties. This unit introduces the requirements of these legal forms, but also some of the potential public policy concerns with the spread of private zoning.

- 12.1 Easements
- 12.2 Restrictive Covenants

On the completion of this unit, students should be able to:

- Explain the elements of an easement at common law and how these elements have been modified by statute;
- Explain how courts have balanced protection for state and private property with freedom of expression;
- Describe the emergence of covenants as a property interest and set out the requirements that must be met in order for the burden of a restrictive covenant to run with the land; and
- Comment on the sources that judges use to infuse the doctrine of public policy with content.

In addition, students will have an opportunity to:

- Apply common law tests to hypothetical fact scenarios; and
- Consider the connections between law and public policy.

### 12.1 Easements

*Property Law Reader 4<sup>th</sup>*, 751-755  
 Ontario Law Reform Commission  
[Robinson v Pipito](#), 2014 BCCA 200, paras 1-7, 18-23, 45-48  
[Land Title Act](#), ss 24, 140, 218  
[Property Law Act](#), RSBC 1996, c 377, ss 18(7), 35

### 12.2 Restrictive Covenants

*Property Law Reader 4<sup>th</sup>*, 794-817  
*Tulk v Moxhay*  
 Ziff, "Restrictive Covenants"  
*Berry v Indian Park Assn.*  
 Ziff & Jiang, "Scorched Earth"  
[Land Title Act](#), ss 1, 222  
[Property Law Act](#), RSBC 1996, c 377, s 35  
[Human Rights Code](#), RSBC 1996, c 210, s 9