

# Property Law

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## 1. Property Law Defined

Property law provides a set of rules as to who has the right to ownership, possession, excluding others from possession and/or ownership, and transfer of property rights to others. Without such rules, anyone could take an item which a person had in his or her possession and not return it, claiming it was theirs to use. Not all holders of property rights are entitled to all rights with respect to all of their property (e.g., joint owners of land cannot exclude the other joint owners from exercising ownership rights on such land). Further, property rights are not absolute; property owners are obliged to use their property in accordance with common law and statutory standards.

Property holders have certain rights and obligations which flow directly from the establishment of property interests, existing separate and independent of contractual relationships. In seeking legal remedy, holders of these rights only need to show that they have an interest in the property at issue.

## 2. Types of Property

**Public property**—owned by the government and is used for the benefit of the public (e.g., parks and community centres).

**Private property**—owned by individuals, corporations, and businesses (e.g., homes, cars, and buildings).

**Personal property**—chattels which are tangible objects that can be moved, such as furniture and stationary. Choses in action are intangible assets such as artwork, music, and money orders.

**Real property**—land, buildings, and fixtures.

Tangible property, such as land and chattels, have been the subject of property protection for centuries. However, recently intangibles have also been identified as property. Intangible property includes

artwork, music and literary works, trademarks, genetically engineered plants or animals, and the subject matter of invention. These forms of property are afforded copyright, trademark, or patent rights and may be called “intellectual property.” Other intangibles, such as business goodwill and negotiable instruments, may also be accorded property status.

The personal property concept as applied to goods and intangibles has, in some cases, been extended to apply to the human body and personality. While tort law deals with the resolution of disputes involving physical and emotional injury, property concepts have sometimes been used to protect physical integrity, body parts, and substances. For example, some courts have allowed a donor to assert a proprietary interest in semen samples. Some jurisdictions have extended property or quasi-property status to privacy and, in some circumstances, to “personality,” allowing remedies for the violation of interests in these. The outer limits of the property concept continue to be tested as information and innovation become the most valuable commodities of our time.

## 3. Ownership (Title) and Possession (Physical Control)

There is a difference between ownership (title to property) and possession, or physical control over property.

Ownership or title to property guarantees a set of rights which includes possessory rights. It is a concept which identifies who is the owner of the property. For example, a rental car business owns (i.e., has title to) the cars, and the cars are in the possession of the business. However, when the cars are rented by customers, the rental car business still has ownership of the specific car, but the customer has possession for the duration of the rental contract.

Ownership or title may be transferred by inheritance, gift, or purchase. Such transfers will usually be established by instruments (i.e., documents), such as transfers.

Possession is a key element of ownership. Possession, itself, is important evidence of title; in some cases, where ownership cannot be established, possession may be used to establish an ownership interest. When an owner of property grants a right of possession to another person, such as renting out the item, there is a split between ownership of goods and possession of goods. This situation is called “bailment.” Disputes usually arise when there is a separation between ownership and possession of goods.

#### 4. Personal Property Concepts

##### a. Found Property

The rights of a finder of property as against the owner demonstrate the difference between ownership or title to the property and possession of the property.

The general rule stipulates that a finder of property has ownership rights subordinate only to the rights of the title holder. Before there can be a “finding,” there must be a “losing.” The real owner must abandon possession (voluntarily or involuntarily) and the finder must intentionally take the property into his or her care and control. A finder’s rights may be limited by the circumstances of the finding. If the finder wrongfully took the property, or found it in the course of trespassing, then the finder’s rights may be subordinate to the rights of other people who may find the item but not be its owner. For example, a trespasser finding a bracelet will have less right to the bracelet than the owner of the land over which the first person is trespassing. Finally, a finder’s rights are accompanied by the obligation to take reasonable measures to find the owner for the purpose of returning the property.

##### b. Bailment

Bailment arises when one person owns the property and another has possession of the same property. The owner is the bailor and the one in temporary possession is called the bailee. The bailee must take care of the bailor’s property. If that property is damaged, the bailor may sue the bailee for damages or negligence. If however, damage results from a defect that was present when the property was rented, then the bailee may sue the bailor for damages.

There is usually a contract between the bailor and bailee that stipulates the terms of bailment. For example, if a person who owns a necklace (bailor) leaves the necklace for repair at the jeweler (bailee), there may be a clause in the contract which excuses the jeweler from being responsible for any damage that may be caused to the necklace while in the possession of the jeweler.

When a bailor loses property, such as a ring, and another person finds it (bailee), the bailee must return the property to the bailor if possible.

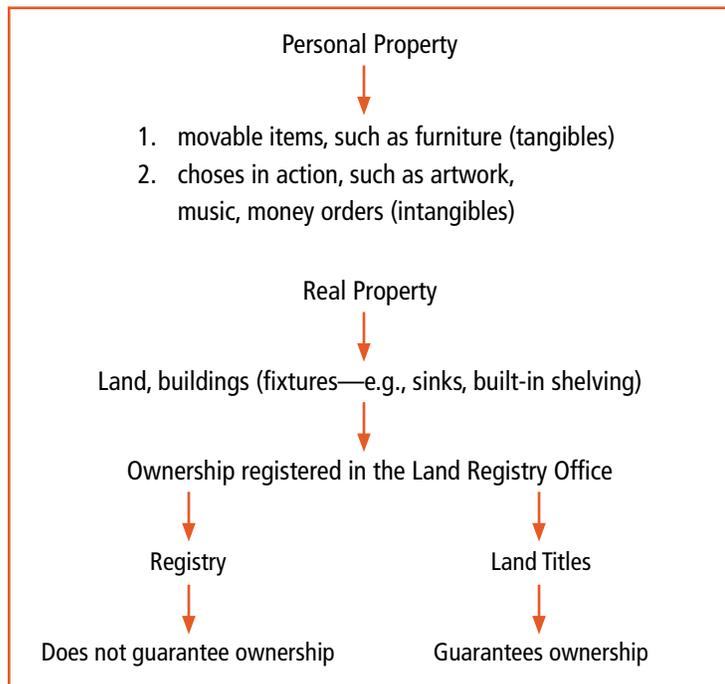
#### 5. Real Property Concepts

Real property is usually defined as land, buildings, and fixtures. Land includes the water and minerals below the surface, and the airspace above it. Fixtures include shelving, sinks, toilets, and other items that are attached to the interior or exterior of the building or home.

##### a. Tenure

All land is technically owned by the government. However, in order to allow individuals to use and possess land at the exclusion of others, the Crown provided certain interest in land to individuals. The interest that grants the most property rights is called “fee simple.” Other interests or estates are life estates and leasehold estates. These rights include possession; excluding others from being on the property; the use of the property; building on it (usually subject to municipality approval); and the right to sell it, gift it, and transfer it by a will.

The tenure of these interests or estates, or “holding,” takes root in the British system of feudalism, or landholding in return for services. After the Norman conquest of England, all land in Britain became the property of the Crown, and the king granted feudal tenure of large parcels to a small number of tenants in return for services. These tenant lords, through the process of subinfeudation, further subdivided and distributed the land in exchange for services owed to them. The type of tenure defined the terms on which a tenant held land of the Crown or of the tenant lord. The tenurial system, as it existed in England, was imported into common law in Canada through colonization and all lands became the property of the British Crown. Our constitution transferred this ownership to the Canadian government, so that no Canadian land is ownerless—the Crown is the ultimate owner. This state of affairs has led to problems with respect to the rights of Indigenous peoples, who have had to establish their pre-existing property rights through negotiation with the Crown. While most ancient tenurial concepts are irrelevant to modern society, the concept of escheat still permits the Crown



to reclaim ownership of property forfeited by death intestate (i.e., without a will) where the decedent has no heirs who would receive the property under provincial intestacy legislation.

### **b. Property Rights**

In general, property owners are entitled not only to the surface of the land, but to the air directly above the land and the earth below. The property owner may grant some of these rights to another, such as mineral deposits in the subsurface, or where property includes the bank of a lake or river (i.e., riparian rights of access to and use of the water). Property owners may also grant rights to extract and use percolating water. Legislation may limit the right of property owners to use water flowing through or under their land. The law of trespass or nuisance can be used to protect property owners against damage to their own lands from their neighbours' use of water. Finally, the law allocates rights on the expansion and reduction of land boundaries through the natural processes of erosion and accretion.

### **c. Landholding and Capacity**

Both natural persons (i.e., human beings) and corporations are entitled to hold Canadian land, but restrictions apply in some cases. Provincial legislation often restricts the rights of minors to sell or gift land and requires parents, guardians, or the courts to do so on behalf of minors. Persons ruled mentally incompetent also face restrictions on their rights as owners. Non-citizens may hold Canadian land, but provincial legislatures can restrict ownership rights of non-citizens. All laws restricting the real property rights of married women in Canada have been abolished. Property rights of married spouses (e.g., who has the right to the home upon separation) are found in provincial legislation (e.g., *Family Law Act*, RSO 1990, c F.3). A corporation's right to hold and dispose of land depends on permission found in the statute or instrument granting corporate status.

## **6. Interests (Estates) in Land**

As described above, in a tenurial system, land owners do not own the land itself since the Crown is the ultimate owner. However, the Crown granted ownership rights by way of interests or estates in the land.

There are different types of interests in land, as outlined below.

### **a. The Fee Simple**

The fee simple is the interest in land that grants the most rights. It may also be referred to as a freehold estate. When we speak about ownership of land, we are referring to the fee simple or freehold estate.

Fee simple may be owned individually or with others. Owning land in fee simple with others is called either a "joint tenancy" or "tenancy in common." Joint tenants own an undivided interest in the whole of the property. When one joint tenant dies, all others automatically become the owner of the property by right of survivorship. Tenants in common own a percentage of interest in the land. It does not have to be equal. For example, a mother could own 60 percent and her son 40 percent interest in the land as tenants in common.

### **b. Leasehold Estates**

A fee simple interest is considered to be a greater estate than a leasehold estate because its termination point is indefinite. A leasehold estate is granted for a limited time (such as a term of years), and at the end of the term, possession reverts to the fee simple owner. Most Canadian leaseholds are of relatively short term and are governed by provincial landlord-and-tenant statutes (with different legislative schemes for residential and commercial tenancies).

### **c. Life Estates**

An owner of a fee simple estate may sell or gift a life estate. For example, a husband with children who is the sole owner of real property (e.g., a home) may devise (i.e., leave by will) his property to his wife for the duration of her life, with a gift over to the husband's children on his wife's death. At the time of the testator's (husband's) death, his wife will have an immediate interest in the land for her lifetime and will be called a life tenant. The husband's children are the fee simple owners, but they cannot own the property until after the testator's wife dies. Therefore, the children have a vested future interest in the same property. When his wife dies, the property will revert to the children (the fee simple owners). The fee simple owner(s) to whom the property reverts after the life tenant's death is (are) called the "remainderman."

The life tenant's (wife's) interest will be limited in that she must not exercise it so as to abrogate the children's interest. Although the testator's wife will often have full possessory and exclusion rights with respect to the land, she will not have the right to sell or gift the interest beyond her own lifetime. The testator's wife may also have to pay for the expenses of the property, such as water, taxes, electricity, and interest mortgage payments. The children would be responsible for the payment of repairs, fire insurance, and the principal payment of the mortgage. This is all subject to the provisions in the will creating this life estate.

### **d. Future Interests and the Rule Against Perpetuities**

In property, as in all legal disciplines, the law favours certainty over uncertainty. A will may provide that certain property interest will pass to a beneficiary (i.e., someone entitled to the full or part of an estate pursuant to the will) at a later date, when certain conditions have been met. For example, a parent's will may state that the child will get the cottage when the child is 40 years old.

This may create uncertainty as to who owns future interests in the property and can cause problems for any current interest holders. In order to relieve some of this uncertainty, the "rule against perpetuities" provides that a contingent interest that might vest outside the perpetuity period (which is 21 years after the date of death of the last beneficiary who was alive on the date of death of the testator) is invalid.

### **e. Conditions for Transferring Property in a Will**

Sometimes conditions are stipulated in a will regarding transfers of property. For example, a testator may devise (i.e., leave in a will) land "to my daughter Mary, on condition that she never sells it to anyone," or "to my daughter Mary, as long as

she deserves it,” or “to my son Solomon, unless he marries that rotten Mary Smith.” Not all conditions imposed by a testator will be upheld by the court. Some conditions may be held to be void because they impose unacceptable restraints on alienation. While partial restraints may be tolerated, blanket restraints (as in the examples above) will be void. Also unacceptable are conditions which are too uncertain to be administered as a question of fact. These, too, will be void. Finally, conditions may be void as against public policy. This, again, is a question of fact, although some specific classes of conditions have been ruled void (including those imposing restrictions on marriage and those incorporating racist elements). Most provincial rights instruments codify prohibitions on racist conditions.

## 7. The Transfer of Real Property

### a. The Transfer and Registration of Property Interest

Most property interests described above can be transferred by deed or by succession (i.e., inheritance).

In order to properly transfer property, whether by sale or succession, parties must comply with the *Statute of Frauds*, which was enacted in England in 1677 and adopted by Canada and the United States. It is still part of Canadian law in most provinces, except for British Columbia, Quebec, and Manitoba.

The *Statute of Frauds*, RSO 1990, c S.19 requires that certain documents must be in writing and signed by the parties. Contracts for the sale of land, or affecting any interest in land, must abide by these requirements. In addition, transfers of interest in land (called a “transfer”) must not only be in writing and signed by the purchaser and seller, but must also be in a prescribed form and contain seals and other mandatory information which may be found in the applicable legislation.

### b. Land Registration System

In order to keep track of transfers of property from one person to another, Ontario has a Land Registration system. This system also provides notice to the public as to who owns a particular property, what type of interest they possess (e.g., fee simple), whether there is a mortgage registered against the property, and whether there are any easements or rights of ways affecting the property.

There are two systems of registration in Ontario: (1) the land titles system; and (2) the registry system.

The land titles system is a more modern system that guarantees to the public that the current owner is the true owner of the property. The *Land Titles Act*, RSO 1990, c L.5 governs this system.

The registry system is an older system. The documents or instruments found in this system are not reviewed to ensure that they are legally valid. For example, the current property owner may not be a valid owner as there could be signatures missing on a previous transfer that would have prevented the proper transfer of the property to the current owner. The *Registry Act*, RSO 1990, c R.20 governs this system.

In the past, documents affecting any particular property, including transfers and mortgages, could only be found by

attending at the land registry office. Today, these documents can be searched and registered electronically through a software system called Teraview without having to attend at the land registry office.

### c. Government Expropriation of Private Land

Property owners may lose title when property is expropriated, or taken over, by the government under expropriation legislation. Property owners may dispute the applicable legislation, the specific mandate of the government body in question, or the amount of compensation offered, but the basic right to expropriate is one of the oldest characteristics of the tenurial system.

## 8. Other Property Interests

### a. Easements and Licenses

There are various property interests that do not grant possession but allow the use of the property in accordance with certain terms and conditions.

Licences are agreements which are not property interests but may give rights to use land. Licences are not attached to land and generally (with some exceptions) are valid only as between the original parties. They need not be the subject of a contract but may arise through behavior demonstrating an expectation on the part of one party that is encouraged by another. For example, a party may be granted a license from the property owner to park his or her car on the property.

Licences can be difficult to distinguish from easements (sometimes called a “right of way”). Easements are property interests tied to land which allow a party to use another’s land for a specific purpose. For example, a property owner may give

### TYPES OF PROPERTY INTERESTS OR ESTATES THAT DO NOT GRANT POSSESSION OR OWNERSHIP

1. Licence—right to use land for a specific purpose or general purpose based on an agreement
2. Easement or Right of Way—allows party to use land, i.e., a right of way: walk across land to get to road

Dominant Tenement  
(receives the benefit)

Servient Tenement  
(grants the benefit)

Could have easements for utilities (e.g., hydro) created by statute

Implication—implied that neighbour walks across land to get to main road

Prescription—neighbour uses land for 20 years without servient tenement owner objecting

## TYPES OF PROPERTY

Real Property	Personal Property		Intellectual Property
Tangible Property		Intangible Property	
<ul style="list-style-type: none"> <li>▪ Land</li> <li>▪ Buildings</li> <li>▪ Garages</li> <li>▪ Fences</li> <li>▪ Bridges</li> <li>▪ Fixtures (e.g., sinks, lighting fixtures, built-in shelving)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Chattels                             <ul style="list-style-type: none"> <li>– automobiles</li> <li>– furniture</li> <li>– computers</li> <li>– inventory</li> <li>– office supplies</li> <li>– machinery</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Choses in action                             <ul style="list-style-type: none"> <li>– shares in corporations</li> <li>– goodwill</li> <li>– negotiable</li> <li>– instruments (e.g., cheques, promissory notes)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Copyrights</li> <li>▪ Trademarks</li> <li>▪ Patents</li> <li>▪ Industrial designs</li> <li>▪ Trade secrets</li> </ul>

his neighbour an easement to walk over the property owner's land in order to get to the main road or in order to make repairs to the neighbour's side of the house if there is not enough space in between the houses.

Easements are created when the servient tenement grants the easement to the dominant tenement. The dominant tenement is the property which receives the benefit and the servient tenement is the property over which the right is granted. For example, in the above scenario, the servient tenement belongs to the property owner who allows his or her neighbour to walk over the land, and the dominant tenement is the neighbour's land.

Easements may also be created by statute (e.g., hydro easements), by implication (e.g., where it is implied that a party will walk over another's land in order to get to the main road), and by prescription (e.g., where an owner of the dominant tenement uses the servient tenement for at least 20 years without being prevented from doing so by the owner of the servient tenement).

Easements do not expire and remain with the land even if the property owners change (i.e., "binding upon and run with the land"). They can also be granted for a specific time period. If a time period is not mentioned, then the easement does not expire. However, easements may be terminated by express agreement between the owners or if the dominant tenement owner abandons the easement (i.e., stops using it).

### b. Restrictive Covenants

A restrictive covenant, just like an easement, has a dominant and servient tenement and runs with the land. It is created when a property owner agrees to restrict the use of his or her land in order to benefit another property owner. For example, a purchaser of a new home may agree not to plant trees in the backyard for a period of several years in order to allow the builder to complete the work on the property. The restriction of not planting trees in the backyard is benefiting the builder.

A restrictive covenant is worded in the negative, whereby it prohibits a property owner from doing something. For example, a property owner may be prevented from using the property for business purposes.

Some restrictive covenants expire on a specific date stated in the document that has created the restrictive covenant, and others may be terminated by express agreement between the owners. It may also be terminated by implication if the dominant tenement agrees to the change of use of the property by the servient tenement (e.g., property owner may now use the property for business purposes).

### c. Adverse Possession

A more dramatic way in which possession can give rise to property rights is through the doctrine of adverse possession. Because of the importance in law of possession as an indicator of property rights, it is possible under special circumstances for a person in possession of land to exclude the title holder from possession if he or she continuously, and without interference by the rightful owner, uses the property for a period of ten consecutive years (*Real Property Limitations Act*, RSO 1990, c L.15, s 4).

The most notorious adverse possessors are squatters, who move in and set up homes on apparently vacant land and eventually defeat the property rights of the paper title holder. More common is the adverse possession of much smaller parcels, as in the case of a neighbour who erects a fence beyond the boundaries of his or her own property and through long use acquires rights in the enclosed strip.

In order to make an adverse possession claim, the following must be proved:

1. actual and continuous possession for ten years,
2. intention to exclude the title holder (actual owner) from possession or use of the property, and
3. actual exclusion of the title holder throughout the ten year period.

The court will not grant adverse possession rights easily. Any act by the title holder, no matter how small, that interrupts the possession of the one claiming adverse possession will be sufficient to dismiss the claim.

It is important to note that adverse possession cannot be claimed over properties that are registered in the Land Titles system (*Land Titles Act*, s 51).