

CHAPTER 13: REAL PROPERTY: INTERESTS AND LEASES

Real Property

- land, buildings and things attached to land (fixtures)

Extent of Real Property Rights

- traditional view: the giant carrot theory
 - ownership extends from the centre of the earth to the skies
- modern view: reasonable use
 - reasonable height to a reasonable depth

As I mentioned, the focus of this chapter is on real property in which you will learn about various interests in real property. Specifically, I will discuss the different types of possessory interests (known as estates in land hence the term real estate) and non-possessory interests. I will also discuss different types of ownership.

If you find that this segment on real property whets your appetite for more on the subject then I highly recommend the BUSN 3770 course - Real Estate Law.

In the slide above, I reiterate what real property covers namely, land, buildings on the land and things that are attached or affixed to the land with a degree of permanence. As we discussed before, some chattels become part of land once they are permanently attached. For instance, a handrail on the front steps, a new glass window for the building, a new hardwood floor or a dining room chandelier all arrive as chattels (personal property - moveables) but once attached to the land become part of the land.

I also set out the two views of property rights that are set out in your text. In the modern interpretation of real property rights, owners/occupiers are given reasonable use of the land (i.e. a reasonable depth to a reasonable height).

Slide 2 - The Estates in Land

Types of Property Interests

- Estates (Possessory Interests)
- Non-Possessory Interests

What is an Estate in Land?: A grant of an exclusive right of possession for a period of time

Types of Estates: Fee Simple, Life Estate, Leasehold

Slide 2 provides an overview of the Estates in Land. Estates are interest in land in which the grantee (the person receiving the property) receives the exclusive right to possess the piece of land for a period of time (hence the name Possessory Interest - we will deal with Non-Possessory Interests later on.)

There are three types of Possessory Interests all with a right to possession but what distinguishes them is the amount of time (along with other things which we will discuss.)

Slide 3 - The Fee Simple Estate

Fee Simple estate:

- also known as a Freehold estate in some jurisdictions
- originally granted by the Crown (state)
- person with fee simple effectively owns the land
- grants the fee simple holder exclusive possession of the property until it is disposed of
 - may dispose of the property at anytime
 - by gift
 - by sale
 - by transfer at death (through a Will)
 - generally allows the owner to use the property as wishes ("use and abuse of the property")
- closest estate in land to giving complete ownership

Slide 3 sets out the basics of the Fee Simple estate (abbreviated f.s.). It is referred to as a Freehold Estate in many jurisdictions including the United Kingdom, Australia, Singapore, Hong Kong and several others (I also believe it is referred to as a Freehold Estate in India - some of you from India might be able to confirm that for me.)

A **Fee Simple estate** is the form of estate that comes **closest to complete ownership of land**. Technically, the Crown (state) retains ownership of all land and gives the holder of an interest possession of the land for a period of time. The fee simple holder is generally considered as the owner since the ownership rights are nearly absolute. In fact, we generally refer to the Fee Simple estate holder as the owner.

A Fee Simple holder can transfer it to other people either while alive (by a gift or a sale) or pass it to another with their Will after they die.

A Fee Simple holder generally has the right to "use and abuse the property" the property as they like since it is their land. This means since they are the owner then they can put whatever they like on the land and do whatever they want to the land. Well, not quite. The law and society has developed over the centuries so that certain limitations are placed on the Fee Simple holder. As such, even the Fee Simple owner of the land is not able to do anything they want on the land. Let's go to the next slide.

Slide 4 - Fee Simple Ownership - Limitations

Fee Simple Ownership: generally unlimited use and abuse of the property
Limitations:

- Tort obligations associated with the land
 - Occupiers' Liability
 - Rule in *Rylands v. Fletcher*
 - Nuisance
- Government Regulation
 - land use regulations (zoning, planning, building regulations, municipal bylaws)
 - environmental regulations
- Expropriation
 - forced sale to the government for a legitimate public purpose
 - land acquired for such reasons in BC pursuant to the *Expropriation Act*
- Non-Possessory Interests

Slide 4 highlights the main limitations that the law places on a Fee Simple owner's absolute right to use the property as they like.

Tort Limitations. Recall our earlier discussions in tort law when we talked about the **Tort of Occupiers' Liability** in which a visitor to the land must be kept reasonably safe. Also, the **Tort of Nuisance** limits an owner from using the land anyway they wish if the way they use their land unreasonably interferes with the way that a neighbour wants to enjoy his land. And the **Tort of the Rule in *Rylands v. Fletcher*** is a strict liability tort that holds the owner of a land liable if the land is being used for a non-natural purpose (creating a special or unusual danger), something flows from the land and then causes harm to an adjacent owner's land.

The limitation of **government regulation** requires the owner of the land to comply with government requirements. Governments limit all types of things that you can and cannot do with your land including the type of structure, the number of structures, the height of the structure, how far the structure must be set back from the lot line, the type of fireplace (some places no longer allow wood burning stoves), a permit to burn leaves (or disallowed altogether), building permits, renovation permits, licence to install a swimming pool, permit to plant trees, permit to cut down trees, business licence for home business (only for certain types of businesses), noise bylaws, and many many more. The point is that government regulations in one form or another greatly impact on the way landowners can use their property.

Expropriation allows the government to force the sale of your property back to the government if the property is to be used for a legitimate public purpose. That usually means the government needs your land for the construction of a school, hospital, fire station, highway, bridge, and so on. There have been **many cases of expropriation in BC** over the last few years with the

construction of new bridges (the Golden Ears Bridge, the Alex Fraser Bridge), new transit lines (the Evergreen Line and Canada Line in places), new highways (the South Fraser Perimeter Road and the Island Highway on Vancouver Island), airports (YVR back in the late 1940s). These are just a few examples but in all of these cases the government paid the owners the fair market value of the land (perhaps with a little premium but usually not that much above FMV) for the land to be sold to the government for public projects.

In the United States, the law of expropriation is often referred to as **Eminent Domain** if you ever hear that phrase. The *Kelo v. New London* case was decided by the US Supreme Court back in 2005 and put a spotlight on the way that a government can abuse its expropriation powers. In that case, the Supreme Court held in a close decision (5-4) that it was a legitimate public purpose for the government (in this case, a city government) to force long-time residents to sell their homes to a developer because the developer was going to build new mixed-use buildings and, in doing so, not only improve that part of the city but also increase the city tax base. Many legal commentators felt that the highest American court got it wrong (me included) and there was a flurry of legislative changes throughout the United States to ensure that such forced sales could not occur in other jurisdictions.

I though you might find this interesting but the case illustrates the importance of ensuring the *Expropriation Act* here in BC only be used for a "**legitimate public purpose**".

Finally, **non-possessory interests** (I will discuss later on) can also restrict the manner in which an owner uses the land.

Next, let's look at the slide for the Life Estate

Slide 5 - Life Estate

Life Estate = right to exclusive possession of the property during lifetime

- grants the life estate holder exclusive possession of the property for his/her lifetime
 - possession may be for life of another who is not the life estate holder (won't put on exam - overly complicates things)
 - usually possession is for the life of the life estate holder
- life interest automatically terminates upon death
 - life estate holder has no right to dispose of property (either during lifetime or upon death)
- who gets the property when the life estate holder dies?
 - reversion - returns to grantor or grantor's estate
 - remainder - goes to person designated by the grantor
- life estate holder liable for waste during time in possession
 - waste - an act that significantly reduces the value of the land

A **life estate** is a really interesting type of interest in land. It has its origins hundreds of years ago when the landed gentry in England wanted to provide for their illegitimate wives and children (and maybe others like a governess) but did not want them to become the owner of the land. Ultimately, the landowner wanted the land to return to his bloodline and pass down to his heirs (usually the first born son - a concept known as primogeniture.) The reason that the first born son received the title (Duke, Viscount, Baron, etc) and the bulk of the wealth and property was so that the wealth would not be diluted among several children.

The life estate was the perfect legal mechanism to accomplish this so, for example, the Duke's mistress could have one of his many properties to live for the rest of her life and then when she died the land would return to the Duke if alive or, if dead, to the Duke's estate and legitimate children (usually his eldest son). This is referred to as a **reversion**.

The Duke could also direct that the land go to someone else once his mistress dies (so, it would be a person different from the heirs in his Will.) This is called a **remainder**.

So the parties in a life estate are as follows:

- the **grantor** - the person making the life estate (the **owner** of the land)
- the **grantee** - the person receiving the life estate (the **life estate holder**)
- the **reversionary interest** or the **remainder interest** - who gets the land after the life estate holder dies

As you might imagine, there was all kinds of nefarious goings-on with life estates in situations where the grantor decided that he wanted the property back or the heir to the property (reversionary or remainder) wanted the property and was unwilling to wait out until the life holder died of natural causes. The problem was that the life holder possessed a legal interest in the property until they died so you probably can imagine what sometimes might have happened.

So, you might wonder what use a life interest holds today. Well, consider this example. Say, Olaf and Olga own a beautiful cottage by the ocean that has been in the family for generations. They have one son, Oscar, who has a son, Octavio, from his wife, Olivia. Olivia died a few years ago. Oscar has some substance abuse problems and has never been able to hold on to a job. Olaf and Olga love their son, Oscar, despite all his problems but absolutely adore their grandson, Octavio.

If Olga and Olaf leave their seaside cottage to Oscar in fee simple when they die then they fear that he will sell it to get money to fuel his substance abuse. If, on the other hand, they give it to Oscar as a life estate with the remainder in fee simple to Octavio then Oscar will still get to enjoy the seaside cottage for his entire life (but he can't sell it!). Then when Oscar dies ownership of the cottage will go to the grandson, Octavio. Beautiful solution, isn't it?

The life estate holder can live on the property and normal wear and tear is permitted. Usually, the grantor (original owner) will leave a fund with monies in it to pay for the upkeep of the property.

The life estate holder is not, however, allowed to commit an act of **waste** on the property (i.e. do something that significantly lowers the value of the property.) Let's say, the life estate holder is on a 100 hectare parcel of forest land with beautiful mature oak, maple, walnut and cherry trees. If the life estate holder clearcuts the forests and sells the trees to furniture manufacturers and then has construction companies turn the land into a large gravel pit then he has laid waste to the land. In such a case, the person with the reversionary interest or remainder would likely go to the courts to seek an injunction against the life estate holder to stop these acts of waste. Next slide - Leasehold.

Slide 6 - Leasehold Estate

Leasehold = right to exclusively possess the property for a specified period of time

- period of time must be stated at the outset of the lease contract
- differs from a life estate
 - life estate - uncertain duration of time (life of individual)
 - leasehold - certain duration - set out at beginning of lease

A leasehold estate gives the lease holder legal rights to remain in possession of the property for the time set out in the lease (although the lease usually sets out incidents of default that will allow the eviction of the tenant such as non-payment of rent, excessive damage or disturbance, criminal activity, etc.)

A lease of more than 3 years can be registered on title pursuant to the BC *Land Title Act* and serves as notice of the person's legal rights in the land.

Most commercial leases are for periods of 5 to 10 years (some longer) with rights of renewal. Leases also exist for residential properties that people "buy" for long periods of time. For instance, when I lived in Singapore, most condominium properties were sold as 99-year leases and then in the early 2000s started being marketed as 999-year leases (in many ways moving closer to a fee simple.) Similarly, properties at UBC and SFU are generally 99-year leases since the universities don't have the right to sell the endowment lands but they can grant a lease over the property.

Long term leases can usually be "sold" by transferring or assigning the leasehold interest.

Slide 7 - Forms of Shared Ownership

Individual ownership - one party owns a single piece of land

Shared ownership - more than one party own a single piece of land

Features of Shared Ownership

- owners of the same property
- owners have an ownership interest over the entire property (i.e. an undivided interest)
- each party is entitled to share in the general profits generated by the property

Forms of Shared Ownership

- Joint Tenancy (joint ownership)
- Tenancy-in-Common (co-ownership, co-tenancy)

Two or more people that own a property together have shared ownership in the property. Shared ownership gives them an undivided interest in the property as well as a right to participate in the profits generated from the property (for example, lease rents.)

The proportion of the profits received by each individual as well as the ownership interest of each individual owner depends on the type of shared ownership.

The two forms of shared ownership are **joint tenancy** and **tenancy-in-common**.

Slide 8 - Joint Tenancy

- also referred to as joint ownership
- requires all shared owners to have identical interests
 - two joint tenants will each have a one-half (1/2) interest
 - five joint tenants will each have a one-fifth (1/5) interest
- general profits will be split equally (i.e. 5 joint tenants will each receive one-fifth (1/5) of the general profits)

Right of Survivorship

- joint tenant has **no** right to dispose of interest on death (i.e. pass it to someone else in a Will)
- deceased joint tenant's interest ***automatically passes*** to the remaining surviving tenants
 - the last standing joint tenant will become the individual owner of the entire property

Example. Let's say five (5) family members inherit an industrial warehouse from their parents who recently died in a car accident. The warehouse spins off profits each year in the form of

lease rent from its tenants. If the parents willed the property to their children as joint tenants then it would look like the following:

Marshall: 1/5 interest
Rocky: 1/5 interest
Skye: 1/5 interest
Everest: 1/5 interest
Chase: 1/5 interest
as joint tenants

So, let's say, the property earns profits of \$500,000 for the year then each of the five children will receive **an equal share of the profits** (\$100,000 each.) They all own an **undivided interest** in the entire property. And, if any of the joint tenants die they cannot dispose of their interest in the property in their Will. Rather, the **Right of Survivorship** applies and requires the deceased member's share to be distributed to the remaining surviving members. To reiterate, the deceased person's share does not go to the heir/beneficiary of the deceased.

So, if **Everest dies** first then the interest of the other joint tenants "swell up" to absorb poor Everest's share as follows:

Marshall: 1/4 interest
Rocky: 1/4 interest
Skye: 1/4 interest
Everest: deceased
Chase: 1/4 interest
as joint tenants

If **Marshall dies** next then the interests line up as follows:

Marshall: deceased
Rocky: 1/3 interest
Skye: 1/3 interest
Everest: deceased
Chase: 1/3 interest
as joint tenants

If **Rocky dies** next then:

Marshall: deceased
Rocky: deceased
Skye: 1/2 interest
Everest: deceased
Chase: 1/2 interest
as joint tenants

Finally, if Chase dies then Skye becomes the individual owner of the entire property

Marshall: deceased

Rocky: deceased

Skye: owns entire property - individual owner - Woo hoo! Yay!

Everest: deceased

Chase: deceased

as joint tenants

Joint tenancy is a great way to avoid probate fees when someone dies since the property will simply go to the other joint tenant. Probate fees are based on a percentage of the value of the property so you can well imagine how much these fees can amount to given the high value of property in BC these days (easily in the tens of thousands of dollars.) Consider the following simple approach to saving on the probate "tax"

Ron owns a property (a house) and marries Rhonda. Ron intends to leave the house to Rhonda. If Ron dies and is the sole owner of the property then his estate must pay probate fees to the government. If, however, Ron put Rhonda on title as a joint tenant then the property would pass to Rhonda with no payment of probate fees.

Next, Rhonda plans to pass the house to her only daughter, RONALDA. If Rhonda dies and is the sole owner then her estate must again pay probate fees to the government. If, however, Rhonda put RONALDA on title as a joint tenant then the property would pass to RONALDA with no payment of probate fees.

Next, RONALDA marries ROMEO the following year and plans to pass the house to him if she dies. If RONALDA dies and is the sole owner then her estate must once again pay probate fees to the government. If, however, RONALDA put ROMEO on title as a joint tenant then the property would pass to ROMEO with no payment of probate fees. And so on and so on.

Now, let's take a look at how this compares to the **Tenancy-in-Common** form of shared ownership.

Slide 9 - Tenancy-in-Common

- also referred to as co-ownership and co-tenancy
- all shared owners do not need to have identical interests
 - five joint tenants could have 1/2, 1/4, 1/8, 1/16 and 1/16 interests
- general profits will be split proportionately

NO Right of Survivorship

- tenant-in-common has right to dispose of interest on death (i.e. pass it to someone else in a Will)

- deceased joint tenant's interest **does not** *automatically pass* to the remaining surviving tenants

Example. Let's say five (5) friends purchase an industrial warehouse for \$1 million. Each of the friends have different financial means so bring a different amount of investment money to the table. Their ownership interest will be set as tenants-in-common.

Mickey: \$500,000 = 1/2 interest

Goofy: \$250,000 = 1/4 interest

Minnie: \$125,000 = 1/8 interest

Donald: \$62,500 = 1/16 interest

Daisy: \$62,500 = 1/16 interest

as tenants-in-common

The warehouse spins off profits each year in the form of lease rent from its tenants. So, let's say, the property earns profits of \$500,000 for the year then each of the five friends will receive a **proportionate share of the profits** based on their relative ownership interests as follows:

Mickey: \$250,000 = 1/2 of profits

Goofy: \$125,000 = 1/4 of profits

Minnie: \$62,500 = 1/8 of profits

Donald: \$31,250 = 1/16 of profits

Daisy: \$31,250 = 1/16 of profits

They all own an **undivided interest** in the entire property. And, if any of the tenants-in-common die they can pass their interest in the property in their Will since there is **NO Right of Survivorship**. That makes sense since, for example, it would be unfair if Mickey died first and his larger interest passed to the other shared owners (instead of his son, for example) who invested much less than him.

Let's say Mickey leaves his share to his son, Pluto? What if Pluto does not get along with the other owners? The risk is certainly there that a new owner could be added who is not compatible with the other owners. In such situations, it is therefore advisable to have a special contract amongst the owners that takes care of situations in which an owner wants to sell his share or dies by having clauses like a Right of First Refusal (you must first offer the interest to the other owners to purchase) or owner insurance (each owner has life insurance so if they die their share can be purchased by the business to pay out money (rather than a share of the business) to the deceased's named beneficiary.

Slide 10 - Partition

Partition of Property

- involvement of the court to divide either
 - the property
 - the sale proceeds from the property
- applies to both joint tenancy and tenancy-in-common
- court can broker an agreement between the parties, or
- court can make an order to compel the parties

BC Partition of Property Act

Sometimes, a situation arises in which shared owners of a piece of property are in dispute whether to retain ownership of the property or sell the property.

For example, let's say five (5) siblings have just inherited a lovely oceanfront property from their parents who tragically died in an airplane crash. The children all have fond memories of their childhood on this property with 5 km of shoreline and no cottage (it was the family's private camping retreat.) As joint tenants, the five children own it as follows:

Art - 1/5 interest
 Beth - 1/5 interest
 Carol - 1/5 interest
 Dave - 1/5 interest
 Edith - 1/5 interest
as joint tenants

Unfortunately, there is a divergence on opinion as to whether keep the property or sell it since some cherish their childhood memories and the property itself over the money and others want to sell it for lots of money. So, here is what the joint owner siblings want to do:

Art - sell it
 Beth - keep it
 Carol - sell it
 Dave - keep it
 Edith - sell it

Now, obviously, the best solution is if the two that want to keep the property (Beth and Dave) simply buy out the other three siblings. But, the property is worth \$50 million so it is unlikely that Beth and Dave have the resources (\$30 million) to buy out the others (plus, financial institutions are very reluctant to grant mortgages over bare land.)

So, the seeds of a dispute have been sown pitting Art, Carol and Edith against Beth and Dave. The British Columbia *Partition of Property Act* is meant to resolve disputes when all of the owners are not in agreement whether the property should be sold or not.

If it is brought to the court then the court will try to mediate a plan between the parties. If, however, that is not possible then it can make an order under s. 6 of the *Partition of Property Act*. The section allows the court to:

- make an order for the sale of the property, and
- distribute the proceeds,
- if one-half (1/2) or more of the owners directs the courts to do so

Under this section of the Act the court can also:

- make an order for the division of the property
- if it feels that a division of the property is a better approach than the sale of the property

Since three of the five sibling joint owners want to sell the property then there is over 1/2 that want to sell the land so in the absence of an agreement the court will order the sale of the land unless convinced that the division (partition) of the property is a better way to resolve the issue.

In our situation, the court might opt for a division of the property into five equal pieces (all with 1 km of oceanfront) so that Art, Carol and Edith can sell their shares (likely for \$10 million each) and Beth and Dave are able to retain a portion of the child (and their childhood memories.)

Consider the situation if it was just a small piece of oceanfront land with a single cottage on it that was left to the five siblings. In that case, a division of the property would not be an option so the court would order the property sold. If the proceeds of the sale is \$5 million then that amount would be distributed to each of the five siblings (\$1 million each.) Unfortunately, Beth and Dave would not be able to keep the property under the Act since 3 of the 5 wanted to sell (but, again, they really wanted the property then they could again look into buying out the three others before the court made a sale and distribution order.)

Let's move on to Strata Properties - next slide.

Slide 11 - Strata Properties

Two levels of ownership

- shared ownership with other strata owners (common areas)
- ownership (individual or shared) of your individual strata unit

Operation of Strata Properties

- Strata Corporation
 - pass strata bylaws
 - manage day-to-day strata activities
 - assess condo fees
 - levy special assessments

Your text discusses this section under the heading "Condominiums". In British Columbia, however, our legislation is called the **Strata Property Act** so we have Strata Corporations and Strata Units **not** condominiums (even though many people in BC still like to call this type of property "condominiums" or simply "condos" - you can correct them now :)

People in BC also like to make a **distinction between a "condominium" and a "townhouse"** - apparently a townhouse is higher up the rung of home ownership. Although a "townhouse" might be slightly different from a "condominium" (slightly larger, layout more similar to a house, small yard, etc) there is really **no legal difference**. Both are strata units under the *Strata Property Act*. In fact, many developments today feature both types of strata units in the same development (apartments and town homes).

If you really need to make a distinction then it is probably better to refer to the units as "**strata apartments**" and "**strata townhomes**" since, again, we don't have condos in BC.

A strata development features **two levels of ownership**. The individual strata unit is owned by an individual or perhaps with another person (say, for example, in joint tenancy with the person's spouse.) There is also common property in the strata development which gives co-ownership to these areas along with all the other owners of the strata development (so, you might have something like a 1/120th share in these areas depending on the size of the development.)

Common areas in a strata development include spaces like the hallways, the balcony and porch areas, the swimming pool, playground, parking areas, townhouse yards, elevators and more depending on the development.

The **strata corporation** also plays a vital role in the strata development. It **passes the bylaws** that govern the development (for example, pet policies, parking policies, renovations to units, and so on.) It also **levies strata fees** to pay for the **day-to-day operations** of the strata development (snow removal, gardening work, general repair work, etc) as well as put money into a **reserve fund** (also called a **contingency fund**) for future repair work (i.e. roof repair or replacement, new asphalt on roadways, new balconies, new fences, etc.)

Since many of you will likely start your home ownership plans as a strata owner then **always take a close look at the strata fees and the reserve fund**. A well managed strata corporation will have a healthy contingency fund since it is assessing an amount to each owner every month that goes into the reserve fund so that when say, a new roof is needed for the entire development (costing millions of dollars) then the money is there. If there is insufficient money in the reserve fund then the strata corporation will be faced with **levying a special assessment** which requires all owners at that time to pay likely tens of thousands of dollars.

So, it comes down to a matter of fairness - either assess slightly higher strata fees on every owner over a long period of time to bolster the size of the reserve fund **or** have lower strata fees over time but then levying a special assessment against the owners that happen to own the strata unit at the particular time the money is needed. Imagine buying a new strata unit and then being

assessed with a \$90,000 special assessment months after you move in because it is discovered that the walls throughout the place are rotting and full of mold and need to be replaced. How would you feel?

The amount of strata fees often causes the most conflict between owners in a strata development. People that plan to live there a long time might not mind paying a little more each month since they will see the benefit down the road whereas older people might not see the benefit of paying for an expense 30 years down the road when they might not expect to be around.

Time to move on. Earlier on, we discussed the estates in land (possessory interests - fee simple, life estates, leasehold estates) so now let's take a look at the **non-possessory interests**.

Slide 12 - Non-Possessory Interests

Non-Possessory Interest

- an interest in real property that does not give the holder of the interest a right of possession in the property

Types of Non-Possessory Interests

- easements
- restrictive covenants
- mineral leases - don't worry about this one - interesting but I won't ask you anything about mineral leases on the final exam

Slide 13 - Easements

Easement = right to use a neighbour's land

positive easement - allows a party (neighbour) to do something on your land (most common type of easement)

negative easement - prohibited from doing something on your land to favour the neighbour (not as common)

Easements run with the land and **not** with the person

Parties to an Easement

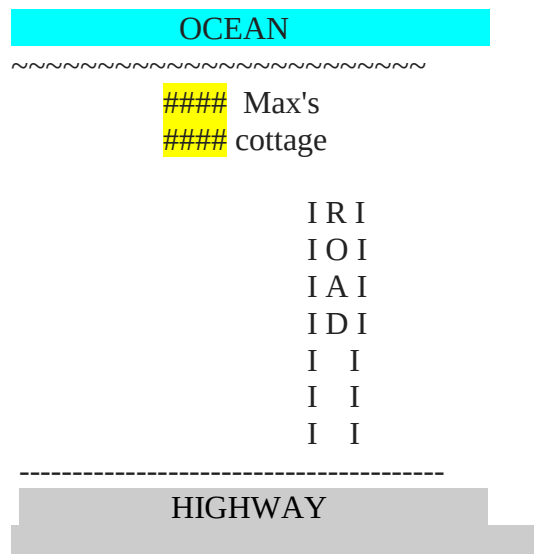
- parties to an easement will always be neighbours
- dominant tenement - property that enjoys the benefit of the easement
- servient tenement - property that bears the burden of the easement

Creation of an Easement

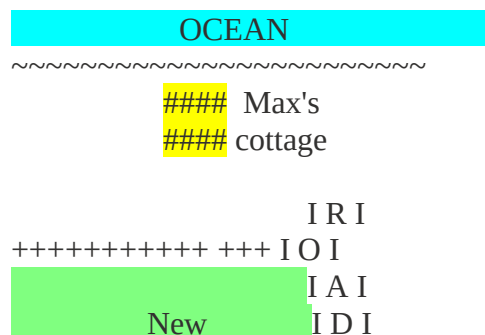
- Express Easement
- Implied Easement
- Prescriptive Easement
- Statutory Easement

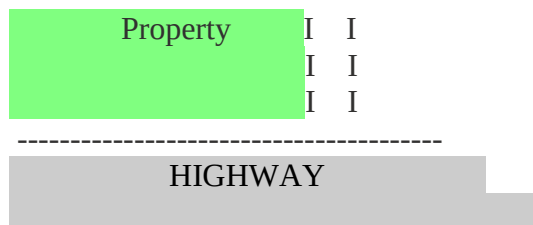
I'll focus on positive easements since they are the most common. An easement usually gives someone the right to cross over someone else's land to get somewhere (maybe to a road, a beach, a horse riding path, a snowmobile trail and so on. I'll start off with an example and then discuss the way an easement works afterwards.

Let's say Max owns a large piece of property by the ocean and decides he wants to sell off the back piece of the property that he never uses in order to make some extra money. Here's a bit of a diagram.



Max decides to subdivide his property and create a back lot to sell (in green). New diagram.

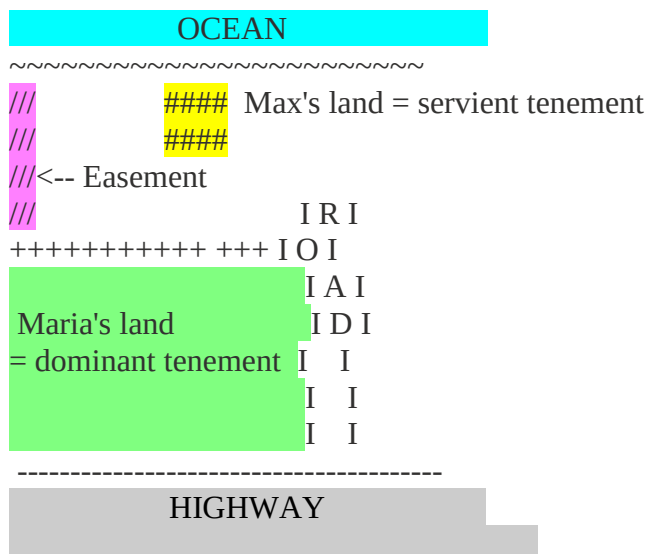




The problem is that the land won't sell for as much money since it doesn't have access to the ocean. Max can create an easement that gives the owner of the land the right to cross over Max's land to get to the ocean. Let's say he sells the new lot to Maria. The easement will be registered on title to the new parcel of land giving Maria the right to cross over Max's land to get to the ocean.

The easement is on Max's land. Maria does not own this land but she does have the right to cross over Max's land.

Max's land is referred to as the **servient tenement** since it has the burden of the easement. Maria's land is called the **dominant tenement** since it has the benefit of the easement. Here's another diagram:



If Maria one day sells her land to Margot, does Margot also enjoy the easement? Yes she does since **the easement runs with the land**.

What if Max one day wants to withdraw the easement? He would need to get the owner of the property at the time (Maria, Margot or someone else) to agree which they likely would not do since removing the easement would greatly devalue their own property by taking away its ocean access. But perhaps Max is offering lots of money to cancel the easement.

This is an example of the most common easement - **an express easement**.

Another kind of easement is an **implied easement** if it is necessary for practical convenience. For instance, the piece of property would be landlocked from the road without the easement. If, however, there is another road out of the property but it just isn't as convenient as having an easement over the neighbour's property then it is unlikely that the court would grant an implied easement.

A **prescriptive easement** is an easement over someone else's land that has been used i) for a long period of time (no. of years - 16, 20 years - depends on the jurisdiction), ii) in an open matter (no concealment of use), and iii) without the objection of the owner. It is similar to **adverse possession (squatter's rights)** that in some jurisdictions allow squatters to register fee simple ownership in the land after openly living on the land for a period of time.

Both adverse possession and prescriptive easements have been **abolished in British Columbia**.

A **statutory easement** is not a true easement but gives the organization (Telus, Terasen Gas, BC Hydro, City of Surrey, Trans Mountain oil pipeline, etc) the right to come on to the owner's land to do their work and then restore the land back to normal. Before purchasing a detached home one day, check out the statutory easements that exist on the property so that you are aware of the companies (usually utility companies) that have the right to come on your land to do repairs or put in new equipment.

Some of you might remember when the Trans Mountain oil pipeline that runs under parts of Burnaby burst over ten years ago and for days gushed oil all over the houses in the area. Trans Mountain Pipeline has a statutory easement on all of the Burnaby properties under which it pipeline passes.

Slide 14 - Restrictive Covenants

Restrictive Covenant = promise by the owner of the land limiting the use of its land

- can only arise by agreement
- limits the servient tenements use of its land

An example of a servient tenement is a new subdivision that might want to enhance its aesthetic appeal by placing limitations on all the owners in the subdivision. It might include certain things like no clothes lines in the yard, no satellite dishes, houses must be a minimum size, no garden sheds or greenhouses on the property, or (my personal favourite) no recreational vehicles or boats parked on the property or the street front (Don't you agree? It is a bit unfair to the neighbours for someone to park their boat with a big tarp on it for 9 months of the year just because they are too cheap to pay the marina fees during the non-boating season.)