

Winter Session 2006-07

PROPERTY LAW 108B

Section YO1

Maneesha Deckha, Assistant Professor

UNIT VALUE: 2.0

CLASS TIMES: Fall 11:30 a.m.-12:20 p.m., Tuesdays and Thursdays
Spring 10:30 a.m.-12:00 p.m., Tuesdays and Thursdays

LOCATION: Room 158 in the Fall and Room 152 in the Spring

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OFFICE HOURS: You are welcome to drop by my office to see me at any time. If you prefer, you may schedule an appointment.

SUMMARY: Property law explores how law regulates and structures relationships among persons in which they acquire, use, and transfer resources. The course will introduce students to well-established doctrine as well as emerging fields of property law. The foundational topics the course addresses include the nature of property, the concept of possession, property in human bodies, Aboriginal title, shared ownership and the doctrine of estates and conditional transfers. The foundational themes the course explores is the blurring line between property and personhood, commodification anxieties, and the relationships between property, power, and differences based on culture, class, gender, and race. The course cultivates an understanding of the intimate relation between law and social context and encourages students to approach their study of property law with critical sensibilities.

OBJECTIVES:

1. To introduce the concept of property and the relationship between property and other branches of the law. This will involve a certain amount of legal history, because property law, perhaps more than any other area of the law, is historically based.
2. To canvass selected aspects of property law, both real and personal, both classic and emergent.
3. To highlight the increasingly important law of Aboriginal title, and some other property issues affecting Aboriginal peoples in Canada.
4. To consider critical theoretical perspectives on property law that explores the connections between property, power, and social justice.
5. To provide intellectual skills necessary to solve basic property law problems in a participatory and active learning environment.

TEACHING METHODOLOGY:

We all have different learning styles. Some of us prefer lectures while others learn best with small group work, immediate written reflection, or active engagement. To accommodate the learning needs of everyone, create classroom community, and generate a participatory, stimulating and fun classroom environment, our classes will be a combination of lecture, discussion, and other active learning exercises. You can help realize these pedagogical goals and create a learning environment you enjoy by reading assigned readings prior to class and coming prepared to participate and interact in class. These are my expectations for you.

EVALUATION:

(a) There will be a take-home examination in December that, as explained below, will be worth either 0% or 30% of the final grade. The exam will be handed out on December 12 at noon and is due at the Law Reception in the front office at **10 am on December 13, 2006**. *This timing is subject to change.*

(b) There will be a final take-home examination in April that will cover material from *both* terms but which *may* focus more upon the spring term. As explained below, it will be worth either 70% or 100% of the grade for the course. The exam will be handed out on April 11, 2007 at noon and is due at the Law Reception in the front office at **noon on April 13, 2007**. *This timing is subject to change.*

(c) The exams will be graded on a percentage basis and the numerical value will be converted to a letter grade according to the Faculty's established scale as follows:

Letter Grade	Grade Point Value	Percentage Value	Narrative Description
A+	9	90-100%	Exceptional, outstanding, and excellent performance, normally achieved by a minority of students. These grades indicate a student who is self-initiating, exceeds expectation, and has an insightful grasp of subject matter.
A	8	85-89%	
A-	7	80-84%	
B+	6	75-79%	Very good, good, and solid performance, normally achieved by the largest number of students. These grades indicate a good grasp of subject matter or excellent grasp in one area balanced with satisfactory grasp in the other area.
B	5	70-74%	
B-	4	65-69%	
C+	3	60-64%	Satisfactory or minimally satisfactory performance. These grades indicate a satisfactory performance and knowledge of subject matter.
C	2	55-59%	
D	1	50-54%	Marginal performance. A student receiving this grade demonstrates a superficial grasp of subject matter.
F	0	49 or below	Unsatisfactory performance.

The December Examination

The December Examination and the Calculation of Final Grades

The December examination is potentially worth 30% of your final grade for the course. However, it will count as 30% of the final grade ONLY if it raises that grade. That is, if the December grade is lower than your final examination grade, your grade in the course will be based solely upon the final examination grade. This means that the December examination can help your final grade but cannot hurt it.

A Mandatory Requirement – Penalty for Failure to Write the December Examination

The December examination in this course must be written, *i.e.*, it is compulsory. *In the absence of a documented medical or other acceptable reason, failure to write the examination in December will mean that a penalty of one grade point will be deducted from your grade in the final examination in April.* (e.g., a final grade of B+ would become a B.)

Establishing Acceptable Reasons for Failure to Write the December Examination

An acceptable reason for not writing a December examination is a reason that would normally justify a Special Examination in a course (*e.g.*, illness, family affliction or other pressing special circumstances) and the procedures to be followed to establish that an acceptable reason exists are the same as those that apply to Special Examinations. Among other things, these procedures require that you contact the Associate Dean as soon as possible, and no later than five days after the scheduled date of the examination, to inform her of the problem and provide the documentation necessary to substantiate your grounds for missing the examination.

(All students should ensure that they are familiar with the Faculty's Regulations regarding Special Examinations that are set out in the calendar and posted on the main notice board.)

Writing the December Examination on a Deferred Basis

A student who establishes an acceptable reason for failing to write the December examination on the scheduled date may be granted special permission to write the examination on a deferred basis, *provided that he or she is capable of doing so within the regular examination period in December.* In such a case, the December examination grade will count in the calculation of the final grade for the course in the usual way. Arrangements to write an examination on a deferred basis must be made through the Associate Dean's office and an undertaking regarding non-discovery of the contents of the examination will be required.

A student who has an acceptable reason for failing to write a December examination on the scheduled date and who cannot write the examination within the regular examination period, will not be allowed to write the examination at a later date and have it count in the calculation of his/her final grade for the course. In such a case, the penalty for failure to write the examination will not apply and calculation of the final grade will be made on the basis of the final examination alone.

Relevance of December Examination in Other Contexts

Students should also be aware that, although writing the December examination in this course cannot adversely affect your final grade in the course, December grades for first year students have recently become relevant in other contexts. For example, you may be asked or required to provide your

unofficial December grades to prospective employers. The law school will refer to these grades if you apply for a summer research position. And, the Director of Co-op may refer to them if a First Year student is not performing well in the Co-op preparation course, to help her determine whether that student should be allowed to apply for a summer work term.

In addition, in January the faculty will meet to review the December grades in order to identify students who are experiencing academic difficulties and thus be in a better position to assist them. A grade of less than C in the December examination in this course may result in remedial work of some kind being required.

Plagiarism and Other Forms of Academic Dishonesty

Students who are unsure of the rules of academic conduct in this area should refer to the Policy on Academic Integrity in the 2006-07 UVic Calendar, in particular the heading “Cheating on Assignments, Tests and Examinations”, and are encouraged to consult the instructor.

SYLLABUS:

[Note: this syllabus and other material relevant to this course may be found at <http://www.law.uvic.ca/mdeckha/108b/index.html>.]

A. Required Course Materials

1. Bruce Ziff, *Principles of Property Law* (Carswell: 4th ed., 2006) [Ziff].
2. Deckha and Foster, eds., *Property: Supplemental Materials* (2006-2007) [DF]. These materials are available from the CDC.
3. The cases, statutes, and articles that are on the website (<http://www.law.uvic.ca/mdeckha/108b>) for each section of Law 108b (Property) under “Course Materials.” One case – *Asher v. Whitlock* – is on reserve in the library. From time to time, additional readings may be distributed or placed on reserve.

B. Readings

The readings for each major topic, which will usually span several classes, are set out below. Reading assignments for individual classes will be posted before each class. See “Announcements” at <http://www.law.uvic.ca/mdeckha/108b/announcements.html>. The chapters in Ziff’s textbook will normally be part of our primary reading. In other sections of the course they are employed as background reading, to help you to understand the cases, statutes and other materials upon which we will focus. This outline indicates how Ziff is to be read for each section. There are also many reference texts under Course Reserve in the library to assist you if you are looking for further background reading. Please note that the reading list may be modified as the course proceeds.

“Cursed be he that removeth his neighbour’s landmark.”

Deuteronomy 27:17, often quoted by early 20th century Nisga’a chiefs when protesting government land policy

He told me I was his property; that I must be subject to his will in all things. My soul revolted against the mean tyranny.

Harriet Ann Jacobs

“Property is organized robbery.”

George Bernard Shaw

PART I: FOUNDATIONAL CONVERSATIONS

1. THE NATURE OF PROPERTY

How does the common law define or attempt to define property and the relationship between property and other legal concepts? How do judges think about what qualifies as property and what does not?

In other words: what is property? How is it different from, say, contract? Can news reports, entertainment “spectacles,” and university degrees be property?

Reading:

DF: “Suddenly a Gate”.

On the website: (i) the excerpt from *Calder v. Attorney General (BC)*; (ii) pp. 229-36, 238-40, 248-50, 255, and 257-59 of *International News Service v. Associated Press* (248 U.S. 215 citation); (iii) pp. 357-374 of Cohen’s “Dialogue on Private Property;” (iv) Parts I, II, III.B and IV of the opinion of Panelli J. and sections 1-4 of Mosk J.’s dissenting opinion in *Moore v. the Regents of the University of California*; (v) paras. 153-207 of *Harvard College v. Canada (Commissioner of Patents)*; paras. 1-24 of *Monsanto Canada Inc. v. Schmeiser*; and the first 4 paras. of the Introduction to Strahilevitz, “The Right to Destroy” (*Yale Law Journal*).

[Background: Ziff, chap. 1.]

2. THE INSTITUTION OF PROPERTY IN CONTEXT

Where does the law of property in Canada come from, how is it organized and what is its social context?

(a) The Sources of Canadian property Law

“[A]n estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time, for he who has a fee-simple in land has a time in the land without end, and he who has land in tail has a time in the land or the land for a time as long as he has issue of his body, and ... “

Walsingham’s Case (1573), 75 ER 805 at 816.

This section is a brief introduction to some basic principles of land law, primarily the doctrines of tenure and estates, and to the reception of English law in Canada. By the 17th century Oliver Cromwell described the law of real property as "a tortuous and ungodly jumble." It has since been reformed. Nonetheless...

Reading:

Ziff, chap. 2, pp. 53-67.

On the website: s. 2 of the Law and Equity Act.

(b) English law and Aboriginal Property Rights

Reading:

Ziff, chap. 2, pp. 67-68, 175-187

On the website: paras. 1-4, 109-118, 124-169, 172-186 of *Delgamuukw v. British Columbia* and s. 35 of the Constitution Act, 1982.

DF: "It's the vibe! the common law imaginary Down Under."

Film: *The Castle*

(c) Basic Divisions of the Law of Property

Reading: Ziff, chap. 2, pp. 68-72.

(d) Property, Class and Poverty

Reading:

Ziff, chap. 2, pp. 73-77

On the website: pp. 309-329, 332-338 of Waldron, "Homelessness and the issue of freedom."

Ziff, chap. 2, pp. 73-77

(e) Property and the Constitution

Reading: Ziff, chap. 2, pp. 77-80

On the website: sections 91(24), 92(13) and 109 of the Constitution Act, 1867; s. 1(a) of the Canadian Bill of Rights, 1960; s. 7 of the Canadian Charter of Rights and Freedoms, 1982; and paras. 37-42, 47-49, 51-62, 72-75, 78-95, and 99-107 of *Mariner Real Estate v. Nova Scotia (AG)* [see the head note for the facts and procedural history of this case].

PART II: BASIC LEGAL AND EQUITABLE INTERESTS

3. THE DOCTRINE OF ESTATES

This doctrine is really the foundation of the common law of real property, and the essence of it is admirably stated in the excerpt from *Walsingham's Case* that is reproduced under Topic 2(a), above.

(a) The Estate in Fee Simple

“In such places as Tristan de Cunha, Pitcairn Island, or the Gambia, which have to some degree enjoyed the reception of the common law, it is wholly obscure whether [the Rule in *Shelley's Case*] ever did exist, and nobody there very much cares.”

A.W. Brian Simpson

So we won't worry about the Rule in *Shelley's Case* ... treat it simply as background.

Reading:

Ziff, chap. 5, pp. 151-154.

On the web site: ss. 19(1) and 19(2) of the Property Law Act; ss. 24 and 25 of the Wills Act; and *Thomas v. Murphy* (1990).

[Background: Ziff, chap. 5, pp. 154-156.]

(b) The Fee Tail

Reading:

Ziff, chap. 5, pp. 156-159.

On the web site: s. 10 of the Property Law Act.

(c) The Life Estate and the Estate *Pur Autre Vie*

Reading:

Ziff, chap. 5, pp. 159-169.

On the web site: s. 11 of the Law and Equity Act.

(d) Life Estates Arising by Operation of Law

Reading:

Ziff, chap. 5, pp. 169-173.

On the web site: s. 96 of the Estate Administration Act and ss. 2-4 of the Land (Spouse Protection) Act.

(e) Estates in Aboriginal Lands

Reading:

Ziff, chap. 5, pp. 187-189.

On the web site: *Songhees First Nation v. Canada* [2002] 4 C.N.L.R. 275 and paras. 34-38 of *Okanagan Indian Band v. Bonneau*.

(f) Personalty and the Doctrine of Estates

Reading: Ziff, chap. 5, pp.189-190.

On the web site: *Re Troup* (1945).

4. THE ORIGINS AND NATURE OF EQUITABLE INTERESTS

“Equity” as a moral and legal idea dates back at least as far as Aristotle, and may be summed up in the maxim, *aequitas est perfecta quaedam ratio quae jus scriptum interpretatur et emendat: nulla scriptura comprehensa, sed solum in vera ratione consistens*. Translated that means: “Equity is, as it were, a complete code, unwritten and based on right reason alone, which interprets and amends the law.” But it has a unique role in the common law, one that can be understood only if one approaches it historically. Indeed, in the beginning equity resembled the description in the maxim, justifying the cynic’s assertion that in England one court was set up to do injustice and another to stop it. By the 19th century, however, it had become as rigid and in need of reform as the law itself (see the caricature of it in the description of the Court of Chancery in Dickens’ *Bleak House*).

(a) Historical Background: Uses and Trusts

Reading:

Ziff, chap. 6, pp. 191-205.

(b) Trusts, Resulting Trusts and Constructive Trusts

Reading:

Ziff, chap. 6, pp. 205-219.

On the web site: the reasons of McLachlin, J., in *Peter v. Beblow* (1993) and the “Factual Background” at the beginning of Justice Cory’s separate, concurring reasons; *Bulun Bulun v. R. & T. Textiles* (1998) (everything but affidavit evidence).

(c) Law, Equity, and the Acquisition and Transfer of Interests in Land

Property is one thing, getting hold of it, another. Examining how this is done legally is a good way to get a sense of how law (narrowly defined), equity and statute each contribute to the law (broadly defined). There are basically four ways to acquire and transfer interests in land:

(i) By crown grant: see s. 50 of the Land Act.

(ii) *Inter vivos* transfers, by gift or contract: see: s. 59 of the Law and Equity Act: ss. 4-7, 15, and 16 of the Property Law Act; and ss. 20-22 and 185-186 of the Land Title Act.

(iii) By will or upon intestacy: ss. 3-5 of the Wills Act and ss. 77-79 and Part 10 of the Estate Administration Act.

(iv) By proprietary estoppel: DF: “The Contract of Sale: Legal Analysis.”

5. CONDITIONAL GIFTS AND FUTURE INTERESTS

We explore here qualified or conditional gifts as well as interests that are designed to accrue in the future. What types of qualifications, conditions and future interests are invalid and what happens to the gift or interest when invalidity occurs?

(a) Introduction: Basic Concepts

(i) Remainders and reversions

Reading:

Ziff, chap. 7, pp. 221-222.

On the web site: *Stuartburn v. Kiansky* (2001).

(ii) Defeasible and determinable interests

Reading:

Ziff, chap. 7, pp. 222-225.

On the web site: s. 23 of the Perpetuity Act and paras. 1-4, 9-10, 12-15, 253-27 and 32 of *Re McKellar* (1972).

(iii) Vested interests, contingent interests and conditions precedent

Reading:

Ziff, chap. 7, pp. 225-227.

On the web site: *Re: Tuck's Settlement Trusts* (1978) (read the opening paras. *before* “The Issue of Uncertainty” section in Lord Denning’s decision), on the classification issue only.

(iv) Precatory words and *in terrorem* conditions

Reading:

Ziff, chap. 7, pp. 227-228.

(v) Transferability and registration

Reading: Ziff, chap. 7, p. 228.

On the web site: ss. 8 and 10(4) of the Property Law Act; ss. 172 and 180 of the Land Title Act; and s. 2 of the Wills Act.

(b) State Limitations on Private Power

(i) Introduction

Reading:

Ziff, chap. 7, pp. 228-230.

(ii) The effects of invalidity

Reading:

Ziff, chap. 7, pp. 230-232.

(iii) Public policy generally

Reading:

Ziff, chap. 7, pp. 232-237.

(iv) Uncertainty

Reading:

Ziff, chap. 7, pp. 238-241.

On the web site: *Re: Tuck's Settlement Trusts* (1978), read from "The Issue of Uncertainty" in Lord Denning's decision to the end of his decision only.

(v) Restraints on alienation

Reading: Ziff, chap. 7, pp. 241-245 (end of 1st full paragraph).

6. PRIORITIES AND REGISTRATION

Many legal problems involve sorting out which of two or more competing and valid claims ought to be given priority. In this course we consider this issue primarily in the context of real property and the Torrens system of title registration, which was established in 1860 in the colony of Vancouver Island (the first North American jurisdiction to adopt it).

- (a) An Overview of Priorities at Common Law and in Equity: the *Nemo Dat* Principle and the *Bona Fide* Purchaser of the Legal Estate for Value Without Notice

Reading:

Ziff, chap. 12, pp. 431-439.

On the web site: the facts in the headnote and paras. 243-246, 258-261 and 276-310 of *Chippewas of Sarnia Band v. Canada*.

- (b) Abstracts of Title, Deeds Registration and Title Registration

Reading:

Ziff, chap. 12, pp. 439-444.

On the web site: s. 54 of the Land Act.

- (c) The Cardinal Elements of Torrens Title: the Mirror, the Curtain and the Assurance Fund

Reading:

Ziff, chap. 12, pp. 445-447.

On the web site: ss.1, 20, 23(2), 26, 169, 179 and 197 of the Land Title Act

- (d) Indefeasibility and its Qualifications

- (i) The nature of indefeasibility:

Reading:

Ziff, chap. 12, pp. 448-449.

On the web site: ss. 23(2), 24, 25, 26, 171 and 297(3) of the Land Title Act; and *Creelman v. Hudson Bay Insurance Co.*

- (ii) The impact of fraud and notice of unregistered interests

Reading:

Ziff, chap. 12, pp. 449-453.

On the web site: ss. 23(2) (i), 25(2) (c) and 29 of the Land Title Act and *Woodvest Developments Ltd. v. Met-Tec installations Ltd.*

- (iii) Caveats and Aboriginal land entitlements

Reading:

Ziff, chap. 12, pp. 455-458.

On the web site: s. 23(2)(g), 215(1) and 282 of the Land Title Act.

[Background: *Skeetchestn Indian Band v. British Columbia* (on the web site).]

7. THE CONCEPT OF POSSESSION

Although it is said that there is no core to any given bundle of rights, the concept of possession remains particularly important. Is it really, as they say, “nine points of the law?”

(a) Introduction: Basic Definitions (or, Cornering the chameleon)

Reading: Ziff, chap. 4, pp. 117-121.

(b) Acquisition of Title by Possession

What is adverse possession and how has BC’s Torrens system of land title registration affected it?

Reading:

Ziff, chap. 4, pp. 121-126.

On the web site: pp. 73-77 and 92-of Carol Rose, “Possession as the Origin of Property” (*Chicago Law Review*); paras. 1-2, 34 and 46-53 of *Re: Canadian Pacific Railway* and provisions of the current Land Title Act and Limitation Act cited therein; s. 8 of the Land Act; s. 36 of the Property Law Act; s. 171 of the Land Title Act; and s. 2 of the Wildlife Act.

On reserve in the library: *Asher v. Whitlock* (1865).

(c) Transfer of Title through Delivery: Gifts

Gifts *inter vivos*, declarations of trust and *donationes mortis causa*

Reading:

Ziff, chap. 4, pp. 140-150.

On the web site: *Schoppel v. Royal Trust Company* (1970); *MacLeod v. Montgomery* (1979); and ss. 20 and 189(1) of the Land Title Act.

8. SHARED OWNERSHIP

In this topic we look at how to create and terminate concurrent ownership arrangements. We concentrate on the rights and obligations, especially when disputes arise, of co-owners in the most common types of co-ownership arrangements. We also consider less conventional, but nonetheless, communal types of property.

(a) Conventional Forms of Concurrent Ownership

(The joint tenancy, the tenancy in common, and some other rather exotic variations...)

Reading: Ziff, chap. 9, pp. 311-318.

On the web site: ss. 11, 12 and 18 of the Property Law Act; ss. 173 and 177 of the Land Title Act

(b) Severance of Joint Tenancies

Reading: Ziff, chap. 9, pp. 318-324.

On the web site: ss. 20 and 231 of the Land Title Act; *Stonehouse v. British Columbia* (1962); and paras. 1-9, 13-25, 28-39, 43-54 of *Re Sorensen and Sorensen* (1977).

PART III: CURRENT DEBATES

9. MATRIMONIAL PROPERTY: CONTINUING INEQUALITIES

We have seen various sources of legal reform seeking to address unjust laws relating to married women's property rights. Have we finally arrived at equality in matrimonial property or do injustices persist?

(a) Coverture Updated?

Reading:

Ziff, chap. 9, pp. 334-337.

DF: "Deconstructing the Ideal Worker Norm in Family Entitlements."

(b) Inequality for Common law Couples?

On the web site: Part 5 of the Family Relations Act; the Land (Spouse Protection) Act; the Wills Variation Act; and paras. 1-8, 31-65, and 190-205 of *Nova Scotia v. Walsh* (2002).

(c) Colonialism and Family Law

Reading: Ziff, chap. 9, pp. 345-349.

On the web site: *Derrickson v. Derrickson* and *Paul v. Paul* and Mary Ellen Turpel, "Home/Land."

10A. PROPERTY AND PERSONHOOD: COMMODIFYING HUMAN BODIES

We possess our bodies and everything inside. Does that mean we have property in our bodies? To our entire bodies or just some parts? *Should* we have property in our bodies? Can we be persons and property at the same time? Are we already? We looked at some of these issues when we examined *Moore* (see Topic 1, above). Here, we go a little deeper.

(a) Property in Human Bodies?

Reading:

DF: Andrews and Nelkin, “*Homo Economicus*”; Sunder, “Property in Personhood”

On the web site: Review *Moore*; pp. 1903-1909 of Radin, “Market-Inalienability;” pp. 206-210 of Mahoney, “The Market for Human Tissue” (*Virginia Law Review*)

(b) Eggs, Sperm and Reproductive Materials

Reading:

DF: Downie et al., “Regulating Reproductive Technologies in Canada;” Carol Rose, “Afterword: Whither Commodification?”; *Assisted Human Reproduction Act*

On the web site: Nedelsky (*Canadian Journal of Law and Jurisprudence*)

(c) Race and Other Social Identities

Reading:

DF: Williams, “In Search of Pharaoh’s Daughter”

On the web site: pp. 1715-1737 of Harris, “Whiteness as Property” (*Harvard Law Review*)

10B. PROPERTY AND PERSONHOOD: DECOMMODIFYING ANIMAL BODIES

Here we approach the property/personhood divide from the other direction. Are there some things that are so routinely and completely commodified as the objects to which property rights attach that should become subjects or persons instead? Specifically, is the property status of nonhuman animals something to decry or at least revisit? Should nonhuman animals be persons, property, or something in between?

(a) Human Subjects, (Nonhuman) Animal Objects

Reading: DF: Francione, “Animals – Property or Person”; Adams and Donovan, “Caring About Suffering”; Mossman and Flanagan, “Possessory Rights: Subject and Object Revisited”

(b) Legal Welfarism

Reading: DF: Francione, *Animals, Property and the Law*; Létourneau, “Toward Animal Liberation?”

(c) A New Legal Status for Animals?

Reading: DF: Favre, “A New Property Status for Animals: Equitable Self-Ownership”; Nussbaum, “Beyond ‘Compassion and Humanity’”