

**EASEMENTS, COVENANTS AND SIMILAR RIGHTS
IN BRITISH COLUMBIA – AN OVERVIEW**

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I. **INTRODUCTION**

A. **SCOPE OF PAPER**

This paper provides an overview of easements, covenants and similar rights in British Columbia. These interests include the following:

- (a) Easements - both positive and negative
- (b) Statutory Rights of Way
- (c) Public Rights of Way
- (d) Restrictive Covenants
- (e) Statutory Building Schemes
- (f) Statutory Covenants
- (g) Profits à Prendre
- (h) Water Rights

B. **REAL PROPERTY AND INTERESTS IN LAND**

It is useful to consider the nature of real property.

The *Interpretation Act*, R.S.B.C. 1996, c. 238 defines land as follows:

"land" includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning.

In general, categories of "estates" in land are:

- (1) **Ownership.** Under the common law, the Crown is the absolute owner of land. The person holding title to land, however, holds an "estate" that is something less than absolute ownership.

- (2) **Fee Simple.** Fee simple is the largest estate known at law. Fee simple may be of potentially infinite duration and confers upon the owner a larger bundle of proprietary rights than those attaching to other estates.
- (3) **Other Estates.** There are other lesser estates, such as a life estate (an interest in property that is for the duration of a lifetime). Life estates and other similar estates are not often found in modern property law.
- (4) **Leases.** A lease is a demise of land under which exclusive possession of such land is granted by a landlord to a tenant. The landlord's right to actual possession is suspended during the term of the tenancy.

This paper does not discuss further the concept of “estates” of ownership or leases.

C. EASEMENTS, COVENANTS AND SIMILAR RIGHTS

There are also other rights and interests in land, such as easements, covenants, statutory covenants and statutory rights of way. It is these interests in land and related rights which will be covered in this paper.

These rights, although lesser than a fee simple or lease, are fundamental to the use and enjoyment of land. Illustrative examples are provided throughout this paper.

D. LICENCES

A “licence” is not an interest in land. Usually, a licence will be created in an agreement between parties and will not run with the land and be enforceable against successors in title to the land over which the licence is held. On the other hand, interests in land, such as easements, do run with the land and will be enforceable in such circumstances.

Licences are a commonly used and versatile right in relation to land, and in the appropriate circumstances can accomplish many of the same purposes as the rights described in this paper.

E. REGISTRATION

British Columbia has a land title office system, which is based on the principles of a “Torrens” system. The governing statute is the *Land Title Act*, R.S.B.C. 1996, c. 250.

Ownership of land and interests in land or affecting land may, if provided by the *Land Title Act*, be registered in a Land Title Office.

In other cases, such as with statutory rights of way and statutory covenants, registration is essential for the creation of the rights conferred by the statute.

F. SUBDIVISION

Section 73(1) of the *Land Title Act* provides:

- 73(1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of
- (a) transferring it, or
 - (b) leasing it, or agreeing to lease it for a life, or for a term exceeding 3 years.

This provision has been problematic for leases of portions of land, since our courts have held that leases that violate the provisions of section 73 are void.

It is important to note, however, that any instrument creating an easement or similar right does not inadvertently grant a fee simple or a lease that contravenes section 73, since any such instrument would be at risk of being declared void.

Incidentally, section 73 has created an additional use for easements. Previously, a landlord and tenant might have been tempted to create a lease of a building that also included a portion of bare land (e.g. for parking). One response to section 73 is to restrict the lease to the building, and then to grant an easement for the bare land that is appurtenant to the lease (as a dominant tenement).

II. EASEMENTS

A. DEFINITION

An easement is a right to the use of land, or a right to restrict the use of land.

An easement has also been described as the privilege of imposing a certain burden on the grantor's land (i.e. the servient tenement) for the benefit of the grantee's land (i.e. the dominant tenement): *Ross v. Hunter* (1882), 7 S.C.R. 289 at 315 (S.C.C.) [N.S.].

An easement may be either positive or negative.

A positive easement gives the owner a right to perform some act on another owner's land. An example of a positive easement is the right to cross over the servient tenement by foot and/or vehicle.

A negative easement imposes a restriction on the use an owner may make of the servient tenement. Under a negative easement an owner may, for example, be restricted from building on the servient tenement if such building would block light to a neighbour's window, or from removing the supporting soil next to the boundary of a neighbour's property. Negative easements appear similar to restrictive covenants. Negative easements came into being before restrictive covenants and to some extent, they overlap.

Neither positive nor negative easements may involve the imposition of a positive obligation upon the owner of the servient tenement. Such an owner cannot be bound by way of an easement to maintain, repair, or improve the easement area or structures located on it, although the owner can be prevented from dealing with its property in a manner that renders the easement over it incapable of being enjoyed. A party wanting to place a positive obligation upon the owner or occupier of the servient tenement must do so by other means such as a personal covenant (which will not run with the land).

B. ESSENTIAL ELEMENTS OF AN EASEMENT

The essential characteristics of an easement are as follows [*In re Ellenborough Park*, [1956] Ch. 131, [1955] 3 All E.R. 667 (C.A.) as adopted by the Supreme Court of Canada in *Dukart v. Surrey [District]*, [1978] 4 W.W.R. 1]:

- (1) **There must be a dominant and a servient tenement.** Ordinarily the dominant tenement is a fee simple or leasehold estate. Easements cannot exist “in gross” (i.e. without a dominant tenement).
- (2) **The easement must confer a benefit or “accommodate” the dominant tenement.** This imposes the requirement that some real benefit must accrue to the dominant tenement, making it a better and more convenient property. The easement must enable the dominant owner to make fuller use of the dominant tenement – it must confer a benefit on the dominant land as land [*Hill v. Tupper* (1863), 159 E.R. 51 (Exch.)]. Although it is not necessary that the dominant tenement and servient tenement be adjacent to one another, there must be reasonable proximity between the dominant and servient lands.
- (3) **The dominant and servient tenements must not be owned and occupied by the same person.** This rule has been abrogated in British Columbia by s.18 of the *Property Law Act*, R.S.B.C. 1996, c.377, which provides that common ownership does not prevent a grant of an easement nor does it extinguish an easement previously granted.
- (4) **The easement must be capable of forming the subject matter of a grant by deed.** This requirement involves the following four sub-parts.
 - (a) The right granted must be sufficiently definite. The right must be capable of reasonably exact definition and must not therefore be too vague. For example, the right to a view is not sufficiently precise; however, a right to light through a particular window may be the subject matter of an easement.
 - (b) The subject matter must be compatible with the nature of an easement. The easement must not grant exclusive and unrestricted use of a piece of land. This is a question of degree. If the right granted in relation to an area over which a right is exercisable is such that it would leave the servient tenement owner without any reasonable use of its land it cannot properly be an easement [*London & Blenheim Estates v. Ladbrooke Retail Parks Ltd.* [1994] 1 W.L.R. 31].
 - (c) There must be a capable grantee. The grantee cannot be an indefinite class of persons such as “the public”. In addition, the grantee must have an interest in the dominant tenement at the time of the grant.
 - (d) There must be a grantor capable of granting the right. At the time of the grant, the servient owner must have an interest in the tenement at least equal to the interest granted by the easement. A fee simple owner or a tenant under a leasehold

interest may grant an easement, although a tenant may only grant an easement for the term of its lease.

An interest that does not satisfy these four requirements may amount to a restrictive covenant, licence or lease, but it is not an easement.

C. CREATION OF EASEMENTS

An easement may be created by grant, reservation, court order under the *Property Law Act*, statute or expropriation.

- (1) **Express Grant.** The simplest way to create an easement is by express grant by the owner of the servient lands.
- (2) **Implied Grant.** An easement may also come into existence by an implied grant. Two types of easements will be implied: an easement of necessity and an intended easement.
- (3) **By Reservation.** An easement may be created by express or implied reservation.

Where an owner disposes of part of his or her land and retains the rest, the owner may “reserve” an easement over the part sold. The need to reserve an easement upon the selling of two adjacent lots has been largely eliminated due to s.18 of the *Property Law Act*, which provides that a landowner of two lots is entitled to grant an easement.

- (4) **By Prescription.** In some jurisdictions, it is possible to acquire easement rights by prescription. It is no longer possible to acquire easement rights by prescription in B.C., (see: s.24 of the *Land Title Act*).
- (5) **By Court Order under the Property Law Act.** The *Property Law Act*, s.36 provides that on application to the B.C. Supreme Court, an owner, which includes a person with an interest in, or right to possession of land, may seek a declaration of an easement where a building on land encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land.

D. TERMINATION OF EASEMENTS.

Easements may be extinguished by express release, abandonment, frustration, termination of term, or by court order.

- (1) **Express Release.** Pursuant to the *Land Title Act*, s.241, an easement may be released by the registration of a discharge executed by the dominant tenement owner in favour of the servient tenement owner releasing the servient tenement owner from the burden.
- (2) **Termination of Term.** Where an easement is made for a particular period of time, it will be extinguished upon the end of the term.
- (3) **Court Order.** The *Property Law Act*, s. 35, authorizes the B.C. Supreme Court to cancel or modify an easement where one of the following circumstances exists:
 - (a) the easement is obsolete because of changes in the character of the land, the neighbourhood or other circumstances the court considers material;
 - (b) the reasonable use of the land will be impeded, without practical benefit to others, if the easement is not modified or cancelled;
 - (c) the persons who are or have been entitled to the benefit of the easement have expressly or impliedly agreed to it being modified or cancelled;
 - (d) modification or cancellation will not injure the person entitled to the benefit of the easement; or
 - (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

Any court order may be made subject to compensation.

E. REGISTRATION OF EASEMENTS

Under the land title system in place in B.C., an easement should be registered to ensure it is enforceable against successors in title.

F. ENFORCEMENT OF EASEMENTS

There are two relevant causes of action in respect of easements. The person claiming the right to an easement may bring an action in nuisance if the easement is interfered with. Conversely, the person claiming that there is no easement on his or her property may bring a claim in trespass.

The remedies available under nuisance and trespass include a declaration to establish the existence and extent of the easement, an injunction to prevent violation of the owner's rights, common law damages to compensate for existing losses and equitable damages to compensate for prospective losses.

Pursuant to s.3(4) of the *Limitation Act*, R.S.B.C. 1996, c. 266 there is no limitation period governing the right to enforce an easement.

G. COMMON EXAMPLES OF EASEMENTS

- (1) **Rights of way.** A right of way is essentially a right to cross over the dominant tenement and may be expressed as a general or limited right. A general right of way is a right which may be used by the dominant tenement and its visitors at any time and in any way. A limited right of way is somehow restricted. For example, it may be limited to certain times of the day, or it may be limited as to the mode in which it can be used (e.g. such as for passage on foot only).
- (2) **Rights of Light.** A landowner may build on land so as to prevent any light from reaching a neighbour's property. However, it is possible for a neighbour to acquire an easement of light.
- (3) **Rights of Support.** A landowner has a natural right of support for his or her land, but this right extends only to the land in its natural state and does not extend to buildings. A right to support for buildings may be acquired through the use of an easement.

H. OTHER EXAMPLES OF EASEMENTS.

Easements may be employed in a wide variety of circumstances in order to enable parties to carry out their objectives. Some examples include:

- (1) The right to wander the foreshore of a subdivision [*Dukart v. Surrey [District], supra*].
- (2) The right to make noise [*Duchman v. Oakland Dairy Co.* (1928), 63 O.L.R. 111 (C.A.)].
- (3) The right to commit a nuisance [*British Columbia Forest Products Ltd. v. Nordal* (1954), 11 W.W.R. 403 (B.C.S.C.)].
- (4) The right to lay and maintain a pipeline [*Lane v. George* (1904) 4 O.W.R. 539 (Ont. H.C.), see also *Shelf Holdings v. Husky Oil*, 56 D.L.R. (4th) 193 (Alta. C.A.)].

- (5) The right to construct a tunnel [*Kolodzi v. Detroit and Windsor Subway Co.*, [1931] S.C.R. 523].
- (6) The right to use a laneway and loading door necessary to receive supplies [*Brass Rail Tavern (Toronto) Ltd. v. Di Nunzio* (1979) 12 R.P.R. 188 Ont. H.C., *aff'd* (1981), 16 M.P.L.R. 56 (Ont. C.A.)].
- (7) The right to project a roof over adjoining land [*Southern Nigeria (Attorney General) v. John Holt & Co. (Liverpool)*, [1915] A.C. 599 (P.C.)]
- (8) The right to discharge substances into the air and deposit them on neighbouring lands [*De Vault v. Robinson* (1920), 48 O.L.R. 34 (Ont. C.A.)].
- (9) The right to take water from a spring or well [*Kingswood Realty Ltd. v. Kileel* (1979), 28 N.B.R. (2d) 352 (C.A.), see also: *Harrison v. McMahon* (1982), 139 D.L.R. (3d) 566 (S.C.)].
- (10) A right of way for a power transmission line [*Smith v. Inland Gas & Oil Co.* (1955), 14 W.W.R. 558 (Alta T.D.)].
- (11) The right to use a path or garden for leisure [*Hillside Farms Ltd. v. British Columbia Hydro & Power Authority*, [1977] 3 W.W.R. 749 (B.C.C.A.)].
- (12) The right to park vehicles [*Leon Asper Amusements Ltd. v. Northmain Carwash & Enterprises Ltd.* (1966), 56 D.L.R. (2d) 173 (Man Q.B.)].
- (13) The right to receive a flow of water in an artificial stream [*Keewatin Power v. Keewatin Flour Mills Co.*, [1929] 3 D.L.R. 199 (Ont. C.A.), *aff'd* [1930] A.C. 640 (P.C.)].

III. STATUTORY RIGHTS OF WAY

A. DEFINITION

A statutory right of way is a right in the nature of an easement and is created by section 218 of the *Land Title Act*. Importantly, this section provides that the common law requirement that there be a dominant tenement and servient tenement does not apply to statutory rights of way.

Statutory rights of way may only be held by those persons specified in section 218. Such persons include the Crown, municipalities and utilities. Pursuant to section 218(1)(d), other persons may apply to the appropriate provincial authorities for the right to hold a statutory right of way. Generally, this process will require the applicant to demonstrate why the holding of the statutory right of way is necessary for the operation and maintenance of the grantee's undertaking.

B. RELEVANT STATUTORY PROVISIONS

The *Land Title Act*, s.218 provides the basis for statutory rights of way.

218(1) A person may and is deemed always to have been able to create, by grant or otherwise in favour of

- (a) the Crown or a Crown corporation or agency,
- (b) a municipality, a regional district, the Greater Vancouver Transportation Authority, a local trust committee under the Islands Trust Act or a local improvement district,
- (c) a water users' community, a public utility, a pulp or timber, mining, railway or smelting corporation, or a corporation authorized to transport oil or gas, or both oil and gas, or solids, as defined in the Pipeline Act, or
- (d) any other person designated by the Minister of Environment, Lands and Parks on terms and conditions that minister thinks proper,

an easement, without a dominant tenement, to be known as a "statutory right of way" for any purpose necessary for the operation and maintenance of the grantee's undertaking, including a right to flood.

(2) To the extent necessary to give effect to subsection (1), the rule requiring an easement to have a dominant and servient tenement is abrogated.

(3) Registration of an instrument granting or otherwise creating a statutory right of way

(a) constitutes a charge on the land in favour of the grantee, and

(b) confers on the grantee the right to use the land charged in accordance with the terms of the instrument, and the terms, conditions and covenants expressed in the instrument are binding on and take effect to the benefit of the grantor and grantee and their successors in title, unless a contrary intention appears.

(4) A person who executes an instrument in which a statutory right of way is created is not liable for a breach of a covenant in the instrument occurring after the person has ceased to be the owner of the land.

(5) This section is retroactive in its application and applies to all statutory rights of way, whenever created.

(6) A recital in a grant or reservation of a statutory right of way that it "is necessary for the operation and maintenance of the grantee's undertaking", or a statement to that effect in the application to register the statutory right of way, is sufficient proof to the registrar of that fact.

C. SRW TERMS BIND SUCCESSORS

Section 218(3)(b) set out above permits terms, conditions and covenants to take effect to the benefit of the grantor and grantee and their successors in title.

This is a useful provision that may allow a statutory right of way to include terms and conditions that, in an easement, would not run with the land and be binding on successors.

D. EXAMPLES

Examples of statutory rights of way include:

- (1) Statutory rights of way for utilities for transmission and distribution.
- (2) Statutory rights of way for municipalities over private land for a sidewalk, together with rights to maintain and repair the sidewalk.
- (3) Statutory rights of way for utility companies over rooftops for the location of telecommunications tower and related equipment.

IV. PUBLIC RIGHTS OF WAY

A. DEFINITION

A public right of way is a right of way under which lands may be used by the members of the public. A public right of way is exercisable by anyone. Land over which a public right of way exists is known as a “highway”.

B. CREATION OF PUBLIC RIGHTS OF WAY

A public right of way may be created by (1) statute, or (2) at common law by dedication and acceptance.

(1) By Statute.

- (a) The *Highway Act*, R.S. B.C. 1996, c.188.

Where public money has been spent on a travelled road, other than for snowploughing or ice control, that road is deemed to be a public highway under the *Highway Act*, s.4.

The Minister is given wide powers to establish and alter highways under s.5 of the *Highway Act*.

- (b) The *Land Title Act*, s.107.

Public roads may also be created under the *Land Title Act*, s.107 by the deposit of a subdivision, reference or explanatory plan showing part to be a highway. The deposit of the plan operates as an immediate and conclusive dedication of the owner to the public or the portion of land shown as highway.

- (2) **By Common Law Dedication and Acceptance.** In B.C., a road can also become a public highway if it is established that: (1) the landowner intended to dedicate the road as a public highway, and (2) the public accepted the road as a public highway.

Once a road becomes a public highway in such a manner, it remains one despite subsequent events, for example the road falling into disuse. Public highways even retain their character if created on public land that is subsequently granted into private title.

The mere obstruction of a highway or the failure of the public to use it will not destroy the rights of the public – once a highway, always a highway.

A road can become a public highway even though it runs over private land. Once it is established as a public highway it retains that character as against subsequent owners.

A landowner's intention to dedicate a road as public highway may be express, such as through words or acts, or it can be inferred from the conduct of the landowner. For example, free and uninterrupted public use over a substantial period of time with the landowner's knowledge has been held to be sufficient to establish an intention to dedicate. In such cases, convincing and substantial evidence is required.

Acceptance by the public is demonstrated through free use of the road by all those who have a reason to go on the road. Such individuals must treat their use of the road as a right (i.e. they are entitled to use the road), rather than as a licensee or invitee of the landowner (i.e. only with the permission of the landowner).

V. **RESTRICTIVE COVENANTS**

A. **DEFINITION**

A restrictive covenant is a right to limit the uses that another person may make of another person's lands. A restrictive covenant will run with the lands and bind successors in title. The law of restrictive covenants is an extension of the law of easements. As with easements, a restrictive covenant requires that there be a servient tenement and a dominant tenement that is benefited or accommodated by the covenant.

Although restrictive covenants have some elements in common with easements, they are a fundamentally different kind of interest. Unlike an easement, a restrictive covenant cannot confer a positive right such as a right of way.

Certain rights of a negative kind, such as the rights to light, air or support, could be acquired as either easements or restrictive covenants. However, restrictive covenants are used for some purposes which are outside the scope of easements.

B. **ELEMENTS OF A RESTRICTIVE COVENANT**

In order for a restrictive covenant to run with the land, it must fulfill the following three conditions [*Tulk v. Moxhay* (1848), 41 E.R. 1143 (U.K.)]:

- (1) **The covenant must be negative in nature.** It is the substance of the covenant that is determinative, rather than the precise language used in the instrument. A simple test to determine whether a covenant is positive is to ask whether its performance requires the expenditure of money. If it does, it is likely positive in nature. The converse, however, does not necessarily follow. A covenant that may be performed without the expenditure of money may nevertheless require some positive act.
- (2) **The covenantee must own land that benefits from the covenant.** The covenant must "touch and concern" the covenantee's land and must be imposed for the benefit or to enhance the value of the benefited land [*Hi-Way Housing (Sask.) Ltd. v. Mini-Mansion Construction Co.*, [1980] 5 W.W.R. 367 (C.A.)].
- (3) **The burden of the covenant must attach and be intended to run with the covenantor's land.** The covenant must be intended to bind not only the covenantor but also anyone else buying from the covenantor.

If the covenant fails to meet any of these criteria, the covenant is simply a personal agreement (i.e.: a licence) and does not run with the land.

C. REGISTRATION AND VALIDITY OF RESTRICTIVE COVENANTS

The *Land Title Act*, s. 182, provides for the registration of restrictive covenants.

The *Land Title Act*, s. 221, stipulates requirements for a registrable restrictive covenant. Generally, a restrictive covenant is not registrable unless: (1) the obligation that the covenant purports to create is negative or restrictive; (2) the land to which the benefit of the covenant is annexed and the land subject to the burden of the covenant are both satisfactorily described in the instrument purporting to create the covenant; and (3) the titles to the benefited and burdened land are registered.

The *Land Title Act*, s. 222, provides that covenants that discriminate on the basis of sex, creed colour, nationality, ancestry or place of origin of a person are void.

The *Property Law Act*, s. 25, provides that if the benefit of a restrictive covenant is annexed to other lands the benefits of the covenant are deemed to be annexed to the whole and to each and every part of the other land capable of benefiting from the restrictive covenant.

The *Property Law Act*, s. 35, discussed previously in this paper, authorizes the B.C. Supreme Court to cancel or modify a restrictive covenant.

D. EXAMPLES OF RESTRICTIVE COVENANTS

The following are some examples of restrictive covenants.

- (1) A covenant to maintain the garden at Leicester Square in London uncovered with any buildings: (*Tulk v. Moxhay* (1848) 2 Ph. 774 (U.K.L.C.).
- (2) A covenant to regulate commercial practices among tenants in a shopping centre [*F.W. Woolworth Co v. Hudson's Bay Co.* (1985), 61 N.B.R. (2d) 403 (C.A.)].
- (3) A covenant that a parcel of bare land cannot be used for the purposes of the sale of certain specified grocery products, in favour of a proximate dominant tenement.

VI. STATUTORY COVENANTS (SECTION 219 COVENANTS)

A. CREATION

The *Land Title Act*, s. 219, provides for the registration of covenants in favour of certain bodies (the “covenantees”) against lands owned by the covenantor. Section 219 covenants are enforceable against the covenantor and its successors in title even if the covenant is not annexed to land owned by the covenantee. The covenant may be positive or negative in nature. This is a departure from common law restrictive covenants concerning land, as they need not be annexed to land and may create positive obligations.

The bodies in whose favour such covenants may be registered as covenantee are the Crown, a Crown corporation or agency, a municipality, a regional district, the Greater Vancouver Transportation Authority, or a local trust committee under the *Islands Trust Act*, R.S.B.C. 1996, c.239.

Such statutory covenants may be taken for limited purposes. For example, under subsection 219(4) a statutory covenant may contain a provision that land is to be “protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state”.

B. EXAMPLES

Some common examples of section 219 covenants are flood plain covenants or restrictions on building or other uses in favour of a municipality or the province.

VII. STATUTORY BUILDING SCHEMES

Statutory building schemes in B.C. can only be created under s.220 of the *Land Title Act*. Under this section, a developer may impose restrictions which are consistent with the general scheme of its development. This is achieved by filing a Declaration of Building Scheme in the prescribed form against particular lots within a subdivision. No instrument creating a statutory building scheme in a manner other than provided by s.220 is registrable.

Section 221 of the *Land Title Act* also applies to statutory building schemes and directs the registrar not to register a building scheme unless the restrictions it creates are negative or restrictive in nature.

The *Property Law Act*, s.35, discussed previously, authorizes the B.C. Supreme Court to cancel or modify a statutory building scheme.

Examples of restrictions in a statutory building scheme for a residential development could be restrictions on the size of dwelling units on the lots, restrictions on the building materials used for construction or restrictions on the type of building materials used.

VIII. PROFITS À PRENDRE

A. DEFINITION

A profit à prendre (“profit”) is a right to enter onto the land of another and take some product or part of the land off of it. The thing taken must be part of the land and it must be susceptible to ownership. Unlike easements, profits may exist in gross (without any dominant tenement). They may also be appurtenant to a dominant tenement. In B.C., profits in gross are the norm. A profit can be either held with others (in common) or exclusively (in severalty). Unless stated to be exclusive, a landowner may grant other rights to others. A profit carries with it implied or express rights that are necessary for its enjoyment.

B. ACQUISITION OF PROFITS

Profits are acquired in the same manner as easements, either by statute or by agreement with the owner of the land.

C. EXAMPLES OF PROFITS

The most typical uses of profits in B.C. are rights to take gravel or timber. However, profits may also exist as a right to take minerals that were not reserved to the Crown in the original Crown grant of the land in question.

IX. **WATER RIGHTS**

A. **COMMON LAW RIPARIAN RIGHTS**

Riparian rights are common law rights in respect of property adjoining or bounded by water. Such property is referred to as an “upland property”. At common law, riparian owners enjoyed a number of rights, including:

- (1) **A right to protection from erosion.**
- (2) **A right to quality and quantity of surface water flow.** Every riparian owner has a right to the ordinary use of water flowing past his or her property for domestic purpose and for cattle, without regard for the effect that the use may have on riparian owners lower down the stream. Such an owner also had the right to “extraordinary uses” provided that such uses did not interfere with the rights of other owners above and below or with their lawful use of the water.
- (3) **Ownership of naturally accreted material.**
- (4) **Unimpeded access to and from water.**

Common law riparian rights have been abrogated by the *Water Act*, R.S.B.C. 1996, c.483, under which the use of water in B.C. is subject to a system of provincial licensing.

B. **WATER ACT RIGHTS**

Under the *Water Act*, a person must not divert, extract, use or store any water from a stream, unless authorized to do so by licence. The holder of a licence under the Act is given the right to (a) divert and use beneficially, for the purpose and during or within the time stipulated, the quantity of water specified in the licence; (b) store water; (c) construct, maintain and operate the works authorized under the licence and necessary for the proper diversion, storage, carriage, distribution and use of the water or the power produced from it; (d) alter or improve a stream or channel for any purpose; and (e) construct fences, screens and fish or game guards across streams for the purpose of conserving fish or wildlife (see *Water Act*, s.5).

In addition, a licensee may have the right to expropriate land “reasonably required for the construction maintenance, improvement, or operation of works authorized”.

X. SUMMARY

This paper provides an overview of various interests and rights in land that are important for the use, development, management and enjoyment of land in British Columbia. The rules governing such interests are often highly technical and must be followed to ensure that the interests are properly created and enforced.

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