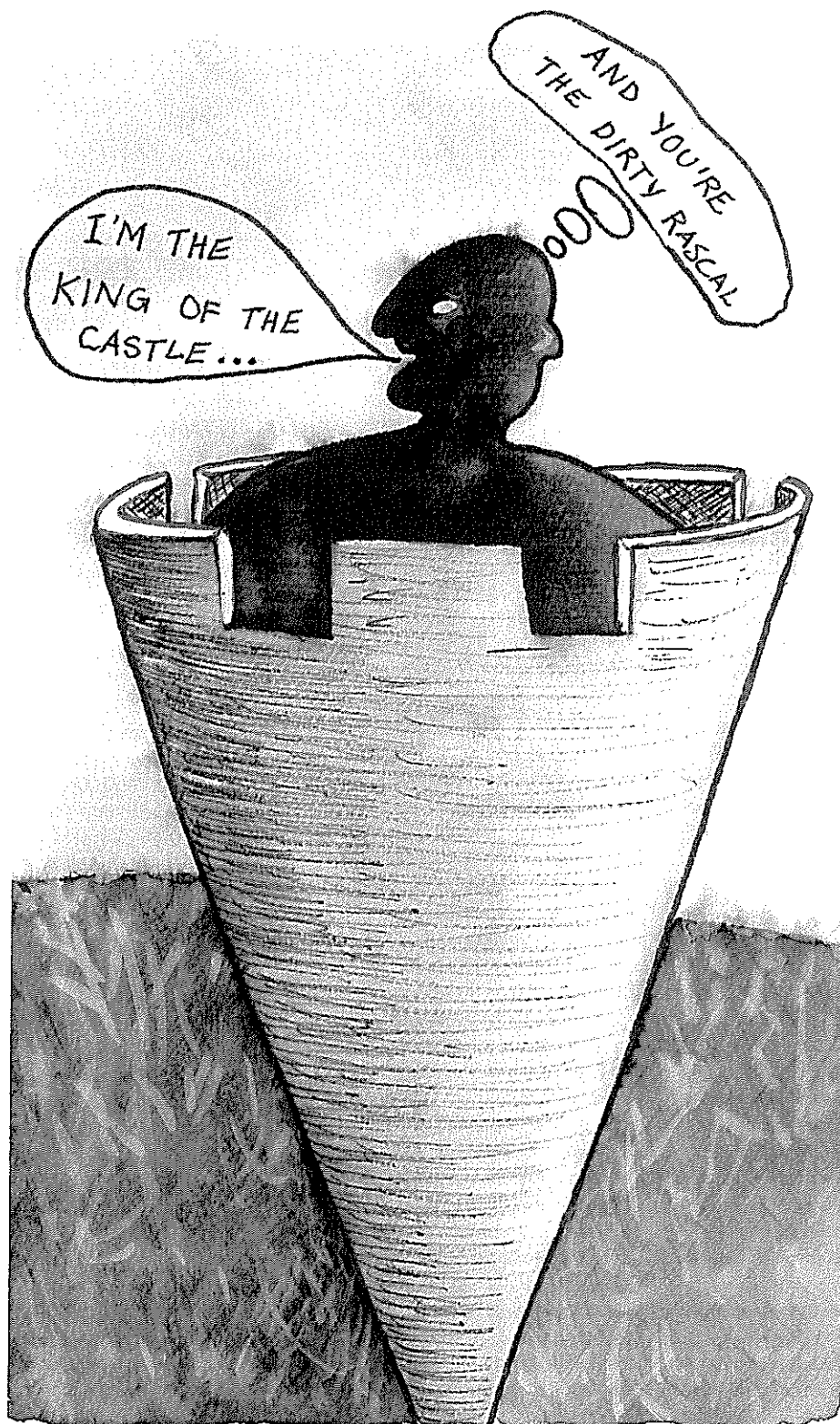


# Concepts of property for tenants of the earth

PETER BOWAL



“*L*et me speak first to those fields where there can be no progress without history. I think the law of real property supplies the readiest example.” - Cardozo, *The Nature of the Judicial Process* (1925), p. 54

**O**ne can imagine what it must have been like when the first men and women walked on the earth. The land was as expansive as it was bountiful. No one knew or cared about the limits and laws of the land, because there did not appear to be any.

Even when human beings formed social groupings, the land was but a transitory medium for survival. It was used for hunting, gathering and for protection from the elements.

This is not to suggest that early man was immune to the strong instinct in all animals called territoriality. As small human societies grew more disparate and numerous and competition for food increased between them, these societies did what their successors would do for thousands of years. Those groups which were first able to do it staked claims to the physical land to ensure their survival as a group. They would be able to defend their rights to only that land which they could use and control. Such an early system of landholding was both efficient and just.

As these societies continued to expand and develop, the proclivities toward territoriality led inexorably to military conquest and annexation. This called for changes to the system of landholding. With the 1066 Norman conquest, for example, a comprehensive system of feudalism was introduced into England. It was a system of landholding in return for services. The King granted land to his followers in return for services. Every acre

# *Feudal land tenure is the backbone of the modern system of landholding*

was held by the Crown. The word "tenure" illustrated this relation of tenant to king. Since land represented, for all practical purposes, the only source of wealth, the Crown's tenants formed the new aristocracy, the land lords. By the time of the Domesday Book in 1086, the whole of England was divided and essentially held by 1,500 people.

The land of Canada also first vested in the Crown. Applicable provisions of the *Constitution Act, 1867* have been interpreted to transfer to each province the federal Crown's entire interest in all land within the respective provincial boundaries, with the exception of lands for certain enumerated federal public purposes. The provincial legislature, under the "property and civil rights" section of the Canadian constitution, can regulate the way in which land in the province may be held, how it may be recorded and transferred and how it may be used.

## **Real property and land**

It is not surprising that the concept of property, among the most basic in society, has tended to reflect the philosophy of the day in a particular society. Blackstone, one of the early commentators on the English law, defined property as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe", which dominion was given him by God in creation (2 Bl. Comm., pp. 2-3). In the philosophy of Lock, of the architects of the American Constitution and of the French Declaration of the Rights of Man of 1789, the right of property was seen as an inalienable natural right of the individual, free from interference by others and by the state. Bentham, on the other hand, was of the view that property was not a natural right, but a creature of the law. He said, "Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases" (Theory of Legislation, vol. 1, p. 112).

We normally think of property as a

tangible thing, whether that be a chattel, a document, or an area of ground. Another, though less apparent, meaning of property is not the thing itself but the legal interest in the thing. This refers to the rights recognized by the law and which the law will protect. To say that one has "property" in something is to say that he has enforceable rights with respect to it. This may be the rights of ownership, unfettered use of it, possession of it, exclusivity to it (which includes the ability to exclude everyone else from it) and the right to dispose of it. Commonly called "interests" or estates in land, many refer to this as the "bundle of rights" theory of property.

Land has numerous very special qualities of its own. In addition to this divisibility into interests, land is permanent. Accounting and taxation rules allow only the depreciation of buildings, not land. With a perpetual existence, it physically remains long after its temporary human occupiers are gone. The law may permit interest to affect the land and its subsequent users even without occupation by the creator of the interest and after his death.

Land has a fixed, immovable location. In this way, each parcel of land is unique with respect to every other. From two otherwise identical houses built next to each other the view, address and location of each are unique. The law recognizes this special feature by allowing a purchaser of land to compel the seller to complete the sale on the principle that the land in question is unique and therefore non-compensable in money damages.

When we ordinarily think of land, we think of the natural surface of soil, water and trees. In law, land includes not only the surface but all that is under and above the surface, such as buildings and chattels attached to the land. More recently, the law accords rights to only that part below and above the surface which can be effectively used by the owner.

While land may be a notion expressed in diverse ways, one would nevertheless think that it was a simple form of property. Its ownership is publicly record-

ed in a comprehensive, computerized and accessible land titles registration system, its boundaries can be clearly demarcated, and it cannot be stolen or moved to another jurisdiction where the laws are different.

The historical importance that land has had in our society, however, has been inestimable. Indeed the march of western Canada's development rested upon federal inducements of land for homesteaders and the quarrying of resources. Still today, native claims to land in Canada cause intractable confrontations.

## **Public interest and land-holding**

The old concept of feudal tenure, though reformulated, is the backbone of the modern Canadian system of landholding and the multitude of technical terms and peculiarities that have persisted from the period of feudalism still make real estate the subject of intricate legal rules.

The closest to absolute private ownership of land in Canada is the freehold estate in fee simple. This is what we mean by "owning" land. The owner of the fee simple may grant any or all interests in it to others, but if he dies without a will and without relatives the land will return, or "escheat," to the Crown.

Land is, unlike most other forms of property, something in which governments play an active role in the public interest. During periods of high rates of interest, provinces have occasionally instituted incentive programs to encourage people to purchase homes or farms. If special circumstances present, such as the demolition of a housing complex or the sale of a mobile home park, governments might choose to intervene in the public interest.

While ownership of land generally implies unrestricted freedom with respect to that land, a number of provincial laws restrict the use and enjoyment of one's real property. In virtually all grants of tenure to its citizens, the Crown reserved for itself all mineral rights under the surface. The passage of aircraft through the air space well above land is in the public interest

and the law permits this without the permission of the landowner.

In the cities where people live in close proximity to each other the laws regulate and prohibit dangerous materials and activities. Municipalities engage in large-scale regulation of uses of land by enacting zoning by-laws concerned with the type and use of buildings in various areas.

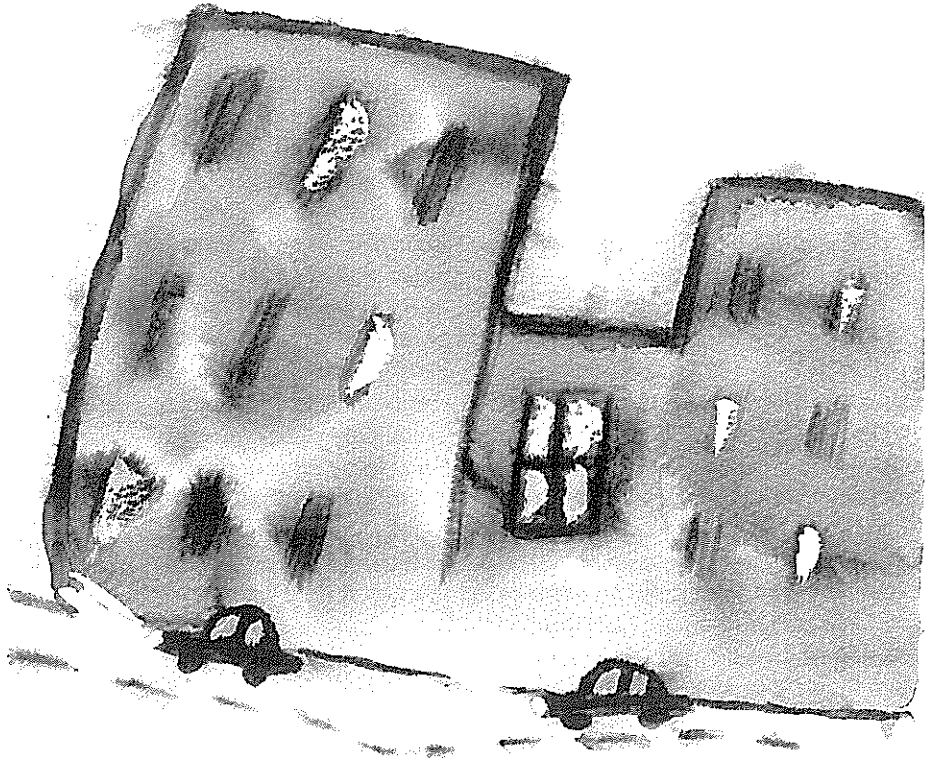
Local authorities raise a substantial measure of their revenues through the taxation of land and may even charge back the cost of improving the neighbourhood to the landowners. If a utility line must cross over or under private property, the law allows for this.

Dower or homestead rights got their start in the common law. Now they are in the form of provincial legislation. Each spouse has the right to remain in the home that served as the matrimonial home and such land cannot normally be disposed of in any way except with the consent of each.

In a similar respect, provincial matrimonial property legislation authorizes a judge to make an order for one or another spouse to exclusively occupy the matrimonial home after the marriage has dissolved. This is usually the case where young children would otherwise be detrimentally uprooted.

From time to time with cyclical swings in the economy and housing market, governments are prone to consider, if not adopt, controls on residential rents. Standing provincial legislation implies certain covenants and establishes other safeguards in favour of the tenant in every residential tenancy.

One of the paramount social considerations regarding all land, given that it is limited, is that it be used. With large estates and absentee landowners, people entered on the land and used it for themselves. Under the law of adverse possession, a trespasser who without interruption openly uses and possesses the land of another for an extended period of time, usually at least ten years, may be able to extinguish the title of the landowner in the property. Possession is a key



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concept in land law, which has as an object the effective use and enjoyment by those in the community who need and can benefit from the land, instead of a privileged few.

The greatest restriction on the free use of one's land is the act of a government body to take away ownership of land by force. Expropriation of land, where the main issue is fair compensation to the landowner, is done again where the public interests supersede the private interests of the individual landowner. The right to own property, found in the constitution of the United States, was left out of the Canadian Charter of Rights to allow for expropriations, among other reasons.

Real property is essentially a relationship between people. Ownership is fragmented into interests. As society has become oriented more and more toward an industrial wage-earning economy, the feudal model has become less relevant, al-

though the importance of land in a nation's welfare and in a citizen's spirit remain undiminished.

The real property right, like most rights, is not regarded as absolute. The government, through the instrument of law, restricts the free and unfettered use of land in private hands. Taxes, environmental and resource issues together with homelessness and urban renewal dominate today's policy of land use and development.

Like in the earliest days of humanity stalking the earth, we are all, in the legal sense, fundamentally tenants of the earth's land. ◁

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