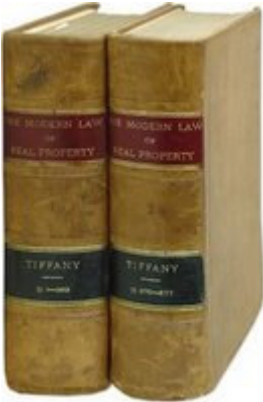


Real Property and Real Estate



By Brian Madigan LL.B.

There certainly is a difference between real estate and real property. Do you know what it is?

Let's first go to the larger category which is property itself. Here there are essentially two basic historical categories:

- 1) **movable** property, and
- 2) **immovable** property.

Movable property includes chattels, furnishings, things that you can pick up and move around. Immovable property means land, the building and improvements made upon the land and those items referred to as fixtures that are part of the property and cannot be moved.

Real estate is considered to be actual **tangible property**, that is, the land and the buildings and the improvements. It is what you can see.

A rather separate and distinct dimension is the concept of the legal rights that accrue to the owner of a parcel of real estate. These legal rights are intangible and vary from one property to the next. The definition of **real property** includes both the tangible real estate and the **intangible legal rights** associated with the real estate.

So, just what are the intangible rights? Here's a partial list, but because they are legal rights, they of course can vary from one property to the next:

- Right to use
- Right to occupy
- Right to sell
- Right to lease

- Right to develop
- Right to grant an easement
- Right to restrict access
- Right to grant access
- Right to harvest crops
- Right to withdraw minerals
- Right to access watercourses
- Right to use the air above
- Right to use the land below

The above list is not intended to be exhaustive but rather examples of various intangible legal rights associated with the ownership of property. Often, the value of a particular property will be based upon the legal rights that go with it, rather than the location. For example, a one half acre of property in the central financial core of downtown Toronto has one value if it can only be used as a park, and quite another value if it can be developed for a high rise office tower. The two properties can be side by side. The park may indeed have a negative value, and the developable land would be worth over \$9 million.

Some of the categories are evolving as time goes by. What is now commonly referred to as “air rights” is not air rights at all. In fact, it’s the right to develop. True air rights are really related to the actual air above the surface of the land. So, this also entails the right to light, and the right not to have your neighbour’s tree over your backyard, as well as the right to ensure privacy, and safety by not having airplanes fly too low. This, of course, begs the question: “how high is up”, and “how low is down” when you are dealing with subsurface rights. Another right here is the subsurface right to collateral support of your property by your neighbour. Also, consider other issues. Can you remove the minerals and the oil that sit below your property. Can you dig down, and then tunnel over under your neighbour’s property? Can you drain away your neighbour’s oil or water if your drain is directly below your own property?

These are all intangible rights that are associated with the property and you will see that they vary from one property to another.

So, when it comes to valuation of a property, you need to consider the intangible rights. What are they and how much are they worth? Have any of these rights been conveyed away by the present owner? If the “air rights” (the right to develop) a property have already been sold, what’s it worth if you want to build something?

There is however, one more definition of real estate that you must consider, and it is the definition contained in the *Real Estate and Business Brokers Act*:

s. 1 (1) “Real Estate” includes leasehold interests and businesses, whether with or without premises, and fixtures, stock-in-trade and goods connected with the operation of a business.

Now, that seems like a crazy definition. From what you just read you may have an inclination that a leasehold interest is real estate, but what about the rest? Why would a business be real estate. And, this part that says “with or without premises”? How can a business that doesn’t even have premises be considered to be real estate? The fixtures part is fine, but can there be fixtures without a premises? The definition goes on to include two items that are clearly chattels, namely “stock-in-trade” and “goods”, the only qualification is that they have to be “connected” (a very broad term, indeed) to the operation of the business.

So, what’s this all about? The legislators have taken a concept and created a legal fiction around it. They can’t change the common law, but they can change the statutory law. For the purposes of trading in real estate, a business with a minivan and a cellphone is real estate. A janitorial service that included detergents and brooms would qualify. Basically, it means that the sale of such a business would be regulated under the Act. Therefore, it really doesn’t matter that much whether it would be real estate under a common law definition, but it is real estate for the purposes of the regulation of the sale of a business. After all it is called the real estate and BUSINESS brokers act. However, why didn’t they just call a business a business? Why bother with this crazy definition? Who knows!

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