**ESTATES**

There are three forms of freehold estate:

* **Fee Simple**: An estate in land which is as close as possible to absolute ownership.
* The common law does not know absolute ownership: it is an estate or right in land which a person enjoys, not absolute ownership of the land itself.
* The owner can freely alienate or bequeath land.
* It lasts as long as the original tenant and his or her heirs survive.
* Fee simple estate in land allows for perpetual ownership, thereby simplifying land-security transactions and induces a landowner to maintain the property generations. As per Ellickson:
* “…cleverly harnesses human selfishness to the cause of altruism toward the unborn, a group not noted for its political clout or bargaining power.”
* “…land interests of potentially infinite jurisdiction are the key to the developments of societies throughout histories and across groups.”
* **Fee Tail**: a form of estate that limits the possible heirs of an estate
* Designed to ensure that estates stayed in families and descended to lineal blood descendants.
* A tenant in fee tail could not completely alienate, he could only grant a life estate which would automatically go to his lineal heirs at that person’s death (or escheat to the Crown).
* **Life Estate**: An estate whose duration is attached to the life of the holder or some other specified party.
* The measuring life is called *cestui que vie* and is fixed at the time the interest is conferred.
* A life estate can be measured by the life of the grantee or a third party.
* Life estates measured by someone other than the grantee are called life estates *pur autre vie*.
* A life estate can be created for multiple people (e.g. “to the children of X for their lives”) in which case the estate terminates on the death of the longest living person.

Common law rules for transferring an estate:

* **Words of purchase**: describe the intended recipient of the property (“To John…”).
* **Words of limitation**: delineate the extent of the right conferred by the grantor to the grantee
  + Classical words of creation for fee simple: “…and his heirs” or “…his heirs, executors and assigns”.
  + Classical words of creation for a life estate: “…for life”.
  + Classical words of creation for a fee tail were “…and the heirs of his body; to X and his seed”.
* A transfer or grant in fee simple must contain the magic words “…and his heirs” or “…his heirs, executors and assigns” otherwise it will turn the grant into a life estate.
* This strict language requirement avoids mistakenly conveying more of an estate than intended.
* The construction of the grantor’s language and any other evidence intrinsic or extrinsic, however convincing, is irrelevant if the magic words aren’t used. This typified the rigidity/formality of feudal land law.
* In a testamentary grant, a more relaxed standard is applied. The instrument will be construed as a whole in order to ascertain the true meaning of its several clauses, not by strictly applying common law rules of construction.

Statutes have created exceptions to the strict common law rules:

*Property Law Act*

19 (1) In the transfer of an estate in fee simple, it is sufficient to use the words "in fee simple" without the words "and his heirs".

(2) A transfer of land to a person without words limiting the interest transferred, or to a corporation sole by his or her corporate designation without the words "successors" passes the fee simple or the greatest estate or interest in the land that the transferor has power to transfer, unless the transfer expressly provides that a lesser estate or a particular interest is being transferred.

*Wills, Estate and Succession Act*

41 (3) A gift in a will

(a) takes effect according to its terms, and

(b) subject to the terms of the gift, gives to the recipient of the gift every legal or equitable interest in the property that the will-maker had the legal capacity to give.

*Thomas v Murphy*

*The common law rule that the grant must include the correct or ‘magic’ words of limitation to convey a valid estate in fee simple is displaced by the broader principle that the grantor’s intent should prevail wherever it can be discerned.*

* This involved an inter vivos grant where it was unclear whether the grantees received a fee simple estate. The language of the transfer did not include “to his heirs” but the grantees were given power of sale as per the habendum of the grant.
* The judge refused an overly technical reading and emphasized the grantor’s clear intent to convey an estate in fee simple.

*Re Walker*

*A “subordinate intention” that is repugnant to the testator’s “predominant intention” is of no force or effect.*

* The testator granted to his wife “all of my real and personal property” but added “should any portion of my estate still remain in the hands of my said wife at the time of her decease undisposed of by her such remainder shall be divided as follows….”
* The Court had two options:
* The gift to the named beneficiary prevails in fee simple, and the gift over fails as repugnant.
* The gift to the named beneficiary was a life estate and the gift over prevails.
* The court finds the gift over, as a subordinate intention, is repugnant to the testator’s gift of an estate in fee simple, the predominant intention.
* Policy: the dead hand of the past cannot encumber states endlessly.
* There is no real explanation of what constitutes a dominant or subordinate intention.

*Re Taylor*

*A life interest does not become an absolute interest merely by the fact that the beneficiary is entitled to encroach on capital for their maintenance.*

* Testator leaves to his wife “all real and personal estate to have and use during her lifetime” and further stipulates that “any estate possessed at her death is to be divided equally between daughters”.
* The court construes this as a life estate coupled with a power to encroach on the remainder during her lifetime.
* The will is construed as a whole in order to ascertain the true intent of the testator. Strictly applying common law rules of construction would have rendered the testator’s intent irrelevant because a gift of absolute interest, with provisions made relative to leftovers at the donee’s death, would be void.
* This is a less rigid approach than in *Walker* that does more justice to the intent of the testator.

*Christensen v Martini Estate*

*The common law rules of construction cannot be applied in an overly strict fashion, and the entire will must be assessed for evidence of the Testator’s intention.*

* The will states “I give to my wife Blackacre for her use, and when she no longer needs it, that it be given to the neighbours.”
* The court finds a life estate with a power of encroachment.

**WASTE**

Waste is an act that causes injury or works a lasting change on the character of the land.

* The doctrine of waste is engaged wherever there is an interested party beyond the immediate possessor.
* It permits the future interest holder or party with a right of reversion to make sure the current holder of the land does not make fundamental changes to the character and value of the land that he or she does not approve of.

There are four types of waste in the common law:

**Ameliorating:** changes that result in a benefit to the value of the land.

* Courts rarely order damages or grant an injunction to stop ameliorating waste.
* May apply where the act decimates something of intangible value.
* The major exception is if “the character of a property is completely changed” (*Anger and Honsberger*).

**Permissive:** occursfrom a failure to maintain the land or tenements on it.

* This is generally not impeachable unless there is an explicit duty to repair in the granting instrument.

**Voluntary:** occurs from a positive and wrongful action that causes diminution in the value of the property.

* Life estate holders are generally liable for these acts.
* The remainder person may seek an injunction.
* The granting instrument can make a life tenant unimpeachable for such waste.
* What constitutes voluntary waste is often the subject of litigation. It is very context specific, but there are two general rules:
* It is voluntary waste to open and work a mine, but not work an already open mine.
* It is voluntary waste to cut down timber trees, which diminishes the value of the land, but not non-timber trees which may require removal for purposes of improving and maintaining the land.

**Equitable Waste:** a form of wanton destruction.

* The life tenant would be required to pay damages equal to the amount of decrease in property value, as well as exemplary damages if necessary.

*Powers v Powers Estate*

*Routine maintenance and periodical costs are for the benefit of the tenant and are payable out of the income of the estate, whereas costs necessary for the preservation of the land are for the benefit of the remainderman and are payable from the capital of the estate.*

* The parties were seeking a declaratory order regarding the distribution of responsibility for expenses related heating, repair and insurance of the property.
* Note: capital is the value accumulated or aggregated in the estate, whereas income is return on investment of the capital.

*Director of Civil Forfeiture v Onn*

*The court is reluctant to make orders so indeterminate and uncertain that the tenant cannot know precisely what it is she must do, or those that impose a burden above and beyond what is required.*

* The *Civil Forfeiture Act* permits the court to make interim preservation orders of property which is suspected of being derived from the proceeds of crime and may be subject to forfeiture to the Crown. The property in question had marijuana grown on it by a tenant but the owner had no knowledge of the operation.
* A requirement to comply with all work orders, bylaws and codes was considered to impose a burden above and beyond what is required.
* There was no evidence of non-compliance, and it is not clear if this required affirmative action.
* Requirements to insure the property and pay taxes, utility charges and strata fees, were considered reasonable and adequately specific.
* A requirement to “ensure that the Property is not used in any fashion that is contrary to any statute or regulation of Canada or British Columbia or any by-law of the municipality” was too broad and vague to be enforceable.
* A permissible order would be one which was more specific and prohibited her from permitting any grow operations or marijuana cultivation on the property.
* A redrafted order must not require her to do something or take responsibility for the acts of others beyond her control.
* The trial judge also focused on the fact it resembled a prohibited order of personal service.
* Enforcing orders for personal service is notoriously difficult because they depend on the subjective opinion of the party to whom the service is rendered.
* More fundamentally, contracts for personal service are considered unenforceable because they resemble forms of slavery and personal servitude in which a party is forced to work against their will.

**QUALIFIED AND FUTURE INTERESTS**

Estates, including fee simple, are distinct from outright ownership of the land, therefore it is possible to carve-out various estates in the same piece of land.

**Vested interests** are either possessory or certain to become so in the future.

* A gift can be vested but subject to divestment on the happening of a condition subsequent.

**Contingent interests** are subject to a condition precedent.

* It may or may not become a vested interest at some later date.

**Condition precedent:** some future event which may or may not occur.

* This can typically be identified by the words “if, when, at, upon, etc.”
* For example: “To A for life, remainder to B when and not before B turns 25 years.”

**Condition subsequent:** an event which comes after an interest has already vested.

* For example: “To A, but if the land is used for something other than a hospital, this interest will revert to the grantor.”

An interest is **defeasible** if it may be brought to a premature end on the occurrence of a specified event.

* This is a vested interest subject to a condition subsequent (vested subject to divestment).
* The grantor retains a contingent interest.
* The grantor retains a right of re-entry.
* A right of re-entry is like a “cloud on title” which will serve to cut short the fee simple when it arises.
* The key language is: “on condition that”; “but if”; “provided that”; “if it happens that”.

A **determinable** interest is similar, but is demarcated by a durational extent of the entitlement.

* The stipulated event is seen as marking the full duration of the estate, and is not a supervening event that cuts short the interest granted (“fence post”).
* The grantor’s interest is vested.
* The grantor retains a right of reverter (a present right to future enjoyment, similar to a right of remainder).
* These are not considered clouds on title because they are predictable and certain.
* The key language is: “while”; “during”; “so long as”; “until”.
* The possibility of reverter only happens with a fee simple, not a life estate.

If a condition subsequent is found to be void, the gift becomes absolute.

* There was a defeasible interest; the interest is vested subject to divestment; the condition subsequent is void; the right of re-entry no longer exists; the gift is absolute.

If a determinable limitation is void, the entire gift fails.

* There is a determinable interest; the right of reversion is vested; the determinable limitation is found void; the entire gift fails.

When interpreting a will, of paramount importance is determining the intention of the testator, first from the words of the will and then what a reasonable person would have intended under the circumstances. The common law allows for several presumptions where the testator’s intent is not clearly expressed:

* **Presumption against intestacy**: unless a testator is explicit in how they frame their will, there is a common law presumption that they did not intend intestacy.
* **Presumption in favour of vesting**: words of contingency do not automatically create a contingent interest, and if the will suggests a reasonable interpretation that supports vesting, the common law will favour vesting over a contingency.
* ***Brown v Moody***: A gift is *prima facie* vested if the postponement is to allow for a life estate.
  + A right of remainder is a present right to future enjoyment, similar to a right of reverter.

*Stuartburn (Municipality) v Kiansky*

*A holder of an interest in land, whether a possessory or future interest, can be said to be present owner of freehold estate.*

* The tenant is vested in possession by way of the life estate, and the remainderman is vested in interest. The remainder interest is current and presently in existence, rather than coming into being at the extinguishment of the life estate.
* To have a present ownership interest in land it is not necessary that seisin (immediate possession) rest with someone for him or her to be a present owner of a freehold estate.
* This givesthe following proposition: If land is granted “to A for life, then to B in tail, remainder to C in fee simple”, all three persons have estate in the land and they exist in the present, that is, they are capable of present ownership. The latter is a precondition of an estate. Even though the seisin rests in A only for the time being, the ownership of B and C also exists in the present…”

*McKeen Estate v McKeen Estate*

* A testator left a life estate for his wife, with the remainder to be divided “equally between my sisters if they are both alive at the time of the death of my wife. If only one of my said sisters is alive at the time of the death of my wife, the estate shall go to the surviving sister.” The sisters died three years before the wife.
* Did the testator intend that the gift to his sisters was contingent on them surviving his wife? If so, the estate would have to be distributed according to the rules of intestacy.
* The court finds the estate vested equally in each of his sisters at the time of his death, subject to the possibility of divestment if only one sister survived the life tenant.
* This was the intention of the testator, with regard to the presumption against intestacy and the presumption in favour of vesting.

*Caroline (Village) v Roper*

* Mr. Roper permitted his land to be used by a community for a hall. His heirs later conveyed that land to the community in fee simple on the condition that it continue to be used as such. The community now wants to sell the land.
* The grant stated: “This acre, transferred to the Caroline Community Hall, shall revert back to the Roper Estate if used for other than a community center.”
* The court found this to be a defeasible interest; therefore the rule of perpetuities applies to defeat the condition subsequent; it was dependent on something that may or may not occur in the indefinite future.

**Rule against perpetuities:** An interest is valid if it must vest, if it is going to vest at all, within the perpetuity period. That period is calculated by taking the lives in being at the date the instrument takes effect, plus 21 years.

In other words, a future interest may endure as a contingent interest for only so long (the perpetuity period). Otherwise too much uncertainty hovers over land.

1. Identify the interests
2. Identify the date of the creation of the interest.
3. Identify the lives in being.
4. Examine whether it is possible for the interest to vest outside the perpetuity period.

BC *Perpetuities Act:*

**7.** Changes the perpetuity period from “21 years plus lives in being”, to “80 years after the creation of the interest”.

**8.** Contingent interests are not void merely because there is a possibility of it vesting beyond the perpetuity period.

**9.** Such interests are presumed valid until actual events establish that the interest is incapable of vesting within the perpetuity period, in which case it is void (subject to ss 11, 12 and 13).

**10.** (1) If section 9 applies, and the perpetuity period is not determined under s 7,

(a) If any persons listed below are in being at the commencement of the perpetuity period, the duration of the perpetuity period is determined by reference to their lives.

(b) If there are no lives under (a), the perpetuity period is 80 years.

(2) List of persons.

**11.** If a disposition creates an interest by reference to the attainment by any person of an age exceeding 21 years, it must be construed as if it had referred to the age nearest the age specified that would have prevented the interest from being void.

**12.** If the inclusion of any persons, being members of a class, prevents section 11 from operating, the persons must be excluded from the class for the purposes of that disposition.

**13.** The court may vary a disposition as to give effect to the general intention of the testator, within the limits of RAP.

**23.** (1) RAP applies to determinable interests.

Policy: there is a concern about the timely vesting of contingent remainders. The Aristocracy was constantly trying to tie up land in its family in perpetuity and Parliament wanted to free property from domination and make it alienable.

History:

* The *Statute De Donis Conditionalibus*, 1285, landlords in control of Parliament passed this statute which permitted them to create entailed fees (which limited who could inherit the land to a specific group and limited the application of inheritance taxes).
* Furthermore, in feudal land law only the King could grant new tenancies, but the lords wanted to derive further value from their land and there was a demand for tenancies so they granted tenancies and subinfeudation – eventually the whole chain became complex and inefficient and the revenues trickling up the chain to the Crown slowed.
* The *Statute of Quia Emptores* 1290 prohibited subinfeudation and required that every grantee hold directly or indirectly of the King – this shrunk the feudal pyramid because fee simple could be created by no one except the Crown.
* In response, landowners began to transfer their land “to A for the use of B”, a way of leaving A with fee simple and permitting B to use it, allowing A to retain control the land keep it in the family) and avoid inheritance taxes.
* The *Statute of Uses,* 1535 was a response of the Crown to the plummeting tax revenues: the statute mandated that any land conveyed “to A to the use of B” was deemed to be a transfer of fee simple, meaning the beneficiary had to pay tax.
* The *Statue of Wills,* 1540 came as a result of rebellion of landowners in the face of the *Statute of Uses.* This statue made it possibly for landlords to determine who would inherit their land by permitting devise by will. It was at this time that the problem of future interests and perpetual vesting became a problem for the Crown. Complex strings of life estates and fee tails undermined alienability of land and permitted it to be tied to one family for many generations.
* The common law and courts of equity began to respond to these problems.
* The *Rule in Shelley’s Ca*se (1851) and the rule against perpetuities expressed in the *Duke of Norfolk’s Case* (1685) were designed to prevent the “dead hand of the past” perpetually restraining the free alienation of estates.
* The *Rule in Shelley’s Case*: “whenever a limitation to A is followed by a limitation to heir either genera or special the limitation to the heirs are not words of purchase but rather words of limitation.” This meant the words “…and her heirs” were words of limitation and created fee simple.
* But there still remained the problem of complex iterations of life estates.
* The rule in the *Duke of Norfolk’s Case* was the first iteration of the RAP. The Duke has attempted to tie up his property for too long, and the court stated “a future interest is void, ab initio, unless it must vest, if at all, within a period measured by lives in being plus a further period of twenty-one years.”

**State Limitations on Private Power**

**Tests for uncertainty:**

* Condition precedent: condition will be struck down only if it is so vague as to be meaningless. Otherwise, condition will stand, and it will then be determined whether a particular claimant has or has not met the test.
* Condition subsequent: must be able to see, from the beginning, ‘precisely and distinctly’ what events would or would not breach the condition (*Hays*); person who could lose the estate must know exactly from the beginning what acts would lead to forfeiture.

*Unger v Gossen*

*The general rule is that where a condition precedent becomes, usually by virtue of unpredicted changes in circumstances, impossible to perform, the gift is void. However, where the testator’s intent is clear it may trump the strict application of the rule.*

* + - The testator left her estate to her sister for life, with the remainder to her nephews, subject to the stipulation that the nephews have to become residents of Canada within 15 years of the testator’s death (they were residents of the USSR).
    - The nephews are not eligible to immigrate to Canada; therefore the condition precedent is impossible to satisfy.
    - The court decided that the condition, not the gift, should fail.
    - The condition was drafted to ensure that the nephews were the beneficiaries and not the Soviet Union. She believed the state would confiscate the funds.

*HJ Hayes Co v Meade*

*Where it is unclear whether an interest vests upon happening of condition precedent or divests on the happening of a condition subsequent, the rule of construction is to treat the condition as subsequent to promote the public policy presumption in favour of early vesting.*

* The testator bequeathed his estate: to his son James on the condition he resides on and cultivates the land, and if not, then to his son Harold upon the payment of $1,000 to his brother James.
* If it is a condition precedent, it does not vest in James unless the condition is met.
* If it is a condition subsequent, it vests in James, subject to divestment if the condition is not met.

*Where a vested estate is to be defeated by a condition subsequent, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that divestment would occur.*

* The condition is void for uncertainty: as to the period of time within which the residence requirement must be met; as well as to whether the beneficiary would forfeit his right if he left the property for any period of time

*Re Leonard Foundation Trust*

* Leonard established a foundation to provide student bursaries. The trust deed contained a lengthy preamble to explain the underlying principles of the foundation, which were inherently racist and favored the white race, Christianity and the British Empire. The student awards were only available to white Protestants of British nationality or parentage, and only one quarter of the funds was available to women.
* All the discriminatory elements of the trust were removed; however the trust was permitted to stand.
* Robins J applied the *cy-pres­* doctrine: if a trust created for a charitable purpose cannot be carried out as specified by the settlor, the court can revise the terms of the trust so as to carry out the settlor’s intentions as nearly as possible.
* In other words, the trust has a charitable purpose therefore the court can use its inherent jurisdiction to bring the trust into accord with public policy and still give effect to the charitable intent of advancing education.
* In a separate judgement, Tarnopolsky J suggested that the validity of such a scholarship should be assessed under a standard of scrutiny analogous to that used in human rights law, and a discriminatory scholarship could be valid if it was directed towards acceptable policy ends, such as education of women or Aboriginals. This would be a context specific inquiry.
* In both judgements, the public policy analysis is directed only at trusts with a public dimension.
* The court identified three categories of discriminatory action:
  + State action, subject to *Charter* scrutiny;
  + Private conduct in the public domain, subject to scrutiny by public policy and human rights legislation; and
  + Private conduct outside the public arena, shielded from scrutiny.
* Ziff: the dividing line between the ‘public’ and ‘private’ is not so clear. It was a private foundation and the *Charter* does not apply to it, but the scholarship could be void for public policy as informed by the *Charter.* Does this limitation make sense?

*Trinity College School v Lyons*

*The right of alienation is an inseparable incident of an estate in fee simple. A condition that would take away the necessary incidents of the estate, such as that the holder shall not take the profits, or shall not have the power to alienate, is void as being repugnant to the estate created.*

* TCS had an option to purchase the lot once both Bennets had died.
* The market price was $135,000, the option was to purchase at $9,375.
* The option was void as an improper restraint on alienation of an estate in fee simple.
* A requirement to sell well below market value is equivalent to an absolute restraint against alienation, as is void as being repugnant to the estate in fee.
* Policy: restraints on alienation keep property out of circulation, resulting in the concentration of wealth and a disincentive to improve and maintain land.

**CO-OWNERSHIP**

Estates can be owned by one or more title holders. Co-ownership arises where two or more people have simultaneous and concurrent rights in a single parcel of land. In other words, they share title, use and enjoyment of the property. There are both common law forms of co-ownership and statutory ones.

At common law, a simple conveyance of land “to A and B” created a **joint tenancy**. Joint tenants have separate rights and obligations to each other, but are effectively a single tenant to third parties. They have two key characteristics:

* Right of survivorship (*jus accrescendi*): on the death of one joint tenant, that tenant’s interest passes by operation of law to the surviving joint tenants jointly until there is only one tenant standing.
* Co-ownership interests in a joint tenancy cannot be transferred by will; the joint tenancy must first be severed and turned into a tenancy in common.
* Four unities:
* Unity of interest: each tenant’s interest must be equal in nature, extent and duration.
* Unity of title: each tenant’s interest must arise from the same act or instrument.
* Unity of time: each tenant’s interest must vest at the same time.
* Unity of possession: each tenant’s interest must relate to the whole of the property.

With a **tenancy in common,** two or more owners still use and enjoy the property in undivided shares just like joint tenants, however there are some key difference:

* Only requires unity of possession.
* Parties may hold a different quantum of the whole.
* There is no right of survivorship: on the death of a tenant in common, their interest will devolve in accordance with general succession principles.

A tenancy in common is created by language that defeats one of the other four unities.

* To A and B in fee simple with a life estate to C (no unity of title)
* 25% each to A and B and the remaining 50% to C (no unity of interest)
* To vest in A, B and C each on their 21st birthday (no unity of time).

**Co-Parceny**: arouse under the feudal primogeniture system (automatic inheritance to the first born son) where there was no male heir. Two or more daughters took as one heir. The nature of the co-ownership included the four unities but did not contain a right of survivorship. It no longer exists in Canada by operation of statute.

**Treaty by Entireties**: in the past, a conveyance of land to a husband and wife was assumed to be a tenancy by the entireties unless otherwise stipulated. It was a patriarchal arrangement whereby all rents or profits generated by the property were to the husband. The nature of the co-ownership included the four unities and a right of survivorship. It has been abolished by statute.

**Severance** is an act which legally terminates a joint tenancy and converts it into a tenancy in common. A joint tenancy can be severed in four ways:

* Mutual agreement;
* Disruption of a unity;
* A will does not severe a joint tenancy: the right of survivorship determines the course of title after the death of an owner (see Ziff pg. 346).
* A conveyance of interest, even if unperfected by registration, severs the unity of title (*Stonehouse*).
* A trust severs the joint tenancy (*Sorenson*).
* If a joint tenant mortgages, this will sever the joint tenancy.
* By any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common; and
* Other means (bankruptcy, murder, etc.)

If there are more than two joint tenants, no single joint tenant can sever the joint tenancy of the others. If you have three joint tenants and one severs, he will be a tenant in common with the other two tenants who continue to be joint tenants with each other.

Most property jurists take the position that a partial alienation by one joint tenant (i.e. by granting a life estate) should automatically sever the joint tenancy and convert it into a common one. It has left that tenant with a right of reversion, therefore the unity of interest has been destroyed.

*Sorenson v Sorenson*

* Settlement agreement created a life estate; but her subsequent conduct was that it was still a joint tenancy; and the lease was only for her life and did not conflict with the joint tenancy.
* The trust was a valid gift of her interest to her son which severed the joint tenancy.
* The will cannot severe a joint tenancy.
* The act of bring an action for partition is not sufficient, it requires acceptance of the other party.

**Partition**: the dividing of land by co-owners into distinct portions so that all may hold them severally rather than jointly. However, all of the tenants in common still hold the whole (unity of possession).

The common law rule that there is no right to force partition in the absence of mutual agreement has slowly been changed by statute. Statutes permitted more and more latitude to aggrieved co-owners to apply to the courts for an order of physical partition. They give judicial discretion as to whether and how property should be divided and sold. Courts consider a myriad of facts such as the nature of the property, contribution to its value by parties, etc. Generally, the entire consideration will be subject to overarching considerations of equity, fairness and practicality.

*Partition of Property Act*

2.All joint tenants or tenants in common may be compelled to partition or sell the property.

4.A person seeking partition may proceed against one of the other interested parties without serving the others.

7.The court may order a sale of the property and give directions.

10. Any of the interested parties may bid on the sale.

The BC *Property Law Act* provides for a statutory reversal of the presumption of joint tenancy. Furthermore, a person can transfer land to themselves to sever a joint tenancy:

11 (2) If, by an instrument executed after April 20, 1891, land is transferred or devised in fee simple, charged, or contracted to be sold by a valid agreement for sale in which the vendor agrees to transfer the land to 2 or more persons, other than personal representatives or trustees, they are tenants in common unless a contrary intention appears in the instrument.

18 (1) A person may transfer land to himself or herself in the same manner as to another person, and, without restricting that power, a joint tenant may transfer his or her interest in land to himself or herself.

(3) A transfer by a joint tenant to himself or herself of his or her interest in land, whether in fee simple or by a charge, has and is deemed always to have had the same effect of severing the joint tenancy as a transfer to a stranger.

Sections 5(2) and 10(2) of the *Wills, Estates and Succession Act* address circumstances where a joint tenant dies:

5 (2) If

(a) two or more persons hold property as joint tenants, or hold a joint account, and

(b) both or all of them die at the same time or in circumstances that make it uncertain which of them survived the other or others,

unless a contrary intention appears in an instrument, for the purpose of determining rights to property, each person is deemed to have held the property or account as tenants in common with the other or with each of the others.

10 (2) If 2 or more persons hold property as joint tenants, or hold a joint account, and

(a) in the case of 2 persons, it cannot be established that one of them survived the other by 5 days,

(i)   one half of the property passes as if one person survived the other person by 5 days, and

(ii)   one half of the property passes as if the other person referred to in subparagraph (i) had survived the first person referred to in subparagraph (i) by 5 days, and

(b) in the case of more than 2 persons, it cannot be established that at least one of them survived the others by 5 days, the property must be divided into as many equal shares as there are joint tenants or persons holding the joint account, and the shares must be distributed respectively to those persons who would have been entitled to a share in the event that each of the persons had survived.

**LEASES**

There are four types of leases at common law:

**Fixed Term:** a lease for a specified and clearly discernable period of time.

* The start date and end date must be clear.

**Periodic:** a lease which automatically renews at specified or periodic time intervals unless the lessor or lessee gives notice not to renew; i.e. from month to month.

* Unless otherwise agreed to or mandated by statute, the notice required to end a periodic lease is the equivalent of the term.
* There is a general rule in the common law that 6 months-notice is required for a year-to-year lease.
* Periodic tenancies are not always explicitly created; they may arise by inference i.e. where a tenant under a fixed term lease remains in possession and continues to pay rent.

**Tenancy at Will:** a lease with no set period or term and which continues only so long as both lessor or lessee or landlord and tenant wish.

* For example, the tenant stays past the expiration date of tenancy but the landlord permits it and continues to accept rent.
* Either party can bring the tenancy to an end without notice, even if this right is stated to be at the role prerogative of the lessor.
* If there is a prior, now expired lease, its terms will continue to apply insofar as they are compatible with the new arrangement.
* In many cases, the payment of rent will convert a tenancy at will into a periodic tenancy.

**Tenancy at Sufferance:** a legal fiction that arises when a tenant overholds after the lease period without clear permission or assent from the landlord but also without active dissent or notice of trespass.

* Once a tenant overstays, they will be a trespasser once the landlord asks them to leave.
* The overholding tenant may be liable for rent for use and occupation of the premises.

A **perpetual lease** has no fixed term or period, no right of termination on notice, and can accordingly last forever.

* There is a common law rule against perpetual leases. They will be struck down insofar as it could potentially last forever thereby rendering the underlying fee simple completely unmarketable.
* There must be some clear limitation on the period of the lease.
* Generally, an attempt to create such a lease is treated as a periodic tenancy, a license, or an outright sale of the freehold.
* They may be created by statute.

A valid lease requires:

* A demise of exclusive possession from the lessor to the lessee;
* Clearly identified parties (the lessor and lessee);
* A clearly identified leasehold property;
* A clearly stated commencement date for the lease; and
* This could be saved if there is reference to an event whose precise date is ascertainable.
* Rent (if any):
* A leasehold can be granted by gift and doesn’t require consideration, but if rent is charged the amount must be clear on the face of the lease.

*Fatac ltd. (in liquidation) v Commissioner of Inland Revenue*

*The right to exclusive possession is the key distinguishing feature between a lease and a license.*

* The owner of land created a grant allowing a third party to operate a quarry.
* The granting had conflicting terminology as to whether it created a license or a lease; it used the words license and royalties (a right in personam), but also created a right of re-entry (a right in rem).
* The court holds that conflicting terminology in a granting instrument is immaterial unless it helps in deciding whether the lessor has a right to exclusive possession.
* A license is mere permission to be on the land, whereas a tenancy is a right to possess land (for a limited period).
* A licensee can terminate a license for reasons beyond the realm of tenancy law (i.e. dismissing an employee); a lessor can terminate a lease for breach of a covenant (i.e. not paying rent).
* The fact a lessor places limits on what the lessee may do with the land does not prevent the court from concluding that a tenancy exists; even where there is a right of re-entry for certain purposes or on certain occasions.
* Examples of situations where a license exists include:
* Where an employee occupies his employer’s premises to perform his duties as an agent of the employer;
* Where a lessee becomes a purchaser in possession pursuant to a an agreement for sale and purchase;
* Where occupation is incidental to the holding of an office; and
* Where there is a mortgagee is possession.
* Here, the agreement stipulated that both parties have access to the land, and it even divided up quarrying rights; therefore the right of occupation was far from exclusive.

*Southwark LBC v Tanner*

*The covenant for quiet enjoyment is not taken literally; instead it means the tenant’s lawful possession of the land cannot be interfered with by the lessor.*

* The tenants are constantly bombarded by noise from their neighbours; the place has very thin walls.
* The tenancy agreement does not contain a guarantee promising sound insulation or any other fitness for habitation; and the common law is acknowledged as being *laissez faire* with respect to protecting vulnerable renters.
* The plaintiffs rely on the common law action for “quiet enjoyment”.
* The court holds that this does not fall within the category of quiet enjoyment.
* The property had thin walls when they agree to the lease and the lessee should have contemplated that there would be other tenants in neighbouring flats.

*Petra Investments Ltd v Jeffrey Rogers plc.*

*The test for derogation is whether the action complained of rendered the premises unfit or materially less fit to be used for the particular purpose for which the demise was made.*

* P owned a shopping centre mostly consisting of women’s clothing stores; D was a tenant and owned one of these stores.
* P renovated the space next to D into a Virgin Megastore; D’s business subsequently faltered.
* D claims P breached their duty to not derogate from its demise of the premise.
* Demise means the conveyance or creation of a leasehold estate.
* The court holds that: a landlord who takes measure to improve and update premises adjacent to a tenant’s leasehold cannot be said to have derogated from the terms of the lease unless he was expressly prohibited from so doing or failed to reasonably alert and compensate the tenant.
* The court looks at both the implicit obligations in the grant as well as the particular purpose of the transaction.
* Here, the grant gave the right of the landlord to undertake renovations in properties adjacent to D’s.
* D tried to claim the lease was entered on an understanding that the space was to be a cluster of women’s stores which would appeal to a similar market.
* The court held that this cannot be realistically policed and there may be public policy reasons against enforcing implicit agreements about the mix of tenants in a 25 years lease.
* The fact that the megastore did not have the ‘attractive force’ expected and may have actually harmed D’s business does not entail that P is liable for the consequences; commercial judgments made from time to time may turn out to be wrong and P was free to make these judgments.

*Land Title Act*

**Cancellation of lease on breach of covenant**

**247** (1) In this section, **"derivative charge"** means a sublease or other charge derived through a lease and includes a mortgage or judgment registered against the lessee or sublessee.

(2) If a lease is registered, the registrar may,

(a) on application,

(b) on proof to the registrar's satisfaction of a breach of a covenant and re-entry and recovery of possession by the lessor or owner of the reversion,

(c) after 30 days' notice of the application to the lessee, and

(d) on hearing all parties attending on the hearing of the application,

cancel the registration of the lease on the register, and the estate of the lessee in the land described in the lease, and the lease, so far as it affects the land, ceases.

(3) Cancellation of the lease does not release the lessee from liability in respect of an express or implied covenant in the lease.

(4) If a person appears on the register as holder of a derivative charge, the registrar may require the applicant for cancellation to give 30 days' notice to that person.

(5) If the registrar cancels the registration of the lease the registrar may cancel the derivative charge, and the estate of the holder of the derivative charge in the land described in the instrument under which the derivative charge is registered, and the instrument, so far as it affects the land, ceases, but the cancellation does not release a party to the instrument from liability in respect of an express or implied covenant in it.

**LAND TITLES**

BC Land Title and Survey Association:

* Administers and maintains the register of titles
* Examination of documents submitted for registration

Three fundamental principles of the Torrens system:

* **Mirror**: the public registry accurately and completely reflects all of the current facts material to the title.
* Certainty and finality.
* **Curtain**: the registry is the sole source of information necessary for a purchaser. No further investigation is necessary.
* Eliminates the need for historical searches.
* Efficiency: easier and faster to transfer interests.
* Must balance with the possibility of fraud.
* **Insurance**: the state is responsible for the veracity of the register and provides compensation to anyone who suffers a loss in the event of an error or fraud.
* Accountability
* Innocent dealers are guaranteed their interest or monetary compensation.
* Public confidence.

When does the “curtain” of indefeasibility fall?

Hypothetical: A buys a property from O. However, O is actually R (a rogue) claiming to be O. A is registered as the owner. A agrees to sell the estate to B, but the sham is uncovered and O tries to reclaim the property.

A system characterized by **immediate indefeasibility** guarantees the registered owner of a fee simple an interest which is immune to a challenge that the registered owner acquired their interest on the basis of a void or defective instrument.

* A became immediately entitled to the indefeasibility protection of the Torrens system. O’s opportunity for rectification was lost on registration of the transfer to A’s name. O must seek compensation through the assurance fund.
* Policy: this reduces the need for A to undertake inquires at the time of sale, and promotes the efficiency of transfers even though the security of O’s title is sacrificed in the process.

A system characterized by **deferred indefeasibility** guarantees the registered owner of a fee simple interest immunity to such a challenge provided they are at least one transaction away from the fraudulent transaction (in other words, they were not the immediate party who dealt with the fraudster).

* A’s interest must be sold and registered in favour of B before the title is rendered in defeasible. O can reclaim their interest while it is still registered in A’s name. A must seek compensation through the assurance fund.
* Policy: reliance on the register can be detrimental, and this places an onus on purchasers to determine if the transfer instrument is a genuine one.

The BC *LTA* act suggests a system of immediate indefeasibility. As per s 23(2), an indefeasible title is conclusive evidence that the registered owner holds indefeasible title, and s 25.1(2) protects registered owners who, in good faith and for value, acquired their interest from a void instrument.

* S 20: unregistered instruments are of no force or effect.
* S 29: notice of unregistered instruments is of no force or effect.
* The assurance fund compensates those who are wrongfully deprived of an interest in land, thereby distributing loss across the system rather than permitting it to fall exclusively on the victim of fraud (ss 296 and 297).
* Note: s 297 protects good faith purchaser for value from being subject to proceedings against them. S 297(3), now repealed, suggested a person does not hold indefeasible title if it was acquired from a rogue under a void instrument (the one-step removed rule).

However, as Professor Harris suggests, the *LTA* may fall short of fully adopting immediate indefeasibility. Under s 25.1(2), a registered owner of a fee simple interest who acquired the interest from a void instrument in good faith, is only “deemed” to have acquired the interest. The word “deemed” is generally understood as a rebuttable presumption, and is not as clear as other portions of the *LTA* which use the words “indefeasible title” or “conclusive evidence”. Therefore it may be open to the courts to defer the indefeasibility of title in certain circumstances.

*Nemo dat qoud non habet:* one cannot sell or assign an interest which one does not have.

In BC, registered mortgages can never achieve indefeasible status. See s 26(1): the owner of a charge is deemed to be entitled to the estate. This is a rebuttable presumption, and the *nemo dat* principle applies to defeat that presumption. As a result, where a rogue fraudulently acquires a registered title, and then mortgages that interest, the mortgagee acquires nothing. Nor can the mortgagee make a claim against the assurance fund to make good the innocent mistake. A subsequent innocent transferee of the mortgage is in no better position. Lenders therefore assume fully the risk of fraud.

*Gibbs v Messer*

*A purchaser of a mortgage, in good faith and for value, and in reliance on a registered title in the registry, has acquired a valid charge.*

* R forges O’s name on transfer documents and registers the property in his name.
* A purchases a mortgage on the property, in good faith and for value.
* The court held that A’s mortgage is valid.

*Credit Foncier Franco-Canadien v Bennett*

*The registration of a mortgage provides a rebuttable presumption of its validity rather than conclusive evidence thereof.*

* D was the registered owner of an estate in fee simple.
* A rogue forged a mortgage on the estate and registered it.
* P subsequently purchased the mortgage and attempted to foreclose on D.
* The court distinguished from *Gibbs:* here, the underlying title was valid but the mortgage was a fraud, whereas in *Gibbs* the mortgage was valid but the underlying title was fraudulent.
* A registered title is conclusive evidence that the registered owner is indefeasibly entitled to an estate, as per s 23(2), whereas the owner of a registered a charge is merely deemed to be entitled to the estate, as per s 26(1), therefore the validity of a registered mortgage is not conclusive but rebuttable.
* The mortgage was a nullity by virtue of the forgery and remained a nullity notwithstanding registration or assignments.

*Canadian Commercial Bank v Island Realty*

*The LTA protects mortgagees who acquire their interest, in good faith and for value, from a registered owner.*

* Island Realty held a mortgage on a property. The mortgage and title were valid and registered.
* A rogue forged a discharge of that mortgage and the charge was removed from the title in the registry.
* CCB subsequently bought and registered a mortgage on the property, in good faith for value.
* The court held that Island Realty’s mortgage should not be restored to the prejudice of CCB.
* The charge owned by CCB become a charge in place of that which was owned by Island Realty.

*Gill v Bucholtz*

*The LTA preserves the* nemo dat *rule with respect to charges, even where the holder of the charge has relied on the registrar.*

* P was the registered owner of property.
* A fraudster forged a transfer of the property and then mortgaged it to D.
* The transfer and mortgage were registered.
* The court held that D did not acquire any interest in the property because the mortgage had been granted by a person who had no interest to give.
* Both the transfer and the mortgage were void.

**Fraud**

*Holt Renfrew Co v Henry Singer Ltd*

*Notice of an unregistered interest, and acting on that knowledge without some further element of dishonesty, is not equated with fraud.*

* D is interested property from the owner, and P is currently leasing that property.
* P has failed to register a caveat on the title, and D knows this. The owner is not aware of the mistake but has been forwarded a copy of the current title by D.
* D purchases the property and a files a caveat on the title, thereby claiming a priority interest over P.
* Is D’s knowledge of the valid but unregistered instrument enough to form the basis of Torrens fraud?
* If yes, this would be an exception to the rule of indefeasibility.
* However: 29(2) states that notice is of no force or effect (subject to the three exceptions).
* *Majority*: it was not shown that the purchaser’s representations were relied on by the owner; or that the offers were cleverly drafted to mislead; and most importantly, the last offer to purchase explicitly stated P’s intention only to be bound by the registered encumbrances.
* *Minority*: the purchaser had been previously told of the lease of their willingness to accept the lease; therefore they had a duty to advise the owner once they had become aware the caveat was not registered. The failure to correct the previous (honest) statement amounted to fraud.

*Alta (Ministry of Forestry, Lands & Wildlife v McCulloch)*

*Notice of an unregistered interest does not constitute fraud, something more is required.*

* D purchased land from P subject to a caveat: a right of repurchase for P.
* A mistake at the registry cancelled that caveat.
* D became aware of this mistake and did not notify P; instead he transferred the property to his own company.
* D claimed this was for “tax purposes” but the court held that it was designed to defeat the unregistered interest, and this constituted fraud.
* Here, the court is essentially lifting the corporate veil.
* The primary purpose of that transaction was to defeat the interest.

Overwhelmingly, courts have resolved difficulties reconciling the Torrens system with Aboriginal title by simply excluding Aboriginal Title from the registry. This includes attempts to register a notice of claim.

*Skeetchestn Indian Band and Secwepemc Aboriginal Nation v Registrar of Land Titles, Kamloops*

*A CPL cannot be issued for a title claim because it is unclear, in the case of successful litigation, whether the party would be entitled to registrable interests in the lands at issue.*

* The band wished to register a certificate of pending litigation (CPL - s 215) against lands the Crown had granted and were now held in fee simple under indefeasible title.
* The band was relying on the decision in *Delgamuukw.*
* The registrar refused to register the certificate.
* In the case of successful litigation, the interest would be *sui generis,* and one cannot have good safeholding and marketable title to an interest unknown to the law.
* Policy: a cloud on title, whether upstream or downstream, prevents parties from relying on their certificates of indefeasible title, and this cloud would exists over the vast majority of the province.

LTA 24.1

* The purpose of Part 24.1 is to establish a title registration system for lands subject to the Nisga’a Final Agreement.
* Agreement describes three different types of categories of land (Category A & B Lands to be registered under the LTA and subject to the Torrens system.

LTA s. 372.2: Effect of indefeasible title to Nisga’a Land

(1) An indefeasible title to a parcel of Nisga'a Lands, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:

(a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, set out in the Nisga'a certificate that relates to that parcel;

(b) a charge, tax, rate or assessment of the Nisga'a Nation at the date of the application for registration imposed or made a lien or that may after that date be imposed or made a lien on the parcel of land;

(c) a charge, rate or assessment of a Nisga'a Village at the date of the application for registration imposed or that may after that date be imposed on the parcel of land, or which had before that date been imposed for local improvements or otherwise and that was not then due and payable;

(d) a right of expropriation under a Nisga'a law.

(2) The matters to which an indefeasible title to a parcel of Nisga'a Lands is subject under subsection (1) are in addition to any other matters to which that title is subject under section 23 (2), as that section applies to that parcel under the Nisga'a Final Agreement.

LTA s 229:

**224. Definition of terms.**

**225. Form must comply.**

**226. Modification of Standard Terms**

**227. Prescribed Standard Mortgage Terms**

**228. Filed Standard Mortgage Terms**

**229. Receipt of terms**

**230. Registrar May Require Filing**

**231. Effect of Mortgage:** charge