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| **CH1: LEGAL CONCEPTS OF LAND** |

***Rights in Airspace*** *– permanency – height – level of intrusion – ordinary use/enjoyment – limited? –*

*Trespass vs. Nuisance*

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| ***Case*** | ***Facts/Conclusion*** | ***Ratio/rules*** |
| ***Kelsen v Imperial Tobacco Co [1957]*** | -P sued D for overhanging sign; permanent held to be **trespass** | **-Trespass** is an *intrusion* in/on to land w/o permission  -A permanent fixture attached to adjoining land that infringes on the airspace of another’s property will constitute a trespass (not nuisance); airspace is owned to a *certain* height; broad *ratio*: airspace capable of ownership |
| ***Bernstein (Lord of Leigh) v Skyviews [1977]*** | -P sued Ds for aerial photos - over flight **NOT trespass** | -Over-flight by aircraft falls *outside* zone of ordinary use AND enjoyment over which a landowner would have airspace ownership rights; *ad coelom* maxim limited  -*Temporary* intrusion; at that height, airspace public (balance of rights)  -**Nuisance** is interference with s/o’s use and enjoyment (vs. trespass phys. intrusion) |
| ***Manitoba v Air Canada [1980]*** | -Province can’t tax airlines for flights overhead | -Airspace (beyond ordinary use) cannot be owned, but limits can be put on who can occupy it; owner can’t have *exclusive* title  -**No rights at commercial over-flight level** |

***Legislation***

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| *Land Title Act*, s. 138-143 | Air space constitutes land and lies in grant. This allows the owner in fee simple to subdivide land into “airspace parcels” for which indefeasible title can be obtained, and dispose of them by grant, transfer, etc. No easements or restrictive covenants in respect to the grantor’s land are implied in the transfer. |

***Fixtures v Chattels*** *– degree/object of annexation – purpose (of building, of item) – intention – primae facie*

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| ***Case*** | ***Facts/Conclusion*** | ***Ratio/rules*** |
| ***Re Davis [1954]*** | -Bowling alley as **chattel** | -Test from *Haggert*:If (degree and**) object of affixation** of chattels is for the better enjoyment of the chattels themselves (rather than of freehold), then affixation does not make them fixture part of realty (still chattel) and vice versa |
| ***LaSalle Recreations Ltd. v. Canadian Camdex Investments Ltd (1969)***  \*\*Leading  Authority\*\* | -P sold carpet to Villa under CSA (remain P’s until fully paid); D gave mortgage to Villa, Villa bankrupts, carpets contested b/t P & D  -Hotel carpet as **fixture** | -If object (purpose) of annexation is to enhance value or improve usefulness and items are affixed to freehold, then = fixture; degree not determinative  - *Conditional Sales Act* (no guidance, just circular definition, so turn to common law)  -***Stack v Eaton*** *(La Salle* ADDS to test re: **obj’ve** **purpose**; tension w/ subj @ *CMIC*)   1. Articles not attached other than by own weight do not = fixtures 2. Even slightly affixed articles = fixtures 3. What are the primae facie characteristics? (Judge applies *Haggert*, adds here: permanency, use of building; permanent = there so long as it serves (obj) purpose) 4. *Intention* of person affixing relevant only so far as it can be presumed from the degree and object/purpose of annexation 🡪 objective intent   -Test leads to uncertainty |
| ***CMIC Mortgage Investment Corp v Rodriguez 2010*** | -Cover All #2 deemed a **chattel** | -D only intended it to be chattel; only rested on its own weight (not affixed), presumptively a chattel  -*RBC v Maple Ridge* 6 rules: (1) Only attached by own weight, easily removable = chattel (2) Plugged in, removable = chattel (3) Attached even minimally = fixture (4) Attached, removable but w/o necessary part = fixture and vice versa (5) Tenant’s fixture can be removed as chattel (6) **Purpose** test considers **intention** (covers areas not included in 1st 5 rules; **subjective intention**) |

***Water/Riparian Rights*** *– Statute trumps CL if license – Right to use unrecorded H20 for domestic purposes – Commercial use w/o license = unlawful – RRs fill gaps in statutes (policy)*

*Is there a license? 🡪 If no, what is H2O being used for?* 🡪 *Domestic (OK) or commercial (not OK)?*

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| Common Law Background | -Water not owned; water rights attached to ownership of land; right to flow (diminished in neither quantity nor quality; no diversion); right to use (ordinary/domestic); Right to use or not use w/o losing right (rocking chair rule); commercial use required H2O be returned to watercourse substantially undiminished in quantity and quality |
| Water Legislation | -Originally driven by *economics*, now concerns re: *sustainability*; curtails CL RRs  -*Water Act*; *Water Protection Act* |

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| ***Case*** | ***Facts/Conclusion*** | ***Ratio/Rules/Attitude to RRs*** |
| ***Johnson v Anderson* [1937] 1 DLR 762, 51 BCR 413 (SC)**  -Narrow embrace of RRs v. *Steadman*  -Full engagement w/ CL rights | D **diverted** stream that went through P’s property; P used it for **DOMESTIC** purposes, sought demo/injunction; D had license but not for diversion; P wins, remedy by way of orders, not damages  -J engages fully w/ CL principles (more so than in *Steadman*) | -Sec.4 of *Water Act* vests in Crown property and right to use of all water in stream in province (doesn’t expressly save right of RO to use of H20 for domestic purposes); *WA* trumps CL  -Judge says RO still has right to make use of water, still has access to remedy against unauthorized diversion depriving him or right (unless taken away by legislation – *Water Act* doesn’t); CL operates, right to use/flow  -+ attitude to RRs, frame legislation over it (protect CL) |
| ***Schillinger v H Williamson Blacktop & Landscaping Ltd (No 2)* (1977 BCCA)**  (unlawful use vs lawful in *Steadman*) | P owned land, diverted H20 for **hatchery**; neighbor/logger D’s ground water flowed to P, contained silt that contaminated P’s H20/closed business; P had license to divert but for *different* Creek, P claims damages; D wins  -**COMMERCIAL** use (vs other 2) | -P’s diversion unlawful; his claim was based on consequences of that diversion 🡪 must fail, his breach of statute (41(1) of *Water Act*) = proximate cause of his damages  -RRs only exist for person *lawfully* using H20, right to use/flow in BC stream must be acquired under *WA* (P hadn’t done so)  -Neg view of RRs, only exist when leg implies them |
| ***Steadman v Erickson Gold Mining Corp* (1989 BCCA)**  -Compares RRs to right to breathe air; quasi public interest  (H2O as public good) | -P using H20 for **DOMESTIC** purposes from well; Ds building road, **contaminates** H20 with silt, makes P’s H20 unusable; no licenses  -Diamond saw (incidental/minor commercial use – detracts from overall domestic use? Not here; non domestic use too small 🡪 insignificant) | -Under *WA* property in and right to use/flow of H20 vested in Crown, except right to *unrecorded* H20  -You can use ground H20 to extent that is dries up neighbor’s well, but can’t *contaminate* it (if P’s water = ground water, he wins, but can’t tell so D wins)  -+ attitude toward RRs, contemplated by and not inconsistent with legislation; quasi public interest; J less engaged w/ CL than in *Johnson*, more concerned with contamination remedy |

***Water Act****,* s. 1: “domestic purposes” = watering for household requirements, sanitation, fire prevention, watering domestic animals/poultry, irrigation of gardens up to 1012m squared; “unrecorded water” = water right to use of which not held under license or special/private Act

s. 2(1): Property in/right to use and flow of BC water vested in Gov unless under private license

s. 42(2): Right to use unrecorded water (divert for domestic); s. 93(2): unlicensed diversion = unlawful/offence

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| **Policy reasons for EXPANSIVE VIEW OF RIPARIAN RIGHTS** (*Johnson*) | |
| PROS   * Fills gaps in statute * Limits bureaucracy (prevents e/o from needing license) * Reflects common sense/public understanding * Allows for more interpretation (not just statutory) | CONS   * Intro’s lack of clarity * Not democratic (leg elected, judges appointed) * Public interest in enviro integrity, econ development * Common law = piece meal |

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| **CH2: THE GENERAL PRINCIPLES OF LAND LAW** |

* Control **disposition**/transfer of land
  + *Inter Vivos* (b/t living persons) – by sale or gift
  + On death – by will, according to intestacy, variation of will
* Control **use** of land
  + Common law – cannot use land to neighbor’s deprivation (limit on RRs)
  + Private arrangements
  + Legislation

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| **REAL PROPERTY** | **PERSONAL PROPERTY** |
| -Land  -Tenurial (own *interest* in land)  -Freely alienable  -Disposed of *inter vivos* or by will, intestacy | -Personalty (fungible and non fungible)  -Allodial (own actual thing) – precludes estates in personalty  -Freely alienable  -Disposed of *inter vivos* or by will, intestacy |

* **Tenure** – Under our system technically only Crown “owns” land; landowner has *interest*/estate in land (tenurial vs. allodial where person owns actual land); rules for allocating land rights and corresponding obligations; benefit of system = Crown as owner **and** as representing public interest
* **Estates** – Tells you *how long* interests in land will last (duration); diff = ability to divide *times* in land

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| **Corporeal Interests** (entitles s/o to *right to possession* of land; landowner has ‘estate’ in land from absolute owner Crown) |
| 1. **Fee Simple** – Indefinite interest in land; freedom to dispose; heritable |
| 1. **Fee Tail** – Abolished in BC in 1921; as long as there are descendants |
| 1. **Life Estate** – Interest for one’s lifetime; can be passed on but ends with death of original holder |
| 1. **Estate *pur autre vie*** – Interest for life of another (see Life Estate; To A for B’s life) |
| 1. **Estate for fixed period (leasehold estate)** |
| **Incorporeal Interests**  *No right to possession* (main distinction from corporeal interests); e.g. easement (right of way), covenant, mortgages |

* **Leasehold Estates** – for fixed period; originally regarded as K (rather than interest in land); increased protection
* **Freehold Estates** – less flexible than leaseholds; same protections; nature determined as matter of law
* **Future Interests** – Holder of FS can create number of estates in succession; can be subject to conditions (contingent); possession postponed until future date
* **The Use** 🡪 **Trust** (A = feoffor = settlor, B = feoffee = trustee, C = *cestui que use* = beneficiary)
  + Legal title remains with trustee, beneficiary relies on courts to see that trustee holds legal title to benefit
  + Interests created in Equity correspond to those @ CL (e.g. equitable FS, LE, E*PAV*, leasehold, FIs)
  + Trustee, as legal owner, can transfer legal title to 3rd party
* **Legal (common law) vs. Equitable Interests**
  + **Common law** 🡪 ***nemo dat*** (can’t give what you don’t have; protects original owner)
  + **Equity** 🡪***bona fide* purchasers for value w/o notice**, protects innocent 3rd party – BC Torrens system lists trusts so this is not a problem
  + Equity applies test of good conscience (should person have to respect equitable interest; clean mind?)
* **Equitable Doctrine of Notice**
  + **Express/actual notice** – what transferee *really* knows (3rd party not protected if colluding with trustee)
  + **Implied notice** – what transferee’s *agent* knows (deemed to have same knowledge as lawyer/RE agent)
  + **Constructive notice** – what transferee *ought to have known* if they made inquiries reasonable person of good conscience ought to have made (no willful blindness)

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| **TYPES OF TRUSTS** |
| **Express** (A to B w/ instructions that property to be used for C’s benefit) |
| **Resulting** (A to B w/o $, B presumed to hold in trust for A) |
| **Constructive** (court imposes trust to redress injustice) |

* **Freedom on Alienation** (Common law transfer of title requirements)

1. Freedom on Disposition
   * + Current owner has freedom to transfer property
2. Limiting restraints on disposition/alienation
   * + Are there limits on owner’s power to impose restraints on transferee’s power to transfer property? (E.g. I am wise, my children are stupid)
     + Direct; fee tails; future interests (rule against perpetuities); strict settlement
     + All limited; freedom of alienability
3. Mechanics of transfer – Is there a simple transfer process?
   * + At common law:
       - Establishing **good root of title** 🡪 search for all docs relating to property going back 60 years; had to be repeated with every transfer
       - “Livery of seisin” (public, physical delivery)
     + Statute of Uses

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| **Recording system** – all docs relevant to parcel of land on file (transferee only need look at these); improvement on ‘root of title’ search but still requires purchaser to interpret docs; BC = quasi Torrens (gaps where CL emerges); Registration of docs ≠ registration of title |
| **Registration system/Torrens system** |
| ***Mirror*** – register of title *reflects* accurately/completely all estates/interests that may affect land |
| ***Curtain*** – registry is *only* source of info for prospective purchaser |

* ***Re Fraser***
  + LE can be created in personalty, if not fungible, and where testator’s intent is clear
  + Deceased left will, R says no life estate in personalty, or will should be interpreted as conferring on widow an **absolute power of encroachment on personalty**
  + Does widow have PtE? Does widow have fiduciary duty to preserve personalty for charity named?
  + Recipient of LE may enjoy revenue derived from corpus but no more unless indicated by testator – not indicated here, no PtE
* **Rule against perpetuities** – curbs excessive creation of future interests
* **Devolution on Death** (*WESA*)
  + Will
  + Intestacy (if no will, no heirs, real property escheats to Crown, personalty to Crown as *bona vacantia*)

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| **CH4: THE ACQUISITION OF INTERESTS IN LAND** |

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| **4 WAYS OF ACQUIRING INTEREST IN LAND** |
| 1. Crown Grant |
| 1. *Inter vivos* transfer |
| 1. Will or intestacy (or through variation of will) |
| 1. Proprietary estoppel |

**CROWN GRANT**

* 94% of BC land is *provincial* Crown land; 1% federal Crown; 5% private; 0.2% treaty settlement land
* *Land Act*
  + s. 50(1)(a) – Crown can only resume/take back up to 1/20 of land (w/o building, garden, etc.)
  + s. 50(1)(b) – Crown grant does *not* convey right to geothermal resources, minerals, coal, fossils, etc. unless specifically provided for

***INTER VIVOS* TRANSFER**

**1. The Contract**

* Enforcing a K relating to land
  + S. 59(3) of *Law and Equity Act* – K must be in writing/signed by both; written evidence of K

**2. The Transfer (form)**

* Writing and sealing:
  + *Property Law Act*
    - S. 15(1) – You need piece of writing to show transfer, but no specific wording
    - S. 16 – Instrument need not be under seal
* Registration – prescribed forms
  + *PLA* ss 4-7: generally transferor must deliver transferee a registrable transfer (e.g. agreement for sale, fee simple, lease)
  + What is registrable?
    - *Land Title Act*, ss. 39, 185, 186: prescribed form, single page (Form A), deemed to include words on schedule B

**3. The Transfer – When is it operative?**

* At CL, to take effect deed had to be “signed, sealed, delivered” (test of delivery = *intention* of transferor)
* In Torrens system, based on REGISTRATION (test of delivery = whether transferee in position to *register*)
* E.g. Registered owner A transfers Blackacre to B who does not register; A then transfers Blackacre to C who *does* register
  + At common law, B would protected by *nemo dat*
  + In Torrens system, C’s interest prevails (protected by mirror/curtain)
  + As against 3rd parties, registration required to protect B’s interest
  + As against A, registration not necessary to pass interest

**4. Transfers to Volunteers** (***Pecore v Pecore***)

* People who acquire interest in land *w/o paying* for it, no monetary consideration
* Traditional view
  + ***Presumption of Resulting Trust***: A ----------🡪 B
    - Presumption that A has transferred legal title but *retained equitable title*; B holds in trust for A (equity says people don’t just go around giving away their property)
  + ***Presumption of Advancement***: Husband ---------🡪 Wife, or, Father ----------🡪 Child
    - Presumption that A transfers title *absolutely* (equity say you have obligations to spouse/child due to certain relationship); *exception* to PoRT
* *LTA*, ss 20-22 – Unregistered instrument does not pass estate; operation of instrument is from *time of registration*
* *Property Law Act*, s.19(3) – Words of Transfer; voluntary transfer need not be expressed to be for use/benefit of transferee to prevent resulting trust; i.e. you know longer need to say “A transfers to B *for her use/benefit absolutely*” (historically specific language was needed for gift, now **no specific language needed for gift**)
* ***Pecore v Pecore*** (2007, SCC) – Rothstein Majority: **While PoA continues to operate, it should be limited to situations involving minor children**; Abella J dissenting reasons: PoA to adult children in general…

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| ***Case/Facts*** | ***Issues/Conclusion*** | ***Ratio/rules*** |
| ***Pecore v Pecore***, [2007] 1 SCR 795  -Dad and adult daughter joint bank acct, he deposited $, she withdrew; no mention of account in will; dispute upon her divorce; she was **adult independent** child | -Did dad intend to make *gift* of beneficial interest in acct to her alone? Or for her to hold assets in trust for benefit of estate to be distributed according to will? **Intention of transferor** = ?  -She successfully rebuts PoRT on Bal/P and wins (onus on transferee)  -PoA should be limited to situations concerning minor children | -Trial J said PoA applied given relationship  -ONCA said dad intended to give her beneficial interest but did not rely on PoA  -PoRT and PoA both *rebuttable*; presumption allocates BoP (PoA – no consideration, gift, onus on transferee to show intent; PoRT – onus on transferee to rebut presumption)  -Rothstein maj: rejects PoA on parental *affection*, **no PoA for adult independent children (only minors)**; danger of exploiting old parents; adult child holding property *in trust* (PoA only for vol’y transfers to minor kids; **PoRT as gen rule for gratuitous transfers**)  -Abella concurs, differing reasons: agrees with trial J applying PoA; affection as basis/starting point for PoA |

**ACQUISITION OF INTERESTS IN LAND ON DEATH**

* Governed by statutes including *Wills Act, Estate Administration Act*, and *Wills Variation Act* 🡪 *Wills, Estates and Succession Act (WESA)* as of 2014
* Anyone 16+ can make will, becomes operative only on death, can be revoked/replaced up until then
* Witnesses to will cannot be beneficiaries but executor can be

**By Will**

* ***Wills, Estates and Succession Act (WESA)***, SBC 2009, c. 13
  + S. 37 – in writing, signed, witnesses in presence of will-maker
  + Deliberate policy choice NOT to do away with claims by adult independent kids, maintain possibility
* ***Will Variation Act***
  + Potential limitations on testamentary autonomy – claims to *vary* will
  + Act doesn’t remove right of legal owner to dispose of property on death, simply *limits* right, can’t dispose in way that wouldn’t be possible during life – *if testator attempts IV transfer just before death to avoid WVA, this is called* ***avoidance*** *(BC has no anti-avoidance legislation)*
  + In these cases, will is clear, party/parties just not happy with it
  + S. 2(1) – testator has duty to make adequate provision for proper maintenance/support of surviving spouse/children; if s/he fails to discharge this duty, court may order claimant the provision from estate that it considers “adequate, just and equitable in the circumstances” (*Tataryn*)

**On Intestacy**

* *WESA* outlines distribution of estate in case of no will; no will, spouse but no kids (to spouse); no will, no spouse but kids (to kids, then parents, then descendants of parents); no will, but spouse and kids (specific distribution)
* Rules of intestate succession apply when there is **no will** or **no *valid* will**; preference for spouse

\*\*Title vests in *personal representatives* (executors named in will or administrator appointed by court in case of intestacy) who has responsibility to gather assets, pay debts, pay taxes, transfer property to those entitled under will or pursuant to rules of intestate succession

\*\***Legal** vs **Moral claims** – Testator would have legal duty to spouse (moral to kids) hence preference for spouse; surviving spouse would have still have legal duty to kids anyway (see *Tataryn* next page)

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| ***Case*** | ***Facts/Decision*** | ***Ratio/rules*** |
| ***Tataryn v Tataryn Estate*** [1994] 2 SCR 807 | -Husband made will leaving wife LE in house, made her beneficiary of discretionary trust of income from residue of estate, son E as trustee; after wife’s death, everything to E, nothing to son J; wife & E sue estate under *Wills Variation Act* (now would be *WESA*)  -Trial J revoked house gift to E, granted wife LE, directed *each* son to receive immediate gift $10G from residue, when wife dies, 1/3 to J, 2/3 to E  -CA dismissed appeal, gave trustee **power to encroach** on residue for wife, ensure her standard of living; wife appeals 🡪 allowed, new orders confirming trial J’s | -**Balance interests** of will-maker’s right to dispose as he sees fits (autonomy) vs. interests of spouses/children  -S. 2(1) ***WVA*** – testator has duty to make adequate provision for maintenance of surviving spouse/kids, if he fails, court may order provision from estate that it considers “adequate, just and equitable in circumstances” 🡪 open to interpretation, viewed in light of social norms; broad discretion to court; limits testator autonomy  -Wife’s ‘**legal claims’** entitle her to at least half of estate, maybe additional maintenance (legally should get at least as much as if they’d divorced when he was alive); her **‘moral claim’** to funds set aside is strong; moral claim of sons met by $10G gift from trial |

**PROPRIETARY ESTOPPEL**

* ***Crabb v Arun District Council***
  + Equity will prevent person from insisting on his strict legal rights when it would be inequitable for him to do so having regard to dealings which have taken place b/t parties
  + Dealings:
    - Contract 🡪 Make binding K *not* to insist on legal position, court of equity will hold him to K
    - Promise 🡪 *Promise* not to insist on legal rights, knowing or intending that other will act on it, and does act on it, CoE won’t allow backing out on promise
    - Final possibility (estoppel by acquiescence 🡪 proprietary estoppel) 🡪 short of promise, **if he by words/conduct, so behaves as to lead another to believe that he will not insist on strict legal rights, knowing/intending that other will act on that behalf and does so act, will raise equity in favour of other** (i.e. he will be estopped from insisting on strict legal right)
  + I.e. (1) D’s behavior leads P to believe D won’t insist on SLRs (2) D knows/intends P to act on that (3) P acts (to detriment) 🡪 D estopped from insisting on SLRs

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| ***Case*** | ***Facts/Decision*** | ***Ratio/rules*** |
| ***Zelmer v Victor Projects Ltd***, (1997) BCCA | -Ps wanted to install reservoir on Ds land; agents met/agreed; P sent D plan, no response; P prepped estimate, D said no $ necessary; reservoir built; D claims it’s in wrong place, P not notified until much later, month after D won’t sign; P files claim  -Trial J said Ps entitled to easement in respect of reservoir  -CA say **proprietary estoppel established** (agree with Trial J), appeal dismissed | -Can D be held to promise of allowing reservoir on land for free? Can **proprietary estoppel** prevent D from exercising legal right? Can Prop/E be a CoA? YES  -*Crabb v Arun* – P claimed right of access on PE grounds; promise was enforced w/o writing or consideration; would be **inequitable** for D to insist on SLRs  -*Willmott v Barber* – 5 part test (not as broad as *Crabb*)  1. P must have made mistake as to his legal rights  2. P must have expended $/done thing on mistaken belief  3. D, possessor of LR, must know of his right that is inconsistent with right claimed by P  4. D must know of P’s mistaken belief of his rights  5. D must have encouraged P in spending $/acts directly or by abstaining from asserting LR |

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| **CH9: THE FEE SIMPLE** |

**CREATION**

**1. Common Law**

**Words of Purchase:** Describe individual who takes interest (“To A”)

**Words of Limitation:** Describes interest that person takes, ‘limits’ interest (“In fee simple”, “and his heirs”)

\*\*At common law, default position was that transfer created *life estate*; to rebut, use “To B and his heirs”

\*\*To create *fee simple* by *inter vivos* transfer, correct words = A transfers to B “and his heirs” (WoL)

\*\*NOW in absence of WoL, courts construe transfer as conferring **fee simple** or greatest estate possible, if it was clear intent of testator

**2. Statute**

***Property Law Act*, s. 19**: (1) Reverses common law, makes it unnecessary to use “and his heirs” to transfer estate in FS

(2) Transfer of land w/o WoL there is presumption of transfer of FS (makes (1) redundant)

***Land Title Act*, s. 186:** If no express WoL, transfer of freehold estate in **FS** (or greatest estate possible), with possibility of imposing conditions

***WESA*, s. 41:** Property that can be gifted by will; **s. 42:** Meaning of particular words in will

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| ***Case*** | ***Facts/Decision*** | ***Ratio/Rules*** |
| ***Tottrup v Ottewell Estate***, (1969 SCC) | -Twins F1 and F2 had wills leaving everything to each other; F1 died, daughter claims she should get whole residue of estate (rather than 1/8) b/c “and his heirs” = WoSubstitution (WoP), not WoL (WoP would allow her to be *substituted* for dad and take interest) – i.e. terms of F2’s will should be read so as to interpret her as her father’s heir  -Her appeal is dismissed | -Judge disagrees w/ daughter, must construe will in context: meaning is clear, they are **WoL** (not required, but if included will be given effect)  -Dissent says it’s unreasonable to think their lawyer would use WoL when they are no longer necessary; no suggestion that intention was *not* to pass to her; presumption again |

**3. Problems of (Will) *Interpretation* – REPUGNANCY**

\*\*Repugnancy: Will *unclear* (not same as wills variation where it’s clear and you just don’t like it/want to change it)

\*\*Capacity to limit alienation problematic under common law – inhibits capitalism, efficient land use

* Executory devise which is to defeat an estate and is to take effect on exercise of any of rights incident to estate is VOID
* Executory devise which is to take effect on alienation or attempt at alienation is VOID (right of alienation incident to every estate in FS)

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| **2 Classes of Repugnancy *(+ possible 3rd*)** |
| 1. Gift to person prevails (FS) and gift over fails as repugnant (*Re Walker*: gift to wife prevails, G-O fails) |
| 1. First named takes *life estate* only and gift over prevails (*Re Shamas*) |
| 1. *(1st taker gets LE but LT given power of sale, may be exercised any time during currency of estate (e.g. trust))* |

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| ***Case*** | ***Facts/Conclusion*** | ***Ratio/Rules*** |
| ***Re Walker***, (1925 ONCA) | -H left everything to wife (except jewelry to nephews), said if any portion of estate remained with wife on her death, remainder ‘shall be ÷ as follows’  -Those claiming under H’s will sought ‘undisposed’ portion; those under W’s will said she took *absolutely* | -When testator gives property to one, intending them to have all rights incident to ownership, and adds to this a gift over of that which remains at death of that person 🡪 *impossible!*  -Intention is clear, but cannot be given effect; must decide **which part of** **testamentary intention predominates, subordinate to be rejected as *repugnant***  -Gift to wife prevails (FS), attempted gift over fails as repugnant (See 1. above)  -Testator can’t give FS and attempt to impose (just give LE!) |
| ***Re Shamas*** (1967 ONCA) | -H’s will left all to wife/mother of 8 to maintain fam until 21; *if she re-marries*, she’ll have share = to kids; otherwise keep whole thing and see kids get shares when she dies; who takes what interest? | -Court **must look to language/circumstances to determine testator’s intention** in order to construe will  -Ultimate intention to benefit kids, estate to vest in kids in = shares; subject to life interest to W, subject to divesting to kids on remarriage; w/ power to encroach to support fam |
| ***Cielein v Tressider*** (1987 BCCA) | -H died, left CL W Saturna property and residue in will, ‘upon sale, proceeds divided = among her son and his 5 kids’  -Is it a LE for wife and gift over should prevail? Or does W have FS with repugnant attempt to gift over?  -Court grants wife fee simple in property | -Court says intention was to benefit wife, will can’t be construed to divest her of interest in property, grants her fee simple (overrules trial decision that H couldn’t have intended to effectively disinherit kids via absolute disposition to wife)  -**Restraint conditions** (clause re: kids) **on otherwise absolute gift** (FS to wife) **are void**; such a restraint on alienation is repugnant/void; absolute to wife unless contingency happens then property distributed in particular way |

*Walker* categories for determining repugnancy:

1. FS w/ limitations on alienation = repugnant (*Cielein v Tressider*)

2. LE = acceptable

3. LE, but if instrument expressly allows, some powers of alienation = acceptable

\*\***Look at language of entire will; interpret inconsistent language**

**\*\*Testator’s ultimate/predominate intention = ? Benefit whom? *Contextual* analysis**

**\*\*1st gift = FS or LE?**

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| **CH10: THE LIFE ESTATE** |

\*\*At common law, default position was that transfer created **life estate**; to rebut, use “To B and his heirs”

\*\*NOW in absence of WoL, courts construe transfer as conferring *fee simple* or greatest estate possible, if intent clear (see Statutes above in Ch.9)

**CREATION**

**1. By Act of Parties** 🡪Intention of transferor (Most LEs created this way); created *expressly*

**2. By Statute**

**-*Estate Admin Act***, s96: where one spouse dies intestate, other auto entitled to LE in matrimonial home

-***WESA*** abolishes this beneficial LE, instead option whereby surviving spouse can opt to buy home from estate under s.26(2) or can retain even if they can’t afford to buy it (s. 33)

-***Land (Spouse Protection) Act***: Spouse who is registered owner of land dies, other spouse gets auto LE (trumps will)

**RIGHTS OF A LIFE TENANT**

**1. Occupation, use and profits** – holder of legal title entitle to occupy/use property, retain profits arising from exploitation

**2. Transfer *Inter Vivos*** – Can assign full interest to 3rd party: “To A for life” – A can assign to B for A’s life (estate *pur autre vie*); or assign less than full interest via lease

**3. Devolution on Death** – LE ends with death of life tenant (no power to dispose in will; but E*PAV* can pass by will)

**OBLIGATIONS OF LIFE TENANT TO THOSE ENTITLED IN REVERSION OR REMAINDER**

* **A transfers Blackacre “To B for life”** 🡪B has LE; A (or her estate) has **reversion** in FS
* **A transfers Blackacre “To B for life, then to C” 🡪** B has LE; C (or estate) has **remainder** in FS

**Waste** (limits what LE can do on property)

**(1) Permissive** 🡪 Passive conduct OK, LE *not* responsible (unless express); damage from failure to maintain property

**(2) Voluntary 🡪** Damage from LT’s activity, LT *is* liable (perm. damage; change to nature: agr🡪res; res🡪commercial)

* Qualified by **ameliorating/improving waste** – recognizes some changes as non damaging (those entitled to remainder/reversion could not get damages) (came from Court of Chancery); *equitable*
* If LT commits VW (not entitled to), may owe damages to person entitled in reversion or remainder)

**(3) Equitable** 🡪 Problems of waste can be prevented by transferor making LT “unimpeachable for waste” (removes restrictions imposed by doctrine of voluntary waste); doctrine of equitable waste then put limits on ability to commit waste

* E.g. *Vane v Lord Barnard*: D gave himself LE in castle unimpeachable for waste, remainder to son; D trashed castle, Court of Chancery (Equity) granted injunction to stop waste, force D to repair (no unfair use of legal rights)
* *Law and Equity Act*, s.11 – no legal right to commit equitable waste unless express intention in instrument

**Liability for taxes/insurance**

**(a) Insurance** 🡪 LT no obligation to insure for benefit of those entitled in reversion/remainder

**(b) Taxes** 🡪 *Mayo v Leitovski*: Qualified obligation on LT to pay taxes (P had FS remainder, challenged LT’s right to acquire tax title to lands so as to defeat remainder, LT cannot be tax sale purchaser to defeat P’s reversionary interest in land); LT & remainderman have trust-like, fiduciary relationship (inconsistent with notion that LT not responsible for maintenance)

**STATUTORY POWERS**

* Default rules to balance interests b/t LTs and those entitled in remainder
* Frequently set up as **trust**; trustee (3rd party) supposed to *balance rights* of LTs and those entitled in remainder
* *The Trust and Settlement Variation Act* gives flexibility

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| **CH12: FUTURE INTERESTS** |

**NATURE OF FUTURE INTERESTS**

* Right to possession in future

**VESTED AND CONTINGENT INTERESTS**

* **Vested** 🡪 in interest and/or in possession
* **Contingent** 🡪Interest contingent until property ID’d; ID of grantee/devisee established; no condition precedent
* Interest may be: (Part B: Qs 1 & 2)

1. **Vested absolutely** (To A in FS)
2. **Vested absolutely, possession postponed** (To X for life, remainder to A in FS)
3. **Vested but subject to divesting** (subject to condition *subsequent*: To A in FS, but if A goes to law school, then back to me) 🡪 not same as repugnancy as this is set out from outset
4. **Vested but determinable** (subject to determinable limitation: To A in FS until A goes to law school, then back to me; “until/so long as” – only for certain time, not defined, *determined* by something that may or may not occur) 🡪 different from c) and “but if”
5. **Contingent** (subject to condition precedent: To A in FS if A goes to law school)

* Classification a matter of *interpretation* (**preference for early vesting; prefer vested over contingent**)
  + *Phipps v Ackers* – To A if she reaches 21, but if she doesn’t, to B 🡪 seems contingent but treated as vested subject to divesting if she doesn’t reach 21 (court viewed gift to A as primary goal)
  + *Festing v Allen* – Court rejects *Phipps* approach: To A for life, on her death to kids who are 21 (with gifot over “for want of any such issue”) 🡪 kids’ interest treated as contingent b/c A died before any of kids was 21, none of them took interest

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| ***Case*** | ***Facts/Conclusion*** | ***Ratio/Rules*** |
| ***Browne v Moody***, 1936 | -Testatrix’s will said income from fund should be paid to son on her death during his life, on his death divided half to grand-d and remainder equally among T’s 3 d’s  -S. 7: If g-d or any of d’s predeceased testatrix or son, kid(s) of dying take interest to which their mom would have got  -They did *not* take vested interests; legacies directed by testatrix to be paid to beneficiaries did not become vested upon her death | -Did g-d or ds take vested interest in fund on T’s death? If so, any of their legacy subject to divested under s. 7?  -Court says object of postponement of division was for son to enjoy income during life; distribution deferred to give precedence to life interest; legatees take vested interest when son dies  -Postponing doesn’t preclude vesting, particularly when there’s intervening LE; if testator want to create contingent interest, must be *clear* |
| ***Re Squire***, 1962 | -G-dad’s will bequeath estate to trustees for Teddy once he reaches 30, w/ condition for his receiving income/education, when he is 30 – absolute interest; does T have vested or contingent interest? He wants property at 21  -Court says gift in will became vested upon death of testator, T entitled to conveyance @ 21 | -Court leans toward **early vesting**, looks to **testator’s intention**: property separate, only thing T is getting; intermediate $ to be used for him; no gift over in event of death before age  -Language: “if” = contingent, but “until” does not |
| ***Re Carlson***, 1975 BCSC | -Dad died left wife, son P, D, son C; will directed residue of estate in trust for C’s education; when he reaches 21, divide 90% of residue b/t C and d, remaining 10% to P, $1 to estranged wife 🡪 W & C want early vesting @ dad’s death | -Do gifts of residue to C and D vest at death of dad or only upon C turning 21?  -**Intentions**: disinherit W, educate C, but mainly keep whole residue intact until C 21 (not give 45% to D asap, =?? impossible to determine residue); court looks to **plain meaning**; no vesting to C & D at dad’s death 🡪 gifts of residue vest upon C turning 21 |

**TYPES OF FUTURE INTERESTS**

**(1) Common Law Future Interests** 🡪 **can only arise in *INTER VIVOS* transfers w/o interposition of trustees**

1. **Reversions** 🡪 Interest that remains with s/o who made partial disposition of property

E.g. A transfers to B for life – B has vested LE; A has reversion in FS (when B dies, A/A’s estate gets reversion)

***Always vested* (never contingent)**

1. **Rights of Entry** 🡪 Interest that arises when transferor conveys apparent absolute interest but adds *condition subsequent* that will divest interest of transferee in favour of transferor & heirs; can now go to 3rd party under *PLA*

E.g. A to B in FS but if B marries C then Blackacre to be returned to A and heirs; B has FS subject to condition subsequent (not absolute FS); A has RoE; arises due to breach of condition subsequent (LE or FS); RoE is **contingent** interest (B may or may not marry C; only *if* B marries C, A will have RoE)

1. **Possibility of Reverter** 🡪 Interest that arises *only* when transferor conveys determinable FS by limiting duration of estate (using WoL: “until B does *x*”); transferor retains PoR; PoR limited to grantor

E.g. A to B in FS until B marries C 🡪 B has determinable FS, A has PoR that would come in to play if B were to marry C; PoR is a **contingent** interest

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| **Right of Entry and Possibility of Reverter** | |
| Similarities  -Both subject to application of **Rule Against Perpetuities**  -Both can be **registered**  -**No LP** (under 2013 BC *Limitations Act*) | Differences  - Courts more willing to accept limitations through *determinable* interests (PoR) than through conditions subsequent (RoE), b/c   * **If a condition in a determinable interest is invalid, the gift as a whole fails** * **If a condition subsequent is invalid, gift takes effect w/o condition**   -PoR limited to grantor, BUT by statute (s. 8(2) of *PLA*) RoE can now be made exercisable by *any* person including 3rd party (**at CL both limited to grantor**)  -Termination of interest of transferee: determinable interest ends *automatically* if/when determining event occurs (PoR); with condition subsequent, estate doesn’t terminate until *claim* is made (RoE exercised) |

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| * “But if” = Condition subsequent (will divest absolute interest, LE or FS) 🡪 contingent RoE for transferor |
| * “Until/so long as” = Determinable interest (only determinable FS, not LE, leads to PoR) 🡪 contingent PoR |

1. **Remainders** 🡪 Future interest where 1) *possession is postponed* until some prior freehold estate expires and 2) where remainder does not operate so as to prematurely end prior estate

E.g. A to B for life, then to C in FS (B has LE vested in interest and possession and C has remainder in FS)

**At CL, Remainder was *only* FI that could be created in interest of 3rd party**; can be **vested or contingent**

Contingent remainder may or may not vest (RoE and PoR not valid 3rd party remainders at CL)

Creation of remainders subject to **4 Remainder Rules**

\*1 & 2 prohibit **‘springing’ interests** (based on CL doctrine of seisin, physical delivery of possession)

\*3 & 4 prohibited **‘shifting’ interests** (based on proposition that only grantor could take advantage of RoE or PoR)

\*Apply to creation of valid **remainders in *iv* transfers only** (NOT in equitable – express though will/trust)

**Remainder Rules** – apply to creation of valid remainders in *inter vivos* transfers only

**(1)** Remainder must be **supported by *prior estate of freehold*** (FS, LE, E*PAV*; **NOT leasehold**) created by same document (still applies)

-To A for life, remainder to B in FS; valid b/c A’s prior estate supports remainder interest

-To my 1st grandchild to obtain LLB; void at CL b/c no prior supporting case

**(2)** In order for remainder to be valid at outset, it must be at least ***possible* that holder of remainder will be in position to take possession at termination** of prior estate (still applies)

(a) No problem if remainder initially *vested in interest*: To A for life, remainder to B in FS (valid, B in position to take possession on A’s death)

(b) In case of *contingent interest*, there has to be possibility that condition precedent will be satisfied prior to termination of prior estate: To A for life, remainder to my 1st grandchild to obtain LLB (valid, possible that grandchild will have obtained LLB prior to A’s death)

( AThere can’t be a gap: To A for life; 2 years after A’s death, to B in FS (void, gap b/t A’s LE and B’s FS)

**(3)** Attempt to create remainder void at outset if remainder operates to **prematurely terminate prior estate** (applied to **RoE (‘but if’) following life estate**)

(a) Precludes giving RoE to 3rd party *following LE* (@ CL, RoE could operate only in favour of grantor)

To A for life, but if she does to law school, to B – VOID.

(b) Under s. 8(2) of *PLA*, can now make RoE in favour of 3rd party (RULE 3 NO LONGER APPLIES)

**(4) Remainder after a fee simple is void**.

(a) *Once you’ve given FS away, it’s gone*, you can’t create interest in favour of 3rd parties

To A is FS, but if she goes to law school, to B – VOID @ Common Law

To A in FS *until* she goes to law school, then B – VOID @ Common Law

(b) **S.8(2) says RoE can operate in favour of 3rd party**; HALF of rule 4 no longer applies

To A in FS, but if she goes to law school, to B 🡪 valid b/c of s.8(2)

(c) Half of rule 4 still applies: After a ***Determinable* FS** **cannot create PoR in favour of 3rd party**

**Destructibility of Contingent Remainders**

* Remainder vested in interest won’t be affected
* *Contingent* remainder can be destroyed if prior supporting estate comes to end and contingency not yet satisfied
  + **Natural Termination**: To A for life, remainder to B if obtains LLB; A is 30, B is 15 – valid at outset (possible for B to obtain LLB before prior estate ends; if A dies and B doesn’t yet have degree, *remainder destroyed and title goes back to grantor*)
  + **Premature or Artificial Termination**: Possible to manipulate things so as to deprive remainder of its prior supporting estate
  + **Avoiding Destruction**: No way of preventing artificial destruction of CR in BC

**(2) Equitable Future Interests – Make it Equitable!!**

**\*\*If done *inter vivos*, is through an express trust**

**\*\*Common law RRs don’t apply but conditions must still be valid**

1. **Governing Rules**
   1. Use of trustee eliminated problems of **‘springing’** interests (legal title remained with trustee)
   2. With **‘shifting’** interests, Courts of Equity gave grantors flexibility to circumvent CL restrictions
2. **Creation of EIs**
   1. **Trust** arrangement (*inter vivos* or in a will)
   2. If no trust, *Re Robson* provides strong argument that **any FIs in will should be treated as** **equitable**

***WESA,* s. 162(1)(2)(3)** – Devolution and administration of land 🡪 Unless there is right to land by survivorship, on death of land owner, land devolves to and is vested in deceased owner’s personal rep in same manner as personal property

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| ***Case*** | ***Facts/Conclusion*** | ***Ratio/rules*** |
| ***Re Robson***, 1916  (don’t rely on when advising client) | -Will provided “to daughter Helen for life, remainder to children of Helen who obtain 21”  -At Helen’s death, 2 of 4 kids were over 21  -Did kids over 21 take exclusion of those under 21? | -Court noted that title goes to personal rep of deceased, they hold as trustee for beneficiaries (or those entitled to take on intestacy); **Once equitable, always equitable (all interests in a will are considered equitable)** (see B.b. above)// s. 162 of *WESA* |

* ***Inter Vivos* Transfers** 🡪 **Common Law Remainder Rules**
* **Disposition in a will** 🡪 **Equitable** (no RRs; express through will or trust)

**\*\* “What would the effect be if this were an *inter vivos* transfer and not a disposition in a will?”**

(E.g. To A for life, but if she does *x*, then to B”)

* For *IV* transfers, at Common Law, the Remainder Rules apply 🡪 **Does it satisfy CL RRs?**
  + Is shifting interest created? If no, 3&4 are fine. Springing? Look to 1&2, explain (even if no effect)
  + Has this been modified by statute in BC? (E.g. s. 8(2) of *PLA* for Rule 3)
* **Wording change** in ***IV* transfer**? “To A for life, then to B, *but if* B does *x*, Blackacre goes straight to him then.”
  + Don’t bother discussing any changes in interests
  + CL RR problem? Rule 3 problem, would terminate A’s interest prematurely

**\*\* What if it were a leasehold interest in a will?** E.g. “To Jane until 2020, then to Michael”

* @ CL, Potential Rule 1 problem (prior supporting freehold estate)
  + If it were an *inter vivos* transfer, VOID (but it’s in a **will** here, all interests **equitable**)

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| **CH13: CONDITIONAL AND DETERMINABLE INTERESTS** |

\*\*For Part B, Q3 (would the court find the condition valid), consider consequences of invalidity, green headings below\*\*

**Qualifications** can be imposed in 3 ways:

* By way of **condition subsequent** (“but if”), which operates as divesting provision (vested subj to divest 🡪 RoE)
* By way of condition that sets limits to or causes interest to “determine” (**determinable interest**, “unless”🡪PoR)
* By way of **condition precedent** (“if”), which must be satisfied before interest can vest (🡪contingent remainder)

**Consequences of INVALIDITY:**

* **Condition subsequent (“but if”) invalid 🡪 gift absolute** 
  + Preference by courts for early/absolute vesting since it facilitates transfer, won’t destroy gift
* **If condition on determinable interest (“unless”) invalid 🡪 gift fails**
  + Courts flexible; preferable to subject transferee to questionable conditions rather than no interest
  + Courts willing to read DIs as absolute interests subject to condition subsequent to save gifts
* **Condition precedent (“if”) invalid 🡪 gift fails**
  + Courts lenient; valid ‘unless terms of condition impossible to give meaning to or involve repugnancies/inconsistencies’ 🡪 Test favours allowing person with contingent interest to satisfy interest

**Uncertainty**

Most cases involves qualifications of the 3 types:

* **Race** (*Noble v Alley*) – difficult to quantify/specify to satisfy courts’ approach to uncertainty
* **Religion** – slightly easier than race; courts more receptive
* **Residence** – easiest to show clear parameters

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| ***Case*** | ***Facts/Issues/Conclusion*** | ***Ratio/Rules*** |
| ***Noble v Alley*** SCC  (Trial J said NOT uncertain, CA agreed, SCC disagrees) | -Clause prohibited sale of property to any non whites  -Can we impose governmental restrictions on private persons’ ability to discriminate? Is condition valid? No  -Is clause **void for uncertainty?** Yes, language used in **restriction on alienation** too uncertain/unenforceable | -Court dealt with **uncertainty**  -***Clavering v Ellison* test**: Condition “must be such that Court can see from beginning, precisely upon happening of what event it was that preceding vested estate was to determine”  racism, inconsistency w/ public policy, but rather deals w/ it through straightforward legal doctrine (cowardice?) – impossible to set limits to lines of race to enable court to say whether proposed purchaser is or is not within ban |

**Restraints on Alienation**

**Two Approaches:**

1. As a matter of *principle*, RoA ought to be invalid and courts ought not extend restrictions already accepted
2. As a matter of *pragmatism*, courts should be asking: ‘does this represent substantial RoA?’ If so, likely invalid

**Restraints on Marriage and other personal restraints**

* Courts must balance wishes of transferor against interests of transferee as well as public interest (maintaining family relationships, preserving personal autonomy)
* Absolute restraints = invalid
* Partial restraints may be acceptable
* Inquire re: motives 🡪 **Punitive? Malicious? Protective?**

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| ***Case*** | ***Facts/Issues/Conclusion*** | ***Ratio/Rule*** |
| ***McDonald v Brown Estate*** | -Willmaker said share held on trust until niece widowed/divorced, then she’d get capital of property absolutely; if not, she would only get interest in share of estate and her share would go to Trevor (“apple of eye”)  -Does this = inducement to divorce? Or protective? Is condition **valid on public policy grounds**? Yes (protective not punitive) | -Language ambiguous (relationship = ?)  -Must balance interests of testator and transferee, and public interest 🡪 form of public policy (maintain family relationships)  -Look at *circumstances, nature, motives* of testator  -Court finds it was **protective**; she still gets estate income while married (absolutely if widowed/divorced)  -Gift over for Trevor also for positive reasons |

**Public Policy** – 2 possibilities:

1. Human Rights legislation may apply directly, OR
2. Facts don’t fall within provisions of HRL, to what extent can we take HRL into account in making argument re: public policy?

**Public Policy: General Arguments**

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| ***Case*** | ***Facts/Issues/Conclusion*** | ***Ratio/Rules*** |
| ***Canada Trust v Ontario (Human Rights Commission)*** 1990 ONCA | -Leonard Scholarships for WASPs, mostly male  -Does condition fail on public policy grounds? Yes (testator’s freedom important, but at odds with *social values*; **void for public policy**) | -**Robins JA**: Real issue/concern = racial supremacist language; discriminatory attitude makes it unable to stand public policy test (equality); he doesn’t limit it to public trusts; raises possibility that private arrangements *could* be covered  -**Tarnopolsky JA**: Treats recitals/language as *irrelevant*; focuses on terms of condition precedent; finds it *sufficiently certain* on technical grounds; notes jurisdiction issue (starts in ON, goes outward), looks at HRL (ON, CA, INTL); those addressed at amelioration of in=’y promote (not impede) public policy of equality; **balancing** process required; would NOT affect private family trusts (this is a *charitable* trust – latitude, higher standard) |

**\*\***Hierarchy/supremacy problematic from **policy perspective**; is there a restraint on *personal* autonomy (religion, marriage)

\*\***Private arrangements** less subject to scrutiny; is person already member of group, already dating member of race, etc?

\*\*Condition usually means transferee will simply not get something they otherwise don’t have, rather than losing something they already do have

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| **SUPPLEMENTARY LECTURE: INTELLECTUAL PROPERTY** |

**\*Should we grant property rights in ideas?**

* **Why:** Encourage people to share/disseminate ideas (court can intervene and ensure benefits); reward labour/effort

**✗ Why not**: How do you quantify ideas? If co-created, how to split rights? How to prove who came up w/ idea?

**\*Copyright:** Ideas not protected; *expression* of ideas protected; idea-expression dichotomy; literary = ?

\*Importance of **free speech**

**\*Rights to Information:**

* Is there an argument for granting property rights in info?
  + Yes: Wealth/value to be derived; why property rights to protect info? Good against world, more certain (vs. torts for example), fewer limitations; alienability; enforceability; financing
  + No: Info is *discovered* (therefore should not be protected), but a lot is developed through labour (justification for right); distinguish b/t types of info that exist
* Would negative consequences arise from protecting info through PRs?
  + Might not be able to be used by other parties in useful ways (e.g. results of test for pharmaceutical drugs – to what extent should that be able to be held back or disseminated to public? 🡪 policy reasons)

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| *Desney v Wilder* – Central issue = protectability of ideas; not usually regarded as property (implies s/t that can be owned/possessed to exclusion of others, ideas are non exclusive, non rivalrous)  -Court rules ideas NOT property; however due to power imbalance b/t parties, court looks to find way to arrive at more just outcome – breach of K? Idea given in exchange for K to pay? Implied K on basis of 2nd convo (secretary took dictation)  **-**Can’t have property right in ideas, only *expression* of ideas |
| *INS v AP* – Granting property rights in info could negatively impact speech, knowledge, flow of info (US context, strong 1st amendment rights); INS bribed AP employees for info, pulled from AP bulletins; papers published at same time  -AP argued property rights in news they gathered, had expended labour/resources to get info, INS as freeloader; but INS had no choice, not same access; public right to info?; split decision, Majority: no PRs in facts, develops idea of *quasi property* (hot news doctrine); reconcile PRs w/ public rights; idea-expression dichotomy as limitation in copyright |
| *CCH Canadian et al v LSUC* – Originality test: must originate from author, be more than mere copy, be exercise in skill/judgement that is more than trivial; leading Canadian copyright case on what is essentially *original* in Canadian copyright law; ways to protect data not involving CR: K law? Tort of unfair competition? Crim law?  -Difficult for courts: how to distinguish ideas and info and expression of them; what is an original selection of facts? |

**------------------------------------------------------------ END OF TERM 1 --------------------------------------------------------------**

**------------------------------------------------------------ TERM 2 -------------------------------------------------------------------**

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| **CH5: REGISTRATION OF TITLE** |

**GENERAL PRINCIPLE/PURPOSE OF REGISTRATION**

**What can be registered?**

* Only ***CL and equitable interests*** can be registered (may register incidents of **title** to land, NOT **use** of land, e.g. restrictions on zoning); Note: *Aboriginal Title claims can NOT be registered*

**Un-registrable interests:** Some CL/Equitable interests that CANNOT be registered

* **Equitable mortgage by deposit of *duplicate* indefeas title** (**s. 33**) (indef’ble = can’t be dfted by other claimants)
  + Note: Legal and equitable mortgages CAN be registered
    - **Legal Mortgage**: Bank lends to A, A gives mortgage to B
      * At CL, this involves actual transfer of legal title to B
      * Bank has “legal mortgage,” A retains equitable title, has “equity of redemption” (could be offered as security for further loan; can get title back)
    - **Equitable Mortgage**: 2nd, 3rd, 4th mortgages (A mortgages EoR, gives EM to C, D, E)
      * Higher risk so higher interest rates; C, D, E have right to call for foreclosure
    - They are ALL registrable: FS as core, everything else registered *against* FS
    - Note: *Mortgagor* = land owner (creates mortgage); *Mortgagee* = Bank (lends $)
  + **Duplicate Indefeasible Title** is *not* a transfer of title (registered FS owner **can only apply for DIT if there are *no mortgages/AfS* registered against it**; used as informal/ST security for loan, treated as mtg in substance – if A doesn’t pay C, C can go to court have it treated as EM, meant to be short term)
* **Particulars of a** **trust** (**s. 180**)
  + Beneficiary has no power, BC LTS protects their (equitable) interest through registration of trust
  + “In trust” notation put on title and doc creating trust filed w/ Registrar but no *particulars* of trust entered
  + Imposes duty on registrar @ LTO (to put trust notation): Not supposed to register s/t unless consistent or if there’s a court order; ***McRae v McRae***: Failure to do so doesn’t defeat trust (just = special protection)
* **Sub-agreement for sale** (**s. 200**)
  + A registered FS owner enters **agreement for sale** w/ B (payment over time: A remains owner until B pays in full, B’s interest as registered charge against A’s FS title; if paying $2000/month and value goes up, B may enter *sub* agreement for sale w/ C @ $3000/month – not registrable); more common @ commercial
  + Agreements for sale ARE registrable, sub agreements are NOT (policy: enter at own risk; more efficient)
  + Or C could step into B’s spot as holder of charge to have interest registered

**Some non CL interests that CAN be registered**

* Caveats (ss. 282-294), Certificates of Pending Litigation (ss. 215-217), Judgments (ss. 210-214)

**Basic Scheme of Registration**

* All registration interests can be divided into 2 categories:
  + **Legal Fee Simple**: surface, strata lot, or airspace parcel
  + **“Charges”**: Estate/interest in land *less than* FS; i.e. All other registrable interests (mortgage, caveat, CPL, judgment; aka encumbrance – anything registered as charge under **s. 179**)

**Registration of Legal FEE SIMPLE** (@ LTO)

* First come, first serve; app time/date stamped, scrutinized, registered (*CIT must be produced*)
* Once FS registered, Registrar must issue **DIT** (assuming title not subject to registered mortgage or AfS; if thereafter app to register mtg/AfS made, duplicate must be produced for cancellation, if mtg/AfS cancelled later, new DIT can be issued 🡪 **no DIT if there is mtg/AfS registered against FS**!)
* **Registration = “conclusive ev at law and equity” that person named is “indefeasibly entitled to estate in FS”**
* Transfer *inter vivos*: Same process as for initial registration; R must be satisfied there is sufficient *description* of land, and that instrument confers “good safe holding and marketable title” upon applicant
* Transmission on death: Title vests in personal rep of deceased who holds it in trust; Executor/admin registered as owner; transfer then made to person entitled to take under will/intestacy

**Registration of CHARGES** (generally analogous to FS process; non CL/equitable; reg: ss. 197-237, cancel: ss.241-259)

***Caveat*** (**ss. 282-294**) – can be anyone as long as they are *claiming an interest in land* (don’t have to be on register)

* Informal/S-T way for indiv to protect interest in land (effect = “freeze” registration process to deal w/ prob), ltd duration (2ms – person lodging can commence litigation in that time period, if so, date of caveat = date of priority)
* Can be lodged by person claiming entitlement to interest in reg’d land; reg’ed owner; registrar
* *Cannot* be done if claim of caveator, if successful, would **destroy ‘root of title’** of person against whose title caveat is lodged (e.g. A grants FS to B, and to C; B’s claim *would* destroy A’s RoT (ability to deal w/ property); if B lodged caveat, C cannot register; BUT if A grants *lease* to B and FS to C, B’s claim would NOT destroy A’s RoT, C can proceed to register subject to B’s claim) – both based on A’s going back on original deal w/ B

***Certificates of Pending Litigation*** (**ss.215-217**) – need court doc showing action commenced, naming FS owner as D

* May be registered by any person commencing or party to a proceeding claiming interest in land, CPL filed in same manner as charge against FS (CPL protects s/o claiming an interest in land; aka *lis pendens* = “pending litigation”)
* General effect = Registrar cannot make entry that has effect of “charging/transferring/affecting” land (Exception: lodging caveat or registration of indefeasible title)
* Individual may proceed to registration subject to CPL (outcome of litigation would be imposed, **s.216**)

***Judgments*** (**ss. 210-214**)

* $ judgment can be registered (in same way as charge**: s. 210**) against judgment debtor’s registered interests in land (gives judgment creditor *security*); Registrar must notify owner of land
* Judgment that affects title will result in change to title

\*\***Role of Registrar**: Determine whether s/o seeking to register has “**Good safe holding and marketable title**”; permissive power/discretionary (to make corrections to register), no *duty*

**The Assurance Fund**

* Function = compensate those who might be **deprived of interest in land** due to operation of land title system
* Requirements for recovery against AF in BC
  + Basic: show ***deprivation*** *of land/interest in land*, then:
  1. ***Fraud*** *or wrongful act* in respect of registration of person other than claimant as owner of land
  2. ***Conclusive*** *nature of operation of the Act* prevents claimant from recovering
  3. ***If not for Act***, plaintiff would in fact have succeeded (This step most often in Q)

***\*\****Note: Is it **legal interest** protected by *nemo dat* or **equitable interest** protected by equitable doctrine of notice? 🡪Not sure? Do both analyses.

***McCaig v Reys*** illustrates 3rd point (ability to recover in absence of Act)

Facts: Farwest sold land to South Transport (headed by P); ST sold to D by sub-agrmt; D offered option to sell back portion, P agreed (option never registered); D then sold by sub-sub-agrmt to Rutland (via Jerome) who knew of option, *said they’d honour, but then registered own interest*; ST assigned option to P; Jerome sold to Jabin w/o notifying Jabin of option; Jabin took title as *BF*PfVw/oN, acquired GSH&MT/registered

Analysis: Jerome acted **fraudulently**, P **can’t exercise option** assigned to him by ST 🡪 basic and first 2 elements satisfied, but 3rd not (w/o Act, P would NOT have succeeded 🡪 P’s interests was *equitable*,w/o act would have had to seek equitable remedy; but as *BF*PfVw/oN, Jabin protected by equity, has title in equity and law) 🡪 P can still gets damages against Rutland though; **no AF protection** in this case

* 1. Other basis for claim against AF 🡪 loss/damage caused solely or partially by ***fault of Registrar***

***Royal Bank v BC***: Distinction b/t mistake of *procedure* and of *substance*; loss did not flow “naturally and directly” from Registrar’s procedural error so recovery NOT possible (recovery against AF only possible if loss caused solely/partially by **procedural** mistake of Registrar)

\*\*See also *Stonehouse v BC* (severance of JT case)

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| **CH4: RELATIONSHIP B/T THE COMMON LAW & LTS** |

\*\*LTS does *not* displace pre-existing property law principles unless *inconsistent* w/ Torrens (eq. doctrine of notice)

**When is the transfer operative?**

* At **CL**, deed had to be “signed, sealed, **delivered**”
* **Torrens** system, what is required? **Registration**-based
  + ***LTA:* S. 20(1)**: ***Except as against the person making it***, instrument purporting to transfer, change, deal w/ or affect land or estate or interest in land does not operate to pass estate/interest, either at law or in equity, in unless instrument is registered in compliance w/ Act.
    - B/t transferor and transferee, registration NOT necessary for interest to pass (but when *does* it?)
  + E.g. Registered owner A transfers to B who does NOT register; A then transfers to C who DOES register
    - At CL, B protected by *nemo dat* (simply fraudulent, no title passed to C)
    - In Torrens, C’s interests prevail (*bona fide* purchaser for value w/o notice)🡪 protect **purchaser**

**Tests for Delivery** (synthesized) 🡪 \*\*Apply both tests on EXAM\*\*

* Common Law: Based upon *intention* of transferor (*Ross*), *at time of transfer*, whether they intended to be immediately/unconditionally bound (*Zwicker*); presumption of intention absent contrary evidence (*Ross*)
* Torrens: (Seems to be) Based upon whether transferee is in *position* to register (*McLeod*)

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| --- | --- | --- |
| ***Case*** | ***Facts/Issues/Conclusion*** | ***Ratio/Rules/Analysis*** |
| ***Ross v Ross***  **1977**  Common Law Test for Delivery | -Ms. Lynds intended to transfer property to grandson, deed was S/S/D, witnessed/executed by lawyer; she said she’d register, didn’t, deed found in purse upon death (didn’t tell g-son)  -Was there delivery of deed? (Was transfer to g-son operative); daughters argue no, lose  -**Intention was clear, delivery effective** | -Presumption of delivery unless evidence that was NOT her intention  -**Intention** construed from behavior, circumstances 🡪 clear here, intelligent woman, properly executed)  -Actual **phys deliv** **NOT necessary** (CL test for deliv)  -**Knowledge**/awareness of transferee **NOT necessary** for delivery |
| ***Zwicker v Dorey***  **1975**  CL Test for Delivery | -4th wife v son from 3rd marriage; Dad conveyed property to son in deed w/ clause saying no recording until after death; later conveyed to self, P, and D (no condition); P was told she’d get everything, claims first deed was will/ineffective; D claims it was effective upon delivery, title passed  -1st deed = testamentary (but not executed properly so no effect); title passed to P wife under subsequent deed | -For delivery: Must have **intention** to be **immediately and unconditionally bound** *at time of transfer* for delivery (Dad did not intend this; first deed was testamentary doc)  -Son had docs, so even if transferee has **knowledge** and docs have been physically handed over, it is NOT enough to trump **intention** of transferor (i.e. *handing over docs not sufficient for delivery*)  -Phys deliv + knowledge of transferee *not* enough w/o INTENTION (to be I/UB @ time of transfer) |
| ***MacLeod v Montgomery***  **1980**  Torrens Test for Delivery  (AB case,  statute//s.20  w/o opening  words) | -G’ma transferred property as gift to g-daughter, **transfer doc delivered** to g-d once executed, G’ma **never gave her duplicate title**, g-d couldn’t register, g-ma dies  -Was gift to g-d complete? Was transfer operative?  -No, gift incomplete b/c g-d did not have everything needed to register (DIT)  -Court reads in transfer of title in equity prior to registration taking place, even in title system **title will pass pre-registration if transferee in *position* to register**  -*McGee*: phys deliv of central signif @ Torrens | -Execution of transfer with delivery but w/o delivery of duplicate title is NOT sufficient🡪 donor must do everything in power to complete gift/put transferee in position to register  -In registration system, **transferee must have *everything* needed to register** (equity will not compel s/o to complete gift, *but*, once complete, will enforce it)  -Equity: once transferor has done everything to put transferee in position to register (including handing over DIT), presumably w/ intention to transfer, then title is presumed to have passed  -**Policy** choice: equity won’t allow transferor to go back on word as against transferee (would create confusion) |

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| **CH6: REGISTRATION** |

**REGISTRATION: FEE SIMPLE**

* ***Indefeasible title*** (in force/un-cancelled) = conclusive evidence at law and in equity, as against Crown and all other persons, that person named in title as reg’d owner is *indefeasibly entitled* to estate in FS to land described (**s. 23**)
* ***Creelman***: Effect of indefeas’y – K b/t HBC and private Co; Co said HBC not allowed to hold property except for certain cases; title as conclusive; if HBC appears as reg’d owner, a/o dealing w/ them has to rely on that/assume; if there are problems it is only registrar who can deal w/ it, no one else can go beyond/behind reg’d title

**Adverse Possession and Indefeasibility** (Squatter’s possession)

* + Pre-1970s: Possible to acquire title through *length* of possession through doctrine of adverse possession (squatter’s right); based on LP restricting right of ‘true’ owner to bring claim 🡪 required **20yrs** against individual or 60yrs against Crown; could only be acquired against *unregistered* land (registered title immunized from claim in AP)
  + Post-1970s: Doctrine largely eliminated as a result of Law Reform Commission; inconsis w/ Torrens; saving clause for rights acq’d before 1975 (*Limit’n Act* s. 28(2)); No claim in AP agst Crown (non retroactive, *Land Act* s. 8(1))
  + Claim in AP cannot be made against registered title (*LTA* s. 23(3)); **s.23(4) as excn** re: 1st indef title reg’d (e.g. If A est’s claim in AP agst B’s land, B hasn’t reg’d, A had poss’y pre-1975; even if B reg’s, A still can make claim since B is *first* IT reg’d; but if B transferred to C, A couldn’t make claim – rarely is a/o dealing w/ 1st IT)
  + Claim in AP can only by made
    - If claim is against unregistered land AND
    - There was **20 years** of possession as against private party or 60 against Crown
    - If right was acquired *before 1975* (i.e. 20/60yrs AP before 1975) 🡪 unlikely!
  + ***PLA*, s. 36 🡪** Addresses concerns re: encroachment on/enclosure of adjoining land (building, fence, etc.)
    - Court *may* (discretionary) grant easement (w/ compensation), vest title (w/ $), require removal
    - Case law indicates that s. req’s court to take broad/equit appch to disputes (“bal of convenience” b/t parties)

**Statutory Exceptions to Indefeasibility**

***LTA,* s. 23(2)** “*Indef title, in force/uncancelled, is conclusive ev at law and equity, as agst Crown and all other persons, that person named in title as reg’d owner is indef’ly entitled to estate in FS to land described in indef title,* ***subj to following****”:*

Sets out exceptions; can be ÷ into 3 categories:

* + - (a) Reservations in Crown grants
    - Public rights ((b)(c) taxes, (f) right to expropriate, etc)
    - Restrictions operating in favour of private individuals (this was our focus – see below)

**Leases –** **S. 23(2)(d)** (… “*lease/agrmt for lease for term not exc’g 3yrs if there is actual occ under lease/agrmt”*)

* Lease/agrmt to lease will be honoured up to 3yrs even if not registered, as long as there is *occupation*
* Leases longer than 3 years must registered (based on *total*, including option to renew)
* Rationale: Prefer not to clutter up LTS by registering large number of short-term leases

**Charges and other entries** – **S. 23(2)(g)** (*“…caveat, charge…judgment, pending court prcdg…noted/endorsed on title”*)

* Not general exception, but allows for operation of other legislation (narrow exception – when work has benefitted land, gives builder ability to recover against property within very ltd time period)
* Lien has priority over all judgments, executions, attachments, and receiving orders recovered, issued, made after that date

**Boundaries – S. 23(2)(h)** (*“right to show that all/prtn of land is, by wrong descript of bndries, impr’y incld in title”*)

* Title not guarantee as to boundaries of land; need to have survey done to check

**FRAUD as an exception to Indefeasibility – S. 23(2)(i)**

* Indefeasibility subject to *“right of person deprived of land to show* ***fraud, including forgery****, in which registered owner has participated in any degree.”*
* **Forgery**
  + E.g. A is reg’d FS owner of Blackacre; Rogue forges A’s sig to transfer Blackacre to B; B registers as new FS owner; should A be able to recover Blackacre from B?
    - At CL, *nemo dat* would have applied (void instrument 🡪 void transactions)
    - In Torrens system, 2 different approaches:
      * **Immediate Indefeasibility**
        + Application of general Torrens principles
        + If purchaser has not participated in forgery/fraud, he has guarantee of indefeasibility *as soon as he is on title* (i.e. indefeasibility is immediate)
        + Triggered by registration, coupled w/ innocence (so above, B is protected, A will have to seek recovery against AF)
      * **Deferred Indefeasibility**
        + Forgery as *exception* to general Torrens principles
        + Person taking through forged instrument – even if innocent – does NOT have indefeasible title, but *can* *give* good root of title to subsequent purchaser (i.e. indefeas’y is *deferred* until such purchase takes place) (NOT w/ charge: ***CF***)
        + As soon as 3rd party enters picture, hands tied, purchaser should be able to rely on register (so above, A could recover property from B, but if B sells to C first, C has indefeasible title, A would have claim against AF, B has no protection)
  + **S. 25.1** (2005 amendment: **BC follows *immediate indefeasibility*** but section is confusing)
    - **(1)** – Person acquiring land/estate/interest by registration of void instrument does NOT acquire any on registration of such instrument 🡪 *suggests deferred indefeasibility*
    - **(2)** – Even though instrument purporting to transfer FS is void, transferee named in instrument, in good faith and for valuable consideration, purports to acquire estate is deemed to have acquired that estate on registration of instrument 🡪 *suggests immediate indefeasibility*
    - **(3)** – Even though reg’d instrument purporting to transfer FS estate is void, transferee who is named in instrument, is, on date that section comes into force, the reg’d owner of estate, and in good faith and for valuable consideration, purported to acquire estate is deemed to have acquired that estate on reg of that instrument 🡪 *suggests immediate indefeasibility AND is retroactive*

\*Amendments meant to ensure “**immediate legal certainty** of land title for person acting in good faith, who unknowingly acquired a FS interest in property *through forged transfer*, provided individual did not participate in fraud”; meant to “ensure legal *fairness* and protection to owners AND purchasers”; could increase public confidence in LTS

\*Recommendation was also made that courts be given discretion to restore title to original owner if s/he could establish **“substantial connection”** to property that could not adequately be compensated by $ (i.e. via AF) – this was *not* done

* **NOTICE of an unregistered interest** (i.e. allegations of **fraud** based on fact that *purchaser had such notice*)
  + **S. 29(2): “***Except in case of* *fraud in which he participated*, person K’ing/dealing w/ or taking transfer or charge from registered owner is NOT, despite rule of law or equity to contrary, affected by notice, express, implied, or constructive, of an unregistered interest affecting the land or charge”
    - I.e. If it’s in *LTA* or legislation as exception (e.g. lease), have to respect it; if it’s not registered, don’t have to respect unless you said you would
    - Unless doing s/t out-and-out dishonest, you should be able to rely on register!
  + **Judicial interpretation of s. 29** and factors seen as important:
    - ***Van City Savings v Serving for Success*** (SCC) 🡪 ***S/t more than knowl is required (notice +)***

Facts: City Centre bought/became reg’d owner of hotel where Ds had pub on ***unregistered* 5yr lease**; Ps advanced CC loans, CC defaulted, Ps petitioned for foreclosure (which would remove D tenants); petitioners found purchasers who insisted on *vacant* possession; Ds claimed right to remain under unreg’d leases arguing petitioners were *aware* of rentals (and added revenue), argued conduct in seeking vacant possession despite knowledge = fraud under s. 29(2)

Issue: **Is knowledge of occupation enough to = fraud? (Notice) 🡪 NO, need Notice +**

* + - * Ds argue knowl enough; Ps argue need additional ‘dishonest’ act for equitable relief
      * Court agrees w/ *Szabo*, before a finding of equitable fraud can be made, must be evidence of **actual notice** coupled w/ some **act of dishonesty** on part of person seeking protection under s. 29 (**Notice +**) 🡪 Ps win, purchasers entitled to vacant possession
  + **Two divergent lines of authority** re: req’t of add’l elements of dishonesty (*\*Engage w/ uncertainty\**)
    - ***Notice*:** Purchaser of real property who takes title to prop **w/ knowl of prior unregistered adverse interest** and who attempts to rely on s. 29 may be found to have committed equit fraud
    - ***Notice +*:** Requires ***more* than knowledge** (“Notice *plus*”), usually conduct that constitutes a form of *dishonesty* (***Van City***) 🡪 on balance this is more predominant in the case law now
  + **BCLI recommendations for reform:**

*Notice*: Registration w/ actual notice of unreg’d interest as fraud as undermining intent of *LTA*

*Notice +*: Denies effect to pre-reg knowledge of unreg’d interest unless coupled w/ dishonest act

* + - **Strict Torrens approach** – knowl alone is NOT fraud; must be participatory element (dishonest)
      * Pros: Consistent w/ Western provinces; certainty
      * Cons: Too great a departure from considerations of fairness/equity accorded to LTS in BC; neg’ve affect on rental market; detrimental to privacy interests of trust beneficiaries
    - **Caveats w/ indefinite duration** – serve as notice of caveator’s interest, preserve priority over subsequent registration (in BC they are currently temporary: 2ms)
      * Pros: Fast, inexpensive means of protecting priority of most interests other than FS
      * Cons: Interfere w/ ease of transfer of land; “fish or cut bait”, either register or don’t (in b/t limbo = odd balancing act)
    - Significance of time at which notice occurred (see **Timing** below)

**Equitable Fraud vs. Legal/CL Fraud**

* **EF** as principle of common *morality*; purchase of prop known by purchaser to be subject of prior sale; equity as intending to rep s/t that operates on *good conscience* – concerning to some (need added element of dishonesty?)
* **Fraud @ CL**: intentional or recklessly making false rep of fact w/ intention that it be acted upon and reliance on false rep by person to whom it was made to detriment of that person; deliberate; high standard

**Actual vs. Constructive Notice**

* Express/Actual: you were told/presumed to be told about it
* Constructive: they *should* have known (RP would have know), should be able to ‘put 2 and 2 together’

**Notice vs. Notice +**

* Some Courts say: Notice alone sufficient to deprive s/o of protection of **s. 29**
* Others/perhaps more say: Notice *plus* some element of dishonesty (e.g. collusion b/t purchaser and vendor to defeat unregistered interest) (***Van City***)

**Timing** 🡪 At what point purchaser (or person attempting to seek protection under **s. 29**) actually learned about unregistered interest that is seeking to be protected; the earlier the notice, the more likely it is will have to respect unreg’d interest

* If notice comes *after* registration, it is irrelevant (***McCaig v Reys***🡪 purchaser didn’t find out until *after* he had registered, notice had no effect; vendor expected unreg’d interest to be respected, purchaser said they would, turned around and didn’t – clearly that’s fraud)
* Point where K came into existence important (notice *after* that point should not be seen as affecting purchaser, unfair to disrupt plans in order to account for unregistered interest)

**“In Personam” Claims** 🡪 Personal claims against D asserting P should derive some benefit from title; potential sources = K, equitable doctrines; LTS not intended to let FS owner escape claims that could be brought against them in their personal capacity; Torrens designed to protect *purchaser* (not reg’d FS owner); *caveat emptor* is not s/t that applies here

**REGISTRATION: CHARGES *LTA*, s. 26**

**Meaning of Registration:**

***Dukart v Surrey* 1978 SCC** – **Expansive rdg of reg’n** (*deemed reg’d once w/in LTS* – does it take us to a ***recording*** sys?)

Facts: Land developed for residential lots; developer transferred foreshore reserves to trustee, w/ trust notation; intended to give effect to rights created in various conveyances to purchasers of lot; FRs purchased by municipality on tax sale (owner/trustee hadn’t paid municipal taxes owing on property, so things from property sold, tax sale normally clears interests against land, but NOT easements); no trust notation entered (so once D purchased it, trust notation no longer there); D decided to build public toilets, some in front of windows of houses abutting on FRs (easement = non possessory right of entry); P sought injunction b/c it obstructed her right of access and wins

Issue: Does right of access granted to P’s predecessor in title amount to valid easement? YES

Did P’s easement survive the tax sale (was it registered?/what is registration?)? YES

Analysis: Easement was *validly created* and *registered* against the land (intended to be easement attached to title); but did it survive tax sale?

* ***LTA*, s. 276** provides that where land is sold on tax sale, title is “purged” of all charges, *with some exceptions* including “any **easement** registered against land” 🡪 so, Q = was easement registered? YES
* Act does not actually define registration – clear that in Estey J’s view that **Act contemplates different kinds of registration**
* *Narrow ratio* (Can’t actually be restricted to this interp, but Mickelson likes it): Easements in trust docs will survive tax sale if in fact property was held in trust when sale took place
* *Broadest interp* (Obstacles to this interpretation b/c of terms of *LTA,* s. 27): If doc is *on file* at LTO, any interest in that doc could be deemed to be registered for purposes of LTA; broader interp = more inconsistent w/ Torrens
* *Middle ground***: Interests that are *created in trust docs* are deemed to be registered** for the purposes of the LTS

Conclusion: P/appellant wins; right of access survived tax sale, is valid easement (considered a registered charge)

**Indefeasibility of Charges?**

**\*\*Diff b/t protection accorded to registered FS** and **REGISTERED CHARGES:** Progression/rlnsp b/t 3 BCCA cases…

|  |  |  |
| --- | --- | --- |
| ***Case*** | ***Facts/Issues/Conclusion*** | ***Ratio/Analysis*** |
| ***Credit Foncier***  ***v Bennett***  (1963)  Seems to take us in CL direction of search for good root of title | -Allen, acting as “Bennetts”, forged mtg, sold it to Stuart (innocent), who *registered* it and sold it to CF; Bs did not respond for requests for payments, CF obtained foreclosure order  -CF argued that they were relying on LTS/register (s. 197: Reg’r need be satisf’d that appl’t entitled to be reg’d as owner of chg), saw it was reg’d, so they should be protected (use of AF) – no, they lose  -**Registered charges are not indefeasible** | -**Charges get lesser level of protection than FS**   * Reg’d FS: **s. 23** “conclusive ev @ law” (validity *irrebuttable*) * Reg’d charge: **s. 26** conseq’s of reg of chg: reg’d owner “deemed” entitled (mng TBD by context; validity *rebuttable*)   -**Reg’d charge is not necessarily valid**: **S. 26** just *deeming* provision (deemed to have interest) – up to anyone to challenge that, **go beyond/behind register** to see what outcome would’ve been at CL:  -Original was forged, should have been void *ab initio*, all subsequent transactions also void; CF **only dealt w/ CH, not FS owner** (v. *CCB*)  -Not deferred indefeasibility std b/c charge, not FS  -One **cannot assume the validity of docs creating charge** (unlike relationship that exists w/ FS, charges are diff situation, diff inquiry)  - **In case of charges, have to do CL search for good root of title** for charges (contrary to “mirror principle”) (Opened door to this) |
| ***Canadian Commercial Bank*** ***v Island Realty***  (1998)  (Limits *CF*) | -Park Meadow granted mtg to Imperial Life, 2nd mtg to Island Realty, 3rd mtg to Almont  -Rogue forged ***discharge* of 2nd mtg** (held by Ds), resulting in Almont’s 3rd mtg moving “up” into position of 2 mtg; PM foreclosed, IR cannot recoup losses  -Ds contest their *losing priority through forged doc* they had no control over/no way to protect  -Holder of 3rd mtg Almont says he relied on register, check to make sure discharge was reg’d, were *bona fide* 🡪 both legit claims! | -Slightly closed door opened by *CF* (GRoT; Torrens about certainty)  -**Charge holder does *not* have guarantee of indefeasibility**  -Charge holder can take advantage of (piggy back on) guarantee of indefeasibility that the FS enjoys *as long as dealing directly w/ reg’d FS owner*  -**Charge holder protected if dealing directly w/ registered FS owner**, able to rely on it  -Unlike in *CF* where mortgagees had not in fact dealt w/ registered FS owner but rather CHs; Almont (3rd mtg holder) *was* dealing w/ FS owner, entitled to rely on ability to deal w/ property  \*As owner of registered charge, you are owner of *legal* interest that can be assigned  -**Doc creating charge valid if can be traced back to original owner**  -B/c Almont acquired interest from PM, did not take under void instrument, has priority over IR |
| ***Gill v Bucholz***  (2009)  (Combines *CF* & *CCB*)  -Interp of ‘idfsblty’ section of *LTA* s.23 and ‘fraud exception’ s.23(2)(i) | -P took out legit mortgage from bank; random rogue claiming to be P took out later mtg from D  -Real Gill P sued D  -Trial J held mortgagee D protected b/c couldn’t have known weren’t dealing w/ real Gill; P can recover from fund, give that $ back to D  -BCCA: Mortgagee D *not* protected  -Act treats reg’d FS owners differently than CHs (2005 amdmts made distinction even more clear) | -You can rely on guarantee of indefeasibility enjoyed by registered FS *if FS owner has guarantee of indefeasibility*  -If FS owner could have title challenged by original owner b/c they were rogue, then CH *cannot* take advantage of that  -If FS owner being dealt w/ by CH is himself a rogue whose indefeasible title could be challenged under s. 23.2(1) CH out of luck  -Differing interpretations of effect of case (problematic): Newbury J: Doesn’t re-visit *CF* but does imply there is dramatically different std for charges than there is for FS and therefore *maybe* all bets are off for CHs; BUT don’t read this case in vacuum, but against backdrop of 2 previous CA decisions in area  **-Fraudster doesn’t have indefeas title; charges can’t piggyback**  **-S. 25.1** – dealing w/ fraud, void interest (*nemo dat*) (Newbury J) |

\*\*What are the policy probs arising if we are left w/ *Gill* where CHs have to take out title insurance b/c they can’t know for certain that FS owner has that Guarantee of Indefeasibility (why register a charge at all then if you won’t be protected?!)?

* Pre-*Gill* Q = Am I dealing w/ the registered FS owner?
* Post-*Gill* Q = Am I dealing w/ registered FS owner AND are they entitled to guarantee of indefeasibility?; Lang of statute indicating leg’re has adopted policy that costs of fraud perp’d against mortgagees and other CHs should NOT be borne by public (as funders of AF) but by lenders and other CHs (good or bad, court must give effect)

**Validity of the interest**

Does Act provide any guarantee that doc create a valid *interest*?

* Wording of **s. 26** makes clear that owner of charge not deemed to have interest that appears on register but deemed to have interest *created by the instrument* 
  + **Registration of charge does NOT constitute determination by Registrar that interest validly created**
  + Open to subsequent purchaser to convince court that this is *not* a valid interest (go beyond/behind register)

**Notice of terms and conditions**

Is prospective purchaser fixed w/ notice of T&C of charge? (*Dukart* told us docs filed at LTO contained T&C could constitute form of registration but there are different interpretations…)

* **S. 27** – Says that registration of charge gives notice of content of documentation *as it relates to that registered interest* 🡪 so if doc creates 2 interests (i.e. a lease w/ option to purchase) each must be registered separately (not protected by *Dukart v Surrey* here)

**Priorities as between charges**

* **S. 28** provides that when 2 or more charges are registered, as b/t those charges, priority is determined by ***dates of applications*** *to register* 🡪 Reverses CL, which determined priority on basis of date of *creation* of interest

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| **CH7: FAILURE TO REGISTER** |

**General Principles**

* ***LTA,* s. 20** – Sets out general princ that **unreg’d instrument does NOT pass title**/transfer estate or interest in land
  + E.g ***Sorenson v Young*** – P reserved RoW when making transfer of adjoining property but failed to register it, could not enforce that right against 3rd party; if you don’t register, you’re out of luck
* ***“Except as against the person making it”*** = exception to general principle (opening words of s. 20)
  + Unregistered instrument, provided it is valid (and provided there has been delivery) IS effective *as between parties* to that document
    - E.g. If A transfers Blackacre to B, even if instrument is not registered, title has passed *as b/t A and B* (recall delivery cases: if there has been delivery, transfer is effective b/t parties)

**Judgments**

* Unregistered doc may allow transferee to take priority over a registered judgment creditor
* Rules pre-1979 were very favourable to judgment *creditors*; modified after to be less so:
* **S. 210** – must register judgments in same way as registering a charge
  + Must find actual piece of property owned by D/judgment debtor (can register against multiple interests, but have to do so individually)
  + No auto attachment to future acquisitions
* Effect of registration of judgment: **s. 86** of *Court Order Enforcement Act* preserves general CL principle that a **judgment creditor can take no more than judgment debtor actually owns**
  + Judgment creditor = successful plaintiff; judgment debtor = unsuccessful defendant
  + Judgment forms lien or charge in same way as if debtor had actually granted lien/charge
  + **S. 86(3)(c)** – Subject to right of purchaser who, before registration of judgment, acquired an interest in the land in good faith and **for value** under an instrument not reg’d at the time of registration of the judgment
  + E.g. *Davidson v Davidson:* A is reg’d owner of lands, transfers to company *for value* but Co never reg’s; A’s wife reg’d 2 jdmts obtained against A – what is **priority as b/t unreg’d transfer & 2 reg’d jdgmts**?
    - Pure Torrens principles – registered judgment would prevail over unregistered transfer BUT
    - B/c of language of **s. 86(3)(c)** priority of unregistered interest takes interest
    - If A can’t make claim against Co (b/c of “except as against the person making it”), A’s wife cannot make claim against Co (but if A to Co had been ***gift***, no reason for Co’s intrst to prevail)
    - **Unregistered transfer** (for value) **prevails** **over registered judgment**
* **Effect of** **s. 20** on reg’d jdmt cred’s (“Except as agst…”) – Allows unreg’d interest to prevail over reg’d judgment

**Other Interests** (*L&C Lumber*)

* **Unregistered doc may allow a 3rd party to claim an interest in land as against transferor**
* “Reasonable restrictions” must be read into “irrationally wide provisions” of **s. 20**
  + Real purpose of Act is to *protect innocent 3rd parties*
  + Consequently, person making transfer will be affected even if interest is unregistered
* ***L&C Lumber Co v Lundgreen*** 🡪 **Third party may have rights against transferor**

Facts: D FS owner sold timber to M w/ right to enter/cut; M transf’d interest to L&C (3rd pty); agrmnt and assnt not reg’d; L&C denied entry by D, claim as reg’d FS owners they don’t have to respect interest

Analysis: Under Torrens, **innocent 3rd party is protected** (i.e. *bona fide* purchaser for value w/o notice)

“A cannot take from C what A has transferred to B and B has transferred to C” (person making transfer will be affected even if that interest remains unreg’d and is transferred to 3rd party); **s. 20 protects 3P**

Conclusion: D still obliged to L&C; person making transfer affected even if intrst unreg’d/transf’d to 3P

**“Prohibited Transactions”**

\*Unregistered doc may be effective as b/t parties to agrmt even if it involves transaction seemingly prohibited by *LTA* itself

Controversial BCCA decision has been *overturned by legislative amendment* (**s. 73.1**) but basic premise important:

***International Paper Industries v Top Line Industries*** (**illegal transaction**)

Facts: Topline D had land, leased it to paper company P; bad relationship, D landlord sought declaration cancelled

Analysis: **Lease is illegal** and can’t be registered but can continue to exist as unregistered; s. 73.1 – can’t subdivide land into smaller parcels for purpose of selling/leasing it unless subdivision done according to Act (obtain approval); any leases of this type are not registrable

-Prior to case, people thought unregistered leases could be effective b/c saved by s. 20 (unregistered instrument effective as b/t parties) 🡪 s. 73 sets out basic consequences/penalties; no right to register

-BCCA regretfully says **transaction ineffective** ***even as b/t parties***, basing dcn on analysis of public policy of s. 73

-Want to maintain integrity of LTS but also need to give municip’s power to control dev’t

Note: Case overturned by 2007 leg’ve amendment (s. 73.1); obj = ensure op of Torrens, maintain publ ben’s of sys

**S. 73(1)** provides that *except in compliance with Act*, person must not subdivide land for purposes of selling or leasing (if you’re going to create smaller parcels out of larger parcel must be done in structured way: zoning, bylaws); public interest in controlling development even if it interferes w/ property owner’s decision to use land in certain way

* + Prior to *Top Line* it was assumed that this provision did not prevent transactions regarding un-subdivided land from being valid as b/t 2 parties to agreement

**The impact of *Idle-O Apartments*** 🡪 **S. 73.1** does NOT have retrospective effect

* + Leases entered into before enactment of **s. 73.1** (May 31, 2007) are **invalid** and **unenforceable**

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| **“Except as against the person making it”** – An unregistered document, provided it is valid:   * Is effective as b/t parties to that doc (*Sorenson v Young*) * May allow transferee to take priority over registered judgment creditor (*Davidson v Davidson*) * May allow 3rd party to claim interest in land *as against transferor* (*L&C Lumber*) * May be eff as b/t parties to agrmnt even if it involves trans’n seemingly prohibited by *LTA* itself (*Top Line*; *Idle-O*) |

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| **CH3: ABORIGINAL TITLE** |

**\*\*Aboriginal Title** is a **common law** **doctrine** that attempts to reconcile itself w/ ordinary CL of real property and rules of property in indigenous legal systems

**Historical Background**

* **Colonialism** 🡪 Inherent imposition of legal, social, political, cultural, linguistic, economic, religious order
* European interests changed from **trade** to **settlement** in mid 19C 🡪 led for need of harder geopolitical boundaries
* Original treaties exceedingly brief, structured as titled deeds but only signed by transferor chiefs (agreement??)
* Relationship b/t aboriginals and British Crown embodied in 2-row **wampum** (aboriginal legal doc) 🡪 embodies indigenous understanding of relationship b/t themselves and British (exists in parallel, separate/distinct/sovereign, connected but separate)
* **Treaty making in BC**
  + Beginning was end! All took place 1850-1854
  + Gov Douglas = pragmatist, only wanted to acquire what he knew he could control/govern effectively
  + 1964: Douglas Treaties found to be treaties (BCCA) rather than just land transfers; Q – what are *terms*?
  + Douglas thought aboriginals would be full participants in colonial economy (// fur trade), retired in 1864
  + Trutch took over, no experience in fur trade, was settlor/white supremacist racist, saw relationship b/t Brits and abo’s as competition for land; reduced reserves of Douglas
* BC joins Confederation 1871, became part of *BNA Act*: aboriginals domain of fed gov (relinquished control to Crown) 🡪 negotiating transfer of control set out in Transfer of Union, province to set aside land held as reserve land held by dominion in trust
* Feds refused to recognize AT, won’t have treaties; BC prevailed: no more treaties, but Indian land policy
* Reserves gave aboriginals toehold in original territories (tiny postage stamp reserves; allocated to secure access to fisheries, but then fish re-allocated to other peoples so abo’s didn’t have access to resource that formed basis on which land was allocated!)

Refusal by province to recognize AT 🡪 Indian land policy imposed jointly by prov/fed gov 🡪Unique reserve geography 🡪 Issue of AT unresolved 🡪 Back before courts in ‘60s/’70s and ‘80s/’90s (*Delgamuukw*)

***St Catherine’s Milling*** (1888 Eng PC) 🡪 “Personal and usufractory”; dependent on goodwill of sovereign

***Calder v AG of BC*** (1973 SCC) 🡪 Extinguishment must be *explicit*

* Nisga’a brought claim that title had never been extinguished (didn’t ask court to define *nature* of title, just declare it still existed)
* First time 6 judges said AT was a legal interest (3 said existed/extinguished; 3 said existed/not extinguished; 7th said need permission from prov to sue them, hadn’t got it so no declaration but case still a success)

***Guerin v The Queen*** (1984 SCC) 🡪 “AT is a legal right derived from the Indian’s historic occupation and possession of their tribal land” and predates the *Royal Proclamation of 1763*

***R v Sparrow*** (1990 SCC) 🡪 SCC recognizes independent ARs (food fishing rights, subject only to conservation req’s)

Some general aspects of the **Gitskan understanding of relationship to land**

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| ***Concept*** | ***Common Law*** | ***Gitskan relationship to land*** |
| **Social/political/legal organization** | -Fixed points of power in state-based society (or separation of powers)  -*Centralized* power | -Organized around decentralized kinship; matrilineal  -*Reciprocal* rights and obligations  -Ongoing respect as basis of law; jurisdiction exercised through feast  -Spirits and animals seen as members of society; interactive power  -Horizontal authority structure, absence of central power |
| **Concept of Ownership** | -CL goal = transferability of land  -Monopolistic (possessor and possessed); exclusivity | -**Inalienability**: can’t be divided unless House unable to produce enough $ to perform feast responsibilities (or required to relinquish as compensation)  -**Reciprocity**: B/t 2 legal entities; Not ownership but ‘ours’ like family members; merging (spirit of place gives itself to group and group leaves power/mark on land) 🡪 Ownership of territory as marriage of Chief and lands |
| -Crown ownership and interaction as similarities | |
| **Who “owns”?** | -Registered and unregistered interest in land  -JTs and TiC | -House owns (through mother’s side, max 30 families or 150 people)  -Chief responsible to communicate, recreates the relationship  -Landless peoples dependent on others, lower status  -Collective/communal |
| **Chief as trustee?** | -Crown ownership, trust, presumption of resulting trust | -Holding for own benefit, multifaceted relationship, responsible to ensure all people in House respect spirit of land |
| **On what basis is “ownership” established?** | -Possession, registration, notice | -*Adaawk* records history/role as precedent; oral histories  -Humans can even fuse w/ land by transforming into animals (binding group even closer to territory) |
| **How is entitlement to territory made known to others?** | -Registration, notice, K | -Face-to-face legal system, consensus building and consultation  -Feast formalizes (taking of a name)  -Spirit power brought to life by *naxnox* performance |
| **What do you “own”?** | -Interest: FS, LE, lease, etc. | -Authority/*responsibility*  -Narrow sense House’s sole possession = its *daxgyet* (power)  -Wider view: possession necessary in own right for House to function  -Territory boundaries precisely delineated, usually follow natural features  -By following law, power/*daxgyet* flows from land to people through Chief  -By using wealth of territory, House feeds Chief so he can fulfill law |

***DELGAMUUKW v BC*** (1997 SCC) 🡪 Establishes key ideas and **Test for Justification**

Trial: McEachern J rejected AT and right to self-gov; endorsed traditional white views, dismissed claimants as primitive peoples who had neither law nor government

**NATURE of Aboriginal Title**

* “***Sui generis***” – 2 aspects:
  1. Must be distinguished from “normal” proprietary interests such as FS; diff from ordinary interests
  2. Characteristics must be understood w/ ref to CL rules of real property AND rules of property found in aboriginal legal systems (court looks for middle ground)
* AT as *sui generis* = unifying principle underlying various **Dimensions of AT**, which include:
  + **Inalienability** 🡪 cannot be transferred/sold/surrendered to anyone except Crown (//*RP*, paternalistic/protective; Crown as essential intermediary)
  + **Source 🡪** arises from prior occupation of Canada by abo people; relevant in 2 ways:
    - Physical fact of occupation (derives from CL principle that occupation = proof of possession)
    - Relationship b/t CL and pre-existing systems of law
  + **Communal/collective nature of right** (over simplified, flattens out cultural realities)
    - Held by all members of aboriginal nation (cannot be held by individuals)
    - Collective decision making

**CONTENT of Aboriginal Title: (once it is proven!)**

* **Right to exclusive use and occupation** (for variety of purposes; need not be aspects of abo practices, customs, traditions that are integral to distinctive abo culture 🡪 rejection of province’s view)
* **Inherent limit** (lands cannot be used in matter *irreconcilable* w/ rltnsp which forms basis of AT – controversial)
  + Manifestation of principle that AT = *sui generis* interest, distinct from ‘normal’ interests like FS
  + Derives from:
    - Recognition of importance of *continuity* of relationship b/t community and land over time
    - View that land has inherent/unique *value* in itself
    - Analogy w/ *equitable waste* (abo people unimpeachable for waste, can change nature of land but can’t destroy basis of connection)
  + If abo peoples wish to use their land in way that AT does not permit, must *surrender* lands and convert them to non-title lands
  + Land uses NOT restricted to traditional activities, but subject to *overarching* limit
  + Policy: Attempt to balance AT alongside societal concerns? Who decides on the limits?

**Aboriginal title protected under** **s. 35(1), *Constitution Act, 1982***

* AT is a type of AR but is distinct from other ARs, confers right to land itself:
* Rights fall along ***spectrum*** w/ respect to degree of connection w/ land
  + At one end: ARs that are practices, customs, traditions integral to distinctive abo culture of group claiming right but no claim to title b/c insufficient occupation/use of land
  + Middle: Activities that take place on land, related to particular piece of land, but nevertheless site-specific right to engage in particular activity
  + Other end: AT, confers right to land itself
* **AT = Right to exclusive occupation and use of land**

**Requirements for PROOF of Aboriginal Title** (also see *Marshall; Bernard*)

* **Occupation** prior to sovereignty (1846 in BC; NOT prior to *contact* as for ARs)
  + Date appropriate b/c
    - AT = burden on Crown’s underlying title – doesn’t make sense to speak of burden on underlying title before that title existed (AT crystallized at time sovereignty was asserted)
    - Under CL, occupation/possession sufficient to ground AT, not necessary to prove land was distinctive/integral part of abo society before European arrival
    - Date of sovereignty more certain than date of first contact
  + Need to take ***both common law and aboriginal perspectives*** into account in establishing proof of occupancy
    - **Aboriginal perspective**: Land tenure system, laws governing land use
    - **Common Law**:
      * Fact of physical occupation = proof of possession grounding land title
      * Can be established in various ways (construction of dwellings, cultivation, enclosure of fields, regular use of definite tracts for hunting/fishing)
      * Accounts for group size, manner of life, material resources, technological abilities, character of land claim
  + No need to demo land was of central significance to distinctive culture
  + Includes any land that parties have maintained **substantial connection** with until now
* **Continuity**
  + If present occupation is relied on as proof of occupation pre-sovereignty, must be continuity b/t present and pre-sovereignty occupation
    - No need to establish unbroken chain
    - Must be “**substantial maintenance of connection**” b/t people and land (*Mabo*, Aus HC)
    - Fact that *nature* of occupation has changed will not ordinarily preclude claim
* **Exclusivity** of occupation at sovereignty
  + Requirement flows from definition of AT: right to *exclusive* use/occupation of land
  + Equal weight given to CL and abo perspective for proof of exclusivity
  + Can be demonstrated even if other abo groups were present/frequently claimed land
  + *Joint* title can result from shared exclusivity
  + If occupation can be shown, but NOT exclusivity, possible to establish ARs short of title

**Test of JUSTIFICATION for infringement –** ARs, including AT, no absolute, may be infringed by prov/fed govs

1. **Compelling and substantial** **legislative objective**
   1. Recognizes prior occupation of NA by abo people and need for reconciliation w/ Crown sovereignty
      1. Reconciliation b/t abo societies and broader political communities
      2. Limits placed on ARs are part of reconciliation
2. **Consistency with the** **special** **fiduciary relationship** **between the Crown and aboriginal peoples** (*Guerin*)
   1. Does not require that ARs always given *priority* but requires they be *taken seriously*/respectfully
   2. Qs to be addressed, depending on circumstances of inquiry (non exhaustive):
      1. Whether there has been *as little infringement as possible* (minimal impairment)
      2. Whether, in situation of expropriation, fair *compensation* is available
      3. Whether abo group in Q has been *consulted*  (**Duty to Consult**)
   3. Will be variation in degree of scrutiny required 🡪 degree of scrutiny = function of exclusive nature of ARs at issue (the **broader the AR** being claimed and the broader the ramifications for non abo interests/more likely to impact other rights, the **lesser the degree of scrutiny**)
      1. E.g. ***Sparrow***: Claim to fish for food/ceremony = narrow right, any infringement on it by gov should be scrutinized *deeply*
      2. E.g. ***Gladstone***: Claim to commercial fishing = broad right, need to be more deferential to gov, requires less scrutiny due to multiple interests at stake (could infringe *other* people’s rights)

**Application of the test of justification to aboriginal title**

* Lamer J: Range of **legislative objectives** that can justify infringement of AT is *broad*, TBD on case-by-case basis
  + E.g. forestry, agriculture, mining, hydro power, general econ dev’t of BC interior, protection of environ or endangered species, infrastructure, settling foreign populations (= micro list of colonial factors! ☹)
  + Lamer started w/ broad scope for AT, by end had narrowed (allows broad scope of gov objs to infringe!)
* Manner in which **fiduciary duty** in 2) operates will be function of nature of AT
  + Involves *assessment of interests at stake*, precise value of abo interest in land, grants/leases/licences granted for its exploitation
  + Exclusive nature of AT relevant to degree of scrutiny of infringing measure (broad right claimed, less scrutiny; narrow right, deeper scrutiny)
  + 3 aspects relevant: Right to exclusive use/occupation; right to choose what uses land can be put (subj to “inherent limit”); has inescapable economic component
* **Duty to consult** 🡪 Right to choose to what ends piece of land is put to use (FD may be satisf’d by involving abos)
  + Nature/scope of duty of consultation will vary w/ circumstances
  + Can range from mere notice, discussion of important decisions, to full consent
  + Must be done in *good faith*, w/ intention of substantially addressing concerns of abo peoples
* **Economic aspect** of AT suggests that compensation is relevant to Q of justification too
  + Fair compensation will ordinarily be required when AT is infringed
  + Amount of compensation will vary w/ nature of title affected, nature/severity of infringement, extent of accommodation

***Marshall; Bernard* – Proof of Aboriginal Title** (doesn’t talk about inherent limit)

* **2005** decision on 2 cases out of Maritimes dealing w/ claim to **log for commercial purposes** based on AT of Mi’kmaq people (regulatory offence – being charged for logging w/o license; defence = right to log based on AT)
* McLachlin CJC: **Court needs to translate pre-sovereignty abo practice into modern legal right**; involves both abo and Euro perspectives; does practice correspond to core concepts of right claimed
* Sensitive and generous approach to evidence (but still CL std)
  + Does oral history provide evidence not otherwise available or ev of abo perspective on right claimed?
  + Reasonable reliability (ensures witness = credible source of particular people’s history)

**Standard of Occupation for Title**

* AT established by abo practices indicating possession similar to that associated w/ title at CL
* Exploiting land, rivers, seaside (for hunting/fishing etc.) may translate into AT to land if activity was *sufficiently regular and exclusive* to comport w/ title at CL
* No need for constant possession (fact specific) but *continuity* required

**Approach to Exclusivity**

* Viewed from *aboriginal* perspective
* Does NOT require proof that abo group physically excluded others (evidence of acts of exclusion)
* Group had to demo **“effective control”** – ability to exclude others *if they chose to do so*

**Nomadic/semi-nomadic people**

* Can establish AT 🡪 depends on circumstances (Q = whether nomadic people enjoyed *sufficient physical possession* to give them title to land; need to establish degree of physical possession/use equivalent to CL title)

\*\**Delgamuukw* vs. *Marshall; Bernard* re: test for AT

* *M/B* **more specific articulation** of *Delgamuukw* Test; clearer more concrete standard
* And/or *M/B* as ***narrowing*** approach in *Delgamuukw* (stricter higher std for proof, problematic from abo POV)
* Or *M/B* as ***widening*** of approach in *D* (left open Q of whether nomadic peoples could make out AT claim)
* Advocacy perspective: *M/D* does = narrowing, but broadening, no need for lower courts to worry
* AT in *M/B* **highlights** how narrow test for proof of AT in *D* was (always been strict/narrow test, clarified in *M/B*)

***Tsilhqot’in Nation* 2007 BCSC; 2012 BCCA**

Chief brings claim for bands, seeks declaration of AT and of ARs to hunt/trap/trade in response to BC’s approval of logging in contested area w/o, according to claimants, adequate prior **consultation/justification** by government

**Vickers J** (Trial) 🡪 sympathetic to Tsilhqot’in

**Overall approach/understanding of reconciliation**

* Courtroom as adversarial (limit of legal system); conflict of legal systems/perspective
* Reconciliation as *process*, not just outcome (courts only one piece of it)
* Need to include *negotiations;* challenge to address issue of living together
* Address *historical* injustices; ground in experience of Tsihlqot’in people
* Weaves in notion of decolonization (notion has less broad appeal than reconciliation)

**“Territorial” versus “site specific” approaches to AT**

* Territorial (Tsihlqot’in): Said to be approach of Tsihlqot’in; not based on site-specificity but an *overall* approach to territory; less artificial, more reasonable understanding of how Tsihlqot’in related to/lived on land; different understanding of land/property; abo people recognized territory as their own
* Site-specific (Gov): Must establish occupation on *site by site* basis (high threshold of proof for use/occupation)
* Vickers J attempts to find a position b/t the 2, meaningful articulation of AT given jurisprudential constraints
  + Go beyond site-specific but not extend to broad swaths of land
  + Test is occupation but usage/occupation needs to be understood through lens of abo culture (e.g. “cultivation” may not look like Euro farm!)
  + Trails/waterways as different form of occupation (patterns in b/t S-S formed part of overall occupation)
  + AT exists, would exist on site-specific basis in this case; take into account specific Tsilhqot’in POV, how they interacted w/ land, how land provided for them

**Approach to private lands issue**

* Pleadings as *inclusive* of private lands (Indian Reserves removed from Claim Area but private lands were *not*)
* Province made veiled attempt to argue private lands were NOT covered by claim to AT, that granting FS title had extinguished AT to privately held lands 🡪 no, only Feds have jurisdiction to extinguish (regardless of private interests in claim area, those interests have not extinguish/cannot extinguish ARs including AT)
* Court unwilling to accept position that simply b/c s/t subject to transfer in FS that it is off the table for AT (balancing, comes down to analysis under test of justification for infringement of AT)

**BCCA**

**Overall approach/understanding of reconciliation**

* No mention of decolonization (vs. Vickers J); Vickers J more concerned w/ reconciliation as *process*
* More focused on *outcome* (respect for culture, honour what is necessary to protect tradition but *rights* will do that in most cases, title not necessary 🡪 title as having detrimental impact on Crown sovereignty)
* Uncertainty as posing obstacle to negotiation (recognizing as little as possible seems inconsistent w/ reconciliation)
* Acknowledges importance of respecting abo cultures/peoples but their view of reconc doesn’t really achieve that!
* Heavily tilted toward ensuring Crown sovereignty; avoid placing unnecessary restrictions on it

**Site-specific approach: how does the Court understand it?**

* Their understanding of *territorial approach* is more rights-based; site-specific does NOT mean postage stamp
* Characterizes Vickers J’s understanding of AT as corresponding to/implying acceptance of territorial (equates territorial approach of Tsilhqot’in w/ that adopted by Vicker J 🡪 accurate reflection?)
* Rejects postage stamp approach to S-S approach; rather as a **“network”** of sites over which title can be claimed and where ARs can be exercised
* Less concerned w/ taking account of circumstances as per Tsilhqot’in perspective but do take acct more broadly

**RELATIONSHIP BETWEEN THE LAND TITLE SYSTEM AND ABORIGINAL TITLE – and its rationale**

***Skeetchestn*** BCCA 2000

* Facts: Ps bring claim after they were refused registration of CPL and caveat from registrar against lands in Kamloops; lands were granted in FS by Crown to Kamlands now holding lands under CIT; Ps argue resort development as being incompatible w/ use of land
* Issue: Can AT claim be reflected within the confines of the LTS? Is AT an interest in land as recognized in LTS?
* Court says nothing in legislative history of BC warrants conclusion that legislature intended claims put forth by Ps (CPL) to be registrable (**s. 215** = reason for rejection, requires claim of *registrable estate or interest in land*, what is claimed is not such: *Uukw*)
* Content of AT not marketable, alienable only to Crown (lacks element of **marketability** necessary to create **“good safe and marketable title”**, the foundation for registration under *LTA*)

***Uukw v BC*** 1987 – P abo’s in *Skeetchestn* argued court ought overturn *Uukw* b/c of *Delgamuukw*

* Decided prior to *Delga*, before elucidation of nature/content of AT; *D* silent on whether AT should be registered
* Held that Torrens system of registration enacted by *LTA* does NOT contemplate registration of ARs

\*\*Recall: Arguments for and against rethinking that relationship as discussed in class

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| **CH11: CO-OWNERSHIP** |

**\* Co-ownership:** 2 or more persons have simultaneous rights to possession of property

\* “Unity of possession”🡪co-owners🡪*concurrent* interests

\* 2 forms abolished (Coparcenary – succession to female heirs jointly; Tenancy by Entireties – marital, single unit, consent)

**Joint Tenancy vs. Tenancy in Common**

* JTs have **right of survivorship** (1 dies, survivor automatically becomes absolute owner of undivided interest; whereas for TiC, if 1 dies, his/her interest passes according to will/intestacy)
* **RoS** takes priority over normal rules of descent on death

**Joint Tenancy:** Essential Elements:

1. **Right of Survivorship**
2. **Need for 3 unities** in addition to unity of possession (defining characteristic of *all* forms of co-ownership)
   1. Unity of *Title* 🡪 Interests must derive from same instrument/document/transaction (e.g. transfer *i-v*, will)
   2. Unity of *Interest* 🡪 Must be same interest, = size (can’t have 1 lease, 1 FS or one w/ 1/3, other w/ 2/3)
   3. Unity of *Time* 🡪 Must vest simultaneously, come into being at same time

**BCLI Recommendations**

Amend *PLA* so interests in JT may:

* Be of ***unequal***size 🡪 Greater flex’y; give indiv property owners range of options (e.g. if rlnsp ends, retain maj’y)
* Arise from *different* instruments
* Arise at different *times*
* If above adopted, ¾ unities would be abolished, RoS would be *only* distinction, so:
  + **TiC** be replaced by term **“co-ownership w/o survivorship”**
  + **JT** be replaced by **“co-ownership w/ survivorship”**

**Common Law preference for JT’y**

* If all 4 unities created, CL *presumption* is that **JT** is created (if any absent, must be TiC); //pref for early vesting
* Grantor can indicate *intention to create TiC* w/ 4/4 unities, but must do so expressly (e.g. **Words of severance** “share and share alike” create TiC 🡪 matter of interpretation) –***Robb v Robb***

**Equity preference for TiC** (statute completes this @ s. 11, reverses CL presumption of JT to TiC)

* Started w/ same presumption of CL but gave effect to it differently:
  + More willing to find indication of intent that doc intended to create TiC in interpreting docs (more likely to see words as ***words of severance***, willing to reverse CL presumption)
  + Certain situations deemed to *reverse* CL presumption (treat as C-O’s as TiC in equity even if JTs in law)
    - If they contributed **unequal shares** to purchase prices (3 unities could still be present)
    - In **commercial transactions** where partners purchased property (RoS inappropriate)
    - **Joint mortgages** where 2 or more people lent $ and borrower transferred title to lenders

***PLA,* s. 11** – **C-Os are TiC unless contrary intent appears in instrmnt** (explicitly); there is argmt that this is all-incl but:

* ***Robb v Robb*** 🡪 Facts: Widow sought declaration as sole owner of shares/***leasehold*** interest in coop housing; deceased’s kids claim entitlement to interest in assets (will left all to wife but kids seeking variation under *WVA*)

Issue: Is widow’s interest as JT or TiC? (If JT, she would get all by RoS; if TiC, subject to will/variations of it)

Analysis: W had paid all $ for purchase price but H transferred Cali property to her later as consideration (his name was put on assignment too); @ CL w/o WoS, H&W would be JTs w/ RoS; Equity doesn’t like JT and leg’re also prefers TiC 🡪 but, CL result of JT must prevail (no unequal contrib given Cali transfer); **s. 11(1) does NOT apply to *assignment* of lease** (can’t be interpreted that way, too broad/liberal, could’ve been drafted that way but wasn’t)

\***S. 11** **covers 4 types of transactions** (transfer in FS, devise in FS, *creation* of charge, agrmt for sale) but does NOT deal w/ assnmt of existing charge (lease) (would cover *creation* but not *transfer* of lease, so CL default rule for JT applies); (Tysoe J not happy, reaching, wants W to take as JT)

Conclusion: **W holds interest as JT**, is entitled to all by RoS (s. 11 does *not* apply)

**Transfer to Self and Co-Ownership**

* At CL, wasn’t possible to transfer to self 🡪 **s. 18** of *PLA* now provides for that (including to self and other as JTs)
* Party who is JT to an interest can transfer their half interest to self (execute Form A) to change it to TiC (destroys unity of title) OR sole owner can transfer to self and another as JTs

**Registration of Title**

* ***LTA* s. 173**: General provision relating to registration by co-owners; Part 11 of *LTA* dealing w/ reg of FS
* ***LTA* s. 177**: In case of **JT, notation** to that effect must be entered in register (JT not default now)

**Relations b/t Co-Owners**

* Common *right to possession* of property
* Co-owner who has not been in possession *generally* not entitled to “**occupation rent**” against/from C-O in possession except in case of ouster (forced to leave) 🡪 courts will to interpret “**constructive ousting**”
* BUT, co-owner *generally*:
  + Entitled to **share of profits** generated by prop (normally determined in proportion to their share in prpty)
    - **Exception**: NOT if part/all of profit derives from *actual work/use/occupation* of 1 co-owner:

***Spelman v Spelman*** – Facts: H&W owned house as JTs, ran boarding house; W left “voluntarily”, H stepped in to run BH; W returned, asked for share of profits and rents from house owned as TiC’s in Victoria

Analysis: H not receiving *unjust* share of profits; just using property, putting in work; it’s H’s work that has gone in to BH, running it (court painting w/ broad brush here, impossible to know how much profit due to his vs. her work, but doesn’t want to parse; not super persuasive analysis but we must take account of it, authority for: **when 1 C-O’s effort/labour involved, other C-O not necessarily entitled to profits**)

Conclusion: W not entitled to ½ profits from BH (vs. Vic house – W entitled to portion of rent)

* + Responsible for **share of expenses** associated w/ property
    - Frequent situations of***joint* *liability*** (e.g. mortgages, taxes), where:
    - If 1 C-O pays full amount, can collect share from other C-O (situations of K’ual liability)
      * ***PLA*, s. 13** – Addresses certain JL expenses; remedy of C-O called on to pay b/c of default of other and has paid more than proportionate share (apply for relief)
      * **S. 14** (broad discretion): On hearing application under s. 13, court may
        + Order that person who made pymt has lien agst other’s interest
        + Order that defaulting owner’s interests be sold if amt not paid w/in certain prd
        + Make another order “incl order that app’t may purchase interests in land of defaulting owner at sale”
      * **Ss. 13-14**: procedural (doesn’t give right, just used to enforce indep right of contrib)
    - As general rule, C-O has no right to compensation for expenses of maintenance/reno costs
      * BUT on **partition/sale**, 1 C-O may be able to claim *greater share* of proceeds b/c of *differential contribution* towards improvements; in such cases *occupation rent* may be assessed as well (***Mastron v Cotton***: 1 JT can’t sue other for use/occ, but when JT term’d, court may make all just allowances, should give such directions as will do complete equity b/t parties)

\*\*The above are *default* rules – if C-Os have NOT est’d own rules, these apply, but nothing prevents and every reasons to encourage C-Os to agree re: how these issues should be dealt w/ (e.g. buying w/ friends, siblings; prevent conflict, clarify)

**BCLI Recommendations**

* *PLA* should be amended so court can order C-O to
  + *Account to* another C-O for profits or expenses in relation to co-owned land
  + *Contribute proportionally* to necessary expense related to co-owned property
  + *Compensate* another C-O
  + *\*\**Expands s. 14, gives it nuance
* *PLA* should be amended so, on app by C-O for relief above, court may consider whether (non exhaustive)
  + C-O owing default to another C-O has *paid more than proportionate* share
  + C-O has been *excluded* from occupation/use of land
  + C-O has *received more than proportionate* share of rents/profits
  + C-O has made *improvements* increasing value of land
  + C-O who claims contribution/set-off expense should pay fair occupation rent
  + C-O has engaged in *unreasonable use* of land

**SEVERANCE of Co-Ownership**

**Severance of JT**

* Converts to TiC
* Can come about in 2 ways:
  + Destruction of one of the unities (*Stonehouse*, *Sorenson*)
  + Agreement b/t JTs (*Flannigan v Wotherspoon*)

|  |  |  |
| --- | --- | --- |
| ***Case*** | ***Facts/Issues/Conclusion*** | ***Ratio/Analysis*** |
| ***Stonehouse v BC***  **1962**  **Severance**  **✓**  *by execution/*  *delivery of*  *transfer* | -H&W JTs, **unknown to H**, W conveyed interest **to daughter**, deed wasn’t registered; W died, D went to register w/ registrar; H claims unreg’d deed had *no effect on JT*, he is entitled to W’s share upon her death as **RoS**; H makes claim under AF to loss he blames on registrar (failed to see if W was alive when reg’g deed)  -Did conveyancing of W’s interest to D sever JT into TiC thus eliminating H’s RoS? YES  -**Unregistered deed was operative to sever JT @ CL** (no duty on registrar to inquire re: W)  -H only has TiC, held jointly w/ D | -On **execution/delivery of transfer** by W, she divested herself of entire interest (no interest remained which could pass to H by RoS)🡪once W passed to D, interest passed (“except as agst the person making it” – W is *making* it); at that moment D had claim against W and so severance occurred (**transfer to 3rd party**)🡪D held interest via unreg’d transfer doc, H held his through original transfer, in what was now TiC) 🡪 destruction of unity of title  -**Registration is NOT necessary to sever JT**  **-Knowledge of other JT is NOT necessary**  -All that is required is actual act that destroys unity |
| ***Sorenson Estate v Sorenson***  **1977**  **Severance**  **✓**  *by declar of*  *trust* | -H&W were JTs w/ 3 lots, 3 kids; divorced  -W executed: transfer of land, **trust deed for son**, action for partition  -Upon W’s death, H filed caveat against lands claiming he was solely entitled as surviving JT by RoS (i.e. that JT was *not* severed by W’s actions)  -Did any of W’s unilateral acts sever JT? Yes, only trust deed (H loses)  -**Execution of will** cannot sever JT (RoS preferred to last will)  **-Action for partition** where action subsequently discontinued insufficient to effect severance  **-Unilateral intention** **NOT enough to sever JT**  **-Declaration of trust** severed JT (son then held interest through DoT) | -**Unilateral intention NOT enough to sever JT** (e.g. executing will; can’t sever unity of death b/c RoS kicks in immediately)  **-JT severed by declaration of *trust*** (but not by agreement, lease, or will)  -***Williams v Hensman***: JT may be severed in 3 ways:  1) **Act** of any one of persons interested in operation upon own share may create sev as to that share  2) Mutual (**express**) agreement  3) **Course of dealing** sufficient to intimate that interests of all were mutually treated as constituting TiC (**implicit**)  -Lease was only for lifetime of W (did not interfere w/ survivorship; intention was not to sever)  -Charge (mtg) by H to W did *not* affect RoS  -W declared in trust she was severing BUT no ev that trust ever came to knowledge of H  -No severance *except* for declaration of trust |
| ***Flannigan v Wotherspoon***  **1953**  **Severance**  **✓**  *Mutual agreement (implicit)* | -Deceased was JT of property w/ D; they sold lands to Ds Robinsons as JTs; deceased died, left will dated *after* sale to Rs, left all estate to daughter P who now brings action against D for declaration that she is entitled to ½ interest (OR that D has ½ interest in trust for her; rather than D taking all as JT through RoS)  -Was course of dealing b/t D and deceased sufficient to establish **mutuality of agreement** necessary to effect severance? YES | -Importance of looking to **factual circ’s** when dealing w/ **severance by mutual agreement**  -P claims JT severed by mutual agreement (inferred from conduct) 🡪 court says this is reasonable, so P daughter wins  -7 factors taken into account (contextual)  1) Agreement for sale 2) Plan for ÷ of monthly pymts 3) Fact that pymts were ÷ as planned 4) Corresp w/ bros that neither need worry 5) Arrgmt w/ bank 6) Convos 7) Uncle’s convo w/ niece (warning her not to count on payments) |

**Severance of JT**

* Can take place during lifetime of JTs (*Williams v Hensman*):
  + By **unilateral act** of one of JTs (*Stonehouse*, *Sorenson*)
  + By mutual (**express**) agreement (*Flannigan v Wotherspoon*)
  + By “any **course of dealing** sufficient to intimate that interests of all were mutually treated as constituting a TiC” –*Williams v Hensman*
* **Unilateral Act**
  + Unilateral *intention* NOT sufficient; an ACT that destroys one of unities is req’d (*Stonehouse* + *Sorenson*)
  + Simple: JT can just transfer interest to self **or** 3rd party to sever (but not *too* straightforward: *Sorenson*)
  + Registration of transfer is NOT required (*Stonehouse*)
* **Agreement: Express and Implied**
  + Must ascertain whether JTs *agreed* to sever (done expressly or courts can *infer* agreement from conduct)
    - Look at **context**: Situation, details of specific circumstances, relationship b/t parties, etc.

**BCLI Recommendations**

* In order to sever JT unilaterally, severing C-O (or other person receiving interests) must **give NOTICE** of severing transaction, including mortgage, to other JT(s) (RoS is s/t JT can *rely* on, notice gives opp to plan/act)
  + Notice of severing transaction = balancing act; but registration = clear!
  + Other options: Consent/court order as in SK, MB; status quo; notification alone

**Partition and/or Sale**

Co-ownership can be terminated by **agreement** or by a **court order**

* *Partition of Property Act* sets out legal framework (focus on whether there is a *right*), ss. 2, 3, 6-8
* Can result in physical division but is usually an *order for sale of property and partition of proceeds*
* On face of statute, C-O entitled to order for partition; but court has *discretion* to refuse to make order in certain circumstances (***Harmeling***)

***Harmeling v Harmeling***:

Facts: H&W married, bought property using $ from sale of H’s trout farm, built house later partly funded by W’s pers injury settlement (from chiro due to work on farm!); W left to live w/ another man, started prcdings for partition/sale (they are JTs)

Issues: Should an order for partition and sale be made by the court? NO (majority); YES (dissent)

Analysis: **There is a *prima facie* right of a JT to partition or sale and the Court will compel such partition or sale *unless justice requires that such an order should NOT be made***;

**Seaton JA, Majority:** In this case, order should NOT be made b/c:

* Home built largely w/ H’s $ and particularly adapted to his needs 🡪 convinced W just wants $
* His half of proceeds would not provide enough; at over age 70 shouldn’t have to start again (husband-friendly)
* Treats it as more open ended question

**Craig JA, Dissenting reasons:** Court would be justified in refusing order if it would cause ***serious hardship***to other party (substantive and attitudinal difference from Majority); more interested in engaging w/ the reality/details of her interests

* If “relative hardship” means anything less than serious it should not be used as test for discretion, fails to give due weight to fact that owner should be entitled to have share when he wants it failing *compelling* reasons not to receive it
* W lived at H’s trout farm *full time working* (while he was away), sustained injuries doing all the chores
* Even though H claimed to add her as JT only to ‘protect’ her, court says no reason to change arrangement
* When W left home, it was temporary, told H she didn’t intend to leave, but he changed locks!
* Rather than focus on relative hardship b/t parties, focus on serious hardship, ask what type W would have (not cut and dry!); *both* are vulnerable, order for partition should recognize W’s legit interest in property

**BCLI Recommendations**

* Extend class of eligible applicants
* Eliminate requirement of applicants having an immediate right to possession
* Take out language of “If this Act had not been passed”; instead just say you have right to apply for P/S