HOW TO BEGIN THE FACT PATTERN

1. Who has the possessory interest in Blackacre?
2. Who has a competing interest in Blackacre?
3. Has there been fraud/forgery?
   1. If forgery—VOID, unless it is to a BFPV of EIFS
   2. If fraud—VOIDABLE (first transaction is a forgery, second transaction to BFPV is okay)
   3. If the disputed element is not an EIFS, probably not protected
4. Which interests take priority?—interests in land take priority over personalty, apply first in time doctrine
5. Who can go to the assurance fund?
   1. Who is getting fucked over?
      1. Why is this person getting fucked over?

HOW TO BEGIN THE PERPETUITY/REMAINDER PROBLEMS (say the greatest interest possible)

1. If the grant is inter vivos
   1. Identify words of purchase/limitation
   2. Look for remainders
      1. Apply remainder rules
         1. Apply statute to protect any ROEs
   3. Are the limitations valid?
      1. if CP: sufficiently certain
      2. if CS: has to SUPER DUPER CERTAIN AT THE OUTSET
      3. public policy
2. If grant is a will—the interests are equitable (Re Robson)
   1. purchase/limitation
   2. apply RAP
      1. if it violates, go to statute
   3. Are the limitations valid?

Aboriginal Title (Ch. 3)

* Ab title is more than an ab right, is recognized by common law (case-by-case basis)
* Courts attempt to reconcile aboriginal rights with Crown sovereignty
* 2 issues: governance and land title

Indian Act- defines broad interests in reserve land, defines governance as a federal responsibility; largely

discriminatory toward Ab people

Royal Proclamation of 1763- unilateral declaration of British governance and sovereignty, all land vested in

Crown; recognition of Ab rights at common law, fiduciary duty to treat Ab people fairly and honourably

St. Catherine’s Milling- recognized ability of gov’t to unilaterally extinguish aboriginal common law rights

S. 35(1) of Charter- entrenchment of existing aboriginal and treaty rights into Constitution; justification

required for any gov’t infringement

Indian Oil and Gas Act- grants mineral rights, permits development of oil and gas reserves under Ab title

Delgamuukw decision (Gitskan/Wet’suwet’en claim for fee simple, then Ab title)- defect in

pleadings/factual issues = new trial; Ab title requires exclusive occupation of land prior to sovereignty

3 criteria for aboriginal title:

• 1) Occupation pre-sovereignty

• 2) Continuity btwn prior and present occupation

• 3) Exclusive occupation at sovereignty

\*Ab title is sui generis (distinct from other proprietary interests)

• **Inalienable**- cannot be transferred, sold or surrendered to anyone other than the Crown

• **Communal**- held by all members of an aboriginal nation

• **Pre-existing**- exclusively occupied by FN group at the time of British sovereignty

o Proof of occupation and exclusivity relies on both common law and aboriginal perspectives

(i.e. dwellings, cultivated areas, enclosed fields, definite tracts of land used for hunting,

fishing or other resource exploitation)

• Culturally-defined- connection with land is of central significance to their distinctive culture

\*Ab title = **right to exclusive use and occupation of land, more than the right to engage in specific activities**

• Uses are not restricted to those grounded in practices, customs and traditions integral to distinctive

aboriginal cultures

• Inherent limit: uses must not be irreconcilable with the nature of the group’s attachment to that land

Justification Test, s.35(1): (for gov’t to infringe aboriginal rights/title)

• 1) Must be in furtherance of a legislative objective that is compelling and substantial- i.e.

conservation of fisheries (Sparrow)

• 2) Must be consistent with the fiduciary relationship between Crown and ab people- gov’t must try

to accommodate ab rights (Gladstone), duty of consultation in good faith

Fair compensation is usually required when ab title is infringed

Van der Peet- identifies 4 key factors of an ab right/title: (integral to a distinctive culture test)

• Precise claim with regards to practices, customs, traditions

• Specific area which has been continuously used/occupied

• Continued occupation and use of the area

• Central significance of the land to the aboriginal group 2

Claimant is required to prove:

• 1) existence of ancestral practice, custom or tradition supporting the claimed right

• 2) that this practice was “integral” to pre-contact society

• 3) reasonable continuity between pre-contact practice and contemporary claim of right

Nisga’a treaty- exception to Indian Act, allows FN group to have own land title system. Contemplates converting

Ab title into estate in FS.

• If there is escheatà land to Nisga’a instead of Crown

Mitchell v MNR: (Mohawk claim that trading right overrides Customs Act- rejected) Ab right must be

integral to the distinctive culture of the FN group and consistent with pre-contact practices.

Note inherent evidentiary difficulties with regards to aboriginal right claims (societies have existed for centuries

without written records, cultural identity is subjective)

• Admissibility of evidence must be determined case-by-case

• Post-contact activities/oral histories may be admissible

• Any evidence must be useful and reasonably reliable, subject to the exclusionary discretion of TJ

R v Marshall; R v Bernard: (Mik’maq claim of ab title/entitlement to engage in commercial logging on prov

Crown lands- rejected) No evidence of sufficiently regular and exclusive pre-sovereignty occupation = no title.

• Court must examine pre-sovereignty ab practice and translate it into a modern CL right

• To establish title, must prove exclusive pre-sovereignty occupation:

o Exclusivity = effective control of the land

o Occupation = sufficient physical possession

o Continuity = connection with pre-sovereignty group, connection with land “of central

significance to their distinctive culture”

• Note that ab rights are not dependent on ab title- nomadic groups can have rights

William v British Columbia: (Tsilhqot’in sued gov’t for land title; territorial vs. site-specific approach,

nomadic Ab group) Ab title must be proven on a site-specific basis; occupancy requires regular and intensive

presence at a particular site.

• Note “doctrine of discovery” allowed European explorers to claim territory on behalf of sovereigns

• Aboriginal rights survived the assertion of Crown sovereignty, continued to exist in CL

• Recognition of these rights occurs on a case-by-case basis

• Courts must reconcile aboriginal rights with Crown sovereignty

• Nomadic groups- can prove title to specific sites within their traditional territories, connected by

broad areas in which identifiable rights can be exercised (consistent with case law and broader goals

of reconciliation)

Woodward: aboriginal identity dynamic, yet persistent—important balance to mainstream CL perspectives

Litigating aboriginal title forces assimilation when aboriginals may not want to assimilate at all

Placing aboriginal title in the context of CL is inherently insidious and hegemonic because it forces the aboriginal “other” to negotiate on terms that are “rational” and Eurocentric

Aboriginal title is the right to exclusive use and occupation of land (Delgamuukw). Therefore, aboriginal title is a particular type of aboriginal right. An aboriginal right is a right that is integral to the distinctive culture of the aboriginal group and consistent with pre-contact practices (Mitchell). As per Van der Peet, the claimant must prove the existence of an ancestral practice, custom or tradition supporting the claimed right, that this ancestral practice was “integral” to pre-contact society, and a reasonable continuity between pre-contact practice and contemporary claim of right. The distinctive culture test from VDP requires precise claim with regards to practices, customs, traditions, a specific area which has been continuously used/occupied, continued occupation and use of the area, and central significance of the land to the aboriginal group. Aboriginal title is an aboriginal right supported by sufficiently regular and exclusive use of a tract of land prior to European sovereignty (Marshall, Bernard). It must be proven on a site-specific basis with evidence of regular and intensive presence at a particular site (William). Lamer sets out the “test” for aboriginal title in Delgamuukw. To prove AT, claimant must demonstrate pre-sovereisgnty occupation, continuity between prior and present occupation, exclusive occupation at sovereignty. Bands can share claims to pieces of land if their occupation was dual at the time of sovereignty. Lamer differentiates AT from other interests in land as sui generis for its inalienability, communal nature, and pre-existence. AT canont be sold or transferred to any party other than the Crown. All members of an aboriginal nation hold AT. Aboriginal control over the land was exclusive at the time of English sovereignty. Aboriginal title is a burden on the Crown’s underlying title (St Cat’s). Aboriginal identity is often inextricable with the land itself, making AT a fundamental and pressing goal.

Aboriginal rights survived the assertion of Crown sovereignty and continue to exist at CL. (William) Because AT carries more gravitas than an aboriginal right, the process to prove AT is more onerous. The courts use relaxed rules of evidence in AT claims (Delgamuukw). However, the relaxed rules of evidence do not automatically make persuading a CL court to recognize AT any easier. Adjudicating land claims requires judges to place aboriginal concepts and legal notions into CL framework. While developing the CL in tandem with aboriginal legal principles is an ideal outcome of the land claim process, it is often the case that establishing AT forces aboriginal groups to conform to Euro-centric principles.

Skeetchisn is an illustrative instance in which the CL perspective failed to appreiacte the nuanced subtleties of recognizing the validity of AT. The judge in Skeetchisn held that aboriginal title is not a marketable instrument, and therefore cannot acquire registration. Because, the judge ruled, there can be no registration, the claimant band could not lodge a caveat on the disputed property. The band was thereby deprived of the right to dispute the transfer of a plot of land for which it was planning to claim title. Had the band in Skeetch initiated proceedings for aboriginal title, s 215 of the LTA may have allowed their claim. However, the Skeetch band were barred because their aboriginal title was not recognized at CL. The judgment in Sketchisn is indicative of the normative values CL judges attempt to impose on the aboriginal groups. The current narrative of aboriginal title is to integrate aboriginal legal principles with the CL system of registration. However, this process often forces the aboriginal groups to conform, assimilate, and speak in a discourse that is inherently alien to their claims.

The decision in Delgamuukw represents a perpetration of symbolic violence. Its hegemonic imposition underlies an insidious trend towards subtle control over aboriginal interests within the CL system. The lack of aboriginal individuals in the legal and judicial communities demonstrates the wide gap between the individuals bringing the claims and the individuals asked to adjudicate the issues. The language in Delgamuukw belies the hegemonic frameowrk. Aboriginal individuals must state their claim in a way that conforms with CL values and principles. The judiciary has indicated that CL perspective is the “rational” method. Individuals who are not necessarily informed in the subtleties of aboriginal perspectives must adjudicate issues that directly affect aboriginal community and identity.

# Registration of Title – Overview Ch.5

## Historical Background

**Common Law Conveyancing to Recording System:**

**The Historical Feudal System:** Only the legal interest exists, and can be transferred via **livery of seisin**, a public and physical act. Documentation later introduced as a record of the transfer taking place. Livery still required to effect the transfer of the legal interest.

**The Even Later Feudal System:** Legal interest continues to pass under livery of seisin. Equitable interest develops (Use/Trust), and can be transferred without public ceremony (i.e. after death). ***Statute of Frauds*** requires that enforceable agreements with respect to land must be in writing. Increasing use of documentation.

**Recording system**

* Physical transfer of feoffment with livery of Seisin gradually replaced by delivery by the transferor to the transferee of the deeds (documents under seal)
  + Necessary to prepare good root title (time consuming to do without records!)
* CL system was replaced by the Recording System
* **Recording System**: provides for recording deeds affecting land in a recording office
* **Only have to search public bins to prepare abstract title**

# Torrens System/Land Title System

* four western provinces in Canada use it— prevents dubious transfers
* once FS entered into Register, conclusive evidence that person on Register owns the interest
  + instead of making lawyers sift through documents, operate running checklist
* someone who doesn’t register may lose interest in land
  + assurance fund prevents unfairness, compensation from assurance fund is not universal

**Effect of Torrens System**

Torrens imposes a registration system which

* **(1)records the written document and**
* **(2) gives legal effect to the document via registration. Registration is required** (***s.20***) in order to effect transfer of legal interest, and to protect that interest against the world ~ ***except as against the person making it.*** Equitable interest transferred upon forming a binding contract (CPS).

**Purposes of Land Title System:**

**Indefeasibility Principle:** Try to achieve a system that better gives the holder certainty of title to the interests in land that they have **Legal effect given to the title by virtue of 2 elements**:

(a) Registrar contains all relevant information related to title, and (b) the fact of registration creates **indefeasible title (*s.23*).**

**Security of Title:** Security is gained through the indefeasibility + if there is a mistake made individuals can be compensated via the assurance funds

**Simplifies Process:**

* Creates uniformity of transfer in a manner which is reasonably comprehensible
* **Land Transfer Form Act**: specifies standard documents to be used, eliminates deeds
* Ensures: Efficiency + Minimization of Transfer costs

**Prescribed form required to register the transfer** [***s.185***; Form A or its equivalent].

## General Pattern of Registration

* make application to register IDT
  + boundaries of property have to be sufficiently defined
  + establish GSMT—possession is safe from attack and cannot be displaced, title is freely alienable
* registrar looks to see if there is lis pendens, liens, charges, that prevent registration
* registration occurs at time of application, Registrar issues certificate of IDT
  + if property subject to registered mortgage or sale agreement no CIDT (if they come after, registration cancelled)
* inter vivos: produce CIDT
* will: title passes to personal representative in trust or on intestacy (secure registration as FS owners in trust)

#### s. 20 – if you do not register you may lose your interest in land

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| **Kessler (1961) = “The general principle that only common law interests in land can be registered” Kessler loses** |
| F: Registrar refused to grant title  I: Can the Registrar do that?  H: Yes  R: Registrar can refuse to register if the instrument does not convey an interest |

**Common Law interests that CANNOT be registered:**

#### equitable mortgage s.33 LTA (Entwhistle)

An equitable mortgage or lien created by the deposit of a duplicate indefeasible title or other instrument, whether or not accompanied by a memorandum of deposit, is not registrable.

**Equitable mortgages occur when a mortgagor grants a second mortgage on his or her property. A mortgagor/borrower retains an equitable right of redemption in his or her property. The borrower can mortgage his or her equitable interest. Legal mortgages are registrable. Equitable mortgages of handing over the duplicate indefeasible title are not registrable.**

#### 2. Trust s.180 LTA but suedo reg by “trustee” on IT doc

CIDT says “in trust”

***3. Sub-agreement for sale s.200 LTA:***

A subagreement for sale by the registered owner of a right to purchase land or of a subright to purchase land, entered into after October 30, 1979, is not registrable.

**Non-Common Law interests that CAN be registered:**

1. ***Caveat:*** may be lodged by any person who claims to have interest in registered land

* as long as caveat lodged, R cannot register another instrument
* lapse of two months—if challenging claim established, caveator entitled to claim priority

***2. Lis pendens:*** party who has commenced proceedings can lodge LP as a charge

* R cannot make entry that changes, transfers, or affects land in question

***3. Liens:*** if you don’t pay someone for work they did on your property, they can lodge a lien until you pay up

4. ***Judgements****:* if P obtains judgment, can register it as a charge

* security for relying on judgment by involving debtor’s land
* BFPV who acquired interest in land before judgment but hasn’t registered may be okay
* Court Order Enforcement Act (s 89, 90)

**Caveats, lis pendens, liens, and judgments can all be registered. The registrar is not a judge. Section 383 of the LTA authorizes the registrar to give title. The registrar is under a legal duty to grant title and not perpetuate error (Re Evans). If the registrar is not satisfied that the applicant has a GSMT, he or she may refuse registration (Shaw). However, the superior courts have exclusive jurisdiction over land disputes. (Heller). Registrar powers are discretionary, not mandatory**

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| ***Skeetchestn Indian Band v BC* (2000) BCSC** – Band lost on lis pendens attempt b/c not a valid attack on title so L/P b/c of AT can’t be registered in Euro-common law system |
| F: Aboriginal claim against Registrar  I: Was Registrar correct in refusing to register certificate of lis pendens and caveat?  H: Yes  R: To file a lis pendens, claimant must be claiming an interest in land that can be registered. **Aboriginal title is not marketable, therefore unregistrable.** Band only wants to give notice of its claim by filing lis pendent and caveat, but can’t do this if interest in land is unregistrable. **Aboriginal rights are not encumbrances.** |

#### s. 215(1)(b) LTA = possible solution for Skeetchestn Band

215 (1) A person who has commenced or is a party to a proceeding, and who is

(b) given by another enactment a right of action in respect of land,

**may register a certificate of pending litigation against the land in the same manner as a charge is registered**

* **s.215 (1)** A person who has commences or is a party to a proceedings, and who is
  + (a) claiming an interest in land (likely means a Euro-common law interest in land)
    - so out of luck
  + (b) given by another enactment a right of action in respect to land
  + may register a certificate of pending litigation against the land …”
    - PAV **thinks s.215(1)(b) would give them a claim**
    - **PAV says s.35 is an “enactment” of AR, and this claim by the band was all about existing abo rights entrenched in the charter**
    - May not win case – but possible prof things that
    - if you can’t show occupation and possession needed fro AT – u could try and put a LP
    - Kamland would argue this is FS land not Crown land

***Role of the Registrar – is not a judge, powers authorized by statute , role in s.383***

***Criteria to give title = the interest must be a good safe holding marketable title***

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| **Re Evans Application (1960) BCSC =** R was within power to say must deal with boundaries of land before transfer affective |
| F: Registrar refuses registration  I: Was there GSMT?  H: No  R: There was an error in the register, but it is not Registrar’s role to adjudicate. Lot had no reported dimensions. **Registrar under duty to refuse to register and not perpetuate an error.** |

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| ***Shaw (1915)* BCCA** = R was w/in power to stop an adjustment to title b/c thought doc didn’t look good |
| F: Petitioner’s father gave him POA, son registered father’s property in his own name. Registrar refuses to grant title  I: Was the Registrar correct in doing so?  H: Yes  R: **Registrar was not satisfied that the transfer was valid.** POA cannot transfer property to himself through statute if there is not evidence suggesting otherwise. |

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| ***Heller* (1963) SCC** = R CANNOT take away rights through correction |
| F: Husband transferred interest to wife, she registers it. Husband applies for cancellation because the IDT was with a BFPV. Registrar will not correct error.  I: Should the registrar fix the mistake?  H: Yes  R: If registrar has evidence, s/he should act upon it. **Registrar has authority, but he cannot assume the role that is reserved for the courts.** |

## The Assurance Fund s.296

* 3 year limitation
* s 296 LT empowers wronged party to recover loss from wrongdoer or from province
* if party would be able to recover under nemo dat but for statute, assurance fund helps
* Minister joined as co-D
* not for subsurface rights, not respect of proportion of loss, damages, etc contributed to by act/neglect of P (if P tells D where CIDT is)

#### s. 20 – you must register to protect your interest

#### s.23 – an estate in fee simple is indefeasible

#### s. 20 & s.23 = trump nemo dat

* person registered on title of EIFS cannot be taken off, other party has to go to AF

#### s. 296 LTA = assurance fund $ granted only if = sue + can’t get money, you would have been successful at common law & lost land b/c conclusiveness of registrar

* claimant loses interest but for LTA would have been able to recover it from ND
  + claimant must try to go after rogue first, then sue for AF

#### LTA 297 – BFPV protected even if s/he obtained interest from transferor who took under a fraudulent deed

#### LTA 298 – Can sue for assurance fund if R screws up

#### s.303 LTA = out of luck from AF if negligent

* ie can’t sue for AF if you only have yourself to blame
* if you leave the CIDT somewhere rogues could get it, you are shit out of luck

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| ***McCaig v Reys*** = s.296 & s.303 LTA = P unsuccessful on recovering from AF b/c no action at common law, only had equitable interest can’t succeed against EIFS of bona fide purchasor for value not meet s.296 requirements |
| F: South Transport purchased land from Farwest. South Transport sells through sub-agreement to Reys. Reys granted an option to purchase 24 acres, which was in a separate interest and not mentioned in sub-agreement. McCaig (prez of South Transport) wished to register the option—land needed to be subdivided. South hadn’t paid Farwest yet, and so Farwest did not consent to the registration of the option. Reys sells to Rutland through sub-agreement, which did not mention unregistered option. Jerome (prez Rutland) said he would honour the option. Rutland registers. Rutland sells to Jabin, a BFPV. McCaig’s rights are extinguished.  I: Does McCaig have a case?  H: No, but can claim from AF  R: Reys and Jerome both knew about the option. Unregistered option was an interest in land. **Jabin obtained IDT as a BFPV, so his interest trumps McCaig. Since there was fraud and breach, McCaig can get damages.** |

**Section 296 of the LTA establishes the assurance fund. The assurance fund empowers wronged parties to recover from the province. A party will go to the assurance fund if he or she would have been able to recover the interest under the CL nemo dat principle. With the advent of s 20 and the indefeasibility of an EIFS in s 23, wronged parties that would otherwise recover under nemo dat cannot rely on the CL principle to recover their interest. The AF is only granted if the party would have been successful at CL and lost the interest in land due to the inclusiveness of the registrar (s 296). If the registrar made an error, the wronged party can claim from the AF (s 298). However, if the wronged party was negligent or did not register his or her interest, that party cannot bring a claim against the AF (s 303, McCaig). There is a 3 year limitation to make a claim for the assurance fund. Equitable mortgage are unregistered and will not allow the holder to claim from the AF (RBC). Errors by the registrar are protected by the assurance fund (Gordon).**

# Registration – Ch. 6

## Registration of the Fee Simple

* registration not technically mandatory, but have to register to get in rem rights guaranteed

#### s.23 LTA – gives indefeasibility to FS (protects innocent EIFS from ND claim) BUT limits

* IDT as long as it is uncontested that registered owner is indefeasibly entitled to estate
* if you are an innocent party who has acquired EIFS, you’re probably okay—at CL you would not be okay b/c application of ND

### s.23(2) = limits to FS resources, lien, lease, highways, expropriation, caveats + charges, boundaries, fraud

* (2) owner has EIFS to land described in the IT
  + description of the prop given in the survey sketch
  + then you are indefeasibly entitled to it subject to the following exceptions
    - s.23(2)
      * a. all existing exceptions/reservations in the original crown grant
        + ie. you don’t get title to the minerals, oil and gas, gold reserved for crown

no ad inferos does not apply

* + - * b. Subject to lien if don’t pay taxes
      * 3. Lease
        + if lease is for three yrs or less you don’t need to register it

IT is subject to lease

Ex. if you are buying prop from Dennis, Dennis has a tenant for an agreement for 3 yrs or less – even when you buy the prop your rights will be subject to tenant – diff if lease agreement is for longer

when you buy prop you should always go and inspect – see if there is a tenant

if tenant for 4 yr less – you need to put it as a charge if you don’t want to be evicted

* + - * e. Highways
      * f. Right of expropriation
      * (g) caveats and charges
        + you can have a situation where a charge is registered after you buy/taken title and charge will be referable to activities of your predecessor/ grantor depending on the legal authority to place charge on tile – you will be subject to it – (but only if the charge is entitled to be put on ) but if after it has to be legally entitled to go on title (only if it is before you take – this obviously will go on)

ex. builders liens special protection given

* + - * h. Boundaries
        + that’s why sketch is so imp. (think Evans case)

if the sketch is wrong indefeasibility won’t protect you

* + - * i. Fraud
        + if registered owner participated in forgery

Bucholtz

* + - * + you can be removed from title if you got on title b/c of fraud

#### s. 23(3) LTA = “ Squatter’s rights abolished”

* after CIDT registered, title not acquired by length of possession

#### s.50 LTA = Crown has right to use private land 1/20 for public words

### Agricultural Land Commission Act all land issued after 1973 subject to ALR: cannot subdivide agricultural land

* land in the ALR is subject to this act, and cannot be used for non-farming purposes
* your use is subject to the restrictions in the ALCA (s. 1,16,20,21,28)
* **s.60** sets out how land is registered in ALR, any land issued after June 29, 1973 subject to ALR

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| ***Creelman v Hudson’s Bay Insurance* (1920)** –SHOWS IMPORTANCE OF BEING ON IT DOC = if on IT the LTA ensures you have a good safe marketable title, HBC was on IT so Creelman lost |
| F: Creelman breaches k, says that Hudson Bat could not acquire or hold property unless it was used for its own purposes  I: Did Hudson Bay have power to hold or dispose of its own land?  H: Yes  R: Where registration takes place, certificate is issued. The certificate guarantees indefeasibility. Creelman received indefeasibility. BFPV must accept IDT. |

#### s. 12 Limitation Act = no limitation in respect of land (BUT tiny window for squattors)

* if landowner does not bring action against wrongful occupier w/in limitation period
* **s. 12 Limitaiton Act** There is a tiny door open to squattors rights for first the holder of the very first IT from crown may be subject to a squatter claim, but limited prior July 1 1975

#### s.171 LTA abolishes squatters rights after 1975 b/c contradictory to the indefeasibility of the estate in FS

An application founded in whole or in part on adverse possession must not be accepted by the registrar unless permitted by this Act and supported by a declaration of title under the Land Title Inquiry Act.

**S 171 of the LTA abolishes squatter’s rights after 1975 because contradicts the fundamental indefeasibility of the EIFS. The section states that an application founded in whole or in part on adverse possession must not be accepted by the registrar unless permitted by the Act and supported by a declaration of title. However, s 12 of the Limitation Act recognizes that the first certificate of INDT from the Crown may be subject to a claim of adverse possession if the adverse possession occurred prior to 1975.**

#### s.36 Property Law Act “Encroachment on Adjoining Land” = buildings OR fences

* if fence or bldg improperly located, BCSC may declare and easement, vest title and compensate, or order an injunction

## Statutory Exceptions to Indefeasibility – “charges on title”

#### s.23(2)(d)LTA “leases”

* if greater than 3 years, lease must be registered as charged
  + if not registered, new BFPV can kick out tenant
    - have option against landlord for breach of k b/c buyer must inspect property

#### s.23(2)(g) LTA “builders lien” = policy to have ppl paid for work despite transfer of prop

* may be filed w/in 45 days of times specified in statute **(s 20 Builders Lien Act)**
* lifted when owner of estate pays the builder for work

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| ***Carr v Rayward* (1955) BC =** “a builders lien” put on for plumbers work P lost b/c **s.23(2)(g)** protects builders lien even after sale subject to 45 days |
| F: Plumber filed lien before work was completed but after BFPV bought property  I: Was the lien effective?  H: Yes  R: Prior registration governs. **Owner includes one claiming under him as prior registration does not give him title free of liens.** |

#### s.23(2)(h) LTA “BOUNDARIES” no guarantees around boundaries, must be surveyed properly Wrienrib Case “not lawyers job to deal w/ boundaries only title”

* each parcel of land has CIDT and map that depicts physical boundaries
* there may be errors—registration does not guarantee accuracy
* Winrob: conveyancers (transferors) not under duty to survey land

***s. 23(2)(i) “Fraud” LTA*** – your indefeasibility is subject to the right of another to show you got title through participating in fraud

* title fraud can happen to innocent parties, but title insurance protects
* A (innocent) to B (rogue) to C (BFPV)
  + legislation only says rogue cannot claim IDT
  + **Gibbs v Messer**: A should recover title b/c C dealt with the rogue so C should bear the loss
  + **Fraser v Walker**: C keeps title b/c C is BFPV registered owner
    - C’s title derived from registration, not fraud
    - confine Gibbs to where rogue uses fictional name (ie not masquerading as A)
* Fred advances money to Dennis who is posing as Allanah, so Fred comes on title through null instrument
  + Allanah’s property now encumbered
    - Fred obtained interest through void instrument, gets no interest, not protected b/c he is not BFPV of EIFS

#### s.25 LTA “only protects FS from fraud not charges”

#### s.25.1 LTA “Void Instruments” gives immediate indefeasibility only in respect to EIFS

* transferee purporting to get EIFS as a BFPV can do that upon registration even if obtained interest from void instrument
* A (original owner) has to go to assurance fund

#### s.25.1(1) LTA “gives effect to ND” for void deeds – all interests in land minus EIFS obtained under null deed are not given effect

#### s.25.1(2) LTA makes innocent party get blackacre despite null deed if EIFS

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| ***Gill v Bucholtz* (2009) BCCA** - mortagee Bucholtz loses = no indefeasibility of mortgages taken under a null-deed mortgagee must investigate registered mortage always subject to state of accounts |
| F: P obtained interest through forged document, granted a mortgage to D  I: Will the mortgages continue to encumber as valid charges?  H: No  R: BFPV of EIFS are protected, but lesser interests (charges) are not. Mortgage was granted by registered owner who held interest in her own name, but nemo dat. Statute preserves nemo dat even where the holder has relied on the register and dealt with a BFPV. **Ds took mortgages under valid instrument, but their interest was carved out of already invalid interest.** |

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| ***Gibson v Messer***  - you must check to make sure not fraudster: VOID |
| BFPV actually deals with fraudster—>nemo dat—>original owner gets interest back |

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| ***Fraser v Walker***  - doesn’t matter if fraudster – you can rely on registrar: VOIDABLE |
| BFPV of EIFS takes interest from fraudster—->registration—->BFPV can keep interest, original owner goes to AF |

**S 23(2)(i) establishes the criteria for defeating indefeasibility in the case of fraud. Indefeasibility is subject to rights of another if the party holding the indefeasibility perpetrated fraud to obtain title. EIFS are protected from defeasibility, but charges and lesser interests do not receive the same protection (s 25 LTA). A transferee purporting to obtain an EIFS as a BFPV can obtain title upon registration even if the transferee obtained the interest from a void (forged) instrument (S 25.2). Therefore, s 25.2 of the LTA shows that nemo dat applies to all lesser interests and charges created from void instrument (Gill). In the cases of BFPV dealing with rogues, the courts take the approach in Fraser, whereby the BFPV of an EIFS takes interest from the rogue, registers the interest, and can subsequently keep the interest. The original owner must go the AF to recover. This approach contrasts with Gibbs v Messer, which rejects the BFPV’s interest in favour of the original owner because the BFPV actually dealt with the rogue. Courts generally apply Gibbs narrowly to cases in which the rogue uses a false name, rather than masquerading as the owner of Blackacre. If a rogue takes title under a null instrument, he or she can effect a transfer of Blackacre EIFS to a third party BFPV. Statute protects this transaction and makes it voidable. Charges taken under a voidable instrument will stand (Giesbrecht). Therefore, if a BFPV of an EIFS takes title from a rogue, any subsequent charges put on the BFPV’s title remain. Owners are presumed legal until the instrument is deemed void (Giesbrecht).**

## Notice of Unregistered Interests

* person acquiring interest will not receive notice of unregistered interests other than leases up to 3 yrs, pending charges, or void IDTs

#### s.29 LTA “effect of notice of unregistered interest”

* unless BFPV has participated in fraud, is not affected by any notice of an unregistered interest

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| ***McCaig v Reys –*** no compensation from AF unregistered charge b/c Jabin EIFS was not fraudulent and McCaig would have lost at common law |
| Jabin (BFPV) not fraudulent and McCaig’s interest was unregistered, so Jabin is fine |

#### s.29(2) “except in the case of fraud in which he or she had participated with” if you fraudulent your title not protected from unregistered charge

* you become fraudulent once you know about an unregistered interest and misbehave
  + have to show clear evidence of dishonesty—bare knowledge on its own will not suffice
    - have to do something morally wrong
* you can ignore notice of an unregistered interest, but you can’t misbehave
  + if you misbehave, the unregistered interest is not necessarily defeated and can register it

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| ***Hudson’s Bay v Kearns and Rowling (1895)* BCCA** – knowledge was not enough to show fraud for charge claim, P loses (strong dissent says smells of fraud) |
| F: Kearns had a pending mortgage, sold her property when her title looked clear  I: In the absence of express notice, can Rowling’s title be affected by the mortgage?  H: No  R: BFPVs are unaffected by notice of any unregistered title whether expressed implied or constructive. |

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| ***Vancouver City Savings v Serving for Success* (2011) BCSC City Savings wins =** you need **knowledge plus a scheme of deception** **–** no evidence of fraud here |
| F: D vested time, effort, and capital under unregistered leases. Building in foreclosure  I: Can the tenants stay in the building as unregistered tenants?  H: No  R: Two lines of authority: BFPV who takes title with knowledge of prior unregistered adverse interest may have committed equitable fraud. Second line requires something more than knowledge, usually dishonest conduct. Before a finding of equitable fraud, there must be evidence of actual notice coupled with some act of dishonesty or deceit on the part of the person seeking protection. The law requires more than simple notice of unregistered interest. |

**A person acquiring interest is not affected by any notice of an unregistered interest (s 29 LTA, Kearns). However, if the BFPV participated in fraud, his or her title is not protected from unregistered interests (s 29(2)). The law requires something more than bare knowledge of the unregistered easement to show equitable fraud (Vancouver City Savings). The BFPV taking title must have behaved in an insidious manner. If the BFPV has not behaved fradulently, his or her title is not affected by any notice of unregistered interests (McCaig).**

#### s.180 LTA – equitable trust are to be referenced elsewhere and not put on IT doc except “in trust”

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| ***McRae v McRae Estate* (1994) BCCA**  John & Kathy win b/c Farquar was deemed to know of **registered** charges such as “trusts” b/c of **s.23 indefeasibility subject to registered interests**  you are deemed to have knowledge of all the interests in land registered on title at the time you take transfer/ **s.23 this limits your indefeasibility** |
| F: Guy leaves land “in trust” to his wife and the remainder for his three children. Wife transfers her interest to son without notation on his title. Son leaves land to his wife and siblings. Siblings sue for mother-son transfer be set aside to get rid of Farquhar’s wife.  I: Who gets interest?  H: Siblings  R: Notice of trust notation would have been imputed to Farquhar. Knowledge creates fraud. Failure to carry on trust notation does not defeat trust. |

**First West Credit Union v Giesbrecht**

**F:** 779 Inc registered EIFS, Barton controls 779. Barton has difficulties, causes 779 to transfers EIFS to Giesbrecht. Giesbrecht takes out mortgage with FWCU. Barton says he has been defrauded.

**I:** Can the charges stand?

**H:** Yes

**R:** Instrument between Giesbrecht and Barton at best a voidable instrument. Barton never owned the properties so he was never deprived of land. Fraud creates voidability. Forgery creates nullity (void). **If instrument is voidable, then the charges stand. Owners are legal until instrument is deemed void.**

**An individual is deemed to have knowledge of all the interest registered on title at the time of transfer (McRae). S 23 maintains that indefeasibility is subject to registered interests.**

**In the case of fraud, the instrument creating the interest becomes voidable. In the case of forgery, the instrument is null. If an instrument is voidable, the charges remain valid. Owners of charges under a voidable instrument remain legal owners until the instrument is deemed void (Giesbrecht).**

## Registration of Charges (s. 25(3) LTA)

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| ***Duckart v Surrey – s.180 LTA*** “crescent beach” Duckart wins b/c easement was “registered” as a charge in the broad meaning s.25(1) b/c of “in trust” on IT |
| F: Foreshore originally held in trust, but Surrey purchases foreshore and there is no trust notation. Surrey puts up a toilet on the foreshore.  I: Can Surrey do that?  H: No  R: Tax sale allows BFPV to take title free of any registered or unregistered interests unless it is an easement. Procedures for registration in BC do not deny the possibility of registering an easement as a term of a trust even if it can also be registered as an independent charge. **Where registration of an instrument does not cause the issuance of a new certificate but the endorsement of a memo or notation on existing certificate, it may retain its force.** |

### Indefeasibility

#### s.26 LTA indefeasibilty of charge “deemed to have interest” brings ND back

* protects registered owners of charges
* charges can be defeasible if nemo dat applies—**ie mortgage secures nothing against the estate, it is defeasible**
* you still have to register charges to get them, but if they are secured under a void instrument, they get no interest
* mortgages: if there is no debt, the security is not valid

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| ***Credit Foncier v Bennet* (1963) BCCA s.23 & s.26** No indefeasibility guarantee with a registered charge like a mortgage  = Bennets win against fraudster who puts mortgage on home they paid off free and clear s.26 brings ND back in & mortgage only secured against actual state of account |
| F: Bennetts pay off their mortgage, rogue fraudulently registers another mortgage in their name. Mortgage changes hands several times until it gets to Credit Foncier, who harass Bennetts for $.  I: Is the charge valid?  H: No  R: “Deemed” denotes a rebuttable presumption. **Mortgage is invalid, and only amounts to what is actually owed**—no loan ever made to the Bennetts, so the mortgage secured nothing—application of nemo dat. |

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| ***Canadian Commercial Bank v Island Reality*** – court favours indefeasibility of charge here and Almont wins 2nd place mortgage though obtained through dishonest deed decision may not stand now b/c of s.25.1 |
| F: Park Meadows has one mortgage, granted another to Island Realty. Park Meadows tells Almont that it had discharged the mortgage to IR and asks for another one—“discharge” was a forgery. Park Meadows goes into bankruptcy, not enough money to repay IR and Almont.  I: Can Almont recover?  H: Yes  R: **Transferee under fraudulent transfer cannot obtain title, but can effect a valid transfer in a subsequent charge to a BFPV.** Almont did not acquire interest from IR, but from a valid mortgage as a BFPV, so it gets priority. |

**Charges are deemed to have an indefeasible interest (s 26 LTA). Statute protects registered owners of charges. However, nemo dat applies if the charge is defeasible. Deemed denotes a rebuttable presumption (Bennet). Therefore, if a mortgage secures nothing against the estate, it become defeasible. If there is no debt in a mortgage, the security is invalid. Owners of charges must still register the charges to enforce them, but if the charges were secured under a void instrument, the charge has no interest. Transferees under fraudulent transfers cannot obtain title, but can still effect valid transfers in subsequent charges to BFPVs (Island Realty). The second transaction to a BFPV is voidable, not void.**

### Priorities

#### s.28 LTA “Priority of Charges based on priority of registration” = first in time is first in law

* preference according to order in which you receive proprietary interests

# Failure to Register – Ch.7

## The General Principle

* **only time where absence of registration will effected is between transferor and transfer (SECTION 20)**
* **s 181: onus is on dominant tenant to register interest as a charge**

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| ***Sorenson v Young (1920)*  BCSC** – easement blocked with gate – gate blocker wins = can’t get around s.20 by saying contents of you easement interest are incorporated into a deed like trusts = **you must register** |
| F: P sold lot, reserving an easement. D later bought the lot without notice of easement because it was not registered.  I: Does the easement stand up?  H: No  R: The only thing registered was a conveyance, not a charge on the CoT—no INDility. |

## Unregistered interests in nonland interests

* can register judgments, caveats that appear on other person’s COT
  + registered judgments yield to unregistered interests in land b/c **judgment is personalty** **and can only give what debtor actually owns at time of registration** (NEMO DAT)
    - if debtor is k obligated to transfer to BFPV, debtor no longer owns the property

**Creditors can register judgments against a borrower’s certificate of title. However, registered judgments yield to unregistered interests in land because judgments are personalty and can only grant what the debtor owns at the time of the judgment registration (Yeulet). Therefore, nemo dat continues to apply in this context. If a debtor is k obligated to transfer property to a BFPV and a judgment creditor registers after this transaction has occurred, the registered judgment is subject to the unregistered interest in land because the debtor no longer owns to the property (s 86(3)).**

#### s.86(3) Court order enforcement act buttresses this conclusion in this case if sale/interest occurred before judgment creditor, creditor subject to it

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| ***Yeulet v Mathews (1982)*** – the mother wins w/ her equitable mortgage **whatever happens first takes priority -** one’s other charges are only subject to what the holder actually has to give = ex. judgement creditor’s charge was subject to equitable mortgage held by Mrs. mathews |
| F: Son gives mother an equitable mortgage that she doesn’t register. Yeulet registers judgment against son.  I: Does the unregistered interest take priority?  H: Yes  R: The holder of an equitable mortgage or charge will always be unable to register, not always outside of LTA. **Judgment creditor is in no better position than judgment debtor because judgment debtor can only give what he actually owns—if there is an equitable mortgage, there can be nothing to give.** |

### s. 20 EXCEPT AGAINST THE PERSON MAKING IT – requirement to register if you don’t want to be vulnerable

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| ***L&C Lumber Co v Lundgren*** *– P wins, no reason to stop D from cutting trees granted in easement even though unregistered* **S.20 EXCEPT AGAINST PERSON APPLIES – b/c Lundgren knew about the easement to cut** |

F: Woman sells right to enter and cut to MacDonald, who assigns the right to LCL but did not register assignment. Woman denies LCL access to her land.

I: Can LCL use the right?

H: Yes

R: **s 20’s real purpose is to protect BFPVs and encumbrances and enable them to rely on the state of the register when they search the title.** MacDonald had k rights, woman breached k because LCL is an assignee and has direct privity with her.

#### s. 73.1 LTA “Lease of part of a parcel of land enforceable”

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| ***International Paper Industries v Top Line* (1996) BCCA –***long lease not registered –* ***s.20 will not save you from getting an illegal lease to be registered even if it is two ppl under EXCEPT AGAINST*** |
| F: IP approached end of its lease, parties prepare their own lease and subdivision of the land. Tenant and landlord turn acrimonious.  I: Can the unregistered lease agreement prevail?  H: No because it was illegal  R: There should be no implications in the illegal lease any obligations to obtain subdivision approval. **Tenant is precluded from enforcing personam or rem rights because the lease was not legal.** |

# Applications to Register – Ch.8

#### s.31 “priority of caveat or certificate of pending litigation:

* if P lodges caveat/lis pendens, P can claim priority

#### s.288 Effect of caveat LTA

* as long as there is caveat on title, R cannot register another instrument

**If a claimant lodges a caveat or lis pendens on another’s COT, the claimant claims priority over other interests (s 31). If there is a caveat on title, the title holder cannot register another instrument (s 288). BFPVs who are victims to registration delays, provided they are not fraudulent, will succeed over competing lis pendens and caveats (Rudland). Parties that only have an equitable right of redemption or were negligent cannot succeed over a BFPV’s interest in the same land (Breskvar).**

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| ***Rudland v Romilly* (1958) BCCA**  the pending registration processing of Romily wins even though the LP was put on before full legal title vested in Romily. It is not Romily’s fault b/c of slow process of LTO EIFS takes priority |
| F: Romily sells to Lindsay, Lindsay sells to Rudland. After k with Rudland, CoT issued to Lindsay free of charges—same day, application to transfer from Lindsay to Rudland made. Romily sues Lindsay before Rudland’s registration is complete, lis pendens filed.  I: Can Rudland succeed?  H: Yes  R: P was BFPV with no notice of lis pendens, **a victim to delays out of her control. In the absence of proof of her participation in fraud, P’s interest succeeds.** |

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| ***Breskvar v Wall* (1971) Australia** two ppl with equitable estates – who to prefer? |
| F: Breskvars joint tenants, sign a transfer document but do not put in name of transferee, later put in D’s name after he loaned them money. D had an agent who sold property to Alban. After sale to Alban, Breskvars file caveat.  I: Can Ps prevail?  H: No because they didn’t pay back the loan and were negligent  R: **Breskvars cannot recover property because they only had the equitable right to petition the court to compel D as legal title holder to deal with title in such a way so as to preclude benefit from the fraud.** Their seeking to have legal title transferred back is contingent on their repaying a loan. Cannot go to AF b/c they were negligent. |

# The Fee Simple, Fee Tail

**2 questions** to ask

1. Who: “words of purchase”

2. What: words of “limitation”: what is the nature of the interest being given ie what is the “quantity of the interest”

## Creation of the Fee Simple

* CL used to be very strict—any deviation would create an LE (statute makes it less formal)
* in wills, if no words of limitation then court looks at testator’s intention

#### S.19 Property Law Act fixes problem of strict wording

***s.19(1)*** *words “in fee simple” OK, don’t need “and his heirs”*

***s.19(2) default interest is the F/S or*** greatest interest the grantor has

***S.186 LTA “Implied Covenants”,*** *word transfer doesn’t need to appear on transfer form – its implied*

* if it does not contain words of limitation, EIFS or greatest interest
* if it does contain words of limitation, transfer gives effect to limitations

#### s 42 WESA

* gift in will takes effect according to terms, receiver gets interest the testator had capacity to give
* gift of property to heirs/next of kin take effect as though it had been made to person among whom share would have been divisible if testator had died intestate
  + if testator says “I give everything to my heirs” follow rules of intestacy

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| ***Tottrup v Ottewell Estate* (1969) SCC daughter lost** b/c Frank meant words of limitation not purchase the words “and his heirs” are now held to be words of limitation” a term of art used only |
| F: Will bequeathed estate to someone who died before testator.  I: Should the estate go to beneficiary’s heirs?  H: Yes  R: Words in the will were of limitation, not purchase. The will clearly stated the estate should pass to the beneficiary’s heirs, not the testator’s heirs. |

**Rules of intestacy:** property devolves to spouse, children, parents, siblings, other kin

Fred has predeceased Frank, Frank has not identified anyone but Fred – and therefore the rules of intestacy take place:

In pecking order:

1st pick. Descendents ie. Children, then grandchildren

2nd. Ascendents if no descendents goes up to ascendents ie parents etc

3rd. Collaterals measured in terms of degrees of closeness. First is Siblings then nieces, nephews

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| ***Re Walker* (1925) BCCA –**ambiguous wording not sure if life estate or fee simple, powers of encroachment look like fee simple wife gets fee simple |
| **Facts:**  property given to wife  comment that anything indisposed of at her death should then be distributed to nephews  - **issue: should this comment be given effect to or should the wife be able to choose who her heirs are is wife getting a life estate or estate in fee simple**  ie there is a contest between his named heirs and hers  Question is who should get  **- is this a life estate given to wife** (but this word is never used) – but b/c will we are told that u are allowed to look what was the intention of the testator  - husband could have been giving an estate in f’/s absolute, life estate, or life estate w/ ability to encroach on capital if need be  **Result:**  wife gets fee simple b/c there is a restraint on her ability to transfer or alienate b/c dictates what will happen at death – she seems to have powers of encroachment therefore fee simple  **Cases can fall into one of 3 classes** (***Re Walker***): 1) gift to person named first **prevails** and **gift over is repugnant**; 2) the first person **take a life estate** only and so the **gift over prevails** OR 3) all that is **given to the first taker is a life estate**, but the **LE holder is given power of encroachment which may be exercised** at any time during the currency of the estate.  One cannot bestow a full **gift of EIFS** and then **qualify it** because it is **REPUGNANT** to the gift. Court will not accept limits on alienation of estates in fee simple **. *Re Walker(****husband leaves property to wife in* ***will giving her an EIFS with qualification****: “should any portion of estate remain indisposed and in hands of my wife when she dies,* ***such a remainder will be divided as follows...****court held that the qualification was repugnant to the gift and struck it out)...Gift of EIFS made first...gift over subsequent* |

**When determining what the named beneficiaries receive in a will, the courts will look to the testator’s intention (Tottrup). Furthermore, the court will examine the entire surrounding circumstances of creating the document to ascertain intention (Shammas, Cieclein). A gift in a will takes effect according to its terms. (WESA s 42).**

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| ***Re Shamas* (1967) BCCA – widow gets life estate b/c restraints on alienation** |
| F: Guy “gives his soul to God” and everything else to his wife until kids turn 21  I: Did the widow take absolute interest?  H: No, she could only encroach until youngest child was 21 or thereafter a LE  R: Entire will document and surrounding circumstances looked at to determine what testator wanted. **Testator wanted his estate to vest in children equally subject to wife’s life interest, subject to her interest being divested upon remarriage when she would take equal share with her children.** |

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| ***Cielein v Tressider* (1987) BCCA - second wife wins** |
| F: Guy wills property to his live-in girlfriend  I: Was the gift absolute?  H: Yes  R: Testator demonstrated clear intention to benefit his girlfriend. Nothing in the will supports the contention that she was a life tenant. |

## Words formerly creating a Fee tail

* **To A and the heirs of his body**—PLA converts any fee tail to fee simple

### RULE IN WILD’S CASE (assessed at time of grant)

* To A and her children
  + if A has any living children, they become JTs (s 11 PLA says courts opt for TIC)
  + if A has no children, A takes property in fee tail (s 10 PLA converts fee tail to EIFS OR GREATEST ESTATE)

### Common Law—“I leave Blackacre to B and his Heirs”

#### Intervivos Transfer

* At CL to create a fee simple it was necessary to use correct words (**now changed by statute**) ***PLA, s.19***
* ***PLA s 19(2) if there are no words of limitation you assume that the transfer is the greatest interest the transferor has***

#### Transfers on Death

**In Absence of Will:**

* CL regulates who your heirs are with assistance of statutory modification

**In Presence of Will:**

* courts are more flexible and will **look at actual intentions of the testator**
* If words of limitation used, courts give effect to them; if not but it’s clearly the testator’s intention courts still construe will as conferring fee simple on beneficiary ***Tottrup***
* ***PLA s 19(2) if there are no words of limitation you assume that the transfer is the greatest interest the transferor has***

**Equitable Interests**

* Treated same as wills. When technical words of limitation used, given common law meaning and effect
* If not used, court of equity could give meaning so that it would give effect to the intention of the grantor as derived from terms of document

### Statute—“I leave Blackacre to B in fee simple”

* CL insistence on use of correct words of limitation created certainty but often created life estates where fee simples were intended so the legislation was passed to modify CL rules
* ***PLA, s.19* (Words of Transfer)** - it is now sufficient to use the words "in fee simple" instead of "and his heirs".
* ***LTA, s.186(4)*** - a freehold estate transfer for valuable consideration which uses Form A (prescribed form) will transfer the fee simple. No need to include express words of transfer.
* ***LTA, s186(5)*** - Assumed that fee simple is the default transfer, unless express words of limitation are used.
* ***LTA, s.186(6)*** - express words of limitation may be used on the Form A to limit the estate [i.e. to a life estate]
* ***LTA s 186(7)*—**EIFS can be accompanied with conditions or reservations...it transfers the estate subject to the reservation or condition

**Words of limitation no longer necessary to convey fee simple ownership, BUT their inclusion** should not be taken to have a separate meaning than was intended - when, they are used, they still hold their traditional meaning. A will should always be interpreted first on the words used - if they are clear, subsequent circumstances **cannot alter their meaning. *Tottrup v Ottewell*** [*Guy left his estate to bro:* ***“I give, devise and bequeath unto my brother… to hold unto him, his heirs, executors and administrators absolutely and forever.”*** *– bro dies before Guy. Words of limitation no longer necessary to transfer an EIFS, so what interest do these words transfer? Bro’s daughter claims they are words of substitution (substitute into purchase category, so she can inherit) not words of limitation. Guy’s heirs said they were words of limitation thus conferring an EIFS  - the* ***gift thus lapsed*** *upon bro’s death and the estate should be distributed to testator’s heirs as upon intestacy.]*

**\*Held:** found for guy’s heirs **-**“to X and his heirs” If X leave EIFS to Y, but Y dies before X, Y doesn’t get it. This means that this property would devolve intestate to X’s heirs (first descendants, ascendants then collaterals). X could leave it to Y’s heirs, but must explicitly say so.

**Dissent (*Tottrup v Ottwell*)**: There is a presumption against intestacy and construing the will with the intent of the testator it is the clear duty of the court; must determine what the testator’s intention **from the words he used in their ordinary sense**.  Words were used specifically to confer interest in bro’s heirs if he was not alive upon bro’s death (i.e. these were words of *substitution*)

#### Doctrine of Lapse:

* You must be alive to take a gift. If a specific gift lapses, it goes into residue. If residue lapses, the will goes intestate. **Rather it goes back to the person giving the gift**

### Problems of Interpretation—REPUGNANCY: (Inconsistency of clauses in one or more document)

* Situations where testator does something completely obnoxious to the fundamental character of the estate in question
* It is very difficult to limit the capacity to alienate
* When repugnant, courts read it out
* Often arise when grantor attaches a condition to the grant which is inconsistent with an outright grant. “I give to Blackacre to Amalia, and when she dies, she must give it to Silvana” inconsistent.
* **Racial covenant, restraints on marriage** are against public policy and can be struck down

**Cases can fall into one of 3 classes** (***Re Walker***): 1) gift to person named first **prevails** and **gift over is repugnant**; 2) the first person **take a life estate** only and so the **gift over prevails** OR 3) all that is **given to the first taker is a life estate**, but the **LE holder is given power of encroachment which may be exercised** at any time during the currency of the estate.

One cannot bestow a full **gift of EIFS** and then **qualify it** because it is **REPUGNANT** to the gift. Court will not accept limits on alienation of estates in fee simple **. *Re Walker(****husband leaves property to wife in* ***will giving her an EIFS with qualification****: “should any portion of estate remain indisposed and in hands of my wife when she dies,* ***such a remainder will be divided as follows...****court held that the qualification was repugnant to the gift and struck it out)...Gift of EIFS made first...gift over subsequent*

**In construing wills, courts must consider the entire document and relevant surrounding circumstances to determine interest intended to be granted. While one passage in a will on its own may appear to grant a particular interest, surrounding circumstances may indicate otherwise. *Re Shamas***

# The Life Estate

## Creation

* may last for life of holder or for another (LEPAV)
* **must be express**—not express, court presumes EIFS being given
* s 21 WESA: on intestacy, surviving spouse gets furnishings and preferential share of estate

**RIGHTS OF A LIFE TENANT**

* holder of legal LE entitled to occupy/use property, retain profits arising from its exploitation
  + can transfer inter vivos, interest ends with transferee’s death (reversion to grantor of LE)
* life tenant shares interest in property
  + to B for life, on B’s death to C in FS—A gets reversion, B has LE, C gets remainder
    - **reversion/remainders entitled to land in substantially same form as when it became a LE**

### Waste

**Permissive waste**: passive conduct permits decay (bldgs deteriorate)

* LE not on the hook unless specified in instrument

**Voluntary waste**: waste comes from life tenant’s activities—Hiltz

* may pay damages to reversion/remainders, may get an injunction against activities
* ameliorating waste is tolerated
* cannot cut down timber unless it is a timber estate, can’t extract minerals unless land already used for that, can’t change use of land

**Equitable waste**: equity might restrain LE destroy property even if they can expressly do so (**Lord Bernard**)

### Liability for Taxes, Insurance, etc.—no obligation to pay house insurance (Verdonc), life tenant has to pay taxes (Mayo)

# Conditional and Determinable Interests

## 3 Ways Person who is disposing property can impose qualifications on the interests

1. making vesting subject to condition precedent (ie this thing has to happen before interest is vested)

**To A in FS if, at the time of testation, A is not married to B**

1. attaching a condition subsequent (if this thing happens, the interest goes away)

**To A in FS, but if A marries C, then to B**

1. creating determinable limitation (the interest exists until this thing happens)

**To A in FS until A marries B**

Ascertain whether or not interest is absolute vested or contingent

If absolutely vested, class and gift are certain and contingency has been fulfilled, could be subject to be divestment—>ROE in grantor

Look to see if condition/limitation is legal

Illegal if restraint on alienation, uncertain, or against public policy—offending clause goes away, person still gets the gift

Uncertainty measured according to whether it is condition precedent on subsequent

CP sees whether articulation of condition is sufficiently certain—if uncertain, entire gift frustrated

CS: high level of clarity required around whether or not it is clear right up front the circumstances of divestiture are met—if not, entire thing goes away

**Noble v Alley**

F: Racist restrictions on disposition of land

I: Is this valid?

H: No because uncertainty

R: Enforceable covenants run with the land in equity and constitute equitable servitude, a burden on the land. This covenant not directed to the land but the transfer of a future purchaser. **Is the covenant unenforceable for uncertainty—it is impossible to set limits on the bloodline of all future purchasers,** especially if the covenant requires future purchasers to not possess any Jewish or black blood at all, so it is uncertain

**MacDonald v Brown**

F: Will gives estate to niece in trust until she is widowed or divorced

I: Uncertainty?

H: No

R: Whether testator’s motive was pure inducement to divorce or whether it was protective is determined on a case by case basis. Here, testator established a protective trust whereby niece would have additional source of income while married. **The clause was supportive not coercive or punitive to induce a divorce.**

* situation of looking at motive and intention
  + if motive is to support and care for someone, public policy will allow it to occur
  + public policy will strike down a clause put in by a testator with the purpose of causing a divorce because she or he doesn’t like spouse

**Canada Trust Co v Ontario (HRC)**

F: Guy sets up scholarship fund for white people only.

I: Uhhhhh???

H: Fuck that

R: Freedom of setting limits is important, but has to be limited for policy reasons. Freedom to dispose of the trust in a racist way must give way to current principles of public policy.

* Tarnopolsky says the criteria clear the hurdles for certainty
  + not like the occupier who has a splash of Jewish blood and would be divested
  + these things contemplate condition precedents, so the test is more lenient
    - the effect of the condition being bad is to wipe out the gift completely, doesn’t give an absolute
  + courts will look as much as they to see if someone qualifies or not

# CHAPTER 12: Future Interests

**If someone has a future interest, they still have a presently held interest to obtain title in the future, all the feature of in rem rights**

* more than one person can have interest in property
  + A transfers to B and C as JTs for life then to D for life then to E and F as JTs in FS
    - B/C get immediate right
    - D, E/F have future interests

**Vested Interests (courts prefer vested interests)**

* if transfer is immediate/unqualified, the interest is VESTED in interest and possession
  + to B for life, remainder to A in FS—A vested in interest, not possession
* resolutive conditions: to Dennis for life, but if Dennis marries Peter, to Jill and her heirs
  + Dennis has vested interest in possession, subject to divestment if he RESOLVES THE CONDITION

**Contingent interests**

* if interest is dependent on occurrence of some contingency that may or may not occur
  + property or identity of grantee not known: Dennis leaves Blackacre to Matthew’s children (Matthew has no children)
    - gift to kids contingent, wait until Matthew is dead or cannot have more kids (contingent upon class closing)
* right to interest distinct from right to possession/distribution/enjoyment
  + To Connor if he turns 30—**suspensive condition** b/c Connor has to wait, different from Connor getting the interest presently but having to wait for enjoyment
* CP that must be satisfied before vesting

**Browne v Moody (ALSO PHIPPS)**

F: Lady leaves some money her son, then her granddaughter, then her daughters

I: Were the interests vested?

H: Yes

R: Date of division is death of son. Executors bound to carry out wishes for testation. All the legatees survived testatrix, so the only contingency that effects them is predeceasing the son leaving children. If a legatee died without issue, the interest would pass to her estate. Contingency prevents absolute vesting, renders it subject to divestiture.

**Re Squire**

F: Guy leaves stuff to his grandson to vest when grandson turns 30

I: Did the gift vest at age 21?

H: Yes b/c Saunders v Vautier (no gift over)

R: Courts lean towards early vesting, here there is evidence of intention to vest gift early because interest is used for beneficiary and there is no gift over clause. Where there is an absolute vested gift made payable at a future event with direction to accumulate income, the court will not enforce the trust for accumulation in which only legatee has interest. The Court will allow a legatee to end the trust if it is exclusively for his benefit.

**Re Carlson**

F: Guy leaves his wife $1.00

I: Did gift vest at age 21?

H: Yes

R: Testator intended to keep whole of residue intact until son is 21. I**ntent of testator was not the same as creating one trust for one person with intention for person to use income until certain but not get capital until certain date.** Testator was not prepared to have son and daughter share on equal basis from date of his death, but only after pre-21 son had been satisfied.

**Courts tend to prefer early vesting of interests. Where there is an absolute vested gift made payable at a future event with direction to accumulate income, the court will not enforce the trust for the accumulation in which only the legatee has an interest (Re Squire). The rule in Saunders v Vautier states that a legatee can call for the end of a trust if the trust is exclusively for his or her own benefit and the legatee is above the age of majority. This situation is different from one in which the testator creates one trust for one person with the intention of the beneficiary not receiving the capital until a certain date (Re Carlson). If the testator intended to keep the entire residue intact until a certain date, the rule in Saunders does not apply.**

#### CL future interests

**Reversions**: interest that remains with transferor who has no exhausted whole interest in transfer

* vests in grantor, keeps what he hasn’t given (Dennis give Mal a LE, Dennis retains right to get property back when I die)
* at CL could not give to third parties, now statute makes it possible

**Rights of entry:** transferor conveys interest w/ CS which makes estate DEFEASIBLE UPON A CONDITION SUBSEQUENT

* words of limitation: **but if, subject to** 
  + to A in FS but if he enrols in law school, to B
* if 6 years elapse of breaking CS and grantor doesn’t do anything, statute of limitations expires

**Possibility of reverter (same limitation period as ROE)**: transferor creates a determinable interest

* boundaries of interest defined by identified condition(s) subsequent
  + to A until he enrols in law school, then to B
* words of limitation: **until, when, as long as, upon**

***Remainder rules***

1. **Remainder must be supported by prior estate created by same instrument as remainder** (problem w/ gap in seisin)

* to B for life, then to C and his heirs—B’s estate is prior freehold
* to B and his heirs if B reaches 21—no prior freehold, springing interest violates rule

2. **Remainder must vest at moment prior freehold estate expires**

* to B for life, remainder to first child of B to reach 21 provided the child reaches 21 in B’s lifetime
  + remainder if okay b/c if child has not reached 21 in B’s lifetime, grant does not take effect
  + no possibility of GiS between B’s death and vesting (if there is vesting)

3. **Remainder void ab initio if it prematurely defeats prior estate in freehold**

* to B for life, but if she marries X, to C and his heirs
  + C gets ROE b/c it follows “but if” (void at CL)
  + B gets LE DUCS
* s 8(2) PLA now allows ROE given to third parties
  + circumvent rule by creating determinable interest (POR)

4. **Remainder after FS is void**

* once transferor disposes of FS, cannot create any further interest
  + applies to EIFS absolute and EIFS subject to CS
* To B and her heirs, but if she marries E, to X and his heirs—okay because it is an ROE

**SAMPLE INTER VIVOS ANSWER**

**X’s interest is valid/invalid at CL.**

**IF INVALID: The interest violates [RULE] because [REASON]**

**Contingent remainders**

* can be destroyed b/c person entitled to it not qualified to take possession (natural termination)
  + to B for life, remainder to C if C attains 21—B dies when C is 19 (remainder destroyed)

***Equitable future interests s. 162 WESA***

* Equitable FI not subject to remainder rules b/c Trustee prevents any gap in seisin
  + subject to RAP
* have to be expressly created by vesting legal title in trustee
* **Re Robson: all interests created by will are equitable**

# RULE AGAINST PERPETUITIES

**Perpetuity = long series of equitable future interests that renders land inalienable b/c no one is entitled to it**

RAP APPLIES TO EQUITABLE INSTRUMENTS (WILLS) AND PORs

***MODERN RULE***

**If a future contingent interest has been created, it must vest, if it vests at all, within the live in being plus 21 years. Even if there is a remote possibility that the interest will not vest, the interest violates the modern rule. A party claiming an interest that violates the modern rule must turn to the Perpetuity Act for remedial solutions.**

To A for life, remainder to first of A’s children to reach age of 21—VALID AT CL

* A is an LIB, any child alive at time of instrument is a LIB
* if all of A’s children die and A has another child, THAT CHILD IS NOT A LIB
  + **the interest is still valid because it can vest within perpetuity period (21 years)**
    - if requirements was 25, the interest would be void

To A for life, remainder to the first child to marry (A has 10 children who are all engaged)—VOID AT CL

* if all of the children die and A has another child, that child is not a LIB
  + **non-LIB child may not get married within 21 years**

**IF AN INTEREST VIOLATES RAP, GO TO REMEDIES IN STATUTE**

**1**. s(14) capacity to have children (prevents precocious 11 yr old/fertile octogenarian)

* males: 14 and up
* females: 12-55

2**.** s(9) Wait and see

* gift is presumed valid until actual events establish the interest is incapable of vesting within perpetuity period
* wait and see period for corporations is 80 years

3. s(11) age reduction

* courts reduce age to nearest age that would prevent if from being invalid (add 21 years to age of child

5. cy pres: court decided whether interest should be given

6. class splitting

**SAMPLE RAP ANSWER**

**X’s interest violates/does not violate the RAP because [REASONS]. X can avail him/herself of the Perpetuity Act for a remedy. X has/does not have capacity to have more children. Run wait/see. If wait/see does not work, reduce the age. If nothing else, use cy pres.**

# Co-ownership

## Tenancy in Common

* when one tenant dies, his/her share goes to his/her estate, not the other tenant

## Joint Tenancy

* when one tenant dies, the interest goes entirely to other tenant(s)
* usually occur in family situations b/c doesn’t make sense in businesses

### Right of Survivorship

* right a JT holds against other JT—if one of them dies first, then the other gets everything

### The Three Unities

**Time: interest acquired at the same time**

**Type: interest created by same instrument**

**Interest: interest is the same (ie has the same duration)**

## Common Law

* used to presume JT, now prefers TICs
* can still create JTs, but need absolute certainty of three unities

## Re Bancroft, Eastern Trust Co. v Calder [1936] –common law - “use of word equally for shares” silence was taken as joint tenancy

* Sam Bancroft had a three stage will
* sam and clara lived together as husband and wife
  + **The words equally were not used in the split of minnie’s quarter share therefore joint tenancy**
  + **The entire estate is tenancy in common, but Paul and jean’s were joint tenancy**
  + Equity would have saved u if u fell in one of three categories and would treat it as a tenancy in common
    - money contributed in unequal shares, property is mortgaged and cowers are mortgagees, cowers are business partners (rebuttable presumptions)
  + **Equity didn’t like the joint tenanc**y
    - Anything that allocates a share (3/5ths, etc.) in the property implies a tenancy in common
      * Only when it is silent did the common law hold (default to joint tenant, prior to statute that changed it to tenancy in common)
      * Note that the word ‘equally’ is not found in the discussion of Paul and Jean, while ‘equal’ was in language allocating shares to his children

##### On the basis of this, the silence is taken to mean that he intended joint tenancy for the grandkids

**Equity**

* Disliked joint tenancy; preferred **tenancy in common** and gave effect to this preference by
  + Interpretation of documents
  + Even where joint tenants in law, equity might treat them as tenants in common in equity
    - If unequal contributions to purchase price
    - In commercial transactions where partners purchased property
    - If joint mortgage where 2/more lent money and borrower transferred title to lenders
* This equity holding is fortified now in all matters by s.11 of statute
  + Note – s. 11 does not apply to leaseholds – only fee simple!!!
    - (Presumption/fall back to tenancy in common) – presumably then the common law standard of fall-back to joint tenancy still holds
* In partnerships (business) – tenancy in common makes more sense than joint tenancy (as that would give everything to your business partner and not to your fanily/people you care about
  + Because – s. 25 of Property Law Act – allocates property of partner to other partner in case of death

#### Robb v Robb (1993) –equity “Man dies who owned share in company, and children claim his share is tenancy in common, not joint tenancy b/c didn’t want 2nd wife to take” joint tenancy, fall back on tenancy in common only for fee simple not shares s.11

* Mary and Mr. Robb purchased a coop (a very common system pre-strata)
* Coop: developer builds a building – he transfers the property to a company so that corporation owns it.
* Provision that ony shareholders in the company can occupy lots in the coop building
* When you buy a coop you are doing two things
  + 1) Buying shares in the company
  + 2) Taking on a rental agreement – take what is left on the original term which is granted in the long-term in exchange for shares
* Mrs. Robb purchases a 3rd generation coop, but places it in his and her name
* Even though he didn’t pay for the property, he had had other property in California, which he transferred to Mrs. Robb as a means of payment (consideration for being put on the lease)
* Mr. Robb dies
* Question is – does she take the condo (which is held jointly) under the rights of survivorship, or is it a tenancy in common (in which case, his interest would go through his estate/will process)
* He left everything to Mary, but the children from his first marriage are trying to come after it under the *Wills Variation Act* – children can challenge a will
* Though there was some indication that both Robbs intended to hold the condo jointly, it is not clear
* Concluded that it is a jont tenancy
  + No words of apportionment, etc.
* Kids were arguing under s.11, though this argument fails because the fall back to tenancy in common under s.11 ONLY applies to fee simple
  + The property interest here isn’t a fee simple – it’s an assignment of a lease

## Statute

* s 11: presumption that property is held as TIC

## Transfer to Self and Co-Ownership

* to get rid of JT, execute proper transfer form
  + makes it clear that one of the three unities is being ruptured
* equity permits transfer to self to permit severing JT
* if other tenants hold JTs, third person moves to TIC and holds 1/3
  + other two hold 2/3 jointly and have rights of survivorship

## Registration of Title

* registration of TIC to rupture a JT is not necessary, but makes intention to rupture three unities clear

## Relations between co-owners

* same in TIC and JT—everyone owns every atom of the property indivisibly
  + co-tenants cannot divide property into halves, fragment rooms in a house, etc
* if one TIC owns 3/4 and other owns 1/4, cannot confine 1/4 owner to 1/4 of property
  + go to court and ask for partition or sale
* any co-owner has access to all parts of the property, cannot be confined—only confinement if parties agree to it
* co-owners should not be saddled with costs they didn’t agree to or pay money with respect to occupation

## Share of Profits: any tenant can bring an action if other tenant is receiving more than JUST SHARE OR PROPORTIONS OF PROFITS

## Spelman v. Spelman (1944 BCCA) – exception to general rule that co-owners are entitled to share of profits

* co-owner entitled to revenue if s/he is deliberately or constructively ousted from the property
  + focus on co-owner’s OPTION to have rights in the profits (ie the wife here had the option)

## Share of expenses

* PLA (13)(1): contemplates scenario where work has been done, paid by one co-owner to prevent judgment being registered
  + paying co-owner can get proportionate share from all other nonpaying co-owners
  + probably also covers decorative repairs
  + if there is a correlation btwn sale price/repairs and nonpaying co-owner can benefit from sale, paying co-owner should benefit from costs of his repairs
* if owner has lived in property and has not had to pay rent and other owner does, occupational allowances taken into account

## Termination of Co-ownership

Common intention of parties: agreement between themselves.

Destruction of one of the unities: usually by alienation of one party – with or without consent, but also through bankruptcy, or order of partition and sale.

Course of dealings which precludes one party from asserting that there was no agreement: no express agreement, but courts can look at **behavior** as indication of severance.

## Severance of Joint Tenancy

* rupture one of the three unities
* mutual agreement (parties agree to their shares)
  + purported agreement by conduct, estoppel by conduct
* can’t sever JT by simply saying you’re doing that, or declaration

### How to get out of joint –tenancy: must create a tenancy in common by issuing share before death takes over and the rights of survivorship occur.

**Stonehouse**: transfer form JT to sever one of the unities once it is signed, completed, and handed on to transferee

* policy preference to let people unshackle themselves from JT

#### Sorenson v Sorenson - wife severed the joint tenancy held with ex husband by giving her share to her disabled son = “I hereby give my share to my son” got rid of rights of survivorship

* creating a trust in a property is enough to to sever JT

**Harmelling:** court will order sale of property or partition is one party applies and it does justice (dissent says only if it will not result in undue hardship)

**Section 11 of the PLA presumes that property co-owned is held as a tenancy in common. Barring explicit evidence to suggest that the grantor intended to create a koi**