**LAW130: Property**

**Full CAN (2013-2014)**

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Registration of Title (Overview)

COMMON LAW CONVEYANCING

**The Historical Feudal System:** Only the legal interest exists, can be transferred via **feoffment w/ livery of seisin** (public & physical act) – gradually replaced by **delivery**, in which the transferor supplied the transferee w/deeds (docs under seal).

* Disadvantages:
  + **Expensive**
  + Prone to **delays**
  + Often led to **ambiguity**, which, in turn, led to **litigation**
  + Person entitled to possession also entitled to custody of deeds – custody of deeds against hazards of fire/loss/theft posed a problem

The Recording System

**Recording System:** Livery abolished – ceremonies no longer required to transfer possession. Written deed required transferring ownership. In order to effect transfer, **both the written document & delivery** are required [intention → acceptance → delivery]

* Recording system records these deeds, but has no legal effect on the title.

The Torrens System

Once a fee simple interest is entered on Register that is **conclusive evidence that person named on the Register is the owner of the interest** (subject to some exceptions)

Torrens imposes a registration system that (1) **records the written document** and (2) **gives legal effect to the document via registration**. Legal effect given to the title by virtue of 2 elements:

1. Registrar contains all relevant information related to title
2. Fact of registration creates **indefeasible title (s. 23 *LTA*)**

**Prescribed form required to register the transfer** (**s. 185**: Form A or its equivalent). **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**).

BC is divided into land title districts – interests are registered under whatever district they’re in

* **Once someone enters their EIFS on the Register it is conclusive evidence that they’re the owner of the interest //** anyone wishing to deal w/that land can determine state of EIFS by looking at Register
* **No longer have to search further than Register to determine state of fee simple title**
* Compels (doesn’t mandate) registration as one can’t sue for their interests if not registered
  + W/o registration one can only sue transferor via K law
* **Central feature:** Crown guarantees title (no need for land insurance)
* Land Title System doesn’t revolve around deeds but **certificate of indefeasible title** – this title & registration are EVERYTHING (ALL OF THE THINGS)

THE GENERAL PATTERN OF REGISTRATION

What Can Be Registered

**The General Principle:** only those interests which were recognized as interests in land at CL (including equity) can be registered under ***LTA***: fee simples, leases, life estates, easements, mortgages, trusts, mineral rights

***R v Kessler, 1961*** (*K argued zoning & development bylaws should be registered in LTO as they “affect the use of land” Interests must be registered under LTA to have effect, thus zoning bylaws should also be registered to have effect*)

* **Held:** only **interests in land** are registrable under ***Land Registry Act*** – zoning bylaw not an interest in land
* Registration may be refused unless the instrument sought to be registered conveys an **interest in land**

Prohibition of Registration of CL Interests

You cannot register the following CL interests:

1. **Equitable mortgages/lien by deposit of duplicate indefeasible title or other instrument** (***LTA s. 33***) – where you provide security by leaving your duplicate CIT w/bank
2. **Details of Trust** (***LTA s. 180***) – while the trustee is listed on the title, you can’t specify who the trust is being held for. BUT trust doc usually deposited at LTO
3. **Sub-right to purchase** (***LTA s. 200***) – all sub-rights after 1979 can’t be registered (sub-right to purchase occurs where agreement for sale is registered on title & owner of that agreement for sale enters into another agreement for sale w/a 3rd party [subsequent agreement can’t be registered])
4. **Aboriginal Title** (***Skeetchestn Indian Band v BC, 2000***) – b/c AT is inalienable except to Crown, doesn’t provide good safe-holding & marketable title; therefore it can’t be registered. **Caveats & certificates of pending litigation (CPLs)** to AT also can’t be registered, BUT encumbrances relating to Nisgas’ lands can be registered (***LTA s. 1***)
5. **Agreements to Sell** – can be registered as a charge on seller’s EIFS, but an assignment or sale of that agreement for sale (sub-agreement for sale) can’t be registered
6. **Leases under 3 years**

Registration of Non-CL Interests (CHARGES)

1. **Caveats** (***LTA ss. 282-294***)
2. **Certificate of pending litigation (**lis pendens) (***LTA ss. 215-217***)
3. **Statutory right of way** (***LTA s. 218***) – allows certain gov’t bodies & others to acquire a right to use another’s land for a certain purpose. Different from CL easement, which allows adjoining land owners to obtain access through their neighbour’s land
4. **Restrictive covenants** (***LTA s. 219***) – imposes restrictions on the use to which land may be put. Frequently restrictive, but may also be positive (benefits)
5. **Statutory building scheme** (***LTA s. 2220***) – restricts use of land. Enforcement comes from adjacent property owners (or developers) rather than from the municipality
6. **Agricultural land reserve parcels** (***Agricultural Land Commission Act***) – while zoning bylaws are not registrable as an interest in land, ALR parcels are. Appears on title under “notations”
7. **Marriage/co-habitation agreements** (***Family Relations Act, s. 17***) – rarely used agreements which allow non-titled individuals to acquire some interest in the property (i.e. veto rights over land dealings, prevent severance of joint tenancy)

**Aboriginal Title** (***Skeetchestn Indian Band v BC, 2000***)

* AT not derived from fee simple, it is ***sui generis*** & doesn’t lend itself to categorization. It is **not alienable**; can only be surrendered to the Crown. Doesn’t fit w/in scheme of current real property law in that it is not an interest in land contemplated by ***LTA*** & is not registrable (***Delgamuukw***)

BASIC SCHEME OF REGISTRATION

All registrable interests can be divided into 2 categories:

1. The legal **fee simple**
2. All other registrable interests = **charges**

THE LEGAL FEE SIMPLE

**Legal fee simple** applies to the **surface of land, a strata lot** or an **airspace lot**. Generally only the owner of surface of the land registers a fee simple (***LTA s. 179(1)***)

* **S. 141(1)** – indefeasible title can be obtained for subdivided airspace parcels
* **S. 141(2)** – airspace parcels can be alienated in same manner & form as other land

***Strata Property Act s. 239(2)*** – strata lots can be alienated in same manner & form as other land → each lot gets a specific description/delineation & each owner thereof gets individual indefeasible title

* **S. 244** – outlines **requirements for strata plan**. Plan must be signed by applicant & each holder of a registered charge, unless registrar decides that the interests of those who haven’t signed aren’t adversely affected by the plan

Initial Application

Process & requirements outlined primarily in ***LTA s. 169***. When applying to have an EIFS registered, registrar must be satisfied that:

* The **boundaries of the land are sufficiently delineated** by description or plan on record in LTO
* A **good safeholding and marketable title in fee simple** has been established by the applicant
  1. Safeholding = title that is “safe from attack & cannot be displaced”
  2. Marketable = title that is freely alienable, “and not so defective that a reasonable purchaser could refuse it”

***Section 169(2)*** – Registrar may give notice that they’re intending to register the title of the applicant unless someone registers a caveat or CPL contesting applicant’s right

***Section 169(3)*** – If caveat or CLP is registered the registrar must defer consideration of application until caveat expires/withdrawn & CLP claim is disposed of

**Applications Received by LTO:**

* Application is deemed to have been received when ***s. 153*** has been complied w: applications for both EIFS & charges are date/time stamped upon receipt & given a serial number
* Application is scrutinized by examiner of titles (i.e. good safe holding & marketable title)
* Final step involves production of indefeasible title → can take 2 forms (**s. 1**):
  + Traditionally – CIT (when signed by Registrar title was deemed to be issued
  + Today – computerized system

When fee simple is registered, the Registrar must issue the owner a **duplicate indefeasible title (s. 176(1)).** The duplicate must contain all the information in the register relating to the land in question, including conditions, exceptions, reservations, charges, liens or other interests (**s. 176(2)**). But DIT can’t be issued if title is subject to either a registered mortgage or agreement for sale **(s. 176(1)).**

**Once title has been registered, it becomes “conclusive evidence at law and in equity” that the person named in the title is “indefeasibly entitled to an estate in fee simple”**

Transfer Inter Vivos

* Same process as for initial registration
  + Registrar must be satisfied that:
    - Land is sufficiently described,
    - Instruments supplied confer good safeholding & marketable title
  + If DIT has been issued, transferor must produce it

Transmission on Death

* **Transmission** = “change of ownership by operation of an Act or law” (***LTA s. 1***)
* Dealt w/ in ***LTA ss. 263-268***
  + Title vested in personal reps who hold it in trust as fee simple owners for the beneficiaries
  + Personal reps register themselves as fee simple owners in fiduciary capacity
  + Personal reps transfer title to beneficiaries, who may then register themselves (***ss. 162-3 WESA***)

CHARGES

**Charges** are defined widely by ***LTA s. 1*** as encompassing any “estate or interest in land less than the fee simple”

* Includes **encumbrances**, defined as:
  + Judgment
  + Mortgage
  + Lien
  + Crown debt
  + Or other claim to or on land created or given for any purpose

***LTA, s. 197*** – Registered charges must show:

1. That the applicant has a good safe holding & marketable title (can establish in a number of ways)
   1. By an instrument from FS owner creating charge in favour of applicant
   2. Assignment to applicant of existing charge (ex. lease)
   3. Creating of sub-charge (ex. sub-lease) in favour of applicant
2. The charge claimed is an estate or interest in land that is registrable under ***LTA***

Caveat

***LTA Part 19 (ss. 282-294)***

**Registration:** Caveats can be lodged by any person who claims to be entitled to an interest in registered land that is not reflected on CIT (***LTA s. 282***). Registered by Registrar by entering endorsement of caveat & time of its receipt (***LTA s. 287***). Caveats may also be lodged by the RO (**s. 282**) and Registrar (**s. 285**).

**Effect:** As long as a caveat remains in force, **other instruments or plans for alteration cannot be registered (s. 288).** Once lodged, Registrar must not:

1. Register another instrument affecting the land unless the instrument explicityly subject to caveator’s claim, OR
2. Change the boundaries affecting the land

= temporary “freeze” on registration process

Caveat lapses after **two months, or 21 days after serving notice** thereof on the caveator – **unless proceedings have commenced** (**s. 293**) – allows ‘challenger’ to get their shit together and serve a writ & subsequently apply for LP

Certificates of Pending Litigation (*lis pendens*)

***LTA Part 14 (ss. 215-217)***

**Registration: Can be registered by any person who has commenced or is a party to a proceeding.** As per s. **215(1)(b)** registration works the same as a charge.

* Registrar must give copy of LP to owner against whose title the LP was registered (**s. 215(3)**)

**Effect:** **halts all dealings w/land (s. 216)**

* While the certificate is in effect, registrar must not make any entry that has the effect of charging, transferring or otherwise affecting the land in Q
* Exceptions **=** lodging a caveat; registration of indefeasible title or charge **if prior application is pending** (**s. 217**)
* LP stays in effect until litigation is concluded. Title Qs can’t be decided by civil servants (i.e. registrars) but must instead by directed to **courts of original jurisdiction** (BCSC)

Judgments

***LTA Part 14 (ss. 210-214)***

**Types of Registrable Judgments:** Someone who has obtained a judgment against a land owner (**judgment creditor**) can have that judgment registered as a charge against the land

* Primarily talking about $$ judgments against a defendant, registered against the judgment debtors interest in land – provides security for the judgment creditor
* Judgment is not an interest in land, and can only be registered by virtue of stat authority
* Judgment creditors are asserting a priority over the land in the event it is sold in execution of that judgment
  + Note: **priority** is measured according to **when interest is registered**
* When judgment registered, Registrar must notify owner of land or charge against whose title the registration has been effected
* $$ judgments: claim by P results in Certificate of Judgment against D ordering that “judgment creditor is owed X dollars by judgment debtor”
* Non-monetary judgments: may include unjust enrichment, proprietary estoppel, etc. – these alter the title to the land, rather than order the transfer of $$

**Effect:** (***Court Order Enforcement Act s. 86(3)***)

* Forms lien & charge on land of judgment debtor – has the effect of making the ‘recipient’ of the judgment a secured creditor
  + Applies subject to interests of equity’s darling

THE ROLE OF THE REGISTRAR

**General Duty:** Administers the ***LTA*** w/respect to the lands w/in their Land Title District. Registrar’s powers are derived from ***LTA*** – they are a Constitutional judge; therefore can’t adjudicate contested rights of parties – need to go to court for that (***Heller***)

* Registrar’s scrutiny of any application based fundamentally on search for **good safeholding & marketable title**

**Quasi-Judicial Role:** Act on principles of law to determine whether interests are registrable [GSMT]. In this role, Registrar is bound by established law b/c they can only apply the facts to the law.

1. **Not all interests are registrable:** (i.e. AT not registrable, nor are charges relating to it [***Skeetchestn***])
2. **Don’t Perpetuate Errors in Title:** Registrar has a duty to satisfy himself that title is good, safeholding and marketable when registering the instrument (***Evans***)
3. **Power to refuse bad documents:** Registrar can refuse to register if docs & evidence produced fail to establish either a *prima facie* or GSMT (***Shaw***)

**Administrative Role:** Act on policy and/or expediency. In this role, Registrar has discretion to make the rules.

1. **Discretionary power to cancel or correct** instruments (**s. 383**): if an instrument has been issued in error by the Registrar, contains a misdirection, or an endorsement has been made or omitted in error on a register/instrument, Registrar may cancel/correct (***Heller***)
2. **No Obligation for non-Registrar Errors:** Registrar is not obligated to correct errors which are not the fault of the Registrar (***Heller***)
3. **Cannot prejudice BFPs:** Power of cancellation occurs only if it doesn’t prejudice rights acquired in good faith & for value (**s. 383(1)**)
4. **No Appeal of Discretionary Decisions:** You can’t appeal discretionary decisions of the Registrar, but you can appeal a refused application

**When an instrument/application is submitted to the LTO**, the Registrar must determine:

1. Whether the instrument deals with an interest in land (***Re Kessler***)
2. Whether the interest is properly derived from the owner/applicant
3. Whether the transaction & instrument are, *prima facie*, valid (***Shaw; Heller***)

***Re Land Registry Act, Re Evans Application, 1960*** (*Land parcel registered as 66 ft ‘more or less’: ½ transferred to S, ½ to E. Mr. E died so Mrs. E applies to update CIT; registrar refuses to register land until uncertainty of exact boundaries is rectified*)

* **Not the duty of registrar to determine:** (a) boundaries (b) adjudicate on property rights (this is under inherent jurisdiction of CL)
* **BUT registrar doesn’t have to perpetuate errors** w/boundaries & can step in to attempt to correct them – has an option not an obligation to correct register.
* In absence of delineation of property there is not GSMT

***Re Land Registry Act and Shaw, 1915*** (*Shaw’s dad gave him power of attorney to sell & dispose of his property; S tried to use this to assign Dad’s interest in a mortgage to himself. Registrar refused to register transfer until notified by Dad, as on its face, transaction was improper*)

* **Registrar has authority to look behind an agency agreement** & was right to refuse to register the transfer as there is not GSMT
* **Registrar can’t determine if doc is voidable**, courts must do this
  + Courts held that **transfer by a fiduciary to himself was *prima facie* voidable at instance of person to whom fiduciary duty was owed**
  + Title is not established if something more is required to prevent it being rebutted

***Section 27 PLA*** (*attorney can’t sell to himself*)– renders such a transfer (in ***Shaw***) invalid unless expressly provided for in the power of attorney or ratified by the principal

***Heller v BC, 1963*** (*H tried to transfer land to wife, registrar registered it w/no duplicate CIT on file. Duplicate already given to someone who already had a ½ interest transferred. H tried to reverse transfer to his wife due to error of allowing registration to proceed w/o duplicate CIT in office but Registrar refused*)

* **This is a discretionary matter – as registrar can’t affect the rights of others by correcting something or adjudicate the rights between parties** he can’t investigate (should be left to courts)
* As H gave deed to his wife this showed intention to transfer land to her (acquired gift in good faith), to restore his title H will have to show this was void, otherwise registrar will not affect wife’s rights she acquired by changing register

***LTA s. 383*** (*Registrar to correct/cancel instruments*)

* If registrar finds an instrument is issued in error/has misdescription or endorsement is made/omitted in error registrar **MAY, so far as practicable, w/o prejudicing rights acquired in good faith and for value** cancel the registration/instrument or correct the error
* Registrar “may” exercise their powers – no duty to enforce rights of party if error exists

THE ASSURANCE FUND

The **Assurance Fund** is a statutory scheme that protects equitable rights and compensates people who lose their CL property rights as a result of ***LTA***. Recovery is dictated by terms of the statute. The Assurance Fund allows plaintiffs otherwise barred to claim compensation for lost interests in land from someone other than the person who occasioned the loss.

As per the requirements from ***s. 296 LTA***, outlined in ***McCaig v Reys***, the claimant must show:

1. That he has been deprived of land or an estate or interest therein
2. That the loss was occasioned as a result of the operation of the ***LTA***
3. That it was occasioned by fraud, misrepresentation, or some other wrongful act in the registration of any other person as the owner of the land or interest in land
4. That he is barred from bringing an action for rectification of the register

**Other Rules for AF:**

* ***S. 296(3)***: AG must be joined as party in any claim against the Assurance Fund
* ***S.* *296(8)***: 6 year limitation period
* ***S. 303***: **Liability is limited –** the following owners can’t claim against AF
  + ***S. 303(a)(i):*** Undersurface rights owners
  + ***S. 303(a)(ii)*:** Equitable mortgagees by deposit of duplicate indefeasible title
  + ***S. 303(d)*:** Errors in airspace plan
  + ***S. 303(f)***: **contributory negligence** – new ***LTA*** amendments will lower P’s damages in event of CN (previously, CN would bar a claim)

***McCaig et al v. Reys et al., 1978*** (*R purchased land from M & registered his interest. R gave M unregistered option to buy back some land, R then sold land to Rutland, who knew of option but sold to Jabin w/o disclosing it. M sued R for breach of K; Rutland for fraud & inducing breach of K; AF for defeating option*)

* M can’t advance claim against AF:
  + In this case loss didn’t result from operation of statute so M can’t rely on AF
  + Only had equitable interest in his option: in CL an equitable interest is lost where person is a BFPV. Under CL Jabin is BFPV so M lost his equitable interest.

Registration: The Fee Simple

Nothing in ***Land Act*** compels registration, but it’s wise to register b/c of its advantages; dangerous not to register

* **S. 54** – requires registration for interests that come from Crown grant (post April 5, 1968)

**Effect of Indefeasible Title** (***Land Title Act s. 23***): indefeasible title is conclusive evidence at law & at equity

**Exceptions & Reservations** (***Land Act s. 50***): specific provisions retained by Crown even if nothing stated in original grant (allowed to resume any part of land necessary for making roads, canals, bridges or other public works, but can’t be more than 1/20 of whole land [also can’t resume land w/building or garden on it])

***Agricultural Land Commission Act***: sets up a regulatory body that freezes land use to farm use; only way you can do something other than farming is get land taken out of Land Commission

* Must find out if land is agricultural reserve & follow regulations

THE GENERAL PRINCIPLE OF INDEFEASIBILITY

**CL Rule:** a forged transfer doc was null & void, even if “purchaser” was a BFPV w/o notice

***Creelman v Hudson Bay Insurance Co, 1920*** (*H owned land, had EIFS title registered; C made K w/H to buy land & put down large deposit. C backs out, H wants to keep deposit, claiming C breached K. C argues:* ***land given to H under federal legislation for purpose of ‘use or occupation of H’s company’****; as H didn’t use it for this purpose H can’t register the land & can’t dispose title to C thus C should recover deposit*)

* **Once indefeasible title is issued, it’s conclusive in law & equity**
* Allowing investigations into right of a person to appear on register when he holds CIT would defeat purpose of statute of registration
* **Held:** C bound to accept H’s CIT & comply w/obligations under K

Indefeasibility & Adverse Possession

**Squatter’s Title/Adverse Possession:** if landowner doesn’t bring action to recover possession of land from wrongful occupier w/in specific period (defined by statute) the right to do so is lost (statute barred). Squatter is given possessory title, which courts protected

* Adverse possession is inconsistent w/indefeasibility of registrable title
  + ***Limitation Act*, s.17**: if a private individual didn’t bring an action respecting land w/in 20 years, and Crown w/in 60 years, right of action would be statute barred (ss. 16,48)
    - **S. 41**: after termination of those periods right & title of original owner was extinguished
  + Above clearly applies to unregistered land, what about registered?
    - S. 38(3) of *Statute of Limitations* (replaced by *Limitation Act*) appeared to prohibit acquisition of title by adverse possession once the land had been registered
* ***Land Act s. 8***: can’t acquire title to Crown land or any land via adverse possession unless exception (own land for 20 years before 1975 applies)

**Effect of Indefeasible Title (*Land Title Act, s. 23(3)(4)*):**

* Possible to acquire title by adverse possession where:
  + No IT has been raised to the subject land
  + Where claimant is challenging first IT registered (no claim if original holder transfers title)
* Acquisition of title by adverse possession can arise both through mutual mistake & where adverse claimant is a knowing trespasser
* For a claim to title based on possession to succeed, act of possession must be open & notorious, adverse (not w/permission of owner), exclusive, peaceful (not by force), in general actual (as opposed to constructive) & continuous

Statutory Exceptions to Indefeasibility

**EIFS:** fullest relationship one can have in respect to land; total control in perpetuity – one may assume it’s absolute but some restriction can make it **qualified**

**Leases:** (***LTA s. 23(2)(d)*)**

* A lease or agreement for lease for a term not exceeding 3 years (doesn’t have to be registered) if there is actual occupation under the lease/agreement (lease only needs to be registered if over 3 years)

**Ex.** If T is lessee & S is lessor selling the land to B buyer; T has lease for 2 years // Any buyer of land has to wait until lease expires until they are able to move into premises // Grant of indefeasibility of B doesn’t protect him as T is a tenant, occupying his land w/a lease less than 3 years. Thus, B can’t kick T off his land before his lease is up.

**Charges & Other Entries:** (***LTA s. 23(2)(g)***)

* A caution, caveat, builder’s lien, condition, entry, exception, judgment, notice, LP, reservation, right of entry, transfer, other matter noted or **endorsed on the title or after registration** of title
* Each charge on a piece of land has to be lawfully justified (depends on nature of charge)
* Registrar checks to make sure every charge is authorized

***Carr v Rayward, 1955*** (*R didn’t pay C for work on property, C filed lien before completion of the work but after R had sold property to the defendant, Bell → had CIT issued in his name w/o lien*)

* **A mechanics’ (builders’) lien is effective against lands if not filed in land registry office after owner for whom the work was done sells the land & purchaser has obtained a CIT from LTO**
* ***Builders Lien Act, 1997 s. 2*:** workers have a lien against interest of owner, the improvement, the land, or the materials for any $$ not paid in respect of the work/materials → gives workers real interest in land + personal interest (under their K)
  + ***S.*** **20***:* lien may be filed w/in 45 days of completion of work; if not it’s extinguished
  + Lien has effect from time that work began/materials supplied & “has priority over all judgment, executions, attachments & receiving orders recovered, issued or made after that date”
* **S.23(2)(g):** a builders’ lien put on title **before/after** date of registration is a restriction on IT
* **Held:** D has to pay P under **s. 23(2)(g)**

**Boundaries:** (***LTA s. 23(2)(h)***)

* The rights of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title
* Registration doesn’t preclude error in location of property lines

***Winrob v Street, 1959*** (*P was buying house & retained D lawyer; D searched title but didn’t check maps in LTO to determine its dimensions; transaction went through & 2 years later P discovers part of their lot is owned by Vancouver & P has to pay rent/vacate it*) **Issue:** does the exercise of due care require lawyer to ascertain dimensions of a lot?

* **Held:** conveyancer has no duty to ascertain or advise on dimensions of property (outside lawyer’s expertise)

**Fraud:** (***LTA s. 23(2)(i)***)

* The right of a person deprived of land to show fraud, including forgery, in which (a) RO has participated in any degree (b) person from/through whom RO derived their right or title otherwise than in good faith & for value has participated in any degree

**Forgery:**

1. A is RO. B forges A’s signature, becomes new RO. A can recover title under s. 23(2)(i)
2. A is RO. B forges A’s signature, becomes new RO. B sells to C, who knows of forgery. A can recover title.
3. **BUT:** A is RO. B forges A’s signature, becomes new RO. B sells to C, who doesn’t know of forgery – WHAT NOW??

***Gibbs v Messer, 1891*** [AUSTRALIA] (*Mrs. M is RO of land; her husband gives her DCIT to their lawyer C. C concocts a transfer form of their land to “Hugh” (fictitious person) forging Mrs. M’s signature. C then arranges w/Ds (McIntyres) for a loan to be secured by mortgage from “Hugh”. They pay “Hugh” & land is transferred to them on another transfer form. C takes $$ & disappears*)

* **Held:** Mrs. M reinstated on register as RO; McIntyre’s mortgage is invalid.
  + Registration in fictitious name can’t impede right of true owner, Mrs. M, who has been defrauded, to have her name restored to the register
  + **Deferred Indefeasibility:** occurs while there is fraudster in transaction – indefeasibility deferred until fraudster sells to C & C sells to another innocent purchaser. While fraudster is on title & before sale, title is vulnerable & can be taken back. Once it passes from fraudster to C, still vulnerable & can be taken back, but by 3rd purchaser, situation is innocent person w/another innocent person = indefeasibility
  + This case goes against literal meaning of s. 23(2)(i)

***Frazer v Walker, 1967*** [NEW ZEALAND] (*Mr. & Mrs. F had EIFS w/mortgage on it. Mrs. F arranges mortgage w/2nd respondents & forges Mr. F’s signature on transfer form (null deed). She used this to pay out their first mortgage & keeps rest of $$. When no payment made on their mortgage 2nd respondents transfer property to 1st respondent. 1st R applies for possession of the land relying on his title as RO. Mr. F claims the mortgage & sale occurred w/o his knowledge & applies for declaration that they are invalid & that register restore his title*)

* **Held:** court denies Mr. F’s claim
* Once 3rd person became registered holder of FS, they keep title & first party (F) should be innocent victim left to seek monetary compensation from fraudster and/or Assurance Fund
* Wanted to preserve public confidence in Torrens System → more important to protect BFPV’s registration of title = protection of conclusiveness of register & registration in itself conferred title
  + Derived from & upon registration, not from the defective title (previous fraud)

**If you haven’t participated in fraud and are BFPV you get indefeasible title. A can’t recover title b/c C = BFPV w/o notice. A can recover from AF b/c under CL A could have recovered title (*nemo dat*, bitches!)**

**How you perform fraud matters!**

* Under ***Frazer***: immediate indefeasibility – if you were in good faith you’re OK
* Under ***Gibbs***: deferred indefeasibility – if you got ownership through null/void dead you’re in trouble

***Land Title Act s. 25.1*** – **Void Instruments – interest acquired or not acquired**

* Immediate indefeasibility is given to FS & deferred indefeasibility given to charges
* S. 1 – can’t acquire interest by registration of void instrument (i.e. forged transfer form)
* S. 2 – appears to enact ***Frazer*** → if transferee is named in instrument (transfer form) & deals in good faith for valuable consideration, person is deemed to have acquired that estate on registration of instrument (immediate indefeasibility)

***Gill v. Bucholtz, 2009*** (*G is RO; GG forges G’s signature on transfer form to transfer land to himself. GG becomes RO. GG mortgages land to B, transferring it to him on 2nd transfer form signed by GG & makes 2nd mortgage to a co. G discovers what’s happened, registers caveat on land; neither B nor Co. knew of fraudulent root of GG’s title!*)

* **Held:** **registered charge doesn’t obtain same quality of indefeasibility as registered FS –** exception in s. 23(2)(i) applies & “void instrument” in s. 25.1(1) includes a mortgage taken from person who obtained title by fraud/forgery
* Act preservers ***nemo dat*** rule re: charges, even where holder has relied on register & dealt *bona fide* w/ non-fictious RO
  + Mortgagees didn’t get any interest b/c GG didn’t have any interest to give, so mortgages granted were void

**\*\*INDEFEASIBLITY DOESN’T APPLY TO CHARGES\*\***

***First West Credit Union v Giesbrecht, 2013***

* Court emphasized distinction between other types of fraud that render transaction **voidable** as distinct from forgery (which renders transaction void)
  + **S. 25.1(1)** only applies *nemo dat* to “void” as distinct from voidable transactions
  + *Gill* – transfer that preceded mortgages “void” due to forgery, rendering transfer & mortgages based on it void also
    - **S. 23(2)(i)** says that “person deprived of land” (i.e. Mr. G) may set aside a fraudulent transaction → victim of the fraud must have been the previous owner of the land
* Petitioner doesn’t qualify for relief under either of above provisions
  + Complained that he was the victim of fraudulent misrepresentations re: effect of a transfer of land from a company to G
    - G didn’t purchase the land for consideration paid to the company. G became registered owner & mortgaged it to FW
  + Petitioner seeking to set aside transfer to G & G’s mortgage was an investor in the company → claimed the transfer had taken value out of the company & his investment, making him victim of fraudulent misreps
  + Company had been registered owner of land, transferred it to G – under company law, investor in a company doesn’t own assets owned by company
  + Since petitioner never owned the land, he hadn’t been “deprived” of the land so no rights under s. 23(2)(i)
  + Fraudulent misrepresentations might render transfer voidable, but until it has been set aside, transfer stands as valid → since transfer to G hadn’t been set aside, petitioner couldn’t claim it as “void” under s. 25.1(1)

Notice of Unregistered Interests

**Effect of Notice of Unregistered Interest** (***LTA s. 29(2))***

* If person applies for registration & becomes RO the are not affected by notice (express, implied or constructive) of unregistered interests affecting their land **unless participating in fraud**: if affect of acquiring their interest is to defeat another’s interest they are subject to theirs
* Exceptions:
  + - s. 29(2)(c): interest w/pending registration
    - s. 29(2)(d): lease not exceeding 3 years if there is actual occupation under lease
    - s. 29(2)(e): title of a person against which the indefeasible title is void under s. 23(4)
* *Actual notice* (real knowledge of circumstance) *Constructive notice* (facts or circumstance one ought to know)

**To make unregistered interest binding on subsequent purchaser, owner must show:**

1. **New owner had actual knowledge (notice) of it before purchase (K of purchase & sale is executed [signed])** (*not constructive notice*)
2. **PLUS element of dishonesty:** additional fraudulent behaviour; one is acting out of the ordinary course of biz or natural course of dealings or transactions (***Kearns***)

***McCaig v Reys*** (*Jerome knew of M’s unregistered option & ensured purchase Jabin didn’t find out. Jerome argues: under s. 29(2) he could ignore M’s option as it was not registered [which is true, if you don’t change behaviour]*)

* **Held:** way in which Jerome behaved ensured Jabin wouldn’t know of the interest is fraudulent
  + As Jabin didn’t know of McCaig’s option when he became new RO his registration was fully indefeasible

***Hudson’s Bay Co. v Kearns & Rowling, 1895*** (*K was RO; owed HB $800. To secure debt she agreed to mortgage w/HB & delivered title deeds including CIT to company’s solicitor. Takes 15 months. In meantime, K offered property to R for $300, gives R transfer form, but K can’t give title deeds b/c still w/HB. R registers himself as charge holder on the title – nothing on title re: mortgage w/HB. When HB goes to register its mortgage, sees R’s registration – HB effectively cut out*)

* **Purchaser entering into K for purchase of land after express notice of an unregistered adverse interest will be presumed fraudulent if he attempts to use statute for protection**

***Vancouver City Savings Credit Union v Serving for Success Consulting Ltd, 2011*** (*S had unregistered lease for 5 years w/option to renew; V takes over after City Centre defaulted on loans V had advanced – 2009 V petitioned order for foreclosure w/vacant possession, which would remove S. V argues only subject to prior* ***registered*** *interests; S argues V had adequate knowledge of S’s lease via due diligence done before granting loan, so S should be protected under s. 29(2) of* ***LTA***)

* **To prove equitable fraud must be established that party had sufficient actual knowledge of conflicting interest + something else (dishonesty)**

***Greveling v Greveling, 1950*** (*Mrs. G is RO, drew up & delivered transfer of her interest to Mr. G. Transfer not registered. Controversy as to what exact effect of transfer was. Mrs. G sold property to Blackburn, who secured registration. Lawyer for Blackburn = same lawyer who acted for Mrs. G. Lawyer knew of transfer to Mr. G*)

* **Solicitor’s knowledge = imputed knowledge**
  + Purchaser who completes a purchase w/actual or imputed knowledge that his vendor is not the owner is guilty of actual fraud (***Kearns***)

***Re Saville Row Properties Ltd, 1969***

* **Can’t prove bad faith just b/c petitioner relies upon provisions of statute → no further actions to deny unregistered interest-holder**

*IN PERSONAM* CLAIMS

Rights against an individual person – claims give P $$ but not land

* Registration (and indefeasibility of title) doesn’t give immunity for K claims
  + Ex. B & A make K, A becomes RO, B alleges breach of K. Their K is not extinguished after A is registered so B can still claim $$ from A but A keeps land.
  + A can’t rely on indefeasibility of title which they have obtained to defeat rights *in personam* (K) which they created, or subject to which the interest has been taken

***Pacific Savings & Mortgage Corp v Can-Corp Developments, 1982***

* CIT not bar to claims at law or equity against RO made by persons asserting interest in lands described in the title
  + Ss. 23 & 25 are for benefit of those who *bona fide* acquire title on faith of register

***McRae v McRae Estate, 1994*** (*Mr. FF willed land to wife, H, in trust, for herself for life & remainder to their 3 children – she became RO w/ “on trust” notation on title – later transfers property to 1 son, F, who became RO w/o indication of trust – F dies, leaving property to his wife, A, bro & sis. When bro & sis find out about transfer and terms of father’s will, they bring action claiming title to be vested in them. TJ set aside transfer to son & returned property to executor of H to be disposed of according to law. A gets 1/3 of land F was given under trust)*

* If property reaches hands of someone who knows of existence of trust, that person is bound by terms of that trust – H couldn’t give all land to 1 son
* Whether you know or don’t know, doesn’t matter – it’s on register & it’s your obligation to read it
* You are **deemed** to have knowledge b/c it’s registered – that’s the whole point of having a registration system!!
* **It wasn’t hers to give – wife was encumbered by other kids future interests**
* Registrar tells you what state of title is – knowledge is imputed under Act via registrar

Registration: Charges

MEANING OF REGISTRATION

* **S. 197:** registration requirements of charges: Form B (mortgage), Form C (other charges)
* **S.** **180:** recognition of trust estates (*requirements for registration*)
* Trusts can be noted on CIT by including words “in trust” – owner of fee simple has “legal fee simple”; beneficiaries of trust have equitable interest
* **s. 180(7):** interests affecting land can’t be registered if prohibited under trust doc or will (*if will forbids a mortgage, trustee can’t later register one as it would be directly in conflict w/ will/trust doc*)

***Dukart v Surrey (District), 1978*** (*Co developed land near Bay; between lots & Bay was “foreshore reserve” which lot owners were given right of access [easement] to; land was transferred from developer to transferee ‘in trust’, easement was not registered as charge. Foreshore reserve transferred again but taxes on it weren’t paid so S took land in tax sale & built ‘comfort station’ on it. Mrs. A [lot owner] claimed it interfered w/her easement & sued for injunction to have it removed*)

* **If a city acquires land in tax sale** gets it free & clear of all charges **except any easement registered against the land**
* **A trust that creates an easement and is registered** in accordance w/provisions of **LTA** will survive a tax sale, despite easement being registered as a trust and not as a charge (**s. 180 LTA**)
* **Held:** Mrs. A wins; easement exists

INDEFEASIBILITY

**Registration of a charge *s. 26(1)***:

* RO of a charge is **deemed** (i.e. rebuttably presumed – doesn’t give indefeasibility as w/EIFS) to be entitled to estate, interest or claim created or evidence by the instrument in respect of which charge is registered (see ***Credit Foncier***)
* **Charges are subject to s. 23(2) exceptions**
* **S. 26(2):** mere fact of registration says nothing re: charge’s validity – charge can still be void

***Credit Foncier France-Canadien v Bennett, 1963*** (*Mortgage was forged outright [no forged transfer] & registered against D’s property – mortgage then assigned to P. P [having checked mortgage was registered] sued D on default, who was unaware of forged mortgage. D always RO, never got $$ from mortgage*)

* **Held:** D not liable for mortgage. **Presumption rebutted:** mortgage was a nullity by virtue of forgery & remained a nullity notwithstanding registration
  + **Nemo dat applies:** even though mortgage was registered doesn’t give P indefeasibility as D had no interest to give them (due to null mortgage)
* **S. 26**: **RO of charge** deemed to be entitled to estate or interest in respect of which he’s registered, creates rebuttable presumption of indefeasibility
* **S. 23: LTA- fee simple** is conclusive evidence in law & equity (creates irrebuttable presumption of indefeasibility)

***Canadian Commercial Bank v Island Realty Investments Ltd, 1988*** (*PME = RO of land;* ***mortgage given to PME to imperial life,*** *a 2nd mortgage given to IR (all of these are valid). PME also approaches A to ask for 3rd mortgage & they refuse. PME forges discharge of IR mortgage (this would only normally be produced by IR if PME paid them). After PME shows this to A, decide to come on title.)* **Issue:** what is effect of forged discharge?

* **Registration of forged discharge has no effect.** BUT Court held in this case that A’s mortgage was new mortgage & moves into 2nd place in front of IR. Even though it was an invalid discharge, A was not aware or a party to forgery & got good 2nd mortgage/valid interest (mortgage itself not forged) – gets defeasibility
* **Held:** courts pay out imperial life & A but not IR; matter over IR sent back to trial, may get $$ from AF
* **A 3rd party who acquires an interest BFV from RO is not affected by a fraudulent discharge of another interest**. A mortgagee must be able to rely on LT system

PRIORITIES

**Priority of Charges Based on Priority of Registration – *LTA s. 28*:**

* If 2 or more charges on register affecting same land priority is given to charge registered first
* Date and time of registration always included on registrar when registration of charges is received

Failure to Register

**\*\*SEE AVA’S CAN\*\***

Applications to Register

**Often a lag between application to register and registration itself**

**Priority of Caveat or Certificate of Pending Litigation (*LTA – s. 31***)

1. If a caveat has been lodged or CPL registered & if their claim is subsequently established by a judgment or order or admitted by an instrument, they are entitled to claim priority over other applications made after the date of the lodging of the caveat or CPL (*lets you ‘get in line’ while you perfect your interest – either leads to a more substantial interest or expires*)

**Effect of Caveat (*LTA – s. 288***)

1. As long as caveat remains in force, registrar must not
   1. Register another instrument affecting the land described in the caveat unless expressed to be subject to the claim of the caveator

***Peck v Sun Life Assurance Co, 1904*** (*H in debt, transfers to E to avoid debts. E transfers to P. D files LP against E – eventually gets judgment – after transfer to P, after P starts paying, but before P registers*)

* **Rule:** A **litigant party is not permitted by alienation pending the suit to defeat the rights, or delay the proceedings of his adversary** → can’t be applied to persons who have acquired interests **before** commencement of litigation (i.e. filing of LP) so as to affect those interests
  + LP only a form of notice → notice which is only given after whole transaction of purchase has been completed can’t affect title of honest buyer
  + P is allowed to rely on registry, but P’s payments for land now go to D instead of E

***Rudland v Romilly, 1958*** (*Rom is the RO, transfers land to L who becomes RO; L sells land to Rud who applies to become RO – delayed due to LTO; 2 weeks later Rom files LP as he wants to reclaim title, asserts L was fraudulent*) → **delays due to administration of LTO don’t affect one’s right to tile**

* **Issue:** does Rud have an interest in land upon filing for application to register prior to Rom’s LP?
  + **Held:** **in favour of Rud**
* **Rule: in absence of fraud,** “a **clear right to registration” = registration** itself where: (TEST from ***Re Saville Row***)
  1. Person claiming such a right is ***bona fide* purchaser for valuable consideration** (w/o notice - think **s. 29 + *McCaig***)**,** AND
  2. Right has been acquired & registration applied for **prior to filing of *lis pendens* (LP)**, AND
  3. Purchaser is not made a party to the LP b/c if he were matter would be “before the Court” (***Greveling v Greveling and Blackburn, 1950***)
  4. If it’s an **agreement for sale or mortgage**: P has failed to give purchaser or mortgagor notice & taken proper proceedings by way of equitable execution or otherwise

***Paramount Life Insurance Co v Hill, 1986*** (*Mrs. H RO in fee simple, Mr. H forged transfer to L & assisted L negotiate a mortgage w/P. Transfer & mortgage presented for registration @ same time. Docs registered – dated at time of application. Mrs. H discovers fraud, re-registered as owner, but subject to mortgage*)

* **Issue:** Is mortgage still valid?
* **Rule: registration begins at time of application; not subject to delays of LTO → *LTA’s* protection extends from registration** 
  + If registration of an encumbrance (i.e. mortgage) is effected following upon the registration of docs creating valid certificate, encumbrance will be protected by *LTA* even if certificate representing valid title not issued until later
  + Court said that Mrs. H is protected by assurance fund provisions of *LTA*
  + Can’t uphold trial judge’s decision to void the mortgage b/c would mean that anyone dealing w/ a transferee & seeking *LTA’s* protection would be obliged to wait until actual physical certificate of title has been issued before undertaking registration

APPLICATION FOR REGISTRATION + EQUITY

If court thinks the case involves **equity** (law not sufficient for fair outcome) will consider equities

* Where there are competing equities, court has jurisdiction to decide which equity will be preferred → usually it will be **first in time**, but can look to other things (i.e. fairness) to come to conclusion

***Breskvar v Wall, 1971*** (*B is RO on CIT. Transfer form from B to \_\_\_. W forged his name in the blank, transfer registered Oct 15. W negotiated transfer w/A & executed transfer to A on Nov 7. B lodges caveat on Dec 13, registered March 6. A applies to become RO on Jan 8.*)

* **Issue:** Should B or A become RO?
* **Rule: in context of competing equities, where one person is responsible for being de-frauded & other party = perfect victim, perfect victim preferred** 
  + B is an unregistered owner, but statute preserves **equitable** (not legal) rights of victims of fraud
    - B was negligent, enabled someone to manipulate system that allowed for innocent party to be duped - can succeed against W only if B can show evidence they paid their loan back (if they haven’t paid it then they haven’t lost anything)
  + While A has not registered, A has an equitable interest as BFPFV **which is given priority**
  + A (BFPFV) = innocent party, will be prioritized; B author of his own misfortune since B applied for caveat after transfer form from W to A was executed

APPLICATION FOR REGISTRATION OF CHARGE

***Canada Permanent Mortgage Corporation v British Columbia (Registrar of Titles), 1966*** (*Vo is RO, transfers FS to Vi, Vi gets mortgage from CPMC for $11k, advanced $3.5k. Vi applied to register deed Jan 6; CPMC applied to register mortgage Jan 7. Feb 3 Vo filed LP against Vi on grounds of fraud*)

* **Issue: what happens to the mortgage – can it be registered when deed upon which it was issued has not yet been?**
* **Rule:** registration of a charge same rule as that of fee simple → if registration has been applied for, then it constitutes registration [**LTA s. 155/198 CONTRADICTS THIS RULING**]

**Application for Registration of Charge:**

***LTA s. 155*** →applications for registration of a charge by someone who is not entitled to be registered in fee simple **must wait for the result of the application for registration of the fee simple**

**Registration of Person Creating Charge:**

**s. 198** → an instrument purporting to create a charge on land executed by a person who is entitled to be RO of fee simple **must not be registered unless that person has first been registered as owner in fee simple**

The Fee Simple

COMMON LAW

**Inter Vivos Transfer:**

At CL to create a fee simple it was necessary to use correct words (NOW CHANGED W/STATUTE)

* **“To A in fee simple”** construed as only creating a **life estate**
* **“To A and his/her heirs”** construed as creating a **fee simple**

**Words of Purchase =** “to A” – who the transferee/acquirer is (called a purchaser even in a gift)

**Words of limitation** = “and her heirs” – what is the nature of the estate? What kind of interest is being given?

* These words indicate the quantum of the interest in land transferred to A, doesn’t confer any interest at all on A’s heirs, whoever they ultimately turn out to be

**Transfers on Death:**

* In absence of will: CL regulates who your heirs are w/ assistance of statutory modification
* In presence of will: Courts are more flexible and **will look at intentions of the testator** 
  + If words of limitation are used, courts generally gave effect to them; if they’re not used, but it’s clearly testator’s intention, courts can still construe will as conferring fee simple on beneficiary

**Equitable Interests:**

Basically works the same as wills (ex. in case of *inter vivos* trust, if technical words of limitation used they’re given their CL meaning and effect)

* If words of limitation not used Court of Equity could still interpret the doc so as to give effect to intention of the grantor as derived from the terms of the instrument (***In re Bostock’s Settlement, 1921***)

STATUTE

CL insistence on use of correct words of limitation created certainty but often created life estates where fee simples were intended so legislation was passed to modify CL rules

**Words of Transfer** (***Property Law Act, s. 19***)

1. In transfer of fee simple, **sufficient to use the words “in fee simple”** w/o words “and his heirs”
2. If words of limitation aren’t included in a transfer, the **fee simple** or **the greatest interest in land** is passed unless expressly stated otherwise

**Default = fee simple or greatest interest transferor has** (not life estate)

* Recognizes that when an EIFS is transferred it may not be an EIFS absolute, but bundles of rights given to other parties or w/conditions or reservations attached

**Implied Covenants (*Land Title Act, s. 186*)**

* **s. 186(4):** A transfer of freehold estate in prescribed form & completed in prescribed manner transfers it to transferee whether or not it contains express words of transfer
* **s. 186(5):** If transfer does not contain express words of limitation **default provision = fee simple**
* **s. 186(6):** If it contains express words of limitation, follow those words
* **s. 186(7):** If transfer contains express reservation or condition, transfer of estate is subject to that reservation or condition
* **s. 186(8):** **s. 186(4)-(7)** don’t transfer a greater interest than transfer has

**Property that can be gifted by Will (*WESA, s. 41(3)*)**

Gift in a will

1. Takes effect according to its terms, and
2. Subject to the terms, gives the recipient every legal/equitable interest in the property the will-maker has the legal capacity to give

***Tottrup v Ottewell Estate, 1969*** (*Frank left his estate to twin bro Fred. Frank had no children; Fred had a daughter. Frank dies, but Fred had already died (if you leave property to somebody who has predeceased you, they don’t get it, unless you make a special provision leaving it to their heirs*). *Frank had no other heirs, which meant property devolved on intestate heirs [CL: descendants, then ascendants, then collaterals in the same degree = brothers, sisters and their children]. Several of these peeps wanted to share Frank’s estate, Fred’s daughter was pissed – if Frank had died first, she would have gotten the whole thing. Furthermore, significant amount of Frank’s estate came from Fred when he died. Disposition given to Fred in Frank’s will: I bequeath to my brother my estate, to hold onto him, his heirs absolute and forever*)

* **Result:** property goes to all collaterals as Fred is dead and can’t receive estate & P (as the “heir” referred to in the disposition) is just a word of limitation, not word of purchase
* Words of limitation no longer necessary to convey fee simple ownership, but their inclusion shouldn’t infer different meaning than intended (note: will drawn up by lawyer)
  + P argued that they were words of substitution, not limitation, but judge rejected this – no authority for this interpretation
* **A will should always be interpreted first on the words used – if they are clear, subsequent circumstances can’t alter their meaning**

**Dissent:** said that “words of limitation” interpretation of “and his heirs” is of “great antiquity” – since there is legislation that makes the phrase redundant, Porter JA argues they should be viewed as words of substitution b/c of rule saying that Court must give effect to every word in a will

**Doctrine of Lapse:** you must be alive to take gift. Lapsed gift goes into residue. Lapsed residue; will goes intestate.

**Meaning of Particular Words in a Will (*WESA, S. 42***)

1. Subject to contrary intention appearing in a will
2. Gift of property in a will to persons described as “heir” or “next of kin” of the testator or another person, it takes effect as if it had been made to the persons among whom and in the shares in which the estate of the testator or other person would have been divisible if the testator or other person had died intestate (w/o will)

PROBLEMS OF INTERPRETATION - REPUGNANCY

**Repugnancy: inconsistency of clauses in one or more documents**

* Often arise when grantor attaches a condition to the grant, which is inconsistent w/the outright grant (ex. “I give Blackacre to George (fee simple), and when he dies he must give it to Mary (life estate)
* **Racial covenants, restraints on marriage** are generally against public policy and can be struck down

***Re Walker, 1925*** (*Husband leaves property to wife in will* ***giving her an EIFS w/qualification****: “should any portion of estate remain undisposed & in hands of my wife when she dies, such a remainder will be divided as follows…”*

*Widow also has own will giving the land to her heirs upon her death.*)

* Wife’s heirs want will interpreted so that she gets EIFS absolutely
* Husband’s heirs want wife to have a life interest, so that they can take gift over on her death
* **Held:** testator (husband) gave the wife an EIFS and his will can’t attempt to impose restrictions or conditions on this – to do this he must have instead used a life estate
  + Wife gets EIFS, qualification is a **repugnancy** (an attempt to deal w/property remaining undisposed by the wife in a manner repugnant to the gift to her) it is struck out as invalid
* General rule: estate given by will may be defeated on happening of any event, but there are EXCEPTIONS
  + Can’t defeat or abridge an EIFS by altering the course of its devolution
  + Can’t defeat EIFS w/devise that is meant to take effect on the exercise of any of the rights of the EIFS – deemed void
* 2 classes:
  + Gift to person first named prevails and gift over fails as repugnant
  + First named takes a life estate only so gift over prevails

***Re Shamas, 1967*** (*Testator left his* ***estate to wife & 8 kids****, but* ***needed family biz to keep running so wife could support kids;*** *will states that “everything goes to the wife until the last kid turns 21”, if wife remarries, she gets a share (same as the kids). Wife works in biz under assumption that everything is hers. Kids seek direction on what interests are theirs and what interests are the widow’s*)

* **Held: wife gets a life estate w/ability to encroach,** at her discretion, upon the capital of the estate to support herself and the kids until they’re all 21 and if necessary, to continue to support herself until she dies – then the estate is divided amongst the kids
* **In construing wills, entire document and relevant surrounding circumstances are considered to determine interest intended to be granted**
* In this case courts looked at the fact wife would need some $$ to support herself and she had been running biz when husband was alive, no reason why that shouldn’t continue
* ***Re Fraser:*** The recipient of a life interest can enjoy revenue derived from the corpus and no more unless testator **expressly or impliedly** indicates intention that recipient have **power to encroach** – in this case there was implied intention to encroach

***Cielein v Tressider, 1987*** (*Mr. E died; was survived by 5 kids of previous marriage; also was CL w/Mrs. R who had a son. He made a will leaving his land to Mrs. R on a* ***standard form used to convey EIFS but included a note:*** *upon sale or disposal of property, proceeds were to be distributed between his 5 kids and her son. Then Mrs. Rich died, left her son as beneficiary*)

**Issue: is this a life estate?**

* **TJ:** will granted Mrs. R a life estate & on her death proceeds were to be divided equally between his and her children.
* **CA:** overturns TJ → testator clearly intended to give Mrs. R not a life interest but an **absolute interest; any restraints or conditions on an absolute gift are void as they are repugnant** to the absolute character of the estate // E’s kids don’t get anything
  + No words in the will to support intention of testator to confer only a life estate to Mrs. R; court instead reads the provisions as clear he intended her to have absolute interest

Words Formerly Creating a Fee Tail

COMMON LAW

**Fee Tails:** wanted to limit those who could inherit to direct descendants, as opposed to fee simple where anyone can inherit

***Property Law Act, s. 10*** → **abolishes fee tails:** attempt to create a fee tail is automatically converted to a fee simple (or greatest interest that can be given by transferor)

* Restraints on alienation are void as matter of policy

**Technical Words of Limitation:**

* *Inter vivos* transfer: “**to A and the heirs of his/her body”**
* Absence of these words created life estate

**Informal Words of Limitation**:

* In cases of wills or equitable interests, courts would give effect to the intention of testator or person creating trust
* **“To A and his/her issue”**
* **“To A and his/her offspring”**
* **“To A and his/her seed”**

Remember: “to A and his/her heirs” = fee simple

What happens if it’s not clear what the intention is? Could be interpreted 2 ways:

1. If words of limitation, then it creates fee tail = fee simple
2. If words of purchase, and A has heirs, all would own fee simple in co-ownership

The Rule in Wild’s Case

Rule of construction, not rule of law – if there is anything to suggest otherwise, the otherwise would apply

→ **Only applies in wills**, not *inter vivos* transfers

***Wild’s Case, 1599*** (*Testator wanted to leave estate “to Roland and his wife and after their decease to their children”; testator died, then Roland, wife and son died, leaving daughter*)

**Issue:** is this a **life estate** or **fee tail**? Did “after their decease to their children” constitute words of limitation?

* **Wild’s Rule of Construction:** applies only to wills to determine who the recipient of an interest is if the will states “**to A and his/her children”**
  + If A **had** kids at the time the testator executed his will, then A and kids get a **joint life estate**
  + If A **did not have** kids at the time the testator executed his will, then assume they are words of limitation and **A gets fee tail (= fee simple now)**
* **At CL was that if it was unclear you would point to a life estate, now you point to fee simple**
* If you think this rule of construction shouldn’t operate, you have to explain why (ex. statute, intention, etc.)

The Life Estate

**Life estate =** lasts for the life of the holder of the estate

**Estate *pur autre vie* =** lasts for the life of some other person

CREATION

By Act of the Parties

**Must be expressly stated “to A for life/life of B”**; OTHERWISE ***PLA s. 19(2)*** and ***WESA s. 41(3)(b)*** **presume that transferor or testator is disposing of the greatest estate they own (fee simple)** (unless there is contrary intention in the doc)

* **Not inheritable**: as it doesn’t include “fee”
* **Duration uncertain**; limited to lifetime of person (either LE holder or other)
* **Remainder**: future interest arising in a 3rd person (ex. A transfers “to B for life, and on his death to C in fee simple” – C gets ‘remainder’ interest

By Statute

CL doctrines of **dower** (widow entitled to life estate in 1/3 of deceased husband’s realty) and **curtsey** (widower entitled to life estate in all wife’s realty) replaced by formal statutes

* **Now**: spouse only automatically acquires rights of success if spouse dies w/o will

***WESA, s. 21*** → if your spouse dies intestate surviving spouse receives the household furnishings

* **ss. 26-35** → abolishes surviving spouse’s beneficial life estate in spousal home. INSTEAD, provides an option whereby surviving spouse may purchase the spousal home from the deceased’s estate, w/ relieving provisions to assist the surviving spouse in financing the purchase

***Family Law Act, s. 90*** → on breakdown of a spousal relationship, spouse must decide if they’ll continue to live under the same roof temporarily, or if one will move out and the other will remain in the home.

* Under this section spouse can apply to the Supreme Court of BC for an order of **temporary, exclusive right of occupying the spousal home**, which would compel the other spouse to leave
* Order doesn’t create any interest in the home in favour of the applicant, merely a temporary measure, pending division of family assets (DOESN’T = GRANTING LIFE ESTATE IN FAMILY HOME)

***Land (Spouse Protection) Act*** → Spouse can file entry in LTO against a “homestead” (any land or interest registered in other spouse’s name on which there is a dwelling occupied by the spouses as their residence)

* Once entry is filed, any disposition made of the property w/o spouse’s consent is **void**
* On death of the other spouse, the filing spouse acquires a life estate in the property (**s. 4(2)**)
* **s. 4(1)** – if entry made on title under **s. 2**; **s. 161(2)** of ***WESA*** applies to devolution of homestead

\*\*NOTE: Life estate appears in **charge** section b/c only fee simple can be in RO section\*\*

RIGHTS OF A LIFE TENANT

**Occupation, Use & Profits:**

* Entitled to **occupy** and **use** the property to **retain any profits** arising from its exploitation (***Re Verdonk, 1979***)
* **Possessory, freehold interest** (like fee simple) actual **possession & management** of property

**Transfer Interest *Inter Vivos*:**

* Life estate can be transferred *inter vivos* in accordance w/general principles, but the measuring life is the first holder

**Transfer on Death:**

* Ordinary life tenancy ends w/death of life tenant
* *Pur autre vie* ends w/death of person who’s life the estate was granted (ex. to A for life of B)
  + What if A predeceases B? If A is intestate, estate for life of B devolves on intestacy, like other real property, until B dies
    - ***WESA, s. 41*** → A may dispose of the estate for life of B by will to a beneficiary, who will hold LE until B dies

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

**Return in Same Condition:** the life tenant’s obligations are based on the principle that the property should return to the fee simple owner (via reversion or remainder) in substantially the same condition as it was received by the life tenant

* Can’t put too much limitation b/c then you’re impeding on life tenant’s rights to use & enjoyment
* There is a balance to be struck between maximizing freedom of life tenant but limiting it so it doesn’t seriously affect remainder person

Waste

After term of LE, property should be given to remainder in **substantially the same condition** as when it was granted LE. Life tenant is a “steward” of the land.

**Permissive Waste:** (Not Responsible) Neglect that permits decay, like allowing buildings to deteriorate. LT not responsible for repairs and maintenance unless terms of K say otherwise (***Homfray v Homfray, 1936***)

**Voluntary Waste:** (Responsible) LT is responsible for commission or act that changes nature of the land, whether for better/worse OR permanently damages land

* **4 Categories:**
  + Removing timber (unless estate is a timber estate)
  + Removing minerals
  + Demolishing buildings
  + Changing land use (ex. from agricultural to residential)
* May be required to **pay damages** to those entitled in reversion or remainder or restrained by an **injunction** from committing acts of waster

**Ameliorating Waste:** (Not Responsible – unless burden is created)

* LT **may be responsible for** improvements/changes to character of property if changes made: (a) **increases burden** on remainder (ex. add maintenance cost) OR (b) **improves land**
* Damages & injunction usually not awarded if the change improves the land

**Equitable Waste:** (Responsible)

* Creator of LE may expressly permit life tenant to commit voluntary waste → where there is such a provision LT is “unimpeachable for waste”
* **But even so**, equity may still restrain LT from making **unconscionable use** of the apparent legal right to commit waste at will (ex. where you spitefully knock the hell out of the property to the detriment of the remainder (***Vane v Lord Barnard***)
* ***Law and Equity Act, s. 11*** → estate for life w/o impeachment of waste doesn’t give LT legal right to commit equitable waste unless the instrument infers intention to do so

***Vane v Lord Barnard, 1716*** (*D gave himself a castle under LE w/o impeachment of waste – ultimately his son was to get property – got pissed at his son & stripped the castle*)

* **An LE w/o impeachment for waste doesn’t give tenant right to commit equitable waste**
* ***LEA, s. 11*** resulted from this case

LIABILITY FOR TAXES, INSURANCE, ETC

* LT pays the taxes & therefore is entitled to Home Owner Grant
* **No obligation to insure** the property against losses (***Re Verdonk, 1979***)
* **No duty to repair the estate** (as LT not responsible for permissive waste)
* Responsible for current interest on a mortgage debt – if you pay some of the principle you may have a claim to get it back
* **Strata bylaws:** LE holder qualifies as owner. Some strata buildings prohibit renters to get around this

***Mayo v Leitovski, 1928*** (*L was granted LE on property owned by her son – she didn’t pay taxes so it went up for tax sale – daughter bought property in tax sale & tried to assign title to her mother; thereby getting around LE*)

* **LT has obligation to pay property taxes;** they **owe a trust-like duty to remainder**
* An LE holder can’t use a tax sale to circumvent a life estate & cut out remainderman
* Neither LT, nor anyone claiming under him, who allows property to be sold for taxes, can acquire title
* In general, LT can do nothing to impair remainder & remainder holder can do nothing to affect LE

Future Interests

**Future Interest =** one by virtue of which **possession** will or may be obtained at a future time

VESTED & CONTINGENT INTERESTS

Vested Interests

“Vested” used in **2 senses:**

1. If an unqualified & immediate transfer of an interest is made to A, A is **vested “in interest**” (an estate has been given to A w/o any precondition to A taking the estate)
2. A is also **vested “in possession”** (A is immediately entitled to possession of the property)
   1. If A was granted a remainder instead, would be vested in interest b/c no precondition but not in possession

An interest that is **vested in interest:**

1. May be vested **absolutely**
2. May be vested **subject to divesting**
3. May be vested w/o there being any prior estate but w/provision which purports to keep the holder of the estate out of possession

**\*\*Courts prefer construction that leads to conclusion that interest is vested if there’s any ambiguity\*\***

Contingent Interests

Contingent = non-vested; dependant on occurrence of some event (i.e. contingency) which may or may not occur

* Subject to **condition precedent** which must be satisfied before it can become a vested interest

An interest is **contingent** until:

1. The property is **identified**
2. The identity of the grantee or devisee is established
3. The right to the interest (as distinct from the right to possession) doesn’t depend on the occurrence of some event
4. In the case of a class gift, the exact share of each member of the class is ascertained

***Browne v Moody, 1936*** (*Mrs. B had a will, left ½ her land to her granddaughter [daughter of her son] and other ½ to be split between her daughters. Clause that said if granddaughter or daughters predeceased her or her son that the children of dead person should take the interest to which their mother would have been entitled*)

**Issue:** whether the grand-daughter & daughters took vested interest on death of Mrs. B, and if so whether any of them was liable to be divested or otherwise affected by clause (do they have to survive the son to get the interest)?

* **Rule:** **mere postponement never by itself held to exclude vesting of the capital** (remainder)
* **Held:** this was an immediate gift of remainder interest to granddaughter & daughters → court said you must make a distinction between **vesting of interest** and **postponement of distribution** from **postponement of actual vesting of the interest**
  + “Object of the postponement of the division is obviously only in order that the son may during his lifetime enjoy the income”
  + Clause serves as a divesting clause

**Courts have preference for early vesting** (***Phipps v Ackers, 1842***) → in general rule of early vesting may be applied when there is a gift to a person when or if a specified event occurs w/a gift over if event doesn’t occur

* Treat the interest as **vested subject to divesting**

***Festing v Allen, 1843*** → held that ***Phipps*** rule didn’t apply b/c there was no gift to anyone who doesn’t fit requisite description (of being her child who is 21); gift is not to her children but to the children who reach 21yo

***Re Squire, 1962*** (*Grandpa left estate to his grandsons, will states that land should be held in trust until they turn 30 when it will be conveyed absolutely*)

**Issue:** does the will suspend the very giving of the interest until age 30? Or just postponing the enjoyment?

* **Held**: court says interest vested immediately (**courts prefer early vesting**)
  + Looked at actual wording of the clause (grandpa contemplated use of funds for education, so clearly talking about exception to getting funds at age 30 if there’s a need for educational purposes to get them earlier) → exception is around payment of income, thus interest already vested
  + Say that **“when/upon” doesn’t = condition precedent**
* ***Saunders v Vautier, 1841*** → principle – applies when interest is vested
  + Where there is an absolute vested gift made payable at a future event, w/direction to accumulate the income in the meantime, & pay it w/the principal, Court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit
  + Rule allowed the grandsons to collapse the trust at 21 b/c interest was already vested

***Re Carlson, 1975*** (*C dies, surviving him are his wife + 3 kids, C & wife didn’t get on so basically disinherits wife; thinks that his son Paul is a screw up, so only gives him 10% of the “then reside” of estate; holds estate in trust until the prized Chris turns 21 – able to use the $$ for education purposes – then splits 90% of estate between Chris & his sister*)

**Issue:** is it immediately vested interest?

* **Held:** judge says NO – word “upon” in this context = contingent
  + **Relevant factor =** disposition of the “then residue” → b/c he talks about the residue in the future, there’s a suggestion that C wanted to give a contingent interest
    - Principle intention = to keep whole of the residue of his estate intact until Chris was 21
  + Even though law prefers early vesting, it’s the combination of words & the clear purpose of will that court has to construe a “word” in the context of the facts
* ***Jarman*** → only where words of the will are ambiguous that vested is presumed over contingent

TYPES OF FUTURE INTERESTS

**CL – 4 future interests:**

1. Reversions
2. Rights of entry
3. Possibilities of reverter
4. Remainders

Reversion

**Reversion:** interest that remains w/a transferor who has not exhausted the whole of the interest by a transfer

* Ex. A (owner in FS) transfers Blackacre “to B for life”
  + B gets vested life estate but grant to B doesn’t exhaust entire fee simple – A has **reversion in fee simple**
  + Even if A later disposes of reversion by sale, gift or will, interest of recipient still called a “reversion” b/c retains status it had when it was created

Rights of Entry

**Right of Entry:** arises in a transferor when he conveys an apparent absolute interest but **adds a condition subsequent** which will **divest** the interest of the transferee in favour of transferor and his heirs (can arise after any estate)

* Ex. A (owner in FS) transfers Blackacre “to B in fee simple but if B marries C, Blackacre is to be returned to A and his heirs”
  + B gets fee simple subject to condition subsequent and A has future interest (right of entry)

“Right of entry” derived from fact that if condition is broken, A (or heirs) has right to enter on the land & resume possession; alternatively can bring an action to recover possession → until either of these things happens, B continues to enjoy Blackacre notwithstanding condition has been broken

***Limitation Act, s. 3(6)(f)*** – when 6 years have elapsed after condition has been broken, action to recover possession is barred by this provision

***Property Law Act, s. 8(2)*** – **allows for right of entry to be made for anyone,** not just transferor

**Words that trigger RE:**

* But if
* Subject to

Possibility of Reverter

**Possibility of Reverter:** determinable interest created by transferor w/use of words of limitation

* Ex. To A in fee simple until she is called to the Bar of the Province of BC
  + Underlined words = words of limitation
  + A gets determinable fee simple
  + Interest is not absolute, to be divested by right of entry, but are by their very words of limitation of a limited duration from the outset
* To recover possession still have to bring an action, subject to same 6 year limitation period as rights of entry

**\*\*Possibility of reverter can arise only after a determinable fee simple & only for transferor\*\***

**Words that trigger PR:**

* When
* Until

Remainders

**Remainder:** future interest in respect of which possession is postponed until some prior freehold estate expires and which does not operate so as to prematurely determine the prior estate

* Ex. A (owner in FS) transfers Blackacre “to B for life and then to C and his heirs”
  + B gets vested life estate in possession and C a vested (in interest only) remainder in fee simple
* **If condition precedent is added** to remainder it **becomes a contingent remainder** as distinct from vested remainder
  + Ex. A (owner in FS) transfers Blackacre “to B for life and then to C in fee simple if C marries D”
    - B gets vested life estate, C gets contingent fee simple in remainder, A has right of entry

**CL:** Only way to create a future interest in a 3rd party was by remainder

Common Law Remainder Rules

**Rule 1: A remainder must be supported by a prior estate of *freehold* created by the same instrument as the remainder.**

* Deals w/ problem of seisin – can’t have a gap
* At CL not possible to create a “springing interest” (ex. A transfers Blackacre “to B and his heirs if B reaches 21 years old” – B gets nothing b/c grant offends rule #1 – no preceding estate of freehold to support the contingent interest A wanted to confer on B)

**Rule 2: A remainder must be limited so as to be capable of vesting, if it vests at all, at the latest at the moment of termination of the prior estate of freehold.**

* Reaffirms gap in seisin principle; says that it’s ok to have a contingent interest, but must ensure that you do nothing to prevent the creation of a future interest which might vest outside the termination of the prior estate of freehold.
* Ex. A transfers Blackacre “to B for life, remainder to the first child of B to reach 21” – *prima facie* good but will fail if child of B is not 21 when B dies, as there would be a gap in seisin before child was able to take it.
* Ex. A transfers Blackacre to “B for life and one year after his death, to B’s child” – grant to B’s child is void *ab initio* (bad from the outset) b/c there would inevitably be a gap in the seisin after B’s death

**Rule 3: A remainder is void *ab initio* if it takes effect in possession by prematurely defeating the prior estate of freehold.**

* Ex. A (owner in FS) transfers Blackacre to “my daughter for life, but if she marries X to my son and his heirs”.
  + “his heirs” signifies EIFS
  + “but if”, “subject to” = right of entry (condition subsequent)
  + Daughter would be getting a life estate, but she is divested of the LE if she marries X
  + Consequence is not for title to go to grantor, but to the son → cutting short a supporting freehold (LE) & shifting interest to a 3rd party is not ok as CL remainder
* This rule prevents creation of “shifting interests”
* At CL this rule can be circumvented by using a **determinable limitation** rather than limitation subject to a condition subsequent (ex. A transfer Blackacre to “my son for life until he marries X, and then to my daughter and her heirs” → valid interest in daughter b/c remainder awaits natural determination of son’s interest)
* ***PLA s. 8(2)*** → has wiped out rule #3 – legitimizes a condition subsequent creating interest in 3rd party

**Rule 4: A remainder after a fee simple is void.**

* Ex. A transfers Blackacre to “my daughter and her heirs, but if she marries Egbert then to X and his heirs’
  + No good as remainder, but now validated under ***PLA s. 8(2)***
* Ex. A transfers Blackacre to “my son and his heirs until he marries Esmerelda, and then to X and his heirs”
  + Possibility of reverter – determinable on marriage to E. Then remainder would go to X. No good under this rule – still violates rule #4 b/c not covered by s. 8(2)

DESTRUCTIBILITY OF CONTINGENT REMAINDERS

Validity of a **vested remainder** depends solely on compliance w/above rules; **contingent remainder** might be destroyed after it has come into existence because the person entitled to it is not qualified to take possession of the property on the termination of the prior estate of freehold.

Natural Termination

A remainder must vest in possession no later than the termination of the prior estate of freehold. If the person entitled to the remainder cannot take possession at that time there is a gap in the seisin and **remainder is destroyed**.

* Ex. A transfers Blackacre “to B for life, remainder to C if C attains 21 years of age”. B dies when C only 19.
  + Remainder to C is destroyed b/c rules provide that there must be no gap in seisin & C is not qualified to enter into possession until 2 years after B’s death.
  + If C attains 21 years of age, then contingent remainder becomes a vested remainder & there’s no problem.

EQUITABLE FUTURE INTERESTS

***Statute of Uses,* 1535** sought to abolish the creation of equitable interests, but by the mid 17th c. equitable interest had been resurrected under the guise of the **trust**. Could avoid the effect of the statute by transferring legal interests “unto to and to the use of trustees” to hold on trust for whatever equitable interests it was desired to create = **express trusts**.

**\*\*CAN AVOID ALL THE ABOVE RULES BY CREATING FUTURE INTERESTS IN TRUST**\*\*

***Re Robson, 1916*** (*testator had given LE to his daughter & on her death “to the use of such of her children as shall attain the age of 21 years”; when she died, 2 of her kids were 21, the other 2 weren’t*)

**Issue:** are the 2 kids that aren’t 21 cut out of the will?

* **Rule: all future interests created under a trust; therefore they are all equitable remainders (**no issue of gap in seisin b/c legal title remainds w/trustee)
  + If you have a contingency in legal trust, gap of seisin never an issue b/c there will always bee a trustee

ATTRIBUTES OF FUTURE INTERESTS

Protection of the Land

**Equitable Interests**: right of the owner of the future interest is generally against the trustee, who, if not protecting the land, is probably in breach of the trust.

**Doctrine of equitable waste** is a way for court to ensure that a fair balance is kept between the interest of the current possessor and the holder of a future interest

Alienability of Future Interests

At CL some types of future interests could be disposed of *inter vivos* and others could not, although in some circumstances Equity would enforce, by a decree of specific performance, a K to assign a contingent interest.

* For the most part, future interest are **alienable** (property) – ***PLA s. 8(1)*** says this, as well as **ss. 1 & 41 of *WESA***

On death all types of future interests devolved on intestacy.

Jarman Rules

If condition is **impossible or illegal** to meet, then it is an absolute transfer to person waiting on the condition

Conditional & Determinable Interests

CONDITION PRECEDENT – “IF”

**Condition precedent:** you must meet the condition to even get the property

* Ex. “To A in fee simple if, at the date of my death, A is not married to B” (A will take an interest only if the condition precedent is met)
  + “to A” = words of purchase
  + “in fee simple” = words of limitation
  + “*if* at the day of my death, A is not married to B” – condition precedent

CONDITION SUBSEQUENT – “BUT IF”

**Condition subsequent:** you get the property, but if the condition is met in the future, you’re out

* Ex. “To A in fee simple, but if A marries B to C in fee simple” (A takes a fee simple subject to a condition subsequent)
  + “to A” = words of purchase
  + “in fee simple” = words of limitation → “fee simple defeasible” on a condition subsequent
  + “to C” = words of purchase – BUT interest C gets is a *future interest* called right of entry
    - 2 people who have interest in the land – C can sell his interest (if anyone would buy it)
  + “in fee simple” = words of limitation implied are: “right of entry on a fee simple” *future interest*
* 2 things must happen for C to get her interest: (1) A must marry B – so condition is met (2) C must exercise a right of entry (i.e. tell A to get OUWT)

DETERMINABLE FEE SIMPLE – “UNTIL” / “WHEN” / “AS LONG AS”

**Determinable limitation:** the property will end when the limitation is reached

* Ex. “To A in fee simple until A marries B” (A takes a determinable fee simple)
  + “to A” = words of purchase
  + “in fee simple” = words of limitation
  + “until A marries B” = A is getting *determinable fee simple*
    - If A does marry B, person who gets property is X or X’s heirs
  + X then has a *future interest* = possibility of reverter
* “to A in fee simple until A marries B, then to C” (C specifically mentioned) – C gets right of entry
* “to A in fee simple until A marries B” (no one specifically mentioned) – X gets possibility of reverter

QUALITY OF CONDITIONS

Uncertainty

***Noble v Alley, 1951*** (*private summer resort in Ontario, “lands shall never be alienated to any coloured race*” *– intention to restrict development to white race. TJ & CA said it was okay)*

* **Held:** clause can only bind immediate purchaser b/c it doesn’t meet the rules of touching & concerning the land – doesn’t go to *question of use*
  + **Not restricting use, you’re restricting transfer – looks more like restraint on alienation**, partial or full, that can’t be enforced as a restrictive covenant
  + Also uncertain w/respect to what the race is – this is what SCC used to truly get rid of this covenant
* **Racial covenants/conditions will fail for reasons of uncertainty. They would also likely fail as undue restraints on alienation (can’t restrict alienation)**

Restraint on Marriage

***MacDonald v Brown Estate, 1995*** (*Uncle left estate to niece “until” she became widowed or divorced*)

**Issue:** whether the conditions were void as being illegal, contrary to public policy or for uncertainty?

* **Intention:** If there is intent by testator to **compel** parties to stay together/break up, it is regarded as against public policy. If intention of testator is **protective**, (I’m giving you property b/c you’ll need it if you’re divorced and alone) – that’s okay
* **Held:** in this case motive/intention was protective b/c he was paying her a sum of $$ to put aside – she was getting $$ while they were married, but if she became widowed or divorced, she would get additional
  + Note: this is determinable interest b/c of word “until” / not conditional

**Other Clauses:**

* Clause inducing child not to associate w/parent = invalid (*In re Piper, 1946***)**
* Clauses inducing person to assume name of testator valid in England (*Re Neeld, 1962*)

Discrimination

***Human Rights Code, s. 9*** – A person must not deny a person or class of persons the opportunity to buy land b/c of race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sexual orientation or sex of that person or class of persons.

***Land Title Act s. 222*** – **covenants that directly/indirectly discriminate are void**

***Canada Trust Co v Ontario (HRC), 1990*** (*Trust created for scholarship to white Protestant students of British nationality or parentage*)

* **Held:** Clause is certain – you can identify at least one person who meets the criteria, but court says it is **against public policy** – can’t discriminate on these grounds; therefore = invalid
  + **Condition precedent** – more lenient in certainty analysis, will not be void for uncertainty if it is possible to say w/certainty that any proposed beneficiary is or is not a member of the class
* If discrimination trying to promote equality value (i.e. affirmative action), discrimination may be upheld (**s. 15(2) – Charter**)

Rule Against Perpetuities

**Old Rule Against Perpetuities**: Any disposition beyond first unborn child is void **(*Whitby v Mitchell***)

* **Section 6(2)** of ***Perpetuity Act*** abolishes this rule

MODERN RULE AGAINST PERPETUITIES

**Future interest either has to be vested now, or if its not vested now, it must vest within “lives in being + 21 years”**

1. Concept of vesting;
2. Period w/in which vesting must take place; and
3. Requirement that it must be clear from the date that an instrument creating a disposition takes effect that vesting, if it is to take place at all, can take place only w/in the period (certainty of vesting)

**Examples:**

* “To A for life, remainder to the first child of A to reach the age of 21” – contingent remainder is **valid** @ CL b/c if a child of A ever does reach 21, it can’t be later than 21 years after the death of A
* “To A for life, remainder to the first child of A to marry” (A is married, has 10 children whose marriages have been arranged to take place over next 6 months) – contingent remainder is **void** at CL b/c it can’t be said w/absolute certainty that first child of A to marry will necessarily do so w/in 21 years of death of any of the lives in being (ex. none of the 10 may get married, A may have 11th child [not a life in being] and then everyone dies and 11th child doesn’t get married w/in 21 years)

**If an interest violates the CL rule against perpetuities then look to s. 3 of the *Perpetuity Act***

**Section 3 = remedial provisions of *Perpetuity Act***

* **Section 14** – **capacity to have children** (deals w/fact that CL assumed that ANYONE could have children)
  + **Male –** able to have a child at age of 14 years +, but not younger
  + **Female** – able to have a child from age **12 – 55**
  + In the case of any living person evidence may be given to show that the person can’t have a child at any time which may be relevant for purposes of application of the rule
* **Section 9** – **wait & see** 
  + Every contingent interest capable of vesting w/in or beyond perpetuity period is presumed valid until actual events establish that interest is incapable of vesting w/in perpetuity period
* **Section 11** – **age reduction**
  + **S. 11(1)(b)** Can change the age requirement if it would mean that interest vests outside the 21 year period to the age closest to the age specified that would have prevented the interest from being void
* **Section 12** – **class splitting**
  + Can exclude people from a class if s. 11 won’t save the interest (i.e. class = grandchildren, can restrict it to the grandchildren that are alive if that will save the interest)
* **Section 13** – **general cy pres**
  + If nothing else works, court can look to general intention of the disposition and try to uphold it as far as possible w/in limits of rule against perpetuities

**Section 4** = rule against perpetuities doesn’t apply to trusts

**Section 7** = 80 year perpetuity period permitted

**Section 10** = determination of perpetuity period

**s. 10(1)(b)** = if there are no lives in being (i.e. dealing w/a company), perpetuity period = 80 years