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## ABORIGINAL TITLE – CHAPTER 3

* Feds have jurisdiction over aboriginal peoples, but provs have jurisdiction over property rights
* ***St Catherine’s*** did not recognize that AT preceded Crown ownership
* Royal Proclamation 1762 declared ownership over NA, but said that land possessed by FN stayed with them – AT was never abrogated
* Se 109 provides that all lands belong to provs subject to any interest other than that of the provs – leading category is that of AT
* Aboriginal land can only be put into private property system through treaty negotiated with govt or through surrender to Crown (***Delgamuukw***)
* S 35 of the Constitution preserves existing AT and rights
* Government of Canada cannot do things that will impair AT except where it is substantial and compelling to do so

## Historical Caselaw on Aboriginal Title

Historically, the courts held that the ***Royal Proclamation of 1763*** had extinguished Indian title. Aboriginals had only a “**personal and usufructory right**” to land (***St Catherines***, *timber-license*). This right was **not** = to a legal and equitable interest in land.

**Personal:** a right or interest less than a fee simple

**Usufructory:** a right of enjoyment of some land owned by another

* ***Royal Proclamation of 1763*** held that treaty needed to be “government to government” or at least a surrender of the Crown
* 1860-64 Douglas Treaties in British Columbia

***Constitution Act***

* s.109: land belongs to provinces subject to Aboriginal entitlement
* s.35(1): Aboriginal title is distinct from other aboriginal rights, confers right to land itself.

***St Catherines*** was overturned by ***Calder***: the courts no longer consider AT to be a “personal and usufructory right.” Likewise, ***RP 1763*** does not apply to AT in BC because the British weren’t present in or aware of BC at the time of the Proclamation (***Calder***).

***Calder***: ARs and title have always existed under the CL. The **Constitution didn’t create AT**, but it does protect it now under s.35 (***Van der Peet***).

AT is not prescriptive (***Calder***). It is **grounded in the reality of pre-sovereignty occupation** (*FN-were-there-when-the-Europeans-arrived*) (***Calder***).

The Crown owes a fiduciary duty to Aboriginal peoples (***Guerin***, *Musqueam-golf-course*).

### Aboriginal Title vs Aboriginal Rights

***s.91(24):*** Federal government can extinguish aboriginal rights and title.

#### What is an Aboriginal Right?

Refers to the customs, practices and traditions of a band: fishing, hunting, gathering rights etc. They are rights that run with the land // a band may not have title but still have rights to engage in site-specific activities.

***Van der Peet*** originally held that in order to be an aboriginal right, an activity had to be an element of a practice, custom or tradition **integral** to the distinctive culture of the group claiming right.

However, the “integral” requirement was overturned by ***Delgamuukw, which*** held that a use of aboriginal lands under title **did not have to be integral** to the group

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| **Factors in deciding whether an activity is integral to the distinctive culture:**   * **Perspective** of aboriginal people themselves * The **precise nature of the claim** being made * **Central significance** to the society in question * **Continuity** is required [from pre-contact traditions to current times ] * Must consider the rules of evidence, and the evidentiary difficulties in determining aboriginal traditions – **oral history** is allowed (***Delgamuukw***) * **Specific** rather than a general basis – success for one community may not lead to success for another community * **Distinctive versus distinct** – the activity must be a feature of the culture, but it does not need to be unique to that culture |

#### What is Aboriginal Title?

* Title is a kind of aboriginal right but it is distinct.
* Right to **exclusive use** and **occupation of land** for a variety of purposes: not confined to traditional practices and customs which are integral to distinctive aboriginal bands (***Delgamuukw***)
* **Does not amount to fee simple as AT has inherent limits** // while FS can have limitations, they **do not result from ownership** (*contrary to LE where there are restrictions inherent in the title that arise as a result of that form of ownership*)

Aboriginal title has **3 main characteristics:** inalienability // source // held communally (***Delgamuukw***)

* **Inalienable:** cannot be transferred to anyone else
* **Source:** pre-sovereignty occupation
* **Held communally** by the group for the use of the group [inherent limit on land use]

#### Elements of Aboriginal Title (Delgamuukw)

1. **Sui generis** (in a class of itself):different from fee simple, can’t be explained by CL rules, distinct from other aboriginal rights – arises where connection of a group with a piece of land “was of a central significance to their distinctive culture” – courts must take into account both CL and aboriginal perspectives (***Delgamuukw***)

* Pre-sovereignty A practices will be translated “**faithfully and objectively**” into modern legal rights/title.
* Only Al practices that indicate a degree of possession similar to CL possession will impose AT (***Marshall/Bernard***)
* CL recognizes AT for groups with pre-sovereignty occupancy who never ceded right to land. Note that LeBel in ***Marshall/Bernard* differed on the test for aboriginal title**: AT can’t simply reflect CL concepts of property and ownership; must reflect diversity of pre-sovereignty land use patterns was well as A practices.

1. **Inalienable except to Crown:** cannot be transferred, or sold to anyone other than crown. Alienating land would destroy its relationship with the band (aboriginal title ‘personal’)
2. **Held communally:** cannot be held by indvks, bands have collective right to use of land, decisions in respect to it are made by entire community.
3. **Source of title:** arises from prior occupation of Canada by Indians before the assertion of British sovereignty; grounded in both CL and A perspective on land.

AT includes the right to use the land for **a variety of uses beyond practices integral** to the group (***Delgamuukw***). There is an **inherent limit** on the land use due to the nature of the group’s attachment to the land (***Delgamuukw***).

This distinguishes AT from regular FS lands: if a native band wants to use lands for non-reconcilable uses, they must convert the land to FS

#### Rules of Recognition: Test for Aboriginal Title (Adapted from Van der Peet)

In order to establish aboriginal title, FN must show **pre-sovereignty physical occupation** and **exclusive possession** in the sense of **intention** and **capacity to control** is required to establish aboriginal title.

* **Exclusion** can be shown by the right to control the land, and if necessary, to exclude others. Semi/Nomadic peoples can demonstrate physical occupation by showing regular occupancy/usage.
* **Continuity** between pre-sovereignty and current practices must be established.
* Connection to land must have been of **central significance to their distinct culture.**
* Colonial separation will not affect continuity.

This links Al title to the **basic CL conceptions of property: occupation**, **possession**, **exclusion** and **control** (***Marshall/Bernard***, *Mikma-q-Indians-want-to-fish*).

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| ***Delgamuukw v British Columbia*** (1997) SCC  **WHAT IS ABORIGINAL TITLE? SCC HELD THAT THERE WAS A CONSTITUTIONAL GUARANTEE TO ABORIGINAL TITLE AND RIGHTS.**  *Gitxan and Wet-suwet’en Hereditary Chiefs initiated proceedings against BC claiming ownership (extinguished AT) and resulting jurisdiction (entitlement to govern by aboriginal laws).* ***Did Aboriginal rights exist and continue to exist with bands that covered territory in BC?***  Aboriginals argued that AT is the equivalent of EIFS (“the big bundle”)  -Crown argues can have rights but not land rights of EIFS; easements to fish, etc.   |  | | --- | | **TEST:**   1. **Land has to be occupied prior to sovereignty (1846 in BC)**  * May be established in a variety of ways: construction of dwellings through cultivation and enclosure of fields to regular use of tracts of land for hunting, fishing or otherwise exploiting resources.  1. **If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation**  * Have to show “substantial maintenance of a place”  1. **At sovereignty, occupation must have been exclusive**  * Can have joint title, if can show joint exclusivity |   **General Features of AT at CL:**   * *Sui generis* 🡪 unique, distinguished from “normal proprietary interests” * It is unalienable 🡪 only to the Crown * It is held communally * It is the source   + Prior occupation   Common law principle that possession is proof of occupation |

#### Inherent Limits on Content of Aboriginal Title- as per Delgamuukw

* Subject to “inherent limit” – title lands **cannot be used in a manner irreconcilable with the nature** of the attachment /relationship which forms the basis of AT (*Ex: if band hunted on land they can’t now use it for strip mining*)
  + Importance of continuity of relationship between community and land over time
  + Land has an inherent and unique value in itself
  + Land uses not restricted to traditional activities, but subject to overarching limit
    - *Ex: can’t destroy land used for hunting to make a shopping centre*
    - To use land in a way that is limited by AT, land must be surrendered to Crown on terms permitting that use; then Crown can put it to that use (*ex: turn over lands to fed to build shopping mall, FN gets all the revenue*)
  + Policy: attempt to balance aboriginal title alongside societal concerns? Who decides on the limits?

#### TEST OF JUSTIFICATION for infringement of right

1. **Infringement must be in furtherance of a legislative objective that is compelling and substantial:**

* Reconciliation between A societies and broader political communities

1. **Assessment of whether infringement is consistent with the special fiduciary relationship btwnn the Crown and A’s**

* Fiduciary duty does not mean that A rights are always given priority, consultation however

1. **Justification and Aboriginal title**

* Range of legislative objectives are quite broad: forestry, agriculture, mining, hydroelectric power, general economic development of BC interior, protection of environment or endangered species, infrastructure, settling foreign populations
* Settled on a case by case basis

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| ***Mitchell v MNR*** (2001) SCC  **ABORIGINAL TITLE v ABORIGINAL RIGHTS**  *Chief Mitchell went to states to buy some stuff (some for gifts, some for resale), refused to pay duty on the way back. Argued that he was exercising A right.* ***Is there an aA right to purchase goods for the purpose of resale (on the southern side of the St Lawrence (USA) and sell it on the north (Canada)?***  Must prove three questions of the ***Van Der Peet* Test (to characterize the right)**   1. The **nature of the action** which the applicant claiming **was done pursuant to an aboriginal right** 2. The **nature of the govt’l legislation or action alleged to infringe the right** i.e. conflict between the claim and limitation 3. The **ancestral practices relied upon to establish the right**   **TEST for establishing aboriginal right** (Modifying the test in ***Van Der Peet***):   1. **A claimant must prove** a modern practice, tradition or custom has a reasonable **degree of continuity to a practice which existed prior to contact** 2. **Custom must have been “integral” to the “distinctive culture”** of the A peoples 🡪 lay at the core of their identity 3. Must be defining feature that w/out, the culture would be fundamentally altered 4. Excludes practices which are **marginal** or **incidental**   **Evidence**   * Flexible application of the rules of evidence must be used in aboriginal cases * Includes admitting evidence of post-contact activities to prove continuity with pre-contact practices, and meaningful consideration of oral histories   + Oral histories may offer evidence of ancestral practices that would otherwise not be available   + Oral histories may provide the aboriginal perspective on the right claimed * Case at bar: **insufficient evidence to prove a right** |

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| ***R v Marshall; R v Bernard*** (2005) SCC  **NARROWS BROAD PRINCIPLES OF DELGAMUUKW**  *2 different claims, prosecuted for cutting trees w/out a license -> prosecuted but asserted not bound by the laws. Attempted to assert right to land and title. Commercial logging not the basis of culture and identity*  **Analysis:** Must understand there is a difference btwn A perspective and the CL. When considering AT must consider both (occupation is a key point through, CL idea).  **Standard of Occupation for Title**   * AT established by A practices indicating possession similar to that associated w/ title at CL * Exploiting land, rivers, seaside (for hunting/fishing etc.) may translate into AT to land if activity was *sufficiently regular and exclusive* to comport w/ title at CL * No need for constant possession (fact specific) but *continuity* required   **Approach to Exclusivity**   * Viewed from *aboriginal* perspective * Does NOT require proof that A group physically excluded others (evidence of acts of exclusion) * Group had to demo **“effective control”** – ability to exclude others *if they chose to do so*   **Nomadic/semi-nomadic people**   * Can establish AT 🡪 depends on circumstances (Q = whether nomadic people enjoyed *sufficient physical possession* to give them title to land; need to establish degree of physical possession/use equivalent to CL title) |
| ***Skeetchestn Band v BC*** (2000) BCSC  **Cannot register AT as an estate or interest in land ≠ registerable because it is inalienable (inalienable ≠ marketable)**  *Band had outstanding land claim on 1000 acres of land but registered owner of land wanted to build a resort. Band applied for certificate of pending litigation and caveat. Registrar ruled that claim was not an estate or an interest in land and therefore was not registrable under* ***LTA*** *(as per* ***LTA s.311****). Band appealed.*   * The Torrens system of land registration covers interest in land that have a clear identity recognized by the rules of property law. AT is not derived from fee simple interests which are registrable. * AT is *sui generis* and not alienable, it could only be surrendered to the Crown – it is likely not safe-holding and marketable. It is not recognized by the ordinary rules of CL. * The Torrens priority system does not accommodate AT, which was based on occupancy and use of lands prior to the assertion of Crown sovereignty. * A claimant may not file a LP if his claim is for an unregistrable interest in land; **s. 215** = reason for rejection, requires claim of *registrable estate or interest in land*, what is claimed is not such) |

##### Tsilquotl’n Nation v BC (2007) BCSC, [2014] SCC

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

* **AT must be shown on a site-specific approach**
* Occupancy requires regular and intensive presence at a particular site
* Nomadic groups can prove title to specific sites connected by broader areas where AR can be exercised

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

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

**Approach to private lands issue**

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

**BCCA**

**Overall approach/understanding of reconciliation**

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

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

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

## REGISTRATION OF TITLE

### Torrens Land Registration System

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

#### Torrens in BC Today

Torrens System comes from Australia. In 1860, ***Land Registry Act*** imposes Torrens on colonies of Van Isl and Van. Today, the ***Land Title Act*** governs the Torrens System. CL rights and obligations remain except where explicitly modified by the ***LTA***.

Two stage process:

1. Upon initial application to register, if Registrar was satisfied by examination of docs that applicant prima facie had good title, title registered in Registrar of Absolute Fees.
2. After 7 years if no challenges, RO could apply for CIT. Absolute fee concept abolished in 1921. If unregistered land is acquired from someone other Crown, may be necessary to secure reg of any unregistered FS owners.

* **Pre-Torrens Rights:** apply to the registry with your pre-Torrens documents > receive a preliminary registration of your title in the **Register of Absolute Fees** > 7 years later, transfer your absolute fee to an indefeasible title (***LTA, s. 174***.)

### What can be Registered?

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

Two categories of interests will appear on the land title search:

1) **fee simples**: the fee simple owner with the indefeasible title

2) **charges:** covenants, mineral rights, life estates, mortgages, etc.

Neither licenses nor zoning bylaws can be registered as interests in land:

* **Licenses** give some rights of occupation, but are not a valid interest in land
* **Zoning bylaws** do not need to be registered in order to have effect (***R v Kessler****– not an interest in land*).

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| ***Case*** | ***Facts/Conclusion*** | ***Ratio/rules*** |
| ***R v. Kessler*** | -K argued that failure of city to register zoning bylaws under terms of *LTA* should exempt the RO of any real property from application of bylaw  -Should be registered because affect use of land  -Bylaws don’t need to be registered | -Registration may be refused unless instrument sought to be registered **conveys interest in land**.  -If it is to be registered, it must be reflected as a title/interest in land; if it is not then even though it is legislation affecting land it doesn’t need to be registered in order for it to be enforceable  Zoning bylaws do not need to be registered to have effect   * Bylaw affects the land itself 🡪 not the land title   -zoning bylaws are not interests in land; do not need to be registered |

#### Prohibition of Registration of Common Law Interests

You cannot register the following interests:

1. **Equitable mortgages** (***LTA, s.33***): where you provide security by leaving your duplicate CIT with the lender. [Second mortages **can** be registered, and they are a different type of equitable mortgage].
2. **Details of Trust** (***LTA, s.180***): while the trustee is listed on the title, you cannot specify who the trust is being held for. But the trust document is usually deposited at the LTO.
3. **Sub-right to purchase** (***LTA, s.200***): all sub-rights after 1979 cannot be registered. A sub-right to purchase occurs where an agreement for sale is registered on a title, and the owner of that agreement for sale enters into another agreement for sale with a 3rd party (the subsequent agreement cannot be registered)
4. **Aboriginal title:** b/c AT is inalienable except to the Crown, it does not provide good safe-holding and marketable title and therefore cannot be registered.

* Caveats+CPLs relating to AT cannot be registered. Encumbrances relating to Nisgas’s lands can be (***LTA, s.1***).

1. **Agreements to sell** (future agreements to sell)
2. **Leases under 3 years.**
3. **Licenses:** agreement to use land (e.g. parking food truck on property)

#### Mechanics of Registration

* ***LTA, s.153*** **Time of Application**: applications for both FS & charges are date/time-stamped upon receipt and given a serial # For the purpose of determining priority, the time/date recorded by Registrar is “real time” (***s.153(2)).***
* ***s.28***: **Priority of Charges**: determined by time/date of pending registration – when the application is received [not the time/date of final registration]
* ***s.27***: **Actual notice of charges** occurs upon registration
* ***s.31***: If registered caveators or CPL-ers are successful, their claim will gain priority over all other titles/charges/claims registered after the date/time which the caveat/CPL in question was registered
* ***s.168***: Registrar has the **right to reject an application upon receipt**, but can also inform applicant of mistakes and give her time to correct them
* ***s.154***: **Form A** is required for fee simple registration
* ***s.155***: **Form B** is required for mortgage registration. Fee simple registration is required before mortgage registration can occur, but in practicality, they move from pending to final registration almost simultaneously.

#### Processing Gap: From Pending to Final Registration

There is a gap btwn pending registration and final registration. The processing gap can vary in length (up to a year). What happens if a caveat or a CPL is lodged during the processing gap?

* Delays caused by LTO administration will not affect a purchaser’s right to title (***Rudland***).

#### Registration of Non-Common Law Interests (registrable as charges)

1. **Caveats** (***LTA, s.282-294***) Can be lodged by any person who claims to be entitled to an interest in registered land that is not reflected on CIT.
2. **Certificate of Pending Litigation** (lis pendens): (***LTA, s.215-217***)
3. **Judgments** (***LTA, s.210-214***)
4. **Statutory right of way** (***LTA, s.218***): allows certain govt bodies and others to acquire a right to use another’s land for a certain purpose. Diff from the CL easement which allows adjoining land owners to obtain access through their neighbour’s land.
5. **Restrictive Covenants:** (***LTA, s.219***): Imposes restrictions on the use to which land may be put. Frequently restrictive, but may also be positive (benefits)
6. **Statutory Building Scheme:** (***LTA, s.220***): restricts use of land. Enforcement comes from adjacent property owners (or developers) rather than the municipality.

### Basic Scheme of Registration

#### The Legal Fee Simple

When the title is being registered for the 1st time, the procedure to be followed is governed by ***LTA Prt 11, Div 1 (ss 169-174).***

***Initial application***

***LTA, s.169***: If an application is made for registration of IT, registrar must be satisfied that a) the boundaries of land are sufficiently defined // b) a **GOOD SAFE HOLDING AND MARKETABLE TITLE** in FS has been established by the applicant

* This section requires the satisfaction of **2 Preconditions to Registration:**

1. Boundaries are sufficiently described: requires a survey acceptable to the R(***Part 7, ss.58-120*** contains the details)
2. R must be satisfied that the instruments produced by the applicant confer a **“good safe holding and marketable title in fee simple”** // safe-holding: a title conferring possession that is safe from attack and cannot be displaced // marketable: a title that is freely alienable, and not so defective that a reasonable purchaser could refuse it.

***LTA, s.169(2)***: R may give notice that they’re intending to register the title of the applicant unless someone registers a caveat or certificate of pending litigation contesting the applicant’s right

***LTA, s.169(3)***: If caveat or LP is registered the registrar must defer consideration of application until caveat expires / withdrawn and the LP claim is disposed of

***Applications Received by the Land Title Office:***

* Application is deemed to have been received when ***s.153*** has been complied with: applications for both the FS and charges are date/time stamped upon receipt and given a serial number
* Application is scrutinized by examiner of titles (i.e. good safe holding and marketable title)
* Final step involves production of an indefeasible title // Can take 2 forms (***LTA, s.1***). Traditionally, CIT(when signed by the R, title was deemed to be issued). Today: computerized system.

When FS is registered, the R must issue the owner a **duplicate indefeasible title** (***LTA, s.176(1)***).

* The duplicate must contain all the info in the register relating to the land in question (all conditions, exceptions, reservations, charges, liens or other interests )(***LTA, s.176(2)***).
* DIT cannot be issued if the title is subject to either a registered mortgage or an agreement for sale (***LTA, 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.”

***Transmission on Death***

* Dealt with in ***Part 17, Div 2, ss.263-268***
* Title vested in personal representatives who hold it in trust as fee simple owners
* Executor or administrator registered as owner
* Transfer them made to person entitled to take under will or on intestacy
* See also: ***Estate Administration Act, ss. 77-78***

### Charges

Procedure for the registration of charges is set out in ***LTA, Part 14 (ss.197-237)***.

***s.197(1)*** Registered charges must show: a) that the applicant has good safe holding and marketable title // b) the charge claimed is an estate or an interest in land that is registrable under this ***Act***

#### Effect of registered certificate of pending litigation (LTA Part 14 ss. 215-217)

**Allows litigants to freeze disputed title** and provides notice to potential buyers that land is being litigated. A CPL can be registered as a charge against the disputed land by a person who has commenced or is party to litigation involving interest in land (***s. 215(a)***). The test for CPL is far less stringent than a caveat; however it is a much slower process because it involves filing lawsuit.

Can be registered by any person who has commenced or is a party to a proceeding (***s.215(1)***)

* Re must give copy of LP to owner against whose title the LP was registered (***s.215 (3)***)
* Restrictive covenants/building schemes (***s.215 (5)***) dissolution of marriage or declaration that marriage is null and void (***s.215 (6)***) actions under ***Wills Variation Act*** (***s.215 (7)***).

#### Effect of registered CPL (s.216) HALTS ALL DEALINGS WITH LAND:

* R may not enter anything into register that has effect of charging, transferring or otherwise affecting land
* **NO ONE LIKES TO DEAL WITH LAND THAT HAS A CPL ON IT.**
* *Does not apply to:* lodging a caveat or registration of indefeasible title or charge
* Indvl may proceed to registration subject to CPL but R must be satisfied that purchasers of interests affecting the land know about the LP and that they are subject to outcome of litigation

### The Role of the Registrar (*LTA*, *s.10*)

#### General Duty & Role of the Registrar

**General Duty:** Administer the ***LTA*** with respect to the lands w/in their Land Title District. R’s powers are derived from the ***LTA*** – they aren’t a ***s. 96*** judge, and therefore can’t adjudicate the contested rights of parties – you need to go to court for that (***Heller)***

**Quasi-Judicial Role:** Act on principles of law to determine whether interests are registrable [good, safe-holding and marketable title]. The R is bound by established law because they can only apply the facts to the law.

1. **Not all interests are registrable**: Torrens only registers interests which are good, safe-holding and marketable
2. **Don’t perpetuate errors in title:** R has duty to satisfy himself that the title is good, safe-holding and marketable when registering any instrument (***Evans***)
3. **Power to refuse bad documents:** R can refuse to register, if the documents and evidence produced fail to produce either a *prima facie* or good safe-holding and marketable title (***Shaw***, *son scams dad*)

**Administrative Role:** Act on policy and/or expediency. The R has the 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 R, contains a misdirection, or an endorsement has been made or omitted in error on a register/instrument, R “may” cancel/correct (***Heller***).
2. **No obligation for non-Registrar errors:** R is not obligated to correct errors which are not the fault of the R (***Heller***).
3. **Cannot prejudice BFPs:** Power of cancellation occurs only if it doesn’t prejudice rights acquired in good faith and for value (***s.383 (1)***).

**When an instrument/application is submitted to the LTO,** the R must determine (1) whether the instrument deals with an interest in land ***(Kessler***) and (2) whether the interest is properly derived from the owner/applicant and (3) whether the transaction and instrument are, *prima facie* valid (***Shaw***; ***Heller***).

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| ***Case*** | ***Facts/Conclusion*** | ***Ratio/rules*** |
| ***Re Land Registry Act, Re Evans Application [1960] (BCSC)*** | -Mrs. E saying we need to clear the title b/c it is wrong (Mr E now dead), it should just have Mrs E on it  -The R refuses; the original lot (B) was subdivided into G and P, so the CIT for B was cancelled, and in its place emerged 2 indefeasible titles (1G, 1 P)  -the original B was described as a parcel of land 66ft, it was then subdivided into 2 lots (G exactly 40ft, and P exactly 26ft)  The problem for the R: was it more or was it less; if it was more, there is now attractive land in the middle of the 2 properties where there is no owner, if it is less one of the parties is encroaching on the other | -Court says R has the power to insist on boundary ratifications (to find out true state of a boundary and to make sure that is corrected), once it is corrected, you as an owner can deal with the property and give your successor in title a good safeholding and marketable title  -If you don’t know the precise measurements, you are allowing to go forward a title that is neither safe holding or marketable with regards to the exact descriptions you are giving  -**Registrar has right to refuse to register until boundaries clarified**  -R has an option not an obligation to correct register  -Must be satisfied of a good safe-holding and marketable title before issuing CIT  -Not duty of R to determine boundaries or adjudicate property rights 🡪 courts |
| ***Re Land Registry Act and Shaw [1915] (BCCA)*** | - A father owning a parcel of land given power of attorney to his son, the son acted as agent for father, assigned a mortgage to himself  He signed the debt to himself, and the son wanted to get this registered | **-R must be satisfied after examination of title deeds that a *prima facie* title has been established by applicant**  🡪 Need to produce title that does not require further evidence 🡪 if something more needed to be shown ≠ *prima facie* title  🡪 Evidence here of S’s action put a blot on title 🡪 not *prima facie*  -S trying to exercise two capacities at once 🡪 buyer and seller  -When you are dealing w/ self-dealing by an agent, you need addtl proof to show that the principal has given you this right and power  **-R HAS AUTHORITY TO LOOK BEHIND AGENCY AGREEMENT. R CANNOT DETERMINE IF THE DOCUMENT IS VOIDABLE (COURTS MUST DO THIS)**  ***Property Law Act s.27*** *Attorney cannot sell to himself*   * Person granted POA (Shaw), cannot transfer land from the person granting the POA (his dad) to himself unless a): POA expressly authorizes it or b) the person granting POA (his Dad) ratifies it; * Burden of proof is on Shaw to show evidence of full disclosure, fair consideration and good faith |
| ***Heller v British Columbia (Registrar, Vancouver Land Registration District) [1963] (SCC)*** | -H executed deed transferring interest to wife and she registered  -H then tried to cancel b/c R did not have the duplicate COT  -Was held by C 🡪 H had transferred him one half interest in property  -R refused to correct error  -R does not have to correct | **-**Section of LTA says registrar "may" do things → no duty imposed (***LTA s.383)***  -Can exercise limited power of cancellation/correction where error has occurred **but doesn’t have to act**  -Powers are limited by words “so far as practicable, without prejudicing rights conferred for value”  -R cannot adjudicate upon contested rights of parties for the determination of which it would be necessary to receive and weigh evidence → can only act upon material in own records  -Any questions of title to land in relation to fraud go to courts  -Nothing before the R to indicate whether or not that duplicate cert of title was available and could be produced by the respondent |
| ***McCaig et al v Reys et al [1970] (BCCA)]***  ***S 296 refused*** | - Farwest sold land to South Transport (head by McCaig)  -South Transport sold to Reys by sub-agreement  -Reys offered option to sell back 24 acres in a separate instrument; McCaig agreed  -Option was never registered  -Reys then sold by sub-agreement to Rutland  -Rutland knew of option, said they would honor it, but then registered their own interest  -Rutland then sold to Jabin without notifying Jabin of the option  -Jabin took title bona fide and for value without notice; acquired a good safeholding and marketable title  -Final transaction with Jabin extinguished any rights McCaig or S.T. would have had | * **To claim against Assurance Fund:**  1. Deprivation of land or interest therein 🡪 YES 2. Occasioned by operation of statute (*LTA*) 🡪 YES 3. Loss occasioned by fraud, misrepresentation, or some wrongful act in the registration of any other person as owner or having interest in land 🡪 YES 4. Barred from bringing action for rectification of the register 🡪 no, Mc cannot succed  * Deprived of his interest by breach of K of Reys and fraud of Rutland * Bona fide purchaser w/o notice (Jabin) has laways been protected in equity * Jabin has a superior title in equity and law   \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  - in this case loss did not result from operation of statute – so M cannot rely on AF  -Jerome acted fraudulently, M can’t exercise option assigned to him by ST → basic and first 2 elements satisfied, but 3rd not (w/o Act, M would NOT have succeeded)  -M only had equitable interest in his option: in CL an equitable interest is lost where person is a BPFV (does not know of fraud and pays purchase price) 🡪 Under CL, Jabin is a BFPV so M lost his equitable interest 🡪 **As M would not be successful under CL he cannot make claims under AF.**  **As Jabin did not know of McCaig’s option when he became new RO his registration was fu**lly indefeasible  **the loss of an equitable interest in land to a legal interest BFPV cannot be compensated by the AF. (McCaigs is not as strong b/c of nemo dat possession of land)** |

### The Assurance Fund

**The Assurance Fund covers two situations:**

1. **Person deprived of interest in land:** A person has been deprived of land in certain circumstances [**involving fraud**] by reason of the conclusiveness of registry (***s. 296***)
2. **Fault of Registrar:** A person has sustained loss **solely** as a result of an omission, mistake or misfeasance of the registrar (***s. 298***)

* R owes no duty to unregistered claimants (as an unregistered title will not appear when R determines GSHM title). R’s duty is to those seeking to use Registry. A successful claim against the AF must show that the P’s loss flowed naturally and directly from the mistake of the R (***Royal Bank v BC***)

**Successful claim against Assurance Fund:**

Claimant must show that (***s.296, subject to s. 303***; ***McCaig v Reyes***):

* They have been **deprived** of land or interest therein
* The loss was occasioned by the operation of the ***Land Title Act*** (and not the common law)
* The loss was occasioned by **fraud**, misrepresentation or wrongful act in respect of registration of person other than claimant as owner of land
* **Conclusive** nature of operations of the Act prevent claimant from recovering (cannot ask the R to put the title back in your name).
* **If not for the Act**, P would have succeeded

**Other Rules for Assurance Fund:**

* ***s.296(8):*** 3 year Limitation Period
* ***s.303:* Liability is limited:** the following owners cannot 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 the event of contributory negligence (previously, contributory negligence would bar a claim)

*Example: Y impersonates X and transfer’s X’s land to himself via forged Form A. Y then transfers the land to Z, a BFPFVWON. Z registers transfer and becomes RO. Because of fraud, the transaction between X and Y is void. At CL, Z would not have received title because* ***nemo dat.*** *But Torrens gives Z indefeasible title because of registration. Under* ***s. 25.1****, Z can keep the land and X can claim against the Assurance Fund because he has lost his land because of fraud (****s.296****) and the conclusiveness of the register.*

***Royal Bank of Canada v BC (AG)***, 1979 (BCSC)

**EQUITABLE MORTGAGES** are not registrable so banks will have no claim with AF. **THOSE WHO SEEK TO RELY ON EQUITABLE MORTGAGES MUST ACCEPT RISKS INHERENT IN SUCH SECURITIES. STRICT ADHERENCE TO/USE OF TORRENS SYSTEM PROVIDES HIGHEST FORM OF SECURITY AND CERTAINTY.**

#### Review of Mortgages

* **1st Mortgage a.k.a. Legal Mortgage**: conditional transfer of one’s EIFS (condition: when you pay in full you automatically get back your EIFS). The homeowner is left with an “equity in redemption” (equitable interest in land); if he fails to pay bank he does not immediately forfeit his property to bank; bank must first sue homeowner to “foreclose” his equity of redemption
* **2nd Mortgage a.k.a. Equitable Mortgage:** 2nd bank gets an equitable mortgage; homeowner gives them their “equity of redemption”

## REGISTRATION – Chapter 6

### Registration: The Fee Simple

* ***Indefeasible title*** (in force/un-cancelled) = conclusive evidence at law and in equity, as against Crown and all other persons, that person named in title as reg’d owner is *indefeasibly entitled* to estate in FS to land described (**s. 23**)
* **Effect of indefeasible title:** (***Land Title Act s.23***): indefeasible title is conclusive evidence at law and at equity – important! LIMITS: if you are an innocent party who has acquired an EIFS, through no fraud of your own you will be protected 🡪 bona fide purchaser of value.
* (***Land Title Act s.23(3)***): “Squatters Rights Abolished” – for both private and Crown land subject to small window (before 1975 if Crown grant)

***Creelman v Hudson Bay Insurance Co [1920]***:

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| Facts: | -HB brought action for breach of K of sale against C (purchaser)  -EIFS registered to HB  -C argued that HB could not hold real property unless it was required for purposes of company |
| Conclusion: | -C must accept CIT |
| Rules/Ratios: | -A certificate, while it remains unaltered or unchallenged on register is one which every purchaser is bound to accept  **-Register is conclusive** 🡪 AG can launch investigation but if another gets CIT before this happens it is too late |

#### The General Principle of Indefeasibility

**CL RULE:** A forged transfer doc was null and void, even if the “purchaser” was BFPFVWON. Same is true under Recording System.

**THE CURTAIN PRINCIPLE:** (s***.23(2)***).: The Torrens system provides security for purchasers against the effect of forged documents, based on the **principle of** **immediate indefeasibility.**

* The fact of registration is conclusive proof of indefeasibility. The “curtain is lowered on previous transactions” and thus BFPFVWON receives immediate indefeasible title (***s.25.1(1)-(3)***).
* The registered owner is thus safe from any previous defects in the title. A cert, while unaltered or unchallenged by the R, is one which every purchaser is bound to accept. To allow an investigation into whether a person has the right to appear on the register would defeat the purpose of the ***LTA*** (***Creelman v HBC***, *HBC has good title because of registration*)

**Effect of s.25.1:** A rogue who **obtains land via their own forgery acquires no interest upon registration** (codifies the CL rule)

* A BFPFVWON who receives a FS interest via a forged (registered or unregistered) instrument will acquire immediate indefeasible title upon registration (strengthens ***s.23*** and asserts pure Torrens rule of immediate indefeasibility
* Note: only applies to fee simple interests – does not apply to gifts of land acquired under a forged instrument (since there is no value / consideration transferred in a gift.)

*Example: A forges a transfer of B’s title to C (a BFPFVWON):*

* **Common law:** C loses out as the A 🡪 C transfer was null and void. If C tries to mortgage his “interest” the mortgagee loses out due to ***nemo dat*** (C can’t pass on an interest that he doesn’t actually hold).
* **Torrens:** C is protected due to immediate indefeasibility (***s.25.1***). B loses his land but can claim against the Assurance Fund.

#### Indefeasibility and Adverse Possession

* **Squatter’s Title/Adverse Possession:** if land owner doesn’t bring an action to recover possession of land from a wrongful occupier w/in a 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 with the indefeasibility of registrable title
  + ***Land Act s.8:*** cannot acquire title to Crown land or any land via adverse possession unless exception (own land for 20 years before 1975 applies)

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

* Possible to acquire title by adverse possession where:

1. no IT has been raised to subject land
2. 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 and where the adverse claimant is a knowing trespasser.
* For a claim to title based on possession to succeed, the act of possession must be open and notorious, adverse (not w/ the permission of the owner), exclusive, peaceful (not by force), in general actual (as opposed to constructive) and continuous.

#### Statutory Exceptions to Indefeasibility

***LTA s.23(2):*** lists interests which qualify an EIFS absolute; **“INDEFEASIBLE TITLE IS SUBJECT TO:”…**

**LEASES** (***LTA s.23(2)(d)***)

* Lease/agrmt to lease will be honoured up to **3yrs** even if not registered, as long as there is *occupation*
* Leases longer than 3 years must registered (based on *total*, including option to renew)
  + *Ex: If T is lessee and 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 the premises // Grant of indefeasibility of B does not protect him as T is a tenant, occupying his land with a lease of less than 3 years. Thus, B cannot kick T off his land before his lease is up.*

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

***Carr v Rayward [1955]* (CHARGES):**

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| Facts: | -C did plumbing, filed lien before completion of work but after land had been sold to B and CIT issued to B  -B did not know about work, original owner didn’t pay  -C suing new owner to get paid |
| Conclusion: | -C entitled to payment |
| Rules/Ratios: | -**CIT in BC is subject to some stat exceptions which may cause something unregistered to become an encumbrance**  -A mechanics’ (builders) lien is effective against lands even if filed in land registry office after owner for whom the work done sells the land and purchaser has obtained CIT from LTO  -anybody who is a builder, if you are going to put a lien on the property and don't need to worry about who owns the estate in fee simple, as a builder you do need to comply with the procedural provisions that are in that statute |

***Builders Lien Act (1997) (s.2):***workers have a lien against the land for $$ not paid for their work. This gives workers a real interest in land + personal interest (under their K).

* + **s.20:** a lien may be filed within 45 days of completion of work; if not it is extinguished
  + Lien has effect from time work began and has priority over all judgment, executions, attachments and receiving orders recovered, issued or made after that date
* ***s.23(2)(g)***: a builder’s 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 ( S. 23(2)(h))**

* *“right to show that all/portion of land is, by wrong descript of boundaries”*
* Title not guarantee as to boundaries of land; need to have survey done to check

#### Fraud

***LTA, s.23(2)(i)***: The right of a person deprived of land to show fraud, including forgery, in which:

1. RO has participated in any degree
2. Person from/through whom the RO derived their right or title otherwise than in good faith and for value has participated in any degree
   1. *A is RO. B forges A’s signature and becomes new RO. A can recover title under s.23(2)(i)*
   2. *A is RO. B forges A’s signature and becomes new RO. B sells to C, who knows of forgery. A can recover title*.

* Literal meaning of ***s.23(2)(i)***: If you haven’t participated in fraud and you take for value, you get IT
* False rep of a matter of fact, by words or by conduct, by false or misleading allegations, or by concealing that which should have been disclosed, which is intended to deceive or does deceive another person who acts on it to his or her legal detriment.

#### Forgery

*A is RO. B forges A’s signature, becomes new RO. B sells to C, who* ***doesn’t know of forgery*** *– what now?*

**AN OWNER OF INTEREST IN LAND WHICH WAS ORIGINALLY OBTAINED FROM THE RIGHTFUL OWNER THROUGH FRAUD, STILL OBTAINS AN INDEFEASIBLE INTEREST IN THAT TITLE IF THEY WERE UNAWARE OF THE FRAUD.**

#### Void Instruments – Interest Acquired or Not Acquired

***Land Title Act s.25.1***

Immediate indefeasibility is given to fee simple and deferred indefeasibility is given to charges

* Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument – Transferee does not get a charge if Form A (transfer form) void
* Even though an instrument purporting to transfer a FS estate is void, a transferee named on the instrument who is a **bona fide purchaser for value** (in good faith) and has acquired the estate on registration – transferee gets fee simple even if Form A (transfer form) is void

***Gill v Bucholtz***, 2009 (BCCA) **Who, between an innocent registered land owner and an innocent lender, should bear the risk of a rogue obtaining mortgage proceeds by fraud?**

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| ***Gill v Bucholz***  (2009)  (Combines *CF* & *CCB*)  -Interp of ‘indefeasibility’ section of *LTA* s.23 and ‘fraud exception’ s.23(2)(i) | -Mr. Amritpal Gill was the RO  -a fraudster forged Mr. Gill’s sign on a transfer of the land to Ms. Gurjeet Gill, who was collaborating with the fraudster  -Ms. Gill then granted a mortgage to a lender who advanced $40,000 to her when the mortgage was filed in the LTO (concurrently with the forged transfer)  -About a month later, she negotiated a second mortgage with another lender but could not register it b/c Mr. Gill, having discovered the fraudulent dealings with his land, had filed a caveat against title.  -the 2nd lender had already advanced $55,000 to Ms. Gill. Neither lender knew that Ms. Gill had obtained her title by fraud | -You can rely on guarantee of indefeasibility enjoyed by registered FS *if FS owner has guarantee of indefeasibility*  **-Immediate indefeasibility applies to EIFS when there is a BFPV**  *-Nemo dat* preserved for registered charges (s. 25.1(1)) 🡪 cannot gain an interest from a void instrument ∴ have no interest to give  -S. 25.1(1) exception only applies to BPFV in EIFS  **-**Title holders can give only that which they validly hold; if they hold because of fraud, then they have nothing to give.  -Although the LTA protects the genuine owner or purchaser of property who is relying on the register in respect of title to the property, it does not protect someone who has a lesser interest in the land such as a registered mortgage  **-mortgage lenders do not obtain the same protection of “indefeasibility”** upon registration of their mortgage  ***LTA s.25.1(i)*** exception to indefeasibility applies.  -“Void Instrument” in ***LTA s.25.1(1)*** includes mortgages from persons obtaining title via fraud/forgery.  The mortgagees in this case did not acquire any estate or interest in the real property on registration of their instruments because having been granted by a person who had no interest to give, those instruments were void both at CL and under the statute.  -b/c Ms. Gill became a RO by fraud and never actually acquired a valid interest in the land, she had no interest to grant to the lenders.  -the 2 mortgages were void (both under S 25.1(1) and at CL and the lenders were left without any security for the $$ advanced to Ms. Gill. |

**Amendments to the *LTA* in 2005 made it clear that an innocent purchaser of a FS interest will, by registration of the instrument purporting to transfer the FS interest, acquire that interest, even if the vendor is a rogue The bona fide purchaser of a FS interest will, by registration, hold indefeasible title. The holder of a charge will not**

**the cost of frauds perpetrated against mortgagees and other chargeholders should be borne not by the public (as the funders of the Assurance Fund) but by lenders and other chargeholders themselves.**

**3 principles from the provisions of the *LTA*:**

1. Indefeasible quality of title as long as it remains ‘in force and uncancelled’ subject to the exception that as against a titleholder who has participated to any degree in a fraud in acquiring title, the true owner can recover title under ***s. 23(2)(i)***
2. Does not give a registered charge the indefeasible quality given to the EIFS interest
3. Preserves the *nemo dat* principle for interests less than EIFS

**So: indefeasibility does not apply to charges.** If you are a **charge-holder** (mortgagor) and you got that through some form of fraud (doesn’t matter if you’re in good faith) then **you are vulnerable and are not protected** with indefeasibility

#### Notice of unregistered instruments

**Effect of notice of unregistered instrument** (***LTA s.29(2)***):

* If a person applies for registration and becomes RO they 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

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

1. **New owner had actual knowledge (notice) of it before purchase** (CPS is executed (signed)) – not constructive notice
2. **PLUS element of dishonesty:** additional fraudulent behaviour; one is acting out of the ordinary course of business or natural course of dealings or transactions (***HB v Kearns***)

**IF THE CONVEYANCES ARE VOIDABLE, THE PROPERTY REMAINS SUBJECT TO THE CHARGES OF THE MORTGAGES. DISTINCTION BETWEEN OTHER TYPES OF FRAUD THAT RENDER A TRANSACTION VOIDABLE AS DISTINCT FROM FORGERY WHICH RENDERS A TRANSACTION VOID. (*First West Credit Union v Giesbrecht)***

* **Fraud creates voidable, unless forgery in which case it is a nullity**
* **forgery is distinct from fraud and that Gill did not apply to voidable as distinct from void mortgages**

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| ***Case*** | ***Facts/Conclusion*** | ***Ratio/rules*** |
| ***Van City Savings v Serving for Success*** (SCC) | - City Centre bought/became reg’d owner of hotel where Ds had pub on ***unregistered* 5yr lease**  - Ps advanced CC loans, CC defaulted, Ps petitioned for foreclosure (which would remove D tenants)  -petitioners found purchasers who insisted on *vacant* possession  -Ds claimed right to remain under unreg’d leases arguing petitioners were *aware* of rentals (and added revenue), argued conduct in seeking vacant possession despite knowledge = fraud under s. 29(2)  -VC entitled to payment | - before a finding of equitable fraud can be made, must be evidence of **actual notice** coupled w/ some **act of dishonesty** on part of person seeking protection under s. 29  -There must also be some other circumstance to take the matter out of the ordinary course of business or to show some clear intention to use s.29 LTA to defeat unregistered owner’s interests in circumstances contrary to common morality such that it would be inequitable for the court to allow reliance upon the statute as protection  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **Fraud requires more than knowledge of unregistered interest:**   * Sufficient, actual knowledge of adverse interest (of conflicting interest in the property to cause a reasonable person to make inquiries as to the terms and legal implications of the proper instrument) * Circumstances must remove the petitioner from regular course of business or to show some clear intention to use the statute to defeat the Rs interests in circumstances contrary to common morality such that it would be inequitable for the court to allow reliance upon the statute protection   \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **-**VC wasn’t doing anything wrong, clearly saw that there were tenants there, but it wasn’t upon them to go check if it was a short term or long term lease   * you had to show that they knew and were dealing in some way to take advantage of the statute in order to further their interests (clearly not shown; they made their mortgage the way any other mortgagee would do it)   -**McCaig** and **Vancity** distinguished with the element of dishonesty/deception in order for you to succeed on the basis that the other party had notice such that the unregistered notice should be impregnated on them |
| ***McCaig v Reys [1970] (BCCA)*** |  | -**Applies s. 29(2) of *LTA* 🡪 except in case of fraud in which participated is proposing to take from RO a transfer/charge on land is not affected by a notice, express, implied, or constructive of an unregistered interest affecting the land**  -Subject to limitation of knowledge + some form of dishonesty to make sure section applies  -if you take and become a RO you are not affected by any notice of an unregistered interest  -notice coming after registration is irrelevant |
| ***Hudson’s Bay Co v Kearns And Rowling [1895] (BCCA)*** | -K owed HBC money so mortgaged her land  -K sold property to R  -R did not inquire why title deeds were not available | -**Fraud not presumed or imputed 🡪 R was careless but his acts were not out of the ordinary course of a pending deal**  -**S. 29(2)** protects unless the purchaser, with actual notice, acts to directly bring himself within the act to prejudice the holder of the unregistered interest 🡪 tantamount to fraud and purchaser will be estopped from invoking Act’s protection  -a man who in consequence of any knowledge constituting actual notice of a prior unregistered title or interest does any act for the direct purpose of bringing himself within the words of the section, thereby prejudicing the holder of the unregistered title, must be held to be guilty of actual fraud and to be estopped from invoking the protection of the enactment |

#### In Personam Claims

* A cannot rely on their indefeasibility of title which they have obtained to defat rights *in personam* (contract) which they have created, or subject to which the interest has been taken

***McRae v McRae Estate [1994] (BCCA)***

|  |  |
| --- | --- |
| Facts: | -Father left in will land to wife for her life and remainder to three kids 🡪 W held ‘in trust’  -W transferred to F  -When F died left to wife and siblings  -Siblings discovered father’s will and wanted to transfer from W to F set aside |
| Conclusion: | Siblings entitled |
| Rules/Ratios: | **-If CIT notes that interest is held ‘in trust’ that is sufficient notice to subsequent purchasers of the trust**  **-**Imputed notice is sufficient → F was ∴ bound by the trust and the trust was not subverted by intervening conveyance to F  **-If you have been registered, you are deemed to know the state of your title according to what it was before (**whole point of the system!); doesn’t matter if you actually know or not, once it is on the register you are deemed to have known  - If property reaches the hands of someone who knows the existence of a trust, that person is bound by the trust |

### Registration: Charges

#### Meaning of Registration

***Dukart v Surrey* 1978 SCC** –

|  |  |
| --- | --- |
| Facts: | -Land developed for residential lots; developer transferred foreshore reserves to trustee, w/ trust notation  -intended to give effect to rights created in various conveyances to purchasers of lot; FRs purchased by municipality on tax sale (owner/trustee hadn’t paid municipal taxes owing on property, so things from property sold, tax sale normally clears interests against land, but NOT easements)  - no trust notation entered (so once D purchased it, trust notation no longer there)  - D decided to build public toilets, some in front of windows of houses abutting on FRs (easement = non possessory right of entry)  -P sought injunction b/c it obstructed her right of access |
| Conclusion: | P/appellant wins; right of access survived tax sale, is valid easement (considered a registered charge) |
| Rules/Ratios: | - ***LTA*, s. 276** provides that where land is sold on tax sale, title is “purged” of all charges, *with some exceptions* including “any **easement** registered against land” 🡪 **so, Q = was easement registered? YES**  -Act does not actually define registration – clear that in Estey J’s view that **Act contemplates different kinds of registration**  **Interests that are *created in trust docs* are deemed to be registered** for the purposes of the LTS  **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 a charge (***s.180 LTA***).  -any charge included in a trust, properly registered in LTO, will also be validly registered despite its absence from the face of the CIT  -In respect of equitable interest contained in a trust instrument that is registered by having the notation in trust put on title; it is your obligation if you are purchasing to pull up the trust instrument to see what the limitations are going to be on your rights and possession of that land |

#### Indefeasibility?

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

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

**Notice given by registration of a charge *s.27***:

* Registration in effect gives notice to world of your claim (party can’t claim they didn’t know about it!)
* ***s.27(2)***: making payments on a mortgage is not a dealing on land

Whether the mortgage itself is forged, as in *Credit Foncier*, or the underlying FS from which the mortgage is granted is invalid, as in *Gill*, in both situations, the mortgage is ineffective at CL to pass any interest: *nemo dat*.

Priority of charges based on priority of registration ***s.28:***

* If 2 or more charges are on register affecting same land, priority is given to charge registered first

|  |  |  |
| --- | --- | --- |
| ***Case*** | ***Facts/Issues/Conclusion*** | ***Ratio/Analysis*** |
| ***Credit Foncier***  ***v Bennett***  (1963)  Seems to take us in CL direction of search for good root of title | -Allen, acting as “Bennetts”, forged mtg, sold it to Stuart (innocent), who *registered* it and sold it to CF; Bs did not respond for requests for payments, CF obtained foreclosure order  -CF argued that they were relying on LTS/register (s. 197: R need be satisf’d that appl’t entitled to be reg’d as owner of chg), saw it was reg’d, so they should be protected (use of AF) – no, they lose  -**Registered charges are not indefeasible**  a rogue forged a mortgage, registered it, and then assigned it to a third party who had no knowledge of the fraud. The new holder of the mortgage registered its interest and then assigned it to another bona fide purchaser who also secured registration. | **Presumption rebutted:** mortgage was a nullity by virtue of forgery and remained a nullity notwithstanding registration.  -**Reg’d charge is not necessarily valid**: **S. 26** just *deeming* provision (deemed to have interest) – up to anyone to challenge that, **go beyond/behind register** to see what outcome would’ve been at CL  -Original was forged, should have been void *ab initio*, all subsequent transactions also void; CF **only dealt w/ CH, not FS owner** (v. *CCB*)  -One **cannot assume the validity of docs creating charge** (unlike relationship that exists w/ FS, charges are diff situation, diff inquiry)  - **In case of charges, have to do CL search for good root of title** for charges  **-Registration of charge creates a rebuttable assumption of entitlement that can be overturned by contrary evidence**  -Registered charges ≠ indefeasible if can be shown that it was created due to fraud, etc.  -Even if a bona fide purchaser holds the charge it is not indefeasible  -**this is nemo dat!** (even though the mortgage is registered, it does not give P indefeasibility as D had no interest to give them (due to null mortgage))  -CF only gets what its transferor has (which is nothing)  indefeasibility did not apply to charges and, b/c the mortgage had been created with a void instrument, the interest was subject to the claim of the person wrongfully deprived of that interest |
| ***Canadian Commercial Bank*** ***v Island Realty***  (1998)  (Limits *CF*) | -IR has second mortgage  -C (lawyer) forged a discharge of IR’s mortgage and registered AA as holder of second mortgage  -C fled BC with AA’s money  -Insufficient funds to pay back both mortgagors on bankruptcy  -Ds contest their *losing priority through forged doc* they had no control over/no way to protect  -Holder of 3rd mtg Almont says he relied on register, check to make sure discharge was reg’d, were *bona fide* 🡪 both legit claims! | Slightly closed door opened by *CF*  -**Charge holder does *not* have guarantee of indefeasibility**  -Charge holder can take advantage of (piggy back on) guarantee of indefeasibility that the FS enjoys *as long as dealing directly w/ reg’d FS owner*  -**Charge holder protected if dealing directly w/ registered FS owner**, able to rely on it  \*As owner of registered charge, you are owner of *legal* interest that can be assigned  -**Doc creating charge valid if can be traced back to original owner**  -The BPFV of a charge who gets the charge under a valid instrument from the holder of the EIFS is deemed to be entitled to that charge upon registration  -Entitlement is not rebutted by pre-existing unregistered charges  -It was discharge not AA’s mortgage that was fraudulent ∴ AA did not take under void instrument  -A 3rd party who acquires an interest BPFV from RO is not affected by a fraudulent discharge of another interest. A mortgagee must be able to rely on the LT system. |

## Failure to Register – Chapter 7

### General Principle

**Unregistered Interest Does Not Pass Estate** (***Land Title Act s.20***)

* “except as against the person making it” a transfer of interest does not pass until instrument is registered
  + *Unregistered interests are only valid between parties to the transaction – unless notice of unregistered interest*
  + Does not apply to a lease of 3 years or less if actual occupation
  + Unregistered interests in land in favour of bona fide purchasers for value takes precedence

***Sorenson v Young*** **🡪 S.20 APPLYING LITERALLY – DOES NOT INVOLVE APPLICATION OF “EXCEPT AS PERSON MAKING IT”**

|  |  |
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| Facts: | -P owned Lot 1 and Lot 2  -Sold L1 to R, reserving a right of way  -R sold to D who claimed no knowledge of P’s right of way  -Built fence to block access |
| Conclusion: | -if you do not register, you are out of luck |
| Rules/Ratios: | -S 20 requires registration in order for you to preserve, enforce, maintain any interest in land including the easement; they haven't registered therefore S loses  -Action failed b/c easement wasn’t registered ∴ the EIFS of the RO couldn’t be successfully challenged  -Legislative changes after this case → can now sell land with reserved interest  -if this case was heard today: have to acknowledge the only saving grace in s 29 you have to been fraudulent if to assert unregistered interest against you (have to show Y was acting dishonestly); S would not be successful b/c of the inability to show dishonesty in terms of moving from R to Y |
| Held: | P doesn’t get an easement as it was not registered properly on the deed (s.26) and P and D were not original parties to the transaction creating the easement  \*\* If R had blocked P, P would successfully be granted easement as R and P were parties to the transaction creating the easement (D is 3rd party). |

**Interest or Right Reserved to Transferor:**

* ***s.181*** was created after Sorenson v Young: if you have a deed in which an easement is reserved which is discovered at a later stage then original IT is cancelled and interest is registered as a charge against new IT.
* If an owner has an easement and they sell the property it must be registered as a charge against the new owner.

### Except As Against the Person Making It

if person A transfers an interest in land to B, A is “the person making it” and that transfer is valid against A even before the interest is registered in the LTO

* Even if B delays registration for a long time, A cannot rely on the land title certificate as proof that B does not have an interest
* the general rule is that B’s interest is not valid until registered, but there is an exception as against A
* “Except as against person making it” – as between transferor and transferee, registration is not necessary for interest to pass

**- An unregistered instrument, provided it is valid, IS effective as between parties to that documen**

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

#### Judgments LTA Part 14 (ss.210-214)

**Judgments** are governed by ***LTA s.210-214***. Judgments are enforced by ***Court Order Enforcement Act***.

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

* 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 an interest is registered
* When a judgment is registered, R must notify owner of land or charge against whose title the registration has been effected
* Money judgments: claim by P results in Certificate of Judgment against D ordering that “judgment creditor is owed x dollars by judgment debtor”

**Court Order Enforcement Act, s.86**

When registered, a judgment is a lien and charge on land of JD{s) subject to rights of a purchaser, who, **before its registered**, acquires an interest in the land in good faith and for valuable consideration under an **instrument not registered at time judgment is registered**

*Example: with gifts there is no valuable consideration so this won’t apply!!*

-A judgment is registered against the equitable interest. Judgments are subject to the rights of a new BFPFVWON who, prior to the registration of the judgment, acquires the legal interest in the land

* Unregistered doc may allow transferee to take priority over a registered judgment creditor
* **S. 210** – must register judgments in same way as registering a charge
  + Must find actual piece of property owned by D/judgment debtor (can register against multiple interests, but have to do so individually)
  + No auto attachment to future acquisitions
* Effect of registration of judgment: **s. 86** of *Court Order Enforcement Act* preserves general CL principle that a **judgment creditor can take no more than judgment debtor actually owns**
  + Judgment creditor = successful plaintiff; judgment debtor = unsuccessful defendant
  + if you are JC and secure registration of your judgment on title what you are securing is that piece of property but only to that extent of the JD beneficial interest in the land
  + Judgment forms lien or charge in same way as if debtor had actually granted lien/charge
  + **S. 86(3)(c)** – Subject to right of purchaser who, before registration of judgment, acquired an interest in the land in good faith and **for value** under an instrument not recognized at the time of registration of the judgment
  + **Unregistered transfer** (for value) **prevails** **over registered judgment**
* **Effect of** **s. 20** on registered judgmentt cred’s (“Except as agianstt…”) – **Allows unregistered interest to prevail over registered judgment**

***Yuelet v. Matthews***

|  |  |
| --- | --- |
| Facts: | - Mrs M held an equitable mortgage from her son (not registrable) by deposit of his duplicate CIT;  -after it’s created P registers a judgment against the son  -If Mrs M held a registrable interest she would have priority but as her interest isn’t registrable, who is preferred? |
| Conclusion: | - Mrs M’s prior unregistered interest (equitable mortgage) is preferred over P |
| Rules/Ratios: | -**Judgment creditor cannot take a greater interest than judgment debtor has**  -S. 20 “except against the person making it” means that the JC’s interest is subject to unregistered interest which would operate against the judgment debtor  -when the judgment gets registered on title, the JC cannot get more in that land than the JD actually holds; what the JD actually holds is a fee simple interest subject to an equitable mortgage created by the handing over of the duplicate IT  -The JC cannot have his or her security enhanced at the expense of (nemo dat still applies to charges)  **-if an earlier, unregistered interest is found to be bona fide and validly executed, it is entitled priority over a registered interest.**  **Registered judgment yields to unregistered instruments in land. Registration of judgment is lowest priority.** |

#### Other Interests

* **Unregistered doc may allow a 3rd party to claim an interest in land as against transferor**
* “Reasonable restrictions” must be read into “irrationally wide provisions” of **s. 20**

***L&C Lumber v Lundgren*** (1942 BCCA)

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| --- | --- |
| Facts: | -Lundgren sold profit a prendre (right of entry + timber) to M  -M assigned his rights to L&C and gave notice to Lundgren; not registered.  -L&C move onto cut trees, Lundgren claims they’re trespassers |
| Conclusion: | - D still obliged to L&C; person making transfer affected even if intrst unreg’d/transf’d to 3P |
| Rules/Ratios: | - s 20 applies to profit a prendre  **-L&C are assignees** (stepped into M’s shoes) acting as an immediate party to the action, and thus have same rights as original purchasers (M) – s. 20 exception applies: **failure to register is not a defence when dealing with the 2 parties who created the interest in land.**  **-s. 20 protects 3rd party**  -the person who have given you the interest in land (the L's) cannot argue s 20 b/c they have given the interest to the M's --> the exception says this  -M's are the assignor and L&C are the assignee  -This is an assignment; an assignment becomes effective against the primary debtor (L) when notice has been given by the assignee to the debtor (this is what happened, notice was given)  -If you are an assignee you step into the shoes of the assignor and you make it complete if you give written notice to the debtor; that means L&C have become the M's and therefore they fit within the exception |

#### Prohibited Transactions

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

***International Paper Industries v Top Line Industries*** {*overturned by legislative amendment* (**s. 73.1**) but basic premise important}

|  |  |
| --- | --- |
| Facts: | - TL is landlord and RO;  -IP leased land for more than 3 years, but was not registered. They developed poor relations and TL was desperate to have IP removed from lease. TL refused to renew lease on expiry.  -IP claimed it was a “renewable lease” and sought court enforcement. TL claimed lease was illegal in the 1st place as it contravened LTA s.73: No one shall subdivide land for purpose of leasing it/agreeing to lease it unless it complies with subdivision rules… |
| Conclusion: | -courts agree breach of s.73 renders lease void; IP were trespassers and had to vacate |
| Rules/Ratios: | - The LL is not bound by the exception is s 20 b/c to make him bound would be giving effect to an illegal interest in land Wrong judgment in light of ***s.73.1***!!! |

***LTA s.73.1***

* It is possible to subdivide a parcel of land and lease parts of it out (not sell); the lease in *top line* should have been enforced according to ***BC Rail v Domtar***
* ***If you are only dealing with a building lease, subdivision doesn’t matter***
* Preserves s.20 except as against the person making it
* Reinstating ***s.20*** by reason that lease/agreement doesn’t comply with subdivision requirements

## Applications to Register – Chapter 8

Courts take the approach of treating application for registration as the same as a registration

### Priority of caveat or certificate of pending litigation *s.31*

(a) if a caveat has been lodged or CPL registered and 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.)

#### Caveats LTA, Part 19 (ss. 282-294)

Can be lodged by any person who claims to be entitled to an interest in registered land that is not reflected on CIT. Allows them to assert their right – **note**; may also be lodged by Registrar (***s.285***) or registered owner

* ***s.288***: ***Effect of a caveat*** once a caveat is lodged, the R must **not**: (a) register another instrument affecting the land unless the instrument explicitly subject to caveator’s claim or (b) change the boundaries affecting the land // temporary “freeze” on registration process // **buyer beware:** prevents future land transactions: no one wants to buy land with potential law suit attached.
* ***s.288(2)***: Title cannot be registered if the claim of the caveator, if successful, would destroy the root of title of the person against whose title the caveat has been lodged// *Ex. A grants fee simple to B and then C. If B lodges caveat, C cannot register.*
* ***s.293***: Privately-filed caveat expires after 2 mos unless proceedings have commenced in this time, one can bring action affecting title of land (*lis pendens*).
* ***s.287 (a)-(c)***: Upon receiving caveat, Re must endorse date/time of receipt, enter endorsement into register, and send copy of caveat to titleholder in question
* *Example: A sells Blackacre to B with a CPS, but not Form A. In the meantime, A sells Blackacre to C. B files a caveat on Blackacre. C registers her Form A on Blackacre subject to the caveat. If B succeeds against A and successfully registers Blackacre, C is screwed.*
* ***s.239***:Privately-filed caveat expires after 2 months
* ***s.285***: Registrar has the power to lodge a caveat himself which never expires unless expressly provided for
* ***s.286***: Individual may lodge a caveat, if caveat is in the prescribed form

**LTA s. 215**: registration of certificate of pending litigation in same manner as charge

**LTA s. 216:** effect of registered certificate of pending litigation

**LTA s. 217:** effect of certificate of pending litigation if prior application is pending

***Rudland v Romilly*** (1958 BCCA)

|  |  |
| --- | --- |
| **Facts:** | Rom is the RO, he transfers it to L who becomes RO;  -L sells land to Rud who applies to become RO; a few days later Rom files an LP as he wants to reclaim title and asserts L was fraudulent.  **Does Rud have an interest in land upon filing application prior to Rom’s LP?** |
| **Reasoning:** | The application to register trumps the later lis pendens (since the application to register was already there, the lis pendens is too late, the application is treated as if registration has occurred) |
| **Ratio:** | - **Delays due to the administration of LTO do not affect one’s right to title.**   * In absence of fraud, a clear **right to registration (application to register) = register itself if:**  1. Person claiming right is BFPFVWON 2. Right has been acquired and registration applied for prior to LP filed 3. Such a purchaser is not party to the litigation |
| **Held:** | For Rud |

Result of Rudland v Romily is subject of s.142 of ***Land Registry Act***

***Breskvar v Wall*** (1971 Australia HC)

|  |  |
| --- | --- |
| **Facts:** | -*caveat applied for first, then an application for registration by 3rd party applied for second, and then after that the caveat is actually registered*  B is RO on CIT. Transfer form from B to \_\_\_\_.  W forged his name in the blank and became recipient on Oct 15 (not registered).  W negotiated transfer with A and executed transfer to A on Nov 7. A applies to become RO on Jan 8.  B learns of A’s application, realizes he was defrauded, applies to LTO to register a caveat on Dec 13.  Should B or A become the RO? |
| **Reasoning:** | -While B is an unregistered owner; statute preserves the equitable (not legal) rights of victims of fraud; B has an equitable right against W (in his caveat) to ensure W does not benefit from fraud  *-*While A has not registered A also has an equitable interest as a BFPFV, **which is given priority**  **-**B is the author of his own misfortune **since B applied for the caveat after the transfer form from W to A was executed**  -A has at least an equitable estate in fee simple, we know that the B's are the legal owners, but they are not on title, and title on the register is which makes you "king and queen" |
| **Ratio:** | If there are 2 competing equitable interests, the equity which will prevail is that of the party who acted blamelessly and in good faith  If a party by their conduct enables a rep to be made upon the faith of which another innocent party acquired an equitable interest, that party’s equity will be postponed (giving blank signed transfer deed = stupidity) |
| **Held:** | A is equity’s sweetheart as a BFPFV and wins; |

***Summary:***

* If a client acquires an interest with facts like ***Rudland*** – likely gets title free of LP
* This supports idea that you acquire rights before registration – somewhat at variance w/ **s.20**
* There is a gap in time btewn receipt of application and final registration – this raises issue of registrations lodged in this gap
* ***s.153(1):*** it is the time of registration which becomes the basis for priority
* ***s.28*** refers to priority based on the date and time of registration
* ***s.168*** there is a possibility created under the statute for ‘queue jumping’ because LP and caveats which can get in the gap and which despite the fact by time alone, they are farther down queue, they may get to jump ahead – however, case law shows this does not always happen

## The Fee Simple – Chapter 9

### Creation

#### Common Law

***Inter Vivos Transfer/Disposition* (Who is getting what?)**

At common law to create a fee simple it was necessary to use correct words (now changed by statute)

* **“to A in fee simple”** was construed as only creating a **life estate**
* **“to A and his/her heirs”** was construed as created a **fee simple**
* ***words of purchase***= “to A” – who was transferee/acquirer? (even in a gift)
* ***words of limitation*** = “and her heirs” – what is nature of the estate? What kind of interest being given?

***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 intentions of testator** / If WoL are used, courts will give effect to them; if they’re not used, but it’s clearly the testator’s intention, the courts still construe will as conferring FS on beneficiary

#### Statute

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

1. It is sufficient to state “in fee simple” without the words “and his/her heirs” to transfer an EIFS
2. If WoL aren’t included in a transfer, the **FS** or **the greatest interest in land** is passed unless expressly stated otherwise

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

***Land Title Act s.186***:

***186(4)***: A transfer of freehold estate in prescribed form and completed in prescribed manner, transfers it to transferee whether or not it contains express words of transfer

***186(5)***: If transfer does not contain express words of limitation **default provision = fee simple**

***186(6)***: If it contains express words of limitation, follow those words

***186(8)***: ***s.186(4)-(7)*** don’t transfer a greater interest than the transferor has

***Wills Act s.24***

* If no contrary intention in will, if real property devised to person w/out WoL the will passes to them in FS or the whole of any estate the testator had power to dispose of by will. Do not need to use words “and his heirs” just “I give to Joan Blackacre”

***Tottrup v Ottewell Estate*** (1969 SCC)

**FACTS:**

**•**Two twins have identical wills and P only child of one

•Contained phrase to F and his heirs, executors, and administrators

•P argued words and his heirs were words of purchase rather than limitation

**WORDS OF LIMITATION NO LONGER NECESSARY TO CONVEY FEE SIMPLE OWNERSHIP**

* but their inclusion should not infer different meaning than intended (note: will was drawn up by lawyer)
* **A will should always be interpreted first on the words used – if they are clear, subsequent circumstances cannot alter their meaning 🡪 probably not the law in Canada anymore**

### Problems of Interpretation - Repugnancy

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

* Often arise when grantor attaches a condition to the grant, which is inconsistent with the outright grant. “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 against public policy and can be struck down

|  |  |  |
| --- | --- | --- |
| ***Case*** | ***Facts/Conclusion*** | ***Ratio/rules*** |
| ***Re Walker*** | - Deceased left estate to wife  -Anything undisposed of in W’s life was left to others  -Wanted will construed so W got LE and the rest got remainder | * **Cannot give an EIFS and simultaneously control the alienation of that interest from the grave** * Court will attempt to give effect to testator’s wishes as much as legally possible 🡪 ascertain what part of the intent predominates (will reject subordinate repugnant intent)   -Restraint on alienation is repugnant to granting of EIFS |
| ***Re Shamas*** | -Deceased created will, wife ran business when he died  -D left everything to W until last child turned 21 (unless she remarried) then she would get same share as kids | - Cardinal rule of construction: a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made  **-THE RECIPIENT OF A LIFE INTEREST CAN ENJOY REVENUE DERIVED FROM THE CORPUS AND NO MORE UNLESS T EXPRESSLY OR IMPLIEDLY INDICATES AN INTENTION THAT RECIPIENT HAVE POWER TO ENCROACH (in this case there was implied intention to encroach).**  - Intended LE for wife and an entitlement to encroach on capital |
| ***Cielein v Tressider )*** | Deceased left personalty and residue to CL partner Rich and his realty  -Had 5 kids from prior marriage  -D qualified gift of realty saying upon sale I would be divided equally between her son and 5 kids | - **ANY RESTRAINTS OR CONDITIONS ON AN ABSOLUTE GIFT ARE VOID AS THEY ARE REPUGNANT**  •Absence of intent to create LE indicated intention to create 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 |

### Words Formerly Creating a Fee Tail

***Property Law Act s.10* abolishes fee tails:** attempt to create fee tail is automatically converted to a fee simple

* Restraints on alienation are void as a matter of policy

**TECHNICAL WORDS OF LIMITATION**

* *Inter vivos* transfer: **“to A and the heirs of his/her body”**
* Absence of these words “and the heirs of his/her body” created life estate (so only “to A” would create LE)

**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 its not clear what the intention is? – could be interpreted in two ways:
  + If words of limitation, then it creates fee tail = fee simple
  + If words of purchase, and A has heirs, all would own fee simple in co-ownership

#### The Rule in Wild’s Case Only applies in wills, not inter vivos transfers

TO A AND HIS CHILDREN:

-if the transferee **did not have children** at the time the will was made = gives you at FT 🡪 today EFS or largest interest

* + Assume “her issue” is a word of limitation

**-**if the transferee **did have children** at the time the will was made= A and the children get co-ownership

* + Assume “her issue” is a word of purchase

*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.*

## The Life Estate – Chapter 10

### Creation

#### By Act of the Parties

* **Not inheritable:** as it doesn’t include “fee”
* **Duration uncertain: limited to lifetime of person** (either LE holder or other (*pur autre vie*))
* **Must be expressly stated “to A for life/life of B”:** otherwise ***PLA s.19(2) and Wills Act s.24*** presume that transferor or testator is disposing of the greatest estate they own (fee simple)

#### By Statute

* Now a spouse only automatically acquires rights of success if spouse dies without will

***Estate Administration Act s.96***

* If your spouse dies intestate and surviving spouse is **not on title**, they get a LE in spousal home + all “household furnishings”

***Wills Variation Act***

* Courts have **created life estates** in resolving a contested will

***Land (Spouse Protection) Act***

* Spouse can file entry in LTO against a “homestead” // Any disposition made of the property w/out their consent is void // On death of spouse, filing spouse gets LE in property

### Rights of a Life Tenant

**OCCUPATION, USE AND PROFITS:**

* Entitled to **occupy** and **use** the property to **retain any profits** arising from its exploitation
* **Possessory, freehold interest** (like fee simple) actual **possession & management** of property
* **Right to remove fixtures** during lifetime of LE holder or on death of LE holder. Chattels fixed to land (that have become fixtures) can be removed by LE holder.

**TRANSFER INTEREST INTER VIVOS**

* Can sell a life estate (transfer *inter vivos*), but still tied to person X’s life as dictated by LE

**TRANSFER ON DEATH**

* If LE is tied to another person’s life (*pur autre vie*), if LE holder dies and other person is still alive, you can grant the interest by will; the heirs can only enjoy it for the duration of the measuring life though.

### 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 in substantially the same condition as it was received by the life tenant.

* You can’t put too much limitation because then you’re impeding
* 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 the remainder in **substantially the same condition** as when they were granted LE.

***Permissive waste:*** (LT Not Liable) Neglect that permits decay, like allowing building to deteriorate. LT not responsible for repairs and maintenance unless terms of K say otherwise.

***Voluntary waste:*** (LT Liable) LT is responsible for commission or act that diminishes value of asset (permanently damages land) //

* 4 categories: (a) removing timber (b) removing minerals (c) demolishing buildings (d) 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 waste
* “without impeachment for waste” – signifies that she is not liable for permissive waste or for voluntary waste

***Equitable waste:*** (Liable)

* Creator of LE may want to help life tenant by saying he won’t be liable for any waste, by expressly permitting LT to commit voluntary waste; “given to life tenant without impeachable for waste”
* **But even so**, equity may still restrain LT from making **unconscionable use** of the apparent legal right to commit waste at will – where you spitefully knock the hell out of the property to the detriment of the remainderment (***Vane v Lord Barnard***)

***Vane v Lord Barnard*** (1716) – Equitable Waste

*D gave himself a castle under LE without impeachment of waste – ultimately his son was to get property – got upset with his son and stripped the castle.*

**An LE w/out impeachment for waste does not give tenant right to commit equitable waste; LTS are liable for equitable waste**

***Law and Equity Act s.11****:* Estate for life without impeachment for waste does not give tenant right to commit equitable waste – this statutory provision resulted from this case.; cannot commit equitable waste unless appears on instrument

#### Liability for Taxes, Insurance Etc.

* **No duty to repair the estate** (as LT is 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)

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| **Facts:** | -P had EIFS in remainder  -D elderly woman who could not pay taxes ∴ tax sale  -Daughter purchased house in tax sale then assigned title to D  -D tried to register but P challenged D’s ability to defeat his remainder |
| **Reasoning:** | -Give Mayo remainder interest back, Mrs. L continued with a fiduciary interest she had earlier to pay the taxes and it continued even though she had been restored to property in EFS cause she owed a fiduciary duty |
| **Ratio:** | **LT HAS OBLIGATION TO PAY PROPERTY TAXES**; THEY **OWE A TRUST-LIKE DUTY TO REMAINDER**  **LT has a fiduciary relationship with the holder of a remainder in FS and may not do anything to injure the property or overcome the rights of the remainderperson**  - LT can do nothing to impair remainder and remainder holder can do nothing to affect LE. |
| **Held:** | the P is entitled to a declaration as claimed that the D was under obligation to pay the taxes for which the lands were sold, |

## Future Interests – Chapter 12

### Nature of Future Interests

**Reversions** and **Remainders** are examples of future interests:

* **Reversion**: A grants to X for life. When X dies, A gets the reversion.
* **Remainder:** A grants to X for life, then to C. C receives the remainder.

**Vested interests:** interest which WILL be granted [to a certain person upon a triggering event]. 2 types of vested interests:

* **Vested in possession:** grants an immediate entitlement to possession
* **Vested in interest:** when the owner has an unqualified right to take possession as soon as the preceding estate (or estates) becomes vacant (i.e. an unqualified and immediate transfer of interest

### Common Law Future Interests

**Determinable Fee:**

* The grant of the fee contains words of limitation based on an event: i.e. A grants Blackacre to B for life, then to C
* The event “determines” the duration of the estate
* There is certainty as to the event [death] and the vested interest [C]
* Met the CL requirement that land always had to be seised: someone had to be in possession
* Generally, determinable fees don't create problems, because the vesting is certain

**Conditional Fee:**

* The entire fee is granted to the transferee, but it is made defeasible [that is, will end] if a specified event occurs
* *Example:* X grants Blackacre to A, unless A begins to smoke. If A begins to smoke, the X can re-enter Blackacre
* Common law held that while the grantor had a right of re-entry, this right need not be exercised
* A conditional fee creates a **contingent future interest:** no vesting in the remainder person at this time. We don’t know if A will smoke, so we don’t know for sure that Blackacre will vest in X (the remainder)
* Conditional fees create problems because the vesting is unknown

**Common Law remainder Rule:** No remainders can exist after a fee simple transfer.

### Vested Interests

If an **unqualified and immediate transfer** of an interest is made to A, A is vested ‘in interest’ and A is also vested ‘in possession.’ Vested when no condition or limitation stands in the way of enjoyment.

If a transfer is made to **B for life, remainder to A in FS**, A is vested in interest, but not vested in possession – B is vested in interest and possession.

**An interest can be vested in interest or in possession and interest.**

**There are three options:**

1. may be **vested absolutely**, that is it can never be lost to the holder of the estate;
2. it may be vested, subject to divesting [if condition is resolved, then the interest goes to someone else];

* I give you an EFS in Blackacre, but if you become Catholic, it is to be divested)
* Condition subsequent

1. it may be vested, without there being any prior estate, but with a provision which purports to keep the holder of the estate out of possession.

* May look like it’s not because of a condition attached, but **law attempts to favour early vesting** -> differentiates between *interest* an the *enjoyment of that interest*
* Illustrated in ***Re Squire***

### Defeasible and interminable interests

**DEFEASIBLE INTEREST:** WORDS: “**on condition that,” “but if,” “provided that,” “if it happens that”, “subject to”** =condition subsequent (a defeasible interest)

* Grantor gets a **right of entry** this is a future interest

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| “*To A in FS,* ***on the condition that*** *if the property shall no longer be needed for school purposes, my estate may re-enter.”*   * A gets a defeasible interest (in this case a **fee simple defeasible upon a condition subsequent**). Descendant’s estate retains a **right of entry**, which may be exercised if the event comes to pass. |

**DETERMINABLE INTEREST:** WORDS: **“while”, “during”, “so long as” and “until.”** Words of duration.

* Defining the countours of the limitation

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| *“To A in FS****, until*** *the land is no longer required for school purposes.”*   * A gets a present possessory right. Should the determining event occur, the fee will end and the property will pass to the grantor (or their estate). The interest that is retained is called a **possibility of reverter.** |

### Contingent Interests

An interest is contingent (non-vested in interest), when it is **dependent on occurrence of some event which may/may not occur** – subject to a condition precedent which must be satisfied before it can become a vested interest.

**AN INTEREST WILL REMAIN CONTINGENT UNTIL:** (1) property is identified; (2) identity of grantee/devisee is established; (3) right to interest does not depend on occurrence of some event (doesn’t matter if right to possession does); and (4) in case of a class gift, exact share of each member of class is ascertained.

‘When’/’upon’ instead of ‘if’ do not establish condition precedent. Property will be held to be vested unless a condition precedent is expressed with reasonable clearness. (***Re Squire***)

**Condition Precedent:** you have to meet the condition to even get the property

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

#### Condition Subsequent – “but if”

“To A in fee simple, *but if* A marries B, to C in fee simple”

* **“to A”** – words of purchase
* **“in fee simple” –** words of limitation -> ***“fee simple defeasible” on a condition subsequent***
* **“*but if* A marries B” –** condition *subsequent*
* **“to C” –** words of purchase – **BUT**the interest C gets is a ***future interest*** called **right of entry**
  + So two 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*
* **Two things must happen for C to get her interest:** (1) A must marry B – so the condition must be met (2) C must exercise a right of entry (i.e. tell A to get out)

#### Determinable Fee Simple – “until” / “when” / “as long as/while as long as”

**“to A in fee simple *until* A marries B”** (grantor = T)

* **“to A”** – words of purchase
* **“in fee simple” –** words of limitation
* “**until A marries B”** – A is getting a ***determinable fee simple***
  + If A in fact does marry B, the person who gets the property is T or T’s heirs
* T, then has a ***future interest***called **possibility of reverter**
* **“to A in fee simple until A marries B, then to C”** (C is specifically mentioned) – C gets right of entry
* **“to A in fee simple until A marries B”** (no one specifically mentioned) – T gets possibility of reverter

**Right of entry:** C has to do something to get the property after condition subsequent is met (w/in limitation period) – i.e. tell A to get out // **Possibility of reverter**: it automatically terminates so don’t have to take action (unless A won’t move, in which case you take them to court) – rules around statute of limitations don’t apply

***Browne v Moody*** (1936) PC

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| **FACTS** | -B died and left fund with income to be paid to son W during lifetime  -Upon his death, divided .5 to granddaughter and other .5 to 3 daughters in = shares  -If daughter predeceased B or W and left an issue, “child of person so dying shall take the interest to which their mother would have been entitled”  -Interest vested or contingent? (time testatrix died, son took vested interest (LE) |
| **RATIO:** | - **Whether or not a future interest is vested will be measured @ the time that the testatrix dies, not at the death of a preceding LE**  -EARLY VESTING IS FAVOURED  Rule 🡪 a gift of remainder will be treated as vested if:   1. It is postponed in the will solely for the convenience of the testator’s estate 2. It is postponed by the creation of some prior interest such as a life estate |
| **HELD:** | Immediate gift |
| **REASONING**: | -Date that W dies is when capital would be divided 🡪 defined as present gift coupled with a postponement of the date of payment  -The contingency represents not the vesting of the interest but the enjoyment of it  -When dealing with vesting 2 things you can focus on: under law it is possible for an interest to vest even though there is a contingency that is part of that transfer, the reason is if the court can say that the contingency represents not the vesting of the interest but on the enjoyment of the interest then you may still get a vested interest |

**Jarman on Wills:**

* “Even though there be no other gift than in the direction to pay or distribute in the future; yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question. Thus, where a sum of stock is bequeathed to A for life; and after his decease, to trustees, upon trust to sell and pay and divide the proceeds to and between C and D, or pay certain legacies thereout to C and D; as the payment or distribution is evidently deferred until the decease of A for the purpose of giving precedence to his life interest, the ulterior legatees take a vested interest at the decease of the testator…”

**CONTINGENT REMAINDER**: dependent on an event that may never occur

**VESTED IMMEDIATE REMAINDER:** the **enjoyment** is postponed; vested means it can **never** be lost

**Saunders Rule**: rights of a beneficiary to bring a trust to an end (**only applies to vested);** for the beneficiary to be able to this:

* they have to be sui juris (of full legal capacity, ie 19 years of age)
* they have to show that the property in the trust are fully vested in the beneficiary

***Re Squire*** (1962)

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| **FACTS:** | -Trustee holding property until two grandsons reach 30  -GF dies, a piece of property left to GS Teddy  -Belongs to Teddy if he turns 30  -Did it vest in Teddy when the testator die, or did it vest in Teddy only when he turned 30? |
| **RATIO:** | **PROPERTY WILL BE HELD TO BE VESTED UNLESS A CONDITION PRECEDENT IS EXPRESSED W/REASONABLE CLEARNESS.**  **-** presumed to vest when it is separated from rest of estate and no gift over  -Where interim interest is given, presumed that T meant immediate gift. Presumption fails when T has expressly declared that legacy is to go over, in case of death of legatee, before a particular period. **CAN IGNORE 30-YEAR AGE CONTINGENCY. GIFT VESTED UPON T’S DEATH**  **-** If T gives property to A absolutely, but directs his trustees to retain possession and accumulate income for a certain # of years and then transfer property and accumulations to A, trust for accumulation is worthless, and A is entitled to have property transferred to him at once   * if gift is **contingent and defeasible**, or if any other person may, by possibility, be interested in trust, this principle does not apply.   -Where there has been a suspension of the enjoyment, if there has been a contingency which suspends enjoyment of property that is already vested in you, and it’s done on the basis of an age contingency, you can call for the trust |
| **REASONING:** | -since they have access to the funds earlier than age of requirement (for school) – interests are vested!  -NOTE: there was also the absence of a **gift over**. In the case the primary recipient is unavailable, unable or unwilling to accept a bequest, an arrangement nominates a secondary recipient  - The GF allows the rent to be used before he reaches 30 if needed for maintenance and education and there is not enough $$ to support education you can dig into the capital (sell the property and use the money to help pay for the education) 🡪 the court says all of this can happen before he can turn 30, suggests that this is an interest in Teddy at the day the testator died |
| **HELD:** | Early vesting applies; Teddy meets Saunders rule so he can bring the trust to an end |

### Vesting of Future Interests

**If it is vested now, don’t have a perpetuity problem** // If it is not vested, you have a perpetuity problem and you have to refer to ***Perpetuity Act*** // only concerned with **vesting in interest** // never applies if transaction immediately taking place

**it does not afflict determinable fees:** “to A in FS until A marries B” – the **possibility of reverter** was not subject to perpetuities

***Re Carlson*** (1975)

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| **FACTS** | -Testator survived by widow, son, daughter and youngest son(C)  -Left estate in trust for education of YS  -Upon C turning 21: divide 90% of the then residue of the estate into 2 = parts for daughter and C  -10% for debts for older son |
| **RATIO** | **WILLS SHOULD BE CONSTRUED TO GIVE EFFECT TO INTENTION OF T**  - A gift to a person ‘at’, ‘if’, ‘as soon as’, ‘when’ or ‘provided’, he attains a certain age, w/o further context to govern meaning, is contingent and vests ONLY on attainment of required age. |
| **REASONING** | **“upon”** is important because it is a condition on the then residue (in the future)   * Suggestion was that Mr Carlson was leaving a **future interest**   - **Even though law prefers early vesting, cannot go against a clear purpose (which was to provide for C’s education)**  - Word ‘upon’ here = contingent – T’s intention was to take care of C  Not vested until 21 b/C T was not willing to have other children share on an equal basis from the date of death 🡪 only get the residue after been used for C  Can’t use Saunders (b/c contingency was all about enjoyment) -> this is about taking care of son, which was T’s intention  -The vesting of the interest in J had to wait until C turned 21, the reason is that the residue became like a legacy fund for C for his maintenance and it stays there until turns 21 |

### Types of Common Law Future Interests

#### Reversions

Interest that remains with a transferor who has not exhausted the whole of the interest by a transfer

* Status quo: rests in the grantor
* the grantor after giving the FH interest to A is waiting to see whether the condition if fulfilled and will result in the divestment of that interest in favor of the grantor
* Right to possession (if didn’t give all rights that he or she had)
* **Rights of succession** mean reversion goes to heirs

*Ex: A (owner in FS) transfers Blackacre to “B for life*”

* then B gets a FH interest [vested LE] (able to take possession and occupation of Blackacre).
* A is no longer in possession but A has a future interest in land (he gets to enjoy the possession of Blackacre at some point in the future, when B dies).
* A has an immediately vested future interest and it’s called a **reversion**.
* A can dispose of the reversion (by gift, sale or will) and interest of the recipient is still called a “reversion”

#### Rights of Entry and Possibilities of Reverter

**RIGHT OF ENTRY:**

* **An interest is given to B but there is a condition attached that has the effect of divesting the interest from B - > so the grantor has a right of entry.**
* **if provided that, subject to, but if,** where you see that you think FS DEFEASIBLE UPON A CONDITION SUBSEQUENT 🡪 where this has happened the grantor gets a right of entry 🡪 this is the future interest
* ***Limitation Act*** s.3(1)(d)) abolished limitation period of 6 years

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| *A (an owner in FS) transfers Blackacre “to B in FS but if B marries C, then Blackacre will be returned to A and his heirs.”*   * Here B gets LE subject to condition subsequent; A only gets property if B marries C. * The condition subsequent is a **resolutive condition,** which divests it from B, if B marries C. * Means that what B is getting a FS, but it is a **FS defeasible upon a condition subsequent.** * What A gets is not a reversion, but a **right of entry**. It is a future interest in which there is a hope that he will be able to utilize it (only in the circumstance that B marries C). |

**POSSIBILITY OF REVERTER:**

* Instead of creating an absolute interest, subject to a right of entry, a transferor may create a determinable interest
* Arises when transferor creates a determinable FS
* Key words: **“until, upon as”**

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| To A in FS *until she is called to the Bar of Province of BC*  To B for life *until he is called to the Bar of Province of BC*   * Words in italics are (along with FS) **WoL of the estate** * A is said to have a **determinable fee simple** * B is said to have a **determinable life estate** * Their **interests are not absolute**, to be divested by a right of entry, but are by their very WOL of a limited duration from the outset * A possibility in reverter arises only when transferor creates a **determinable fee simple** (i.e. not when it’s a determinable LE) |

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| *A (an owner in fee simple) transfers Blackacre “to B in fee simple until B marries C”*   * If and when B marries C, B’s interest comes to an end and automatically reverts to A * A’s interest is known as possibility of reverter * A has to bring action to recover possession unless B voluntarily gives land up * **Cannot go to a third party** |

#### Consequences of distinction between Rights of Entry and Possibility of Reverter:

* Same **limitation period** applies to both
* **Rule against perpetuities** applies to both

**BUT**

* At common law, both a right of entry and a possibility of reverter could only arise in favour of the transferor

***Property Law Act s 8* – Disposition of Interests and Rights**

(2) a ROE affecting land, exercisable on breach of condition of for any other reason may be made exercisable by a third party or someone claiming under a third party.

(3) The exercise of ROE under subsection (2) is subject to the ***Limitation Act***

### Common Law Remainder Rules:

**Remainder** is a future interest where possession is postponed until some prior freehold estate expires and which does not operate so as to prematurely determine the prior estate.

Future interest in a third person.

Generally CL didn’t like remainder interest going to a third party and didn’t want gaps in seisin.

* Practically caused problems: attempts to control future dispositions as well as potential gaps in seisin
* All of these CL Remainder Rules could be circumvented by creating **EQUITABLE FUTURE INTERESTS.**
* if these rules are not satisfied, the purported remainder is either void from the outset or becomes void subsequently

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| **RULE** | **EXAMPLES** |
| **1. A remainder must be supported by a prior estate of *freehold* created by the same instrument as the remainder**  \*\* There must be a prior FH interest that supports it  \*\*If there was going to be a gap in seisen, the remainder is void | A transfers Blackacre "to B for life and then to C and his heirs"   * B has a vested LE and C has a vested remainder in FS; B's estate is the prior estate of FH which supports the remainder interest in C   A transfers Blackacre "to B for life and then to C and his heirs if C reaches 21 years of age"   * B has a vested LE and C has a contingent remainder in FS; B's prior estate of FH supports the contingent remainder interest in C   A transfers Blackacre "to B and his heirs if B reaches 21 years of age"   * B gets nothing; the grants offends the rule b/c there is no preceding estate of FH to support the contingent interest in which A wished to confer on B   A transfers Blackacre "to B for 2 years and then to C and her heirs if C reaches 21 years of age"   * C gets nothing b/c it is only a LD interest and not a FH estate |
| **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 FH**  \*\* okay to have contingent interest but **must** ensure you do nothing to prevent the creation of a future interest which might vest outside the termination of the prior estate of freehold | A transfers Blackacre "to B for life, remainder to the 1st child of B to reach 21 provided that the child reaches 21 during B's lifetime"   * the remainder in favour of the 1st child is good b/c the interest granted must vest in the child by the time of B's death * If a child has not reached 21 by the time of B's death, then the grant will not take effect b/c the condition precedent to the child's taking will not have been satisfied * There is no possibility of a gap in the seisin btwn B's death and the vesting of the remainder   A transfers Blackacre "to B for life, remainder to the 1st child of B to reach 21"   * A child of B could reach 21 before or after his father's death; thus there may or may not be a gap in the seisin * The remainder is treated as a prima facie good but will fail if a child of B is not 21 when B dies, as there would be a gap in the seisin before the child could take it   A transfer Blackacre "to B for life and one year after his death, to B's child"   * The grant to B's child is void ab initio b/c there would inevitably be a gap in the seisin after B's death |
| **3.** **A remainder is void ab initio if it takes effect in possession by prematurely defeating the prior estate of FH**  **\*\* S 8(2) PLA eliminated rule 3**  \*\*Prematurely defeating the interest of the prior FH and giving the property to a 3rd party, if this was done under a condition, this was void 🡪 over the years court allowed where dealing with possibility of reverter (while, until as long as, it was ok) 🡪 now b/c of section 8(2) the interest in the 3rd person which has prematurely defeated the current FH holder now is validated ; as a result of the joint act as accepting as acceptable remainder formats and b/c of **8(2) recognizing that the right of entry w/a remainder** | A (the owner in FS) transfers Blackacre to "my daughter for life, but if she marries X to my son and his heirs"   * The interest in favour of the son contravenes rule 3 and void at CL b/c the LE of the daughter was liable to be prematurely terminated in favour of the interest to her son * Only the transferor of his heirs could take advantage of a condition subsequent and the effect   A (the owner in FS) transfers Blackacre "to my son for life until he marries X, and then to my daughter and her heirs"   * Creates a valid interest in the daughter; the remainder awaits the natural determination of the son's interest, which as created limited to him during his lifetime or until he marries X, whichever comes first |
| **4. A remainder after a FS is void**  \*\* At CL, once transferors have disposed of their FS interests, they could not create any further interest  \*\* If my FH estate is FS instead of a LE, a remainder was no good  \*\*b/c of s 8(2) if you use the “but if” language, s 8(2) validates so you can have EFS with a remainder that whats been made using the condition language   * **Half of rule 4 with 8(2)** * **RULE DOES NOT APPLY TO R.O.E BUT YES TO POSSIBILITY OF REVERTER** | -A (the owner in FS) transfers Blackacre to "my daughter and his heirs, but if she marries Egbert then to X and his heirs"   * interest prima facie created in favour of X was void   A transfers Blackacre "to my son and his heirs until he marries E, and then to X and his heirs"   * interest created prima facie in favour of X was void |

#### Destructibility of Contingent Remainders

Remainder may be destroyed after it has come into existence b/c person entitled to it is not qualified to take possession of property on termination of prior estate of FH

**Natural Termination**

* If person entitled to remainder cannot take possession at time that prior estate of FH terminates, then there is a **gap in seisin** and remainder is thereby destroyed – title goes back to grantor.

**Could avoid gap in seisin and destruction of contingent remainders through: Executory Future Interest**

* If case law is to be followed (***Re Robson***) then all wills are treated as equitable future interests
* if ***Re Robson*** applies in BC: the remainder interest is being bequeathed then whether in the form of a later trust or not doesn’t matter; equitable as soon as person dies b/c of the transmission to the executor 🡪CL remainder rule does not apply

***Re Robson*** 1916

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| **FACTS** | -T devised land to use of D for life and on death to ‘the use of such of her children as shall attain the age of 21 years’  When daughter died 2 children 21+ and 2 under 21 |
| **RATIO** | **ALL INTERESTS CREATED BY WILL ARE TO BE TREATED AS EQUITABLE. FUTURE INTERESTS UNDER TRUSTS = EQUITABLE REMAINDERS. NOT NECESSARY TO CREATE TRUST TO PROTECT AGAINST NATURAL DESTRUCTION BECAUSE TRANSMISSION AUTOMATICALLY GOES TO PERSONAL REPRESENTATIVE.** |
| **REASONING** | -Remainder Rule #2 violated, gap of natural destruction kills their contingencies, due to being a CL remainder   * HOWEVER b/c it was a will, there was a personal representative in place 🡪 Automatic transfer to personal representative (transmission) occurs when T dies 🡪 That rep holds title for the benefit of the legatees that the T has named. **All future interests are under a trust.**   **-**Contingency in a trust is never a problem (for having a gap in seisin) b/c legal title is always held by someone  -Court considered ***WESA s.162***. |
| **HELD** | No gap in seisin b/c legal title is with personal rep. 2 older children are not entitled to land to exclusion of infants. |

***WESA s 162*** – Devolution and Administration of Land

(1) Unless there is a right to land by survivorship, on death of owner land is vested in personal rep of deceased – legal title transmits to personal reps (trustees)

(2) Subject to this Act:

a) A personal rep to whom land devolves holds the land as a trustee for the person beneficially entitled to it.

b) A person beneficially entitled to the land has the same power as a person beneficially entitled to personal property to require a transfer from the personal rep.

### Attributes of Future Interests

#### Alienability of Future Interests

***Property Law Act s 8*** – *Disposition of Interests and Rights*

Following interests can be disposed of: (a) contingent, executor or future interest in land or possibility coupled with interest in land; (b) right of entry on land, immediate or future, vested or contingent.

***WESA s 41*** – *Property that can be gifted by will*

A person may, by will, make a gift of property to which he/she is entitled at law or in equity at time of death, including property acquired before, on or after date will is made.

### Registration of Future Interests

***LTA s 172*** – *First Estate of Inheritance necessary to registration of FS*

If 2+ persons are owners of diff estates/interests in the same land; (a) 1st owner must be registered as owner in FS (not according larger estate than that to which they are entitled); (b) other estates etc. must be **registered as charges** according to priority.

***LTA s 180*** – *Recognition of Trust Estates*

If land vests in personal rep or trustee, that person’s title may be registered, but particulars of a trust created/declared in respect of that land must not be entered in the register.

## Conditional and Determinable Interests – Chapter 13

### Uncertainty

***Noble v Alley*** (1951) SCC

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| **FACTS** | Private summer resort where not allowed to sell to any person of Jewish, Hebrew, Semitic, Negro or coloured race or blood. |
| **RATIO** | **RESTRICTIVE COVENANTS MUST RESTRICT THE USE OF THE LAND; CANNOT BE USED TO MERELY RESTRICT ALIENATION**  - Covenants have an additional facto; subject matter of the covenant has to be concerning/touching the property |
| **REASONING** | -Covenant not directed to the land but the transfer of a future purchaser. This attempted to set limits on the bloodline of all future purchasers (at bar, was for Black or Jewish blood). |
| **HELD** | Clause is void for uncertainty |
| **ESTIE J** | **how to you measure uncertainty?**   * **Where a vested estate is to be defeated by a condition subsequent, Court must be able to see,** from the beginning, precisely and distinctly,(from the time you get presented) **what clearly and precisely and distinctly is being prohibited**. * if you cannot do this, then the condition is void for uncertainty; strike out the condition leaving the grant of the estate absolute (strike out offending words and still read the grant as a grant) |
| **RAND J** | not a restrictive covenant, as the restriction must touch and concern the land  -racial covenant does not touch and concern the land; not inherent in a restrictive covenant |

Racial covenants or conditions will fail for reasons of uncertainty. Also likely fail as undue restraints on alienation

- **if it is a condition a propos a religion,** then you can argue the uncertainty, but you can get extraneous evidence (*Teppo Woods)*

1. **analyze the form in which the prohibition exists;** if it is a covenant, is it restrictive? Is it a restraint on alienation? Is a uncertain?

**2.** **need to ask how much certainty is required?**

* Enormous is CS, a lot less for CP (the law is trying to prevent the hand sticking up from the grave an controlling what is taking place, preventing from CP the hand has worked and the dead are governing)
* CS trying to get rid of this control, the only way I can do this is by giving you the interest absolute, best do it by eliminating the qualification and require a high level of certainty
* those around religion are the most uncertain (what makes you a Catholic??)
* as a CP, easy to strike out the words Catholic; if CS subject to divestment, then getting rid of the condition firms up the gift
* Generally if the words are unclear and form part of a CP, that has the effect of negating the entire gift (the grantor has given nothing)

***MacDonald v Brown Estate*** (1995)

|  |  |
| --- | --- |
| **FACTS** | -Testator gives shares until niece becomes widowed or divorced from present husband  -If doesn’t happen goes to grand-nephew |
| **RATIO** | **IF MOTIVE IS TO SUPPORT AND CARE FOR SOMEONE, PUBLIC POLICY WILL ALLOW FOR IT TO OCCUR. PUBLIC POLICY WILL STRIKE DOWN A CLAUSE PUT IN BY A TESTATOR WITH THE PURPOSE OF CAUSING A DIVORCE BECAUSE HE OR SHE DOESN'T LIKE SPOUSE.** |
| **REASONING** | -Motive was to give added security in the event on of the situations occurred |
| **HELD** | Provisions here are supportive, and not coercive/punitive/intending to induce divorce. |

***Re Piper*** (1946): clause inducing a child not to associate with a parent is invalid

***Re Neeld*** (1962): clause inducing a person to assume name of testator are valid in England

***Re Kennedy Estate*** (1950): condition that a person must/must not marry a person of a specified religion is valid; conditions that a person must not drink intoxicating liquor, or play cards or continue steady are valid; condition against smoking is valid.

#### Jarman Rules – Consequences of Invalidity

At Common Law:

* Void condition and condition precedent = whole transfer is void
* Void condition and condition subsequent = transfer is absolute, cross out condition

At Equity:

* If condition precedent is originally impossible or illegal, then treat condition precedent as a condition subsequent
* Where performance of condition is sole motive of bequest, or its impossibility was unknown to T, or condition has become impossible or condition is illegal because it is morally wrong, then Equity agrees with CL and holds the gift and condition void
* Limitations are treated in same way as conditions subsequent with regard to uncertainty

### Human Rights Legislation

***Canadian Charter of Rights and Freedoms***

*s. 15* – Equality before and under law and equal protection and benefit of law

*s.15 (2)* – Does not apply to affirmative action programs

*s. 32* – Charter applies to the government of Canada

***Human Rights Code*** (BC) – *Discrimination in accommodation, service and facility*

Cannot discriminate in provision of accommodation, service or facility.

***Human Rights Code*** (BC) – *Discrimination of purchase of property*

Cannot discriminate in allowing purchase of commercial/dwelling units; OR opportunity to acquire land/interest in land; OR regarding term/condition of purchase/acquisition.

***Human Rights Code*** (BC) – *Discrimination in tenancy premises*

Cannot discriminate in right to lease space or in lease terms/conditions.

***LTA s 222*** – *Discriminating covenants are void*

Provides that covenants that discriminate on the basis of sex, creed, colour, nationality, ancestry or place of origin of a person are void and of no effect. R may cancel a discriminatory covenant on application. If R has notice that covenant is void due to discrimination, it may cancel w/out application.

***Canada Trust Co v Ontario Human Rights Commission*** 1990 ONCA

|  |  |
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| **FACTS** | -L established a trust to provide scholarships for white Christians only |
| **RATIO** | **WHERE A TRUST IS PUBLIC AND DEVOTED TO CHARITY, RESTRICTIONS CONTRARY TO PUBLIC POLICY OF EQUALITY WILL RENDER IT VOID.**  If it is a condition precedent (a suspensive condition): the condition will not fail for uncertainty **unless it is clearly impossible** for anyone to qualify. Enough of a definition to know that someone will qualify. |
| **REASONING** | Court says that it actually is certain (although the terms seem quite uncertain. Because it was a condition precedent it was okay).  **Definition of a class of beneficiaries is deemed to be a condition precedent**: CP is one in which no gift is intended until the condition is fulfilled.  -If it is a condition precedent (a suspensive condition): the condition will not fail for uncertainty **unless it is clearly impossible** for anyone to qualify. Enough of a definition to know that someone will qualify.  -NEED TO LOOK AT EXISTING LEGISLATION/CASE LAW FOR SUPPORTING THE PUBLIC POLICY |
| **HELD** | fails on public policy ; **Doctrine of** **cy pres** allows the trust to continue, but now w/out the restrictions. B/c it was a charitable purpose trust, the court didn't have to unravel the entire trust, they just severed the objectionable clauses. |

## Rule Against Perpetuities – Ch 1

#### The Modern Rule Against Perpetuities

* Lives in being = those alive at time that instrument takes effect – when title in property vests in trustee or on death of T if interest comes from will; anybody in the world who is alive at the day the interest was created

**RESULTING TRUST: if a future interest is not good** because it violates rule against perpetuities then **it reverts back to grantor**.

When is the interest created?

1. When the title vests in the trustee
2. If the interest is created in a will, on the death of a testator

* If violates the rule of perpetuities
  + Equitable interests revert back to the grantor --> called a **resulting trust**

**TEST:**

The ability to see whether the interest must vest, if it vests at all, within lives in being plus 21 years, requires you to be absolutely sure that it will happen!

* If you can construct a **hypothetical where the interest may not vest**, then the **interest is void as a perpetuity** (*ab initio*)

**PP:** lives in being at the date the instrument takes effect + 21 years

#### Perpetuity Act (BC)

* **s. 6(1):** Preserves the CL, except as otherwise modified by the statute, but lessens the impact of the CL rule ("Except as provided in this acts, the rule of law known as the modern rule against perpetuities continues to have full effect")
  + Means apply the rule and then ...
* **s. 6(2)** Abolishes the rule in *Whitby v Mitchell* prohibiting the disposition after a life interest of an unborn person
* **s. 7: 80 year perpetuity period:** “lives in being” requirement cancelled, and replaced with an 80 year perpetuity period: interest must vest 80 years after the date the instrument is created
* **s.8: Possibility of vesting beyond period:** no disposition creating a contingent interest in property is void as violating the rule against perpetuities only because of the fact that there is a possibility of the interest vesting beyond the perpetuity period
* **s.9: Presumption of Validity**: Every contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumed to be valid until actual events establish that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 11, 12, or 13 becomes void
  + **“Wait and see” provision:** if you have a potential problem under the perpetuity rule, you can wait until the perpetuity period is over before the gift must be declared void

**Section 3 Application of Remedial Provisions** must be applied in the following order**:**

* **s.14** (capacity to have children):
  + Girls can't have children before 12 and after 55
  + Boys fertile from 14 to forever
  + -> Can introduce evidence of sterility (for both men and women)
* **s.9** (wait and see)
  + List of statutory lives in being (set out in s.10) excludes royal lives clause
  + remember **s.7** Eighty year Perpetuity Provision
* **s.11** (age reduction)
  + Lower age to reach perpetuity period (add current age to 21)
  + If still doesn't work too bad 🡪 revert to grantor or to whom if it is divested (if divesture class)
* **s.13** 
  + Cy Pres: Gives court general discretion to try and rearrange/restructure the qualification in the contingency. But you must be able to justify that it is within overall conformity w/the intention of the T or the grantor

#### Steps for a Grant/Devise

1. **Need to see what type of grant/devise it is**

* inter vivos, will, trust?

1. Identify the **words of purchase**

* Need to look at interpretation found in s.10
* Example: "to his heirs / to A in FS" both mean EIFS

1. Identify the **words of limitation**

* What kind of limitation are we talking about?
* Is there something that produces a **possessory interest?**
  + Is it **freehold?** (FS or LE absolute or determinable?)
  + is it **leasehold?**
* Is it something that creates a **future interest?**
  + expressly stated?
  + in a will (***Re Robson***)

1. **Ascertain whether or not the interests are absolute:** are they **vested** or **contingent?**

* **VESTING:**

1. may be vested absolutely, that is it can never be lost to the holder of the estate
2. may be vested, subject to divesting
3. may be vested, without there being any prior estate, but with a provision which purports to keep the holder of the estate out of possession

* **CONTINGENT until:**

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

* **If contingent --> will they reach the vesting/absolute stage within the Perpetuity Period?**

1. Is the actual condition or limitation legal?

* Will **not** be legal if:
  + 1. Restraint on Alienation
    2. Public Policy
    3. Uncertainty
       1. If **condition precedent**: open to scrutiny, court welcomes evidence
       2. If **condition subsequent:** if cannot see right away the **circumstances** which **divestures can take place** then struck out immediately

1. **Jarman Rules**

* "Where land is devised upon a void condition, and the condition is precedent, the devise is itself void"
  + If the condition is subsequent, the devise is absolute
* Personal estate is bequeathed on a void condition
  + Subsequent: bequeath is absolute
  + Equity will treat Precedent differently:
    - If impossible or illegal (malum prohibtum - wrong due to statute) then bequest is absolute
    - BUT if performance is at the sole motive of the bequest, or impossibility unknown to testator, or condition was impossible due to Act of God or where illegal (malum in se - morally wrong) --> Gift and condition is void

***Ex:*** A (FS of Blackacre) grants to B (FS owner of Whiteacre) an easement over Blackacre, if a house is built on Whiteacre. Perpetuity problem, since you don't know if the house will be built before perpetuity period ends. But under the ***PA*** you can wait out the 80 year perpetuity period to see if the house is built: if the house isn't built, then the gift is void.

***Ex:*** Blackacre is left to the VBA, but if the premises cease to be used by lawyers, then Blackacre is to be left to the SPCA.

* If SPCA has a right-of-entry, this right of entry could arise outside the perpetuity period, and VBA ends up with the gift outright.

***Ex:*** Blackacre is left to the VBA until the premises cease to be used as a club for lawyers, then Blackacre is to be left to the SPCA.

* This is a determinable reversion and vests with certainty. No perpetuity problem.

## Co-Ownership - Concurrent Estates Ch 11

**General Principle:** Co-ownership exists when you have 2 or more people [or corporations] with concurrent rights to possession of real or personal property.

(1) **Tenancy in Common** and (2) **Joint Tenancy.** Both forms share the **same unity of possession** (co-owners who have concurrent interests).

**Unity of possession:** 2 or more persons, by virtue of the interests they own, are **simultaneously** entitled to possession of the property as a whole // land is undivided // tenants are treated as ‘single owners’

* **Right of survivorship** in joint tenancy; **none** in tenancy in common
* **No consent required:** no consent of co-owners required to dispose of interests

#### Registration of Title for Co-Owners

* ***LTA, s. 173*** requires the title reflect the nature of the co-ownership (either JT or TIC). The default is “tenancy-in-common.”
* ***LTA, s. 173*** requires the title specifically indicate “joint tenants” in order to create joint tenancy

### Two Remaining Forms of Co-Ownership

#### Tenancy in Common

* When 2+ people, by virtue of interests they own, are simultaneously entitled to possession of property. Apart from unity of possession, law treats tenants in common in the same way as it would single owners.
* Historically CL preferred JT but legislation has changed this:
  + Tenancy in Common ***Property Law Act s. 11***:
  + “If, by an instrument executed after April 20, 1891, land is transferred or devised in fee simple, charged or contracted to be sold by a valid agreement for sale in which the vendor agrees to transfer the land to two or more persons, other than personal representatives or trustees, they are tenants in common unless a contrary intention appears in the instrument.”
  + “transferred” includes vesting by declaration of trust or order of court
  + if the interests of the tenants in common are not stated in the instrument, they are presumed to be equal
* fixed with a share -> can deal with your share as you like

**SHARES OF HOLDINGS ONLY MATTERS FOR THREE SITUATIONS:**

* Any co-tenant can call upon the other to **contribute to expenses** for the property according to their proportionate share. *Note: this only applies for expenses essential to maintaining the land.*
* **Share profits** according to the share owned: if co-owners don’t put up risk capital then they may get nothing if land creates income. *Note: different story if one owner excludes the others from participating in the investment.*
* **Partition:** if co-owners are irreconcilable and cannot use the property together court under CL can order a subdivision of land according to their respective shares. *Note: under* ***Partition Act*** *courts are empowered to order sale of property and divide proceeds according to shareholding.*

Ifyou use words such as **“equally” or “2/3 to 1/3”,** it **denotes TENANCY IN COMMON** since **JT is viewed as a whole.**

#### Joint Tenancy

* **No consent required:** no consent of co-owners required if JT wishes to dispose of interest (only *inter vivos*), or sever JT unless required by K.
* **Right of survivorship:** (*jus accrescendi*) : A and B may convert JT into TIC during their lifetimes (if they want to sever the JT) BUT if one dies before it is converted, then the survivor becomes absolute FS owner.
* **To abolish unity to make it your share a tenancy in common:**
  + Could transfer your share to someone, to hold it in trust (an effective way to give the interest to a 3rd party if you don’t want to give it to someone right away)
  + Is a device to abolish unity
  + Can transfer something to yourself – allowed by statute (shuts out ***Wills Variation Act***)
  + Requires formal transfer – anything less than a transfer does not work (***Sorenson***)
  + Equitable transfer will work too
* JT can dispose of their interest *inter vivos* freely, but cannot dispose of interest upon death as right of survivorship holds that surviving JT will inherit deceased JT’s interest
* **Deceased JT cannot dispose of his/her interest by will, and any attempt to do so will be of no effect.**

**Common Law** favours creation of JT over TIC

**Equity** favours creation of TIC over JT

***Property Law Act s. 11***agrees with equity so courts will opt for tenancy in common over joint tenancy

***Property Law Act s. 18***allows me to transfer to another person

**THREE UNITIES**

Each is essential to existence of JT (in addition to the unity of possession). If any one is missing, then co-ownership is TIC

1. **Unity of title:** co-owners must derive their titles from **same instrument**.

* i.e. same Form A or same will.
* If one JT transfers their interest JT is severed since the operative instrument is no longer the same
* *Severance only changes right of survivorship aspect, not proportion of ownership*

1. **Unity of interest:** interests of joint tenants in property must be the same

* All co-owners must have equal interests in property. Interests must be of same quality (legal/equitable, or both). If one JT mortgages their interest, JT is severed since the legal interest has changed.
* *Owners can be joint tenants in the legal interest, but tenants-in-common in the equitable interest*
* *Ex: A and B are JT, and B sells ½ their interest to C – A has ½, B and C each have ¼ - severs JT between A and B, but B and C could have a JT*
* *Ex: If A and B are JT, A goes bankrupt and trustee takes the interest, JT is severed. A’s interest passes to trustee in bankruptcy.*

1. **Unity of time:** interests of co-owners must all vest simultaneously

* Does not apply in a transfer to uses, nor in a gift by will – if an interest arises in either of these two ways, and if the other unities exist, a joint tenancy will be created.
* *Ex: if will gives property upon children reaching age 21, they acquire interests at different times – TIC*

1. **Unity of Possession:** Co-owners are entitled to undivided possession of the whole property (like TIC)

Historically, CL preferred JT but three ways to have it **not apply:**

1. **Show one of the unities wasn’t there**
2. **Expressly clear not a joint tenancy** (even if all the unities are met)
3. **Implied** 🡪 most commonly through words of severance

### Creation of Concurrent Interests

* When concurrent interests are created, it follows there is unity of possession. If the other three unities are also present, the **CL presumption is that a JT has been created.**
* If one of the three unities is absent, concurrent interests must be TIC.
* Grantor can indicate intention to create TIC even if all the unities exist (may be done expressly)
* Transferor may also create TIC by the use of **words of severance** (language of specific shares in the undivided title). *Ex: To A and B in FS equally”*.

#### Common Law

The **common law favours creation of a JT.** In the absence of any words to indicate otherwise, it was assumed that a JT was created (***Re Bancroft***). But the **slightest hint towards intention to divide will create a tenancy-in-common** (***Re Bancroft***).

***Re Bancroft, Eastern Trust Co v Calder*** (1936)

|  |  |
| --- | --- |
| **FACTS** | T’s will stated that residue of estate should be divided into 2 equal shares – one should be paid to widow and other should be divided for term of widow’s life into 4 equal shares to P, A, F and children of M (T’s daughter who pre-deceased T), P1 and J.  No problems until P1, one of M’s children, died. P1 has 4 children. |
| **RATIO** | **ANYTHING WHICH IN THE SLIGHTEST DEGREE INDICATES AN INTENTION TO DIVIDE PROPERTY MUST BE HELD TO ABROGATE IDEA OF A JOINT TENANCY AND TO CREATE A TENANCY IN COMMON.**  -Language is **indicative of intention of testator**. |
| **REASONING** | Share paid to P1 should now go to surviving sister J (M’s children took as JTs). [No longer applies in BC because of ***PLA s. 11*** which holds that a TIC is the default position for FS unless the transfer specifies otherwise].  - Used word “equal” when talking about everyone else 🡪 split equally (severing) |
| **HELD** | No words such as “equal” qualified bequest to children of M. Nothing in will indicates intention to divide income between children of M and which can be held to abrogate idea of JT and create TIC. |

#### Equity

**Equity preferred tenancies in common** by interpreting the documents broadly – **looked at intention**.

Courts of Equity would presume that a **TIC arose in 3 categories:** (***Robb***)

1. Where the parties contributed purchase $4 for property in unequal shares [can be rebutted by evidence of contribution]
2. Where property was a mortgage and the co-owners were mortgagees. But if one mortgagee died, equity would compel surviving JT to hold legal title arising as result of operation of right of survivorship on trust for deceased’s estate and survivor.
3. Where parties were business partners, *prima facie* TIC in equity.

|  |  |
| --- | --- |
| **FACTS** | Wife bought a co-op in Van and paid in full, but requests that the property be put into both their names (husband and wife) jointly  - He doesn’t pay for anything at the onset (resulting trust). He then sells the property in Cali and gives her $$ from it – he says it is consideration for the share of the co-op that she has purchased. He dies. |
| **RATIO:** | there is an equitable presumption (rebuttable) of a tenancy in common – the assignment of a lease is not covered as a “charge” under **S11(1) *PLA*** |

#### Transfer to Self and Co-Ownership

-at CL, was not possible to transfer an interest to oneself

-rules for transfer and ownership to oneself ***s 18 PLA :*** **you get out of It by severing one of the unities. Usually the unity of title**; easiest way to do it is to transfer my share to myself. I execute a transfer to myself of the interest that we hold together as JTs. I can do that by ***s 18.1 -18(3)*** says this constitutes a TIC

**S18.1 *PLA*** – allows transfer to yourself in the same manner you would to another – another transfer back to yourself also severs the joint tenancy because the unity of time is gone – severance of the joint tenancy creates a tenancy in common: ***Stonehouse***

-if we are TIC and want to be JT, we can together enter into a new transaction in which we re-transfer which we already own to each other, but complying with the 4 unities

-you cannot get out of a JT by giving an oral or written declaration or by sneakily creating a will in which you leave your share to your heirs

### Registration of Title

**S173 *LTA*** – title must reflect the nature of the co-ownership

**S177 *LTA*** – requires that the title specifically indicate “joint tenants” if it is a joint tenancy

### Relations Between Co-Owners

#### Share of Profits

***Spelman v Spelman***

|  |  |
| --- | --- |
| **FACTS** | Wife sues for account of rents and profit derived from (1) a Van rooming house which they owned as JTs, (2) a Vic house to which the husband has legal title, but it is held in trust for himself (2/5) and his W (3/5).  -They had lived in the Van house together, and she ran a rooming-house operation; most of the proceeds went to paying off the mortgage. She then left and he continued the operation. Upon her return, she brought this suit. |
| **RATIO:** | 1. **Was the JT ousted?** Co-owner who remains on land can reap the benefits, provided they didn’t oust the other  2. The remaining co-owner has no right to ask for share of expenses, unless they are prepared to pay rent for their possession  3. **Consider the nature of the activity:** If 1 party bore risk and expended his own skills/labour, they are presumptively entitled to profits.  4. **Must be fair, just, and proportionate:** If 1 party is bearing all the risk, they should also reap the profits/losses. However, if there is just a steady stream of income, it is more likely that the money should be split. |
| **HELD:** | Vic property has to be shared, nothing from the Van property |

**S13.1 *PLA* – share of profits:** actions may be brought against the TIC or JT holder for receiving more than their fair share/proportion

#### Share of Expenses

**S13 *PLA*:** remedy of the co-owner: b/c of the default of another registered owner, a co-owner who has been called to pay and has paid more than the owner’s proportionate share of anything (mortgage, charge, repairs, insurance, etc) where the land may be subject to a forced sale or foreclosure, may apply to the SCC for relief under **S14** against the other registered owners, one or more of whom is in default

**S14** – the court may order a lien and a sale

-General rule is that 1 JT, unless ousted by his co-tenant, may not sue another for use and occupation (***Mastron)***

- If one tenant has made improvements which have increased the selling value of the property, the other tenant cannot take the advantage of increased price w/o submitting to an allowance for improvements(***Mastron)***

### Termination of Co-Ownership

**Destruction of one of the unities**

* + With or without consent – unilateral alienation will do the trick
  + Simple declaration is not enough – something needs to be transferred: ***Sorenson***
  + Severance cannot be done in a will – the *jus accrescendi* is immediate upon death: ***Sorenson***
* Bankruptcy of one of the joint tenants
* Order of partition and sale – court order issued under the ***Partition of*** ***Property Act***: 1 owner wants to sell and can't get consent of the other – *prima facie* right of the JT to get a partition for sale – the Court will compel unless it would be unjust to do so one co-owner wants exclusive possession

**S20 *LTA*** – “except as against the person making it” – when a person transfers their interest in a jJT, their portion is divested & vests in the transferee. **The deed is immediately operative as between the two of them**. Even if the deed is unregistered, the result is alienation of title that destroys the unity of title – the right to survivorship is extinguished.

***Stonehouse v BC***

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| **FACTS** | -Wife transferred interest in JT to the daughter (w/out knowledge of the husband), who only registered it after the death of mother. |
|  | The transfer of an interest to a stranger to the JT itself destroys the unity of title w/out which a JT cannot exist at CL |
| **HELD** | The transfer severed the joint tenancy and therefore, the husband doesn’t get sole survivorship. |

***Sorensen Estate v Sorensen***

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| --- | --- |
| **FACTS** | the Wife tried multiple ways to move from a JT to a TIC so as to leave her son her estate when she died. |
| **RATIO** | **the onus lies on those who wish to contend there has been a severance**  A JT can be severed by a co-owner creating an equitable interest for which the co-owner is the trustee and another is the beneficiary. |
| **REASONING** | **1. Was the original settlement agreement a severance?** No. The wife’s further conduct clearly indicates she didn’t find the interest severed.  2. **Lease-granting severs?** The reversionary interest still goes back to the JTs – the lease didn’t interfere w/the chief characteristics of a JT of survivorship.  **3. Mortgage?** The $100 payable by the husband for the maintenance of the son “charged by way of security against the interest of the husband in the matrimonial home.” The charge didn’t affect the JT survivorship b/c on the death of either one, the security wouldn’t continue as a charge.  4. **Issuance of partition** (declaration) doesn’t sever a joint tenancy.  **5. Trust deed and transfer:** the trust deed was a declaration not made evident to the husband so there was no effect of severance.   * Execution of transfers would not be enough because the solicitor was the wife’s – no effective delivery so the gift was not complete – not effective to pass upon death after the JT was crystallized – the right of survivorship is preferred to the last will * The executed trust deed is severance b/c “the presumption of advancement applied and the result was there as a valid gift of the beneficial interest in the properties to the son. The gift, although only of the equitable title, severs the joint tenancy” |

### Partition and Sale

***Partition of Property Act***

**S2 – Parties may be compelled to partition or sell land**

(1) “may be compelled to partition or sell the land, or a part of it as provided by this Act”

(6) **Sale of property where the majority requests it** – to the extent of ½ or upwards in the property involved request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the Court must, unless it sees good reason to the contrary, order a sale of the Property, and may give directions.

(7) – **Sale in place of partition** – if the Court thinks it is more beneficial for the interested parties that a sale be ordered than a partition, then the Court may (a) on the request of any of the parties and despite the dissent or disability of any other interested party, order a sale of the property, and (b) give directions.

(8)(2) – The Court may not make an order of a sale if the other parties interested in the property, or some of them, undertake to purchase the share of a party requesting a sale. (3) if the request is made, the Court may order a valuation of the share in the manner the Court thinks fit, and may give directions.

***Harmeling v Harmeling***

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| --- | --- |
| **FACTS** | Both parties are pensioners with health issues. Mrs. H left to go live with another man and now requests the Court to partition/sell the house. |
| **RATIO** | the Court ought to accept, w/out qualification, the general statement that there is a *prima facie* right of a JT to partition or sale and that the Court will compel such partition or sale unless justice requires that such an order not be made. |
| **HELD** | the “may be compelled” in the ***Partition of Property Act*** gives the Court the discretion to force a sale or partition when there is no injustice preventing it. Here there would have been an injustice to Mr. H and all his electronics. He would have to find a smaller place and he’s old |
| **DISSENT** | Order should only be refused when it would cause the other party “serious/severe hardship” almost always amounting to “economic oppression”   * A successful application under the ***Partition of Property Act*** does not automatically result in an = share for each tenant. The Courts evaluate the nature of the contributions (monetary and equitable) of each tenant to the value of the property. |