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(2) A disposition conferring a general power of appointment, which but for this section would have been void on the ground that it might become exercisable beyond the perpetuity period, is presumed to be valid until the time, if any, it becomes established by actual events that the power cannot be exercised w/in the perpetuity period. 40

(3) A disposition conferring a power other than a general power of appointment, which but for this section would have been void on the ground that it might be exercised beyond the perpetuity period, is presumed to be valid and becomes void for remoteness only if, and so far as, the power is not fully exercised w/in the perpetuity period. 40

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# Chapter 3: Aboriginal Title

## Policy/Essay points

### Should Aboriginal Title Subordinate Fee-Simple?

* Yes
  + AT is an encumbrance on radical Crown title, which also underlies fee simple estates (*Royal Proclamation 1763, Delgamuukw*).
    - If this encumbrance was on the Crown title at the time of the grant, it is arguable that the nature of AT (possessory and usufructory right, the FN’s to keep, not the Crown to disposess) should mean that “Nemo Dat” nullifies that grant.
    - AT is only alienable by the FN to the crown (*Delgamuukw*), only after FN has alienated the Crown can the Crown grant it to someone else
  + Policy: Would NOT upset all non treaty lands
    - Only where AT is proven (hard to do) by a FN.
* No
  + The infringement tests and evidentiary burdens (*Delgamuukw,* Tsilhqot’in) focus on maintaining a balance between Aboriginal perpectives/rights and common law rights/Crown sovereignty.
    - **This balance is abandoned if AT can void fee simple.**
  + *Nemo Dat* is “emasculated” by Torrens system
  + Policy: this could put all non-treaty lands in Canada into question
    - Too large an economic shift for the courts to burden the country with.

### Would Skeetchestn Be Decided Differently Today?

* Yes
  + Court in *Skeetchestn* focused entirely on s 215(a) of *LTA* (is the right argued in court ultimately registrable?). But they ignored 215(b) (are they given a right of action in respect of land by some other enactment)
    - S 35 guarantees the right of AT where it can be proven.
    - As an incident to recognizing this right, it must give a right of action on order for a FN to prove it.
  + (Note the 215(a) argument in *Skeetchestn* still holds up as AT is alienable only the Crown)
  + Policy: The point of the Torrens system is to give certainty to title. Allowing *lis pendens* advances this purpose by making it clear that title is in question.
* No
  + S 35 only guarantees Aboriginal rights are affirmed, does not expressly give a right of action in respect of land.
    - This is bad
  + Only CL interests of land may be registered (*Kessler*)

Policy: Claims for rights that should not be gumming up the property market in Canada if they can never be registered at all.

## Cases

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| Delgamuukw v British Columbia (1997) (3-9)**R:** Aboriginal rights may manifest as title to the land itself. Test for Aboriginal Title as painstakingly detailed below.  **F**: Peoples suing for “aboriginal title and self government,” Evidence: the existence of a feast hall, dance, and oral history detailing their ownership of the territory.  **I**: What is the content of aboriginal title, how is it protected by s. 35(1) of the Constitution Act, 1982 , and what is required for its proof?  **A**: Aboriginal Title is *sui generis* (in a class of its own) with regard to property rights. Not the same as fee simple, more than a bundle of rights to engage in certain activities.  Features:   * Inalienable - can only be transferred to crown * Source - the prior occupation of the land by Aboriginal peoples (NOT the royal proclamation). * Communal - cannot be held by individual aboriginal persons, but is held by the people as a whole → no individual right of *disponendi*   Content**:**   1. can be used for wide variety of purposes, not just traditional culture 2. Inherent limit: cannot use in a way which affects future generations’ ability to use land, or which is incompatible with traditional relationship with land   Spectrum of Aboriginal Rights under s 35:   1. Practices/customs/traditions: non-land aboriginal rights 2. Activities which take place on land and might be intimately related to a particular piece of land (might = site-specific right to activity on land) 3. Aboriginal title itself – confers the right to land itself – property interest   How to prove:   1. *Sufficiency of Occupation* - Show land was occupied prior to sovereignty 2. *Continuity of Occupation* - Show continuity between present and historical occupation (if you’re relying on current occupation as evidence of historical occupation). Some interruption of occupation and/or changed nature of occupation is fine 3. *Exclusivity of Occupation* - Show that occupation was exclusive at time of sovereignty; intention and capacity to retain exclusive control. Can allow for people to come onto the land. can be shared.   Test for justifying infringement   1. Must be furthering legislative objective that is compelling and substantial. Economic objectives work, so long as compatible with “reconciliation of the prior occupation of North America w/ Crown Sovereignty. 2. Must be consistent with the special fiduciary duty of the crown. 3 aspects of AT guide the level of scrutiny court will apply on this 3. AT is exclusive - Gov’t must allocate resources accounting for the proper priority of AT under the fiduciary duty) 4. AT encompasses right to choose how land is used - There is always a duty of consultation 5. Economic Aspect – compensation is ordinarily required |

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| William v British Columbia (2014) (3-52) [Tsilhqot’in Case] **R:** *Delgamuukw* test requirement for exclusivity and occupation **must take the aboriginal perspective** into account. AT is therefore not confined to intensive use, but regular use as well.  **F**: Tsilhqot’in sought AT in land that they actively and traditionally occupied. BCCA said not AT to entire claimed area, but could be for certain intensively occupied sites in the future. Tsilhqot’in appealed for AT to entire territory.  **I**: Can AT apply to semi-nomadic peoples for larger territories used for hunting/fishing.  **A**: Clarifies 3 steps:   * *Sufficiency*- Aboriginal group must show it historically used the land extensively enough to communicate to third parties that they held the land for their own purposes. Court affirms TJ in saying that sufficiency of occupation is demonstrated not only where land was intensively occupied but also where it was in **regular use.** * *Continuity* - Affirms TJ who uses archeological/historical/oral evidence from elders to determine continuity. * *Exclusivity* - Understood in terms of intention/capacity to control the land, also understood from mix of common law/aboriginal perspectives. Evidence that Tsilhqot’in repelled others from land and demanded permission from some who wanted to cross it - this is enough to demonstrate exclusivity.   Gov’t has duty to consult in good faith to seek the consent of AT-holders/to accommodate interests of AT-claimants to a degree pursuant to their strength of claim. |

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| Mitchell v MNR (2001) (3-35) **R:** In establishing an Aboriginal Right, evidence of Aboriginal perspective must be given due weight by the courts but within the limits of Canadian rules of evidence. **Binnie:** Claimed AR cannot be established if incompatible with Crown sovereignty.  **F**: Mohawk Chief brought items across the border, refused to pay duty claiming Aboriginal right to trade.  **I**: How is a claim for Aboriginal rights established?  **L:** *Van Der Peet*  **how claims of right should be characterized**: action must (1) be pursuant to an Aboriginal Right, (2) which government legislation infringes upon, (3) and which must rely on ancestral traditions/practices to be established  **establishing an Aboriginal Right**: (1) existence of ancestral practice/custom/tradition as supporting the claimed right, (2) which was integral to their distinctive pre-contact society, (3)with reasonable continuity btwn ancestral practice and the claim  **A**: Aboriginal Right claimed = to enter Canada from US without paying customs duties and to trade the obtained goods with other First Nations. Using first *Van Der Peet* test, we see ***the claim is properly characterized as an Aboriginal Right for free trade across the St Lawrence River*** (~where the Canada-US border is):   1. Claimed trade & commerce = essential to their soul; 2. Legislation conflicts with this trade. 3. “Essential to their soul” claimed historically true (though gov denies that it traditionally happened over where the border would be).   Although Chief tried to narrow right: NOT just “in that specific area between First Nations groups” but to bring goods to trade. Court broadens his claimed right to be one of “trade” in general. CL evidentiary principles: must be **useful/relevant, reasonably reliable, and not have an overshadowing potential for prejudice.** Aboriginal perspective evidence (eg. oral history) must be given due weight by courts (not undervalued), BUT not to a level that strains the rules of evidence and Canada’s constitutional/legal structure.Evidence does not establish to AR as it does not show that trade is a distinctive and integral facet of Mohawk culture. |

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| R v Marshall; R v Bernard (2005) (3-44) **R: exclusive possession is required to establish title and it can be established through showing regular occupancy or use of the land; continuity is also required to establish title**  **F**: Marshall charged with tree cutting. Bad. Claimed entitlement to cut timber b/c AT.  **I**: Do members of the Mi’kmaq people have AT to engage in commercial logging on Crown lands without authorizations?  **A**: The court is to translate the pre-sovereignty aboriginal practice into a modern legal right (a) by examining the nature and extent of the pre-sovereignty practice and (b) to seek a corresponding common law right. Must take *generous* view on aboriginal practice and not insist on exact conformity with CL.  **C: Marshall et al do not have a treaty right to log nor aboriginal title to the cutting sites** |

# Chapter 5: Registration of Title: An Overview

# A. Historical Background

## 1. Common Law Conveyancing

Delivery by transferor to transferee of deeds – prepare abstract of title (history of titles for piece of land) and establish good root of title. Disadvantages: expensive, delays, might require recourse to courts, risk of loss etc. of deeds, repetitive. Could operate for or against purchaser e.g. Purchaser took subject to ALL legal interests BUT equitable interest not enforceable against bona fide purchaser for value of legal title who took w/o notice of interest or w/o notice that transferor was in breach of obligations.

## 2. The Recording System

Provides for recording of deeds affecting land in a recording office. Unrecorded deeds have no effect. Creates active and profitable insurance industry – title insurance – insure against lawyer error in creation of abstract.

## 3. The Torrens System

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

* **section 23, *LTA***: 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”
* **section 185, *LTA*:** Prescribed form required to register the transfer (Form A or its equivalent)
* **section 20, *LTA*:** Registration is required in order to effect transfer of legal interest, and to protect that interest against the world (**except as against the person making it**)
* Process & requirements of application outlined primarily in ***LTA s. 169***.
* When applying to have an EIFS registered, registrar must be satisfied that:
  + The **boundaries of the land are sufficiently delineated** by description or plan on record in LTO
  + A **good safeholding and marketable title in fee simple** has been established by the applicant
    - *Safeholding* = title that is “safe from attack & cannot be displaced”
    - *Marketable* = title that is freely alienable,
* **Section 169(2)**: Registrar may give notice that they’re intending to register the title of the applicant unless someone registers a caveat or lis pendens contesting applicant’s right
* **Section 169(3)**: If caveat or CLP is registered the registrar must defer consideration of application until caveat expires/withdrawn & CLP claim is disposed of

Once a FS interest is entered on Register, that is conclusive evidence that the person named on the Register is owner of interest (subject to some exceptions). Abstract of title prepared by civil servants – title insurance not necessary. **Every indefeasible title, as long as it remains in force and uncancelled, shall be conclusive evidence at law and in equity, as against Crown and all other persons, that person named in title is indefeasibly entitled to EIFS to land described in indefeasible title.** If there is financial encumbrance, duplicate indefeasible title must stay w/ LTO.

**Note**: Primary function of mortgages – interest in property conferred by borrower (mortgagor) on lender (mortgagee) for purpose of providing a fall-back if repayment obligations not met.

## 4. The Torrens System Introduced in BC

*Land Registry Act 1860* for Vancouver Island and *Land Registry Ordinance 1870* for rest of BC. Two stages 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 Register 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 than Crown, may be necessary to secure reg of any unregistered FS owners.

# B. The General Pattern of Registration

## 1. Land Title Districts

Province divided into 7 land title districts. Interest in parcel of land must be registered in district in which land is located.

## 2. What Can Be Registered?

**What *Can* Be Registered?**

* **section 197*, LTA*:** a registered charge must show that it has GS & M title
  + **(2)**: the registrar can refuse to register a charge if it is not shown to be of GS & M OR if it is not an interest or estate in land
* **section 210-214, *LTA*:** registration of judgements
  + Judgment is not an interest in land, and can only be registered by virtue of statutory authority (*Court Order Enforcement Act)*
    - **section 86(3)(a)** (*Court Order Enforcement Act)*- if you are a judgment creditor, and you secure registration it is ONLY to the extent of the debtor’s beneficial interest in the land
    - **section 86(3)(c)** (*Court Order Enforcement Act)* – if before the judgement was registered, a new purchaser has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgement
* **section 215-217, *LTA*:** registration of lis pendens
  + **215(1)(a)**: can be registered by any onewho has commenced or is a party to a proceeding and is claiming an estate or interest in land **(b)** or who is given by another enactment a right of action in respect to land
* **section 282-294, *LTA*:** registration of caveat
  + **282:** can be registered by any person who claims to be entitled to an interest in registered land that is not shown on CIT
  + **288:** temporarily freezes on registration process *except* (2) you can register subject to the caveat unless the registrar thinks that the success of the caveat would destroy a good root of title
* **Agricultural land reserve parcels** (*Agricultural Land Commission Act*) – while zoning bylaws are not registrable as an interest in land, ALR parcels are. Appears on title under “notations”
* **Marriage/co-habitation agreements** (*Family Relations Act, s. 17*) – rarely used agreements which allow non-titled individuals to acquire some interest in the property (i.e. veto rights over land dealings, prevent severance of joint tenancy)

**What *Cannot* Be Registered?**

* **section 33, *LTA*** - cannot register equitable mortgage created by the duplicate indefeasible title
  + informal mortgage where owner hands over duplicate indefeasible title
* **section 200, *LTA*** – sub agreement is not registrable
  + all sub-rights after 1979 can’t be registered (sub-right to purchase occurs where agreement for sale is registered on title & owner of that agreement for sale enters into another agreement for sale w/a 3rd party [subsequent agreement can’t be registered])
* **section 180, *LTA*** – beneficiary is not listed. Only says “in trust”
  + while the trustee is registered on the title “in trust”, you don't list the particulars on title BUT trust doc usually deposited at LTO
  + EVEN THOUGH NOT REGISTERED, if an “in trust” notation is on CIT, no further interest may be registered or be able to defeat the trust and beneficial interest unless authorized by the instrument that created it, and so the trust may still be performed (*McRae*)
  + **S 180** sets out the process for registering a trust, and if followed you are still protecting the interests within that trust (*Dukart*)

**Only interests recognized as interests in land at CL** (including equity) can be registered (*Kessler*). 2 categories of interests will appear on the land title search: (1) **fee simples**: fee simple owner w/ indefeasible title; (2) **charges**: covenants, mineral rights, life estates, mortgages, etc.

### (a) The General Principle

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| R v Kessler (1961) (5.5) **R**: Only interests in land need to be registered; zoning by laws are not interests in land as recognized at common law.  **F:** Kessler was being prosecuted for violating zoning regulations. K argued that zoning bylaws “affect the use of the land” they must be registered to be enforceable.  **I**: Do zoning bylaws need to be registered?  **A:** Land use rules do not need to be registered because they are not *interests* in land. |

### (b) Prohibition of Registration of Common Law Interests

**(i) Equitable mortgage** (*LTA s 33*) **or lien by deposit of Duplicate CIT or other instrument cannot be registered**

* BUT mortgages can be registered – just mortgages which are created by handing over DIT cannot be registered.
* At CL, if title deeds deposited w/ a lender that gave rise to presumption that it was intention of parties that land of borrower was to be subject to equitable mortgage in favour of lender.
* A person who is a trustee may secure registration – BUT details of trust may not be listed on title (*LTA* s *180*)

**(ii) Sub-agreement for sale by RO of right to purchase land or of sub-right to purchase land is not registrable** (*LTA* s *200*).

### (c) Registration of Non Common Law Interests

Requires specific legislation authorization. E.G. Caveats, *Lis Pendens,* and Judgments.

* Most common are judgments: If someone has been awarded a monetary judgment, if they are not paid immediately by D they can register the judgment – secures their priority.

### (d) Aboriginal Title

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| Skeetchestn Indian Band v BC (2000) BCSC **R**: Only interests or estates in land can be registered and AT is neither.  **C**: Court ignored part of section 215 (b) which states that a person who has commenced or is a party to a proceeding, and who is given by **another enactment a right of action in respect to land** - as section 35 does for Aboriginal people - may register a certificate of pending litigation. Court worried about freezing development if it allows for AT to be registrable. Court was racist.  **F:** Kamland holdings was a fee simple owner of a large parcel of land under development. Skeetchestn Band (SB) claimed they had AT to land. Wanted to register a caveat and then a lis pendens to freeze development until their claim was settled. Registrar (R) refused to register either.  **I:** Does AT allow for the registration of caveats and lis pendens?  **L:** *Land Title Act:* **s. 215** and **s.282**  **A**: R argued   1. that **s. 215** of the *Act* requires a claim of registrable estate or interest in land and AT is neither; 2. pursuant **s. 282**, a caveat can only be lodged if a person is “entitled to land” and this means having an interest or estate in land 3. Cannot put a lis pendens for an interest (AT) that, if established, is not entitled to be registered; and 4. Registration system is only for private, marketable interests.   Court accepts these arguments.  **C:** SB cannot register a caveat or lis pendens while AT claim is being settled. |

## 3. The Basic Scheme of Registration

### (a) The Legal Fee Simple

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| LTA s 179 – Rights of owner of surface  1. Only owner of surface of land is entitled to be registered as FS. Owner of part of land above/below surface registers interest as charge. 2. If no Crown grant of surface registered – Crown registered as owner. 3. If title of owner to certain minerals/timber is registered in register of absolute fees and applies to become RO of other materials, title is registered as single charge in register of indefeasible fees and entry in register of absolute fees is cancelled. |

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| LTA s 141 – Subdivision of land into air space parcels  1. Owner in FS may create 1+ air space parcels and obtain indefeasible titles. 2. Air space parcels may be transferred etc. – dealt w/ in same manner as other land registered. 3. May be subdivided under Strata Property Act. |

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| Strata Property Act ss 239, 244 239: Strata lots treated in same manner as other land titles registered. Each strata lot has its own CIT.  244: Strata plan requirements. |

### (b) Charges

All interests other than legal FS in surface of land, strata lot or air space lot are classified as charges.

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| LTA s 1 – Charges "**charge**" means an estate or interest in land less than the fee simple and includes   1. an estate or interest registered as a charge under s 179, and 2. an encumbrance;   "**encumbrance**" includes   1. a judgment, mortgage, lien, Crown debt or other claim to or on land created or given for any purpose, whether by the act of the parties or any Act or law, and whether voluntary or involuntary...   \*\*some interests in land not registrable- (Aboriginal Title [*Skeetchestn*]; Equitable Mortgage via DCIT deposit) |

## 4. The Legal Fee Simple

### (a) Initial Application

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| LTA s 169 – Registration of title  1. **Boundaries** of land must be sufficiently defined. 2. **Good safe holding and marketable title** in FS must be established.    * **Safeholding**: title conferring possession that is safe from attack and cannot be displaced.    * **Marketable:** title that is freely alienable, and not so defective that a reasonable purchaser could refuse it.    1. Registrar may require that person named in registrar be served w/ notice of intention to register title unless caveat or CPL filed.    2. If caveat lodged or CPL registered, registrar must defer consideration of the application until the caveat expires/is withdrawn/adverse claim is disposed of. Applicant must also ensure docs are attested and executed as required and file a completed property transfer tax form.   **Application deemed received when s 153 complied w/** (according to **s 168(3)**)**.**   * Examiner makes draft which indicates all info which is to be shown on new title. Final step is production of indefeasible title. When FS is registered the Registrar must issue to the owner a DCIT (**s 176**). Duplicate must contain all the info in register relating to land in question. Cannot be issued if title is subject to registered mortgage or agreement for sale. Duplicate must be produced for cancellation if application to register mortgage or agreement for sale is made.   \*\* Once the title has been registered this constitutes conclusive evidence at law and in equity that the person named in the title is indefeasibly entitled to an EIFS (s 23(2))\*\* |

### (b) Transfer Inter Vivos

Procedure is essentially same as that for initial reg. Applicant must also produce DIT if one has been issued.

### (c) Transmission on Death

“Transmission” is change of ownership by operation of Act/law. Title to deceased’s real and personal property passes by law to personal reps, who hold property in trust. Personal reps secure reg of themselves as FS owners in fiduciary capacity, then transfer title to appropriate beneficiary.

## 5. Charges

### (a) General

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| LTA s 197 – Registration of Charges  * Registrar may refuse to register charge if: **good** **safeholding** and **marketable** title not established or charge claimed is not an estate/interest in land that is registrable under Act. * Registrar may be satisfied that applicant has good safeholding and marketable title by: instrument from FS owner creating charge; assignment to applicant of existing charge or; creation of sub-charge. |

### (b) Caveats; Certificates of Pending Litigation; Judgments

**(i) Caveats**

Registered by Registrar entering an endorsement of it and of time of its receipt in Register. May be lodged by any person who claimed to be entitled to interest in registered land. May also be lodged by RO and Registrar.

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| LTA s 288 – Effect of caveat  1. temporarily freezes on registration process   ***except***   1. you can register subject to the caveat unless the registrar thinks that the success of the caveat would destroy a good root of title |

**(ii) Certificates of Pending Litigation (*LP* aka *lis pendens*)**

Any person who has commenced/is party to a proceeding may register a *LP* in same manner as charge is registered. Stays until lawsuit is settled.

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| LTA s 215 – **Registration** of LP in same manner as charge  1. One can register an *LP* if    1. They’re claiming an estate or interest in land    2. They’re given a right of action in respect of land by another enactment  * registration works the same as a charge.  1. Registrar must give copy of *LP* to owner against whose title the *LP* was registered **s. 215(3)** |

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| LTA s 216 – **Effect** of registered LP  1. While the certificate is in effect, registrar must not make any entry that has the effect of charging, transferring or otherwise affecting the land in question (until its cancelled) |

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| LTA s 217 – **Effect** of LP **if prior application is pending** Register may make entry for registration applied for before application to register *LP* was received. If prior applicant is party to proceeding, register subject to *LP*. If not party to proceeding, cancel registration of certificate and give notice of cancellation. If claim to certificate established, person who registered the certificate is entitled to claim priority. |

**(iii) Judgments**

1. Type of judgment that can be registered: If a P obtains a money judgment against a D, P may register judgment in same manner as charge in LTO in which judgment debtor has registered interest in land. Judgment which affects title to land will not be registered in this manner.
2. Manner of registration: Registrar must notify owner of land/charge.
3. General effect of registration: *Court Order Enforcement Act* s 86: Judgment forms liens and charge on land of judgment debtor to extent of beneficial interest in land subject to rights of purchaser who acquired interest in good faith.

* **Lien**: legal right of creditor to sell collateral property of debtor who fails to meet the obligations of a loan contract.

# C. The Role of the Registrar

1. **Not all interests are registrable:** (i.e. AT not registrable, nor are charges relating to it [*Kessler*/*Skeetchestn*])

* “nothing can be registered the registration of which is not expressly authorized by statute” (*Heller v BC* in *Skeetchestn Band v BC*)
* AT is not registrable because inalienable = first Delgam. and this still applies because the new one does not discuss registration (*Skeetchestn Band v BC*)
  + discusses 215(1)(a) which says only interests or estate can be registered but ignores but ignores 215(1)(b) which applies: given by another enactment ie **section 35 of the Constitution**

1. **Don’t Perpetuate Errors in Title:** Registrar has a duty to satisfy himself that title is good, safeholding and marketable when registering the instrument (*Evans*)

* Registrar has power to correct and has the power under the statute to insist on boundary rectifications(*Re Land Registry Act, Re Evans Application*)
  + must ensure title is of good safeholding and marketable quality as per **section 169**
  + **Section 27 *PLA*** (*attorney can’t sell to himself*)– renders such a transfer (*Shaw*) invalid unless expressly provided for in the power of attorney or ratified by the principal

1. **Power to refuse bad documents:** Registrar can refuse to register if docs & evidence produced fail to establish either a *prima facie* or GSMT (*Re Land Registry Act and Shaw*)
   * if the situation disclosed is such that it is inevitable that the document relied upon must be supplemented by another or receive some further ratification or approval to make it effective, no *prima facie* title is established (*Re Land Registry Act and Shaw*)
2. Registrar’s has discretion and *limits* on what he can do to correct an error (*Heller*)
   * for the PL to have won there would have to be fraud, but the registrar does not have the powers to look into fraud (only section 96 courts do) (*Heller*)
   * **section 383, *LTA*:** If registrar finds an instrument is issued in error/has misdescription or endorsement is made/omitted in error registrar MAY, so far as practicable, w/o prejudicing rights acquired in good faith and for value cancel the registration/instrument or correct the error
     + use of the term may shows discretion (*Heller*)

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| Re Land Registry Act, Re Evans Application (1960) (5-28) R: Registrar should not issue CIT on unclear interest because good safe-holding and marketable title don’t exist.  F: Lot was “more or less” 66ft, subdivided into 2 exact portions. P survived joint tenancy of one portion, registrar refused to give her title because there couldn’t be two indefeasible titles when whole of land’s exact measurements weren’t known. I: Is there good safe-holding and marketable title in a piece of land to which we do not know the exact size? A: IT requires “good safe-holding and marketable title” = owner isn’t liable to be disturbed in full possession/enjoyment of land. If boundaries are not adequately described on CIT, no good safe-holding or marketable title. Clarifying/describing interest (as opposed to substantive discretion) is judicial duty of registrar, who must correct, not perpetuate, error. . |

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| Re Land Registry Act and Shaw (1915) (5-31) R: Registrars have the power to halt registration when the nature of the transfer raises suspicion concerning validity. Meeting all pre-reqs to registration does not mean you will automatically be able to register.  F: Son had power of attorney to father’s property, wanted to register mortgage to himself. I: Is registrar justified in ***not*** issuing title until there’s sufficient security (e.g. in cases of self-dealing)? A: Registrars are not just bureaucratic machines but have discretionary power to halt registration in certain circumstances. This circumstance was self-dealing by son, needed greater assurances (e.g. assent of principal) to be able to register a transfer. |

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| Property Law Act s 27 (*RE Shaw*) Attorney cannot sell to himself. Person granted POA (S) cannot transfer land from person granting POA (dad) to himself unless: (a) POA expressly authorizes it or (b) person granting POA ratifies it. **Burden of proof is on S to show evidence of full disclosure, fair consideration and good faith.** |

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| Heller v British Columbia (Registrar, Vancouver Land Registration District) (1963) (5-34) R: Registrar has discretion - able to correct title after error has been made, but ***not*** ***required*** to act in cases w/o fraudulent intent/transfer from void instrument.  F: Husband transferred deed to wife, who registered it, then husband wanted land back. Found that duplicate IT was not at registry office nor on her person but with third party. Registrar refused to correct wife’s registration. I: Should registrar cancel registration of title b/c duplicate IT wasn’t present (despite no fraudulent intent)? A: Registrar acted on discretion when registering title though duplicate IT wasn’t mentioned, and COULD act to correct that IF registrar so chose. Mistake in not providing duplicate IT was husband’s. |

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| LTA s 383 - Registrar to cancel or correct instruments, etc.  1. If Registrar finds **(a)** an instrument is issued in error/has a misdescription or **(b)** an endorsement (rubber stamp) is made/omitted in error **Registrar *MAY*, so far as practicable**, w/o prejudicing rights acquired in good faith and for value **(c)** cancel the registration/instrument or **(d)** correct the error. |

# D. The Assurance Fund

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| LTA s 296 – Remedies of person deprived of land **Before you can make a claim under AF:**   * Bring action against person who’s holding your land now **(s 296(2)(b))**; * File *LP* – if unsuccessful after litigation, then launch action in BCSC (s 296(2)) against person who defrauded you, ***simultaneously join AG as nominal party D*** **(s 296(3))**. * If fraudulent person cannot be found, or cannot pay full damage award, or is dead, then claimant can try to collect from AF **(s 296(4/5))**. * Under **s 296(2)(a)**, claimant must prove deprivation – must show you lost your land for 3 reasons:   1. Lost your land due to conclusiveness of register?      + Would claimant have succeeded in CL if the Torrens system hadn’t been enacted? – **s 296(2)(a)(i)**   2. Fraud operating? – **s 296(2)(a)(ii)**   3. Claimant barred by the Act or any other Act, or otherwise precluded from recovering or having title rectified? |

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| LTA s 297 – Protection of purchaser in good faith and for value  1. In this section, "transferee" means a transferee who, in good faith and for valuable consideration, acquires an estate or interest in land less than a fee simple estate. 2. Despite anything to the contrary in this Act, no transferee is subject to a proceeding under this Part in respect of an estate or interest in land of which the transferee is the registered owner, for    1. recovery of land,    2. deprivation of land, or    3. damages in respect of land   on the ground that the transferor   * 1. may have been registered as owner through fraud, error or a wrongful act, or   2. may have derived title from or through a person registered as owner through fraud, error or a wrongful act. |

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| LTA s 298 – Fault of registrar If someone has lost "solely or partially, as a result of an omission, mistake or misfeasance of the registrar," they can claim against AF.   * Note this is *another* way to claim in addition to **s 296**.   Limitation period: within 3 years after the loss or damage is discovered by claimant. |

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| LTA s 303 – Limitation of liability of assurance fund **AF or Minister are never liable for loss, damage or deprivation:**   1. occasioned to or suffered by (i) the owner of undersurface rights, or an equitable mortgagee by deposit of DCIT or 2. occasioned by (i) breach by the registered owner of a trust, (ii) land being included under an IT w/ a misdescription of boundaries, (iii) improper use of seal by a corporation or an authorized signatory who exceeds her authority, (iv) the dissolution of a corporation or its lack of capacity to hold/dispose of land, or... 3. land in question was incl. in 2+ Crown grants 4. an error or shortage in an area of a lot/block/subdivision/air space parcel according to a plan deposited at the LTO 5. the P was served with notice or had knowledge that the Registrar or a person under the Registrar’s direction was about to commit the act through which the P suffered damages unless they took and maintained the proper proceedings to prevent the act 6. **in respect of the portion of loss caused or contributed to by the act, neglect, or default of the P**    * MOST IMPORTANT SECTION 7. if the loss arises out of a matter in respect of which the Registrar was not req’d to inquire or 8. occasioned by an act or omission of the gov’t in relation to s. 250 of the *Strata Property Act* |

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| McCaig v Reyes (1978) (5-42) **R:** To recover from assurance fund, claimant must show:   1. that he was deprived of land or an estate or interest therein; 2. that the loss was occasioned as a result of the operation of the statute (*Land Title Act*); 3. that the loss was occasioned by fraud, misrep., or some wrongful act in respect of the registration of any other person as owner of the land or interest in land; and 4. that he is barred from bringing an action for the rectification of the register.   **In this case:** McCaig did not meet **(2)** of the test, as his option would not prevail against Jabin even w/o Torrens system; option was an equitable interest; Jabin was “equity’s sweetheart”, and therefore McCaig could not recover.  **F:** FW owns EIFS. Agreement to sell to ST (McCaig). ST sells property to Reys by subagreement but retains option to purchase a portion of the land for personal use (option not registered). Reys sells property to Rutland (Jerome) by further subagreement and Rutland is aware of option and agrees to honour it. Rutland buys everyone out and sells to Jabin free and clear of all encumbrances. Jabin becomes registered owner of EIFS. Rutland transferred property fraudulently but Jabin was *bona fide* purchaser.  **I**: Can McCaig recover from assurance fund?  **L:** *LTA* s. 296 |

# Chapter 6: Registration

You don’t get an interest in land unless it has been registered (**s 20 *LTA***). Clarity obtained by abolition or significant attenuation of CL doctrine of nemo dat. Nothing in LTA specifically compels reg, but *Land Act* requires reg in certain cases; *Land Act* s 54 – Crown grants must be registered if issued after April 6, 1968.

# A. Registration: The Fee Simple

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| LTA s 23 – Effect of indefeasible title  1. An **indefeasible title**, as long as it remains in force and uncancelled, is **conclusive evidence at law and in equity, as against Crown and all other persons, that person named in title as RO is indefeasibly entitled to an EIFS to land described in indefeasible title,** subject to:    1. conditions etc. in original grant    2. fed/provincial tax, rate or assessment    3. municipal charge, rate or assessment    4. lease/agreement for lease not exceeding 3 years if there is actual occupation    5. highway etc. – public easements    6. right of expropriation/escheat under an Act    7. **any charges etc. noted/endorsed on title or later noted on title**    8. if third party shows that there was wrong description of boundaries       * No guarantee on indefeasibility if wrong boundaries were registered    9. **if third party shows that there** **was fraud which registered owner participated in**    10. restrictions under *Forest Act* 2. **(No Squatting) -** After registration, title adverse to/in derogation of title not acquired by length of possession 3. **(Limited Squatters rights) -** BUT in case of first indefeasible title registered, title is void against title of person adversely in actual possession of and rightly entitled to land included in indefeasible title at time of registration |

Indefeasible = not able to be lost, annulled, or overturned

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| Land Act s 50 – Exceptions and reservations Crown grants are subject to:   * Right in gov’t to public works – not more than 1/20 of land * Right in gov’t to geothermal resources, coal, petroleum, gas/gases * Water privileges for mining/agricultural purposes * Gravel, sand, stone, lime, timber or other material for construction of public works * Do not include: geothermal resources, minerals/placer minerals, coal, petroleum, gas * No right to highways * Crown grant may by express terms be different, must refer to Act that authorizes the different terms * Crown grant may by express terms grant gov’t more rights/privileges * Gov’t may grant right of way |

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| Agricultural Land Commission Act ss 1, 16, 20, 21, 28, 60  * Defines farm use and non-farm use * Land included in agricultural land reserve remains agricultural land unless excluded under this Act * Person must not use agricultural land for non-farm use unless permitted – includes removal of soil and placement of fill * Must not subdivide agricultural land unless permitted * Post 1973 you do need to register that the land is subject to the Act – prior to that it will not be noted on the CIT |

## 1. The General Principle of Indefeasibility

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| Creelman v Hudson Bay Insurance Co (1920) (6.6) **R:** If someone registered, their right is indefeasible: it is not open to scrutiny whether they *should* be registered because that would undermine the Torrens system.  **F**: Hudson Bay Insurance (R) brought action against A for breach of contract of sale. A’s defence = due to federal act it was incorporated under, R couldn’t acquire or hold real property unless required for purpose/use/occupation of company. Also that R wasn’t holding it for these purposes and had no power to dispose of or hold the land.  **I:** Can R transfer the land to Creelman?  **L:** s 23 🡪 indefeasible  **A:** As registered owner, R has good safeholding and marketable title and can therefore transfer the land to Creelman. Only a shareholder or AG could disturb R’s title. |

## 2. Indefeasibility and Adverse Possession

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| Land Act s 8 Person may not acquire by prescription/adverse possession interest in Crown land or in land as against gov’ts interest in it. |

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| Limitation Act  1. Does not apply to court proceedings enforcing local judgment for possession of land or based on existing aboriginal and treaty rights. 2. Does not apply to claims for possession when disposed in circumstances amounting to trespass or claims by someone in possession of property. 3. Rules of equity not overridden. 4. **Except as specifically provided by an Act, no right/title in or to land may be acquired by adverse possession.** This Act does not interfere w/ rights/titles acquired by adverse possession before July 1, 1975. |

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| LTA ss 23, 171 – Adverse Possession thing 23: After indefeasible title registered – title adverse to it cannot be acquired by adverse possession **except in case of first indefeasible title registered** (NB: so adverse possession is not totally gone).  171: Application for adverse possession not accepted unless permitted by LTA and supported by declaration of title under *Land Title Inquiry Act*. |

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| Property Law Act s 36 **– Court’s Power to Fix Encroachment – Extremely important** If a building or fence encroaches on land, court may:   1. grant an easement for a period of time (combined w/ compensation), 2. vest title to land encroached in owner of land encroaching (combined w/ compensation), or 3. order owner to remove encroachment |

* B/C court has wide discretion; it is important that you as an advocate make a compelling narrative as to why they should bless you with their God-like powers.

## 3. Statutory Exceptions to Indefeasibility

### (a) LTA s 23(2)(d) – Leases

Lease/agreement to lease will be **treated as registered** for up to 3 years **even though it’s not registered**, as long as there is actual occupation. Leases longer than 3 years must be registered – **based on total term**, not initial term of lease (e.g. 2 years w/ option to renew for 2 years must be registered as such).

### (b) lTA s 23(2)(g) – Charges and Other Entries

Lien has priority over all judgments, executions, attachments and receiving orders recovered, issued or made after that date.

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| Carr v Rayward (1955) (6.11) **R:** Builder’s lien (in fact any charge) is effective even if filed after sale so long as another statute allows it. Must be per statutory requirements (45 days from completion of work in case of BL). Allowed by *LTA* 23(2)(g)  **NB:** Why does this apply with AT in *Skeetchesten?*  **F**: Plumber did work for EIFS owner. Owner sells to D. Plumber registers builder’s lien on CIT of D.  **I:** Does lien registered after-sale encumber the title of the new owner without notice?  **L:** *LTA* 23(2)(g)  **A:** In Alberta, prior registration governs claim of CIT holder over mechanics’ lien. In BC, clause (g) excepts mechanics’ liens registered after CIT application; prior registration does not give a title free of liens. |

* Statutes that might give rise to these rights:
  + *Builder’s Lien Act*
  + *Court Order Enforcement Act*

### (c) LTA s 23(2)(g) – Boundaries

### (d) LTA s 23(2)(i) – Fraud

**(i) Forgery**

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| LTA s 25.1 - Void instruments – interest acquired or not acquired  1. Person who acquires land by registration of void instrument does not acquire interest on registration. (NB: Reaffirms 23(2)(i), but only in terms of a void (think forged) instrument (*non est factum*) – **not in respect of a fraudulent instrument 🡪 fraud without forgery = voidable**) 2. BUT transferee named in instrument who acquired interest in **good faith and for valuable consideration** is deemed to have acquired interest on registration. 3. AND transferee named in instrument who is RO (registered owner) of interest and acquired it in good faith and for valuable consideration is deemed to have acquired interest on registration (retroactive).    * (2) and (3) apply ***only to instruments transferring FS estates***   What this section does is if you take pursuant to a **void** interest you don't get the interest that you are purporting to take. BUT because of 2 and 3 *there is an exception built in for an EIFS* acquired in good faith and for valuable consideration*.* In this case then A gets the assurance fund.  R: **S 25.1(1) only applies nemo dat to ‘void’ as distinct from voidable transactions.** |
| Gill v Bucholtz (2009) (6.28.1) **R: *Nemo dat* preserved in respect of charges which originated by void instrument.**  **F**: Fraudster transfer’s P’s EIFS to GG (same name). GG grants a mrtg to Bucholtz, who advanced $40. 000 to GG, negotiated 2nd mortgage with corporate D. P found out and filed caveat. **TJ ruling**: P can be restored to title BUT title would remain encumbered by the two mortgages because to require the mortgagee to search good root of title undermines the purpose of the land title system  **I:** Is P encumbered by mortgages?  **L:** *LTA* 25.1, s. 23(2)(i), s. 26(1), *Credit Foncier*  *Gibbs*: if a real person is on title fraudulently but grants a mortgage to a *bona fide* lender = valid encumbrance  **A:** 23(2)(i): indefeasibility of EIFS does not extend to fraudulently registered title. 25.1(1) and (2): EIFS is indefeasible despite fraud if bonafide purchaser for value.  Unlike in *Gibbs*, BC Statute does not extend indefeasibility to mortgages or other charges. As held in *Credit Foncier*, s 26: those acquiring charges are *deemed* to have acquired them, i.e. **rebuttably presumed**. The exception for the bonafide purchaser for value does not apply to 26(1) and therefore the Act preserves *nemo dat* in respect to charges. |

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| First West Credit Union v Giesbrecht (BCSC 2013) **R**: Fraudulent misrepresentation might render the transfer voidable, but until it has been set aside, the transfer stands as valid.  **NB**: BCCA rejected TJ reasoning that forgery is distinct from fraud and that *Gill* does not apply to voidable as distinct from void mortgages.  Court emphasized the distinction b/w other types of fraud that render a transaction voidable as distinct from forgery that renders a transaction void. S.25.1(1) only applies *nemo dat* to ‘void’ as distinct from voidable transactions. In *Gill,* the transfer that preceded the mortgages was ‘void’ for forgery, rendering the transfer and the mortgages based on it void also under s.25.1(1).  In *First West* h/w, petitioner claimed hi was victim of fraudulent misrepresentation regarding the effect of a transfer of land from a company to G. G did not purchase the land for consideration pad to company. G became the registered owner and mortgaged it to the credit union. But since the petitioner was an investor in company claimed was deprived, petitioner himself had never owned land and had not been deprived of land, and therefor had no right under s.23(2)(i). As transfer from company to G had not been set aside, the petitioner could not claim it was ‘void’ as required by s.25.1(1).  **Shepard**: The effect of void and voidable is the same. Someone claiming an EIFS will keep their title if they took under either. But someone claiming a charge will lose it in either case.  **Pavlich**: The effect is different. If it is void, someone claiming an EIFS will keep their title if they took under either. Someone claiming a charge with lose if taking under a **void** instrument but not a **void** instrument. |

**(ii) Notice of Unregistered Interests**

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| LTA s 29 – Effect of notice of unregistered interest (2) **Except in the case of fraud in which he or she has participated**, a person contracting or proposing to take from a registered owner   1. a transfer of land, or 2. a charge   ***is not affected by notice*** (express, constructive, or implied) of an unregistered interest affecting the land or charge other than   1. an interest for which registration is pending, 2. a lease not exceeding 3 years w/ actual occupation under the lease, or 3. the title of a person against which the IT is void under s. 23(4) (that is when IT is reg’d for 1st time and person already in occupation by adverse possession)   (3) Person in subsection 2 is also not affect by a financing statement registered under the *Personal Property Security Act*, regardless of notice (express, implied, constructive).  (4) The fact that a person who is contracting with a registered owner under subsection (2) has knowledge of a financing statement registered under the *Personal Property Security Act* is not evidence of fraud or bad faith for the purposes of subsection (2). |

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| Hudson’s Bay Co v Kearns and Rowling (1895) (6.30) **R**: Gives effect to s 29. Unregistered charge does not encumber the title of a bonafide purchaser for value without notice.  **F**: D1 was registered owner of EIFS. D1 owed P $800, and assigned mortgage to P. D1 delivered CIT to P’s solicitor but mortgage wasn’t prepared for another 15 months. In interim, D1 sells title to D2 for low low price, who registers. D2 registers after finding title was unencumbered in registry.  **I**: Does an unregistered charge bop off the title of a BPFV?  **L**: *LTA* s 29.  **A**: D2’s EIFS is unencumbered. D2 didn’t have notice of P’s mortgage and did not participate in fraud as required by 29(2)(c). |

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| Vancouver City Savings Credit Union v Serving for Success Consulting Ltd (2011) (6.34) **R:** In order to prove equitable fraud (to stop s.29 being used to disregard unregistered interests) one must show there was knowledge AND dishonesty (eg. attempt to use the statute against common morality) in regard to those interests.  **F:** P forecloses on property whose owner had defaulted, wants to kick out D in foreclosure, using s.29 to disregard D’s unregistered 5 year lease. D says this is equitable fraud so s.29 should not allow disregard of D’s interest.  **I:** Does it take more than knowledge to amount to equitable fraud which can stop s.29 being used to disregard unregistered instruments?  **A**: Law requires more than just notice of unregistered interests in the property - knowledge isn’t enough. In order to prove equitable fraud there must also be some circumstance to either take the matter out of ordinary course of business, or show some clear intention to use the statute to defeat the respondent’s interests in circumstances so contrary to common morality that it would be inequitable for the court to allow P the protection of s.29. |

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| McRae v McRae Estate (1994) (6.51) R: Under Torrens system, if a title is registered (with notice) with an “in trust” notation, no further interest may be registered or be able to defeat the trust unless authorized by the instrument that created it, and so the trust may still be performed.  R2: you are imputed to have the knowledge of what was in the register before you went on title.  Comment: Had FJr.’s wife’s interest been an in rem right (registered interest in land), instead of a personal right (money from the estate) would this have been different?  F: Fraser’s will to his wife with title “in trust”, remainder to children; Mrs Fraser willed it to son (FJr.) without “in trust” notation. FJr. left it then to bro, sis, wife. Bro/sis found out about Fraser’s transfer, wanted all of it. Wife appealed.  I: If “in trust” notation is not carried forward, is trust still performed?  A: FJr. found to have notice of trust, therefore is not an innocent third party. With that notice, the trust is not defeated due to the Torrens system saying that only the authorizing instrument (or courts) can register interests or defeat trust when an “in trust” notation may be found. |

# B. Registration: Charges

## 1. Meaning of Registration

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| LTA s 180 – Recognition of trust estates (1) Personal rep’s or trustee’s title may be registered, but particulars of the trust should not be entered in register.  (2) Registrar must add endorsement identifying the estate to the register (interests in beneficiaries- highlight )  (3) Registrar may add endorsement containing ‘in trust’ in registering trustee’s interest, w/ folio number.   * Everything that qualifies the EIFS equitably is regarded as registered (everything on the trust instrument)   (4) Trust instrument must be filed w/ the registrar w/ application for reg  (5) Certified copy of trust instrument can serve purpose for (4) if original is required outside BC. (6) Copy has same effect as original.  (7) **Transfer/mortgage etc. of a land w/ an “in trust” endorsement per ss. 2/3 cannot take place unless expressly authorized by law/instrument or by order from Supreme Court.** |

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| Dukart v Surrey (District) (1978) (6.56) **R**: If “in trust” notation on registered title and accompanying memorandum detailing easement exists, the easement laid out under the trust instrument will be registrable and therefore   1. not subject to be erased upon tax possession of land. 2. Treated as registered   **F**: Subdivided beach in trust, created easements for holders to enjoy beach, including foreshore reserves. A holds subdivided parcel. R acquires foreshore through tax possession, wants to build on foreshore, A seeks injunction.  **I**: Are easements created under trusts validly registrable and are they erased when land is acquired through tax possession?  **A**: *LRA* does not define “registration” exactly. S 276 *LRA* says registered easements not erased when land is acquired through tax possession. s.180 says that easements may be created under trust instrument if “in trust” noted on registered title with an accompanying memorandum detailing the easement. |

## 2. Indefeasibility?

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| LTA s 26 – Registration of a charge Registered Owner of a charge is **deemed (i.e. rebuttably presumed – does not give indefeasibilty as w/ EIFS)** to be entitled to the estate, interest or claim created or evidence by the instrument in respect of which the charge is registered. Subject to other registered charges.   * Mere fact of registration says nothing about a charge’s validity; charge can still be void. |

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| LTA s 27 – Notice given by registration of charge Registration in effect gives notice to world of your claim.   * If the charge is on there, people can’t claim they didn’t know that |

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| Credit Foncier Franco-Canadien v Bennett (1963) (6.64) **R**: s 26 of the *LTA* creates the presumption that the registered owner of a charge actually holds that charge, but that presumption can be rebutted by evidence of earlier fraud.  **F**: D registered as owner of EIFS. A forged a mortgage for D’s land. A assigned the mortgage to AS, who assigned the mortgage to P. P ensured that mortgage was registered (it was) and wrote to D, claiming they owed payments. D refused to pay. P tried to foreclose.  **I**: If a charge, which originated fraudulently but was transferred to the current owner by a valid instrument, is registered, is it indefeasible?  **L**: *LTA* s 26 (registration of charges & their indefeasibility), interpreted by comparison with s 23  **A**: s 26, which says that if your charge is registered, it is deemed to be yours, should not be read as saying this ‘deeming’ is conclusive. s 26 creates a rebuttable presumption, which is that the registered owner owns the charge. This presumption can be rebutted by evidence of earlier fraud. This is evident when we compare s 26 to s 23, which makes FS title indefeasible. s 23 says registration is ‘conclusive evidence’ of ownership, whereas s 26 does not. This means *nemo dat* still applies in these circumstances. |

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| Canadian Commercial Bank v Island Reality Investments Ltd (1988) (6.67) R: *Crédit Foncier* reasoning only applies if fraud goes to the root of the interest. If an interest in land (including a charge) has a valid root, registration is conclusive evidence of its validity.  (The fraud here does not rebut the deemed entitlement of P to the interest, in this case there was no fraud involved in the creation)  NB: D could likely claim from assurance fund.  **F**: PME is registered owner of EIFS. PME granted ILACC a (1st) mortgage on the property. PME granted a 2nd mortgage to D. D registered the mortgage. P was potential 3rd mortgagee. P refused to advance funds until D’s mortgage was paid off (making P 2nd mortgagee). PME’s lawyer registered P’s mortgage and **registered a forged discharge of D’s (2nd) mortgage**. P advanced funds to PME on the strength of the discharge. PME’s lawyer could not be found. PME declared bankruptcy—there is only enough money to pay one of P and D.  **I**: Whose mortgage has priority, P’s or D’s?  **L**: *Crédit Foncier* + *LTA* s 26 (distinguished)  **A**: The *LTA* generally eliminates the application of *nemo dat*, but an exception is made where the document of title relied upon is a fraudulent transfer. If *nemo dat* applied in this instance, D would win, since PME had no interest to give to P. However, unlike in *Crédit Foncier*, this mortgage began validly—the transfer itself involved no fraud. P was a bonafide purchaser for value, and finding against them would mean that the *LTA* does not protect mortgagees who acquired their interest from the registered owner legitimately. POLICY: this would go against the purpose of the *LTA*. |

## 3. Priorities

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| LTA s 28 – Priority of charges based on priority of registration If 2+ charges on register, charges have priority according to date received by registrar (not date executed), unless contrary intention is provided by instruments creating the charges.  Makes importance of registration clear. |

# Chapter 7: Failure to Register

# A. The General Principle

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| LTA s 20 – Unregistered instrument does not pass estate Except as against the person making it, an unregistered instrument does not pass estate unless registered. This does not apply to leases not exceeding 3 years when there is actual occupation. |

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| Sorenson v Young (1920) (7.1) **R**: Unregistered interests cannot be enforced unless trying to enforce them against the person who made it.   * If tried today could have argued:   + s 29 🡪 If you could show (1) D had notice and (2) had fraudulent intent (per *Woodwest* and *Vancouver City Savings*), then P would likely win.   + Proprietary Estoppel   **F**: P owned 2 lots. Sold lot 1 to R, reserved an easement. Easement not registered. R sells to D. For 4 years, D let P use. D then erected fence blocking the way.  **I**: Does the unregistered easement encumber D’s EIFS?  **L**: *LTA* s 20  **A**: Fuck naw. As the easement is unregistered, it is unenforceable against D, who purchased in good faith and for value when the CIT was clear of encumbrances. It would have been enforceable against R, (“except against the person making it”) per *LTA* s 20. |

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| LTA s 181 – Interest or right reserved to transferor **On application to register as owner in fee simple** under an instrument which (a) keeps estate/interest w/ transferor; (b) enters restrictive covenant or; (C) condition, exception, reservation, easement, statutory right of way or other right in the land is reserved… then the **reservation etc. will be registered as a charge against the new indefeasible title ON APPLICATION**. So have to notify the registrar of the reservation and get a new title with charge. |

# B. “Except against the person making it”

## 1. Judgments.

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| Yeulet v Matthews (1982) (7.4) R: Unregistered interests prevail against later registered **judgments** even if unregisterable. (Even though not registered, “except as against the person making it,” means that they apply against the debtor and therefore the creditor, b/c creditor can only take what debtor has).  F: D held an equitable mortgage in son’s EIFS (**not registerable).** P then registered judgement against son.  I: Which prevails between registered judgement and a “first-in-time,” unregistrable, equitable mortgage?  L: *Jellett v Wilkie et al.:* An execution creditor can only sell the property of his debtor subject to all charges, liens and equities: the same as it was in the hands of his debtor.  *Entwisle v Lenz:* Legislature intended to convey to the creditor only what the debtor has in a real or beneficial interest*.*  *Bank of Hamilton v Hartery:* Criticizes *Entwisle* Mortgage was granted b4 judgement but registered after*.* First in time to register wins.  *Gregg v Palmer* Criticism of *Entwisle* from *Bank of Hamilton* was nullified by two statutory changes:(1) Addition of “except as against the person making it”(2) Series of sections which requires the creditor to justify her priority to the Registrar*.* Took this to mean that the priority is unregistered interests (first in time)> judgments  A: P argued that the above case law is only applicable if the interest is actually registerable. Equitable mortgage *can* lead to some registration (if they foreclose they can register EIFS). PLUS judgement only entitles you to an interest in what the debtor actually *has*. If before you register judgement, there is an encumbrance (even if unregistered) on their interest, you can only get what they have! |

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| Court Order Enforcement Act s 86 – Registration of judgments after October 30, 1979 Just *Yeulet v Matthews* |

## 2. Other Interests

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| L&C Lumber Co Ltd v Lungdren (1942) (7.12) R: Unregistered interests are enforceable against the person who made them. When an interest is **assigned** from B to C, C “becomes” B in a contractual sense and therefore can enforce the unregistered interest because they are privy to the K which created the interest.  F: D sold *profit a prendre* to M. “Come chop my timber” she said. He looked at her puzzled. “Okay” he said and then he signed the documents. Anyhow the point is that he had *profit a prendre*. M then assigned this to P. D was notified. *Profit a prendre* never registered under either name. D said no way to P chopping her timber.  I: Is the unregistered interest enforceable by P against D?  A: S 20 does not rule out unregistered titles – its real purpose is to protect purchasers and encumbrancers for value w/o notice, and enable them to rely on state of register when they search the title. D gave real right to M. M assigned this to P. For the purposes of their legal relations, P=M. Therefore “except as against the person making it” applies to P and D. Still enforceable. A cannot take from C what A has transferred to B and B has transferred to C |

## 3. “Prohibited Transactions”

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| International Paper Industries v Top Line Industries Inc (1996) (7.15) R: If an interest is not in compliance with LTA, or is illegal, may be valid, but not registrable under *LTA* or enforceable even against the person making it.  F: P sold building to D. As part of deal, D moved building to D’s property and leased a portion of land to P.  They did not get the subdivision approved, just laid it out in the K. THEREFORE ILLEGAL/UNREGISTERABLE (no good safeholding marketable title). Lease was for 51 months, therefore must be registered (LTA). Had seeming right of endless renewal.  P wanted to renew lease, D denied that it had agreed to a perpetually renewable lease. **D then said lease was unenforceable/void because of non-compliance w/ s 73 LTA.**  I: Does this unregistered lease avail against the person making it (thus making it possible to enforce renewal clause)?  L: s 73 *LTA*  - Need to subdivide under compliance of part 7 of *LTA* A: Purpose of s 73 is to ensure that municipal authorities retain control over subdivision. S 73 says that instruments executed in contravention do not confer rights of registration, but does not say that they are void (still valid under K law). There was no duty on the parties to bring the lease in compliance with s 73. Found that, on particular facts, it would defeat the purpose of s 73 to give a license. Therefore, parties have a lease that is valid, but not registrable under *LTA* or enforceable even against the person making it. |

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| LTA s 73.1 – Lease of part of a parcel of land enforceable (Changes Top Line) A lease or an agreement for lease of a party of a parcel of land is *not unenforceable between the parties* by reason only that  (a) the lease does not comply w/ this Part (requiring subdivision) or  (b) an application for the registration of the lease may be refused/rejected. |

# Chapter 8: Applications to Register

General Rule: Procedural delays at the LTO should not harm the priority of your interests

* However, if the larger ratio in *Breskvar* is accepted*,* then there is an exception in the case of application for EIFS vs application for lesser interest.

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| Rudland v Romilly (1958) (8.10) R: In the case of a bonafide purchaser for value, registration is effective from the time the application to register is made.  F: D executed deed to AL for consideration. AL executed deed to P covering the same land. By the time the latter took place, AL is the registered owner and D is alleging fraud on AL’s part. D placed a lis pendens on the title, but not until P had already applied for registration.  I: When is registration effective?  L: *Land Registry Act*, s 44 (OLD)  A: s 44 of the *LRA* specifies that ‘registered owner’ includes someone who has applied for registration and became registered later. |

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| LTA s 155 – Application for registration of charge  1. If title to an EIFS has been registered/registration has been applied for, a person not entitled to be registered in FS, claiming to be RO of a charge must apply for registration of the charge, and if registration of the FS has been applied for by an application that is pending, the application for registration of a charge must await the result of the application for registration of the FS. |

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| LTA s 198 – Registration of person creating charge (8.17) An instrument purporting to create a charge on land executed by a person who is entitled to be registered as owner of the fee simple must not be registered unless that person has first been registered as the owner of the fee simple. |

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| Breskvar v Wall (1971) (8.17) R:   1. Who equity favours is generally dealt with by priority in time, but not where one party has prejudiced its claim by negligent conduct. 2. There is the suggestion (perhaps *obiter*?) that an application to register an EIFS takes precedence over an application to register a *LP* (or anything less than EIFS)*,* even if second in time. *Application* for EIFS trumps *application* for lesser interest.    * S 155 bolsters this.   F: 2 claimants (B & A), neither registered. B executed blank TF to Petrie. Petrie registers W. W sold to A. B applied for caveat/LP. Land registered by A. Caveat registered.  I: Does the rule that ‘an application to register is treated as registration itself’ apply equally to registration of all kinds of interests in land?  L: *LTA* s 23(2)(i) (indefeasible title not so indefeasible when the registered owner got on title by fraud in which he participated)—would have made W’s title voidable if he had not sold the land to a bonafide purchaser for value.  *Frazer v Walker*—used in passing to establish that registration of a void instrument is effective, as title is derived from registration itself, rather than from the transferor’s title.  A: Bs could claim against W in equity, but A is a bonafide purchaser for value, which makes it first in equity in this case. Bs’ (equitable) interests dealt with entirely in equity—A has equity on its side because Bs were negligent in executing a blank TF |

# Chapter 9: The Fee Simple

# A. Creation

## 1. Common Law

At CL, in order to create FS by inter vivos transfer it was necessary to use words ‘to transferee and his/her heirs’.

* **‘And his heirs’** are **words of limitation**: indicate quantum of interest in land which is transferred – do not confer any interest on B’s heirs.
* ‘To B’ are **words of purchase**: indicate the person to whom interest is transferred.

In case of a **will**:

* if words of limitation were used, courts gave effect to them – more flexible.
* In absence of words of limitation, courts would sometimes construe doc as conferring FS on a beneficiary if that was clearly testator’s intention.
* Law w/ respect to creation of equitable interests was in general same as that w/ respect to wills – look at intention.

## 2. Statute

Leg has made CL rules more relaxed. **You can use any words provided your intention is clear.**

Now that leg has relaxed CL rules, confusion as to meaning of ‘heirs’ because it can be words of limitation OR words of purchase (Note: *Tottrup* clears this up in most situations – it will generally be seen as words of limitation)

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| Property Law Act s 19 – Words of transfer  1. Sufficient to use words ‘in fee simple’ to transfer FS 2. Transfer of land w/o words limiting the interest transferred **passes the FS or the greatest estate/interest in the land that the transferor has power to transfer**, unless otherwise expressed. |

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| LTA s 186 – Implied covenants  1. Transfer of a freehold estate for valuable consideration and in the approved form… operates to transfer the freehold estate of the transferor to the transferee whether or not it contains express words of transfer 2. If transfer does not contain express words of limitation – FS 3. If transfer contains express words of limitation – give effect 4. If transfer contains express reservation/condition – give effect 5. Cannot transfer estate greater than the estate in respect of which the transferor is the RO.   **Remember Ch II: newer words of transfer do the work of the old Gandalf words** |

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| WESA s 41 – Property that can be gifted by will A gift in a will takes effect according to its terms and, subject to terms, **gives to the recipient every legal/equitable interest in the property that the will-maker had the legal capacity to give.** |

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| Tottrup v Ottewell Estate (1969) (9.3) **R**: Legislation does not get rid of old terms, just expands scope of possible language. When language is clear surrounding circumstances will not be used to change the meaning of will, and terms of art can still apply.  **F:** Brother Frank granted to brother Fred ‘balance and residue of all my estate, both real and personal… to hold unto him, his heirs, executors and administrators absolutely and forever’ (**those are the classic common law words of limitation**). Fred had will that gave same interests to Frank. Fred died before Frank. P is only daughter and sole next of kin of Fred – claims whole of residue – argues that ‘heirs’ = words of purchase. D claims ‘heirs’ = words of limitation – residue should be divided amongst next of kin of Frank.  **I:** Who are beneficiaries entitled to take residue of estate?  **A**: **‘His heirs’ are traditionally words of limitation.** Duty of a Court of construction: first construe will; if meaning is clear, surrounding circumstances cannot be looked at to throw a doubt upon that meaning, or to give will a different meaning. Here meaning of will is clear.. “and his heirs” are unambiguously words of limitation because that is exactly what they have traditionally been.  Just because there is now statute, doesn’t mean the old words are no longer good. Words of limitation should NOT be used as words of purchase. |

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| WESA s 42 – Meaning of particular words in a will  1. Subject to contrary intention appearing in a will. 2. A gift of property in a will to persons described as ‘heir’ or ‘next of kin’ of the will-making or of another person takes effect as if it had been made to the persons among whom and in the shares in which the estate of the will-maker or other person would have been divisible if the will-maker or other person had died w/o a will. |

## 3. Problems of Interpretation – Repugnancy

**Two possible outcomes:** (1) Gift to first person named prevails (EIFS); gift over fails as repugnant; (2) Gift over prevails; person first named takes life estate only.

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| Re Walker (1925) (9.9) R: Look to the language of the will to decide whether the testator intended to give an EIFS, life estate, or life estate with right of encroachment.  F: Husband leaves wife almost everything in his will but adds: “...should any portion of my estate still remain in the hands of my said wife at the time of her decease undisposed of by her such remained shall be divided as follows…”—**known as a “gift over”**  I: Court must ascertain which part of testamentary intention prevails when there is repugnancy.  A: Cases fall into 3 classes:   1. gift to person first named prevails and gift over fails as repugnant; 2. first named takes a life-estate only, and so gift over prevails (**for this, wording must very specifically indicate LE!**) 3. Scenario 2 but holder of life estate has option to encroach, and what ever is left goes to remainders.   Words ‘undisposed of’ do not refer to a testamentary disposition by the widow but refer to a disposal ***by her*** during her lifetime. Gift to her must prevail and attempted gift over must be declared to be repugnant and void. **Ability to alienate is an incident of every estate in fee simple.** |

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| Re Shamas (1967) (9.12) R: When construing a will, must look at the entire document to figure out the intention of the testator and if the intention is clear, the words/form/language of the will are not important.  Note: This seems to be distinguishable from *Tottrup/Walker* b/c testator wrote will himself, as opposed to an instance where a lawyer wrote will and can be assumed to know proper form/language.  F: Shamas and widow ran store. S’s will said: ‘All will belong to my wife until the last [child] comes to the age of 21 yo. If my wife marries again she should have her share like the other children, and if not, she will keep the whole thing and see that every child gets his share when she dies.’ Widow sold store but retained property [encroached]. Did not remarry and all children reached 21.Widow argues that either (a) she received an EIFS or (b) she received a LE with right to encroach.  I: What type of interest does the will confer on the Widow?  A: In construing wills, the *entire* document and the relevant surrounding circumstances are looked at to determine the interest intended to be granted. in this case, the will as a whole expressed the intention that the estate vest in the children in equal shares *subject to* the widow’s life interest. The widow’s life interest falls into the third category set out by Middleton in *Re Walker*: she has the power to encroach on the estate until her death (or remarriage). B/c Widow would obviously have to encroach to support family, such encroachment basic principle of trusts, even though not clearly stated in language of will clearly implied through surrounding language. |

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| Cielein v Tressider (1987) (9.17) **R**: To determine whether T intended to give a LE or an EIFS, look to which words of limitation are clearer. If one part uses words of limitation for EIFS, and the other, while suggesting intention for LE, does not contain words of limitation for LE, go with EIFS.  **F**: T had 5 kids with first wife and 1 with second wife, R. T used a standard form will but added some clauses himself. One of these clauses said R was to have all the assets including a specific property. It then said “all the rest and residue of my estate I devise and bequeath to R” and then that if the land was sold, the proceeds would be divided equally among the children.  **I**: Is this a repugnant restraint on alienation, or an indication that R only gets a LE?  **L**: *Blackburn v McCallum* cited for what a repugnancy is  **A**: Most important question is whether T had the clear intention to dispose of the property to R absolutely. There are no signs (i.e., no *words of limitation*) of an intention to only give R a LE, so the clause is an invalid restraint on an absolute gift. |

# B. Words Formerly Creating a Fee Tail

## 1. The Common Law

### (a) Technical Words of Limitation

Fee tail created when an inter vivos transfer used words of limitation ‘**heirs of his/her body’;** *PLA* s 10 abolishes fee tails, turns them into EIFS.

### (b) Informal Words of Limitation

**Examples: ‘his issue’; ‘his offspring’; ‘his seed.’** Failure to use technical words resulted in creation of only life estate (**Now EIFS, co-ownership**)

In case of wills and equitable interests, courts did not insist on use of technical words of limitation. Tried to give effect to intention of testator or person creating trust.

* **For inter vivos**: the ambiguous words are generally understood as words of purchase
* **In a will**: could be words of purchase or words of limitation
* If words of limitation, then they create a fee tail which will be converted to FS (*PLA* s 10)
* If unsure – use the rule in *Wild’s Case*

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| Wild’s Case F: Dispositions that follow form ‘to A and his issue’ or ‘to A and her children’ or ‘to A and the male heirs of his body’.  R: ‘A’ is word of purchase. ‘His issue’ and ‘his children’ would be words of purchase in inter vivos transfer. BUT wills are more flexible. Obiter: Legally rebuttable presumption: **Court will look to see whether A had children at the time the will was made – if at that date A had children, then the words ‘her issue’ or ‘her children’ would be construed as words of purchase. If at date the will was made A had no children, then words would be construed as words of limitation [creating a fee tail].** |

Use w/ *Tottrup*: Presumption in *Tottrup* can be rebutted if there are children.

# Chapter 10: The Life Estate

# A. Creation

## 1. By Act of the Parties

If a life estate is to be created, it **should be done expressly.** If nature of estate being created is not expressly stated then, due to statutes, presumption is that transferor/testator is disposing of greatest estate he owns (s 19(2) of *PLA* and s 41 of *WESA*).

## 2. By Statute

### (a) Introduction

At CL a widow was entitled to a life estate in 1/3 of her deceased husband’s realty (dower). Widower was entitled to life estate in all of wife’s realty (curtesy). Both abolished in BC in 1925.

### (b) Wills, Estates and Succession Act (WESA)

Former ***Estate Administration Act*** **s 96** gave to surviving spouse, in addition to any other rights on intestacy, all of household furnishings and a life estate in spousal home. Problems: spouse’s life estate was not marketable and impossible to value; surviving spouse not always able to afford to maintain home. Under ***WESA*** **s 21,** surviving spouse continues to receive household furnishings. Abolished surviving spouse’s beneficial life estate in spousal house – provides an option whereby surviving spouse may opt to purchase spousal home from deceased’s estate – **ss 26-35.**

### (c) Family Law Act

To obtain a court order resolving issue of which spouse should move out of family home, a spouse may apply to BCSC for an order for temporary, exclusive right of occupying spousal home, which would compel other spouse to leave – ***Family Law Act*** s 90 - Merely a temporary measure, pending division of family assets.

### (d) Land (Spouse Protection) Act

Married or unmarried spouses can make a filing on register of family home that is in name of other spouse, to prevent RO from selling it w/o notice to spouse. On death of other spouse, filing spouse acquires a life estate.

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| Land (Spouse Protection) Act s 4 – Application of the WESAIf an entry has been made on title, s 161(2) of WESA applies to devolution of homestead. A personal rep holds homestead in trust for an estate for the life of surviving spouse. |

# B. Rights of a Life Tenant

## 1. Occupation, Use and Profits

Holder of legal life estate is entitled to occupy and use property and to retain any profits arising from its exploitation. Equitable life tenant can benefit from property but not necessarily occupy it.

## 2. Transfer Inter Vivos

Life estate may be transferred inter vivos.

## 3. Devolution on Death

e.g. to A for the life of B - If A dies before B and A is intestate, the estate for the life of B devolves on intestacy, like other real property, until B dies. A may dispose of the estate for the life of B by will to a beneficiary, who will hold the life estate until B dies.

# C. Obligations of a Life Tenant to those Entitled in Reversion or Remainder

## 1. Waste

Those entitled in reversion or remainder are entitled to have the land pass into their possession, on the termination of the life estate, in substantially the same form as it was when received by the life tenant.

### (a) Permissive Waste

Passive conduct which permits decay. Life tenant is not responsible for this, unless expressly made so by terms of instrument creating the interest.

* Ex: Mould

### Voluntary Waste

Waste that results from activities of life tenant – life tenant is responsible for this.

Remedy can be damages or injunction.

Nature of voluntary waste may be stated in one of two ways:

1. Voluntary waste is any act of life tenant which causes permanent damage to land;
2. Voluntary waste is any act of life tenant which changes nature of land, whether for better or for worse.

**Doctrine of ameliorating waste** – even though a change for better is technically waste, if it improves land it will not render life tenant liable in damages, and usually an injunction will not be awarded.

* Ameliorating waste ***will*** leave life tenant liable if (1) it increases the burden on the remainder-person (2) or it is diametrically opposed to that which the transferor wanted for the property

Four categories of voluntary waste:

1. Timber – life tenant may not cut timber, unless the estate is a timber estate – at CL a life tenant could cut timber for repairs;
2. Mines and minerals;
3. Demolishing or altering buildings;
4. Changing the use to which the land is put.

### (c) Equitable Waste

Creator of a life estate may expressly permit life tenant to commit voluntary waste – life tenant is said to be **unimpeachable for waste** – “grant of life estate w/o impeachment for waste”. BUT Court of Equity might still restrain life tenant from making an unconscionable use of apparent legal right to commit waste at will.

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| Vane v Lord Barnard (1716) (10.7) R: Without impeachment of waste does not expand to **equitable waste**. Court granted injunction (stop wasting and repair). **Equitable waste:** Equity might still restrain LT from making unconscionable use even when LE is without impeachment.  F: Father gave himself a life estate (LE) without impeachment of waste and gave the remainder to his son. Father got mad at his son for some reason or another and he stripped the castle of the lead, iron, glass doors and boards |

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| Law and Equity Act s 11 – Equitable waste An estate for life without impeachment of waste does not confer and is deemed not to have conferred on the tenant for life a legal right to commit equitable waste, unless an intention to confer that right expressly appears by the instrument creating the estate. |

## 2. Liability for Taxes, Insurance, etc.

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| Mayo v Leitovksi (1928) (10.8) R: A life tenant owes a fiduciary duty to the remainderman, and this includes paying property taxes.  F: P owner of EIFS in remainder of a farm, to which D has a life estate; D acquired EIFS when daughter and son in law purchased tax title to farm and transferred their interest to D, thereby acquiring EIFS in remainder from P.  I: Is the transfer of EIFS from P to D through sale of tax title made available on account of D’s failure to pay taxes void/voidable?  A: Owner of LE cannot fail to pay taxes, and then take advantage of a tax sale to purchase EIFS and defeat interest of remainderperson in EIFS; Rule in general is that a life tenant cannot impair the estate in remainder, and conversely, remainderman cannot act in any way that affects LE (p. 10:11) A life tenant is under an obligation to prevent forfeiture of the reversion as well as their own life interest by paying the property taxes. |

# Chapter 11: Co-ownership – Concurrent Estates

# A. Types of Co-ownership

## 1. Coparcenary

At CL, on intestacy the heir of deceased succeeded to his real property. In absence of male heir, property descended to female relatives, and if there were more than one in same degree of kinship, they succeeded jointly as coparceners. Impliedly abolished in BC by *Estate Administration Act*.

## 2. Tenancy by the Entireties

At CL, when land was transferred to a husband and wife in circumstances where, if they had not been married, they would have taken as joint tenants, they took as ‘tenants by the entireties’. Title regarded as a single and indivisible title, survivor taking title to property absolutely. Abolished by *Married Woman’s Property Act* and *Property Law Act* s 12 – “A husband and wife must be treated as 2 persons for purposes of acquisition of land.”

## 3. Tenancy in Common

When 2+ people, by virtue of interests they own, are simultaneously entitled to possession of property. Apart from unity of possession, the law treats TICs in same way as single owners.

Parties share in ownership and their shares are specified (i.e. 40%) – ability to use the property **is not** contingent on shareholding.

Court will presume equal shareholding if not specified in creation of TIC.

\* Equity prefers to find TIC over JT.

## 4. Joint Tenancy

**Right of survivorship** is most significant characteristic: A and B may convert joint tenancy into tenancy in common during their lifetimes BUT if one dies before it is converted, then the survivor becomes absolute FS owner.

### The Three Unities (FOUR ACTUALLY)

Each is essential to existence of JT (**in addition to unity of possession**). If one is missing, co-ownership is TIC not JT.

**(i) Unity of Title** – co-owners must derive their titles from same instrument.

**(ii) Unity of Interest –** interests of joint tenants in property must be same

**(iii) Unity of Time** – interests of co-owners must all vest simultaneously

* (iii) does not apply in a transfer to uses, nor in a gift by will – if an interest arises in either of these 2 ways, and if the other unities exist, a joint tenancy will be created

# B. Creation of Concurrent Interests

## 1. Common Law

* If unity of possession plus all 3 unities are present, **CL presumption is that a JT** has been created (*Re Bancroft*) **PLA s 11: statutory presumption is TIC.**

**Grantor can indicate an intention to create a TIC** even if all of unities exist – may be done expressly or by use of ‘words of severance’ (impliedly), i.e. language indicating creation of specific shares in undivided title e.g. ‘to A and B in FS equally; 1/3 to A and 2/3 to B’.

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| Re Bancroft, Eastern Trust Co v Calder (1936) (11.4) F: T’s will stated … 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.  I: Does P’s share go to P’s sister J, or to estate, or to children of P? Did M’s children inherit as joint tenants or tenants in common?  L: **Anything which in slightest degree indicates an intention to divide property must be held to abrogate idea of a JT and to create a TIC.**  A: No words such as ‘equal’ qualified bequest to M’s children. No indication of intention to divide income between children of M that could be held to abrogate idea of JT and create CIT.  C: Share paid to P1 should now go to surviving sister J – M’s children took as JTs. |

## 2. Equity

**Equity prefers TIC** – in absence of express declaration as to beneficial interests, equity may treat JTs at law as TICs of beneficial interest, so that although at law survivor is entitled to whole estate, he will hold in part as trustee for reps of deceased ().

1. If 2+ persons bought land and provided $ in unequal shares, then treated as TIC in equity. If $ was provided in equal shares, then treated as JTs at both law and equity.
2. In commercial transactions, prima facie partners would hold property as tenants in common in equity.
3. When 2+ persons lent money on security of mortgage of land and borrower transferred land by way of mortgage to lenders, prima facie at law lenders held as joint tenants. BUT if one of mortgagees died, Equity would compel surviving joint tenant to hold legal title arising as result of operation of right of survivorship on trust for deceased’s estate and survivor.

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| Robb v Robb (1993) (11.8) **F:** Mrs R bought a co-op with her money but she put the shares/lease in her name *and* her husband’s name (Mr.R). Intention showed joint tenancy. Later, Mr R transferred a piece of his property to Mrs R to pay her back for shares/lease. Mr R died. Mr R’s kids are arguing that it was a tenancy in common rather than a joint tenancy so they could claim an interest in the property. If shares and leasehold interests were owned by Mr and Mrs R as joint tenants, they go to Mrs R by right of survivorship. If they were owned as tenant in common, they pass to husband’s estate and are subject to a potential order varying husband’s will.  **I:** Is Mr. R’s interest a joint tenancy or tenancy in common?  **L:** **s.11** (applies only to EIFSs)  **A:** Equity stipulates that there is a presumption for tenancy in common where the parties both contribute money to the purchase of property in unequal shares. Mr R’s transfer of the property to pay Mrs R back for the shares/lease should not be seen as an unequal contribution. It is not the courts job to participate in retroactive accounting if the two parties acted contrary to the equitable presumption of tenants in common. Also, the evidence suggests the two values were roughly equal. The statutory presumption for tenancy in common in section 11 of the *Property Law Act* does not apply because it only applies to **EIFS.**  **C:** Mrs R and Mr R held co-op as joint tenants. Mrs R gets interest to property due to right of survivorship. |

Purchasing a co-op:

**(a)** building is owned by company whose shares are owned by all of ‘owners’ of suites;

**(b)** company grants long term leases to each of its shareholders for suites that they have ‘purchased’**;**

**(c)** ‘owner’ pays purchase price for shares and lease at time they are acquired.

## 3. Statute

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| PLA s 11 – Tenancy in common (2) If, by any instrument... land is transferred or devised in fee simple, charged, or contracted to be sold... to 2 or more persons... **they are tenants in common unless a contrary intention** appears in the instrument.  (3) If the interests of the tenants in common are not stated in the instrument, they are presumed to be equal. |

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| PLA s 25 – Partnership property treated as personalty If land or any heritable interest in it becomes partnership property, it must be treated as “personal or movable” (i.e. tenants in common) and not “real or heritable” (i.e. joint tenancy) unless a contrary intention appears. |

## 4. Transfer to Self and Co-ownership

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| Property Law Act s 18 – Rules for transfer and ownership to oneself (1) **A person may transfer land to themselves** in the same manner as to any other person; joint tenant may do so as well.  (2) Trustee or personal rep may transfer land to themselves in their personal capacity.  (3) **Transfer by joint tenant to himself of his interest in land is deemed always to have same effect of severing joint tenancy as transfer to stranger.**  (4) RO may transfer to themselves jointly w/ another.  (5) Owner of a FS or a registered lease (or sublease) may grant themselves an easement or restrictive covenant for benefit of other land that he owns in FS/leases/subleases, but must be consistent w/ interests held by him as grantor and grantee at time of grant.  (6) Corp that owns land in FS and is member of class of persons under s 218 of *LTA* may grant/reserve right of way over land to itself.  (7) Common ownership and possession of dominant and servient tenements does not extinguish an easement.  (8) Common ownership and possession of burdened and benefited land does not extinguish a restrictive covenant. |

# Registration of Title

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| LTA s 173 – Several persons interested in registration Registrar may effect registration of a FS at the instance of several people who together are entitled to it. |

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| LTA s 177 – Registration of joint tenants Registrar must add the words “joint tenants” if the 2+ people registering under 173 are joint tenants. |

# D. Relations Between Co-owners

Same whether it is joint tenancy or tenancy in common.

## 1. Share of Profits

Cotenants have no right to share in one another’s labour profits so long as profits do not arise through exclusion of one cotenant from using the property (*Spelman*)

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| Spelman v Spelman (1944) (11.15) **F:** Wife (W) and Husband (H) jointly owned property. W left H and the property of her own accord. While she was away H continued a rooming business and kept the profits. W suing for profits.  **I:** If one joint tenant chooses *not* to occupy the property, can that tenant claim profits from occupying tenant?  **A:** It is not unjust to allow one tenant to claim the profits/rents because he occupies the property when the other has left of his/her own choice. Similarly, If the occupying tenant lost money, he could not ask the non-occupying party to pay for part of the losses: he took the risk.  **R:** A and B are joint tenants. A autonomously chooses not to occupy the space. B continues to occupy the space and makes a profit in some way. A does not have a right to any of the profits. |

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| PLA s 13.1 – Actions of account (1) Actions in nature of CL action of account may be brought and maintained by one joint tenant or tenant in common against the other as bailiff for receiving more than comes to that person’s **just share or proportion**, and against executor or administrator of joint tenant or tenant in common. |

## 2. Share of Expenses

Remaining co-owner has no right to request that other co-owner contribute to expenses, unless remaining co-owner is willing to pay rent for his possession (*Spelman*).

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| PLA s 13 – Remedy of co-owner An owner who, because of default of another RO, has been called on to pay and has paid more than proportionate share (of mortgage money, rent, interest, taxes, insurance, repairs, a purchase money installment, a required payment under *Strata Property Act* or under a term or covenant in the instrument of title or a charge on the land, or a payment on a charge where the land may be subject to forced sale or foreclosure) may apply for relief under s 14 against other ROs, one or more of whom is in default. |

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| PLA s 14 – Court may order lien and sale (1) Upon hearing an application under s 13, the court may do one or more of the following:  (a) order that the applicant have a lien on the defaulting owner’s interest (for the amount recoverable)  (b) order that the defaulting owner pay the amount recoverable within 30 days or their interest will be sold  (c) allow the applicant to purchase the interest in the land of the defaulting owner at the sale, or some other order  (2) the amount recoverable is the amount owed at the time the application is made based on how much would be owed if the debt had been allowed to accumulate until that time  (4) surplus money from a sale must be paid into court to credit the defaulting owner |

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| Mastron v Cotton (1926) (11.20) One joint tenant, unless ousted by his co-tenant, may not sue another for use and occupation. BUT when joint tenancy is terminated by a Court order for partition/sale, Court may in such proceedings make all just allowances and should give such directions as will do complete equity between parties. |

# E. Termination of Co-ownership

## 1. Severance of Joint Tenancy

**Severance** = conversion of joint tenancy into tenancy in common.

**Joint-tenancy may be severed in 3 ways**: (1) An act of any one of persons interested operating upon his own share may create a severance as to that share; (2) A joint-tenancy may be severed by mutual agreement; (3) There may be severance by any course of dealing sufficient to intimate that interests of all were mutually treated as constituting a tenancy in common (*Sorenson*)

### (a) Destruction of one of the unities

- Joint tenancies are severed by execution and delivery of deed of transfer – does not require registration of title to sever (*Stonehouse*)

- Effect of a joint tenant alienating share to stranger is to convert joint tenancy into tenancy in common (*Stonehouse*)

- The right of survivorship inherent in a joint tenancy operates automatically, taking priority over any will (*Sorenson*)

- Creation of trust may sever joint tenancy (*Sorenson*)

- Declaration of one party of intention to sever joint tenancy w/o any other act and w/o acceptance by other JT does not sever tenancy (*Sorenson*)

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| Sorenson Estate v Sorenson (1977) Ratio: Joint tenancy can be severed into a tenancy in common with a declaration of trust transferring equitable title to a beneficiary. (For examples of ways in which it cannot be severed, see analysis.)  F: Husband (H) and Wife (W) own lots as joint tenants. W given lease for life on a lot and money to care for disabled son. W is dying, wants to set aside estate for son. W releases transfer and trust documents to explicitly sever joint tenancy, transfer property to son, and declare herself to be trustee for her son as beneficiary.  I: How can joint tenancy be severed? What are ways it cannot be severed?  L: *Williams v Hensman:* 3 ways to sever joint tenancy.  (1) Express act by any tenant, who is at liberty to dispose of his own interest to sever it from the joint fund (losing right of survivorship).  (2) Mutual agreement from joint tenants.  (3) By inference: any course of dealing to intimate that interests of all are mutually considered as constituting tenancy in common  A: Ways in which the courts CANNOT infer joint tenancy to be severed:  (1) Selling part of the total interest. (2) Leasing the property to one joint tenant for life. (3) A mortgage by one joint tenant. (4) A declaration of severance by one party which is uncommunicated to the other. (5) A conveyance of future interest upon one party’s death. (6) Execution of an incomplete gift. (7) Execution of one party’s will. (8) One party bringing an action for partition that was discontinued with no acceptance by the other party.  Ways in which the court CAN infer joint tenancy to be severed:  (1) Leasing the property to one joint tenant for a set number of years. (2) Execution of all joint tenants’ wills which leave the property to the other (common intention to treat property as severed). (3) A declaration of trust by one party to hold title for a beneficiary as a trustee, therefore giving the beneficiary equitable title.  C: Joint tenancy severed due to wife’s declaration to hold property as trustee for her son, the beneficiary, giving him equitable title. |

## 2. Partition and Sale

**Partition**: physical division of property between co-owners so that each becomes an owner in severalty of a particular part. At CL, co-owners could, by agreement and suitable transfers, physically subdivide property so that each became an individual owner.

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| Partition of Property Act s 2 – Parties may be compelled to partition or sell land (1) All joint tenants, tenants in common, coparceners, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or to sell land, or a part of it as provided in this Act.  (2) (1) applies whether estate is legal or equitable. |

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| Partition of Property Act s 3 – PleadingIn a proceeding for partition it is sufficient to claim a sale and distribution of proceeds, and it is not necessary to claim a partition. |

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| Partition of Property Act s 6 – Sale of property where majority requests it In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if party or parties interested, individually or collectively**, to extent of ½ or upwards** in property involved request court to direct a sale of property and a distribution of proceeds instead of a division of property**, court must, unless it sees good reason to contrary**, order a sale of property and may give directions. |

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| Partition of Property Act s 7 – Sale in place of partition In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if it appears to court that because of nature of property involved, or of number of parties interested or presumptively interested in it, or of absence or disability of some of parties, or of any circumstance, a sale of property and a distribution of proceeds would be more beneficial for interested parties than a division of property, court may  (a) on request of any of interested parties, despite dissent/disability of any other interested party, order a sale of property and (b) give directions |

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| Partition of Property Act s 8 – Purchase of share of person applying for sale (1) In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, if any party interested in property involved request courts to order sale of property and distribution of proceeds instead of division of property, court may order sale of property and give directions.  (2) Court may not do this if other parties interested in property, or some of them, undertake to purchase share of party requesting sale.  (3) If undertaking is given, court may order a valuation of share of party requesting sale in manner court thinks fit, and may give directions. |

* In an application under PPA, court has discretion to refuse to make an order, or to make an order for sale or partition or both as it sees fit

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| Harmeling v Harmeling (1978) R: the Court ought to accept, without qualification, the general statement that there is a *prima facie* right of a joint tenant to partition or put up for sale and that the Court will compel such partition or sale unless justice requires that such an order not be made.  F: Both parties are pensioners with health issues. Mrs. H left to go live with another man (who is more sexually satisfying) and now requests the Court to partition/sell the house to which she and Mr. H own in joint tenancy.  I: When does the court force partition/sale?  Holding: The words “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, however, court thinks 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, and you know, his projectors + age = more important.  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 equal share for each tenant. The Courts evaluate the nature of the contributions (monetary and equitable) of each tenant to the value of the property. |

### Notes:

A successful application under PPA does not automatically result in an equal share for each tenants – courts evaluate nature of contributions of each tenant to value of property

- In valuing share of a registered co-owner of property who has made significant non-monetary contributions to property, it cannot be case that such a co-owner is entitled to a lesser remedy under PPA than that to which she would be entitled if not so registered

- Word ‘may’ in ss 2, 7, and 8 confers a wide judicial discretion to refuse partition or sale if, in circumstances, justice requires it

# Chapter 12: Future Interests

1. To A + her issue
   * Inter Vivos
     + It will be taken as words of purchase
     + EIFS
       - S 19 *Property Law Act*
       - Joint Tenancy
   * Will
     + If children EIFS co-ownership (fee tail)
       - S 10, fee tail becomes EIFS co-ownership (or the largest estate that the
     + If no children just to A EIFS
2. To A + her heirs
   * Designate the problem: Disposition of the property from \_\_ to A. A is a word of purchase. "his heirs" is either a word of purchase or word of limitation. Classically at common law "his heirs" were words of limitation. *Tottrup* supports that even though s 19 of the property law act says that they are not necessary to indicate EIFS, this does not necessarily turn them into words of purchase. However, they said that if other things in the will indicate that they were meant as words of purchase, they may be treated as such.
3. To A + her children
   * Same as 1
4. To A + on her death to her children
   * + "On her death" was clear enough that it meant a life estate
     + The facts in *Wild's case*!
     + They get EIFS in remained (s 19 *PLA*)

1. To A+ the male heirs of his body
   * This indicates fee tail, but because of s 10 *PLA* it turns into EIFS

# A. Vested and Contingent Interests

Both are property – can be marketed and sold. If uncertain, law prefers early vesting (*Brown*).

## 1. 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’. 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 that is vested in interest:** (a) may be vested absolutely, that is it can never be lost the holder of the estate; (b) it may be vested, subject to divesting [if condition is resolved, then the interest goes to someone else]; (c) it may be vested, w/o there being any prior estate, but w/ a provision which purports to keep the holder of the estate out of possession.

## 2. Contingent Interests

An interest is contingent, i.e. 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 is 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; and (4) in case of a class gift, exact share of each member of class is ascertained.

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| Browne v Moody (1936) (12.4) R: Case creates a presumption of early vesting of a remainder interest after a life estate; the existence of the prior estate (e.g. LE) does not prevent the vesting of the remainder interest. Future interest is vested at death of T.  F: Cl. 5: T vested LE in son (vested interest). On his death it should be divided among her g-daughter (B) and her daughters (M) – remainder interest. Cl. 7: in the event that B or M die before T or T’s son, children of person who dies should take their mother’s interest. TJ ruled that M and B did not take vested interests.  I: When do interests vest? If B or M have interest, what happens if they predecease son without issue?  A: **Postponement of distribution to enable a prior LE to be enjoyed (to let the live with it) has never by itself been held to exclude vesting of capital**.This means B and M get vested interests upon death of T, subject to divestiture if they predecease T’s son. If they predecease son without leaving issue, the interest would pass to their heirs b/c their estate still “has” it. |

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| Phipps v Ackers (1842) (12.7) R: Law favours early vesting, so if enjoyment is postponed, law will prefer to say that interest is vested w/ only enjoyment postponed. When there is a gift to a person when/if a specified event occurs, w/ a gift over to a **determined** **person** if event does not occur: on application of the rule, interest of donee may be treated as vested subject to divesting. |

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| Festing v Allen (1843) (12.7) R: The presence of a gift-over seems to indicate to the court that the interest was *contingent* (contra *Phipps*)  F: Land devised to trustee to hold for Mrs. F for life, and on her death for her children ‘who shall attain the age of 21 years’, w/ a gift over ‘for want of any such issue’. Children took no interest on Mrs. F’s death as they had not reached 21 years.  C: Contingent interest – no gift to anyone who does not answer whole of requisite description.  D: Example of court not favouring early vesting.  **NB**: consider distinguishing *Festing* from *Phipps* on the grounds that in *Festing* the recipient had not yet been determined, where in *Phipps* it had. |

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| Re Squire (1962) (12.8) R: If interested is vested, the rule in *Saunders* applies and B can end trust. If interest is contingent or defeasible or if any other person may, by possibility, be interested in trust, this principle does not apply.  F: Will states “I give, devise and bequeath all the rest, residue and remainder… unto my trustees upon the following trusts…” Property is to be held until gson (B) reaches 30 years, at which point lands should be conveyed to B absolutely. Rental income should be invested until B is 30, and proceeds given to him when he turns 30. If he decides to go to college after turning 18, then his needs should be paid for out of proceeds. If $ runs out, then property should be sold and proceeds paid to him for school.  I: Did property vest upon T’s death, or is it contingent upon B’s reaching 30?  L: ***Saunders v Vautier***: if B meets two conditions, B can end the trust: (1) sui juris: of full legal capacity (19 years of age at least) (2) must show the property (the assets if you like) are fully vested in the beneficiary.  A: Wording in will suggests that preference for early vesting stands. “Upon attaining an age” rather than “if he should attain an age,” which suggests no condition. G gave B entire property. There was no gift over 🡪 lightly suggests that it was vested. Had education fund + right to encroach, suggests he held that interest. |

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| Re Carlson (1975) (12.11) R: Where the intention is clear, the presumption of early vesting can be rebutted.  F: F had 3 kids: C, J, and P. Will stated: 1) to hold the residue of my estate in trust for the education and maintenance and advancement of C. (2) when C turns 21, 90% of the then residue is to be divided equally between C (45%) and J (45%). (3) 10% of what remains at that time is to cover certain of P’s debts. J argues she can get $ now, was vested at death.  I: Are interests vested or contingent upon C turning 21? A: Look first to intention: intention seemed clear to keep residue intact until C turned 21, as executor was to use residue and income for C’s education until that time. |

# B. Types of Future Interests

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| **CONDITIONS** | **LIMITATIONS** |
| **Condition precedent:** you have to meet the condition to get the property – “if”  - ‘Subject to condition precedent’  **Condition subsequent:** you get the property, but you lose it if the condition is met – “but if”  - ‘Defeasible upon a condition subsequent’  (also ‘subject to divestment’ | **Determinable FS**: “to A in FS until A marries B”  - If A marries B, then X/X’s heirs get the possibility of reverter |
| **Words:** If, subject to, on condition that, but if  **so long as x situation doesn’t happen, unless x situation happens, on the condition that the use it this way.** | **Words**: Until, when, as long as  **until this thing happens, so long as this thing is** |
| **Condition subsequent – Right of entry** | **Limitation – possibility of reverter** |

## 1. Common Law Future Interests

### (a) Reversions

Interest that remains w/ transferor who has not exhausted whole of interest by a transfer.

### (b) Rights of Entry and Possibilities of Reverter

**(i) Rights of Entry** - Arises in transferor when he conveys an apparent absolute interest in FS, but adds a **condition subsequent** which will divest interest of transferee in favour of transferor and his heirs (**or a third party**). May arise after any estate (that is defeasible upon condition subsequent). If condition is broken then A, or his successors in title if A is dead, has the right to enter on land and resume possession OR can bring an action to recover possession.

E.g. A to B but if B marries, return to A and her heirs.

**Previously -**  When 6 years had elapsed after the condition has been broken, an action to recover possession is statute barred (*Limitation Act* s 3(6)(f)).

**(ii) Possibility of Reverter** - Arises when transferor creates a determinable FS. E.g. A transfers to B in FS until she is called to the Bar of Province of BC – B has a determinable FS. When B is called to Bar, B’s interest is determined – A’s interest is possibility of reverter. A has to bring action to recover possession unless B voluntarily gives land up. **Cannot go to third party, b/c of Remainder Rule 4 when F/S** (note if it is a determinable LE, the next person holds a **remainder,** *not* a possibility of reverter).

**Previously -** When 6 years have elapsed after the condition has been broken, an action to recover possession is statute barred (*Limitation Act* s 3(6)(f)).

**(iii) Consequences of Distinction**

* Similarities: both subject to Rule against Perpetuities; both can be registered; both subject to 6 year limitation period
* Differences: Qualifications which may be imposed on transferee vary. At CL, both a right of entry and a possibility of reverter could arise only in favour of transferor (BUT see s 8 below).

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| Property Law Act s 8 – Disposition of Interests and Rights  1. A right of entry affecting land… may be made exercisable by any person and the persons claiming under the person.   NB: This kills Rule 3, and nullifies Rule 4 in respect of F/S defeasible upon condition subsequent |

### (c) Remainders

**(i) Defined and Illustrated**

Future interest in respect of which possession is postponed until some prior freehold estate expires and which does not operate so as to prematurely determine prior estate.

* **If a condition precedent is added to remainder, it becomes a contingent remainder as distinct from a vested remainder**. E.g. A transfers to B for life and then to C if C marries D.

**(ii) Creation – Restrictive Rules**

1. **Remainder must be supported by a prior estate of freehold created by same instrument as remainder** (e.g. ‘A transfers to B and his heirs if B reaches 21 years of age’ is void)
   * NO GAP IN SEISIN

1. **Remainder must be limited so as to be capable of vesting, if it vests at all, at latest at moment of termination of prior estate of freehold** (e.g. ‘A transfers to B for life, remainder to first child of B to reach 21’ is void if child of B is not 21 when B dies [**but will not be void ab initio**] – if possible, law will presume that transferor does not intend for there to be gap in seisin).
   * IF the remainder person reaches the age before the death of the life tenant, then the remainder becomes vested.
   * IF the person dies before the other person hits the age, the non-vested remained *becomes* ***void*** because courts can't deal with a gap.

1. **Remainder is void ab initio if it takes effect in possession by prematurely defeating the prior estate of freehold** (e.g. "A transfers to my daughter for life, but if she marries C to my son and his heirs" is *void*) – this rule is eliminated by s 8(2) of *Property Law Act*.

1. **Remainder after a FS is void** (because of s 8(2) of *PLA* you cannot have a determinable FS w/ a possibility of reverter in remainder, but you can give a FS w/ a condition subsequent/right of entry).
   * Can now give a F/S upon a condition subsequent giving the right of entry to the third party

* For all except rule 2 it made them *void ab initio*
  + **Rule 2 you can wait and see**
    - If you waited and it was fucked, ***natural destruction of the remainder***

**(iii) Destructibility of Contingent Remainders**:

May be destroyed after it has come into existence because person entitled to it is not qualified to take possession of property on termination of prior estate of freehold.

Natural termination: if person entitled to remainder cannot take possession at time that prior estate of freehold terminates, then there is a gap in seisin and remainder is thereby destroyed – title goes back to grantor.

## 3. Equitable Future Interests

Created in express trusts.

### (a) The Governing Rules

You can break w/ impunity all rules that constrain creation and operation of future interests at CL.

### (b) Creation of Equitable Interests

Normally have to be expressly created by vesting legal title in trustees and creating equitable interests behind that legal title. BUT *Re Robson*: **all interests created by will are to be treated as equitable.**

Creating a trust allows circumvention of CL future interest rules – trust continues w/ endless stream of trustees holding legal title. No gap in seisin or shifting interest.

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| Re Robson (1916) (12.38) R: Any interest created by a will is at least nominally equitable because of s. 162 of *WESA* and this means that common law rules do not even apply. Future interests under trusts = equitable remainders, therefore no gap in seison b/c legal title of remainder remains with the trustee.  F: A testator devised land to the use of his daughter Helen for life and on her death “to the use of such of her children as shall attain the age of 21 years”. Testator dies. Helen dies. Two of her four children are 21.  I: Whether the children who had reached the age of 21 took to the exclusion of those who had not reached the age?  L: An English law similar to **s.162**: personal representative gets all the interests immediately on death of the testator and acts as a trustee  A: The executors of a will hold real estate as trustees for the person by law beneficially entitled to it. Any interests created by the will are therefore to be treated as equitable interests. Immune from common law remainder rules. |

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| 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) A personal rep to whom land devolves hold it as a trustee for the beneficiary. Beneficiary has same power as a person beneficially entitled to personal property to require a transfer from the personal rep. |

* The above confirms that interests in will are equitable interests.

# C. Attributes of Future Interests

## 1. Protection of the Land

In case of equitable interests, right of owner of future interest is generally against trustee, who if not protecting land is probably in breach of trust.

## 2. Alienability of Future Interests

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| 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 w/ interest in land; (b) right of entry on land, immediate or future, vested or contingent. |

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| WESA s 1 – Definitions **Estate**: property of deceased person  **Personal property**: every kind of property other than land  **Property**: land and personal property |

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| WESA s 41 – Property that can be gifted by willA 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. |

# D. Registration of Future Interests

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| LTA s 172 – First estate of inheritance necessary to registration of FS If 2+ persons are owners of different estates/interests in same land; (a) first 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. |

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| 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. |

# Chapter 13: Conditional and Determinable Interests

**A person disposing of property can impose ‘qualifications’ on interests created in one of three ways: (1) By making vesting of an interest subject to a condition precedent; (2) By attaching to an interest a condition subsequent; (3) By creating a determinable limitation.**

**Four bases upon which contingencies can be rendered void**

1. **Remainder Rules (CL only)**
2. **Restraint on alienation**
3. **Uncertainty**
4. **Public Policy**
5. **Rule Against Perpetuities**

# A. Crown Grants

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| Land Act s 11 – Minister may dispose of Crown land In a disposition of Crown land, minister may impose terms etc. they consider advisable, including that (a) applicant must personally occupy and reside on Crown land for a set period; (b) applicant must do work and spend money for permanent improvement of Crown land within required period. |

# B. Uncertainty

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| Noble v Alley (1951) (13.2) R: A condition must be such that a court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding estate was to determine. Such a condition would be void for uncertainty.  **F**: Racial covenant that the land could not be alienated to any one of Jewish, Hebrew, Semitic, Black person  **I**: Is this racial covenant valid?  **A**: Rand J: does not qualify as restrictive covenant because the restriction must touch and concern the land. So need to see if it is a legitimate condition or if it is void for uncertainty. **Rule to be applied: the condition must be such that the court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding estate was to determine.** Fails this test.  Estey J: A restrictive covenant needs the same type of precise and distinct language as a condition. The general language as to this restrictive covenant fails to indicate the intention of the parties as to the **amount of degree** of the prohibited race or blood that might be permitted. Fails for uncertainty. |

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| MacDonald v Brown Estate (1995) (13.41) R: Whether T’s purpose, aim, object or motive was pure inducement to divorce or whether it was protective is the question to be determined w/ each case being decided on its circumstances, nature of provision, extent to which it would naturally tend to induce divorce or separation, motives of settlor, etc  F: T directed that share of estate was to be held on trust until niece becomes widowed/divorced from her present husband at which time capital should be paid to her for her own use absolutely. Annual income from capital should be paid to niece during her lifetime/until conditions of absolute vesting are met. If she dies w/o being widowed/divorced from present husband, then her share should go to grand-nephew.  C: Provisions here are supportive and not coercive/punitive/intending to induce divorce. |

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

- *Re Neeld* (1962): clauses 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

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| Jarman Rules – Consequences of Invalidity  * At CL:   + If void condition precedent = whole transfer is void   + If void condition subsequent = transfer is absolute and the condition is removed. * At Equity:   + If condition precedent is originally impossible or illegal, then transfer is absolute (*Mal um prohibitum)*   + 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 w/ CL and holds the gift and condition void (*Malum um se*).   In applying the Jarman rules, use CL rules in *inter vivos* transfer and the equitable rules are applied in case of testamentary transfer. |

# 13. Human Rights Legislation

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| Canadian Charter of Rights and Freedoms S 15 – Equality before and under law and equal protection and benefit of law  (2) Does not apply to affirmative action programs  S 32 – Charter applies to gov’t of Canada |

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| Human Rights Code RSBC 1996 s 8 – Discrimination in accommodation, service and facility Cannot discriminate in provision of accommodation, service or facility. Does not apply to discrimination on basis of sex if it relates to maintenance of public decency or to determination of premiums/benefits under Ks of life/health insurance. Does not apply to discrimination on basis of physical/mental disability if relates to determination of premiums/benefits under Ks of life/health insurance. |

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| Human Rights Code RSBC 1996 s 9 – 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. |

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| Human Rights Code RSBC 1996 s 10 – Discrimination in tenancy premises Cannot discriminate in right to lease space or in lease terms/conditions. Does not apply if: space is to be shared w/ another person; as it relates to family statute/age if unit is reserved for persons 55 years or older; or if rental unit is in a prescribed class of residential premises; as it relates to physical/mental disability if rental unit is designed to accommodate persons w/ disabilities and conforms to prescribed standards. |

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| LTA s 222 – Discriminating covenants are void **Covenant that, directly or indirectly, restricts sale, ownership, occupation or use of land on account of the sex, race, creed, colour, nationality, ancestry or place of origin of a person, however created…is void and of no effect.** Registrar may cancel a discriminatory covenant on application. If registrar has notice that covenant is void due to discrimination, it may cancel it w/o application. |

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| Canada Trust Co v Ontario (Human Rights Commission) (1990) (13.46) F: In 1923 trust scholarship was restricted to awards for only white (and mostly male) protestant recipients of British descent.  I: Should a trust with discriminatory restrictions be invalid for public policy reasons? A: Charitable trusts that are restrictive through conditions precedent are only void for uncertainty if it’s clearly impossible for any mentioned class to qualify. **This is a charitable trust which is void on ground of public policy to extent that it discriminates on grounds of race, religion and sex.** Discrimination is against public policy, developed through case law (progression from *Noble* -> *Bhadauria)*, human rights legislation, *Charter*, government policy declarations. This is important for public/charitable trusts, but may not be for private ones. R: Discriminatory restrictions can render public/charitable trusts invalid for public policy reasons  C: **Trust is not void, but restrictions are.** Majority court of appeal said the **trust** **not void** because the restrictions were valid at time of creation. However, conditions now contrary to public policy so use discretion (cy-près) to void all discriminatory restrictions, and maintain the charitable trust. Minority finds **trust void** on basis of discrimination, but judicial discretion should be used to save the trust b/c of charitable purpose. |

# Chapter 14: The Rule Against Perpetuities

Fact that equitable future interests are free from the CL remainder rules initially allowed land owners to create long series of future interests, extending into the future (“perpetuity”). The land was virtually inalienable and no person was in a position to transfer FS. Courts responded w/ **rule against perpetuities**.   
BC passed reforming leg in 1975 – *Perpetuity Act*.

Despite the reforming statute, one must still know the modern rule because: (i) the operation of the *Act* is generally only prospective in effect (s 2), (ii) even for the future, the *Act* confirms the rule but provides modifications of its operation in certain circumstances, (see s 6) and (iii) the Act is only applicable where a future interest infringes the rule. Only if it infringes the rule will the leg operate to potentially save the future interest from being void in whole or in part.

**Steps:** (1) Future interest that is contingent? (2) Does interest violate modern rule against perpetuities? If no – valid future interest. (3) If interest might vest outside perpetuity period – void at CL. (4) Apply remedial provisions in order set out in s 3 to see if interest can be saved.

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| Perpetuity Act s. 2 – Application of Act The act applies only to instruments taking effect after December 31, 1978, including an instrument made in the exercise of a general or special power of appointment after December 31, 1978, even though the instrument creating the power took effect before January 1, 1979. |

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| Property Act s. 6(1) – Rule against perpetuities Except as provided by the Act, the rule of law known as the modern rule against perpetuities continues to have full effect. |

# A. The Old Rule Against Perpetuities (ABOLISHED)

A transfers x to B (who is alive) for life and then to B’s first (unborn) child for life and then to that child’s child for life, etc., etc., etc. - Dispositions beyond the one to B’s unborn child were all void. The rule was reaffirmed in *Whitby v Mitchell*. It applies to both legal and equitable remainders in realty, but it did not apply to personalty.

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| Perpetuity Act s. 6(2) - rule against perpetuities Abolished rule in *Whitby v Mitchell.* |

# B. The Modern Rule Against Perpetuities – “The Rule”

**The Modern Rule against Perpetuities (CL):** The Rule provides that an interest in land is void *ab initio* unless it vests, if at all, not later than 21 years after last **life in being** **at the time of creation of the interest dies**.

* + **“**Lives/Life in being” 🡪 anybody in the world who is alive **at the day** the interest was created (must be alive at the time the interest is created) – can include a foetus. **Also includes any spouse (regardless if they were born at the time or not – “unborn spouse”).**
  + **When is the interest created?** 
    - “Date of creation” for inter-vivos = day the property is transferred.
    - “Date of creation” for Will = date the person (testators) dies.
  + **LIFE IN BEING DO NOT NEED TO WORRY ABOUT 21 YEARS – just descendants of a life in being (who was not alive at date of creation).**
  + **CORPORATIONS/SCHOOLS ARE NOT LIVES IN BEING (s.10) – 80 years from disposition if no lives in being (s.7)**

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

## 1. The Act

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| Perpetuity Act s. 1 – Definitions “in being” means living or **conceived** but unborn  “perpetuity period” the period in which an interest must vest  “power of appointment” any discretionary power to transfer a beneficial interest in property w/o the furnishing of valuable consideration |

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| Perpetuity Act s. 3 – Application of remedial provisions **The remedial provisions of this Act must be applied in the following order: (a) s. 14 (capacity to have kids), (b) s. 9 (wait and see), (c) s. 11 (age reduction), (d) s. 12 (class splitting - ignore), (2) s. 13 (general cy pres).** |

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| Perpetuity Act s. 4 – Rules not applicable to benefit trusts **The laws relating to perpetuities and accumulations do not apply (and are considered to have never applied) to trusts of**: (a) plans, trusts, or fund established to provide pensions, retirement allowances, annuities or sickness, death or other benefits to persons or their surviving spouses, dependents or other beneficiaries; (b) retirement savings/home ownership savings plan registered under the *Income Tax Act*; (c) property donated to a corporation established under the *First Peoples’ Heritage, Language and Culture Act*; (d) property donated to a university or foundation established by a university; (e) any property donated to the corporation established under the *Hospital Act*; (f) any property donated to the corporation under *Health Research Foundation Act*. |

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| Perpetuity Act s. 5 – Application to the government The rule against perpetuities as modified by this Act binds the gov’t except in respect of dispositions of property by gov’t. |

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| Perpetuity Act s. 7 – Eighty year perpetuity period permitted (1) Subject to subsection (2), an interest in property which either (a) expressly or (b) impliedly must vest, if at all, **no later than 80 years after the creation of the interest does not violate the rule against perpetuities** |

* NB: Draftsman may select any fixed period of years, up to max of 80, in leu of period determined by reference to lives in being.
* e.g. To A for life, remainder to his first child to marry, provided he marries within 60 years of my death. – Valid
* e.g. To A for life, remainder to his first child to marry. The perpetuity period for purposes of this bequest is fixed at 60 years. – Somewhat unclear.

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| Perpetuity Act 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. |

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| Perpetuity Act s. 9 – Presumption of validity (‘wait and see’) (1) Every contingent interest that is capable of vesting w/in 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 ss. 11, 12 or 13 becomes void.(2) A disposition conferring a general power of appointment, which but for this section would have been void on the ground that it might become exercisable beyond the perpetuity period, is presumed to be valid until the time, if any, it becomes established by actual events that the power cannot be exercised w/in the perpetuity period.(3) A disposition conferring a power other than a general power of appointment, which but for this section would have been void on the ground that it might be exercised beyond the perpetuity period, is presumed to be valid and becomes void for remoteness only if, and so far as, the power is not fully exercised w/in the perpetuity period. |

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| Perpetuity Act s. 10 – Determination of perpetuity period (Period during which you ‘wait and see’)  (1) If s 9 applies to a disposition and the duration of the perpetuity period is not determined under ss 7, 21 or 22, the **perpetuity period must be determined as follows:**  (a) Look at the people under subsection (2), if any are lives in being (and ascertainable) at the commencement of the perpetuity period, the duration of the period is determined with reference to those lives and no others; and those described in subsections (2)(b) or (c) will be disregarded if the number of persons fitting the description is such as to make it impractical to ascertain the date of death of the survivor;  (b) if there are no lives under para (a), the **perpetuity period is 80 years.**  (2) The persons referred to in subsection (1) are:  (a) Grantor (not in a will);  (b) Beneficiaries or potential beneficiaries;  (i) a person or potential member of a class (class disposition)  (ii) a person who has satisfied some conditions and the remainder may be satisfied (individual disposition to a person taking only on certain conditions being satisfied)  (iii) a member or potential member of the class (special power of appointment exercisable in favour of members of a class)  (iv) if, in the case of a special power of appointment exercisable in favour of one person only, the object of the power is not ascertained at the commencement of the perpetuity period, a person as to whom all of the conditions are satisfied, or some of the conditions are satisfied and the remainder may in time be satisfied, and  (v) in the case of a power of appointment, the person on whom the power is conferred;  (c) a person having a child or grandchild w/in para (b)(i) to (iv) or a person any of whose children or grandchildren, if subsequently born, would by his or her descent, fall w/in para (b)(I) to (iv);  (d) a person who takes a prior interest in the property disposed of and a person on whose death a gift over takes effect;  (e) if  (i) a disposition is made in favour of any spouse of a person who is in being and ascertainable at the commencement of the perpetuity period  (ii) an interest is created by reference to an event occurring during the lifetime of the spouse of a person who is in being and ascertainable at the commencement of the perpetuity period or during the lifetime of the survivor of them, or  (iii) an interest is created by reference to the death of the spouse of a person who is in being and ascertainable at the commencement of the perpetuity period or the death of the survivor of them,  the same spouse whether or not that spouse was in being or ascertainable at the commencement of the period (allows for the very young spouse scenario). |

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| Perpetuity Act s. 11 – Reduction of age (1) If a disposition creates an interest in property by reference to the attainment by any person of a **specified age exceeding 21 years**, and actual events existing at the time the interest was created or at any subsequent time establish  (a) that the interest, but for this section, would be void as incapable of vesting w/in the perpetuity period, but  (b) that it **would not be void if the specified age had been 21 years**,  The disposition must be construed as if, instead of referring to the age specified it had **referred to the age nearest the age specified that would have prevented the interest from being void**  (2) One age reduction to embrace all potential beneficiaries must be made for the purposes of subsection (1).  (3) If in the case of any disposition different ages exceeding 21 years are specified in relation to different persons,  (a) the reference in subsection (1)(b) to the specified age must be construed as a reference to all the specified ages, and  (b) the subsection operates to **reduce each such age so far as is necessary** to save the disposition from being void for remoteness. |

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| Perpetuity Act s. 13 – General cy pres provision (1) If a disposition would be void solely on the grounds that it infringes the rule against perpetuities (apart from the provisions of this section), an interested person may apply to the court who may vary the disposition to give effect as far as possible to the **general intention** of the disposition within the rule against perpetuities (so long as the general intention of the disposition can be ascertained in accordance with normal principles of interpretation and the rules of evidence)  (2) Subsection (1) doesn’t apply if the disposition has been subject of a valid compromise |

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| Perpetuity Act s. 14 - Presumption and evidence as to future parenthood (1) If a proceeding regarding the rule against perpetuities turns on the ability of a person to have kids, it must be presumed  **(a) male 14 years or over can have children**  **(b) female 12 – 55 can have children**  (2) Despite (1), a living person may show evidence that they cannot have kids  (3) If any question is decided based on a person’s ability or inability to have a child, then for any further questions which may arise respecting the rule against perpetuities in relations to that same disposition, the person must continue to be treated as able or unable regardless of subsequent events which have shown the presumption to be erroneous  (4) If a question is decided in relation to a disposition by treating a person as unable to have a child at a particular time and that person subsequently has a child at that time, the court may make an order as it sees fit to protect the right that the child would have had in the subject of the disposition as if that question had not been decided and as if the child would, apart from the decision, have been entitled to a right in the subject of the disposition not in itself invalid by the application of the rule against perpetuities as modified by this Act.  (5) For the purposes of this section, the possibility of adoption or legitimation are not considered but if a person does subsequently have a child by that means, subsection (4) applies to the child.  (6) A trustee or personal representative is not personally liable if  (a) relying on a decision of a court having jurisdiction in relation to a disposition that a person is or will be unable to have a child at a particular time, and  (b) before the trustee or personal representative has notice that that person subsequently has a child at that time,  the trustee or personal representative transfers, delivers or pays over property under the control of the trustee or personal representative.  (7) Subsection (6) does not extend to indemnify a trustee or personal representative in respect of any act done in accordance with the opinion, advice or direction of a court if the trustee or personal representative has been guilty of fraud or willful concealment or misrepresentation in obtaining that opinion, advice or direction. |

* NB: proceeding = presumably there must be a court order before section can operate

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| Perpetuity Act s. 15 – Application to court to determine validity An executor or a trustee of property or a person interested under, or in the validity or invalidity of, an interest in that property may at any time apply to the court for the opinion, advice or direction of the court as to the validity or invalidity with respect to the rule against perpetuities of an interest in that property and with respect to the application of a provision of this Act. |

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| Perpetuity Act s. 16 – Interim income (1) Until an interest presumed to be valid becomes void under section 9, the income arising from that interest and not otherwise disposed of must be treated as income arising from a valid contingent interest.  (2) An uncertainty as to whether or not the disposition will ultimately prove to be void for remoteness must be disregarded. |

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| Perpetuity Act s. 17 - Saving provision and acceleration of expectant interests (1) A disposition that, if it stood alone, would be valid under the rule against perpetuities is not invalidated **only** because it is preceded by one or more dispositions that are invalid under the rule against perpetuities, whether or not the disposition expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent on, the invalid disposition.  (2) If a prior interest is invalid under the rule against perpetuities, a subsequent interest that, if it stood alone, would be valid is not prevented from being accelerated only because of the invalidity of the prior interest. |

## 2. The Operation of the Rule and the Act

### BC Perpetuities Act, by A.J. McClean

Greatest criticism of CL rule has been directed at requirement of certainty of vesting: silly to hold a disposition invalid on basis of one hypothetical set of circumstances which might carry vesting outside period, when on every other hypothesis vesting would take place within it.