Property Law Outline

GENERAL PRINCIPLES OF LAND LAW

THEMES IN PROPERTY LAW

- ***Interests*** which run with the land
- ***Registration*****:** what can be registered? How to register? What happens if there is no registration?
- ***Indefeasibility*****:** title that cannot be defeated, revoked, or made void
- ***Alienability*****:** common law alienability versus Aboriginal inalienability
- ***Possession*****:** exclusivity

THEORIES OF PROPERTY

Property is culturally based, a physical object of value and a collection of enforceable rights and responsibilities. A common law property holder can freely alienate their land either inter vivos (transaction between living persons) or upon death. Multiple owners can own the same piece of property. Property can be he held either publicly or privately.

SOURCES OF REAL PROPERTY LAW

In 1066, common law began in Europe. The First Nations in BC have occupied land since before 1790s when the Europeans came. Reception of English Law into BC occurred in 1858 (***Law and Equity Act, s. 2***) – all British statutes and case law in existence before 1858 are of legal force and in effect in BC. In 1870, BC passed ***Land Registry Ordinance***, giving it the Torrens Land Registration System. In 1871, BC joined Confederation.

JURISDICTION

Property rights are under provincial jurisdiction via the common law, equity and statutes:

- ***Land Act*** deals with Crown land, Crown grants (***s. 50***), the 7 land districts and surveying
- ***Land Title Act*** sets up the BC Torrens land registration system and require that all transfers be made on the prescribed form (Form A) and on a single page (***s. 185***). However, ***s. 185*** does not apply if another statute allows a different form, or the Registrar accepts the different form
- ***Property Law Act*** deals with everything else (statutory provisions with land issues)
- ***Land Transfer Form Act*** (ch. 4–12) deals witH the meaning to be given to words in prescribed forms

REASONS FOR STUDYING THE LAW OF REAL PROPERTY

Land law attempts to do two things:

(1) control the disposition of land
(2) control the use

DISPOSITIONS

Property (realty or personalty) may be disposed of:

1. ***Inter vivos*** (transaction between living persons)**:** sold // gift
2. **On death:** will // according to rules for intestate succession set out in Part 10 of the ***Estate Administration Act*** (in the absence of a will)

USE OF LAND

Restrictions on the use of land fall into 3 categories:

1. ***Common Law:*** From the law of tort: nuisance, trespass and negligence
2. ***Private Arrangements:*** From the law of contracts: protecting interests of a residential neighborhood, for instance (e.g. restrictive covenants)
3. ***Legislation:*** Federal and provincial statutory restraints in connection with air space, environment, particular uses (e.g. agriculture) as well as municipal regulations (e.g. zoning)

SOME BASIC PRINCIPLES OF LAND LAW

Historical background

- William the Conqueror took land unto himself, parceled it out among followers, who then parcelled it out amongst tenants, sub-tenants, etc.
- This process was called sub-infeudation
- King never parted with absolute ownership – this remains theoretical basis in land law today that Crown is an absolute owner and that an individual cannot own land; instead, he can only have an interest in land
- NB: What implications does this have for the aboriginal title claims? Particularly in BC, aboriginal right over territory has never been ceded

TENURE

Crown owns all the land. Two remaining concepts of land ownership:

- **Tenure:** Conditions under which land was held. Only free and common socage exists today (***Tenures Abolition Act, 1660*** abolishes knight service, sergeantry, frankelmoin). Only remaining conditions are forfeiture (treason) and escheat (no heirs)

CORPOREAL AND INCORPOREAL INTERESTS IN LAND & THE DOCTRINE OF ESTATES

Estate: How long an interest in land could be held [freehold vs. leasehold]

Freehold Estates	***Leasehold Estates***
Indefinite, uncertain (almost forever) time period	Certain, ascertainable, limited time period
Exclusive possession	In possession of land (landlord retains some residual possessory rights
Ex. Fee simple, life estate	*Ex. Lease*

Corporeal Interests: right to use and exclusive possession
Fee simple / fee tail / life estate / estate pu autre vie / leashold estates / future interests
Incorporeal Interests: do not confer the right to possession of the land
Easements / covenants / profits a prendre / mortgages

LEGAL VS. EQUITABLE INTERESTS

Legal Interests come through the common law and are good against the world: upon completion (registration) in BC, you receive the legal interest // **Equitable interests** originally came from the Court of Equity, but were not as secure as legal interests: upon signing of the CPS, you receive the equitable interest (as you have entered into a binding contract)

The Use: Equity developed the Use to compel the holder of a legal interest to hold that interest for the benefit of a 3rd party (who held the equitable interest) // Addressed issues such as **English Knights** going off to the Crusades (*knight's-best-friend-holds-legal-interest-for-knight's-wife- who-holds-equitable-interest*), **Monks** and **Inheritance Tax Evasion** (*rich-folks-trying-to-avoid- taxes*) // The Use's survival was guaranteed by **joint tenancy** which ensured that the estate would never come to an end through the right of survivorship

Statute of Uses failed to force equitable beneficiaries to assume legal title as it **did not apply to active uses** (uses with obligations), or **to a person who was seised to his own use** (A is both beneficiary and trustee), or **to a use upon a use** (A holds interest for B for the use of C for the use of D)

The Modern Trust emerged out of the Use – Legal title remains in the **trustee** who holds the land in trust for the **beneficiary** (who holds the equitable interest) // As the legal owner, the trustee can transfer ownership to a 3rd party // **However, the beneficiary can deal with his equitable interest just like any other interest in land //**Trusts are a great way to avoid taxes, for better or worse

FREEDOM OF ALIENATION

Throughout its history, one of the aims of English land law has been to ensure that land is **freely alienable** // to achieve this aim, three requirements must be satisfied: (1) owner for the time being of an estate must have technical **freedom of disposition** // (2) in disposing of property, owner must not have the power to impose excessive **restraints on the freedom of alienation** of any transferee // (3) actual **mechanics of transfer** must be as simple as possible

FREEDOM OF DISPOSITION

The ***Quia Emptores, 1290*** allowed free disposal of land (except that which reverted back to the Crown) // The ***Statute of Wills, 1540*** and ***Tenures Abolition Act, 1660*** also allowed land to be freely willed

RESTRAINTS ON ALIENATION

Direct restraints on alienation could be voided by the courts but rich folks tried to restrict alienation by imposing fee tails (***Statute De Donis Conditionalibus***) and future interests (barred by ***Whidby v. Mitchell; Statute of Uses***) and strict settlements (broken by ***BC Land (Settled Estate) Act***) so that the owner couldn't freely dispose of his land *inter vivos* or by will

MECHANICS OF TRANSFER

Must consider: (1) by what means does the intended transferee (or transferee's solicitor) ascertain precisely what interest in land is held by the intended transferor (establishing **good root of title**) // (2) by what methods or documents (i.e. conveyancing) is the actual transfer of an interest in land effected?

Good Root of Title

A conveyancer could establish "good root of title" upon making a search of title (going back 60 years) // ***Safe-holding title:*** Gives an owner rights against the world in terms of exclusive possession, even though he has no proof of his title // ***Marketable title:*** Gives an owner rights against the world to freely alienate his title, and provides the owner with proof of that title.

Methods of Transfer

Originally, transfer was made by "feoffment with 'livery of seisin' – public, physical delivery of property // ***Statute of Uses*** moved legal title regardless of whether there had been livery of seisin (lease and release, enabled gifts between relatives)

REAL AND PERSONAL PROPERTY

Real Property: can recover the actual subject matter in dispute, the res (thing) Either a corporeal-tangible (right to possession) or incorporeal-intangible (right to the use)

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Personal Property: the judgment is against a person, not related to any specific piece of property, can obtain a money judgment Either chose in possession-tangible (chattels) or choses in action-intangible (intellectual property, money, stocks, etc

- Judgment is against a person, not related to any specific piece of property, can obtain a money judgment // Possession-tangible (chattels) // Action-intangible (IP, money, stocks, etc)

- Historically, real and personal property had **different actions** (*in rem* vs *in personam*).
- Personal property operates under **absolute ownership** (owner is absolute) // No concept of tenures for personal property but courts can create equitable interest in personal property
- Personal property is **freely alienable** both inter vivos and upon death // No registration is required for a completed gift of personal property
- A holder of a life estate in personalty owes a fiduciary duty to preserve the estate for the ultimate recipient (***Re Fraser***, *widow-can't-encroach-on-personalty-if-not-granted-that-right*)

contd >>

RELATIONSHIP BETWEEN REAL AND PERSONAL PROPERTY

TENURE
No longer used

DOCTRINE OF ESTATES
- Does not apply to Personal Property (based on absolute (allodial) ownership)
- **Fungibles:** property consumed in use – not given equitable interests
- Convenient to consider legal and equitable title separately

Re Fraser *BCCA 1974*
Testator died and left his life estate (which consisted of realty and personality) to his wife and wished to give the remainder to a Christian Society after she died. ***Does the widow have the right to encroach on the property?***
- 2 Beneficiaries: **Life tenant** (widow) and **remainder** (Christian Society) – legal title given to person with the life estate (widow)
- **Held:** Widow has a "**fiduciary duty"** to preserve the personality in its entirety for **ultimate recipient or remainder** (the Christian Society) // **Life Interest:** recipient can enjoy revenue derived from the corpus and no more unless **testator expressly or impliedly** indicates an intention that recipient have **power to encroach** // will in this case does not indicate any such intention

ALIENABILITY
- Personality is freely alienable
- Modern selling techniques: have a registry system for personal property like Land Title System

DEVOLUTION ON DEATH
- Both reality and personality can be disposed of by will
- BC: ***Estate Administration Act:*** rules for disposition where person dies intestate (no will)
- Their property reverts to Crown: called "unclaimed goods" – same effect as escheat

THE RELEVANCE OF ENGLISH LAW

Law and Equity Act, s. 2 British law was formally received in BC on November 19, 1858 by proclamation of Governor Douglas (substance of which now appears in ***Law and Equity Act,*** *1996*) // British statutes and case law which were in existence before this date are of legal force and effect in the province // includes: ***Tenures Abolition Act***, ***Quire Emptores***, ***Statute of Uses***

LEGAL CONCEPT OF LAND: PHYSICAL DIMENSIONS

Land is measured on both the **horizontal plane** and **vertical plane.** Horizontal boundaries of land are fixed at the moment of surveying, but can change by **accretion** or **erosion**.

Surveying required in BC (***LTA, s.58***): Surveying assists in giving certainty of ownership as the physical description clearly spells out boundaries of land. Normally, surveying produces a **plan** which divides the land into a lot // block // district lot // section // township // meridian.

Registrar can also accept a **Metes and Bounds description** with or w/o a reference plan (***LTA, s.99***)

Indefeasible title is subject to right of a person to show that land is **wrongly described** (***LTA, s.23(2)(h)***).

No obligation on lawyers to investigate whether the plan and the boundaries of land are correct (***Winrob v. Street***, *lawyer-does-not-obtain-plan*)

Cujus est solum ejus est unsque ad coleum et ad inferos

Common law rule: whomever owns the title to the soil also holds title all the way up to the heavens and down to the depths of the earth // "*To whomever the soil belongs, that person owns also to the sky and to the depths*"

AD COLEUM

An owner has a right in the air space above his land only in the enjoyment of that land, and in preventing anyone else from acquiring a right in that air space (***Bernstein,*** *Eng 1977*)

Owners & leasors who have possessory interests in the building can also have **possessory interests in the airspace** above the building (***Kelsen,*** *Eng 1957*, *billboard-over-building*). Airspace rights extend only up to the "**ordinary use & enjoyment**" of the plaintiff (***Bernstein,*** *Eng 1977*, *aerial-photographer*). **Owner has no property right or legislative jurisdiction in relation to airspace** above his land (***Manitoba,*** *SCC 1980*, *Manitoba-tries-taxing-AC*).

Land Title Act, ss. 138–143: recognizes air space parcels and air space plans

- ***s. 139:*** title to airspace is recognized (can be transferred)
- ***s. 140:*** a grant of an airspace parcel to a guarantee does not allow that grantee to interfere with that grantor's interest in land or remaining airspace parcels
- ***s. 141:*** an owner of an air space plan can subdivide it into air space parcels (each with an indefeasible title)
- ***s. 142:*** Minister of Transportation can grant airspace parcels above highways for power lines, billboards, Skytrain etc.
- **Title*:*** Fee simple owner of airspace parcel receives separate title. Does not normally appear as a charge on the surface landowner in question, but will appear as an easement if one is required to access the airspace // Not contradictory to CL cases // for creating "air space parcels" for apartments

Strata Property Act, ss. 1, 66: permits a person to acquire fee simple ownership in a multi-unit building situated on land that he does not own.

- Grants a strata lot owner an airspace unit
- Each strata lat owner gets a series of rights (access, support, services)
- **Bare land strata plan** permits the subdivision of the horizontal plane only
- **Building strata plan** allocates strata lots to individual owners (vertical)
- **Title:** strata owner's title includes both the condo and a part-interest in the common area. No separate title for the land on which the condo building sits

AD INFEROS

Landowners own elements below surface to an undefined depth subject to:

1. Prerogative rights in the Crown
2. Terms and reservations in the original Crown grant
3. Extensive statutory restrictions

Common Law: Crown retained rights to gold & silver, but remaining mineral rights passed to the grantee

- Post-1897: Base metals reserved to Crown
- Post-1899: Coal & petroleum reserved to Crown
- Post-1951: Natural gas reserved to Crown

Bottom Line: Everything of value stays with the Crown. Check title for mineral rights

Mineral Rights: Fee simple owner of mineral rights appears as a charge on the fee simple surface landowner in question

Mineral Tenures Act allows **free miners** with proper licenses to come onto **public and private land** to **prospect** for Crown mineral rights. You must obtain a license first to prospect on private land (but you don't need permission from actual owner).

FIXTURES

Common law rule: whatever is fixed to the soil belongs to the soil

3 possibilities for personal property: (1) Chattel (2) Fixture (3) Part & Parcel of the Land

Common Law Rule: A transfer of an interest in land included all the fixtures on the land
Fixture: A chattel so fashioned or connected to the land that in law it forms part of the land
Onus of Proof: The opposing party must rebut the ***Stack*** presumptions

Degree of annexation: how well is the object affixed to the building? // consider the how easily it can be removed, how permanent the object is (***Re Davis***, *Eng 1954 bowling alleys aren't fixtures*)

Purpose of the annexation: improve the land or the chattel? (***Haggert,*** 1897)

- If object was attached for better enjoyment of the building, it is a fixture, even if only slightly fixed
- If it was for the better enjoyment of the chattel, it is a chattel (***Re Davis***)

Test from ***Stack v. Eaton*** (*ONCA 1902*)**:**

1. What is the ***degree of annexation***?
   - If a chattel rests on its own weight, presumed to be chattel (not part of land)
   - If a chattel is attached (even slightly), presumed to be a fixture
2. What is the ***object or purpose of the annexation***?
   - **Objective Test:** Would a reasonable person, familiar with customs of the time and place, conclude that the parties **intended** that the item remain a chattel, or become part of the real estate?
   - **Intention** is only important for considering the degree/object of annexation

Chattel becomes a fixture when it is **affixed to the land by more than its own weight** and the purpose of the attachment is for the better use of the building as a building, and not for the better use of the chattels as chattels (***La Salle***, *BCCA 1969 carpet-vendor*) // **Large equipment** may be chattel if you can remove it easily and install it somewhere else // also look at purpose of annexation (and use of object)

Rules for differentiating chattels from fixtures: (***Maple Ridge***, *BCSC 1995*)

- Any item which is **unattached to the property, except by its own weight,** and can be removed without damage/alterations to the fixtures or land that will need repair, is a chattel (ex. premises have been altered to accommodate a large item, the item was built inside the structure and can't be taken out window/door)
- Any item which is **plugged in and can be removed** without any damage or alteration is a chattel (jack itself, electrical outlet are fixtures because its attached to the wall)
- Any item which is **attached even minimally** is a fixture (requiring screws, bolts, plumbing)
- If a piece of equipment is attached to a structure, **part of which could be removed but which would be useless without the attached part** (loses its essential character), then entire piece of equipment is fixture
- Where an item is determined to be a fixture, it may be removed if it can be shown that it is a **tenant's fixture** (may be removed before end of tenancy provided tenant leave premise same as he received them)
- **Purpose test:** mobile home may be resting on its own weight, but was clearly intended to be a fixture

WATER

SOURCES OF WATER RIGHTS:

- **Common Law**: percolating groundwater; water which has never been licensed
- ***Water Act***: Use of flowing water (must be licensed, unless ***s. 42*** exceptions)
- ***Land Act***: Water bed rights
- ***Land Title Act:*** Rights upon accretion or erosion

RIPARIAN RIGHTS

Common Law: Riparian owner had proprietary rights in flowing water and percolating water (groundwater). Acquisition of an interest in water not based on prescription (rights by use) // **Common law rights to water**:

- Water flow, quantity and quality in its natural state
- Use of the water for domestic purposes while on your property, even if your use affects the rights of other riparian owners
- Obligation to not cause injury to other riparian owners by diminishing the flow, quantity or quality of their water.
- Use of the water must be connected to the property where the water exists
- Limited irrigation purposes

Statutory Modifications: In BC, the ***Water Act*** governs your riparian rights. Riparian rights, if any, can only exist for a person lawfully using the water. The only way to acquire the right to the use and flow of water in any stream in BC is under the provisions of the ***Water Act***.

- ***s. 2:*** An interest in water **cannot be acquired via use**
- Original right to use **flowing water** is vested in the Crown.
- ***s. 3***: **Percolating Water** governed by CL, not ***Water Act***. Owner entitled to flow, quantity and quality of percolating water on his property in its natural state (***Steadman***, *spring fed dugout gets polluted*).
- ***s. 5:*** License is required to acquire an interest in water bordering riparian lands
  - **You Snooze, You Lose:** Unused licenses are subject to cancellation.
  - **Priority:** Priorities between licenses are determined by dates of licenses.
  - **Diversion:** License-holders can divert their water to other users and expropriate land on which to construct pipelines to divert water.
- ***s. 42:*** No license required for use if **firefighting**, **domestic purposes, prospecting for minerals**

Remember those common law rights: The ***Water Act*** does not completely cancel out common law riparian rights. A riparian owner maintains the common law rights to clean flowing water on his land until the Crown issues a license removing those rights (***Johnson***, *BCSC 1937, unauthorized diversion of stream from unlicensed domestic use*; ***Steadman***, *BCCA 1989, unlicensed spring-fed dugout gets polluted*). But if the water is used contrary to the licence granted under the ***Water Act***, no enforceable rights exist (***Schillinger***, *BCCA 1979, no-protection-for-polluted-unlicensed-fish- farm-water*).

PERCOLATING WATER

Common Law: the body of rules applicable to riparian owners did not extend to water that percolates, flows through the soil or flows in an unascertained channel – it became property of the first person to draw it lawfully to the surface. But in BC the effect of CL has been affected by both the *Water Act* and the *Water Protection Act*

OWNERSHIP OF THE BEDS OF WATERCOURSES, LAKES, AND PONDS

Non Tidal Riparian Rights (Freshwater)

Common Law: Land bordering on non-tidal **non-navigable** body of water: Riparian owner owns land up until the middle of the water bed // Land bordering on **non-tidal navigable body of water**: No right to water bed

Statutory Modifications: In BC, riparian owners have no rights to the navigable or non- navigable river bed of shore (***Land Act, s.55(1)***) unless specifically granted or where those rights were never taken away (***s. 56***).

Tidal Riparian Rights (Salt Water)

Common Law: Riparian owner had a right of access to the **foreshore** (between high water & low water mark), but no right of ownership

Today in BC: Foreshore is owned by Provincial Crown. Riparian owners have rights to high water mark, which is marked by change in vegetation. Federal Crown owns water beyond foreshore, and the foreshore in 6 harbours: Victoria, Esquimalt, Nanaimo, Alberni, Burrard Inlet and New Westminster.

ACCRETION AND EROSION

Accretion: The process by which land bordering on **a tidal water body** is **increased** by the silting up of soil, sand, or other substance.

Erosion: The process by which land bordering on a **tidal water body** is **decreased** by the permanent withdrawal/retreat of the waters.

Accretion/Erosion applies to both **riparian owners** and **leaseholders**, and to **inland lakes** as well (***Southern Centre***, *Aus 1981, leaseholders-apply-for-accreted-land*). Accretion must be **gradual and imperceptible**. **Human action** (except that of the owner) can produce accretion. Accretion can only be produced by **natural substances,** though those substances need not be carried by water.

Riparian owners are entitled to an increase by accretion, or may suffer a decrease by erosion (***LTA, s. 94-96***). A new plan must be registered to show change in boundaries.

ACCESS BY RIPARIAN OWNERS

Riparian's owner right of access stems from his ownership of land which abuts water. This right of access is **distinct from the public right of navigation** and **does not depend on ownership of the water bed**.

- Right to moor vessels on the shore
- Riparian owner must not interfere with any public right of navigation and cannot impede access by building a structure on the foreshore (***North Saanich***, *1975, Murray- builds-wharf-which-blocks-foreshore*). A pier/causeway is an acceptable means of access as long as it doesn't interfere with foreshore owner's rights.

SUPPORT

Common Law Rule: An owner of land is entitled to have his land left in its **natural plight and condition** without interference by the direct or indirect action of nature facilitated by the direct action of the owner of adjoining land (or subsurface owner) (***Cleland***, *HL 1916, removal-of-sand-causes- lot-to-sink*).

An **absolute right**: Exists **independent of any claim in negligence** (***Rytter***, *BCSC 19745, basement-excavation-causes-building-to-fall*). Properties need not be contiguous to have a duty of support.

Lateral Support: Right of support between adjacent surface owners

The right of support does not extend to actual title in dirt **(*Bremner***, *ONCA 1924, digging-holes-to- steal-sand*). **Limited to land in its natural state**: Does not include support for the additional weight of any structures which have been on the land unless obtained by easement or prescription or unless it can be shown that subsistence would have occurred even absent the buildings on that parcel (***Gillies***, *Man 1952, collapsing-grocery-store*).

Note: loss of lateral support can occur even where the movement is vertical.

Vertical/Subjacent Support: Subsurface owner's duty to support surface owner

Gillies and ***Rytter:*** Limited to land in its natural state, but can be extended to **vertical support for a building by applying the rules of trespass** rather than the support doctrine (because removal of vertical support requires trespass underneath the soon-to-collapse building).

ABORIGINAL TITLE

- **SCC:** under Canadian common law, **existing aboriginal rights** are those rights that have not been extinguished (either through an express or implied act of sovereignty or through a treaty)
- Currently in BC bands are engaged in treaty making with the province but very few treaties have emerged

Delgamuukw v. BC *SCC 1997 – leading authority on* ***rules of recognition of Aboriginal entitlement***
- **Issue:** whether aboriginal rights existed and continue to exist with bands that covered territory in BC
- **SCC** held that there was a constitutional guarantee to aboriginal title and rights
- Judges should look **both** at specific aboriginal evidence for establishing title (blankets, totem poles, oral histories) **and** regular property law to see whether they have a claim to title

ABORIGINAL TITLE VS. ABORIGINAL RIGHTS

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

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

Van der Peet originally held that in order to be an aboriginal right, an activity had to be an element of a practice, custom or traditional **integral** to the distinctive culture of the group claiming right. However, the "integral" requirement was overturned by ***Delgamuukw*** which held that a use of aboriginal lands under title **did not have to be integral** to the group.

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

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

ELEMENTS OF ABORIGINAL TITLE (*Delgamuukw*)

1. ***Sui Generis*** (in a class of itself)**:** different from fee simple, can't be explained by common law rules, distinct from other aboriginal rights – arises where connection of a group with a piece of land "was of a central significance to their distinctive culture" – courts must take into account both common law and aboriginal perspectives (***Delgamuukw***)
2. **Inalienable except to Crown:** cannot be transferred, or sold to anyone other than crown
   - Alienating land would destroy its relationship with the band (aboriginal title 'personal')
3. **Held communally:** cannot be held by individuals, bands have collective right to land, decisions in respect to it are made by entire community
4. **Source of title:** arises from prior occupation of Canada by Indians before the assertion of British Sovereignty; grounded in both common law and aboriginal perspective on land

Aboriginal rights (of which, title is one kind) existing before 1982 that have not been extinguished are **constitutionally protected** under ***Constitution Act 1982 s. 35(1)***

INHERENT LIMITS ON ABORIGINAL TITLE

- Cannot be used in manner **irreconcilable with the nature** of the attachment to the land and the band's relationship with the land which forms the basis of their claim to aboriginal title // *Ex: If band hunted on land they cannot now use it for strip mining*
- Community cannot put the land to uses which would destroy land's inherent and unique value or would threaten their **future relationship** with the land // *Ex: cannot destroy land used for hunting to make a shopping centre*
- **To use land in a way that is limited by aboriginal title**, land must be surrendered to Crown on terms permitting that use; then Crown can put it to that use. *Ex: turn over lands to fed to build shopping mall, Indians get all the revenue.*

RULES OF RECOGNITION: TEST FOR ABORIGINAL TITLE (*adapted from **Van der Peet***)

Aboriginal group asserting title must satisfy following criteria:

1. **Land must have been <u>occupied prior to Crown asserting sovereignty</u>** (shows land was of central significance to the band)
   - Occupation can be established by: bands having laws in relation to land (*ex*: tenure system), exploiting the land's resources, farming, dwellings
   - If present occupation is relied on as proof of occupation pre-sovereignty, there must be a **<u>continuity</u> between present and pre-sovereignty occupation**
     - Just need "substantial maintenance of the connection between people and land
     - Nature of occupation can change
   - ***Occupancy:*** creates a special bond between band and land, makes it a distinct part of their culture; references activities and uses of land by the band

   - Pre-sovereignty aboriginal practices must be translated "**faithfully and objectively**" into modern legal rights/title. However, only aboriginal practices that indicate a degree of possession similar to common law possession will impose aboriginal title (***Marshall/Bernard,*** *Mikma'qs want to fish*)
   - Common law recognizes aboriginal title for groups with pre-sovereignty occupancy who never ceded right to land (Note: **LeBel in *Marshall/Bernard* differed on the test for aboriginal title**: aboriginal title can't simply reflect common law concepts of property and ownership; must reflect diversity of pre-sovereignty land use patterns as well as aboriginal practices)

2. **At sovereignty, that occupation must have been <u>exclusive</u>**
   - Ensures only 1 band can have title over land (though sometimes 2 bands can)
   - Even if other bands were present or frequented the land, this can be still be demonstrated by intention and capacity to retain exclusive control
   - If exclusivity cannot be proved, bands may still be given cite-specific rights to land

JUSTIFICATION FOR INFRINGEMENT OF RIGHT

Aboriginal rights are not absolute (***s. 35(1)***) – can be infringed by federal and provincial laws if:

1. Infringement of aboriginal rights is to further a **compelling and substantial legislative objective**
2. Government must satisfy its **fiduciary duty** with Indians:
   - ***s. 35(1)*** requires the Crown to ensure its regulations **give priority to aboriginal people**
   - **Duty to consult** with aboriginals before making decisions about land
   - **"Fair compensation"** required if aboriginal title is infringed

<u>Legislative objectives justifying infringement</u>: development of agriculture, forestry, mining, and hydro power, general economic development, protection of environment or endangered species, building infrastructure and settlement of foreign populations (*analyzed on case by case basis*)

Mitchell v. MNR *(2001)*

- Courts rejected right of Mohawks to bring goods from US into Canada across the St. Lawrence river without paying customs duties
- There was **not enough evidence of "pre-contact" trade across the border** to support the claim, the trade was incidental, and it was not integral to the Mohawk culture. Even if a right existed it was **incompatible with Crown sovereignty** as it conflicted with control over movement of goods and people into Canada – the right could never be protected by ***s.35(1)***

Test for establishing aboriginal right

Practice, custom, or tradition must be integral to distinctive culture of aboriginal peoples; it must distinguish or characterize their traditional culture and lay at the core of their identity. It must be a "defining feature" of their society, a feature of "central significance" to their culture which "truly made the society what it was"

- Practices vital to the life, culture, and identity of aboriginal society in question
- **Not** practices that are marginal or incidental to the aboriginal society's cultural identity
- Must have been carried on pre-contact and have been continuous

Haida Nation v. BC *(2004)*

- Haida had claimed title to land but not yet resolved negotiations with the government over it. Government issued licenses to a company to cut down trees on the land without consent of Haida. **Issue:** Does government have a **duty to consult** with Haida or accommodate their concerns?

Honour of the Crown (CL Concept):

- Government has duty to consult with Aboriginal people and accommodate their interests – both are essential to reconciliation that ***s. 35*** demands
- **Gives rise to fiduciary duty** if Crown assumes discretionary control over specific aboriginal interests
- **Cannot be delegated to 3rd Parties** (not to company in this case)
- **Honour of the Crown and treaties**: Crown must act with integrity to avoid "sharp dealing". Until treaties are signed, bands are at risk as Crown can exercise acts of sovereignty (in the form of resource disposition). These can render meaningless any subsequent treaty finalized between Crown and a band. This problem is especially significant in BC where there are few treaties in effect

Potential but Unproven Aboriginal Interests:

- Crown Duties start before final settlement of aboriginal title over land
- **Crown may be required to consult/accommodate** pending resolution of claim if Crown has knowledge of potential existence of aboriginal right or title and contemplates conduct that might adversely affect it
- **Duty to consult and accommodate is proportionate to** (and its scope is determined by): (a) strength of case // (b) seriousness of potential adverse effects on the right or title claimed
- **Vulnerability of band** determines how careful the Crown must be in negotiations
- **Held:** Haida had a very strong *prima facie* claim to the land and right to use trees. Government was aware of their claim when issuing the license and were required to consult and accommodate (under the honour of the Crown). By failing to do so, they breached ***s. 35*** and licenses were invalid

R v. Marshall/Bernard *(2005)*

- Narrows broad principles of ***Delgamuuk***
- Court can consider both **aboriginal and European perspectives** when analyzing aboriginal title
- In analyzing claim for aboriginal title, both aboriginal and European common law perspectives must be considered. Court must examine nature and extension of the pre-sovereignty aboriginal practice and translate that practice into a modern common law right

Skeetchestn Band v. BC *(BCSC 2000)*
First case to deal with conflict between fee simple and aboriginal title. *Band had outstanding land claim on 1000 acres of land but registered owner of land wanted to build a resort. Band applied for certificate of pending legislation and caveat. Registrar ruled that claim was not an estate or interest in land and therefore was not registrable under* ***LTA*** *(as per* ***LTA s. 311****). Band appealed under* ***LTA s. 311****.*

- The Torrens system of land registration covers interests in land that have a clear identity recognized by the rules of property law. Aboriginal title is not derived from fee simple interests which are registrable.
- Aboriginal title is *sui generis* and not alienable, it could only be surrendered to Crown – it is likely not safe-holding and marketable. It is not recognized by ordinary rules of common law.
- The Torrens priority system does not accommodate aboriginal title, which was based on occupancy and use of lands prior to the assertion of Crown sovereignty.
- A claimant may not file a LP if his claim is for an unregistrable interest in land; aboriginal title is not registrable under ***LTA s. 23(2)*** as ***LTA*** only deals with EIFS which must be alienable. Aboriginal title is not registrable as an encumbrance.
- Court has not stated how conflicts between aboriginal title and indefeasible title should be resolved
- Need a full hearing to decide whether Charter is violated by preventing registration of the LP
- **Held:** Aboriginal title is not an estate or interest in land registrable under the ***LTA*** (*based on* ***Delgamuukw***) // Registrar's decision is upheld and band is not granted CPL
- Case also shows: **not all interests are registrable // Registrar's quasi-judicial power**

ACQUISITIONS OF INTERESTS IN LAND

CROWN GRANT

- 1866: Provincial crown of BC created and acquired ownership of all land in BC
- 1870: ***Land Registry Ordinance Act*** (***Land Title Act***) sets up present system of land ownership

As a result, all lands in BC are owned by the Provincial Crown, except:
- **Federal Crown lands** (public harbours, national defence lands, Indian reserves, some railway lands
- **Privately owned lands** (though Crown still "owns" fee simple lands)
- **Aboriginal title lands** (granted via treaty, or lands contingent on settlements)

Crown grants normally given for leases / rights-of-way / licenses of occupation (***Land Act***). If you get a fee simple Crown grant (rare), ***Land Act, s.50*** establishes what rights the Crown still holds to your land.

INTER VIVOS TRANSFER

Common Law: Livery of seisin or sealed document/deed required to transfer land

Conveyance/Conveying: An instrument in writing which creates/transfers an interest in land

Today in BC: Transfer of equitable and legal interest takes place by sale/contract via (1) the **Contract/ Executory Stage** (transfers equitable interest) and (2) the **Transfer/Executed Stage**, respectively (transfers legal interest)

THE CONTRACT (transfers equitable interest)

An *inter vivos* transfer often is preceded by a contract under which a vendor agrees to transfer an interest in land to a purchaser.

Contract of Purchase and Sale: A contractual agreement between the vendor and purchaser which results in a legally binding contract.
- **Equitable interest passes:** Vendor becomes a trustee for the purchaser (beneficiary) of the transferred estate. Vendor retains legal interest until completion (registration)
- **Rights of Vendor:** Vendor retains right to possession until purchase money is paid. Vendor has right to purchase money & can sue for breach of contract or impose lien on property if unpaid.
- **Obligation of Purchaser:** Purchaser must pay purchase money. Purchaser has right to sue for specific performance. At common law, purchaser bore risk of loss, but ***s.6 CPS*** holds that vendor bears risk of loss until completion. Purchaser should ensure that insurance begins upon completion, when both legal & equitable interest have transferred.

Law and Equity Act, s. 59 (general rule)
(3) A contract respecting land or a disposition of land is not enforceable unless:
(a) there is, in writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter

Requirements known as the **"Three Ps"** – property, price, parties
- There must be a valid contract [implicit]
- There must be writing that indicates the contract has been made and gives a reasonable indication of the subject matter [***s. 59(7)***: writing can be sufficient even though a term is left out or wrongly stated]
- Contract must be signed by the party being sued or that party's agent

Predecessor of ***s. 59*** was ***s. 1(1) of the Statute of Frauds***
- Contract must be valid
- Writing can take any form
- It must be signed by the party to be charged or that party's agent
- It need not have come into existence to satisfy the statute and it may come into existence after the contract has been entered into
- Two documents, if they expressly or impliedly refer to each other, may be combined to satisfy the requirements of the section

cont'd >>

THE TRANSFER FORM

Completion: Carries out the binding contract reached at the Executory State, and transfers the legal interest from the vendor to the purchaser. Under Torrens, completion = Form A registration.

LTA, s.185: transfer must be in writing, in prescribed form and on single page (Form A).

- ***s.185(2)(a)–(b)*** **(Other Forms):** Registrar has discretion to accept alternate forms and/or historical documents for registration
- ***s.43-45*** **(Witnessing):** Officer's signature required to certify identity of transferor as person named in title (individual > corporation > POA)
- ***s.186(2)*** **(Meaning of Words):** Words of Form A deemed to be words in Part 1 of ***Land Transfer Form Act*** with the meaning given in Column 1 of Schedule 2
- ***s.186(4)*** **(No Express Words of Transfer):** Form A legally transfers the interest even without express words of transfer (X transfer to Y)

WRITING AND SEALING

Property Law Act

- ***s. 15(1):*** Land may be transferred in freehold only by an instrument expressed to transfer the land, but it is not necessary to use the word grant or any other term of art
- ***s. 16:*** Instrument need not be executed under seal

REGISTRATION – PRESCRIBED FORMS

Property Law Act, ss. 4-7: general requirement is that a transferor deliver to a transferee a registrable transfer. To determine what is registrable, look at ***Land Title Act***

PLA additional Form A requirements:

- ***s. 5(1):*** Vendor must provide Form A
- ***s. 5(2):*** Leases over 3 years must be registered
- ***s. 15:*** Transfer need not include word "grant" or other terms of art. Transfer may occur without livery of seisin (no actual entry required)
- ***s.16(1)***: No seal required to effect transfer

Land Title Act (LTA)

- ***s. 39:*** instrument sufficient to pass or create an estate or interest in land is registrable unless the use of a prescribed form is required
- ***s. 185(1):*** a transfer of a freehold estate must be in the prescribed form and on a single page

STANDARD FORMS

Land Transfer Form Act, ss. 2-4

- Form A is required to transfer a freehold estate
  - Includes: ID of applicant, ID of property, market value, consideration, transferor, freehold estate transfer (e.g. fee simple, w/ or w/o conditions), transferees, execution
- Relatively simple form, but qualified by other documents that preserve legal underpinnings

REGISTRATION

This area is normally dealt with under contract law (becomes significant for gifts). **Under common law**, deed takes effect immediately after "signed, sealed, and delivered" (intention given). **Under Torrens system**, there must be a physical act.

According to Part 3 of LTA: unregistered instrument does not pass estate

s. 20 (1): Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land **unless the instrument is registered in compliance with this Act**

- "Except as against the person making it" – between transferor and transferee, registration is not necessary for interest to pass (they have a binding contract)
- *Example:* A (registered owner) –> B (doesn't register) ... A then –> C (does register)
  - Under common law: B is protected by doctrine of ***nemo dat*** (A can't give to C what A doesn't have)
  - Under Torrens system: C's interest prevails // B is vulnerable to a third party – may have claim against A, but no claim against C

GIFTS

Gift: A voluntary & intentional transfer of property from owner (donor) to another (donee) without consideration – is normally not enforceable by donee. Can be transferred *inter vivos*, upon death or as *donatio mortis causa* (gift on occasion of death). Testamentary gifts are always revocable, up until death/completion.

4 STEPS REQUIRED FOR A COMPLETED GIFT

1. ***Intention:*** Donor must have "sufficient intention" to donate. Donor must have mental capacity to appreciate the nature of what they are doing (parting with ownership). Words, or actions, must be "unequivocal" or unambiguous: Must clearly point to intention to part with ownership. Matter of evidence**:** circumstances, donor-donee relationship, size of gift, relation of gift to donor's total assets.
2. ***Acceptance:*** The donee must accept the gift. Anything short of outright refusal = acceptance. Usually assumed that the donee is accepting, but sometimes donee might not want obligations tied to gift. Donee must decide within a reasonable time if they don't want to accept.
3. ***Delivery:*** Transfer of possession (or its equivalent) of the gift from donor to donee is required to complete the gift. Delivery is both evidence of intention/acceptance, but also a required element of the gift on its own.
   - **Physical delivery of a deed to grantee** is not necessary to constitute effective delivery and enforceability of a transfer Must examine the intentions of the grantor (***Ross****, deed in grandma's purse*)
   - **A document operative upon death** is not a deed but a testamentary document (i.e. a will). The court will look at intention at the time of transfer (***Zwicker,*** *land-giving overly-marrying uncle*)
   - A gift that is not delivered can still be effective if you can show intention to be immediately and unconditionally bound (once you start giving bits and pieces away, don't meet this criteria) (***Zwicker***)
4. ***Registration*** (***LTA s. 20***): The donor must have done everything that needs to be done in order for the transfer to take place. This includes both delivery of deed and registration. A written Form A is required to transfer an interest in land (no oral gifts). Donor must provide Form A (***PLA s. 5***). Unregistered gifts are valid between the original parties, but not against subsequent BFPs (***s.20***)
   - Donor is obligated to do everything required to enable transfer of property // ***equity will not force a volunteer to complete that which is not complete*** (***McLeod*** , *no duplicate title*)

Ross v. Ross *1977*
*Grandmother went to lawyer's office to prepare a deed conveying property to grandson. Deed stated, "**signed, sealed, delivered**". Deed was executed, witnessed, but not recorded in LTO. GShe did not physically hand it (deliver) to grandson rather; he found it in her purse after she died.* **Issue:** Should the non-delivered deed be considered valid?

- **Physical delivery of a deed to grantee** is not necessary to constitute effective delivery and enforceability of a transfer
- **If Grantor has intention** to be **immediately and unconditionally bound** then execution of deed becomes effective. **Grantee need not be aware of gift.**
- If a doc has words **"signed, sealed and delivered" it creates rebuttable presumption** that there has been delivery and title has passed under common law system of transfer
- Court will attempt to fulfil intention of grantor (based on circumstances, behaviour)
- The transfer was complete and immediately operative though the grandson was not aware

Zwicker v. Dorey *1975*
Father Z conveyed lands to stepson D in a deed stating "signed, sealed, delivered" but with clause it was not to be registered until father's death. Father then conveyed promised lands to his 4th wife P through a deed. The father died, and wife claimed husband said he would give her everything. **Issue:** Who was the land conveyed to?

- Facts imply that **Z did not intend** to be unconditionally and immediately bound by his deed to D
- **A deed is classified as a will and cannot transfer the land** if its purpose is to have a future **operation after the death** of the person making it: Z asked D to not record deed until he dies
- **Deed was intended to be a will** but did not comply with *the* ***Wills Act*** thus has no effect in law
  - ***Wills Act*** requires 2 witnesses when the testator signs will, there is only 1 witness for deeds
- You cannot have a condition in which a deed is held in escrow until the person dies
- Wills by definition are changeable and Z clearly changed the transfer to D by his conduct – he gave away his interests to other people and gave a deed to his 4th wife
- **Held:** Title passes to P // A document operative upon death is not a deed but a testamentary document (i.e. a will). The court looked at **intention at the time of transfer.** cont'd >>

MacLeod v. Montgomery *ABCA 1980*
Grandmother A executed transfer to granddaughter R as a gift. Transfer document given to R (equitable title) and duplicate title promised, but never actually turned over. R brought action to compel A to hand over the duplicate title. **Issue:** Does the execution of the transfer constitute a complete or incomplete gift?

- **If Duplicate CIT is not with registrar of LTO** (someone else possesses it) no transfers on the land will be registered. Holding onto duplicate CIT prevents land transactions from going on title
- **For gift to be complete**: (1) intention (2) acceptance (3) delivery in which the donor is obligated to do everything required to enable transfer of property (in this case the delivery of transfer form and duplicate CIT) // **Gift must be complete to be enforceable**
- ***Equity will not force a volunteer to complete that which is not complete***
- **Held: t**here was not a complete gift. A's decision to hold on to CIT shows she might have changed her mind. R does not get the house.

TRANSFERS TO VOLUNTEERS (USE/TRUST)

Trusts: Fragment ownership of estate in fee simple into two types: (1) Management and administration (2) Beneficial interest or enjoyment of the property

Presumption of Resulting Trust: Common law presumes that a gift (transfer w/o consideration) transfers only the legal interest and not the equitable interest: Donee holds gift in trust for donor (trust results back to donor). No one gives away something for nothing. Can be rebutted by:

- **Sealed gift document** (***Romaine***): shows intention to transfer both legal/equitable interest
- **Presumption of Advancement:** gifts to spouse/children presumed to transfer both interests
- Some other evidence

Property Law Act

- ***s. 19(3):*** A voluntary transfer need not be expressed to be for the use or benefit of the transferee to prevent a resulting trust
- No need to use specific language to state gift; can use supporting documents (does not change presumption of resulting trust, just eliminates need for specific language)

PRE *STATUTE OF USES*
A transferred to B (volunteer)

- Equity presumed that B now held to the use of A (resulting use)
- If B wished to claim an absolute interest, the onus was on B to prove that was A's intent (would have said "unto and to the use of B")

STATUTE OF USES
A transferred to B (volunteer)

- It was presumed B now held on resulting use of A
- The use was executed and legal title was back with A
- B still had to show intent to make it an absolute gift

THE TRUST
Unto and to the use of B on trust for C

- Confirm the location of legal title, and by analogy, the resulting uses
- Presumption of resulting trust for the transferor
- But, also said that the fact that the transfer was to the use of the transferee was a sufficient indication that the transferee was intended to have an absolute title

WILL OR INTESTACY

INTERPRETATION OF DEEDS AND WILLS

- **Deeds:** Court focuses on Form A (prescribed form) to determine transferor's intention
- **Wills:** Court focuses on all the words used in the will [not just the clause in question] and all relevant surrounding circumstances in deciding testator's intentions (***Cielein***).
  - Armchair Rule: What facts were known to the testator at the time the will was made?

GENERAL RULES RE TESTAMENTARY TRANSFER

Any person may dispose of their real and personal property by will. Any person can acquire an interest in real or personal property as the result of a death of another person.

- Death triggers transfer
- Testamentary gifts revocable up until death
- Testamentary gifts are subject to debts against estate (but insurance/RRSP/joint tenancies are safe)
- Real property may be sold off in order to provide assets for descendants
- Transfer of Assets: When testator dies, the legal interests in their assets are transferred to the PR who must distribute the legal & equitable interests according to the will or EAA.

STATUTES GOVERNING TESTAMENTARY GIFTS

- **Common law rule:** personal property to PR, real property to eldest male heir (modified by ***EAA, s.77(1)***)
- ***Wills Act:*** Formal requirements for wills
  - ***s. 3 & 4:*** Basic requirements for validity of will with regard to form (very strict in BC):
    - **Writing:** will must be in writing to be valid
    - **Signature:** signed by testator or by another in his presence and by his direction
    - **Witnesses:** at least 2 must be present when testator makes/acknowledges signature
    - **Signature of witnesses:** at least 2 must sign in presence of testator
- ***Estate Administration Act:*** Intestacy
  - ***s. 77(1):*** Both real & personal property go to personal representative
  - ***Part 10 (ss. 81–99):*** Distribution of intestate estate
- ***Trustee Act:*** Governs how trustees (executors/administrators) act
- ***Wills Variation Act:*** Allows the court to **vary** an otherwise valid will if current/separated spouse or biological/adopted children have not been **adequately** provided for – considers both **legal obligation** and **moral obligation**

TESTACY

Will: A declaration made by a testator in writing in the form required by law of what s/he desires to be done after his or her death. May include a codicil. May establish a trust

- **Personal Representative:** Executor chosen by deceased and named in the will
- **Will speaks from the date of death** (not the date of signing): ***Wills Act*** allows the PR to dispose of all property acquired by the deceased both before and after the signing of the will
- **Contains** name, division of assets, funeral arrangements, children's guardian, etc.
- **No special words required**
- **Intention** must be unequivocal & express desire to dispose of assets only after death
- **Witnesses/Signature:** Testator & 2 witnesses must sign in presence of each other
- **Holograph Wills** not valid in BC

INTESTACY

Intestacy occurs when the deceased dies without a will. Governed by the ***EAA*** which determines administrator and division of estate.

- **Administrator**: spouse > next of kin (beneficiaries) > other indvls > gov't official
- **Distribution** (***EAA, s.10***): (1) spouse if 2 years before death and (2) lineal issue
  - If no spouse/issue, then intestate's estate goes to parents
- ***Survivorship and Presumption of Death Act:*** If 2 people die close in time, but you can't tell who died first, it is assumed that the oldest person died first

Example: A (24) & B (25) are spouses with no children. A's parents are still alive. Only B's brother & sister are alive. While driving up to Whistler, A & B die in a car crash together

- If B dies first (assumed), then B's estate goes to A, and then to A's parents
- If A dies first, then A's estate goes to B, and then to B's brother and sister

PROPRIETARY ESTOPPEL

Where it would be inequitable for defendant to assert his rights, the plaintiff can claim **proprietary estoppel** as a cause of action (***Zelmer***, *reservoir gets built D changes mind*). The following conditions must exist:

1. Plaintiff must have made a **mistake** to his legal right
2. Plaintiff must have **expended money** or act **on faith of his/her belief**
3. **Defendant must know of his legal right** and that it is **inconsistent** with P's claimed right
4. **Defendant must know of the plaintiff's mistaken belief** of right
5. Defendant must have **encouraged** P in expenditure of money or other actions either implicitly or by abstaining from asserting his/her legal right
6. D's actions were **unconscionable**, inequitable or unjust equitable fraud

Zelmer v. Victor Projects Ltd. *1997*

Z owned land he wanted to develop, needed water supply, to get a permit he needed a reservoir constructed on higher land; this land was owned by D. Z and D meet, D agrees to grant Z an easement over the specific spot needed for the reservoir for free. Z builds, D claims its in the wrong spot and denies forming agreement. **Issue:** should Z be granted an easement through proprietary estoppel to build reservoir?

- **Proprietary Estoppel**: When A to the knowledge of B acts to his detriment in relation to his own land in the expectation, **encouraged by B (through his words or conduct)**, of acquiring a right over B's land, court will order B to grant A that right
- Denning: basis of **proprietary estoppel** is equity, mitigates rigors of strict law by preventing individuals from relying on their strict legal rights. It **can give rise to a cause of action!**
- **Held:** Z relied on words and acts of D to give him permission to build. Proprietary estoppel applies and Z is granted an easement

REGISTRATION OF TITLE: THE TORRENS SYSTEM

HISTORICAL BACKGROUND

COMMON LAW CONVEYANCING: LIVERY OF SEISIN

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

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

THE RECORDING SYSTEM

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

Recording System records these deeds, but has no legal effect on the title. Good root of title established by searched deeds, mortgages, transfers, wills (standard conveyancing practice = 60 years). Recording systems still exist in some Canadian jurisdictions (i.e. Ontario, NS)

THE TORRENS SYSTEM

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

Torrens imposes a registration system which (1) records the written document and (2) gives legal effect to the document via registration. Legal effect given to the title by virtue of 2 elements: (a) Registrar contains all relevant information related to title, and (b) the fact of registration creates **indefeasible title** (***s. 23***).

Prescribed form required to register the transfer [***s. 185***; Form A or its equivalent]. Registration is required (***s. 20***) in order to effect transfer of legal interest, and to protect that interest against the world ~ ***except as against the person making it.*** Equitable interest transferred upon forming a binding contract (CPS).

THE TORRENS SYSTEM INTRODUCED IN BC

Torrens system comes from Australia. In 1870, ***Land Registry Act*** imposes Torrens on colonies of Vancouver Island and Vancouver. Today, the ***Land Title Act*** governs the Torrens System. Common law rights and obligations remain except where explicitly modified by ***LTA.***

- BC is divided into land title districts – interests are registered under whatever district they're in
- Once someone enters their EIFS on the Register it is conclusive evidence that they are the owner of the interest // anyone wishing to deal with that land can determine the state of EIFS by looking at Register
- No longer have to search further than Register to determine state of fee simple title
- Compels (does not mandate) registration as one cannot sue for their interests if not registered
- Without registration one can only sue the transferor via contract law
- **Central feature**: crown guarantees title (no need for land insurance)
- Land Title System does not revolve around deeds but **certificate of indefeasible title** – this title and registration are everything

Certificate of Indefeasible Title

Estate in Fee Simple: *Snooks*
Land Described: *Black Acre Ranch*

Charges: *(emerge out of the EIFS)*
Life Estates, Easements, Mortgages etc.

THE GENERAL PATTERN OF REGISTRATION

LAND TITLE DISTRICTS

Land Title Districts: Province is divided into seven land title districts (***s. 4***). An interest in any particular parcel of land must be registered in the district in which the land is located. There are Land Title Offices at locations designed by Lieutenant Governor in Council – four offices total.

WHAT CAN BE REGISTERED

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

Two categories of interests will appear on the land title search: 1) **fee simples**: the fee simple owner with the indefeasible title // 2) **charges**: covenants, mineral rights, life estates, mortgages, etc.

Neither liceces nor zoning by laws can be registered as interests in land:

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

R v. Kessler *1961*
K argued zoning and development bylaws should be registered in LTO as they "affect the use of land". Interests must be registered under land title act to have effect, thus, zoning bylaws should also be registered to have effect.

- **Held:** Only interests in land are registrable under the ***Land Registry Act***. **A zoning bylaw,** although it may affect the use of land, **is not an interest in land and cannot be registered**
- Registration may be refused unless the instrument sought to be registered conveys an interest in land

PROHIBITION OF REGISTRATION OF COMMON LAW INTERESTS
You cannot register the following common law interests: **(1) Equitable mortgages** (***LTA, s. 33***): where you provide security by leaving your duplicate CIT with the bank // **(2) Details of Trust** (***LTA, s. 180***): while the trustee is listed on the title, you cannot specify who the trust is being held for. But the trust document is usually deposited at the LTO // **(3) Sub-right to purchase** (***LTA, s. 200***): all sub-rights after 1979 cannot be registered. A sub-right to purchase occurs where an agreement for sale is registered on a title, and the owner of that agreement for sale enters into another agreement for sale with a 3rd party (the subsequent agreement cannot be registered) // **(4) Aboriginal Title:** because aboriginal title is inalienable except to the Crown, it does not provide good safe-holding and marketable title and therefore cannot be registered. **Caveats and CPLs** relating to aboriginal title also cannot be registered. But encumbrances relating to Nisgas's lands can be registered (***LTA, s. 1***) // **(5) Agreements to sell** // **(6) Leases under 3 years**

REGISTRATION OF NON COMMON LAW INTERESTS (*registrable as charges*)

1. **Caveats** (***LTA, s. 282–294***)
2. **Certificate of pending litigation** (*lis pendens*) (***LTA, s. 215–217***)
3. **Judgments** (***LTA, s. 210–214***)
4. **Statutory right of way** (***LTA, s. 218***): allows certain government bodies and others to acquire a right to use another's land for a certain purpose. Different from the CL easement which allows adjoining land owners to obtain access through their neighbor's land
5. **Restrictive covenants** (***LTA, s. 219***): Imposes restrictions on the use to which land may be put. Frequently restrictive, but may also be positive (benefits)
6. **Statutory building scheme** (***LTA, s. 220***): restricts use of land. Enforcement comes from adjacent property owners (or developers) rather than from the municipality.
7. **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"
8. **Marriage/ co-habitation agreements** (***Family Relations Act, s. 17***): rarely used agreements which allow non-titled individuals to acquire some interest in the property (i.e. veto rights over land dealings, prevent severance of joint tenancy)

ABORIGINAL TITLE ***Skeetchestn v. BC*** *BCSC 2000 see p. 12*
Aboriginal title is not derived from fee simple. It is ***sui generis*** and does not lend itself to categorization. It is **not alienable**; it can only be surrendered to the Crown. It does not fit within the scheme of current real property law in that it is not an interest in land contemplated by the ***LTA*** and is not registrable (***Delgamuukw***)

BASIC SCHEME OF REGISTRATION

All registrable interests can be divided into two categories: 1) the legal fee simple 2) all other registrable interests, designed by the *Act* as "charges"

THE LEGAL FEE SIMPLE

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

Initial Application

s. 169(1): If an application is made for registration of IT, registrar must be satisfied that: (a) the boundaries of land are sufficiently defined // (b) a good safe holding and marketable title in fee simple has been established by the applicant

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

s.169(2) Registrar may give notice that they're intending register the title of the applicant unless someone registers a caveat or certificate of pending litigation contesting the applicant's right

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

Applications received by land title office:

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

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

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

Transfer Inter Vivos

- Same process as for initial registration
- Registrar must be satisfied there is sufficient description of land, instruments confer good safe holding and marketable title upon applicant

Transmission on Death

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

CHARGES (*see also p. 28, 32*)

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

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

Caveat ***LTA Part 19 (ss. 282–294)***

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

- ***Effect of a caveat*** (***s. 288***)**:** once a caveat is lodged, the Registrar must not: (a) register another instrument affecting the land unless the instrument explicitly subject to caveator's claim or (b) change the boundaries affecting the land // temporary "freeze" on registration process // **buyer beware:** prevents future land transactions: no one wants to buy land with a potential law suit attached
- Title cannot be registered if the claim of the caveator, if successful, would destroy the root of title of the person against whose title the caveat has been lodged (***s. 288(2)***) // *Ex. A grants fee simple to B and then C. If B lodges caveat, C cannot register*
- Privately-filled caveat expires after 2 months unless proceedings have commenced (***s. 293***) – in this time, one can bring action affecting title of land (*lis pendens*)
- Upon receiving caveat, Registrar must endorse date/time of receipt, enter endorsement into register, and sent copy of caveat to titleholder in question (***s. 287 (a)–(c)***)
- *Example: A sells Blackacre to B with a CPS, but not Form A. In the meantime, A sells Blackacre to C. B files a caveat on Blackacre. C registers her Form A on Blackacre subject to the caveat. If B succeeds against A and successfully registers Blackacre, C is screwed.*

Certificates of Pending Litigation (lis pendens) ***LTA Part 14 (ss. 215–217)***

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

- Registrar must give copy of LP to owner against whose title the LP was registered (***s. 215(3)***)
- Restrictive covenants/building schemes (***s. 215(5)***) dissolution of marriage or declaration that a marriage is null and void (***s. 215(6)***) actions under ***Wills Variation Act*** (***s. 215(7)***)
- ***Effect of a CPL*** (***s. 216***)**: halts all dealings with land:**
  - Registrar may not enter anything into register that has effect of charging, transferring or otherwise affecting land
  - *Does not apply to:* lodging a caveat or registration of indefeasible title or charge
  - Individual may proceed to registration subject to CPL but registrar must be satisfied that purchasers of interests affecting the land know about the LP and that they are subject to outcome of litigation

Judgments ***LTA Part 14 (ss. 210–214)*** (*see also p. 33*)

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

- Judgement creditors are asserting a priority over the land in the event it is sold in execution of that judgement // note: priority is measured according to when an interest is registered
- Registered the same way as charges
- When judgment is registered, Registrar must notify owner of land or charge against whose title the registration has been effected
- Money judgments: claim by P results in Certificate of Judgment against D ordering that "judgment creditor is owed x dollars by judgment debtor"
- Non-monetary judgments may include unjust enrichment, proprietary estoppel, etc. – these alter the title to the land, rather than order the transfer of money
- ***Effect of registered judgements*** ***Court Order Enforcement Act S.86(3)***
  - Forms lien and charge on the land of judgment debtor
- *Ex. K sues C and wins but C doesn't pay because he has no cash. K does a land title search and finds out C owns a house. K wants to force C to sell her land to get her payment. To prevent C from selling it to someone else, K can register her judgment as a charge against the land*

THE ROLE OF THE REGISTRAR

General Duty: Administer the ***LTA*** with respect to the lands within their Land Title District. Registrar's powers are derived from the ***LTA*** - they aren't a ***s.96*** Constitutional judge, and therefore can't adjudicate the contested rights of parties – you need to go to court for that (***Heller***, *husband realizes mistake, tries to cancel wife's transfer*, *1963, SCC).*

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

1. **Not all interests are registerable:** Torrens only registers interests which are good, safe-holding and marketable; therefore Aboriginal title is not registerable, nor are charges relating to aboriginal title (***Skeetchestn***, *band tries to register CPL against ab title lands*).
2. **Don't Perpetuate Errors in Title:** Registrar has a duty to satisfy himself that the title is good, safe-holding and marketable when registering any instrument. (***Evans***, *westerly 40 feet*, *1960, BCSC*)
3. **Power to refuse bad documents:** Registrar can refuse to register, if the documents and evidence produced fail to establish either a *prima facie* or good safe-holding and marketable title (***Shaw***, *son scams dad*, *1915, BCCA)*

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

1. **Discretionary power to cancel or correct** instruments (***s. 383***): If an instrument has been issued in error by the Registrar, contains a misdirection, or an endorsement has been made or omitted in error on a register/instrument, Registrar "may" cancel/correct (***Heller***).
2. **No Obligation for non-Registrar Errors:** Registrar is not obligated to correct errors which are not the fault of the Registrar (***Heller***).
3. Cannot prejudice BFPs: Power of cancellation occurs only if it doesn't prejudice rights acquired in good faith and for value (***s. 383(1)***).
4. **No Appeal of Discretionary Decisions:** You cannot appeal discretionary decisions of the Registrar, but you can appeal a refused application (***Basque Improvement District v. Lischa,*** *2003, BCSC*)

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

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

- **Not the duty of the registrar to determine:** (a) boundaries (b) adjudicate on property rights; this is under inherent jurisdiction of CL (provincial and supreme courts)
- **BUT registrar doesn't have to perpetuate errors** with the boundaries and can step in to attempt to correct them; he has an option not an obligation to correct registrar. **Registrar has quasi-judicial duties** as he must be satisfied of good safe-holding and marketable title before issuing CIT (cannot do this until boundaries are fixed)

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

- **Registrar has authority to look behind an agency agreement** and was right to refuse to register the transfer as there is not good safe-holding and marketable title. **Registrar cannot determine if the document is voidable**; courts must do this

Property Law Act s.27 *Attorney Cannot Sell to Himself*

- Person granted POA (Shaw), cannot transfer land from the person granting the POA (his dad) to himself unless: (a) POA expressly authorizes it or (b) the person granting POA (his Dad) ratifies it;
- Burden of proof is on Shaw to show evidence of full disclosure, fair consideration, and good faith
- *Ex: if you're holding a trust for yourself you can't transfer it to yourself*

cont'd >>

Heller v. British Columbia (Registrar, Vancouver Land Registration District) *(1963)*
H tried to transfer land to wife, registrar registered it with no duplicate CIT on file. Duplicate already given to someone who already had a ½ interest transferred. H tried to reverse transfer to his wife due to error of allowing the registration to proceed without the duplicate CIT in the office but Registrar refused

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

LTA s. 383 *Registrar to correct or cancel instruments*

- If the registrar finds an instrument is issued in error/has a misdescription or an endorsement is made/ omitted in error registrar **MAY, so far as practicable, without prejudicing rights acquired in good faith and for value** cancel the registration/instrument or correct the error
- Registrar "may" exercise their powers: no duty to enforce the rights of a party if an error exists

THE ASSURANCE FUND

The Curtain Principle of Torrens provides security to those who register by imposing immediate indefeasibility upon all registered titles (***LTA, s. 23***). However, the security provided by Torrens means that some common law rights are lost under the ***LTA***. Under the common law, a BFP taking land under a void instrument would lose that land to the original owner. Under the ***LTA***, the new "owner" would be protected if they registered that void instrument – because registration provides immediate indefeasibility.

The Assurance Fund is a statutory scheme which protects equitable rights and compensates people who lose their common law property rights as a result of the ***LTA***. Recovery is dictated by the terms of the statute. The Assurance Fund is **funded** via percentages taken from each land transaction. While successful AF claims are rare, the Assurance Fund is not to be regarded as a citadel which no one is allowed to scale (***Gordon v. Hipwell***, *fake diamonds for land and mistake of Registrar*, *BCCA*). However, as ***McCaig*** shows, there are severe limits to liability under the Assurance Fund.

The Assurance Fund covers two situations:

1. **Person deprived of interest in land:** A person has been deprived of land in certain circumstances [**involving fraud**] by reason of the conclusiveness of registry (***s. 296***)
2. **Fault of Registrar:** A person has sustained loss **solely** as a result of an omission, mistake or misfeasance of the registrar (***s.298; Gordon v. Hipwell***)
    - Registrar owes no duty to unregistered claimants (as an unregistered title will not appear when Registrar determines GSHM title). Registrar's only duty is to those seeking to use Registry. A successful claim against the Assurance Fund must show that the plaintiff's loss flowed naturally and directly from a mistake of the Registrar (***Royal Bank v. BC***, *AF claim for defaulted equitable mortgage fails, 1979, BCSC*)

Successful claim against Assurance Fund:
Claimant must show that (***s. 296***; ***McCaig v. Reys***):

- They have been deprived of land or interest therein
- The loss was occasioned by the operation of the ***Land Title Act*** (and not the common law)
- The loss was occasioned by fraud, misrepresentation or wrongful act in registering of another person as having an interest in the land and
- They are barred for bringing an action for rectification of the register (cannot ask the register to put the title back in your name)

Other rules for the Assurance Fund:

- ***s. 296(3):*** AG must be joined as a party in any claim against the Assurance Fund
- ***s. 296(8):*** 6 year limitation period
- ***s. 303:*** **Liability is limited**: the following owners cannot claim against AF
    - ***s. 303(a)(i):*** Undersurface rights owners
    - ***s. 303(a)(ii):*** Equitable mortgagees by deposit of duplicate indefeasible title
    - ***s. 303(d):*** Errors in airspace plan
    - ***s. 303(f):*** **Contributory Negligence:** New ***LTA*** amendments will lower plaintiff's damages in the event of contributory negligence (previously, contributory negligence would bar a claim)

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

McCaig etal. V. Reys et al. *(1978)*
R purchased land from M and registered his interest. R gave M an unregistered option to buy back some land. R sold land to Rutland, who knew of option but sold to Jabin without disclosing it. M sued R for breach of K, Rutland for fraud & inducing breach of K and AF for defeating option.

- **In order to be successful against AF claimant must show:** (a) They've been deprived of land or interest therein (b) Loss was occasioned by the operation of Land Registry Act (c) Loss was occasioned by fraud, misrepresentation or wrongful act in registering of another person as having interest in the land (d) he is barred for bringing an action for rectification of the register (cannot ask the register to put the title back in your name)
- **McCaig cannot advance claim against AF:**
  - To advance a claim against AF claimant must show: he has been deprived of land/an interest resulting from the operation of the ***Land Title Act*** **– in this case loss did not result from operation of statute – so McCaig cannot rely on AF**
  - McCaig only had equitable interest in his option; in CL an equitable interest is lost where person is a bona fide purchaser for value (does not know of fraud and pays purchase price). Under CL, Jabin is a bona fide purchaser for value so McCaig lost his equitable interest. ***As McCaig would not be successful under CL he cannot make claims under AF***
  - *Note: Intention in the sale agreement is to give legal title to the purchaser; it goes to them on conveyance and registration but prior to this the buyer has an equitable interest in land and it is registrable (you can register both equitable and legal interests in land)*

Royal Bank of Canada v. British Columbia (AG) *(1979)*
W became RO of land in 73; ***LTO gave him a duplicate CIT which he deposited at RBC (P) as security for loans*** *they gave him. LTO did not mark delivery in their books. 74: W was granted mortgage from BNS, when it was registered with LTO they noted that they thought duplicate CIT was on file but couldn't locate it. After this, RBC advanced W the loans but couldn't recover them from W. RBC argues registrar erred by accepting W's mortgage registration without the duplicate CIT in his possession; RBC wants compensation from AF*

- **RBC cannot recover from AF:**
  - Registrar owed no duty to RBC as it did not utilize their services; they accepted security from a CIT but did not avail themselves to the safeguards under the *Act*
  - Giving RBC protection would give them protection only afforded to registration
  - RBC's loss does not flow naturally and directly from Registrar's mistake
- **Equitable mortgages** are not registrable so banks will have no claim with AF – these shouldn't be used; adhering to Torrens system avoids litigation of this sort

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

Gordon v. Hipwell *(1952)*
Successful claim against AF when registrar incorrectly removed a caveat; went against the BPV

REGISTRATION

REGISTRATION: THE FEE SIMPLE

- Nothing in the Act compels registration but it is wise to register because of its advantages. Although unregistered docs have some effect it is dangerous not to register
- **Exception: Delivery and Registration of Crown Grants** (***Land Act s. 54***)**:** After 1968 purchasers of Crown land were required to register
- **Effect of Indefeasible Title** (***Land Title Act s. 23***)**:** indefeasible title is conclusive evidence at law and at equity – important!
- **Exceptions and Reservations** (***Land Act . 50***): specific provisions are retained by the crown even if nothing is stated in the original Crown Grant
- **Agriculture Land Commission Act:** Sets up a regulatory body that freezes land use to farm use; only way you can do something other than farming is get land taken out of Land Commission // Must find out if land is agricultural reserve and follow regulations

THE GENERAL PRINCIPLE OF INDEFEASIBILITY

Common Law Rule: A forged transfer document was null and void, even if the "purchaser" was a BFPFVWON. The same situation is true under a Recording System.

The Curtain Principle (***s. 23(2)***): The Torrens system provides security for purchasers against the effect of forged documents, based on the **principle of immediate indefeasibility.** The fact of registration is conclusive proof of indefeasibility. The "curtain is lowered on previous transactions" and the BFPFVWON receives immediate indefeasible title (***s. 25.1(1)–(3)***). The registered owner is thus safe from any previous defects in the title. A certificate, while unaltered or unchallenged by the Registrar, is one which every purchaser is bound to accept. To allow an investigation into whether a person has the right to appear on the register would defeat the purpose of the ***LTA*** (***Creelman v. HBC***, *HBC has good title because of registration, 1920, PC*).

Effect of *s. 25.1:* A rogue who obtains land via their own forgery acquires no interest upon registration (codifies the common law rule). A BFPFVWON who receives a fee simple interest via a forged (registered or unregistered) instrument will acquire immediate indefeasible title upon registration (strengthens ***s. 23*** and asserts pure Torrens rule of immediate indefeasibility – cancels out any effect ***Gibbs*** might have in BC on fee simple interests) // Note: only applies to fee simple interests – does not apply to gifts of land acquired under a forged instrument (since there is no value/consideration transferred in a gift).

Mirror Principle (Quasi-Torrens): The **exceptions** noted in ***s. 23*** modify the pure Torrens System by allowing some interests which do not appear on the title to challenge indefeasibility. Other exceptions include ***s. 29*** unregistered interests, *in personam* claims, caveats/CPLs, and interference with title by reason of court order (***s. 23(2)*** & ***s. 34***).

Insurance Principle: The Assurance Fund compensates those who have lost their land through forgery/ mistake ***as a result of the conclusiveness of the register***. Under a pure Torrens system, the public (via the LTO and the AF) bear the risk of forgery, rather than the registered owner.

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

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

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Practical Note: ***s. 23*** is central to the conveyancing done by lawyers: is your client getting the interest they think they're getting? Are there any restrictions/encumbrances on the land?

1. Dealings in land involve **more than the horizontal plane**
2. Dealings in land involve a **description/plan**
3. A **title search is required** before commencing any real estate transaction
4. The **title is never ultimately conclusive** (***s. 23*** exceptions)
5. The **title may change over time** [title searches are time-sensitive]
6. Not all charges & interests will affect your client/purchaser: but discuss them all
7. Section 23 lists all the exceptions that your client must worry about

Creelman v. Hudson Bay Insurance Co *(1920)*
HB owned land, had EIFS title registered; Creel made a K with HB to buy the land and put down a large deposit; Creel backs out, HB wants to keep deposit, claiming C breached K. Creel argues: ***land was given to HB under federal legislation for purpose of 'use or occupation of HB's company'****; as HB didn't use it for this purpose HB cannot register the land and cannot dispose (transfer) the title to Creel; thus, Creel should recover deposit*

- **The register is conclusive**. Allowing investigations into the right of a person to appear on the register when he holds a CIT would defeat the purpose of statute of registration. **AG can still take steps to rectify the register but if you get on title, curtain comes down and you can't look behind it!** ***Land Title Act s. 23(2)***
- **Held:** Creel is bound to accept the CIT from HB and to comply with their K
- *Note: Even if HB shouldn't have been on title as they didn't use the land for the right purpose, it is an efficient solution to sell the land to C who can now use it for another purpose*

INDEFEASIBILITY AND ADVERSE POSSESSION

- **Squatter's Title/Adverse Possession:** if land owner doesn't bring an action to recover possession of land from a wrongful occupier within a specific period (defined by statute) the right to do so is lost (statute barred). Squatter is given possessory title which courts protected
- Adverse possession is inconsistent with the indefeasibility of registrable title
- ***Land Act s. 8:*** cannot acquire title to Crown land or any land via adverse possession unless exception (own land for 20 years before 1975 applies)

Claiming Adverse Possession in BC:

1. **Transitional Provision** (***Limitations Act s. 14***)**:**
   - Can only make claim for right/title if acquired by adverse possession **before July 1, 1975**
   - Had to live on land for 20 years to adversely take it from another person (or 60 years from Crown)
   - Note: claims are rarely made (almost doesn't exist in BC)
2. **Effect of Indefeasible Title** (***Land Title Act s. 23(3)(4)***)**:**
   - Possible to acquire title by adverse possession where: (a) no IT has been raised to the subject land (b) where claimant is challenging first IT registered (no claim if original holder transfers title).
   - Acquisition of title by adverse possession can arise both through mutual mistake and where the adverse claimant is a knowing trespasser.
   - For a claim to title based on possession to succeed, the act of possession must be open and notorious, adverse (not with the permission of the owner), exclusive, peaceful (not by force), in general actual (as opposed to constructive) and continuous.
   - *Ex: commonly used if land owner tries to* ***bring trespass against*** *party, and party claims adverse possession as a defence*

STATUTORY EXCEPTIONS TO INDEFEASIBILITY

- **EIFS:** fullest relationship one can have in respect to land; total control in perpetuity; one may assume its absolute but some restrictions can make it "qualified" // to what extent does registration guarantee an EIFS absolute?
- ***LTA s. 23(2):*** lists interests which qualify an EIFS absolute; "indefeasible title is subject to:" ....

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

- A lease or agreement for lease for a term not exceeding 3 years (doesn't have to be registered) if there is actual occupation under the lease or agreement (lease only needs to be registered if over 3 years)
- *Ex: if T is lessee and S is lessor selling the land to B buyer; T has lease for 2 years // Any buyer of land has to wait until lease expires until they are able to move into the premises // Grant of indefeasibility of B does not protect him as T is a tenant, occupying his land with a lease less than 3 yrs. Thus, B cannot kick T off his land before his lease is up.*

CHARGES AND OTHER ENTRIES (***LTA s. 23(2)(g)***) (*see also p. 22, 32*)

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

Carr v. Rayward *(1955)*
P did plumbing work on land, filed lien with registry but original owner already sold land to D (who didn't know about P). D got a CIT from registry without the lien on it. Original owner did not pay P; now P is suing the new owner D, to get his payment.

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

BOUNDARIES (***LTA s. 23(2)(h)***)

- The right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title

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

- **Exercise of Due Care:** Must determine: (1) what "general and approved" practice of lawyers is (2) If this is consistent with provident precautions against a known risk
  (1) **general and approved practice is not to check** (remember this is in the 1950s)
  (2) **not a solicitor's job to determine dimensions of land their client is purchasing**; this should be left to surveyors **unless lawyer explicitly accepts to do so**
- **Held:** D wins, P cannot recover

FRAUD (***LTA s. 23(2)(i)***)

- The right of a person deprived of land to show fraud, including forgery, in which (a) RO has participated in any degree (b) person from/through whom the RO derived their right or title otherwise than in good faith and for value has participated in any degree
  (a) A is RO. B forges A's signature and becomes new RO. A can recover title under s. 23(2)(i)
  (b) A is RO. B forges A's signature and becomes new RO. B sells to C, who knows of forgery. A can recover title.

- **Literal meaning of s. 23(2)(i):** if you haven't participated in fraud and you take for value, you get IT
- No statutory definition for fraud in *Act*: must be able to prove fraud though!
  - False representation of a matter of fact, by words or by conduct, by false or misleading allegations, or by concealing that which should have been disclosed, which is intended to deceive or does deceive another person who acts on it to his or her legal detriment.

FORGERY

(a) A is RO. B forges A's signature, becomes new RO. A can recover title under s. 23(2)(i)
(b) A is RO. B forges A's signature, becomes new RO. B sells to C, who knows of forgery. A can recover title.
But: A is RO. B forges A's signature, becomes new RO. B sells to C, who **doesn't know of forgery** – what now??

Gibbs v. Messer *(1891) (Australia)*
Mrs. M is RO of land; her husband gives her DCIT to their lawyer C. C concocts a transfer form of their land to "Hugh" (fictitious person) forging Mrs. M's signature. C then arranges with the Ds (McIntyres) for a loan to be secured by mortgage from "Hugh". They pay "Hugh", land is transferred to them on another transfer form. C takes the money and disappears

- **Held:** Mrs M is reinstated on register as the RO; McIntyre's mortgage is invalid
- Registration in the fictitious name cannot impede the right of the true owner, Mrs M, who has been defrauded, to have her name restored to the register.
- **Torrens system gives <u>deferred</u> indefeasibility (law in BC):** while McIntyres don't get good title, if they were to pass it on to bona fide purchaser value, that person would get good title
- This case goes <u>against</u> the literal meaning of ***s. 23(2)(i)***

So the person who deals with the fraudulent party C (i.e. doesn't matter if it comes directly from a void deed or not) is vulnerable because they are in the better position to be able to check that they are dealing with a fraudulent person – in Australia, second innocent party could be vulnerable. A can recover title.

Frazer v. Walker *(1967) (New Zealand)*
Mr and Mrs. F had an EIFS with a mortgage on it. Mrs. F arranges a mortgage with 2nd respondents and forges Mr F's signature on the transfer form (null deed). She uses this to pay out their first mortgage and keep the rest of the $. When no payment made on their mortgage 2nd Rs transfer property to the 1st respondent. 1st R applies for possession of the land relying on his title as RO. Mr. F claims the mortgage and sale occurred without his knowledge and applies for a declaration that they are invalid and that the register restore his title

- **Held:** court denies Mr F's claim
- Even though 2nd Rs entered into a fraudulent agreement, he was a **bona fide purchaser for value**, so he had an interest that was equally as legitimate as Mr F's
- *Court distinguishes from Gibbs v. Messer* which dealth with a bona fide purchaser for value of a fraudulent title from a fictitious party (B pretended to be A). This case deals with an adverse claim made in good faith on a fraudulent instrument. If mortgage is valid, it follows that sale is also valid.
- The register is conclusive. Where a person acquires a registered interest, it grants him title with respect to that interest which is immune from adverse claims other than those specifically stated in s. 23(1). **In this case, <u>immediate</u> indefeasibility is given.**
  - The file transfer form was clearly a null deed as Mrs. F forged Mr. F's signature, but the second transfer form (from 2nd R to 1st R) was protected as the 2nd responded registered his mortgage giving him immediate indefeasibility under the Torrens system
- This case is in line with literal meaning of ***s. 23(2)(i)***

So if you haven't participated in fraud and you are a bona fide purchaser for value, you get indefeasible title. A cannot recover title because C is a BFPFVWON, but A <u>can</u> recover from Assurance Fund because under CL, A could have recovered title (nemo dat!). cont'd >>

Moral of the story: how you perform the fraud matters!

- Under ***Frazer***: immediate indefeasibility – if you were in good faith, you're okay
- Under ***Gibbs***: deferred indeafisibility – even if you were in good faith, if the way in which you got the ownership was through a void/null deed, you're in trouble

Land Title Act s. 25.1 Void Instruments – Interest Acquired or not Acquired

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

(1) Subject to this section a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument – Transferee does not get a charge if Form A (transfer form) void

(2) (3) Even though an instrument purporting to transfer a fee simple estate is void, a transferee named on the instrument who is a **bona fide purchaser for value** (in good faith) has acquire the estate on registration – transferee gets fee simple even if Form A (transfer form) is void

LTA s. 25.1 (2) *and* ***(3)*** sounds like it is going towards Frazer

Advice to give original owner who loses their interest due to void transfer:

1. Judges may go OUT OF their way to find a way for original RO to keep their interest (if you can show your client has the biggest sob story)
2. Original RO can apply to AF
3. Best way to protect yourself is **get Duplicate CIT** and put it in safety deposit box!
   - The registrar cannot do anything to affect your title without this
4. If taking out a mortgage recommend that they request mortgagee to obtain insurance
5. To confirm that someone is who they say they are and what they promise is true then get credit reports, check their passports

Gill v. Bucholtz *(2009)*

G is RO; GG forges G's signature on a transfer form to transfer the land to himself. GG becomes RO. GG mortgages land to B, transferring it to him on a 2nd transfer form signed by GG and makes a 2nd mortgage to a co. G discovers what's happened, registers caveat on land; Neither B nor Co. knew of the fraudulent root of GG's title!

- 2nd transfer form to give mortgage from GG to B is valid as GG didn't forge his own signature
- Mr. G will get his land back; **Issue:** whether Mr. G's title will be subject to mortgage interests of B and the Co who are both bona fide purchasers? (*short answer: nope, too bad for you*)

- ***s. 23(1)(i)*** exception to indefeasibility applies. "void instrument" in ***s. 25.1(1)*** includes mortgages from persons obtaining title via fraud/forgery. B and Co don't acquire an interest on registration as GG had no interest to give when granting their mortgages; void at CL and under ***s. 25.1(1)***

- ***Gibbs v. Messer*** **and** ***s. 25.1(1)*** **only applies to EIFS and not to charges**
- Note: judge only states this in regards to mortgages so it is obiter that this applies to all charges but as this is the most recent and only case we would follow this law
- **Nemo Dat still applies to registered charges**: Charges are not indefeasible and subject to fraud; if acquired under void instruments they are invalid. Charge-holders do not obtain protection of indefeasibility that bona fide purchasers obtain on registration
- In this case the mortgagees did not acquire any estate or interest as it was **granted by a person who had no interest to give**
- ***Policy:*** *in BC costs of frauds against mortgagees and charge-holders should not be borne by the public (via the Assurance Fund) but by lenders and other charge-holders themselves (get insurance)*

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

NOTICE OF UNREGISTERED INTERESTS

Effect of Notice of Unregistered Interest (***Land Title Act S.29(2)***)**:**

- If a person applies for registration and becomes RO they are not affected by notice (express, implied or constructive) of unregistered interests affecting their land **unless participating in fraud:** if affect of acquiring their interest is to defeat another's interest they are subject to theirs
- *Actual notice* (real knowledge of circ) *Constructive notice* (facts or circ one ought to understand)

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

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

McCaig v. Reys

Jerome knew of McCaig's unregistered option and ensured purchaser Jabin didn't find out. Jerome argued: under s. 29(2) he could ignore McCaig's option as it was not registered (which is true, ***if*** *you don't change behaviour)*

- Held the way in which Jerome behaved ensured Jabin would not know of the interest is fraudulent
- As Jabin <u>did not know</u> of McCaig's option when he became new RO his registration was fully indefeasible

***IN PERSONAM* CLAIMS**

- Registration (and indefeasibility of title) does not give immunity for contractual (*in personam*) claims
- *Ex: B and A make K, A becomes RO, B alleges breach of K. Their K is not extinguished after A is registered so B can still claim monetary damages from A but A keeps land.*
- A cannot rely on their indefeasibility of title which they have obtained to defeat rights *in personam* (contract) which they have created, or subject to which the interest has been taken

McRae v. McRae Estate *(1994)*

Mr. FF willed land to wife, H, in trust, for herself for life & remainder to their 3 children – she became RO w/ "on trust" notation on title – later transfers property to 1 son, Fjr, who became RO w/o indication of trust – Fjr dies, leaving property to his wife, A, bro, and sis. When Fjr's bro and sis learn terms of their dad's will, they bring action claiming title be vested in them. TJ set aside transfer to son & returned property to executor of H to be disposed of according to law. A gets the 1/3 of the land F jr was given under the trust

- If property reaches hands of someone who knows of existence of trust, that person is bound by the terms of that trust – H could not given all land to 1 son
- Whether you know or don't know, doesn't matter – its on the register, and its your obligation to read it
- You are **deemed** to have knowledge because it is registered – that's the whole point of having a registration system!!!
- **It wasn't hers to give – the wife was encumbered by John and Kathy's future interest**

- *Ex: When B becomes RO of A's land, any in personam claim (in this case, trust) A has against B is not extinguished by registration (where B is not a BFPFVWON). RO good against world, except A!*

REGISTRATION: CHARGES (*see also p. 22, 28*)

MEANING OF REGISTRATION

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

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

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

INDEFEASIBILITY

Registration of a charge s. 26(1):

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

Notice given by registration of a charge s. 27:

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

Credit Foncier Franco-Canadien v. Bennett *(1963)*
A mortgage was forged outright (no forged transfer) and registered against Ds property – mortgage then assigned to P. P (having checked mortgage was registered) sued D, on default, who was unaware of forged mortgage. D was always registered owner, never got the $ from the mortgage

- **Held:** D not held liable for mortgage. **Presumption rebutted:** mortgage was a nullity by virtue of forgery and remained a nullity notwithstanding registration
  - **Nemo dat applies:** even though the mortgage is registered it does not give P indefeasibility as D had no interest to give them (due to null mortgage)
- ***s. 26:*** **RO of charge** deemed to be entitled to estate or interest in respect which he is registered"
  - "deemed" only creates a rebuttable presumption of indefeasibility
- ***s. 23:*** **LTA: fee simple** is conclusive evidence in law and equity
  - "conclusive" creates irrebuttable presumption of indefeasibility
- ***Relate to Gill: s. 25.1 immediate and deferred indefeasibility***

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

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

PRIORITIES

Priority of Charges Based on Priority of Registration s. 28:

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

FAILURE TO REGISTER

THE GENERAL PRINCIPLE

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

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

Sorenson v. Young *(1920)*
Illustrates s. 20 applying literally – does not involve application of "except as person making it"
P owns Lot1 and Lot2, P sells Lot1 to R but reserves an easement (right of way) over it in the deed that is not registered. R sells Lot1 to D who becomes registered owner without easement. D later doesn't get along with P so he blocks him from his easement. **Issue:** is D bound by the unregistered easement? NOPE

- **Held:** P doesn't get an easement as it was not registered properly on the deed (***s. 26***) and P and D were not original parties to the transaction creating the easement
- *Note: if R had blocked P, P would successfully be granted easement as R and P were parties to the transaction creating the easement (D is 3rd party)*

s. 181 **Interest or Right Reserved to Transferor:**

- Created after this case: if you have a deed in which an easement is reserved which is discovered at a later stage then original IT is cancelled and interest is registered as a charge against new IT
- If an owner has an easement and they sell the property it must be registered as a charge against the new owner

"EXCEPT AGAINST THE PERSON MAKING IT"

These words expressly make operative an unregistered instrument against party making it

JUDGMENTS (*see also p. 22, 28, 32*)

- *Ex: A owns Blackacre, A transfers FS or gives mortgage to B who doesn't register. C registers judgement debt against A.*

Yeulet v. Matthews *(1982)*
Mrs. M held an equitable mortgage from her son (not registrable) *by deposit of his duplicate CIT; after it's created P registers a judgment against the son. If Mrs. M held a registrable interest she would have priority but as her interest isn't registrable, who is preferred?*

- If an earlier, unregistered interest is found to be bona fide and validly executed, it is entitled priority over a registered interest. A judgment creditor cannot obtain any more rights than a judgment debtor. "A creditor can only attach that interest which exists in the execution debtor."
- **Held:** Mrs. M's prior unregistered interest (equitable mortgage) is preferred over P

Court Order Enforcement Act s. 86

- When registered, a judgement is a lien and charge on land of judgment debtor(s) subject to rights of a purchaser who, **before its registered**, acquires an interest in the land in good faith and for valuable consideration under an **instrument not registered at time judgement is registered**
- *Ex: with gifts there is no valuable consideration so this won't apply!!*

Martin Commercial Fuelling Inc. V. Virtanen *(1997)*
Registered vendor agrees to sell property; Judgement creditor registers judgment against vendor's interest Oct 25; sale is closed on Nov 6 and the purchaser registers their interest. **Issue:** is purchaser's interest subject to the debtor's judgement which occurred before?

- Judgement only attaches to what a debtor actually owns
- **Result:** ***s. 86 Court Enforcement Act*** **applies,** purchaser's interest is not subject to creditor's judgement as they were a bona fide purchaser for value who acquired the interest in land before judgement debtor registered

OTHER INTERESTS

L&C Lumber Co Ltd. v. Lungdren (1942)
*Lung sold **profit a prendre** (right of entry + timber) to M; M assigned his rights to L&C and gave notice to Lung; not registered. L&C move onto cut trees, Lung claims they're trespassers*

- **Profits a prendre (getting timber and right of entry)** is another kind of unregistered interest in land which stands up against subsequent purchasers. s.20 is applied to another kind of interest!
- **L&C are assignees** (stepped into M's shoes) acting as an immediate party to the action, and thus have same rights as original purchasers (M) – ***s. 20*** exception applies, **failure to register is not a defence when dealing with the 2 parties who created the interest in land**

"PROHIBITED TRANSACTIONS"

International Paper Industries v. Top Line Industries Inc. *(1996)*
*TL is LL and RO; IP leased land for more than 3 years, but was not registered. They developed poor relations and TL was desperate to have IP removed from lease. TL refused to renew lease on expiry. IP claimed it was a "renewable lease" and sought court enforcement. TL claimed lease was illegal in first place as it contravened **LTA s. 73***: No one shall subdivide land for purpose of leasing it/agreeing to lease it unless it complies with subdivision rules…

- They were trying to use the lease as an excuse to get out of their lease agreement
- **Held:** courts agree **breach of** ***s. 73*** renders lease void; IP were trespassers and had to vacate
- Wrong judgment in light of ***s. 73.1***!!!

Land Title Act s. 73.1 ***Lease of Part of a Parcel of Land Enforceable:***

- It is possible to subdivide a parcel of land and lease parts of it out (not sell); the lease in *top line* should have been enforced according to ***BC Rail v. Domtar***
- ***If you are only dealing with a building lease subdivision doesn't matter***

APPLICATIONS TO REGISTER

There is often a lag between application to register and registration itself

Priority of Caveat or Certificate of Pending Litigation (***s. 31***)
(a) if a caveat has been lodged or CPL registered and if their claim is subsequently established by a judgment or order or admitted by an instrument, they are entitled to claim priority over other applications made after the date of the lodging of the caveat or CPL *(lets you 'get in line' while you perfect your interest – either leads to a more substantial interest or expires)*

Rudland v. Romilly *(1958)*
Rom is the RO, he transfers land to L who becomes RO; L sells land to Rud who applies to become RO; a few days later Rom files an LP as he wants to reclaim title and asserts L was fraudulent. **Issue:** does Rud have an interest in land upon filing application prior Rom's LP?

- ***Delays due to the administration of LTO do not affect one's right to title.***
- In absence of fraud, a clear **right to registration (application to register) = registration itself if:**
    1. Person claiming right is BFPFVWON
    2. Right has been acquired and registration applied for prior to LP filed
    3. Such a purchaser is not party to the litigation
- **Held:** in favour of Rud

Breskvar v. Wall *(1971)*
B is RO on CIT. Transfer form from B to ___. W forged his name in the blank and became recipient on Oct 15 (not registered). W negotiated transfer with A and executed transfer to A on Nov 7. A applies to become RO on Jan 8. B learns of A's application, realizes he was frauded, applies to LTO to register a caveat on Dec 13 **Issue:** Should B or A become the RO?

- While B is an unregistered owner, statute preserves the equitable (not legal) rights of victims of fraud; B has an equitable right against W (in his caveat) to ensure W does not benefit from fraud
- While A has not registered A also has an equitable interest as a BFPFV, **which is given priority.**
- **A is equity's darling as a BFPFV and wins; B is the author of his own misfortune since B applied for the caveat after the transfer form from W to A was executed**

Summary

- If client acquires an interest with facts like ***Rudland*** – likely get title free of LP
- This supports idea that you acquire rights before registration – somewhat at variance w/ ***s. 20***

- *There is a gap in time between receipt of application and final registration – this raises issue of registrations lodged in this gap*

- ***s. 153(1)***: it is the time of registration which becomes the basis for priority
- ***s. 28*** refers to priority based on the date and time of registration
- ***s. 168*** there is a possibility created under the statute for 'queue jumping' because LP and caveats which can get in the gap and which despite the fact by time alone, they are farther down queue, they may get to jump ahead – however, case law shows this does not always happen

THE FEE SIMPLE

CREATION

COMMON LAW

Inter Vivos Transfer

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

- **"to A in fee simple"** was construed as only creating a **life estate**
- **"to A and his/her heirs"** was construed as created a **fee simple**

- ***words of purchase*** = "to A" – who the trasnferee/acquirer? (even in a gift)
- ***words of limitation*** = "and her heirs" – what is nature of the estate? what kind of interest being given?

Transfers on Death

- In Absence of Will: CL regulates who your heirs are with assistance of statutory modification
- In Presence of Will: Courts are more flexible and **will look at intentions of the testator** // If words of limitation are used, courts give effect to them; if they're not used, but it's clearly the testator's intention, the courts still construe will as conferring fee simple on beneficiary

STATUTE

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

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

(1) It is **sufficient to state "in fee simple"** without the words "and his/her heirs" to transfer an EIFS
(2) If words of limitation aren't included in a transfer, the **fee simple** or **the greatest interest in land** is passed unless expressly stated otherwise

- **Default = fee simple or greatest interest transferor has** (not life estate)
- Recognizes that when an EIFS is transferred it may not be an EIFS absolute, but bundles of rights given to other parties or with conditions or reservations attached

Land Title Act s. 186

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

Wills Act s. 24

- If no contrary intention in will, if real property devised to person without words of limitation, the will passes to them in fee simple or the whole of any estate the testator had power to dispose of by will. Do not need to use words "and his heirs" just "*I give to Joan Blackacre*"

Tottrup v. Ottewell Estate *(1969)*

Frank left his estate to his twin brother Fred. Frank had never had any children. Fred had a daughter. Frank dies – but Fred had already died (if you leave property to somebody who has predeceased you, they don't get it, unless you make a special provision leaving it to their heirs). Frank had no other heirs, which meant this property would now devolve on the intestate heirs (common law are: descendants; then ascendants then collaterals in the same degree – brothers, sisters and their children). There were several brothers and sisters and children of those brothers and sisters alive. So that group of 10 people were asking to share the $253,000 that was in Frank's estate. Fred's daughter is dissatisfied – if Frank had died first, she would have gotten the whole thing. Furthermore, a significant amount of that estate actually came from Fred when he had died. Disposition given to Fred in Frank's will (the second to die): I bequeath to my brother my estate, to hold onto him, his heirs absolute and forever.

- **Result:** property goes to all collaterals as Fred is dead and can't receive the estate and P is just a word of limitation (not a word of purchase)
- Words of limitation no longer necessary to convey fee simple ownership, but their inclusion should not infer different meaning than intended (note: will was drawn up by lawyer)
- ***A will should always be interpreted first on the words used – if they are clear, subsequent circumstances cannot alter their meaning.***

Doctrine of Lapse: You must be alive to take gift. Lapsed gift goes into residue. Lapsed residue, will goes intestate.

PROBLEMS OF INTERPRETATION – REPUGNANCY

Repugnancy: Inconsistency of clauses in one or more document

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

Gift to Heirs Wills Act s. 25

- Unless a contrary intention appears in the will, if property is devised or bequeathed to the heir or next of kin of the testator or of another person, it takes effect as if it had been made to the persons among whom and in the shares in which the estate of the testator or other person would have been divisible if the testator or other person had died intestate
- **Gift Over:** if A wants to give his EIFS to B but ensure that his kids get something too then he can write "gift over"

A gift over can fall into two classes:

- First gift of fee simple prevails and "gift over" fails as repugnant
- First gift of life estate prevails and the "gift over" prevails

Re Walker *(1925)*

Husband leaves property to wife in will ***giving her an EIFS with qualification****: "should any portion of estate remain undisposed and in hands of my wife when she dies,* ***such a remainder will be divided as follows****..." Widow also has own will giving the land to her heirs upon her death.*

- Wife's heirs want will interpreted so that she gets EIFS
- Husband's heirs want wife to have a life interest, so they can take gift over on her death
- **Held:** testator (husband) gave the wife an EIFS and that his will cannot attempt to impose restrictions or conditions on this – to do this he must have instead used a life estate
- Wife gets EIFS, the qualification is a **repugnancy** (*an attempt to deal with the property remaining undisposed by the wife in a manner repugnant to the gift to her*) it is struck out as invalid

Re Shamas *(1967)*

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

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

Cielein v. Tressider *(1987)*

Mr. E died; was survived by 5 kids of previous marriage; also was CL with Mrs. R who had a son. He made a will leaving his land to Mrs. R on a ***standard form used to convey EIFS but included a note****: upon sale or disposal of property, proceeds were to be distributed between his 5 kids and her son.* **Issue:** is this a life estate?

- **TJ:** Will granted Mrs. R a life estate and on her death proceeds were to be divided equally between his and her children.
- **CA:** Overturns TJ: testator clearly intended to give Mrs. R not a life interest but an **absolute interest**; **any restraints or conditions on an absolute gift are void as they are repugnant** to the absolute character of the estate // E's kids don't get anything

WORDS FORMERLY CREATING A FEE TAIL

THE COMMON LAW

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

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

- Restraints on alienation are void as a matter of policy

TECHNICAL WORDS OF LIMITATION

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

INFORMAL WORDS OF LIMITATION

- In cases of wills or equitable interests, courts would give effect to the intention of testator or person creating trust
- **"to A and his/her tissue"**
- **"to A and his/her offspring"**
- **"to A and his/her seed"**
- Remember: "to A and his/her heirs" = fee simple
- What happens if its not clear what the intention is? – could be interpreted two ways:
  - If words of limitation, then it creates fee tail = fee simple
  - If words of purchase, and A has heirs, all would own fee simple in co-ownership

THE RULE IN WILD'S CASE

- Rule of construction, not rule of law – *if there is anything to suggest otherwise, the otherwise would apply*
- Only applies in wills, not *inter vivos* transfers

Wild's Case *(1599)*

Testator wanted to leave estate "to Roland and his wife and after their decease to their children"; Testator died, then Roland, wife and son died, leaving daughter. **Issue:** Is this a *life estate or a fee tail? Did "after their decease to their children"* constitute words of limitation?

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

THE RULE IN SHELLEY'S CASE

- Was an absolute rule // not the case today
- Today – rule of construction (*if you made it clear in some other way that these were words of purchase*) // courts would look to intention, if they can't find intention, rule in Shelley's case would still apply strictly
- Only applies in wills, not *inter vivos* transfers
- **"to A for life, remainder to his/her heirs"**
  - Looks like a life estate:
    - Words of purchase: "to A"
    - Words of limitation: "for life"
  - "remainder to his/her heirs" – words of purchase or limitation??
    - "to A and his heirs" = fee simple so "his heirs = words of limitation
- **Rule in Shelley's case:** "remainder to her heirs" = words of limitation // A gets fee simple

THE LIFE ESTATE

CREATION

BY ACT OF THE PARTIES

- **Not inheritable**: as it doesn't include "fee"
- **Duration uncertain; limited to lifetime of person** (either LE holder or other (*pur autre vie)*
- **Remainder:** future interest arising in a third person. *Ex: A transfers "to B for life, and on his death to C in fee simple" – C gets 'remainder' interest*
- **Must be expressly stated "to A for life/life of B":** otherwise ***PLA s. 19(2)*** and ***Wills Act s. 24*** presume that transferor or testator is disposing of the greatest estate they own (fee simple)

BY STATUTE

- CL doctrines of dower or curtsey were replaced by formal statutes
- Now a spouse only automatically acquires rights of success if spouse dies without will

Estate Administration Act s.96

- If your spouse dies intestate and surviving spouse is **not on title**, they get a life estate in spousal home and all "household furnishings."

Wills Variation Act

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

Land (Spouse Protection) Act

- Spouse can file entry in LTO against a "homestead" // Any disposition made of the property without their consent is void // On death of spouse, filing spouse gets LE in property

CIT: *Life estate appears in* ***charge*** *section because only fee simple can be in RO Section*

RIGHTS OF A LIFE TENANT

OCCUPATION, USE AND PROFITS

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

TRANSFER INTEREST INTER VIVOS

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

TRANSFER ON DEATH

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

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

Return in Same Condition: The Life Tenant's obligations are based on the principle that the property should return to the fee simple owner in substantially the same condition as it was received by the life tenant.

- You cant put too much limitation because then you're impeding
- There is a balance to be struck between maximizing freedom of life tenant but limiting it so it doesn't seriously affect remainder person

cont'd >>

WASTE

After term of LE, property should be given to the remainder in **substantially the same condition** as when they were granted LE. The life tenant is a "steward" of the land.

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

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

- **4 Categories:** (a) removing timber (b) removing minerals (c) demolishing buildings (d) changing land use, ex: from agricultural to residential
- May be required to **pay damages** to those entitled in reversion or remainder or restrained by an **injunction** from committing acts of waste

Equitable waste: (Responsible)

- Creator of LE may want to help life tenant by saying he won't be liable for any waste, by expressly permitting LT to commit voluntary waste; "given to life tenant without impeachable for waste"
- **But even so,** equity may still restrain LT from making **unconscionable use** of the apparent legal right to commit waste at will – where you spitefully knock the hell out of the property to the detriment of the remainerment (***Vane v. Lord Barnard***)
- ***Law and Equity Act s. 11:*** estate for life without impeachment of waste doesn't give LT a legal right to commit equitable waste unless the instrument infers intention to do so

Ameliorating waste: (Not Responsible – unless burden is created)

- LT **may be responsible for** improvements/changes to character of property if changes made: (a) **increases burden** on remainder LT responsible (*Ex: add maintenance cost*) or (b) **improves land;** damages and injunction usually not awarded

Vane v. Lord Barnard *(1716) – Equitable Waste*
D gave himself a castle under LE without impeachment of waste – ultimately his son was to get property – got upset with his son and stripped the castle.

- ***An LE without impeachment for waste does not give tenant right to commit equitable waste.***
- ***Law and Equity Act s. 11*****:** Estate for life without impeachment for waste does not give tenant right to commit equitable waste – this statutory provision resulted from this case.

LIABILITY FOR TAXES, INSURANCE, ETC.

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

Mayo v. Leitovski *(1928)*
Old woman was granted LE on property owned by her son – she did not pay taxes so it went up for tax sale – daughter bought property in tax sale and tried to assign title to her mother, thereby getting around LE.

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

FUTURE INTERESTS

CONDITIONS AND FUTURE INTERESTS

- **Condition precedent:** you have to meet the condition to even get the property
- **Condition subsequent:** you get the property, but if the condition is met in the future, you're out

CONDITION PRECEDENT – "*if*"

"**to A in fee simple *if* at the day of my death, A is not married to B"** – putting conditions on disposition

- **"to A"** – words of purchase
- **"in fee simple"** – words of limitation
- "***if* at the day of my death, A is not married to B"** – condition *precedent*

CONDITION SUBSEQUENT – "*but if*"

"to A in fee simple, *but if* A marries B, to C in fee simple"

- **"to A"** – words of purchase
- **"in fee simple"** – words of limitation –> ***"fee simple defeasible" on a condition subsequent***
- **"*but if* A marries B"** – condition *subsequent*
- **"to C"** – words of purchase – ***but*** the interest C gets is a ***future interest*** called **right of entry**
  - So two people who have interest in the land – C can sell his interest (if anyone would buy it)
- **"in fee simple" –** words of limitation implied are: "right of entry on a fee simple" *future interest*

Two things must happen for C to get her interest: (1) A must marry B – so the condition must be met (2) C must exercise a right of entry (i.e. tell A to get out)

DETERMINABLE FEE SIMPLE – "*until*" / "*when*" / "*as long as*"

"to A in fee simple *until* A marries B" *(grantor = X)*

- "to A" – words of purchase
- "in fee simple" – words of limitation
- "until A marries B" – A is getting a ***determinable fee simple***
  - If in fact A does marry B, the person who gets the property is X or X's heirs
- X, then has a ***future interest*** called **possibility of reverter**

- **"to A in fee simple until A marries B, then to C"** (C is specifically mentioned) – C gets right of entry
- **"to A in fee simple until A marries B"** (no one specifically mentioned) – X gets possibility of reverter

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

VESTING OF FUTURE INTEREST

Future interest either has to be vested now, or if its not vested now, it must vest within a certain period of time, set at "lives in being + 21 years"

If it is vested now, don't have a perpetuity problem // If it is not vested, you have a perpetuity problem and you have to refer to ***Perpetuity Act*** // If C was not alive when that interest was given to A, then C's interest is **only an interest in land if C can get a vested interest within that perpetuity period** (lives in being + 21 years) // Note: the perpetuity is around the issue of remoteness of vesting, not the future interest itself

Ex. if C is X's great great great great great grandson, C is not alive at the time this gift is given, so C does not have a vested interest because you have to be around to be fully clothed. So this future interest is a non-vested future interested (it's a hope) – you can't hope to get a great great great great great grandson in lives in being + 21 years – there is no way it would meet time restriction, so that comes to an end and A gets a fee simple absolute.

The issue around remoteness of vesting afflicts B, afflicts right of entry, afflicts estate in fee simple subject to condition subsequent, **it does not afflict determinable fees**: "to A in fee simple until A marries B" – the **possibility of reverter** was not subject to perpetuities (***it is now*** *because of legislation*)

Future interests are registered as charges reflecting right of entry / possibility of reverter / remainders

Future interests: fee simple // Fee simple defeasible/conditional – on a condition subsequent // Fee simple determinable – possibility of reverter // Remainders // Reversions // Fee simple condition subsequent

QUALITY OF CONDITIONS

Noble v. Alley *SCC 1951*
Private summer resort in Ontario. "Lands shall never be alienated to coloured races" – intention to restrict the development to white race. ***TJ & CA*** *said it was okay.*

- The clause is a restrictive covenant (distinguished from covenant because it runs with the land) – to get this quality, it must touch and concern the land
- **Held:** It can only bind immediate purchaser because it doesn't meet the rules of touching and concerning the land – it doesn't go to the *question of use*
- You're not restricting the use (you can use it for this, but not for that), you're restricting the transfer – **it looks more like a restraint on alienation**, partial or full, can't be enforced as a restrictive covenant
- Also uncertain with respect to what the race is – this is what the SCC uses to knock it out of the park
- Today, there would be no question, public policy would knock it out

Racial covenants or conditions will fail for reasons of uncertainty. They would also likely fail as undue restraints on alienation (can't restrict alienation).

MacDonald v. Brown Estate *(1995)*
Uncle left estate to niece "until" she became widowed or divorced. **Issue:** whether the conditions were void as being illegal, contrary to public policy or for uncertainty.

- **Intention:** If there is an intent by the testator to **compel** parties to stay together/break up, it is regraded as against public policy. If intention of testator is **protective**, (I'm giving you property because you will need it if you're divorced) – that's okay
- **Held:** in this case, it was protective because he was paying her a sum of money to put aside – she was getting money while they were married. But if she became widowed or divorced him, she would get additional
- Note: This is determinable interest because of the word "until" / not conditional

Other clauses:

- Clause re child not being around one parent – not valid
- Where do u draw the line? Smoking/over-weight
- Courts say: you can restraint on religion – but you have to do it in a way that is not uncertain

DISCRIMINATION

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

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

- **Held:** The clause is certain – you can identify at least one person who meets the criteria – you can draw up a checklist and determine if someone does qualify but court says, in this day and age, this is **against public policy** – you can't discriminate on these grounds – therefore, invalid

Human rights legislation does permit discrimination, although there are circumstances where it is okay to discriminate – usually to address particular systemic discrimination (you may want to advance a group that has experienced systemic discrimination in the past)

- Race covenants are no good unless they are based on affirmative action

CO-OWNERSHIP - CONCURRENT ESTATES

TYPES OF CO-OWNERSHIP

TENANCY IN COMMON

- **Unity of possession:** 2 or more persons, by virtue of interests they own, are ***simultaneously*** entitled to possession of the property as a whole // ***land is undivided*** // tenants are treated as 'single owners'
- **Unity of interest is not necessary** – can have different shares (contributed or profits)
- **No right of survivorship:** Can dispose of their interest *inter vivos* or on death by will or intestacy as they would any other property
- **No consent required:** No consent of co-owners required to dispose of interests
- **Creation:** Created upon registration of 2 or more owners on the same title (***LTA, s. 173***)

Share of holdings only matters for 3 situations:

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

If you use words "equally" or "2/3 to 1/3" –> tenancy in common since joint tenancy is viewed as a whole

JOINT TENANCY

RIGHT OF SURVIVORSHIP (*jus accrescendi*)

- **No consent required:** No consent of co-owners required if JT wishes to dispose of interest (only *inter vivos*), or sever joint tenancy unless required by K.
- **Right of survivorship:** If a JT is not severed and one tenant dies, the **survivor instantly becomes absolute fee simple owner**. JT's can dispose of their interest *inter vivos* freely, but cannot dispose of interest upon death as the right of survivorship holds that the surviving JT will inherit the deceased JT's interest. Right of survivorship takes priority over normal rules of descent on death – in/testacy rules and statutes have no impact on right of survivorship. Applies to both real & personal property.

Common law favours creation of joint tenancy over tenancy in common.
Equity favours creation of a tenancy in common over joint tenancy
Property Law Act s. 11 agrees with equity so courts will opt for a tenancy in common over joint tenancy

If you use words "equally" or "2/3 to 1/3" joint tenancy not given. Joint tenancy is viewed as a whole

THE 3 UNITIES

1. ***Unity of Title:*** All co-owners must acquire their interests from the same instrument (i.e. same Form A or same will). If one JT transfers their interest JT is severed since the operative instrument is no longer the same (*severance only changes right of survivorship aspect, not proportion of ownership*)
2. ***Unity of Interest:*** All co-owners must have equal interests in property. Interests must be of same quality (legal/equitable, or both). If one JT mortgages their interest, JT is severed since the legal interest has changed. (*owners can be joint tenants in the legal interest, but tenants-in-common in the equitable interest*)
   - *Ex: A and B are JT, and B sells ½ their interest to C – A has ½, B and C each have ¼ – severs JT between A and B, but B and C could have a JT // Ex: If A and B are JT, A goes bankrupt and trustee takes the interest, JT is severed. A's interest passes to trustee in bankruptcy.*
3. ***Unity of Time:*** All co-owners must receive interests at same time (usually through single Form A).
   - *Ex: If will gives property upon children reaching age 21, they acquire interests at different times – TIC*
4. ***Unity of Possession:*** Co-owners are entitled to undivided possession of the whole property (like TIC)

CREATION OF CONCURRENT INTERESTS

COMMON LAW

The common law favours creation of a joint tenancy. In the absence of any words to indicate otherwise, it was assumed that a joint tenancy was created (***Re Bancroft***, *NSSC 1936, will doesn't specify TIC or JT)*. But the **slightest hint towards intention to divide will create a tenancy-in- common** (***Re Bancroft***).

In ***Re Bancroft,*** the first split between his children used the words "equal shares". The second split between his grandchildren does not contain word "equal" – this means, the children of Minnie (his daughter) take as joint tenants. Therefore, when Minnie's son dies, the sister has right of survivorship – so his share goes to her. The grandchild is preferred to the great-grandchildren (the children of the brother). Ouch!

Re Bancroft no longer applies in BC because of ***PLA s. 11*** which holds that a tenancy-in-common is the default position for fee simples unless the transfer specifies otherwise.

EQUITY

Common law rule: without words to the contrary, a joint tenancy is assumed. **But equity favoured tenancies in common** by interpreting the documents broadly – looked at intention.

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

1. Where the parties contributed purchase money for property in unequal shares [can be rebutted by evidence of contribution]
2. Where property was a mortgage and the co-owners were mortgagees
3. Where parties were business partners

STATUTE

PLA s. 11: Where land is transferred to 2 or more persons, the **default position is a tenancy-in- common** (unless the instrument explicitly creates a joint tenancy i.e. **"to Bloggs and Snooks, joint tenants in fee simple absolute"**). ***PLA*** does not apply to personal property, which follows common law rules.

- **Problems:** Unregistered property interests which don't fall under the provisions of the ***PLA*** may cause problems in deciding the nature of co-ownership.

Companies Act s. 32: A limited liability company can hold property with another (company or individual) as a joint tenant. Dissolution of the company ≠ death of company – therefore, the right of survivorship can only move from the individual to the company (not the other way around).

TRANSFER TO SELF

How do u bring someone into joint tenancy? Transfer to yourself + wife in joint tenancy

- Problem in common law: you couldn't transfer to yourself (*res sua*)
- ***PLA s. 18.1*** changes this – a person may transfer land to himself in the same manner as a trasnfer to another person. A transfer by a joint tenant to himself of his interest in land, whether in fee simple or by a charge, has the same effect as severing the joint tenancy (***s.18(3)***).

How to screw your fellow joint tenant: Transfer Blackacre to yourself via a Form A, then leave Form A unregistered. When you die, your heir can screw your co-owner by revealing Form A, thus severing the joint tenancy and your co-owner's right of survivorship.

- ***Trust deed which contains declaration of severance, and provides that the interest is to be held in trust for another to be registered on the joint tenant's death will sever joint tenancy*** (***Sorenson***).

REGISTRATION OF TITLE

LTA s. 173 requires that the title reflect the nature of the co-ownership (either JT or TIC). The default setting is "tenancy-in-common". ***LTA s. 177*** requires that the title specifically indicate "joint tenants" in order to create a joint tenancy.

RELATIONS BETWEEN CO-OWNERS

Share of profits: Co-owners need not account ("share") to other co-owners for benefits derived from possession. A co-owner who remains on the land can reap the benefits of the land, assuming that they haven't ousted the other co-owner (***Spelman***, *wife sues husband for rent, 1944, BCCA*)

Must consider:

1. **Whether JT was ousted** – pushed out the door/barred from coming back either actually or constructively (made life so miserable that they left) – if yes, then that triggers payment to ousted JT
   - Statute – had to determine whether one JT had received more than his "just share or proportion"
2. Even if JT wasn't ousted, as to what was a proportionate share, you have to look at **the activity that was engaged in** – if that activity was one in which remaining JT was expending his own skill and taking risks (i.e. it was his business) then the JT who is just standing by can't claim a share of that money
   - If this wasn't the rule, then if he was losing money, he would be able to claim a share of his losses
   - So, you're not entitled to profits but you're also not liable for losses

Spelman:

- In the property where neither JT was in occupation and there was an income stream coming in – that should be shared according to their division (after deducting expenses in running the rental)
- In the property they were occupying and she had left, she couldn't collect on profits because she hadn't been ousted

Share of expenses: The remaining co-owner has no right to request that other co-owner contribute to expenses, unless the remaining co-owner is willing to pay rent for his possession (***Spelman***)

- If tenant in occupation claims for upkeep and repairs, the court, as a term for such claim, requires that the claimant shall submit to an allowance for use and occupation
- If one tenant has made improvements which have increased value sale, other tenant can't take advantage of increased price without submitting to an allowance for the increase in value
- So if you've increased the value and you want to keep that increase for yourself, but you've been living there for 12 years, well the court will say we're going to put a value on that 12 years that' you've been there to balance that out with the increase in value

Rent: An absent co-owner has no right to claim rent from the remaining owner except:

(1) Where ousted (***Spelman***)
(2) In a partition action, where the occupying owner claims for expenses (i.e. mortgage interest/taxes/ insurance/repairs/improvements) (***Bernard***, *wife must pay rent in exchange for mortgage reimbursement, 1987, BCSC*)

Summary

- If no ouster, then the person in possession need not account
- If the person in possession is claiming expenses, then they must pay occupation rent
- If there has been ouster, then the person in possession must pay occupation rent

TERMINATION OF CO-OWNERSHIP

Severance of joint tenancy creates a tenancy in common (i.e. no more right of survivorship) (***Stonehouse***)

SEVERANCE OF JOINT TENANCY

1. **Destruction of One of the Unities:** usually by alienation of land by one party
   1. With or without consent: unilateral alienation – you can sever a JT by transferring your interest to yourself or a third party
      - Declaration of one party of the intention to sever a joint tenancy without any other act and without acceptance by the other JT does not sever a tenancy. To sever, you need to transfer something (***Sorrenson***, *declaration of trust was enough to sever*)
      - Cannot sever a joint tenancy in a will (***Sorrenson***)
   2. Bankruptcy: bankruptcy of one JT will sever the joint tenancy
      - Note that registration of a judgment against the co-owner does not sever joint tenancy
   3. Order through partition and sale
2. **Agreement Between Joint Tenants:** both parties agree to sever JT and do some act
3. **Unilateral Intention of One Joint Tenant**

PARTITION AND SALE

Partition: Dividing of lands held by co-owners into distinct portions so that individual co-owners each have exclusive possession of one part of the whole land. Effectively subdivides the land.

Common law: no right to enforce partition or sale

Partition of Property Act allows co-owners to apply for a court order which will sell the land and divide the proceeds (sale) or divide the land into multiple parts (partition) for 2 reasons:

- **No Consent:** One co-owner wants to sell and can't get the co-operation of the other co- owner [because co-owners can prevent each other from alienating the land]
- **Exclusive Possession:** One co-owner wants exclusive possession of the property, but still maintain their interest

s. 2: only joint tenants, TIC, mortgagees, creditors, and all other parties interested in the land may use the Act to partition/sell land
s. 3: you can claim sale, partition or both
s. 6: if majority of co-owners agree to sale, court **must** ordera sale
s. 7: otherwise,court has discretion to order a sale (court can refuse)
s. 8: in distributing proceeds of sale, court can consider surrounding circumstances to adjudicate claims [i.e. co-owner's non-financial contributions]
s. 17: partition may amount to subdivision, but in order to get partition, you must comply with ***LTA*** and municipal requirements for subdivision

There is a *prima facie* right of a joint tenant to get a partition or sale of lands, and the court will compel such a partition for sale unless justice requires that such an order not be made (i.e. age of parties, intent behind acquisition, number of co-owners, etc) (***Harmeling***; *wife seeks to evict 70 year old husband, 1978, BCCA*)

Skeetchestn v. BC

BACKGROUND

1 This is an appeal by the Skeetchestn Indian Band ("the Band") from two decisions of the Registrar of Land Titles, Kamloops Land Title District ("the Registrar"), whereby he refused to register first, a certificate of pending litigation and second, a caveat. Both appeals pertain to an aboriginal title claim made by the Band against approximately 1000 acres of land known as the 6 Mile Ranch.

2 Those lands have been privately owned in fee simple and registered under the B.C. Land Title Act for several decades. In the late 1800's, the province transferred all its lands contained within the "Railway Belt" to the federal government, who in turn offered the land for sale to settlers. Thus over one-half of the parcels comprising the 6 Mile Ranch were originally granted by Dominion Government patent between 1904 and 1930. In 1930, all unalienated lands in the Railway Belt were transferred back to the provincial Crown. As a consequence the remaining parcels resulted from provincial Crown grants issued between 1950 and 1991.

3 Kamlands Holdings Ltd. ("Kamlands") purchased the 6 Mile Ranch in January 1995 in order to create a destination resort. The development plan envisages a marina, a golf course, an equestrian center, 129 equestrian homes on quarter-acre lots, 518 townhomes, bungalows, multi-story living units, 3 hotels, and 75 condominium hotel suites convertible into 150 hotel rooms. Because the project is of major economic importance to the Kamloops area the provincial government has facilitated the development by removing part of the 6 Mile Ranch from the Agricultural Land Reserve. The government also intends to transfer 34 acres of Crown land to Kamlands in return for Kamlands surrendering certain water licences.

4 The Band alleges that the proposed development will interfere with its aboriginal title. In its main action brought against Kamlands and the Province of British Columbia, the Band seeks the following:

1 (a) A declaration that the Plaintiff has aboriginal title, within the meaning of Section 35(1) of the Constitution Act, 1982, to 6 Mile;
2 (b) A declaration that the authorization by the Province for the development at 6 Mile by Kamlands unjustifiably infringes the Plaintiff's aboriginal title;
3 (c) A declaration that all titles in Schedule "A" [the entire 6 Mile Ranch] held by Kamlands are null and void;
4 (d) A declaration that a transfer of the 34 acres is or would be a breach of the Province's fiduciary duty to the Plaintiff and is null and void;
5 (e) A declaration that the exercise by B.C. Lands of the Province's fiduciary obligations in respect of the Plaintiff's title to the 34 acres is null and void;
6 (f) A temporary and permanent injunction restraining Kamlands and the other Defendants from interfering with the Plaintiff's aboriginal title to 6 Mile;
7 (g) A lis pendens over all its titles set out in Schedule "A";
8 (h) A lis pendens over the 34 acres;
9 (i) Costs; and
10 (j) Such further and other relief as this Honourable Court may deem appropriate.

5 Although this appeal turns on the narrow issue of whether the Registrar was correct in refusing to register the certificate of pending litigation and the caveat, the main action has broad implications because this aboriginal title claim is directed primarily against private lands rather than Crown lands. The nature of the action and its outcome is of particular concern to persons living in certain rural areas of the province. There are two reported British Columbia cases where aboriginal land claims involved fee simple lands. They resulted in injunctions being granted and were ultimately settled out of court. Thus the question of registration under the Land Title Act did not emerge. Consequently this is the first British Columbia case to directly confront the inherent conflict between fee simple title and aboriginal title. The advantage of injunction proceedings as opposed to this situation is that during injunction proceedings, the court considers the harm that might occur to either party by answering these questions:

1 (1) Is there a fair question to be tried?
2 (2) Will irreparable harm follow if an injunction is not granted?
3 (3) Does the balance of convenience favour an injunction?

Those questions cannot be asked in these proceedings.

6 In his reasons for refusing to register the Band's certificate of pending litigation, the Registrar said:

> 1 The estate or interest in land claimed by the plaintiff for registration in this office is aboriginal title. Section 215 of the Act requires a claim of a registrable estate or interest in land. What is claimed by the plaintiff is, in my opinion, not an estate or interest in land that is registrable under the Act. ...

7 The Registrar's reasons for refusing to register the caveat are as follows:

> 1 To lodge a caveat pursuant to section 282 of the Act, a person must be "entitled to land" the title to which is registered under the Act. It is my view that in order for a person to be "entitled to land" that person must be claiming an estate or interest in land capable of registration under the Act. ... As well, the nature and purpose of the Torrens system, being the establishment of indefeasible titles and the conclusiveness of the register, precludes the registration of claims that are ultimately not registrable.

These rulings are based on the British Columbia Court of Appeal decision in Uukw v. B.C. (1987), 16 B.C.L.R. (2d) 145 (C.A.).

8 The Court at p. 151 specifically adopted Heller v. Registrar, Vancouver Land Registration District (1960), 26 D.L.R. (2d) 154 at 159-60 (B.C.C.A.), which quotes the following passage from Fels v. Knowles (1907), 26 N.Z.L.R. 604 at p. 620:

> 1 The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest.
> 2 [My emphasis.]

9 The Court of Appeal held that in order to file a lis pendens, the claimant must be claiming an interest or estate in land that is capable of registration. At p. 153 the Court said, "It is not sensible that the statute would provide for registration of a certificate of lis pendens with respect to a claimed estate or interest in land which, if established, is not entitled to be registered."

10 The Court of Appeal found that even if aboriginal title was an estate or interest in land, it was not registrable under the Land Title Act because one of the defining characteristics of aboriginal title was inalienability. The Court said at p. 154:

> 1 Dickson J. [in Guerin] spoke of the "general inalienability" of the Indian title. The respondents' argument concedes that it is alienable only to the Crown. That being so, it cannot be registered under the Land Title Act. The registrar will register an indefeasible title or charge upon being satisfied that the applicant has established a good safe holding and marketable title. One need not be concerned with the precise definition of "marketable" in this context. It is enough to observe that aboriginal title can have no place in a Torrens system which has the primary object of establishing and certifying the ownership of indefeasible titles and simplifying transfers thereof. I conclude that s. 213 requires the claim of a registrable estate or interest in land and what is claimed in this case is not registrable.

11 For those reasons the Court concluded that the Land Title Act did not accommodate aboriginal title or a charge claiming aboriginal title. It therefore declared the certificates of lis pendens null and void. It should be noted that the Supreme Court of Canada refused to hear an appeal from the Uukw decision.

12 The Band has advanced a number of reasons why its certificate of pending litigation and caveat should be registered. Each of those grounds will be discussed in turn.

CONCLUSION

43 The Torrens system is designed to register interests in land that have a clear identity recognized by the rules of real property law. It is a real property regime based on fee simple grants by the Crown. A fee simple interest can be fragmented into smaller units. Other registrable interests in the land result from the fee simple interest. However, aboriginal title is not derived from fee simple. It is sui generis and does not lend itself to categorization. It is not alienable; it can only be surrendered to the Crown. Aboriginal title does not fit within the scheme of current real property law in that it is not an interest in land contemplated by the Land Title Act which only accommodates traditional common law or equitable interests in the land. Aboriginal title has no "identity recognized by the ordinary rules of the common law." Furthermore, under the Torrens system priorities are based on the date of registration rather than the date when the right is acquired and therefore cannot accommodate aboriginal title which has its source in the occupancy and use of lands prior to the assertion of sovereignty by the Crown. For those reasons, aboriginal title is not registrable under the Land Title Act.

44 The same considerations apply to a caveat. From a practical point of view the principal difference between a caveat and a certificate of pending litigation is that the caveat has a predetermined life span during which nothing can be registered. Property subject to a certificate of pending litigation can be dealt with, although subsequent dealings may be subordinated to the claim being advanced.

45 The Supreme Court of Canada decision in Delgamuukw does not address the issue of registration of aboriginal title. Nor does it cast any light on the impact that aboriginal rights have on privately owned lands as opposed to Crown lands. According to Delgamuukw, it is possible for two aboriginal groups to have aboriginal title over the same land provided those interests can be reconciled and coexist. Delgamuukw does not say that this is so with respect to fee simple title. It suggests no mechanism for reconciling fee simple and aboriginal rights.

46 This case pits aboriginal title against fee simple title. Most of the fee simple lands in this province are derived from Crown grants issued in an era when government knew less about their obligations to aboriginals than now. Many of these lands have been developed at substantial cost to their owners. Can this be ignored? Can aboriginal rights extend to fee simple lands? Is it possible to reconcile aboriginal title and fee simple title at this late stage? Should the fee simple title be declared null and void as requested by the Band or is the Band's claim reduced to a claim in damages if aboriginal rights were in fact wrongfully and irrevocably infringed by fee simple grants? These are only some of the questions that arise in this litigation.

47 Delgamuukw does not address most of those questions, nor does it by implication or otherwise overrule Uukw. Consequently, the appeal from the decision of the Registrar is dismissed.