PROPERTY FINAL CAN

SILVANA LOVERA

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# Basic Principles in Land Law

**Themes in Property Law**

* **Interests** which run with the land
* **Registration**: what can be registered? How to register? What happens if 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 or upon death. Multiple owners can own the same piece of property. Property can be held either publicly or privately.

**Sources of Real Property Law**

In 1066, common law began in England. The First Nations in BC have occupied the 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 the *Land Registry Ordinance*, giving us the Torrens Land Registration System. In 1871, BC joined Confederation.

**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 requires that all transfers must 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

Historically, real & personal property had different **actions** (***in rem***vs ***in personam***) and **intestate distribution schemes**. Today, there is no distinction b/t real & personal property in intestate distribution.

***Personal property operates under*** *absolute/allodial ownership* ***(owner is absolute). No concept of tenures for personal property. But courts can create equitable interest in personal property, which essentially create estates (i.e. car leases).***

Personal property is free 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*).

**Legal versus Equitable Interests**

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

**The Use: An Equitable Interest**

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). This 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.

**Feudal Concepts of Land Ownership**

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)
* **Estate:** How long an interest in land could be held [freehold versus leasehold]
  + **Corporeal Interests:** right to use and exclusive possession

|  |  |
| --- | --- |
| ***Freehold estates*** | ***Leasehold estates*** |
| Indefinite, uncertain (almost forever) time period | Certain, ascertainable, limited time period |
| Exclusive possession | In possession of the land [landlord retains some residual possessory rights] |
| Ex: Fee simples, Life estates | Ex: Leases |

* **Fee tails**: required heirs to be direct descendants of the owner. Abolished by the ***PLA, s.10***.
* **Future interests:** where the estate is promised to the holder in the future.

**Possession: It's my land! Get off!**

**Right of Possession**: An **intention to possess** and an **ability to exclude** others. Corporeal interests have the right of possession.

**Common Law Rule:** Possession depended on the nature of the land and manner in which land was commonly enjoyed. Intermittent/ sporadic possession may be adequate for title. Exclusivity did not preclude consensual arrangements that recognized shared title to the same parcel of land.

**Law of Finding /** “**Finders keepers, losers weepers**”

The finder of a chattel (personal property) acquires title that is good against the entire world except for the true owner. Not indefeasible title since true owner can always reclaim his interest.

**Aboriginal Title**

Aboriginal title is ***sui generis***(of its own class or kind). Exclusive occupation of land is sufficiently similar to the common law concept of possession to impose aboriginal title.

**Adverse Possession / "Possession is 9/10s of the law" / Get that squatter off my land!**

***LTA, s.23(3)*** abolishes the concept of adverse possession in BC, except against land which has never had an indefeasible title imposed before (i.e. a Crown grant) (***LTA, s.23(4)****)*. The court can adjudicate adverse possession claims (***Land Title Inquiry Act, s.171***). Acquisition of title by adverse possession can arise both through mutual mistake and where the adverse claimant is a knowing trespasser. In order for a successful adverse possession claim to title, 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 possession (as opposed to constructive) and continuous.

## Freedom of Alienation

Our liberal capitalist system likes to ensure that our land is freely alienable: that we can sell & dispose of our land whenever we want. 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. 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.

**Good, safe-holding and marketable title**

**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.

**Legal Concepts 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**.

***Ad Coelum* / Airspace Rights**

**Common Law Rule: Whoever owns the title to the soil also holds title all the *way up to the heavens and down to the depths of the earth*.**

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.

**Owners & lessors** who have possessory interests in the building can also have **possessory interests in the airspace** above the building (***Kelsen***, *billboard-over-building*). Airspace rights extend only up to the "**ordinary use & enjoyment**" of the plaintiff (***Bernstein v. Skyviews***, *aerial-photographer*). **Owner has no property right or legislative jurisdiction in relation to airspace** above the ordinary use and enjoyment of his land (***Manitoba v. Air Canada***, *Manitoba-tries-taxing-AC*). Owner has a **right to fell overhanging branches** and remove protruding roots of trees grown on a neighbouring property.

**Statutory Principles**

* ***Civil Aviation Statutes*** recognize airspace rights by parties other than the owner.
* ***Land Title Act, s.138***: recognizes **air space parcels** and **air space plans**
  + **S.139: Air Space is Land** and lies in grant:
  + **S.140(1):** a grant of an air space parcel does not transfer to the grantee and easement of any kind whatsoever nor does it imply a covenant restrictive of use nor a covenant to convey another portion of the grantor’s land
  + **S 140(2)** Unless expressly granted, the title to the airspace above the upper limits and below the limits of an air space parcel remain with the grantor.
  + **S.141(1):** an owner in fee simple with registered title can, by deposit of air space plan, create air space parcels separate by surfaces (walls/floors) and obtain indefeasible titles for them
  + **S.141(2):** air space parcels can be transferred, leased, mortgaged or dealt with in the same manner and form as other forms of registered land
  + **S. 142**: Air parcels in respect of highways: Minister of Transportation can grant airspace parcels above highways (for power lines, billboards, Sky train etc.)
  + **Title:** Fee simple owner of airspace parcel receives a 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.
* ***Strata Property Act*:** permits a person to acquire fee simple ownership in a multi-unit building situated on land that s/he does not own.
  + Grants a strata lot owner an airspace unit.
  + Each strata lot 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 & a part-interest in the common area. No separate title for the land on which the condo building sits.

***Ad Inferos* / Below the Land**

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

* **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

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

**Water Rights / Riparian Rights** of owners whose land border 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 Ownership Rights to the Water Itself**

**Common Law:** Riparian owner had proprietary rights in flowing water and percolating water (groundwater).

Every owner of real property bordering a stream has a proprietary right to:

1. Have the water flow to her in its natural state in flow, quantity and quality, neither increased or diminished, whether she has made use of it or not.
   1. **Natural State**: uncontaminated state – can sue for nuisance if someone does
   2. **Right to flow:** entitled to this in an unpolluted condition
2. Make certain uses of the water

* **Incidental Rights:**  don’t depend on prescription or grant,
* **Non-Exclusive:** right to enjoy the water is subject to similar rights of other riparian owners
  + Cannot cause material injury to fellow riparian owners
  + Not for uses unconnected to riparian property
  + If supply exhausted through ordinary use, cannot complain
  + Can use for Domestic purposes only
  + Restrictions on irrigation – "amount adjudged reasonable" "
  + Cannot grant use of water to another person
* **Long Term:** Riparian owner doesnt lose his right to the water simply because he hasn’t exercised his right

**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***.

**"domestic purpose"** means the use of water for household requirements, sanitation and fire prevention, the watering of domestic animals and poultry and the irrigation of a garden not exceeding 1 012 m2 adjoining and occupied with a dwelling house

**"ground water"** means water below the surface of the ground

**"stream"** includes a natural watercourse or source of water supply, whether usually containing water or not, and a lake, river, creek, spring, ravine, swamp and gulch;

**"unrecorded water"** means water the right to the use of which is not held under a licence or under a special or private Act;

* **S.2(1)Definitions: Vesting Water in Government:** Property in and right to use and flow of all water in a stream in BC is vested in the gov’t except for private rights established under licenses issued by gov’t
* **S.4 Prohibitions:** No right to divert or use water may be acquired by **prescription (the fact that you use something means u acquire right)**
* **s.5:** gov’t has the capacity to give licenses to use, store, and divert water or construct works to distribute water or create power from it etc.
* **s.42: Rights to use Unrecorded Water*:*** *it is not an offence to:*
* **(1)** Divert unrecorded water for extinguishing a fire (must restore the flow after)
* **(2)** Divert unrecorded water for domestic purposes or prospecting if proven it’s unrecorded!

**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 v. Anderson***, *unauthorized-diversion-of-stream-from-unlicensed-domestic-use*; ***Steadman****, 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***, *no-protection-for-polluted-unlicensed-fish-farm-water*).

**Ownership of Water Beds**

**Land act Bodies of water 55(4):** if the gov’t grants Crown land bordering a lake, river, stream no part of the bed or shore of the body of water below its natural boundary passes to grantee unless:

* (1) there is an express provision in grant to contrary
* (2) minister endorses a declaration on the plan under s.58

\*Overrules CL ad medium filum!

**Tidal Riparian Rights (Saltwater)**

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

**Riparian owners have a private right to access and regress to and from water abutting their land but cannot put down anything which disturbs the foreshore and interferes with the foreshore owner’s rights (in this case north saanich owns the foreshore). WATER ACT DOESNT APPLY TO OCEAN *North Saanich***

***Hals* States Law in BC (stated in *North Sannich*)**

**1)   General rights of riparian owners:** a riparian owner is entitled to access and regress to and from the water adjacent to his land

**2)   Nature of rights access**: riparian owner’s right is private & not a public right and interference is actionable without proof of damage; does not depend on ownership of bed of river or other water in question and is distinct from public navigation rights

**3)   Exercise of rights access**: in exercising his right a riparian owner must not interfere with any public right of navigation in the water *or* ***put anything down that disturbs the foreshore***. If there is something erected, must be used as a means of access

**4)   Incidental rights**: riparian owner’s rights include: right to land, or pass over shore at all states of water for the purpose and right to moor vessels adjacent to land for period as necessary to load or unload them and keep them there till complete.  Must not moor vessel to interfere with another owner’s right to access or to interfere with any public right of navigation

**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 of Theosophy v. South Australia***, *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.

**Fixtures:** Is the mobile home a chattel or a fixture?

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

**Fixture:** A chattel so fashioned or connected to the land that in law it forms part of the land.

**Common Law Rule:** A transfer of an interest in land included all the fixtures on the land.

**Bottom line**: Evaluate the degree of annexation and the object of the annexation.

**Onus of Proof:** The opposing party must rebut the ***Stack*** presumptions.

**Test: Has the chattel become a fixture?** (***Stack v. Eaton,* 1902**)

1. What is the **degree of annexation**?
   * If a chattel rests on its own weight, it is presumed to be personal property.
   * If a chattel is attached, it is presumed to be a fixture.
2. What is the **object or purpose of the annexation**?

* **Objective Test:** Would a reasonable person, familiar with the customs of the time and place, conclude that the parties **intended** that the item remain a chattel, or become part of the real estate?
  1. Intention is only important for considering the degree/object of annexation

**Test: Has the fixture become "part and parcel of the land"?**

Whether an object is part and parcel of the land must be determined by examining the ***degree*** and ***object*** of the annexation, to infer whether the annexation was **intended** to be permanent or temporary (***Elitestone***, *bungalow-on-concrete-pillars-for-50-years*).

**Canadian principles for fixtures** (***Stack v. Eaton***, **1902**)

1. Articles attached to the land by their own weight are chattels unless intended to be fixtures
2. Articles affixed to the land slightly are considered fixtures, unless intended to be chattels.
3. Must examine degree and object of annexation in order to rebut the presumption.
4. Intention is only relevant if it can be presumed from the degree & object of annexation.
5. **Tenants' Fixtures:** Tenants' fixtures (attached for trade) become fixtures unless the tenant wants to take them back.

**Maczko's 6 principles in *Royal Bank of Canada*** (*restaurant-equipment*) (best to cite ***Stack***)

1. *Chattel -* If an item is unattached and can be removed w/o damage to the item or land.
2. *Chattel -* If an item is only plugged in and can be removed w/o damage to the item/land
3. *Fixture -* If an item is even minimally attached (i.e. not just plugged in)
4. *Fixture -* If an item would be useless without a certain removable part
5. **Tenant's Fixture -** A fixture may only be removed if it is a tenant's fixture, provided the premises are restored
6. **Purpose test** - If the item is unattached, but the party can establish that the intent was that it be a fixture, then it is a *fixture*

**Historical Caselaw on Fixtures:**

* Was the object of the annexation was to improve the land, or whether it was to improve the chattel?(***Haggert v. Brampton Town***, 1897)
* If object was attached for the better enjoyment of the building as a building, it is a fixture. If it was for the better enjoyment of the chattel as a chattel, it is a chattel. (***Re Davis***, *bowling-alleys-aren't-fixtures!*)
* Chattel became 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***, *carpet-vendor*).

**Tenant’s fixtures**: articles affixed to the land by a tenant

* When an owner adds a chattel, it improves the land.
* When a tenant adds a chattel, it merely improves the chattel.
* **Test:** Was it affixed by the tenant? Can be removed with no material damage? If yes, then tenant's fixture.
* If tenant wants to take her fixture with her, it must be removed during the lease, subject to the terms of the lease.

**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***, *removal-of-sand-causes-lot-to-sink*).

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

**Lateral support:** right of support between adjoining surface owners

No one can interfere with the land by removing lateral support. **Now even without prescription there is a common law right for vertical support. Principle of support extends beyond land in its natural state to buildings as well** (***Rytter v. Schmitz*** *basement-excavation-causes-building-to-fall;*).

The right of support does not extend to actual title in dirt **(*Bremner v. Bleakley***, *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 v. Bortoluzzi***, *collapsing-grocery-store*). ***Capilano Bungalow*** (*collapsing-concrete-building-in-North-Van*) may be useful in arguing that we need to extend the doctrine of vertical support to cover buildings, but do not rely on this case.

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

***Gillies v. Bortoluzzi***; ***Rytter v. Schmitz***. 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).

**Acquiring an Interest in Land**

**4 Ways to Acquire Interests in land:**

(1) Crown Grant

(2) Inter vivos transfer \*

(3) Will or intestacy

(4) Proprietary estoppels

**CROWN GRANT**

* 1866: Provincial crown of BC created and acquires 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** (e.g. 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 TRANSFERS**: ***SALE OF LAND***

**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** and (2) the **Transfer/Executed Stage**, respectively

### STEPS if selling land

**1 Listing agreement**

* Enter as a principal into an agreement with agent, get agent to sell land [not necessary but should]
* Usually professional does it and gets contract of % of selling price to do it
* Performed if agent sells house and you pay agent commission

**2 Contract: INTERIM AGREEMENT**

* **Used in whatever interest is being sold....not just for purchase and sale in fee simple**
  + **Can be used also for life estates, long leases over 3 years, etc.**
* Real estate agent prepares the document and has the **buyer sign** and then go to the seller and see if seller will accept offer and sign or will counter
* Description of land and price
  + Sets out what exactly the land is, seller is selling the title to the land which includes the covenants, the easements, grants, fixtures, air conditioning, buildings, fixed mirrors “including: x but excluding: x”, etc. all needs to be set out here if its not a standard transfer
* Document says that on a date known as ‘completion date’ [usually 1-3 months after signed seller will cause a transfer of property [estate in land described]
* During the months, the purchaser and his lawyer will check to see if everything is correct...check how good the title is...the outcome of interim agreement is the payment of the price and the outcome of the transfer
* **Interim agreement not completed till transfer is done**

**3 transfer**

* important to know which interests transferor actually has (others may have claims to the land)
  + Spawned land title insurance industry
* the land is actually given to the buyer and both parties sign again
* **any equitable title now becomes legal title under this document**
* this document is the substitute for deeds and livery of Seisin

**4- registration of title**

* The transfer finally gets registered in land title office

**The Contract or Executory Stage** ( when the K is concluded and binding equitable interest transfers)

**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 ***CPS, s.6*** holds that vendor bears risk of loss until completion. Purchaser should ensure that insurance begins upon completion, when both legal & equitable interest have transferred.

**STATUTE OF FRAUDS 1677**

***Law and Equity Act s 59***

1) Must be a valid contract   
2) Must have a written memorial of the transaction (any terms regarded as material); writing can be in any form (will, email etc.) **Exceptions: The only time enforceability rules do not apply (it does not have to be in writing):(A) Creation of trusts; (B) Grants for leases with term of 3 years or less ; (C) Guarantees or indemnities**

3) Contract must be signed by party to be “charged”/ party undertaking promise (usually buyer)  
4) Two docs can be combined if expressly stated

**The Transfer Stage (After transfer form is executed, Purchaser gets legal interest in land)...its vulnerable to 3rd parties**

**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 39 Registrable instruments***
  + An instrument that creates an interest in land is registrable and effect must be given to it according to its tenor, unless the use of a prescribed form is required
* ***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)

***PLA:*** additional Form A requirements

* **S 4: vendor to deliver registrable instrument**
  + Person making the agreement must deliver to the person buying in an instrument to be registerable under the land title act
    - Person goes from buyer to transferee/grantee (feoffee)
    - From Vendor🡪transferor/grantor
* **S5: transferor to deliver registrable instrument**
  + if transferring in fee simple, vendor must give transfer to purchaser that is registrable under the land transfer act (see document on page 55)
  + Landlord makes lease and deliver it to tenant in registrable form, unless the lease is for less than 3 years.
* **S6 Vendor or transferor to register own title**
  + Person transferring land must register his own title so that person receiving transfer can register instrument
  + Action musn’t be brought on agreement by a person who doesn’t comply with this section
* **S7: transferor to provide registrable description**
* ***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 Transfer Form Act***

* **S2 Effect of deed:**deed has same effect as if it was construed to contain the form of words in column 2 schedule 1 (standard clauses)
* **S3 Deed to include all buildings, etc.** Deed includes everything that belongs to the land in law and equity; rights, buildings, trees, privielges etc,
* **S4 validity of deed failing to take effect by this part-** a deed that doesnt take effect by this part is valid as far as law and equity permit.

### Step 4-The Registration (Secures legal interest in land)

See other chapters on registration

**INTER VIVOS TRANSFER: *GIFTS***

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

**Transfer: When is it Operative?**

1. **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***).

* **IN COMMON LAW Physical delivery of a deed is not necessary for effective delivery. The retention of the deed by the grantor does not=non-delivery, neither does the decision not to communicate deed to parties.**
* **The Transferor must intend for the transferee to get the land immediately and unconditionally.**
* **If a doc has words “signed, sealed and delivered” it creates rebuttable presumption that there has been delivery and title has passed under CL system of transfer**(***Ross****, Deed in grandma's purse*, 1977, NS).

**A deed which has a condition that it be recorded upon the death of the grantor is testamentary (will) and can’t take effect. The Transferor must intend for the transferee to get the land immediately and unconditionally.** (***Zwicker,*** 1899, SCC, *Land-giving-overly-married-uncle*).

Donor must do everything they are required to do in order to effect the transfer (***MacLeod***, *didn’t give granddaughter Duplicate Title, if dupCIT had been in LTO then the transfer form would have been enough 1980, AltaCA).*

### Presumption of Resulting Trust / Presumption of Advancement

**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:

* **Presumption of Advancement**: Gifts to spouse/children presumed to transfer both interests
* Some other evidence

***Property Law Act RSBC 1996 c 377***

**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

## TESTAMENTARY TRANSFERS: Wills or Intestacy

### Acquisition of interest in land by will

* **People can choose who land goes to**
* **Must make in presence of witnesses who CANT BE BENEFICIARIES**
* **Testator/testatrix** makes a will to transfer property to individuals
* **Testamentary documents:** don’t transfer any interests until the person who makes them is dead. Can be revoked or replaced by further documents until date of death**.** Must comply with ***Wills Act*** to be valid
* **If no will:** will pass on intestacy to any surviving spouse or children and if none to other relatives in order of priority
* **Personal Representatives:** when someone dies, the title to his property goes to his personal representatives who is charged with administration of the estate. They can be appointed in the will (**executors**). If no will, or no personal rep, appointed by court and called **administrators**.
  + This person automatically becomes the owner IN TRUST and its their job to carry out the administration of the estate. Has to gather assets, debt, legacies etc. and then whatever is left over is for the heir. Its his responsibility to transfer the property to the heir

***Wills Act* RSBC 1996**

* **3** will only valid if in writing
* **4** will not valid unless
  + A-at end signed by testator or in his name by some person in his presence and by his direction
  + B-testator makes or acknowledgs signature in presence of 2 or more witnesses at same time
  + C-2 or more of witnesses subscribe the will in presence of testator
* **5** exceptions for military members

**S 77 of estates and administration act—deals with appointment of personal representatives [will be in new act]**

**Proprietary Estoppel**

Where it would be inequitable for the 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** w/ 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

# Registration of Title

## Common Law Conveyancing to Recording System:

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

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

**Recording system**

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

## Torrens System/Land Title System

* **Premised on question of indefeasibility of title**
* **Until registration has occurred, NO GUARANTEE OF TITLE IN RESPECT TO THIRD PARTIES**
* **Transfer form NO LONGER END OF ROAD, becomes the MEANS TO THE END. End=registration**

### Effect of Torrens System

Torrens imposes a registration system which

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

**Purposes of Land Title System:**

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

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

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

**Simplifies Process:**

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

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

### Torrens System in BC

• BC is divided into land title districts***(LTA s24)*** – interests are registered under whatever district they’re in  
• Central feature: crown guarantees title (no need for land insurance) w respect to interest in land that are registered on the CIT – only for EIFS  
• Once someone enters their EIFS on the Register it is conclusive evidence that they are the owner of the interest and anyone wishing to deal with that parcel of land can determine the state of the EIFS by looking at the Register   
o No longer have to search further than Register to determine state of fee simple title   
• Practically compels (does not mandate or create offences) registration as one cannot sue for their interests if not registered. Without registration one can only sue the transferor via contract law   
Purposes of Land Title System:

## General Pattern of Registration

### What Rights can be Registered?

1. **Only interests which were recognized as interests in land at CL can be registered under the Act *Kessler***
   * Estate in fee simple, freehold estates, leasehold estates, future interests, equitable and legal mortgages, restrictive covenants easements, profits au prendre
2. **Non-CL interests:** Caveats, Certificates of pending litigation (LPs), Judgements
   * Sub right to purchase (if buyer can’t get a mortgage, seller can agree that tenant pay off price in chunks
3. **Rights to Purchase**
   * The transfer form gives the buyer an equitable interest in fee simple
   * Will give legal estate in fee simple after price paid off
   * The buyer gets a **RIGHT TO PURCHASE [RP]🡪can be registered**

### Rights cannot be Registered?

1. **Sub-rights to purchase/sub agreement for sale *s200***
   1. IF D sells their right to purchase to C, LAND TITLE ACT **says you can’t register a sub-right to purchase**
2. **Lease with terms less than 3 yrs**
3. **Zoning Bylaws** (not interests in land even though they affect use in land)***Kessler***
4. **Details of a 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
5. **Aboriginal Title** **(*Skeetchestn*** *applied to the registrar for a Certificate of Pending Litigation (Lis Pendent). Registrar refused under* ***s. 168(discretion)*** *says you cant register it because* ***s 215*** *says you can only register a CPL if you have an interest in land and aboriginal title is not an interest in land*): Because aboriginal title is inalienable except to the Crown, it does not provide good safeholding and marketable title and therefore cannot be registered. **Therefore, caveats and CPLs relating to aboriginal title also cannot be registered because they must be registered against registerable interests in land.** But encumbrances relating to Nisga'a lands **can** be registered (***LTA, s.1***).
   1. **IF THIS ON ESSAY ARGUE** THAT AB TITLE COULD ATLEAST BE REGISTERED AS A CHARGE...IT CAN BE ALIENATED TO CROWN, THERE CAN BE LONG LEASES, CAN BE SURRENDERED
6. **Equitable mortgage** or lien by deposit of a duplicate CIT or other instrument

## Basic Registration Scheme:

All registration interests can be divided into two categories

* (1) Legal fee simple – surface, strata lot or airspace parcel
* (2) “Charges” – all other registrable interests e.g. above list; aka encumbrance

### The Legal in Fee Simple

#### Procedure for Initial Application for Registration

***LTA, s.153*** (**Time of Application**): Applications for both fee simples & charges are date/time-stamped upon receipt and given a serial number (***s.153(1)(a)-(b)***). For the purposes of determining priority, the time/date recorded by Registrar is the "real time" (***s.153(2)***).

***s.28*** - **Priority of charges** is determined by time/date of pending registration - that is, when the application is received [not the time/date of final registration]

***s.27*** - **Actual notice of charges** occurs upon registration.

***s.31*** - If registered caveators or CPL-ers are successful, their claim will gain priority over all other titles/charges/claims registered after the date/time which the caveat/CPL in question was registered

***s.168*** - Registrar has the **right to reject an application upon receipt**, but can also inform applicant of mistakes and give her time to correct them

***s.154*** - **Form A** is required for fee simple registration.

***s.155*** - **Form B** is required for mortgage registration. Fee simple registration is required before mortgage registration can occur, but in practicality, they move from pending to final registration almost simultaneously.

**Land Title Act – Registration of Title**

**When title is being registered for the first time, the procedure to be followed is governed by part11, division 1 of the act. Key section is 169**

**s.169(1): 2 Preconditions to Registration:** *When an application is made for registration of indefeasible title to land, Registrar must be satisfied that:*

* (a) **Boundaries** must be sufficiently described through survey
* (b) Instruments produced by applicant confer "**a good safe-holding and marketable title in** **FS”**
  + Must show you have interests in land you claim to!
  + **Safe-holding**: no one can disturb you in your interest or possession (no squatters!)
  + **Marketable title:** transfer/disposition is possible (i.e. not a trust)
* Other preconditions: (1) ensure documents supporting application are attested and executed as required (2) file completed property transfer tax form
* **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

#### When Application is handed to Land Title Office:

* **Info in register Register** **refers** **to:** either books in which certificates of title are bound or the where the information is stored in the computer
* After registration, registrar required to make on documents an endorsement which is then received as conclusive evidence of registration
* Priority on first come, first serve basis
* When fee simple is registered, Registrar can issue a **duplicate indefeasible title BUT** cannot be unless property is owned in full (ie no charges)
* If DCIT is issued, and thereafter an application to register either a mortgage or agreement for fee simple is made, DIT must be produced to the registrar for cancellation
* A person may take out a DIT for safekeeping, to ensure the borrower does not deal with land, or to create an equitable mortgage
* A presumption of an intention to create an equitable mortgage arises on the giving of a DCIT to someone in exchange for $

**When Registration is Complete:**

* 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"***s23 LTA***

#### (2)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**
* Applicant must also produce DCIT if one has been issued

#### (3)Transmission on death

* Title vested in personal representatives who hold it in trust as fee simple owners
* Executor or administrator registered as owner
* Transfer then made to person entitled to take under will or on intestacy

### Charges

**Charge:** (***s.1 LTA***) An estate or interest in land which is less than fee simple [i.e. leases, caveats, CPLs, etc] and encumbrances. Charges must have “good safeholding and marketable title ***s197.LTA*** Registered charges entered in front of certificate to fee simple. On application, DCIT must be surrendered to registra ***s195LTA.*** Owners can obtain “certificate of charge” from register. ***S208LTA***

**Encumbrances (s.1)** can include voluntary (mortgages/easements) & involuntary (liens/judgments/caveats/CPLs) claims against land. Encumbrances can also be registered against Nisga'a lands in the LTO: this is an exception to the rule that charges related to aboriginal title lands cannot be registered

***s.28*** - **Priority of charges** is determined by time/date of pending registration - that is, when the application is received [not the time/date of final registration]

#### Caveats (Part 19 ss.282-294):

**A caveat is:** a written warning to anyone who checks the CIT that the person who lodged the caveat (known as the "caveator") has an interest in it. The **Registrar of Titles cannot deal with the property without first notifying the caveator**. That is, it is a way telling anyone who wants to deal with the property to beware of the fact that someone else's interest already has priority.

* **LTA S.288: Effect of Caveat**:
  + As long as its registered, registrar must not: (a)register another instrument affecting land unless subject to caveator’s claim (if any interest is registered it will be subject to caveat)(b) change the boundaries affecting the land
* **s.293:** Lapses after 2 months 60 days unless proceedings have commenced or , in this time one can bring action affecting title of land Lis Pendant
* **If the person buys land that has a caveat as a charge, the new person assumes the risk involved**

#### Certificates of Pending Litigation (Lis Pendens)

**Certificate of Pending Litigation:** A special notation that goes on charges section and notifies the world **of a claim against the land** (must have a litigation pending re the land) - provides notice that land is being litigated. A CPL can be **registered as a charge against the disputed land by a person who has commenced or is party to litigation involving an interest in that land** ***(s.215(1) LTA***) - ***Skeetchesn*** - **can only file CPL for registerable interests in land!**• Property can be on the market, but at a very reduced price as anyone who is purchasing the property has notice of the pending lawsuit (will they really want to buy the property if it will mean a law suit?)   
• ***S.216(1) LTA:*** **Effect is that it halts all dealings with land.** Registrar may not enter anything into register that has effect of charging, transferring, or otherwise affecting land until the litigation has concluded, **unless the new applicant in writing explicitly takes the interest subject to the CPL**

#### Judgements

**Judgement Creditor:** someone who has obtained a judgement sounding in money against a land owner can have that judgement registered as a charge against the land to give the judgement creditor security. ***S83 Court Order Enforcement Act***

* When judgment registered, Registrar must notify owner of land or charge against whose title the registration has been effected
* Judgement can **only** **be registered against the interest in land that the owner has**. IE if owner has sold interest to BFPV, even if they haven’t registered yet, the judgement cant be filed against that interest

## ROLE OF THE REGISTRAR

**Registrar has to determine if good safeholding and marketable title**

**o Safe-holding**: a title conferring possession that is safe from attack and cant be displaced   
o **Marketable title**: title is freely alienable; transfer/disposition is possible (i.e. not a trust)

* **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) ***Evans*** *registrar refused to register land as boundaries too uncertain)*
* **If transaction seems fishy, registrar can refuse. Administrative powers are considerable . (*Shaw,*** *dad gave son Power of Attorney & son asked registrar to transfer mortgage from dad to son—refused –self dealing=’palpable blot)***.**
  + ***Property Law Act s27***Eg Person granted Power of Attorney cannot transfer land from the person granting POA to himself unless POA expressly authorizes it or the person granting POA ratifies it
* **Not the duty of the registrar to determine:** (a) boundaries (b) adjudicate on property rights; this is under inherent jurisdiction of courts ***Evans*** *registrar refused to register land as boundaries too uncertain*
  + **Powers of registrar extends to administrative powers;** assessments of title in the face of competing claims BUT **Registrar does not have jurisdiction over substantive issues of property law** (e.g. BCSC) (***Heller:*** *registrar registered deed from husband to wife when DCIT was not at LTO...committed error, but wouldn’t reverse transfer)*
* **LTA s.383:** If the registrar finds an instrument is issued in error it **MAY, so far as practicable, without prejudicing rights acquired in good faith and for value** cancel the registration/instrument or correct the error

## THE ASSURANCE FUND

The Curtain Principle of Torrens provides security to those who registered 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" in good faith and good value would be protected if they registered that void instrument** - **because registration provides immediate indefeasibility.*LTA s297***

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. However, as ***McCaig*** shows, there are severe limits to liability under the Assurance Fund.

Ss ***295-307 of LTA*** establish assurance fund out of which, if preconditions are satisfied, a person may be able to claim compensation for loss of land **s.295 of *LTA*: show you lost interest in land because of register**

**AF compensates people who** have lost something due to the LTA (ie something they would have had at CL)

### AF covers 2 situations

1. **Person deprived of interest in land:** A person has been deprived of land in certain circumstances **involving fraud which have deprived person of right at COMMON LAW—loss is due to** conclusiveness of the 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***

**BUT you cannot be the author of your own demise—AF not available** in respect of proportion of loss caused or contributed to by the act, neglect, or default of plaintiff ***LTA s303f***

### Successful Claims against the AF

Claimant must show that (***s.296; McCaig v. Reys***, *P lost equitable option as it was not registered and BFPV acquired land and registered...not compensated by AF because would’ve lost EVEN AT CL*, *1978, BCCA*):

* 1. They have been deprived of land or interest therein;
  2. The loss was occasioned by the operation of the ***Land Title Act*** (and not the CL),
  3. The loss was occasioned by fraud, misrepresentation or wrongful act in registering of another person as having an interest in the land; and
  4. They are barred for bringing an action for rectification of the register.

NOTE: **equitable** **title always loses to legal title at common law**; therefore, the **loss of an equitable interest in land to a legal interest BFPV cannot be compensated by the AF. *McCaig v. Reys***, *P lost* ***equitable option*** *as it was not registered and BFPV acquired land and registered...not compensated by AF because would’ve lost EVEN AT CL*, *1978, BCCA*):

**Crucial Questions to ASK to see if P can rely on AF**

1. Would this claimant be successful at CL?
   1. If not, no compensation
   2. If yes→
      1. Could this claimant be successful under LTA?
         1. If yes, then no compensation
         2. If no, this claimant has been deprived of an action that they would have had at CL as a result of the interposition of the LTA. This is where one can get compensation from the AF. Have to make sure action brought within 3 yr limitation period

# Registrations

## Registration : THE FEE SIMPLE

**Crown Grants must be registered in LTO *LTA s54.*** specific provisions are retained by the crown even if nothing is stated in the original Crown Grant ***LTA s50***

**Indefeasible Title:** indefeasible title is **conclusive** **evidence at law and at equity as against the crown and all other persons** that the person registered is **indefeasibly entitled** to **estate in fee simple** ***LTA S23***

### General principle of indefeasibility

**The registration of title is conclusive evidence at law and in equity of ownership *(s 23 LTA)****.*

\*\***Allowing investigation** the right of a person to appear on the register **when he holds a CIT** would **defeat the purpose of statute of registration**. Only way to challenge conclusiveness is through exceptions in s23.. ***Creelman v Hudson Bay (****creel tried to back out of deal with HB; argued HB not using land for purpose govt gave it. Court said HB Rosin EIFS so doesnt matter)*

### Indefeasibility and Adverse Possesion

Cannot acquire title to Crown land or any land via adverse possession unless exception (own land for 20 years before 1975 applied) – ***LTA s8*** Can only make claim for right/title if acquired by adverse possession **before July 1, 1975 *Limitations Act s14***

### Exceptions to Indefeasibility

***LTAs23(2)*** lists interests which qualify an EIFS absolute… “indefeasibility is subject to…|”

**Exceptions:** leases, charges & other entries, boundaries, fraud

#### S 23 (2) (d) LEASES

* **Indefeasibility is subject to leases for terms of less than 3 years (if > 3yrs, have to respect lessee for 3)**
* Always inspect property because leases less than 3 years not registered.
* Any buyer of land has to wait until lease expires until they are able to move into the premise**s**
* 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 or until 3 yrs has passed if person there for more than 3.

***Remeber:* if it is a lease for over 3 years, the holder of the lease MUST REGISTER or will be vulnerable after 3 years is up (23(2)d does not say this but you can infer this from s 23(2)d because it only protects under 3 yrs)**

#### S 23 (2) (g) CHARGES AND OTHER ENTRIES

* For example, as per ***s20 of Builder’s lien Act* a builder’s lien can be registered after the property has been sold to a new owner**(as long as its within 45 days of the work being completed). This affects the indefeasibility of the new owner***. Carr v Rayward***(*builder filed lien against property after debtor sold to 3rd party)*

#### S23 (2)(h) BOUNDARIES

The Indefeasiblity conferred by LTO does not extend to accuracy of boundaries as depicted by map or plan, Land owners have the right to show that boundaries are inaccurate.

**Onus is on the BUYER to check the boundaries of the land. Not the solicitor’s job. They should hire a surveyor *Winrob v Street(****after buying house p discovered part of land owned by Van city. Ps lawyer never checked map, P tried to sue lawyer)*

#### Section 23 (2)(i) FRAUD

##### Forgery

**\*\*Note: 1 bad signature is enough to create a null deed**

If you are on title because of fraud or forgery, your title is **not** **indefeasible**.

The right of a person to show fraud including forgery in which an RO has participated in to any degree (***s.23(2)(i)***).If you are no longer on title, but you can show that the person who is on title got there as a result of fraud in which they participated to **any degree**, you can get back on title ***s.23(2)(i)***).

**Old distinction -**  ***gibbs v messer***  (deferred indefeasibility) and ***fraser v walker*** (immediate indefeasibility). **But with respect to EIFS, Pavi this seems to have been resolved in favour of** ***Frazer v Walker*** (**immediate indefeasibility**) ***Gill v Bucholz***. BUT with respect to interests other than EIFS, **deferred indefeasibility** is given.

**Immediate Indefeasibility given to Estates in Fee Simple**

**ESTATES IN FEE SIMPLE: s.25.1 (2)/ (3)** Even though an instrument purporting to transfer a fee simple estate is void, a transferee (b) in good faith and for valuable consideration, purports to acquire the estate, is *deemed* to have acquired that estate on registration of that instrument.

* if purchaser in good faith for value & was NOT fraudulent, but took from someone who was, that **interest will prevail over that of the true owner** – they get **immediate indefeasibility** notwithstanding the fact that there was a fraud perpetrated on the previous RO **– *Nemo dat* does not apply!** Old RO may recover from AF fund as they’ve lost their interest due to the ***LTA*** (***Gill v Bucholz***)
* ***LTA s23******FEE SIMPLE= Conclusive evidence at law 🡪nemo dat doesnt apply to fee simple***

**Policy**: what the point of having a LTO/ registration system if purchasers of EIFS cant be confident that when they’ve registered they’ve secured their interest? The whole point of such a system is to give security/ indefeasibility

**No Immediate Indefeasibility for CHARGES**

**No immediate indefeasibility for charges**: ***s.26(1)*** holds that the Registered Owner of a charge is **"deemed to be entitled"** to the estate which the charge applies to.

* “**Deemed”** = **rebuttable presumption 🡪*nemo dat applies to charges*** (***Credit Foncier***, *forged mortgage registered against unknowing RO court said that nemo dat applies and that BFPV out of luck, 1963, BCCA)*

**Registration of a charge *26 (2)*** ***does not*** constitute a determination by the registrar  **that the charge is enforceable -** ***Gill v Bucholtz*** *(John Doe forges Ps sig transferring land to GG. GG KNOWS ABOUT FRAUD. GG gives mortgage to D1 and D2. Both Ds BFPV Court gives. P land back without charges)*

If **charges** are acquired under **void instruments** they are **invalid**, even where the holder is a bona fide purchaser for value.  ***LTA* does not give indefeasibility to charges - *Nemo dat* still applies to registered charges**! ***Gill v Bucholtz*** *(John Doe forges Ps sig transferring land to GG. GG KNOWS ABOUT FRAUD. GG gives mortgage to D1 and D2. Both Ds BFPV Court gives. P land back without charges)*

**Policy**: in BC costs of frauds against mortgagees and chargeholders should not be borne by the public (via the Assurance Fund) but by lenders and other chargeholders themselves

**Note:** If charge holders have acquired their interest from a fraudulent party, **then they have nothing at CL, so cannot get compensation from AF. Mortgagees really need to scrutinize.**

##### Notice of Unregistered Interests s 29LTA

***s.29*** holds that persons dealing in land are **not affected by (express or implied**) notice of **UNREGISTERED INTERESTS**, with the following **exceptions *s.29 (2)***: **interests pending registration** ;**leases not exceeding 3 years if there is occupation**; **adverse possession** against the 1st indefeasible title where the **person dealing in land has participated** in **fraud** ***McCaig v Reys***

***2 Types of Notice:*** *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 actual 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 **(*McCaig v Reys****) Jerome knew about the option and went out of his way to make sure new solicitors didn’t know...took advantage of the statute..stepping into “zone of fraud”)*

**Note: If property reaches the hands of someone who knows the existence of a trust, that person is bound by the trust. *McRae*** *(Man left estate to wife. She became RO “in trust” for her kids. She transferred to son but without indication of “trust” on title. His siblings find out. He claims no notice, court said too bad.)*

## REGISTRATION : CHARGES

**MEANING OF REGISTRATION**

**Charges** = estate/interest in land, less than fee simple - includes encumbrances.

**Charges can be Registered in 2 ways**

**1)ON CIT**

**2)Through at Trust document**

* (1) registrar must register charge (2) but can refuse if (a) a good safeholding and marketable title is not established (b) the charge is not an interest that can be registered ***LTA s197***

### RECOGNITION OF TRUST ESTATES

Trustee's name appears on title, but **particulars of the trust must not be entered on the title** (***s.180(1)-(2)***) so as to keep the Register clean. Will is generally deposited in the LTO and can be accessed by the public. Trusts can be noted on CIT by incl. words “in trust”. Owner of fee simple has “legal fee simple”; beneficiaries of trust have equitable interest ***LTA s180(3)* Interests affecting the land cannot be registered if prohibited under the trust document or will** (***s.180(7)****).*

A **trust which is registered that creates an easement** **will survive a tax sale, despite the easement being registered as a trust and not as a charge** (***Dukart v. Surrey***; *easement in trust said to keep foreshore clean, city tried to put bathroom on foreshore, 1978, SCC)*

**Words “in trust” are adequate notice.** Onus on purchaser to see what trust contains. IE if it contains an easement (***Dukart v. Surrey***; *easement in trust said to keep foreshore clean, city tried to put bathroom on foreshore, 1978, SCC)*

### Indefeasibility of Charges?

**No immediate indefeasibility for charges**: ***s.26(1)*** holds that the Registered Owner of a charge is **"deemed to be entitled"** to the estate which the charge applies to, subject to the ***s.23(2)*** exceptions.

* “**Deemed”** = **rebuttable presumption 🡪*charges get deferred indefeasibility*** (***Credit Foncier***, *forged mortgage registered against unknowing RO court said that nemo dat applies and that BFPV out of luck, 1963, BCCA)*
* ***LTA s23******FEE SIMPLE= Registration =Conclusive evidence at law and equity 🡪EIFS gets immediate indefeasibility***
* ***LTA, s.26(2)*** - the mere fact of registration does not constitute a determination that the instrument creates or is evidence of an interest in land or that the charge is enforceable

**A 3rd party** **BFPV** who acquires an interest from the registered owner is **not affected by a fraudulent DISCHARGE of another interest**. (If you forge a cancellation and issue a valid mortgage, the valid mortgage is effective) **A mortgagee must be able to rely on the Land Title System** (***Canadian Commercial Bank,*** *BFPV receives valid interest from RO and gains priority over fraudulently discharged mortgage, 1988, BCCA)...contrary to* ***s28 Priority of charges***

**Distinguished from** ***Credit Fonciers(*** *forged mortgage registered against unknowing RO court said that nemo dat applies and that BFPV out of luck, 1963, BCCA)* because the mortgage in ***CF*** was granted via a **NULL DEED** whereas in this case it was **VALID** only the discharge was null.

### Priority of Charges

***s. 28 LTA*** - if 2 or more charges appear entered on the register affecting the same land, the charges have priority according to the date and time the respective applications for registration of the charges were received by the registrar, and not according to the respective dates of execution of the instruments

# Failure to Register

## THE GENERAL PRINCIPLE: FEE SIMPLE

1. ***LTA s 20*** A transfer of inerest does not pass until the instrument is registered“**except as against person making it” *Sorrenson v Young*** *(unregistered easement did not pass obligations to new RO but old RO obligated cause he made it)*

After ***Sorrenson LTA s181*** provided that if there was a deed in which an easement which is reserved is **discovered at a later stage**, than the **original CIT is cancelled** and **interest is registered as a charge against the new CIT**.

## EXCEPTIONS: “EXCEPT AGAINST THE PERSON MAKING IT”

### Judgements

Judgements can only attach to the extent of the judgment debtor’s **beneficial interest in land (*s86(3) Court Enforcement Act).***Purchaser’s interest is not subject to creditor’s judgement when they are ***bona fide purchaser in good faith and for VALUABLE CONSIDERATION* (*s86(3) Court Enforcement Act) Martin Commercial Fueling Inc v Virtanen*** *(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 creditor registered***)**

**JUDGEMENT CREDITOR ONLY GETS THE ACTUAL INTEREST THAT THE JUDGEMENT DEBTOR HAS AT THE TIME THE JUDGMENT IS REGISTERED. IF THERE IS AN UNREGISTERED BENEFICIAL INTEREST OF A 3RD PARTY PRIOR TO REGISTRATION OF JUDGEMENT, THE UNREGISTERED 3rd PARTY INTEREST WILL PREVAIL...**

* But if the judgment was made before the contract, the unregistered interest must yield to judgment.
* NOTE: **with GIFTS there is NO VALUABLE CONSIDERATION**🡪 ***s86(3) Court Enforcement Act*** might NOT apply!

**CRUCIAL QUESTION**: **did beneficial interest transfer**? If unregistered equitable interest transferred **subsequent** to the judgement, the **judgement attaches** (onus on purchaser to check title for encumbrances). But if **unregistered (equitable) interest is transferred before judgement, then the judgement debtor is out of luck.** Judgement can only attach to beneficial interest that debtor has.  
 **Note: potential policy concern**: those who fail to register judgements prudently will be denied their interest if RO sells property. Purchasers and sellers could conspire to dupe judgement holder out of interest, BUT this could be fraud and thus NOT bona fide, which would solve problem

### “Prohibited Transactions”

Parties cannot claim protection of ***LTAs.20*** for unregistered transactions which are **prohibited for reasons of ILLEGALITY( eg. violating *LTA*) or PUBLIC POLICY**. (***International Paper vTop Line***  *1996, BCCA* ***)***

**For example,*s*.73 of LTA**: No one shall subdivide land(only applies to subdivision of dirt/airspace doesnt apply to building subdivisions) for purpose of leasing it/agreeing to lease it unless it complies with subdivision rules and gets approval of approving officer. Leases in excess of three years of **subdivision of** land must be approved by an approving officer and a formal subdivision plan must be obtained. **If long-term lessees violated this section and didn’t register, his rights wouldn’t be protected AFTER 3 YRS OF OCCUPATION.**

* **Reason it doesnt apply to leases less than 3 years: probably wont be building on land**

But ***Int’l Paper*** might have been decided differently in light of ***s.73.1*** which was enacted after the decision – “A lease or an agreement for lease not unenforceable between the parties by reason ONLY that (a) the lease or agreement for lease does not comply with this Part, or(b) an application for the registration of the lease or agreement for lease may be refused or rejected”...if it’s only the contract that’s the problem...don’t worry. There must be other reasons. The reasons must concern **PUBLIC POLICY: questions to consider:**

* Where is this located? (Eg: Swamp area/floodplane zone)
* Would there need to be special interests that an approving officer would require?
* Are subtenants in danger?

***NOTE: BCltd v Cactus Cafe Maple Ridge* Says that 73 (1) “does not apply to a subdivision for the purpose of leasing a building or part of a building** . if an offer pertains to lease of a building or part of a building, it does not contravene s 73(1). If unit on ground with patio on dirt, patio considered part of the building.

# Applications to Register

## Processing Gap: From Pending to Final Registration

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

* **Delays caused by LTO administration will not affect a purchaser's right to title (*Rudland*** *P applied for registration but b4 getting CIT due to busy LTO an LP was registered against title. LP not effective because application=registration)*

An **application to register** will be **treated in the same way as registration**. **Delays** due to the administration of LTO **do not affect one’s right to title. *Rudland***

* In absence of fraud, application to register = registration itself if:
  + (1) person claiming right is **BFPV (without notice...think s29 & *McCaig***)
  + (2) right has been acquired and registration applied for prior to LP filed
  + (3) such a purchaser is **not party to the litigation**
  + (4)in **case** of agreement for sale or mortgage the **P has failed to give purchaser or mortgager** notice and taken the proper proceedings by way of equitable execution or otherwise

\***s.217 Effect of CPL if Prior Application is Pending:**

* Despite s.216 which holds that a CPL freezes activity, registrar may complete registration of IT or charge **applied for** **before an application to register CPL** was made.
* **(c)** If CPL relates to certain proceedings (foreclosure; *Family Relations Act*; *Wills Variation Act*) (2172c), they take title subject to CPL whether or not party is prior applicant to proceedings

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

* Where there are competing equities, court has jurisdiction to decide which equity will be preferred. Usually it will be the first in time, but it doesn’t have to be…it can look to other things, consider fairness etc. to come to conclusion.
* **In context of competing equities, where one person is responsible for being frauded and the other party is a perfect victim, the perfect victim is preferred. *Breskvar (****B gave W a blank transfer form as security for a mortgage – the blank transfer form which enabled W to be fraudulent. B’s negligence coupled with B’s failure to place upon the CIT any notice of any interest retained by them enabled W to sell to A, a BFPV. So, at equity, both had interests in land and court decided based on equity who should prevail.)*

# The Fee Simple

## Creation

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

#### Intervivos Transfer

* At CL to create a fee simple it was necessary to use correct words (**now changed by statute**) ***PLA, s.19***
* “to A in Fee simple” was construed as only creating a **life estate** by the common law courts
* **Magic Words:** “to A and his/her heirs” was construed as created a fee simple by common law courts
* **2 categories of words in transfer**
  + **WORDS OF PURCHASE: “to A”** = **recipient of interest**;
  + **WORDS OF LIMITATION:“and her heirs”** = **duration** **of interest;** DON’T give an interest to the heirs but stipulates EIFS
    - Heirs served as a measuring device indicating that fee will endure as long as the current holder has someone to devolve his estate to.
* ***PLA s 19(2) if there are no words of limitation you assume that the transfer is the greatest interest the transferer has***

#### Transfers on Death

**In Absence of Will:**

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

**In Presence of Will:**

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

**Equitable Interests**

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

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

* CL insistence on use of correct words of limitation created certainty but often created life estates where fee simples were intended so the legislation was passed to modify CL rules
* ***PLA, s.19* (Words of Transfer)** - it is now sufficient to use the words "in fee simple" instead of "and his heirs".
* ***PLA s 19(2) if there are no words of limitation you assume that the transfer is the greatest interest the transferer has***
* ***LTA, s.186(4)*** - a freehold estate transfer for valuable consideration which uses Form A (prescribed form) will transfer the fee simple. No need to include express words of transfer.
* ***LTA, s186(5)*** - Assumed that fee simple is the default transfer, unless express words of limitation are used.
* ***LTA, s.186(6)*** - express words of limitation may be used on the Form A to limit the estate [i.e. to a life estate]
* ***LTA s 186(7)*—**EIFS can be accompanied with conditions or reservations...it transfers the estate subject to the reservation or condition
* ***Wills Act, s.24*** - if property is given without express words of limitation, the transfer is assumed to transfer the fee simple interest

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

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

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

#### Doctrine of Lapse:

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

**Wills Act s.25 Gift to Heirs**

* 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”

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

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

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

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

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

|  |
| --- |
| ***Re Shamas* 1967 Ont CofA** |

**Facts:** *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 their last kid turns 21. If my wife marries again she should have her share like the other kids. If not she shall keep the whole thing and see that every kid gets his share when she dies”; wife works in business under the assumption everything is hers. Kids seek direction on what interests are theirs and what interests are the widows*

**Issue:** Is the wife’s interest absolute or subject to interests of her kids?

**Held:** **wife gets a life estate** **with ability to encroach (3rd *Walker* category)**, how else could she support kids? – **then the estate is divided amongst the kids** because the **intention of the testator** is to give his kids something**.**

**Any restraints or conditions on an absolute gift are void as they are repugnant to the absolute character of the estate *Ceilin v. Tressider***

|  |
| --- |
| ***Ceilin v. Tressider* 1987 BCCA** |

**Facts:** *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:** was it a life estate or absolute EIFS?

**Held:** It was an absolute gift of EIFS. Court found the note repugnant to the EIFS.

## Words formerly creating a Fee tail

### Common Law/Statute

**Fee Tails:** wanted to limit those who could inherit to your direct descendants, as opposed to fee simple where anyone can inherit. Used to keep property in the family. (part of social structure based on class and feudal times)

***S.10 (2) of Property Law Act* abolishes fee tails:** if you attempt to create a fee tail it is automatically converted into a fee simple or the greatest estate that the transferer has.

### Technical words of limitation: INTER VIVOS TRANSFERS: shelly’s case

* At vintage common law, Fee tail was created when an ***inter vivos*** transfer used **technical words of limitation “heirs of her body”.**
* Absence of these words created life estate only

#### Rule in Shelly’s Case (doesnt apply to wills)

The ***Rule in Shelley’s*** ***Case*** DOES NOT apply in BC. The Rule holds that "to A for life, remainder to A's heirs" grants A the fee simple, with "to A's heirs" as words of limitation not words of purchase.

* A conveyance that attempts to give a person a life estate, with a remainder to that person's heirs, will instead give both the life estate and the remainder to that person, thus giving that person the land in fee simple absolute i.e., the life estate collapsed and the entire estate vested in that person

### Informal Words of Limitation: WILLS (wild’s case)

In cases of **wills or equitable** **interest only** courts would give effect to the intention of testator or person creating trust if they used words like “to A and her **issue/seed/offspring**” [not in ***inter vivos*** transactions]

***PLA s 19(2) if there are no words of limitation you assume that the transfer is the greatest interest the transferer has***

#### The Rule in Wild’s Case (applies to wills only)

[not a rule of law...a rule of CONSTRUCTION: it creates a presumption if there is anything to suggest otherwise, it will apply.]. **IT ONLY APPLIES TO WILLS**

**To determine who the recipient of an interest is if the will states “to A and his children”: You need to see if at the date the testator made his will, the persons had children**

* **if A has kids at the time the testator dies, then you assume “her children” is a word of purchase.**
  + Clearly its **a co-tenancy**. Then must decide Is it a **tenancy in common or a joint tenancy**?
  + If there are no words of division you might think **joint tenancy** because of old **CL presumption**, but you need further facts and to be cognisant of the ***S.11 Property Law Act*** which says courts will opt for a tenancy in common over a JT with respect to **EIFS*.***
* **if A does not have kids when testator dies, then “her children” is a word of limitation. “Her children” is akin to “heirs of her body” because the court is more flexible in interpreting wills. A would get a fee tail.**
  + BUT as fee tails have been abolished by *PLA s10*, it will **automatically be converted to fee simple or the greatest interest that the devisor ha**d *PLA s10 (2)*

# The Life Estate

## Creation

### By Act of the Parties

* may last for life of the holder of the estate or for the life of another person (**estate pur autre vie)**
* **Inter vivos transfer** (Form A): must specify that a life estate is being created, otherwise default fee simple or greatest interest owner has will result (***PLA, s.19(1)-(2)***)
* **Will**: must specify that a life estate is being granted, otherwise default fee simple transfer will result (***Wills Act s24***)

### By Statute

**(Common Law: Dower** and **Curtesy** provided widows and widowers a life estate in their deceased partner's realty, notwithstanding that they were not on title. Abolished by ***EAA, s.95*** in BC, but valid in some Canadian jurisdictions.

**Statute**

* ***Estate Administration Act, s.96*** - If spouse dies intestate and surviving spouse is not on title, they will get a life estate in the matrimonial home and household furnishings (with no power to encroach). Applies only to spouses, not children.
* ***Land (Spouse Protection) Act, s.4*** - Allows untitled spouse to file an entry on the homestead title, which prevents disposition of the property w/o their consent. If titleholder dies, PR must hold estate in trust for other spouse.
* ***Wills Variation Act -*** Allows spouses (broad) and children (narrow) to bring forward an action to set aside a will. Resolution can include life estates.

## 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
* **Can’t do anything that exceeds nemo dat**
* Right to remove fixtures during lifetime of LE holder or on death of LE holder. Chattels fixed to land (and become fixtures) can be removed by LE holder.

### Transfer Inter Vivos

* Can sell a life estate (transfer inter vivos), but still tied to person X’s (**cesti que vie)** life as dictated by LE
  + Ex i can give rav a life estate for the life of Brandon 🡪Rav gets **estate pur autre vie** which ends when Brandon dies...the younger and healthier Brandon, the better

### Devolution on Death

* If LE is tied to another person’s life, if the holder dies and person whose life its tied to 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

* If A owns FEE simple and gives life estate to B, A has reversion
* A could also give life interest to B and on Bs death to C...C has remainder
* Those **entitled to remainder or reversion** are **entitled** to have land pass into their possession **in substantially same form as when it was received by life tenant**
* **2 policy issues:** ability of life tenant to use property to fullest according to his judgement v interest to limit this but not unduly limit it...you don’t want to impede the life tenant’s ability to enjoy the property

### Waste

* **3 kinds:** **permissive, voluntary, equitable**

**(a)Permissive Waste: LT NOT LIABLE**

* Passive conduct that allows decay...like building deteriorating. Life tenant not responsible for this unless expressly says they are in instrument

**(b)Voluntary Waste: LT LIABLE**

* Waste arising from activities of tenant which either **cause permanent damage** to land or **changes the nature of land for better or worse**
* Life tenant liable for voluntary waste
* May be required to pay damages may be restrained by injunction from committing acts of waste
* **4 categories of voluntary waste: Timber**: life tenant cant cut timber unless its a timber estate (at time of life tenancy). Unless cutting to improve property; **Mines and minerals:** LT may not open mines or extract minerals unless activities were being carried out at start of life tenancy; **Demolishing or altering buildings; Changing** the use to which the land is put

**(c)Equitable Waste= spiteful waste to the detriment of the remainder-man: LT LIABLE**

* Creator of life estate may expressly permit life tenant to commit voluntary waste. Will give LT **“without impeachment for waste”.**
* BUT **A Life estate that is “unimpeachable for waste” does not give a tenant the right to make unconscionable use of the right to commit waste at will (commit equitable waste). *Vane v Lord Barnard* 1716(***D gave himself life estate “unimpeachable for waste” with remainder to his son. Got pissed at his son and stripped the land of its value and sold valuables)*

***Law and Equity Act* s 11:** an estate for life “without impeachment of waste” does not confer on the tenant for a right to commit equitable waste, unless an intention to confer that right expressly appears by the instrument creating the estate

**d) Ameliorating waste**: an improvement/ enhancement to an estate that changes its character. May increases the land's value. **LT may be responsible for restoring land to previous condition. If changes improve land damages and injunction usually not awarded. BUT, if changes made increases burden on remainder LT responsible** (e.g. add maintenance cost, increase in property taxes)

* + If waste makes land BETTER, **LT will not be liable in damages**
    - But sometimes can be liable for this...ex: if Ravi tears down the log cabin that means so much to Pavl family. Reversionary could prob get injunction against this...maybe not damages

### Liability for Taxes, Insurance, etc.

* LT is obligated to pay taxes on property

**LT has obligation to pay property taxes;.** An LE holder cannot use a tax sale to circumvent a life estate and acquire title adverse to the remainder man by purchasing at the sale himself or through an intermediary. **Neither LT, nor anyone claiming under him, who allows property to be sold for taxes, can acquire title. LE holder has quasi-trust relationship to those who have a remainder interest.** LE may not do anything to impair remainder & remainder holder can do nothing to affect LE. ***Mayo v Leitovski* 1928 Man Kb(***old woman did not pay taxes on her LE so land sold in tax sale. Her son-in law bought land and tried to transfer it to her, to get around the Life Estate)*

*While obliged to pay taxes, life tenant may not be responsible for insurance premiums* ***Re Verdonk***

# Conditional and Determinable Interests

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

1. By making the interest subject to **condition precedent🡪TRIGGERS INTEREST [need to meet condition]** **“To A in FS if, when I die, A is not married to B”**
2. Attaching a **condition subsequent** to the interest **[get it but not absolutely, if you breach condition you get it taken away]** **“To A in fee simple but if A marries B, to C in FS”**

* “to A **(word purchase**) in fee simple (**word of limitation**), but if **(condition**) A marries B, to C **(word of purchase)** in fee simple **(words of limitation)”** A does not get an EISF absolute, but a conditional EIFS – condition subsequent terminates A’s interest & triggers C

The interest that C gets is a FUTURE INTEREST A RIGHT OF ENTRY /FEE SIMPLE UPON A CONDITION PRECEDENT

If A sells the property, the person buying has to make sure that A doesn’t marry B.

* 1. Future interests are registered as charges on the property, so this would probably prevent a purchaser from acquiring the land in EIFS

**Note**: If you have a **future interest it has to either be vested now, or if it’s not vested now, it must vest within perpetuity period. And this period of time is set at “lives in being + 21 years”.**

* If C alive interest = fully vested. If C not alive when interest is given, then C’s interest is only an interest in land if C can it vests interest within the perpetuity period

1. By creating a **determinable limitation**: **“To A in fee simple until A marries B”**

The GRANTOR has a FUTURE INTEREST with a POSSIBILITY OF REVERTER. [a gets a fee simple at the time of disposition, but after A marries B A will be divested of the property]...the property will go to whoever was identified by grantor or back to the grantor [and his or her heirs]

**The difference between possibility of reverter and right of entry?**

In right of entry, person getting property has to do something to get it back...if they don’t act within limitation period they get cut off

If it’s possibility of reverter it automatically terminates...you don’t have to take action...rules around statue of limitations doesnt apply

Possibility of reverter wasn’t subject to perpetuity but it IS NOW because of legislation

## CROWN GRANTS

***Land Act***

***Minister may dispose of Crown Land***

***S 11 (3) minister can impose terms, covenants, stipulations, reservations that minister considers advisable and without limiting those powers the minister may impose some or all of the following:***

1. ***The applicant must personally occupy and reside on the crown land for a period set by minister***
2. ***The applicant must do that work and spend money for permanent improvement of the crown land within the period the minister requires***

## UNCERTAINTY

**Covenants that are too uncertain cannot be valid. *Noble v Alley(****owner of land put restrictive cov on it prohibiting its transfer to jews,negros, coloureds etc. court said too uncertain)*

**Test for certainty** ***(Canada Trust Co—white supremacist leaves charitable fund for only white br males):*** a condition will be void for uncertainty if it is not possible to say with certainty that any proposed beneficiary is or is not a member of the class or what event may trigger or terminate the estate.

## Valid v Invalid Conditions

**Restrictive covenants must restrict the use of the land ; cannot be used to merely restrict alienation. *Noble v Alley(****owner of land put restrictive cov on it prohibiting its transfer to jews,negros, coloureds etc. court said too uncertain)*

**Where a trust is public and devoted to charity, restrictions CONTRARY TO PUBLIC POLICY of equality will render it void. This is not applied to trusts devoted to ameliorating inequality by helping disadvantaged groups advance. *Canada Trust Co—****white supremacist leaves charitable fund for only white br males****)***

**Conditions contrary to public policy will not be upheld.** Court must look to the circumstances/facts of the case, nature of provisions, etc. In conditions which affect a marriage the **court looks to the testator’s intentions.**

* If the intention of the testator is **protective**, the determinable interest is valid. If on the other hand is to **disrupt** a marriage or cause celibacy, it is void. ***MacDonald v. Brown Estate (****X left determinable interest in land to niece only if she became widowed or divorced. Court said it was protective)*

**Conditions held to be void:** Child not to associate with parent ***Re Piper,*** Inducing Divorce ***Macdonald***

**Conditions held to be valid:** Clause inducing person to assume name of testator; Condition that person must not marry a person of specific religion ***Re Kennedy Estate*** [ BUT raises issue of uncertainty]; Condition that person won’t play cards, smoke, drink, or ‘must continue steady’

## HUMAN RIGHTS LEGISLATION

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

***S 15: (1)equality before and under the law and equal protection and benefit of law***

***(2)affirmative action programs***

***S32:Application of Charter (a)to parliament and govt of Canada...(b)to legislature and govt of each province...***

***Human Rights Code*  
Discrimination in accommodation, service and facility  
• S.8** (1) A person must not, without a bona fide and reasonable justification deny to a person or any accommodation, because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.  
  
**Discrimination in purchase of property  
• s9.** A person must not deny to a person or class of persons the opportunity to purchase an interest in land because of the race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sexual orientation or sex of that person or class of persons.  
  
**Discrimination in tenancy premises  
• s. 10** (1) A person must not deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or lawful source of income of that person or class of persons, or of any other person or class of persons.

***Land Title Act*  
Discriminating covenants are void  
• s. 222** (1) A covenant that, directly or indirectly, restricts the sale, ownership, occupation or use of land on account of the sex, race, creed, colour, nationality, ancestry or place of origin is void and of no effect.

# Co-Ownership-Concurrent Interests

Co-ownership exists when you have two or more people [or corporations] with concurrent rights to possession of real or personal property.

* Multiple owners > same interest > same land > same time

Only two forms of co-ownership exist today: (1) **Tenancy in Common** and (2) **Joint Tenancy**. Both forms share the same unity of possession. The distinguishing feature is that the joint tenancy has the right of survivorship

## Tenancy in Common

* **Unity of Possession:** Two or more persons are simultaneously entitled topossession of the undivided property because of the fee simple interest they hold.
* **Unity of interest is not necessary** for TIC (TICs can have different % shares)
* **No Right of Survivorship:** TICs can dispose of their interest freely *inter vivos* or by will/intestacy.
* **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***)

## Joint Tenancy

* **4 Unities Required:** unity of **possession** > **time** > **title** > **interest**
* **Right of Survivorship:** JTs can dispose of interest ***inter vivos* freely (BUT THEN JT SEVERED)**, but cannot dispose of interest upon death as the right of survivorship holds that the **surviving JTs will inherit the deceased JT's interest**. In/testacy rules and statutes have no impact on right of survivorship. Applies to both real & personal property.
* **No Consent Required:** No consent of co-owners required if JT wishes to dispose of interest, or sever joint tenancy.
* **Intention Alone is Insufficient:** While intention is necessary to create JT, intention alone is insufficient if one of the 4 unities is missing
* If you SEE the word “**equally” or “2/3s to 1/3” a JT is NOT given**;🡪**CREATES TENANCY IN COMMON**
* \*Equity favours the creation of a tenancy in common over a JT (note: CL favours JT**!). *S.11 Property Law Act*** agrees with equity so courts will opt for a tenancy in common over a JT.

### 4 Unities that you need for Joint Tenancy...if one missing NO JOINT TENANCY

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, the JT is severed since the operative instrument is no longer the same.
2. **Unity of Interest:** All co-owners must have equal interests in the property. Interests must be of the same quality (both legal/equitable, or both). If one JT mortgages their interest, the 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.
3. **Unity of Time:** All co-owners must receive interests at same point in time (usually through a single Form A).
4. **Unity of Possession:** Co-owners are entitled to undivided possession of the whole property

## CREATION OF CONCURRENT INTERESTS

* To understand creation of joint tenancies and tenancies in common important to know effects of common law, equity, and legislation

### Common Law Prefers Joint Tenancy

* Where concurrent interest🡪unity of possession
* Where other 4 unities present🡪joint tenancy presumed
* If one of 3 unities missing🡪tenancy in common
* Grantor can indicate an intention to create

**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***, *will doesnt use the words of division [eg “equally, halves, thirds, etc” so court presumes JT , 1936, NSSC)*. But the slightest hint towards intention to divide will create a tenancy-in-common (***Re Bancroft***).

* ***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. Now for JT need implied or express indication that you are creating it.

### Equity Prefers Tenancy in Common

* Equity more willing to find indication of intent to create a tenancy in common by interpreting documents broadly
* In some cases co-owners= joint tenants at law but equity treated them as tenants in common

**At common law, when real property is granted to 2 or more ppl with no words of severance, it creates a joint tenancy.** ***Property Law Act s11*** **changed this** **presumption and assumes Tenancy in Common BUT** this applies to **EIFS ONLY**. Therefore, CL presumption remains for leases. ***Robb*** *(kids of deceased argued section 11 made lease tenancy in common, but court said it only applies to EIFS . Found lease to be JT cause of CL presumption)*

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

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

### Statute

***Property Law Act***

**Tenancy in Common**

**S11**: (1) “transferred” includes vesting declaration of trust or order of court

(2)If land is transferred or devised (after april 20 1891)in fee simple, charged or contracted to be sold by a valid agreement for sale in which vendor agrees to transfer land to 2 or more ppl, other than pers reps or trustees, they are tenants in common unless contrary intention in instrument

(3) if interests of tenants in common not stated in instrument, presumed to be equal

**NOTE: SECTION 11 YIELDS TO CONTRARY INTENTION EXPRESS OR IMPLIED...LOOK TO CIRCUMSTANCES. IT IS NOT ENOUGH NOW FOR THE ABSENCE OF WORDS OF DIVISION. THERE NEEDS TO BE SOME POSITIVE ACT/CIRCUMSTANCE TO INDICATE/IMPLY THE GRANTOR WISHES TO CREATE A JOINT TENANCY**

**Partnership property treated as personalty**

**S25** If land or interest in land has become partnership property, it must unless contrary intention appears, be treated as between the partners, including the rep of a deceased partner, and also as between the heirs of a deceased partner and his or her executors or administrators, as personal or movable and not real or heritable estate (JOINT TENANCY SHOULDNT APPLY)

### Transfer to Self and Co-ownership

* At CL it was not possible to transfer property to one’s self, but you’d need to do this if you owned property and you wanted to include someone else on title as a JT (i.e. you’d need to re-give it to yourself, any other of your JTs & the other person so that there was unity in time of acquiring title). To enable this →s.18 of the Property Law Act
  + ALSO, if you want to sever JT, and thus right of survivorship, you re-transfer the interest to yourself. s. 18 allows you to do this
* ***Property Law ACT s18*** *(1) allows person to transfer to himself in same manner as to another person and JT may transfer his interest to himself. (note: they can do this to include 3rd party).(3) Transfer by JT to himself is deemed to have same effect of severing joint tenancy as transfer to stranger.*

## Registration of Title

***Land Title Act***

**S173 Several persons interested in Registration**

* Registrar may effect reg of FS at instance of JT or Ten in Comm, or sev persons, who together are entitled to complement of fee simple

**S177 Registration of Joint Tenants**

* If, on registration of title to land under instrument or document, 2 or more ppl are joint tenants, the registrar **must enter the words “joint tenants” in the register .**

## RELATIONS BETWEEN CO-OWNERS

### Share of Profits

* **Share of Profits:** Co-owners need not account ("share") to other co-owners for benefits derived from possession & can remains on the land can reap the benefits of the land, UNLESS (***Spelman***, wife left husband & -sues-husband-for-rent earned while running boarding house):  
  1) The non ocuupier has been **ousted** (literally or constructively. If yes → payment to ousted   
  2) The occupying tenant is receiving **more of their “just share or proportion**” – whether occupier is taking risks & expending to make profit will be considered

***s. 71 of the Estate Administration Act:*** An absent co-owner has no right to claim rent from the remaining owner except:  
1) Where ousted (***Mastron***) ***Bernard;***)  
2) When one co-owner is acting as a bailiff  
3) One tenant is receiving more than his just share or proportion

### Share of Expenses

* **Share of Expenses:** If a co-owner leaves at his own volition, he may not sue for use and occupation, and 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 (***Mastron) Bernard*** *Wife must pay rent in exchange for mortgage reimbursement. Court looked into because she wanted to sell and husband wanted to benefit, 1987, BCSC*

***Mastron* When JT terminated by court order for partition or sale, court can make allowances and the allowances will do equity between parties. Court will usually require claimaint to submit allowance for use and occupation.**

* **If tenant has made improvements increasing value of property, other tenant cannot take advantage of increased price without submitting allowance for the improvements**
* **When one tenant has paid more than his share for expenses, he is entitled to allowances for each increase in value**

**Summary:**

* If action takes place during the time of co-ownership**...OUSTER IMPORTANT**
* If takes place in partition or sale...consider **OUSTER** and **WHAT IS FAIR PROPORTION ...**

***Property Law Act***

* **s.13** - Remedy of co-owner - an owner who, because of the default of another registered owner, has been called on to pay and has paid more than the owner's proportionate share of the mortgage money, rent, interest, taxes, etc. may apply to the Supreme Court for relief against the other one in default.
* **s. 14** - Court may order lien and sale (1) On hearing an application under section 13, the court may do one or more of the following: (a) order that the applicant has a lien on the interest in land of the defaulting owner (b) order that if the amount recoverable under subsection is not paid by the defaulting owner, within 30 days the defaulting owner's interest in the land be sold under the Supreme Court Civil Rules governing sales by the court; (c) make order, that the applicant may purchase the interest in the land of the defaulting owner at the sale

## TERMINATION OF CO-OWNERSHIP

### Severance of Joint Tenancy

* Severance means conversion of JT into Tenancy in Common
* You can **sever a JT by** **transferring** your interest **to a third party...**you create your own share and transfer it
  + The transferee is no longer subject to unity of time or title with the other tenants...this creates tenancy in common
* If there are more than 2 JT, the **other** **remaining JTS still have the 4 unities and their joint tenancy will continue**, but in relation to the **new transferee they are tenants in common**
* **You can SEVER by transferring to YOURSELF *PLAs18***

#### Destruction of one of the Unities

“Except as against the person making it” in ***s.20 of LTA*** makes operative an unregistered instrument against the person transferring it. **When a person executes a deed transferring their interest in a JT, they divest themselves of their portion of the JT and vest it in the transferee**. **The deed is immediately operative btw the two as per s.20**. **Even if the deed is unregistered**, the result is an alienation of title that changes the character of the JT and thus **destroys the unity of title and therefore the JT. Right to survivorship is thus extinguished** (***Stonehouse*** *wife transferred interest in JT to daughter, who only registered after mom died, court said transfer severed JT and husband couldn’t get sole survivorship****)***

**Giving a mortgage severs JT**– If one of the holders of a JT takes out a mortgage on the property, the a **legal interests is transferred to the mortgagee subject to an equity of redemption in the mortgage.** **Unity of title is ruptured** and JT is converted into a tenancy in common ***(North Van)***

**JT severed by actually transferring: NOT by declaration: *Sorrenson Estate v Sorrensen* 1977:**

* Action for partition:**NOT SEVER**
* Will: **NOT SEVER**

### Partition & Sale

**Partition:** the physical division of property between co-owners so that each becomes an owner in severalty (separate) of a particular part –Could do this at CL by agreement & suitable transfers   
  
***Partition of Property Act***  
s.2: co-owner may be compelled to either partition or sell the land. Where one owner wants to force sale and can’t get co-operation of the other.

There is discretion in court despite granting of right in statute.  
s.6: presumption that where 50% or more ownership wants partition opposed to a division of the property, it should be so.   
s.8: objector may be given right to buy out person who wants sale.  
s.8(3): If an undertaking is given, the court may order a valuation of the share of the party requesting a sale in the manner the court thinks fit, and may give directions.

# Aboriginal Title

## BACKGROUND

Historically, the courts held that the ***Royal Proclamation of 1763*** had extinguished Indian title. Aboriginals had only a "**personal and usufructory right**" to land (***St Catherines***, *timber-license*, 1889). This right was not equivalent to a legal and equitable interest in land.

* **Personal:** a right or interest less than an estate in fee simple
* **Usufructory:** a right of enjoyment of some land owned by another

***St. Catherines*** was overturned by ***Calder:*** the courts no longer consider aboriginal title to be a "personal and usufructory right". Likewise, ***RP1763*** does not apply to aboriginal title in BC because the British weren't present in or aware of BC at the time of the Proclamation (***Calder***).

***Calder*** (*SCC, 1973, Nisga'a-claim-Nass-River-Valley-based-on-use-for-time-immemorial*) held that Aboriginal rights and title have always existed under the common law. The Constitution didn't create aboriginal title, but it does protect it now under ***s.35*** (***Van der Peet***, *1996, SCC, aboriginal-fishing-rights?*). Aboriginal title is not prescriptive (***Calder***). It is grounded in the reality of pre-sovereignty occupation (*FN-were-there-when-the-Europeans-arrived*) (***Calder***).

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

## What is An Aboriginal Right?

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

**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

### Test for Aboriginal Right *Mitchell adapted from Van der Peet*

1. **Aboriginal claimant must prove** a modern practice,tradition or custom that has a reasonable **degree of continuity existed prior to contact**
2. **Custom must have been “integral” to the “distinctive culture”** of the aboriginal peoples...lay at core of their identity
3. Must be defining feature that without it the culture would be fundamentally altered
4. EXCLUDES practices which are MARGINAL OR INCIDENTAL

### Test of Justification for infringing aboriginal rights:

**Infringement of Aboriginal Right: Test of Justification *(Delgamuukw*)**

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

1)    Infringement of ab rights must be to **further a compelling and substantial legislative objective**

2)    Gov’t must **satisfy its fiduciary duty with Indians**

a.      S.35(1) requires the Crown to ensure its regulations give priority to aboriginal people, but do not always need to be given priority

b.     Usually **duty to consult** with abs before making decisions about land

c.      **“Fair compensation”** required if AT is infringed

This links aboriginal title to the **basic common law conceptions of property**: **occupation, possession, exclusion** and **control** (***Marshall/Bernard***, *Mikma'q-indians-want-to-fish*)

## What is Aboriginal Title?

Aboriginal title has **5 main characteristics**: (***Delgamuukw***)

1. **Sui Generis:** (in a class of itself/unique): different from fee simple, can’t be explained by CL rules, distinct from other ab rights. Must be understood by reference to common law and aboriginal perspectives. arises where connection of a group with a piece of land **"was of a central significance to their distinctive culture**”
   1. **ABORIGINAL TITLE IS NOT REGISTERABLE: Aboriginals can’t register Lis Pendens/CPL, caveats on land on the basis of aboriginal title because aboriginal title is not a common law interest in land *Skeetchestn*** *applied to the registrar for a Certificate of Pending Litigation (Lis Pendent). Registrar refused under* ***s. 168(discretion)*** *says you cant register it because* ***s 215*** *says you can only register a CPL if you have an interest in land and aboriginal title is not an interest in land*
2. **Inalienable except to crown:** cannot be transferred, or sold to anyone other than crown (inalienable to third parties) because it belongs to community, not individuals. R***oyal Proclamation 1763***
   1. Alienating land would destroy its relationship with the band (ab title ‘personal’)
3. **Source of Title:** arises from prior occupation of Canada by Indians before the assertion of British Sovereignty; grounded in both CL and aboriginal perspective on land
   1. Relevant in two ways: physical fact of occupation before the british, relationship between common law and pre-existing systems of aboriginal law
   2. ABORIGINAL TITLE BECOMES DEFINABLE WHEN CROWN CLAIMED SOVEREIGNTY OVER THE LAND. AB TITLE IS A COMMMON LAW DOCTRINE
   3. Aboriginal sovereignty can only be something like a municipal-style sovereignty, it can only proceed out of a legislative body. It’s not original power the way the federal govt or a province has original power.
4. **Held Communally:** cannot be held by individuals, bands have collective right to land, decisions in respect to it are made by entire community
5. **Constitutionally Protected Under S.35(1) Constitution Act 1982 (grundt norm):** aboriginal rights existing before 1982 that have not been extinguished are protected (rights were possessed under CL)
   1. **Aboriginal rights and title are now PART OF THE COMMON LAW**

However, **only aboriginal practices that indicate a degree of possession similar to common law possession will impose aboriginal title** (***Marshall/Bernard***). Common law recognizes aboriginal title for groups with pre-sovereignty occupancy who never ceded right to land. Note that **LeBel in *Marshall/Bernard* differed on the test for aboriginal title**: 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.

### Content of Aboriginal Title *Delgamuukw*

**1)** Ab title encompasses the **right to exclusive use and occupation of the land** held pursuant to that title for a variety of purposes which need not be aspects of Ab practices/ tradition (i.e. pre-contact)

**2)    Inherent limits**: protected uses **must not be irreconcilable w the nature** **of that group’s attachment to the land** (e.g. If band hunted on land they cannot now use it for strip mining)

·      The land is **inalienable**

·      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 (cannot destroy land used for hunting to make a shopping centre)

·      To use land in a way limited by ab title, land must be surrendered to Crown on terms permitting that use; then Crown can put it to that use. E.g. turn over lands to fed to build shopping mall, Indians get all the revenue.

### Test for Aboriginal Title (*Delgamuukw* adapted from *Van der Peet*)

*Aboriginal group asserting title must satisfy following criteria:*

1. **Land must have been occupied prior to Crown asserting sovereignty** (shows land was of central significance to the band)
   * Both aboriginal systems of law and physical occupation (common law requirement) should be taken into account in establishing proof of occupancy
   * Occupation can be established by: bands having laws in relation to land (ex: tenure system), exploiting the land’s resources, farming, dwellings
   * Common law says occupation is sufficient
2. If present occupation is relied on as proof of occupation pre-sovereignty, there must be a **continuity** **between present and pre-sovereignty occupation** 
   * Just need “substantial maintenance of the connection between people and land
   * Nature of occupation can change
   * The occupation may have been disrupted for time ...doesnt need to be “unbroken chain”
3. **At sovereignty that occupation must have been exclusive** 
   * Ensures only 1 band can have title over land (though sometimes 2 bands can have joint title)
   * 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 site-specific rights to land

### Duty to Accommodate

#### Honour of the Crown (*CL Concept)* *(Haida)*

Gov’t has duty to **consult** with Aboriginal people and **accommodate** their interests – grounded in fact that Crown must act honourably in dealings w Ab**.** Based on a standard of reasonableness.

**Gives rise to different duties…**

**1)    Gives rise to fiduciary duty:** Must act w reference to Ab group’s best interests in exercising discretionary control over Ab interests

**2)    Honour of Crown cannot be delegated to 3rd Parties** (not to co. in this case)

**3)    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.

#### Potential but Unproven Ab Interests *(Haida)*

·       Crown honour starts before final settlement of ab title over land; must respect potential but unproven interests

·       To unilaterally exploit a claimed resource during neg process may deprive Ab claimants of benefit of resource

·       ***When does a duty to consult arise?***

o   Crown may be required to consult and accommodate pending the resolution of a claim if Crown has knowledge of potential existence of Ab right or title and contemplates conduct that might adversely affect it

#### Duty to consult and accommodate is proportionate to *(Haida)*

a) Strength of case

·      Where claim is weak, Crown may give notice, disclose info, discuss issues

·      Where claim strong, may require formal participation in decision making

b) Seriousness of potential adverse effects on the right or title claimed

Provincial & Federal Power to deal with Indian Land  
**Tsilquouten** (Band tried to claim title to land; some of the land they were claiming was in private hands. The EIFS owners had received the grants from the provincial Crown.)  
• namo dot quad non habit -court says that the attempt by the prov to give an EIFS from the Crown title is subject to the maxim. Under constitution, the prov Crown does not have jurisdiction over Ab title and land rights—this is a matter allocated to the federal Crown.   
• But Fed Crown as power to exercise sovereignty in relation to Indian territory.