## Property CAN

## Chaper 1: The legal concept of land:

Property rights: are *real rights*, asserted exclusively against the world. They are to the thing itself.

Breach of real right -> remedy is the thing itself.

License -> creates only personal rights (breach is only damages), not an *in rem* right.

*In Rem* Rights: property rights, avail against the world (e.g. leashold).

*In Personam* Rights: personal rights, avail against the person (e.g. license).

## AIRPSACE:

* **Kelsen v Imperial Tabaco**: *as a tenant with leasehold interest, you have the same rights as fee simple against the world (protection against trespass), and leasing the land entitles you to the airspace above using the* ***ad caelem*** *maxim (those who own the ground own up to the heavens). Concept of land includes airspace*.
  + Note: there was no limit on the height here necessary (at least 20ft).
  + Facts: Kelsen leasing the property from IDDC, IDDC (fee simple) permitted ITC to hang the sign in a way that overhangs in Kelsen’s airspace (several feet above). Kelsen gave *license* permitting ITC to do so, but revoked and enforced his property rights (sue for *trespass*). Leasehold said nothing about upward limit.
  + Decision: In favour of Kelsen – injunction to remove sign granted.
* **Berstein v Skyviews**: *Qualification on the ad cealem doctrine -> property rights with respect to airspace above owned land extends only to the height as is ordinary for the reasonable/usual enjoyment of that space*; *you cannot be held liable for trespass if you’re just flying over* (surveillance/harassment = different).
  + Note: Ad Cealum doctrine is not completely discarded.
  + Led by policy considerations: aircraft
  + Facts: Bernstein tried to sue Skyviews for trespass over property from aircraft taking pictures. Notices issue of USE was being left aside in *Kelsen + others*. Argument that *ad cealum* goes up to heavens absurd, sweeping + impractical and civil aviation act.
  + Decision: In favour of Skyviews.
* **Manitoba v Air Canada**: *airspace way above (beyond ordinary use) cannot be owned by anyone, because it belongs to the commons, and cannot be delineated/demarcated*.
  + Note: This is right about ‘air’ but not ‘airspace’, which can be owned/delineated. The maxim is still right insofar as that airspace extends to ordinary use.
  + Facts: Manitoba tries to tax AC for all of its flights coming through their airspace.
  + Decision: In favour of AC.

*Nemo dat*: You cannot give what you do not have.

**Land Title Act, ss138–143 page 1-16**  Part 9 of LTA: Air Space Titles.

* Provides definitions (s138) including that air space is land (s139) and **lies in grant**. Any easements or restrictive covenants must be expressly stated (s140), and you can subdivide air space into air space parcels and obtain indefeasible titles (ITs) for them (s141).
  + **Implications for Manitoba?**

**Strata Property Act , ss1, 66-72 page**

* Under a strata title, each owner owns his/her own personal space (the apartment) and together with the other owners s/he jointly owns the common area. The B.C. Strata Property Act provides the terms for registration of a “strata plan” in the Land Title Office, which must include a description of the physical dimension of the individually owned units “strata lots.”  Strata lots are defined on a horizontal plane by a reference to survey markers (s1). There exists an easement in favour of each strata lot (s69) for vertical and sideway support by the common property; passage or provision of water, sewage, drainage, etc, other services. There is an easement in favour of common property. These easements (in s69) exist without registration in Land Title Office

## AD INFERNOS (below):

*The right to land below the surface to an unknown depth*. This is limited by the crown (statute), which allows is to take certain minerals, golds, etc, or any terms/reservation in original crown grant. They can give license to other people to mine/take resources (charging them).

## Fixtures/Chattels:

(another aspect of “what is land”) – another maxim: *whatever is planted on the soil seeds to the soil* (what is affixed to the land). Does the thing belong to the land/soil?

* **Re Davis**: *the test for whether something is a fixture or chattel*: 1) **the degree of annexation**: *how attached are the things?* (The more attached, the more fixture, the less, the more chattle) 2) **The purpose of annexation**: *what is the purpose of the things being affixed*? (If to improve freehold -> fixtures, if they can exist independently and are merely for their better enjoyment -> chattels).
  + Implication: if it’s loosely attached, it’s a chattel. The only thing that can disturb this is if it’s there for a certain purpose -> dichotomy.
  + Facts: question of whether the bowling alleys put in the building were fixtures (belonging to the real estate value) or chattels..
* **Lasalle**: *4 part test for fixture/chattel* ***STACKS test***:
  + **1.** Objects resting on their own weight (and not otherwise attached) do not belong to the land, unless evidence shows otherwise. (**chattel presumption**)
  + **2**. Objects affixed to the land are to be considered part of the land unless evidence is shown that they were intended to continue separately as chattels. (**fixture presumption**).
  + **3**. The object’s affixation to the land will raise a rebuttable presumption as to its legal character, and the degree of affixation, size, value, and nature of the object are used to refute the presumption.
  + **4**. The intention of the person affixing the object is material only to the extent it can be presumed from the degree and nature of affixation.
* Facts: Lasalle trying to argue that their carpets they installed were *chattels*, because they failed to register their carpets under the **conditional sales act** (when goods are affixed, a claim has to be entered) -> says carpets are mine until price is paid). Q of whether the semi-finished carpets are fixtures or chattels (Whitespot takes over building and argues fixture).
* Decision: against Lasalle -> **the carpets were fixtures**, **because although their degree of annexation (3) was slight, it was rebutted by the intention (4): purpose of affixing carpets is not to better enjoy carpets, but to improve the hotel**. (hence, fixture)
* **CMIC Mortgage**: *the loose method of annexation (presumptive fixture) for very large items can be defeated by the OBJECT of annexation* -> *something intended to be portable*. *CAB#2 is a chattel because of its OBJECT of annexation, even though slightly affixed*.
  + Decided on the following principles: 1-4 above (Stack’s), and (from Royal Bank):
* 1. Any object which is unattached to the property, except by its own weight, and can be removed without damage or alterations to the fixtures or land that will need repair, is a chattel.
* 2. Any object which is plugged in and can be removed without any damage or alteration is a chattel.
* 3. Any object which is attached even minimally will be considered a fixture subject to the conditions set out in the other rules set out in *Royal Bank* herein.
* 4. An object will be considered a fixture unless there is evidence to show that the object is only affixed with the intention of making better use of the chattel, and not for the improvement of the property. Consequently, an object will be considered a chattel unless there is evidence to show that the object is affixed with the intention to improve the property or the premises as a whole.
* 5. Where an object is determined to be a fixture, it may be removed if it can be shown that it is a tenant’s fixture provided the tenant leaves the premises in exactly the same condition that he or she received them.
* **6.. The purpose test is only used in exceptional circumstances (in relation to very large or expensive items) where after applying rules 1-5 above, there is no clear determination if an object is a fixture or chattel.** 
  + Facts: Mrs R defaults on her second cover-all building, both are very similar, and CMIC has mortgage over her property. CAB#1 = barn for horses. Only difference: CAB#1 has concrete hold below ground. Mrs R goes backrupt, and CAB argues that it’s their chattel, so they could take it back, otherwise bank would take it as added security in bankruptcy. **Clear statement** of intention to make #2 portable and foundation different.
  + Decision: CAB2 is a chattel, CAB entitled to keep it.

**RODRIGUEZ?**

-> something about item being a fixture if it loses its essential character when you take it off.

* **Elitestone v Morris**: *includes being ‘part and parcel of the land’ as THIRD criteria on top of fixtures and chattels*.
* -> Agreement between fixer of the chattel and owner of land cannot prevent the chattel from becoming in law part and parcel of the land, once it *rests on its own weight* on the land.
* -> **Role of things being brought onto land**: houses (even though this one is moveable) are usually part and parcel of the land - > Common sense approach.
  + Facts: Bungalow resting on concrete pillars – Q whether chattel or fixture.
  + Held: Bungalow part and parcel of land.

## Water – Riparian Rights:

NOT land itself, but there is land below it.

Water however does not belong to the owner, unless the ENTIRE thing falls within someone’s property. Common law rights granted to those adjacent to water -> **Riperian Law** (CL) deals with the Q of what rights they have with respect to the water (MCLEAN): Divided into two **1.)** *from point of view of USE* and **2.)** *POV of FLOW*.

* Non-riparian owners in society cannot use these rights.
* Relationship between upper and lower owners:
  + One right is that people *don’t pollute the river*.
  + You cannot use it in a way that diverts flow to non-Rowners/non domestic purpose connected /w property **(right to flow?)**
  + You can *draw* water for *domestic* purposes (washing, cooking, feeding animals, swage, etc) and in if water exhausted this way, lower Rowner cannot complain (**right to use**).
  + Lower Rowners have a right to the non-impeded replenished flow of that water (**right to flow)**

**Right to use (domestic) and flow (no right to divert to non-rip owners)** = two main rights of Rowner.

**Water Act**: regulatory piece of legislation dealing with water, trying to redistribute the water rights to people who were not Rowners.

S1: ***Domestic purpose*** *means household requirements, sanitation & fire prevention, watering of DOMESTIC animals and poultry, and irrigation of garden not exceeding 1012m/2 adjoining and occupied with a dwelling house*.

**Ground water:** water below surface of the ground.

**Stream**: natural watercourse.. containing water or not, and a lake, river, creek, ravine, swamp, etc.

S2: *property in/right to use and flow of all water in BC are vested in the government (except insofar as licenses given)*.

S2(2): *no right to divert or use water may be acquired by prescription*.

S3: THE WATER ACT NOW APPLIES TO GROUND WATER (didn’t during Steadman).

S5: *rights acquired by licenses: by the manor specified in the license* (works, store water, divert and use, alter or improve)

* License: allows you to divert and use specified amount (use for works, etc.)

S93: *interferences with people using licenses is an offence*

**S42(2) – right to use unrecorded water:** *defense to s93* -> *not an offence to divert water from stream for extinguishing fire, AND* ***domestic purpose*** *(but you have to show that it was unrecorded).*

**Principles features of Water Act** (MCLEAN):

-right to use dependent on license, which protects use (natural, uncontaminated state), and flow

-holder of WL can construct works

-Properties between licenses determined by date of license

So, right to even domestic use is subject to only unrecorded (unlicensed water)

**Water Protection Act**:

* S2: The purpose of the Act is to foster sustainable use of BC’s water resources
* S3: Water is vested in the gov’t

\*Everyone including Rowners should get water licenses, otherwise only residual riparian rights exist, if any, subject to the statute. Dealing wit the residual rights…**Common law + Statute** ->

* **Johnson v Anderson**: *Riperian rights can still be asserted against people with licenses in LIMITED contexts -> when person /w water license exceeds that license and causes injury to domestic use of Riperian owner, remedy still available under common law*.
* *The abrogation of Riperian Rights is not so far as to prevent them from being protected against unauthorized diversions*.
* *Until all water is covered by license, FRAIL riparian right still exists*.
  + Facts: both Rowners, but plaintiff didn’t have license, and defendant, who diverted the water upstream from plaintiff, did. Although defendant had license, using more than permitted to use. Q – can nuisance be brought by person w/o license against person /w license for diminished flow?
  + Decision: Plaintiff given injunction.

Mechanism between two riparian owners:

* **Schillinger v Williamson**: *Riperian rights exist, but only when the use of water is legal (which means abiding by the Water Act)* – *diverting unrecorded water w/o license is proximate cause of loss, and illegal, so cannot assert his rights*, because it was for INDUSTRIAL purpose 42(2) only allows domestic.
  + Facts: plaintiff had a fish farm and diverted water for stockwatering, but the area he was diverting water in was not licensed (license for other area). Defendant’s works caused silt downstream to kill fish farm. Plaintiff sought nuisance and negligence based on *RR* – water in unpolluted state. His use was commercial/industrial.
  + [Doing something not even tolerated by common law]

Groundwater:

* **Steadman v Erickson Gold Mining Corp**: *Water Act does not apply to sub-surface water (common property) DURING THIS TIME, but even if the well source of water was surface water, he has a statutory right to use unrecorded water for domestic purposes* (which it was) – fragile right: only as long as no license to it.
  + Facts: Steadman piping water fron cc dugout in his land, it was polluted by the project nearby, and sues for negligence (polluting his use). If sub-surface water -> everyone has right to appropriate it, but not to pollute it. If not sub-surface water -> 42(2): unrecorded water for *domestic* purposes (not works, or industrial purposes).
  + **WORKS**: 41(1) –(j): anything capable of or useful for diverting, storing, measuring, conserving, retarding, confining or using water or producing, transmitting electricity, or collecting or disposing of sewage/garbage, etc.
  + **42** DOES allow works which are permitted for domestic use.
    - Distinguished: from *Shillinger*, where use of unrecorded water was industrial and unlawful (not even supported by RR).

## Ownership of Beds, Watercourses, Lakes, Ponds: LAND ACT 1996 RSBC

Ownership of land beneath water used to be determined by *ad medium filum* for land bordering lake, river, stream -> now **Land Act, ss55-56**: 55(1) -> removes *ad filum* by saying that by default all bed/lake shore belongs to crown. 56: REGARDLESS of whatever the official crown grant shows, 55 applies.

## Accretion and Erosion:

Accretion changes boundaries of property, but has to be 1) **gradual** and 2) **imperceptible**…

* **Southern Center of Theosophy v South Australia**: *The doctrine of accretion/erosion allows Rowners to lose/acquire more land GRADUALLY & IMPERCEPTIBLY, and applies to inland lakes, even if boundaries recorded in public maps*. *Land can also be accreted in a lease*..
  + Facts: crown argued it owned the land that was created by accretion between Theosophy (leasehold initially abutting the water but water went down) and the shore of the lake. Theosophy argues DOA applies to the inland lake, but crown points to original plans in grant claiming fixed boundary (e.g. fence), and accretion does not apply to inland lake. Crown arguments rejected. \*Good reasons why DOA can add/subtract, unless specifically stated it does not apply (convenience & justice).
  + \*note: you can put into contract that says accretion doesn’t apply.

## Access by Riperian Owners:

**Foreshore**: area between the high tide mark and low tide mark. All shores vest in the crown, unless expressly stated otherwise (LTA).

* **North Sanich District v Murray**: *Access to the foreshore is a public right, not a private one, and Rowners must not inferefere with the public right to navigation/putting anything down that disturbs the foreshore – using foreshore for access is the limit* (need a special license or lease).
  + Facts: Riperian owners near tidal water, built wharf to access water that their property abutted. Crown argues that this is a trespass and seeks injunction for removal. Q – does the Rowner’s right to use/access of water contain the right to FORESHORE? (Brackton -> at high tide: on THEIR land, low tide -> crossing crown’s foreshore to get to water).
  + Held: injunction granted.

## Support:

Common law doctrine of support: entitled to *lateral support* for your land in natural state (part of enjoyment of your property).

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

**Vertical/Subadjacent**: subsurface owner’s duty to support surface owner.

-> both limited under CL to natural state of land, but vertical support for a building can be gotten (if not by easement (abolished)) by rules of trespass (negligence).

* **Clevland v Berbarick**: *the natural state of one’s land implies that it may receive lateral/adjacent support from other land/owners (incident)* – not an easement (applies if not exclusion contract); *you cannot use your property in such a way that disturbs another’s*.
  + Facts: both properties on the beach, and defendant was removing + selling sand supporting plaintiff’s property. Storm came and destroyed plaintiff’s beach, and he argued defendant facilitated destruction.
  + Decision: for plaintiff.
* **Bremmer v Bleakley**: *damage caused by movement of parts of one’s property have to be causally connected to some (wrong) act; sand/soil cannot absurdly be a chattel either – with land you accept natural additions/subtractions*. *Lateral support does not extend to title in soil.*
  + Facts: defendant dug holes in the ground to sell his sand, which according to plaintiff caused his sand not to return after a storm. Causally disconnected: non-existence of hole does not guarantee sand will come back. Lateral support does not apply here (hole in the middle of land).
  + Decision: defendant not responsible on appeal – overturned because lateral support (natural plight & condition) does not apply here.
  + **Gilles v Bortoluzzi**: *right of lateral support is limited land in its natural state (common law), does not include support for the additional weight of structures which have been on the land unless obtained by easement or prescription, or unless shown that subsidience would have occurred even absent the buildings on that parcel*.
    - Facts: tenant had grocery store, and B had excavating co. Went close to the line and blew out support -> you have to make sure it stays when prescriptive easement (abolished ’76). Even if no easement, case suggests **independent right vertical/subadjacent support + lateral** – -🡪you get this by **trespass**, unless there was an easement of vertical support before the statute abolished it.
    - Decision: in favour of plaintiff (store clerk had right to support – easement operated but would have had independent right if abolished anyways).
  + **Rytter v Schmitz**: *as above, development of the right of vertical support* *with the law of trespass*. *Right to lateral & vertical in this and Gilles*. *There may be a right to vertical/lateral support in these case in the CL*. *Normally only entitled to support for land in natural state*, *and not none when building imposed on the land*. *Both cases involved the loss of both vertical and lateral support at the same time, by the trespass*. It is however not necessary to show negligence, intent or trespass, because there is a very strict right to support (?) Even if easement didn’t exist for plaintiffs, they could’ve recovered for the trespass though. 
    - Facts: another excavation case.

## Chaper 2: General Principles of Land Law:

**Seisin of land**: *sitting on land, control/management of it*. Eventually inadequate while moving out of feudal system, and replaced with rights (today = possession).

**Tenurial obligations**: existed during feudal times (Socage, etc)

**Allodial ownership**: (the opposite of feudal) Owned freely without obligations.

**\*Jus Jutendi**: (right to use, enjoy and dispose - Romans).. use: controlling/administration. Enjoyment: why you do all of this. Disposition: giving this right away… the **consequence of *jus*** is *real rights*. -> **fragmentation = equitable (use from enjoyment/legal title from benefit).** Jus = right with respect to people, time, and space.

**Reversion**: the future interest someone has in property, which will revert back to the person disposing of it. E.g. John is fee simple owner and gives Kathy a life interest. She has the life interest until she dies, but throughout the time, John has a reversionary interest, until she dies. So you have the land, but you go out of possession.

**Estate vs Interest in land**: interest in land = broader category, while estate is only a limited category within the interest category (e.g. the interest for a period of time).

**Real vs Personal property**:

* Real: land. *In rem rights* against ALL others (you can recover it). Both corporeal and intangible. Specific performance can be granted.
* Personal: all other types (other than land – chattles, etc) Rights to obtain damages, not any specific performance. Only a right that can be upheld privately between parties.

**Ownership of land**: *person does not actually own land, the crown does, but you can have an* ***estate*** *in land (an interest for a period of time) that is fully alienable, and even divisible between legal title and benefit* (trusts). *Can be passed on indefinitely*.

* Types of feehold: 1. **Fee simple**: indefinite ownership (highest kind of right – basically ‘ownership’) – has seisin. 2. **Life estate**: right to give the bundle of rights away for the duration of that person’s life. 3. **Leasehold** (time of interest in land is defined the lease) – also has real rights. 4. **Fee tail**: abolished (this restricted who the could acquire/inherit the land to bloodline, if no one, reverts to grantor). 5. **Future interests**: you can give rights (that exist presently as a future right) for future interests (many in succession).. e.g. you give bob a life-estate, and in your will, and then fee simple to Clark -> when Bob dies, C can go into possession.

**Easements**: incorporeal interest in land. Make your land more valuable… involves right to the USE of someone else’s land (e.g. a path… or easement of support). These are not ESATATES in land (they do coming with *in rem rights* though)… you just have a restricted use of something.

**Court of Chancery**: (king’s advisor) where the law of equity developed, and the modern trust. Follows the CL (makes equitable titles similar to CL title). They were willing to enforce people who would inequitably take legal title for the benefit of someone else (splitting *jus jutendi*).

**Methods of transfer**: *intervivos or by will*.

**Trustee**: given the use/administration/legal title (by someone who had property rights) for the enjoyment/benefit another. Fiduciary duty.

**Statute of Uses**: *birth of the modern trust*. This is an attempt to execute the use (to stop tax evasion). It makes it so that when John (feoffor) grants legal *title* to Bob for the *benefit* of Kathy, the statute transfer legal title to Kathy (the Ceti Que Use). She then ends up with legal & equitable title, and will pay taxes.

* Loopholes: you could create *use for myself*... or since it talks about only ONE use being executed, you create two, so it executes the first, and you end up giving legal/equitable title in the way you wanted to in the first place.
* Eventually: formalities replaced and just says “Unto M to the use of X”

**Equitable interest**: not as secure as legal but mirror the CL ones -> you can lose it if sold to a *bona fide* purchaser for the value without notice. You can only enforce your right to the BENEFIT of it, except when the above happens. Example of where you can enforce: the person got the land for nothing.

**Alienability**: freedom of disposition, free of restraint needed for capitalist system – lower transaction costs, and movement from inefficient to efficient user. As simple as possible, no excessive restraints, etc. Need to make sure things like fee tails, future interests don’t hold up all of the land.

**Personalty:**

* **Re Fraser**: *personalty (personal property) can be treated similarly to realty, in that you can have successive interests in personalty*. *These things are subject to an estate duty*. *Concepts like alienation apply to personalty as well*.
  + e.g. car leases.

Relationship between real & personal property

* In personal property you have complete (allodial) ownership
* In real property (land) the crown has absolute ownership; others have bundles of rights, the most complete being fee simple
* You can have an equitable interest in personal as well as real property

## Chaper 4: Transfer of land:

How to acquire an interest in land:

1. Crown Grants

2. Inter vivos Transfer

3. Will

4. Proprietary estoppel

**1. Crown Grant**:

*Land Act*, since all land is vested in crown since late 1800’s, crown gave out land with a doc called ‘crown grant’, puts land into private ownership. **Statute**: this transfer is subject to conditions set out in statute.. e.g. government can take 1/20th of the land (e.g. to make a road), right to mineral reserves, etc.

s50 -> if you get fee simple (rare) sets out what rigths they still have.

S48-50 -> administration carried out by *crown land registry*.

-Before issuing grant, the **exact status of the land has to be determined** by legal survey.

52-> says whatever applies in 50 regardless of whatever is in the grant.

**2. Inter Vivos Transfer**

**Four phases of transfer**:   
1. [Contract law] *Enter into agency agreement (****listing agreement****). Contract in which agent acts for you*. (Agent not necessary)

2. [contract law/real estate transactions] ***The contract*: *interim****. If agent successful, they will have produced the next stage.* Identifies seller, purchaser, land being sold, roughly 6 months before contract becomes effective. Standard form.

### Law and Equity Act, s. 59

* Deals with enforceability of contracts.
* “Disposition” excludes trusts, testamentary (wills), leases < 3 years
* Contracts respecting land or disposition of land must be signed.
* General propositions of s59:
  + Must be a valid contract
  + Writing can be in any form (even if term is left out – nor important terms i.e. price) (‘written memorial’)
    - Essential terms – who is contracting, what is being sold, price
  + **Concerned only w/ enforceability of K (not existence)**
  + 1. Must be signed by the party to be charged 2. must not act contrarily 3. reasonable reliance
  + Two documents, if expressly or implicitly refer to one another, may combine to satisfy requirements

**59** (3) Contract respecting land/disposition is NOT ENFORCEABLE UNLESS

**a.** there is, in a WRITING SIGNED by the PARTY CHARGED or by THAT PARTY’S AGENT, both an INDICATION THAT IT HAS BEEN MADE AND INDICATION OF THE SUBJECT MATTER

**b.** party to be charged has DONE AN ACT, or ACQUIESCED IN AN ACT of the party alleging the contract, that INDICATES that a contract or disposition not inconsistent with that alleged has been made

**c.** the person alleging the contract/disposition has, IN REASONABLE RELIANCE ON IT, changed the person’s position that an INEQUITABLE result, having regard to both parties interest, can only be avoided by enforcing the contract/disposition

(4) for 3(b) an act includes a payment or acceptance by that party or on that party’s behalf of a deposit or part payment of the purchase price

\*So, BOTH parties are to be charged… you need this for enforceability. If you say you have a right to property from X, you need a written document in which X has indicated X is ready to transfer (signed by X). Same goes if you demand payment for the property, but they decided they don’t want it.. you need written memorial to enforce.

\***Equity**: 59s(3)(b) and (4)-> “part performance” (can include payment/deposit) and s59(3)(c) -> estoppel (person relied on the promise and inequitable result can only be avoided by enforcing the contract/disposition). Can be of help where no written memorial (oral contract).

3. [ch4 – transfer] *The* ***transfer***: this doc sets up that on some future fate, parties will get together and execute the transfer. Makes buyer new owner. Used to be by livery of seisin – actual physical soil, now that is embodied in *transfer form* (deed or grant).

**This is the property side**: since livery of seisin abolished in BC (wasteful/inefficient), there is a standard transfer form to be executed. Transfers must comply /w property law act and land title act.

a) writing and sealing:

### Property Law Act, ss. 15, 16

* S 15/16 Property Law Act: Transfer of land must be done by instrument expressed to transfer, and does not require seal
  + 15: transfer of land by instrument
    - 15(1) Don’t need to use the word “grant” or any other magic incantation (disposition phrase) in land transfer
    - 15(2) Don’t have to go on land to possess it (eg, no livery of seisin)
    - 15(3) subject to LTA.
  + 16: Execution without seal
    - 16(1) seal isn’t necessary
    - 16(2) seal isn’t special unless expressly stated parties want the instrument to be a deed

b) Registration – Prescribed forms:

### Property Law Act, ss. 4-7

* S4: Vendor must deliver registrable instrument
* S5: Transferor must deliver registrable instrument; lease <3 yrs; must deliver instrument creating lease to tenant in form registrable under LTA
  + Title registered and contract requires purchaser to bear the cost of preparing documents of transfer; general practice for purchaser to prepare the documents and vendor must be ready to sign them
* S6: Vendor or transferor must register their own title under LTA
* S7: Transferor needs to give description.. 30 days for demand or can obtain the necessary description.

### Land Title Act, ss. 39, 185-186

* **S39: Registrable Instruments– must use the appropriate forms to register (the historical deed, which was a document under seal)**.
* S185 **(FREEHOLD**) Forms of transfer: must use the appropriate forms unless a different form is prescribed by another enactment; or the registrar gives you the ok and accepts another form of transfer
* S186: Implied Covenants: transfer of freehold estate is made under Part 1 of *Land Transfer Form Act* and any words from column 1 have the same effect of words in column 2. (Column 1 is abbreviated, column 2 is lengthy legalese which every single stipulation, clause, and run-on sentence spelled out in full).
  + 186(3) as long as valuable consideration ($), approved form and execution witnessed - transfer even without the express words “transfer”
  + 186(5): if transfer does not have express words of limitation, it transfers freehold estate in fee simple
  + 186(6) If the transfer has express words of limitation, then the transfer is made with those limitations
  + 186(7) if there are conditions or reservations on the transfer, then the transfer is made with those conditions/reservations
  + 186(8): Subsections 4–7 do not operate to transfer an estate greater than the estate than is registered (**Nemo dat qui non habet**)

Instrumentation/Form of delivery: (what needs to be filled out for transfer to take place)

### Land Title Act, ss. 20-22

* **S20 (1) *Except as against the person making it*, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument i*s registered in compliance with this Act*** 
  + Means that an instrument dealing with land does not operate to pass an interest, either at law or in equity, unless registered in compliance with the Act
  + "Except as against the person making it" – only that as between transferor and transferee, registration is not necessary for interest to pass
* Transfer form under LTA
* Transfer does not operate to pass interest (CL or Equity) UNLESS the instrument is **registered** in compliance /w the act (Land title office). You have to register the property – that’s when you get real rights. You DO have personal rights against the seller until then though.
* Have to go to black acre bin.

**A deed**: *A written instrument, which has been signed and delivered, by which one individual, the grantor, conveys title to real property to another individual, the grantee; a conveyance of land, tenements, or hereditaments, from one individual to another*. (However, under LTA’s form is basically the proper form which contains the “deed”, and seals no longer required).

**GIFT - TRANSFER UNDER COMMON LAW** (before statute):

-Q: do you actually need to physically transfer over the document (deed)?

* **Ross v Ross**: *physical delivery of deed under CL not actually required, (when there is an intention to immediately and unconditionally bind the person*) – added from Zwicker.
  + Facts: no registration in NS, and G’Ma is ready to transfer property to G’son. This is executed (deed /w seal), witnessed by lawyers, but not recorded, and deed is discovered after her death. Q -> should the deed have been considered valid, even though not actually handed to G’son? (She waited so property didn’t transfer right away.. needed a place to live still).
  + Decision: Mr Ross gets property.
* **Zwicker v Dorey**: *if the transfer is operative on death, it is a will not a deed (intervos transfer)*; *intention in executing the deed (as a gift) must be to be immediately and unconditionally bound*.
  + Facts: Z executed deed under seal to one of wife’s sons (D). He didn’t hand over deed, but he did execute it. He also transferred bits and pieces of it over time to other people. Q – whether or not there was an EFFECTIVE transfer (argument: all of those other transactions invalid). Transfers upon death require certain different requirements (testamentary disposition). Furthermore, you need appropriate intention.
  + Decision: in favour of zwicker.

**Note on gifts**: deed executed as a result of a gift.. vs contract: you can use for breach of contract. Gift = not a contract. We only make gifts enforceable when you *really* meant it (handing someone the document, or if not, clear intention of unconditionally/immediately being bound). \*Requirements for gifts (which can always be revocable until complete): **1. Intention 2. Acceptance 3. Delivery and 4. Registration (s20 LTA: no oral gifts.. on form).**

**SYSTEMS WITH LAND REGISTRY SYSTEM (or corresponding s20):**

\*so in land title systems, the surrogate of the deed is the execution of the transfer form.

* ***MacLeod v Montgomery***: *volunteer giving gift does not have to be forced by equity to complete the gift; You can’t become holder of estate unless you secure registry (transfer form + duplicate)*.
  + Facts: Montgomery (Mon– G’ma) wanted to give fee simple interest to Macleod (Mac) as a deed. She executed to the deed, (standard transfer form in the land registry system), but the **duplicate** **indefeasible title** was with the lawyers, who wouldn’t give it to her yet. (Relations went sour?). Mac argued that she had CL equivalent of deed, and should be transferred to her.
  + Decision: in favour of Mon
  + \*Courts looked to intention as well (the gift still has to be intended to be transferred…and there was reason for it not to be).

**Transfer to volunteers**: equity’s attitude towards this is that people do not just go around giving their property. **Resulting trust**: rules of equity say you can create an implied trust or express.. when implied = resulting trust. So when you are giving voluntary gift to someone, even though you’ve given them legal title, the equitable title bounces back to you. A -> B.. B gets legal, and A gets equitable upon this voluntary gift. You had to make clear if you wanted to give both legal & equitable title: *unto and to the use of B*.

### Property Law Act, s.19

* S 19(3) – a voluntary transfer need not be expressed for the use [language based on historical dispositions] or benefit of the transferee to prevent a resulting trust
  + No need to use specific language to state gift; can use supporting documents
  + Does not change presumption of resulting trust, just eliminates the need for specific language
* Presumption that ppl do not go around giving away their property

Less formalistic – intention: s19 does not require you to actually use the words to prevent the *result in trust*.

4. ***Registration*:** *going to land title office, register ‘partlands’ in the appropriate bin. Crosses out seller and replaces with buyer.* This is public, and everyone can see what interests are in your land.

**3. Transfer by Will:**

Intestate secession: *you don’t have a will, goes in a certain order (in statute).. and if no one, goes to crown*.

No interests until death of makers.

**S42 WESA**: few formal requirements.

Transfer takes place by TRANSMISSION. Trustee is usually employed to secure title in the different registries.

**Property is immediately subsumed within a trust** -> legal title goes to them and beneficial/equitable goes to you. Beneficiares can bring the trust to an end and get full legal capacity.

**4. Transfer by Proprietary Estoppel**:

* **Zelmer v Victor Projects**: *you can initiate a cause of action based on proprietary estoppel, which can lead you to acquiring an equitable interst in land without registry, when there is a detrimental reliance on someone’s statements*.
  + Facts: P wanted to develop land and needed to build a reservoir on D’s land, the only suitable place. D assured them they would not need to compensate him and could go ahead with project.. As they go ahead, he backs out. Sustained detriment and relied.
  + Decision: easement granted to P.
  + **[45]**: you have to have some sort of detrimental reliance.. e.g. spending money, or some other act.. you either lead them to believe this by direct statement or indirectly by not enforcing your own legal right.

# CH 5: REGISTRATION OF TITLE

In our LT system, the provincial office is responsible for inspecting and accepting all documents in their proper form, and registering the title (analysis of interests in BlackAcre). The document produced is called **indefeasible title** (*like old “abstract of title”*). LT system “guarantees” indefeasibility (IT holder at top and charges listed below). Property Law Act: requires you to have an inspection, submit everything correctly, and then getting cert of IT. A duplicate IT sits in the office, but owner can keep it (if there is no *encumbrance*). Every time property is being transferred to transferee, they have to (should) go to the LTA and check out CofIT.

## What can be registered?

**(provision)** You can only register INTERESTS IN LAND (possessory or non: e.g. FS or something less than estate (easements, leases).

**Re Kessler**: *zoning by-laws are not registrable,*

-**Rule**: zoning by-laws, although they can dictate how land in certain areas is used/affected, are not recognizable **common law interests** in land. LTO only accepts these interests, but zoning by-laws come from the legislature. Moral: *you have the burden of checking appropriate by-laws*/own research.

**Land Title Act**: *things you cannot register*

**S33**: **Mortgage** **that is created by handing over a duplicate IT** \*have to enter into a *formal* mortgage (can’t register an equitable mortgage by handing a duplicate IT).

**S200**: **Subagreements for sale**

-Agreement for sale (AFS): financing technique, where you can’t get a mortgage for property but think the person will successfully make payments. When paid in full, property will be transferred (IT: “EIFS to X until paid in full by Z”). This gives you an **equitable FS**, (gives effect to your intentions – CL: not until formal transfer – registered as equi FS), but **legal FS** in X still. If Z decides to do another AFS to W before full paid, **subAFS** formed. POLICY decision not to register the **subAFS** (can only do the transaction by paying X out and then AFS with W).

**Land Title Act**: *things* ***you ca****n register that are not interests in land, but only if you have special legislative statement*

**S210**: **Judgments**

-Monetary award for *breach of K*, or from torts. If you not paid immediately, you find out if they have any real property, and you **register** it. **Effect** of judgment: **securing priority** – *no one will get piece of interest before you*.

**Provision?: Caveat**

-Wanting lawsuit that challenges someone’s registered ownership or title of that particular property. **Freezes** all further transactions on the interest the caveat is related to – stayed **registered** for **two months** on the property.

**S215-217**: ***lis pendens***

-Cert of pending litigation, can be filed after the caveat, which stays *until litigation resolved*.

**S218 - Statutory Right of way**

**\*All questions on Land Title**: *deal with by COURTS OF ORIGINAL JURISDICTION* (can’t be decided by *prov courts,* but SUPREME courts). LTO -> more of a procedural authority under LTA.

**S23 Land Title Act**: ***Indefeasibility of FS when EIFS registered***

-**s23**: once you’ve registered, you are **indefeasibly entitled** to the EIFS that is recorded. No one can knock you off – real registered ownership. Everyone else is a **charge-holder** (can be possessory).

-Where property divided into AIRspace, you have *IT* wrt to those air parcels (*Strata Property Act* – subdivided according to *Condominium Act*). Each strata surveyed and given description for each parcel. Common ownership over common areas.

-**s38**: *summary of* ***duplicate IT*** – held and created by LTO normally.

-Issued once registrar is satisfied of *marketability & good safeholding*.

**Re Land Registry Act, Re Evans Application**: *ROLE of the REGISTRAR****: clarification*** *OK*

-F: an application by joint tenant after husband died to get his name off, and her rights of survivorship put her on. Registrar looked at applications (4th one) and noticed **no proper dimensions given** -- nothing to show *correlation between what’s on land and the document*. Ambiguity proved to LTA that it could not be a **good safeholding title**.

-L: **Court affirms LTO’s decision**, because it is permitted a **clarificatory role.** LTO cannot investigate **q’s of title**, but trying to figure out the proper dimensions of the property are not a legal issue (which is left for SC).

**Re Land Registry Act and Shaw**: *Role of Registrar*, *questions of* ***CLARIFICATION***, *insufficient documentation*

-F: Father had given son **power of attorney** to deal with property, and son filled in HIS OWN NAME. “I’m selling this property FOR my father TO MYSELF” (signed both sides). Registrar only prepared to go ahead if father asserts it’s okay (**s27 LTA** – Attorney cannot sellf to himself). Agents must act in the best interest of their principal.

-L: **The LTA is permitted to seek more information**, and **questions of clarification** are **not legal determinations**. Asking if there is authorization really = within rights of LTA.

***Nemo Dat & Indefeasibility***: if the crown guarantees indefeasibility, *nemo dat* (old CL doctrine) will be seriously eroded.

**Core POLICY principles of registration**:

1. **S20**: the *need* to register an interest in land (except as against the person making it, everyone needs to register if they want to assert *in rem* rights). You simply risk interest you’ve paid for if you don’t.
2. ***Nemo Dat*:** eliminated or emasculated. If you become registered owner, you can ignore *nemo dat*, because you only have to take account of what is registered (with exceptions).
3. **Indefeasibility Principle**: tells us why we have an assurance principle. Person who holds title is conclusively regarded as the owner of the interest.

**Heller v BC (Registrar Van Land Registration District)**: *LTO going beyond mere clarification*; *role of registrar*

-F: Mr. H transferred his parcel of land to Mrs. H, used deed (equiv of xfer form) and took it to the office to register title. Registrar in effecting this *ERRED* because **duplicate** in Mr. H’s possession. He sold land to Mr. Puff, and duplicate handed to him. When he went to register, was told that he was “not Mrs. Heller”, who was on the title. Ascertained there was error, and Mr. Puff wants to undo error.

-L: **The LTO *does not have the power to reverse*, because this is a LEGAL question** (**even though there may have been fraud**). Requires *evidence, judicial skill, and legal knowledge on rules of transfer*. (BC legislature cannot subtract from powers of courts of original jurisdiction).

**Assurance Fund**:

**S296 (PROPERTY LAW ACT?! OR LTA?):** ID (indefeasibility) given for FS when registered. Under CL, you would be protected by *nemo dat* in case someone defrauded you by fudging title and selling it to a third party. The province setse up the fund for this. You have to show that you’ve taken **reasonable precautions** (3yrs to act) -> not able to recover under fund **if you contributed** (**s303 – LIMITS)**.

**Mcaig v Reys et al**: *IMPORTRANCE OF REGISTRATION*, *equity BFPFV, marketable good safeholding, assurance fund*  
 -F: FWF owns parcel, sells to McCaig under AFS.

M sells to R (equitable estate in FS). Legal estate still with FWF. But M wants to live there at some point, just wants 23 acres. Asks for “option” to buy back some (also equitable). Sale to rees = **subagreement for sale** (because M hasn’t went to the top of title by paying off FWF completely). Two equitable interests floating: 1. Agreement for sale (FWF -> M and subAFS: M -> R).

R comes in an registered subAFS (*prior to current statute – s200*). **OPTION NOT REGISTERED** -> goes back to **Marketable and Good Safeholding**, because the parcel has not been subdivided OFFICIALLY (requires money).

R wants to get rid of this equitable subAFS, and sells to (Rutlands) Jerome, who comes on as a **sub-sub agreement**, and is registered under CIT as charge). R is very clear that there is an **option**, and Jer **know about it**, yet sells to Jab.

Jer finds out how much is owing and wants to xfer EIFS to Jab, HIDES the option, pays off the different interests, so that cert now has jabin as *owner* in *FS* -> **bona fide purchaser for value** (he is registered properly).   
Now M wants to exercise equitable interest, but the statute has taken away his ability to do so (*removed nemo dat* here). **Tries to claim the value for what is lost** (the exercise of option). Wants comp from Jer or Jab and R .

Q: **Should M succeed against the assurance fund**?

-L: **M loses.** Judge scolds Jer (who behaved badly) for trying to get EIFS and wipe out the option (because unregistered). M loses because *statute* (if it were passed then) -> because option should have been registered as an interest in land (Jabin is registered -> “conclusiveness of the registrar”). However would’ve failed under common law anyways: ***Jabin is equity’s sweetheart******🡪 the bona fide purchaser for value*** (and so equitable estate stops). Holder of equitable estate does not win over the bona fide purchaser, since he had not been given notice and gave value.

* + **In order to be successful against AF claimant must show:** (a) They’ve been deprived of land or interest therein (b) **Loss was occasioned by the operation of Land Registry Act (you would’ve had it in CL otherwise) (**c) Loss was occasioned by fraud, misrepresentation or wrongful act in registering of another person as having interest in the land (d) he is barred for bringing an action for rectification of the register (cannot ask the register to put the title back in your name)

\*(d) and (b) failed

# CH 6 – REGISTRATION

## Fee Simple & indefeasibility

**S20 LTA**: **no interest passing, unless it is registered.**

-Advantages that come from registering: element of *clarity* around interests pertaining to the parcel of land. Identifies the individuals/companies that have interest in it. Involves abolition or significant attenuation of CL doctrine of ***Nemo Dat*** **for EIFS** (when property passed on to *innocent bona fide purchaser for value*, policy to side with innocent purchaser, but give person access to AF).

**S23(2)** **LTA: effect of indefeasibility** – “never truly absolute”

- (2) An indefeasible title, as long as it remains in force and uncancelled, is **conclusive evidence** at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following…

(g) showing caveat, lis pendens, builder’s liens, entry, judgment, etc. placed on title

(i) showing person on title has participated in fraud

-Other things like inceptions/reservations, federal or prov tax assessments, municipal charges (e.g. don’t pay your taxes), certain things by statute (e.g. crown using land for public facilities), **EIFS qualified by ANY leases, provided the term is three years or less** (if more than 3 years, and not registered, you can kick them out).

**General Principle of Indefeasibility**: *it’s quite strong* – *nemo dat has been significantly eroded*.

**Creelman v Hudson Bay Inusrance Co**: *Articulation of view of indefeasibility*

-F: C purchasing property owned by The Bay. Before transfer, he decided to back out. Looking at statutes, they were given that property for certain purposes, but said they weren’t using it for those purposes. Therefore, C’s argument is that **under *nemo dat, C would be vulnerable too***.

-L: **JCPC denies this argument** -> ***nemo dat has been seriously eroded***. It doesn’t operate now in BC. You have the Land Registry Act, and indefeasibility given to holder of EIFS, and until changed, you can accept it as indefeasible. If AG hasn’t taken action, and they are sitting as holder, no caveats, lis pendens, etc. then it is **good safeholding & marketable title**, therefore, purchaser must take it. **Remaining title holder, unchallenged = evidence of indefeasibility**.   
  
**Indefeasibility & Squatter’s Rights/Adverse possession**:

-**LTA 23(3)** “After an indefeasible title is registered, a title adverse to or in derogation of the title of the registered owner is **not acquired by** length of possession.” Because of clarity around title, and desire to remove surprise claims undermining title, law seriously **emasculated squatter’s rights** (acquisition of title by *adverse possession* or through *acquisitive prescription*). **23(4)** puts it back a little, doesn’t eliminate completely: if you’re very first holder of IT, the title may be void against someone adversely in actual possession, and was rightly entitled to the land at the time it was registered.

**-Limitation Act** **s8,9**: incentive to bring actions within certain time. Ability to assert title is **not statute barred by expiration of time**.

-**Limitation Act s2(2)**: The limitation act does not apply to the core proceedings of aboriginal treaty rights recognized. They can still claim title through acquisitive prescription.

-> *Skeetch*: possible support for argument in contrary position in Skeetch (it wasn’t adverse possession, but given the purpose of *caveat/lis* is to freeze the world around you and give notice, or you might lose out on your claim.

-**Limitation Act s28(1)**: *no right acquired through adverse possession*, except as allowed by another Act.

**Property Law Act s36**: ***Encroachment on adjoining land***

-Gives the court a fair amount of jurisdiction to deal with property interests of buildings in adjoining parcels. Sometimes when a fence is improperly placed, can apply under s36 to get **ADJUSTMEN where encroachment** **is building or fence**.

-3 options available: 1. Give an **easement**; 2. **Title** (resurvey); 3. Or to **remove**. With the first two, compensation must be ordered.   
  
 **Builder’s Liens Act s2, 20, 21:** ***Protecting Builders***

-If you employ builder and don’t pay, they can protect themselves by placing *builder’s liens* on title (registering it), but has to be done at any time **during the 45 day period after work completed (s20)** – extinguished otherwise. Has effect from the time the work began/materials supplied, and has priority over all judgments made after that date.

-You usually hold-back on paying the full price (up to 15%) 45 days after sale taken place to check for no builder’s liens

-**23(2)(g)**: the builder’s liens put on the title before/after date of registration is a restriction on IT

**Carr v Rayward**: *Builder’s Liens still effective within period even if filed AFTER property sold to another who gets registered on title*

-F: Pluming work done, filed *liens* before completing work, and owner sold property to another before it was registered.

-L: The *liens* will still be effective even though new owner got registered on title before completion **s23(2)(g)**.

## FRAUD & FORGERY

**LTA 23(2)(i) -** : your title is *indefeasible*, with the exception that someone can show that the person getting on title has done so by **fraud** (which includes forgery).

-Clear that if B is on vacation and S signed “from B to S”, it would be *fraud (forgery)*, and hence no interest would pass, as B participated.

**LTA 25.1** **VOID INSTRUMENTS**: **interest acquired or not - companion to 23(2)(i)**

(1) Makes clear that under registration system, indefeasibility is guaranteed insofar as someone cannot get on your title by a void instrument. -However, the *innocent bona fide purchaser for value* is okay, even when interest is got to them by a void instrument – *nemo dat gets cut off here*.

(2) Even though an instrument purporting to transfer a fee simple estate is void, a transferee who

(a) is named in the instrument, and

(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.

-**Distinction between fraud & forgery**: you CANNOT acquire an interest through a **VOID** instrument (some cases collapse distinction between the two). **Forgery makes things a *null deed* (void) through *NEF*.** Fraud is a much bigger category.

Example Scenario: B on vacation, S trying to sell B’s property to T, unknown to B. S signs document saying S is really B (fraud), and it says the transfer is from “B to T” (therefore, NEF). This is a *void deed*, since proceeding by NEF (and is fraudulent, the broader category – you can have fraud without forgery).

**Deferred Indefeasibility – *Gibbs Forgery****,* ***invalidity***

-With example above, where T is on title, T is vulnerable against B, who could succeed due to null statement -23(2). Policy rationale: the best person to check whether B is really B is T. Therefore; you suffer consequences for dealing with crook. Indefeasibility is “deferred” for T.

-**However,** *any subsequent transfer grants the purchaser good root of title, if they are an innocent purchaser for value*. If T sold to X, would be giving a *genuine* signature (not one that is null by NEF), and would hence be a **valid instrument** (says: “T to X”).

\*Person transacting with rogue is not doing so *on faith of the registrar*, but with the forger. They do not get the interest through the invalid instrument, but will not be prevented from passing that interest to a third party BFPFV.

**Immediate Indefeasibility** **– *Fraser v Walker*** (EIFS ONLY)

-Instead: **once you’re on title, you’re on** (strict defeas). As long as you had no role in the fraud, you gain indefeasible title through the forged instrument. It is the fact of registration and not its antecedents which vest/divest title. Thus, the person gaining the title, even through null/forged instrument, will have indefeasibility immediately.

-(The Husband’s interest was deemed “indefeasible” by the statute, and although his wife forged his signature, the registrar is conclusive, so interest passed to him. Notice: no fictitious person).

-OR, with example: with ID, T would be given indefeasibility and go on title through the forged instrument given by S (which is technically null).

**BC’s POSITION**: **s25.1** -> **LEGISLATIVE EFFECT TO *FRASER v WALKER***

**-**Says that you don’t acquire any interest in land through void instrument. ***Nemo Dat* is back for the case of forgery (Charges).** However, **for an EIFS** it is taken away. T, who came on as a result of a *void* instrument (fraudulent forgery by B), T would be able to trump B’s claim, who then has to go to assurance fund.

-> creates the problem for the registered owner, taking the *Gibbs* approach however poses difficulty for the innocent purchaser, who can’t go after the rogue usually.

-> Cancels out any effect *Gibbs* may have on BC EIFS.

-> “Immediate Indefeasibility” supposed to strengthen **s23(2)(I), HOWEVER**, *ONLY IN TERMS OF A VOID* *instrument* (doesn’t say fraudulent).

**Gill v Bucholtz**: *Indefeasibility of ENCUMBERANCES vs EIFS* (mortgages) – *NEMO DAT STILL APPLIES*, *25.1 only for registered EIFS owners, lender’s interest unprotected*

-F: A Gill was registered owner of property. Two rogues come in, one we don’t know if, and other is G Gill. The unknown one is where A’s name is signed on transfer to G. G comes on title and borrows from first lender (B), and B gets mortgage on A’s title, and 4337 investments are second mortgage (basically treated this way, although never actual come on title).

-Q: does the property return to A gill *without encumbarances*?

-L: ***Nemo Dat applies to interests lower than EIFS (even when registered)***, *and 25.1 protection of your interest from people coming on as a result of a VOID instrument (e.g. forgery) doesn’t apply to the banks, since mortgage is not EIFS*. Thus, A Gill can say the rogues gave something they did not have to the banks, and the whole transaction was *carved out of a null deed*.

-C: mortgages not attached

**First West Credit Union**: *Fraud but not forgery (not void instrument)*, *uses 23(2)(I), lender’s interest still protected (normally charges not given such status)*

-F: Mr B (owns the company 779, which has EIFS on the land) encounters some financial difficulty, and Mrs. G suggests he should transfer the interest to her (she also had piece). She takes a mortgages out with *First West* *Credit Union*, but not doing anything for the company with money. Mr. B tries to argue “fraud” using 23(2)(I) to get Mrs G off, because the instrument is not void (forgery – he transferred it to her). If she does this, *lenders have no security on their loan*.

-Q: is this the same thing as *GILL*? *Would properties be restored subject to the charges*?

-L: **Not like circumstance in *Gill****, because of difference between* ***void and voidable***. Here, at best, voidable (not hit by 25.1, which only refers to **void**). If the conveyances are *voidable*, the properties will (may?) remain **subject to charges** (of mortgage). If Void, they will not (*nemo dat* for something less than EIFS). **Gill is not applying to voidable transactions, just void** -> LTA is not displacing the CL.

-C: For the mortgages. (BFPFV)

## NOTICE OF UNREGISTERED INTERESTS

**S29 LTA**: **Effect of Notice of Unregistered Interest**:

* - **Except in the case of fraud** in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner a transfer of land, or charge on land, etc., **is not,** despite rule of law or equity to the contrary, **affected by a notice, express, implied, or constructive**, of an unregistered interest affecting the land or charge

**Hudson’s Bay Co v Kearns and Rowlings**: *Knowledge of existing unregistered charge INSUFFICIENT. Need FRAUD, and notice is not enough*.

-F: K is R/O of EIFS, owes HB co some money. To secure the debt, she gave mortgage to HBC. Lawyer was preparing the mortgage, took a long time though. Meanwhile, K offered the property to R, who checked the title (which was clear of any registered charges), and R puts money down and registers his charge on K’s property. Now R’s charge ahead of HBC’s, and HBC argues R *knew* of the charge.

-L: **s29(2)** indicates that HBC’s charge *cannot be included*. **It doesn’t even matter that R knew, R *is entitled to ignore***. S29 is supposed to *absolutely protect purchaser for value* against notice, but qualified by **actual fraud** -> **going outside of the ordinary course of business**, prejudicing the holder of the title.

**Serving For Success**: *Adds to what the Fraud Requirement Needs*

-*morally wrong*: have to show you are utilizing the provisions of the statute for an improper purpose..

**McRaig v McRea**: *Knowledge of a registered interest, will/trust****, can’t escape trust notification (on CIT)***

-F: Husband dies, leaving property in trust to Widow with life estate, and remainder to few children, including F(jr). The trust notification was clearly marked down on the title. She holds the EIFS as *trustee*, but she gives it to F(jr) in FS, no trust qualification. Then F dies, leaving to his wife (A) & children. Other siblings learn about it and challenge this as beneficiaries under F(sr)’s will.

-L: A argued he was registered properly. **Court**: **F** **was infused with the knowledge he got from the *original title* (from mother to Son)**. At that point, the registrar tells you what the state of title is, and you can’t ecape it. **Even if he didn’t know it**, knowledge of all the interests (other siblings) would’ve been known about.

## REGISTERED CHARGES

**S197** **LTA** **– Registration of Charges**:

-Registrar has to be *satisfied* that a charge had a **good safe-holding and marketable title**. If not, can refuse registration.

**S180 LTA** **– Recognition of Trust Estates**:

-Particulars of the trusts are not entered in by registrar, but must be an endorsement (e.g. “in trust”) which contains any additional info (e.g. folio #). To know them as equitable interests, **cannot be put as charges with trustee as EIFS**, but have to have the endorsement which creates a reference to the trust instrument. This document “vested in X” will have **all of the *powers & qualifications*.**

-Trustee is given *legal possession* (takes title) and registers it, because it if you were registered as owner of EIFS without any marking, tempted to abuse.

**Dukart v Surrey**: *Alternative method of registering charges:*

-F: purchasers of lots in surrey given right of way for *collective use of the beach* (by way of *jus spatiandi* easement). Since easement difficult to register, created a document that put the “foreshore reserve” in trust to a 3rd party (there is reference number to the trust document with powers & qualifications). 3rd party failed to pay the taxes and the reserves sold in a tax sale to Surrey, but trust for purchasers was not noted on title. Surrey put toilets down on reserve, and Dukart sought injunction (obstructing right of access). **LTA s276**: if land sold in *tax sale*, the title is purged of everything **except for easements, restrictive covenants, etc.**

-Q: Can surrey take the property ignoring the *beneficiary easements* under trust document?

-L: **Municipality must take the land subject to any *easement REGISTRABLE against the land*.** Argued this was not, but court rules that creating these trust documents, where the beneficial interests *are not put on as charges*, **still counts as registration**. There is no definition of “registered”. Court allows broader version of registration, so *jus spatiandi* caught under there.

-C: city is burdened by easement

**S26 LTA Effect of registering a charge – defeasible** – Parallel to s23 (s20 – registration)

(1) A registered owner of a charge is **deemed** to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.

(2) Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.

-**Rebuttable presumption** is all registration gets you. ***Nemo Dat still in full force***.

**S27** **LTA** – **Notice of charge given by registration**:

-When registered, you are *deemed* to know the contents of the charge in relation to the estate the charge applies to. Notice from date of application for registration to everyone dealing with the title.

**Credit Foncier v Bennet**: *“****indefeasibility of charges****”*, ***Nemo Dat applies to charges – registered interest is rebuttable***

-F: George & Irene Bennet pay off mortgage eventually for their house. They burn the document. Rogue (Allen) forges (*void/NEF*) document with mortgage between “Todd Investments” and the old couple (worth 7400). Registrar duped and Todd gets their mortgage registered against G&I’s property. Todd sells their mortgage to Stuart, who sell to Credit Foncier. CF sends them letter demanding payment for the loan.

-Q: does CF have a mortgage? Or must they use assurance fund?

-L: **Credit Foncier does not have a mortgage, as *nemo dat* applies**. Allen’s original instrument was a **void/null deed**, and nothing flows from that (s25.1). ***No protection for innocent purchaser for anything but FS (which has high indefeasibility).*** The documents passed become legit, but were carved out of void/null deed. LOW INDEFEASIBILITY for charges, as you are only deemed to have the registered interest. **\*However,** CF would have also failed anyways: whole point of mortgage -> security for DEBT obligation, but there is **NO debt** outstanding for the old couple (onus on bank to check actual amount owing).

**Canadian Commerical Bank v Island Realty Investments**: *preference of charges (mortgages*), *example of preference for “indefeasibility”*

-F: Park Meadow (PM) granted mortgage to Imperial Life, and 2nd to Island Realty. Cowan (rogue) forges **discharge** of IR’s mortgage, and grants the 3rd to Almont (which becomes the 2nd by discharge), who only gives the money when they see the mortgage to IR has been “discharged”. Cowan pisses off with the money.

-Q: since not enough money to pay Almont & IR, which should be preferred?

-L: Dealing with Almont’s interest, who was *bona finde purchaser* with **valid mortgage** (nothing void about it, despite the discharge being null) – they had no way to tell certificate was void (no notice). Island Realty is **disenfranchised**, and should go to Assurance Fund. *Credit Foncier* does not apply, because flowing form NULL instrument there, here Almont got on title as a result of the fraudulent cancelation of IR’s mortgage.

**S28 LTA**: **Priorities**

-Priority of charges based on priority of registration – the one given to the registrar first.

# CH 7 – FAILURE TO REGISTER

**S20 LTA – General Principle**

-Failure to register means that the **estate does not pass,** *EXCEPT as against the person making it* (the unregistered interest is effective as between parties to the document).

**Sorenson v Young**: *unregistered interest which is not interest in land* – *importance of registration for charges, FAILURE OF PASSING INTEREST*

-F: Sorenson owned BA, and divided property GA, BRA. EIFS wrt to the different lots. Sells one to Young but **reserves himself the *right of way*** in the transfer. *Easement not reflected in the charge*. Y prevented S from using his right of way. S didn’t register it, but suing Young to enforce.

-L: **Cannot enforce the easement – underscores importance of registration for things that are less then EIFS**, which are still vulnerable to *nemo dat* even when registered.

**When failure to register NOT an interest in land**

-Judgments, caveats, lis pendens -> important to register so everyone has notice dealing with the land

-**Registered judgment *YEILDS to the UNREGISTERED*** ***interest*** **(CL)**:

-Reason is that judgment is actually **personal** – not giving interest in land – just a device helping you secure the money owed, by putting *liens* on property. All you get out of the debtor as judgment creditor is what they actually own, therefore, only attaches to the actual interest they have -> **bare legal title**. The debtor can transfer (*Entwhistle*) and the judgment comes off (**court sided with unregistered interest** over the judgment).

-**s86 of Court Enforcement Act** – gives statutory effect to this

-Subject to the unregistered interest of someone who is in good faith and gives valuable consideration.

**Failure to register OTHER INTERESTS – s20 “except as against the person making it”**

**L&C Lumber Co v Lungdren**: *Profit a Prendre + Assignment*, **s20 exception** (meaning/application)

-F: parcel owned by appellant with forest. She transferred to MacDonald -> *Profit*: less than EIFS. Entitles you to **some product from the land** (e.g. fruit, gravel, trees). MacD did not register it (although it should go on as a charge). MacD transferred *profit* through **assignment** (gives 3rd party same rights you have), and the 3rd party shows up to collect product, she says no (you need to be registered –s20).   
 -L: **Lundgren loses against third party**, because assignment means “stepping in the shoes of the right holder” (assignor – MacD). S20 exception: you must register the interest **EXCEPT FOR IF THIS IS AN ISSUE BETWEEN GRANTOR & GRANTEE**. Thus, lumber co stepped in the shoes of MacD, and she is bound by assignment.   
  
**International Paper Industries**: *“Prohibited transactions”* *(not overruled, but statute in place to prevent this result again) – importance of seeking registration*

-F: IPI (tenant) was leasing land from Top Line (landlord). Long history of leasing, and with 2nd lease, period was 51 months (over 3 years must be registered). This one was NOT registered. They attached subdivision diagram (**not legal one** – need proper one for marketable and good-safehold). Tennant wanted to renew lease, but landlord refused. (Tennant stayed on premises, refused to pay rent and was removed. Landlord sued & lost – not commercially friendly).

-L: **subdivision is an important policy issue** (**s73)** -> wants to have some regulation over people carving out pieces of land. Court not willing to enforce the lease, because **not marketable + good-safeholding**. Illegal lease, so court doesn’t want to give action out of a wrong.

-C: in favour of landlord.

\***Statute: 73.1** -> added to address this. (1) A lease or an agreement for lease of a part of a parcel of land is not unenforceable between the parties to the lease or agreement for lease 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.

# CH 8 - APPLICATIONS TO REGISTER

**Rutland** **v Romily**: *lis pendens, priority for first application* *(should not be subject to processing of LTO*)*, Application = Registration* *(for these purposes).*

-F: D - > AL(reg)

Al -> P (innocent PFV, applies for reg )

D sues AL for fraud related to x-fer, and *lis* filed in LTO before P’s app for reg processed.

Reg then refuses to complete P’s reg until *lis* gone.

P’s action against D = no interest and *lis* should be removed.

D transfers property to AL, who registers. AL then transfers property to P, a bona fide purchaser for value, who **applies** to have it registered. Meantime, D files suit against AL for fraud related to their transfer. This lis pendens is filed in LTO before P’s application for registration is processed, and the registrar refuses to complete P’s registration until the lis pendens is disposed of. P takes action that D has no interest in the land and thus that the lis should be removed.

-L: **For the purposes of determining priority, application to register (if good safeholding and marketable) is treated as registration. Not determined by delays in the LTO** (things get stamped as they are received).

-C: FOR THE P (priority for the first application).

**Breskvar v Wall**: *Voidable does not = automatic restoration, and equity prefers innocent*

-F: B is registered owner on CIT. Produced a transfer form from B to \_\_\_ that was given to P as security for his loan to them. P **fraudulently entered** W’s name in the blank and became recipient on Oct 15 [this is a **voidable (fraud – not forgery)** transfer—23(2)(i), B would have to pay back the loan given them by P before being able to regain title]. *W negotiated transfer with A* and executed transfer to A on Nov 7. A applies to become registered owner on Jan 8. B realizes he was defrauded, and applies to LTO to register a caveat on Dec 13. With B’s caveat on the property, A could not move onto title to replace W.

-L: Court: W’s act was **fraud**, but does not mean B’s automatically get title (since only *voidable – equity*). However, **TWO EQUITIES**: transfer to A’s (BFPFV) because of agreement for sale. You can hence apply equitable principles -> B’s did a silly thing (blank transfer form – enabled manipulation and dupe innocent third party giving value), so clearly A’s equitable int preferred.

\*B’s might be able to get something under the fund (as they lost their legal title under the statute), **but probably not because of negligence**. Suing W’s is possible, but *have to prove damages*.

C: For the A’s

# CH 9 – FEE SIMPLE

## Words of purchase/limitation

**Words of Purchase**: “**WHO**”

-Words that designate the person receiving the gift (intervivos or in will)

**Words of Limitation**: “**WHAT**”

-Words that that designate the kind of interest being given? How expansive/what are its limits?

**Property Law Act s19**: Words of Transfer – “in fee simple” sufficient to transfer EIFS

-Historically, fallback estate was LIFE-ESTATE, so if you didn’t specify, greatest given would be life-estate. Now it is **FEE SIMPLE** (greatest one you can give – *nemo dat*). The requirement used to be “To A and her *heirs*”, as a word of limitation, to say that you are just giving A the greatest interest possible. This is not necessary in order to give someone FS. -**Problem**: “To A and her *heirs”* alone is ambiguous and is either a **formalism** (words of limitation), or *her heirs* is to whom the estate is given (words of purchase – because it’s a CLASS of people).

**Tottrup v Ottewell Estate**: *“And his heirs..*” – *Purchase or limitation? Lawyer knows what he’s doing*

-F: Ot family has many siblings, but the two most relevant are identical twins Frank & Fred. Fred had a child, but lived with his twin for a while. **Fred dies**, and is only one with a child (Mrs. T). Fred & Frank wrote almost identical wills within a month of each other – primarily leaving estate to each other, and rest to same people. His bro Frank gets estate, if not alive, goes to 2nd group of heirs. Now frank dies, leaving everything to Fred (dead), so goes to *collaterals* (if those dead, their descendants). Mrs. T was receives (descendent), but makes a case because too many people to share. Challenge: “I give to my bro the balance & residue of my estate…to his *HEIRS, ADMINS, EXECUS, etc. absolutely, forever*” – tries to construe **“and his heirs”** as **words of purchase** (*looking to s19(1)*), since no longer necessary to use the old formalism. Thus, since Frank had what Fred (dead) gave him, on Frank’s death, all of this would go to Mrs. T if Fred is not there.

-L: **The mob wins, but strong dissent (why would it be added unnecessarily?)**. **Courts must:** (1) Construe the will and (2) if meaning unclear, look to surrounding circumstances. **Majority**: must’ve been suspicious as to why Fred didn’t give to Mrs. T, but to his brother (culturally what you do). Hence, seems impossible that it’s all to her. Also seems like word of art -> “heirs, executors, etc.” **Notwithstanding** **s19(1), terms of art CAN STILL APPLY** (19(1) only expanded scope of limitation language). u

**Re Walker**: *Repugnancy*, *presumption*, *language is performative, gift-over? Dominant intention?*

-F: John Walker died, left behind wife and nephews- few chattels to nephews but everything else to his wife. Words of purchase clear: “I give and devise \_\_ to my wife” (EIFS and chattels). But also includes this: “should any portion of my estate remain in my said wife…UNDISPOSED of by her, it shall be divided as follows...” She dies, without exhausting everything, so argument between husband’s heirs and the wife’s over rest.

-Q: Do JW’s heirs succeed in undisposed of estate? O

-L: **Gift to wife not absolute**, **because condition attached**. Her heirs argue **repugnancy**: ***you CANNOT restrain the ability of EIFS holder to get rid of that property*** (against the essence of EIFS & alienability – against public policy). Recharacterization NECESSARY: will not work as life-estate -> **not on plain meaning**.

-**Three options**:

**1**. Gift to 1st person prevails, **gift over** repugnant (outright EIFS)

**2**. 1st named person takes LE only, gift over prevails (LE to widow, EIFS to named remainders)

**3.** 1st named person has LE /w power of encroachment to be exercised at any time during LE (intermediate category – wife can encroach during lifetime).

-C: **gift to widow prevails**, **gift over repugnant (option 1)**. **Dominant intention here is to give.**

**Re Shamas**: *Construing wills, dominant intention,*

-F: Shamas wrote his own nonsense will, court had to fix it by interpretation. The will left considerable amount by the time of trial. He provides: “All will belong to my wife **unti**l the last one comes to the age of 21 years old. **If my wife marries again she should have her share like the other children** if not, she will keep the **whole thing** and see that every child gets his share when she dies.” She did not remarry and all children over 21. Children argue this means when 21 they each take their share.

-L: **Trial** -> 3rd category employed: (Gift to widow = LE but with power of encroachment).

-**CA**: **Dominant intention likely life-estate**, confirms TJ’s ruling. Interpretation: **have to sit in “armchair” of testator**, not entitled to make fresh will, despite there being nonsense. He clearly wanted BOTH wife & children to inhereit. If it were FS, there would be repugnancy, so has to be LE (constraint on alienation). Thus, trying to provide for both… **she can encroach on capital even when the youngest turn 21** (for maintenance).

**Cielien v Tressider**: *Repugnancy, option 1*

-F: Mr. vE had 4 kids from prior marriage and re-married, Mrs. Rich having his 5th child. They lived with the child for a while. He wants to leave property to his wife, and all other assets, “however, upon the sale/disposal of the real estate as described above, the proceeds shall be divided equally between her son…and my children (4)” (*curveball*). She dies and property sold.

-Q: Should the 4 other kids collect, or just Mrs. R’s son?

-L: **Trial** -> not clear that Mrs. R got property absolutely, and constructs life estate and rest of the words of purchase are the 5 children (cultural fact).

-**CA -> Rejects TJ** **view**: *LE usually expressed as “FOR LIFE OF X”*, *cannot find the words in this will*. Also can’t really find the remaining interest after LE, without making the cultural inference. Furthermore, can’t be an EIFS with a restraint on alienation (repugnancy) must be struck out/interpreted. **Thus, wife gets absolute interest** (estate). **Option 1**

## Rules Developed for Interpretation

**Wild’s Case**: *Presumption in case of children*

- in Totrup type cases, where ambiguity as to whether “and her heirs/seed/offspring” is formalism (words of limitation) or actual words of purchase (class of people = the hiers). Clearly in *inter vivios* such words would be words of purchase. Q is about wills then, since wills give **more generous effect to intention** (flexibility).

-**Legally rebuttable presumption**: *if there are children alive at the time of creation of will, it is presumed that “and his heirs” are words of purchase* (and the property would vest in the owner + children **as co-owners**)*, if not, words of limitation*.

-**Note**: applied to “fee tail” which is now banned. If nothing else specified, you are giving your highest interest.

# CH 10 – LIFE ESTATE

Normally “for the life of X” or for estate *pur autre vie* “to A for the life of B”. Often formed by putting them in a trust, trying to provide for various people. Trustee then has legal title for benefit of beneficiary during their life. It is a possessory interest, *including profits*, and transfer is possible, but becomes *pur autre vie* (of the person transferring). Can be further transferred to others when *pur autre vie*, but only endures as long as the person it is rooted in.

Obligations of Life-Estate:

\*General rule: the remainder person has a right to the property in a similar shape.

1. **Permissive Waste**: Life tenant is not responsible for natural deterioration, unless transferor specifically forbids.
2. **Voluntary Waste**: LT liable for wastes resulting from their activities, for better or for worse. Not permitted to **change the fundamental character** of the land (or causes damage to the land). \***Ameliorating waste rule**: qualifies the proposition by saying that improvements are permissible.
3. **Equitable Waste**: *specific* permission to make voluntary waste (“unimpeachable for waste” provision). However, equity can intervene when use is unconscionable.

\***Law and Equity Act s8**

**Mayor v Leitovski**: *Liability for taxes*, *obligations to remainder person, equity*

-F: son, L, buys property owned by parents who couldn’t deal with it. L gave LE to parents, maintained reversionary int. Then sold the reversion to M. Mrs. L couldn’t pay the taxes on the “practically worthless land” (other farms in area abandoned and she was 82). So town sold property to recover taxes. Fausts (Mrs. L’s daughter/son in law) purchase property from tax-sale (out of pity) and transfers EIFS to mom. **M’s Reversion** gone, because tax sale purchase = without financial encumbrance. M argues they can’t get out of obligations to him.

-L: **resurrected M’s remainder through equity**. You can’t gain by violating the law. Should’ve given the mother life tenancy if anything.

# FUTURE INTERESTS (CH 12, 13, 14)

**Future interests** **context** -> clash between **freedom of property** (maximal ability to use property for any purpose) vs **public policy** (greater concerns, e.g. equality, discrimination, etc). Transferor may want to impose certain limits on transferee, but need to strike a balance (e.g. *Re Walker* -> imposing restraints inconsistent with the character of the interest = struck out for repugnancy). *Pater Familias* -> reigning over family/children to ensure they didn’t break-loose.

**Categories**:   
1. when interest is creating such that *remainder* is left over, someone may have right to that in the future (e.g. to life estate when someone dies). **Separation between immediate vested interest vs enjoyment**: If A has life estate when B dies, A has *immediately vested* future interest, with *enjoyment/possession* later on. (This is a real right and can dispose of it).   
2. **Vested but subject to divesting.** Interest vests in someone (e.g. “To Dennis for life, until he marries Peter”), there is a condition that can resolve his interest. Whoever is supposed get the interest upon the divestiture condition occurring has a remainder future interest of a certain kind.

3. **Contingent interest**: This is different from both of the above. This says you have *no vested interest* at all or possession, until some antecedent condition activates the interest (**suspended on the contingent event**) – e.g. “To Dennis for life, if he turns 21”. This is *still* a future interest and still property, but of a less certain nature.

**Brown v Moody**: *distinction between VESTING of interest and postponement of enjoyment/possession vs postponement of vesting altogether* (contingent)

-F: Mrs. Brown (testatrix) appointed Mr. W as trustee, and holds all of the estate. Life estate to the son (William Brown), and **half of remainder interest** split between William’s daughter, ENID, and other between the other three of testatrix’s daughters. Eldest son’s bloodline preferred here. Problematic: provision for: “*in the event of my g-daughter or daughters leaving issue*”, in case first named persons died before getting interest.

-Q: when testatrix died, we **know** son took a **vested interest** (LE), but did his child *Enid* and other 3 daughters take a **vested remainder interest**, or **is the interest contingent**? (“in the event of them predeceasing me, interest is to go to that child’s issue”..)

-L: **this is an immediate gift, not only to son as life estate (vested), but remainder interest to Gdaughter and son’s sisters**. *Have to distinguish between vesting of interest and postponement of enjoyment, vs complete postponement of vesting*. They already have the interest, but it’s only **enjoyment that’s being postponed**. Purpose of clause was a **divestiture** clause, saying that while they have the interest vested immediately, if they predecease testatrix, the interest is divested (or if she has sold it), then property **goes to the issue** **of that child.**

-C: the remainder gift was immediately vested, but postponement of enjoyment with *divestiture* clause.

## Illustrations of the categories

**Re Squire**: *the law prefers EARLY VESTING* *where possible, Saunders v Bautier rule: collapsing trusts, contingent language not necessarily resulting in conditional int*

-F: Deceased wants to give two grandsons (Arthur + Teddy) identical dispositions. Wants trustee to hold the real-estate until they turn 30, when land is conveyed absolutely (plus income). However, if they desire to pursue higher education, then certain amount of payment each year to assist in this. \*Note: **trust-law**: ***saunders v bautier*** -> at law, attaining age of majority (19) allows you to exercise all rights of ownership in respect of things you own.

-Q: are they given *vested interest but postponed enjoyment*, or is the *entire interest suspended* till 30, when it vests (matters because if former, *saudners* applies).

-L: **Interest vests immediately**, for a few reasons. 1. **Court prefers early vesting**. 2. **Actual wording**: he’s contemplating that you can use the funds for education before 30 (exception around *payment* of income). Because interest *already vested* -> Saunders applies (can collapse trust). 3. **No gift-over**: gift-over signifies that testator accepts condition may not be met and may travel elsewhere, but no-gift over signifies gift is immediate, and contingency is rather about *enjoyment*, not actual interest.

**Re Karlson**: *Case like Squire, but “the THEN residue”, turns out future contingent*

-F: attempts same argument as in *Squire*, but fails. Mr. K dies, left behind wife, three children. Disinherited wife (didn’t get along). Eldest son is “wash-out” so gives him only “10% of the residue only to pay his debts”. Janice & Chris get most. Mr. K wants to ensure Chris is properly looked after by trustee (maintenance, education, etc). However, the **condition** creates a problem: “upon my son’s 21st birthday, to divide 90% of **the THEN** residue of the estate into *equal parts*… (share to Chris and Janice) for their use *absolutely*.

-Q: Whether these gifts vest *immediately* or do vest when Chris turns 21.

-L: **Not like *Re Squire***, **because it’s a disposition of the THEN residue**. The law does like early vesting, but this here is a contingent future interest (cannot trump **clear language & intention**). Both cases allowed capital to be used for maintenance/education, but this one’s language changes the outcome.

**-**C: **Therefore, contingent future interest** (not vested, until 21).   
\*The “then” residue signifies that he wants to ensure he is taken care of through the fund, and if anything is left over, it will be split when 21 between the two.

**Categories of future interests** (further defined):

1. **Reversion**: what you haven’t given, you are presumed to keep. You can however give any left-over estate to someone else. EIFS holder, when giving anything less than that, will always cause a remainder to exist: if you die after life estate, it goes back to my estate. It is the future right to the interest.
2. **Rights of Entry**: when an interest is given, such that it will vest (it is “absolute”) but is vulnerable to **divesting** upon a **condition subsequent**, the interest is said to be “defeasible”. This involves **conditional language** – e.g. “**if** you do X”. The right you have over the person (in case they divest themselves) is called **RIGHT OF ENTRY** (ROE) – you must exercise within certain period. ROE is a contingent future interest, because you may get the property back. CL didn’t allow for this to go to a third party, but to initial *grantor* (concern about land being too heavily controlled).
3. **Possibility of Revert**: when the interest given has language that *defines the contours* of that interest, it is **determinable** (upon certain identified events). It’s not a condition marking the end, but the limits are built-in, e.g. “To Tommy until he turns 50” (non-conditional language, also: “as long as”). The right to the interest in case of the end of this one is called **POSSIBILITY OF REVERT** (POR) – also a future interest.

**Remainders & Remainder Rules**

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

## Remainders can be vested or contingent, but “springing interests” are not allowed: where A transfers to B if B reaches 21 years. Basically synonymous with “gap in seisin”, because policy concern is to avoid giving property to descendants far into the future (in limbo meanwhile). Freehold: (lease, LE, etc)

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

## Again, no gap in seisin. Just specifying the last moment at which the remainder must vest. Contingent interest is permitted, but you must ensure that nothing is done to prevent the creation of a future interest that might vest outside the determination of the prior freehold. The contingency cannot create a *gap in seisin*. (Trusts not a problem, circumvent rules, and Wills are by trust instrument according to caselaw).

## A remainder should not prematurely defeat a life estate:

## Otherwise remainder *void ab initio*. Not allowed to have shifting interests: e.g. “to daughter for life, but *if she marries X*, then to my son and heirs”. Son would have right of entry to EIFS (defeating the EIFS). Under CL, *circumvented* by creating a determinable interest (not condition subsequent).

## A remainder after fee simple is void:

## E.g. A transfers EIFS to son and his heirs *until* he marries E, and then to X and his heirs. However, this only holds now for POR, and Right of Entry can now give something after FS to anyone.

**S8(2) Properly Law Act** – *modifications to remainder rules*:

-**Brings the requirements down to 2.5, not 4**: a) removes rule 3 completely (it is okay to have “shifting interests” that could defeat the life estate) and b) removes half of rule 4, so remainder after fee simple is only **void** when you have a *Possibility of Reverter* (determinable interest), but not when you have ***Right of Entry*** (defeasible upon condition subsequent).

**Destruction of Contingent Remainders**:

-A **natural destruction**: if you don’t meet the contingency before the prior freehold estate comes to an end, your remainder interest “self-destructs”.

**Equitable Future Interests**:

## -None of the remainder rules apply, if you have an EQUITABLE interest (e.g. trust).

## Re Robson: *Wills operate by trust, and “equitable” interests flow, NOT subject to REMAINDER rules*

## -F: testator gave LE to daughter, and upon death, to the use of such of her children as shall attain the age of 21. When she died, two children not 21, while other two did. Argued under RR#2 (remainder rule), the children under 21 LOST their interest.

## -L: Children did not lose their interest, because WESA s162 says unless there is a right by survivorship, a trust instrument is created (executor becomes “trustee”) and interests that flow from it are “equitable”, so the CL remainder rules do not apply.

## -C: *No issue with GAP IN SEISIN*.

# Legality of qualifications

Another reason why a future interest may be hopeless is because of being void for public policy (content of the qualification) – e.g. class-based, religious-based, discrimination, etc.

**Noble v Ally**: *Discriminatory (race/religion-based) qualification* *void, certainty test HIGH for DIVESTITURE conditions (precise & distinct or nothing*) ///**also applies to DETERMINALBE**.

-F: Question clause regarding the preventing of selling/transferring/leasing the parcel of land to anyone of certain religions, and anyone else that is not of “the white/Caucasian” race.

-L: **Rejected on three bases**:

1. **Fails as restrictive covenant:** \*allowing individuals to enforce covenant against parcels within development (e.g. to prevent polluting factories). Courts recognized this, *despite individuals not having* ***contractual privity*** (only the developer). Land must be benefited by covenant, land servient to covenant, and covenant has to TOUCH and CONCERN the LAND (improved value/use of land). However, **racial covenant** cannot *TOUCH* or CONCERN the land, unconnected with it, therefore fails.

2. **Restraint on alienation**: telling grantor he/she can’t sell to anyone but whites or particular faiths.

3. **Uncertainty**: e.g. “what is a jew”? These are really **conditions subsequent**, and as such, the **test for certainty is much stronger**: *must be able to tell* ***PRECISELY and DISTINCTLY***what event needs to happen for divestiture. If not, the line is **read out of existence**, and EIFS granted. In this case: too uncertain to tell what boundaries and levels involved in making a determination.

**MacDonald**: *Look to motive, if qualification actually supportive, will stay for policy – law does not like punitive qualifications though*

-F: Testator directed share of estate to be held in trust, **until** niece (Sharon) becomes *widowed* or *divorced*, at which point trustees must pay capital. If she dies without being widowed or divorced, then share goes to newphew.

-Q: Is it against policy to have conditions seemingly supporting divorce?

-L: **Stands on the basis of policy** -> *looking to motives, it’s really just providing for her when she is most in need* (presumption that she would be getting enough with someone, and not when she is on her own). Also trying to provide for nephew: if she doesn’t need it, it will go to him. **Supportive, not punitive** -> likely to stay for policy. If trying to promote divorce, law will usually strike it out.

**Canada Trust v Ont HRC**: *LOWER threshold test for CERTINATY in qualification* *when condition PRECEDENT*, *legislative intent/statutes*

-F: Rubin Lenard dies, scholarship and excludes all who are not “CHRISTIANS, of the white race, of British nationality or parentage, or owe alliegance to the pope”. All of these criteria are “certain enough”, and are **conditions precedent** (you need to meet them prior to being awarded gift) – not divestment.

-L: Since this is not about “wiping out property” (divesting), which courts don’t like, test is **more lenient**. Even though this is somewhat vague, **enough to say for *any one person* presented, whether they do or don’t fulfill the categories**. HOWEVER, clause STILL FAILS for **public policy** -> Canadian society does not approve of such actions, looking to all the anti-discrimination statutes + affirmative action.

## PERPETUITIES

Another reason why a future interest may be invalid: violates the Modern Rule and can’t be saved by the statute. These are *CONTINGENT* interests, and are not vested, and equity lets you leave it to UNBORN people (under trust/will). Perpetuities are interests *ongoing* into future. Courts realize this ability to do what you couldn’t under CL can have serious *CLASS* implications (e.g. land owning class gets control). Response is the **modern rule**.

**Modern Rule** **Against Perpetuities**: (*whitby v Mitchell*)

-**The CL rule**: *if a future contingent interest is being created, then it* ***must******vest***, *if it is to vest at all,* *not later than 21 years after the LAST LIFE IN BEING*.

-The period: “Lives in being +21 years” -> **Lives in being** refer to those people who are ALIVE at the date the interest is CREATED. *Potentially everyone* is a life in being, provided the yare alive at creation of interest. If born after that, no longer LIB. **Interest created** -> **when title vests** in the **Trustee** or if interest created in WILL, **death of the testator**.

\***Note:** CL EXERCISE ASSUMES YOU CAN HAVE KIDS AT ANY POINT

Thus, an additional basis for invalidating a future equitable interest is the RAP: *the unborn must be able to have a vested interest* in the 21 years after the last LIB (and hence has to be born). It can’t be too far down the line, or else LIB no longer there at time interest given.

LOOKING TO CONTINGENCIES TO SEE IF RULE OPERATES:  **Example (invalid)**: (*Equitable) interest to A for life and remainder to* ***first child*** *who reaches 25* *(A has a son who is 19*)

-The 19 year old only has 6 years before reaching 25, and will reach this age in 6 years…however, still the hypothetical that she has a child after creation of interest (not a LIB), this child is the only one not hypothetically killed-off, and the child would not make the deadline (being 25 in 21 years). Hence, **INVALID FUTURE INTEREST**.

**Requirement of ABSOLUTE CERTAINTY**: wanted to be able to tell up-front with *most certainty* that the first son reaching 25 will have it. Anything hypothetical under which it will vest *outside* of the period by the LIB beyond 21 + the last LIB, would *void* the interest.

**Two things:** to prevent the above scenario:

1. **Outer limit needs to be 21** **yrs**
2. **Get around the certainty of vesting requirement** (set up list of people alive (LIBs) and see if it vests within the last one standing - > gets you *out of hypotheticals and “wait and see” for actual lives*).

**Mclean’s Article**:

Examples (why/why not void under CL RAP):

1. “To A for life and remainder to **first child** to reach 21” (A = bachelor)
   1. **Valid**: because although A has no children, A is a life in being. Thus, the 21 years after the only life in being here will start after A is dead. Either A has a child before death or does not. If not, interest is scrapped, but if A does have a child, it will necessarily reach 21, even if A dies the moment it has the child. Either way -> there is **no possibility of it vested *outside*** of the 21 years after A’s death, if it is to vest at all. (The problem is not with not vesting, just vesting outside).
2. 2. “To A for life, and reminder to **first child** to marry” (A is married, has many kids who are al in arranged marriages in 6 months).
   1. **Invalid**: because *no guarantee* (lack of **certainty** of vesting) that any of the children will have an interest that vests *within* 21 years after A (last LIB) dies. The *hypothetical*: kill off everyone else, and A’s child (not a LIB) is born *after* trust document created. Now you have 21 year period (after A’s death) and the **possibility** that this child will not marry in the next 21 years.

**BC Approach to Modern Rule**: ***Remdial Legislation*** (Ontario + Alberta too) – **Perpetuity Act**:

-**s6**: CL Rule of Perpetuities continues to have full effect (thus you have to go through it first before statute). + *Whitby* abolished (prohibiting disposition of an interest to an unborn child *after* a life interest).

-**s8**, **9**: Saves the interest from being **voided** **at CL** (just because it might theoretically vest outside of the period) (8). S9(1) establishes the **presumption of validity**: WAIT AND SEE (go to **actual events**).

**s10** **Determination of perpetuity period**

**Lives in Being (10(2))**

* 1. Person making the disposition (not applicable in case of will) **(a)**
  2. If disposition is made to a class of people, any actual or potential member of that class (grandchild getting married: you’re a grandchild, just not yet married) **(b)(i)**
  3. Person who has satisfied some, but not all conditions, but who may in time satisfy the rest (condition: grandchild getting married, if you’re a grandchild…) **(b)(ii)**
  4. Parents or grandparents of beneficiaries, or potential parents or grandparents of beneficiaries/potential beneficiaries **(c)**
  5. Holder of a prior interest in the property (e..g., holder of prior LE) **(d)**
  6. Unborn spouses **(e)**
     1. **(i):** Deemed that spouse unborn at time of grant is life in being
     2. if interest is created once the survivor of you and your spouse dies ???

1. If there are **no statutory LIB, then 80 years** (10(1)(b) (Gravel pit situation/NO LIB in will etc)

“To ABC Ltd if it ceases to engage in environmentally destructive activities”

**-s3**: **ordering of application**:

**(a)** section 14 (capacity to have children): – if can’t, no need to construct hypothetical: males (14+), females (12-55). \*Evidence may be given that the living person can’t have children in the time in question.

**(b)** section 9 (wait and see): look to actual events (make determination based on whether they actually make it).

**(c)** section 11 (age reduction): (1) If a disposition creates an interest in property by reference to the attainment by any person of a specified age **exceeding 21 years**, and **actual events existing** at the time the interest was created or at any subsequent time establish (a) that the interest, but for this section, **would be void** as incapable of vesting within the perpetuity period, but (b) that it w**ould not be void if the specified age had been 21 years,** the disposition must be construed as if, instead of referring to the age specified, it had referred to the age nearest the age specified that would have prevented the interest from being void.

**(d)** section 12 (class splitting): excluding certain members/potential members to make saving the class by age reduction in s11 possible.

**(e)** section 13 (general cy pres): if the future interest would be invalid solely because it vests outside of the CL RAP period, if there is evidence of intention that would allow the interest to vest within the normal limits of the rule, it can be given effect.

-**s7**: **80 year period** permitted -> has to be done for corporations. This does not violate the RAP. (Must vest, if at all, within 80 years after the creation of the interest) -**just a general period**.



\***DON’T FORGET JARMAN RULES**:

-> Defeasible – treated same as condition subsequent for certainty

-> If bad condition precedent (whole gift is void)

-> If bad condition sub/defeas -> condition ignored, full interest possible.

# CH 11 – CO-OWNERSHIP

“Words of purchase” with *special focus*: two or more owners with interest in the land. Either JT or TIC, Co-owner = broader umbrella. CL Fallback: **joint tenancy**, along with the **life estate**. Changed due to **S11 Property Law Act**: *if in doubt, assume TIC*. **Common thread**: they are both co-ownership situations (property dealt with by 2+).

**JT**: *Right of survivorship*

-You lost the interest when you die. Sole survivor gets *everything* (equality of chance).

**TIC**: *Equal Shares*

-Fixed with your share and you can deal with it as your own.

**How do you become JT and how do you get out**?

**-Possession** is standard unity for all Co-Owners.

**Becoming JT**:

-**Three unities**: ***TITLE, TIME and INTEREST*** (TTI) are necessarily a part of the JT (interest is INDENTICAL),

-Thus, for JT, the **vesting of interest must happen together**, **as a result of the same document**.

-All 4 unities give you a **JT** with a **right of survivorship** – *jus acustendi*.

-**\*Important**: ***you have to BREAK them BEFORE YOU DIE*** (because of how Will works: *RIGHT OF SURVIVORSHIP* takes place before your provision breaking the unities). **Getting out:**

If you want to get out of the risk of losing it all (for your estate) and don’t want the chance of getting it all, you need to **sever the three unities**. (maybe only want to leave **unity of possession**).

-You can get rid of it by **transferring your interest away** (e.g. transfer to X, and X back to you) breaks you from the other unities (**PLA s18**) -> **DELCARING IS NOT ENOUGH**, need to actually transfer, but this provision allows you to *formally* do it to yourself (**ruptures time element**) -> holding BA in a *different instrument*. **THE OTHER CO-OWNERS KEEP HOLDING JT**.   
-**Mutual Agreement**: *each agreeing to their share* (talk of severance)

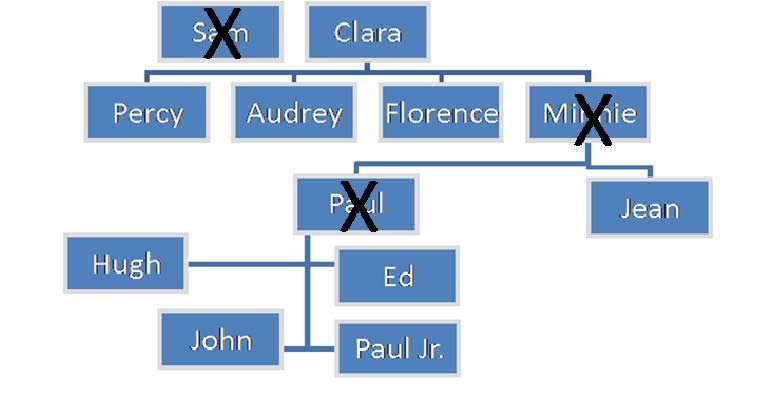
-**Agreement by ‘conduct’**: sort of like *estoppel* -> your behavior led one to *believe* they were okay with conversion to TIC (need proof).

## Issues of interpretation

Historic CL approach -> didn’t like severing the unities, so assumed JT. If you made clear you *didn’t want one*, courts gave effect to this.

**Words of severance**: “to each of them *equally*”, “one *third each*”, etc. – words that are *inconsistent* with the UNITY display an intention to treat each person separately (severing the unity).

**Re Bancrof, Eastern Trust Co v Calder**: *CL presumption of JT*, *unless words of severance*



-F: Sam B dies, leaving assets. Widow = Clara, three children (Percy, Aubrey, Florence). 4th child (Minnie) predeceased him, but had the two grandchildren of Sam/Clara’s (Paul & Jean). Paul had 4 kids, but died while widow still alive. Sequence of death relevant because Sam divides property as follows: House + life estate to wife Clara. Balance of life estate gets divided into 4 pieces, 1 to Percy, Aubry, Florence, and Mini (who is dead, so ¼ split by J and P). *All happens while Clara alive* (different picture when she dies). **Stage 1**: C alive -> 4 kids left when he dies.

-Q: *when PAUL dies during step 1, is his share SPLIT among the 4 kids, or does it all go to Jean (because share held as* ***JT – Right of survivorship****)?* \*Mini’s share immaterial (goes to stage 2) – 4 kids batting auntie Jean (who’s arguing she holds until Clara dies).

-C: **in favour of auntie Jean**

-L: **Wording** -> the life-estate *pur autre vie* divides **4 equal shares** (Percy, Aubrey, Florence, and two children of deceased Mini). **Words of severance**: P,A,F aren’t part of a **trinity**, but “each in turn”. However, **no words of severance** wrt to the two children: doesn’t say P&J “equally”, so **no language of division**, which is significant. **CL presumption of JT** takes effect, unless clear words of severance. Thus, while widow alive, JT between P&J, therefore **ROS**.

**Equity**: *towards the TIC*

-Preferred the TIC over JT, how it gives effect:

1. If 2+ people purchase land, assumes TIC **if different prices paid**

2. JT – inappropriate for **commercial transactions**. If you did not use words of severance in comtrans, assumed you did to make TIC.

-Legislation **s11 WESA**: *now makes TIC the* ***DOMINANT intention***. JT may prevail for spouses however, or putting property out of reach of children.

**Rob Case**: *Equity (TIC presumption) does not apply to Co-Op* *(shares, personalty)*, *and neither will s11 of PLA*.

-F: R had 2nd marriage, and kids from previous one. He had property in Cali, and they (she) bought a co-op in Van. She pays for the co-op in FULL, but puts it in their names ***JOINTLY***. He sells the Cali property, and gives her money from this (in consideration). He dies first, her children launched suit under WVA challenging this holding as JT. Challenge: half of the co-op falls into the estate they’re fighting for, even though it looks like all left to her (in JT). **Nature of a co-op**: different way to create condos -> create a “company” (each person a “shareholder” – gives money), occupancy controlled through lease, and require certain behavior. You don’t own BA wit ha co-op, just a SHARE in CO. Getting out: sell share and assignment of the lease. Her argument: he dies, therefore lease is all hers. Kids: **no, because equity doesn’t like JTs**, therefore TIC.

-L: **Court:** court disagrees with kids (was not paid for *unevenly*). **Not enough to rebut the presumption of JT** to **ROS**. S11 talks about transfer/devise of EIFS, but **this is a transfer of an *assignment*.** The assignment is not a charge either (denies this argument) -> **charge** should have a very narrow interpretation, not applicable to assignment of leases. **Thus, s11 only talks about land, not share-situations** (leaves out co-ops of this sort – *personalty*), and judge cannot look at **equity’s preference for TIC**, since can’t even go to the statute.

\*The share & lease cannot be separated.

## Relations Between Co-Owners

Everyone owns *ALL* the airspace, soil, works, **indivisibly** (cannot claim one part over another), even if shareholding imbalanced (e.g. one has ¾ other has ¼). The only way to do that is by **partitioning** (rare) by court. At CL, you cannot act **unilaterally** on the property (e.g. if renting room, have to share rent).

**Spellman v Spellman**: *actions against co-owner (JT/TIC) for receiving more than comes to his/her just share or portion*, *no “accounting” necessary* ***unless ousted***

-F: couple owns 2 pcs of property, Vic and Van, as JTs. Split 6 or so years ago. He stayed in property and ran Van as **rooming house** (rented rooms, did housekeeping, provided food, etc). She came back after 6 years, stuck around, decides to go but reminds him they “own it together”, and she should receive some of the money he’s making off of it. She wants some rent from Vic property as well. **Guiding Statute**: Queen Anne -> permits actions for receiving as **more than comes to a Co-owner’s just share/portion**.

-Q: Was wife deprived of her share/portion?

-L: **No, she lost it** -> WHILE SHE WAS AWAY, *he* *bore all the costs and RISK* for the business, and would have made no money at all, if not for that. **She would only be entitled in the circumstances that she was *ousted/excluded*** (and can’t decide how property is run), or *constructive* ousting -> (taking away indivisibility).

**S13, 13.1 PLA**:

-**s13.1**: wills situation, similar to QA’s statute -> **JUST & PROPORTIONATE** **shares**.

-13: **remedy of co-owner**: *where work is done but not paid*

-Where creditor after one or all co-owners, and one wants to prevent judgment so he/she pays -> able to get **proportionate share from other non-paying owners**.

-Might cover **decorative repairs**. That charge would affect your title, so you pay and collect from other owners (can put *special lien* against owners of other shares) -> could lose their interest if keep defaulting.

Example: Mike makes decorative repairs unilaterally and Dennis won’t pay. If he went to court, Dennis would say “proportionate = just & proportionate” and he didn’t authorize it. However, where *property being sold*, CL won’t let Dennis get benefit of the extra work.. or **discretion will be used in partition** (either way, **fuller accounting** at this point).

**Stonehouse v BC**: *You can sever a JT by signing x-fer form without party knowing, and s20 does not prevent it from being effective,* ***TRANSFER*** *–* ***getting out of JT****.*

-F: (CL system where instead of x-fer form they have a “deed” for effective conveyance). Property put in Mr + Mrs. Stonehouse’s names (her 2nd marriage) – JT. However, she privately preferred her previous daughter to have the share in this JT. Daughter takes the deed to execute it at office mother dies, but Mr. Stonehouse argues **s20**: the “except as against the person making it” part doesn’t apply here (interest is not effective against anyone unless you have it registered). Does one party transferring for the purposes of severing fall under exception?

-L: **Court took POLICY PREFERENCE for getting out of the JT**: *accept that you can sever by signing the x-fer form, WITHOUT THE OTHER PERSON EVEN KNOWING, therefore, there can be some* ***asymmetry***(e.g. Mrs. S/daughter keeps it a secret to get chance at ROS – win big – and even if Mrs. S dies first, daughter can just go in and register the severed interest for TIC).

**Sorenson estate v Sorenson**: ***ACTUALLY SEVERING*** *the 3 unities to get out of JT*

-F: Couple split, part of arrangement that they dealt with titles to property. Ensured there was proper support for wife & son (mentally disabled) with **settlement agreement**. Left the matrimonial home, fixed up to provide for them two (lease at 1$/month), but wife was also terminal. She **executed a will** and left everything to him for his life. She also made **declaration of trust**: “I hold JT, but from now on, holding it *for my son*”. Also **executed a transfer form** to the son (said *effective* when she dies). Also launches a **partition** **action** (form).

-Q: have any of her actions properly severed the JT?

-L:   
**Will**: FAILS, because the ROS would kick in before the will.

**Unilateral Declaration**: FAILS, not enough to sever to say you don’t want JT – need formal transfer

**Settlement Agreement**: FAILS, just entering into the separation agreement does not clearly say parties wanted to sever the JT (no intention).

**Leasing**: FAILS, even if she is leasing from him, **the reversion is still shared**. You still own this as JTs, even if lease arrangement.

**\*Actual Severance**: WORKS, because she made **the transfer pursuant to a declaration of trust.** (She holds legal title for him in the meantime, and he has beneficial title from then on)

**H v H**: *LEADING CASE – Criteria for partitioning, when JTs actually wish to sever, Just-refusal for partition allowed*

-F: Two older married JTs had some property before but sold it and moved into Cloverdale property (adapted to his needs – radio equip stuff). He retires and she moves out for another fellow. She asked for the share/cash (to sever).

-L: **Generally, the court will *prima facie* accept an application for partition under statute** **where one JT or TIC applies, but retains the jurisdiction to say no, *where justice requires a refusal*** (will be very fact-based).

-C: Majority refused the partition because it would be hard on the defendant (special situation). [**Dissent**]: -> **requirement of serious hardship** (e.g. eco-oppression).

# CH 3 - ABORIGINAL TITLE

**Delgamuukw**: *6 major issues*, *AT exists as a communal right*, *limited in various respects*

1. **Use of oral history**:
   1. Must be given **fair weight** (Abo perspective) *and* CL: towards true reconciliation (**equally**). Adapt laws of evidence and accommodate without too many technicalities (e.g. being constrained by statute)
2. **Test for proving AT**:
   1. 1: **pre-sovereignty occupancy**; 2. **Continuity of occupation** (flexible/vague) – *substantial connection between control of territory and current date* 3: **Exclusive Occupation**: does not have to be strictly exclusive, shared can still count (e.g. presence of other group may confirm title)
3. **CONTENT of AT**: *sui generis* -> reference to both perspectives, so it’s neither CL or ABO completely. Basically **inalienable** except for to the crown; **source**: pre-contact (CL principle: **helps in proof of possession**); Held **communally** (collective rights against the world). **Exclusive use & occupation** for a variety of purposes (not necessarily trade), but subject to the **limitation** that it cannot be used in a manner that is ***irreconcilable with the purposes/basis of title*** (“nature of attachment”) – **rationale**: *cannot deprive the progeny of this title*.
4. **Ability to Infringe**: s35 gives constitutional guarantee to these rights, when proven, but can be limited (not according to s1), but by the crown when **justified**. *Sparrow Test*: 1. **Pressing & Substantial Objective**: (*wide range of possible objectives – Gladstone language*) and 2. In accordance with **fiduciary duty** (arising from the HOC) – *degree of scrutiny dependent on the depth of infringement* -- must reflect the **effort t**o accommodate and give “priority” to aboriginal interests, duty to consult, and **take into account** the interests genuinely.
5. **Province cannot extinguish AT**: Prov title is subject to *s109* – took it subject to other interests (AT/AR) in land. Only feds have the authority to do so, but s35 protects any right from 1980’s and onwards.
6. **Duty to consult/negotiate**: always exists, arises out of HOC – can range, but can go from notice to consent/consultation.

**Mitchell v MNR**: *Duties/Customs, ABO RIGHT failed*

-Q: Whether Mohawk Canadians of Akwesasne have the right to bring goods into Canada from the US for **collective use** and **trade** with other 1st nations without paying custom duties.

-L: **Test for ABO RIGHT** under s35 - > **VDP** (10 factors). 3 Factors to guide court’s **characterization** of claimed AR: a. **Nature** of the **action** which the applicant is claiming was done **pursuant** to an AR; b. **Nature** of the **governmental leg** or action *alleged to infringe* the **right**; c. The ancestral traditions and practices relied upon to establish the right.

-C: **AR RIGHT NOT established**; had to pay for customs.

-**Comments**: This & Marshall illustrate principles of law wrt AT & AR. To exercise the right, you have to show it’s a **defining characteristic** of your band (becomes evidence issue – VDP difficulties – oral evidence, etc.)

**R v Marshall; R v Bernard**: *AT -> NOMADIC GROUPS, HARD TEST, “exclusive possession ->* ***intention and capacity to control the lands***” .. equal weight

-F: Mi’kmaq charged with illegally cutting timber (*commercial*) on crown land without permit. Accused argued they were allowed to log because of AT.

-Q: *how to consider both abo & common law perspectives* in determining whether occupation has been proven (*Delga*) + *What are the rights around nomads*? Focus on evidentiary value.

-**Considering BOTH perspectives means**: “***translating the pre-sovereignty abo practice into a modern legal right*”.** Ultimate Q -> does the practice “**correspond**” to the legal right claimed? Title to land must be established by *practices* which “**compare with” the notion of common law title:** you have to establish ***effective control of the land*,** so that the group could have excluded others if it had chosen to do so, ***sufficiently regular use***. MERELY seasonal hunting will probably turn into only a specific right to hunt/fish, but sufficiently regular and exclusive practices on the land may lead to title (like CL). For **nomadic groups**, must show a degree of occupation **equivalent** to CL title. QUESTION OF fact.

-**Affirms Delga**: you need the three factors still (1. Exclusive occupation; 2. Continuity; 3. Pre-contact).. the connection with the land still has to be of “central significance to their **distinctive culture**”.

-Ultimate goal: translate pre-sovereignty AT to a modern *CL right*.

- you have to give due weight to abo perspective, including **weight to oral testimonies, and unconventional evidence**.. flexibility, if it **meets the standard of *usefulness and reasonable reliability***.

**C:** INSUFFIICIENT evidence to ground title here and not by treaty either -> conviction restored.

**Williams v BC**: *AT claims must be* ***supported by definite tract in land/site-specific***.

-F: The prov govt granted a **forest license** and **cutting permit** to a log traditional TN territory. The TN claimed AR and AT in two areas known as the Tachelasch’ed Territory and the Trapline Territory, collectively referred to as the Claim Area (CA) which was 438,000 hectares. The former chief of the XG, Williams, brought the claim along with 4 other bands of the TN.

Q: does TN have AT over the *ENTIRE* CA (territorial claim)

-C: **No, but they have ARs**.

L: **AT** cannot be established here, because the right is **site-specific** and requires **sufficient and regular exclusive occupation/use**, therefore most of the area was not so. The claims were **all-or-nothing**, so it failed, but smaller areas found to support AT. Still found that ARs for hunting and trapping and to trade in skins and the forestry activities in CA were unjustified ably infringed by forest activity. (DELA + Marshall applied) -> **TERRITORIAL CLAIMS WILL NOT SUCCEED** (for AT). AT must be supported by **definite tract in land** and be occupied/cite-specific. **Territorial claims**: are “anti-reconciliation”, because the goal is to respect tradition aboriginal right WITHOUT unnecessarily limiting crown sovereignty and other Canadians.

-Note; where occupation/use is insufficient for AT, can go to prove AR.

**Skeetcherson**: *Abo Lis Pendens* *NOT REGISTRABLE under LTA,* ***Good safeholding and marketable title****.*

-F: Aboriginals asserting that land is subject to aboriginal title and rights over 1000 acres, most of which is held by different owners in FS, and also land the crown intended to give to Camlands. Wanting to turn it into a resort. Put a *caveat* down, and launched litigation before expiry. Issue: whether they can register *lis*

-L: **Aboriginal interest in land is inalienable and communal**, therefore falls outside of registration under LTA. **Purpose of LTA**: *producing a measure of certainty* around LT issues (streamlining, efficiency, etc.). **Registrable title has to be *marketable*** – have to be able to put it up for sale (part of Euro CL system). *Lis Pendends* -> supposed to provide an orderly process for sorting out land claims. \*MORE Analysis:

* Matter of statutory interpretation to be addressed in historical context
* Leaves it to SCC to decide what Delgamuukw tells us about CIT
* S. 37 LTA – **CIT is conclusive evidence** of **fee simple** ownership w/ some exceptions
* There is nothing in the legislative history of this Province, up to and including the enactment in 1978 of the statute now in issue, to warrant the conclusion that the Legislature intended the claims put forth here by the appellants to be registrable. Therefore, A has no right to registration under s. 215
* ***Uukw v. British Columbia*** (1987), 16 B.C.L.R. (2d) 145. The judgment of the court delivered by Macdonald J.A. held that the Torrens system of registration enacted by the ***Land Title Act*** does not contemplate registration of aboriginal rights.

Ratio: the content of Aboriginal title is not marketable, and charges against the land will not be registrable (**s197 LTA)**.

**PERPETUITIES EXAMPLES FOR YOU UNFORTUNATE ENOUGH TO DO THEM**

* 1. **\*CERTAINTY**: don’t forget to ask “what are university purposes” – validity of that.
  3. 1. To snooks for life, then to UBC, but if the land is not used as for uni purposes, then to Bloggs if she is then living:
  4. • Snooks, UBC, Bloggs.. X -> words of purchase
     1. o Snooks – (vested) life estate \*always think.. inter vivos/will, next.. vested/contingent..
     2. o UBC -> vested: future. Subject to DIVESTMENT (Who then gets in the situation it gets divested? Think of category based on the words.. **RIGHT OF ENTRY**). UBC’s interest: **remainder in FS,** *defeasible on condition subsequent*.
     3. o **Right of entry** – Who has it? -> Bloggs.
     4. o Bloggs -> likely to be uni purposes.. OLD. Bloggs is unlikely to be alive.
     5. o Next Q: who else gets it? Her interest is contingent on her being alive when the uni stops using the land. Unlikely to happen.
     6. o **Reverts back to X**.. X also unlikely to be alive.. just trace it through to the heirs. X has **contingent future interest** (creates the perpetuities issue) (depends on UNI not using the property).
        1. ♣ Problem: both in WILL and INTERVIVOS..
           1. ⎥ **This interest may vest outside of the perpetuity period**. Dealing with a corporation.
           2. ⎥ **Resolving it**:
     7. o \*Will – Re robson = correct, so trust.
        1. ♣ **Corporation, no real lives in being**.. **21 years remediated by statute, where corporation you can give it 80 years**. “Wait and see” -> UBC gets it absolutely.. (statute?). \*80 years begins when document comes into effect..
        3. **2.** To Orscilla for life, then to her first daughter when she graduates from College and if she does not graduate from College to her first grandchild to do so [At the date of the transaction Orscilla is 73, has 4 daughtes ages 35-45, none has a college degree, though the youngest is in her 4th year of a BA. There are grand children each of whom has a degree].
        5. Purchase – O.. life estate
        6. First daughter or first to graduate – purchase?
  5. • Trying to determine whether possibility of reverter or right of entry.. seems to be talking about going to the first one, but she has to have a graduate degree.. if none of them, goes to someone else.
  6. • On the other hand, doesn’t look like a divestment subject to divestment.
  7. • Work out the options: **contingency based on condition PRECEDENT** or language that looks like a limitation.. **possibility of reverter/determinable int** or may, because of “if” be a **remainder in FS, defeasible on a condition subsequent**.
     1. o Take it apart.
     2. o **What is the remainder interest**: condition precedent.. probably. What’s potentially wrong is the “when” and “if”.. don’t go together. Proves what you’ve got is a conditional remainder.
  8. • Next: first g-daughter -> **contingent remainder**.
     1. o **Interest in Will**: (has real problems because of remainder rule)
        1. ♣ Interest that looks like contingent remainder.. have to see whether int is valid, complying with modern rule.
        2. ♣ **CL RULE**: even though 73, doesn’t matter yet. Another child -> **would be not a life in being** (important step). Q: whether that child, not a life in being can meet the condition within 21 years? You can assume everyone dies.. it may not happen, therefore makes it **violate the Modern Rule**. This CL interest would be invalid.. *This is where you would go to Jarman rules*.
     2. o 12-55: **under statute, you can say that other daughters are lives in being**.. **that SAVES the gift**. (Condition precedent -> dependent on one of those daughters meeting the age-range). If she doesn’t it goes to one of those g-kids.
     3. (you just look at the ones actually born and say it would be saved).

     6. \*when is possibility of reverter..
  9. • rule 3 -> was okay if it prematurely defeated life estate. Even under CL it was okay. Only ROE was a problem. POR was only hit in rule 4. If you defeated a EIFS prematurely through 4 with POR.. statute attacked this.

\*the fact that there are g-children.. class closing rules close it – we just look to the 4 g-children. **Two things to look at -> is the interest ab initio void**.. that is different from one where it is not.. but we have to **wait and see**.. maybe the contingency won’t be met.. this is okay -> it will just revert to the GRANTOR.

* + **3.** To Oswald until he marries Tom then to Jasime [Tom is married to Elspeth and having an affair with Oswald]
  + Os -> determinable FS.. “until”
  + • FS because doesn’t say ‘for life’
  + • He gets greatest interest possible.. because X has an EIFS.. DON’T ASSUME ANYTHING
  + • (you are allowed to assume it’s thegreatest estate)
  + • **Determinable**: \*limitation different from condition. You can’t say a “determinable limitation, defeasible on condition subsequent” They are quite different metaphysically.
  + • \*This is limited .. because I’m taking it away if this happens. This is an EIFS ABSOLUTE, but thing attached to it.. defeasible upon condition subsequent -> this is DIFFERENT merging the language into the estate.
  + • ‘but, if’ – absolute that is qualified by a condition.
  + • ‘until, when, as long as’ -> determinable
  + • \*similar practical effect
  + Jazmine -> possibility of revert -> violates rule 4. Could prematurely defeat EIFS.. **cl remainder no good**.
  + **Trust**: remainder rules don’t matter.
  + **Perpetuities**: all of these are lives in being. You say no perpetuity problem ere.. everyone is alive.. only ones affected by interest
  + Have to see if limitation is legal -> it is not uncertain.. but policy -> homophobic**? Macdonald** -> *consider motive* of testator.. Canada trust -> *if it’s inconsistent with HR legislation*.. (it might be to keep the marriage with elsebeth).
  + -> motive is not usually part of the rule. Here it can be. If it’s to keep a marriage, or provide for someone in event of marriage breaking up.. those are okay. But if to prevent certain relations.. (class of people e.g.) then trickier.
  + **4**. To belinda for life, then to emmarentia and her heirs if belinda dies unmarried [Belinda is married to Ralph]
  + Bleinda gets life estate
  + E – Contingent remainder – on condition precedent (if she is unmarried at death)
  + If she is married, then X’s estate would get the remainder (FS)
  + • Investigate Q of marriage -> not enough info.
  + • ‘and her heirs’ -> most likely words of limitation
  + **5.** To Aman for life then to VGH so long as it remains a publicly funded hospital and when it ceases to be so used.. to Evadne and her heirs [Aman is dead and VGH is a publicly supported hospital].
  + • Aman -> life estate
  + • Remainder to VGH: intervivos ..
    - o **FS subject to condition sub or.. determinable? Or precedent?** 
      * ♣ ‘when’ and ‘so long as’ -> **remainder of EIFS determinable**.
  + • ROE -> go with defeasible.
  + • If simpler one.. (determinable) -> **POR**.
  + • Here, POR..
    - o **Is it valid**?
      * ♣ **Third party is getting remainder** -> is it valid. Which remainder rule? RULE NUMBER 3. May prematurely defeat a life estate.
      * ♣ We’re out of the life estate. Now into FS determinable. The determining event -> Publicly fundededness..
        + ⎥ We have EIFS with remainder of EIFS. This would violate **rule 4**. Then 8(2) does not encompass POR as legit violation.
        + ⎥ **EFFECT**: the interest is gone.. (to E) is no good. Then it could go back to grantor if VGH’s time up.
  + • **If in Will**:
    - o ?
  + • **Modern Rule**? Would the interest be invalid under a will?
    - o **The interest to E would be valid**
  + • E is alive.. life in being. Issue here: what about her HEIRS? What if nothing happens?
  + • Future interest.. maybe her HEIRS will get it. How do you measure that future interest? You ask if it can vest..
  + **Practice Questi**ons:
  + #7:
  + • Words of purchase -> Tewksburry, perhaps B and C and son
  + • Words of limitation -> T: he would be receiving the LEGAL title.. Fee Simple. Others .. A: equitable life estate. (Everything held in trust by beneficiary = equitable) .. to A’s son: ***determinable EIFS*** (“until”).. **possibility of reverter**?
    - o T – is clearly trustee.. he’s getting the legal EIFS
      * ♣ Because we’re told the grantor has that
      * ♣ Everything AFTER that is equitable..
      * ♣ VESTED LIFE ESTATED IN A (equitable..)
      * ♣ Then to her SON: FOR LIFE **UNTIL** reaches 40 (**equitable DETERMINABLE LIFE ESTATE**) – because its to the son “for life”, and “UNTIL” is used.
      * ♣ B: VESTED equitable life estate.. and C gets VESTED EQUITABLE REMAINDER (FS) -> because they’re getting rest of it. Legal intrest if sull FS in Tewks.. so this remainder can only be equitable interest that is in remainder. It is VESTED -> **no contingency attached**. Eeven though not enjoying or not possessing (no income), doesn’t mean it’s not vested.
      * ^If this is intervivos.. still in trust
      * #8:
      * Not a trust or anything
  + • A transfers WHAT to B? (greatest estate he has.. EIFS s19..PLA)
    - o Words of purchase -> “B”
    - o Words of limitation -> “IN FEE SIMPLE”
    - EIFS ABSOLUTE DEFEASIBLE ON A CONDITION SUBSEQUENT
  + • **Resolute condition**
  + • What happens is that if the smoking happens, then it goes to C and HEIRS..
    - o C - > word of purchase.. “and his heirs” -> **word of limitation** (but arguably could be words of purchase – tottrup)
    - o There is a **condition**: so it is an EIFS **CONDITIONAL** -> B must smoke (precondition).
    - o C then has a **future interest**.
    - \*is the defeasing condition applying to B **VALID**?
  + • \*if defeasing condition happens.. it comes back to C -> **future interest that has a RIGHT OF ENTRY.. IN THE FORM OF A REMAINDER NOT REVERSION**.
    - o 1. Inter vivos: is this valid? Because rights of entry were fine with the grantor.. but not fine with third party – because of remainder rules. Does the future interest in C satisfy the 4 remainder rules?
      * ♣ **Statute** -> it would’ve violated rule 3 .. but saved by s8 of the property law act.. which allows you to create ROE to third persons.
      * ♣ As a remainder it is fine now.
  + 2. – other hurdle for validity:
    - * ♣ You have to determine whether the qualification is an acceptable one in law -> only basis is **either as UNCERTAIN or AGAINST PUBLIC POLCY**
        + ⎥ \*most likely uncertainty.

• If it is uncertain -> what happens? ***Jarman rules* -**> condition SUBEQUENT: strike it out.

o Leaving B with EIFS absolute..

9. To B in fee simple UNTIL B she becomes a Catholic

* + • B – WORD OF PURCHASE
  + • FEE SIMPLE – word of limitation
    - o **DETERMINABLE** -> limitation
    - o Can it be void due to public policy?
      * ♣ Religious beliefs? It was okay.
    - o **Certainty** ->
      * ♣ What is the applicable test (two)
        + ⎥ 1. *Noble*: if you’re testing the certainty of a condition, all you have to be able to say is whether the definition is *clear enough* to say of any person that is presented, whether he or she is or is not a member of the class. (easier threshold to pass) – BUT THIS IS NOT A CONDITION PRECEDENT but a determinable interest. Which is treated the same as condition SUBSEQUENT

• \*Group as a condition subsequent for the TEST OF VALIDITY.

* + - * + ⎥ 2. *Leanoard trust* : for conditions subsequent.. you have to point out the precise point at which you’ll be disqualified..

• You can’t tell on THIS DEFIITION precisely. Very strict test.. if you can’t meet it just will be struck out.

10.

* + • T – Legal FS (word of purchase)
  + • B – Equitable life estate
  + • C – remainder subject to EQUITABLE CONDITIONAL REMAINDER
  + 11. T – Legal FS.. word of purchase
  + • A – Equitable life estate
  + • (in who)? **Vested subject to divestment** -> in which case it would go to the youngest son.. would have an equitable contingent future interest (remainder).
    - o “vested subject to divest” -> future interest to someone.. a right to it. Determine validity of this life estate? **Defeasible upon condition subsequent**?
      * ♣ Marriage: difficult. **It is against public policy to retrain it.. if you’re trying to prevent someone from it/compel them to divorce/life of cellebacy** -> *prima facie against public policy*. A good motive could save it (e.g. marriage condition there, not because you’re trying to do the above.. maybe protection or by getting married they have another form of support .. therefore you want to take care of someone else). Looks like it maybe attempting to prevent a gay marriage -> also against public policy (devise by looking or determining according to legislation and its consistency across Canada)