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*Sorenson v Young (1920)*  BCSC – easement blocked with gate – gate blocker wins = can’t get around s.20 by saying contents of you easement interest are incorporated into a deed like trusts = u must register 10

s.86(3) Court order enforcement act buttresses this conclusion in this case 🡪 if sale/interest occurred before judgment creditor, creditor subject to it 10

*Yeulet v Mathews (1982)* – the mother wins w/ her equitable mortgage **🡪** whatever happens first takes priority - one’s other charges are only subject to what the holder actually has to give = ex. judgement creditor’s charge was subject to equitable mortgage held by Mrs. mathews 10

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*L&C Lumber Co v Lundgren – P wins, no reason to stop D from cutting trees granted in easement even though unregistered* S.20 EXCEPT AGAINST PERSON APPLIES – b/c Lundgren knew about the easement to cut 10

s. 73.1 LTA “Lease of part of a parcel of land enforceable” 10

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s. 24 “Devise without words of limitation”, Wills Act: repeats s.24 don’t need to use “his heirs” to grant fee simple 14

*Tottrup v Ottewell Estate* (1969) SCC 🡪 daughter lost b/c Frank meant words of limitation not purchase **🡪** the words “and his heirs” are now held to be words of limitation” **🡪** a term of art used only 15

*Re Walker* (1925) BCCA –ambiguous wording not sure if life estate or fee simple, powers of encroachment look like fee simple **🡪** wife gets fee simple 15

*Re Shamas* (1967) BCCA – widow gets life estate b/c restraints on alienation 15

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# Registration of Title – Overview Ch.5

## Historical Background

**Common Law Conveyancing to Recording System:**

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

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

**Recording system**

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

**Torrens System/Land Title System**

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

**Effect of Torrens System**

Torrens imposes a registration system which

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

**Purposes of Land Title System:**

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

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

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

**Simplifies Process:**

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

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

**Torrens System in BC**

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

## General Pattern of Registration = *policy to promote registration in a capitalist system – want land freely alienable + good safe marketable title*

#### s. 20 – if you do not register you may lose you interest in land

|  |
| --- |
| Kessler (1961) = “The general principle that only common law interests in land can be registered” 🡪 Kessler loses  |
| **Facts:*** Kessler charged w/ something contrary to permitted bylaw use in municipality
* Kessler argues what he is doing is interest in land guaranteed by LTA \_\_. your municipal bylaws must be registered in order to be affective

**Result:*** Kessler loses 🡪 these bylaws are not interests in land but only regulations around usage 🡪 not interest in land recognized by Euro-Common Law system of BC
 |

## Common Law interests that CANNOT be registered:

#### 1. equitable mortgage s.33 LTA

by handing over the IT doc to someone, this is not going to be registered

#### 2. Trust s.180 LTA but suedo reg by “trustee” on IT doc

#### 3. Sub-agreement for sale s.200 LTA:

you can only have agreements for sale registered 🡪 NOT sub agreements (**s.200 LTA)**

## Non-Common Law interests that CAN be registered:

#### 1. Caveat

device to question someone’s title to property

**Example:**

you questioning Bloggs Title 🡪 Bloggs may transfer to Tubbs quickly, who knows nothing

Person challenging in trouble b/c now Bloggs doesn’t own Black

Solution: launch a caveat: puts warning to anyone dealing with Black that there is a caveat 🡪 last **3 months only** = **90 days**; freezes dealings.

must launch legal proceeding in period and then get LP on.

#### 2. Lis pendens

will replace caveat once LP lodged

Capatilist system does not like LP b/c freezes land transfer

#### 3. Liens

like a LP but is a judgement that solely sounds in **money – not attack on title**

you sue someone, you win, they can’t pay, can get judgement registered as a charge = if property sold with a lien will NOT go to transferee until time person who put lien on is paid out. 🡪 it allows you to enforce common law interest

**Example**

hurt in Bear trap on Ranch prop, sue ranch and win 100K but not paid

2 solutions:

* + - * 1. U can go with your court decision, the register will put “judgement Dennis” as a lien (under charges) – can try and compel Kamlands to sell so they can pay you.
			* 2. OR if Kamlands sells it to ACME – if ACME wants to come on title this sale transfer can’t happen unless ACME pays you out.

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| *Skeetchestn Indian Band v BC* (2000) BCSC – Band lost on lis pendens attempt b/c not a valid attack on title 🡪 so L/P b/c of AT can’t be registered in Euro-common law system |
| **Facts:*** Kamlands wanted to develop 6mile Ranch into massive resort
* Band asserted AT over this land; Band knew multiple charges put on Ranch for development to take place
* Band says: we have sued the Crown + Kamlands and want an LP
* Registrar denied LP to Band b/c **you can only put LP unless direct attack on title**

**Issue:** *Could this LP be registered?* **Result**: registrar did not err in refusing to registrar the lis pendens by the band. Not a recognized attack on land title by common law b/c land title system centred & developed around Euro-common law, NOT Canadian CL which includes AT* First case in BC to directly confront the inherent conflict between fee simple title and aboriginal title

**Other:*** Prof thinks Band could use **s. 215(1)(b) LTA**
* ***s.215 (1)*** *A person who has commences or is a party to a proceedings, and who is*
	+ - *(a) claiming an interest in land* (likely means a Euro-common law interest in land)
			* **so out of luck**
		- (b) *given by another enactment a right of action in respect to land*
		- *may register a certificate of pending litigation against the land …*”
			* **prof thinks s.215(1)(b) would give them a claim**
			* **Prof says s.35 is an “enactment” of AR, and this claim by the band was all about existing abo rights entrenched in the charter**
			* May not win case – but possible 🡪 prof things that
			* if you can’t show occupation and possession needed fro AT – u could try and put a LP
			* Kamland would argue this is FS land not Crown land
 |

#### s. 215(1)(b) LTA = possible solution for Skeetchestn Band

## Basic Scheme of Registration

if you are the first holder of FS after crown grant must make sure surveys are correct and in LTO

Strata Property Owners = original developer gets EIFS, all other owners to the air space will be registered as charges

## Role of the Registrar – is not a judge, powers authorized by statute , role in s.383

#### Criteria to give title = the interest must be a good safe holding marketable title = if can force unwilling buyer to take

is good title if someone bought property then don’t want to take – and you can compel them to take then u have good safe marketable title

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| Re Evans Application (1960) BCSC = R was within power to say must deal with boundaries of land before transfer affective |
| **Facts:*** Registrar refused to reg. a transfer b/c previously the boundaries of land were incorrectly measures (not fault of current owner)
* it said 40 ft “more or less” = not good, R wanted exact portions
* Register saw this issue as not a good safe marketable title

**Result:*** Registrar correct = was within power to say must deal with boundaries of land before transfer affective
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| *Shaw (1915)* BCCA = R was w/in power to stop an adjustment to title b/c thought doc didn’t look good |
| **Facts:*** Son who had been given power to deal with the mortgage that father owned (father was lender) was dealing with the debt – instead of son selling the debt to someone else - Son wanted to be put on the title as the assignee of the dad’s mortgage
* transferor and transferee had the **same signature** b/c son was POA
* registrar wanted a doc that indicated dad authorized this activity by son as his power of attorney

**Result:*** Registrar correct
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| *Heller* (1963) SCC = R CANNOT take away rights through correction |
| **Facts:**Husband tried to transfer land to wife – Registrar registered it – no duplicate certificate of title on file – Duplicate already given to someone who already had a half interest transferred – Heller tried to have transfer to his wife reversed due to error – Registrar refused – SCC agreed with Registrar.* Power to correct or cancel instruments (s.383). BUT: If error is there, someone has come along and acquired interest, to correct error would take something away from interest that has been required and so Registrar cannot do that. (*Heller)*

**Result:** Registrar made NOT OK decision***Registrar cannot affect the rights of others by correcting something – there are limits. The Registrar cannot adjudicate on the rights between parties – this is discretionary.*** |

## The Assurance Fund s.296

Province generally guarantees is land title holdings but subject to exceptions

Funded by taxes from property transactions and pays for mistakes

wants to ensure that people on IT are secure

**s.20** if don’t get registered you don’t have claim against anyone

**s.23** grants indefeasibility

if on title but issues, if turns out title is imputable, **s. 296** may give u compensations

#### s. 20 – you must register to protect your interest

#### s.23 – an estate in fee simple has indefeasibility = king/queen

#### s. 20 & s.23 = trump nemo dat

person on title cannot be taken off

other person who loses out can only get compensation

#### s. 296 LTA = assurance fund $ granted only if = sue + can’t get money, you would have been successful at common law & lost land b/c conclusiveness of registrar

claimant has lost an interest in land which but for the passage of the land title act at common law they would be able to get it (due to ND which would have protected claimant)

show loss of land b/c registration in LTA

if act wasn’t there, you would have been successful at common law b/c of ND

**you must sue person**, and if don’t get money then go to assurance fund

three year limitation **s.296(8)**

**you can only succeed if you would have succeeded at common law 🡪** at common law you could only succeed provided the person is not a BFPV 🡪 ie a BFPV gets interest through consideration (this is why **McCaig** lost)

#### LTA 297 – Protection of purchaser in good faith and for value

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

#### LTA 298 – Fault of registrar

* "Solely or partially, as a result of an omission, mistake or misfeasance of the registrar"
* This is new – previously, loss or damage must have been caused solely by fault of registrar
* Limitation period: within 3 years after the loss or damage is discovered by claimant

#### s.303 LTA = out of luck from AF if careless

you can’t get money from AF if you only have yourself to blame

**Example**

you leave the Duplicate IT outside in the flower pot & it gets stolen

then stealers forge a transfer document + put themselves on IT, you will be put out luck b/c shouldn’t have left this in an unsafe place

If you discover before transferred to someone else 🡪 can sue this person

BUT if transfers to someone else 🡪 AF won’t protect you b/c new person will be **a bona fide purchasor for value**

Minister uses s.303 to his defence to defend the AF

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| *McCaig v Reys* = s.296 & s.303 LTA = P unsuccessful on recovering from AF b/c no action at common law, only had equitable interest can’t succeed against EIFS of bona fide purchasor for value 🡪 not meet s.296 requirements  |
| **Facts:*** Jerome exercised a bunch of fraudulent quick claims (to remove sub-agreements for sale *that are no longer OK*) and in the process McCaig’s option agreement to purchase 25 acres of property got lost in the mix.
* Jabin became the new EIFS holder and he unaware of McCaig’s option agreement
* McCaig doesn’t have his interest surveyed and registered (but did not have to 🡪 not why he lost)
* McCaig sues everyone, including AF 🡪 and wants money to claim his loss against Jabin.

**Result:*** McCaig loses action against AF, b/c he would not win at common law either b/c CL wants to protect the true BFPV “equities sweatheart” Jabin
* McCaig is successful in person action against Jerome for his fraud
* McCaig only had an **equitable interest in land** with his option agreement to purchase 25 acres
 |

# Registration – Ch. 6

## Registration of the Fee Simple

#### s.23 LTA – gives indefeasibility to FS (protects innocent EIFS from ND claim)🡪 BUT limits

* if you are an innocent party who has acquired an EIFS, through no fraud of your own you will be protected
* at common law you would lose your interest b/c of ND (you never really had the land)

#### s.23(2) = limits to FS 🡪 resources, lien, lease, highways, expropriation, caveats + charges, boundaries, fraud

* + (2) owner has EIFS to land described in the IT
		- description of the prop given in the survey sketch
		- then u are indefeasibly entitled to it subject to the following exceptions
			* **s.23(2)**
			* a. all existing exceptions/reservations in the original crown grant
				+ ie. U don’t get title to the minerals, oil and gas, gold 🡪reserved for crown
				+ no ad inferos does not apply
			* b. Subject to lean if don’t pay taxes
			* 3. Lease
				+ if lease is for three yrs or less u don’t need to register it
				+ IT is subject to lease
				+ Ex. if u are buying prop from Dennis, dennis has a tenant for an agreement for 3 yrs or less – even when u buy the prop ur rights will be subject to tenant – diff if lease agreement is for longer
				+ - when u buy prop u should always go and inspect – see if there is a tenant
				+ if tenant for 4 yr less – u need to put it as a charge if u don’t want to be evicted
			* e. Highways
			* f. Right of expropriation
			* . (g) caveats and charges
				+ u can have a situation where a charge is registered after u buy/taken title and charge will be referable to activities of your predeseser/ grantor 🡪 depending on the legal authority to place charge on tile – u unforutynly will be subject to it – (but only if the charge is entitled to be put on ) but if after it has to be legally entitled to go on title (only if it is before u take – this obv will go on)
				+ ex. builders leans 🡪 special protection given
			* h. Boundaries
				+ that’s why sketch is so imp. (think Evans case)
				+ if the sketch is wrong indefeasibility won’t protect you
			* i. Fraud
				+ if registered owner participated in forgery
				+ bucholtz
				+ you can be removed from title if you got on title b/c of fraud ie you took part in the fraud

#### s. 23(3) LTA = “ Squatter’s rights abolished”

* for both private and crown land subject to small window before 1975 if first crown grant.

#### s.50 LTA = Crown has right to use private land 1/20 for public words

### Agricultural Land Commission Act 🡪 all land issued after 1973 subject to ALR

* land in the ALR is subject to this act, and cannot be used for non-farming purposes
* your use is subject to the restrictions in the ALCA (s. 1,16,20,21,28)
* **s.60** sets out how land is registered in ALR, any land issued after June 29, 1973 subject to ALR

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| *Creelman v Hudson’s Bay Insurance* (1920) –SHOWS IMPORTANCE OF BEING ON IT DOC = if on IT the LTA ensures you have a good safe marketable title, HBC was on IT so Creelman lost |
| **Facts:*** Creelman wanted out of deal & didn’t want to pay breach of K
* C found an exception that HBC not actually allowed to purchase land unless using land for company
* C said you are registered in defiance of federal laws, and I don’t want to take title from u b/c you are not a good safe marketable title
* HBC said but I have the IT, and went to registrar to get C on

**Result*** **C loses**
* HBC is on IT and has good title, C must take or breaching contract
 |

#### s. 12 Limitation Act = no limitation in respect of land (BUT tiny window for squattors)

* + Squattors rights are contradictory to the importance of having an indefeasible title – so it says no squattors titles
	+ **s. 12 Limitaiton Act** There is a tiny door open to squattors rights for first the holder of the very first IT from crown may be subject to a squatter claim, but sooooo limited prior July 1 1975

#### s.171 LTA abolishes squatters rights after 1975 b/c contradictory to the indefeasibility of the estate in FS

#### s.36 Property Law Act “Encroachment on Adjoining Land” = buildings OR fences

* + court is given full powers to make it’s decision
	+ if one parcel of land has an encroachment of a building to the other neighbouring land – the court has the power on **application** made to deal with the encroachment
	+ ordinary this is the trespass
	+ if u are the owner who’s building has trespassed (usually you may not have known bout the encroachment – it was done by previous owner) u go to court and argue:
		- property line should be transferred so u get more land,
		- or court may order the structure to be taken down (usually occurs if it is a fence that can be easily removed),
		- or may get an easement for time of building or fence’s existence and may need to give compensation

## Statutory Exceptions to Indefeasibility – “charges on title”

#### s.23(2)(d)LTA “leases”

* leases are interest in land
* must be registered if longer than 3 years = **long lease**
* if you as tenant has long lease and don’t register 🡪 you are vulnerable, but may have option against landlord for breach of K
* a **buyer must inspect the property you purchasing b/c could be a tenant w/ lease under 3 yrs** 🡪 which won’t be registered

#### s.23(2)(g) LTA “builders lien” = policy to have ppl paid for work despite transfer of prop

* builder has 45 days to charge his work on title **s.20 Builders Lien Act**

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| *Carr v Rayward* (1955) BC = “a builders lien” put on for plumbers work 🡪 P lost b/c s.23(2)(g) protects builders lien even after sale subject to 45 days  |
| **Facts:** * Raywood owned property, and plumber did work but prop sold and transferred to Bell
* Bell had EIFS, and didn’t want to pay lien –said you should sue Raymond for it

**Result:*** Bell lost

**Other*** generally what happens in big transactions --If u are a puchasor and u are going to get transfer before the period of 45 days within Builders Lien act 🡪 you the new purchasor want to be able to withhold payment for the portion of the price for the work that has been done. you can pay the price – then pay the balance after the 45 days
 |

#### s.23(2)(h) LTA “BOUNDARIES” 🡪no guarantees around boundaries, must be surveyed properly 🡪 Wrienrib Case “not lawyers job to deal w/ boundaries only title”

#### s. 23(2)(i) “Fraud” LTA – your indefeasibility is subject to the right of another to show you got title through participating in fraud

**s. 23(2)(i)** allows wronged and original owner of blackacre to sue and recover from the current owner if they got their bc they personally participated in fraud

#### s.25 LTA “only protects FS from fraud not charges”

#### s.25.1 LTA “Void Instruments” gives immediate indefeasibility only in respect to EIFS

null deeds occur through 1) forgery or 20 non est factum “this is not my deed, I didn’t make it, can occur if someone has sight impairment and thinks is signing something else”

#### s.25.1(1) LTA “gives effect to ND” for void deeds – all interests in land minus EIFS obtained under null deed are not given effect

#### s.25.1(2) LTA makes innocent party get blackacre despite null deed if EIFS

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| *Gill v Bucholtz* (2009) BCCA - mortagee Bucholtz loses = no indefeasibility of mortgages taken under a null-deed 🡪 mortgagee must investigate 🡪 registered mortage always subject to state of accounts |
| **Facts:*** fraudery of transfer forms occurs where some Gills take property from another Gill
* the transfer document is forged to transfer property to Gill
* woman Gill buys a mortgage from Bucholz’ and this is executed using a transfer form

**Result:*** Bucholtz should have investigated it when giving mortgage and discovered null deed b/c they in better position to investigate then registrar

**Other:*** now many lenders/mortgagees/ banks are insisting on title insurance b/c of the problem that they won’t get compensated.
* **prof critiques** – doesn’t think that realistic for Bucholtz to have to investigate

he doesn’t think Bucholtz were actually taking a null deed b/c the Gills did own the estate in FS when transferred even though it was gained through fraud. fraud doesn’t necessarily make instrument void **result still correct b/c** – registered mortgage is always subject to state of accounts, and the state of accounts between the plaintiff and the bucholtz was zero |

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| *Gibson v Messer*  - you must check to make sure not fraudster |
| * + M’s went away to England, once away a rotten lawyer had the property transferes through fraud deeds to “Cameron” then had had himself as a lawyer representing “Cameron” – lawyer had a bunch of mortgages put on the property
	+ Rotten lawyer got money
	+ The issue was whether the mortgage holders could get their money back
	+ Court said no = b.c the mortgagee’s can investigate title better than anyone else
	+ **deferred indefeasibility**
	+ Jurisdiction = new south whales
	+ Ratio:
		- While immediate indefeasibility is not poss, deffered indefeasible is so once u start getting a good route of title – at this point only can subsequent encomberances and mortgages work
 |

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| *Fraser v Walker*  - doesn’t matter if fraudster – u can rely on registrar |
| * + - said if some forger is representing themselves to be the real owwner’s and someone takes money under what is going to be a null deed (b/c signed by fraud person not the actual holder) but ppl rely on registrar then ok =
			* called = **immediate indefeasibility**
 |

## Notice of Unregistered Interests

#### s.29 LTA “effect of notice of unregistered interest”

* fraudsters in lease situations may rely on s.29 and s.20 which says u have no interest unless you register land
* the only interest which survives if you are claiming against the grantor or transfor “**EXCEPT AGAINST THE PERSON MAKING IT”** 🡪 if your fraudsters transfers to someone else – you are out of luck

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| *McCaig v Reys –* no compensation from AF unregistered charge b/c Jabin EIFS was not fraudulent and McCaig would have lost at common law |
| **Facts*** McCaig had the unregistered option agreement to purchase 25 acres
* he lost this unregistered charge as a result of scheme

**Result*** Jabin got to keep property and McCaig out of luck from the assurance fund b/c McCaig would not have won against Jabin “equities sweetheart”
 |

#### s.29(2) “except in the case of fraud in which he or she had participated with” 🡪 if you fraudulent your title not protected from unregistered charge

**knowledge** of unregistered charge is not enough 🡪 you need **knowledge + conduct to show fraud** if want to be successful in unregistered charge claim

**s.29(2)** says you can **ignore**

***McCaig v Reys*** *🡪 even if Jabin aware of option of McCaig – still safe unless he was fraudulent*

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| *Hudson’s Bay v Kearns and Rowling (1895)* BCCA – knowledge was not enough to show fraud for charge claim, P loses (strong dissent says smells of fraud) |
| **Facts:*** woman Kearns owned FS in parcel of land, she owed HBC $800 so created an equitable mortage by handing them the duplicate IT (**unregistered mortage)**
* she needed more money so get Rowling to give her $300 for prop (Rowling likes b/c risk taker
* but she can’t transfer to him b/c she doesn’t have duplicate IT
* Rowling gets his interest registered as a charge BUT HBC doesn’t want this charge
* Rowling says you should get your mortgage registered

**Result*** Court finds for Rowlings 🡪 sees no fraud (s.29(2) doesn’t save HBC)

**Other*** stream of cases saying **knowledge = fraud *(woodwest developments, jagger the cleaner)***
* stream of cases which **Rowlings follows** = **knowledge NOT fraud – need more**

\* this is more effective for courts  |

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| *Vancouver City Savings v Serving for Success* (2011) BCSC 🡪 City Savings wins = you need knowledge plus a scheme of deception – no evidence of fraud here |
| **Facts:*** Vancouver City Savings comes on to property as a lender (mortagee) when there is a series of sub leases on the property that **are not registered**
* Vancouver city savings interest **is registered**
* Things go financially south (foreclosure order) and Vancouver City Centre find a buyer buy property but this buyer wants all debts off including the sub leases
* City Savings brings an action to get lease holders off title
* City Savings says we knew there was leases but we didn’t know about all these sub-leases (which were longer than 3 yrs and unregistered)

**Issue: *is mere knowledge enough for fraud?*** **Result*** City Savings wins because court says you need **knowledge plus a scheme of deception** – no evidence of fraud here
 |

#### s.180 LTA – equitable trust are to be referenced elsewhere and not put on IT doc except “in trust”

can create a trust inter vivos or upon death through will

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| *McRae v McRae Estate* (1994) BCCA 🡪 John & Kathy win b/c Farquar was deemed to know of registered charges such as “trusts” b/c of s.23 indefeasibility subject to registered interests  🡪 you are deemed to have knowledge of all the interests in land registered on title at the time you take transfer/ **s.23 this limits your indefeasibility**  |
| **Facts:** * Family situation where Dad in will gives life estate to wife who is to hold title of property “in trust” for three children (john, Kathy, farquar) until she passes 🡪 they will then get EIFS
* the IT doc said = Mrs Fraser “In Trust”
* Mrs Fraser then transfers property to her fav son farquar and there is no “in trust” any more
* Farquar dies but leaves EIFS to his two siblings and his wife Agnes
* registrar did not reference this to the trust settlement 🡪 remember **trusts don’t need to be put on as a charge 🡪 just in trust**
* John and Kathy want Agnes off – but agnes objects b/c nothing on the IT doc woith Farquar’s name on it said “in trust”

**Result*** Agnes loses; Court agrees with John and Kathy 🡪 farquar was “deemed to know”
* b/c this was registered, knowledge of the “trust settlement doc” was imputed to farquah–
* Judge says – that a registration has taken place (which is correct according **to s.. 180** – says Pavlich) but there is no compulsion on registrar to read the Trust settlement - it still will remain a registration –
* Court does not accept the argument that Farquhaar added value to the property - Farquhaar should have known the trust interest was there
 |

* + “Andrea holds an EIFS in blackacre on/in trust for Kevin, Kevin has an equitable estate in fee simple in blackacre being administaterred by Andrea who has legal (the trustee, administrator)
	+ Kevin = bennefiicary or ceti qui trust
	+ even a life estate can be split into legal and equitable

## Registration of Charges (s. 25(3) LTA)

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| *Duckart v Surrey – s.180 LTA* “crescent beach” 🡪 Duckart wins 🡪 b/c easement was “registered” as a charge in the broad meaning s.25(1) b/c of “in trust” on IT |
| **Facts:*** property owners given a “easement of way” to wander on the foreshore
* **easement was not registered as a charge** on the **foreshore parcel** which became owened by others but always had **“in trust”** on it to reference the easement unregistered charge.
* City of Surrey takes Foreshore reserve b/c nobody is paying the taxes and **words in trust are missing** on the IT for foreshore
* Surrey puts bathrooms on Foreshore and Duckart sues b/c impeding her **right to wander**
* Surrey argues we not bound by easement b/c not on IT 🡪 can wipe out all unregistered easements with a tax sale

**Result*** Court says word “registered” is not defined 🡪 we should use the ordinary meaning of register and these were registered b/c of **in trust”**
* we use the broader definition of register in **s,25(1)** vs narrower **s.25(3) “registration as a charge”**
* (**McCaig** goes even further than this case for saying Farquar was “deemed to know”)
 |

### Indefeasibility

#### s.26 LTA indefeasibilty of charge “deemed to have interest” brings ND back

* when you have a mortgage registered as a charge – you are deemed but not irrebutable deemed to have indefeasibility to that charge
* province not prepared to give same indefeasiibiltiy to charges as fee simple

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| *Credit Foncier v Bennet* (1963) BCCA 🡪 s.23 & s.26 🡪 No indefeasibility guarantee with a registered charge like a mortgage= Bennet’s win against fraudster who puts mortgage on home they paid off free and clear 🡪 s.26 brings ND back in & mortgage only secured against actual state of account |
| **Facts:*** Bennet couple owned property and paid off mortgage fee and clear so went on vacation
* while gone a crook pretended to be a lawyer then got a mortgage on property from Todd Investments
* This mortgage is put on IT
* (if Bennets found out at this point could have gotten mortgage off right away)
* another guy buys mortgage debt for less money and gets registered
* Credit Foncier now buys mortgage and sends letters to Bennets saying we will foreclose if you don’t pay

**Result*** Sheppard J: there is a deliberate difference between the wording in **s.23 conclusivley presumed** & **s.26 “deemed to have interest”**
* s.26 deals with charges which the indefeasibility is rebuttable – if after investigation it turns out you don’t have interest – u don’t get
* Credit Foncier loses b/c didn’t get the mortgage from the only ppl they could the bennets (ND no remedy through AF) and the mortgage is secured against the actual state of accounts – but not debt on prop.
 |

### Priorities

#### s.28 LTA “Priority of Charges based on priority of registration” = first in time is first in law

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| *Canadian Commercial Bank v Island Reality* – court favours indefeasibility of charge here and Almont wins 2nd place mortgage though obtained through dishonest deed 🡪 decision may not stand now b/c of s.25.1  |
| **Facts:*** Almont was the third mortgagee on park meadows and had an 2nd equity of redemption
* Almont didn’t want to be third in line but 2nd
* Almont made arrangement with a Crook who worked with Park Meadows and created a discharge of mortgage transfer form of Island Reality’s mortgage which was in 2nd place.
* now Almont goes on and Island Reality’s equity of redemption from their mortgage is off 🡪 through a **void instrument**
* Island Realty sues

**Issue:** *Does Almont have a third or a second mortgage? Does ND save Island Reality in second place?***Result 🡪 Almont wins 🡪** discharge valid* + S.1 LTA "instrument" means
	+ (a) a Crown grant or other transfer of Crown land, and
	+ (b) a document or plan relating to the transfer, charging or otherwise dealing with or affecting land, or evidencing title to it, and includes, without limitation
	+ (i)  a grant of probate or administration or other trust instrument, and
	+ (ii)  an Act;
* discharge valid b/c Crook worked for prop and it was not void b/c could actually create the discharge form. 🡪 the transfer form between Park Meadow and Almont was valid and so it took through a valid deed.

**Other:*** court showed policy approach to favour indefeasibility of charges (unlike Credit Fonceir)
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# Failure to Register – Ch.7

## The General Principle

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| *Sorenson v Young (1920)*  BCSC – easement blocked with gate – gate blocker wins = can’t get around s.20 by saying contents of you easement interest are incorporated into a deed like trusts = u must register  |
| **Facts*** easement for right of way to the property was not registered
* and property exchanged hands so s.20 EXCEPT AGAISNT PERSON COULDN’T SAVE Them
* it was argued that there were references to the deed that had the registration but arg only works for trusts
* (today **s.181 would require registrar to put this charge on title again for new owner)**
 |

#### s.86(3) Court order enforcement act buttresses this conclusion in this case 🡪 if sale/interest occurred before judgment creditor, creditor subject to it

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| *Yeulet v Mathews (1982)* – the mother wins w/ her equitable mortgage 🡪 whatever happens first takes priority - one’s other charges are only subject to what the holder actually has to give = ex. judgement creditor’s charge was subject to equitable mortgage held by Mrs. mathews  |
| **Facts:*** Mrs Mathews got an equitable mortgage from her son by getting her son’s IT doc (so not registered)
* son got into trouble so judgement debtor registered it on IT

**Issue: *Which should get priority, the unregistered mortgage which was first or the judgment creditor?******Result**** Mother wins
* judgment creditor could only get what the son had subject to the mothers interest
* **s.86(3) Court order enforcement act buttresses this conclusion in this case 🡪** if sale/interest occurred before judgment creditor, creditort subject to it
 |

### s. 20 EXCEPT AGAINST THE PERSON MAKING IT – requirement to register if you don’t want to be vulnerable

## Court Order Enforcement Act

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| *L&C Lumber Co v Lundgren – P wins, no reason to stop D from cutting trees granted in easement even though unregistered* S.20 EXCEPT AGAINST PERSON APPLIES – b/c Lundgren knew about the easement to cut |
| **Facts*** D by an agreement in writing sold McDonald standing timber on her land w/ right to enter and cut
* McDonald assigned all his rights to P the lumber company, who gave due notice in writing to the vendor?
* Neither of these (agreement or assignment) were registered in the Land Title Office
* P attempted to cut under the agreement, but D refused entry and tried to justify this under the failure to register section of Act (now s. 20)

**Result EXCEPT AGAINST PERSON APPLIED B/C L&C TOOK OVER FROM MCDONALD 🡪 Now in contractual privity** * Appeal dismissed. P wins. No reason for D to stop entry.
* S. 20 today does not rule out unregistered titles; can’t ignore unregistered documents for which you have notice
 |

#### s. 73.1 LTA “Lease of part of a parcel of land enforceable”

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| *International Paper Industries v Top Line* (1996) BCCA –*long lease not registered – s.20 will not save you from getting an illegal lease to be registered even if it is two ppl under EXCEPT AGAINST*  |
| **Facts:*** P (the “tenant”) was approaching the end term of its lease of its business premises (waste recycling business). P owned building it operated in.
* P began negotiations with D (the “landlord”) and agreement reached that D would buy building from P, building would be moved to Sooke, and tenant would then lease a portion of that property, including the building.
* **registrar is not going to register your lease unless you have a survey**
* Parties created their own lease but no mention made of whether the Lease was to be registered; nor did the Lease state whether, how, or by whom the property was to be properly subdivided in future.
* Two judicial disputes occurred in meantime 1) failure of landlord to provide loading dock 2) late rent payment 🡪 courts considered lease valid
* Lease term up and tenant decided to renew, Landlord denied it had agreed to a “perpetually renewable lease” 🡪 court
* Landlord then argued Lease unenforceable or void b/c **s.73**’s subdivision restrictions

**Issue*****Will EXCEPT AGAISNT THE PERSON apply to preserve relations between two unregistered parties*** *What is the consequence of a breach of s.73 on parties who created a lease unaware of the provision?****Result*** * D wins
* S. 73 precludes the Tenant from enforcing personal or proprietary rights in respect of the leased premises pursuant to the Lease
* Topline had land, leased land to paper company
* Bad relationship; landlord sought declaration was cancelled
* Lease is illegal and can't be registered, but can continue to exist as unregistered
	+ s. 73(1) – can't subdivide land into smaller parcels for purpose of leasing it unless subdivision done according to act. Any leases of this type are not registrable
	+ Prior to *Top Line*, people thought it unregistered leases could be effective b/c saved by s. 20

Holding: s. 73(1) upheld. Lease is invalid and cannot be enforced* 2007 amendments to LTA reversed *Top Line*
* s.73: (May 2007). If you don’t comply with s.73: (*Topline* says it is void.) **s.73.1 – as between the parties of agreement, it is still enforceable.** .
* Note: 73.1 does not *say* it is retroactive – there are no cases indicating whether it is or not
 |

# Applications to Register – Ch.8

#### s.31 “priority of caveat or certificate of pending litigation:

#### s.288 Effect of caveat LTA

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| *Rudland v Romilly* (1958) BCCA 🡪 the pending registration processing of Romily wins even though the LP was put on before full legal title vested in Romily. It is not Romily’s fault b/c of slow process of LTO 🡪 EIFS takes priority |
| **Facts:*** Romily owned land then transferred to Lindsay who became registered on IT
* Lindsay sold to Rudland but Rudland couldn’t get on title yet because waiting for docs to process in Land title office
* Romily then decided linsday had done something bad and shouldn’t get title and puts and LP on
* Rudland wants LP off

**Issue:** whose interest will be preferred the non registered title awaiting process of the LP that came in while process?**Result** * Romily wins b/c he can’t lose b/c of slow processing in LTO
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| *Breskvar v Wall* (1971) Australia 🡪 two ppl with equitable estates – who to prefer? |
| **Facts:*** Breskver needed money
* Breskver gave blank transer form to Alban who put his grandma Wall on it
* Breskver now has an equitable estate, but now Wall has equitable too
 |

# Co-ownership – common law presumes joint tenancy

## Tenancy in Common

* When 2 or more people are simultaneously entitled to possession of property
* Treated the same way as single owner; on death, interest passes either by will or intestacy

## Joint Tenancy

* + (any words that connote a share in the transfer or the device indicate that the transferor is intending a tenancy in common and not a joint tenancy)
	+ indication of j t = 1) no words indicating share 2)unity of title & time

### Right of Survivorship

* If joint tenancy is not jointly or unilaterally severed, survivor will become absolute FS owner
* Takes priority over normal rules of descent on death

### The Three Unities

* Unity of possession is characteristic of all forms of co-ownership
* All three unities must exist to create joint tenancy
	+ Unity of Title – co-owners must derive titles from same interest
	+ Unity of Interest – interests must be the same
	+ Unity of Time – interests must all vest simultaneously (exceptions: transfer to uses, gift by will)

## Common Law

* Presumption: if three unities present, **joint tenancy** has been created
* Otherwise, tenancy in common
* Grantor may create tenancy in common expressly or with "words of severance"

## Re Bancroft, Eastern Trust Co. v Calder [1936] –common law - “use of word equally for shares” 🡪 silence was taken as joint tenancy

* Sam Bancroft had a three stage will
* sam and clara lived together as husband and wife
* - 4 children born during married
* - Minnie one of the children died – but had two children
* when Sam died he then had three kids and grandchildren
* **-** Sam has lots assets:
	+ want Clara to have family home until dies
	+ then wants Clara to have some shares
	+ the other shares were invested and profits ¼ to each three children – the children of minnie get her ¼
	+ **“4 equal shares” = tenancy in common**
	+ the ¼ share will be split between the children of Minnie: Paul and Jean
	+ both Paul and Jean have kids
	+ Paul dies, Clara is still alive
	+ The question is whether the ¼ 🡪 then split 1/8 each -> does the surviving child jean get Pauls’ 1/8 or do Paul’s children get this
	+ **He used the word equally but didn’t when talking bout paul and clara 🡪 this meant** that this was a joint tenancy – which meant that Jean got everything
	+ **The words equally were not used in the split of minnie’s quarter share 🡪 therefore joint tenancy**
	+ **The entire estate is tenancy in common, but Paul and jean’s were joint tenancy**
	+ Equity would have saved u if u fell in one of three categories and would treat it as a tenancy in common
	+ Equity didn’t like the joint tenancy
		- Anything that allocates a share (3/5ths, etc.) in the property implies a tenancy in common
			* Only when it is silent did the common law hold (default to joint tenant, prior to statute that changed it to tenancy in common)
			* Note that the word ‘equally’ is not found in the discussion of Paul and Jean, while ‘equal’ was in language allocating shares to his children
				+ **On the basis of this, the silence is taken to mean that he intended joint tenancy for the grandkids**

**Equity**

* Disliked joint tenancy; preferred **tenancy in common** and gave effect to this preference by
	+ Interpretation of documents
	+ Even where joint tenants in law, equity might treat them as tenants in common in equity
		- If unequal contributions to purchase price
		- In commercial transactions where partners purchased property
		- If joint mortgage where 2/more lent money and borrower transferred title to lenders
* This equity holding is fortified now in all matters by s.11 of statute
	+ Note – s. 11 does not apply to leaseholds – only fee simple!!!
		- (Presumption/fall back to tenancy in common) – presumably then the common law standard of fall-back to joint tenancy still holds
* In partnerships (business) – tenancy in common makes more sense than joint tenancy (as that would give everything to your business partner and not to your fanily/people you care about
	+ Because – s. 25 of Property Law Act – allocates property of partner to other partner in case of death

#### Robb v Robb (1993) –equity “Man dies who owned share in company, and children claim his share is tenancy in common, not joint tenancy b/c didn’t want 2nd wife to take” 🡪 joint tenancy, fall back on tenancy in common only for fee simple not shares s.11

* 2nd marriage, had children from his first wife, with his second wife, Mary, for a long time
* Mary and Mr. Robb purchased a coop (a very common system pre-strata)
* Coop: developer builds a building – he transfers the property to a company so that corporation owns it.
* Provision that ony shareholders in the company can occupy lots in the coop building
* When you buy a coop you are doing two things
	+ 1) Buying shares in the company
	+ 2) Taking on a rental agreement – take what is left on the original term which is granted in the long-term in exchange for shares
* Mrs. Robb purchases a 3rd generation coop, but places it in his and her name
* Even though he didn’t pay for the property, he had had other property in California, which he transferred to Mrs. Robb as a means of payment (consideration for being put on the lease)
* Mr. Robb dies
* Question is – does she take the condo (which is held jointly) under the rights of survivorship, or is it a tenancy in common (in which case, his interest would go through his estate/will process)
* He left everything to Mary, but the children from his first marriage are trying to come after it under the *Wills Variation Act* – children can challenge a will
* Though there was some indication that both Robbs intended to hold the condo jointly, it is not clear
* Concluded that it is a jont tenancy
	+ No words of apportionment, etc.
* Kids were arguing under s.11, though this argument fails because the fall back to tenancy in common under s.11 ONLY applies to fee simple
	+ The property interest here isn’t a fee simple – it’s an assignment of a lease

## Statute

* s. 11 of *Property Law Act* provides they are **tenants in common** unless contrary intention appears **in the instrument**

## Transfer to Self and Co-Ownership

* At CL, not possible to transfer interest to oneself
* s. 18 of *Property Law Act* allows this
	+ If you have a joint interest and transfer to yourself 🡪 become tenants in common
	+ If you have a sole interest, transfer to yourself and another 🡪 become joint owners

## Registration of Title

* s. 173: general provision relating to registration by co-owners; in Part 11 of the LTA dealing with registration of FS
* s. 177: in the case of joint tenancy, a notation to that effect must be entered in the register

## Relations between co-owners

* Co-owners have the common right to possession of the property
* A co-owner who has not been in possession will generally not be entitled to “occupation rent” against the co-owner in possession except in a case of ouster (i.e. where s/he has been forced to leave by the other co-owner).
* However, a co-owner not in possession may be:
	+ Entitled to a share of the profits generated by the property, and/or
	+ Responsible for a share of the expenses associated with the property.

##  Share of Profits

* General rule: co-owners are entitled to a share of the profits, normally determined in proportion to their share in the property
* Exception: where one of the co-owners has to work to generate a profit

## Spelman v. Spelman (1944 BCCA) – exception to general rule that co-owners are entitled to share of profits

Facts

* Husband and wife owned house as joint tenants; ran boarding house
* Wife left voluntarily; husband continued to run boarding house
* Upon wife's return, she asked for her share of the profits
* *Estate Administration Act*, s. 71 at 11-19: action for an account may be maintained between co-owners on the basis that one person has received more than that person’s just share or proportion
* “Just share or proportion” – judicial discretion involved

Judgment

* Husband not receiving unjust share of profits; using his own property, putting in own work
* Wife not entitled to half of this
* Contrast with situation regarding house in Victoria; wife entitled to portion of rent

## Estate Administration Act (71)

**Actions of account**

(71)Allows a joint tenant or tenant in common to ask for an accounting if:

 (i) one tenant has excluded them from the property;

 (ii) there is an express agreement that one tenant act as bailiff for the other

 (iii) one tenant is receiving **more than his just share** or proportion

## Share of expenses

* NO claim made by co-owner in possession for expenses.
* If you claim expenses, you have to pay occupational rent.
* Note: in separation, husband leaves and wife stays. Should he charge occupational rent? No. Balance your options!
* Improvements to property: Value increased. No claim unless there is a sale or partition, at which time there can be an accounting over. If you spend $20K on new roof, you have **no right to demand money now**. You have to wait until it is sold!
* *Property Law Act*, ss.13-14: RO may petition court for payments from absentee or RO co-owner in default for their proportionate share of purchase money, mortgage money, repairs, or other expenses.

## Termination of Co-ownership

Common intention of parties: agreement between themselves.

Destruction of one of the unities: usually by alienation of one party – with or without consent, but also through bankruptcy, or order of partition and sale.

Course of dealings which precludes one party from asserting that there was no agreement: no express agreement, but courts can look at **behavior** as indication of severance.

## Severance of Joint Tenancy

* Severance can take place during the lifetimes of the joint tenants
	+ By unilateral act by one of the joint tenants
	+ By joint agreement
	+ By operation of statute (family law context)
* Results in a tenancy in common

### How to get out of joint –tenancy: must create a tenancy in common by issuing share before death takes over and the rights of survivorship occur.

* + - most often joint tenant wants to create a tenancy in common
		- u have to do it before one of the parties die – b/c use acresendi –“
		- a will does not severe a joint tenancy – b/c right of survivorship happens first
		- occurs in *Sorrenson v Sorrenson*

#### Sorenson v Sorenson - wife severed the joint tenancy held with ex husband by giving her share to her disabled son = “I hereby give my share to my son” 🡪 got rid of rights of survivorship

* + okay transfers:
		- pavlich gives transfer deed to another – that will severe his joint tenancy – total rupture of the unity of title and time
		- 4 unities: title, time, possession \_\_\_\_
	+ FACTS
		- several props owned by husband and wife as joint tenants
		- had several children: girls and disabled boy
		- they divorced
		- during divorce they were worried that children would be accounted for in prop
		- separation agreement: in respect to the matrimonial home – wife would occupy it under a lease for her life (lease for life) and she would pay one dollar a year
		- there is an agreed split in possession but there is still a coownership with regard to reversion – they would both get it after the lease
		- ***question – does this severe joint tenancy and create a tenancy in common***
		- she got cancer and started off partison proceedings (which were never executed b/c she died)
		- she created a trust deed – she made herself the trustee and boy the beneficiary
		- she has legal title and so does husband, but she transferred equitable title to son
		- issue is this a severance of her interest?
		- TJ says a severance has not occurred – there is not an actual transfer
		- **in** her will she left her share to her son
		- **will: this was too late – b/c the use acrescendi has already occurred**
		- CA court looks at lease: we know a lease is a transfer – the proponderous is that lease not severing – the court does not think the lease is enough to severe the reversion –
		- court says the balance of authorities does not allow the lease to severe
		- partision – they continued to sit there as co-owners
		- CA – she actually took steps and made sure no evidential issues here: I hereby transfer the equitable estate to my son
		- the CA says this was an effective severence – so now these were held by tenancy in common not joint tenants – and the right of survivorship was gone – unity of tile severed- u only have unity of possession left
		- **b/c** the son has equitable title – he could apply to the trustee and then court to transfer the legal estate to him
* **hus**band and wife should buy their property as tenancy in common b/c that way when one spouse dies the other will get it in full and not need to worry bout kids challenging to get part of partner

# The Fee Simple, Fee Tail and Life Estate – Ch.9 and 10

* **2 questions** to ask
* 1. Who: “words of purchase” (“substitution”) /acquirer is the latin translation
* 2. What: words of “limitation”: what is the nature of the interest being given ie what is the “quantity of the interest”

## Creation of the Fee Simple

The Creation of the Fee Simple 9.1 – 9.21

**In Past:**

* Used to have to use the correct form of words when creating an ***inter vivos*** transfer (creating a will): **to the transferee “and his/her heirs”**

A has fee simple in Blackacre and wants to transfer to B

From A to **“B and her heirs”**, transferred

“and her heirs” = **words of limitation** – b/c they indicate the quantum of the interest B gets, and do not confer any interest at all on B’s heirs

“to B” = **words of purchase** – b/c they indicate the person or persons to whom the interest is transferred (a gift of land would also make B a purchaser)

if the transferor did not use the correct formula, ex “to A” or ”to A in fee simple” then A would only get a life estate

Strict form of transfer wording was also required for creating “equitable interests” ex. *inter vivos* trust 🡪 but if not used Court of Equity could interpret doc to give effect to the intention of the grantor

 **Today**

#### S.19 Property Law Act fixes problem of strict wording

s.19(1)words “in fee simple” OK, don’t need “and his heirs”

####  s.19(2) default interest is the F/S or greatest interest the grantor has

* greatest estate or interest in land transferor has power to transfer is presumed to transfer unless express language used to indicate a lesser interest for transfer

fixed problem of life estates being created when fee simple was meant due to common laws strict insistence on the correct words of limitation being used.

#### S.186 LTA “Implied Covenants”, word transfer doesn’t need to appear on transfer form – its implied

#### s. 24 “Devise without words of limitation”, Wills Act: repeats s.24 don’t need to use “his heirs” to grant fee simple

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| --- |
| *Tottrup v Ottewell Estate* (1969) SCC 🡪 daughter lost b/c Frank meant words of limitation not purchase 🡪 the words “and his heirs” are now held to be words of limitation” 🡪 a term of art used only  |
| **Facts**large family of siblings the twins give the property to eachother issue is use of the word “heirs” was it meant to be a word of purchase (therefore daughter would get) or a word of limitation (therefore nobody gets but siblings due to the secession rules) * ie the siblings argued that Frank just used the words “and his heirs out of habit” and didn’t actually intend to give the estate to Fred’s heirs
* but the daughter is arguing that Frank used those words out of intention

**Result = daughter lost** *Words of limitation are no longer necessary to convey fee simple ownership, although their inclusion should not infer a separate meaning was intended. A will should always be interpreted first on the words used - if they are clear, subsequent circumstances cannot alter their meaning. Never use words that you aren’t sure of meaning.* |

**Rules of intestacy:**

* + Fred has predeceased Frank, Frank has not identified anyone but Fred – and therefore the rules of intestacy take place:
		- In pecking order:
			* + 1st pick. Descendents 🡪 ie. Children, then grandchildren
				+ 2nd. Ascendents 🡪 if no descendents goes up to ascendents 🡪 ie parents etc
				+ 3rd. Collaterals 🡪 measured in terms of degrees of closeness. First is Siblings then nieces, nephews

|  |
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| *Re Walker* (1925) BCCA –ambiguous wording not sure if life estate or fee simple, powers of encroachment look like fee simple 🡪 wife gets fee simple  |
| **Facts:**property given to wifecomment that anything indisposed of at her death should then be distributed to nephews- **issue: should this comment be given effect to or should the wife be able to choose who her heirs are 🡪 is wife getting a life estate or estate in fee simple** ie there is a contest between his named heirs and hersQuestion is who should get**- is this a life estate given to wife** (but this word is never used) – but b/c will we are told that u are allowed to look what was the intention of the testator- husband could have been giving an estate in f’/s absolute, life estate, or life estate w/ ability to encroach on capital if need be **Result:** wife gets fee simple b/c there is a restraint on her ability to transfer or alienate b/c dictates what will happen at death – she seems to have powers of encroachment therefore fee simple **Cases can fall into one of 3 classes** (***Re Walker***): 1) gift to person named first **prevails** and **gift over is repugnant**; 2) the first person **take a life estate** only and so the **gift over prevails** OR 3) all that is **given to the first taker is a life estate**, but the **LE holder is given power of encroachment which may be exercised** at any time during the currency of the estate.One cannot bestow a full **gift of EIFS** and then **qualify it** because it is **REPUGNANT** to the gift. Court will not accept limits on alienation of estates in fee simple **. *Re Walker(****husband leaves property to wife in* ***will giving her an EIFS with qualification****: “should any portion of estate remain indisposed and in hands of my wife when she dies,* ***such a remainder will be divided as follows...****court held that the qualification was repugnant to the gift and struck it out)...Gift of EIFS made first...gift over subsequent* |

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

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| *Re Shamas* (1967) BCCA – widow gets life estate b/c restraints on alienation |
| “I give all I below to my wife” … but then qualifies “I want her to pay my debts, raise family etc” “all to my wife till last child 21” “if she remarries gets a share like children”he puts restraints on alienataionshe gets life estate with right to encroach |

|  |
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| *Cielein v Tressider* (1987) BCCA - second wife wins  |
| **Facts:*** property in name of deceased – who he leaves property to second wife
* - had 5 kids with first wife, one w/ second 🡪 6 kids
* - he dies and leaves everything to second wife
* -second wife wants all – fee simple
* - children says this is just a life estate: so can’t sell
* - man (Mr. Van Essen) has created his own will based on pre-package (stationer’s form will)– puts his second wife for everything
* - but there is this qualification in the will: that the house if sold will be divided between her son and my children
* - kids argue that why would he put this qualification unless he was trying to create a life estate for her

**Result**looking at will nothing to explicitly say life estate, it is just a repugnancy and will be removed |

## Creation

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

#### Intervivos Transfer

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

#### Transfers on Death

**In Absence of Will:**

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

**In Presence of Will:**

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

**Equitable Interests**

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

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

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

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

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

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

#### Doctrine of Lapse:

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

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

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

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

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

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

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

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

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

**Facts:** *testator left his* ***estate to wife and 8 kids****, but* ***needed family business to keep running******so wife could support kids****; will states that “everything goes to the wife until their last kid turns 21. If my wife marries again she should have her share like the other kids. If not she shall keep the whole thing and see that every kid gets his share when she dies”; wife works in business under the assumption everything is hers. Kids seek direction on what interests are theirs and what interests are the widows*

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

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

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

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

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

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

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

## Words formerly creating a Fee tail

### Common Law/Statute

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# The Life Estate

## Creation

### By Act of the Parties

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

### By Statute

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

**Statute**

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

## RIGHTS OF A LIFE TENANT

### Occupation, Use, and Profits

* Entitled to **occupy** and **use** the property to **retain any profits** arising from its exploitation
* **Possessory, freehold interest** (like fee simple) actual **possession &management** of property
* **Can’t do anything that exceeds nemo dat**
* Right to remove fixtures during lifetime of LE holder or on death of LE holder. Chattels fixed to land (and become fixtures) can be removed by LE holder.

### Transfer Inter Vivos

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

### Devolution on Death

* If LE is tied to another person’s life, if the holder dies and person whose life its tied to is still alive, you can grant the interest by will; the heirs can **only** enjoy it for the **duration of the measuring life though**

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

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

### Waste

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

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

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

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

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

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

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

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

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

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

### Liability for Taxes, Insurance, etc.

* LT is obligated to pay taxes on property

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

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

#  Conditional and Determinable Interests

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

1. By making the interest subject to **condition precedent🡪TRIGGERS INTEREST [need to meet condition]** **“To A in FS if, when I die, A is not married to B”**
2. Attaching a **condition subsequent** to the interest **[get it but not absolutely, if you breach condition you get it taken away]** **“To A in fee simple but if A marries B, to C in FS”**
* “to A **(word purchase**) in fee simple (**word of limitation**), but if **(condition**) A marries B, to C **(word of purchase)** in fee simple **(words of limitation)”** A does not get an EISF absolute, but a conditional EIFS – condition subsequent terminates A’s interest & triggers C

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

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

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

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

* If C alive interest = fully vested. If C not alive when interest is given, then C’s interest is only an interest in land if C can it vests interest within the perpetuity period
1. By creating a **determinable limitation**: **“To A in fee simple until A marries B”**

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

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

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

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

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

## CROWN GRANTS

***Land Act***

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

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

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

## UNCERTAINTY

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

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

## Valid v Invalid Conditions

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

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

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

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

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

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

## 3 cases on contingencies

#### Messenger case:

* + Dealing with the qualification of “residing”
	+ Interest left to a former wife but she had to reside in the city of Vancouver, she didn’t want to be struck with the conditions
	+ Court said condition was too vague and struck it out –
		- Court said it was a #3 condition subsequent 🡪 which indicates that they wanted to give wife an absolute life estate without qualificaton
		- Pavlich is confused by judgement b/c they use the word “while” which is actually a #2 determinable interest and therefore the wife would not have got anything b/c the whole thing would have been emploaded

#### Re Allan Case - the court does not want to frustrate the interest of grantor or grantee – certainty for inherent in religion more relaxed when looking at condition precedent

* - condition subsequent is that u had to be an inherent of the Anglican Church
* - the court does not want to frustrate the interest of grantor or grantee
* - court said test for certainty for inherit of a religious – is more relaxed when looking at a condition precedent
	+ court says u have to look at individual
	+ when condition subsequent the test for certainty is more relaxed ? check this
	+ Court says it is more evidential uncertainty not conceptual uncertainty

#### Re Tuck Settlement Trust case – jewish guy wanted prop to go to kids if remained jew & married jew 🡪 ok to discriminate provided give mechanism for providing certainty of ex. what is jew (third party empire)

* + A way to get around things
	+ Guy wanted to have property go to children but only if they remained a jew
	+ Corut said this was ok as long as provided certainty around what is a jew.
	+ **Guy** selected “a third party umpire” to determine whether was sufficiently jew 🡪 court ok with this