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# Aboriginal Title (ch 3)

### Delgamuuk v British Columbia – 1997 SCC

**F:** In 1984, 35 Gitxsan and 13 Wet’suwet’en Hereditary Chiefs initiated proceedings against BC. They claimed, both individually and on behalf of their respective houses, ownership (unextinguished AT) and resulting jurisdiction (entitlement to govern by Aboriginal laws) over separate portions of territory in northwest BC. The plaintiffs acknowledged the Crown’s underlying title to these lands, but asserted that their claims constituted a burden upon that title. In the alternative, the plaintiffs claimed ARs to use the territory. Compensation was also sought for lost lands and resources. BC counterclaimed, arguing that the plaintiffs had no right or interest in the land, and that their compensation claim should be against Canada.

**A** (**features** of AT): they are ***suis generis*** and cannot be fully explained by reference to either CL rules of real property or property rules of Aboriginal legal systems

(1) Inalienable: (a) Lands held pursuant to AT may be **surrendered only to the Crown** (b) This does not mean, however, that AT is a non-proprietary interest that amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests

(2) Source, AT arises from (a) The prior occupation of Canada by Aboriginal peoples prior to the *Royal Proclamation, 1763* and under CL principles, the physical fact of occupation is proof of possession in law, and (b) the relationship between pre-existing systems of Aboriginal law and common law

(3) Communal nature: AT is a collective right to land held by all members of an Aboriginal nation

**A** (**content** of AT): Right to exclusive use and occupation, for various purposes. BC restricted AT to the right to use the land for activities arising out of practices or traditions integral to the distinctive culture of the group claiming the title. Lamer J. rejected citing (a) the case law is clear that AT is not restricted in this way (b) The legal principles governing Aboriginal interest in reserve lands and lands held pursuant to AT are the same, and under the *Indian Act*, the uses to which reserve lands can be put are very broad, and (c) the *Indian Oil and Gas Act* presumed that aboriginal interests in land include mineral rights, which are included in AT so land held pursuant to AT should be capable of the same forms of non-traditional exploitation.

**A (content** of AT, **restrictions**): These limits reflect the ***suis generis***nature of AT.

(1) Lands held pursuant to AT cannot be put to uses that are irreconcilable with the nature of the occupation of the land and the relationship of an Aboriginal group to its land. This is because prior occupation is the source of AT; therefore, the law seeks to determine historic rights and afford legal protection to prior occupation in the present day, in recognition of the importance of the continuity of the relationship of an Aboriginal community to its land over time. That continuity of the relationship must be protected into the future (e.g. an Aboriginal group that claims AT for lands occupied as hunting grounds cannot destroy its value for hunting).

(2) Inalienability of AT reflects that (a) the land in question is *more than a commodity*, it holds inherent value to that Aboriginal group and cannot be put to uses which would destroy that value. As such, (b) alienation of the land would terminate the entitlement to occupy the land and any special relationship with it

(3) Nevertheless, AT is not restricted to traditional activities. They may be put to a full range of uses subject to the overarching limit under “(1)” due to the special nature of the AT.

(4) If Aboriginal peoples wish to use the land for a manner incompatible with AT (see (1)), they may do so if they surrender the land and convert them into non-title lands.

**Test:**

**(1) Pre-sovereignty occupation** (time: prior to when Crown asserted sovereignty)—this time period is used because (a) AT is a burden on the Crown’s underlying title, which was gained only upon the Crown’s assertion of sovereignty so AT was crystallized at that time, (b) under the CL, the physical fact of occupation/possession suffices to ground AT without proof that the land was integral to the Aboriginal society pre-contact, (c) the date of sovereignty is easier to determine than date of contact. This occupation must be established (d) using both the CL and Aboriginal perspective on land. (i) CL perspective is implicated by the fact that physical occupation proves legal possession and grounds title. That occupation can be proven through construction, cultivation, and/or resource exploitation by the claiming group, taking into account that group’s size, manner of life, resources, and technological capacity to determine whether it was sufficient occupation.

**(2) Continuity between present and pre-sovereignty occupation**, if present occupation is relied on as proof of occupation pre-sovereignty. This requirement (a) recognizes the potential scarcity of conclusive evidence of pre-sovereignty occupation, allowing groups to show present occupation and continuity, (b) continuity need not be absolute, substantial maintenance of the connection to the land is sufficient, and (c) if substantial connection has been maintained, alterations in the nature of occupation b/w sovereignty to present will not bar the claim.

&(**3) exclusive occupation at sovereignty –** this also requires reference to both CL and Aboriginal perspectives so that (a) the CL principle of exclusivity linked to fee simple ownership must consider (b) the context of the Aboriginal society at sovereignty so that (c) exclusive occupation may still be demonstrated if other nations were present or frequented the land claimed. This allows (d) the possibility of joint title between 2+ nations where 2+ groups shared a particular piece of land, recognizing each other’s entitlement at the exclusion of others; however, (e) even if non-exclusive occupation cannot be established, site-specific Aboriginal rights (ARs) short of AT may be available where numerous groups shared land, not at the exclusion of others.

Why would they want AT? (*suis generis*)

**Title** = inalienable **fee simple** (ownership) – bundle of rights, or right to exclusive use and occupation in order to engage in aboriginal rights. It would allow a FN the right to use land for a variety of activities, not all of which must be practices, customs or traditions integral to their culture—this introduces a **proprietary element**. They are **greater rights** than AR under *VDP* test but they do have an inherent limit, which is that they cannot be put to a use which is irreconcilable with the aboriginal attachment to the land. That inherent limit is one way that AT is distinct from fee simple (*suis generis*). The title must be understood from both a CL and an aboriginal perspective.

Recall, two important elements (1) AT is the right to **exclusive use and occupation** of the land held pursuant to that title for a **variety of purposes**, (2) none of which can be irreconcilable with the nature of the group’s attachment to the land.

**Critique**: If the basis upon which AT is established is the possession prior to sovereignty, why does AT crystallize at the time of British sovereignty?

Inalienability

Land remains alienable but only to the Crown. The inherent limit facilitates surrender to the Crown. So for a FN to use land in a way irreconcilable with the nature of their attachment, they must surrender the land and convert them into non-title lands, generally through the treaty process.

Held communally

This is based on the Aboriginal perspective and the CL (*Royal Proclamation; Indian Act*).

### William v British Columbia – 2012 BCCA

**F**: The Provincial gov’t granted a forest licence and cutting permit to log traditional Tsilhqot’in Nation (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 Xeni Gwet’in First Nations, Williams, brought the claim along with four other bands of the TN.

**I**: Does TN have AT over the entire CA?

**D**: No, but they do have ARs.

**P/H**: Trial J app’d the *Delgamuukw* test for proof of exclusive occupation at the time of sovereignty. He also app’d *Marshall* to say that AT is not co-existence in traditional territory and that occasional entry and use of land is insufficient for AT. He found that some smaller areas could have supported a claim or AT but made no such declaration b/c P’s pleadings were for all-or-nothing over entire CA. He still found ARs for trapping and hunting and to trade in skins and pelts “as a means of securing a moderate livelihood” and to capture/use horses for work and transportation. He found that the forestry activities in the CA unjustifiably infringed those ARs.

**A**: Court applied three *Delgamuukw* criteria ((a) land occupied prior to sovereignty, (b) if present occupation is used to support that claim, there must be continuity between past and present occupation, and (c) occupation must be exclusive at sovereignty) as well as the suggestions that the land need to be (d) of central significance to their distinctive culture and (e) an area that was occupied intensively. The CA also app’d *Marshall* where (f) the claimant must show possession similar to that of CL title, meaning exclusive possession shown by intention and capacity to control the lands.

**R**: Territorial claims for AT will not succeed. AT claims must be supported by a definitive tract of land, consistent with the SCC’s decisions in *Delgamuukw* and *Marshall*. Territorial claims will never succeed because they are antithetical to the goal of reconciliation which demands that the traditional rights of FN be fully respected without placing unnecessary limitations on the sovereignty of the Crown and the aspirations of all CDNs, Aboriginal or non-Aboriginal.

**R2**: Where traditional use and occupation of land is less intensive, ARs may be sufficient to preserve a group’s traditional activities, lifestyle, and culture.

### Mitchell v MNR – 2001 SCC

**F**: Grand Chief Mitchell (M) was charged with violating the *Canada Customs Act.* M claimed that the Mohawks of Akwesasne had an aboriginal right to convey goods across an int’l boundary for the purposes of trade.

**I**: Is the right to convey goods across int’l boundaries for the purposes of trade an aboriginal right within the scope of s. 35(1)?

Background:

Aboriginal peoples occupied and used vast expanses of land in organized, distinctive societies with their own social and political structures prior to European contact. English law accepted that the Aboriginal peoples possessed pre-existing laws and interests and recognized their continuance in the absence of extinguishment by cession, conquest, or legislation in the *Royal Proclamation, 1763 (Sparrow)*. The Crown asserted sovereignty and ownership on the underlying title, but out of that assertion arose an obligation to treat aboriginal peoples fairly and honourably, in a fiduciary relationship (*Guerin)*.

European settlement did not terminate aboriginal interests, they survived the assertion of sovereignty though the absorption into the CL as rights, unless (1) they were incompatible with the Crown’s assertion of sovereignty, (2) they were voluntarily surrendered via the treaty process, or (3) the government extinguished them. At CL, Aboriginal rights were therefore vulnerable to unilateral extinguishment (*St Catherine’s Milling*) until 1982 when they were entrenched in the *Constitution Act, 1982*. The existing CL aboriginal rights as well as those beyond the CL could not be unilaterally abrogated by the government without justification, which was usually a compelling public objective (*Gladstone*).

In *Van der Peet*, affirmed those principles and set out a test for establishing an AR. Given that s. 35(1) seeks to reconcile prior occupation and the assertion of Crown sovereignty, the test focuses on identifying the integral, defining features of those societies. The aboriginal group must prove a modern practice, tradition or custom that has a reasonable degree of continuity with practices pre-dating contact. It must be a practice, tradition or custom integral to the distinctive culture, laying at the core of the peoples’ identity so that the culture would be fundamentally altered without it. It must be of central significance, truly making the society what it was (*Van der Peet*). This excludes only marginal or incidental customs. Once an AR is established in this manner, it must be determined whether the act which gave rise to the case was an expression of the right. The rights are not frozen in time and may find modern expression.

**A (characterize the right—step 1)**: First characterize the right claimed. The characterization should be based on (1) the nature of the action done pursuant to the claimed AR, (2) the nature of the leg’n which infringes that right, and (3) the ancestral traditions and practices relied upon to establish the right. It shouldn’t be too narrow to risk excluding valid claims nor to broad to obscure the specific cultural and historical value. It was characterized as the right to bring goods across the Canada-US border at the St. Lawrence River for the purpose of trade.

**A** (admissibility of evidence): Aboriginal oral histories are useful because they are (1) evidence of ancestral practices and (2) they may provide the aboriginal perspective. They should not be dismissed simply because they contain elements that may be classified as mythology, etc. They may also provide reliable representations of a people’s history outside of Eurocentric traditions and views. However, the trial judge, upon hearing the evidence, is found to be best situated in determining the weight ascribed to those sources. Trial judges are given significant discretion and should do so in a way that is conscious of the special nature of aboriginal claims and the meaningful protection of s. 35(1); it would be hollow recognition of the aboriginal perspective to admit oral histories and then systematically undervalue or deprive them of any independent weight (*Delgamuukw*). The *suis generis* nature of AR require this approach but also require that the accommodation be done in a manner which does not strain the “Canadian legal and constitutional structure” (*Delgamuukw, VDP*).

**R**: The court has a duty to admit useful and relevant aboriginal oral histories in order to incorporate the aboriginal perspective. They must do so in a way that is mindful of the special nature and meaningful protections under s. 35(1). The trial J may weigh the evidence and must do so in a way that does not strain the Canadian legal structure but which provides equal and due treatment to aboriginal perspectives. The rules of evidence should not stand in the way of justice.

**R2**: An AR is more than an incidental practice of a First Nations. It must be lay at the core of their identity, without which they would not be the same (*VDP*). The right to bring goods across the St Lawrence River for the purposes of trade was incompatible with Canadian sovereignty and did not evidence to support its establishment through the *VDP* test (existence of an ancestral practice, integral nature of practice, and reasonable continuity).

### R v Marshall – 2005 SCC

**F**: Marshall, 35 Mi’kmaq were charged with cutting timber on Crown land in NS without authorization, contrary to *s. 29* of the *Crown Lands Act*. The accused argued that authorization to log was unnecessary because the Mi’kmaq have a right to harvest timber on Crown land for commercial purposes pursuant to treaty or AT.

**I**: Do Mi’kmaq people of Nova Scotia have the right to log on Crown lands for commercial purposes pursuant to AT?

**P/H**: The trial court entered convictions, set aside at CA, new trial ordered. The Crown appeal and M cross-appealed. (This case allowed the appeal and dismissed the cross, restoring the convictions).

**D**: The claim for aboriginal title in the relevant areas could not be established under CL. There was insufficient evidence of regular and exclusive use of cutting sites at the time of the assertion of sovereignty.

**Note:** In this case, they sought AT rather than AR because the test is less burdensome to meet.

**A** (**AT**): AT is an AR established by Aboriginal practices demonstrating exclusive use and occupation similar to that associated with title under the CL. Whether possession is sufficient to ground title will depend on the nature of the land and the manner in which it was enjoyed. It will require exclusive **pre-sovereignty occupation** (i.e. physical occupation established through construction of dwellings through cultivation, enclosure of fields, definite tracts of land for hunting, fishing, or otherwise exploiting its resources; occupation should be generously interpreted taking into account the perspective of the Aboriginal group and the CL). **Exclusivity** is necessary because of the nature of AT (which is exclusive use and occupation) and the concept of title to land under the CL. It can be established if the claiming nation had the **intention and capacity to retain exclusive control** over the land, notwithstanding occasional acts of trespass or the presence of other groups with consent of the claiming group.

**A (AT🡪AR**): Exclusive occupation does not require proof of acts of exclusion but effective control of an area by one group will lead to an inference of exclusion. If exclusive occupation cannot be established, ARs may be established. For instance, if hunting or fishing on a piece of land was **seasonal** and was not sufficient regular and exclusive, there may be ARs with respect to that particular area. For **nomadic** or semi-nomadic nations, they will not succeed in a claim of AT unless they can show a degree of physical occupation or use **equivalent to CL title**. If they can only show low-intensity uses, they will likely get AR, not AT. The ultimate goal is to translate pre-sovereignty aboriginal rights to modern CL sovereignty. It should not be narrow and formalistic but should give a generous view of the practice. The practice must correspond to the core concepts of the legal rights claimed.

The case sets up three types of ARs: (1) ARs like those in VDP, meaning practices, customs and traditions integral to the culture where the occupation and use of the land where the activity is taking place is insufficient to support a claim for title. (2) Activities which out of necessity take place on land and indeed may be intimately related to a particular piece of land. Even if the FN cannot establish title to the land, they will have site specific ARs (based on VDP test. (3) AT which is a right to the land itself.

The result is that ARs have a pre-contact time-frame (1500) and AT is a pre-sovereignty (1846) time-frame so the evidentiary standard req’d by VPD for rights is less than that of AT.

**A (aboriginal perspective):** The Honour of the Crown requires that both CL and Aboriginal perspectives are considered in assessing a claim for AT. They must show continuity with the group from which they have descended which exercised those practices which the claiming groups relies on for their right. Oral history is admissible so long as it conforms to standards of usefulness and reasonable reliability.

**R:**  In order to establish AT, the claiming nation must demonstrate possession similar to that associated with title at common law, and exclusive possession in the sense of the Aboriginal group’s intention and capacity to control the lands. Possession is typically established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources. The requirement of physical occupation must be generously interpreted, taking into account both the Aboriginal perspective and the perspective of the common law. Continuity demonstrating the Aboriginal group’s descent from pre-sovereignty and the Aboriginal right into a modern common law right is also required.

**R2**: The line separating sufficient and insufficient occupation to establish AT is the line between irregular use of undefined lands on the one hand and the regular use of defined land on the other.

**R3**: If a nation cannot establish exclusive pre-sovereignty occupation, they may still have ARs but they do not have AT which is exclusive use and occupation.

# Registration of Title (ch 5)

## Common Law Conveyancing

To establish a “good root of title”, an abstract has to be prepared. It’s expensive and the work must be done each time there is a transfer. It also requires considerable delays. Further, legal title was established through deeds which had to be physically held by those with legal title, increasing their vulnerability to theft, loss, or fire. The purchaser of a CL conveyance would take subject to all legal interests except when there was an equitable interest and they were not given notice of the interest (*bona fide purchaser or value*).

## Recording System

This involves public record offices where one could go to prepare the abstract. By statute, if not recorded, some interests would not be given effect. Still applies in the Maritimes and parts of ON.

## The Torrens System

This exists in Western Canada, the territories and part of ON. Registration is compulsory. Once a fee simple interest is registered, it is conclusive evidence of ownership of the interest. If the Registrar (R) is satisfied by the documents of the applicant (shows a good title), the title is registered in the Register of Absolute Fees, where 7 years are allowed for it to be challenged. The applicant could also apply for cert of indefeasible title (IT)

## The general pattern of registration: what can be registered?

### R v Kessler – 1961 BC Mag. Ct

**F**: Zoning and development bylaw No. 3575 affects the use of land.

**I**: Do zoning bylaws need to be registered in the land registry office to restrict the use of subsequent purchasers?

**D**: No.

**A**: K argued that actual notice of the bylaw (through registration) was necessary to affect/restrict his use of land. The Ct found that the R would refuse to register a bylaw because he/she only registers instruments which convey an interest in land.

**R**: The R (Registrar) will only register instruments which convey an interest in land; nothing else needs to be registered.

## Prohibition of Registration of CL interests

(1) An equitable mortgage by deposit of a duplicate IT cannot be registered (*Land Title Act* s. 33). Their effect is sometimes dealt with by legislation and conflicting CL has arose over their effect if deposited.

(2) The particulars of a trust are also not registered—the R simply notes (trustee or “in trust”)

## Registration of non-CL interests

(i) caveats (ii) cert. of pending litigation (cpl), and (iii) judgments

## Registration of Aboriginal Title?

### Skeetchestn Indian Band v BC – 2000 BCSC

**F**: The 6 Mile Ranch is going to be heavily developed by Kamlands (1000 acres) which is a major economically important project for the area so the provincial government has facilitated the development by removing some of the lands (34 acres) from the Agricultural Land Reserve. P claims Aboriginal Title (AT) to the land.

**I**: Was the R correct in refusing to register the cpl and caveat?

**D**: No, appeal dismissed

**A**: There is an inherent conflict b/w fee simple title and AT. By statue, there are restrictions on the interests registrable and Registrar is bound by the statute—he cannot register anything which is not expressly authorized by statute. AT is *suis generis* and inalienable to third parties so it is therefore not a good safeholding and marketable title. P argued that Torrens was to give notice of all interests and that cpl would not prevent a transfer of land but *de facto* it would b/c no prudent person buys land with a *lis pendens*. R is not able to register AT an encumbrance because that requires leg’ve authority.

**R**: In order to register a caveat or *lis pendens*, they must be based on registrable interests. Aboriginal title is not a registrable interest because it is inalienable.

**R2**: The Registrar can only register interests which are authorized by statute and which demonstrate a good safeholding and marketable title.

## Registering a legal fee simple

An interests may be (i) the legal fee simple or (ii) charges

### Land Title Act s. 179 (rights of owner of surface)

(1) The owner of the surface of the land is registered as the owner of the EIFS and any owners of land above or below the surface are registered as charges (except as provided in the *Strata Property act*)

(2) The Crown can be registered as the owner of EIFS if no Crown grant on surface is registered

### Land Title Act s. 141 (subdivision of land into air parcels)

(1) EIFS owner may deposit an air space plan and obtain IT to 1+ air parcels

(2) the air space parcel can be transferred, leased, mortgaged or otherwise dealt with in the same manner as other land

### Strata Property Act s. 239 (effect of deposit of strata plan)

(2) All strata lots created by deposit of a strata plan may be disposed of in the same manner as any land the title to which is registered in the land title office

### Strata Property Act s. 244 (strata plan requirement)

(1) The strata plan must incl boundaries, sufficient description to identify the title of the land, distinguish lots by consecutive #s or letters, be endorsed by a surveyor, be endorsed by an approving officer, and be signed by the person depositing the plan and each holder of a registered charge on all or part of the land included in the strata plan

(2) Common areas must be included as part of the strata lot or part of the common property

### Initial Application

The initial application is subject to s. 169 of the *LTA.* R must be satisfied that the (a) boundaries are sufficiently defined and that (b) a good safeholding and marketable title in fee simple has been established. Under subsection 2 and 3, the R may direct that a 3rd party is served notice of the R’s intent to register unless the person registers a caveat or cpl and R will defer consideration of the application until the caveat expires/is withdrawl or the cpl is disposed of.

The requirement under s. 169(1)(a) of sufficiently defined boundaries requires a survey acceptable to the Registrar. The reference in s. 169(1)(b) to a **good safe holding and marketable title** means a title conferring possession that is safe from attack and cannot be displace and is freely alienable so that a reasonable purchaser could not refuse to take it.

There are other requirements (ss. 41 – 50) that the applicant ensures all documents are executed and attested as required and that he or she files a proper transfer tax form.

An applicant will bring the documents to the *LTO*, will pay a fee, and the application is stamped for date/time. The application is thereafter “pending” for IT. An examiner scrutinizes for a good safe holding and marketable title then makes a draft, ready for actual registration. The registration is said to be effective from the date/time of the initial application. This occurs after all information relevant to title is entered into the computerized registration system. The duplicate IT is issued to the owner after the fee simple is registered. It will not be issued if there is an agreement for sale or a registered mortgage.

### Transfer inter vivos

Part 12 of *LTA* sets out a process for registration essentially the same as above and requires the production of the duplicate IT (if it has been issued). The Registrar must be satisfied by sufficient description of land and good safe holding and marketable title.

### Transmission on death

Part 17 of the *LTA* deals with this. Title goes to a personal representative (i.e. executor or administrator) who holds property in trust for those entitled under a will or on intestacy. On completion of the administration of the estate, it will be transferred to beneficiares (*Estate Administration Act* ss. 77 – 79).

## Registering Charges

### Land Title Act s. 1 (definitions)

Charges are estates or interests in land less than fee simple, including encumbrances. Encumbrances include: judgments, mortgages, liens, Crown debt, or other claim to or on land... whether voluntary or involuntary

### Land Title Act s. 197 (registration of charges)

(1) R must register a charge if satisfied the applicant is entitled to that charge

(2) R may refuse if (a) a good safe holding and marketable title has not been established by the applicant; or (b) the charge is not an estate or interest in land registrable under the Act

### Land Title Act various sections regarding caveats

**287** (registered at the time of receipt), **282** (may be lodged by any person who claims to be entitled to an interest in registered land; the lapse in 2 months), **291** (one further caveat can be lodged after the 1st is withdrawn), **293(2)** (w/drawl times does not apply to caveats lodged by the R), **284** (SC can prohibit dealing w/ specified land as it sees fit—dealt with the same as a caveat, **31** (a caveat, once the claim to which it relates is established, gives the caveator priority in its claim over all those made after the date of the lodging of the caveat).

### Land Title Act s. 288 (effect of caveat)

(1) While caveat remains in force, R may not (a) register another instrument affecting the land described in the caveat; or (b) deposit a plan or allow any change in boundaries affecting the land

(2) An instrument expressed as subject to the claim of a caveator may be registered unless the claim of the caveator would destroy the root of the title of the person against whose title the caveat has been lodged.

### Land Title Act s. 215 (certificates of pending litigation (cpl))

(1) Registered in the same way as a charge by any party to the proceedings who is (a) claiming an interest or estate in land, or (b) given by another enactment in a right of action in respect of land

(2) Land must be described satisfactory

(3) R must mail a copy of the cpl to the owner of the title

(5) a person who has commenced an action to enforce a restrictive covenant that they are entitled to enforce, they may register a cpl

(6) a party to a divorce, etc. may register a cpl

(7) a person who has commenced an action under the wills variation act may register a cpl

(8) judgment creditor may register a cpl

### Land Title Act s. 216 (effect of registered cpl)

(1) After cpl is registered, R must not make an entry that affect the land until the cpl is cancelled

(2) Subsection (1) does not apply to lodging a caveat or the registration of: (a) IT or charge if instrument is expressed as subject to the final outcome of the proceedings, (b) elects in writing to be subject to the outcome, (d) assignment of a charge if registered before cpl is registered, (e) sublease if lease from which it was derived was registered prior to the registration of the cpl, (f) involuntary charges such as orders, judgments, etc.

### Land Title Act s. 217 (effect of cpl if prior application is pending)

(1) R may complete registration of an IT or charge if applied for prior to the application for the cpl

(2) (a) If a prior applicant is a party to the proceedings, IT or charge is registered subject to cpl; (b) if one of the following, R must register IT or charge subject to the cpl whether or not the prior applicant was a party to the proceedings (i) charge or enforcing/cancelling/foreclosing a reg’d charge, (ii) s. 215(6)—family relations act, (iii) s. 215 (7)—wva

### Land Title Act s. 31 (priority of cpl)

If the claim to which the cpl relates is eventually established, the person who registered the cpl is entitled to claim priority over any filing made after the date of registration of the cpl.

### Court Order Enforcement Act s. 86 (registration of judgments)

(3) Registering a judgment forms a lien or charge on the land of the judgment debtor (a) to the extent of the debtor’s beneficial interest, (b) if debtor is beneficiary of a trust, to the extent of that interest, (c) subject to the rights of a *bona fide* purchaser for value who registered an instrument prior to the registration of a judgment

## Role of the Registrar

If approved by R, the applicant gets all of the advantages of registration. If rejected, they may appeal (ss. 308 – 14) or reshape their application. R may make corrections under ss. 382 (1)(c) and 383

### Re: Land Registry Act, Re Evans Application – 1960 BCSC

**P/H:** A petition to review a decision by R

**F:** X owned lot 14. In 1886 he transferred 26 feet (the eastern portion) to Y and 40 feet more or less to Z (western portion). Lot 14 never had stated dimensions but was expressed as 66 feet wide, more or less. Z eventually sold and along the line, Mr and Mrs Evans became the registered owners. P (Mrs Evans) applied to have it registered in her name alone after her husband died, as the surviving joint owner. R refused b/c he was not satisfied that it was a good, safe-holding and marketable title given the ambiguity of the dimensions. He wanted P to get a survey. She took him to court instead...

**I**: Should R be compelled to register the land?

**A**: Safe holding means perfectly good so that the owner cannot be disturbed in his or her possession or full enjoyment. Marketable means that it can be forced upon an unwilling purchaser. R has a duty to satisfy himself of a good safe holding and marketable title prior to registration and if there was a past error in the registration, he is obliged not to perpetuate that error. S. 255 gave R the power to correct errors (now 382, 383) in the register or in an instrument. In this case, R did not want to cut down the interest, simply to clarify the description of the land.

**R**: R’s role is not simply clerical or administrative, it is also judicial.

**R2:** The R has a duty to refuse to register an interest if s/he is not satisfied that there is a good safe-holding and marketable title. That duty remains when a pre-existing error prevents a new, innocent party from successfully registering.

### Re Land Registry Act and Shaw – 1915 BCCA

**F:** Son (petitioner) has power of attornery for his father. S app’d to register an assignment of a mortgage from his father to himself. Registrar refused to register the assignment until notified by father.

**P/H**: At trial, Registrar was ordered to accept the registration.

**I**: May the Registrar refuse to register an interest if he or she needs more information?

**D**: Yes, appeal allowed.

**A:** The Registrar is not a mere machine for making registrations. The law requires a person w/ power of attorney to provide evidence of full disclosure, fair consideration & good faith if they are to sell and assign to themselves. If there is no proof, the presumption is against the validity of the transfer. The transaction proposed by S was of a nature as to be inevitably voidable if not approved by the assignor. In the face of the voidability of the transfer, it becomes necessary for the Registrar to inquire.

**R**: The Registrar may rqst additional info to ensure a good, safe-holding and marketable title when there is a palpable blot upon the face of the title.

### Property Law Act s. 27 (one with power of attorney cannot sell to himself or herself)

A sale/transfer/charge in favour of the attorney named in a power of attorney is not valid unless the power of attorney expressly authorizes it or the principal ratifies it.

### Heller v British Columbia (Registrar) – 1963 SCC

**F**: Mr Heller executed a deed transferring his interest to Mrs Heller—she registered it. The dup. IT (cert) was given previously to Mr Cuff—Registrar (R) erroneously assumed that it was deposited at the land office.

**P/H**: Mr H app’d to R to have his wife’s registration cancelled and his own reinstated, R refused. At trial, J ordered R to exercise his s. 388 rights to make the correction. Mrs H appealed to CA and the appeal was allowed b/c she was not fraudulent and no issue w/ the validity of the deed or its delivery. Mr H appealed to SCC.

**D**: Appeal dismissed

**I**: What is the nature of R’s power?

**A**: R’s power is discretionary. His or her duty is not to enforce the right of a party; R only has a limited power of cancellation or correction. R has no constitutional jurisdiction to adjudicate upon contested rights of parties. R registered the title issued to Mrs H which her conveyance provided for so that was not problematic; what was problematic is that R failed to have the duplicate cert of IT provided.

**R**: The R does not have the power to adjudicate or weigh the rights of parties. His or her role is discretionary but only so far as the statute permits.

### Land Title Act s. 383 (Registrar to cancel or correct instruments)

(1) If it appears to the R that (a) an instrument was issued in error or contains errors, or (b) an endorsement had been made or omitted in error, the R may, without prejudicing the rights of those who acquired in good faith and for value, (c) cancel the registration of an instrument or an endorsement or (d) correct the error.

(6) the cancellation of an instrument or endorsement is valid and effective from the date the instrument or endorsement was issued or made

## The Assurance Fund

### Land Title Act s. 296 (Remedies of person deprived of land)

(2) A claimant who:

(a) is deprived of an interest in land (i) because of the conclusiveness of the Registrar and without the Act, would have been entitled to recover the land from the present owner and (ii) where the wrongful act or fraud with respect to registration of another person has led to their ownership of the land instead of the claimant; and

(b) cannot bring an action for possession or rectification of the register because of this Act or by any other Act;

may subject to subsections 3 + 4 proceed in Ct for the recovery of damages against the person by whose fraud or wrongful act the claimant has been deprived of land.

(3) In the proceedings under subsection 2, the Minister may be joined as a nominal defendant and the Minister will have all defences available to the minister or any other person to protect the assurance fund.

(4) If the person who is liable is dead or not found in BC, the claimant may proceed in court for the recovery of damages and costs against the Minister as nominal defendant.

(5) The claimant must get a favourable judgment in a case where the Minister is a nominal defendant and must take all reasonable steps to recover from the liable person and if that is done, the Ct can provide the judgment and the Minister will have to pay out of the fund.

(8) The claimant must bring their action against the person whose fraud/wrongful act deprived them of their land and/or the minister within three years of discovering the deprivation.

### Land Title Act s. 297 (protection of purchaser in good faith and for value)

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.

### Land Title Act s. 298 (fault of Registrar)

(1)If a person sustains a loss solely/partially as a result of an omission, mistake, or misfeasance of the Registrar, they may proceed in the supreme court under s. 303 and name the Minister as a nominal defendant

(2) 3y limitation period after the loss is discovered by the claimant

### Land Title Act s. 303 (limitation of liability of assurance fund)

The assurance fund or Minister are never liable for loss, damage or deprivation:

(a) occasioned to or suffered by (i) the owner of undersurface rights, or an equitable mortgagee by deposit of dup. cert. of IT or

(b) occasioned by (i) breach by the registered owner of a trust, (ii) land being included under an IT w/ a misdescription of boundaries, (iii) improper use of seal by a corporation or an authorized signatory who exceeds her authority, (iv) the dissolution of a corporation or its lack of capacity to hold/dispose of land, or...

(c) land in question was incl. in 2+ Crown grants

(d) an error or shortage in an area of a lot/block/subdivision/air space parcel according to a plan deposited at the LTO

(e) the plaintiff was served with notice or had knowledge that the Registrar or a person under the Registrar’s direction was about to commit the act through which the plaintiff suffered damages unless they took and maintained the proper proceedings to prevent the act

(f) in respect of the portion of loss caused or contributed to by the act, neglect, or default of the plaintiff

(g) if the loss arises out of a matter in respect of which the Registrar was not req’d to inquire or

(h) occasioned by an act or omission of the gov’t in relation to s. 250 of the *Strata Property Act*

### McCaig et al v Reys et al – 1978 BCCA

**F**: Fairwest sold land (x) by an agreement for sale to South Transport (ST). ST sold x as a sub-agreement for sale to Reys; this sale included an option to purchase 24 acres of land which would be open until March 31/76. McCaig was a principal shareholder of ST and wanted to register; Fairwest would not allow it with the outstanding moneys. In 1969 Reys sells the sub-agreement for sale to Rutland, informing them of the option, which the principal officer, Jerome (J) says he will honour; the agreement itself makes no reference to the unregistered option. In 1971, ST assigned its interest in the option to McCaig. After the prior agreement and sub-agreement had been released from the title and the interest of ST had been expunged via quitclaim deed (ST was unaware of the option). In 1972, Rutland sold to Jabin; the transaction extinguished any rights McCaig or his company could have against the land pursuant to the option. Jabin took title *bona fide* and for value without notice of McCaig’s option. Prior to the registration of Jabin’s interest, new counsel for Rutland equivocated on FW’s question regarding the option when getting the quitclaim deed.

**P/H**: Appeal by AG of BC for award against Assurance Fund—allowed; appeal by Rutland for finding of fraud and award of damages to McCaig—appeal dismissed.

**A (claim against assurance fund)**: McCaig could not claim against the assurance fund b/c of a longstanding equitable rule: the protection of the *bona fide* purchaser for value without notice. Even without the statute, McCaig would have been deprived of his interest because the interest of the *bona fide* purchaser for value without notice is unassailable.

**A (claim against Rutland for breach of K and fraud)**: Rutland clearly knew of the option and carried out deception to conceal it from Jabin.

**R**: An aggrieved party may only claim against the Assurance Fund if they suffered their loss *as a result* of the operation of the statute.

### Royal Bank of Canada v BC (AG) – 1979 BCSC

**F**: Walsh deposited his duplicate cert of IT w/ P for present and future loans. W got a mortgage from the Bank of Nova Scotia. The clerk at the Land Registry Office wrote that the dup cert of IT could not be found, as if the dup cert was on file but simply could not be located. P cont’d to advance $$ to W as a loan.

**COA**: P claims against the Assurance Fund for the loans made after the Bank of Nova Scotia mortgage was registered.

**I**: Can the holder of an equitable mortgage by deposit of dup. cert. of IT claim against the assurance fund?

**D**: No, decision for D.

**A**: Equitable mortgages are inherently risky and they allow the holder of a mortgage not to pay fees into the assurance fund; this should be discouraged and the holder of an equitable mortgage should not be able to recover.

**R**: A holder of an equitable mortgage may not claim under the assurance fund.

# Registration (ch 6)

Most applications to register lead to registration without major difficulties. Others may be halted by the lodging of a caveat or filing of a cert. of pending litigation (cpl).

## Registering a Fee Simple

### Land Title Act s. 23(2) (effect of IT)\*\*

(2) An IT is conclusive evidence in law and equity as against The Crown and all other persons, and is evidence that the person named on the title is entitled to an EIFS in the land described on the IT, subject to:

(a) reservations of the Crown

(b) a federal or provincial tax

(c) a municipal charge

\*\*(d) a lease not exceeding 3 years if there is actual occupation under the lease

(e) a highway or public right of way or other public easement

(f) a right of expropriation or escheat under an Act

(g) a caveat, builder’s lien, judgment, reservation, right of entry, etc., or other matter noted or endorsed on the title or that may be noted after the date of the registration,

(h) the right of a person to show that some/all of the land was incorrectly included in the title due to an improper description of boundaries,

(i) the right of a person deprived of land to show fraud in which the registered owner participated in any degree.

### Land Title Act s. 50 (Crown reservations)

(1) A disposition by the Crown

(a) reserves the following interests

(i) the right to resume any part of land up to 1/20th of the whole of the land which is deemed necessary for roads, public works, etc.

(ii) right to enter the land and get out geothermal resources, minerals, coal, petroleum, gas or gases, etc. found under the land and use and enjoy any and every part of the land and its easements and privileges for the purpose of raising the resources and any other purpose connected with them, by paying reasonable compensation for the raising, getting, and use

(iii) right to take and occupy water privileges and have and enjoy the rights of carrying water over, through, or under any part of the land granted as may be reasonably req’d for mining or agricultural purposes in the vicinity, paying reasonable compensation;

(iv) right to take from any part of the land granted gravel, sand, stone, lime, timber, or other material that may be req’d for the construction or maintenance of public works without paying compensation

(b) conveys no right, title or interest to (i) geothermal resources, (ii) minerals, (iii) coal, (iv) petroleum, (v) gas

(3) A disposition of Crown land may be made which expressly authorizes the disposition on different terms

(4) A Crown grant can reserve greater rights than those referred to in subsection (1) through express words

(5) All grants are conclusively deemed to contain the reservations from subsection (1) except to the extent that the disposition is made on different terms under subsection (3).

(6) Under subsection (4) the Crown can reserve greater rights by creating a right of way and the right of way is conclusively deemed to be necessary for the operation and maintenance of the gov’t’s undertakings

### Agricultural Land Commission Act ss. 16, 20, 21, 28, 60

16. Land included in an agricultural land reserve remains agricultural land included in the reserve unless excluded by Act

20. (1) Agricultural land may not be used for non-farm uses unless permitted by Act

(2) the removal of soil and placement of fill are non-farm uses

21. (1) Agricultural land cannot be subdivided unless permitted by the act; (2) an owner may apply to have it subdivided

28. If the boundaries of the reserve divides a parcel of land, subsections 18 to 21 only apply to the part that is within the reserve

60 (1) a cert of IT issued before June 29/73 is subject by implication to the Act (2) After that date, the Registrar must endorse on every IT to agricultural land that it may be affected by the Act

## Registering an EIFS: General principle of indefeasibility

### Creelman v Hudson Bay Insurance Co – 1920 PC

**F**: HBC was not allowed to hold land for the purposes other than its corporation.

**R**: The holder of the EIFS who is registered on the IT is the holder of the right against all others and if there is an issue with that holder’s interest, the Registrar may investigate and alter the record. However, so long as the holder of the IT remains on the IT, that is conclusive evidence against all others.

## Adverse Possession

Title by adverse possession was based on a land owner not bringing an action for recovery of possession of the land from a wrongful occupier w/in a specified period of time, as defined by statute (Crown 60, Private 20). After that time, statute barred. The wrongful occupier would acquire possessory title which the courts protected.

This is conceptually at odds w/ the concept of indefeasibility of title based upon registration. Although unclear, it seems as though this applies only to unregistered land (s. 38(3) – prohibits acquisition of title by adverse possession after the land has been registered).

### Land Title Act s. 8(1) (Adverse Possession of Crown Land – not possible)

Cannot get possessory title of Crown land by adverse possession.

### Limitation Act s. 3(4) (no limitation periods for the following)

There is no limitation period for (a) possession if the person entitled to possession was disposed in circumstances amounting to trespass, (b) for possession by a life tenant or a person entitled to a remainder, (c) on a local judgment for possession, (d) by a debtor to redeem collateral, (e) by a secured party in possession of collateral to realize on that collateral, (f) by a landlord to recover possession by a tenant in default or overholding, (g) enforcing an injunction or restraint order, (H) enforcing an easement, restrictive covenant or profit a prendre, (i) declaration of personal status, or (j) title to property or for a declaration about title to property of any person in possession.

### Limitation Act ss. 12, 14(5) (adverse possession)

12. Except as specifically provided for in the Act, no right may be acquired by adverse possession.

14 (5). Nothing in this Act interferes with any right acquired by adverse possession before July 1, 1975.

### Land Title Act s. 23 (effect of IT – adverse possession)

(3) After an IT is registered, title adverse to it or in derogation of the title is not acquired by length of possession.

(4) In the case of the 1st IT, it is void against the title of a person adversely in actual possession of and rightly entitled to the land included in the IT at the time registration was applied for and who continues in possession.

### Land Title Act s. 171 (adverse possession – Registrar must not accept app)

An application founded wholly or in part on adverse possession must not be accepted by the Registrar unless permitted by the Act.

### Property Law Act s. 36 (encroachment on adjoining land)

(2) If upon survey, the building or a fence of one encroaches or encloses land of the true owner, the neighbour can come to court which may (a) give an easement and order compensation (b) give title and order compensation, or (c) order removal of the encroachment.

## Statutory Exceptions to Indefeasibility

**Leases not exceeding 3 years w/ actual occupation**

The registered owner of an EIFS does not have conclusive evidence against the holder of a lease or an agreement for a lease for a term not exceeding 3 years if there is actual occupation under the lease or agreements (***s. 23(2)(d)*** of *Land Title Act*).

**Charges and other entries** (**s. 23(2)(g)** of ***Land Title Act*)**

### Carr v Rayward - 1955 BC County Ct

**F**: X sold to D, Rayward, w/o a mechanic’s lien on title. After D had registered his EIFS and had the cert of IT, the mechanic, P, registers a lien.

**I**: What effect does a mechanic’s lien have on a registered EIFS?

**A**: *Builders Lien Act* allows a mechanic to register a lien for any $$ not paid during a 45 day period, specified by the Act. If not filed during that time, the lien is extinguished by the Act.

**R**: A mechanic’s lien is good against the holder of an EIFS, whoever it may be, even if it is a new holder of an EIFS so long as it is done in accordance with the *Builder’s Lien Act*. This limits the indefeasibility of title.

**Boundaries (s. 23(2)(h))**

Indefeasibility applies to the *legal title* not to the location or physical boundaries. Registration *does not preclude* error in the location of the property lines. Instead of relying on the accuracy of a plan, a survey should be undertaken.

### Winrob v Street - 1959 BCSC

**F**: P physically inspected and contracted to purchase a lot. The vendor represented that the hedge and fence were correctly placed. P retained a lawyer (D) to conveyance. D searched the title but did not verify the dimensions or search any maps at the land title office. Two years after the purchase, the City claimed that the property line was 26 feet off and that P owed rent. P sued his lawyer, D.

**I**: Does the lawyer owe a duty to their clients to ascertain the dimensions of the property?

**D**: No, that is for the surveyor.

**R**: A lawyer is only responsible to advise a client as to the legal title, not to physical boundaries. If the lawyer is responsible for verifying physical boundaries, the lawyer must have been specifically instructed to do so and must actually accept to do so.

**Fraud s. 23(2)(i) – Forgery**

If the innocent owner’s (A) title is transferred to B (fraudster) by fraudulent mean, A has an action against B. If B later gives to an innocent victim, what is the solution?

### Gibbs v Messer – 1891 PC (Australia)

**F**: A (innocent owner of the fee)’s title is transferred to the fraudster, B, who sells to the bona fide for value 3rd p, C.

**I**: Who should get title—A or C?

**D:** A should recover title

**A**: C actually dealt with the fraudster so is better placed to stop the fraud. However had C sold to D, D’s indefeasibility would be protected against A. The court also weighed the interests of C and A and considered A’s long-term attachment to the property in comparison to C’s brief ownership.

 **R**: Deferred indefeasibility: every person who purchases, in good faith and for value, from a registered proprietor and enters his deed on the register receives an indefeasible right notwithstanding the infirmity of his author’s title. Those who deal with forgers (rather than registered proprietors) do not transact on the faith of the register and cannot by registration of a forged deed acquire a valid title—although they can pass a valid right to a third party.

### Frazer v Walker – 1967 PC (New Zealand)

**F**: A (innocent owner of the fee)’s title is transferred to the fraudster, B, who sells to the innocent victim, C.

**I**: Who should get title—A or C?

**D:** C should recover title (opposite of Gibbs)

**A (policy)**: This decision was motivated by a desire to preserve public confidence in the Torrens system. If C had to investigate the legitimacy of B’s registered ownership, there would be disastrous results. The Torrens needs conclusiveness of the Registrar. This was somehow distinguished from Gibbs because in Gibbs the fraudster employed the use of a fake name (so Gibbs was said to remain good law when there is a fake name involved).

**R**: Immediate indefeasibility: The Torrens allows the register to always be conclusive

### Land Title Act s. 25.1 (void instruments—interest acquired or not acquired)\*\*\*

(1) Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument.

(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.

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

(a) is named in the instrument,

(b) is, on the date that this section comes into force, the registered owner of the estate, and

(c) in good faith and for valuable consideration, purported to acquire the estate,

is deemed to have acquired that estate on registration of that instrument.

### Gill v Bucholtz – 2009 BCCA

**F**: Mr Gill (P) is the registered owner of x (land). A fraudster forged P’s signature on a transfer form and gave it to his accomplice, Ms. Gill. Ms. Gill got a mortgage from D (Mr and Mrs Bucholtz) and registered at the Land Title office. Ms. Gill got a 2nd mortgage form a corporate defendant (CD) who began to advance $$ before it was registered. The Registrar refused to register the 2nd mortgage because P had filed a caveat. Neither of the mortgagees knew Ms Gill was fraudulent but did verify and confirm her ID before advancing the funds.

**Law**: s. 23(2)(i) says that IT, if in force and uncancelled, is conclusive evidence against all persons and the named person is entitled to the EIFS, subject to (i) the right of a person to show fraud from or through which the registered owner participated in any degree.

s. 25.1(1): A person who purports to acquire an interest in land by registration of a void instrument does not acquire any interest upon registration.

**I**: Are charges indefeasible under the land title system? **No**

**I2**: Was the mortgage issued pursuant to a valid instrument? **No** (but Pav says **yes**)

**A**: Distinguishes BC Torrens system from that in *Gibbs*; in our system, charges are not indefeasible.The BC system preserve *nemo dat* with respect to interests less than EIFS. Persuant to s. 26(1) a charge, once registered by the holder, is deemed to be held by that person (“entitled”) but that is a rebuttable presumption and it’s not “conclusive evidence” which is what arises in the case of the registration of an EIFS.

**Pav’s cmnt**: Proper result but wrong method. The instrument should have been valid because it was issued when Ms Gill was on title (therefore the mortgage was issued pursuant to a valid instrument). The decision should have been made on the basis that mortgages are always subject to the statement of accounts and P owed nothing to D.

**R**: Charges are not indefeasible in the BC land title system.

**Fraud – Notice of unregistered Interests**

### Land Title Act s. 29 (effect of notice of unregistered interest) \*\*

(2) Except in the case of fraud in which he or she has participated, a person contracting or proposing to take from a registered owner (a) a transfer of land, or (b) a charge, is not affected by notice (express, constructive, or implied) of an unregistered interest affecting the land or charge other than (c) an interest for which registration is pending, (d) a lease not exceeding 3 years w/ actual occupation under the lease, or (e) the title of a person against which the IT is void under s. 23(4) (that is when IT is reg’d for 1st time and person already in occupation by adverse possession)

(3) Person in subsection 2 is also not affect by a financing statement registered under the *Personal Property Security Act*, regardless of notice (express, implied, constructive).

(4) The fact that a person who is contracting with a registered owner under subsection (2) has knowledge of a financing statement registered under the *Personal Property Security Act* is not evidence of fraud or bad faith for the purposes of subsection (2).

### McCaig v Reys

Jabin was not affected by the fraud of Rutland because Jabin was a *bona fide* purchaser for value. He took the EIFS and McCaig was deprived of his option (i.e. charge).

### HBC v Kearns and Rowling – 1895 BCCA

**F**: Kearns (K) owed HBC (P) $800 and gave P her title deeds to mortgage her interest. It took P 15 months before the mortgage was prepared. K offered her property to R for $300—he searched the title which was clear and paid ½ by promissory note on the faith that the title deeds were forthcoming; he learnt later that night that they were not and made no inquiry into why. K transferred to Rowling (R) and R registered and paid.

**I**: Is an equitable mortgage by deposited title deeds a better interest than a subsequent purchase for valuable consideration who has no express notice of the equitable mortgage and commits no actual fraud?

**D**: no.

**A (fraud)**: Fraud will never be presumed or imputed. R was careless and risky in seeking profit. However, his acts were not out of the ordinary course of a pending dealing.

**R:** The *Land Registry Act* protects a purchaser for valuable consideration of registered real estate from an attack on the grounds of notice—express, implicit, or constructive—of any unregistered title *unless* the purchaser, with actual notice, acts to directly bring himself within the act to prejudice the holder of the unregistered title, which is tantamount to fraud and the purchaser will be estopped from invoking this protection in the Act because no instrument of Parliament will be used in defence of fraud.

### Vancouver City Savings Credit Union v Serving for Success – 2011 BCSC

**F**: CC owned the Traveller’s Inn and had two 5-year unregistered leases with the defendants, SFS and KKBC. P advanced loans to CC and registered a mortgage. CC went bankrupt and petition to foreclose with vacant possession b/c a potential purchaser insisted it be vacant. The Ds argued that P knew about them therefore their conduct amounted to fraud under s. 29(2).

**I**: behaviour constitutes equitable fraud under s. 29(2) such that a subsequent registered interest will not have statutory protection from an unregistered interest?

**Law**: s. 29(2) says that (unless participating in fraud) a person who gets an interest in land and registers is not affected by a prior interest despite notice of that interest.

**A**: P knew of D’s tenancies. Is that knowledge sufficient to constitute equitable fraud so that P cannot rely on s. 29 to avoid the tenancy? The case law suggested that a purchaser who takes with knowledge of an unregistered interest may be guilty of fraud if they later seek protection of the Act—but not necessarily. Fraud, in equity, is a principle of common morality. There was no evidence to suggest that P had an intention to or tried to interfere with the tenancy relationships at the time the mortgages were granted. To assess what P knew, need to look at what they knew when granting the mortgages and when registering. There was no suggestion that P acted outside of the normal course of business and there was no suggestion of an ulterior motive.

**R**: Fraud requires more than knowledge and is never presumed: it is strictly alleged and strictly proven.

**R**2: Before finding equitable fraud which would deprive a petitioner of the protection under s. 29(2), there must be more than actual knowledge of an unregistered interest. The law requires (i) sufficient, actual knowledge at the time the mortgage was granted of an adverse interest which, at the time, would make a reasonable person inquire into the legal implications of that interest and (ii) the circumstances must remove the petitioner from the regular course of business, showing some clear intent to use the statute to defeat an unregistered interest in circumstances contrary to common morality. If that is the case, The Ct will not allow reliance on s. 29(2).

### Greveling v Greveling – 1950 BCCA

**F**: Wife (W) held a farm in EIFS. She conveyed the EIFS to her husband (H) who did not register. W subsequently sold the farm to Blackburn (B); her lawyer knew of the unregistered conveyance to H. Her lawyer was also B’s lawyer. H sued W and B and registered a *lis pendens*. H claimed W acted fraudulent and that B was aware that W didn’t hold the EIFS and therefore participated in the fraud.

**P/H**: Trial Ct dismissed H’s action, upholding the conveyance to B.

**I**: Was the transfer to H effective?

**I2:** Was the transfer to B effective?

**I3:** Was B fraudulent or a *bona fide* purchaser for valuable consideration? (*no*)

**D**: The majority found that W was fraudulent but not B.

**Law**: s. 29(2) except if a party to fraud, a person taking from a registered owner is not affected by notice of an unregistered interest affecting the land other than... the title of a person against which the IT is void.

**A**: The law seems to suggest that if B has notice of the title of a person (H) against which W’s IT is void, B is affected despite the failure of H to register. If B perpetrated fraud, the interest would be affected by an unregistered interest. However, in this case, the court did not impute wrongful knowledge to B.

**A (fraud):** B’s lawyer’s knowledge is imputed knowledge of a client. If B’s lawyer was helping W commit a fraud and concealing that fraud from B, B did not know of the fraud. It’s also possible that the lawyer didn’t think the deed was enforceable; he did not profit from the transfer.

**R**: If a 3rd party has knowledge of a fraud being committed against the holder of an unregistered interest, they may not seek the protection of s. 29 if they later take an interest adverse to the interest of the unregistered owner.

### Re Saville Row Properties Ltd – 1969 BCSC

**F**: The Registered owner (E) gave an option to Ian open until March ’69 which could be extended until September ’69 with an $100 payment. In April ’69, E conveyed x to the petitioner, P (Saville Row). P paid E $21,000 and tried to register that month. Earlier in April, Ian applied to register its option which was eventually rejected on August 1st ’69. Ian filed a *lis pendens*. P’s application was rejected Aug. 25 ’69. P admitted knowledge of the option but also knew that the application to register was rejected. P was not accused of bad faith and none was found. P and E are the same person. P was petitioning the Registrar’s decision to reject its application to register.

**I**: Was P a *bona fide* purchaser or fraudulent?

**D**: Ordered lis pendens removed and conveyance registered.

**A**: The law presumes against fraud and bad faith. Merely relying on the statue when a party knows of an unregistered interests and its rejection from being registered does not mean that P was acting in bad faith.

**R**: A petitioner is presumed to not be acting fraudulent. A petitioner who knows of an existence of an unregistered interests cannot be said to be acting in bad faith simply because the petitioner relies on the provisions of the statute.

## In personam Claims

### Pacific Savings and Mortgage v Can-Corp Developments 1982 BCCA

**F**: The respondent (mortgagee, R) started foreclosure proceedings and they rec’d a cert of IT on Oct 1 ’81. The appellant (mortgagor, A) gave notice of its intention to redeem in Oct ’81 and obtained a cert of lis pendens. The lis pendens was filed at the Land Registry office on November 20th at about 9am. On November 17th, an offer was made to buy the property. R accepted the offer on November 20th at about 5pm.

**P/H**: The trial J refused to re-open the final foreclosure order. A appeals that decision.

**I**: is the register conclusive against all who claim an interest to the land described in the cert of IT?

**D**: No.

**A**: The *lis pendens* is a way for a person claiming against the registered owner for an interest to protect that interest by notifying potential *bona fide* purchasers for value. Once it is filed, a judgment in favour of the mortgage would give them precedence over any *bona fide* purchaser. At CL, rights are not deemed to be abrogated except by clear and express statutory enactments and ss. 23 and 25 only protect a *bona fide* purchaser for value. Cts are not permitted to order that the title of one party be cancelled and that another party be given title.

**R**: Sections 23 and 25 seek to protect a *bona fide* purchaser for value who has obtained IT. The LTA does not operate to allow a reg’d owner who acquires through foreclosure to have conclusive IT against the mortgagor who seeks to exercise equity of redemption. (i.e. The LTA does not bar claims against the registered owner by a person asserting an interest in the lands described by the certificate of IT).

### McRae v McRae Estate – 1994 BCCA

**F**: Father (H) left in his will his land for his wife (W) for her life with a remainder for their three kids—J, C and F (in 1924). In 1949, W transferred to F. She held the title with the notation “in trust”, F got the title free and clear (giving $1 consideration). When F died (1989) he left it to his wife (A), as well as to his siblings, J and C. In 1990, J and C found out about their father’s will and wanted the 1949 transfer set aside.

**I**: What type of notice of a trust is necessary for a purchaser to be subject to the trust?

**A**: It would be wrong to say only actual knowledge of a breach of trust could impugn F’s title. Imputed notice is sufficient and is made out by the notation “in trust” beside the name of the holder of the EIFS (W) plus reference by number to the instrument creating the trust. The particulars of the trust are not registered as charges on title. F was therefore found to have notice of the trust so he was bound by the trust and the trust was not subverted by an intervening conveyance to F.

**R**: If the cert of IT notes that the interest is held “in trust” that is sufficient notice to subsequent purchasers of the trust.

## The Registration of Charges

### Land Title Act s. 197 (registration of charges)\*

(1) On being satisfied that an applicant is entitled to be registered as the owner of a charge, the Registrar must register.

(2) The Registrar may refuse to register a charge if it’s the Registrar’s opinion that

(a) a good, safeholding and marketable title to the charge has not been established

(b) the charge claimed is not an estate or interest in land that is registrable under the Act

### Land Title Act s. 180 (recognition of trust estates)

(1) If a land vests in a trustee or personal representative, the particulars of the trust are not entered in the register.

(2) In effecting registration of the name of the personal representative, the Registrar must add a reference in order to identify the testate or intestate and a reference by number to the trust instrument.

(3) In effecting registration of the name of a trustee, the Registrar must also add the endorsement “in trust” and a reference by number to the trust instrument.

(4) The trust instrument must be filed with the application to register title to the personal representative or trustee.

(7) If an endorsement has been made under subsections 2 or 3, no instrument may deal with the land unless (a) such an instrument was expressly authorized by law or by the instrument declaring the trust, or (b) an order from the Supreme Court has construed the instrument as authorizing the transfer, mortgage, etc.

(9) If a registered owner appears on the face of the register to be beneficially entitled to land and from the instrument creating a trust, it is established to the satisfaction of the registrar that the registered owner was at the time that person became registered and the person still is a trustee, the registrar may, on application, make an endorsement similar to subsection (3) or the registrar may register a new IT in the name of the trustee.

### Dukart v Surrey – 1978 SCC

**F**: In 1912, the developer of land created hundreds of residential lots, all of which were given an easement to the Foreshore Reserve (FR) by way of the title transfer—the easements were never registered under the charge section of the IT for FR. In 1917, the developer transferred the FR in trust, subject to the easements—The IT denoted “in trust” and there were deposited plans and a reference to the trust deed. The Respondent (Surrey) acquired FR due to a tax sale and registered its interest in 1963 with no reference to the trust deed. R built a “comfort station” on the FR and A (Dukart) sought an injunction. A owned one of the lots.

**I**: Was an easement which did not appear on the face of the cert of IT but which was included in a registered trust instrument a registered easement?

**D**: Yes, decision for Dukart.

**P/H**: A won at trial; lost on appeal

**Law**: The *Land Title Act* s. 25(a)(i) provides that the purchaser of a tax sale gets the title free of registered and unregistered interests except a registered easement. Section 180 subsections 2, 3, and 7 note that a trust is registered by noting “in trust” and by refereeing to the deed #, which must be filed with the Registrar. It also states that no instrument dealing with land can be registered after the trust memo is entered “upon the register”.

**A**: A’s interest would have been safe if directly registered as a charge on the IT of the FR—it was not, it was contained in a trust document. The procedures for registering an easement did not preclude registration by trust.

**R**: Any charge included in a trust, properly registered at the land title office, will also be validly registered despite its absence from the face of the certificate of IT.

## Are charges indefeasible?

### Land Title Act ss. 26 and 27 (registration of a charge; notice given by registration of a charge)

26(1) The registered owner of a charge is deemed to be entitled to that interest subject to exceptions, registered charges, and endorsements which are deemed to be incorporated in the register.

(2) Registration of a charge is not evidence that the charge is enforceable.

27(1) Registering a charge gives notice from the time the application was received to all those dealing with the title of the land affected—notice is of the interest in respect of which the charge was registered and the contents of the instrument so far as it related to the interest—but not otherwise.

### Crédit Foncier Franco-Canadien v Bennet – 1963 BCCA

**F**: D was the holder of the EIFS of land (x). Allan (A) of Todd Investments (T) forged a mortgage for D in favour of T. A sold to his friend Stuart (S) who did not notify D of the assignment. S then sold to P; P notified D, D ignored b/c they thought it was a mistake. P sued D for a personal judgment and foreclosure.

**P/H**: at trial, the AG was ordered to pay out P with the assurance fund and gave 6 mo. to redeem.

**I**: Is a charge indefeasible once registered?

**D**: No, P could not recover from the assurance fund.

**A**: The language of s. 26(1) (“deemed”) is contrasted with s. 23(2)(i) that a registered EIFS is “conclusive evidence”. “Deemed” is defined by the Ct as a rebuttable presumption. So a *bona fide* purchaser for value of a charge who registers does not have conclusive evidence of entitlement. The mortgage was therefore not valid. Even if it was valid, mortgages are only security for the amount owing and D owned nothing to P.

**R1**: A mortgage is only security for the amount owing. A fraudulent mortgage cannot bind the true owner who owes nothing.

**R2**: The registration of a charge creates a rebuttable presumption of entitlement which can be overturned by contrary evidence. As such, registered charges are not indefeasible if it can be shown that the holder of the charge is not actually entitled to the charge due to fraud, etc. Even if a *bona* fide purchaser later holds the charge, the charge is not indefeasible.

### Canadian Commercial Bank v Island Realty Investments – 1988 BCCA

**F**: IL (imperial life) held PM (park meadow estate)’s first mortgage. PM granted IR (Isl. Realty) the 2nd mortgage. Cowan (C) was a lawyer and director of PM. C contacted AA (Almont and Avis) seeking a mortgage for PM. C & AA had an understanding that IR’s mortgage was going to be discharged and replaced by A as the holder of the 2nd mortgage. C prepared a mortgage in favour of AA. C registered a forged discharge by IR. C sent AA the cert of IT showing the discharge and AA advanced $$. C confirmed again that AA was the holder of the 2nd mortgage. C then fled BC with the $$ and abandoned his law practice. PM filed for bankruptcy, their property was sold but the funds were insufficient to pay back both IR and AA.

**P/H**: Trial J highlighted that a charge, when registered, is a rebuttable presumption of entitlement. He found that IR had a stronger claim at CL which rebutted AA’s entitlement to the 2nd mortgage. This was b/c the discharge was a forgery which was a nullity at CL such that discharge never occurred.

**I**: Should a *bona fide* purchaser for value of a mortgage who gets a valid mortgage from the registered owner of the EIFS be subject to pre-existing unregistered charges?

**I2**: Does the CL (in which a forged discharge is a nullity) override presumed entitlement to a charge based on the register?

**A**: CA rejected the trial J’s decision b/c the consequence would be to remove the protections of the *Land Title Act* for mortgagees who acquire their interest *bona fide* and for value from the registered owner. AA got its interest *bona fide* and for value from the registered holder of the EIFS. It was the discharge—not the mortgage deed to AA—which was fraudulent. AA did not take under a void instrument, which is what distinguished this case from *Credit Foncier* where the forged mortgage was not valid.

**R**: The *bona fide* purchaser for value of a charge who gets the charge under a valid instrument from the holder of the EIFS is deemed to be entitled to that charge upon registration; entitlement is not rebutted by pre-existing unregistered charges, in order to achieve the goals of the BC Torrens system.

### Land Title Act s. 28 (priority of charges based on priority of registration)

If 2+ charges appear entered on the register affecting the same land, the charges have, between themselves, but subject to a contrary intention appearing on the instruments creating the charges, priority according to the date and time the respective applications for registration of the charges were received by the Registrar, and not according to the respective dates of execution of the instruments.

# Failure to Register (ch 7)

### Land Title Act s. 20 (unregistered instrument does not pass estate)\*\*

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

(2) An instrument referred to in subsection (1) confers on every person benefited by it or claiming under the person benefited by it the right to apply to have the instrument registered and to use the name of all parties to the instrument in proceedings incidental or auxiliary to registration.

(3) Subsection (1) does not apply to leases or agreements for leases not exceeding 3 years where there is actual occupation

### Sorenson v Young – 1920 BCSC (and s. 181 of the Land Title Act)

**F**: P owned lot 1 (L1) and L2—he sold L1 to Roch, reserving a right of way (as access to the highway). Roch sold to D who claimed no knowledge of P’s right of way. D built a fence to block P’s access.

**COA**: P went to Ct to seek the remedy of having his entitlement to the right of way declared.

**Law**: At the time, the equivalent of s. 20 did not include “except as against the person making it”. The historical antecedent to s. 29 did not include “except in the case of fraud”

**A**: The action failed because the easement was not registered and therefore the EIFS of the registered owner could not be successfully challenged. After this case, there were legislative changes, including the introduction of s. 181 (then s. 150) of the Land Title Act: when an application to register an instrument transferring an EIFS and under the instrument the grantor purports to retain or reserve some interest or other charge that can be registered in the Act, the existing IT is cancelled and the rights reserved to the grantor are registered as charges against the new IT.

**R**: This case is based on historical antecedents to the Land Title Case and legislative changes came about after the case, including s. 181 which allows a grantor to reserve an interest. When the new instrument containing the EIFS with the reservations is applied to be registered, the Registrar cancels the existing IT and registers the grantor’s reservation as a charge on the new indefeasible title.

## Except as Against the Person Making It: Judgments

If an estate or interest is unregistered and a judgment creditor registers, the unregistered interest actually has priority because of the common law principle that a judgment creditor (jc) cannot take a greater interest than the judgment debtor (jd) actually has.

### Yeulet v Matthews – 1982

**F**: D held an equitable mortgage by deposit of a dup cert of IT. Her son was the mortgagor. Her son had a judgment registered against him by P. D did not register her equitable mortgage interest.

**I**: What interest can a jc have? Does the registration of a judgment take precedence over an unregistered preceding charge?

**D**: No. The interest is no greater than that of the jd (*nemo dat*).

**R:** The jc can take no interest greater than that of the jd and due to the small reservation of CL in s. 20 (“except against the person making it”), the jc’s interest is subject to unregistered interests which would operate against the jd.

### Court Order Enforcement Act s. 86 (registration of judgments after October 30, 1979)

(3) From the time of registration, the judgment is a lien on the land of the jd (a) to the extent of his/her beneficial interest in the land, (b) if the owner is a trustee, to the extent of the interest of the beneficiary who is the jd, (c) subject to the rights of *bona fide* purchasers for value who do not register their interest before the registration of the judgment.

### Martin Commercial Fueling v Virtanen – 1997 BCCA

**F**: Jd agreed to sell on Oct 21. Four days later, a judgment was registered. The sale wasn’t closed until November 6th.

**A**: Despite the mischief which might arise with sales to friendly third parties just before a judgment is registered, the legislature has not acted upon it and the rule in *Yuelet* remains.

## Except as Against the Person Making It: Other Interests

### L&C Lumber Co v Lungdren – 1942 BCCA

**F**: Appellant sold the timber on her land to McDonald and gave him the right to enter and cut. M assigned his rights to the plaintiff (respondent). Neither M nor R were registered. M gave notice in writing to A of the transfer. When R went to cut down, A would not allow R to enter.

**I**: Does s. 20 prevent an unregistered assignee of an unregistered interest from having an operative interest in relation to the grantor?

**D**: No, appeal dismissed

**A (2 judges for the majority)**: The real purpose of s. 20 is to protect purchasers for value without notice and enable them to rely on the register. Section 20 should not be taken literally and was found not to rule out unregistered interests. A was found to have interfered with R’s property rights and broke a K.

**A (Fisher J, agreeing in result)**: A cannot take from R what A has transferred to M and M has transferred to R.

**A**: one other J agreed in result.

**A (dissent)**: unregistered agreement between A and M is effective against A, as “the person making the same”. Also the unregistered agreement between M and R is effective against M. But the unregistered agreement b/w A and R is ineffective against A because there is no privity of K. Due to s. 20, M’s agreement is inoperative and cannot pass any estate or interest in law or equity as against A because it was not registered.

### Carlson v Duncan – 1931 BCCA

**F**: H granted all timber rights and a right to enter, cut, and take away to K and his heirs and assignees. The grant was registered. H transferred to Agassiz who transferred the EIFS to the appellant (A). K died and his heirs quitclaim their interest to respondent but the quitclaim was not registered. R entered the land and began to cut timber. A sued for an injunction and damages.

**A**: Timber will be chattel if it is sold and be withdrawn immediately. This was not the case, it was an interest in land. The transfer from K’s heirs to R was unregistered and because of s. 20, they conveyed no interest in land to R.

**R**: When an interest is purportedly transferred or assigned to a third party, that transfer must be registered to be an operative interest in land, effective against the holder of the EIFS.

### International Paper v Top Line – 1996 BCCA

**F**: Tenant is IR—“T”; landlord is Top Line --“L”. L was to lease a portion of a building to T for 51 months w/ a right of renewal. The parties wrote their own lease but did not register. During the 51-month term, several disputes arose which went to Ct and never once did the Ct challenge the validity of the lease, nor did L despite L really wanting T out. T tried to renew but L denied the right. They went to the BCSC and sometime during the proceedings, L raised a new issue—s. 73 (re: subdivisions) which L argued would make the lease void.

**P/H:** The trial J found that the only consequence of s. 73 was the non-registrability of the lease and found T had rights in the lease, enforceable as a personal K, including perpetual renewing option.

**I**: Do valid personal or proprietary rights arise out of a lease agreement which is prohibited by statute?

**Law**: S. 73 of the Land Title Act said (1) that except in compliance with the Act, no subdivision for the purpose of (a) transferring; or 9b) leasing for more than three years. It also noted that any instrument in contravention would not confer a right to registration of that instrument.

**A**: Looked at policy reasons behind s. 73, which was municipal control for the public interest and the Torrens system goal which is allowing individuals to rely on the register.

**D**: s. 73 precluded T from enforcing personal or proprietary rights in respect of the leased premises, pursuant to the lease. Decision for L; appeal allowed.

**R**: An interest which is prohibited by statute cannot be enforced by the grantee/transferee.

### Land Title Act s. 73.1 (lease of part of a parcel of land enforceable)

(1) A lease or agreement for lease of part of a parcel of land isn’t unenforceable between the parties by reason only that (a) it doesn’t comply with this Part, or (b) an application for the registration of the lease or agreement for lease may be refused or rejected.

Comments: Originally s. 73.1 was a celebrated response to *Top Line* because it was thought to allow *in personam* enforcement of leases of raw land despite no subdivision. However, the BCCA interpreted it as prospective only, preserving *Top Line* so that a pre-2007 lease of portions of bare land is illegal unless preceded by subdivision.

# Applications to Register (ch 8)

### Land Title Act s. 31 (priority of caveat or cert of pl)

If a person who lodges a caveat or registers a CPL is successful, they are entitled to priority over other charges applied for after the time when a caveat or CPL was applied for (for the title or charge so claimed).

### Land Title Act, s. 288 (effect of caveat)

(1) As long as a caveat is lodged with the registrar and remains in force, the registrar (R) may not (a) register another instrument affecting the land unless the instrument says that it is subject to the caveator’s claim, or (b) allow any change to the land’s boundaries unless the caveator consents.

(2) An instrument expressed to be subject to the caveat may be registered unless the claim of the caveator, if successful, would destroy the root of title of the person against whose title the caveat is lodged.

### Land Title Act, s. 215 (registering a CPL in the same manner as a charge)

(1) A person who commences or is party to a proceeding and is claiming an interest or a right of action in respect of land may register the CPL against land in the same manner as a charge is registered

(2) CPL must describe land to the R’s satisfaction

(3) Upon registering a CPL, R must mail a copy to the owner against whose title the CPL has been registered

(4) If there is a subsequent change of parties, R must register a change in the same manner as a modification of a charge

(6) Dissolutions of marriage, etc. parties to may register a CPL in respect of any estate or interest in land which could change as an outcome of the proceeding.

(7) A person who starts an action under the *WVA* may register a CPL

(8) A judgment creditor who applies under the Fraudulent Preference Act and claims to be entitled to register the judgment may register a CPL against the land.

### Land Title Act, s. 216 (effect of registered CPL)

(1) After a CPL is registered, R can make no entry in the register affecting the land until the CPL is cancelled

(2) This does not apply to lodging a caveat or the registration of:

(a) IT or a charge if the instrument supporting the application is expressed as subject to the final outcome of the proceeding

(b) IT or charge where applicant says in writing (i) elects to proceed to registration subject to the final outcome of the proceeding, and (ii) authorizes R to register the title or charge claimed subject to the CPL

(c) a priority or postponement agreement

(d) an assignment of a charge, if the charge was registered prior to the CPL registration

(e) sublease if the lease from which it was derived was registered before the CPL, or

(f) a cert. of judgment, order, claim of lien under the *Builders Lien Act*, cpl, or any other involuntary charge

(3) Anything registered under (2) is subject to the final outcome of CPL

### Land Title Act, s. 217 (effect of cpl if prior app’n is pending)

(1) Despite s. 216, R may complete the registration of an IT/charge applied for before the application to register a CPL was rec’d by the R

(2) If in the circumstances described in subsection (1),

a) if the prior applicant is a party to the proceeding, the R must register the IT or charge claimed by the prior applicant subject to the cpl

b) if the prior applicant is not a party to the proceedings, R must cancel the CPL and give notice to the applicant for the CPL and register the IT/charge claimed by the prior applicant

(c) whether or not the prior applicant was a party to the proceeding, R must register the IT/charge subject to the CPL if the CPL relates to a proceeding to

(i) enforce/forcelose/cancel a registered charge

(ii) in s. 215(6)—divorce

(iii) in s. 215(7)—wills variation

### Rudland v Romilly – 1958 BCCA

**F**: D (Romilly) conveyed land (x) to Lindsay for value. Lindsay applied to register (Dec 14) and then executed a deed to P (Rudland). Lindsay got his certificate of title, free of charges on Dec 29 and immediately applied to register the deed from Lindsay to P. D filed a *lis pendens* against x on Jan 16. At that time, P had not yet received her certificate of IT.

**COA**: P applied for a declaration that D had no interest and an order that the notice of *lis pendens* be removed from the register.

**P/H**: P’s application failed at trial—apparently trial J did not clearly understand the facts

**A**: P was a *bona fide* purchaser for value: she only received notice of D’s *lis pendens* 2 weeks after applying to register her interest. A *lis pendens* which gives notice only after an honest buyer completes the entire transaction of purchase cannot affect that buyer’s title. P acquired her interest before litigation commenced and applied to register on a date when she had a right to register. Her right, absent participation in fraud, cannot be defeated because of a law suit antedating her *bona fide* acquisition of land.

**R**: If a *bona fide* purchaser of an EIFS applies to register their interest before an application to register a *lis pendens* is received by the registrar, the prior application to register the EIFS will take priority.

**R**: A person contracting with the registered owner although she may not acquire the IT until she is actually registered, will nevertheless be given considerable protection after lodging her documents and making her application to register.

### Re Saville Row Properties

After Rudland, McIntyre set out the following:

Absent fraud, the *Land Title Act* equates a clear right to registration to registration itself where:

(1) The person claiming is a bona fide purchaser for valuable consideration, and

(2) The right was acquired and registration thereof app’d for prior to the filing of the CPL, and

(3) The purchaser is not made a party to the *lis pendens*, and

(4) In the case of an agreement for sale or mortgage the P failed to give the purchaser or mortgagor notice and taken the proper proceedings by way of equitable execution or otherwise

### Land Title Act, s. 155 (application for registration of charge)

If an EIFS has been applied to be registered, a person who is not entitled to the EIFS but claims to be the registered owner of a charge on the land, may apply to register in the approved form of the R, but the application must await the result of the pending application to register the EIFS.

### Land Title Act, s. 198 (registration of person creating charge)

If a charge on land is executed by a party who is entitled to be registered as the holder of the EIFS, that charge must not be registered until the person executing the charge is registered as the holder of the EIFS

### Breskvar v Wall – 1971 Australian HC

**F**: P (appellant) was the registered owner of the EIFS. DP (respondent) received a transfer issued by P with no name listed for the transferee. DP inserted the name of his grandson, Wall (DW). DP was said to be acting as an agent for DW. DW made a K for sale with Alban (3rd party) after being registered on title. On Nov 7, DW executed the transfer to Alban. On Dec 13, a caveat was lodged by P. On Jan 8, the transfer was registered.

**I**: What protection is given to a person who contracts to buy an EIFS but who has yet to have their interest registered?

**A**: DP and DW were fraudulent; A was a *bona fide* purchaser for value without notice. P would have succeeded against DW but did not challenge DW’s registration until after A had entered into a K for purchase without notice of P’s interest. Although DW was the registered holder, the transfer to DW was void and inoperative in that DW would not have been able to rely on the register as conclusive if P challenged the title, which P did not do at first. Because DW was registered, P was not said to have a legal estate but an equitable estate instead. The Ct could have compelled DW to deal with the property so as not to take any benefit from the fraud but the legal title would not be transferred back (probably) until the loan was repaid by P. P’s equitable right was enforceable against DW. P’s conduct in giving DP a signed transfer form and failing to register any notice of the right retained put DW in a position to make representations on which A acted. Contrast with A who acquired his equitable interest without fault (it was based on a K made in good faith).

**R**: If there are 2 competing equitable interests, the equity which will prevail is that of the party who acted blamelessly and in good faith. If a party by their conduct enables a representation to be made upon the faith of which another innocent party acquired an equitable interest, that first party’s equity will be postponed.

**R2**: A contract of sale of an EIFS is an equitable interest which will at least receive some protection prior to being registered.

# The Fee Simple, Feet Tail (ch 9)

## Common law

**Words of limitation**: quantum of the interest (i.e. “and his heirs”)

**Words of purchase**: indicates who is the transferee (i.e. to A)

The CL s**trictly required** that *inter vivos* transfers contain “to ‘transferee’ and his/her heirs” to transfer an EIFS. If this was not done, there would be a life estate. For wills, courts would usually gave effect to the words of limitation that were used. If they weren’t used properly to establish an EIF, the court would sometimes give effect to the testator’s clear intent and confer the fee simple to a beneficiary.

**Equity** would **give effect to the grantor’s intent** when the technical words of limitation were not used. This was so for *inter vivos* transfers and wills.

## Statute

To overcome the disadvantage of frequently having life estates despite an intent to create a fee simple, leg’n was created

### Property Law Act s. 19 (words of transfer)\*

(1) The words “in fee simple” are sufficient without the words “and his heirs”

(2) If there are no words of limitation, a fee simple (or the greatest interest possessed) is passed unless the transfer expressly provides that a lesser estate/interest will be transferred

### Land Title Act s. 186 (implied covenants)

(4) Subject to subsections (5) to (8), if a transfer of a freehold estate for value is executed in proper form in accordance with Part 5 of the Act, the freehold estate is transferred whether or not it contains express words of transfer

(5) default is fee simple when no words of limitation are used

(6) if the transfer contains express words of limitation, they are given effect

(7) if the transfer contains an express condition or reservation, the transfer of the freehold estate will be subject to that reservation or condition

(8) the section does not operate to transfer a greater estate than that held by the transferor as registered owner

### Wills Act, s. 24 (without words of limitation)

Unless a contrary intention appears by the will, if real property is devised without words of limitation, it will pass in fee simple or the whole of any other estate that the testator had power to dispose of by will.

### Tottrup v Ottewell Estate – 1969 SCC

**F**: Two twins: Fred and Frank, both of whom lived together. P was the only child of Fred. Fred and Frank had nearly identical wills, each leaving one another nearly everything. the wills contained the phrase “to F and his heirs, executors and administrators.” The statute at the time made such words no longer necessary. Fred pre-deceased Frank. Frank later died and P argued that the words “and his heirs” were words of purchase rather than words of limitation.

**I**: Does the phrase “to x and his heirs” consist entirely of words of purchase given that they are no longer req’d by statute?

**D**: No, appeal dismissed

**A:** the words had long been used as words of limitation, applying to personalty and realty. There is no patent ambiguity as to their meaning.

**R**: Although it is no longer necessary to say “to x and his heirs”, it is sufficient to say so to transfer an EIFS.

### Wills, Estates, and Succession Act, s. 42(2)

Unless a contrary intention appears by the will, if property is bequeathed to the heir or next of kin of the testator or of another person, the bequest takes effect as if it had been made to the persons among whom (and in the share in which) the estate of the testator or other person would have been divisible if the testator or other person had died interstate.

### The Rule in Shelly’s Case

When property is transferred *inter vivos* or in a will, the words “To A and remainder to his heirs” will be a fee simple with “and his heirs” will be words of limitation, rather than words of purchase.

## Problems of interpretation – repugnancy

### Re Walker – 1925 ONCA

**F**: Deceased (D) left his estate to his wife. In his will, he left anything undisposed of in W’s life to other people; those people wanted the widow’s interest to be construed as a life estate and for them to have the remainder, as provided for in D’s estate

**P/H**: Trial judge did so, construing as a life estate

**I:** Are restraints on alienation repugnant to the granting of an EIFS?

**D:** Yes, appeal allowed

**R**: A testator may not give a fee simple and simultaneous control the alienation of that interest from the grave

**R2**: The court will attempt to give effect to a testator’s wishes as much as legally possible, ascertaining which part of the intent predominates and the court will give effect to that predominate intent while rejecting a subordinate repugnant intent.

### Re Shamas – 1967 ONCA(?)

**F**: Deceased (D) created his own will. He had 8 kids under 21 years old. D and his widow (W) ran a business together. After D died, W continued to run the business and increased its value. D left everything in his will to W until the last child turned 21 (unless she remarried, then she would only get a share similar to the kids). She did not remarry. When all kids were 21, there was a question about the construction of the will.

**I**: How should a will be construed in light of an apparent repugnancy?

**A**: J found that D intended a life estate for the widow and an entitlement to encroach on capital. This was based upon the surrounding circumstances (8 young kids, would need to make provisions for them).

**R**: When construing a will, the whole document and the surrounding circumstances at the time the will was made are relevant in determining the interest which the testator intended to grant. If a testator’s intent is clear, the language and form used are unimportant.

### Cielein v Tressider – 1987 BCCA

**F**: D left a standard-form will which he filled in by himself. D’s will left his personalty and residue to his CL partner, Mrs Rich and also his realty (house on Saturna Isl.). D had 5 kids from a previous marriage, Mrs Rich had 1 son which lived with her and D. D qualified his gift of realty to Mrs Rich saying that, upon its sale or disposal, would be divided equally between her son and his 5 kids.

**P/H**: Trial J found intent to make a life estate for Mrs Rich for the realty only so as to not disinherit her children

**I**: How should a seemingly repugnant clause in a will be construed?

**A**: There was obviously a clear intent to benefit Mrs Rich from the statement in the opening clause and the residue. Trial J found no clear intention to transfer the realty absolutely. CA found no a clear intent to create a life estate. CA found that absence of intent to create life estate indicated intention to create an absolute interest.

**R:** A condition restraining an absolute gift will be inconsistent with the absolute character of the gifted interest and therefore repugnant and void.

## Words formerly creating a fee tail

Technical words were “to A and the heirs of his body” required for an *inter vivos* transfer or else default to a life estate. In wills and with equitable interests, court would give effect to the technical words of limitation if used and if not, would try to give effect to the testator’s intent

**Recall that s. 10 of the *Property Law Act* converts fee tail to fee simple**

### Rule in Wild’s Case

**F**: A grant was made by a will to “RW and his wife, and after their death to their children”

**I**: Was the reference to the children intended to be words of limitation or words of purchase?

**A**: This rule helps to determine the testator’s intent. Although recall that *Tottrup* sets up that history will rule (unless the presumption is rebutted) so that if a testator uses the classic/traditional “to A and the heirs of her body”, it will be presumed to be words of limitation, not purchase.

**R**: If a grantee has children at the time a will is made, the grantor is presumed to have intended to create co-ownership (and therefore a life estate for children following parents life estate). – construed as **words of purchase**

**R2:** If a grantee has no children at the time the will is made, then the grantor is presumed to have intended to create a fee tail.—construed as **words of limitation**

# The Life Estate (ch 10)

## When are they created?

May be in the life of the holder or an estate *pur autre vie*. At CL, the assumption was of a life estate. Due to **s. 19(2)** of the ***Property Law Act*** and **s. 24** of the ***Wills Act***, the presumption is that the transferor is disposing of the greatest estate, which will likely be an EIFS.

*Wills, Estates and Succession Act*, surviving spouse receives the household furnishings (i.e. chattel) and a right to acquire ownership of the spousal home from the deceased’s estate, on intestacy.

*Land (Spouse Protection Act)*, (**s. 4)** a spouse could file the dwelling occupied by themselves and their spouse as a homestead and any disposition made of the property without the consent of the filing spouse would be void. On death of the other spouse, the filing spouse would get a life estate.

## General nature

The holder of a legal life estate may **occupy** and **use** the property, retaining any **profits**. It can be **transferred** *inter vivos* and **ends** with the death of the measuring life (may be tenant or the *cestui que vie* if an estate *pur autre vie*). Although a life tenant has rights of possession, rents, and profits similar to a fee simple, the **holder of the reversion or remainder** is **entitled** to have the **land pass** into their possession in **substantially the same form** as it was when received by the life tenant.

## Waste

**Permissive waste:** that waste which is permissible and for which a tenant is **not** **responsible**, unless expressly so made.

**Voluntary waste**: this results from activities of the life tenant for which they may be required to pay damages or be restrained by an injunction. It includes any act of the life tenant which **causes permanent damage** and any act of the life tenant which **changes the nature** of the land, for **better** or for **worse**. **Doctrine of ameliorating waste**: even though a change for the better is technically waste, it will not render the life tenant liable in damages and usually an injunction will not be awarded. A life tenant cannot:

Cut timber unless it’s a timber estate or to be used for repairs. Non timber trees can be cut, except not ornamental.

Open mines or extract minerals unless those activities were being carried on at the commencement of the tenancy.

Demolish or alter buildings

Change the use to which land is put

Equitable waste: Even if a tenant is expressly permitted to commit voluntary waste (“unimpeachable for waste”), equity may restrain the life tenant from making unconscionable use of that right (i.e. malicious destruction).

### Vane v Lord Barnard – 1716

**F**: father transferred his castle to his son, maintaining a life estate without impeachment for waste. He became upset with his son and starting stripping the castle of lead, iron, glass-doors, etc.

**COA**: son ordered an injunction (prohibit further waste; order repairs)

**R**: Life tenants are liable for equitable waste.

### Law and Equity Act, s. 11 (equitable waste)

A life estate without impeachment for waste does not confer a legal right to commit equitable waste unless expressly permitted by the instrument which created the estate.

### New Westminster (City) v Kennedy – 1918 BC County Court

**F**: owner of a house was stripping his house during the period in time in which he could redeem his property by paying outstanding taxes. The house was to be sold at a tax sale.

**COA**: City sought injunction

**R**: One in possession will be restrained from using his legal power unfairly—unconscientiously—so as to destroy or depreciate the subject-matter

## Liability for taxes and insurance

### Mayo v Leitovski – 1928 KB

**F**: P owned an EIFS in remainder. D held a life estate. D was an elderly woman who was attached to her home but could not pay taxes so the house was subject to a tax sale. Her daughter purchased the house on the tax sale out of concern/caring for her mother and then assigned her tax-sale certification to D. D tried to register. P, the remainderman, challenged D’s (the life tenant) ability to acquire the tax sale of the land and defeat the P’s remainder.

**I**: What is the nature of the relationship between a life tenant and remainderperson?

**R**: The life tenant has a fiduciary relationship with the holder of a remainder or reversion in fee simple and may not do anything to injure the property or overcome the rights of the remainderperson.

**R2**: : A life tenant can do nothing during the continuance of her estate to impair the estate in remainder, and on the other hand the remainderperson cannot do any act which will affect the life estate

### Re Verdonk (1979) – BCSC

**R**: A life tenant “may well” not be responsible for insurance premiums.

# Co-Ownership/Concurrent Estates (Ch 11)

### Property Law Act s. 12 (spouses separate)

A husband and wife must be treated as two persons for the purpose of acquiring land.

## Tenancy in Common

Two or more persons who are simultaneously entitled to possession of property. They have unity of possession, entitling them to possession of every part of the estate. When one owner dies, their interests pass by will or intestacy in the same way as the single owner of property.

## Joint Tenancy

Unlike TIC, JT has a **right to survivorship**. When one JT dies, the right of survivorship (*jus accrescendi*) takes priority over the normal rules of descent on death. The surviving JT will become the absolute fee simple owner if other JTs die.

For a JT to be formed, there must be four unities:

1) Unity of possession (each entitled to possession simultaneously)

2) Unity of title (each derives their title from the same instrument)

3) Unity of interest (they must have the same property interests)

4) Unity of time (the interest of the co-owners must all vest simultaneously) – exception when it is a transfer to uses or a gift by will (in which case, if the other three unities are present, a JT is created)

**To get out of a JT,** you must **rupture one of the interests.** This can be done by transfering the property to yourself or someone else and you will have TIC because the unity of title and time will be gone. (see *Sorenson*)

## Creation of concurrent interests

The CL has been modified by equity. Both CL and equity have been modified by statute

Common law

If all three unities (plus unity of possession which is automatic with concurrent interests) are present, presumption is that a JT has been created. However, the grantor may expressly indicate that she intended a TIC, which will be upheld.

### Re Bancroft, Eastern Trust Co v Calder – 1936 NSSC

**F**: Testator was survived by widow (C), two sons (PB and A), one daughter (F), and was pre-deceased by (M). M had two kids (PC and J). PC died leaving four children and J remained alive at the time of the case. During C’s life, the residue of the testator’s estate would be divided into two shares—one for C. The other share would be divided “into four equal shares” to PB, A, F, and “the other of said shares to the children of [M]”.

**I**: Did M’s children (PC and J) take as joint tenants or tenants in common?

**A**: Courts don’t like JT. When words like “equally”, or those which demonstrate even slightly that the testator intended to divide the property, will lead to a TIC. The words equally were used for the four shares. They were not used to describe a division between PC and J for the fourth share, which indicated JT.

**R:** A bequest to a number of persons without accompanying explanatory words creates a joint tenancy.

**R**: When the words of a will suggest (even slightly) an intent to divide property, there will be a TIC. Such words include “equally”.

Equity

Disliked JT and preferred TIC. Equity was more willing to find TIC than JT, particularly where there were concurrent interests of family members. Even if the co-owners were JT at CL, equity might treat as TIC in equity if: (i) 2+ people purchased land providing unequal shares of the purchasing price, but if equal shares, JT; (ii) in commercial transactions b/c survivorship is incompatible with commercial partnership; and (iii) If 2+ people lend money on a mortgage, and the mortgagor transfers the property, *prima facie* at law JT of the house. If one of the mortgagees died, equity would compel the other co-owner to hold the mortgage in trust for the deceased’s estate so that the estate would not lose its security for the repayment of the loan.

### Robb v Robb – 1993 BCSC

**F**: Mrs and Mr Robb lived together in a co-op. Mr Robb died and left everything to his wife. His children wanted to vary the will and as a result, they wanted the co-op to fall within Mr Robb’s estate. Mrs. Robb purchased (on her own) the shares in the building. The lease was granted to Mrs and Mr Robb as co-owners. 1 year later Mr Robb transferred a property in California to Mrs Robb as consideration for her making him a co-owner.

**I**: Do Mr and Mrs Robb hold the interests in the share and the lease as joint tenants or TIC?

**A:** At CL, property granted to 2+ people without words of severance is presumed to be held in joint tenancy. Equity hated JT and had three exceptions (outlined above i-iii). None of those operated in this case. The transfer of the property did not lead to unequal contributions. That was simply used to rebut the presumption that Mr Robb held his legal interest and the shares and the lease in trust for Mrs Robb (which is the presumption when there is no consideration for a transfer). Section 11 of the *Property Law Act* embodied equity’s distaste for JT and created a presumption of TIC if land is transferred or devised in fee simple (or charged or contracted to be sold) unless a contrary intent appeared on the instrument. S. 11 does not apply to an assignment of a lease so the CL determination of JT applied to both the assignment of lease and the share.

**R**: Absent words of severance, the CL presumption of JT will prevail if the equitable exceptions to the presumption are not established and no legislation otherwise alters the presumption.

### Property Law Act s. 11 (tenancy in common)

(2) If, by any instrument... land is transferred or devised in fee simple, charged, or contracted to be sold... to 2 or more persons... they are tenants in common unless a contrary intention appears in the instrument

(3) If the interests of the TIC are not stated in the instrument, they are presumed to be equal

### Property Law Act s. 25 (partnership property)

If land or any heritable interest in it becomes partnership property, it must be treated as “personal or movable” (i.e. TIC) and not “real or heritable” (i.e. JT) unless a contrary intention appears.

Transferring to self and co-ownership

At CL, one could not transfer an interest to oneself.

### Property Law Act s. 18 (transfer and ownership to oneself)

(1) A person may transfer land to themselves in the same manner as to any other person; JT may do so as well

(2) trustee or personal rep’ve may transfer land to themselves in their personal capacity

(3) transfer by JT to himself/herself (or stranger) will sever the joint tenancy

(4) a registered owner may transfer to themselves jointly with another

(5) an owner of a fee simple or a registered lease (or sublease) may grant themselves an easement or restrictive covenant

...

## Registration of Title

### Land Title Act s. 173 (registrar may register co-owners)

Registrar may effect registration of a fee simple at the instance of several people who together are entitled to it

### Land title Act s. 177 (adding “joint tenants” after names)

Registrar must add the words “joint tenants” if the 2+ people registering under 173 are joint tenants

## Relations between Co-owners

### Spelman v Spelman – 1944 BCCA

**F**: husband and wife owned two properties. The legal title to the Victoria property was held by H in trust for himself (2/5) and his wife (3/5 interest). This property required no labour and profits were simply rent. The other property was in Vancouver and it was held in joint tenancy. W had operated the Van property as a rooming house and then left H “without cause”. H began operating the Van property as a rooming house which included labour (i.e. cleaning, etc.). W returned but did not assist him. H did not pay W the profits from either property.

**P/H**: W sued and won at trial. This is an appeal on that decision.

**I**: Can a co-owner sue another co-owner for profits arising out of the latter’s labour on the property?

**D**: No, decision in part for H (re: Van profits) but decision regarding Vic profits was upheld.

**A**: At CL, no obligation to account for profits between co-owners. Leg’n changed the CL so that one co-owner could not receive more than his/her just share or proportion. The case turned on what is a “just share or proportion”. Found that a co-owner could not be sued in respect to the produce of the land (*fructus industriales*) which would not exist except for the capital and industry of that co-owner.

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

### Estate Administration Act s. 71 (Actions of account)

(1) One JT or TIC (or their executor/administrator) may bring an action against their cotenant if the latter received more than comes to that person’s just share and proportions (and against their executor/administrator)

(2) The court may appoint the registrar (or another person) to make inquiries into the account, including ability to examine the parties

### Property Law Act s. 13 (remedy of co-owner)

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

### Property Law Act s. 14 (court may order lien and sale)

(1) Upon hearing an application under s. 14, the court may do one or more of the following:

(a) order that the applicant have a lien on the defaulting owner’s interest (for the amount recoverable)

(b) order that the defaulting owner pay the amount recoverable within 30 days or their interest will be sold

(c) allow the applicant to purchase the interest in the land of the defaulting owner at the sale

(2) the amount recoverable is the amount owed at the time the application is made based on how much would be owed if the debt had been allowed to accumulate until that time

(4) surplus money from a sale must be paid into court to credit the defaulting owner

### Mastron v Cotton – 1926 ON CA

**A**: General rule is that one joint tenant, unless ousted by his cotenant, may not sue for use and occupation. The court may make all allowances with the goal of doing complete equity between the parties. What is just and equitable depends on the circumstances of the case. For instances, if one tenant makes improvements which increase the selling price, the other tenant cannot take advantage of that without being submitted to allowances. If one tenant pays more than her fair share of encumbrances, she is entitled to an allowance for such surplus.

An ouster of one joint tenant by another may include violent conduct (*Dennis v McDonald*) which entitled the partner who was ousted in claiming a sum in occupation rent from her violent partner.

### Sorenson Estate v Sorenson – 1977

**F**: A husband and a wife are JTs of several properties; they have three children, one of whom is disabled (S). During the course of the couple’s divorce, they try to arrange property to take care of S. The separation agreement provided that the W could have a life estate in the matrimonial home with a reversion to the JTs, W and H. W began partition proceedings but she developed terminal cancer and died before that could occur. She also executed a trust in which she was the trustee and S was the beneficiary. W’s will left her share to S.

**I**: did W successfully sever the JT, making it a TIC prior to her death?

**At stake**: If she did not sever, the rules of survivorship will operate and H will own her interest as well. The will which left her share to S will never operate because the right of survivorship is automatic.

**P/H**: The trial J found that there was no neat and simple transfer and no formal agreement between the parties to hold that the JT had become a TIC so he held that severance did not occur.

**A**: The lease on the matrimonial home was a transfer but the authorities were ambiguous at best and most suggested that a lease was not sufficient to sever a JT so the CA did not find severance on these grounds (this is controversial, the Ct was probably influenced by the fact that there was a JT in reversion). Further, the partition proceedings were ineffective since they could not be finalized prior to W’s death. W’s will was ineffective because of the automatic nature of the right of survivorship.

**A**: W had left a personal declaration of trust with her lawyers saying that she transferred her equitable interest to her son. That was found to be severance. After that, the H and W held as TIC and the right of survivorship fell away.

**R**: The right of survivorship inherent in JT operates automatically, taking priority over any will.

**R2**: To sever a JT there must be an explicit agreement to sever or a transfer.

# Future Interests (Ch 12)

## Vested and Contingent Future Interests

Vested interests: Unqualified and immediate transfer is possible (but may not be vested in possession)

Contingent interests: those which depend on the occurrence of some event which may or may not occur. There is a condition precedent for the contingent interest to become a vested interest.

If there is **ambiguity** whether a VI or CI, it will come down to **construction** and courts will prefer a construction creating a vested interest, rather than a CI.

### Browne v Moody – 1936 P.C.

**F**: Testatrix (B) died and left a fund with income to be paid to her son (W) during his lifetime; but upon his death, divided ½ to one granddaughter and the other ½ between the daughters with equal shares. If a daughter predeceased B or W and left an issue, “child of the person so dying shall take the interest to which their mother would have been entitled.”

**I**: Did the grand-daughter and the three daughters take a vested interest on the death of B? Were any liable to be divested?

**A**: The date that W dies would be the date the capital is divided. Defined it as a present gift coupled with a postponement of the date of payment. The vesting of the capital takes place at the death of the testator.

**R**: Whether or not a future interest is vested will be measured at the time that the testatrix dies, not at the death of a preceding life estate.

### Phipps v Ackers – 1842 House of Lords

Rule: If there is a gift to A when or if a specified event occurs, with a gift over if the event does not occur, the interest may be treated as vested subject to divesting.

### Re Carlson – 1975 BCSC

**F**: Testator was survived by widow (W), son (P), daughter (J), and youngest son (C). he left his estate in trust for the education, etc of C. Upon C turning 21, it would be split 45% J, 45% C, and 10% P.

**I**: Do the gifts to C and J vest at the death of the deceased or upon C turning 21?

**A**: The cardinal rule of construction is to give effect to the testator’s intent. Found the principal intention to have been to keep the whole of the residue intact until C turns 21. But that intent is inconsistent with providing 45% for J. Court will prefer earl vesting. Ct found that the main intent was to provide for C until he was 21 (what was at stake was him using the capital of the estate)

**D:** Interest in the residue of both C and J are only vested upon C turning 21

## Types of future interests

### Reversions

The interest that remains in the transferor who has not exhausted the whole of the interest by transfer.

### Rights of Entry:

The transferor creates an **estate subject to a condition subsequent.** When a transferor conveys an apparent absolute interest but adds a condition subsequent which will divest the transferee in favour of the transferor and his heirs. It is a right to enter the land and resume possession but an action must be brought to recover possession. If an action is not brought, the transferee may continue to enjoy the estate and the action will be statute barred after 6 years (*Limitation Act*). *A to B but if B marries, return to A and her heirs*

### Possibility of Reverter:

The transferor creates a **determinable interest**. The words of limitation are such that the duration of the estate is limited/qualified from the outset (although the condition need not occur). When the condition does occur, the right automatically reverts to the transferor. The transferor will still need to bring an action to recover possession which is subject to the *Limitation Act* (6 years). *To A in fee simple until she wins the Olympics*.

Similarities: at CL, both can arise only in favour of transferor; same limitation period; rule against perpetuities applies

Differences: qualifications that may be permissibly imposed differ and **s. 8(2) of the *Property Law Act*** allows a right of entry to be exercisable by any person and the persons claiming under the person.

*None of the above three may be created in any person other than the transferor.*

### Property Law Act s. 8 (2) (disposition of interests and rights) \*\*\*

A right of entry affecting land, exercisable on breach of condition or for any other reason, may be made exercisable by any person and the persons claiming under the person.

### Remainders:

future interest in a third party, other than the transferor. (both not permitted at CL

A right of entry in remainder: (To B but if B does X, then to C) – void at CL, **saved** by **s. 8(2)** of *PLA*

A possibility of reverter in remainder: (To B until X occurs, then to C)—**void**

### Remainder rules

Applies to vested or contingent, would make the remainder void *ab initio* or subsequently void

**(1)** A remainder must be supported by a prior freehold interest created in the same instrument.

**(2)** The latest that a remainder must be capable of vesting, if it vests at all, is upon the termination of the prior estate.

(3) A remainder is void *ab initio* if it takes possession prematurely, defeating the prior estate. (*this was to prevent shifting interests—to A for life until she marries then to B; A might still be alive, B defeated her interest*). This **rule** was **destroyed** b/c: s. 8(2) made so possible with ROE/defeasible interest (ii) with a POR, on could construe as a determinable interest with a contingent remainder (To A until X, then remainder to B)

**(4)** A remainder after a fee simple is void (today only operates so that you cannot have a determinable fee simple with a possibility of reverter in remainder; but possible for ROE which was destroyed by s. 8(2)) – *To A in fee simple until she does x, then to C = void.* The rule was “**half-destroyed**”.

### Natural Termination:

If it’s possible that the **remainderperson cannot take possession** at the time of termination of the prior estate, there is a gap in seisin and the **remainder is destroyed**. “To B for life, remainder to C if C attains 21 years of age.” B dies when C is 19 – naturally terminated at CL.

## Equitable Future Interests

The **CL remainder rules** **do not apply to equitable interests**.

### Re Robson – 1916 \*\*

**F**: Testator (T) gives land to daughter (H) for life and on her death, to the use of her children as shall attain the age of 21. When H died, she had four children, 2 of whom were 21+.

**I**: Do the children who have reached 21 years take the interest at the exclusion of those children under 21?

**L** (cdn eqv): Estate Administration Act

s. 77(1) Despite a will, if real estate is given to a person without a right to any person on the first’s death, then it devolves and becomes part of the first’s estate.

s. 78 the personal representative of a deceased person holds the real estate as trustee for the benefit of those entitled to it.

s. 79 After testator dies, the personal representative may transfer to a beneficiary or assent to a device contained in the will

**A**: Found that the freehold was vested in the executors, not in H who held the life estate.

**R**: Estates create equitable future interests rather than CL future interests.

### Estate Administration Act ss. 77-79

77 (1) Despite a testamentary disposition, if real estate is vested in a person without a right in any other person to take by survivorship, on the person’s death it devolves to and becomes vested in the person’s personal representatives.

78 (1) The personal representatives of a deceased person must hold the real estate as trustee for the persons by law beneficially entitled to it

79(1) At any time after the death of the owner of real estate, the person’s personal representatives may (a) assent to a devise contained in the person’s will, or (b) convey the real estate to any person entitled to it as heir, devisee or otherwise.

## Attributes of Future Interests

**Protection of the land**

For an equitable interest, the right of the owner of the future interest is generally against the trustee who, if not protecting the land, is probably in breach of trust.

The person who has a contingent remainder is likely in a weaker position than he or she with a vested remainder.

**Alienability of Future Interests**

### Property Law Act s. 8 (disposition of interests and rights)

A contingent, executory or future interest may be disposed of; a right of entry (immediate or future) can be disposed of (vested or contingent).

### Wills Act s. 2 (Property disposable by will)

A person can dispose of all property in a will whether acquired before or after making the will if at the time of the person’s death, they were entitled to the property at law or in equity incl. rights of entry; contingent, executor or future interests.

## Possibility of Reverter/Defeasible Fee Simple

Pursuant to s. 10(4) of the *Property Law Act*, a possibility of reverter (or right of entry) may be registered in the same manner as a charge. But a possibility of reverter is not a charge and its effect on the interest is far different (*Westsea*).

### Westsea Construction Ltd v British Columbia (Registrar, Land Title Office) – 1995 BCSC

**F**: Document purports to give a mortgage priority to an already registered possibility of reverter. The Developer (D) is trying to sell residential apartment units as if they were condominiums with the purchasers taking title to the entire project as tenants-in-common. It was a way to avoid creating strata lots and therefore get around municipal approval process. In order to make purchasers honoured the intent of the plan, the developer would retain as possibility of reverter so that individual fee simple interests held by purchasers would be determinable upon any certain stipulated defaults. D registered the possibility of reverter in feb ’94. The appellants are the mortgagees and want to register a postponement agreement to secure their loan against loss of the propery by reversion.

**P/H**: The Registrar refused to register. This is an appeal on that decision.

**I**: What is the nature of a possibility of reverter? May it be lawfully postponed, giving a mortgage interest priority?

**Law**; Under s. 202 of the *Land Titles Act*, a charge may be postponed by agreement.

**A**: A registered mortgage is attached to the interest held by the mortgagor, which would be to the determinable fee in this case. Based on *nemo dat*, regardless of a priority agreement, the mortgagee can get no more than what the mortgagor has—which is a defeasible fee simple. If the fee reverts, there would be nothing left for the mortgage to attach to. Allowing a mortgage in priority to a possibility of reverter purports to attach a mortgage to a greater interest than what was held by the mortgagor. When a possibility of reverter is registered, it gives notice that the fee simple no longer exists—it has been converted into a determinable fee.

**R**: A possibility of reverter is a limitation on the grant, it is not a charge. Upon the occurrence of a specified event, a determinable fee automatically determines and the interest comes to the natural limits of its existence.

**R2**: A mortgage attaches to the interest of the mortgagor, nothing more given the principles of *nemo dat*.

# Conditional and Determinable Interests (ch 13)

## Crown Grants

Subject to s. 11(3) of the *Land Act* the minister has discretion to impose terms upon the disposition of Crown lands, including (a) personal occupation and residence over a time period and (b) doing work and spending money to improve the land during a prescribed period.

## Uncertainty

### Noble v Alley – 1951 SCC

**F**: Private summer resort sells parcels of land in 1935. The transfer contains a covenant which says that the land will not be sold/transferred/alienated in any way whatsoever to a person of the “Jewish, Hebrew, Semitic, Negro or coloured race or blood”... restrict ownership/enjoyment of the land to persons of the “white or Caucasian race not excluded by this cl.” An owner tried to sell to a purchaser who might fall within the clause as of Jewish race or blood. The purchaser required the vendor to obtain a court order declaring the clause invalid.

**P**/**H**: At trial, it was not uncertain, not an invalid restraint on alienation, and not void for public policy; aff’d on appeal.

**I**: Was the clause sufficiently certain as to be unenforceable?

**A**: From the language used, impossible to know what degree/limits on the lines of race or blood were intended. Was it the slightest degree of blood?

**R**: If a restraint is so construed so that it is such a substantial restraint upon alienation, the restrictive clause will be “repugnant to the very conception of ownership” and therefore void. (in the case of the slightly degree of race or blood within the category of Jewish, etc.)

**R**: A contingent condition must be sufficiently precise and distinct from the outset so that the Court knows what precisely how the contingent condition will become vested (or the estate determined—although this case is a bit different)

### Clayton v Ramsden – 1943

**F**: Testator bequeats to his daughter upon a condition subsequent that “she marries a person not of Jewish parentage or of the Jewish faith”, which would terminate her interest.

**R**: The term Jewish parentage is void for uncertainty because it’s impossible to know what degree of Jewish blood was required—the court could not possibly see from the beginning precisely and distinctly when the daughter’s vested interest would determine

### Blathwayt v Baron Cawley – 1976 H.L.

**F**: Forfeiture clause under which the interest of a devisee was terminated was if he became a Roman Catholic

**I**: Is the clause too uncertain? Was it against public policy?

**D**: No

### Re Tepper’s Will Trusts – 1987 (UK)

**F**: a clause in a will provided that the interests were subject to a condition subsequent against marrying “outside the Jewish faith”

**I**: Is this a valid condition subsequent?

**A**: In *Clayton v Rasden*, there was no relevant evidence as to the meaning of the expression, “of the Jewish faith”. Evidence of the Jewish faith practiced by the testator and his family would have helped to determine what the testator meant by that expression. That would allow the expression to be sufficiently certain to enable the *Clayton* test to be satisfied.

**R**: A condition subsequent may discriminate on the basis of religion so long as it does so in a certain way.

### Re Rattray – 1974

**F**: A deed provided that property was to be paid to Queen’s University to be used for scholarships. The condition was that no study may be a Communist, Socialist, or a Fellow Traveller

**D**: too uncertain

### Re Messinger – 1968 BCSC

**F:** Deceased (D) left property to his widow in his will—he gave her a life interest so long as she resided in the house. She would hold the life estate while she lived in the house and if she left the house, the estate would be distributed between the daughters of the deceased. During his life, D and his widow were separated. W did not live in Vancouver and didn’t want to live in the house.

**A:** Whether a condition be precedent or subsequent, the Court *prima face* treats it as subsequent b/c there is a presumption in favour of early vesting.

**A**: Cts finds that she has a life estate with a condition subsequent, which is void for uncertainty. She would hold the life interest whether or not she resided in the house.

**Note**: this was a case with a clear determinable fee simple but the court recharacterizes the interest and gives a result which they find more appropriate. If they had treated it as a determinable fee simple, the only remedy would be to strike the whole thing out, leaving W with nothing.

### In Re Allen – 1953 CA

**F**: Testator devised realty to the eldest son of his nephew “who shall be a member of the Church of England and an adherent to the doctrines of that Church…”

**I:** Is the condition void for uncertainty?

**A**: A condition subsequent operates to determine/divest an estate previously vested, so if the condition is void, the estate remains. Cts do not like determinable interests. They will find a c.s. void if its terms are uncertain so it is not clear in advance what will cause the divesting of the gift.

**A**: A fee simple on a condition precedent is a gift for which the condition is the sole motivation. If that condition is avoided, the gift is avoided.

**A**: In this case, the first qualification (Church membership) was not found to be void because it would be offensive to common sense to say that if you have an individual who is dignitary of the Church is not a member—a reasonable test would be possible. For the later qualification, pertaining to adherence to the doctrines of the Church, that was far more difficult because the testator wanted some sense of conscientiousness which is more difficult to assess than outward membership to a Church. Decided that it would be possible if the grantee was a dignitary of the Church, etc. or held some sort of clerical role which would offend common sense to suggest that he was not an adherent.

**R**: For a condition precedent, a c.p. or qualification relating to degrees (i.e. tallness, adherence to a faith, etc.) is not necessarily void if the claimant can satisfy any reasonable test to show entitlement (i.e. 6 foot 5, Bishop, etc.). However, a c.s. relating to degree would be fatal for a condition subsequent divests a person of their estate.

**R2**: If a c.p. or qualification is uncertain, the court should not declare it void, thus defeating all possible claims to the gift, unless the terms are so vague that giving them any meaning would be impossible or they involve repugnancies or inconsistencies which are not mere problems of degrees.

### In Re Tuck’s Settlement Trusts – 1978 CA (UK)

**F**: Testator was a baronet and wanted his baronetcy to pass to successors in title who were of Jewish faith and “Jewish blood”. He put his money in trust for “the Baronet for the time being if and when and so long as he shall be of the Jewish faith and be married to an approved wife. He defined “approved wife” as a wife “of Jewish blood by one or both of her parents and who had been brought up in and has never departed from and at the date of her marriage continues to worship according to the Jewish faith”. He added a clause so that if the facts were in dispute or doubt, the decision of the chief rabbi in London in either the Portuguese or Anglo German Community would be conclusive. Title passed to his eldest son, William then to William’s son, Bruce. B married an approved wife, had two sons, and were divorced. He remarried a woman who was not an “approved wife”.

**I**: Is approved wife too uncertain so that those provisions must be disregarded?

**A**: There are two types of uncertainty—conceptual uncertainty (where the words are too vague so as to be meaningless such that the Cts give them no effect) or evidential uncertainty (the words are clear but there is difficulty in applying them to the situation and require extrinsic evidence, Cts will give effect to them on the evidence avl.). In this case, “Jewish blood” seems to be afflicted with conceptual uncertainty but “Jewish faith” is not conceptually uncertain and can be held as valid.

**A**: The conceptual uncertainty was cured by the Chief Rabbi clause.

**R**: Demonstrates distaste for rule in Allen (and Blathwayt agreed) that conceptual uncertainty may avoid a c.s. but not a c.p. He “deplores” the dichotomies because they defeat the will of the testator.

**R2**: A testator can leave a doubt or difficulty to be decided by a third person, whose decision will be final and binding so long as there is no misconduct or the decision is not wholly unreasonable.

### Re Kennedy Estate – 1950 MB QB

**R**: If a condition has been sufficiently clearly defined it may be left to a 3rd party to decide if the condition has been satisfied.

## Restraints on Alienation (13.20)

### Blackburn v McCallum – 1903 SCC

**F**: Father in his will left his farm to his two sons—William and Hugh. They were not to get the farm until 25 years after his death and they could not put any charges on the property during that time.

**Law**: The general rule avoids conditions which prohibit a grantee in fee from alienating his land

**R**: Original rule is that you cannot annex a condition to a fee simple gift.

### Trinity College School v Lyons – 1995 Ont HC

**F**: Bennett sold some land to TCS but retained some land, giving TCS the first right of refusal (at same price or $9,375; or option to buy after death of the survivors of the Bennett at $9,375). B survivor dies, land is valued at $135,000.

**COA**: TCS suing for specific performance at price of $9,375

**I**: Was the fixed price void as a restraint on alienation?

**R**: A right of option triggered upon death is a restraint on alienation.

## Restraints on Marriage and other Personal Restraints

### MacDonald v Brown Estate – 1995 SCC

**F**: Testator directs that a share of his estate will be held in trust for his niece “until she becomes widowed or divorced from her present husband” and at that time, the trust would pay capital to her for her use during her lifetime. If she dies without being widowed or divorced, the share would go to testator’s grand-nephew.

**I**: Is the condition void because of public policy?

**A**: Terms are not uncertain. Here is an area where testator’s motive is important. It was found that he wanted to protect his niece, not induce a divorce.

**R**: When assessing whether a condition is void due to public policy, the motive of the testator—whether coercive/punitive or supportive—are relevant.

### Land Title Act, s. 222 (discriminating covenants are void)

A covenant is void *ab initio* (or voidable by registrar if already registered) if it directly or indirectly restricts sale, ownership, occupation or use of land on account of sex, race, creed, etc.

### Human Rights Code (BC)

**Discrimination in accommodation, service and facility**

**8**  (1) A person must not, without a bona fide and reasonable justification,

(a) **deny** to a person or class of persons any accommodation, service or facility **customarily available to the public**, or

(b) **discriminate** against a person or class of persons **regarding any accommodation**, service or facility **customarily available to the public**

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

(2) A person **does not contravene** this section by discriminating

(a) on the **basis of sex**, if the discrimination relates to the **maintenance of public decency** or to the determination of **premiums** or benefits under contracts of life or health **insurance**, or

(b) on the **basis of physical or mental disability or age**, if the discrimination relates to the determination of **premiums** or benefits under contracts of life or health **insurance**.

**Discrimination in purchase of property**

**9**  A person must not

(a) **deny to a person or class of persons** the opportunity to purchase a commercial **unit** or dwelling unit that is in **any way represented as being available for sale**,

(b) deny to a person or class of persons the opportunity to **acquire land or an interest in land**, or

(c) discriminate against a person or class of persons regarding **a term or condition of the purchase** or other acquisition of a commercial unit, dwelling unit, land or interest in land

because of the race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sexual orientation or sex of that person or class of persons.

**Discrimination in tenancy premises**

**10**  (1) A person must not

(a) deny to a person or class of persons the **right** **to occupy, as a tenant,** space that is **represented as being available for occupancy by a tenant**, or

(b) discriminate against a person or class of persons regarding **a term or condition of the tenancy of the space**,

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or lawful source of income of that person or class of persons, or of any other person or class of persons.

(2) Subsection (1) **does not appl**y in the following circumstances:

(a) if the space is to be **occupied** by **another person** who is to **share**, with the person making the representation, the use of any **sleeping, bathroom or cooking facilities** in the space;

(b) as it relates to **family status or age**,

(i)  if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person who has reached **55 years of age** or to 2 or more persons, at least one of whom has reached 55 years of age, or

(ii)  a rental unit in a **prescribed class of residential premises**;

(c) as it relates to **physical or mental disability**, if

(i)  the space is a **rental unit in residential premises**,

(ii)  the rental unit and the residential premises of which the rental unit forms part,

(A)  are **designed** **to accommodate persons with disabilities**, and

(B)  **conform** **to the prescribed standards**, and

(iii)  the rental unit is **offered for rent exclusively to a person with a disability** or to 2 or more persons, at least one of whom has a physical or mental disability.

### Canada Trust Co v Ontario (Human Rights Commission) – 1990 ON CA

**F**: Leonard Scholarship (LS) created in 1920s - trust was for British, White, Protestant, only 1/4th of the total money could go to a female. The trust details L’s opinions about the superiority of British, Protestant, White males.

**A**: Considers briefly value of allowing testator to dispose of property as they wish. But, LS was so at odds with present social values that to allow it to continue was “inimical to the public interest”. The trust was premised on the notions of racism and religious superiority and flies in the face of social values in which equality rights are constitutionally granted. However, testator’s freedom to dispose of his property through a charitable fashioned as such had to give way to current principles of public policy.

**A**: public policy was informed by statute, Charter, and international law. Commitments to anti-discrimination. This decision was made on the basis that this was a public charity (the decision did not go so far as to include private family trusts)

**R**:The value of allowing individuals to dispose of their property as they see fit is not an absolute right, it is balanced by public policy concerns,.

# The Rule Against Perpetuities (ch 14)

The fact that equitable future interests are free from the CL remainder rules initially allowed land owners to create long series of future interests, extending into the future (“perpetuity”). The land was virtually inalienable and no person was in a position to transfer the fee simple. The courts responded with the rule against perpetuities.

The rule resulted in its own anomalies. Manitoba abolished it in 1983, other jurisdictions reformed it, including BC which passed reforming leg’n in 1975 (*Perpetuity Act*).

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

### Perpetuity Act s. 2 (application of the act)

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

### Property Act s. 6 (rule against perpetuities)

Except as provided by the Act, the rule of law known as the modern rule against perpetuities continues to have full effect.

## The old rule against Perpetuities

A transfer x to B (who is alive) for life and then to B’s first (unborn) child for life and then to that child’s child for life, etc., etc., etc.

Dispositions beyond the one to B’s unborn child were all void. The rule was reaffirmed in *Whitby v Mitchell*. It applies to both legal and equitable remainders in realty, but it did not apply to personalty.

### Perpetuity Act, s. 6(2) (rule against perpetuities—getting rid of old rule)

Abolished rule in *Whitby v Mitchell*

## The modern rule against perpetuities

**No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.**

The lives in being would be those (alive or *in utero*) at the time that the instrument takes effect.

### Perpetuity Act s. 1 (definitions)

“in being” means living or conceived but unborn

“perpetuity period” the period in which an interest must vest

“power of appoint” any discretionary power to transfer a beneficial interest in property w/o the furnishing of valuable consideration

### Perpetuity Act s. 3 (order in which remedial provisions are app’d)

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

### Perpetuity Act s. 4 (rules not applicable to benefit trusts)

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

### Perpetuity Act s. 5 (applies to gov’t)

The rule against perpetuities as modified by this Act binds the gov’t except in respect of dispositions of property by gov’t.

### Perpetuity Act s. 7 (80 year perpetuity period)

(1) Subject to subsection (2), an interest in property which either (a) expressly or (b) impliedly must vest, if at all, no later than 80 years after the creation of the interest does not violate the rule against perpetuities

(2) An interest created under the exercise of a special power is considered created at the date of the creation of the power.

### Perpetuity Act s. 8 (possibility of vesting beyond period)

No disposition creating a contingent interest in property is void as violating the rule against perpetuities only because of the fact that there is a possibility of the interest vesting beyond the perpetuity period.

### Perpetuity Act s. 9 (presumption of validity—wait and see)

(1) Every contingent interest that is capable of vesting w/in or beyond the perpetuity period is presumed to be valid until actual events establish that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of ss. 11, 12 or 13 becomes void.

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

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

### Perpetuity Act s. 10 (determination of perpetuity period)

(1) If s.9 applies to a disposition and the duration of the perpetuity period is not determined under s. 7, the perpetuity period must be determined as follows:

(a) Look at the people under subsection (2), if any are lives in being (and ascertainable) at the commencement of the perpetuity period, the duration of the period is determined with reference to those lives and no others; and those described in subsections (2)(b) or (c) will be disregarded if the number of persons fitting the description is such as to make it impractical to ascertain the date of death of the survivor;

 (b) if there are no lives under para (a), the perpetuity period is 80 years.

(2) The persons referred to in subsection (1) are:

(a) transferor (not in a will, obv);

(b) a person to whom or in whose favour the disposition was made, that is to say,

(i) a person or potential member of a class (class disposition)

(ii) a person who has satisfied some conditions and the remainder may be satisfied (individual disposition to a person taking only on certain conditions being satisfied)

(iii) a member or potential member of the class (special power of appointment exercisable in favour of members of a class)

(iv) if, in the case of a special power of appointment exercisable in favour of one person only, the object of the power is not ascertained at the commencement of the perpetuity period, a person as to whom all of the conditions are satisfied, or some of the conditions are satisfied and the remainder may in time be satisfied, and

(v) in the case of a power of appointment, the person on whom the power is conferred;

(c) a person having a child or grandchild w/in pp (b)(i) to (iv) or a person any of whose children or grandchildren, if subsequently born, would by his or her descent, fall w/in pp (b)(I) to (iv);

(d) a person who takes a prior interest in the property disposed of and a person on whose death a gift over takes effect;

(e) if

(i) a disposition is made in favour of any spouse of a person who is in being and ascertainable at the commencement of the perpetuity period

(ii) an interest is created by reference to an event occurring during the lifetime of the spouse of a person who is in being and ascertainable at the commencement of the perpetuity period or during the lifetime of the survivor of them, or

(iii) an interest is created by reference to the death of the spouse of a person who is in being and ascertainable at the commencement of the perpetuity period or the death of the survivor of them,

the same spouse whether or not that spouse was in being or ascertainable at the commencement of the period (allows for the very young spouse scenario).

### Perpetuity Act s. 11 (reduction of age)

(1) If a disposition creates an interest in property by reference to the attainment by any person of a specified age exceeding 21 years, and actual events existing at the time the interest was created or at any subsequent time establish

(a) that the interest, but for this section, would be void as incapable of vesting w/in the perpetuity period, but

(b) that it would not be void if the specified age had been 21 years,

The disposition must be construed as if, instead of referring to the age specified it had referred to the age nearest the age specified that would have prevented the interest from being void

(2) One age reduction to embrace all potential beneficiaries must be made for the purposes of subsection (1).

(3) If in the case of any disposition different ages exceeding 21 years are specified in relation to different persons,

(a) the reference in subsection (1)(b) to the specified age must be construed as a reference to all the specified ages, and

(b) the subsection operates to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

### Perpetuity act s. 12 (exclusion of class members to avoid remoteness)

 (1) If the inclusion of any persons, being members or potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents section 11 from operating to save a disposition from being void for remoteness, those persons must be excluded from the class for the purposes of the disposition, and that section has effect accordingly.

(2) If, in the case of a disposition to which subsection (1) does not apply, it is apparent at the time the disposition is made, or becomes apparent at a subsequent time that, but for this subsection, the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the disposition to be treated as void for remoteness, those persons must be excluded from the class for all the purposes of the disposition, and section 11 has effect accordingly.

### Perpetuity act s. 13 (general cy pres provision)

(1) If a disposition would be void solely on the grounds that it infringes the rule against perpetuities (apart from the provisions of this section), an interested person may apply to the court who may vary the disposition to give effect as far as possible to the general intention of the disposition within the rule against perpetuities (so long as the general intention of the disposition can be ascertained in accordance with normal principles of interpretation and the rules of evidence)

(2) Subsection (1) doesn’t apply if the disposition has been subject of a valid compromise

### Perpetuity act s. 14 (presumption and evidence as to future parenthood)

(1) If a proceeding regarding the rule against perpetuities turns on the ability of a person to have kids, it must be presumed

(a) male 14 years or over

(b) female 12 – 55

(2) Despite (1), a living person may show evidence that they cannot have kids

(3) If any question is decided based on a person’s ability or inability to have a child, then for any further questions which may arise respecting the rule against perpetuities in relations to that same disposition, the person must continue to be treated as able or unable regardless of subsequent events which have shown the presumption to be erroneous

(4) If a question is decided in relation to a disposition by treating a person as unable to have a child at a particular time and that person subsequently has a child at that time, the court may make an order as it sees fit to protect the right that the child would have had in the subject of the disposition as if that question had not been decided and as if the child would, apart from the decision, have been entitled to a right in the subject of the disposition not in itself invalid by the application of the rule against perpetuities as modified by this Act.

(5) For the purposes of this section, the possibility of adoption or legitimation are not considered but if a person does subsequently have a child by that means, subsection (4) applies to the child

(6) A trustee or personal representative is not personally liable if

(a) relying on a decision of a court having jurisdiction in relation to a disposition that a person is or will be unable to have a child at a particular time, and

(b) before the trustee or personal representative has notice that that person subsequently has a child at that time,

the trustee or personal representative transfers, delivers or pays over property under the control of the trustee or personal representative.

(7) Subsection (6) does not extend to indemnify a trustee or personal representative in respect of any act done in accordance with the opinion, advice or direction of a court if the trustee or personal representative has been guilty of fraud or willful concealment or misrepresentation in obtaining that opinion, advice or direction.

### Perpetuity Act, s. 16 (Application to Ct to determine validity)

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

### Perpetuity act s. 16 (interim income)

(1) Until an interest presumed to be valid becomes void under section 9, the income arising from that interest and not otherwise disposed of must be treated as income arising from a valid contingent interest.

(2) An uncertainty as to whether or not the disposition will ultimately prove to be void for remoteness must be disregarded.

### Perpetuity act s. 17 (saving valid provision following invalid provisions)

(1) A disposition that, if it stood alone, would be valid under the rule against perpetuities is not invalidated **only** because it is preceded by one or more dispositions that are invalid under the rule against perpetuities, whether or not the disposition expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent on, the invalid disposition.

(2) If a prior interest is invalid under the rule against perpetuities, a subsequent interest that, if it stood alone, would be valid is not prevented from being accelerated only because of the invalidity of the prior interest.

## BC Perpetuities Act, by McClean

Outlines examples of its operation where dispositions created a trust arising in a will on Jan. 2 1979.

**No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.**

Two examples, e.g. 1: To A for life, remainder to the 1st child of A to reach the age of 21; e.g. 2: to A for life, remainder to the 1st child of A to marry.

In the above, the 1st would be valid because if a child of A’s did ever become vested (i.e. 21), it would occur within 21 years of A’s death. However, in example 2, it is possible to think of a hypothetical in which A might die and none of his children would marry within 21 years, even if 10 were engaged at the time of his death, this would be the case. In example 2, the gift is void *ab initio*.

The *Perpetuities Act* allowed the perpetuity period to be up to 80 years from the date of its creation, rather than 21. It also eliminated some absurd hypothetics as they related to fertility. The *Act* allowed it to be presumed that a male could only have children over the age of 14, that a woman could only have children from 12 – 55, and that a person who is incapable of having children could show so for the application of the rule. It also allows an unborn spouse to be treated as a life in being.

E.g.7: To the first child of A to become a lawyer, but if there is no such child, then to B. (A + B are bachelors; their are dead). At CL this would be void due to the hypothetical which could arise.