

## Aboriginal Title (Ch. 3)

- Ab title is more than an ab right, is recognized by common law (case-by-case basis)
- Courts attempt to reconcile aboriginal rights with Crown sovereignty
- 2 issues: governance and land title

**Indian Act**- defines broad interests in reserve land, defines governance as a federal responsibility; largely discriminatory toward Ab people

**Royal Proclamation of 1763**- unilateral declaration of British governance and sovereignty, all land vested in Crown; recognition of Ab rights at common law, fiduciary duty to treat Ab people fairly and honourably

**St. Catherine's Milling**- recognized ability of gov't to unilaterally extinguish aboriginal common law rights

**S. 35(1) of Charter**- entrenchment of existing aboriginal and treaty rights into Constitution; justification required for any gov't infringement

**Indian Oil and Gas Act**- grants mineral rights, permits development of oil and gas reserves under Ab title

**Delgamuukw decision** (Gitskan/Wet'suwet'en claim for fee simple, then Ab title)- defect in pleadings/factual issues = new trial; Ab title requires exclusive occupation of land prior to sovereignty

### 3 criteria for aboriginal title:

- 1) Occupation pre-sovereignty
- 2) Continuity btwn prior and present occupation
- 3) Exclusive occupation at sovereignty

\*Ab title is *sui generis* (distinct from other proprietary interests)

- **Inalienable**- cannot be transferred, sold or surrendered to anyone other than the Crown
- **Communal**- held by all members of an aboriginal nation
- **Pre-existing**- exclusively occupied by FN group at the time of British sovereignty
  - Proof of occupation and exclusivity relies on both common law and aboriginal perspectives (i.e. dwellings, cultivated areas, enclosed fields, definite tracts of land used for hunting, fishing or other resource exploitation)
- **Culturally-defined**- connection with land is of central significance to their distinctive culture

\*Ab title = **right to exclusive use and occupation of land**, more than the right to engage in specific activities

- Uses are not restricted to those grounded in practices, customs and traditions integral to distinctive aboriginal cultures
- Inherent limit: uses must not be irreconcilable with the nature of the group's attachment to that land

**Justification Test, s.35(1)**: (for gov't to infringe aboriginal rights/title)

- 1) Must be in furtherance of a legislative objective that is compelling and substantial- i.e. conservation of fisheries (*Sparrow*)
- 2) Must be consistent with the fiduciary relationship between Crown and ab people- gov't must try to accommodate ab rights (*Gladstone*), duty of consultation in good faith

Fair compensation is usually required when ab title is infringed

**Van der Peet**- identifies 4 key factors of an ab right/title: (integral to a distinctive culture test)

- Precise claim with regards to practices, customs, traditions
- Specific area which has been continuously used/occupied
- Continued occupation and use of the area
- Central significance of the land to the aboriginal group

Claimant is required to prove:

- 1) existence of ancestral practice, custom or tradition supporting the claimed right
- 2) that this practice was “integral” to pre-contact society
- 3) reasonable continuity between pre-contact practice and contemporary claim of right

Nisga’a treaty- exception to Indian Act, allows FN group to have own land title system. Contemplates converting Ab title into estate in FS.

- If there is escheat → land to Nisga’a instead of Crown

**Mitchell v MNR:** (Mohawk claim that trading right overrides Customs Act- rejected) Ab right must be integral to the distinctive culture of the FN group and consistent with pre-contact practices.

Note inherent evidentiary difficulties with regards to aboriginal right claims (societies have existed for centuries without written records, cultural identity is subjective)

- Admissibility of evidence must be determined case-by-case
- Post-contact activities/oral histories may be admissible
- Any evidence must be useful and reasonably reliable, subject to the exclusionary discretion of TJ

**R v Marshall; R v Bernard:** (Mik’maq claim of ab title/entitlement to engage in commercial logging on prov Crown lands- rejected) No evidence of sufficiently regular and exclusive pre-sovereignty occupation = no title.

- Court must examine pre-sovereignty ab practice and translate it into a modern CL right
- To establish title, must prove exclusive pre-sovereignty occupation:
  - **Exclusivity** = effective control of the land
  - **Occupation** = sufficient physical possession
  - **Continuity** = connection with pre-sovereignty group, connection with land “of central significance to their distinctive culture”
- Note that ab rights are not dependent on ab title- nomadic groups can have rights

**William v British Columbia:** (Tsilhqot’in sued gov’t for land title; territorial vs. site-specific approach, nomadic Ab group) Ab title must be proven on a site-specific basis; occupancy requires regular and intensive presence at a particular site.

- Note “doctrine of discovery” allowed European explorers to claim territory on behalf of sovereigns
- Aboriginal rights survived the assertion of Crown sovereignty, continued to exist in CL
- Recognition of these rights occurs on a case-by-case basis
- Courts must reconcile aboriginal rights with Crown sovereignty
- Nomadic groups- can prove title to specific sites within their traditional territories, connected by broad areas in which identifiable rights can be exercised (consistent with case law and broader goals of reconciliation)

### **Registration of Title (Ch. 5)**

- Livery of seisin replaced by delivery of deeds then recording system
- Under **Torrens system**, Registrar evaluates title
- **LTA, s.169:**
  - Boundaries of land must be sufficiently described
  - Registrar must be satisfied that there is a good safeholding and marketable title in fee simple (safe from attack and freely alienable)
- **s.197:** registration of charges; registrar may refuse registration if good safeholding and marketable title has not been established

- s.382(1)(c) and 383: power of Registrar to make corrections

**R v Kessler:** (argument that bylaws must be registered as interests in land) Only established, recognized, European-based common law interests can be registered.

Exceptions:

3 common law interests cannot be registered:

- equitable mortgage or lien by deposit of a duplicate indefeasible title (s.33)
- particulars of trusts (s.180)
- sub-agreements for sale (s.200)
- \*Also, aboriginal CL interests cannot be registered (**Skeetchestn**)

3 non-common law interests can be registered as charges:

- **caveat**- claim of entitlement to interest in the land, lasts for 3 months, prevents further transactions/transfers (s.288)
- **certificate of pending litigation (lis pendens)**- legal proceedings against landholder, replaces caveat (s.215-217)
- **judgment**- forms a lien, is removed when damages are fully paid, prevents further transactions/transfers (LTA s.210, Court Order Enforcement Act, ss.86-91)

**Skeetchestn v BC:** (conflict btwn fee simple title and aboriginal title, attempt to register caveat/lis pendens) Ab CL interests are not registrable because of inalienability; cannot establish good safeholding/marketable title.

**Re Land Registry Act, Evans Application:** (land transfer “40 feet more or less”) Accurate boundary descriptions are required to give effect to good safeholding and marketable title.

**Re Land Registry Act and Shaw:** (son had power of attorney, assigned dad’s mortgage interest to himself) Transfer must be expressly authorized by principal landholder.

- PLA s.27: Attorney cannot sell to himself or herself unless expressly authorized.

**Heller v BC:** (no duplicate title, transfer/registration in wife’s name, potential fraud/delivery issue) There are limits to Registrar’s power; complex questions of law are not within Registrar’s jurisdiction. Registrar has discretion but not obligation to cancel or correct instruments.

Assurance Fund = money collected by prov through property transactions, protects against registration mishaps S.296-298 of LTA:

- If claimant would be entitled to the land under common law, but is deprived by registration, can sue Assurance Fund + person responsible for their loss
- There are many exceptions (303)- i.e. cannot collect from Assurance Fund if it was your own fault, did not take reasonable steps to protect yourself

**McCaig et al v Reys et al:** (several sub-agreements for sale were registered, McCaig had unregistered option; Jerome organized quitclaim of charges, sold land to Jabin) Jerome is liable for fraud, but Assurance Fund is not liable; under CL/nemo dat, an equitable interest does not prevail over a bona fide purchaser for value.

## **REGISTRATION (Ch. 6)**

2 categories of interests:

- 1) **Legal estate in fee simple**
- 2) **all other interests = charges**

\*LTA, s.23: defines rights of fee simple owner/indefeasible title

- s.23(2): exceptions to indefeasibility = Crown rights, tax rates, charges/liens, leases < 3 years, correct sketch plan, fraud

- **Lease 3 years or less does not need to be registered**; buyer is responsible for discovering tenant
- **Lease > 3 years must be registered**
- Any charges must be agreed to by fee simple owner (exception = builders lien)
- Buyer's lawyer must investigate state of title (registration, charges) but has no duty to survey boundaries
- **S.23(3)**: occupation is not a basis for legal title; prevents squatting

**Land Act, s.12**: except as specifically provided, no title can be acquired by adverse possession (squatter's title)

- **S.3: no limitation periods in respect of land**
- **s.54**: requires registration of Crown grants
- **s.50**: reserves certain rights for the Crown (i.e. 1/20<sup>th</sup> of land can be taken for roads, bridges, public works; minerals and other resources are vested in the government)

**Agricultural Land Commission Act**: restricts agricultural land to farming purposes only

**PLA, s.36**: encroachment of building or fence onto neighbouring property; court may grant an easement, order removal of encroachment, or move property line and provide compensation

**Creelman v Hudson Bay Insurance**: (Creelman wanted to get out of purchase, argued that HB was not using land for company purposes/was not legally registered) Fact that HB was registered, even if registration was a mistake, gives it a real enforceable right = indefeasible title; can validly dispose of land.

**Carr v Rayward**: (property transferred, builders lien registered without new owner's approval) A worker is entitled to attach a lien to the property where the work was completed, irrespective of who the owner is.

- **Builders Lien Act**: protects workers, provided that they levy a lien within 45 days of completing their work

#### **FRAUD:**

- **A (innocent owner) to B (fraudster)**
  - B has defeasible title, A can recover property
- **A (innocent owner) to B (fraudster) to C (innocent victim)**
  - Either A can recover property and C can collect damages, or C can keep property and A can collect damages

**Gibbs v Messer**: (Australian context) A should recover title, since C was in a better position to investigate B's legitimacy of title = deferred indefeasibility.

**Frazer v Walker**: (New Zealand context) C should keep title, since it is more important to protect registration/indefeasibility of title and preserve public confidence in the Torrens system = immediate indefeasibility.

- **A (innocent owner) to B (fraudster) to C (innocent victim) to D (innocent purchaser)**
  - D = bona fide purchaser for value; Torrens principles protect indefeasibility of his title (**Gibbs**)

Bona fide purchaser:

- Has given consideration
- Does not know of pre-existing interest

**\*LTA, s.25.1**: Anyone who purports to acquire an interest in land by registration of a void instrument does not actually acquire that interest; it is defeasible (see **Gill v Bucholtz**)

- **\*25.1(2)** Exception: bona fide purchaser for value is protected, gets indefeasible title (with regards to a **fee simple interest only**)

**\*Gill v Bucholtz:** (forged transfer from A to B, registration of mortgage charge by B; A recovers title but is not subject to mortgage) Torrens system guarantees indefeasibility for the estate in fee simple but not for charges; lender has responsibility to investigate potential fraud/get title insurance.

- In general, no indefeasibility for charges
- \*Fraudulent owner is defeasible
- \*Charges are also defeasible- A cannot be subject to an interest that B had no right to give (via nemo dat/statute)

Notice of Unregistered Interests:

- **LTA, s.20:** no interest in land unless it is registered
- **S.29(2):** Except in the case of fraud, a person contracting with a registered owner is not affected by unregistered interests
  - **Unregistered interests are lost when title is transferred**
  - Exception for leases 3 years or less, interests that are pending registration

**McCaig:** If buyer knew about the unregistered interest and acted in a scheme of deception, then they will be bound by the unregistered interest.

**Hudson Bay v Kearns and Rowling:** (registered charge in purchaser's name, unregistered/equitable mortgage with HB) Purchaser for valuable consideration of registered real estate shall be unaffected by notice of any unregistered title.

**Vancouver City Savings v Serving for Success:** (mortgagor/purchaser? of hotel aware of unregistered 5-year leases) Mere knowledge of unregistered interest is not enough, a scheme of deception/dishonesty is required for purchaser to be bound by the interest.

2 lines of authority:

- 1) Purchaser with knowledge of prior unregistered interest, who then attempts to rely on s.29, may be found to have committed equitable fraud (**Woodwest**)
- 2) Before a finding of equitable fraud can be made, there must be evidence of actual notice coupled with some act of dishonesty on the part of the person seeking the protection of s.29 (**Szabo, Vancouver City Savings**)
- Courts are more inclined to accept the 2<sup>nd</sup> line of authority

**McRae v McRae Estates:** (Mr. Fraser gave life estate to Mrs. Fraser, remainder interest to 3 children in trust document. 1 son gained title, died, left property to his wife/2 siblings) Registration was in trust instrument, owner is deemed to know all interests registered at time of transfer. Wife loses.

**\*Dukart v Surrey:** (Crescent Beach development, IT for foreshore reserve; trust document referencing owners' easements in reserve area) "In trust" notation on IT satisfies registration; city is violating P's right to wander, must remove comfort station.

- **LTA, s.180:** trustee becomes registered owner, "in trust" notation refers to trust document on file in LTO
- **Charges can be registered in the charge section, or can be registered "in trust"** (does not apply to unregistered easements- see **Sorenson v Young**)

**\*Credit Foncier v Bennett:** (forgery of mortgage, money is owed but forger has disappeared) You are deemed to be indefeasible as a charge holder, but that is a rebuttable presumption. Mortgages are always subject to the state of accounts, bank loses because of nemo dat. No claim against Assurance Fund.

- **\*LTA, s.23:** strong language indicating immediate indefeasibility of registered fee simple interest
- **\*S.26:** weaker language, registered owner of a charge is entitled to the interest, not indefeasibly entitled

\*difference in language suggests that there is a lesser degree of protection applied to charges than to FS

- In general, registered FS owner is protected
- Charges are presumed to be indefeasible, but this is rebuttable (agrees with *Gill v Bucholtz*)

**Canadian Commercial Bank v Island Realty:** (3 mortgages and equities of redemption, crook faked discharge of 2nd mortgage) Void instrument; however, court gives effect to discharge because it was registered.

- Ignorance of **LTA, s.25.1?**
- Decision favors indefeasibility of charges, reliance on register → contradicts *Credit Foncier* and *Gill v Bucholtz*
- **S.28:** priority of charges; the one who is first in time is first in law

**\*Sorenson v Young:** (right of way easement reserved in original deed, never registered on IT) Easement invalid because it was not registered.

- Recall **S.20:** interest must be registered to be valid
- **S.181:** must look at relevant deeds when transferring land, must apply to have charges registered against new IT (exception for trusts- see *Dukart v Surrey*)

**Yeulet v Matthews:** (mom loaned money to son = unregistered equitable mortgage. Judgment was registered against son) Equitable mortgage has priority; judgment creditor gets son's title, subject to mom's interest.

- Judgment creditor cannot take any greater interest than the judgment debtor actually has

**L&C Lumber v Lundgren:** (P sold *profit a prendre* right to cut trees- was never registered as a charge, was assigned to another co) Where there is an assignment and debtor has been notified in writing, there is a relationship created between debtor and new creditor.

- **S.36 of Law and Equity Act:** creates relationship between debtor and 3<sup>rd</sup> party creditor
- **s.20 of LTA:** “EXCEPT AS AGAINST THE PERSON MAKING IT” → court manipulates this phrase to ensure a fair result, allows 3<sup>rd</sup> party to claim interest against grantor in certain circumstances

**International Paper Industries v Top Line:** (long lease never registered, tenant stopped paying rent; lease invalid) Cannot claim interest against grantor if you have failed to comply with a statutory requirement- subdivision approval in this case. S.20 exception does not apply if transaction is prohibited/illegal

- **S.73.1:** protects personal obligations- even if lease is not registrable/enforceable, other provisions (paying rent, looking after property) may be enforceable

## CHAPTER 8: Applications to Register

**Rudland v Romily:** (application for registration came in before a caveat/lis pendens) Bona fide purchaser is not subject to caveat registered after purchase; cannot penalize honest purchaser for busy LTO.

**Breskvar v Wall:** (P needed money, borrowed from fraudster in exchange for blank transfer form; property was registered in fraudster's name and then transferred to bona fide purchaser) Legal estate appears to be with P, equitable estate with bona fide purchaser... sale gives what was intended = equitable estate, registration would transfer legal estate as well

- In general, equitable estate yields to legal estate
- However, court favors bona fide purchaser in this case (P should not have written blank transfer form!)
- P's interest is re-characterized as an equitable estate, since he transferred legal estate to fraudster
- Equitable estate vs. equitable estate → Bona fide purchaser wins

## CHAPTER 9: Fee simple

**Words of purchase and words of limitation:**

- Who is getting the interest/what are they acquiring?
- Common law has become less formal; “to A and his heirs” is no longer required to transfer fee simple (**s.19 of PLA, s.24 of Wills Act**)

- Unless there is a contrary intention in the document, we assume that a fee simple interest is being transferred or devised (PLA, s.19)

**Tottrup:** (twin brothers gave estates to each other in their wills) “his heirs absolute and forever” = words of limitation; EIFS is transferred. Intention of testator is important, daughter not specifically included.

**Re Walker:** (EIFS left to wife, contest between his and her named heirs) Against public policy to restrain an owner from free disposal; undue restraint on beneficiary’s ability to deal with the property completely = contradictory to EIFS.

- “should any portion of estate remain undisposed when she dies, such a remainder will be divided as follows...” = invalid, qualification is a repugnancy
- Restrictions on LE would have been okay ?

**Re Shamas:** (“everything to wife until last kid turns 21”) = LE with a right to encroach on capital; can support herself throughout lifetime and kids until they are 21. When she dies, estate to be divided amongst kids.

- In construing wills, must consider entire document and relevant surrounding circumstances.

**Ceilin v Tressider:** (std form used to convey EIFS to wife- but with note that upon disposal/sale, any proceeds to be distributed btwn kids) Clear intent to give EIFS absolute, any qualifications on this are repugnant/invalid.

\*In general, cannot restrain disposal of EIFS (Re Walker, Ceilin v Tressider)

Rules of construction applicable to wills:

1) Rule in Wild’s case: “to A and his heirs/children/issue”

- “to A” = words of purchase; A gets interest
- **If there were children at the time will was drafted:**
  - “A’s heirs” = words of purchase
  - Co-ownership situation between A and children (joint LE?)
- **If there were no children at the time will was drafted:**
  - “A’s heirs” = words of limitation
  - A gets fee tail → fee simple, can freely dispose of interest

2) Rule in Shelley’s case: “to A for life, remainder to his heirs”

- “to A” = words of purchase, “for life” and “remainder to his heirs” = words of limitation
- A gets LE + remainder = EIFS

**PLA, s.10(2):** abolishes fee tails (which limited inheritance to direct descendants)

- Any attempt to create a fee tail is automatically converted to FS (or greatest interest in the land)

## **CHAPTER 10: Life Estate**

- Must be created expressly: “to A for life”
- Lasts for the life of the estate holder, or the life of another person (estate pur autre vie)
- **Estate Administration Act, s.96:** gives surviving spouse all household furnishings and LE in matrimonial home
- **Land (Spouse Protection) Act:** both spouses must consent to any disposition of the property; surviving spouse acquires LE
- LE = possessory interest- tenant controls and enjoys the property, has right to retain any profits arising from its exploitation
- LE can be transferred inter vivos- grantee gets estate pur autre vie
- If life tenant dies, estate reverts to grantor or holder’s heirs (i.e. A is the measuring life, B holds estate pur autre vie, then B dies- B’s heirs are able to use and enjoy the land until A dies)
- FS owner has reversionary interest- will eventually get land back

- LE is not very marketable- cannot lease property because length of lease is unknown
- Today, equitable LE is more likely to be created- trustee holds legal title, beneficiary holds equitable LE and equitable remainder

Waste:

- **Permissive** = passive conduct which permits decay, life tenant is not responsible for this
- **Voluntary** = any act which causes permanent damage, life tenant is liable for this (may be required to pay damages or may be restrained by injunction from committing acts of waste)
  - 4 categories: timber, mines/minerals, demolishing or altering buildings, changing the use to which the land is put
- **Equitable** = voluntary waste that is expressly permitted, life tenant is “unimpeachable for waste”
  - However, court can still restrain a life tenant from using this right unconscionably

**Vane v Lord Barnard:** (without impeachment of waste, Lord Barnard demolished son’s castle) He acted with malice, was liable for damages.

**Mayo v Leitovski:** (L did not pay taxes, municipality sold the land and M lost remainder interest; L’s family repurchased the land) Life tenant is obliged to pay property taxes and must safeguard remainderman’s rights; cannot avail herself of her position as a tax-sale purchaser to defeat reversionary interest.

## CHAPTER 12: Future Interests

### Vested interests:

- A) may be vested absolutely
- B) may be vested, subject to divesting
- C) may be vested with a provision which keeps the holder of the estate out of possession

Vested in interest = estate given without any precondition  
 Vested in possession = entitled to possession of property

### Contingent interests:

- Non-vested, dependent on the occurrence of some event

Interest is contingent until:

- 1) property is identified
- 2) identity of grantee is established (unborn child)
- 3) contingent event has occurred
- 4) exact share of each member is determined (in a class gift)

\*Rule against perpetuities only applies to contingent interests

\*If any ambiguity- assume that the interest is vested; court will lean towards an “early vesting”. Wills should be construed to give effect to the testator’s intention.

### Types of Future Interests:

- **Reversion**- remains with transferor
- **Right of entry**- created by condition subsequent
- **Possibility of reverter**- created by determinable limitation
- **Remainder**- interest in 3<sup>rd</sup> party, possession is postponed until the prior freehold estate expires

\*at common law, ROE and POR could only arise in favor of transferor

PLA, s.8(2): allows ROE to be given to any person

**Westsea Construction v BC:** (condo developer with POR, purchasers with determinable fees) POR is a limitation on the extent of a determinable fee, not a charge against title; interest divests automatically when limitation is met. Cannot expand mortgaged interest to include POR, holder can only grant mortgage against the title held.

PLA, s.10(4)- POR and ROE are registrable in same manner as charges, despite not being charges

### **Restrictive Remainder Rules:**

- 1) remainder must be supported by a prior freehold estate created by the same instrument as the remainder
  - cannot have a gap in seisin
- 2) remainder must vest when the prior freehold terminates
  - can put a contingency on the remainder
  - cannot have a gap in seisin
- 3) remainder is void if it takes effect in possession by prematurely defeating the prior freehold
  - cannot have shifting interests
- 4) remainder after disposal of a FS is void

PLA, s.8(2) changes the rules- #3 no longer applies

#4 does not apply to ROE, but still applies to PoR in 3<sup>rd</sup> person

Vested remainders- must comply with the restrictive rules

Contingent remainders- can be destroyed

- **Natural termination:** if person entitled to the remainder cannot take possession at the time that the prior freehold terminates, then there is a gap in seisin and the remainder is destroyed
- i.e. preceding interest is extinguished before contingency is met

### **Equitable future interests:**

- Are not subject to the remainder rules or destructibility
- Legal title is vested in a trustee

**Re Robson:** all interests created by will are, or are to be treated as, equitable

### **CHAPTER 13: Conditional and Determinable Interests**

#### **3 ways to impose qualifications on an interest:**

##### 1) **condition precedent = “if”**

- “to A if she resides in Vancouver”
- A gets FS on a condition precedent, grantor gets reversionary interest

##### 2) **condition subsequent = “but if”/“subject to”**

- “to A, but if she resides out of Vancouver, to B”
- A gets FS defeasible upon a condition subsequent, B gets ROE, grantor gets nothing

##### 3) **determinable limitation = “until”/“when”/“while”/“so long as”**

- “to A until she resides outside Vancouver”
- A gets determinable FS, grantor gets POR

**If qualification is invalid-** whole clause is invalid for 1 and 3; cannot separate FS and qualification. For 2- offending words (but if...to B) can be struck out; can separate fee simple and condition subsequent.

In respect of personalty, distinction is made between qualifications that are malum prohibitum/malum in se:

- Malum prohibitum = unlawful conduct, can strike out the offending qualification
- Malum in se = conduct evil in and of itself, must strike out the whole clause

#### **3 bases for getting rid of qualifications:**

- 1) uncertainty
- 2) public policy
- 3) undue restraint on alienation

**Noble v Alley:** (racial covenant restricts sale to a number of races) Covenant must touch and concern the land; this is a restraint on alienation, also void because of uncertainty. Interpreted as a condition subsequent- can be struck out.

Racial covenants will fail for reasons of uncertainty, will also likely fail as undue restraints on alienation

**Re Messinger:** (will giving estate to wife, condition “while she resides in the home”) Condition subsequent is void for uncertainty; wife gets LE in home, whether she resides in it or not.

Presumption in favor of early vesting; if doubtful, court will interpret a condition as subsequent not precedent

**Re Allen:** (condition that grantee must adhere to a particular faith) Qualification is not void for uncertainty; test for certainty with regards to an adherent- much more relaxed when analyzing condition precedent than condition subsequent.

**Re Tuck’s Settlement Trusts:** (condition that son must remain Jewish and marry a Jewish woman; son’s 2<sup>nd</sup> wife was non-Jewish) Any conceptual uncertainty is resolved by Chief Rabbi clause- 3<sup>rd</sup> party decision is final and binding so long as he arrives at it honestly and in good faith.

**2 types of uncertainty:**

- conceptual uncertainty = when testator has not expressed himself clearly enough, words are too vague, condition is meaningless
- evidential uncertainty = when testator has expressed himself clearly, words are sufficiently precise; but court has difficulty applying them because the facts are uncertain

Restraints on religion are okay, but must not be too uncertain

**Blackburn v McCallum:** (general prohibition on alienation for a certain period of time) Limited restraints on alienation are allowed- i.e. to a particular class of individuals. General restraint on alienation is not permitted, even if it is limited by time.

**Trinity College School v Lyons:** (some land sold to TCS with option to purchase rest when owner/heirs died) Option is void as an unlawful restraint on alienation.

**MacDonald v Brown Estate:** (estate held on trust until niece becomes widowed or divorced) Provisions are supportive, are not intending to induce divorce/not contrary to public policy.

Motive is important with regards to marriage qualifications

Human Rights Code, s.8: must not discriminate in accommodation

S.9: must not discriminate in purchase of property

S.10: must not discriminate in tenancy premises

- ...because of a person’s race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation.

Land Title Act, s.222: discriminating covenants are void

**Canada Trust Co v Ontario (Human Rights Commission):** (scholarships given to white people only) Public trust devoted to charity must agree with public policy; provisions related to race, colour, ethnic origin, religion and sex contravene the public policy of equality and are void.

**Marshall v Strata Plan:** (condo bylaw prohibited occupancy by anyone under 55) Human Rights Act permits the creation of retirement communities by means of age restrictions.

## CHAPTER 14: Rule Against Perpetuities

**Perpetuity** = long series of equitable future interests, not subject to destructibility, land rendered inalienable because no one person is absolutely entitled to it

**Modern (CL) Rule Against Perpetuities:** No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest

- **Vesting within perpetuity period (LIB + 21 years) must be certain**
- If there is even a remote possibility that contingent interest will not vest during this period, gift is void

If void under CL rule, may be saved by **BC Perpetuity Act**

- **s.9: Wait and See**- gift is presumed to be valid until actual events establish that the interest is incapable of vesting within the period. Note 80-year period for corporations with no specific lives in being.
- **s.11: Age reduction**- gift will be construed to refer to the nearest age that would prevent it from being void; add 21 to actual age of child rather than age stipulated.
- **s.14: Capacity to have children**- males 14 and older, females 12-55 are presumed to be child-bearing; can be rebutted by evidence.

## CHAPTER 11: Co-ownership

### Tenancy in Common

- **Unity of possession**- 2 or more people are entitled to possession of the property as a whole
- **“equally” or “2/3 to 1/3” or words that suggest shareholding → TIC**

### Joint Tenancy

- **Right of survivorship** (*jus accrescendi*)- if JT is not severed and 1 tenant dies, survivor instantly becomes absolute FS owner
  - Takes priority over normal rules of wills/intestacy
- **Unity of possession**
- **Unity of title**- co-owners must derive titles from same instrument
- **Unity of interest**- interests must be the same
- **Unity of time**- interests must vest simultaneously
- **No words that suggest shareholding → JT**

\*CL favoured creation of a joint tenancy

PLA, s.11(2): presumption of a tenancy in common

LTA, s.173: nature of the co-ownership (JT or TIC) can be registered

LTA, s.177: title must specify “joint tenants” in order to create JT

**Re Bancroft v Calder:** (1<sup>st</sup> split btwn children specified “equal shares”, 2<sup>nd</sup> split btwn grandchildren did not contain word “equal”) Joint tenancy created btwn grandchildren, because the word “equally” was not used.

**Robb v Robb:** (co-op building, shares purchased by wife and consideration later given by husband) **S.11(2)** presumption only applies to FS, leasehold interest in this case = joint tenancy.

- Argument that TIC arises when parties contribute purchase money in unequal shares (rebutted by evidence of contribution)

CL rule that you cannot transfer property you already own to yourself

PLA, s.18(1): Re-transfers are allowed in a JT

**S.18(3):** if joint tenant transfers land to himself, severs JT (ruptures unity of title and time) → TIC

**Sorenson v Sorenson:** (several attempts to transfer land from wife to children, disabled son) Trust deed transferring equitable estate to son, to be registered on joint tenant’s death = severance of JT, disruption of unity of title.

Share of profits/expenses: In general, profits and expenses are shared

**Spelman v Spelman:** (wife left husband, he operated boarding house in her absence) Not just and proportionate for co-owner to collect profits when partner is expending own skill and taking risks.

A co-owner who remains on the land can reap its benefits, so long as they have not ousted the other co-owner

**Mastron v Cotton:** if person has not enjoyed the benefit of the land, they cannot be responsible for expenses.

**Framework for exercises:**

1) What are the words of purchase and words of limitation?

- Who is getting what?

2) Is the interest vested or contingent?

- Vested in interest or possession, or both?
- Future interests are not vested in possession

3) If future interest, is it legal or equitable?

- **Re Robson:** interest in a will is presumed to be equitable
- If it is in a trust = equitable
- If it is inter vivos = legal
- If equitable → must comply with Rule Against Perpetuities/BC Perpetuity Act, interest is not subject to natural destruction
- If legal → must comply with CL remainder rules, interest is subject to natural destruction

4) What is the nature of the qualification? (see p.10)

- Cannot be uncertain, cannot be an undue restraint on alienation, must comply with public policy

Rule in Wild's Case = "To A and his heirs"

- If there were children: co-ownership btwn A and children
- If there were no children: fee tail → EIFS to A

Rule in Shelley's Case = "To A for life, remainder to his heirs"

- EIFS to A (LE + remainder interest)

**\*Presumption of Early Vesting:** if ambiguity, assume that an interest is vested

**S.19 of LTA** = presumption that greatest interest in land is transferred (FS)

**S.10(2) of PLA** = fee tail → FS (or greatest interest in the land)

**s.19 of PLA, s.24 of Wills Act** = "his heirs" no longer required to transfer FS

### Other Statutory Provisions:

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

- registration not necessary for interest to pass btwn transferor and transferee
- A (registered owner) → B (doesn't register)... then A → C (does register)
  - Under common law: B is protected by nemo dat
  - Under Torrens: C's interest prevails. B is vulnerable to 3<sup>rd</sup> party- may have claim against A, but no claim against C
  - \*s.20 seriously emasculates nemo dat
  - \*Note that nemo dat still applies to charges (see *Credit Foncier* and *Gill v Bucholtz*) and judgments (see *Yeulet v Matthews*)

**s.23(2):** An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title.

**s.26(1):** A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.

**s.25.1: (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.