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# CHAPTER 3—Aboriginal Title

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| Delgamuukw v British Columbia | |
| **Facts** | At trial, 71 houses of NA people, all belonging to Gitksan or Wet’sewet’en nations claimed “ownership” and “jurisdiction” over separate portions of 58,000 km2 in BC   * + trial judge rejected oral evidence and dismissed the claim   On appeal, the original claim was amended to be a claim for “aboriginal title” and “self government,” and the individual claims were combined into two large claims, one on behalf of each nation   * + this appeal was dismissed by majority of the court of appeal |
| **Issue A** | Do the pleadings preclude the Court from entertaining claims for aboriginal title and self-government?   * The change in the nature of the claims (ownership🡪aboriginal title and jurisdiction🡪self-government) should not limit the court * The amalgamation of the claims “would retroactively deny the respondents the opportunity to know the appellants’ case,” meaning the court cannot consider the merits of the appeal   + new trial is ordered |
| **Issue B** | What is the ability of this Court to interfere with the factual findings made by the trial judge?  There is a general principle that appellate courts should be reluctant to overturn findings of fact by trial courts, but   * + “In cases involving the determination of aboriginal rights, appellate intervention is warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, first, applying the rules of evidence and, second, interpreting the evidence before it . . .”   + here, trial judge erred in giving oral histories no weight, but SCC couldn’t make new findings of fact, therefore ordered a new trial |
| **Issue C** | What is the content of aboriginal title, how is it protected by s. 35(1) and what is required for its proof?  (1) Introduction   * + FN argument—aboriginal title is equivalent to an inalienable fee simple   + government argument—2 alternatives:     - aboriginal title is a bundle of rights to engage in other activities that are themselves aboriginal rights, has no independent content     - aboriginal title is the right to exclusive use and occupation of the land   + SCC decision—“Aboriginal title is a right in land, and as such is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title.”   (2) Aboriginal title at common law  (a) General features   * + - described as *sui generis* because:       * it is distinct from “normal” property interests       * its characteristics can only be explained by reference to both common law rules of real property and the aboriginal perspective on property     - inalienable—cannot be transferred, sold or surrendered to anyone but the Crown     - the source of aboriginal title is the prior (before the Proclamation) occupation of Canada by Aboriginal peoples     - held communally—cannot be held by individual persons   (b) The content of aboriginal title   * aboriginal title encompasses the right to exclusive use and occupation of the land * the land must not be used in a way that is irreconcilable with the nature of the group’s attachment to the land   (c) Inherent Limit: Lands held pursuant to aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group’s claim to aboriginal title   * land must be preserved in accordance with continuing relationship between the people and the land * this is also the reason that aboriginal title is inalienable   (d) Aboriginal title under s. 35(1) of the Constitution Act, 1982   * aboriginal title at common law is fully protected by 35(1) * aboriginal title is a species of aboriginal right recognized and affirmed by section 35(1), it is distinct because it arises where the connection of a group with a piece of land was of central significance to their distinctive culture * site-specific rights can be made out even if title cannot, aboriginal title confers the right to the land itself   (e) Proof of aboriginal title   * the land must have been occupied prior to sovereignty—aboriginal title crystallized at the time sovereignty was asserted   + occupation/possession is sufficient to show aboriginal title, don’t have to prove land was distinctive/integral part of society * if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation   + doesn’t have to be an unbroken chain of continuity, but must be “substantial maintenance of the connection” between the people and the land * at sovereignty, occupation must have been exclusive   + judge suggests “shared exclusivity”—the right to exclude other except those with whom possession is shared     - no claim to joint title has been asserted here, so will not work out complexities of joint title   (f) Infringements of aboriginal title: the test of justification   * aboriginal rights recognized and affirmed by section 35(1) are not absolute, they may be infringed on, both by the federal and provincial governments * two part test:   1. The infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial   2. Assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal people      + Requirements of fiduciary duty are the function of the "legal and factual context" of each appeal; fiduciary duty does not demand that aboriginal rights are always given priority      + Questions to be addressed, depending on the circumstances of the inquiry      + As little infringement as possible to effect the desired result      + Fair compensation is available in a situation of expropriation      + Consultation of aboriginal group      + Fiduciary duty and degree of scrutiny of infringement will vary      + Suggestion: broader the aboriginal right being claimed and broader the ramifications for non-aboriginal interests, the lesser the degree of scrutiny on the govt * Range of legislative objectives that can justify the infringement of aboriginal title is fairly broad and will be decided on a case-by-case basis, e.g.: forestry, agriculture, mining, hydroelectric power, general economic development of BC interior, protection of environment or endangered species, infrastructure, settling foreign populations * Manner in which the fiduciary duty in stage 2 operates will be a function of the nature of aboriginal title * Involves assessment of interests at stake, precise value of aboriginal interest in land, grants/leases/licenses granted for its exploitation * Right to choose to what ends a piece of land = duty of consultation * Nature and scope of the duty of consultation will vary with the circumstances * Can range from mere notice, discussion of important decisions, full consent * Must be done in good faith, with intention of substantially addressing concerns of aboriginal peoples * Economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well * Fair compensation will ordinarily be required when aboriginal title is infringed.   Amount of compensation will vary with nature of title affected, nature/severity of infringement, extent of accommodation |

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| Mitchell v MNR | |
| **Facts** | Chief Mitchell purchased goods in the US and brought them back into Canada. When he tried to cross the border, he was told that he had to pay duty. Mitchell claims that he did not have to pay duty because he was exercising an aboriginal right. |
| **Issue** | Does the aboriginal group have the right to bring goods into Canada from the United States for collective use and trade with other First Nations without paying customs duties? |
| **Law** | First you must characterize the nature of the aboriginal right and what has to be shown to successfully assert it. From *Van der Peet*, three factors to guide characterization of a claimed right:   1. The nature of the action which the applicant is claiming was done pursuant to an aboriginal right. 2. The nature of the governmental action/legislation alleged to infringe the right 3. The ancestral practices relied upon to establish the right   Test for establishing an aboriginal right:   1. Prove the existence of the ancestral practice/tradition/custom 2. Prove that the practice was integral to pre contact society and marked it as distinctive 3. Show reasonable continuity between pre-contact practice and contemporary claim   Evidentiary concerns:   * Oral evidence should be admissible where it is useful and reasonably reliable, subject to the exclusionary discretion of the trial judge. * Aboriginal evidence should not be undervalused simply because it is oral, but it should not be artificially strained to carry more weight than it can reasonably support. |
| **A/C** | The aboriginal right disclosed by the evidence is incompatible with sovereignty:   * Claim fails at step 2 of the test for establishing an aboriginal right: * A right to trade is something that most cultures do, and is incidental and not distinctive. |

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| R v Marshall; R v Bernard | |
| **Facts** | Bernard, a Mi’Kmaq person, cut timber for commercial purposes on Crown lands without provincial authorization. He was charged under provincial legislation, and in his defence he claimed that he didn’t need provincial authorization to cut down timber because of treaty rights and aboriginal title to the land   * trial—they were convicted * CA—overturned convictions and ordered a new trial |
| **Issue** | Do people from this group have aboriginal title that allows them to do commercial logging on their lands? |
| **L/A/C** | Aboriginal title at common law:   * an aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to that land, continues to enjoy it * that right could have been extinguished by a clear legislative act before 1982, not anymore * crown can impinge on aboriginal title only if it can establish that this is justified in pursuance of a compelling and substantial legislative objective for the good of larger society   Standard of Occupation for Title:   * court should take a generous view of the aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right * A pre-sovereignty aboriginal practice cannot be transformed into a different modern right * “The question is what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective.”   What is meant by exclusive control?   * don’t have to show acts of exclusion, just a demonstration of effective control   Can semi-nomadic people ever claim title to land?   * depends on the evidence in each case, whether a degree of occupation/use equivalent to CL title has been shown.   Requirement of continuity:   * Must establish a connection with the pre-sovereignty group whose practices they rely upon * To claim title, group’s connection to land must have been of central significance to their distinctive culture |

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| William v British Columbia | |
| **Facts** | Chief William sued Federal and Provincial governments for declarations of AT and AR over areas of BC. Trial judge found that title was proven over part but not all of the claimed lands**. Leave to appeal to SCC!** |
| **Issue** | Is AT site specific or territorial? |
| **L/A/C** | The result for semi-nomadic FN is not a patchwork of unconnected “postage stamp” areas of title, but rather a network of specific sites over which title can be proven, connected by broad areas over which ARs can be exercised. This is entirely consistent with their traditional culture and with the objectives of s. 35. |

# CHAPTER 5—Registration of Title (Overview)

## Historical Background

Fragmentation and alienation of property becomes increasingly important because we are **wealth-seeking individuals**, and wealth can only be increased if we are able to trade, which requires free markets for efficiency.

* Two goals—(1) maximize efficiency of transfer and (2) minimize fraudulent activity

Common Law Conveyancing

See Ch. 2: Livery of seisen, gradually replaced by the “delivery” by the transferor to the transferee of deeds (documents under seal). Seller had to deliver all deeds and buyer would have to carefully sift through all the deeds:

* time consuming and expensive because it had to be done every time a transfer took place
* abstract of title—end result of the investigation
* person entitled to legal possession was entitled to the deeds
* problem—deed could be stolen, lost, burned in a fire

Recording System

This came about in England in the 1700s. Every contract regarding land would be housed in a specific bin.

* minimizes loss of documentation
* a system of title insurance had grown up, active and profitable, to protect against lawyer mistake

Torrens System

The “bin” is in a state office and provincial employees prepare abstracts of title, start off w/ fee simple, look at land and make sure the measurements are correct (w/ surveyor diagrams), then see what interests in land have been carved up, then produce an indefeasible title.

* Indefeasible title gives a good indication of what the interests are
  + EIFS at the top
  + Charges below—keep in mind that charges can have further dealings (ex sublet of lease)
* The purpose of this system is to enable certainty, to allow an orderly way to sort out land claims.
* **Exam:** when looking at legislation or CL rule, always consider what the purpose of it is

## General Pattern of Registration

What can be registered?

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| R v Kessler (1961 BC) | |
| **Facts** | Kessler was being prosecuted for a zoning violation. |
| **Issue** | Do zoning bylaws need to be registered to be enforceable? |
| **L/A/C** | CL—only interests in land qualify for registration. A bylaw is not an interest in land and therefore does not need to be registered to be valid. |

#### Land Title Act s 33 (equitable mortgage)

* An equitable mortgage or lien by deposit of duplicate indefeasible title or other instrument cannot be registered

#### Land Title Act s 180 (trust)

* A trustee can get registration, but Certificate would say “in trust,” however no particulars of the trust can be put on the certificate (see *Dukart v Surrey*)

#### Land Title Act s 200 (sub-agreements for sale)

* Cannot register sub-agreements for sale. I.e. I will sell you Blackacre if you make payments for 20 years, and when you have paid in full I will transfer EIFS to you. When this is done, purchaser gets equitable EIFS.

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| Skeetchestn v British Columbia (Aboriginal Title) | |
| **Facts** | NA group was making an assertion of AT over land that included fee simple ownership as well as Crown land. Kamlands had purchased a large parcel of this land from the Crown and intended to put a residential development on it. NA band asked and registrar refused to register first a lis pendens and second, a caveat. |
| **Issue** | Was the registrar correct in refusing to register the lis pendens and the caveat? |
| **L/A/C** | Lis pendens—certificate of pending litigation—does not expire, land can be sold even if there is a lis pendens registered as a charge.  Caveat—has a predetermined life span during which nothing can be registered  Registrar Argued: (and was accepted by court)  CANNOT register a caveat or a lis pendens wrt a claim for AT because AT itself is not registrable.  AR/AT cannot be sold, mortgaged, or be otherwise alienated, therefore they are not marketable. **Registrar must only register things that have a good safeholding and marketable title.**  Reservation—grantor reserves to itself a right/interest that has no previous existence as such but that is called into being by the interest reserving it. (I.e. on a Crown grant.) AT clearly not a reservation. |

## Basic Scheme of Registration

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

* With the exception of dividing and registering airspace, only the owner of surface of land is entitled to be registered as owner of EIFS

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

* Registered owner in EIFS can deposit an air space plan and get indefeasible titles for each parcel

***Strata Property Act***

* sets out requirements for dividing airspace

**Legal Fee Simple**

#### Land Title Act s 169 (preconditions for registration)

* boundaries of the land must be sufficiently described
* registrar must be satisfied that the instruments produced by the applicant confer “a good safeholding and marketable title in fee simple”
  + safeholding = safe from attack and cannot be displaced
  + marketable = freely alienable and not so defective that a reasonable purchaser would refuse it

Pending Application—When an application is received it is time/date-stamped and assigned a serial number.

Indefeasible title—produced when registrar is satisfied that application meets the conditions, can take 2 forms:

* certificate—in paper
* electronic information (stored in the electronic “bin” for Blackacre)

Duplicate Indefeasible Title—issued to the owner on application (s 176(1)), must contain all the information in the register including charges, conditions, exceptions, etc.

* Duplicate cannot be issued if the title is subject to a mortgage or an agreement for sale (s 176(1)). If a duplicate has been issued and an application to register a mortgage or agreement for sale is made, the duplicate must be returned to the registrar for cancellation (s 195(1))

#### Land Title Act s 23(2) (the “heart of the Torrens system”)

* registration of title constitutes conclusive evidence at law and in equity that the person named in the title is indefeasibly entitled to an EIFS.

**Charges**

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

* (1) on being satisfied . . . the registrar must register the charge
* (2) despite subsection (1) the registrar may refuse to register the charge if he believes:
  + (a) a good, safeholding and marketable title to it has not been established
  + (b) the charge claimed is not registrable under the Act
* Registrar may be satisfied in a number of ways:
  + by an instrument from fee simple owner creating a charge in favour of the applicant (ex a mortgage)
  + by an assignment to the applicant of an existing charge (ex. a lease)
  + by the creation of a sub-charge in favour of the applicant (ex a sub-lease)

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

* (1) when a caveat is in force, the registrar can’t register another instrument (unless instrument expressed subject to caveat) or deposit a subdivision plan unless the caveator consents
* (2) interest expressed as subject to caveat can’t be registered if caveat defeats its root of title

#### Land Title Act s 215 (registration of lis pendens)

* a person who has commenced or is party to a proceeding may register a *lis pendens* as a charge

#### Land Title Act s 216 (effect of lis pendens)

* registrar cannot allow any changes to register of land once *lis pendens* has been registered unless the changes are expressed subject to the lis pendens or unless that charge/lease was registered before the *lis pendens* was registered

#### Land Title Act s 217 (effect of lis pendens if prior application is pending)

* the registrar can register an indefeasible title or charge that was applied for before the application to register the *lis pendens*

#### Court Order Enforcement Act (registration of judgments)

* If a P gets a money judgment against a D, the P can register the judgment as if it is a charge
* 86(3)—From the time of its registration the judgment forms a lien and charge on the land of the judgment debtor (i.e. D who lost)
  + (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 judgment debtor
  + (c) **subject to the rights of a purchaser who, before the registration of the judgment, has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgment**

## Role of the Registrar

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| Re Land Registry Act; Re Evans Application (1960) | |
| **Facts** | Husband and wife are joint tenants of a parcel of land. Husband dies and widow went to the registrar to have the joint title registered in her own name as the survivor. The registrar refused because the land had been subdivided without being surveyed, and he said it was possible for their to be a dispute if the two parcels were found to be overlapping. Widow appeals this decision to the BCSC. |
| **Issue** | Should the registrar be compelled to register the property? |
| **L/A/C** | The registrar must satisfy himself that there is a good safe-holding and marketable title before he can issue a certificate of indefeasible title—now s 169 of LTA.  The duty of the registrar is to refuse to register and not to perpetuate error by continuing to do that which was done in error in the first instance. |

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| Re Land Registry Act and Shaw (1915) | |
| **Facts** | Father gives son power of attorney on land, and the son tries to sell the property to himself. Registrar refused to register unless father verified the sale. |
| **Issue** | Should the registrar have registered the property? |
| **L/A/C** | In order to satisfy the registrar that he has prima facie good title, he must provide an instrument that does not require further clarification. If clarification is needed, then the applicant has not established title.  This transaction from the son to himself is a “palpable blot,” and requires more evidence before it is legally effective. Land Title Act s 27  * A person with “power of attorney” cannot sell land to himself unless the principal expressly authorizes it. |

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| Heller v British Columbia (Registrar) (1963 SCC) | |
| **Facts** | Mr. Heller owns land, executes a deed transferring the property to his wife. Wife takes deed to transfer office and it is registered, but this is done in error because the duplicate indefeasible title is with Mr. Heller. Mr. Heller then sells land to a buyer and gives buyer the duplicate. Buyer tries to register and registrar says no. Registrar refuses to correct the register. |
| **Issue** | Should the registrar be compelled to exercise his statutory power correct the register? |
| **L/A/C** | The issue here goes beyond simple clarification. There are some issues around transfer, maybe bad transfer, maybe fraud, who know, but that is a legal question requiring you to weigh up evidence and knowledge and judicial capacity, which is not something in the jurisdiction of the registrar.  The power conferred on the registrar is discretionary, and are limited by the words, “so far as practicable.” without prejudicing rights conferred for value” Land Title Act s 383 (registrar to cancel or correct instruments)  * The registrar may cancel or correct instruments so far as practicable |

## The Assurance Fund

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

(2) A person

* + (a) deprived of land because of the conclusiveness of the register, who, without the LTA would have been able to recover the land (by operation of nemo dat), by a wrongful act regarding the registration of another person as owner of the land **and**
  + (b) who is barred from bringing an action for possession, rectification of the register, etc.
* may proceed in court for recovery of damages against fraudster

(3) the minister must be a party to the suit and has the right to defend the assurance fund from claimant’s suit

(4) if fraudster is dead or MIA, the claimant can bring an action to recover from the assurance fund

(5) if the claimant tries and fails to recover from the fraudster, they can recover from the assurance fund

(8) limitation period of 3 years after deprivation is discovered by plaintiff

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

* A transferee who purchases land in good faith and for valuable consideration won’t be subject to a proceeding for recovery, deprivation, or damages in respect of land on the ground that the transferor was registered (or derived title from someone who was registered) through fraud, error, or a wrongful act

#### Land Title Act s 298 (fault of registrar)

* If a person sustains loss due to the fault of the registrar, they can make a claim to recover under the fund

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

(f) The assurance fund is not liable for the proportion of any loss, damage or deprivation caused or contributed to by the act, neglect or default of the plaintiff

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| McCaig v Reys | |
| **Facts** | Farwest Farms (FF) has legal EIFS, sells land to South Transport (ST) in an agreement for sale (ST gets equitable EIFS, only gets legal title once fully paid). Before fully paid, ST sells land to Reys in a sub-agreement for sale (equitable) and ST's controlling shareholder, McCaig, reserves an option to buy back a small part of the large parcel of land. McCaig wants to register option, but can’t unless land is subdivided, and FF (still legal owner) is only one who can subdivide, and refuses due to cost.  Reys sells land to Rutland by sub-sub-agreement for sale, and Jerome (Controller of Rutland) knows about McCaig’s option and agrees to honour it even though it is not written in the sale contract. This sub-sub-agreement for sale is registered (this is now illegal). Jerome gets rid of the lawyer who did this sale, gets a new lawyer that doesn’t know about the option, and sells the land to Jabin, who becomes registered owner because previous agreements for sale have been paid off. **Jabin is a *bona fide* purchaser for value.** McCaig wants to assert his option but can’t because the statute took away his right (i.e. no *nemo dat* here). McCaig claimed against Reys for breach of K and against Rutland for fraud (and against the assurance fund because of the fraud). |
| **Issue** | Should McCaig succeed against the assurance fund? |
| **L/A/C** | Court says NO, to succeed against the Assurance Fund, claimant must show:   1. he had been deprived—296(2)(a) 2. loss was the result of the LTA—296(2)(a) 3. fraud—296(2) 4. barred from bringing an action for rectification—because of the application of s 297   P showed 1, 3, and 4 (because Jabin holds indefeasible title), but NOT 2. P was deprived of his interest by breach of contract, not the operation of the LTA.  Court here agrees there is fraud but won’t allow P to recover from the assurance fund. P can still recover damages from Reys and Rutland (contract and fraud). |

# CHAPTER 6—Registration

## Registration: The Fee Simple

#### Land Title Act s 23 (effect of indefeasible title)

(2) “An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an EIFS to the land described in the indefeasible title, subject to”:

* exceptions and reservations contained in original grant or Crown grant
* federal, provincial, or municipal taxes
* lease less than 3 years
* public easement (i.e. roadway)
* (g) “a caution, caveat, charge, claim, builder’s lien, condition, entry, exception, judgment, notice, pending court proceeding, reservation, right of entry, transfer or other matter noted or endorsed on the title or that may be noted or endorsed after the date of the registration of the title”
* person who can show the boundary is wrong
* (i) “the right of a person deprived of land to show fraud, including forgery, in **which the registered owner had participated** in any degree”
* a restrictive condition, right of reverter

(3) Once indefeasible title is registered, cannot acquire title to the property by adverse possession

(4) Very first indefeasible title registered is void against title of a person adversely in actual possession and rightly entitled to the land included in the indefeasible title at the time registration was applied for and continues in possession

#### Agricultural Land Commission Act s 60

(1) in addition to the rest of 23(2) of LTA, certificate of title issued before June 29, 1973 is subject to this act (which says can’t use agricultural land for non-farm use)

(2) registrar must endorse on all titles issued after June 29, 1973 that title may be affected by this act

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| Creelman v Hudson Bay Insurance Co | |
| **Facts** | D (Creelman) had contract to buy land from P (The Bay) and wanted to get out of contract. P sued for breach of contract. In defense, D said that the Bay could only hold real property if it was required for company purposes, which it wasn’t, therefore the P had no power to dispose of the land, which would make D vulnerable under *nemo dat*. |
| **Issue** | Does *nemo dat* apply here? |
| **L/A/C** | The certificate of title, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept (because it is evidence of indefeasibility.)  I.e. indefeasibility is not subject to *nemo dat*. |

## Indefeasibility and Adverse Possession

These two concepts are at odds with one another. Title by adverse possession based on the fact that if an owner didn’t bring an action to recover possession of land from a wrongful occupier within a specific period of time, he lost the right to do so.

#### Land Act s 8(1)

You can’t acquire any interest in land from the Crown by adverse possession.

#### Limitation Act

**2**(1) LA does not apply to court proceeding to enforce judgments for possession of land

**2**(2) LA does not apply to proceedings based on existing aboriginal and treaty rights

**3**(1) LA does not apply to claim for possession by someone who has been dispossessed another’s trespass or a claim for adverse possession by the trespasser.

**5** LA does not interfere with equitable rules about laches

**28**(1) Except as specifically provided for by statute, no right or title to land may be acquired by adverse possession

**28**(2) Nothing in LA interferes with any right or title to land acquired by adverse possession before July 1, 1975.

**171** Application founded on adverse possession must not be accepted by registrar unless permitted by LA

#### Land Title Act s 23 (effect of indefeasible title)

(3) Once indefeasible title is registered, cannot acquire title to the property by adverse possession

(4) Very first indefeasible title registered is void against title of a person adversely in actual possession and rightly entitled to the land included in the indefeasible title at the time registration was applied for and continues in possession

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

* (2) If a land survey shows that a building on it encroaches on adjoining land, the court had discretion to declare an easement on or vest title to the land (in exchange for compensation) or order the owner to remove the encroachment

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| Carr v Rayward | |
| **Facts** | P was doing plumbing on seller’s house, and filed a mechanics lien before work had been completed but after the house had been sold to D. |
| **Issue** | If a buyer gets certificate of indefeasibility to land before a mechanics lien against title of the seller is registered, can the court give effect to the lien? |
| **L/A/C** | LTA s 23(2)(g) indefeasibility (certificate of indefieasible title) is subject to *inter alia* builders liens registered after the date of registration of title.  A lien can be filed within 45 days of the completion of the work, evidenced by date of invoice |

## Sec 23(2)(i) Fraud vs. Forgery

Sec 23(2)(i) of the *Land Title Act* says that when the registered person participated in fraud, their indefeasibility is subject to a claim from the person defrauded. This section is silent as to what happens when the fraudster who got on title by forgery sells the property to an innocent party, should the person who was defrauded get title back or should the innocent purchaser get to keep it. I.e. do we give effect to indefeasibility or *nemo dat*?

#### 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 no acquire any estate or interest in the land on registration of the instrument.

* **so far, this is *nemo dat***

(2) If unregistered instrument purporting to transfer a EIFS is void, a transferee is deemed to acquire the interest upon registration, if:

(a) the transferee is named in the instrument, and

(b) the transferee purports to acquire the estate in good faith and for valuable consideration

(3) if the void instrument has already been registered, the transferee is deemed to have acquired the EIFS, if:

(a) the transferee is named in the instrument, and

(b) the transferee is the registered owner of the estate

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

* **(2) and (3) take *nemo dat* away again in specific situations**

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| Gill v Bucholtz | |
| **Facts** | P(AG) owns property, and unbeknownst to him, there are two forgers: one the GG and one unknown. Transfer to GG with AG’s signature forged by unknown forger. GG goes to B and borrows money by mortgaging the property to B, B comes on title as a charge. GG approaches corporation 4337 and does the same thing, but AG files a caveat before 4337 can register, so 4337 never comes on title. All parties agree to proceed as though 4337 had been registered. AG, B and 4337 are all innocent. AG, relying on statute gets GG off. |
| **Issue** | Does AG get his property back with encumbrances or is he free of them? Does indefeasibility or *nemo dat* apply to charges? |
| **L/A/C** | 23(2)(i) says that a person named in title as registered owner is indefeasibly entitled to an EIFS to land, subject to the right of a person deprived of land to show fraud or forgery in which the registered owner has participated—true exception to the indefeasibility of title held by a registered owner  26(1) says that the registered owner of a charge is deemed to be entitled to the estate or interest on the register (subject to exceptions) and 26(2) warns that registration of a charge does not constitute that the charge creates an enforceable interest in land.  25.1(1) reinforces the point that the mortgage remains void notwithstanding registration.  25.1(2&3) create exceptions for *bona fide* purchasers for value, but they only apply to instruments purporting to transfer EIFS, not every grant of interest carried out by a fraudster who is a registered owner.—*nemo dat* and **not** indefeasibility wins out here |

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| First West Credit Union v Giesbrecht (2013 BCSC 564) | |
| **Facts** | B claimed that he was a victim of fraud that deprived him of majority ownership of his company which resulted in the fraudulent majority shareholder transferring title of a building owned by the company to G, who did not purchase the land for consideration. G granted mortgages to the credit union, and B is looking to have those mortgages set aside. |
| **Issue** | Is the mortgagee’s security affected where the mortgagor, the registered owner of the EIFS acquired title as a result of a voidable conveyance? |
| **L/A/C** | * B didn’t own the land, the company did, therefore B was not “deprived of land” and had no right under 23(2)(i). The fraudulent misrepresentation that preceded the transaction made it voidable, not void. * 25.1 does not apply to voidable transactions as far as the consequences relate to a bona fide third party for value and without notice. *Nemo dat* applies because there is a rule of construction that clear language is needed for a statute to override the common law. * Some examples may help to illustrate the workings of section 25.1.  For example, if A had been the registered owner of Blackacre and R (as in rogue) through forgery becomes the registered owner of Blackacre and then sells to B, a *bona fide* purchaser for value, B will be deemed to be the registered owner on registration.  This will be so “even though [the] instrument purporting to transfer [the] fee simple estate” from A to R is void.  Under the *nemo dat* principle, B would have had nothing because R had nothing to give.  The fee simple estate would be A’s.  As a result of section 25.1(2) (or subsection (3) as the case may be), B will be the registered owner.  A will lose his or her fee simple estate.  A’s recourse will be to claim under the “assurance fund.” * Company should be able to claim under the assurance fund because it lost by virtue of interpretation of the statute |

## Notice of Unregistered Interests

#### Land Title Act s 29 (effect of notice of unregistered instrument)

(1) “registered owner” includes a person who has made an application to register and subsequently becomes registered owner.

(2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner

a) a transfer of land

b) a charge on land, or transfer/assignment of a subcharge of the charge, is not despite a rule of law or equity to the contrary, affected by a notice express, implied, or constructive, of an unregistered interest affecting the land or charge **other than**

c) an interest whose registration is pending

d) a lease for a period less than 3 years if there is actual occupation

e) the title of person who has defeated an indefeasible title (now void) by adverse possession under 23(4)

(3) A person looking to take from a registered owner an estate/interest in land or a transfer/assignment of an estate/interest in land is not affected by a financing statement registered under the *Personal Property Security Act* whether or not they had notice or knowledge of the registration

(4) The fact that a person looking to take from a registered owner under subsection (2) had (or could have obtained) knowledge of a financing statement registered under the *Personal Property Security Act* is not evidence of fraud or bad faith

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| McCaig v Reys (see Ch 5) | |
| **L/A/C** | Jerome’s argument was that McCaig’s interest was unregistered and therefore Jerome would be protected by 29(2) and therefore whether Jerome had notice was irrelevant.  Court says that Jerome was not protected by 29(2) because he behaved fraudulently by switching lawyers so that Jabin wouldn’t find out about McCaig’s option. |

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| Hudson’s Bay Co v Kearns and Rowling (1895) | |
| **Facts** | K had a registered EIFS. She owed money to the Bay, so she gave them the deeds to her property so the Bay’s lawyer could prepare a mortgage. This took 15 months, and in the meantime, K offered the property to R for a very low price. He searched the title, saw that it was free, and gave K a promissory note for 1/3 of the price, and asked for the deeds. K did not hand over the deeds, but R still paid the rest of the money and was registered as a charge (today this would be a mistake, can’t register w/o deed). |
| **Issue** | In the absence of express notice of the Bay’s interest, can R’s title be affected by the unregistered interest? |
| **L/A/C** | [Equivalent of s. 29] absolutely protects a purchaser for value against attack on the ground of any kind of notice, subject to the qualification that a person who, in consequence of knowledge constituting notice of a prior unregistered interest/title does any act to bring himself on title (distinguished from an act done in the ordinary course of business) that prejudices the holder of the unregistered interest/title is guilty of fraud and will not be protected by the act.  Majority: R is fine, he had no knowledge.  Dissent: R must have known something was wrong when K did not hand over the deeds, but proceeded anyway, which is the equivalent of fraud. |

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| Vancouver City Savings v Serving For Success Consulting | |
| **Facts** | City Center is registered owner of EIFS and runs a hotel on the property. There are two tenants on the property with unregistered 5 year leases w/ an option to renew, KKBL and Serving for Success. Hotel borrows 5.1 million from Vancity who registers the mortgage against the title. Hotel defaults on mortgage and Vancity petitioned for order to foreclose with vacant possession which would remove the tenants from the premises (because their leases are unregistered). Tenants argued that Vancity, in seeking vacant possession while knowing of the tenancies amounted to fraud under 29(2) of the LTA. |
| **Issue** | What role does knowledge of the unregistered instruments play here? |
| **L/A/C** | To prove equitable fraud, there has to be sufficient actual knowledge of the conflicting interest **and** some other circumstance to take the matter out of the ordinary course of business or conduct that is dishonest/unconscionable and would violate common sense ideals of morality.  “Something more than simple knowledge is required.”  Vancity is entitled to vacant possession. |

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| McRae v McRae Estate | |
| **Facts** | Husband dies, in his will he leaves his property to his wife on trust, in effect for her life with the remainder to their three children. Wife is registered as owner of EIFS with “in trust” notation on the title. Wife transfers title to her son but trusteeship is not transferred to the new title (does not say “in trust”). Son dies, and in his will he has left the lots to his wife and his brother and sister. The brother and sister learn about their father’s will and try to have the transfer from their mother to now deceased brother set aside. Argument for deceased brother’s wife is that the deceased took title to the lots free of the trust because he was a bona fide purchaser for value without actual notice of his mother’s breach of trust. |
| **Issue** | Can a trust be extinguished by transfer to a transferee who has no knowledge of the trust and buys the property in good faith and for valuable consideration? |
| **L/A/C** | The language of the statute imputes knowledge to the transferee, i.e. even if he has no actual knowledge of the trust, the knowledge is imputed, and therefore he took subject to the trust. The trial judge found that there was evidence of fraud, but on appeal they say that because there is no intervening conveyance to an innocent third party the trust is still capable of being performed and therefore fraud is not relevant. |

## Registration of Charges

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

(1) Registrar must register a charge claimed by the applicant

(2) Registrar can refuse to register the charge if

a) a good, safeholding and marketable title to it has not been established

b) the charge is not an estate/interest that is registrable under this Act

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

(1) beneficial interests cannot be registered on title as a charge

(2 & 3) when registering legal title in personal representative/trustee, registrar must put an endorsement saying “in trust” (or something equally appropriate) and a reference number to the trust instrument.

(4) Trust instrument must be filed with the registrar with the application for registration of title

(5 & 6) If trust instrument (not a will) has been executed outside BC, the registrar, upon being satisfied . . . can accept a copy of the instrument, which will have the same effect s the original.

(7) If title has been endorsed with “in trust,” an instrument purporting to deal with the land can only be registered if

a) expressly authorized by law or the trust instrument itself

b) BCSC makes an order construing the instrument as authorizing the transfer or otherwise orders the transfer

(9)If

a) registered owner appears to beneficially entitled to land, and

b) a trust instrument shows that the registered owner was and still is meant to be a trustee,

the registrar,

c) may put the words “in trust” on the register as endorsement, or

d) if required, may register a new indefeasible title in the name of the trustee

(10) If a title is registered in accordance with this section and an instrument is produced and filed that changes the trust somehow, the registrar may add a note to the existing endorsement

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| Dukart v Surrey | |
| **Facts** | * Developer develops a big piece of land into smaller parcels which front a large area that adjoins the beach. Developer puts the large area, the “foreshore reserve,” into a trust that creates an a special type of easement, called a *jus spatiandi*, that gives the right to wander and enjoy collectively to the owners of the individual parcels. The certificate of title is registered to trustees with the words “in trust” endorsed on it. The easement is described on the trust instrument which can be found by looking up the folio number next to “in trust” on the certificate of title. * Property taxes are not paid so the city takes title to the property and puts up a “comfort station” which affects the owners right to wander and also attracts extra people. A resident sought an injunction. |
| **Issue** | Can Surrey take title ignoring the trust instrument that creates the easement? |
| **L/A/C** | Sec 276 of the LTA says that when the city gets the property pursuant to a tax sale, it takes the property and all the financial encumbrances are wiped off, but their title will still be subject to any easement registered against the land.  Court finds a distinction between being “registered” and being “registered as a charge,” where an equitable interest is “registered” through the registrar placing the endorsement “in trust” on the certificate of title, even though equitable interests cannot be registered as “charges.” |

## Indefeasibility

#### Land Title Act s 26 (registration of a charge)

(1) A registered owner of a charge is deemed to be entitled to the interest, subject to exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.

(2) Registration of a charge does not constitute a determination that the instrument creating the charge creates an enforceable interest in land.

#### Land Title Act s 27 (notice given by registration of charge)

(1) Registration of a charge gives notice, from the time the application to register was received, to every person dealing with the title to land affected, of

a) the estate/interest that the charge has been registered against

b) the contents of the instrument creating the charge,

but not otherwise

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| Credit Foncier v Bennett | |
| **Facts** | Married Bennetts have EIFS absolute because their mortgage is paid off. Allen (officer of Todd Investments) forge a mortgage from Bennetts to Todd investments for $7400, and this is registered. Alan sells (assigns) the mortgage to Stuart for $5500, and Stuart sells (assigns) the mortgage to Credit Foncier for $6000. Credit Foncier sends letters to Bennetts telling them they have to pay, but Bennetts ignore the letters, assuming that they’re a mistake. Credit Foncier brought an action to foreclose against Bennetts. |
| **Issue** | Does Credit Foncier have a mortgage, such that the Bennetts should get money from the Assurance Fund to pay for the mortgage. |
| **L/A/C** | * 25.1 says that there is no recovery for anything transferred under a void instrument other than an EIFS. Court looks at the wording in sec 26, which says that “a registered owner of a charge is deemed to be entitled to the interest” and notes from the case law that “deemed” has to be interpreted in context. They compare the wording of sec 26 to the wording is sec 23, which says that registration of an EIFS is “conclusive evidence” that the registered owner is “indefeasibly entitled” to the estate. * Here, “deemed” means rebuttably presumed, so the effect of the registration of charges is to give you the interest in the charge, but it is open to others to rebut this interest by asserting ***nemo dat*.** * The P would not have succeeded even if the mortgage had been valid, because a mortgage is only security for the amount actually owing, and the D’s owed nothing, onus is on assignee to check $ owing. |

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| Canadian Commercial Bank v Island Realty | |
| **Facts** | C was the director of Park Meadow. There were two mortgages on the title to Park Meadow, 1st to Imperial Life and 2nd to Island Realty. C was looking to get a 3rd mortgage from Almont, who agreed to give money to C only if the 2nd mortgage to Island Realty was discharged and Almont’s mortgage could come on as the 2nd. C registered a fraudulent discharge of Island Realty’s mortgage. Almont gives the money to C, C goes missing, and Park Meadow files for Bankruptcy. There is only enough money to pay the first mortgage, and either Island Realty or Almont, but not both. |
| **Issue** | Should the register be rectified to give effect to Island Realty’s mortgage to the prejudice of Almont who was a bona fide purchaser for value? |
| **L/A/C** | The forged discharge of Island Realty’s mortgage effectively released their interest in land back to Park Meadow. Almont acquired their mortgage from Park Meadow by way of a valid mortgage, and is entitled to the interest that is registered, which is different from Credit Foncier where the mortgage itself was void.  Once the Island Realty mortgage was discharged, it could “no longer affect the land in respect of which it was registered.” (sec 227)  Judge orders that Almont gets paid as the second mortgage and the issue of whether Island Realty should be able to take from the Assurance Fund is referred back to the trial judge. |

## Priorities

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

If 2 or more charges appear on the register affecting the same land, the charges have priority according to the date/time the applications for registration were received by the registrar, not according to the date of execution of the instrument

# CHAPTER 7—Failure to Register

## General Principle

#### 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, 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.

(2) The instrument confers on every person benefited by it the right

a) to apply to have the instrument registered, and

b) . . .

(3) Subsection (1) does not apply to leases less than 3 years if there is actual occupation under the agreement.

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| Sorenson v Young | |
| **Facts** | S subdivides his property into lot 1 and 2. S sells lot 1 to R and reserves himself a right of way in the conveyance. Later, R sells his lot to Y and Y puts up a fence preventing S from using the right of way. S sues. |
| **Issue** | Is the easement that was in the original conveyance form but not registered effective? |
| **L/A/C** | No, the easement would have to be registered as a charge to be effective. |

#### Land Title Act s 181 (interest or right reserved to transferor)

On application to register a person as owner of EIFS in an instrument that reserves an interest or right to the transferor, the existing indefeasible title must be cancelled and the rights reserved to the transferor must come on title as a charge

## “Except Against the Person Making it”

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| Yeulet v Matthews | |
| **Facts** | D held, from her son, an equitable mortgage by deposit of duplicate. After the equitable mortgage came into existence, P registered a judgment against the son. It is clear that if Mrs. Matthews had a registrable interest she would have had priority. |
| **Issue** | Which interest takes priority, an unregistered equitable mortgage that came into existence first or a registered judgment that came into existence later? |
| **L/A/C** | All a judgment creditor can get from the judgment debtor is something he actually owns at the time the judgment is registered. Here, all the son owned was bare legal title, the mother owned equitable title so the unregistered equitable mortgage takes priority.  Registration of judgments is very defeasible. |

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

(3) From the time it is registered, a judgment forms a lien and charge on the land of the judgment debtor

a) to the extent of his or her beneficial interest in the land

b) if an owner is registered as a trustee (or personal rep), to the extent of a beneficiary who is a judgment debtor

c) subject to the rights of a purchaser who, before the registration of the judgment, has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the interest

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| L & C Lumber Co v Lungdren | |
| **Facts** | Appellant owned parcel of land that has a forest on it. She transferred to McDonald a profit-a-prendre (right of taking) such that he had an *in rem* right to go onto the land and take lumber. McDonald assigned his rights to the respondent company who gave notice to the appellant. Neither the profit or the assignment were registered. |
| **Issue** | How does an assignment of an interest work wrt sec 20, which says that, “except as against the person making it” an unregistered instrument does not pass an interest in land? |
| **L/A/C** | With an assignment, the assignee steps into the shoes of the assignor, so this falls under the exception of s 20. The appellant was the “maker” of the instrument that gave a profit to McDonald, so the respondent can assert this right against the appellant. |

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| International Paper Industries v Top Line Industries | |
| **Facts** | Tenant company owned a building that it operated out of on land that it leased from the landlord. They agreed that the landlord would purchase the building and move it to another property, where the tenant would lease a portion of that property including the building. The parties drew up their own 4-year lease that was unregistered/unregistrable because they attached an illegal subdivision plan to it. (This is not a good safeholding and marketable title, registrar would not be able to register something like this.)  At the end of the 4-year lease, the tenant tried to exercise their option to renew and the landlord said that the lease was unenforceable or void because it violated sec 73 of the *Land Title Act* which said that a person can’t subdivide land four the purpose of leasing it and that no instrument that contravenes this section could be registered. |
| **Issue** | What is the effect of s 73 on the validity of proprietary and personal rights arising under a lease entered into by parties who were unaware of the provision? |
| **L/A/C** | The tenant has no right of occupation because to allow the tenant a right of occupation would offend the policy objectives behind s. 73, which include policy reasons for zoning regulations as well as the object of the Torrens system to ensure a good safeholding and marketable title. Section 73.1 was passed as a response to this case (i.e. this case is not the law anymore). |

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

A lease or agreement for lease of part of a parcel of land is not unenforceable between the parties just because the lease doesn’t comply with the subdivision part of the LTA or because an application for registration of the lease may be refused

# CHAPTER 8—Applications to Register

#### Land Title Act s 31 (priority of caveat or lis pendens)

* If a caveat or lis pendens has been registered and the caveator or plaintiff subsequently receives judgment, the plaintiff/caveator is entitled to claim priority for their interest over any interests that have been registered after the caveat/lis pendens but before the judgment.

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

* (1) when a caveat is in force, the registrar can’t register another instrument (unless instrument expressed subject to caveat) or deposit a subdivision plan unless the caveator consents
* (2) interest expressed as subject to caveat can’t be registered if caveat defeats its root of title

#### Land Title Act s 215 (registration of lis pendens)

* a person who has commenced or is party to a proceeding may register a *lis pendens* as a charge

#### Land Title Act s 216 (effect of lis pendens)

* registrar cannot allow any changes to register of land once *lis pendens* has been registered unless the changes are expressed subject to the lis pendens or unless that charge/lease was registered before the *lis pendens* was registered

#### Land Title Act s 217 (effect of lis pendens if prior application is pending)

* the registrar can register an indefeasible title or charge that was applied for before the application to register the *lis pendens*

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| Rudland v Romilly | |
| **Facts** | D transfers to Lindsay, Lindsey transfers to P and P applies to register her interest. After P applies to register but before certificate of title is issued, D files a *lis pendens* saying that her transfer to Lindsay was fraudulent. P sues to have *lis pendens* removed. |
| **Issue** | Is the transfer of interest effective at the date of the filing of the application or at the date the certificate of title is issued? |
| **L/A/C** | A certificate of *lis pendens* is only a form of notice, and notice which is only given after the whole transaction of purchase has been completed cannot affect the title of an honest buyer. There was no proof given that Lindsay had been fraudulent, which, if present might have changed the outcome.  Transfer of interest is effective at the date of the filing of the application to register. |

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| Breskvar v Wall | |
| **Facts** | B has an EIFS, and borrows money from Petri in exchange for handing over a signed transfer form with no transferee named (blank) as security for the loan. Petri (fraudulently) inserted the name of his grandson, W. W is now the registered owner and acquired this by result of a voidable deed (not forgery, B signed it themselves). W sells the parcel to A. B files a caveat before A applies to register. |
| **Issue** | Given that B has been negligent and A (bona fide purchaser for value) has not applied to register, who is entitled to the land? |
| **L/A/C** | You can’t say that B would automatically get title because they had to pay back the loan to get back on title, therefore they have an equitable right, not a guaranteed right. Here there are two competing equitable interests, the court applies equitable principles to decide which one will prevail. B was negligent by placing W in a position to make representations, upon which A acted, making equity prefer A. A was not at fault where B was partly at fault. A wins.  Here, the competing interests are the equivalent of s 20(1) and 20(2) of the LTA. B is trying to assert 20(1) by saying that A does not have interest because they are not registered, where A is relying on the right to apply to register given to them by 20(2). |

# CHAPTER 9 & 10—The Fee Simple, Fee Tail, and Life Estate

## Creation of the Fee Simple

#### At Common Law:

To create a fee simple in an *inter vivos* transfer, you had to say Blackacre to “B and her heirs.”

* Words of purchase—indicate the person to whom the interest is transferred (purchaser means one who acquires)—“to B” would be the words of purchase
* Words of limitation—indicate what interest is being transferred to B—“and her heirs” were words of limitation to transfer an EIFS at common law.
* Unless the correct words “and her heirs” was used, the court would construe it as creating a life estate

In a will (or in an *inter vivos* trust):

* the court generally gave effect to words of limitation
* if no words of limitation, then sometimes they would construe the document as conferring an EIFS if it was clearly the testator’s intention

#### Property Law Act s 19 (words of transfer)

(1) In the transfer of an EIFS, it is sufficient to use the words “in fee simple” without the words “and his heirs”

(2) If no words of limitation, then the transfer of land passes an EIFS or the greatest estate the transferor has

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

(4) transfer of a freehold for valuable consideration in the approved form/manner operates to transfer the freehold of the transferor to the transferee whether or not is contains express words of transfer.

(5) subject to subsection (8) if no express words of limitation, then assume fee simple

(6) subject to subsection (8) if there are express words of limitation, then transfer in accordance with limitation

(7) subject to subsection (8) if the transfer has an express reservation/condition, the transfer is subject to the reservation or condition.

(8) subsections (4) to (7) do not operate to transfer an estate greater than that which the transferor has

#### WESA s 41 (property that can be gifted by will)

(3) A gift in a will

a) takes effect according to its terms, and

b) subject to the terms of the gift, gives to the recipient of the gift every legal or equitable interest in the property that the will-maker has

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| Tottrup v Ottewell Estate | |
| **Facts** | Fred and Frank are twins. Fred had a child but for a long time Fred lived with Frank. Fred and Frank have wills that are almost identical. Fred dies first, leaving behind a child. Frank dies, and his will says:  “I give, devise, and bequeath unto my brother, Fred S. Ottewell, the balance and residue of all my estate, both real and personal, whatsoever and wheresoever found or situate, to hold unto him, his heirs, executors and administrators absolutely and forever.”  There is a clash between T (Fred’s daughter) and a second group of heirs that would take by the rules of intestate succession. T claims that the words, “to hold unto him, his heirs, executors . . .” are words of substitution. |
| **Issue** | What is the true meaning of the residuary clause? |
| **L/A/C** | The words in the residuary clause are 900-year-old words of limitation signifying a fee simple. Even though they are no longer necessary to transfer an EIFS, they are still effective.  “What has to be done is first to construe the will. The meaning placed upon the language used as the result of this process cannot be altered by reference to the surrounding circumstances when the will was executed. The procedure is not—first ascertain the surrounding circumstances and with that knowledge approach the construction of the will, but first construe the will; if the meaning is clear, surrounding circumstances cannot be looked at to throw doubt upon that meaning, or give the will another meaning.” |

## Problems of Interpretation—Repugnancy

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| Re Walker | |
| **Facts** | Husband dies, will says “I give and devise unto my said wife all my real and personal property saving and excepting [some personal chattels to nephews] . . . and also should any portion of my estate still remain in the hands of my said wife at the time of her decease undisposed of by her such remainder shall be divided up as follows . . . “ The wife has not exhausted everything, dies and leaves a will that competes with husband’s will. The wife’s heirs argue that the condition in husband’s will is a repugnancy and should be struck out. |
| **Issue** | What happens in the case of a repugnancy? |
| **L/A/C** | The court says that his intention is clear but it cannot be given effect to. This condition in the will looks like a restraint on alienation, which would be against public policy. The court must ascertain which part of the will is dominant and which is subordinate, getting rid of the subordinate. 3 ways to resolve this:   1. Gift of person named prevails and giftover is defeated. 2. First named takes a life estate and giftover prevails (heirs get remainder interest) 3. Where specific and clear, you can give a life estate and allow tenant to encroach on capital.   The court says here he clearly wanted to give her an EIFS, and it would be repugnant to give effect to the condition, so the gift prevails and the giftover is void. |

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| Re Shamas | |
| **Facts** | Guy dies, his will reads, “I give all I belong to my wife. I want her to pay my debts—raise the family. All will belong to my wife until the last one comes to the age of 21 years old. If my wife marries again she should have her share like the other children, if not, she will keep the whole thing and see that every child gets his share when she dies.” They had 8 kids and ran a retail store together. |
| **Issue** | What interests in the estate are taken by his widow and his children? |
| **L/A/C** | To construe an ambiguous clause, you have to look at the whole will, as the context of the clause.  If intention is shown, the mode of expression of the intention and words chosen are unimportant.  “To understand the language employed the court is entitled to sit in the testator’s armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said.”  Here, court decided that the widow would get a life estate with the power to encroach, subject to divestment upon her remarrying. |

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| Cielein v Tressider | |
| **Facts** | Testator (who had 5 kids) lived with a woman (who had 1 kid). In his will he willed all of his assets plus a parcel of land to the lady, with a clause that said, “upon the sale or disposal of the real estate the proceeds shall be divided equally between her son and my children.” |
| **Issue** | Is the interest given to the woman an EIFS or a life estate? |
| **L/A/C** | Looking at the intention of the testator, it is clear that he wanted to benefit the woman. The clause that mentions the children constitutes a restraint on alienation of an absolute gift, and is void. |

## Words Formerly Creating a Fee Tail

Inter vivos—technical words of limitation for a fee tail are “heirs of his/her body” (heirs=fee, of body=procreation)

By will—court would give effect to technical words of limitation, but they would still give effect to the testator’s intention by construing “and his issue/seed/offspring” as giving a fee tail

#### Property Law Act s 10

(1) EIFS cannot be changed into a limited fee, remains an EIFS in the owner

(2) A limitation which would have previously created a fee tail transfers an EIFS or the greatest estate the transferor had in the land

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| Wild’s Case | |
| **Rule** | Rule of construction for a will (does not apply to inter vivos transfers):  “To A and his issue/children”   * Look to see if A has children at the time the will was **made**   + if yes, then they are words of purchase, and legal interest would vest as co-ownership   + if no, then they would be words of limitation, indicating a fee tail (which we know, by section 10 of the *Property Law Act* automatically converts to fee simple.) |

## Creation of a Life Estate

#### By Act of the Parties

“To A for life”—A life estate should be created expressly. If the nature of the estate being created is not expressly stated, then the presumption is that the transferor or testator is disposing of the greatest estate he/she owns:

*Property Law Act* s 19(2), *WESA* s 41(3)(b)

#### By Statute

The former *Estates Administration Act* gave the surviving spouse a life estate, which was problematic because it is hard to sell and it may be difficult to maintain. The new *WESA* gives the surviving spouse the option to buy the spousal home.

## Rights of a Life Tenant

The holder of a legal life estate has the right to use, occupy, and retain any profits arising from exploitation. They also have a right to transfer it *inter vivos*, and if it is an estate *pur autre vie*, they can dispose of it by will/intestacy.

## Obligations of a Life Tenant to Those w/ Future Interests

Those entitled to a remainder have a right to the land in substantially the same form as when the life tenant got it.

There are 3 kinds of waste:

* permissive waste—passive conduct which permits decay (life tenant not responsible for this unless instrument says otherwise)
* voluntary waste—waste that results for the activities of the life tenant, tenant is liable for these, regardless of whether they change the land for the better or the worse
  + doctrine of ameliorating waste—even though a change for the better is technically waste, the life tenant will not be liable in damages and an injunction will usually not be awarded
* equitable waste—where the creator of the life estate permits waste (i.e. life tenant is “unimpeachable for waste”) the court of Equity might restrain the life tenant from making an unconscionable waste.

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| Vane v Lord Barnard | |
| **Facts** | D, on the marriage of his son (P), gives himself a life estate without impeachment of waste, with the remainder to go to his son. D gets mad at his son and starts destroying the castle. |
| **Issue** | Is the D liable for the waste, notwithstanding the unimpeachable for waste clause? |
| **L/A/C** | The court found that the D was guilty of equitable waste, and ordered that the castle be repaired. |

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

A life estate without impeachment of waste does not confer and is deemed not to have conferred on the tenant for life a legal right to commit equitable waste, unless an intention to confer that right expressly appears by the instrument creating the estate.

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| Mayo v Leitovski | |
| **Facts** | P gives life estate to his elderly parents, then leaves. Father dies, and the mother (D) hasn’t paid the taxes, so the municipality sold the house in order to realize the outstanding taxes. D’s daughter buys the house in the tax sale. (If you buy a property in a tax sale, you buy it without the financial encumbrances, etc). This has the effect of getting rid of P’s remainder. P sues. |
| **Issue** | Can D keep the house without giving effect to P’s remainder? |
| **L/A/C** | A life tenant who allows the property to be sold for taxes cannot acquire a title adverse to the remainderman by purchasing at the sale himself or through an intermediary, or by obtaining a conveyance of the title acquired by another purchaser.  A life tenant is responsible for paying property taxes.  In this situation, equity presumed that the daughter was buying the house for D because it was the D’s responsibility to keep the house for the P, i.e. she was just fulfilling her obligation. |

# CHAPTER 12, 13 & 14—Future Interests

## Vested and Contingent Interests—Vested in Possession vs Vested in Interest

#### Vested Interests

The word “vested” is used in two senses:

* vested “in interest” means that there is no precondition to taking the estate (even if there is a prior estate like a life estate, the person with the remainder is said to be vested “in interest”)
* vested “in possession” means immediately entitled to possession of the property

An interest that is vested in interest may be:

* vested absolutely (meaning it can never be lost by the holder of the estate)
* vested, subject to divesting
* vested, without there being any prior estate, but with a provision which purports to keep the holder of the estate out of possession.

#### Contingent Interests

An interest is contingent when it is dependent on the occurrence of an event which may or may not occur. An interest is contingent until:

1. The property is identified
2. The identity of the grantee or devisee is established
3. The right to the interest (as distinct from the right to possession) does not depend on the occurrence of some event; and
4. In the case of a class gift, the exact share of each member of the class is ascertained

In the case of an ambiguity as between whether an interest is contingent or vested, the courts tend to prefer a construction which leads to the conclusion that an interest is vested.

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| Browne v Moody | |
| **Facts** | The testatrix dies with a $100 000 fund. She leaves a life estate in the income from the fund to her son. In regard to the remainder, clause 5 of the will says, “on the death of my son, I direct that the said fund of $100 000 is to be divided as follows: One half to my granddaughter Enid (daughter of my son), and the remainder of the said fund to be divided equally between my three daughters.  Clause 7 of the will says, “in the event of my grand-daughter or any of my daughters predeceasing me or predeceasing my son leaving issue I direct that the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived.” |
| **Issue** | 1. Did the grand-daughter and daughters of the testatrix take vested interests upon the death of the testatrix? 2. If so, was the legacy of any of them liable to be divested or otherwise affected by clause 7? |
| **L/A/C** | 1. Where there is direction to pay the income of a fund to one person during his lifetime (life estate) and to divide the capital among certain other named and ascertained persons on his death, even though there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the interest in the remaindermen takes place upon the death of the testator. 2. The contingency of a predecease “leaving issue” is a resolutive and not a suspensive condition, meaning that it does not prevent vesting, it is just vesting subject to divestiture. |

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| Re Squire | |
| **Facts** | Deceased gives two grandsons identical dispositions, says for the trustee to retain possession and accumulate the income and give the fund and the income to the grandsons when they turn 30, but if they go to college, they can use some of the money to support themselves during their studies. |
| **Issue** | Is the requirement of age 30 there to postpone enjoyment of property or is it suspending the vesting of the interest until they turn 30? |
| **L/A/C** | The rule in *Saunders v Vautier* only applies if the fund is vested in interest. The rule is: where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the beneficiary, or (in other words) the court holds that the beneficiary may put an end to the accumulation which is exclusively for his benefit—i.e. he can collapse the trust  The court here says that the interest is vested immediately, for 5 reasons:   1. the court prefers early vesting 2. actual wording of the devise—the testator contemplates that the grandson can use the fund for education, therefore it must be vested 3. there is no giftover here—a giftover is important because it signifies the testator saying, if they don’t reach the age contingency, then [giftover] 4. the language itself was not conditional 5. the testator was postponing the enjoyment, but under the rule in *Saunders* you can ignore this instruction. |

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| Re Carlson | |
| **Facts** | Testator died, and is survived by his wife, his son Paul, daughter Janice, and son Chris survived him. He disinherits his wife (not an issue). His will says:   * “hold the residue of my estate in trust for the education, maintenance, and advancement of my son, C, and to use such portion of income and/or capital for the said maintenance.” * “Upon C turning 21, divide 90% of the **then** residue” into two equal parts and divide it between J and C. * The remaining 10% is to be used to pay the debts of the eldest son, P |
| **Issue** | Do the gifts vest immediately or are they contingent upon C turning 21? |
| **L/A/C** | Judge says that the word “upon” in this context is contingent because it is a disposition of the “then residue,” the word “then” suggests that the residue is to be ascertained at a point in the future. Jarmon says that the court does prefer early vesting, but that rule can’t trump the clear intention reflected elsewhere in the language. |

# Types of Future Interests

## Common Law Future Interests

#### Reversion

The interest that stays with the transferor when he gives something less than the full interest he has

#### Right of Entry

A right of entry arises in a transferor when he conveys an apparent absolute interest but then adds a condition subsequent which will divest the interest of the transferee in favour of the transferor and his heirs.

* Language signifying a ROE includes: “if” “subject to” “on condition that”
* statutory limitation period of 6 years (*Limitation Act* s 3(6)(f))

#### Possibility of Reverter

A POR arises when a transferee creates an interest that is determinable. This is different from a ROE because it is limited from the outset, rather than being absolute and subject to a condition

* Language signifying a POR includes: “until” “when” “as long as” “upon”
* statutory limitation period of 6 years (*Limitation Act* s 3(6)(f))

At common law, both a ROE and a POR could only arise in favour of the transferor, however, the following statute changes that:

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

(2) a ROE affecting land, exercisable on breach of condition of for any other reason may be made exercisable by a third party or someone claiming under a third party.

(3) The exercise of ROE under subsection (2) is subject to the *Limitation Act*

#### Remainder

Common Law Remainder Rules:

1. A remainder must be supported by a prior estate of *freehold* created by the same instrument as the remainder
   1. Blackacre to B and his heirs if B turns 21 (bad because property in limbo until 21)
   2. Blackacre to B for two years and then to C and her heirs if C reaches 21 (here, C gets nothing because the prior estate is a leasehold)
   3. this rule is based on the idea that you can’t have a gap in seisen
2. A remainder must be limited so as to be capable of vesting, if it vests at all, at the latest at the moment of termination of the prior estate of freehold
   1. Blackacre to B for life and one year after his death, to B’s child
   2. this rule is based on the idea that you can’t have a gap in seisen
3. The remainder is void *ab initio* if it takes effect in possession by prematurely defeating the prior estate of freehold (i.e. gives a ROE to third parties)
   1. due to *Property Law Act* s 8(2) this rule does not operate at all anymore
4. A remainder after a fee simple is void. (This includes both POR and ROE).
   1. due to *Property Law Act* s 8(2), this rule does not apply to ROE
   2. therefore, a POR after a fee simple is void

Natural Termination—Contingent remainders will are said to destruct if the contingency is not met before the prior freehold estate terminates.

## Equitable Future Interests

Equitable future interests are **NOT** subject to the common law remainder rules.

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| Re Robson | |
| **Facts** | A testator devised land to the use of his daughter Helen for life and on her death “to the use of such of her children as shall attain the age of 21 years.” At the time the daughter died, she had two children over 21 and two children under 21. |
| **Issue** | Do the children over 21 take to the exclusion of the children under 21 due to a gap in seisen? |
| **L/A/C** | A will is treated as a trust, so future interests left in a will are not subject to the common law remainder rules. In a trust/will, legal title is always with the trustee/executor, therefore there can be no gap in seisen. Equitable contingent remainders originally created by the will retain their initial immunity from destruction, therefore the children under the age of 21 can take upon reaching 21. |

#### WESA s 162 (devolution and administration of land)

(1) Unless there is a right to land by survivorship, on the death of the land owner, land devolves and is vested in the deceased owner’s personal representative (like personalty)

(2)(a) the personal representative is a trustee for the person beneficially entitled to the land and (b) a person beneficially entitled to the land can require a transfer from the personal representative

(2) Land must be administered in the same manner as personal property

## Alienability of Future Interests

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

(1) The following interest and rights may be disposed of:

(a) a contingent, executory or future interest in land or a possibility coupled with an interest in land, whether or not the object of the gift, the limitation of the interest or the possibility is ascertained;

(b) a right of entry on land, immediate or future, vested or contingent

#### WESA s 1 (definitions and interpretation)

(1) In this act

“estate” means the property of a deceased person;

“personal property” means every kind of property other than land;

“property” means land and personal property

#### WESA s 41 (property that can be gifted by will)

(1) A person may, by will, make a gift of property to which he or she is entitled at law or in equity at the time of his or her death, including property acquired before, on, or after the date the will is made

## Registration of Future Interests

#### Land Title Act s 172 (first estate of inheritance necessary to registration of fee simple)

If 2 or more persons are owners of different estates or interests in the same land, by way of remainder or otherwise,

(a) the first owner of the estate of inheritance must be registered as the owner of the fee simple but, in the register, the owner of the estate of inheritance must not be shown to be possessed of a larger or different estate from that to which he or she is by law entitled, and

(b) the estates or interests of the other owners must be registered by way of a charge according to their priority.

## Types of Conditions and Determinable Interests

#### Land Act s 11 (minister may dispose of Crown land)

(3) In a disposition of Crown land, the minister may impose the terms, covenants, stipulations and reservations the minister considers advisable, and without limiting those powers, the minister may impose some or all of the following terms:

(a) the applicant must personally occupy and reside on the Crown land for a period set by the minister;

(b) the applicant must do that work and spend that money for permanent improvement of the Crown land within that period the minister requires.

## Concepts of Void for Uncertainty, Contrary to PP, Restraints on Alienation, Remoteness of Vesting

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| Noble v Alley | |
| **Facts** | Several parcels of land which were developed into a resort were transferred by instruments containing a covenant saying that the lands would not be sold, assigned, transferred, leased, rented, alienated to, or occupied by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention and purpose of the grantor, to restrict the ownership, use, occupation, and enjoyment of the land. The owner of one of the parcels agreed to sell it to a purchaser who was Jewish, which required the vendor to obtain a court order saying the clause was invalid. |
| **Issue** | Is the clause invalid? |
| **L/A/C** | The rule in ***Tulk v Moxhay*** says that a restrictive covenant must run with the land such that some land is benefited by the covenant while other land is burdened by it (i.e. there must be a correlation between the RC and the improved use of the land).  On its true interpretation, the covenant is a restraint on alienation, and assuming that the grantor would otherwise be able to enforce it, you must deal with the question of whether it is void for uncertainty.  Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.  These racial/religious conditions are void for uncertainty because it is very difficult to determine exactly what is a jew. |

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| MacDonald v Brown Estate | |
| **Facts** | A testator directed that a share of his estate was to be held on trust until his niece becomes widowed or divorced from her present husband, at which time the trustees were to pay her the capital, otherwise she was only to get the interest. |
| **Issue** | Is this condition, “whether she becomes widowed or divorced from her present husband” against public policy and therefore void? |
| **L/A/C** | Judge says the purpose of the clause is supportive, not coercive. In a situation like this you look at motive in addition to intention, and if the motive is to support and take care of someone, then public policy will allow it to occur. |

#### Canadian Charter of Rights and Freedoms s 15 (equality rights)

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

#### Human Rights Code s 8 (discrimination in accommodation, service and facility)

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

#### Human Rights Code s 9 (discrimination in purchase of property)

A person must not deny the opportunity to purchase land offered for sale, the opportunity to acquire land or an interest in land, or discriminate regarding a term or condition of a purchase 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.

#### Human Rights Code s 10 (discrimination in tenancy premises)

(1) a person must not deny rental or discriminate against a person regarding a term or condition of the tenancy of the space because of the race . . .

(2) this does not apply in the following circumstances

(a) if living space is to be shared and the discrimination is coming from one of the people to live there

(b) as it relates to family status or age WRT retirement condos, etc.

(c) as it relates to physical or mental disability if the unit is designed to accommodate disabled persons

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

(1) a covenant that directly or indirectly discriminates against someone is void

(2 & 3) the registrar may cancel these covenants

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| Canada Trust Co v Ontario (HR Commission) | |
| **Facts** | A guy dies and sets up scholarships, puts in a clause to exclude all who are not Christians of the white race, not of British nationality, and all who owe allegiance to any foreign authority. |
| **Issue** | Is any part of this scholarship void? |
| **L/A/C** | Robins (majority): this particular trust clearly states that the reason for the condition are founded on ideas of white supremacy, therefore this trust cannot be perpetuated, but this doesn’t necessarily apply to all discriminatory scholarships  Tarnopolsky (dissent): a condition precedent is one in which no gift is intended until the condition is fulfilled. A condition subsequent differs in that not-compliance with the condition will put an end to an already existing gift. A condition precedent will not be void for uncertainty if it is possible to say with certainty that any proposed beneficiary is or is not a member of the class. The clause in this case is sufficiently certain (possibly with the exception of the “allegiance” part), but it is still void for public policy. |

## Jarman Rules

**Land**

Condition Precedent🡪Land **if** [void condition]🡪whole devise void.

Condition Subsequent🡪Land **until/but if** [void condition]🡪devise absolute, ignore condition.

**Estate**

Condition Subseqent🡪Estate until/but if [void condition]🡪devise absolute, ignore condition

Condition Precedent:

* Estate **if** [condition void because prohibited (i.e. white collar crime)]🡪devise absolute, ignore condition
* Estate **if** [condition void because immoral/elicits illegal behaviour/impossible (i.e. act of god)]🡪whole devise void.

# Rule Against Perpetuities

#### The Modern Rule Against Perpetuities

**Rule: 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.**

* There are 3 elements involved in the rule:
  1. the concept of vesting
  2. the period within which the vesting must take place (lives in being + 21 years)
     + life in being is anyone who was alive at the time the interest was created
     + will—interest created on the death of the testator
     + *inter vivos* trust—interest created when title vests in the trustee
  3. certainty of vesting—the requirement that it must be clear from the date than an instrument creating a disposition takes effect that vesting, if it is to take place at all, can take place only within the period
     + you have to construct a hypothetical where all the lives in being die and one more child is born, who is not a life in being at the time the testator dies/trust made, and then see if that child can meet the contingency within 21 years of the interest’s creation (this means the interest can only remain in limbo for a maximum of 21 years)
* If the interest is not good because it violates the CL rule (ignoring the statute for the moment), the equitable title is referred back to the grantor as a resulting trust (and then the grantor can collapse the trust, under the rule in *Saunders v Vautier*)
* If the testator puts a royal lives clause in (or specifies some other lives in being) this causes a “wait and see”

#### Perpetuity Act

Section 3—Order of Application of Remedial Provisions

* 14—Capacity to have children—if it is clear that the person linking the progeny (i.e. the parent) to which the contingent interest applies, can’t have children, then you don’t have to make the hypothetical—you can make assumptions here (and this may save the interest)—cannot create a life after the existing lives in being because this person can’t have any more children
* 9—Wait and See—gives you a list of statutory lives in being, set out in section 10
* 11—Age Reduction
* 12—Class Splitting—we are not going to deal with this, it is complicated
* 13—General cy pres—if all else fails, you can ask the court to decide

Section 4—Rules not applicable to benefit trusts or property donated to certain corporations

Section 5—Rule only applies to government WRT property disposition by the government

Section 6—Abolishes rule in *Whitby* but gives effect to the modern rule

Section 7—An interest in property must vest (in interest), if at all, not later than 80 years after the creation of the interest does not violate the rule

* This allows the drafter to select any fixed period, to a maximum of 80 years

Section 8—just because a contingent interest has a possibility of vesting (in interest) beyond the eighty year period does not make that interest void

Section 9

* (1) Every contingent interest capable of vesting within or beyond the perpetuity period is presumed valid until it is established that it is incapable of vesting w/i the perpetuity period (unless validated by sec 11, 12, 13)
* (2) and (3) a disposition conferring powers is valid until it is established that they cannot be exercised within the perpetuity period

Section 10—Determination of Perpetuity Period

* this section limits the potential lives in being to:
* the grantor (this obviously will not apply in the case of a will)
* beneficiaries or potential beneficiaries
* the done of a power of appointment
* (potential/actual) parents or grandparents of (potential/actual) beneficiaries
* the holders of any prior interest, and any person on whose death a gift over takes effect
* unborn spouses
* even if a person falls into one of these categories, he must also be a life in being and ascertainable at the commencement of the period (the date the instrument takes effect)
* if there are many people who fall into the above categories making it hard to ascertain the date of the death of the survivor then those persons may be disregarded for the purpose of determining the perpetuity period

Section 11—If a disposition creates an interest that would be voided as incapable of vesting by perpetuity period that is contingent on a person reaching a specified age that is >21, the age will be reduced to 21 if that would save the disposition from being void

Section 12—if inclusion of members of a class would prevent section 11 from operating to save a disposition from being void for remoteness, those persons will be excluded from the class

Section 13—if a disposition is void because it violates the rule, the court can vary it to give effect as far as possible to the general intention of the testator within the limits of the rule

Section 14—presumptions and evidence as to future parenthood:

* (1) if a question turns on the ability of a person to have a child in the future, it is presumed that:
* men can have children from 14 to death
* women can have children from 12-55
* (2) can give evidence that shows a person will be unable to have kids
* (3) if it is decide for one question in a particular disposition that a person will be unable to have kids, it is extended to apply to any questions in the same disposition
* (4) if a person is treated as unable to have a child and then subsequently has a child, the court can make an order as it sees fit to protect that child
* (5) if a person adopts a child then the court can make an order as specified in sec 4
* (6) and (7) concerns the liability of a trustee for transferring property as ordered by a court unless it is found that the trustee has been fraudulent

Section 15—trustee can make an application to the court to determine validity

Section 16—income arising from an interest presumed to be valid under section 9 must be treated as arising from a valid contingent interest

Section 17—Saving provision and acceleration of expectant interests

# CHAPTER 11—Co-Ownership

## Types of Co-Ownership and their Creation

#### Tenancy in Common

When two or more people are simultaneously entitled to possession, they are tenants in common. Their “unity of possession” entitles each of them to possession to all parts of the property. On death, interest in tenants in common passes by will or on intestacy like any other property.

#### Joint Tenancy

Characterized by the right of survivorship and the need for existence of the three unities (in addition to unity of possession.

* Right of Survivorship (***jus accrescendi***)—if A and B are joint tenants in fee simple, they may act **during their lifetimes** to sever the joint tenancy, either jointly or unilaterally, to convert the joint tenancy into a tenancy in common. If they have not severed the joint tenancy and one of them dies, the survivor becomes absolute owner by right of survivorship. A joint tenant can’t dispose of his/her interest by will because that is not enough to sever the unities.
* The Three Unities—each of these are essential to the existence of a joint tenancy, if any of them are missing then there is a tenancy in common instead.
  + Unity of Title—the co-owners must derive their titles from the same instrument (transfer/will)
  + Unity of Interest—the interests of the joint tenants must be the same
  + Unity of Time—the interests of the co-owners must vest simultaneously (exception is if it is in a will)

#### At Common Law

If the three unities were present, at common law there was a presumption that a joint tenancy had been created.

However, a grantor can indicate an intention to create a tenancy in common even if the three unities present by:

* expressly saying so—“to A and B in fee simple as tenants in common”
* by using **words of severance** (i.e. by indicating creation of specific shares)—“to A and B in fee simple equally”

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| Re Bancroft | |
| **Facts** | Sam (Testator) and Clara (widow, still alive) have 4 children, 3 of whom are alive and one, Minnie, who is dead. Before Minnie dies, she has two children. After Minnie dies, the testator also dies, leaving a will that said, in part, “divide the income thereof annually during the term of the life of my said wife into four equal shares and pay one of the shares to my son Percy, one of the said shares to my son Aubrey, one of the said shares to my daughter Florence and **the other of the said shares to the children of my deceased daughter Minnie**.” For a time, the last share is divided equally between Minnie’s two children, Paul and Jean. Paul has 4 kids and then dies. Jean argues that she should be getting the whole share where the 4 kids are saying they should be entitled to their deceased father’s share. |
| **Issue** | Did the children of Minnie take as joint tenants or tenants in common? |
| **L/A/C** | CL presumption is a joint tenancy unless there are words of severance to rebut the presumption. Here, there are words of severance to divide the whole into the four equal shares, but WRT the last share there are no words of severance, so they followed the presumption that it was a joint tenancy, therefore Jean keeps it all and Paul’s children get nothing.  The point of this case is that it is very important to read the will in detail and look carefully at where the words of severance are. |

#### In Equity

Equity preferred tenancy in common to joint tenancy, and tried to give effect to this by either,

* Interpreting documents as saying that the intent of the grantor/devisor was a tenancy in common
* Allowing co-owners to be joint tenants at law, but tenants in common in equity. Examples include:
  + if people bought land together and paid an unequal share, they would be treated as tenants in common
  + in a commercial transaction, the right of survivorship is incompatible, therefore treated as tenants in common
  + when two or more people lent money on the security of a mortgage of land and the borrower transferred the land to the lenders as security, if one of the lenders died, the law would compel the other lender to retain legal title so that the estate would not lose security for repayment of loan

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| Robb v Robb | |
| **Facts** | Testator has children from a previous marriage and marries new wife. He had property in California, and the new wife paid for a co-op in Vancouver and puts the assignment of the lease of the co-op in both of their names. Neither the assignment nor the share certificate indicated whether they were supposed to be joint tenants or tenants in common. He then transfers the California property into her name and states that the consideration for the transfer was the fact that she purchased the co-op and named him as a co-owner.  The testator dies and leaves everything in his will to his new wife. The testator’s children are challenging the will under the *Wills Variation Act* and whether the co-op can be included in their challenge depends on whether it was held as a joint tenancy (right of survivorship) or tenancy in common (no survivorship). |
| **Issue** | Was this a joint tenancy or a tenancy in common? |
| **L/A/C** | The common law presumption is joint tenancy. There are 3 situations where you can have a joint tenancy in law but a tenancy in common in equity, but none of those 3 situations are applicable here (the husband’s transfer of the California property made their payment roughly equal, meaning there is no basis for finding them unequal).  There is legislation, ***Property Law Act* s 11(2)** that says “where land is transferred or devised in fee simple, charged, or contracted to be sold by a valid agreement for sale to two persons other than personal reps/trustees, they are tenants in common unless a contrary intention appears in the instrument.”  Using statutory interpretation, the judge finds that an assignment of a lease (the interest held in ownership in a co-op) is not a charge, therefore the common law presumption wins and it is a joint tenancy, giving the wife the right to survivorship. |

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

(1) In this section, “transferred” includes vesting by a declaration of trust or order of the court.

(2) If, by an instrument executed after April 20, 1891, land is transferred or devised in fee simple, charged or contracted to be sold by a valid agreement for sale in which the vendor agrees to transfer the land to 2 or more persons, other than personal representatives or trustees, they are tenants in common unless a contrary intention appears in the instrument.

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

#### Property Law Act s 25 (partnership property treated as personalty)

If land or any heritable interest in land has become partnership property, it must, unless the contrary intention appears, be treated as between the two partners as personal or movable and not real or heritable estate.

Transfer to Self and Co-Ownership

At common law, it was not possible to transfer an interest to oneself. The following statute changes that.

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

(3) A transfer by a joint tenant to himself or herself of his or her interest in land, whether in fee simple or by a charge, has and is deemed always to have had the same effect of severing the joint tenancy as a transfer to a stranger.

Registration of Title

#### Land Title Act s 173 (several persons interested in registration)

The registrar may register a fee simple as a joint tenancy or tenancy in common

#### Land Title Act s 177 (registration of joint tenants)

If two or more people are joint tenants, the registrar must enter in the register the names of the joint tenants followed by the words “joint tenants”

## Relations Between Co-Owners

**Share of Profits:**

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| Spelman v Spelman | |
| **Facts** | A husband and wife are joint tenants of a rooming house. The wife leaves for 6 years and in her absence the husband runs the rooming house and keeps all the profits. The wife comes back and asks for profits from the time when she was away. |
| **Issue** | Is the wife entitled to profits? |
| **L/A/C** | At common law there was no obligation to account between joint tenants or tenants in common, unless one excluded the other from the property. There is a statute that applies in this case that says, “Actions of account shall and may be brought and maintained by one joint tenant and tenant in common against the other as bailiff for receiving more than comes to his just share or proportion.”  Here, the husband bore all the risk and put in labour. If it turned out that he sustained a loss because of this, he would not be entitled to ask the wife to bear part of the loss, therefore she is not entitled to the profits either.  WRT another property that they owned that was rented out, the wife was entitled to a share, but that is different because it was just a straightforward rental situation. |

#### Property Law Act s 13.1 (actions of account)

(1) Actions in the nature of the common law action of account may be brought and maintained by one joint tenant or tenant in common against the other as bailiff for receiving more than comes to that person’s just share or proportion, and against the executor or administrator of the joint tenant or tenant in common.

(2) The registrar or other person appointed by the court to inquire into the account . . .

**Share of Expenses:**

#### 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 [any number of things that require payment] may apply for relief under s 14 (infra).

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

(1) On hearing an application under section 13, the court may do one or more of the following:

(a) order that the applicant has a lien on the interest in land of the defaulting owner

(b) order that the property be sold to pay back the non-defaulting owner

(c) make a further or other order, including an order that the non-defaulting owner can purchase the interest of the defaulting owner.

(2) The amount recoverable by the non-defaulting owner is the amount the defaulting owner would have been liable to contribute to satisfy the defaulting owner’s share of the original debt if it had been allowed to accumulate until the time the application (under s 13) is made. (I.e. the non-defaulting owner gets their money back with interest.)

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| Mastron v Cotton | |
| **L/A/C** | When a joint tenancy is terminated by a court order for partition or sale, the court may make just allowances and give orders that would do equity between the parties. What is just and equitable depends on the situation:   * if the tenant in occupation claims for upkeep an repairs, the court can order payment * if one tenant has made improvements that have increased the selling value of the property, the other tenant cannot take advantage of the increased price without paying for part of the improvements * of one tenant has paid more than his just share of encumbrances, he is entitled to be paid for it |

## Termination of Co-Ownership

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| Stonehouse v British Columbia (AG) | |
| **Facts** | A property is purchased and put in the names of Mr. and Mrs. Stonehouse. This is Mrs. Stonehouse’s second marriage. She falls terminally ill, and prefers privately that her daughter from a previous marriage should have her share in the jointly owned property. Here, it is a situation of joint tenancy (i.e. a right of survivorship to the husband), so the wife has to sever one of the unities to convert it into a tenancy in common. Here, the wife made a deed that conveyed “all her interest in and to” her house to her daughter without telling the husband. The daughter did not register the deed until after her mother died. |
| **Issue** | Is severance effective upon execution of the deed or upon registration? |
| **L/A/C** | The joint tenancy was severed at the time the deed was executed and delivered to the daughter  Section 20(1) of the *Land Title Act* reads, “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.”  The words, “except as against the person making it” in s 20(1) make the instrument operative against Mrs. Stonehouse, meaning that here interest was, in fact, transferred to her daughter, severing the unities. |

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| Sorensen Estate v Sorensen | |
| **Facts** | Several pieces of property are held by husband and wife as joint tenants. They decide to split up and enter into a separation agreement where they agreed to sell one of the properties to fix up the matrimonial home, and that the matrimonial home was to be leased to the wife for her lifetime for $1 a year. Later, the wife found out she had cancer, and in order to provide for her mentally retarded son, she executed a trust deed that said “I declare that I hold said lands upon trust for my son . . . his heirs and assigns forever.” She also declared that she had executed transfers of the lots which were not to be registered until her death, she commenced an action for partition of the lands (and died before it was complete), and she left the property to her son in her will. |
| **Issue** | Did any of the unilateral acts by the wife effect severance of the joint tenancy? |
| **L/A/C** | Will—execution of a will does not sever a joint tenancy.  Unilateral declaration (partition action)—no impact on title, therefore not enough to sever joint tenancy.  Separation agreement—there was no clause indicating that they agreed to sever the tenancy, not effective.  Lease—the couple still shares the reversion together, so a lease does not affect severance.  Trust—by executing the trust, she is severing legal and equitable titles, and that is enough to sever the joint tenancy. |

## Partition and Sale

#### Partition of Property Act s 2 (parties may be compelled to partition or sell land)

(1) All joint tenants, tenants in common, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or sell the land, or part of the land.

#### Partition of Property Act s 3 (pleadings)

In a proceeding for partition it is sufficient to claim a sale and distribution of proceeds, and it is not necessary to claim a partition.

#### Partition of Property Act s 6 (sale of property where majority requests it)

If parties with half or more of the interest in the property request the court to direct a sale of the property instead of a division, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.

#### Partition of Property Act s 7 (sale in place of partition)

If it appears to the court that a sale of the property and a distribution of the proceeds would be more beneficial for the interested parties than a division of the property, the court may

(a) on the request of any of the interested parties and despite the dissent or disability of any other interested party, order a sale of the property, and

(b) give directions.

#### Partition of Property Act s 8 (purchase of share of person applying for sale)

(1) If any interested party requests a sale, the court may order a sale.

(2)The court may not order a sale under subsection (1) if the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale

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| Harmeling v Harmeling | |
| **Facts** | An elderly married couple are joint tenants of a property. The wife leaves and lives in a motorhome with another man. After leaving, she started proceedings for partition and sale. |
| **Issue** | How broad is a judges discretion whether or not to order partition and sale? |
| **L/A/C** | There is a prima facie right of a joint tenant to partition or sale and the court will compel such partition or sale unless justice requires that such an order should not be made. Each case must be considered in light of the particular circumstances and facts.  Majority finds that the old man would not be able to find similar accommodation with the money he has and that he is too old to be “turned out.”  Dissent says that the court should only refuse the application for partition when the defending co-owner can show that the sale would result in serious hardship and would be economically oppressive. They would order partition and sale. |