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# Chapter 3: Aboriginal Title

Feds have jurisdiction over aboriginal peoples, but provinces have jurisdiction over property rights. *St. Catherine’s* did not recognize that AT preceded Crown ownership. *Royal Proclamation of 1762*: declared ownership over NA, but said that land possessed by FN stayed w/ them – AT was never abrogated. S 109 provides that all lands belong to provinces subject to any interest other than that of the provinces – leading category is that of AT. Aboriginal land can only be put into private property system through treaty negotiated w/ gov’t or through surrender to Crown (*Delgamuukw*). S 35 of Constitution preserves existing AT and rights – gov’t of Canada cannot do things that will impair AT except where it is substantial and compelling to do so.

AT is a right in land. AT confers 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 distinctive cultures of aboriginal societies. Uses must not be irreconcilable w/ nature of attachment to land which forms basis of particular group’s AT. Arises where connection of group w/ piece of land was of central significance to their distinctive culture.

**Test for proof of AT**: (1) land must have been occupied prior to sovereignty, (2) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation [ok if there are interruptions or if nature of occupation has changed] and (3) at sovereignty, that occupation must have been exclusive [take into account context of aboriginal society](*Delgamuukw*)

**Claimant is required to prove:** (1) existence of ancestral practice, custom or tradition advanced as supporting claimed right (2) that this practice, custom or tradition was integral to his pre-contact society in sense it marked it as distinctive and (3) reasonable continuity between pre-contact practice and contemporary claim (*Mitchell*).

#### Delgamuukw v British Columbia (1997) (3-8)

F: Claim for AT based on historical use and ownership of territories. Non-traditional evidence to support claim (oral/song/dance/feast hall).

I: Can court interfere w/ fact findings of TJ? What is content of AT, how is it protected by s 35, what is required for proof? Does province have power to extinguish aboriginal rights? Did As make out claim to self-gov’t?

A: TJ was too strict w/ rules of evidence – need to take into account perspective of aboriginals and CL. Oral histories should be given weight.

**Sui generis** interest in land – distinct from FS: distinct from ‘normal’ proprietary interests; cannot be completely explained by reference to CL rules of real property or aboriginal rules of property. (1) **Inalienability** – AT lands can only be transferred to the Crown. This does NOT mean that AT = non-proprietary interest. (2) **Source -** FS proceed on basis of Crown declaration of ownership of land, but AT precedes this. At CL occupation is proof of possession. AT originates in part from pre-existing systems of aboriginal law. (3) Held **communally.**

ARs which are recognized and affirmed by s 35 fall along a **spectrum w/ respect to their degree of connection w/ the land:**

**1.** Practices, customs and traditions that are integral to the distinctive aboriginal culture – non-land aboriginal rights

**2.** Non-site specific aboriginal right

**3.** Activities which take place on land and might be intimately related to a particular piece of land (might = site-specific right)

**4.** Aboriginal title itself – confers the right to land itself – property interest

Occupancy determined by reference to activities that have taken place on land and uses to which land has been put by particular group. AT is one type of aboriginal rights.

Time for identification of aboriginal rights is time of 1st contact, time for identification of AT is time at which **Crown asserted sovereignty over land –** AT crystallized at time sovereignty was asserted – AT is a burden on Crown’s underlying title, but Crown did not gain this title until it asserted sovereignty. Canadian sovereignty has not expunged AT, but it has made it more fragile. Joint title can arise from shared exclusivity. Exclusivity = ability to exclude others from lands – demonstrated by intention and capacity to retain exclusive control. Proof must rely on perspective of CL and aboriginal, placing equal weight on each.

If aboriginal peoples wish to use their lands in a way that AT does not permit, then they must surrender those lands and convert them into non-title lands to do so.

**Ways to prove possession**: (1) Fact of physical occupation; (2) Aboriginal legal system which recognizes AT – but aboriginal perspective must be taken into account alongside perspective of CL.

**To justify infringement** of aboriginal right under s 35, (1) leg objective must be compelling and substantial and (2) directed at purpose underlying s 35 (recognition of prior occupation by aboriginals or reconciliation). Infringement must be consistent w/ fiduciary relationship. For aboriginal rights to be recognized and affirmed by s 35, must have existed in 1982. Fed gov’t has exclusive power to extinguish aboriginal rights. **Fiduciary duty does not demand that ARs always be given priority** – form and degrees of scrutiny required by fiduciary duty will vary depending on nature of AR at issue.

**To consider w/ regard to degree of scrutiny**:

1. Exclusive nature of AT

- Gov’t must demonstrate both that process by which it allocated resource and actual allocation of resource which results from that process reflect prior interest of holders of AT in land

2. AT encompasses right to choose to what uses land be put

- Fiduciary relationship may be satisfied by involvement of aboriginals in decision-making

- There is always a **duty of consultation**

- Nature and scope of duty of consultation varies w/ circumstances

3. Lands held pursuant to AT have an inescapable economic component

**- Compensation** is relevant to question of justification

C: Allow appeal in part, dismiss cross-appeal, order new trial. Dissent: Nature of aboriginal claim must be identified precisely. Distinction between general right to lands and discrete right to engage in activity in particular area. Date of sovereignty may not be only relevant time. Economic dev’t in BC satisfies 1st part of justification analysis.

#### Mitchell v MNR (2001) p. 3-35

F: P brought goods into Canada from US, presented some of goods to another aboriginal group as gift. Claimed didn’t have to pay custom duties.

I: Does group have right to bring goods into Canada from US for collective use and trade w/ other FN w/o paying custom duties?

A: **Aboriginal rights presumed to survive assertion of sovereignty and absorbed into CL unless (1) incompatible w/ Crown’s assertion of sovereignty; (2) surrendered voluntarily or (3) extinguished by gov’t.** S 35 elevated existing CL aboriginal rights to constitutional status. Aboriginal right must have been defining feature of aboriginal society. **3 factors that should guide a court’s characterization of a claimed aboriginal right**: (1) nature of action which applicant is claiming was done pursuant to an aboriginal right; (2) nature of gov’t legislation/action alleged to infringe right (3) ancestral traditions and practices relied upon to establish right. Evidence must be useful and reliable. Admissibility determined case-by-case. Right claimed must be characterized in context and neither artificially broadened nor narrowed. Dissent: int’l trading/mobility right claimed by P is incompatible w/ historical attributes of Canadian sovereignty.

C: Aboriginal right claimed has not been established – trade was incidental, not integral, to Mohawk duty.

#### R v Marshall; R v Bernard (2005) (3-44)

F: P cut timber for commercial purposes on Crown lands w/o provincial authorization. P claimed entitlement to cut timber on basis of AT.

I: Do they have treaty rights/AT entitling them to commercial logging?

A: Aboriginal group which occupied land at time of sovereignty and never ceded/lost its right to land still enjoys title to it.

- Court’s task in evaluating claim for AR is to examine pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a **modern legal right**

- Court must consider pre-sovereignty practice from perspective of aboriginal people. But in translating it to a CL right, the Court must also consider the European perspective. Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the CL right.

- Exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into AT to the land if the activity was **sufficiently regular and exclusive** to comport w/ title at CL

- Consider whether practices of aboriginal peoples at time of sovereignty compare w/ **core notions of CL title to land**

- For **exclusion**: all that is required is demonstration of **effective control** of land by group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so

- **Oral evidence** can be accepted, provided conditions of usefulness and reasonable reliability set out in *Mitchell* are respected

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

- Whether a nomadic peoples enjoyed sufficient ‘physical possession’ to give them title to the land, is a question of fact, depending on all the circumstances

- Question is whether a degree of physical occupation/use equivalent to CL title has been made out

- Continuity is required, in the sense of showing the group’s descent from the pre-sovereignty group whose practices are relied on for the right.

CL recognizes that: (1) Possession sufficient to ground title is a matter of fact, depending on all the circumstances; (2) A person w/ adequate possession for title may choose to use it intermittently or sporadically; (3) Exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land.

C: Treaty rights did not extend to commercial logging. Appeals allowed – restore convictions.

#### William v British Columbia (2012) (3-52)

F: P sued D for declarations of AT and aboriginal rights in response to Province’s approval of logging in contested area w/o adequate prior consultation/justification by gov’t.

I: What is appropriate test for occupation? Territorial or site-specific?

A: **Territorial theory**: proof of movement by people over land and attempts at repulsion of others from that land at time of sovereignty sufficient to establish presence. **Site-specific**: requires proof of well-defined, intensively-used area on which activities regularly occurred at time of sovereignty. Claim is territorial, not site-specific. **Land needs to be of central significance to their distinctive culture and an area that was occupied intensively**. Title site may be defined by particular occupancy of land or on basis that definite tracts of land were subject of intensive use. Result for semi-nomadic FN like the P 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 in which various identifiable Aboriginal rights can be exercised. ARs are recognized, not created, by CL.

- Law must recognize and protect AT where exclusive occupation of land is critical to traditional culture and identity of an aboriginal group – this will usually be the case where traditional use of tract of land was intensive and regular

- Exclusive possession in sense of intention and capacity to control is required to establish AT

- Requirement of physical occupation must be generously interpreted taking into account both aboriginal perspective and perspective of CL

- Ultimate goal is to translate pre-sovereignty aboriginal right to a modern CL right

- Territorial claim for AT does not meets tests in *Delgamuukw* and *Marshall; Bernard*

- Broad territorial claim does not fit within purposes behind s 35 of *Constitution* or rationale for CL’s recognition of AT

- Broad territorial claims to title are antithetical to goal of reconciliation, which demands that, so far as possible, traditional rights of FN be fully respected w/o placing unnecessary limitations on sovereignty of Crown or on aspirations of all Canadians, Aboriginal and non-Aboriginal

C: Dismiss claim to AT, but P can make new claim for title for specific areas.

R: AT must be proven on site-specific basis.

#### Skeetchestn Indian Band v BC (2000) (5.7)

F: Registrar refused to register CPL and caveat – said that AT is not interest in land. CPL and caveat pertain to AT claim made by Band against 6 Mile Ranch.

I: Was Registrar correct in refusing to register CPL and caveat?

A: ARs are not marketable/alienable. **Cannot file lis pendens if claim is w/ respect to interest/estate in land that is not registrable.** AT is not an exception/reservation from Crown. LTA only accommodates traditional CL or equitable interests in land. Torrens system designed to register interests in land that have clear identity recognized by rules of real property law. AT not derived from FS – sui generis and doesn’t lend itself to categorization. Priorities in Torrens system based on date of reg rather than date when right is acquired – cannot accommodate AT which has its source in occupancy and use of lands prior to assertion of sovereignty by Crown.

C: Registrar was correct – appeal dismissed.

R: **AT not registrable under LTA.**

D: Purpose of lis pendens is to allow for measure of certainty/orderly process – why does it matter whether claim is AT?

# Chapter 5: Registration of Title: An Overview

# A. Historical Background

## 1. Common Law Conveyancing

Delivery by transferor to transferee of deeds – prepare abstract of title (history of titles for piece of land) and establish good root of title. Disadvantages: expensive, delays, might require recourse to courts, risk of loss etc. of deeds, repetitive. Could operate for or against purchaser e.g. Purchaser took subject to ALL legal interests BUT equitable interest not enforceable against bona fide purchaser for value of legal title who took w/o notice of interest or w/o notice that transferor was in breach of obligations.

## 2. The Recording System

Provides for recording of deeds affecting land in a recording office. Unrecorded deeds have no effect. Creates active and profitable insurance industry – title insurance – insure against lawyer error in creation of abstract.

## 3. The Torrens System

Once a FS interest is entered on Register, that is conclusive evidence that the person named on the Register is owner of interest (subject to some exceptions). Abstract of title prepared by civil servants – title insurance not necessary. **Every indefeasible title, as long as it remains in force and uncancelled, shall be conclusive evidence at law and in equity, as against Crown and all other persons, that person named in title is indefeasibly entitled to EIFS to land described in indefeasible title.** If there is financial encumbrance, duplicate indefeasible title must stay w/ LTO.

**Note**: Primary function of mortgages – interest in property conferred by borrower (mortgagor) on lender (mortgagee) for purpose of providing a fall-back if repayment obligations not met.

## 4. The Torrens System Introduced in BC

*Land Registry Act 1860* for Vancouver Island and *Land Registry Ordinance 1870* for rest of BC. Two stages process: (1) Upon initial application to register, if Registrar was satisfied by examination of docs that applicant prima facie had good title, title registered in Register of Absolute Fees. (2) After 7 years if no challenges, RO could apply for CIT. Absolute fee concept abolished in 1921. If unregistered land is acquired from someone other than Crown, may be necessary to secure reg of any unregistered FS owners.

# B. The General Pattern of Registration

## 1. Land Title Districts

Province divided into 7 land title districts. Interest in parcel of land must be registered in district in which land is located.

## 2. What Can Be Registered?

**Only interests recognized as interests in land at CL** (including equity) (*Kessler*). 2 categories of interests will appear on the land title search: (1) **fee simples**: fee simple owner w/ indefeasible title; (2) **charges**: covenants, mineral rights, life estates, mortgages, etc.

### (a) The General Principle

#### R v Kessler (1961) (5.5)

F: A asserts that zoning bylaws must be registered in land registry office because they affect use of land.

A: Zoning bylaws are not interests in land – they are leg. Not to be registered in Torrens system.

R: Registration may be refused unless instrument sought to be registered **conveys interest in land**.

### (b) Prohibition of Registration of Common Law Interests

**(i) Equitable mortgage** (*LTA* s 33) **or lien by deposit of DIT or other instrument cannot be registered**

* BUT mortgages can be registered – just mortgages which are created by handing over DIT cannot be registered.
* At CL, if title deeds deposited w/ a lender that gave rise to presumption that it was intention of parties that land of borrower was to be subject to equitable mortgage in favour of lender.
* A person who is a trustee may secure registration – BUT details of trust may not be listed on title (s 180)

**(ii) Sub-agreement for sale by RO of right to purchase land or of sub-right to purchase land is not registrable** (s 200).

### (c) Registration of Non Common Law Interests

Requires specific leg authorization. Most common are judgments: If someone has been awarded a monetary judgment, if they are not paid immediately by D they can register the judgment – secures their priority.

### (d) Aboriginal Title

See Chapter 3.

## 3. The Basic Scheme of Registration

### (a) The Legal Fee Simple

#### LTA s 179 – Rights of owner of surface

(1) Only owner of surface of land is entitled to be registered as FS. Owner of part of land above/below surface registers interest as charge.

(2) If no Crown grant of surface registered – Crown registered as owner.

(3) If title of owner to certain minerals/timber is registered in register of absolute fees and applies to become RO of other materials, title is registered as single charge in register of indefeasible fees and entry in register of absolute fees is cancelled.

#### LTA s 141 – Subdivision of land into air space parcels

(1) Owner in FS may create 1+ air space parcels and obtain indefeasible titles.

(2) Air space parcels may be transferred etc. – dealt w/ in same manner as other land registered.

(3) May be subdivided under *Strata Property Act*.

#### Strata Property Act ss 239, 244

239: Strata lots treated in same manner as other land titles registered. Each strata lot has its own CIT.

244: Strata plan requirements.

### (b) Charges

All interests other than legal FS in surface of land, strata lot or air space lot are classified as charges.

#### LTA s 1 – Charges

Estate/interest in land less than FS, includes estate/interest registered as charge under s 179 and encumbrance.

**Encumbrance** includes: judgment, mortgage, lien, Crown debt or other claim to or on land created or given for any purpose, whether by act of parties or any Act or law, and whether voluntary or involuntary.

## 4. The Legal Fee Simple

### (a) Initial Application

#### LTA s 169 – Registration of title

**(1) (a) Boundaries** of land must be sufficiently defined. **(b) Good safe holding and marketable title** in FS must be established. **Safeholding**: title conferring possession that is safe from attack and cannot be displaced. **Marketable:** title that is freely alienable, and not so defective that a reasonable purchaser could refuse it.

(2) Registrar may require that person named in registrar be served w/ notice of intention to register title unless caveat or CPL filed.

(3) If caveat lodged or CPL registered, registrar must defer consideration of the application until the caveat expires/is withdrawn/adverse claim is disposed of. Applicant must also ensure docs are attested and executed as required and file a completed property transfer tax form.

**Application deemed received when s 153 complied w/.** Examiner makes draft which indicates all info which is to be shown on new title. Final step is production of indefeasible title. When FS is registered the Registrar must issue to the owner a DIT (s 176). Duplicate must contain all the info in register relating to land in question. Cannot be issued if title is subject to registered mortgage or agreement for sale. Duplicate must be produced for cancellation if application to register mortgage or agreement for sale is made.

\*\* Once the title has been registered this constitutes conclusive evidence at law and in equity that the person named in the title is indefeasibly entitled to an EIFS\*\*

### (b) Transfer Inter Vivos

Procedure is essentially same as that for initial reg. Applicant must also produce DIT if one has been issued.

### (c) Transmission on Death

“Transmission” is change of ownership by operation of Act/law. Title to deceased’s real and personal property passes by law to personal reps, who hold property in trust. Personal reps secure reg of themselves as FS owners in fiduciary capacity, then transfer title to appropriate beneficiary.

## 5. Charges

### (a) General

#### LTA s 195 – Registration of Charges

Registrar may refuse to register charge if: good safeholding and marketable title not established or charge claimed is not an estate/interest in land that is registrable under Act.

Registrar may be satisfied that applicant has good safeholding and marketable title by: instrument from FS owner creating charge; assignment to applicant of existing charge or; creation of sub-charge.

### (b) Caveats; Certificates of Pending Litigation; Judgments

**(i) Caveats**

Registered by Registrar entering an endorsement of it and of time of its receipt in Register. May be lodged by any person who claimed to be entitled to interest in registered land. May also be lodged by RO and Registrar.

#### LTA s 288 – Effect of caveat

Registrar must not register another instrument affecting land or deposit a plan of subdivision or otherwise allow any change in boundaries. Instrument expressed to be subject to claim of the caveator may be registered/deposited, **unless claim would destroy root of title** of person against whose title caveat has been lodged. Caveat lapses after expiration of 2 months or if notice served on caveator, then 21 days from notice. Does not apply to caveats lodged by Registrar. SCC may issue order prohibiting dealing w/ specified land upon such terms and conditions as court sees fit. If claim to which caveat relates is established, caveator is entitled to claim priority.

-> Allows the would-be P to get their act together and issue a writ – have caveat removed when writ goes through by a CPL.

**(ii) Certificates of Pending Litigation (CPL aka *lis pendens*)**

Any person who has commenced/is party to a proceeding may register a CPL in same manner as charge is registered. Stays until lawsuit is settled.

#### LTA s 215 – Registration of CPL in same manner as charge

Registrar must attach copy of pleading etc. to certificate. Land must be described in satisfactory manner. Registrar must mail copy of CPL to owner. Must register certificate of charge in same manner as modification of charge if necessary. If person entitled to enforce a restrictive covenant/building scheme has commenced an action to enforce it, they must register a CPL. Party to a proceeding for order for dissolution of marriage etc. may register CPL in respect of any estate/interest in land the title to which could change as an outcome of the proceeding. Person who has commenced action under *WESA* may register a CPL. Judgment creditor who claims to be entitled to register judgment against land in respect of which application was made may register CPL.

#### LTA s 216 – Effect of registered CPL

Registrar must not make entry in register that charges etc. land until registration of certificate cancelled. This does not apply to lodging of caveat or registration of indefeasible title/charge, if instrument subject to final outcome of proceeding etc.

#### LTA s 217 – Effect of CPL if prior application is pending

Register may make entry for registration applied for before application to register CPL was received. If prior applicant is party to proceeding, register subject to CPL. If not party to proceeding, cancel registration of certificate and give notice of cancellation. If claim to certificate established, person who registered the certificate is entitled to claim priority.

**(iii) Judgments**

1. Type of judgment that can be registered: If a P obtains a money judgment against a D, P may register judgment in same manner as charge in LTO in which judgment debtor has registered interest in land. Judgment which affects title to land will not be registered in this manner.
2. Manner of registration: Registrar must notify owner of land/charge.
3. General effect of registration: *Court Order Enforcement Act* s 86: Judgment forms liens and charge on land of judgment debtor to extent of beneficial interest in land subject to rights of purchaser who acquired interest in good faith.

* **Lien**: legal right of creditor to sell collateral property of debtor who fails to meet the obligations of a loan contract.

# C. The Role of the Registrar

Registrar is charged w/ responsibility of deciding in case of each application whether applicant has a good safeholding and marketable title. Has power to make corrections under ss 382(1)(c) and 383.

#### Re Land Registry Act, Re Evans Application (1960) (5-28)

F: Land parcel registered as 66 ft ‘more or less’. ½ of parcel transferred to S and ½ transferred to E. Mr E dies, so Mrs E applied to update CIT. Registrar refuses to register land until uncertainty of exact boundaries is rectified.

I: What are duties of Registrar? Was Registrar right in refusing to register parcel?

A: **Not duty of registrar to determine (1) boundaries; (2) adjudicate on property rights** – this is under inherent jurisdiction of CL. **Registrar doesn’t have to perpetuate errors w/ boundaries** and can step in to attempt to correct them. **Has option to correct register**. Registrar has **quasi-judicial duties** – must be satisfied of good safeholding and marketable title before issuing CIT.

C: Registrar does not have to register parcel.

#### Re Land Registry Act and Shaw (1915) (5-31)

F: S’s dad gave him power of attorney to sell and dispose of his property. S tried to use this to assign dad’s interest in a mortgage to himself. R refused to register transfer until notified by dad – on its face, transaction was improper.

I: Was R wrong in refusing to register instrument w/o proof of transfer of mortgage?

A: R not wrong to refuse to register instrument w/o proof of acquiescence of donor in transfer of mortgage to himself by donee of power of attorney. In equity a transfer from a donee to himself of mortgage could not be upheld w/o proof to rebut presumption. Voidability of transfer appears on face of docs – ‘pulpable blot’. No good safeholding and marketable title. **Courts must determine if doc is voidable**, not R.

C: R right to refuse reg w/o proof. Appeal allowed.

R: **R has jurisdiction over all issues of good safeholding and marketable title that relate to clarification.**

#### Property Law Act s 27

Attorney cannot sell to himself. Person granted POA (S) cannot transfer land from person granting POA (dad) to himself unless: (a) POA expressly authorizes it or (b) person granting POA ratifies it. **Burden of proof is on S to show evidence of full disclosure, fair consideration and good faith.**

#### Heller v British Columbia (Registrar, Vancouver Land Registration District) (1963) (5-34)

F: H tried to transfer land to wife, R registered it w/ no duplicate CIT on file. Duplicate already given to someone who had ½ interest transferred. H tried to reverse transfer to wife due to error of allowing reg to proceed w/o duplicate CIT in office. R refused.

A: **Discretionary matter: as registrar cannot affect rights of others by correcting something or adjudicate the rights between parties, he cannot investigate.** This matter should be left to provincial or supreme courts. As H gave deed to wife this showed intention to transfer land to her (acquired gift in good faith), to restore his title H will have to show this was void, otherwise R will not affect wife’s rights she acquired by changing the register. Nothing before R to indicate whether or not DIT was available and could be produced by respondent. H executed and delivered conveyance w/o duplicate title – should not complain of conduct of R in respect of registration of conveyance.

C: R right to refuse.

#### LTA s 383 - Registrar to cancel or correct instruments, etc.

If R finds an instrument is issued in error/has a misdescription or an endorsement is made/omitted in error **R MAY, so far as practicable**, w/o prejudicing rights acquired in good faith and for value cancel the registration/instrument or correct the error.

# D. The Assurance Fund

If Crown is going to give and guarantee indefeasibility – doctrine of nemo dat is now seriously eroded. True owner of property who did not register loses interest in land. Principle of assurance incorporated into land title scheme – **system of compensation for people who have lost their CL interests**.

Part 20 of LTA establishes AF out of which, if certain preconditions are satisfied, person may be able to claim compensation for loss of interest in land. **Compensates individuals who are deprived of title or interest through operation of Torrens system.**

Available in case of (1) Fraud (s 296) and (2) Mistake of Registrar (s 298).

#### LTA s 296 – Remedies of person deprived of land

Basic requirement: show deprivation of land or an interest in land. Fraud or wrongful act in respect of registration of a person other than the claimant as owner of the land. Conclusive nature of operation of the Act prevents claimant from recovering. Apart from Act, P would in fact have succeeded at CL or equity.

**Before you can make a claim under AF:**

(1) Bring action against person who’s holding your land now (s 296(2)(b));

(2) File CPL – if unsuccessful after litigation, then launch action in BCSC (s 296(1)) against person who defrauded you, simultaneously join AG as nominal party D (s 296(3)). If fraudulent person cannot be found, or cannot pay full damage award, or is dead, then claimant can try to collect from AF (s 296(4/5)). (3) Under s 296(2)(a), claimant must prove deprivation – must show you lost your land for 3 reasons:

(a) Lost your land due to conclusiveness of register? Would claimant have succeeded in CL if the Torrens system hadn’t been enacted? – s 296(2)(a)(i)

(b) Fraud operating? – s 296(2)(a)(ii)

(c) Claimant barred by the Act or any other Act, or otherwise precluded from recovering or having title rectified?

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

(1) In this section, "transferee" means a transferee who, in good faith and for valuable consideration, acquires an estate or interest in land less than a FS.

(2) Despite anything to the contrary in this Act, no transferee is subject to a proceeding under this Part in respect of an estate or interest in land of which the transferee is the registered owner, for: (a) recovery of land, (b) deprivation of land, or (c) damages in respect of land on the ground that the transferor (d) may have been registered as owner through fraud, error or a wrongful act, or (e) may have derived title from or through a person registered as owner through fraud, error or a wrongful act.

#### LTA s 298 – Fault of registrar

"Solely or partially, as a result of an omission, mistake or misfeasance of the registrar". Limitation period: within 3 years after the loss or damage is discovered by claimant.

#### LTA s 303 – Limitation of liability of assurance fund

**AF or Minister are never liable for loss, damage or deprivation:**

(a) occasioned to or suffered by (i) the owner of undersurface rights, or an equitable mortgagee by deposit of DCIT or

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

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

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

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

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

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

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

#### McCaig v Reyes (1978) (5-42)

F: F had legal interest in ranch; enters into sale agreement w/ ST. ST won’t get property until they complete K for sale. Legal EIFS w/ F, equitable EIFS w/ ST. Once complete, then ST gets legal interest and can register. ST sold interest by sub-agreement to D – as part of deal, D sells to ST option to purchase (equitable interest). D makes another sub-agreement to sell to R – didn’t mention ST’s option to purchase. ST transfers option to P – option not registered because it required consent of F (who would not give consent until receiving $). R then sells to J, who is registered as bona fide purchaser (no notice of R not honouring P’s option to purchase).

I: Does P have valid claim against AF?

A: P did not show loss was result of LTA. P deprived of interest by breach of K by D and fraud by R, not by operation of LTA. Even w/o LTA, J would have secured superior title as bona fide purchaser for value w/o notice (equity’s darling) – J acquired good safeholding and marketable title. R carried out scheme of deception which enabled him, after acquiring registered interest, to dispose of interest while concealing true state of affairs from purchaser and from P.

C: No $ from AF, but P can recover damages for breach of K against D and for inducing breach of K and fraud against R.

R: **To succeed against the AF, claimant must show (1) he had been deprived; (2) loss was result of LTA; (3) fraud; (4) barred from bringing an action for rectification of the register**. If A enters into sake K to sell Blackacre to B, then until the transfer is complete A has legal EIFS and B has equitable EIFS.

# Chapter 6: Registration

You don’t get an interest in land unless it has been registered (s 20 LTA). Clarity obtained by abolition or significant attenuation of CL doctrine of nemo dat. Nothing in LTA specifically compels reg, but *Land Act* requires reg in certain cases; *Land Act* s 54 – Crown grants must be registered if issued after April 6, 1968.

# A. Registration: The Fee Simple

#### LTA 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 Crown and all other persons, that person named in title as RO is indefeasibly entitled to an EIFS to land described in indefeasible title,** subject to:

(a) conditions etc. in original grant

(b) fed/provincial tax, rate or assessment

(c) municipal charge, rate or assessment

(d) lease/agreement for lease not exceeding 3 years if there is actual occupation

(e) highway etc. – public easements

(f) right of expropriation/escheat under an Act

(g) any charges etc. noted/endorsed on title or later noted on title

(h) if third party shows that there was wrong description of boundaries

-> No guarantee on indefeasibility of wrong boundaries were registered

(i) if third party shows that there was fraud which registered owner participated in

(j) restrictions under *Forest Act*

(3) After registration, title adverse to/in derogation of title not acquired by length of possession

(4) BUT in case of first indefeasible title registered, it is void against title of person adversely in actual possession of and rightly entitled to land included in indefeasible title at time of registration

Indefeasible = not able to be lost, annulled, or overturned

#### Land Act s 50 – Exceptions and reservations

Crown grants are subject to:

- Right in gov’t to public works – not more than 1/20 of land

- Right in gov’t to geothermal resources, coal, petroleum, gas/gases

- Water privileges for mining/agricultural purposes

- Gravel, sand, stone, lime, timber or other material for construction of public works

- Do not include: geothermal resources, minerals/placer minerals, coal, petroleum, gas

- No right to highways

- Crown grant may by express terms be different, must refer to Act that authorizes the different terms

- Crown grant may by express terms grant gov’t more rights/privileges

- Gov’t may grant right of way

#### Agricultural Land Commission Act ss 1, 16, 20, 21, 28, 60

- Defines farm use and non-farm use

- Land included in agricultural land reserve remains agricultural land unless excluded under this Act

- Person must not use agricultural land for non-farm use unless permitted – includes removal of soil and placement of fill

- Must not subdivide agricultural land unless permitted

- Post 1973 you do need to register that the land is subject to the Act – prior to that it will not be noted on the CIT

## 1. The General Principle of Indefeasibility

#### Creelman v Hudson Bay Insurance Co (1920) (6.6)

F: D brought action for breach of K of sale against P – P refused to pay. P claimed that under fed act, D could not acquire or hold real property unless it was required for purposes, use or occupation of that company – since D did not acquire land under these requirements, it had no power to hold or dispose of land.

C: Appeal dismissed – P bound to accept certificate and comply w/ all their obligations under the K.

R: **Every purchaser is bound to accept CIT while it remains unaltered or unchallenged on Register.**

## 2. Indefeasibility and Adverse Possession

**Title by adverse possession (squatter’s title)** based on fact that if land owner did not bring action to recover possession of land from wrongful occupier within specified period of time defined by statute, right to do so was lost and wrongful occupier had possessory title – gained titled through ‘acquisitive prescription’.

Pre-1970s: *Statute of Limitations*: if a private individual did not bring action within 20 years, and Crown within 60 years, then the right of action would be statute barred – right and title of original owner extinguished; BUT w/ respect to registered land, title could not be acquired by adverse possession once land registered.

#### Land Act s 8

Person may not acquire by adverse possession interest in Crown land or in land as against gov’ts interest in it.

#### Limitation Act

(2) Does not apply to court proceedings enforcing local judgment for possession of land or based on existing aboriginal and treaty rights.

(3) Does not apply to claims for possession when disposed in circumstances amounting to trespass or claims by someone in possession of property.

(5) Rules of equity not overridden.

(28) **Except as specifically provided by an Act, no right/title in or to land may be acquired by adverse possession.** This Act does not interfere w/ rights/titles acquired by adverse possession before July 1, 1975.

#### LTA ss 23, 171

23: After indefeasible title registered – title adverse to it cannot be acquired by adverse possession **except in case of first indefeasible title registered** (NB: so adverse possession is not totally gone).

171: Application for adverse possession not accepted unless permitted by LTA and supported by declaration of title under *Land Title Inquiry Act*.

#### Property Law Act s 36

If a building or fence encroaches on land, court may grant an easement for a period of time, vest title to land encroached in owner of land encroaching, or order owner to remove encroachment (combined w/ compensation).

## 3. Statutory Exceptions to Indefeasibility

### (a) LTA s 23(2)(d) – Leases

Lease/agreement to lease will be honored for up to 3 years even though it’s not registered, as long as there is actual occupation. Leases longer than 3 years must be registered – **based on total term**, not initial term of lease (e.g. 2 years w/ option to renew for 2 years must be registered).

### (b) lTA s 23(2)(g) – Charges and Other Entries

Lien has priority over all judgments, executions, attachments and receiving orders recovered, issued or made after that date.

#### Carr v Rayward (1955) (6.11)

F: Builders lien for work done registered against title after sale of property by unknowing 3rd party.

I: Was lien valid charge on property w/o notice being given to purchaser?

C: Yes – LTA allows this type of lien to be registered after sale – s 23(2)(g).

R: **Mechanics (builders) lien can be effective against lands if not filed in LTO until after owner for whom work was done and materials supplied has sold land and purchaser has obtained CIT from LTO.**

Under *Builders Lien Act*, a contractor, subcontractor or worker who has done work or supplied materials has a lien against the interest of the owner, the improvement, the land or the materials for any monies not paid in respect of the work or the materials. May be filed within 45 days of times specified in Act, which include issuing of certificate that work is completed. Lien has priority, has effect from time that work began or materials supplied.

### (c) LTA s 23(2)(g) – Boundaries

For each parcel of land under Torrens system, 2 fundamental docs: CIT and map/plan. Accuracy of map/plan in defining boundaries is within expertise of surveyors. **Indefeasibility does not extend to boundaries.**

*Winrob v Street*: conveyance advises client on state of title, but has no duty to ascertain/advise on dimensions of property. **Client must give and conveyance must accept a special instruction to become responsible for verifying dimensions.**

### (d) LTA s 23(2)(i) – Fraud

(2) An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following: … (i) the right of a person deprived of land to show **fraud, including forgery**, **in which the registered owner has participated in any degree.**

**Forgery = null/void deed = non est factum versus fraud w/o forgery = voidable**

- If B commits forgery from A and transfers to C who is BFPV, then s 25.1 says C gets to keep interest and A goes to AF.

- If B commits fraud from A and transfers to C who is BFPC, then *First West* says 25.1 doesn’t apply, transfer is not void ab initio, and C gets to keep interest (and then does A still get to go to AF?).

- If B commits forgery from A and gives charge to C who is BFPC, then too bad for C (*Gill/Credit Foncier*) – nemo dat applies

- If B commits fraud from A and gives charge to C who is BFPC, then C gets charge – EVEN if A gets EIFS back, but A can go to AF to pay for charge (*First West*)

- If C knows about fraud/forgery – then s 23(2)(i).

NB: Law in this area is a bit unclear because *Gill* conflates fraud/forgery.

**(i) Forgery**

e.g. A is RO at FS of Blackacre. B forges transfer of title from A to B, then sells Blackacre to C and disappears. Does A or C have title to FS?

- At CL nemo dat: void instrument leads to series of void transactions.

- S 23(i): nemo dat operates when title was obtained as result of fraud/forgery, but more complex when 3rd party C is involved

- 2 approaches in Torrens system (not binding in BC):

1. *Gibbs v Messer* (1891) – **deferred indefeasibility**: A should recover title because they had no involvement – C could have investigated further and had briefer ownership. C would have claim for $ against B or maybe AF. BUT: A (innocent owner) to B (fraudster) to C (innocent victim) to D (innocent purchaser): A could not recover title from D. A’s only recourse to seek monetary compensation from B and/or fund.
2. *Frazer v Walker* (1967) – **immediate indefeasibility**: once C became registered holder of fee, C keeps title and A should be innocent victim left to seek $ from B and/or AF. Needed to preserve public confidence in Torrens system. C’s title derived from registration, not from B’s defective title. *Gibbs* only applies where fraudster B uses name of fictitious person.
   * **Given legislative effect in BC w/ regard to EIFS under LTA s 25.1**

#### LTA s 25.1 - Void instruments – interest acquired or not acquired

(1) Person who acquires land by registration of void instrument does not acquire interest on registration. (NB: Reaffirms 23(2)(i), but only in terms of a void instrument – **not in respect of a fraudulent instrument**)

(2) BUT transferee named in instrument who acquired interest in **good faith and for valuable consideration** acquired interest on registration is deemed to have acquired interest on registration.

(3) AND transferee named in instrument who is RO of interest and acquired it in good faith and for valuable consideration is deemed to have acquired interest on registration (retroactive).

-> (2) and (3) apply only to instruments transferring FS estates

#### Gill v Bucholtz (2009) (6.28.1)

F: P is RO. Fraudster forged transfer to GG (same name as P, but different person). GG granted mortgage to Ds. GG negotiated 2nd mortgage w/ corporate D.

I: Is P’s interest subject to mortgage interests of Ds?

A: S 23(2) does not on its face extend to lesser interests than FS. S 26(1) states that RO of charge is deemed to be entitled to estate/interest on register, subject to appropriate exceptions. Registered charge does not obtain same quality of indefeasibility as registered FS. Exception in s 23(2)(i) to indefeasibility of title applies and **phrase ‘void instrument’ in s 25.1(1) includes a mortgage taken from a person who obtained her title by fraud/forgery** (NB: conflates fraud/forgery). Mortgage is ineffective at CL to pass any interest (under nemo dat and s 25.1). Mortgagees need to investigate person they’re getting mortgage from.

C: Appeal allowed, mortgages cancelled.

R: **Deemed = ‘rebuttably presumed’ – if you are registered then you are rebuttably presumed to have interest identified on CIT – indefeasibility is not absolute – nemo dat still applies in relation to registered charges, even where holder has relied on register and dealt bona fide w/ a non-fictitious RO.** I.e. If you are a charge-holder (mortgagor) and you got that through some form of fraud, then you are vulnerable and are not protected w/ indefeasibility.

D: Judge does not make distinction between void and voidable.

#### First West Credit Union v Giesbrecht (2013)

F: EIFS held by 779 Inc. 779 Inc. controlled by Mr B. D persuades Mr. B to transfer Blackacre to D to let her resolve financial problems. Mr B tells 779 to transfer Blackacre to D. D then takes a number of mortgages – one of mortgagees is P. Mr B says that $ from mortgages is not being put to good use at 779 – claims that he has been defrauded by D (not a forgery). Mr B claims under s 23(2)(i) that he can get D taken off CIT. If D is taken off, then according to *Gill* the mortgagees have no security for their loans in respect of Blackacre.

A: There is a difference between void and voidable. At best, D’s title is voidable – therefore s 25.1(1) does not apply. S 23(2)(i) does not apply because Mr B cannot be shown to have been deprived of lands – lands belong to 779. If conveyances are voidable, properties will remain subject to charges of mortgages. *Gill* does not apply to voidable transactions.

C: Finds for mortgagees.

R: **S 25.1(1) only applies nemo dat to ‘void’ as distinct from voidable transactions.**

**(ii) Notice of Unregistered Interests**

#### LTA s 29 – Effect of notice of unregistered interest

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

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

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

#### Hudson’s Bay Co v Kearns and Rowling (1895) (6.30)

F: K mortgaged interest to P and delivered title deeds, including CIT. Mortgage not prepared for 15 months. In meantime, R and K entered into verbal K to sell property to R – R searched title and found it clear. R gave K first promissory ntoe and was told title deeds would be produced. R registered transfer of title, then paid remainder of $ w/o having seen title deeds.

I: Can an equitable mortagee by deposit of title deeds acquire a better title to registered land than purchaser for valuable consideration who, w/o actual fraud/express notice of equitable mortgage, takes a conveyance unaccompanied by delivery of title deeds?

A: As purchaser for valuable consideration of registered land, R is unaffected by notice of unregistered title whether expressed, implied or constructive – s 29 LTA. Leg shall not be used as instrument of, or in defence of, actual fraud. Dissent: R should have suspected fraud.

C: No fraud – appeal allowed.

R**: If B, w/ knowledge of facts which would render a purchase a fraud upon A, deliberately carries out the purchase, which w/o the aid of a statute aimed at the suppression of fraud would be null and void, a Court of Equity will hold B, estopped from setting up the provisions of such statute when to permit him to set it up would be to enable him to commit a fraud.**

**Fraud is never presumed.**

#### Vancouver City Savings Credit Union v Serving for Success Consulting Ltd (2011) (6.34)

F: CCMH purchased and became RO of land w/ hotel on it. KKBL and D under unregistered leases of 5 years w/ option to renew on land. P advanced loans to CCMH, secured by registered mortgages on land. CCMH defaulted. P petitioned for order for foreclosure w/ vacant possession. KKBL and D claimed right to remain as tenants under their unregistered leases.

I: What knowledge did P have about occupation of space, is that sufficient to constitute equitable fraud?

A: No evidence of fraud on part of P.

C: In favour of P.

R: **To prove equitable fraud, it must be established that the party acquiring a registered interest in land had sufficient actual knowledge** of conflicting interest in property to cause a reasonable person to make inquiries as to terms and legal implications of prior instrument. **There must ALSO be some other circumstance** to take the matter out of the ordinary course of business or to show some clear intention to use s 29 LTA to defeat unregistered owner’s interests in circumstances contrary to common morality such that it would be inequitable for the court to allow reliance upon the statute as protection.

#### McRae v McRae Estate (1994) (6.51)

F: FF left by will 3 lots to his wife, H, on trust, in effect, for herself for life and remainder to their 3 children J, C and F. H registered as fee simple owner w/ ‘on trust’ notation on title. H then transferred lots to F. F registered as FS owner w/o any notation on title. F then died. F left lots to wife A and J and C by will. J and C found out about terms of FF’s will – they were beneficiaries under his will.

A: F knew of trust because he registered the land. Where ‘in trust’ is on duplicate, interest cannot be transferred unless instrument which created the trust allows it. Language of Act imputes notice of trust to F. Trust is still capable of being performed.

C: J and C’s claim not barred by *Limitation Act* – executors must hold lots on terms of F’s will.

R: **Registrar fixes you w/ knowledge – if info is in Register, you are imputed to have that knowledge.**

# B. Registration: Charges

## 1. Meaning of Registration

#### LTA s 197 – Registration of charges

(2) Registrar may refuse to register charge if (a) good, safeholding and marketable title has not been established or (b) charge is not a registrable interest/estate

#### LTA s 180 – Recognition of trust estates

(1) Personal rep’s or trustee’s title may be registered, but particular of trust should not be entered in register.

(2) Registrar must add endorsement identifying the estate to the register

(3) Registrar may add endorsement containing ‘in trust’ in registering trustee’s interest, w/ folio number.

-> Everything that qualifies the EIFS equitably is regarded as registered (everything on the trust instrument)

(4) Trust instrument must be filed w/ the registrar w/ application for reg

(5) Certified copy of trust instrument can serve purpose for (4) if original is required outside BC. (6) Copy has same effect as original.

(7) **Transfer/mortgage etc. of a land w/ an endorsement cannot take place unless expressly authorized by law/instrument or by order from Supreme Court.**

#### Dukart v Surrey (District) (1978) (6.56)

F: Company developed land near bay; between lots and bay was ‘foreshore reserve’ which lot owners were given right of access (easement) to. Land transferred to transferee ‘in trust’. Easement not registered as charge, but P’s title (lot-owner) reflected in CIT. Foreshore reserve transferred again. Then D took land in tax sale and built on it. D registered its interest – no indication of trust. P claimed D interfered w/ easement and sued for injunction to have building removed.

I: Does P have right to easement? Was easement registered within requirements of LTA so as to be binding on D?

A: Easement was validly created. **If a city acquires land in a tax sale it gets it free and clear of all charges except any easement registered against the land** (s 276 LTA). A trust that creates an easement and is registered in accordance w/ provisions of LTA will survive a tax sale, despite easement registered as trust and not as charge (s 180 LTA). You have to look at trust instrument to get an idea of all the equitable interests.

C: In favour of P – easement exists.

R: **Narrowest view: Easement contained in trust doc can continue to exist despite tax sale.**

**Middle ground: interest in trust doc is considered registered.**

**Widest view: If a doc is on file at LTO, anything included in that doc is registered.**

## 2. Indefeasibility?

#### LTA s 26 – Registration of a charge

RO of a charge is deemed (i.e. rebuttably presumed – does not give indefeasibilty as w/ EIFS) to be entitled to the estate, interest or claim created or evidence by the instrument in respect of which the charge is registered. Subject to other registered charges. Mere fact of registration says nothing about a charge’s validity; charge can still be void.

#### LTA s 27 – Notice given by registration of charge

Registration in effect gives notice to world of your claim.

#### Credit Foncier Franco-Canadien v Bennett (1963) (6.64)

F: Ds registered as EIFS owners. Mortgage on lands registered by forgery by A. A then assigned mortgage to AS. AS then assigned mortgage to P. P checked and found mortgage registered. P wrote to D requesting payments and D did not pay. P brought action against D for personal judgment and foreclosure.

I: Does P have mortgage? Can D get $ from AF?

A: S 26 LTA: registration of charge raises rebuttable presumption. **Nemo dat applies**: even though mortgage is registered it does not give P indefeasibility – null mortgage. Even if mortgage was valid, it is only security for amount actually owing – Ds did not owe anything.

C: D not liable for mortgage. Presumption rebutted.

#### Canadian Commercial Bank v Island Reality Investments Ltd (1988) (6.67)

F: PME is RO of land. ILACC held 1st mortgage. PME granted 2nd mortgage to D. D’s mortgage registered. Lawyer for PME then granted another 2nd mortgage to P. P understood that D’s mortgage would be cancelled. Lawyer registered P’s mortgage, then registered discharge of D’s mortgage. Discharge was a forgery. PME filed for bankruptcy – not enough funds to pay P and D.

I: Whose mortgage has priority?

A: Even though it was a forgery, discharge of D’s mortgage cleared PME’s title of D’s charge. P acquired interest from RO by way of valid mortgage, bona fide and for value.

C: Appeal allowed – P’s mortgage is valid charge, they are entitled to $. D may apply to AF.

R: **The *bona fide* purchaser for value of a charge who gets the charge under a valid instrument from the holder of the EIFS is deemed to be entitled to that charge upon registration; entitlement is not rebutted by pre-existing unregistered charges. Mortgagee must be able to rely on LT system.**

## 3. Priorities

#### LTA s 28 – Priority of charges based on priority of registration

If 2+ charges on register, charges have priority according to date received by registrar (not date executed), unless contrary intention is provided by instruments creating the charges.

# Chapter 7: Failure to Register

# A. The General Principle

#### LTA s 20 – Unregistered instrument does not pass estate

Except as against the person making it, an unregistered instrument does not pass estate unless registered. This does not apply to leases not exceeding 3 years when there is actual occupation.

#### Sorenson v Young (1920) (7.1)

F: P had formerly owned lots 1 and 2. P sold lot 1 to R, reserving to himself a right of way across lot 1. P built garage etc. to make use of right of way. D purchased lot 1 from R, then erected fence that prevented P from using right of way. D claimed he purchased lot 1 for value and w/o notice or knowledge that P had right of way.

A: D has indefeasible title in FS – nothing on title about right of way. Easement of right of way not registered.

C: In favour of D – P cannot execute easement.

#### LTA s 181 – Interest or right reserved to transferor

**On application to register owner in fee simple** under an instrument which (a) keeps estate/interest w/ transferor; (b) enters restrictive covenant or; (C) condition, exception, reservation, easement, statutory right of way or other right in the land is reserved… then the **reservation etc. will be registered as a charge against the new indefeasible title.**

# B. “Except against the person making it”

## 1. Judgments

CL principle that a judgment creditor cannot take any greater interest than the judgment debtor actually has – nemo dat. **A registered judgment yields to an unregistered interest in land** (*Yeulet*)**.**

#### Yeulet v Matthews (1982) (7.4)

F: MM held, from her son, an equitable mortgage by deposit of duplicate certificates of title (not registered). P then registered judgment against son.

A: Execution creditor can only sell property of his debtor subject to all charges, liens and equities as the same was subject to in lands of his debtor. Competing charge (equitable mortgage) is not registrable. BUT equitable mortgage never registrable. Judgment can only attach on actual assets of judgment debtor.

C: Equitable mortgage and charge of MM has priority over judgment.

#### Court Order Enforcement Act s 86 – Registration of judgments after October 30, 1979

From the time of its registration the judgment forms a lien and charge on the land of the judgment creditor (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.

## 2. Other Interests

#### L&C Lumber Co Ltd v Lungdren (1942) (7.12)

F: D sold to M standing timber on her land w/ right to enter and cut. M assigned his rights to P, who gave due notice to D. Agreement and assignment not registered. D refused to let P enter land to cut timber because of failure to register.

A**: S 20 does not rule out unregistered titles – its real purpose is to protect purchasers and encumbrancers for value w/o notice, and enable them to rely on state of register when they search the title.** M acquired an interest in land AND contractual rights. D has interfered w/ property rights and broken Ks. Judgment creditor cannot take A’s land to pay B’s debt – therefore A cannot take from C what A has transferred to B and B has transferred to C. Dissent: unregistered agreement between M and P is ineffective against D – no privity of K between P and D.

C: Appeal dismissed – in favour of P.

R: **You do not have to pay under AF if you have got into the situation as a result of willful neglect. In situation where A gives rights in A’s land to B, s 20 ‘except as against the person making it’ prevents A from preventing B from accessing rights even where B assigns their rights to C.**

#### Carlson v Duncan (1931) (7.14)

F: H granted timber to K and heirs, w/ right to enter at any time and take it away. Grant registered against H’s title, remained on title when H transferred FS to A and when A transferred it to A. K died and his heirs quit-claimed their interest to R. Quitclaim not registered. R entered onto land and commenced cutting timber, A sued R.

A: Unregistered transfer from heirs of K to R conveyed no estate/interest in land by reason of s 20 LTA – distinguish from *L&C Lumber* because here H has transferred FS to A.

C: Appeal allowed.

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

## 3. “Prohibited Transactions”

#### International Paper Industries v Top Line Industries Inc (1996) (7.15)

F: Lease of unsubdivided portion of land. P was approaching end of term of lease – P owned building. P negotiated w/ D, agreed that D would buy building, building would be moved to D’s property, and P would then lease a portion of property. Lease of 51 months w/ right of renewal. K contained plan that indicated what portion of land P would lease – functional not legal subdivision. Lease would not have been able to be registered because no good safeholding and marketable title. P wanted to renew lease, D denied that it had agreed to a perpetually renewable lease. D then said lease was unenforceable/void because of non-compliance w/ s 73 LTA.

L: S 73 LTA prohibits subdivision of land except on compliance w/ Part 7 of LTA.

A: Lease was ‘illegal’ subdivision. S 73 says that instruments executed in contravention do not confer rights of reg, but does not say that they are void. No condition precedent that lease must comply w/ s 73.

C: S 73 precludes P from enforcing personal or proprietary rights in respect of leased premises pursuant to lease. Allow D’s appeal.

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

#### LTA s 73.1 – Lease of part of a parcel of land enforceable

A lease or an agreement for lease of a party of a parcel of land is not unenforceable between the parties by reason only that (a) the lease does not comply w/ this Part (requiring subdivision) or (b) an application for the registration of the lease may be refused/rejected.

-> BCCA interpreted s 73.1 as having prospective effect only – preserved *Top Line’*s invalidating of pre-2007 leases of portions of bare land as illegal and unenforceable, unless preceded by subdivision.

# Chapter 8: Applications to Register

Courts treat application for registration as equivalent to registration, provided applicant has met all requirements needed to qualify for registration.

#### Peck v Sun Life Assurance Co (1904) (8.5)

F: HE conveyed lands to EE. By K which was registered, P contracted to purchase one parcel from EE. EE executed deed which conveyed to him the parcel sold once P had paid all the $. When P tried to register title, P discovered that after registering purchase K, D had commenced action against EE claiming nullification of transfer from HE to EE – action registered as lis pendens. SCC granted relief to D and EE directed to satisfy D’s claim. P claims to have reg of lis pendens vacated.

I: Did P acquire right to have lis pendens reg vacated?

A: Lis pendens properly registered. **Doctrine of lis pendens is application of maxim ‘interest rei publicae sit finis litium’: a litigant party is not permitted by alienation pending the suit to defeat the rights, or delay the proceedings of his adversary.** P not bound by result of EE’s litigation w/ D BUT any interest acquired by him after action and not merely in consummation of his rights under K he took is subject to event of action. Purchase $ not paid and no interest passed by force of K – BUT by a fresh alienation (deed) made pending the D’s action, the legal estate transferred to P. Assuming EE’s title to be vitiated by fraud of herself and her husband, P’s rights under K are not affected by that fraud. LTA s 216 does not impute knowledge of lis pendens to P.

C: In favour of P.

R: **Doctrine of lis pendens does not apply to persons who have acquired interests before commencement of litigation, so as to affect such interests. It does apply to such persons in respect of interests acquired after commencement of litigation. Protection afforded a bona fide purchaser for value is available in favour of a purchaser who (having bought w/o notice) becomes aware of an adverse claim before the whole of the purchase money has been paid, only to the extent of payments made prior to his knowledge of such adverse claim.**

#### Rudland v Romilly (1958) (8.10)

F: D owned parcel of land. (1) D executed deed conveying land to AL. (2) Application made to register that deed. (3) AL executed deed to P covering same land. AL signed contract saying deed transferring land to P would be registered if AL did not pay P (basically a mortgage). (4) CIT, free of charges, issued to AL. Application lodged to register deed from AL to P. (5) D commenced action against AL to set aside deed on ground of fraud – argued it was a voidable transaction. (6) D filed lis pendens – registrar refused to issue CIT to P. Now P files order to have lis pendens removed.

A: Under LTA, priority goes to whoever is first – lis pendens here came when CIT still reflected AL as indefeasible owner. When P applied to register, title was in AL’s name w/ no encumbrances – P had no notice of claim by D – bona fide purchaser for value. P had clear right to have interest registered and had applied for registration when lis pendens was filed.

C: In favour of P – vacation of lis pendens.

R: **Lis pendens – notice which is only given after whole transaction of purchase has been completed cannot affect title of an honest buyer.** **Delays due to admin of LTO do not affect one’s right to title.**

#### Re Saville Row Properties Ltd (1969) (8.12)

**Result in *Rudland* equates a clear right to registration to registration itself where:**

1. Person claiming such a right is a bona fide purchaser for valuable consideration

2. Right has been acquired and registration thereof applied for prior to filing of certificate of lis pendens

3. Such a purchaser is not made a party to the lis, if he were the matter would then be before the Court

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

#### Paramount Life Insurance Co v Hill (1986) (8.13)

F: D was RO in FS of house. P’s husband forged transfer of FS to L, assisted L in negotiating mortgage w/ P. Transfer and mortgage registered. On fraud being discovered, D re-registered as FS owner, but subject to mortgage.

A: **Act’s protection extends from registration, regardless of delays encountered in mechanical reproduction of docs. If registration of an encumbrancee is effected following upon reg of docs creating a valid certificate, encumbrancee will be protected by Act, even if certificate representing valid title is not issued until some time later.**

C: Mortgage was valid encumbrance on L’s title.

#### Canada Permanent Mortgage Corporation v British Columbia (Registrar of Titles) (1966) (8.14)

F: VO, FS RO, transferred interest to Vi by deed. Vi granted mortgage to P, part of $ was advanced by P to Vi. Vi applied to register transfer. P applied to register mortgage. VO filed lis pendens in respect of proceedings against Vi for recession of transfer. Registrar refused to register mortgage. P appealed.   
A: Cannot compel registration of Vi’s deed in face of lis pendens. P loaned money in good faith and for value. Once mortgage/value was given a number, reg should have been completed and petitioner really took no risk in making an advance. Nothing to indicate petitioner was aware of adverse claim until action was started, by which time mortgage in question had already been given a number.

C: No order for Vi’s transfer to be registered. Direct registrar to register the P’s mortgage.

#### LTA s 155 – Application for registration of charge

(1) If title to an EIFS has been registered/registration has been applied for, a person not entitled to be registered in FS, claiming to be RO of a charge must apply for registration of the charge, and if registration of the FS has been applied for by an application that is pending, the application for registration of a charge must await the result of the application for registration of the FS.

#### LTA s 198 – Registration of person creating charge (8.17)

An instrument purporting to create a charge on land executed by a person who is entitled to be RO of the fee simple must not be registered unless that person has first been registered as the owner of the FS.

#### Breskavar v Wall (1971) (8.17)

F: As were RO of EIFS. Signed memorandum of transfer expressed to be absolute transfer of all estate and gave to Pe (in exchange for loan of money from Pe). No name of transferee inserted. Later name of D inserted by Pe – fraudulent act by Pe and D which results in parcel of land being registered in name of D and not As. Voidable transfer – no forgery, but fraud (s 23(2)(i)). Transfer registered. TJ found that transfer from As to Pe only intended to be a loan for 12 months. D then put land up for sale – title had not yet moved from As to D. Then Alban finds that title has moved to D. K of sale between D and Alban. D executed transfer to Alban and Alban applies to register. THEN caveat lodged by As and entered. In between loding and entering caveat, transfer registered.

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

A: As must show they paid loan back to Pe to get title back – voidable transfer, not void. Reg of D vested title in D and divested As even though transfer was void and inoperative and intended only as loan. As have CL EIFS – nemo dat – but because of LTA As only have equitable right. As rights by reason of fraud are primarily enforceable against D as party to transaction w/ them and as holder of registered title acquired by means of transfer. As interest not entitled to priority over Alban’s interest. As conduct placed D in position to make the representations upon which Alban acted: gave transfer in a form which enabled him to make it appear to be an absolute transfer; allowed D to have possession of CIT; failed to placed registration of notice of interest at relevant time.

C: Alban gets to keep interest in land. As can apply to AF and try to get $ from D.

R: **Despite requirements for registration in statute, a purchaser for value has been regarded as having, before the registration of a transfer of the land to him, an equitable estate in the land which will be recognized and will in appropriate cases be given priority over a prior equitable interest. If there are 2 competing equitable interests, the party who acted blamelessly and in good faith will be given priority. If a party by their conduct enables a representation to be made upon the faith of which another innocent party acquired an equitable interest, that first party’s equity will be postponed.**

**Notes:**

- S 153(1): it is the time of reg which becomes basis for priority

- S 28: refers to priority based on date and time of reg

- S 168: there is a possibility created under statute for ‘queue jumping’ because LP and caveats which can get in gap and which despite fact by time alone, they are farther down queue, they may get to jump ahead – however, case law shoes this does not always happen

# Chapter 9: The Fee Simple

# A. Creation

## 1. Common Law

At CL, in order to create FS by inter vivos transfer it was necessary to use words ‘to transferee and his/her heirs’. **‘And his heirs’** are **words of limitation**: indicate quantum of interest in land which is transferred – do not confer any interest on B’s heirs. ‘To B’ are **words of purchase**: indicate the person to whom interest is transferred.

In case of a will, if words of limitation were used, courts gave effect to them – more flexible. In absence of words of limitation, courts would sometimes construe doc as conferring FS on a beneficiary if that was clearly testator’s intention. Law w/ respect to creation of equitable interests was in general same as that w/ respect to wills – look at intention.

## 2. Statute

Leg has made CL rules more relaxed. **You can use any words provided your intention is clear.**

Now that leg has relaxed CL rules, confusion as to meaning of ‘heirs’ because it can be words of limitation OR words of purchase.

#### Property Law Act s 19 – Words of transfer

(1) Sufficient to use words ‘in fee simple’ to transfer FS

(2) Transfer of land w/o words limiting the interest transferred **passes the FS or the greatest estate/interest in the land that the transferor has power to transfer**, unless otherwise expressed.

#### LTA s 186 – Implied covenants

(4) Transfer of a freehold estate for valuable consideration and in the approved form… operates to transfer the freehold estate of the transferor to the transferee whether or not it contains express words of transfer

(5) If transfer does not contain express words of limitation – FS

(6) If transfer contains express words of limitation – give effect

(7) If transfer contains express reservation/condition – give effect

(8) Cannot transfer estate greater than the estate in respect of which the transferor is the RO.

#### WESA s 41 – Property that can be gifted by will

A gift in a will takes effect according to its terms and, subject to terms, **gives to the recipient every legal/equitable interest in the property that the will-maker had the legal capacity to give.**

#### Tottrup v Ottewell Estate (1969) (9.3)

F: Will of Frank. Granted to brother Fred ‘balance and residue of all my estate, both real and personal… to hold unto him, his heirs, executors and administrators absolutely and forever’. Fred had will that gave same interests to Frank. Fred died before Frank. P is only daughter and sole next of kin of Fred – claims whole of residue – argues that ‘heirs’ is words of purchase. D claims ‘heirs’ is words of limitation – residue should be divided amongst next of kin of Frank.

I: Who are beneficiaries entitled to take residue of estate?

A: **‘His heirs’ are traditionally words of limitation.** Duty of a Court of construction: first construe will; if meaning is clear, surrounding circumstances cannot be looked at to throw a doubt upon that meaning, or to give will a different meaning. Here meaning of will is clear.

Dissent (would rule w/ P): Leg has made ‘his heirs’ redundant as words of limitation. Every word in a will must be given its ordinary meaning unfettered by any general rule assigning to a word a particular meaning in other circumstances. Here ‘heirs’ is meaningless – words of substitution.

C: Appeal dismissed – divide amongst next of kin of Frank.

R: **Where words of will are clear, surrounding circumstances will not be used to change meaning of will. Terms of art can still apply – legislation was not getting rid of the old terms, it was just expanding the scope of possible language. ‘His heirs’ will be presumed to be words of limitation unless circumstances suggest otherwise.**

#### WESA s 42 – Meaning of particular words in a will

(1) Subject to contrary intention appearing in a will.

(2) A gift of property in a will to persons described as ‘heir’ or ‘next of kin’ of the will-making or of another person takes effect as if it had been made to the persons among whom and in the shares in which the estate of the will-maker or other person would have been divisible if the will-maker or other person had died w/o a will.

## 3. Problems of Interpretation – Repugnancy

**Two possible outcomes:** (1) Gift to first person named prevails; gift over fails as repugnant; (2) Gift over prevails; person first named takes life estate only.

#### Re Walker (1925) (9.9)

F: JW died – widow EW was sole executrix. Will: ‘I give and devise unto my said wife all my real and personal property saving and excepting… and also should any portion of my estate still remain in hands of my said wife at time of her decease undisposed of by her such remainder shall be divided as follows…’ EW died. Those claiming under JW’s will seek to have some of EW’s estate marked as ‘undisposed of’ portion of JW’s estate. Those claiming under EW’s will contend that EW took absolutely under JW’s will.

A: Court must ascertain which part of testamentary intention predominates when there is repugnancy. Cases fall into 2 classes: (1) gift to person first named prevails and gift over fails as repugnant; (2) first named takes a life-estate only, and so gift over prevails. 3rd class of cases: all that is given to first taker is a life-estate, but life-tenant is given a power of sale which may be exercised at any time during currency of his estate. Words ‘undisposed of’ do not refer to a testamentary disposition by the widow but refer to a disposal by her during her lifetime. Gift to her must prevail and attempted gift over must be declared to be repugnant and void.

C: Allow appeal – EW’s will prevails.

R: **Any executor devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. Any executor devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void.**

#### Re Shamas (1967) (9.12)

F: Appeal by FS, widow and administratrix of will of MS. HS and MS ran store. MS’s will said: ‘All will belong to my wife until the last one comes to the age of 21 yo. 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.’ HS sold store but retained property. Widow has not remarried and all children are now over 21. HS says that all estate and interest of MS devolved at death upon widow of testator absolutely, or HS has unlimited right to encroach until her death.

A: Will expresses intention of MS that estate vest in children in equal shares subject to life interest to HS – dominant interest is life estate. Right to HS to postpone realization of assets of estate, to carry on business as she saw fit and to encroach, in her discretion, upon capital for support/maintenance of her and children, until youngest reached 21 yo. Intention that HS should have right to encroach on capital if necessary, for her maintenance/support, after youngest reaches 21 yo.

C: TJ affirmed w/ variation.

R: **Look at surrounding circumstances to construe will – find intention of testator. If intention is shown, mode of expression etc. are unimportant. Look from perspective of testator.**

***Re Fraser*: recipient of a life estate can enjoy revenue derived from corpus and no more unless T expressly/impliedly indicates an intention that recipient have power to encroach.**

#### Cielein v Tressider (1987) (9.17)

F: VE died. VE and Mrs R had lived together. A, Mrs R’s son, had lived w/ them. VE was survived by 5 children from previous marriage. VE made a will using a form which he wrote on. In his own writing, VE left Mrs R a property and all other assets. Printed on form read ‘All the rest and residue of my estate I devise and bequeath to’ and VE wrote in ‘Mrs R’. VE then added “upon the sale or disposal of the real estate as described above the proceeds shall be divided equally between her son… and my children”.

I: Should 5 children collect on property or should it just go to A, Mrs R’s son?

A: Testator intended to benefit Mrs. R – intended her to have absolute interest. Clause drawn by testator in which children are mentioned constitutes a restraint on otherwise absolute gift of property to Mrs R – such a restraint cannot be supported in law.

C: Absolute interest to Mrs. R.

R: **Where property is given absolutely a condition cannot be annexed to the gift inconsistent w/ its absolute character.**

# B. Words Formerly Creating a Fee Tail

## 1. The Common Law

### (a) Technical Words of Limitation

Fee tail created when an inter vivos transfer used words of limitation ‘**heirs of his/her body’; ‘his issue’; ‘his offspring’; ‘his seed’**. Failure to use technical words resulted in creation of only life estate. *PLA* s 10 abolishes fee tails.

### (b) Informal Words of Limitation

In case of wills and equitable interests, courts did not insist on use of technical words of limitation. Tried to give effect to intention of testator or person creating trust.

- **For inter vivos**: words are generally understood as words of purchase

- **In a will**: could be words of purchase or words of limitation

* If words of limitation, then they create a fee tail which will be converted to FS (*PLA* s 10)
* If unsure – use the rule in *Wild’s Case*

#### Wild’s Case

F: Dispositions that follow form ‘to A and his issue’ or ‘to A and her children’ or ‘to A and the male heirs of his body’.

A: ‘A’ is word of purchase. ‘His issue’ and ‘his children’ would be words of purchase in inter vivos transfer. BUT CL is more flexible in wills. Obiter: Legally rebuttable presumption: **Court will look to see whether A had children at the time the will was made – if at that date A had children, then the words ‘her issue’ or ‘her children’ would be construed as words of purchase. If at date the will was made A had no children, then words would be construed as words of limitation [creating a fee tail].**

Use w/ *Tottrup*: Presumption in *Tottrup* can be rebutted if there are children.

# Chapter 10: The Life Estate

# A. Creation

## 1. By Act of the Parties

If a life estate is to be created it **should be done expressly.** If nature of estate being created is not expressly stated then, due to statutes, presumption is that transferor/testator is disposing of greatest estate he owns (s 19(2) of *PLA* and s 24 of *WESA*).

## 2. By Statute

### (a) Introduction

At CL a widow was entitled to a life estate in 1/3 of her deceased husband’s realty (dower). Widower was entitled to life estate in all of wife’s realty (curtesy). Both abolished in BC in 1925.

### (b) Wills, Estates and Succession Act (WESA)

Former *Estate Administration Act* s 96 gave to surviving spouse, in addition to any other rights on intestacy, all of household furnishings and a life estate in spousal home. Problems: spouse’s life estate was not marketable and impossible to value; surviving spouse not always able to afford to maintain home. Under *WESA* s 21, surviving spouse continues to receive household furnishings. Abolished surviving spouse’s beneficial life estate in spousal house – provides an option whereby surviving spouse may opt to purchase spousal home from deceased’s estate – ss 26-35.

### (c) Family Law Act

To obtain a court order resolving issue of which spouse should move out of family home, a spouse may apply to BCSC for an order for temporary, exclusive right of occupying spousal home, which would compel other spouse to leave – *Family Law Act* s 90 - Merely a temporary measure, pending division of family assets.

### (d) Land (Spouse Protection) Act

Married or unmarried spouses can make a filing on register of family home that is in name of other spouse, to prevent RO from selling it w/o notice to spouse. On death of other spouse, filing spouse acquires a life estate.

#### Land (Spouse Protection) Act s 4 – Application of the WESA

If an entry has been made on title, s 161(2) of WESA applies to devolution of homestead. A personal rep holds homestead in trust for an estate for the life of surviving spouse.

# B. Rights of a Life Tenant

## 1. Occupation, Use and Profits

Holder of legal life estate is entitled to occupy and use property and to retain any profits arising from its exploitation. Equitable life tenant can benefit from property but not necessarily occupy it.

## 2. Transfer Inter Vivos

Life estate may be transferred inter vivos.

## 3. Devolution on Death

e.g. to A for the life of B - If A dies before B and A is intestate, the estate for the life of B devolves on intestacy, like other real property, until B dies. A may dispose of the estate for the life of B by will to a beneficiary, who will hold the life estate until B dies.

# C. Obligations of a Life Tenant to those Entitled in Reversion or Remainder

Those entitled in reversion or remainder are entitled to have the land pass into their possession, on the termination of the life estate, in substantially the same form as it was when received by the life tenant.

## 1. Waste

### (a) Permissive Waste

Passive conduct which permits decay. Life tenant is not responsible for this, unless expressly made so by terms of instrument creating the interest.

### (b) Voluntary Waste

Waste that results from activities of life tenant – life tenant is responsible for this. Remedy can be damages or injunction. Nature of voluntary waste may be stated in one of two ways: (1) Voluntary waste is any act of life tenant which causes permanent damage to land; (2) Voluntary waste is any act of life tenant which changes nature of land, whether for better or for worse. **Doctrine of ameliorating waste** – even though a change for better is technically waste, if it improves land it will not render life tenant liable in damages, and usually an injunction will not be awarded. Four categories of voluntary waste: (1) Timber – life tenant may not cut timber, unless the estate is a timber estate – at CL a life tenant could cut timber for repairs; (2) Mines and minerals; (3) Demolishing or altering buildings; (4) Changing the use to which the land is put.

### (c) Equitable Waste

Creator of a life estate may expressly permit life tenant to commit voluntary waste – life tenant is said to be **unimpeachable for waste** – “grant of life estate w/o impeachment for waste”. BUT court of Equity might still restrain life tenant from making an unconscionable use of apparent legal right to commit waste at will.

#### Vane v Lord Barnard (1716) (10.7)

D had life estate of castle, w/o impeachment of waste, w/ remainder to his son P for life. D got mad at P and stripped castle of a bunch of materials. Court granted injunction and ordered that castle be restored.

#### Law and Equity Act s 11 – Equitable waste

An estate for life w/o impeachment of waste does not confer a legal right to commit equitable waste, unless an intention to confer that right expressly appears by the instrument creating the estate.

## 2. Liability for Taxes, Insurance, etc.

#### Mayo v Leitovksi (1928) (10.8)

F: P is owner of EIFS in remainder of lands expectant on death of D, who holds life estate. P as remainderman challenges right of life tenant to acquire tax title to lands so as to defeat P’s remainder, or otherwise than as in trust for P as to remainder. WL owned land. Made a conveyance of land to father IL and mother (D) DL, for term of their lives and lives of their survivors. WL conveyed land to P, subject to life estate of D. Lands were sold for arrears of taxes by municipality to Mrs F, daughter of D. Mrs F assigned her tax-sale certificate and her interest as tax-sale purchaser to D, and D made application to registrar for title to be issued in her own name. Notice mailed to P, requiring him to redeem the land from tax sale and reciting that in default of such redemption CIT to land would issue to applicant - D.

A: Annual value of property is at least equivalent to taxes charged against it. D has right to acquire title. Registrar is bound to give effect to tenor of tax-sale certificate and assignments w/o regard to any trusts as between tax-sale purchaser and some other person. Neither a life tenant nor one claiming under him, who allows property to be sold for taxes can acquire a title adverse to the remainderman or reversioner by purchasing at sale himself, or through an intermediary, or by obtaining a conveyance of title acquired by another purchaser at such sale. D is under an obligation to prevent forfeiture of reversion as well as her own life interest by paying taxes charged against lands. Equity will presume that D in acquiring tax title to property in which she enjoyed a life estate, did so by way of redeeming lands from the tax sale, which she ought to have done, and will impute to her an intention to fulfill her obligation in that regard.

C: P is entitled to a declaration as claimed that D was under obligation to pay taxes for which lands were sold, and that as to any interest/estate she now holds under tax-sale certificate or may acquire by certificate of title pursuant thereto, remainder in FS expectant on her death is held in trust for the P.

R: **As a tenant for life has certain rights, so also, he is under certain obligations to the reversioner or remainderman w/ reference to the estate – he must pay all taxes imposed on the land**.

# B. Statutory Powers

Practical and usual solution: create an equitable and not a legal life estate. Today life estates are much more likely to be equitable life estates in personalty than either equitable or legal life estates in realty.

# Chapter 11: Co-ownership – Concurrent Estates

# A. Types of Co-ownership

**In severalty** = ownership by a single owner. **Unity of possession** = co-owners = concurrent estates.

## 1. Coparcenary

At CL, on intestacy the heir of deceased succeeded to his real property. In absence of male heir, property descended to female relatives, and if there were more than one in same degree of kinship, they succeeded jointly as coparceners. Impliedly abolished in BC by *Estate Administration Act*.

## 2. Tenancy by the Entireties

At CL, when land was transferred to a husband and wife in circumstances where, if they had not been married, they would have taken as joint tenants, they took as ‘tenants by the entireties’. Title regarded as a single and indivisible title, survivor taking title to property absolutely. Abolished by *Married Woman’s Property Act* and *Property Law Act* s 12 – “A husband and wife must be treated as 2 persons for purposes of acquisition of land.”

## 3. Tenancy in Common

When 2+ people, by virtue of interests they own, are simultaneously entitled to possession of property. Apart from unity of possession, law treats tenants in common in same way as it would single owners.

## 4. Joint Tenancy

**Right of survivorship** is most significant characteristic: A and B may convert joint tenancy into tenancy in common during their lifetimes BUT if one dies before it is converted, then the survivor becomes absolute FS owner.

### The Three Unities

Each is essential to existence of joint tenancy (in addition to unity of possession). If any one is missing, then co-ownership is tenancy in common and not joint tenancy.

**(i) Unity of Title** – co-owners must derive their titles from same instrument.

**(ii) Unity of Interest –** interests of joint tenants in property must be same

**(iii) Unity of Time** – interests of co-owners must all vest simultaneously

* (iii) does not apply in a transfer to uses, nor in a gift by will – if an interest arises in either of these 2 ways, and if the other unities exist, a joint tenancy will be created

# B. Creation of Concurrent Interests

## 1. Common Law

If unity of possession plus all 3 unities are present, **CL presumption is that a joint tenancy** has been created (*Re Bancroft*). **Grantor can indicate an intention to create a tenancy in common** even if all of unities exist – may be done expressly or by use of ‘words of severance’ (impliedly), i.e. language indicating creation of specific shares in undivided title e.g. ‘to A and B in FS equally; 1/3 to A and 2/3 to B’.

#### Re Bancroft, Eastern Trust Co v Calder (1936) (11.4)

F: T’s will stated that residue of estate should be divided into 2 equal shares – one should be paid to widow and other should be divided for term of widow’s life into 4 equal shares to P, A, F and children of M (T’s daughter who pre-deceased T) - P1 and J. No problems until P1, one of M’s children, died. P1 has 4 children.

I: Does P’s share go to P’s sister J or to estate or to children of P? Did M’s children take as joint tenants or tenants in common?

L: **Anything which in slightest degree indicates an intention to divide property must be held to abrogate idea of a joint tenancy and to create a tenancy in common.**

A: No words such as ‘equal’ qualified bequest to children of M. Nothing in will indicates intention to divide income between children of M and which can be held to abrogate idea of joint tenancy and create tenancy in common.

C: Share paid to P1 should now go to surviving sister J – M’s children took as joint tenants.

* **No longer applies in BC because of PLA s 11**

## 2. Equity

**Equity preferred tenancy in common** – in absence of express declaration as to beneficial interests, equity may treat persons who are joint tenants at law as tenants in common of beneficial interest, so that although at law survivor is entitled to whole estate, he will hold in part as trustee for reps of deceased (*Robb*).

1. If 2+ persons bought land and provided $ in unequal shares, then treated as tenants in common in equity. If $ was provided in equal shares, then treated as joint tenants at both law and equity.
2. In commercial transactions, prima facie partners would hold property as tenants in common in equity.
3. When 2+ persons lent money on security of mortgage of land and borrower transferred land by way of mortgage to lenders, prima facie at law lenders held as joint tenants. BUT if one of mortgagees died, Equity would compel surviving joint tenant to hold legal title arising as result of operation of right of survivorship on trust for deceased’s estate and survivor.

#### Robb v Robb (1993) (11.8)

F: P applies to Court for declaration that she is sole owner of properties. Ds are children of P’s deceased husband by a former marriage. Suite 501 is in a co-operative. Co-ops are usually structured: (a) building is owned by company whose shares are owned by all of ‘owners’ of suites; (b) company grants long term leases to each of its shareholders for suites that they have ‘purchased’; (c) ‘owner’ pays purchase price for shares and lease at time they are acquired. $ for acquisition of apartment came entirely from P, but assignment of lease was in favour of P and husband and shares were transferred into names of P and husband. 1 year later, husband transferred a property to P in consideration for P paying for the apartment and naming husband as co-owner. Husband’s will left all assets to P. If shares and leasehold interests were owned by Robbs as joint tenants, they go to P by right of survivorship. If they were owned as tenant in common, they pass to husband’s estate and are subject to a potential order varying husband’s will.

I: Is interest of P in shares in Ocean Towers Limited and leasehold interest in Suite 501 as a co-owner w/ her husband an interest as a joint tenant or an interest as a tenant in common?

L: **S 11 of *PLA* prefers tenants in common, but does not apply to an assignment of a lease.**

A: P contributed all purchase $, but then husband effectively made subsequent contribution when he transferred property to P. Cannot be inferred that at time of transfer of 2nd property P transferred ½ of beneficial interest in shares and leasehold interest to husband as a tenant in common. They did not hold shares and leasehold interest in unequal proportions.

C: Determination of joint tenancy means that P had a right of survivorship that became operative when husband died.

## 3. Statute

#### PLA s 11 – Tenancy in common

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

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

#### PLA s 25 – Partnership property treated as personalty

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

## 4. Transfer to Self and Co-ownership

#### Property Law Act s 18 – Rules for transfer and ownership to oneself

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

(2) Trustee or personal rep may transfer land to themselves in their personal capacity.

(3) **Transfer by joint tenant to himself of his interest in land is deemed always to have same effect of severing joint tenancy as transfer to stranger.**

(4) RO may transfer to themselves jointly w/ another.

(5) Owner of a FS or a registered lease (or sublease) may grant themselves an easement or restrictive covenant for benefit of other land that he owns in FS/leases/subleases, but must be consistent w/ interests held by him as grantor and grantee at time of grant.

(6) Corp that owns land in FS and is member of class of persons under s 218 of *LTA* may grant/reserve right of way over land to itself.

(7) Common ownership and possession of dominant and servient tenements does not extinguish an easement.

(8) Common ownership and possession of burdened and benefited land does not extinguish a restrictive covenant.

# C. Registration of Title

#### LTA s 173 – Several persons interested in registration

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

#### LTA s 177 – Registration of joint tenants

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

# D. Relations Between Co-owners

Same whether it is joint tenancy or tenancy in common.

## 1. Share of Profits

- Cotenants have no right to share in one another’s labour profits so long as profits do not arise through exclusion of one cotenant from using the property (*Spelman*)

#### Spelman v Spelman (1944) (11.15)

F: H and W owned 2 properties. Legal title to Victoria property was held by H in trust for himself (2/5) and his wife (3/5 interest) - required no labour and profits were simply rent. Other property was in Vancouver and it was held in joint tenancy. W had operated Van property as a rooming house and then left H “w/o cause”. H began operating Van property as a rooming house which included labour. W returned but did not assist him. H did not pay W profits from either property. W sued H and won at trial.

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

L: Interpretation of ‘just share or proportion’ in PLA s 13.1.

C: H does not have to share Van profits, does have to share Vic profits.

#### PLA s 13.1 – Actions of account

(1) Actions in nature of CL 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 executor or administrator of joint tenant or tenant in common.

## 2. Share of Expenses

Remaining co-owner has no right to request that other co-owner contribute to expenses, unless remaining co-owner is willing to pay rent for his possession (*Spelman*).

#### PLA s 13 – Remedy of co-owner

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

#### PLA s 14 – Court may order lien and sale

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

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

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

(c) allow the applicant to purchase the interest in the land of the defaulting owner at the sale, or some other order

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

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

#### Mastron v Cotton (1926) (11.20)

One joint tenant, unless ousted by his co-tenant, may not sue another for use and occupation. BUT when joint tenancy is terminated by a Court order for partition/sale, Court may in such proceedings make all just allowances and should give such directions as will do complete equity between parties.

# E. Termination of Co-ownership

## 1. Severance of Joint Tenancy

**Severance** = conversion of joint tenancy into tenancy in common.

**Joint-tenancy may be severed in 3 ways**: (1) An act of any one of persons interested operating upon his own share may create a severance as to that share; (2) A joint-tenancy may be severed by mutual agreement; (3) There may be severance by any course of dealing sufficient to intimate that interests of all were mutually treated as constituting a tenancy in common (*Sorenson*)

### (a) Destruction of one of the unities

- Joint tenancies are severed by execution and delivery of deed of transfer – does not require registration of title to sever (*Stonehouse*)

- Effect of a joint tenant alienating share to stranger is to convert joint tenancy into tenancy in common (*Stonehouse*)

- The right of survivorship inherent in a joint tenancy operates automatically, taking priority over any will (*Sorenson*)

- Creation of trust may sever joint tenancy (*Sorenson*)

- Declaration of one party of intention to sever joint tenancy w/o any other act and w/o acceptance by other JT does not sever tenancy (*Sorenson*)

#### Stonehouse v British Columbia (AG) (1962) (11.29)

F: P bringing claim against Registrar for an omission/mistake/etc. under s 223 of *Land Registry Act*. P and wife were ROs as joint tenants. Wife, w/o telling P, conveyed all her interest in and to property to her daughter (from previous marriage). P was unaware of existence of this deed which remained unregistered until day after wife dies. P argues that because of s 35 of *Land Registry Act*, unregistered deed did not affect P’s interest as joint tenant – registrar should have been alerted to possibility of grantor having died since deed’s execution and whole title having thus become vested in P as surviving joint tenant.

A: Joint tenancy was severed by delivery of deed to daughter – P lost right to claim title by survivorship.

C: Registrar was under no obligation to inquire as to whether P was dead/alive at time of application for reg of daughter’s deed. Appeal dismissed.

#### Sorenson Estate v Sorenson (1977)

F: H and W held 3 lots in joint tenancy. H and W then divorced. 3 separate titles for lots. Several actions which may have severed joint tenancy:

(i) Settlement agreement between H and W – divided title to matrimonial home into 2 titles, provided for lease of H’s interest in lot on which matrimonial home was situated and charge on H’s interest in said lot to W for her life

(ii) Trust deed which declared W was holding lots in trust for her son and declared that she had executed transfers of lots to her son which were not to be registered until her death. Gave transfer docs to W’s solicitor – to be registered upon her death. Said that W intended to sever joint tenancy w/ transfers and trust.

(iii) Execution of W’s will. Appointed daughters as trustees of her will – instructed to set aside residue of estate and pay income to son – any remainder in fund upon son’s death to be divided between daughters.

(iv) Commencement of action for partition of lands by W

I: Was there severance of joint tenancy titles of 3 lots? Did W’s death cause H’s right of survivorship to crystallize at moment of death so as to render transfers null and void and unregistrable?

A: (i) – Settlement – did not sever. **Subsequent conduct** of W indicates she did not believe she had severed title. Lease **did not interfere w/ right of survivorship**. Charge did not transfer an interest. (ii) – Trust – DID sever title. You can create a trust by declaring that you hold your legal title as a trustee for a named beneficiary. (iii) – Will – did not sever. (iv) – Action – did not sever. **Declaration by one party of an intention to sever alone w/o any other act and w/o acceptance by other joint tenants does not sever tenancy.**

C: Declaration of trust severed titles – appeal allowed.

## 2. Partition and Sale

**Partition**: physical division of property between co-owners so that each becomes an owner in severalty of a particular part. At CL, co-owners could, by agreement and suitable transfers, physically subdivide property so that each became an individual owner.

#### Partition of Property Act s 2 – Parties may be compelled to partition or sell land

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

(2) (1) applies whether estate is legal or equitable.

#### Partition of Property Act s 3 – Pleading

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

In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if party or parties interested, individually or collectively**, to extent of ½ or upwards** in property involved request court to direct a sale of property and a distribution of proceeds instead of a division of property**, court must, unless it sees good reason to contrary**, order a sale of property and may give directions.

#### Partition of Property Act s 7 – Sale in place of partition

In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if it appears to court that because of nature of property involved, or of number of parties interested or presumptively interested in it, or of absence or disability of some of parties, or of any circumstance, a sale of property and a distribution of proceeds would be more beneficial for interested parties than a division of property, court may

(a) on request of any of interested parties, despite dissent/disability of any other interested party, order a sale of property and (b) give directions

#### Partition of Property Act s 8 – Purchase of share of person applying for sale

(1) In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, if any party interested in property involved request courts to order sale of property and distribution of proceeds instead of division of property, court may order sale of property and give directions.

(2) Court may not do this if other parties interested in property, or some of them, undertake to purchase share of party requesting sale.

(3) If undertaking is given, court may order a valuation of share of party requesting sale in manner court thinks fit, and may give directions.

* In an application under PPA, court has discretion to refuse to make an order, or to make an order for sale or partition or both as it sees fit

#### Harmeling v Harmeling (1978)

F: P wants to force sale of property. Parties are married, old age pensioners, both in poor health. P left home to live w/ another man, then started proceedings for partition and sale. Home was paid for in large part from sale of fish farm, which P did most of the work on. If this order stands, D will be ousted from home that was built largely from his money to provide for his retirement.

I: What effect should be given to word ‘may’ in s 3 of PPA, which provides that joint tenant ‘may be compelled to make/suffer partition/sale’?

L: **Prima facie right** of joint tenant to partition/sale of lands. Court should say no to partition order only in those circumstances **where justice requires a refusal**. Dissent: Court is justified in refusing order if Court feel that it would **cause serious hardship to other party**. Court does not have to refuse order merely because applicant does not have ‘clean hands’.

C: Circumstances are such that justice requires refusal of order of sale – appeal allowed.

### Notes:

- A successful application under PPA does not automatically result in an equal share for each tenants – courts evaluate nature of contributions of each tenant to value of property

- In valuing share of a registered co-owner of property who has made significant non-monetary contributions to property, it cannot be case that such a co-owner is entitled to a lesser remedy under PPA than that to which she would be entitled if not so registered

- Word ‘may’ in ss 2, 7, and 8 confers a wide judicial discretion to refuse partition or sale if, in circumstances, justice requires it

# Chapter 12: Future Interests

Basic principles concerning land law apply to future interests. A future interest may be defined as one by virtue of which possession will/may be obtained at a future time.

# A. Vested and Contingent Interests

Both are property – can be marketed and sold. If uncertain, law prefers early vesting (*Phipps*).

## 1. Vested Interests

If an **unqualified and immediate transfer** of an interest is made to A, A is vested ‘in interest’ and A is also vested ‘in possession’. If a transfer is made to B for life, remainder to A in FS, A is vested in interest, but not vested in possession – B is vested in interest and possession.

**An interest that is vested in interest:** (a) may be vested absolutely, that is it can never be lost the holder of the estate; (b) it may be vested, subject to divesting [if condition is resolved, then the interest goes to someone else]; (c) it may be vested, w/o there being any prior estate, but w/ a provision which purports to keep the holder of the estate out of possession.

## 2. Contingent Interests

An interest is contingent, i.e. non-vested in interest, when it **is dependent on occurrence of some event which may/may not occur** – subject to a condition precedent which must be satisfied before it can become a vested interest.

**An interest is contingent until:** (1) property is identified; (2) identity of grantee/devisee is established; (3) right to interest does not depend on occurrence of some event; and (4) in case of a class gift, exact share of each member of class is ascertained.

#### Browne v Moody (1936) (12.4)

F: Cl. 5: T directed that income from a fund should be paid to her son during his lifetime – life estate to son (vested interest). On his death it should be divided among her grand-daughter (B) and her daughters (M) – remainder interest. Cl. 7: in the event that B or M die before T or T’s son, children of person who dies should take their mother’s interest. TJ ruled that M and B did not take vested interests.

I: Did M and B take vested interests in fund on death of T? If so, are any of their legacies liable to be divested under or otherwise affected by cl 7?

A: **Mere postponement of distribution to enable an interposed life-rent to be enjoyed has never by itself been held to exclude vesting of capital**. General rule is that capital vests in remaindermen when T dies. All legatees have survived T, so only contingency now affecting them is contingency of predeceasing son of T ‘leaving issue’ – legacies are vested, subject to divestiture. **Whether or not future interest is vested will be measured at time that T dies, not at death of preceding life estate.**

C: Appeal allowed – they are vested interests.

#### Phipps v Ackers (1842) (12.7)

**Law favours early vesting**, so if enjoyment is postponed, law will prefer to say that interest is vested w/ only enjoyment postponed. **When there is a gift to a person when/if a specified event occurs, w/ a gift over if event does not occur**: on application of the rule, interest of donee may be treated as **vested subject to divesting.**

#### Festing v Allen (1843) (12.7)

F: Land devised to trustee to hold for Mrs. F for life, and on her death for her children ‘who shall attain the age of 21 years’, w/ a gift over ‘for want of any such issue’. Children took no interest on Mrs. F’s death as they had not reached 21 years.

C: Contingent interest – no gift to anyone who does not answer whole of requisite description.

D: Example of court not favouring early vesting.

#### Re Squire (1962) (12.8)

F: Will states “I give, devise and bequeath all the rest, residue and remainder… unto my trustees upon the following trusts…” Property is to be held until gson reaches 30 years, at which point lands should be conveyed to gson absolutely. Rental income should be invested until gson is 30, and proceeds given to him when he turns 30. If he decides to go to college after turning 18, then his needs should be paid for out of proceeds. If $ runs out, then property should be sold and proceeds paid to him for school.

I: Did gson become entitled to conveyance of property upon attaining age of 21 years?

A: Property will be held to be vested unless a condition precedent to vesting is expressed w/ reasonable clearness. ‘When’/’upon’ instead of ‘if’ do not establish condition precedent. Where interim interest is given, presumed that T meant immediate gift. Presumption fails when T has expressly declared that legacy is to go over, in case of death of legatee, before a particular period.

C: Can ignore 30-year age contingency – gift vested upon T’s death.

R: **If T gives property to A absolutely, but directs his trustees to retain possession and accumulate income for a certain number of years and then transfer property and accumulations to A, trust for accumulation is worthless, and A is entitled to have property transferred to him at once – if gift is contingent or defeasible, or if any other person may, by possibility, be interested in trust, this principle does not apply**.

#### Re Carlson (1975) (12.11)

F: T had a wife, a son P, a son C and a daughter J. Will: “To hold the residue of my estate in trust for the education etc. of C and to use such portion of income and/or capital for the said education etc. of C; Upon C attaining age of 21 to divide 90% of the **then** residue of estate into 2 equal parts and pay over one share to C and one to J for their use absolutely; to stand possessed of the remaining 10% of the residue of estate to use to cover debts of P. Leave $1 to wife.”

I: Were gifts of residue to C and J vested at date of death of T or only upon C attaining 21 years?

A: Wills should be construed to give effect to intention of T. Sit in T’s armchair to understand language. A gift to a person, **‘at’, ‘if’, ‘as soon as’, ‘when’, or ‘provided’, he attains a certain age, w/o further context to govern meaning, is contingent**, and vests only on attainment of required age. Word ‘upon’ here = contingent – T’s intention was to take care of C.

C: Contingent interest – gifts of residue vest upon C attaining 21 years.

R: **Preference for early vesting does not trump clear intention to create a contingent interest.**

# B. Types of Future Interests

|  |  |
| --- | --- |
| **CONDITIONS** | **LIMITATIONS** |
| **Condition precedent:** you have to meet the condition to get the property – “if”  - ‘Subject to condition precedent’  **Condition subsequent:** you get the property, but you lose it if the condition is met – “but if”  - ‘Defeasible upon a condition subsequent’  (also ‘subject to divestment’ | **Determinable FS**: “to A in FS until A marries B”  - If A marries B, then X/X’s heirs get the possibility of reverter |
| **Words:** If, subject to, on condition that, but if | **Words**: Until, when, as long as |
| **Condition subsequent – Right of entry** | **Limitation – possibility of reverter** |

## 1. Common Law Future Interests

### (a) Reversions

Interest that remains w/ transferor who has not exhausted whole of interest by a transfer.

### (b) Rights of Entry and Possibilities of Reverter

**(i) Rights of Entry** – Arises in transferor when he conveys an apparent absolute interest in FS, but adds a **condition subsequent** which will divest interest of transferee in favour of transferor and his heirs (**or a third party**). May arise after any estate. If condition is broken then A, or his successors in title if A is dead, has the right to enter on land and resume possession OR can bring an action to recover possession. When 6 years have elapsed after the condition has been broken, an action to recover possession is statute barred (*Limitation Act* s 3(6)(f)). E.g. A to B but if B marries, return to A and her heirs.

**(ii) Possibility of Reverter** – Arises when transferor creates a determinable FS. E.g. A transfers to B in FS until she is called to the Bar of Province of BC – B has a determinable FS. When B is called to Bar, B’s interest is determined – A’s interest is possibility of reverter. A has to bring action to recover possession unless B voluntarily gives land up. When 6 years have elapsed after the condition has been broken, an action to recover possession is statute barred (*Limitation Act* s 3(6)(f)). **Cannot go to third party**.

**(iii) Consequences of Distinction**

* Similarities: both subject to Rule against Perpetuities; both can be registered; both subject to 6 year limitation period
* Differences: Qualifications which may be imposed on transferee vary. At CL, both a right of entry and a possibility of reverter could arise only in favour of transferor (BUT see s 8 below).

#### Property Law Act s 8 – Disposition of Interests and Rights

(2) A right of entry affecting land… may be made exercisable by any person and the persons claiming under the person.

### (c) Remainders

**(i) Defined and Illustrated**

Future interest in respect of which possession is postponed until some prior freehold estate expires and which does not operate so as to prematurely determine prior estate.

* **If a condition precedent is added to remainder, it becomes a contingent remainder as distinct from a vested remainder**. E.g. A transfers to B for life and then to C if C marries D.

**(ii) Creation – Restrictive Rules**

LOOK TO REMAINDER RULES FOR INTER VIVOS TRANSFERS/LEGAL INTERESTS.

If not satisfied, purported remainder is void from outset or becomes void subsequently. These are concerned w/ gap in seisin and shifting interest.

1. **Remainder must be supported by a prior estate of freehold created by same instrument as remainder** (e.g. ‘A transfers to B and his heirs if B reaches 21 years of age’ is void)
2. **Remainder must be limited so as to be capable of vesting, if it vests at all, at latest at moment of termination of prior estate of freehold** (e.g. ‘A transfers to B for life, remainder to first child of B to reach 21’ is void if child of B is not 21 when B dies [but will not be void ab initio] – if possible, law will presume that transferor does not intend for there to be gap in seisin).
3. **Remainder is void ab initio if it takes effect in possession by prematurely defeating the prior estate of freehold** (e.g. A transfers to my daughter for life, but if she marries C to my son and his heirs is void) – this rule is eliminated by s 8(2) of *Property Law Act*.
4. **Remainder after a FS is void** (because of s 8(2) of *PLA* you cannot have a determinable FS w/ a possibility of reverter in remainder**,** but you can give a FS w/ a condition subsequent/right of entry).

e.g. “A (the owner in FS) transfers Blackacre ‘to B and his heirs, but if B marries X then to C and his heirs’

* Gives right of entry to C – would be void at CL but saved by s 8(2) of *PLA*

e.g. “A (an owner in FS) transfers Blackacre ‘to B and her heirs until B ceases to be a member of the Bar of the province of BC, and then to C’

* Gives possibility of reverter to C – void at CL and NOT saved by s 8(2) of *PLA* – B keeps interest

**(iii) Destructibility of Contingent Remainders**: May be destroyed after it has come into existence because person entitled to it is not qualified to take possession of property on termination of prior estate of freehold. Natural termination: if person entitled to remainder cannot take possession at time that prior estate of freehold terminates, then there is a gap in seisin and remainder is thereby destroyed – title goes back to grantor.

## 3. Equitable Future Interests

Created in express trusts.

### (a) The Governing Rules

You can break w/ impunity all rules that constrain creation and operation of future interests at CL.

### (b) Creation of Equitable Interests

Normally have to be expressly created by vesting legal title in trustees and creating equitable interests behind that legal title. BUT *Re Robson*: **all interests created by will are to be treated as equitable.**

Creating a trust allows circumvention of CL future interest rules – trust continues w/ endless stream of trustees holding legal title. No gap in seisin or shifting interest.

#### Re Robson (1916) (12.38)

F: T devised land to use of his daughter H for life and on her death ‘to the use of such of her children as shall attain the age of 21 years’. When H died, she left 4 children, 2 had reached 21.

I: Did children who had reached age of 21 (Ps) take to exclusion of those who had not?

A: Court considered s 162 of *WESA*. This freehold vested in executors upon H’s death. There was assent to devise at some tome during life tenancy. Equitable contingent remainders which having regard to provisions of the *Land Transfer Act*, were originally created by will retained their initial immunity from destruction though clothed from the date of such assent w/ the legal estate. No gap in seisin because legal title is w/ trustee.

C: Ps are not entitled to land to exclusion of infants.

R: Future interests under trust = equitable remainders.

#### WESA s 162 – Devolution and Administration of Land

(1) Unless there is a right to land by survivorship, on death of owner land is vested in personal rep of deceased - legal title transmits to personal reps (trustees)

(2) A personal rep to whom land devolves hold it as a trustee for the beneficiary. Beneficiary has same power as a person beneficially entitled to personal property to require a transfer from the personal rep.

# C. Attributes of Future Interests

## 1. Protection of the Land

In case of equitable interests, right of owner of future interest is generally against trustee, who if not protecting land is probably in breach of trust.

## 2. Alienability of Future Interests

At CL, some types of future interests could be disposed of inter vivos and others could not. On death all types of future interests devolved on intestacy and what could be disposed of by will depended to a large extent on interpretation of various Wills Acts.

#### Property Law Act s 8 – Disposition of interests and rights

Following interests can be disposed of: (a) contingent, executor or future interest in land or possibility coupled w/ interest in land; (b) right of entry on land, immediate or future, vested or contingent.

#### WESA s 1 – Definitions

**Estate**: property of deceased person

**Personal property**: every kind of property other than land

**Property**: land and personal property

#### WESA s 41 – Property that can be gifted by will

A person may, by will, make a gift of property to which he/she is entitled at law or in equity at time of death, including property acquired before, on or after date will is made.

# D. Registration of Future Interests

#### LTA s 172 – First estate of inheritance necessary to registration of FS

If 2+ persons are owners of different estates/interests in same land; (a) first owner must be registered as owner in FS (not according larger estate than that to which they are entitled); (b) other estates etc. must be registered as charges according to priority.

#### LTA s 180 – Recognition of trust estates

If land vests in personal rep or trustee, that person’s title may be registered, but particulars of a trust created/declared in respect of that land must not be entered in the register.

# Chapter 13: Conditional and Determinable Interests

**A person disposing of property can impose ‘qualifications’ on interests created in one of three ways: (1) By making vesting of an interest subject to a condition precedent; (2) By attaching to an interest a condition subsequent; (3) By creating a determinable limitation.**

# A. Crown Grants

#### Land Act s 11 – Minister may dispose of Crown land

In a disposition of Crown land, minister may impose terms etc. they consider advisable, including that (a) applicant must personally occupy and reside on Crown land for a set period; (b) applicant must do work and spend money for permanent improvement of Crown land within required period.

# B. Uncertainty

#### Noble v Alley (1951) (13.2)

F: In 1935, F sold various parcels of land, which were developed by purchasers as a private summer resort. Sales included requirement that any grantees that sell their property will impose same restrictions on it as are imposed on them. Clause (f) states that land cannot be sold, occupied etc. by any person of Jewish, Hebrew, Semitic, Negro or coloured race or blood. In 1948 then owner of one of parcels agreed to sell to purchaser. Purchaser required vendor to obtain a court order declaring clause (f) void.

I: Is covenant unenforceable for uncertainty for purposes of specific performance?

A: **Enforceable covenants must touch/concern land as opposed to a collateral effect**. Collateral here is directed to transfer by act of purchaser – it is a restraint on alienation. **Where a vested estate is to be defeated by a condition subsequent, it must be such that Court can see from beginning, precisely and distinctly, upon happening of what event it was that preceding estate was to determine**. These are conditions subsequent – show non-white occupation in order to gain divestiture of property.

C: Covenant is void for uncertainty.

#### MacDonald v Brown Estate (1995) (13.41)

F: T directed that share of estate was to be held on trust until niece becomes widowed/divorced from her present husband at which time capital should be paid to her for her own use absolutely. Annual income from capital should be paid to niece during her lifetime/until conditions of absolute vesting are met. If she dies w/o being widowed/divorced from present husband, then her share should go to grand-nephew.

A: **Whether T’s purpose, aim, object or motive was pure inducement to divorce or whether it was protective is the question to be determined w/ each case being decided on its circumstances, nature of provision, extent to which it would naturally tend to induce divorce or separation, motives of settlor, etc**. Provisions here are supportive and not coercive/punitive/intending to induce divorce.

C: Conditions are valid.

- *Re Piper* (1946): clause inducing a child not to associate w/ a parent is invalid

- *Re Neeld* (1962): clauses inducing a person to assume name of testator are valid in England

- *Re Kennedy Estate* (1950): condition that a person must/must not marry a person of a specified religion is valid; conditions that a person must not drink intoxicating liquor, or play cards, or continue steady are valid; condition against smoking is valid

#### Jarman Rules – Consequences of Invalidity

- At CL:

- Void condition and condition precedent = whole transfer is void

- Void condition and condition subsequent = transfer is absolute – cross out condition

- At Equity:

- If condition precedent is originally impossible or illegal, then treat condition precedent as a condition subsequent

- Where performance of condition is sole motive of bequest, or its impossibility was unknown to T, or condition has become impossible or condition is illegal because it is morally wrong, then Equity agrees w/ CL and holds the gift and condition void.

- Limitations are treated in same way as conditions subsequent w/ regard to uncertainty

# E. Human Rights Legislation

#### Canadian Charter of Rights and Freedoms

S 15 – Equality before and under law and equal protection and benefit of law

(2) Does not apply to affirmative action programs

S 32 – Charter applies to gov’t of Canada

#### Human Rights Code RSBC 1996 s 8 – Discrimination in accommodation, service and facility

Cannot discriminate in provision of accommodation, service or facility. Does not apply to discrimination on basis of sex if it relates to maintenance of public decency or to determination of premiums/benefits under Ks of life/health insurance. Does not apply to discrimination on basis of physical/mental disability if relates to determination of premiums/benefits under Ks of life/health insurance.

#### Human Rights Code RSBC 1996 s 9 – Discrimination of purchase of property

Cannot discriminate in allowing purchase of commercial/dwelling units; OR opportunity to acquire land/interest in land; OR regarding term/condition of purchase/acquisition.

#### Human Rights Code RSBC 1996 s 10 – Discrimination in tenancy premises

Cannot discriminate in right to lease space or in lease terms/conditions. Does not apply if: space is to be shared w/ another person; as it relates to family statute/age if unit is reserved for persons 55 years or older; or if rental unit is in a prescribed class of residential premises; as it relates to physical/mental disability if rental unit is designed to accommodate persons w/ disabilities and conforms to prescribed standards.

#### LTA s 222 – Discriminating covenants are void

**Covenant that, directly or indirectly, restricts sale, ownership, occupation or use of land on account of… is void and of no effect.** Registrar may cancel a discriminatory covenant on application. If registrar has notice that covenant is void due to discrimination, it may cancel it w/o application.

#### Canada Trust Co v Ontario (Human Rights Commission) (1990) (13.46)

F: In 1923, L established a trust to provide education scholarships. Trust states: “the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope, or Potentate, or who recognize any such authority, temporal or spiritual.” Provided that in any one year amount available to female students could not exceed ¼ of total amount.

A: Many scholarships are available which restrict eligibility or grant preference on basis of e.g. an applicant’s religion, ethnic origin, sex or language - none is rooted in concepts in any way akin to those articulated here which proclaim some students, because of their colour or their religion, less worthy of education or less qualified for leadership. Definition of class of beneficiaries is a condition precedent – condition precedent is one in which no gift is intended until condition is fulfilled. A condition precedent will not be void for uncertainty if it is possible to say w/ certainty that any proposed beneficiary is or is not a member of the class. **This is a charitable trust which is void on ground of public policy to extent that it discriminates on grounds of race, religion and sex**. Necessary in each case to undertake an equality analysis. **Public trusts which discriminate on basis of distinctions that are contrary to public policy must be void**. **Only where trust is a public one devoted to charity will restrictions that are contrary to public policy of equality render it void**.

C: Restrictions are void on public policy grounds.

# Chapter 14: The Rule Against Perpetuities

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

BC passed reforming leg in 1975 – *Perpetuity Act*.

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

**Steps:** (1) Future interest that is contingent? (2) Does interest violate modern rule against perpetuities? If no – valid future interest. (3) If interest might vest outside perpetuity period – void at CL. (4) Apply remedial provisions in order set out in s 3 to see if interest can be saved.

#### Perpetuity Act s. 2 – Application of Act

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

#### Property Act s. 6(1) – Rule against perpetuities

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

# A. The Old Rule Against Perpetuities

A transfer x to B (who is alive) for life and then to B’s first (unborn) child for life and then to that child’s child for life, etc., etc., etc. - Dispositions beyond the one to B’s unborn child were all void. The rule was reaffirmed in *Whitby v Mitchell*. It applies to both legal and equitable remainders in realty, but it did not apply to personalty.

#### Perpetuity Act s. 6(2) - rule against perpetuities

Abolished rule in *Whitby v Mitchell.*

# B. The Modern Rule Against Perpetuities – “The Rule”

**CL 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.

* Lives in being = those alive at time that instrument takes effect – when title in property vests in trustee or on death of T if interest comes from will

- **Resulting trust**: if a future interest is not good because it violates rule against perpetuities then it reverts back to grantor

* E.g. if P transfers inter vivos an interest to V that violates rule against perpetuities, then V will still hold legal title but will hold it w/ P as beneficiary

## 1. The Act

#### Perpetuity Act s. 1 - Definitions

“in being” means living or **conceived** but unborn

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

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

#### Perpetuity Act s. 3 – Application of remedial provisions

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

#### Perpetuity Act s. 4 – Rules not applicable to benefit trusts

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

#### Perpetuity Act s. 5 – Application to the government

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

#### Perpetuity Act s. 7 – Eighty year perpetuity period permitted

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

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

* NB: Draftsman may select any fixed period of years, up to max of 80, in leu of period determined by reference to lives in being.
* e.g. To A for life, remainder to his first child to marry, provided he marries within 60 years of my death. – Valid
* e.g. To A for life, remainder to his first child to marry. The perpetuity period for purposes of this bequest is fixed at 60 years. – Somewhat unclear.

#### Perpetuity Act s. 8 – Possibility of vesting beyond period

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

#### Perpetuity Act s. 9 – Presumption of validity (‘wait and see’)

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

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

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

#### Perpetuity Act s. 10 – Determination of perpetuity period

(Period during which you ‘wait and see’)

(1) If s 9 applies to a disposition and the duration of the perpetuity period is not determined under ss 7, 21 or 22, the **perpetuity period must be determined as follows:**

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

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

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

(a) Grantor (not in a will);

(b) Beneficiaries or potential beneficiaries;

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

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

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

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

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

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

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

(e) if

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

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

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

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

#### Perpetuity Act s. 11 – Reduction of age

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

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

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

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

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

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

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

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

#### Perpetuity Act s. 13 – General cy pres provision

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

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

#### Perpetuity Act s. 14 - Presumption and evidence as to future parenthood

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

**(a) male 14 years or over can have children**

**(b) female 12 – 55 can have children**

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

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

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

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

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

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

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

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

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

* NB: proceeding = presumably there must be a court order before section can operate

#### Perpetuity Act s. 15 – Application to court to determine validity

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

#### Perpetuity Act s. 16 – Interim income

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

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

#### Perpetuity Act s. 17 - Saving provision and acceleration of expectant interests

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

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

## 2. The Operation of the Rule and the Act

### BC Perpetuities Act, by A.J. McClean

- Greatest criticism of CL rule has been directed at requirement of certainty of vesting: silly to hold a disposition invalid on basis of one hypothetical set of circumstances which might carry vesting outside period, when on every other hypothesis vesting would take place within it.