Freehold estates: Life Estates & Fee Simples 4

Life Estate (LE) (not by inheritance) 4

Who’s Life is it Measured By? 4

Fee Tail (inheritance) 🡪 now abolished 5

Fee simple (FS) (inheritance) 6

R.C. Ellikson, “Property in Land” (For and Against Perpetual Property Rights) 6

Creation of estates: common law vs. statutory reform 7

*Thomas v Murphy, 1990 NBQB* 8

Ambiguities: Life Estate or Fee Simple? 9

*Re Walker (1925) ONCA (p. 374)* 9

*Christensen v. Martini Estate (1999) ABCA (p. 383)* 10

*Re Taylor (1982) Sask Surr. Ct. (p. 377)* 10

W. Renke, “Homestead Legislation in the Four Western Provinces” 11

Future Interests: Defeasible and Determinable Interests 12

*Stuartburn (Municipality) v. Kiansky (528 Reader)* 12

Defeasible Interest 13

Determinable Interest 14

Determinable or defeasible? 14

*Caroline (Village) v. Roper [537 Reader]* 14

Vested or Contingent Interests (and RAP) 16

Vested or Contingent 16

Vested Interests 16

Contingent Interests 16

*McKeen Estate [533 Reader]* 17

Rule Against Perpetuities (RAP) 18

CONDITIONAL TRANSFERABILITY: LIMITS 19

Limit (1): Uncertainty 19

*H.J. Hayes Co. v Meade (1987) NBQB – uncertainty* 20

Limit (2): Public Policy 20

Heads of Pubic Policy (seen to contravene public policy): 21

*Re Millar (“Stork Derby”) (1938) SCC* 22

*Kent v McKay (1982, BCSC)* 22

*Re Leonard Foundation Trust (1990) ONCA* 22

*Re Ramsden Estate (1996) PEISC (Jan. 29)* 22

Limit (3): Restraints on Alienation 22

Effect of Invalidity 24

Law of Waste: Rights Given By Estates to Holders 25

Law of Waste 25

(1) Ameliorating Waste 25

(2) Permissive Waste 25

(3) Voluntary Waste 26

(4) Equitable Waste 26

Remedies for Waste: 26

*Power v Powers Estate* 27

*British Columbia (Director of Civil Forfeiture) v Onn, 2009 BCCA 402* 27

Leasehold Estates 28

5 Types of Leases 28

Essential (substantive) requirements for valid lease at Common Law 29

Lease v License 29

*Fantac Ltd (in liquidation) v. Commissioner of Inland Revenue* 30

Reasons why a landlord may want to characterize as a license instead of a lease: 30

Obligations of Landlords and Tenants 31

*Southwark LBC v. Tanner (2001) HL* 32

Main theme of residential tenancy reform: 32

Concurrent Interests – Co-Ownership 33

Common Law Presumption has been Modified by Statute in BC 33

Guidelines for Words Used and the type of Estate will result: 33

*Re Bancroft, Eastern Trust Company Co v Calder (1936, Nova Scotia SC)* – application of CL presumption 34

*McEwen v. Ewers & Ferguson* – application of statutory presumption 34

Four Unities 35

Joint Tenancy 36

Requirements for a Joint Tenancy 36

Severance of a Joint Tenancy (Williams v Hensman) 36

*Re Sorensen & Sorensen* 36

Tenancy in Common 37

Requirements for a Tenancy in Common 37

Ending co-ownership 37

Servitudes over Property 38

Easements 38

Contrast: crossing someone’s property to get to a bike path 39

Requirements for an Easement – Re: Ellenborough Park 40

*Re: Ellenborough Park (1955, England)* 41

Creation of easements: 42

Registration of Easements 42

Termination of easements 42

*Robinson v Pipito (2014, BCCA)* 42

Restrictive Covenants 44

*Levitt Town, 1947* (not a case, just an example) 45

*Re: Drummond Wren (1945)* 46

Restrictive Covenants in Law vs. in Equity 46

Restrictive Covenants at Law 46

Restrictive Covenants in Equity 47

*Tulk v. Moxhay (1848) UK (p. 797)* **Negative covenant running with the land** 48

*Amberwood Investments Ltd. v. Durham Condominium Corporation No. 123 (2002) ONCA* 49

Invalidity of Covenants 49

Termination of Covenants 50

Succession 51

Land Title Registration 56

Four conflict permutations: 56

(1) Legal interest followed by legal interest 56

(2) Legal interest followed by an equitable interest 57

*Northern Counties of England Fire Insurance v. Whipp (1884)* 57

(3) Equitable interest followed by a legal interest 57

*Chippewas of Sarnia Band v. Canada (2000)* 58

Criticism of the Application of the Equitable Doctrine (J Reynolds) 59

(4) Equitable interest followed by an equitable interest 59

*Rice v. Rice (1853)* 59

Indefeasible Title and Fraud 59

Five main stages in conveyancing practice 59

Deed Registration Systems 60

BC’s Current System: Torrens-type land title systems 61

Title Registration in BC 62

*Lawrence v. Wright, 2007 Ontario* – found deferred indefeasibility to apply (doesn’t apply in BC) 71

*Credit Foncier (1963, BCCA)* 72

*Canadian Commercial Bank v. Island Realty (1988, BCCA)* 72

*Gill v. Bucholtz (2009, BCCA)* 73

*Holt Renfrew & Co v Henry Singer Ltd, [1982] 4 WWR 481 (CA)* 74

Aboriginal Title 75

*St. Catharine’s Milling & Lumber Co. v. The Queen (1888 Privy Council)* 75

*Calder et al v. AG of BC (1973 SCC)* 75

*Guerin v. The Queen (1984 SCC)* 76

*R. v. Sparrow (1990 SCC)* 77

*Delgamuukw v BC (1997, SCC)* 77

*Tsilhqot’in Nation v BC (2014, SCC)* 80

*Long Plain First Nation v Canada, 2012* 84

Property Rights on Reserves 85

Reserve Land 86

*The First Nation of Na-Cho Nyak Dun v. Yukon (Gov’t of), 2014 YKSC 69* 87

*Nisga’a Final Agreement, 2000* 88

Responses to the Nisga’a Final Agreement 89

Aboriginal Property Rights Review – ESSAY 90

Freehold estates: Life Estates & Fee Simples

**Estates**: A piece or segment of ownership that lasts for a specific period of time

Think of property rights as **four-dimensional**:

* Physical boundaries (3d)
* And Time for which the interest will endure (the 4th dimension)
* **Time continuum**: Look at the period of time from now to eternity
	+ It can be the case where two people own portions of the time continuum for the same piece of property. Property law tries to coordinate/balance between the rights of these two property owners

Estates are divided into different terms based on duration:

1. **Leasehold estates** = estates of certain duration
2. **Freehold estates** = estates of uncertain duration
	1. Estates not of inheritance = life estate (still considered to be categorized as an estate of an uncertain duration)
	2. Estates of inheritance = fee simple and fee tail

Ask if it is an estate of inheritance.

1. No, not an inheritance estate: **Life Estate**
2. Yes, inheritance estate: **Fee Tail** (now abolished by **section 10 of the Property Law Act**)
3. Yes, inheritance estate: **Fee Simple**

Life Estate (LE) (not by inheritance)

* Uncertain duration because you don’t know how long the person will live
* **Typically used for maintenance:** to provide a person with income to live off of, up to certain amount per year
* Rights to possession & profits; sometimes also right to destroy/alienate & can sometimes dip into balance of estate (**when have power to encroach**)

Who’s Life is it Measured By?

1. “**Life estate pur sa vie**”: Life interest measured by the life of the person granted the interest
	1. Ex. To Bill for life (meaning: to Bill for the life of Bill – for the period of time that Bill is alive)
2. “**Life estate pur autre vie**”: Life interest measured by the life of another
	1. Ex. To Bill for the life of Ted (Bill has the property interest for a specific period, but the period is measured by the life of Ted. Whenever Ted dies, Bill’s estate ends)

**Note**: Both types of estates **can be transferred**

**I. Life estate pur sa vie**

If a **life estate pur sa vie** is transferred to another person, it becomes **a life estate pur autre vie**

* I.e.: Life estate: to Neo for the life of Neo
* Neo transfers their life estate to Morpheus
* The life estate becomes: to Morpheus for the life of Neo
* Ends when the reference point person dies (Neo in this case)

**II. Life estate pur autre vie**

* Anyone can be chosen to be the measuring life (no connection necessary); measuring life is a reference point that tells you how long the estate is going to last for
* You can choose more than one life to act as the measuring life
* Unless indicated otherwise, the life estate won’t end until the last measuring life has died

A **life estate pur autre vie** can also be transferred to someone else

* To Hamlet for the life of Claudius
* (Hamlet transfers the property to Ophelia)
* To Ophelia for the life of Claudius
* *What happens if Hamlet dies before Claudius?* It can be willed, it can descend to be enjoyed to Hamlet’s heirs to the person who it was specifically bequeathed, etc. until Claudius dies, at which point the property would go to the next property holder

**WHEN A LIFE ESTATE ENDS (REMAINDERS AND REVERSIONS):**

The grantor (X) granted an estate to A, and A dies before the grant is over:

* **X grants property to A for life**
	+ A has a life estate pur sa vie
	+ X (or X’s heirs) has a **reversion** (X still has a property interest referred to as a reversion)
	+ When A dies, the property reverts back to X, the grantor
* **X grants property to A for life, and then to B**
	+ A has a life estate pur sa vie
	+ B gets the remainder of the estate (**remainderperson** or **remainderman**) – B has a fee simple remainder
	+ After the grant is made, X has no interest

Fee Tail (inheritance) 🡪 now abolished

**Principal function**: to perpetuate family dynasties

* **The estate descends only to lineal descendant of first tenant in tail** (includes children, near children – excludes collaterals (i.e. uncles, nieces))
* Lasts as long as there are direct lineal descendants of the holder
* Where no direct lineal descendants remain, the estate passes to the holder of fee simple
* Doesn't just have to be children – can be to male or female heirs, or to the children of a certain individual. **It is an opportunity to restrict how property passes on through generations**

**Fee tail has been abolished in BC**

Property Law Act, RSBC 1996, c. 377.

Certain interests prohibited or permitted

**S 10  (1)**An estate in fee simple must not be changed into a limited fee or fee tail, but the land, whatever form of words is used in an instrument, is and remains an estate in fee simple in the owner.

**(2)**A limitation which, before June 1, 1921, would have created an estate tail transfers the fee simple or the greatest estate that the transferor had in the land

* **10(1)** Fee simple can’t be changed to fee tail – remains a fee simple
* **10(2)** Prior fee tails turn into fee simples, or greatest interest that was had in the land

Fee simple (FS) (inheritance)

The largest estate known to the law

* **Fee simple:** Tenure of potentially unlimited duration (**Gray**)
* The amplest estate which a tenant can have in or over land (**Gray**)
* Largest possible bundle of rights exercisable with respect to land (**Gray** citing to a 1944 UK decision)

Fee simple is full ownership in practical terms, BUT is not absolute ownership. It ends with the conditions of **escheat** (no will, no next of kin as recognized by law – in Canada, it would go to the government/Crown)

* If it is an individual, usually you can find a next of kin recognized in law
* If it is a company, this is more difficult and the property will likely go into escheat

**“To A + heirs of his body”** signifies Fee Tail, but because established in BC, would be Fee Simple

**The Rule in Shelly’s Case:** “to A for life, then to heirs of A” (has to be exact) – then A receives Fee Simple + heirs receive nothing

* Words of purchase = to A
	+ A gets the property interest
* Words of limitation = for life, then to the heirs of A
	+ Equivalent to “and his heirs”
* If this language is used, the result is that **A receives a fee simple** (A’s heirs receive nothing)
* Unlikely to come up too often in Canada, but the rule does still apply

R.C. Ellikson, “Property in Land” (For and Against Perpetual Property Rights)

Argues that all Western systems of property provide for virtually absolute land rights/perpetual property rights (analogous to Fee Simple)

**Policy reasons in support of perpetual property rights**:

* Greatly simplifies land-security transactions
* It is a low transaction cost device for inducing a moral landowner to conserve natural resources for future generations
* Maximizes the potential of good stewardship of the land: induces landowner to conserve natural resources for future generations
* Perpetual landowner can consider the resale value: benefits for multiple generations
* Having perpetual property interests encourages **development**/capital investment in the property (linked to labour theories)
* If it's a perpetual property right, on death the person can **provide for the their heirs/family members**.

**Against perpetual property rights:**

* Perpetuates inequality: inheritance and the ability to pass property along plays a role of preserving this level of inequality
* Competing understandings of land ownerships (**western v Aboriginal title**); focused on individualistic lens of benefits
* Challenging stewardship – look at each scenario

Idea of the value of absolute rights and the specific reasons about investment, development, stewardship and the inherent value of property (connections of property and freedom)

Creation of estates: common law vs. statutory reform

**Rule of law**

* Prescribes a result that will apply even if it is inconsistent with the intention of the person making the transfer
* Look at common law requirement of having to use “magic words” – it would apply even if it is inconsistent with the intentions of the grantor

**Rule of construction**

* Provides a presumed interpretation that can be rebutted by showing that the transfer expressly provides that a lesser estate is being transferred
* Look at our statutory presumption today and see that as a rule of presumption

**I. COMMON LAW**

**Will**: property passed when the testator dies

***Inter vivos* grant**: transfer while grantor is still alive (e.g., a deed)

**At common law, there is a presumption of life estates in grants and wills (stronger in grants, relaxed in wills)**

* Greater precision is needed in drafting of a transfer of fee simple
* “To A in fee simple” or “to A forever” would only pass a life interest
* If you wanted to create a fee simple for a life estate, you need to use **“magic words”** – if you didn’t use these words, you would end up with a life estate

**Magic words “To A & his/her heirs” 🡪 to create a fee simple interest (A gets FS)**

* “To A” = words of purchase/receipt (describing the intended recipient of the property)
* “And his/her heirs” = words of limitation (delineate the extent of the right conferred on A)
* What rights do the heirs acquire? Nothing of substance – the term heirs is purely descriptive of the rights given to A and confers on the heirs no enforceable claim to the land.
* A’s heirs have no interest under the grant (A’s heirs have a *potential* interest) (see ***D’Arundel’s*** Case (1225) pg 372); A can sell her interest without the consent of the heirs.

* **Magic words** needed for fee simple or fee tail in grant
	+ **Fee simple: i.e. “to A and his heirs”; “to A, her heirs, and assignees”**
	+ Fee tail: “to B & the heirs of her body”
* The need to invoke the perfect phrase is indicative of the early traditionalism of land law

**Rule relaxed in case of wills**

* **EXCEPTION** to presumption of life estate: these magic words are not essential in a will; as long as the devise shows in some convincing way that there was **an intention to create a fee simple** – otherwise, only life interest created (like an *inter vivos* grant)

**“To A forever”:**

* **Will**: Fee Simple (Common Law rules relaxed because grantor deceased)
* **Grant**: Life Estate (because grantor alive, need magic words to grant fee simple)

**“To A”: this could be argued either way**

* **Will**: presumption of Life Estate unless intention to create Fee Simple (look at absence or existence of any limiting terms)

**Failed attempts to confer a Fee Simple can produce a Life Estate**

* Fill phrases that confer Life Estate: “privilege” to live on land, “free use” of land, “use” of property with gift over “when she no longer needs” premises, use property “as long as he wishes”

**II. STATUTORY REFORM**

**Today in BC**: Presumption is that fee simple passes, **unless** “the transfer expressly provides that a lesser estate or a particular interest is being transferred” (**19(2), Property Law Act**).

* Reverses common law presumption for wills & grants
* The presumption is that you are granting the largest possible estate or fee simple. This **presumption can be rebutted by the words of the grantor/will**.

For Fee Simple transfer, can use words “in fee simple” without the words “+ his heirs” (**19(1) PLA**)

S 19 – Property Law Act, RSBC 1996, c. 377

**S 19  (1)**In the transfer of an estate in fee simple, it is sufficient to use the words "in fee simple" without the words "and his heirs".

**(2)**A transfer of land to a person without words limiting the interest transferred, or to a corporation sole by his or her corporate designation without the words "successors" passes the fee simple or the greatest estate or interest in the land that the transferor has power to transfer, *unless* the transfer expressly provides that a lesser estate or a particular interest is being transferred.

* Principle applied: ***Thomas v. Murphy***
* Two other statutes relevant:
	+ ***Land Title Act,* s. 186(4) – (8)**
	+ ***Wills, Estates and Succession Act,* s. 41(3)**

**Equivalent for wills:**

S 41(3) – WESA: Wills, Estates And Succession Act, [SBC 2009] Chapter 13

**Property that can be gifted by will**

**41 (3)** A gift in a will

(a) takes effect according to its terms, and

(b) subject to the terms of the gift, gives to the recipient of the gift every legal or equitable interest in the property that the will-maker had the legal capacity to give.

Thomas v Murphy, 1990 NBQB

**Facts**: Grant gave estate to “grantees and their successors”. The word “heirs” was specifically missing

**Issue**: Was a fee simple created even though “heirs” was forgotten in grant?

**Held**: Fee simple was created.

**Analysis**:

* In common law, the result of no magic words would have been a life estate
* In New Brunswick under the statutory scheme, it was interpreted in such a manner as to make this become a fee simple (focused more on the intentions of the grantors)
* In Ontario, it would also be a fee simple interest
* In BC, a fee simple grant would be transferred under s 19 (1-2)

Ambiguities: Life Estate or Fee Simple?

* A gift that **looks like an absolute gift** but also has a gift to another person after the first person’s death
* I.e.: To Jack absolutely during his lifetime, then to Annie
* Courts deal with such ambiguities in three ways:
1. **First interest is absolute** (strike out “then to B”; the second party right’s are struck out)
2. **First interest is reduced to life estate, remainder to donee of second gift**
3. **First interest is treated as a life estate with a power of encroachment** [think of – use, enjoy the fee simple itself]**, the second party has the fee simple remainder**

**1. First Gift Absolute** (*Re Walker*)

* Court determines fee simple was intended: absolute gift to J (gift over to A struck out)
* *Re Walker*: Court try to uphold both intentions where possible; here, dominant intent: “all to the wife” – so she got FEE SIMPLE in the property; rest would go to beneficiaries under wife’s will (only satisfied 1 of 2 intentions)

**2. First Gift Reduced to LE, Remainder to Donee of 2nd Gift** (*Christensen v Martini Estate*)

* Court: clearly intention was for both parties to benefit
* *Christensen*: writer was layman without legal training, so lack of keywords was not fatal – intention was to benefit M + the C’s – supported by language of clause, will, and surrounding circumstances – passed LE without power of encroachment to M w gift over to C’s

**3. First Gift Treated As LE w Power of Encroachment** (*Re Taylor*)

* Allows LE holder to exercise rights usually only FEE SIMPLE holders have – holder can exercise the powers during the term of their life & when they die what’s left passes to next person (A in this case)
* Power of encroachment = power of full disposal
* *Re Taylor*: encroachment for purpose of maintenance allowed – wife got LE, so not able to dispose of property by will

Re Walker (1925) ONCA (p. 374)

**Facts**: John Walker gave to his wife "all of my real and personal property", but added that "should any portion of my estate still remain in the hands of my said wife at the time of her decease indisposed of by her the remainder shall be divided as follows… to the nephews". When the wife died, people stepped forward seeking some of the money from the original testator's will – alleging that the value of her estate represented the "undisposed" part of his property that remained when his wife died.

**Issue**: Was a fee simple created?

**Ratio:**

* An absolute transfer of land (fee simple) cannot be accompanied by directions on how to deal with the land upon the death of the receiver; however, if all that is transferred is a life estate then these types of gifts are valid.
* It is possible to transfer a life estate with the power to sell the property (must be explicit), and if this is the case then the gifts will be void if the property is sold

**Held:**

* Seems there were two goals in the mind the grantor: (1) To provide for the widow for her life (2) To provide something for other beneficiaries
* Here, the dominant and subordinate intentions can’t be reconciled, so to satisfy the dominant intention, **the court gave the entire estate to the widow as fee simple**

**From Reynolds Problem Set:** In *Re Walker* "I give and devise unto my said wife all my real and personal property excepting [jewellery to nephews]..." was held to create a fee simple and the subsequent wording "and also should any portion of my estate still remain in [her] hands.... at the time of her decease undisposed of by her such remainder shall be divided as follows..." was held to be inconsistent with the fee simple and therefore had no effect.

The Court in *Walker* should have considered a **third option**: that the wife had been left a life estate with the power to encroach on the remainder. On this interpretation, A would receive a life estate, and the children would have a remainder in fee simple; however, A would have the power to encroach upon (use) the estate in such a way that there might be very little or nothing left for the children. If there were anything left, however, A could not will it to anyone else - the remainder would go to the children under the terms of the wife's will.

The testator ‘urges’ the spouse to give whatever is left over to the children, rather than saying whatever is left over is to go straight to the children. One way in which to view this statement is as an expression of hope rather than an actual gift to the children. Under this interpretation, giving a fee simple to A might be the better option.

Christensen v. Martini Estate (1999) ABCA (p. 383)

**Facts:** Will stated: “I give to my wife Sharie Raby of Calgary 2203 31 Ave S.W. Calgary for her use. When she no longer needs 2203 31 Ave S.W. Calgary that she give said property to Sandra and Sonya Christensen of the city of Calgary”

**Issue:** What kind of estate did the wife get?

**Ratio (Hunt J):** absence of the phrase “during her lifetime” is not fatal to conveying a life interest

Three options:

1. Absolute gift to Martini, with words expressing the testator’s hope that she will give what remains of the property to the Christensen’s when she no longer needs it herself
2. (2 options in 1) A life estate to Martini, with or without the power to encroach on the estate, with a gift over to the Christensen’s
* The judge looked at the legal experience or expertise of the individual who drafted it (he was a layman), and how can we figure out what the drafter intended. It was found that there was an **intention to benefit both parties**. The language of the clause, the entire will and the surrounding circumstances supports this interpretation.
* The judge found that there was no evidence that there was no intention to have the property diminished. Therefore, unlikely that he would be granting a life estate with a broad power of encroachment – no encroachment because indication was that he wanted to make sure that both parties would benefit

**Analysis**: writer didn’t have legal training, therefore, probably didn’t know about magic words and thus, should be interpreted generously.

**Conclusion**: Wife was given life estate + Sandra & Sonya get remainder fee simple.

Re Taylor (1982) Sask Surr. Ct. (p. 377)

**Facts:** Mr. Taylor’s will stated that all of his property goes to Mrs. Taylor to have and use during her lifetime. After her death, it’s to be divided among their daughters.

**Issue:** Does Mrs. Taylor have an absolute interest or life interest?

**Ratio:** The intent of will takes precedence over necessity of “magic words” and “rule of law”

**Analysis:** Court created life estate with a limited power of encroachment (right of possession, profit and alienation) for purposes of maintenance of person for the remainder. After the widow’s death, passes to daughters as fee simple.

W. Renke, “Homestead Legislation in the Four Western Provinces”

**\* Statutory reform: despite any will that might exist, if spouse dies, a LE will arise in favour of the other spouse**

Statutory reform 🡪 protects the interest of one spouse when the other spouse has passed away:

* ***Land (Spouse Protection) Act,* s. 4(2)**: despite any will that might exist – if a spouse dies, a life estate will arise in favour of the other spouse
* Meant to be a more modern version of the homestead legislation that was put in place as a mechanism to put a limit on the ability of the testator to determine exactly where property goes
* Protective mechanism put in place to ensure that the interests of one spouse are provided protection, at least to a certain degree

Future Interests: Defeasible and Determinable Interests

**Dead hand of the past**: To what extent can property owners place conditions on the use and enjoyment of property or conditions that must be in place before a person gets control of property? To what extent can property owner control property interests, relationships, and behaviour?

**Reversions and Remainders** (examples):

(1) Harry (fee simple owner) conveys property to Hermione for life.

* Harry has a **Reversion** – at the end of Hermione’s life, interest in the property reverts to Harry.

(2) Harry (fee simple owner) conveys property to Hermione for life, then to Ron in fee simple.

* Ron has a **fee simple remainder** (remainderperson)

Remainders and reversions are both considered **“present rights to future enjoyment” (vested interest)**

* Both Harry and Ron have present interest – they are concurrently seen as having these estates. Because they get to exercise these rights in the future, they are described as present rights to future enjoyment. (***Stuartburn v Kiansky***)

**Remainder + reversions are vested interests**; ownership of this right is distinct from being seized of lands (***Stuartburn v Kiansky***)

**Owing an estate in land vs. being seised in land**

**Seisin** means possession and right to immediate possession (***Forrestall*** discussion) – vested remainder interest doesn’t entitle remainderperson to seisin because they are not entitled to possession

* Ex: To Harry for life, then to Hermione – both of these parties are seen as having present rights; both are owners of estate in land; the interest of both parties are vested (nothing has to happen before they get to have the legal entitlement to the property). Only Harry is the party who has possession of the land (Harry during the term of the life estate).

Stuartburn (Municipality) v. Kiansky (528 Reader)

**Facts**: To hold elected office, a person must be an owner of land. K had an interest in land subject to a prior life estate to his grandma. (K was to be the remainderperson)

**Issue**: Does K have a present interest in the land for the purposes of the *Local Authorities Election Act*?

**Held**: K’s remainder interest was deemed to be a sufficient interest in ownership in land

**Analysis**:

* A remainder interest, like a reversion, is a present right; it is a right that is **vested in interest**
* It is something that co-exists with the life estate, even though the remainderperson’s enjoyment and use of the land is postponed until the life estate ends

**Defeasible Interest**: independent clause added to (tacked on) to an otherwise complete estate which operates so as to defeat it (**DARK CLOUD HANGING OVER ESTATE**). One party has a **defeasible interest** and the other party has the **right of re-entry** (NOT VESTED – must comply with RAP)

* Phrases indicating defeasible: **on condition that, but if, provided that, if it happens that**; a stipulation stated at a later part in the gift also suggests condition subsequent (words refer to an event that could potentially arise)

**Determinable Interest**: an estate is limited from the beginning. It will end automatically upon the occurrence of a determining event and the estate will pass to the grantor/their estate (**FENCE POST**). One party has a **determinable interest** and the other party has a **possibility of reverter** (vested).

* Phrases indicating determinable: While, during, so long as, until; words of duration; have a temporal sound; “fence post”; limited by the condition; something less than a full estate

Defeasible Interest

* Independent clause added to complete fee simple which operates so as to defeat it
* Estate may be brought to **premature end on occurrence of specified event** (condition subsequent)
	+ Dark cloud that hangs over an otherwise complete or full estate
	+ If the condition occurs, the estate might be brought to an untimely/early end
* Grantee: gets **defeasible interest** (fee simple subject to condition subsequent)
* Grantor: retains a **right of re-entry (contingent interest)**, which may be exercised if stated event (**must comply with Rule Against Perpetuities**; OR Rule Against Perpetuities can be used to invalidate it)
* **Phrases indicating defeasible**: **on condition that, but if, provided that, if it happens that**; a stipulation stated at a later part in the gift also suggests condition subsequent (words refer to an event that could potentially arise)
* Re-entry cuts short the fee simple estate (dark cloud)
* Example “to School Board in fee simple, on the condition that if the property shall no longer be needed for school purposes, my estate may re-enter”

**Conditions**:

* Rights of re-entry **must be exercised**
* Need:
	1. **Formal entry into the property**
	2. **Demand for possession**
* Limit on how far into the future a right of re-entry can be exercised? (RAP)
	+ Common Law: no limit
	+ Former Limitations Act, BC: 6 years – modified
	+ **Current Limitations Act: no limit (3(1)(d), Limitation Act)**

**Consequences of Breach (Condition subsequent) (*Caroline v Roper*)**

1. **Effect of breaching the clause**: grantor or estate must take action to exercise their right of re-entry
2. **Effect of invalidity of forfeiture clause**: If invalid, clause is struck out; if the initial grant is a defeasible fee simple (for instance), that is struck out and it becomes fee simple.
	1. I.e.: To the Community Hall, ~~but if it is used for something other than as a community centre, my estate may re-enter~~
	2. **\*NOTE**: Because of the effect of invalidity, courts try and read grants as a defeasible interest rather than a determinable one
3. **Applicability of the rule against perpetuities (RAP):** Right of re-entry is a contingent interest (something has to happen before the interest can vest), so it must comply with the RAP (invalidates certain future interests that might vest or become certain outside of the perpetuities period).

Determinable Interest

* Determinable estate limited from beginning
* Upon occurrence of determining event, fee simple will end and property will **automatically** pass to grantor (or their estate)
* Estate granted will **end automatically** on happening of prescribed event & no formal entry or demand for possession required by person holding possibility of reverter (like fence post that demarcates durational extent of entitlement)
* Grantee: **determinable fee simple**
* Grantor: retains **possibility of reverter** – this is a **vested interest** (Rule Against Perpetuities doesn’t apply to it)
* Phrases indicating determinable: **while, during, so long as, until** (words of duration – temporal sound)
* Determinable **life estate**: Reverter/reversion (**not “possibility of reverter”** because the estate will just go to the person it was supposed to go to (grantor or remainderperson) either at the end of the life estate OR when the determining event occurs)
* Determinable **fee simple**: possibility of reverter
* Example “to School Board until the land is no longer required for school purposes”

**Consequences of Breach (Determinable event) (*Caroline v Roper*)**

1. **Effect of breaching the clause:** the estate is lost automatically
2. **Effect of invalidity of forfeiture clause:** If invalid, the entire grant/estate is invalid (struck out), the land would automatically revert back to the grantor or the grantor’s estate
	1. ~~To the Community Hall for so long as it is used as a community centre~~
3. **Applicability of the rule against perpetuities (RAP):** a reverter has a vested interest (no limitations or conditions obstruct enjoyment of the property interest), so RAP is not applicable and cannot be used to defeat the rights of a reverter

Determinable or defeasible?

* Question of intention, based on words used
* Words associated with **defeasible**:
	+ Phrase that is tacked on to the estate: On condition that, but if, provided that, if it happens that; “dark cloud”; independent clause added to complete fee simple which operates so as to defeat it
	+ Comma in the context of a grant might be a signal
* Words associated with **determinable**:
	+ Words of duration: While, during, so long as, until; words of duration; have a temporal sound; “fence post”; limited by the condition; something less than a full estate
	+ Can be looked at as one fluid statement
	+ Something that is modified from the very beginning

Caroline (Village) v. Roper [537 Reader]

**Facts**: grant of land to a community group to build a community hall. After, it shall revert back to the Roper estate when it is no longer used as a community hall. “This acre … Transferred to the Caroline Community Hall, this day, Shall revert back to the Late Thomas Roper Estate if used for other than a community centre”

**Issue:** What type of interest is it (based on the words that are used in the context of the grant)?

**Analysis**:

* The words in this case used the future tense, which may not occur – **defeasible** if a future event occurs
* Court focused on the intention of the grantor and tried to uphold that
* Court also considers the different consequences that would flow from finding if it were determinable or defeasible
	+ (1) Effect of breaching the clause
	+ (2) Effect of invalidity of forfeiture clause
	+ (3) Applicability of the rule against perpetuities

**Held**: Right of re-entry didn’t comply with RAP, so that right is void. BUT, the judge rectified the deed to change it from a defeasible fee simple to a determinable fee simple because that is what the parties seemed to have intended.

Vested or Contingent Interests (and RAP)

* **Vested**: a property is vested when no limitations or conditions obstruct enjoyment of the property interest (aside from the natural end of another estate – whether it is a term on a lease or a life estate itself)
	+ I.e.: To Harry for life – Harry’s interest is vested
	+ I.e.: To Harry for life, then to Hermione – Harry’s interest is vested and Hermione’s interest is also seen as being vested
* **Contingent**: something has to happen before the interest can vest
	+ I.e.: To Harry for life, but if Harry stops playing Quidditch, then to Hermione – Harry’s interest is vested but Hermione’s interest is seen as being contingent (on IF Harry stops playing Quidditch)

Vested or Contingent

Vested Interests

* Exist when there are no limitations or conditions obstruct enjoyment of property interest.
* The estate is fixed and certain either immediately or in the future

**Conditions**

1. Person(s) entitled to take interest is ascertained (i.e. “To Harry” as opposed to “To Hogwarts’ top Quidditch player”)
	* You don’t have to figure out who the person actually is yet
2. No conditions before the interest can be enjoyed (subject to termination of prior life estate)
	* So, for ex, “To A, then to B” – both are vested
* Devise by Harry to Hermione for life, then to Ron
	+ Interests of Hermione, Ron both vested
	+ Hermione’s life estate = **vested in possession**
	+ Ron’s remainder = **vested in interest**

Contingent Interests

* Contingent interests deal with conditions of eligibility
* Vesting delayed pending the occurrence of a condition precedent (i.e. “if someone enters law school; if someone stops smoking”)
* Conditions precedent = **conditions of eligibility** – where you are not entitled to have a property interest until that condition is satisfied
	+ **Ziff**: A bridge that must be crossed before the estate can be enjoyed
* From Harry: to Hermione for life, remainder to Ron but only if and when Ron marries
	+ Hermione = life estate, vested in possession
	+ Ron = contingent fee simple remainder
	+ Harry = reversion in fee simple, vested in interest (**can be divested** (Harry can loose this interest) if condition precedent is satisfied before Hermione dies)

**(*McKeen Estate*)**

1. **Presumptions against intestacy**: intestacy means that their property hasn't been allocated to anybody under the will, in that case you must look to the legislation in BC which determines how the property is allocated
	1. The court is more inclined to choose the construction that leaves all the property allocated with no gaps
2. **Construction in favour of vesting**: in ambiguous situations, courts have followed a rule that favours vesting or early vesting. Presumption that testators intend to create vested interests rather than contingent interests (they don't intend to create interests where people have to satisfy conditions)
3. **Rule in *Browne v Moody***: Gift prima facie vested if the postponement is to allow for a prior life estate. I.e. – To Harry for life, then to Hermione
	1. If there is a life estate and a gift-over following the life estate, courts will look at the gift-over as something that is vested rather than contingent

***Note***: A condition can serve both as a condition precedent and a condition subsequent

* I.e.: From Harry: To Hermione for life, remainder to Ron, on the condition that he continue to work in the Ministry of Magic
* We need to look very carefully at the type of estates that are set out in the relevant documents. You can use some of our terms and presumptions (***McKeen***) that might be helpful to try and decide what type of property interest exists here.

**Transferability:** you can transfer essentially **every type of property interest**.

* Interests vested in possession, remainders, reversions
* Also contingent interests (see **s. 8(1)** **Property Law Act, RSBC 1996, c. 377**)
* Possibilities of reverter are **not included** in the Property Act s 8(1)
	+ ***West Sea Construction Case***: suggests that possibility of reverter are transferable

McKeen Estate [533 Reader]

**Facts: Contingent or vested?**

Residue of the estate should be divided *“equally between my sisters, Alice McKeen and Beatrice McKeen if they are both alive at the time of the death of the survivor of me and my said wife. If only one of my said sisters is alive at the time of the death of the survivor of me and my said wife, I direct my Trustees to deliver the residue of the estate to the surviving sister, the same to be hers absolutely”*

**Issue**: are the gifts to the sisters contingent on the sister’s surviving the wife?

**Analysis**:

* This issue is important because if they do not meet this criteria, the interest will revert back to the estate
* But, if the estate is vested in interest at the date the will took effect, the estate would take their property interest (it would pass down to the sisters’ estate)
* Most important question: **intention of the testator.**
* In determining the intention, some presumptions are helpful:
	+ Presumptions against intestacy
	+ Construction in favour of vesting
	+ Rule in Browne v Moody

**Held**: The sisters’ interests were seen as vested. The interest of one of the sisters could be seen as divested (if you have an entitlement to a property, you could lose that entitlement) if the other sister survived the life tenant. Therefore, the estate of the sisters received the property interest (if it was contingent, it wouldn't have gone to them at all)

Rule Against Perpetuities (RAP)

**RAP:** A rule that can invalidate future interests if they might vest or become certain outside of the perpetuities period

* If an interest is contingent and might vest down the road, outside the perpetuities period, seen as void from the very beginning

**RAP is relevant when you have a contingent interest.**

CONDITIONAL TRANSFERABILITY: LIMITS

The extent to which the dead hand of the past can control land use and how the law can constrain this

Conditions attached to grants/devises are presumptively valid but… can be invalidated on the basis of:

1. **Uncertainty** – courts do not like uncertainty in the property law context
2. **Public policy** – certain public policy reasons will invalidate conditions
3. **Restraints on alienation** – at a certain point, courts will say “you have fetered this property too much to too high of a degree, we are going to take some of these restraints off so the property can flow through:”

Limit (1): Uncertainty

**Is the condition itself so unclear that it doesn't meet what the standard is?**

Conditions attaching to property transfers that are too imprecise may be found to be void

Policy reason: need for certainty in property dealings. The law demands a **practical level of clarity**, so the recipients know the scope of the restrictions of the right they have.

**Courts are looking for the intention of the testator** – interpretations in previous cases are useful, but not determinative because the intentions change person to person. Why?

* Easy way to deal with issues down the road which would lead to further litigation
* It allows the recipients of property to understand the scope of any restrictions that affect their property interests. In the situations of forfeiture, what types of things would cause them to lose their property interests.

Here, we are dealing with question of conceptual uncertainty, NOT evidential uncertainty.

Courts apply **objective tests**: what would a reasonable person presume the intention of the testator to be?

**Two Tests: One for conditions of forfeiture and one for conditions precedent**

**Test for Conditions of Forfeiture** (conditions subsequent/determinable limitations):

* Donee must be able to see **distinctly and precisely**, from the outset, those **actions** that will **lead to a loss of their interest** (***Hayes***)
* Conditions subsequent/determinable limitations are more vulnerable to invalidity than Conditions Precedent on the basis of uncertainty
* ***Hayes***: conditions were to reside on the land & cultivate the land; treated as conditions subsequent because if they were conditions precedent, entire gift would fail (would go into intestacy), BUT the conditions subsequent void for uncertainty (so son took absolute title, not subject to CS)

**Test for Conditions of Eligibility** (condition precedent):

* Lower threshold than conditions subsequent/determinable limitations
* Need to show that **the condition is capable of being given some plausible meaning**
* Question: **Is it so vague as to be meaningless?**
	+ Example: To A if he is tall
	+ This will not fail for uncertainty – we can give this some meaning and establish a reasonable definition of the term. Because we can do this, the gift will pass to A provided he meet the definition of Tall

H.J. Hayes Co. v Meade (1987) NBQB – uncertainty

**Facts**: Hayes left a will in 1929: give all property to James, provided that **he live on the land and cultivate it**. If he does not, then that portion of the property goes to Harold, with Harold having to pay James $1000 for it. James came to live on the property in 1968 (previously out of country – unsure of how long he was gone for). James died in 1983, and executed a will including title to his part of the property. Harold did not pay $1000 to James, ever.

**Issue**: Is the condition at bar a condition precedent or subsequent?

CP = condition must be met before property vests in the beneficiary
CS = property vests immediately, subject to its *loss* if the conditions are *not subsequently met* 🡪 **CS can be void for uncertainty**

**Held**: CS for residency and cultivation 🡪 **void for uncertainty**. Intention of Hayes was to benefit each son – either with land or money. If a condition can be interpreted as a condition precedent or a condition subsequent, and construing it as a **condition subsequent** would *not contravene* the intention of the entire will, that is the **interpretation that will be favoured**.

“… *Condition must be such that the court can see from the beginning… upon the happening of what event it was that the preceding vested estate was to determine*”. Here, there was uncertainty as to the period of time within which the residence requirement must be met, uncertainty as to whether the beneficiary would forfeit their right if they left the property for any period of time etc.

Limit (2): Public Policy

Conditions that contravene public policy will not be enforced

**Open-ended standard**: Conditions are declared invalid on public policy grounds only in clear cases in which **harm to the public is “substantially incontestable”**

* Helps ensure that conditions are not invalidated based on the idiosyncratic interest of a judicial mind

Critique: could allow subjective ideologies or personal beliefs to inform “public policy”

**Courts are reluctant to develop new grounds for invalidating on public policy**, BUT new grounds can be added, established grounds can be reconsidered, or made more flexible

***Re Millar* (“stork derby”)**: Court: **“substantially incontestable” is high threshold** to meet. The fact that some people would have to behave in a way that may be detrimental to their spouse and their children doesn’t affect the grant 🡪 court is reluctant to step in and invalidate conditions

Heads of Pubic Policy (seen to contravene public policy):

1. **Restraint on marriage**
	1. **Total restraint** on marriage will generally be held to contravene public policy (total restraint NOT OK – to A until A is married)
	2. **Partial restraints** may be allowed (partial restraint OK)
	3. Restraints that exclude certain groups as spouses are okay
2. **Breach of statute/civil wrong**
	1. **Invalid** if required to breach statute/commit civil wrong/encouraged to violate the criminal law
	2. See ***Kent v. McKay* (1982, BCSC)**
		1. Will to split up property to the family, but if they go to the court and stop litigation, their benefits are revoked.
		2. Court said that if the purpose is to **insulate** the will **from total application of the court or statutes**, then will be found to be invalid (in this case found that intention of clause was to prevent application of *Wills Variation Act*).
		3. **Wills Variation Act**: Intention of this act is to ensure adequate maintenance and support for specific individuals (widows and children) – allows to have a will modified to provide help to them. As a result, found this to be invalid.
3. **Race and religion**
	1. **NB**: *Charter* does not apply directly to private transactions, absent government action; can apply indirectly through doctrine of public policy to influence private deeds
	2. See ***Leonard Foundation***
		1. A **public or quasi-public trust** based on notions of religious superiority contravenes contemporary public policy under which all **races and religions** are to be accorded **equal regard and equal respect**
		2. **Doctrine of cyprès** applies because it allows the court to take action to prevent the trust from being declared void, by amending the terms of the trust as close as would be possible to the testator’s original intention.
		3. This applies to trusts with a **public dimension** – this trust had public dimension because provided scholarships to public for attendance at publicly funded institutions
		4. **Tarnopolsky JA (Minority)**:Validity of trust should be assessed under a standard of scrutiny analogous to that used in **human rights law** to review discriminatory conduct. Necessary to undertake an equality analysis like that adopted by the Human Rights Commission.
	3. See ***Re Ramsden Estate***
		1. Scholarship at UPEI tenable only by protestants was upheld
		2. Distinguished from ***Leonard*** on grounds that Leonard was based on **blatant religious supremacy and racism**, which was absent in ***Ramsden***;
		3. The trust is valid as long as someone else, not university, administers the trust
		4. Can the distinction between private and public be justified?
			* Think about in the context of proprietary freedom – should courts be able to intervene or should people be able to allocate their property as they wish?

Re Millar (“Stork Derby”) (1938) SCC

**Facts:** P’s will gave property to a company to Toronto woman who could have the most babies in the next 10 years

**Issue:** Does this offend public policy? Might women and children be harmed? Should this matter?

**Ratio (Landry J):** Public policy is a valid reason to hold a condition invalid

**Analysis:** Concern of children in family law is now a core concern, not in original decision

**Held**: Not invalidated

Kent v McKay (1982, BCSC)

**Facts**: Split up property to the family – on the condition that if anyone initiates litigation for provisions of the will, then the benefits are revoked.

**Held**: Clause would prevent the statute (Wills Variations Act) from ensuring adequate support for specific individuals; therefore, found to be invalid.

Re Leonard Foundation Trust (1990) ONCA

**Facts**: Terms of Leonard Trust scholarship limits eligibility by race, religion, ancestry, ethnicity, color etc. These terms do not conflict with the operative provisions.

**Issue**: Are the terms of this scholarship unenforceable by virtue of violating public policy?

**Held**: YES. Foundation is acting in the public sphere, as it is awarding scholarships for students to study at public educational institutions (attended by the public at large).

**NB**: Courts can refuse to enforce contractual terms of land transfers that offend public policy (i.e. are contrary to good morals or public order). Often hesitant to do so 🡪 danger in imposing own morals; public policy should be reflected by legislature etc. Important to allow individuals to dispose of their property as they see fit, however this cannot be an absolute right 🡪 courts must balance this against the public interest.

Re Ramsden Estate (1996) PEISC (Jan. 29)

**Facts:** Scholarship at UPEI only available to Protestant students. School policy prohibited school from assessing religiosity of students

**Issue:** Is the trust invalid?

**Ratio:** A private party is to be found who can administer the scholarship without violating the University Act which requires them to be non-denominational in all of their decisions

**Held:** Court found it acceptable if someone other than school administers trust who gave out the scholarships

Limit (3): Restraints on Alienation

**Law promotes alienability** and therefore, conditional transfers that **impose unacceptable restraints** on transfer of property are **invalid.**

* There are some restrictions on degree to which grant can be given to others will be tolerated

**Doctrine of repugnancy:** restraints invalid if they are **inconsistent with an inherent attribute of ownership** (i.e. right to transfer property freely)

* Example: The following grant would be invalid: “to A on condition that the property never be sold, leased, or mortgaged” would be struck down for offending doctrine of repugnancy
* Only **substantial restraints on alienation** are void

**What are some policy issues that arise?**

* Restraints on how property is actually used
* Wanting to ensure that property flows freely through society; don't want to pose unnecessary restrictions
* The promotion of freedom – people should be able to do whatever they want with their property (Problems: Whose freedom are we talking about? Current or future owners?)
* Whether to allow individuals to frustrate creditors’ intentions
* To what extent should the law permit protection of vulnerable adults?
* Economic efficiency – allowing property to circulate as a commodity is good for economic efficiency, and the market is the best mechanism for allocating resources
* Basically creates fee tail
* Keep property out of commerce (economic system)
* Tends to result in concentration of wealth
* May prevent improvements to property: econ efficiency

Twin beliefs that underpin idea that law should prevent certain restraints on alienation:

1. Allowing property to circulate as commodity maximizes efficiency
2. Market provides best mechanism, as a whole, for allocating resources

***Re Rosher***: couldn’t sell land without first offering it to mother for $3K, at the time, was worth $15K – struck down as **invalid restraint** on alienation \*\*protection of vulnerable adults.

***Trinity College School v Lyons***

Two aspects of the agreement were in question

* Right of first refusal granted by T & MB
* Post-mortem option – option to purchase the loss on the death of the survivor

What does the court determine with respect to whether these aspects of the agreement are void as a restraint on alienation?

* **Right of first refusal was not found to be void**. Because the grantor was fettering himself and his own action.
* Post-mortem option to purchase lot on death of survivor of grantor is **void as restraint** on alienation (because the executrix’s ability to make decisions about the property greatly restrained and not at her doing) attaching burden to fee simple, making it less than otherwise would have been. Additional obligation; fetterer. Courts allowed a certain degree of freedom.
* It also has to do with the amount being set prior; it doesn't reflect the current market value of the property. Policy problems come into play such as economic efficiency

**Test: Does the condition take away the whole power of alienation substantially?** (***Blackburn v McCallum***)

**Facts**: Can’t sell/encumber land for 25 years post-testator’s death

**Issue**: Given the restriction in the will, could the property actually be sold and was the mortgage valid or void?

**Consider 4 factors:**

1. **Mode of alienation** (can you mortgage? Sell?)
2. **Class of recipients** (ex. clause where construction has to be carried out by specific company)
3. **Time period** (can’t alienate for 2 yrs? 5 yrs?)
4. **Price** (restriction on how much you can sell property for – ***Re Rosher***)

Applied to ***Blackburn v McCallum***:

* Mode: total restraint, except for will
* Class: total, you cant alienate to anybody
* Time period: 25 years
* Price: No price restriction

🡪 Held that this was a substantial restraint, and as a result, it was void

Applied to ***Thibodeau v Thibodeau***: can only transfer to son, son can only sell to continue education

* Mode: none
* Class: Only to Luc (son)
* Time: two generations into the future
* Price: none

🡪 Therefore, only to one person (Luc) is a substantial restraint on alienation and is void

Applied to***Re Brown***: family business given to 4 sons – can only sell or mortgage to each other

* Mode: restriction on selling
* Class: small class – only 4 brothers (eventually, there would be no one left to sell to)
* Time: none
* Price: none

🡪 Therefore, the restricted class of recipients is a substantial restraint on alienation and is void

Applied to ***Re MacClay***: can only sell to members of family – **not void** because there is no restriction on mode, price, time, and family size may increase with time

* You can have a condition that allows you to only sell to ‘family’. BUT, you have to look at the context (i.e. given different family sizes today, would it be decided in the same way today?)

Impossible to fulfill by operation of law: ***Unger v Gossen***

* Condition that nephews come to Canada impossible to fulfill by operation of law – question is whether testator knew of impossibility of performance of condition when she drafted it
* **Need to look @ intention**: her intention was to benefit her nephews – condition drafted to make sure nephews were beneficiaries and not Soviet government – the condition precedent is invalid

Effect of Invalidity

1. **Fee Simple subject to a Condition Subsequent**: if the clause is invalid, the Condition Subsequent is struck out (so the party that had the condition placed on them would get a Fee Simple absolute)
2. **Determinable Fee Simple**: if the determinable limitation is invalid, the entire grant/devise will fail
3. **Condition precedent**: condition, if invalid, will be voided; depending on how it is framed, the entire grant/devise may fail

Law of Waste: Rights Given By Estates to Holders

**Three Primary Rights Associated with Estates:**

1. **Possession (usus) – right to use property**
2. **Profits (income) – right to gain an income from the property**
3. **Right to destroy/alienate (abusus)**

**Fee Simple**: Right to possession, profits and to destroy/alienate the estate

(Subject to other laws – nuisance laws or other by-laws)

**Life Estate**: Right to possession and profits, but NOT to destroy/alienate

* Life estates have typically been given to a specific individual for their maintenance – allow an individual to possess and gain an income for that property

**Leasehold**: Right to possession only

Law of Waste

* Limits the extent to which the life tenant can encroach on the capital
* Limits the extent to which the life estate holder can alter the property interest

**Life Tenant**: Non-inheritance

**Life Estate**: Inheritance

“**Waste**”: an act that causes injury or does lasting damage to the land.

Four types:

1. **Ameliorating**: acts that enhance the value of the land
2. **Permissive**: damage resulting from the failure to preserve, repair property
3. **Voluntary**: conduct that diminishes the value of the land
4. **Equitable**: severe and malicious destruction

(1) Ameliorating Waste

* Enhances the value of the land
* ***Anger and Honsberger*** note that “unless the character of a property is completely changed, it is unlikely that a court will award damages or grant an injunction for ameliorating waste between a life a tenant and remainder[person]”
	+ In this case, it was found that the character of the property was changed completely (an exception to the above rule)
* **Examples**: Conversion of run down dwellings into modern productive shops. Arable land into pastureland.
* Nominal damages

(2) Permissive Waste

* Damage resulting from the failure to preserve or repair property
* This obligation to preserve the property and keep it in good repair is not automatically imposed, but a **duty to repair can be built into the instrument under which the estate is created**
* **If it is not built into instrument, there is NO obligation assumed by tenant for repair or maintenance**
	+ This comes from the law’s reluctance to impose positive obligations of uncertain bounds on a tenant
* Is this problematic in any way?
	+ If there is a gift over where you want B to benefit, the grantor probably intended to gift the property in good condition. Could be looked at as encroachment through neglect by reducing the capital interest in the property
* Example: Letting a property succumb to normal wear and tear without doing anything to prevent it

(3) Voluntary Waste

* Committing a positive, wrongful action
* Intentional conduct that diminishes the value of the land
* Severely restricts what a life tenant can do: **Tenants/ life estate holders can’t create voluntary waste and they are liable for voluntary waste**
* Intended to prevent:
	+ Cutting of timber (some exceptions); destruction of buildings; opening of new mines; other conduct that will diminish the property in the long run
* Some qualifications/exceptions (in Common Law or by-laws):
	+ In terms of cutting timber, it depends on whether the act is such as a prudent farmer would do on his own land
	+ Ask whether the value of the land decreases
	+ If there is an existing mine on the property, you can continue to operate it
* Life tenant would be liable for the diminished value of the estate
* Compensatory damages/ injunction

(4) Equitable Waste

* Severe and malicious destruction (consider intention)
* Examples: Sledgehammers to property, bulldozer to property
* Exemplary damages/ injunction

Remedies for Waste:

**a) Damages** – get equivalent of decrease in value

**b) Exemplary damages** – in certain circumstances. Extra damages being given as a way to punish or deter the party who has committed the waste

**c) Injunction possible** – where waste seen as more than minor + is ongoing

**d) Accounting of profits** – where waste results in profit, can get that person’s profit

A grantor can make a life tenant **“unimpeachable for waste”** (this waiver covers ameliorative, permissive, and voluntary waste)

* This waiver permits the life tenant to commit **voluntary waste** (main impact of this provision)
* It also allows them to do **ameliorative** and **permissive** **waste**
* The broad waiver does not permit the tenant to commit **equitable waste**.
	+ Must explicitly state, in the granting instrument, that the tenant can commit equitable waste, if you want the tenant to be able to do so
	+ See ***Law and Equity Act,* RSBC 1996, c. 253, s. 11**

Power v Powers Estate

**Facts**: equitable life estate with the power of encroachment (limited power to maintain and provide services to the property).

**Who pays the expenses? The life tenant or the remainderperson?**

* **If an act done primarily to benefit the remainderman, cost should be borne by capital; if for regular maintenance, responsibility lies with life tenant**
* **Life tenant**: heating costs, regular repair (ex. lawn care), content insurance, periodic taxes imposed on the land
* **Remainderperson**: repairs necessary for proper preservation of the building, insurance to benefit the remainderman (like to replace water heater)
* If mortgage is interest + capital, paid by **life tenant** but portion which contributed to capital to be reimbursed by **remainderperson**
* There is no obligation for a life tenant to insure premises or repair; **BUT** if life tenant refuses to repair, can be liable for waste. One method of managing this: placing legal title in hands of trustees and leaving instructions
	+ ***Trustee Act* s 8(1)** A trustee may insure against loss or damage by fire
	+ If regular steps are taken for regular maintenance and repair, that is paid for by income
	+ The trustee may insure against fire and take that premium out of the income
	+ Long-term benefit of the remainderperson is paid out of capital

British Columbia (Director of Civil Forfeiture) v Onn, 2009 BCCA 402

How does waste apply in this context? Why is it relevant in the context of a civil forfeiture case?

* This person no longer is the sole interest holder in the property. As a result, they are required to preserve the property under the terms of the order.

The doctrine of waste generally refers to conduct by either a life tenant or a leasehold tenant which permanently alters the nature of the property they occupy. **Waste consists of any act or omission which causes a lasting alteration to the nature of the land in question to the prejudice of the person who has the remainder or reversion of the land.** There are four types of waste recognized at common law:

1. **Ameliorating**: an act which results in an improvement to the property and is only actionable where the improvement results in an increased burden to the owner of the property
2. **Permissive**: where the tenant passively allows the property to fall into a state of disrepair, for example, where a house is allowed to fall into decay.
3. **Voluntary**: active conduct by a tenant which injures the inheritance of the remainder person or owner.  For example, by pulling down a house, felling trees, or in some way increasing the burden on the estate
4. **Equitable**: voluntary waste but of a more extreme nature, it is “wanton, malicious or unconscientious destruction”

**Held**: Referencing number 7(a): The court says that this is generally consistent with the doctrine of waste, but the last clause is insufficiently precise for the defendant to know what it is she must do. Rather a more appropriate measure of her obligations would require the defendant to maintain the property in the same condition it was in on the date the Director obtained the order.

Leasehold Estates

**Lease**: A leasehold is an estate. The right owned by the leaseholder is **the right to possess the land for a certain period (the duration of the lease)** – they are the holder of an estate, they have a property interest

* The fee simple/life estate holder, after carving out a leasehold estate from their larger estate, retains what is referred to as a **reversion**
* Once the lease is finished, the right reverts back to the landlord
* The life estate holder can also transfer the right to somebody else who would then become the lease holder, as soon as that right ends the property goes back to the life estate holder.

**Sources of landlord-tenant law**

* Common law applies to all tenancies
* Extensive statutory regulation of residential tenancies but not commercial tenancies, so for this, you can apply the common law.

5 Types of Leases

1. **Fixed term**
	1. May last for any interval
	2. Term must be certain in terms of its start and end date
	3. **Exception**: Valid if it has a stated fixed terminal date, but which may be ended prematurely on the happening of a specific event – ex. it's a 10 year lease that may be ended prematurely in the event that the Jets win the Stanley Cup, this is valid (defeasible an determinable interests are applicable here)
	4. Lease for life is not governed by that requirement because at common law, that is treated as a life estate
2. **Periodic tenancy**
	1. Tenancy enjoyed for some recurring period of time (ex. weekly, monthly, yearly)
	2. Generally, it continues until terminated by notice
	3. Common Law: notice required is the length of tenancy period (so if tenancy is one month, you need to give one month notice) (**exception**: 6 months notice required for yearly tenancy)
	4. Periodic tenancy may arise from inference, such as when tenant under fixed term lease remains in possession and pays rent that is accepted by the landlord
3. **Tenancy at will**
	1. Ex. over holding tenant – but with consent
	2. No set period or term, continues so long as the landlord and the tenant wish, but either can bring to an end by giving notice. (Liability for use and occupation, but money still has to flow)🡨 if there was no money, it would be a ***tenancy at sufferance***
	3. May convert to ***periodic tenancy*** if the tenant continues to pay rent and accept rent (still no fixed end term, but the end of the period just keeps getting re-uped)
	4. Can be created by implication (if so, terms of the original lease apply if compatible with new relationship)
	5. Can be ended by implication (i.e. conduct)
	6. Tenant liable for use/occupation
	7. Period of notice to terminate: reasonable notice – what constitutes reasonable notice depends on the circumstances/jurisdiction
4. **Tenancy at sufferance**
	1. Arises when a tenant remains on the premises without permission of the landlord after the termination of one of the other types of tenancies
	2. Not an actual estate (no right in the land)
	3. Non-consensual: doesn't produce a tenurial relationship
	4. Landlord can evict the tenant at sufferance at any time
	5. Tenant liable for use and occupation
	6. Different from tenancy at will: different notice, rights, etc.
5. **Perpetual lease**
	1. By statute or Crown grant **only**
	2. **Not permissible at Common Law** (no fixed term or stated period, no right of termination on notice, can last forever), but it can be created under a statute or a Crown grant
	3. An attempt to create a perpetual lease – unless by statute or by Crown grant – will create either a periodic tenancy or an outright sale of the property (with a monthly charge called a rentcharge)
	4. BUT lease can allow for a perpetual right of renewal
	5. Ex. leases given by the Crown to Railroad companies

Essential (substantive) requirements for valid lease at Common Law

In order to have a lease, you need to have a grant of exclusive possession (cf License). Identify:

1. **Grant of exclusive possession**
2. **Identification of parties**
3. **Identification of property**
4. **Identification of term**
	1. Max duration must be certain or ascertainable @ beginning of term of lease
5. **Identification of date of commencement**
	1. Can take effect in future
6. **Rent (if any) to be paid**
7. **Formalities Required (modified by statute):**
	1. >3 years:
		1. Need standard form asked for by Land Title office (**s. 5(1) *Property Law Act***) and need to present a document to tenant w the terms of the specific agreement (**s. 5(2) *PLA***)
	2. <3 years – none (Can be oral)
		1. Doesn't have to be in writing so long as there is “actual occupation under the lease or agreement”(**s. 5(2) *Property Law Act***)

Lease v License

**Licence**: permission to do that which would otherwise amount to a trespass

**Lease**: grant of an interest (property right, an estate that an individual holds)

**Key point**: did the parties intend for occupier to have right to exclusive possession?

**What distinguishes a lease from a licence?** (***Fantac***)

* Primary: **Tenant has a right to exclusive possession**; licensee does not
	+ **This is LAW** – question is one of substance, not form. The terminology used by they parties in describing their relationship is immaterial unless it helps decide if this is a right of exclusive possession – just because the agreement says it is a license, does not mean that this is the case
* Licenses can be revoked at any time
* **Key**: the intention of the occupier to have exclusive rights of possession – if that is what the parties intended, then it is a lease
* Indicators:
	+ **Rent** is an important indicator of intention to be legally bound
	+ Significance of **restrictions upon the use** to which the occupier may put the land: may have some restrictions that are not inconsistent with exclusive possession
	+ If it is found that there is **no intention to enter a legally binding relationship**, then there is no tenancy relationship established
	+ If tenancy is **precluded by statue** (not allowed under statute), then it is not a tenancy
	+ Consider **circumstances** under which occupation can be **terminated**: if right to possession can be cut off for reasons outside of what you do on the land itself, then not tenancy (ex. If there is occupation pursuant to an employment relationship)
* Need to look at whether the **party in fact** enjoys exclusive right of possession; situations where might not be (***Fantac***):
	+ a) Landlord reserves right to live on premises from time to time
	+ b) Landlord reserves right to let more people stay on property
	+ c) Owner provides service that requires frequent access by landlord
* \* Consider whether it’s realistic that the powers will actually be exercised (ex. if have lived there for 5 years and they’ve never been exercised then might just be smokescreen – it’s actually a lease, not a license)
* \* Even if agreement says “the tenant shall not have exclusive possession,” if that doesn’t reflect current situation because tenant in fact enjoys exclusive rights and was really meant to, then a tenancy will be found

Fantac Ltd (in liquidation) v. Commissioner of Inland Revenue

**Conclusion**: There was no exclusive possession/occupation granted here; therefore it was a license

🡪 Did the party enjoy the exclusive rights in this case? No.

Reasons why a landlord may want to characterize as a license instead of a lease:

**Class Discussion**

* Greater power/authority: landlord can evict whenever they want
* Licensee don’t have standing to sue in trespass: tenant would
* Licensees are more vulnerable: Right to revoke license may differ from how you can end a tenancy
* Licensees might not enjoy all the statutory protections available to residential tenants.
	+ BC: ***RTA***: protections apply to persons contemplated in the Act (ex. doesn’t apply to rooming house lodgers)
	+ In other provinces (ex. AB), tenant defined broadly – Tenancy Act can give broad protections, including for licensees

Obligations of Landlords and Tenants

Freedom to contract is the guiding principle in commercial leases.

Some terms are implied by common law (so parties can waive the application of these terms and can insert terms inconsistent with these terms 🡪 implied terms in the common law would be trumped by an express term in the K pertaining to the same matter)

1. **Covenant by landlord for quiet enjoyment** 🡨 EXAMINABLE
2. Covenant by landlord not to derogate from the lease
3. Covenants by the tenant to
	1. Pay rent
	2. Keep up and deliver premises in repair
	3. Pay certain taxes (not required by law to be paid by landlord)
	4. Allow landlord to enter/view state of the property

**(1) Covenant to Quiet Enjoyment**

**S 28 *RTA***: Protection of Tenant’s Right to Quiet Enjoyment:

**(a)** Reasonable privacy

**(b)** Freedom from unreasonable disturbance

**(c)** Exclusive possession of rental unit subject only to the landlord’s right to enter the rental unit in accordance with s. 29

**(d)** Use of common areas for reasonable + lawful purposes, free from significant interference

\***s. 4 *RTA***: who Act doesn’t apply to

* Often explicitly set out in leases/but regardless, will be implied at CL
* Definition = **peaceful occupation of the premises**
* Gives the tenant protection against substantial interference with the use and enjoyment of the premises by the landlord or others claiming under the landlord (**Ziff**, text)
	+ Substantial interference with possession includes:
		- **Direct physical interference** (i.e. *Kenny v Preen* – landlords’ threat to evict accompanied by repeated threats, shouting and knocking is a breach was found to infringe upon the right to quiet enjoyment)
		- **Indirect action in certain circumstances** (i.e. *Pellatt v. Monarch Investments Ltd* – studying for the bar exam and they were renovating her apartment. Court found that this was a breach – regular excessive noise may constitute a breach of quite enjoyment)
		- **May include regular excessive noise**
	+ Expansive definition: *Caldwell v Valiant Property Management,* (1997) 145 DLR (4th) 559: [A] breach of the covenant [of quiet enjoyment] should arise from any acts which arise in the tenant’s reasonable peace, comfort, or privacy being interfered with, whether due to liquids, gases, vapours, solids, odours, vibration, noise, abusive language, threats, fire, the total or partial withholding of heat, electricity, water, gas or other essential services, or the removal of windows, doors, walls or other parts of the rented premises.
* Covenant for quiet enjoyment doesn’t cover defects already present at the beginning of the term – paper thin walls don’t violate because extant structural feature (*Southwark v Tanner*)
* **Conflicting approaches as to whether disturbances by other tenants can result in breaches of right to quiet enjoyment** (**exam alert**: unsettled area of law):
	+ Disturbances caused by tenants in circumstances where the landlord could have taken action but didn’t constitute a breach of the right of quiet enjoyment (*Albamor Construction & Engineering Inc v. Simone, 1995 Ont*)
	+ Where tenants cause a disturbance, in order for a breach to have occurred, the landlord must have consented or actively participated (*Curtis Investments Ltd v. Anderson, 1981*)

**🡪 Which one would you adopt in BC?**

* + - 2nd approach could be okay if there was a very broad reading of ‘consenting to’

Southwark LBC v. Tanner (2001) HL

**Facts**: Tanners could hear all (normal!) sounds from neighbouring apartments – there was nothing in the tenancy agreement regarding a guarantee for sound insulation, but did agree to keep the structure “in repair” (neighbours weren’t being unreasonable noisy)

**Issue**: Was there a breach of the covenant of quiet enjoyment?

**Held**: NO. Covenant means living without interruption of possession – does **not** relate to actual “quiet” environment (i.e. freedom from noise). **Would need to demonstrate that there is substantial interference with the tenant’s possession**. Lack of soundproofing is an inherent structural defect for which the landlord assumed no responsibility.

Main theme of residential tenancy reform:

* Idea that it is important to rebalance the inequality of bargaining power between landlords and tenants – creating statutory conditions of a lease
	+ Greater security of tenure, increased notice periods and additional remedies for tenants
* Reform has lessened the preference for landlords in the common law
* Creates new form of dispute resolution

**Underlying theme**:

* Shelter as human right, not commodity (see UDHR art. 25(1); ICESCR art. 11.1)
	+ Strong theme in the 70’s-90’s

***Residential Tenancy Act,* SBC 2002, c. 78**

Go through it multiple time addressing different problems and different issues (class exercise)

In the act, if you have a lease but you want to get out of that lease before the term is up, instead of paying rent for every month that the landlord can’t find a tenant, can they replace that provision and just set up a flat fee for breaking the lease?

**This Act cannot be avoided**

**S 5** (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect

Concurrent Interests – Co-Ownership

**Where O (the grantor) conveys the same estate ‘To A and B and heirs’**

* Both of them have a FS at the same time in the same land
* As co-owners, each has the right to possess the whole estate

**BUT:** What happens when A dies? Does B own the entire property, or do A’s heirs step into A’s place and share the house with B?

Depends on:

1. What is the **form of the grant** (how is the grant created)?
2. What has happened since the grant was created (**subsequent events**)?

There are now 2 recognized forms of co-ownership:

1. **Joint Tenancy**
2. **Tenancy in Common**

**Joint tenancy** – think about the share as shifting across the current generation

**Tenancy in common** – think of the share as descending down to heirs/descendants

Common Law Presumption has been Modified by Statute in BC

Common Law **presumption in favour of joint tenancy** (see ***Bancroft***, Reader)

This presumption can be rebutted if you show an intention to grant a tenancy in common

Exceptions:

1. Where two plus people advance money on a mortgage, the CL would presume that was a tenancy in common
2. Partnership (business), the presumption of equity was that this was held as a tenancy in common
3. Where the purchase price is provided unequally, but the title rest was put in the name of one of those two people - sense of unequal contribution that has been made and the title is put in one individual

**Statute in BC** modified the presumption. Now: **presumption of tenancy in common** (except for trustees/personal representatives – presumption of joint tenancy)

In BC, this CL presumption of joint tenancy has been modified by **s 11(2) of the Property Act**.

* **In BC:** if land is transferred/devised to two or more persons – other than personal reps or trustees – the persons are presumed to be tenants in common unless a contrary intention appears in the instrument (i.e. unless it is expressly declared to be a joint tenancy)
* ***McEwen v Ewers & Ferguson*** (court applied the statutory presumption of tenancy in common was upheld regardless of the use of the word “jointly” in the grant)

Guidelines for Words Used and the type of Estate will result:

|  |  |
| --- | --- |
| **Words used:** | **Estate that will result:** |
| “Jointly and equally” | Tenancy in common |
| Words of distribution such as: “To be divided” or “equally” | Tenancy in common |
| Any intention to divide the property | Tenancy in common |

🡪 Shatters the fiction of the ‘one person/one bubble’

**In the absence of these words, it might rebut this presumption**

Re Bancroft, Eastern Trust Company Co v Calder (1936, Nova Scotia SC) – application of CL presumption

**Facts**: SB died, leaving a widow C, three kids (P, A and F) and one who predeceded him (M) who left two kids (Paul and J) and Paul died after a certain point leaving four kids (J, H, E and P)

Certain gifts were set out:

* The first share would go to C during her lifetime
* The other share would be invested and the income would be divided during the life of C into four equal shares (P, A, F and children of M)

When Paul passed away, was the money that was formally paid to Paul go to his kids, to his sister (J), or back to the estate?

* CL presumption is one for joint tenancy

**Issue**: Is there anything in the clause that rebuts this presumption of joint tenancy?

**Analysis**:

* Court looked to another clause which was clearly intended to benefit the grandkids of M AFTER C dies
* Court found that there are two different temporal situations: before C dies and after C dies
* In this specific temporal situation (after Paul dies and before C dies), the language did not displace the presumption of joint tenancy – the share that was formally paid to Paul would instead go to his sister, J, rather than Paul’s kids

McEwen v. Ewers & Ferguson – application of statutory presumption

**Facts**:

* Testator devised lot to his daughters Bertha and Janet under a will which stated that it was to become their property jointly and should they decide to sell the property each of them is to have an equal share of the proceed of the sale.
* Bertha predeceased Janet and by her will devised her half of the lot to the P, Robert.

**Issue**: Did the will create a joint tenancy or a tenancy in common?

**Application**:

* The Property Act in Ontario (very similar to s 11(2) in BC): an estate granted to two or more people will be a tenancy in common unless expressly declared to be a joint tenancy
* **Presumption:** Bertha and Janet have a tenancy in common
* **BUT, the word “jointly” was used – is this enough to rebut this presumption?**
* Class discussion:
	+ Seems that the word jointly wouldn’t be enough to rebut the presumption as a tenancy in common
	+ The second half of the provision comes into play somehow

**Held**: Court found that this leads toward a tenancy in common because with a joint tenancy, the property is held by ‘one person/one bubble’ and there are no distinct shares (this conception is a legal fiction). The discussion of the ideas of equal shares leans towards a tenancy in common. Therefore, Robert would get the share (in tenancy in common, it descends through the will) .

Four Unities

1. **Possession** (rights relate to same piece of property)
2. **Interest** (holdings equal in nature, extent, duration)
3. **Time** (holdings arise at the same time)
4. **Title** (holdings arise from same act or instrument)

For **Joint Tenancy**, must have **ALL FOUR UNITIES present** (**as well as the statutory presumption being rebutted**).

**If any one is not there** (destroyed or never established), co-ownership will be a **Tenancy in Common.**

All 4 unities **may be present** in a tenancy in common.

The **ONLY unity that is required** for **tenancy in common** is the **unity of possession**.

 **(1) Unity of possession**

* + **Each co-owner is entitled to possession of all the property** – subject to the equal right of possession of the other co-owners.
	+ I.e. if the grant specifies that A gets the East half and B gets the West half and they shouldn’t trespass onto each others’ side, there would not be unity in possession
	+ Choosing not to exercise the right to possession does not, by itself, destroy the unity of possession.

**(2) Unity of interest**

* Co-owners **must have the same estate in the land**, **equal share in that estate**, and each must have the same quality of estate (legal, equitable or both)
* If one person has a legal estate and the other has the equitable estate, unity of interest is not there

**(3) Unity of time**

* All co-owners receive their estates at the same time (vesting takes place simultaneously)
* Some exceptions (ie…remainder to children as joint tenants)
* NB: **s. 18(1) PLA**: can convey land to yourself jointly with another person
	+ Conveyance from A to “A and B”
	+ Allows A to achieve both unity of time and unity of title

**(4) Unity of Title**

* + Co-owners have to acquire their estates from the same instrument, whether will or deed (same grant or same will)

Joint Tenancy

Common to both joint tenancy and tenancy in common:

* All co-owners have an equal right to possession and use of the whole property
* Absent a court order, no co owner can exclude another co owner from possession
* Each co-owner can make *inter vivos* dispositions of his or her share in the undivided property (can transfer the property during their lifetime – by gift or sale)

**Joint tenants** constrained by the **right of survivorship**

* On death of joint tenant, their share of property goes to the surviving co-owner(s)
* The longest living of them ends up as the sole owner as that property

Once a joint tenant dies, his or her interest is extinguished, which increases the holdings of the survivors

* + 10 tenants = 10% interest each
	+ 2 tenants = 50% interest each
	+ 1 tenant = 100% interest

Requirements for a Joint Tenancy

1. Express declaration that grant/devise is to be in joint tenancy
2. Four unities
* Gives you right of survivorship

Severance of a Joint Tenancy (*Williams v Hensman*)

1. By one person acting on his or her own share (unilateral action)
2. By mutual agreement
3. By any course of dealing sufficient to indicate that the interests of all were mutually treated as constituting a tenancy in common

**(1) Severance through unilateral action**

* Any act that destroys one of the four unities brings the joint tenancy to an end
* **Ex1**: A and B are joint tenants. A conveys his property to C. What is the new co-ownership relationship between B and C? Tenancy in common – Time and title are both missing from being a joint tenancy
* **Ex2**: A, B and C hold jointly. C conveys to D. What are the interests? A and B in joint tenancy and D holds a 1/3 interest as the only tenant in common. The interests of A and B pass on survivorship and the interest D has will pass to D’s heirs
* **Ex3:** A & B are joint tenants. A conveys the property from A to A. What is the result? Why is this the case? They become tenants in common – a new title results (time and title are both absent) 🡨 A can do this in secret! B can have no idea that this occurred. There is a legislative provision that allows for this (**s 18(3) PLA**). **Think about whether you think that reform is necessary here…**

It is the onus on the party that is arguing that the joint tenancy has been severed to prove it (***Re Sorensen***)

Re Sorensen & Sorensen

**Facts**: Mr and Mrs Sorenson are divorced and they are joint tenants in the property and Mrs wanted to sever this. Did her actions sever the joint tenancy?

**Issue**: Did/does X sever a joint tenancy?

* **Settlement agreement**: no, didn't sever it (based on her course of action which showed that Mrs thought she had to do something else to sever the joint tenancy)
* **Granting a lease**: no, didn't sever it (because it wouldn't affect survivorship – it wouldn't extend beyond the death of one of the two parties)
* **Granting a mortgage**: no, didn't sever it (also wouldn't affect survivorship)
* **Trust deed (failed attempt to create a trust):** YES, found to sever the joint tenancy 🡪 the presumption of gift would apply (seen as a valid gift with beneficial interest in the property to the son)
* **Will**: no, not found to sever it (exception: if there are mutual wills where each party leaves their interest to the other person)
* **Bringing of action for partition** (subsequently discontinued)
* **Declaration of one party of intention to sever** (with no acts, no acceptance): declaring that you intend to sever does not sever it

Tenancy in Common

Common to both joint tenancy and tenancy in common:

* All co-owners have an equal right to possession and use of the whole property
* Absent a court order, no co owner can exclude another co owner from possession
* Each co-owner can make *inter vivos* dispositions of his or her share in the undivided property (can transfer the property during their lifetime – by gift or sale)

**Only the tenant in common can dispose of his or her share of the property by will** (sale of a property creates a shift in this ownership)

Requirements for a Tenancy in Common

* **S. 11(2) PLA (BC),** presumption of tenancy in common
* Unity of possession
* Interest devolves in accordance with general principles

**Creating a tenancy in common**

1. Express creation
2. Pursuant to the statutory presumption
3. Result of a failed attempt to create a joint tenancy
4. By operation of law

­­­­­­­­­­­­

Ending co-ownership

1. Can apply for court order (1) partitioning property OR (2) for its sale with a division of the proceeds
2. See Partition of Property Act, RSBC 1996, c. 347
	* S. 2(1): sets out that you can apply for a partition and sale
	* S. 4(1): who can apply for partition or for sale (joint tenants of a FS, profit au prendre, life estate or co-owners). If you want to seek partition, you have to have immediate right to possession in the land.
	* 7, 10

**🡪 Partition is NOT EXAMINABLE**

Servitudes over Property

**Servitudes**: **Non-possessory rights** that **burden the possessory entitlements** of an owner of a freehold or leasehold estates (property interests that don’t include a right to possession)

* Think of it as a barnacle – something that is on the right itself
* Example: easements (ex. the right of the owner of one piece of property to walk across the land of their neighbour – the owner of property A has the right to walk over the land of neighbour B. This is a non possessory right, it is a right only attached to property A that burdens the rights of property B)
* Also referred to as incorporeal hereditaments: intangible property right that’s **capable of being inherited/can be transferred**; gives right to make some use of or restrain certain uses of another’s land – rights that one person can exercise on property of another

***Sinclair & McCallum***: Servitude is a right that can be transferred that doesn't give somebody the right to posses the land of another, but gives the right to make some use of another’s land or the right to restrain certain uses

* The rights that one person can exercise on some else’s land (positive)
* Or that ability to prevent someone from doing something on their land (negative)

Easements

**Easements are property rights.**

**Positive easements**: give the owner of land (A) a right himself to do something on or to his neighbour B’s land (rights of way)

* To walk on someone else’s land
* To have drainage pipes on someone else’s land
* To take water from someone else’s land

**Negative easements**: give the owner of land (A) a right to stop his neighbour B from doing something on B’s land (right to light)

* Right to prevent the owner of property A to erect structures that would impact upon the light of property B
* Right to discharge cinders or soot\*
* Right to make excessive noise\*
* Right to emit noxious and offensive fumes\*
* \*Restricts what the owner of that property can do – they are restricted from taking certain actions against the other property owner (i.e. prevents the owner of property B from objecting to those nuisances committed by the owner of property A)

Neither positive nor negative easements can impose positive obligations on “B”

🡺 **Can’t impose positive obligations through easements**

***Positive or negative easement?***

* Right-of-way over nearby land - positive
* Use of a washroom – positive
* Receipt of light through a specific window – negative (gives the owner of the right to stop the neighbour from doing something)
* Right to commit a nuisance – negative (the obligation to suffer)
* Use of a drainage pipe – positive
* Access to a water well – positive
* Overhead power lines – positive (given trespass to airspace rights)

**Class Discussion**: **Few negative easements have been recognized; those that have are interpreted narrowly: why might this be the case?**

* Some remedies are already provided in torts through nuisance
* We want to main the freedom of property – we don't want to constrain actions
* Freedom of contract – but keep in mind that we aren’t really talking about contract rights; this is a property right that attaches to the land. Courts are unwilling to fetor the rights of property owners
* Liberty argument
* Overlap with restrictive covenants
* Takes away from the bundle of rights associated with a property
* General fear of making a property unsellable or sterilizing the property interest

Contrast: crossing someone’s property to get to a bike path

**(1) Trespass**: You can just trespass and go to the bike pass

**(2)** **Gratuitous licence** – ask your neighbour if you can pass their property (neighbour grants you permission to cross their land – this permission is revocable at any time without notice); You have no interest in your neighbours land; if the neighbour sells the land, the permission is automatically revoked and you have to ask for permission again

* Your neighbour may grant you permission to cross the land
	+ Revocable by neighbour at any time without incurring liability
	+ You have no interest in your neighbour’s land
	+ If your neighbour sells property to someone else, permission is automatically revoked

**(3) Contractual license** – your neighbour can charge you for a yearly licence. This can be revoked at any time, but the neighbour would likely have to pay damages if they revoked it early (court will ask what did you pay and what advantage have you had from the licence so far)

* + 10 yr licence for $100/yr
	+ Revocable by neighbour at any time (but must pay damages)
	+ Injunctions/specific performance are generally unavailable to you
	+ If your neighbour sells to a 3rd party, can only sue former neighbour if third party fails to respect the licence (privity of contract)
	+ If you sell to another party, the neighbour with whom you signed the contractual licence need not let the new party use the licence

**(4)** **Easement (Best Option)** – assumed permanent unless it is expressly limited by time. Here, you have a property interest. If your neighbour blocks your access, you can request an injunction. This easement is enforceable by all of your successors in title against all of the neighbour’s successors in title – the easement runs with the land.

* Your neighbour grants you an easement by deed
	+ You have a property interest
	+ It is assumed permanent unless it is expressly limited
	+ You can get an injunction if your neighbour blocks your access
	+ This easement is enforceable by all of your successors in title against all successors in title in your neighbour
	+ The easement runs with the land
	+ The benefit of the easement always runs with the dominant land and the burden of the easement always runs with the servient land
	+ Gives one person the right to do something over the land of another (positive easement), the key is that the other person still retains ownership of their land

Requirements for an Easement – *Re: Ellenborough Park*

**This common law test has been modified by legislation**

**1. There must be a DT and a ST (no easement in gross)**

* + **DT, dominant tenement**, is the land which enjoys the benefit of the easement
	+ **ST, servient tenement**, is the land which is burdened by, or subject to, the easement – the land over which the right is exercised
	+ **EXCEPTION**: But see **s. 218 Land Title Act (you can create an easement in gross – without a DT)**: **(1)** **person can and always was able to create in favour of** [govt, transportation authority, resource providers] **an easement w/o DT** – known as statutory right of way – for purpose necessary for operation + maintenance of grantee’s undertaking, including a right to flood 🡪 This section allows for the creation of easements without a DT.

**2. Different owners for DT and ST**

* At Common Law, the DT and ST can’t both be in the hands of the same person, they must be held by different parties (if the holder of the DT acquires the ST, the easement would disappear – common law doctrine of merger)
	+ **Why is this a common law rule?** Could lead to unfairness
* **EXCEPTION**: Changed by statute in BC: **s. 18(5-7) Property Law Act (you can grant an easement to one’s self)**
	+ Common ownership of a DT and a ST doesn’t extinguish an easement
* Advantage of creating easements before selling: helps to facilitate commerce

**3. Easement must accommodate DT**

* The easement must actually benefit the DT
* The right has to be connected with the normal enjoyment of the DT
* **TEST**: whether the easement makes the DT **a better and more convenient property**
	+ Ex. allowing to walk across someone’s land to have access to water – gives a benefit to your property by allowing your land to have access to this resource

**4. Capable of forming subject matter of grant (certainty)**

* **Ask:**
	+ 1. Is the easement sufficiently defined?
		2. Does it confer a right to possession inconsistent with the rights of the servient owner? I.e. Does it dispossess the servient owner of the land? Is it actually not an easement, and is it instead an annexation of the land itself for one’s own purposes?
* Rights under an easement **can’t be too vague**, must be sufficiently defined – there has to be clarity in terms of what the owner of the DT is allowed to do
* **Capable grantor and grantee** – a child can’t grant an easement; you have to have legal authority to grant an easement over somebody else’s land
* Grant **can’t require the servient owner to spend money**
* \*\*Grant **can’t confer a right to possession or control of the servient lands that is inconsistent with the possessory rights of the servient owner** – **Ziff**: there is no easement known to the law which gives exclusive or unrestricted use to a piece of land. Sometimes ask does the easement constitute a substantial interference with the use of the piece of property?
* The subject of the easement **must be acceptable to the courts** – a number of easements have been recognized by the courts, but they are reluctant to accept new ones
* Can’t grant an easement over land of a 3rd party; no easement gives unrestricted use of land

Re: Ellenborough Park (1955, England)

**Facts**: Park in England – 2 tenants in common own the Park and surrounding property. 1855, sold plots surrounding park (subdivisions). Vendors granted to purchasers, “the full enjoyment . . . in common with other [Ps] of the pleasure ground.” Each one would pay part of upkeep. If license, no interest. If easement, entitled to compensation for upkeep.

**Issue**: Is this an easement? Did they have a property interest in the park?

**Analysis:** Were the 4 requirements for an easement met?

1. Must be a DT and a ST (no easement in gross)
	1. All of the property owners who live around the park would be the DTs and the park itself would be the ST.
2. Different owners for a DT and ST
	1. Yes, the owners are different
3. Easement must accommodate the DT
	1. Yes, it is nice to have a park. The right to full enjoyment of the park makes it a better property. It makes it a better and more convenient property.
	2. If two properties are separated by a gap, how much of a gap can you have before it stops being acceptable? Court will ask if it is reasonably proximate.
4. Capable of forming subject matter of grant
	1. Yes – it doesn't exclude the possession of the owners of the park, it was well defined, it was commonly understood what this easement involved, there is nothing that is inconsistent with the owners’ possession of the park

**Found**: the owners of the land did have an easement in the park. They were able to get compensation from the war office.

Creation of easements:

**(1) By Express Grant (most common)**

* Where the owner of servient land expressly grants an easement over his/her land

**(2) By Express Reservation**

* Where the owner of a parcel expressly reserves the right to exercise an easement over another parcel of land
* Example: A owns property and wants to sell half to B – would include an easement over the portion of the land sold to B

Also possible to create an easement:

**(3) By implication of necessity**

**(4) Through the doctrine of estoppel**

**(5) By statute** (see **ss. 218, 219 Land Title Act**)

* **s. 218 *LTA*** (see above)
* **s. 219 *LTA*** registration of covenant as to use and alienation (from s.218)

Used to be the case that easements could be acquired by **(6) prescription**:

* No longer possible in BC due to **s. 24, Land Title Act**
	+ **S 24** All existing methods of acquiring a right in or over land by prescription are abolished and, without limiting that abolition, the common law doctrine of prescription and the doctrine of the lost modern grant are abolished.

Registration of Easements

* Easement must be registered (**s. 182(1) *LTA***)
* Easements transfer with the title (**s.182(2) *LTA***)

Termination of easements

(1) Express release (see **s. 241, Land Title Act**)

* Owner of the DT can cause an easement to be released by registering a discharge of the easement
* You require the consent of the party to terminate the easement

(2) Court order (see **s. 35(1), Property Law Act**)

* **S 35(1)(a)** – a person interested in land can apply to the court for an order to modify or cancel an easement
* **S 35(2)** – sets out the circumstances where the court would want to modify or cancel an easement

Robinson v Pipito (2014, BCCA)

**Facts**: Owner of the DT had the exclusive right to farm and recreational uses. Also the right to have free and uninterrupted access. The Grantor agreed not to erect or maintain any buildings or structures on the easement that would obstruct farm and recreational uses or access to and from the property. The Parties agreed that the Grantee shall have full rights to all timber in the Easement Area, including the right to remove timber and sell the same, and the Grantee shall retain any and all proceeds from the sale of such timber. The Parties agreed that the Grantee shall have full rights to all gravel and/or fill in the Easement Area, including the right of removal.

* Gut reaction that what was set out in this easement agreement was excessive

**Issues**: Is this a valid easement? Does the easement constitute a substantial interference with the use of the piece of property?

* This was a question because **an easement is not valid if it is inconsistent with the proprietary rights of the owner of the ST (part 4 of the requirements of the easement test)**
* Easement is not valid if the DT tries to **retain so much** that it is inconsistent with the possessory rights of the ST
* Gives a lot of different examples of different types of easements that have been considered before the court as to whether they were inconsistent with the proprietary rights of the owner of the ST

**Other cases the BCCA pointed to that dealt with similar issues**:

***Grant***: easement providing for the construction of a swimming pool and the exclusive use by the owner of the DT.

* Was this inconsistent with the proprietary rights of the owner of the ST so that the easement would be invalid? **NO**.
* The court found that this was okay as it only occupied a portion of the easement areas. The owner of the ST had some right to possess and use the balance of the easement area. Also, the owner of the dominant tenement would have no right to occupy the substantial portions of the easement area not used for the construction of a swimming pool (doesn’t seem to give the owner of the DT the right to exclusive possession of the strip as a whole).
* **An easement will be invalid where the owner of the DT has the right to exclusive possession of the easement area**

***Kassell***: easement permitting the owners of the dominant tenement to “fully use and to enjoy” an easement over the servient tenement “for their pleasure, for all purposes connected with the use and enjoyment” of the dominant tenement.

* Not found to be too broad.
* Although it contained no limitations, the express description of its purpose – to permit the owners of the DT to enjoy their property – limited the use that could be made of the easement.
* **The uses contemplated did not preclude the owner of the servient tenement from continuing to make such use of the easement area as did not interfere with the permitted uses**.

***Lund***: easement was seeking the DT to prevent the ST from trespassing on the easement area.

* The court did not look favourably upon an application, the effect of which would be to preclude the servient tenant from exercising rights ordinarily associated with ownership of the property.
* The nature of the permitted use of the land in the easement area was read so as not to exclude the owner of the servient tenement from that property. **The court held that the easement agreement should be interpreted in light of the rule that an easement could not convey rights equivalent to a grant of exclusive or unrestricted use of land for all purposes**.

***Prinsen***: easement agreement that gave the owners of the dominant tenement the right to garden in and landscape the easement area, despite the fact the right was to be exercised together with the owner of the servient tenement.

* Court found that this part of the easement to be **invalid because there is no way that the owners of the DT and ST could both landscape and garden the area. Therefore, the court excluded the DT from that use of the land.**
* You could essentially garden in all areas, so infringes upon the possessory rights of the ST.
* Also, only one person could actually *control the garden* in essence (i.e. landscape the way they wanted to).

**Ratio**:

* The courts have been loathe to invalidate instruments. They have sought to interpret grants in such a manner to **preserve some proprietary rights to the owners of the ST** – in a way that allows the owners of the ST to do certain things still. Where this cannot be done, then the court will invalidate the instrument

**Held**:

* Effectively would be a **full right of exclusion by the DT to the ST**
* Couldn’t be interpreted in such a way that allows the ST to do certain things
* The owner of the ST was effectively precluded from certain uses of their land
* From ***Clos***: the easement incapable of forming the subject-matter of a grant “because it neutralized the servient owners’ rights and left them powerless to control or influence what was to happen to their agricultural land.” 🡪 The grant here clearly has the same effect.
* What the party was trying to do was not really an easement – **they tried to hold back too much from the ST**
* Fails the FOURTH ELEMENT of our test

Restrictive Covenants

A **restrictive covenant** (agreement) is a condition in a contract for the sale of land which benefits the vendor by restricting the purchaser's use of the land in some way. Covenants are valid contractual undertaking made by a covenantor (who assumes the burden of the promise) in favour of a covenantee (who obtains the benefit)

* Covenants **benefit one party** (the covenantee) and **burden the other** (the covenantor).
* **Servient tenement**: land burdened by the covenant
* **Dominant tenement**: land that benefits from the covenant

They bind the party to the initial contract but they can also be used to create enforceable land rights, even to third parties

* Starts out as a contractual right, but **may become a property right** depending on the circumstances

Rights enforceable by one landowner against another landowner

**Different principles apply to covenants at law, and in equity**

🡪 If you want damages, you should sue in law.
🡪 The courts of equity would aim to mitigate the harshness of the common law (see rules around the enforcement of covenants.

* Injunction
* Specific performance

**Class Discussion**: Why create a restrictive covenant?

* Emotional attachment
* Conservation covenants: preserve the environmental value of the land itself
* Heritage covenants: restrict the abilities of individuals to do things to heritage properties
* Covenants that restrict the size of properties (in terms of square footage or height)
* Quite a powerful mechanism of control over the use of land – regulate the nature and quality of property development

**Ziff**:

* Discusses the impact of restrictive covenants on commercial developments
	+ When the land that hosts large stores (i.e. grocery stores) are sold, they cant be used to create another large store
	+ Example: Safeway stores in Edmonton – original lots remained empty and burdened with restrictive covenants that didn't allow another large food chain
		- Suppresses competition
		- Can contribute to a ‘food desert’ in certain areas
* Allow individuals to regulate commercial practices (To restrict land to certain uses)
* Regulate the nature and quality of construction in residential developments
* Preserve the character of the neighbourhood to enhance property values
* “Not in my backyard” behaviour
* Limits the abilities of cities to develop affordable housing properties in certain areas
* Could adversely effect personhood values – if you own a property that is burdened, you lose a certain element of self determination

**Ziff: Used to be used for racial and religious purposes** (to ban certain religious or racial groups from certain land areas)

* Examples: *Levitt Town*; *Re: Drummond Wren*
* These kinds of restrictive covenants were popular from 1910-1940’s

**BUT**: See **s. 222, Land Title Act (BC):** you can’t create restrictive covenants based on race or religion

* Doesn't mean that these covenants no longer exist on land (they are preserved on the record), but that they are of no force or effect
* Led to a push in the US for legislation to be introduced for these types of covenants to be PURGED whenever property changes hands

**Class Discussion**: Should this be undertaken in BC or Canada?

* If it is already legally void, no need to rewrite that out
* For purposes of clarity, the historical record could be maintained

*Levitt Town, 1947* (not a case, just an example)

**Facts**: Community that refused to sell land to African Americans

The "**restrictive covenant**" in the original rental agreement, which migrated to the sales agreement, stipulated that houses could not be rented or sold to any but members of the "Caucasian" race. The Levitts did not undertake efforts to counteract the racial homogeneity of the suburb and thus the racial composition of Levittown did not change. By 1960 Levittown was still a completely white suburb. Only well after the 1954 racial integration decisions, including *Brown v. Board of Education*, was Levittown racially integrated, and even as late as the 1990 census only a tiny fraction of the community was non-white, a stigma that still exists until this day.

Re: Drummond Wren (1945)

**Facts**: Dispute in Drummond concerned a residential lot in Toronto that was subject to a restrictive covenant that the property could never be sold to Jewish people or “persons of objectionable nationality”. Wren applied to the court for a declaration that the covenant was invalid.

**Held**: Order granted:

* Covenant void for uncertainty
* Void as a restraint on alienation
* Void as being contrary to public policy

Restrictive Covenants in Law vs. in Equity

Dealt with in both courts of law and courts of equity:

🡪 If you want damages, you should sue in law.
🡪 The courts of equity would aim to mitigate the harshness of the common law (see rules around the enforcement of covenants.

* Injunction
* Specific performance
1. Has the benefit of the covenant run to the claimant in law or equity?
2. Has the burden of the covenant also passed to the defendant in law or equity?

🡪 Must be symmetry between running of benefit and burden.

* If the claimant is suing at law, have to show that the defendant is subject to the burden at law
* If the claimant is suing at equity, have to establish that the burden has passed in equity… (?)

Restrictive Covenants at Law

**(A) Benefit runs only if**:

1. Successor in title of covenantee holds same estate as original covenantee (i.e. successor in title holds a fee simple)
2. It was intended that the covenant would pass automatically – that it runs with the land (covenant can’t be one that was only intended to be applicable to the specific convenantee – has to be able to pass)
3. And the covenant “touches and concerns the land” (as opposed to just conferring a personal benefit to the covenantee (i.e. is directly related to its use)
* Benefit runs whether the covenant is positive or negative in nature.
	+ Positive covenant = covenant obliging a party to do something
	+ Negative covenant = promise not to do something
* The land has to be described adequately
* The party has to actually have an interest in the land in order to bring a suit

**(B) Burden does not run at law:** (regardless of whether they are positive or negative)

* Burden can only be enforced against the original covenantor

**EXAMPLE**: V sells land to P but carries on business on land retained. P covenants not to carry on same business

* V = covenantee (has benefit)
* P = covenantor (has burden)
* Successor of V (V1, V2, V3…) can enforce against original P if benefit runs
* P sells land to P2 – V can’t enforce against P2 (burden doesn’t run in law)

\*\***Remedies at law only apply when a new owner of the benefited land tries to bring a suit against the original covenantor** (i.e. V1 or V2 or V3… against P)

**EXCEPTIONS to rule that burdens do not run in law:**

* Modern condo laws
* Conservation legislation
* Exception to running of burden of negative covenant overcome in equity (our focus)
* More in ***Amberwood*** case

Restrictive Covenants in Equity

**(A) Benefits run only if:**

1. P holds interest in DT (same estate)
2. Benefit intended to run with the land (generally as long as it is clear in the context of the transfer that the benefit will pass to successors in title, then this condition will be satisfied)
3. Benefit must touch and concern the land (capable of benefiting the owner of the dominant land)
* Covenant has to benefit the land itself, as distinct from conferring a personal benefit to the covenantee
* Has to affect the use or value of the land

**S. 18(1), Property Law Act** – owners of DT and ST don’t have to be separate people

**(B) Burden runs only if:**

1. Negative **in substance**
	1. It cannot impose a positive obligation to do something on the ST, but must restrict activity
	2. Terms that seek to regulate or restrict the class of acceptable purchasers or occupiers have been held not to meet the touch and concern requirement
	3. **EXCEPTION**: see **s. 219, LTA**
	4. Only restrictive covenants will be enforced
	5. Not concerned about the form of the words and how things are drafted, but **about the duties imposed**) – see *Tulk v Moxhay*
2. Burden must be **intended to run with covenantor’s land (ST)** and the **ST must be sufficiently described**
	1. Can’t be a personal promise between one person and another person, has to be able to run with the land itself
3. Covenant **“touches and concerns”** (taken for the benefit of**) the dominant lands** (see **s. 219, LTA**)
	1. **Two main questions:**
		1. **Is it reasonably proximate (distance wise)?**
		2. **Is there a benefit for the dominant lands?** Does it impact the land or the business operating on the land? **Does it effect the mode of occupation of the land, the value of the land?**
	2. **Found to be OKAY**: if a covenant restricts a property to residential uses, covenants that preserve the land for the use of amenities, covenants aimed at restricting competitive business practices (but policy considerations are important here)
	3. **Found to FAIL** this requirement: covenants that regulates or restricts the class of acceptable purchaser or occupiers (**section 222, LTA**)
	4. **You don't have to have a DT in certain contexts** (one of which is the preservation of natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value) (**s 219 LTA**) – the public may be the ones who benefit in these cases.
4. Burden **runs only in equity**
	1. Consequence: all the limitations that exist in the context of equity would apply.
	2. If you don't have **notice** (bona fide purchaser for value without notice), then you wont be found to comply with this covenant
	3. **Deeming provision** that helps deal this issue – will look at in a few classes

Tulk v. Moxhay (1848) UK (p. 797) **Negative covenant running with the land**

**Facts:** Idea at the time of protecting land was to prevent further purchases to do whatever they wanted with the land. Vendor wished to maintain open space in Leicester Square, London for the enjoyment of the surrounding property. In 1808, the Vendor of several parcels of land in Leicester Square sold a plot to another party, making a covenant to keep the Garden Square "uncovered with buildings" (i.e. not to build). Over the following years the land was sold several times over to new parties, eventually to the defendant. The vendor retains some plots around the square. Successor in title of D takes with notice of 1808 covenant in 1845, proposes to build in defiance of it (refused to abide by the covenant as he claimed he was not in privity of contract and so was not bound by it). Vendor able to get an injunction in the court of Chancery: birth of restrictive covenants

**Issue:** Is D bound by convenant? Should the Defendant be allowed to use the land in a manner inconsistent with the contract entered into by the individual who sold Defendant the land, when the Defendant had notice of the restriction?

**Ratio:**

* Covenants are allowed to create new interests in the land, contrary to the normal presumption of the opposite
* Running of burden in equity requirements
	+ Covenant must be negative in substance
	+ Must have been intended that the burden was to run with covenantor’s land, not just a contractual term
	+ All general principles of equity apply (including notice rules)
	+ Must have been made for + benefit, land retained by covenantee (touch + concern), which land must be easily ascertainable from the covenant document

**Held:** D bound by covenant (he had notice of it when he purchased the land)

Amberwood Investments Ltd. v. Durham Condominium Corporation No. 123 (2002) ONCA

**Facts:** A developer, WHDC Harbour Development Corporation, owned two parcels of land that they divided for separate condominium complexes to be built upon. D bought one of them before the other lot had been purchased. Both complexes were to share a common recreational facility and park + share the costs. WHDC agreed to subsidize Durham for the expenses until someone purchased the other

P eventually purchased the other lot, and agreed to pay the costs. They did so for a while, but then stopped and stated that positive covenants cannot pass with a transfer of land.

**Main legal issue**: Can the burden of this positive obligation run at law?

**Held**: Burdens cannot run at law. But the OCA does engage in a detailed discussion about whether the common law rule (equity rule of burdens running with the land) should be maintained.

**Secondary Issue**: Should the common law be reformed to permit the burden of affirmative (positive) obligations to run upon a transfer of land? If so, in what contexts?

* The law should be reformed, but it should be a decision of the legislature, not the courts (majority)
* If you know what you are getting into, you should be held to that in law
* BUT, a covenant is a contract between two parties, so if the contract no longer exists, the party shouldn't be held liable for the contractual obligations
* Consistency could be considered as something that may be beneficial to have
* There are many ways around this rule – is this artificial then?
* Considers some of the reasons why positive covenants haven’t been allowed to run with the land in the past: might make land more difficult to sell (burdening the free flow of property), concerns about people who buy a property and whether they know about the covenants

**Exceptions to the rule** that positive covenants do not run with the land brought up by the OCA

1. Applicability of ***Halsall v. Brizell***exception: **If you receive the benefit of a deed, you must take it subject to its burden** – takes fairness into account
	1. The impact of this would be that every single positive covenant runs and supplant the common law rule – but the court found that they need to consider this more narrowly
		1. There has to be a linkage between the benefit and the burden
		2. It must be possible (at least in theory) to reject a benefit
	2. OCA says that this exception shouldn’t be applicable – **has been cited with authority in BC and can be applied in BC**
2. Availability of **conditional grant exception**: similarity between the first exception. As a determinable interest in the sense that the benefit that you receive is itself limited by the condition, and if that is the case, there isn’t really a positive burden that passes but that any benefit that passes is limited in some way
	1. If the granting of a benefit is conditional on assuming the positive obligation, then the benefit is itself limited

Invalidity of Covenants

* If all the requirements are not satisfied, then the covenant is not valid
* If the covenant can be seen as posing too much of a restraint on alienation, then it can’t be valid
* If it is contrary to public policy
* If it is **contrary to statute (s. 222, LTA)**

Termination of Covenants

* Passage of time
* The benefited owners or owners might agree to terminate the agreement
* Unity of ownership & possession\*\* (**not in BC** – see **s. 18(1), Property Law Act**)
	+ In the common law, if the DT and ST became owned by one person, that would terminate the covenant (analogous to what would happen in easements)
* Legislation (**see s. 35, Property Law Act**)
	+ **(1)(e)** Court may modify or cancel charges – can apply to the supreme court to terminate the covenant.
	+ The court will look at a number of circumstances under **s 35(2)**

Succession

**Intestate Succession:** When someone dies and there is (1) no will; or (2) the will does not mention a specific piece of property

***Wills, Estates and Succession Act,* SBC 2009, c. 13**

**Part 2: Divisions 1 and 2 (Meaning of Spouse; Survivorship Rules)**

Survivorship Rules

* **Doctrine of Lapses**: a gift to a beneficiary who predeceases a testator (dies before the testator dies) will lapse, it will not pass to the beneficiaries estate. But a gift to a beneficiary who survivors the testator (even for a very short period of time) will take effect and pass to the beneficiaries estate.

**EXAM**: if claiming entitlement by virtue of gift, you have to prove that the beneficiary didn’t die until after testator died

**From X to A, then to B**. What happens if A passes away before X? All of A’s heirs would never receive this property; it would pass straight to B when X passes.

* **Common law**: in these situations, you must bring proof about the order of death
	+ Ex. Shipwrecks – led to circumstance where it couldn't be determined to whom the property should flow to
* **Statutes** had to step in because of the difficulty of being able to provide poof
	+ First presumption: people were presumed to have died in order of seniority (oldest to youngest)
	+ **New approach**: presumes the testator has survived the beneficiary (I.e. the beneficiaries gift would have lapsed)

**Fundamental Rule - when persons die simultaneously** (or uncertain who died first)

**S 5(1)** unless contrary intent is in the instrument, rights to property determined as if each survived the other(s) (this presumes that beneficiary dies before the testator)

**S 5(2)** joint tenants considered tenants in common (A’s property goes to A’s heirs + B’s property goes to B’s heirs)

**General Presumption – Disposition of Property on Simultaneous Deaths**

**S 6** – can opt out of **5(2)** by declaring contrary intention – gives deference to instrument that provides for how that property should be disposed of (if the instrument provides for the disposition of property in uncertain circumstance, and uncertain circumstances of death occurs, the event for which the instrument provides is conclusively deemed to have occurred)

* Example: “property will go to X if Y dies before Z” – Y + Z die in circumstances that make it unclear which of them survives the other – because of s. 6, it is deemed that Y did die before Z, so X would get the property interest

**Survival of Beneficiaries**

**S 9(1)** if inheritance by beneficiary conditional on them surviving another, and it is uncertain which dies first or both die at the same time, the beneficiary is presumed to have died first

* Example “to A as long as A lives longer than B,” dies at same time, A deemed to have died first

**S 9(2)** multiple beneficiaries, all die, unclear who died first, unless contrary intent declared in instrument, divide property equally between the 2 or more beneficiaries and distribute to those who would have got the share in event that each had survived

* Example A gives gift to B + C for life, then to survivor of them🡪 gift shared equally between B+C’s successors

**Five-day Survival Rule**

**S 10** – gift will only take place if beneficiary survives 5 days longer than testator – this 5 day period will apply even if you express a contrary intention (BUT you can make the period longer if you want)

**Spouse but no descendants**

**S 20** If a person dies without a will leaving a spouse but no surviving descendant, the spouse gets everything.

**When a person is a spouse under this Act**

**S 2**  (1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and

(a) they were married to each other, or

(b) they had lived with each other in a marriage-like relationship for at least 2 years.

**S 2** (2) Two persons cease being spouses of each other for the purposes of this Act if,

(a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 *[Property Division]* of the [*Family Law Act*](http://www.bclaws.ca/civix/document/id/complete/statreg/11025_01), to arise, or

(b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

**S 1** **"descendant"** means all lineal descendants through all generations;

**Spouse and Descendants**

**S 21(2)** – if have spouse and descendants, spouse gets household furnishings (personal property usually associated with enjoyment by spouses of spousal home) and preferential share (meaning of “preferential share” depends on whether all of the descendants are both of theirs)

**S 21(3)** – if all descendants are the kids of the intestate & the spouse, the preferential share is $300k

**S 21(4)** – if not, preferential share is $150k

**S 21(5)** – if net value < preferential share, spouse gets entire value

**S 21(6)(b)** – after spouse gets preferential share, of remainder, spouse gest ½ and descendants get ½

🡪 (I.e. if there are 3 kids, the spouse gets 3/6 of the estate and the each child would get 1/6)

**Example**: A and B have three kids, C, D and E. The estate is worth $500,000. A dies without a will, and B gets a preferential share of $300,000 and also half of the remainder. C, D and E get the rest. If C dies with two kids C1 and C2, the kids would get C’s portion of the estate.

**Per Stirpes**: each branch of the family receives an equal branch of the estate.

**Two or more Spouses**

**S 22(1)** – if more than 1 spouse, they divide spousal share among themselves. If they can’t agree, Court will determine how it’s split



**No Spouse but Intestate Leaving Descendants or Relatives**

**S 23(1)** – have to die without a will AND without leaving a surviving spouse

**S 23(3)** beneficiary must be 4th degree or closer relationship to intestate (otherwise deemed to have predeceased intestate 🡪 BUT this requirement doesn’t apply to descendants (you can be a higher than 5th degree if you are a direct descendant) (**23(4)(a)**) or the right of persons 5th degree or further to apply under Escheat Act on basis of moral or legal claim (**23(4)(b)**)

**S 23(2)** subject to (3) and (24), estate distributed:

(**a)** to descendants

**(b)** if none, to intestate’s surviving parent(s) in equal shares

**(c)** if none, to descendants of intestate’s parent(s)

**(d)** if none, but intestate survived by grandparent(s) or descendants of grandparent(s),

**(i) + (ii)**: half to grandparents on either side in equal shares (1/4 ea); BUT if missing surviving grandparent on that side, all of that ½’s share, to the one grandparent on that side or to descendants of those grandparents 🡪 ½ to ea side to be split among that side

**(e)** if none, but survived by great-grandparent(s) or their descendants, apply same as in (d)

**(f)** if none, whole estate goes to govt under *Escheat Act*

**S 23(5)(a)** degrees of relationship computed by calculating upward from intestate to nearest common ancestor of intestate and his/her relative, and then downward to the relative (Use Parentelic Chart)

**S 23(5)(b)** relatives of half kinship (ex. ½ brother) inherit equally w those of same degree of whole kinship

**Distribution to Descendants**

**S 24(1)** property divided into equal shares equivalent to number of:

**(a)** surviving descendants, and

**(b)** deceased descendants who have left descendants surviving the person, in the generation nearest to the intestate that contains 1 or more surviving members

* Example: A has 3 children: B,C,D; B has 2 kids: B1, B2; B passes away🡪B1 + B2 split B’s share of the will

**S 24(3)** distribution to descendants under (1) as a result of intestate’s parents having predeceased them ends with children of a sibling of the intestate

**Spousal Home**

**SS 26-35** set out mechanism through which spouse acquires interest in spousal home

**Adopted Children:**

* Become descendants of individuals who adopted them (**s. 37 Adoption Act**)
* Once adopted, cease to be descendants of pre-adoption parents (exception: step-parent adoptions) – **s. 3 WESA**

**Vesting of property on death**

**S 102**  (1) On the death of a person, the deceased person's estate vests in the court if

(a) the estate is an intestate estate, or

(b) an executor is not named in the deceased person's will.

(2) The estate of a deceased person vests in the person's personal representative when the personal representative assumes or is appointed to that office.

**Priority among applicants — intestate estate**

**S 130**  If a person dies without a will, the court may grant administration of the deceased person's estate to one or more of the following persons in the following order of priority:

(a) the spouse of the deceased person or a person nominated by the spouse;

(b) a child of the deceased person having the consent of a majority of the children of the deceased person;

(c) a person nominated by a child of the deceased person if that person has the consent of a majority of the deceased person's children;

(d) a child of the deceased person not having the consent of a majority of the deceased person's children;

(e) an intestate successor other than the spouse or child of the deceased person, having the consent of the intestate successors representing a majority in interest of the estate, including the intestate successor who applies for a grant of administration;

(f) an intestate successor other than the spouse or child of the deceased person, not having the consent of the intestate successors representing a majority in interest of the estate, including the intestate successor who applies for a grant of administration;

(g) any other person the court considers appropriate to appoint, including, without limitation, and subject to the Public Guardian and Trustee's consent, the Public Guardian and Trustee.

**Special circumstances**

**S 132**  (1) Despite sections 130 and 131, the court may appoint as administrator of an estate any person the court considers appropriate if, because of special circumstances, the court considers it appropriate to do so.

(2) The appointment of an administrator under subsection (1) may be

(a) conditional or unconditional, and

(b) made for general, special or limited purposes.

The administrator of an estate does many things:

* Set up funeral
* Find estate
* Advertise in newspapers for creditors
* Sell assets that need to be sold
* Locate family members who may be heirs to the estate
* Take care of tax
* Create estate account, pay debts, pay themselves
* Any money left over is paid out to the heirs (s. 23)
* Report to the relatives what happened

Land Title Registration

A thief (T) fraudulently sells an owner’s (O) property to a buyer (B). T vanishes. Out of O or B, who should bear the loss?

**Key Themes**: Efficiency of property transactions versus justice and fairness to the original owner of the property

**Bona Fide Purchasers for Value Without Notice**

* Individual who purchases a property (gives money or some sort of consideration)
* Bona fide: they acted in good faith
* Purchaser for value: you are paying something (you purchase the property, it isn’t being given as a gift)
* Without notice: they had no actual or constructive notice that that the other interest existed
	+ Notice is a common law doctrine

Four conflict permutations:

**Bona Fide Purchasers for Value Without Notice** – conflicts were dealt with through the combined effect of legal and equitable principles.

1. Legal interest followed by legal interest
2. Legal interest followed by equitable interest
3. Equitable interest followed by legal interest
4. Equitable interest followed by equitable interest

**Mortgages terminology**

**Mortgagor**: the person borrowing the money. In exchange for this loan, they grant a mortgage of the property

**Mortgage**: the security for the loan

* It used to be the case that the actual interest in title would be transferred from the borrower to the lender. Once the loan was repaid, you would get your deed back.

**Mortgagee**: the person lending the money. They receive the mortgage of the property – the security for their loan (the title to the property as security). When the loan is repaid with interest, the title goes back to the original owner.

* Legal mortgage: complete and full interest
* Equitable mortgage: mortgages that satisfy basic criteria, but fail to satisfy the criteria for a legal mortgage (most commonly, they fail to include a legal description of a property)

(1) Legal interest followed by legal interest

**Principle**: *nemo dat quod non habet* (you can’t give what you don't have)

**Principle**: *Caveat Emptor* (buyer beware)

**Example #1** : (Blackacre is a standard term for a piece of property)

* A owns Blackacre in fee simple
* A sells Blackacre to C (who moves in).
* A had already sold Blackacre to B (prior to sale to C).
* Who gets the property? B or C?

A has already transferred all they own to B – A had no property interest to give to C.

**The first legal interest prevails – first in time is first in right**.

**Example #2:**

* A is the owner of Blackacre in FS absolute
* A grants a legal lease of the land to B for a period of 10 years
* Later, A sells the freehold to C. Assume C is unaware of the existence of the lease

**C is, a *bona fide* purchaser for value without notice (is the owner)**

**Even so, C will be bound by B’s pre-existing lease.**

(2) Legal interest followed by an equitable interest

**General principle**: legal interest takes priority over a subsequent equitable interest

Northern Counties of England Fire Insurance v. Whipp (1884)

**Facts**: Crabtree (rogue) is the manager of Northern Counties and the property owner. A legal mortgage is granted first to Northern Counties. Crabtree then executes an equitable mortgage in favour of Mrs Whipp. She has no idea that there has been an previous mortgage.

**Issue**: Which mortgage takes priority?

**General principle**: legal interest takes priority over a subsequent equitable interest

**In what circumstances will a court postpone the legal interest in favour of a subsequent equitable interest?**

* The court decides that the **court will postpone the prior legal estate for a subsequent equitable estate when there has been** **FRAUD by the owner of the legal estate (assisted or connived at the fraud)**
* **Carelessness or a lack of prudence is not enough** to disrupt this general principle

**Held**: Northern Counties may have been careless, but they hadn’t actually committed fraud. The general principle applies and Northern Counties’ interest prevails over Mrs Whipp’s equitable interest.

**NB:** This analysis comes into play **regarding questions of bankruptcy** – priority in interests is key

(3) Equitable interest followed by a legal interest

**General Principle**: An equitable interest is not enforced against a bona fide purchaser for value without notice of a legal estate (**O’Connor**)

**Constructive Notice (Common Law):** prompted by the perceived need to give purchasers an incentive to seek out information about prior interests.

* Rationale for encouraging buyers to seek notice: if purchasers are affected by notice **only of matters which have actually been brought to their attention** they will take care to **avoid acquiring such information.**

**The purchaser of the legal estate has priority**

* If an equitable interest is granted then a legal interest is subsequently granted, the legal owner has priority as long as they are a bona fide purchaser for value without notice
* **BUT,** an **equitable interest will be enforced** in a number of circumstances, including **when the legal estate had notice of the prior equitable estate**
	+ Connected to questions of justice, and fairness and fraud
	+ Emerged as solution to proving the element of fraud
	+ Notice: Define objectively verifiable circumstances in which fraudulent intent could be inferred
	+ Thought to be acting contrary to good conscience
	+ Link: **notice** to **fraud**

Chippewas of Sarnia Band v. Canada (2000)

**Facts**: aboriginal leaders purported to sell land to Malcom Camron. In 1853, letters patent were issued to Cameron – a **valid surrender hadn’t actually happened** (AT inalienable, except to the crown). The result to this is that title hadn’t actual passed from the band to Cameron through the vehicle of the Crown. This was discovered about 150 years later. In the intervening periods, the lands had been subdivided and sold numerous times.

**Issue**: What was the correct state of title? Should the Chippewas of Sarnia Band have their lands returned on the basis of the *nemo dat* principle (that one cannot transfer what one does not have)? Or should the lands remain in the hands of the innocent purchasers?

**Held OCA** (it has discretion in terms of the remedies they could grant):

* AT is *sui generis*, reflecting the interaction between the traditional aboriginal values and those of European settlers, and consequently AT is not classified in the conventional categories of the English CL tradition.
* This case invokes dual public and private law dimensions of property and AT
	+ Allows for wider remedies to be considered (i.e. not just common law remedies, but equitable as well)

**Remedies and Equitable Defences:**

* Court found it was appropriate to apply the defenses of “laches” and acquiescence. Delay in bringing the lawsuit either constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable.
	+ “We are of the view that the Chippewas not only knew that the lands had been given up but actively acquiesced in the transfer by seeking and receiving payment of the proceeds.”
* **Court focuses on the equitable doctrine of bona fide purchaser for value** (a good faith purchaser for value should be protected) – protect the truly innocent purchaser who buys land without knowledge of a previous claim by another owner and to protect the security of title to land (those who bought land from Malcom Cameron)
* Did Cameron have knowledge that the Crown didn't actually secure surrender of the lands from the band?
	+ TJ found it arguable that Cameron had knowledge of the failure of the Crown to secure a proper surrender of the lands, there was no evidence to suggest that any subsequent owner knew or ought to have known that the Cameron lands were unsurrendered Indian lands.

**Held**: Despite the fact that the Chippewas of Sarnia Band never formally surrendered their lands, these lands cannot be returned on the basis of both delay and the landowners’ reliance on title

Criticism of the Application of the Equitable Doctrine (J Reynolds)

Court’s application of the equitable doctrine of bona fide purchaser for value without notice has been subject to criticism:

* Doctrine only applies if the interest being defeated is equitable rather than legal
	+ But the interest being defeated (AT) can’t be seen as an equitable interest or legal (AT is unique), therefore no justification for this doctrine.
* Doctrine only applies if the interest being given priority is legal rather than equitable
	+ Concern that since the letters patent (land grant to Malcom Cameron) was made in breach of the RP, it couldn't actually be seen as a legal interest
* Doctrine is an exception to the basic rule of both equity and law that interests in land rank in order of creation.
	+ Neither is a valid extinguishment nor surrender on the facts of the Sarnia case and the CA did not apply that test 35(1) of the *Constitution Act,* 1982.
* Doctrine is not an exception to the *nemo dat* rule “cannot create title where no title exists”
* Court seems to confuse the equitable nature of the remedy sought with the nature of the interest of the claimant
	+ What we are concerned with is interests, not remedies

**NB**: This case gives an opportunity to apply these permutations and think about how priorities are structured and how they should be structured.

(4) Equitable interest followed by an equitable interest

**General principle:** if the relative merits of the claim are equal, whoever got it first gets priority

Rice v. Rice (1853)

1. Court examines the relative merits of the claims, considering all of the circumstances
	1. Nature of interests
	2. How did they acquire the interests
	3. Conduct of the parties
2. If equal, priority of time determines priority

Indefeasible Title and Fraud

FIVE main stages in conveyancing practice

**Conveyancing practice**: the process of transferring legal title to freehold property)

1. **Medieval era**: the ceremony of livery of seisen (idea of recording the transfer of property)
	1. The title rests in community memory
	2. The law is characterized as a performance or ritual
	3. Any documents that might have been used would confirm the transfer, not actually constitute the transfer
2. **Early modern** (after the Statute of Uses)
	1. Widespread shift to documentary modes of transfer
	2. Doesn't actually confirm the transfer, it CONSTITUTES the method of transfer
	3. It can be done privately
	4. The law makes assumption as to who the parties are (i.e. must have been literate)
	5. Process of examining a chain of documents
	6. **Paramount principle: Caveat Emptor (buyer beware)**
	7. The purchaser has to look a the documents that constitute transfers and interpret them to ensure that they are getting good title
3. **18th century**: concern during this time that the stated title should be publicly known
	1. Registry acts start to be passed in various jurisdictions
	2. Becomes quite common in certain colonies
	3. Enhanced role of the state in ensuring that the state of title is publicly known (for tax and security of title).
	4. Registration is voluntary – so never actually perfectly reflects the state of title
	5. An attempt to create a record and repository of documents
	6. Instead of being held by an owner, they are held in a public place
	7. Gov’t record replaces the private practice of assembling the record
	8. But registration doesn't say anything about whether the documents are valid or invalid
4. **19th century:** advent of the Torrens system
	1. Registering is not a set of documents, you are actually registering title
	2. The purchaser should be able to go to he public registry to look at a document for a piece of land and find out the true state of the title
	3. The gov’t actually plays a role in guaranteeing the title
5. **20th century**: transition in some jurisdiction moving from registry act system to a Torrens system
	1. A register of land holdings maintained by the state guarantees an indefeasible title to those included in the register.
	2. Land ownership is transferred through registration of title instead of using deeds.

Deed Registration Systems

* **Registry office is a depository**: office assumes no responsibility for ensuring the substantive delivery of documents
* **Registration is not mandatory**: unregistered documents remain valid according to their own terms, but there is an incentive to register because of the possibility of losing out to subsequent registrants
* **Many overriding interests take effect in spite of not appearing in chain of title**:
	+ Ex. Adverse possession
	+ Ex. Prescriptive easements: those that are acquired over time
	+ They wouldn't appear in the chain of title, but they would attach to the property
* Search conducted by **purchaser’s solicitor** must be done every time the property is sold (must search chain of title back 40/60 years)

**Three types of Deed Registration Systems:**

Ex: A sells house to B, who does not register the sale. A then sells house to C, who registers the sale all the while knowing of the previous sale to B

1. **Race to register:** The first party to register gains priority to the property
	1. If there is notice, it is irrelevant
	2. In the example, C gets priority
2. **Notice:** priority is ranked on the basis of whether a subsequent transaction was entered into with notice of a prior transaction
	1. In the example, B would get priority because C had notice of B’s interests
3. **\*Race-notice** (most common): the first person to register has priority provided that they didn't know of any previous interest
	1. C would have priority, but because they had notice of B’s interest, B has priority

BC’s Current System: Torrens-type land title systems

* Torrens-type land title systems seek to overcome the shortcomings of the deed registry systems
* Title registration **guarantees that the person registered as the holder of the title is the title holder**
* Any defects in title that exist get **‘cured’** when they are registered in the Torren system
* Deed system has been called complex – goal of Torren system is to simplify transactions, reduce transaction costs, and also tries to reduce the risk of loss to individuals

**Main benefits**: efficiency, focus on the power of the market, land is a driver of economic growth

**Major goals of Torrens-type land title systems (D.C. Harris)**

* + Simplify land transactions and reduce transaction costs
	+ Reduce risk of loss to individuals
	+ Make sure full economic potential of land resource is unlocked

**Major legal principles of Torren System (D.C. Harris)**

These principles have been implemented to different degrees in Torren type land systems

* **Mirror**:
	+ System itself reflects all relevant property interests at present moment
	+ The registry is the whole reflection of all relevant property interests
	+ You should be able to rely on the register
* **Curtain**
	+ *Indefeasible title* (marks the fundamental difference between title reg. and CL)
		- Two variants of title reg. that differ on the timing of indefeasible title: immediate or deferred.
	+ Purchaser need not be concerned with any transactions not on record
	+ Need not search for title
* **Assurance/Net:**
	+ If a property owner suffers because of an error on the record, compensation is provided by the government
	+ IN the event that you rely on the register to your detriment, there is an insurance fund that will pay certain parties out

🡪 **End result is a system that provides purchasers and, by extension, lenders who take property interests as security for a loan, greater confidence in the veracity of the interests they acquire.**

Title Registration in BC

**Colony of Vancouver Island**

* Adopted title registration with passage of Land Registry Act 1860
* **Two-tier approach**: title vulnerable to challenge for five years following first registration
	+ First the title holder acquired absolute title on first registration, but it was vulnerable for 5 years
	+ If nobody did so after five years, the title becomes absolute and indefeasible

**Colony of BC**

* Adopted the two-tier approach in 1870
* In 1921, **abandoned the two-step approach** (by abolishing absolute title); from that point on, **registered titles were indefeasible**

**Common law principle** that appears throughout the cases: ***nemo dat quod non habet***

If you want to transfer ownership of something to someone else, you either have to be **the owner** or the **owner’s agent**. If you aren’t, then good title wont pass.

***Nemo dat quod non habet***

* + **You cannot give better title than you have**: if this rule is put in place, it protects the property rights of the original property owner at the expense of the party who thought that they were acquiring the property interest
	+ If A tries to sell or give something to B, and A does not have good title, B does not acquire good title
	+ Protects the property rights of the original property owner

**Exceptions to *nemo dat***

* + Certain situations where you can pass on better title than you have
	+ These exceptions protect **the efficiency of commercial transactions** over the protection of property (at the expense of the original property owner)
	+ When these exceptions apply, a person acquiring the property from a person who doesn't have good title GETS good title.
	+ The original title is only left with the option to sue the rogue.

**How the Torrens principles have been registered in BC’s Land Title Registration System (Harris)**

The land title act provides for a system of compulsory title registration

* + **LTA s 175(1)** requires the existence of this registry
	+ **LTA s 20(1)** an unregistered instrument does not pass an estate

**(1) Mirror**

**Registration results in the creation of indefeasible title** (**mirror**)

* + **LTA S 23(2)** Establishes the principle of indefeasibility
	+ **LTA S 23(2)(i)** Fraud in which the registered owner has participated in is one of the exceptions to indefeasible title. If the person deprived of land can show fraud, then the title isn’t indefeasible
	+ **LTA S 25.1(1)** deals with void instruments – affirmation in the act of the continued **applicability of the nemo dat principle** and of the statement that **the system will not protect rogues**
	+ **LTA S 25.1(2-3)** states **exceptions to nemo dat** apply and states that they **apply to fee simple interests**

**LTA S 23**: Certainty in the proof of title by reference to a certificate issued by the registrar and made conclusive by law

**(2) Curtain**

Once a person registered an interest in land, they are the owner of the property and the curtain falls over other possible interest holders

* The CL protected settled interests in land over those acquired in good faith under a transfer.
* A title is indefeasible when it can’t be annulled by a prior act that might undermine the validity of the current rights
* **Major exception**: **FRAUD** – title registration system does not protect rogues

**Indefeasible Title**: A right or title in property that cannot be made void, defeated or canceled by any past event, error or omission in the title.

**Harris**:

* In a title registration system the principle of **indefeasibility secures the registered owner’s interest unless that person has participated in fraud to acquire that interest**.
* Title registration systems do not protect rogues. Even if registered, **the rogue’s interest is always subject to the claim of the person wrongfully deprived of an interest in land**.
* With this exception, title registration operates on the principle that the person named in the registry as the owner of an interest in land *is* the owner of that interest.
* Prospective purchasers have to go no further than the registry to determine conclusively who holds title.

**Two types of indefeasibility**: these types differ based on time – when does the curtain fall on prior owners of that interest?

* **Immediate indefeasibility**:
	+ A purchaser for value who obtains a certificate of title without knowledge that the certificate of title was obtained by fraud will receive the protection of the land titles legislation.
	+ Registration based on an invalid document is entitled indefeasibility - Unless the person on title is a party to the fraud, the registered owner of a fee simple interest holds indefeasible title, whether or not that person acquired that interest on the basis of a forged document (Harris)
* **Deferred indefeasibility**:
	+ A purchaser for value who obtains a certificate without knowledge that the previous certificate of title was obtained by fraud does not receive the protection of the land titles legislation, and loses her certificate of title to the original owner.
	+ Indefeasible title is delayed until the person acquiring the interest does so from the person who is the registered owner and is, therefore, at least one step removed from the rogue and the forged transfer instrument (**Harris**)
	+ Registration based on an invalid document can be cancelled – The registered owner of a fee simple interest who had participated in fraud to acquire that interest did not hold indefeasible title (s. 23(2)(i)), and neither did the person who acquired from a rogue under a void instrument (s. 297(3) – eliminated later) (Harris)

**Example**: B concludes a contract of purchase and sale with R for the fee simple interest in Blackacre. But R is a Rogue! R represents themselves as O – the registered owner of the fee simple interest in Blackacre. R forges O’s signature on the transfer instrument, which B registers. B had no knowledge of the fraud.

* **In a system of immediate indefeasibility**: the fact that B has dealt with rogue (R) does not matter. Once B registers the transfer instrument, he holds indefeasible title.
	+ O, having been wrongfully deprived of an interest in land because of fraud, and unable to reclaim their interest, can claim compensation
* **In title registration systems, based on deferred indefeasibility**: B’s interest would be subject to O’s claim to recover title.

**Which system – deferred or immediate indefeasibility – do you prefer, and why?**

* **Immediate Indefeasibility**: preserves the sanctity of the transactions; if we are looking to create an efficient system – immediate is the best way to do it. If it was immediate, people can rely on the register. Simpler. Overcomes the insecurity of title that is inherent in the previous system.
* **Deferred Indefeasibility**: balancing between efficiency and the recognition that property holds a lot of significance for individuals

***Lawrence v Wright, 2007 Ontario***: CA applyed the theory of **deferred indefeasibilty**, to find that the original owner could have mortgage made by the imposter owner to MT set aside, though he could not have done so if MT had assigned to someone else (i.e. innocent party who had no interaction with the imposter owner).

**Policy Rationales for *Lawrence*:**

* Decision would encourage lenders to be vigilant when making mortgages – puts the burden on the party who has a chance to avoid it
* Under the theory of immediate indefeasibility, the innocent homeowner has no defence to a mortgage’s action for possession.

**Abolition of the CL doctrine of notice** (**curtain**): idea that you don't have to look beyond the register to determine who has title

* + **LTA s 29(2):** effect of notice of unregistered interest

**Does BC have a system of deferred indefeasibility or immediate indefeasibility?**

* Prior to 2005 amendments? It wasn't clear whether BC’s land title registration system operated on the basis of immediate or deferred indefeasible interest
* Post-2005 amendments: immediate indefeasibility is the informing principle in BC’s title registration system – **purchasers kept their newly acquired fee simple interest; wrongfully deprived owners received compensation**

**BC has a system of immediate indefeasibility**: the registered owner is immune to a challenge that they acquired the interest on the basis of a void instrument, **UNLESS they participated in fraud**

**“Title registration systems do not protect rogues”** (**Harris**)

* **LTA ss. 23(2); 25.1(1)**
* If you manage to fraudulently register a fee simple from someone else, despite the requirement for immediate indefeasibility, the original owner will be able to have that interest struck
	+ **23(2)(i)** **states that the registered owner is said to have an indefeasible interest** SUBJECT TO the right of the original owner to show fraud, including forgery, in which the registered owner has participated in any degree
	+ **25.1(1)** Subject to this section, a person who purports to acquire land or an estate or interest in land **by registration of a void instrument** does not acquire any estate or interest in the land on registration of the instrument.
* Note: The LTA draws a distinction between fee simple interests and charges

**This Principle of Indefeasibility only applies to Fee Simple Interests (LTA s. 23(2); 25.1)**

* **23(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
* The addition of “as registered owner”: The person who holds the registered fee simple is the party who holds the indefeasible interest
* **25.1 (2-3)** exceptions apply only to fee simple estates
* These statutory interpretations allow people to imply **that indefeasibility only applies to fee simple interests**

**Charges are defeasible if based on a void instrument (something that is invalid from the outset – ex. an instrument created through fraud) (LTA 26(1))**

* What is a charge? (see s. 1) an estate or interest in land **less than a fee simple**
	+ Includes:
		- Life estate (LSBC and McDonald, 2013)
		- Lease;
		- Mortgage (included under the definition of encumbrance)

**Registration of a charge**

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

**(2)** Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.

***Credit Foncier*** **[MORTGAGE WAS FORGED, BUT UNDERLYING TITLE IS FINE]**:

BCCA determined that **the concept of indefeasibility does not apply to charges.** The words ‘deemed to be entitled’ in s 26(1) signals a rebuttable presumption that Credit Foncier had rights in respect of the mortgage, and because of the forgery, the mortgage was nulled. As a result, the mortgage was discharged and the principle of nemo dat continues to apply.

***Gill v Bucholtz*** **[UNDERLYING FEE SIMPLE FROM WHICH THE MORTGAGE IS GRANTED IS INVALID]:**

\*\*\*Unless a mortgage is granted by the true owner of a property, it is invalid and the owner’s title will be returned to its original state.

**For fee simple**: registration confers indefeasibility (except where the party registering the has participated in some way in fraud)

**For charges**: nemo dat rule governs… and you can’t pass better title than you have

***Canadian Commercial Bank v Island Realty* [DISCHARGE DONE FRAUDULENTLY, NOT THE MORTGAGE]:**

**TJ:** Applied principle from *Credit Foncier* to find that a forged discharge was, at CL, null and void. Therefore, he prioritized the first 2nd mortgage that was fraudulently discharged over the second 2nd mortgage. **🡨 AFTER *GILL v BUCHOLTZ* WILL NOW APPLY IN THIS SITUATION**

**CA:** Allowed the appeal and distinguished the case from *Credit Foncier* because here, the defect (fraud) wasn't in the mortgage, but in the discharge.Following this decision: “as long as the registered holder of the charge dealt with the registered holder of the fee simple interest, the court would uphold the presumption in favour of the charge’s validity” (**Harris and Mickleson, 2012**) **🡨 LATER REVERSED BY *GILL v BUCHOLTZ***

**Impacts of *Gill v Bucholtz*:**

**Will it lead to a destabilizing effect**? If you can’t rely on the registry for mortgages, will this undermine the land title registration system itself?

**Harris** suggests some possible solutions:

* Extending indefeasible title to mortgages
* Compensate mortgage holders for the loss of their interest through fraud through the public systems
* Continue with the current system

The way system is currently structured is that it **gives stronger protection to current owners than bona fide purchasers of charges.**

* Would you prefer a land title system that provides stronger protection to bona fide purchasers?
* Is it important that it provides certainty to owners?
* Or is it good that it is only meant to protect fee simple owners and charge holders have insurance to protect their interest?
* Are you content with the CA’s decision with how the legislature balances between landowners, the innocent charge holders, and the public?
* **In this system:** When a discharge is done fraudulently, the person who gets the next mortgage would not have priority.

**Note:** Alternative to this would be the CA decision in *Canadian Commercial Bank*

**NOTICE (Curtain)**

* **Ideal under Torrens**: “public title register … relieve[s] prospective purchasers, mortgagees, and others transacting with a registered owner of land of the need behind what is shown on the register to determine the state of the title” (BCLI)
	+ Simplify the law
	+ To minimize risk related to the transfer of land title
* BUT, the BCLI says that this ideal has NOT been achieved! Attributes this to **differing judicial interpretations** of **s. 29(2) LTA – its about statutory interpretation**

**Types of Notice (BCLI):**

* **Actual notice**: notice of a fact that is actually brought home to someone
* **Constructive notice**: knowledge of facts that a person is conclusively presumed to have (almost willful blindness to a degree)

**Common Law position with regards to Notice**

* + Buyer beware (Caveat Emptor)
	+ “Pre-existing legal interests such as life estates, mortgages, leases and easements were effective against the purchaser **whether or not the purchaser learned of them**” (BCLI)
	+ Pre-existing equitable interests (third conflict permutation) were also effective against purchasers who were not BFPFVWN (bona fide purchasers for value without notice)

**Definition of fraud**

* **Legal concept of fraud**
	+ Intentional or reckless making of a false representation of fact with the intention that the representation be acted on
		- Saying something that is reckless and intending that the person act on that representation and followed by reliance
	+ Reliance on that false representation by the person to whom it was made to the detriment of that person
* **Equitable concept of fraud (broader than the legal concept)**
	+ CL fraud (above), as well as a **broader range of conduct** that the court would consider to be in breach of obligations of conscience – including trying to defeat a prior, competing interest of which you have notice (**Harris**)
		- Court would consider a person who had actual knowledge of a prior interest and went ahead and tried to acquire title
		- Actual notice fits here
		- Constructive notice – depends on the court

**Effect of notice of unregistered interest**

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

(a) a transfer of land, or

(b) a charge on land, or a transfer or assignment or subcharge of the charge,

is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than

**🡪 THIS CREATES UNCERTAINTY IN BC AS TO WHAT CONSTITUTES FRAUD**

* **Is Actual Notice enough to constitute fraud? (Line of Cases A)**
* **Does fraud both actual notice and dishonesty? (Line of Cases B)**

**In other provinces**: Knowledge of an unregistered interest does not in itself amount to fraud (i.e. **fraud requires something more than actual notice** – **Line of Cases B**)

* Because of the absence of this provision in BC, the courts go back and forth on this issue (the act of registering an interest with the knowledge of an unregistered interest would be considered fraud)

**Two Lines of Cases with regards to Notice:**

1. **Registering with actual notice of an unregistered interest amounts to fraud**
* It is fraud to have notice, as a result, the prior unregistered interest prevails
1. **Fraud requires dishonesty in addition to mere registration with actual notice**
* Notice of an unregistered interest is irrelevant

The BCLI takes issue with these two cases – they result in **uncertainty** when dealing with land – can result in increased legal fees, can hold up the release of mortgage funds, can slow or prevent the completion of land exchanges

**A) Registering with actual notice of an unregistered interest amounts to fraud**

* “Proceeding to register with actual knowledge of an unregistered interest inconsistent with one’s own can amount to fraud” (BCLI)
* ***Hudson’s Bay Co v Kearns & Rowling* (BCSC, 1896)**
* The title or charge of the party registering with actual notice is subject to the unregistered interest – preserves the concept of equitable fraud

**B) Fraud requires dishonesty in addition to mere registration with actual notice**

* “Taking advantage of the land title statute in the sense of protecting one’s position through registration when one has actual notice of unregistered interests is insufficient for a finding of fraud. An additional element of dishonest conduct or intention is required” (BCLI)
* ***Assets Co v Mere Roihi,* [1905] AC 176 (PC) (NZ)**
* You have to have dishonest conduct and dishonest intentions – absent this, the title or charge of the party registering with actual notice isn’t subject to an unregistered interest
* **What constitutes dishonest conduct or intention?** (BCLI)
	+ The purchaser’s acceptance of rent after completion of the transfer and assignment of its interest as lessor to a bank as security, and subsequent repudiation of the unregistered lease (***Me-n-ed’s Pizza Parlour Ltd. v Franterra Developments Ltd.,* [1975] 6 WWR 752 [BC]**)
		- If the purchaser accepts rent after the completion of the transfer and assignment of the interest, and subsequently repudiates the unregistered lease
	+ Contracting for the sale of the land on the basis that existing leases will be honoured and then repudiating them after the transfer of title on the basis that they were not registered at the time the title was acquired (***1198952 Alberta Ltd v. 1356472 Alberta Ltd.,* 2008 ABQB 386**)
	+ Collusion between the purchaser and the vendor to defeat an unregistered interest (***Alberta (Minister of Forests, Lands and Wildlife) v. McCulloch,* [1992] 1 WWR 747 (Alta CA)**)

**The tests from the different lines of cases comes down to different views of what land title registration systems are meant to do**

1. **Strong common law position** (statutes only displace common law to the extent necessary)
	1. Where the statue doesn't speak to the issue, apply the CL
	2. Associated with the first view whereby registering with actual notice amounts to fraud (legal definition of fraud applies)
2. **Statutes meant to implement pure Torrens principles**
	1. The statue should be interpreted in a manner that keeps with their objectives and their principles
	2. Associated with the second approach whereby fraud requires dishonesty in addition to registration with actual notice (equitable definition of fraud applies)

**Current position in BC:**

* **Uncertainty** … some cases adopt line of authority A); others B)
* **Harris** and **Au** offer generalizations about likely outcomes where courts are asked to decide on these issues. **They suggest that**:
	+ Courts appear more likely to find fraud where there is express or actual rather than constructive notice
	+ If the registered holder of the interest has notice only after it changed its position in reliance on the absence of a prior registered interest, then notice is likely to be irrelevant.
		- Ex. if a purchaser receives notice after it acquires a contract of purchase/sale, but before it registers, then notice is likely to be irrelevant
	+ Courts seem more likely to find that notice of a prior unregistered interest amounts to fraud where the prior unregistered interest is the fee simple interest.
		- Potentially connected to the idea that a land title registration system is meant to protect fee simple holders

**Consequences of current position in BC (BCLI): UNCERTAINTY**

* + “The ‘curtain’ that section 29(2) ostensibly creates to keep unregistered interests from clouding the title to land is only partially drawn”
	+ Can’t give “unqualified opinion on whether purchaser with knowledge of unregistered interest…will acquire title free of that interest on becoming registered owner”
	+ Not possible to give a conclusive opinion on priority of mortgage if lender aware of unregistered instruments impacting title

**BCLI’s recommendations for reform:**

1. Amend the LTA to provide expressly that knowledge of an unregistered interest or instrument on the part of a person transacting with a registered owner is not fraud
2. Define fraud: fraud found if the person taking a transfer or assignment from the registered owner actually knew that the owner of the unregistered interest was not acquiescing in the subsequent transaction and would be prejudiced by it
3. Add a new exception to 29(2): confined to cases in which someone seeks to obtain priority through registration while ignoring knowledge of an unregistered interest, if that knowledge was gained (a) before entering into a binding contract with the registered owner in the case of transactions where value is exchanged for an interest in land, or (b) before a title or interest obtained through a gratuitous transfer or assignment from the registered owner is registered.

**(3) Net**

The act provides for an **assurance fund** to provide remedies for persons who lose out (**net**) **Part 20, LTA in particular s. 296(1)-(4)**

Potentially kicks in when prior owner is wrongfully deprived of their interest in land, they can recover damages (wrongfully deprived either because of conclusiveness or register or because of fraud)

**Requires that:**

* They have to go in court against the perpetrator of the fraud and join the gov’t system as a defendant
* If the fraudster is judgement-proof, then at that time, the assurance fund will kick in and cover the loss
* Makes sense because you want to try and first recover from the actual individual fraudster first

**S 296(2)** **Substantive Steps you need to establish to have a claim against the Assurance Fund:**

1. Deprived of an interest in land
2. As a result of the conclusiveness of the register
3. Entitled to recover at common law
4. Was prevented from claiming because of the Act

**Key**: in order to make a successful claim against the assurance fund, the person wrongfully deprived must be able to show they would have recovered the land under a CL conveyancing system

**Loops back to 4 permutations (CL Conveyancing System)**:

* Legal interest v. Legal interest
	+ Nemo dat rule governs: priority based on chronology (first in time)
* Legal interest v. Equitable interest
	+ Generally, the legal interest will prevail
* Equitable interest v. Legal interest
	+ Legal claim will prevail only if the purchaser w. the legal claim is a BFPFVWN
* Equitable interest v. Equitable interest
	+ When equities equal, first in time prevails

**How often is the assurance fund used?**

Only two instances where the homeowner lost title due to fraud and was able to claim from the assurance fund

**Title insurance**

* Indemnifies for actual loss
* Creates, for the insurer, a duty to defend the title on the insured’s behalf
* **Harris & Mikkelson** suggest that one result of the BCCA decision in ***Gill v. Bucholtz*** will be to increase the use of title insurance
* Is this a problem? Does this reveal a problem in BC’s title registration system? (**Harris & Mikkelson**)

Lawrence v. Wright, 2007 Ontario – found deferred indefeasibility to apply (doesn’t apply in BC)

**Facts**:

* + L’s home sold by someone posing as L to an imposter, W.
	+ W mortgages to Maple Trust, which registers the mtg.
	+ L applied to have transfer to W & mtg set aside
	+ TJ allowed transfer to W to be voided, but upheld mtg based on prior OCA precedent (2005)
	+ L has to ask OCA to overrule it

**Lawrence’s argument (original owner):**

* + Only the true owner of land can grant an interest in, or charge on, the land and that all transactions arising from fraud are void
	+ **Rejected**: this would defeat the entire purpose of the act and return us to the common law – the fraudulent root of title does not invalidate all subsequent transactions, and if that was the case, it would defeat the entire purpose of the land title act.

**MT’s argument (innocent party):**

* + The theory of immediate indefeasibility should be applied
	+ A title registration system is designed to protect the innocent party
	+ The purpose of the act isn’t concerned with true owners, it is concerned with creating an efficient way of title passing
	+ A fraudulent transferee who is a registered owner can grant a valid mortgage to a mortgagee who is acting in good faith without notice of the fraud
	+ **Rejected** on the basis of policy reasons, statutory interpretation and case law.

**Ontario’s position:**

* + Deferred indefeasibility theory
	+ Three classes of parties:
		- Original owner
		- Intermediate owner (person who dealt with the party responsible for the fraud)
		- Deferred owner (bona fide purchaser or encumbrancer for value without notice who takes from the intermediate owner)
	+ Only a deferred owner defeats the original owner’s title

**Result**: applying the theory of DI, L can have mortgage to MT set aside, though could not have done so if MT had assigned to someone else

**Policy Rationales:**

* Decision would encourage lenders to be vigilant when making mortgages – puts the burden on the party who ahs a chance to avoid it
* Under the theory of immediate indefeasibility, the innocent homeowner has no defence to a mortgage’s action for possession.

**Another issue: Does MT have an interest?**

* Maple Trust is the intermediate owner of an interest in the property.
* Why is this question significant?
	+ It had an opportunity to avoid the fraud. It did not take from a registered owner.
	+ Therefore, despite registering its charge, Maple Trust loses in a contest with the true registered owner, Ms. Lawrence.
	+ Accordingly, the charge against the Property in favour of Maple Trust should be set aside.

Credit Foncier (1963, BCCA)

**Facts**:

* Sept 27, 1960: B registered as owners of fee simple estate
* Jan 13, 1961: Fraudulent mortgage from B to TIL (forged by Allen)
* Jan 19, 1961: Mortgage assigned from TIL to Stuart (had known Allen; made no inquiries of B; but found to be innocent party)
* Jan 24, 1961: Stuart assigns mortgage to Credit Foncier (innocent party)
* May 11, 1961: CF brings action against B for personal judgment and foreclosure (non-payment)

**Issue**: Since the mortgage was created through fraud, it was a void instrument. But did immediate indefeasibility apply to the charges?

If immediate indefeasibility was the applicable principle to charges, when the mortgage was assigned from Todd to Stewart, then it would clear the defect and the burden would remain on the fee simple (note: Finding by the court there was no fraud involved in the Stewart transaction). Credit Foncier would be able to foreclose on the property.

**Held**: BUT the BCCA determined that **the concept of indefeasibility does not apply to charges.** The words ‘deemed to be entitled’ in s 26(1) signals a rebuttable presumption that Credit Foncier had rights in respect of the mortgage, and because of the forgery, the mortgage was nulled. As a result, the mortgage was discharged and the principle of nemo dat continues to apply.

When you have a rogue who forges a mortgage, registers it and assigns it to other people: the mortgage will be void and have no effect. Because of forgery, the mortgage was a nullity; registration had no effect; should be discharged

Canadian Commercial Bank v. Island Realty (1988, BCCA)

**Facts**:

* PM owns fee simple in Kelowna
* ILA holds first mortgage
* Sept 3, 1983: PM grants 2nd mtg to IR
* Jan 1984: C/R (director of PM and a solicitor) contracts A looking for loan to be secured by 2nd mtg on Kelowna lands (but there is already a second mtg held by IR! But the understanding between those parties was that the second mtg to IR was to be discharged and replaced by the A second mortgage)
* Feb 10, 1984: C/R registers forged discharge of IR mortgage
* Feb 13, 1984: on the strength of that, A advances money to C/R
* March 9, 1984: C/R abandons law practice
* June 27, 1984: PM files for bankruptcy

**Issue**: The first mortgage was paid out to ILA and the balance of funds were brought into court. Out of the two remaining parties, IR and A, who gets repaid?

**Analysis**:

* **TJ**: Applies the principle from ***Credit Foncier***: forged discharge was, at CL, a nullity; IR takes priority over A
* **CA**:
	+ Allows the appeal – in part on the basis of policy reasons (comes back to why a Torrens system has been implemented)
	+ Result in TJ decision “runs counter to … whole purpose and effect of the LTA”
	+ Based on the idea that the LTA that in the Torrens system, you should be able to rely on the registry. If you can’t rely on the registry, the system falls apart.
	+ Distinguishes Credit Foncier from the facts of the case – in Credit Foncier, the defect was in the mortgage and they hadn’t dealt with the registered owner of the interest – here, the defect was in the fraudlent discharge of IR’s mortgage (?)

**Following this decision**: “as long as the registerd holder of the charge dealt with the registered holder of the fee simple interest, the court would uphold the presumption in favour of the charge’s validity” (Harris and Mickleson, 2012)

* Until *Gill v. Bucholtz* (2009, BCCA)…

Gill v. Bucholtz (2009, BCCA)

**Facts:**

* Mr. G owned “Lot 4”
* Nov 2005: R forged Mr. G’s signature on transfer to Ms. G (who was working with R)
* Nov 10, 2005: Ms. G grants mortgage to B
* Ms. G then neg. 2nd mortgage in favour of 4337, Investments Ltd (#Co)
* Mr. G files caveat; registration of 2nd notice refused; but #Co had already advanced $55G, relying on title

Para 2: None of the morgagee’s had notice of the route of Gill’s title. They did some diligence before they advanced funds. The rogue remains an unknown figure (we don't know where they are).

**Not at issue**:

* Ms. G – because of fraud – could not gain protection of the LTA (23(2)(i); 25.1)
* Mr G could always gain his title back from Ms G

**Issue**: Can Mr. G cancel the mortgages that were fraudulently registered against his land, or are they valid?

**TJ: Chambers J**

* S 23(2) gives the registered title holder an indefeasible right to deal with the property
* This interpretation is consistent with previous case law
* Policy rationales come from Lord Watson

**TJ Held**: Mr. G gets his title back for Lot 4, but it is encumbered by the two mortgages; the mortgages are valid (“net” will have to be used to compensate)

Case was Appealed: The parties really weren’t concerned with the outcome; either way, they would be compensated. Who would have to pay? The Title insurers pay (would be the case if Gill wins) or the Assurance fund (would be the case if Bucholtz wins)

**Court of Appeal:**

* Many different ex of Torrens systems – look to the words of the Act implementing the system
* Fraud exception (23(2)(i)) applies; “void instrument” in 25.1(1) including mortgage taken from person who obtained title by fraud
* LTA preserves nemo dat rule with regards to charges (even where there is reliance on the register)
* Policy: cost of fraud borne not by public but by lenders and other chargeholders
* BCCA tries to shift away from policy – instead, we should look to the words of the statute

Holt Renfrew & Co v Henry Singer Ltd, [1982] 4 WWR 481 (CA)

**Facts**: Company who owns a building that Holt Renfrew leased. The lease was made out for a number of years. Somebody went up to the owner’s lawyer who mentioned that they wanted to sell and that they would keep the lease. Turns out the lease was registered wrong on the property, and the new purchaser’s lawyer realized this and didn't bring it to the attention of the current owner. The current owner thought that the new purchaser was going to buy it and keep it subject to the lease

**What would be the outcome under the line of authority A** (registering with actual notice of an unregistered interest amounts to fraud)?

* They would find that the lawyer for the purchaser had committed fraud because he was cognisant of the mistake and didn't bring it to the new owners attention
* The new purchaser would have to take the ownership subject to the unregistered interest

**THIS IS WHAT THE COURT HELD**: **What would be the outcome under the line of authority B** (fraud requires dishonesty in addition to the mere registration with actual notice)?

* He thought his duty to the contract was to conceal the fact that there was an unregistered interest, not to correct the representation that was believed to be true at the time it was made and subsequently becomes untrue
* Court found that fraud has to be specifically pleaded and true, that that wasn't proved on the facts here

Aboriginal Title

Can be described as a **bridge** between two different systems of law dealing with rights to land

1. First nations have systems of land use and ownership – all societies have their own views of **who has rights**, **how they are enforced**, and **what limits are attached to those rights**.
2. Distinct from treaty rights (rights that have been recognized through a treaty, generally between the Crown and a particular aboriginal community)
3. Flows from:
	1. The occupation of what is now Canada by Aboriginal peoples at the time of the British assertion of sovereignty
	2. The relationship between common law and pre-existing systems of Aboriginal law

Scope of Aboriginal Rights:

1. Includes title to land (Aboriginal title) 🡨 our focus
2. Activity rights: right to do certain things
	1. Could be related to a particular piece of land or not
	2. Ex. hunting, fishing
3. Aboriginal rights is an umbrella term, and one aspect is aboriginal title

St. Catharine’s Milling & Lumber Co. v. The Queen (1888 Privy Council)

**Parties**: federal and provincial government in Ontario

**Facts**: Determining whether aboriginal title had been extinguished by way of a treaty. Dispute as to whether the provincial or federal crown held title to the land.

**What is Aboriginal title?**

1. **Flows from Royal Proclamation of 1763** (so **not inherent**) – it only exists to the extent that it was given by the crown in the RP of 1736
	1. Idea of ‘our colony’s’ – living under the Crown’s protection
	2. Alliance of nation
	3. Lands must be seeded or purchased
2. **Alienable only to the Crown**
3. This **personal and usufructory** right is **dependent on the goodwill of the sovereign** (could be extinguished at any time)
	1. Personal and usufructory: civil law concept – the right to enjoy something in which you have no property rights
4. **Exists in conjunction with underlying Crown title**
	1. Aboriginal title is a burden or encumbrance upon the Crown’s underlying title

Calder et al v. AG of BC (1973 SCC)

***Calder*** was the first case to explicitly recognize the existence of Aboriginal title (there was some recognition of the concept of Aboriginal land in the RP & some case law from ***St Catherines Milling***.

**Facts**: Nsiga’a were trying to assert a claim for Aboriginal title in BC. No other first nations band was making a claim in the same area (there no competing claims, so the matter was simplified). Also, no treaty had been signed in the area (in our BC context, that is not surprising). Although there had been a few small grants in Fee Simple in the area, most of the land was under Crown title. Those that were making the claim were descendants of those who had used the land initially and had hunted, and fished and roamed.

**Issues**:

* Did the Nsiga’a ever have Aboriginal title to the land in question; if so, what is the source of that title? [**6 of 7 judges who heard the case said yes; title was inherent**]
* If Aboriginal title did exist, had it been extinguished? [**3 of 6 said yes; 3 said no**]

**Analysis**:

* Arguments that could have been raised for issue 1 (did the Nsiga’a have title):
	+ Inherent title flowing from historical occupation
	+ If a document was needed to grant title, it should be done under the RP

**Held**:

* At one time, **Aboriginal title was there** and **it was inherent** (i.e. not flowing from the RP 1763) (6/7 judges agreed with this)
* 3 judges held it was extinguished, 3 judges held it wasn't extinguished
* Despite the 4/3 loss (that Aboriginal title no longer existed as of 1973), **the recognition of aboriginal title was seen as a significant victory** – it paved the way to force the government to negotiate land claims

**After this decision**: “perhaps you have more legal right than we thought you did” (Trudeau)

Calder decision paved the way towards negotiation processes and played an important part in creating **the Constitutions section 35(1)**.

**Key points from *Calder***:

* Aboriginal title is **inherent**
* It **exits at the same time as Crown title** (**burden** that exits on underlying Crown title)
* It **can only be alienated to the Crown**
* It **can be extinguished by the Crown (*Calder*** provides a test for extinguishment**)**

Guerin v. The Queen (1984 SCC)

***Guerin*** deals with reserve lands, not land claimed by way of Aboriginal treaty. **Dickson** states that both are the same kinds of interest in land. This case was the first to introduce the idea of a **fiduciary relationship** between the Crown and Aboriginals.

**Facts**: The Musqueam people were approached by a private party to surrender 162 acres of their reserve lands to create a golf course. Because title is alienable only to the Crown, the Federal government enters into a deal with the private party regarding the reserve lands. The final deal entered into by the gov’t and private party failed to include terms specifically asked for by the Musqueam people.

**Analysis**:

* Court established that Aboriginal title is **sui generis** – unique – we can’t completely understand Aboriginal title by reference to other concepts of property law
* It **exists in conjunction with underlying Crown title** (burden)
* Since Aboriginal title land can only be surrendered to the Crown, this **gives rise to a fiduciary relationship**
	+ **FIDUCIARY**: legal duty to act solely and faithfully for the benefit of another
	+ The Crown undertakes to act in the best interests of the Aboriginal people

R. v. Sparrow (1990 SCC)

First time SCC considered the **impact of section 35(1).**

**Facts**: fishing rights case. Sparrow was charged with a violation of net length according to the Indian Food Fishing license held by the Musqueam (a communal license). Sparrow said because his aboriginal rights to fish hadn’t been extinguished, he didn't need to follow the act.

Principles SCC established regarding Aboriginal rights in regards to Aboriginal treaties:

1. Existing (in **s. 35(1), Constitution Act**): **rights in existence as of April, 1982**
2. Any rights that have been extinguished before this date can’t be revived (for example, extinguished by treaty – but treaties were not common in BC)
3. Doctrine of ‘frozen rights’ rejected – **rights that are still in existence in 1982 can be exercised in modern ways**

**Four step process for considering claims of Aboriginal rights** (said in ***Delgamuukw*** to be relevant to an Aboriginal title claim) (note: this test was modified in ***Van der Peet***)

* **Did the claimed Aboriginal rights exist?** (Onus on Claimant to prove)
* **If the Aboriginal right existed, does it still exist, or was it extinguished?** (Onus on Crown to prove that the right was extinguished)
	+ Crown’s intent to extinguish must be **clear and plain** – intent must be to extinguish the underlying right (language established in ***Calder***)
	+ Post 1982, there can be no unilateral extinguishment – this does not mean that Aboriginal Rights are absolute
	+ The Crown can regulate Aboriginal rights, but if they are seen to interfere with their rights, it has to be **justified**
* **If the right still exists, but is regulated, does that regulation prima facie interfere with the Aboriginal right?** (Onus on the Claimant)
* If the regulation prima facie interferes with the Aboriginal right, **can this interference be justified**? (Onus on the Crown)
	+ Is the limit unreasonable?
	+ Does it impose an undue hardship?
	+ In considering these questions, one has to take account of aboriginal perspectives.
	+ Intended to be a low hurdle (***Gladstone***)

Though this test may be viewed as similar to a section 1 analysis to see if a law is unconstitutional, this test is seen to be broader. Some critics propose this make it easier for the Crown to justify their interference with Aboriginal rights.

Delgamuukw v BC (1997, SCC)

First time a court had commented on the nature and scope of the protection afforded by s 35(1) to Aboriginal Title.

**Focus on Lamer’s judgement:**

* Types of evidence used to prove Aboriginal rights
* Content of Aboriginal title
* Proof of Aboriginal title
* Extinguishment of Aboriginal title
* Justification of infringement of Aboriginal title

**Facts**: The proceedings were started in 1984 by the Gitxsan and the Wet'suwet'en Nation. They claimed ownership and legal jurisdiction over land in northwestern British Columbia, an area larger than the province of Nova Scotia. The Gitksan and Witsuwit'en used their oral histories as principal evidence in the case. **Two factual differences from Calder** – there were overlapping claims and there were other fee simple settlements in the area. On Appeal, the claims for ownership were changed to claims for Aboriginal title and the claims for jurisdiction was changed to a claim to the right of self-government. Individual claims were amalgamated into two collective claims – the question was ‘is this okay or do we have to go back to trial?’ The first change had been made informally (both side knew what issues they were arguing) and was fine, the pleadings had not been altered to reflect the amalgamation to a collective claim – **therefore had to go back to trial.**

**Types of evidence used to prove Aboriginal rights:**

* **TJ erred** in refusing to give any independent weight to oral histories
* SCC held that requiring documentary proof might preclude claims (prevent claims from being successfully raised)
* SCC held that Aboriginal rights have to be adjudicated in a way to **reflect both aboriginal perspectives and the Crowns perspective**
* Para 87: “Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an **equal footing** with the types of historical evidence that courts are familiar with, which largely consists of historical documents” 🡨 how oral histories can be considered in this context

**Content of Aboriginal Title:**

Crown tried to argue a very restrictive view: that it was a right to carry out certain activities, not a right to the land itself 🡨 this argument **failed**

Claimants tried to argue that their right was a fee simple 🡨 also **rejected**

* Aboriginal title is a **right to the land itself**
* Aboriginal title is **sui generis (unique)**: an amalgam of both Aboriginal laws and patterns of landholding, and common law rules of real property
	+ Must be understood by reference to both common law and Aboriginal perspectives
* **Ultimate sovereignty and underlying fee simple (radical title) lie with the Crown** – aboriginal title exists in conjunction with this underlying title
* **Aboriginal title is inherent** (arises out of the fact of prior occupation and use – not through the RP 1763) – can only understand it by reference to both systems
* Aboriginal title land **can only be surrendered to the Crown (inalienablity)**
* Aboriginal title is a **collective right to land** (held communally – cant be held by a single person but is held by all members of a nation and decisions are made by the community as a whole)
* Aboriginal **title encompasses the right to use the land for quite a broad range of purposes** (not just limited to those activities that can be proven as separate aboriginal rights – non traditional activities are also permissible), with **one inherent limit**. **Lands held pursuant to Aboriginal title cannot be used in a manner irreconcilable with the community’s continued relationship with the land.**
	+ These rules are designed to preserve a continuing connection with the land and if the use would destroy that connection, it would fall outside the realm of aboriginal title
	+ Ultimately, this signals that it is up to the judiciary to determine what constitutes a use that is considered in the best interest of the community – is this a good idea?

**Proof of Aboriginal title:**

* Must show that:
	1. **Land was occupied prior to the Crown’s declaration of sovereignty,**
	2. That **occupation was exclusive, AND**
	3. That there must be **continuity between present and pre-sovereignty occupation** (not necessarily unbroken chain, but **substantially maintained**)
* Meaning of occupation:
	+ Look to **both Aboriginal and common law perspectives** on land holding;
	+ Also must take account of **size**, **lifestyle**, **resources** of the claimant First Nation and the **character** of the land being claimed
	+ An unbroken chain is not required – too stringent
	+ Occupation is made out if the connection of the land has been substantially maintained

**Extinguishment of Aboriginal title:**

* **Pre-confederation**: British government could extinguish
* **Post-confederation (but pre-1982)**, only the Federal government could extinguish it (due to s. 91(24)) (province’s don't have the authority to extinguish title – in order to show clear and plain intent, legislation has to fit within s 91(24) and the provincial gov’t does not have that power)
* How was/is extinguishment to be accomplished?
	+ **Pre-1982**: Bilaterally or unilaterally
	+ **Post-1982**: **Only with consent**

**Regulation/Infringement of Aboriginal rights:**

* S 35 rights are not absolute and they can be interfered with proper justification
1. Given s. 35(1), for any interference to be justifiable, the regulation/limitation would have to be **in furtherance of a legislative objective that is compelling and substantial**
	1. This includes a broad list: i.e. agriculture, forestry, mining, protection of the environment (**Christie**: “everything but the kitchen sink”)
	2. Given that this list is so broad, how much protection is **actually given** under s 35?
	3. This is only the first part of the test, the Crown still has to meet the second part – fiduciary obligation
2. The restriction must also **meet the fiduciary obligation of the Crown** – might need to balance with other interests
	1. What is required depends on circumstances of consultation
	2. Also a presumption of fair compensation for any infringement

**Held**: new trial was ordered

**Para 186**: Finally, this litigation has been both long and expensive, not only in economic but in human terms as well.  By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts.  As was said in *Sparrow*, at p. 1105, s. 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place”.  Those negotiations should also include other aboriginal nations which have a stake in the territory claimed.  Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. **Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para 31, to be a basic purpose of s. 35(1) -- “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”.** Let us face it, we are all here to stay.

Tsilhqot’in Nation v BC (2014, SCC)

Facts/timeline:

* The Tsilhqot’in have unresolved land claims
* From their perspective, the land has always been theirs from **time immemorial**
* The province granted a company a forest license to cut trees in part of the Tsilhqot’in territory
* The Tsilhqot’in objected and sought a declaration prohibiting commercial logging on the land
* The dispute led to a blockade and reached an impasse on their right to first refusal on the logging
* In **1998** (after the ***Delgamuukw*** decision), they add a **claim for aboriginal title**
* **2002**: Justice Vickers (Trial Judge) found that they were **in principle entitled to a declaration of aboriginal title in a small part of the claim area** and a small parcel outside of it but for procedural reasons, **he refused to make a declaration of title**
* **2012 BCCA**: Held that their claim to title had not been established, but left open the possibility that in the future, they might be able to prove title to specific areas in the claim area
	+ **Postage Stamp approach**: Intensive occupation of the land which would lead to small areas of title in a broad area
* **SCC**: Tsilhqot’in asked for a declaration of aboriginal title in the area described by the trial judge – exceptions were the parts of land that was privately owned (fee simple) or underwater

**Held**: SCC found that title had been established

**Pleadings in Aboriginal land claims cases** (addressed by the SCC in para 19-23)

* We need to take a functional approach taken – what are these pleading actually for?
* Purpose is to provide the parties/court with an outline of the **material obligations and the relief sought**
* The SCC said that in Aboriginal land claim cases, they would **overlook minor defects in absence of clear prejudice**
* Para 23: What is at stake is nothing less than justice and reconciliation and a technical approach to pleadings would serve neither goal – it is in the broader public interests that this issue is solved in a way that reflects the substance of the manner. Only if it is done in this way can the process or reconciliation begin
* **Reconciliation** will be achieved only if land claims/rights issues are resolved in a way that reflects the substance of the matter

**Overarching Themes:**

* **Idea of reconciliation**
* Does the test for aboriginal title achieve this idea of reconciliation?

**Aboriginal Title (Starting at para 24)**

* Precise question: **how should the courts determine whether a semi-nomadic indigenous group has title to lands?**
* In what context is occupation established?
* **Occupation (for Aboriginal title purposes) is established where it is**:
	1. **Sufficient**
	2. **Continuous**
	3. **Exclusive**

**Postage Stamp approach (by the BCCA) was rejected by the SCC:**

* **“Postage stamp” approach**: To prove sufficient occupation, an Aboriginal group must prove that its ancestors intensively used a definite tract of land (with reasonably defined boundaries) …
* **Rejected** – would have resulted in small islands of title surround by large territory - didn’t adequately balance the aboriginal perspectives in terms of occupancy in land holdings
	+ Failed to achieve reconciliation with this approach

**Consider three elements – sufficiency, continuity, exclusivity – together**

* We need to consider these elements together – they shed light on the question of whether aboriginal title is established
* **SCC warns**: the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts
	+ **The use of the word translation – what are the pitfalls of the use of that term?**
	+ **Aboriginal Title is a bridge** – mechanism to connect or link their version of land title with the western version of land title (i.e. fee simple)

**(A) Sufficiency of occupation (para 33)**

* **(1)** Approach from **both** the common law perspective and the Aboriginal perspective
	+ Aboriginal perspective (refers to ***Delgamuukw***): laws, practices, customs and traditions – also size, manner of life, material resources, technological ability and character of the land claims
* **(2)** Is a **context-specific inquiry** – use might vary depending on the characteristics of the Aboriginal group
	+ The land being claimed here: while extensive, was harsh and capable to supporting a lot more people than those who were actually using it
* **(3)** To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that **it has historically acted in a way that would communicate to third parties that it held the land for its own purposes**
	+ Doesn't demand the same criteria as adverse possession, but it can’t be purely subjective or internal
	+ There must be evidence of a strong presence on or over the land claimed manifesting itself in acts of occupation that could reasonably be interpret that **the land belonged to, was controlled by or was the exclusive stewardship of the group**
* ***R v Marshall*** – Cromwell compares the sufficiency of occupancy required to establish Aboriginal Title compared to general requirements of the common law
* **🡪 Summary**: what is required is a **culturally sensitive approach** to sufficiency of occupation based on the **dual perspectives** of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. (Para 41)
* REJECTED BCCA approach (postage stamp approach)

**(B) Continuity of occupation (para 45)**

* Emphasizes that it doesn’t require evidence of an unbroken chain of continuity, but that it was **substantially maintained** (from *Van Der Peet*)
* Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, **the present occupation must be rooted in pre-sovereignty times**

**(C) Exclusivity of occupation** **(para 47)**

* Understood in the sense of **intention and capacity to control the land**
* The fact that other groups or individuals were on the land doesn't necessarily negate exclusivity
* **Context-specific inquiry:** approachedfrom both the common law and Aboriginal perspectives (Taking into account the context and characteristics of the Aboriginal group in question)
* Can be established by (for instance):
	+ Proof others were excluded from the land
	+ Proof others were only allowed access with permission
	+ Treaties with other groups (could indicate that the group had the authority and capacity to dictate who was able to come onto their land and who was not)
	+ Lack of challenges to occupancy

**How was the Aboriginal title test applied:**

* Correct test applied by the TJ (**question of law**)
* **Questions of fact** is whether evidence supports Aboriginal title (standard of review: palpable and overriding error) – did the TJ make a **palpable and overriding error**
	+ Evidence supports TJ’s conclusions (including territorial boundaries drawn by TJ)
	+ TJ’s findings with respect to Aboriginal title should not be disturbed

**What rights does Aboriginal title confer?** – What is the relationship between Aboriginal title and underlying crown title and what is the incidence of Aboriginal title (para 67)

* At time of assertion of European sovereignty, the Crown acquired radical/ underlying title to all land in BC
* This title was burdened by Aboriginal title, other pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival
* **Aboriginal title holders have a beneficial interest in the land**; right to the benefits associated with the land (terminology that has come up in the concept of Trusts)
	+ The **right to benefit, use, enjoy and profit from the land’s economic development**

**GROUND-BREAKING (para 70)**: **Crown does not retain a beneficial interest in Aboriginal title land. So what remains of the Crown’s underlying title?**

1. **Crown retains a fiduciary duty** (owed by the Crown to Aboriginal people)
2. Crown retains the **right to encroach on Aboriginal Title** if the government can **justify** this in the broader public interest under section 35 of the Constitution

**Existence of Aboriginal title**: creates an analog to common law concepts (exists alongside common law property concepts, but there are similarities and important restrictions) – not an analogy to common law property concepts because aboriginal title is suis generis.

* **Ownership rights similar to those associated with fee simple**:
	+ Right to decide how the land will be used
	+ Right of enjoyment and occupancy of the land
	+ Right to possess the land
	+ Right to the economic benefits of the land
	+ Right to pro-actively use and manage the land
* **Important restrictions** (linked to and drawn from *Delgamuukw*)
	+ Aboriginal title is collective title held for the present and for all succeeding generations (held communally – cant be held by a single person but is held by all members of a nation and decisions are made by the community as a whole)
	+ Can’t be alienated except to the Crown
	+ Can’t be encumbered in ways that would prevent future generations of the group from using and enjoying it
	+ Can’t be developed or misused in a way that would substantially deprive future generations of the benefit of the land

**Para 76**: The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land **must obtain the consent of the Aboriginal titleholders**. If the Aboriginal group does not consent to the use, the government’s only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution*

**Justification of infringement (para 77)**

* Three step process that governments have to follow:
	1. Show that it discharged its procedural **duty to consult and accommodate**
	2. Show that its actions were backed by a **compelling and substantial objective**
	3. Show that the governmental action is consistent with the **Crown’s fiduciary obligation to the group**

**(1) Duty to consult and accommodate**

* **Procedural duty** that arises from the honour of the Crown prior to confirmation of title
* Must be **discharged prior to carrying out the action** that could adversely affect the right
* Degree of consultation and accommodation **lies on a spectrum** – the degree of consultation and accommodation is proportionate to the strength of the claim and the seriousness of the adverse impact that the governmental action might have
	+ I.e. Strong claim **+** Serious adverse consequences **=** Strong duty to consult and accommodate

**(2) Compelling and substantial objective**

* + Must be considered from both the Aboriginal perspective and the common law perspective
	+ To be compelling and substantial, **the broader public goal asserted by the government must further the goal of reconciliation** (accommodating pre sovereignty interests with public interests today), having regard to **both the Aboriginal interest and the broader public objective**
	+ SCC cites to its judgment in ***Delgamuukw v. BC***for examples of interests that might justify an incursion on Aboriginal title (including agriculture, forestry, mining, hydro electric power, etc.)

**(3) Government action consistent with the Crown’s fiduciary obligation to the group**

* + Crown’s underlying title held **for the benefit of the Aboriginal group**; is **constrained by the Crown’s fiduciary or trust obligation to the group**:
		1. Gov’t must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations
* Incursions on title can’t be justified if they would substantially deprive future generations of the benefit of the land
	+ 1. Crown’s fiduciary duty infuses an obligation of proportionality into the justification process
			1. Incursion must be necessary to achieve the government’s goal = rational connection
				- Potentially low threshold
			2. Gov’t must go no further than necessary to achieve it = minimal impairment
				- May be viewed more stringent than current section 1 test (where the gov’t only needs to choose a reasonable option)
			3. Benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest = proportionality of impact

**Note**: another difference from actual section 1 analysis is that this test is to be applied BEFORE any infringement occurs whereas section 1 applies only after an infringement to see if it is justified.

**Remedies and transition (para 89)**

* Differ pre- and post-declaration of Aboriginal title
* **Prior to establishment of title**:
	+ Crown required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups
	+ If the Crown fails to discharge this duty, a number of remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out
* **After Aboriginal title has been established:**
	+ Crown must seek the consent of title-holding Aboriginal group to developments
		- Note: still unclear what ‘meaningful consultation’ actually means in practice
	+ Absent consent, development cannot proceed unless Crown discharges duty to consult; Crown justifies intrusion under s. 35 of Constitution Act, 1982.

**Provincial laws of general application apply to land held under Aboriginal title, but there are constraints**

1. Provincial power to regulate land held under Aboriginal title is limited by test previously described;
2. Province’s power to regulate lands under Aboriginal title may be limited for division of powers reasons (the province may not have the authority to make certain types of legislation due to federal 91(24) powers)

**Range of commentary/responses, including**:

* Bruce McIvor: quite optimistic about the decision
* Miller Titerle: less optimistic than McIvor piece, but still optimistic
* Letter of understanding between Tsilhqot’in Nation Chiefs and BC Premier Clark: described as a commitment to work together towards reconciliation and long term future negotiation
* A number of op-eds; bulletins from law firms
* A number of papers; talks; etc (including by John Borrows)

Long Plain First Nation v Canada, 2012

**Facts**: MB first nations signed a treaty to give land to Canada in exchange for 160 acres per family of 5 (per capita agreement) – this was broken by Canada. Both parties signed a TLE claims agreement to try and fulfill promise broken in 1871 about per capita agreement

* Gave first nations **right of first refusal on surplus government land**
	+ Government closed Kapyong Barracks and the barracks were expected to be declared surplus and the first nations expressed interest
	+ Government split surplus property into two categories--strategic= high market value; and routine = not of high value
		- Barracks were put into strategic category and right of first refusal not given to first nations
		- Barracks transferred to an external party (CLC)
		- First nations commenced actions
* Heard in FC--invalidated 2007 decision to transfer land to CLC
* Appeal to FCA--decision overturned because judge did not do a good enough job of clarifying the issues; sent back down to FC
* Rehearing in FC--was a duty to consult with the first nations, including long plain, and Canada failed to consult properly and the 2007 decision to sell the barracks has been set aside
* FCA--appealed the ruling again and decision will come out soon; expected to go up to SCC

Timeline:

1871: The First Nations of MB and Canada signed Treaty No. 1

1990s: Treaty Land Entitlement (TLE) agreements signed between Canada, five First Nations

2001: Dept of Nat’l Defence announced closure of Kapyong Barracks; interest in Barracks expressed by several First Nations incl. the Long Plain First Nation

2001: Treasury Board enacted policy governing surplus property

2007: Treasury Board approved transfer of Barracks to Canada Lands Corporation outside scope of TLE agreements

2008: Several First Nations commenced action

2009: Case first heard by Campbell J. of Federal Court

2011: Appeal heard by FCA

2012: Re-hearing before Hughes J. of Federal Court

**Hughes J**:

* There was a duty to consult with the applicant First Nations (including the Long Plain First Nation); Canada failed to consult meaningfully within the scope of that duty
* November 2007 decision to sell the Kapyong Operational Barracks set aside; sale enjoined until Canada can demonstrate to the Court that it has fulfilled its duty in a meaningful way

Property Rights on Reserves

**Division of Powers s. 91(24)**

* **S. 91(24) of the *Constitution Act,* 1867** gives the Federal Government authority over “Indians, and Lands reserved for … Indians”
* Under this authority, Parliament passed the ***Indian Act (Act)***(in place since 1876)
* **The *Act***deals with a wide range of issues, many of which address property rights on reserves
	+ Possession of lands on reserves, trespass on reserves, roads and bridges, etc.

The central role played by the minster with respect to land management. **Aboriginal Affairs and Northern Development Canada (AANDC)** provide land management services. AANDC personnel carry out provisions of the act and work with first nations to do a number of differing things with respect to reserve lands:

* Approve the allotment
* Prepare documents for reserve surrenders and agreements
* Addition of land to reserves
* Review and approve transfers of land between band members
* Approve and enforce leases, licences and permits

The government with respect to reserve lands plays a significant role: **To approve, reject or to manage**

Reserve Land

**How are reserve lands created?**

1. The federal gov’t allocates or allots Crown land for the purpose of forming a reserve.
2. The Crown buys private land to then convert into reserves.
* Sometimes, reserves are created on the traditional territory of the first nations land in question, but not always

**Indian Act**

**Section 2(1) of the *Act*** defines **‘Reserve Land’**

**(a)**means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band

**Section 2(1) of the *Act*** defines **‘Band’**

“Band” means a body of Indians

**(a)**For whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

**(b)**For whose use and benefit in common, moneys are held by Her Majesty, or

**(c)**Declared by the Governor in Council to be a band for the purposes of this Act;

The Crown holds legal title in Reserve land for the benefit of the Band.

**Differences between reserve land and non-reserve land**:

* Legal title to reserve lands held by Crown (**s. 18(1), *Act***) – as opposed to by individuals or organizations
* Bands recognized under the *Act* have an interest in reserve land
	+ First nations have a recognized interest – exclusive use, to occupation – this interest is inalienable and also communal
* Minister must approve or grant most land transactions under the *Act*
* Land can’t be seized by legal process or be transferred or pledged to non-members of a first nations.
* The rights of individuals to do things with reserve lands are severely limited by the Act itself.

**Note**: This *Act* works as both a granting and restraining mechanism

**Two types of interests in reserve land**

1. **Collective interest of bands**
	1. A band has the right to the **use and benefit of reserve land**
	2. Collective interest of bands in reserve lands cannot be transferred to another entity except by following strict statutory provisions (see, for instance, **s. 37 of *Act***)
2. **Interest of individual band members**
	1. Interest referred to as an **allotment** (right to use and occupy a parcel of reserve land)
		1. ***Act* S 20. (1)**No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.
	2. Minister may issue a Certificate of Possession as evidence of a person’s right to possession of the land
	3. Estimated that >50% of allotted lands not held by certificate procedures, but in accordance with the band’s customs (**Borrows & Rotman**)
	4. Title remains with the Crown

**To what extent can a person transfer their allotment?**

* A person may transfer their allotment to the band or another band member, and may leave the allotment to another band member in his/her will; **these transfers must be approved by the Minister** (see **s. 24, *Act***)
* If a person ceases to be a band member:
	+ Their allotment must be transferred to the band **or another band member** within 6 months.
	+ If they don't do so, the right to possession reverts back to the band (see **s. 25, *Act***)

**To what extent can non-members of bands obtain rights to use or occupy reserve land?**

* Non-members **cannot** hold “lawful possession” of reserve land
* Non-members **can** obtain permits to occupy/use/reside/exercise rights on a reserve **if approved by the Band Council or Minister** (**ss. 28(2), *Act***) – to do so they have to enter into lease, obtain permits or licenses
	+ Permit: right to use reserve lands in a limited, specific way for a defined period of time (i.e. remove sand, timber; rights of way to run power lines)

**First Nation Land Management Regime**

* Provides certain First Nations with powers to manage their reserve land and resources under their own land codes
* Presently 94 First Nations operating under, or developing, their own land codes for operation under this Regime (48 in BC (20 operational; 28 developmental))

**Criticisms of *Act* (selected)**

* “… assimilative premises are racist and outmoded. … presumption of delegated authority is offensive” (**Borrows & Rotman**)
* “… highly invasive and paternalistic” (**document created by FNSP at UBC**)
* Doesn’t address issue of matrimonial real property rights
* “Conflicts with the way that Aboriginal communities have traditionally understood their land holdings” (**Legal Services Society of BC**)

Think about the different rights granted to rights holders under the *Act* system in reserves and contrast that with the Fee Simple ownership of property and also contrast it with Nisga’a final agreement and the implementation of the final agreement. Also think about the extent to which the *Act* is an impediment or contributes in a positive or negative way in the context of **reconciliation**.

The First Nation of Na-Cho Nyak Dun v. Yukon (Gov’t of), 2014 YKSC 69

**Example of modern day treaty negotiations in BC 🡪 Future of Peel Watershed**

* **1993**: Canada, Gov’t of Yukon, and Yukon First Nations signed the Umbrella Final Agreement (UFA); one aspect of the agreement involves a blueprint for land use planning; provisions of UFA incorporated into final agreement signed by any Yukon First Nation
* **2004**: Peel Watershed Regional Planning Commission established to develop regional land use plan

Wording in section 11.6.0: Is the gov’t of the Yukon limited in its ability to modify the plan as presented?

* **2009**: Commission submitted its Recommended Peel Watershed Regional Land Use Plan
* **2010**: Joint letter of understanding signed
* **2011**: Final Recommended Plan released
* **2011**: Joint letter of understanding signed
* **\*2012**: Gov’t of Yukon announced it had developed eight core principles to guide modifications and completions of the Peel Watershed Regional Land Use Plan
* **2014**: Gov’t of Yukon announced its Peel Watershed Regional Land Use Plan

**Principles to keep in mind:**

1. Final agreements are land claim agreements under s 35 of the Constitution act.
2. As a result, rights assumed under land claim agreements are treaty rights within the meaning of section 35
3. First nations rights held under treaty have constitutional protection

**The ultimate plan was quite a shift from the plan process**.

* Veale J.: has “the planning process envisioned in the Final Agreements ... been followed and [what is the] … appropriate remedy if it has been not”?
* Plaintiff’s argument: You need to approve, reject and modify in the context of the process as a whole
* Gov’ts argument: It has the authority to approve, reject or modify without any restrictions placed on them by the process
* Veale J. required to interpret Ch. 11 of the Final Agreements

**Veale J.:**

* Process adopted by the Gov’t of Yukon to create the gov’t approved plan was not based on a contextual interpretation of s. 11.6.0; **did not enhance the goal of reconciliation**; and was an ungenerous interpretation not consistent with the honour and integrity of the Crown
* Gov’t cant ignore the previous steps of the process

**Held**: Granted an order quashing the gov’t approved plan of January 2014, and permitting the Gov’t of Yukon to submit modifications (limited)

Nisga’a Final Agreement, 2000

Post-*Calder,* Comprehensive Land Claims Policy (Federal) introduced.

**Nisga’a Treaty**: first modern-day treaty in BC; 14th modern treaty in Canada to be negotiated since 1976

* Jurisdiction of Nisga’a Government concurrent with federal, provincial jurisdiction
* Nisga’a laws prevail in a number of contexts relating to property issues (**Edmond Wright**):
	+ Use/management/possession/disposition of Nisga’a Lands
	+ Establishment of a land title or land registry system
	+ Devolution of cultural property of a Nisga’a citizen who dies intestate

**Four basic components of the Nisga’a Treaty**

1. Substitution for Aboriginal title with a grant of fee simple to the Nisga’a Nation
2. Defines existing hunting, fishing, and trapping rights in the Nisga’a lands
3. Payment of money over a period of years
4. Recognition of Nisga’a government

**Lands (Chapter 3)**

* + Conversion of Aboriginal title to fee simple title (8% of Nisga’a original traditional territory)
	+ Underlying Provincial Crown title recognized over 100% of area that was formerly Nisga’a traditional title lands
	+ Nisga’a Lands can be sold without consent of Canada/BC
	+ Extent to which Nisga’a Lands can be seized by creditors in payments of debts owed by the Nisga’a Nation is limited
	+ Existing third party interests on Nisga’a Lands will continue
	+ BC and Canada maintain the power to expropriate Nisga’a Land for public purposes – expropriation power is maintained – it is limited to the smallest amount and interest necessary, the shortest time for a public purpose, you have to have consent by the Queen or Governor general
	+ Mineral rights owned by Nisga’a Government within parcel of Nisga’a Lands
	+ Replacement interests (**Chapter 3, paras. 30-40**)

**Land title (Chapter 4)**

* + Nisga’a can apply to have the Provincial Torrens System apply to parcels of Nisga’a Lands

**Access (Chapter 6)**

* + Canada and BC have a broad right to access Nisga’a Lands
	+ Nisga’a will allow public access to Nisga’a Public Lands in certain contexts

**Cultural artifacts and heritage**

* + Certain provisions addressing cultural artifacts and heritage
	+ Certain museums will return certain artifacts to the Nisga’a

**How the Agreement has been Implemented:**

**Land**:

* Nisga’a Individual Land Holding Project
	+ Initially, it can only be made to Nisga’a citizens, but after that it can be passed along
	+ Can be no greater than 0.2 hectares
* Legislation passed (**Nisga’a Land Title Act**, **Nisga’a Landholding Transition Act**)
* As of Nov 5, 2013, two individuals had obtained fee simple title to their homes

**Land Title**:

* Creation of Nisga’a Land Title Office

Responses to the Nisga’a Final Agreement

* Chief Gosnell (speech to BC Legislature) describes the agreement as a triumph in a number of different ways
* Other views (Sanders piece)
	+ Ie: Powers granted are modest and do not address broader issues surrounding sovereignty

Aboriginal Property Rights Review – ESSAY

Questions to Consider:

* Are courts all First Nations have in seeking to achieve meaningful change? (**Welch**)
* One core issue requiring resolution is the ongoing alienation of indigenous peoples from the land (**King**). How can this issue be resolved?
* Compare and contrast the different types of property rights covered over the past few classes.
	+ Aboriginal title in different categorizations
	+ How would you compare aboriginal title to fee simple (in Nisga’a agreement) or to property rights in reserve land?
* What might it mean to take the perspective of Aboriginal groups into account in the context of Aboriginal title cases?
	+ Look back to **Overstall** reading from first term and **Borrows & Rotman**
* What does **reconciliation** mean in the context of land claims involving the traditional territory of a First Nation?
* What are your views on the Nisga’a Nation’s individual land holding project?
* How does the SCC’s decision in *Tsilhqot’in* advance the project of reconciliation, if at all?