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# COMMON LAW ESTATES

Piece or segment of ownership that lasts for a specific period of time

**Leasehold:** of certain duration

**Freehold:** of uncertain duration

**Estates not of inheritance:** Life estate

**Estates of inheritance:** Fee simple + fee tail

**Fee simple:** absolute ownership (approx.)

**Fee tail:** inheritable right of conceptually more limited duration

# Duration:

## Fee Simple:

* Largest estate known to law // full ownership in practical terms but not absolute
* Will end w/ conditions of escheat
* Tenure of potentially unlimited duration;

Gray

* Largest possible bundle of rights exercisable w/ respect to land
* Argues that all Western systems of property

Provide for virtually absolute land rights; why?

Ellickson

* + Stewardship/conservation
  + Discounted present value
  + Investment, development

## Life Estate

|  |  |
| --- | --- |
| **Pur sa vie** | **Pur autre vie** |
| To A for life (for the life of A)   * If a life estate pur sa vie is transferred to another person, it becomes a life estate pur autre vie: (To A for life) → A transfers their life estate to B = to B for life of A | To A for the life of B   * Anyone can be chosen to be the measuring life * If more than one life chosen: unless indicated otherwise, LE won’t end until the *last* measuring life ends * Can be set up for the joint lives of A+B or until the first dies * Can be transferred to someone else: (To A for life of B) → A transfers to C = to C for life of B * If A predeceased B, there is an unexpired portion of life interest which is dealt with by leg’n stating property devolves along w/ rest of A’s estate |

|  |  |
| --- | --- |
| **Remainders and reversions** | |
| To A for life | To A for life, and then to B |
| A has life estate pur sa vie  X has a reversion  When A dies, the property reverts back to X, the grantor | A has a life estate pur sa vie  B gets the remainder of the estate (B = remainderperson)  After the grant is made, X has no interest |
| → A holds a life estate, X holds a reversion | → A has a life estate, B has a remainder |
|  | Income and capital beneficiaries: Income goes to LE holder + capital preserved for remainderperson |

## Fee Tail:

* Estate descends only to lineal descendant of first tenant in tail + lasts as long as there are direct lineal descendants
* Where none remain, the estate passes to the holder of the fee simple
* Principal function to perpetuate family dynasties
* Abolished in BC by *Property Law Act,* RSBC 1997 s. 10

# Creating an Estate in Land:

## Fee Simple

“To A & his heirs”

* To A = words of purchase (who takes an interest?); may be better described as words of receipt
* And his heirs = words of limitation (delineating extent of the right conferred on A)
  + How long estate is granted for: FS will endure so long as A has some designated heir
  + A’s heirs have no substantive rights under the grant (*D’Arundel’s Case* (1225)); merely a descriptive term of the rights given to A

### Common Law vs. Statutory Presumptions

**Common Law Presumption**

* Presumption of life estate in grants/wills
* 'magic words' needed for fee simple or fee tail:
  + FS: ' To A, and his Heirs'; 'To A, her heirs, and assignees'
* Rule relaxed for wills: had to show convincing evidence of intention to create FS

***→ Statutory reform reverses CL presumptions:***

* The new presumption is Fee Simple, unless the transfer expressly provides otherwise (*PLA,* s. 19(2))
* *Property Law Act,* s. 19; *WESA*, s. 41(3); *LTA,* ss. 186(4)-(8)
* Applied in *Thomas v Murphy*

### *Thomas v Murphy*, 1990 (NB QB)

|  |  |
| --- | --- |
| **F** | * Grantors held property in FS * title was conveyed to the trustees as “grantees, their successors, and assigns” and not to “grantees, their heirs, successors, and assigns” * Πs argued that it did not amount to fee simple, and interest remained with the grantors b/c ‘heirs’ missing * The use of the word “heirs” constitutes words of limitation, which is omitted, making the whole transfer void. * Π Claims title is defective + must be repaired and given costs + damages |
| **I** | Was the grant in fee simple, despite the missing magic words? |
| **D** | Action dismissed. Π found to have marketable title from grant; steps taken to repair were unnecessary ∴ Δ not req’d to pay costs. |
| **RA** | **THE INTENT OF THE DOCUMENT TAKES PRECEDENCE OVER THE NECESSITY OF ‘WORD MAGIC’ AND ‘RULE OF LAW’** |
| **RE** | Conveyance as a whole shows intention of parties to pass all of the grantors’ interest to the grantees |
| **ETC** | Marketable title: not subject to claims or defects which would prevent it from being sold  Repairing title: further steps need to be taken to gain marketable title  Rule of Law: prescribes a result that will apply even if it is inconsistent w/ intention of the person making transfer  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 |

### To A absolutely during his lifetime, then to B [LE vs FS]

|  |  |  |
| --- | --- | --- |
| 1. A gets FS; gift to B gets struck out   *[gifts are inconsistent – doctrine of repugnancy]* | 1. A gets LE; B gets remainder in FS   *[strike out word ‘absolutely’]* | 1. A gets LE w/ power to encroach; B gets remainder in FS   *[access to capital of property, not just income; language of the will will be looked to for finding encroachment power]* |
|  | These two options give effect to intent of testator (the dominant principle in will interpretation) | |
| ***Walker*** | ***Christensen*** | ***Taylor*** |

\*\* case law is inconsistent; no principles that control absolutely ∴ results can be dependant on judicial perspective

## Life Estate:

### *Re Walker*, 1924 (Ont. CA)

|  |  |
| --- | --- |
| **F** | * Husband’s will: if any of his estate remained undisposed of by wife when she dies, remainder would be divided in a certain way * Those claiming under husband’s will want some of the ‘undisposed of’ portion * Those claiming under wife’s will contend W took absolutely |
| **I** | What was the property interest given to the wife by husband’s will? |
| **D** | Gift to widow prevails + attempted gift over declared repugnant and void |
| **RA** | **IN CONSTRUING A WILL, THE COURT MUST GIVE EFFECT TO THE WISHES OF THE TESTATOR AS FAR AS LEGALLY POSSIBLY BY ASCERTAINING WHICH PART OF THE TESTAMENTARY INTENTION PREDOMINATES, AND BY GIVING EFFECT TO IT. THE SUBORDINATE INTENTION WILL BE REJECTED AS BEING REPUGNANT TO THE DOMINANT.** |
| **RE** | This was an endeavour to do the impossible – to both give all the rights to one person but also to add that whatever remains should be given to someone else. There are only two possibilities; appears to be no middle course. |

### *Re Taylor*, 1982 (Sask)

|  |  |
| --- | --- |
| **F** | Husband’s will: wife to be given all of his estate “to have and use during her lifetime” and upon her death, whatever remains is to be divided between 2 daughters |
| **I** | Whether wife took absolute interest or only life interest under husband’s will |
| **D** | Life estate + power of encroachment for the purpose of maintenance, not including the ability to dispose of the property through the will. |
| **RA** | **WHERE A TESTATOR USES PLAIN LANGUAGE TO INDICATE AN INTENTION TO GIVE A LIFE INTEREST ONLY, THAT INTEREST IS NOT ENLARGED TO AN ABSOLUTE INTEREST B/C THE TESTATOR HAS DECLARED THAT THE DONEE HAS THE RIGHT TO ENCROACH ON CAPITAL FOR HER OWN PROPER MAINTENANCE.** |
| **RE** | * Fund’l rule about construing will is that will must be considered as a whole * Life interest found b/c of “during her lifetime” are words of limitation (defining size of estate wife is to take) * There is possibility that there may be nothing left on which the gift over can take effect but that doesn’t enlarge the life interest to an absolute one * Providing capital for maintenance is better evidence of a power to encroach vs absolute interest b/c if you gave away a portion of the estate, that would hinder its ability to provide you w/ proper maintenance * Differs from *Re Walker* b/c there aren’t opposing intentions |

### *Christensen v Martini Estate,* 1999 (Alta. CA)

|  |  |
| --- | --- |
| **F** | A: Testator’s (T) widow  R: T’s neighbours  T’s will: gives duplex (matrimonial property) to A “for her use. When she no longer needs it”, she was to give it to R |
| **I** | What is the nature of the bequest of T’s duplex? |
| **D** | A given Life estate + power to encroach w/ gift over to R |
| **RA** | **IT IS THE DUTY OF THE COURT TO DISCERN THE TESTATOR’S INTENTION, AND TO RECONCILE APPARENTLY CONFLICTING PROVISIONS IN A WILL RATHER THAN IGNORE ONE OF THEM OR FIND ONE VOID FOR UNCERTAINTY.** |
| **RE** | * T meant to benefit both A + R → supported by language of the cl, the entire will, and surrounding circs * Absence of ‘during her lifetime’ doesn’t mean T didn’t intend to grant life estate * Inappropriate to decide case by applying standards of pro-drafted wills * No mechanism to force A to make an inter vivos transfer to R of property * B/c T + A lived together in the property, it’s likely that T intended her to have right to continue to occupy property after his death, for the duration of her life. |

### The Rule in Shelley’s Case:

**Rule of law:** “To A for life, then to the heirs of A”

**Words of purchase** = ‘to A’ // limitation = ‘for life, then to the heirs of A’

**Result**: A receives FS + A’s heirs receive nothing

## Fee Tail

“To A & the heirs of his body” (differs from FS: “to A and his heirs”)

→ would’ve created a fee tail, but b/c they’ve been abolished, today these words would give

# The Rights of an Estate Owner

|  |  |  |  |
| --- | --- | --- | --- |
| Primary Rights Associated with Land | Fee Simple | Life Estate | Leasehold |
| Possession (usus) |  |  |  |
| Profits (income) |  |  |  |
| Right to Destroy/Alienate (abusus) |  | Sometimes, if power to encroach |  |

## Waste

An act that causes injury or does lasting damage to the land

### Ontario Law Reform Commission: *Report on Basic Principles of Land Law*

* Limits the extent to which the life tenant can encroach (or make inroads/alterations) on the capital or make changes to the property
* Holder of FS gen’lly not impeachable for waste
* Holder of FS subject to executory gift over is in same position as a life tenant w/o impeachment for waste (i.e. cannot commit equitable waste)
* Will or settlement may also expressly prohibit waste which can be enforced by injunction
* Little recent case law

***Ameliorating: results in benefit rather than injury + improves inheritance***

* E.g. turning pasture land into arable land
* Anger + Honsberger: “unless character of property is completely changed, it’s unlikely that a court would award damages or grant an injunction for ameliorating waste as between a life tenant and remainderman”

***Permissive: failure to act***

* E.g. Allowing buildings to become dilapidated by not repairing
* Life tenant not impeachable *unless* duty to repair provided in grant
* Law reluctant to impose positive obligs of uncertain bounds on life tenant (what does it mean to preserve or repair something?)
  + Does this create problems? → could allow property to deteriorate to such an extent that value becomes diminished

***Voluntary: positive wrongful action that diminishes land value***

* Life tenant liable for voluntary waste but may be made unimpeachable by grant terms
* Prevents cutting of timber (w/ some exceptions), destruction of buildings, opening of new mines

***Equitable: severe and malicious destruction***

* E.g. taking a sledgehammer to the walls
* Even if life tenant exonerated for liability for waste, they’ll be restrained in equity by injunction
* May be permitted by grant but must be explicitly provided

***Remedies for Waste***

* Damages, amting to decrease in value of reversion/remainder, less an allowance for immediate payment
* Exemplary damages might be avail in certain circs
* Injunction to prevent threatened or apprehended waste
* If waste = profit for LT, $ can be recovered by accounting
* Onus on Π to prove damage

***Exemptions from Liability:***

Can be made unimpeachable; See law and equity act s. 11; can modify liability through contract

### *Law and Equity Act,* RSBC 1996 c. 253, s. 11

**Equitable waste**

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

### *Powers v Powers Estate,* 1999 Nfld TD

|  |  |
| --- | --- |
| **F** | Applicant, Powers, has life interest + power to encroach (for maintenance and providing services to the property) in property being held for her by executor respondent of Powers estate  Application for declaratory order respecting responsibility for certain expenses related to the property  Life tenant = income vs. remainderperson = capital |
| **I** | Should the following expenses be paid from the income or the capital of the property in question:   |  |  | | --- | --- | | 1. Heating costs | 1. Taxes | | 1. Repair costs | 1. Mortgage | | 1. Insurance premiums |  | |
| **D** | |  |  | | --- | --- | | 1. Income | 1. Income (like any other daily maintenance expense) | | 1. Capital (directed towards preservation of house) | 1. LT req’d to pay monthly interest on mtg debt but if part of it is principal, then they are entitled to reimbursement from remainderrperson | | 1. Income | |
| **RA** | **IN GENERAL, DAILY MAINTENANCE EXPENSES SHOULD BE PAID BY INCOME, AND LONG-TERM PRESERVATION COSTS SHOULD BE PAID BY CAPITAL** |
| **RE** | * If trustee pays premiums out of income, bene of life interest has his/her income reduced equally * If payments from capital, estate is reduced by that amount and income of life tenant reduced by the interest on that amount * No obligs for life tenant to insure, however trustee might be seen as negligent if they didn’t insure the property * Premiums paid from income: consistent with *Trustee Act* and American cases which find that insurance premiums are like any other modern day expense (like taxes or mortgage interest) and should be treated thusly   + Insurance related to regular maintenance, paid out of income (by life tenant) * If the insurance is for a longer term benefit, then it’s paid out of capital (by remainderperson) * s. 18 of Trustee act: power to insure property: a trustee *may* insure against loss or damage by fire and pay the premiums out of the income * If there are repairs necessary to preserve, it is consistent w/ doctrine of waste for remainderperson to pay for those |

# Succession

## *Wills, Estates and Succession Act,* SBC 2009 ss. 1, 2, 5, 10, 20-25 GO TO STATUTORY SUPPLEMENT

# Mortgages and Other Security Interests

**Security:** Form of property right that provides financial protection should some primary obligation not be met; i.e. mortgage ‘secures’ a loan

* Prov’l diversity is significant: mtgs are statutory creations, grounded in 91(13) – property and civil rights; each prov has its own system ∴ ct decisions are not necessarily authoritative inter-prov’lly
* Conveyance: legal process of transferring property from one person to another

**Mortgage:** type of security, most often assoc’d w/ FS in real property

* Borrower: mortgagor // lender: mortgagee (secured creditor ∴ takes precedence over unsecured in distribution of assets)
* Evolved from a system of live-gage where a lender would keep the physical land for duration of the loan (practical and inconvenient) to mort-gage where the lender gets the land *only* if the debtor defaults
* History of mtg law reflects enduring tension between CL and equity
  + At CL, due date of repayment was sacrosanct + Eq stepped in to mitigate harshness through giving borrower the **equitable right of redemption** (ERR)
  + At a certain pt, a mortgagee can apply to court to foreclose the ERR → equitable right of foreclosure

**Rationale for ERR:**

* Protecting young heirs from their own stupidity and susceptibility to usury
* Ensures that land would be returned to its ‘rightful’ owner
* Cts loath to accept Ks which transferred ownership of land b/c inconceivable that anyone would want to give it up
* Reflected and re-affirmed the elevated position of the landed establishment
* Mortgagees seen as servants of landowner

# LAND TITLE REGISTRATION

# Common Law Priorities and Title Registration

The equitable fee simple can be carved up **independently** of the legal fee simple

EXPRESS TRUST: Equitable interest held by the trustee; legal interest held by the bene // most common

CONSTRUCTIVE TRUST: separates out the legal and equitable interest

* Effected by the actions of the parties
* Until the interest in land is transferred, the vendor holds the legal interest
* After the contract is signed, the equitable interest goes to the purchaser and the legal interest is held by the vendor, for the benefit of the purchaser

→ This means that the vendor can’t then go on and sell the legal interest to someone else

***∴ 2 stages for a transaction in land:***

1. K for purchase and sale (usually involves agment to transfer $ and title)

[purchaser holds equitable interest + vendor holds legal, for benefit of purchaser]

1. Actual transfer – closing date where legal title and money are actually transferred

[purchaser gains legal title from vendor]

|  |  |  |
| --- | --- | --- |
| **COMMON LAW PRIORITIES** | | |
| *Prior interest* | *Subsequent interest* | *Result + principle* |
| Legal | Legal | Prior legal; first in time |
| Equitable | Equitable | Prior equitable; first in time |
| Legal | Equitable | Prior legal; first in time + nemo dat |
| Equitable | Legal | Exception to first in time: equitable interest not enforce against bona fide purchaser of legal estate who has given valuable consideration and had no notice of the prior interest |

* Title under CDN law is a relative term – what matters is that B can show a right superior to C in a conflict even if both must yield to the superior rights of A
* Doctrines necessary to order competing claims b/c property rights are divisible + manifold
* CL approach is first in time is first in right whereas equity, usually but not always, adheres to importance of temporal priority in ranking claims
* Also supplemented by statutory measures for registration of land claims
* Regimes provide procedures for recording and sometimes validating property claims + can affect priority ranking ∴ can work to alter substantive rights

### *Northern Counties of England Fire Insurance v Whipp,* (1884) CA

'Winding Up': The process of selling all the assets of a business, paying off creditors, distributing any remaining assets to the principals or parent company, and then dissolving the business.

|  |  |
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| **F** | * Legal mortgage holder (Π) challenged by a later equitable mortgage holder (Δ) * Mortgagor (Crabtree [C]) gave title docs to Π when mortgage created, and he was manager of company; C retained key to safe where title docs created * C later got loan from Δ and used title from safe to secure it * Removed title docs and deposited them with Δ * Δ unaware of earlier mortgage to Π * In an action for foreclosure by liquidator of Π’s company against C’s trustee in bankruptcy and Δ, Δ filed defence claiming declaration that company’s mortgage was fraudulent against her |
| **I** | Πs as owners of legal estate are prima facie entitled to priority but Δ seeks postponement – what conduct in relation to the title deeds of a mortgagee with a legal estate is sufficient to postpone it in favour of the equitable mortgagee without notice? |
| **D** | Πs entitled to priority |
| **RA** | **THE COURT WILL POSTPONE A PRIOR LEGAL ESTATE TO A SUBSEQUENT EQUITABLE ESTATE WHERE THE PRIOR OWNER HAS BEEN A PARTY TO FRAUD OR CREATED SITUATION WHERE FRAUD IS POSSIBLE BUT THE COURT WON’T POSTPONE THE PRIOR ESTATE ON THE GROUNDS OF MERE CARELESSNESS.** |
| **RE** | 1. A court will postpone the prior legal estate to a subsequent equitable estate where    1. Owner of legal estate has assisted in or connived at the fraud which has led to the creation of subsequent legal estate w/o notice of the prior legal estate       1. Which omission to use ordinary care in inquiry into title deed’s location may be sufficient evidence where such conduct cannot otherwise be complained       2. Where the owner of the legal estate has constituted the mortgagor his agent w/ authority to raise money and the estate thus created has by the fraud of the agent been represented as being the first estate 2. But the court doesn’t postpone the prior legal estate to subsequent equitable estate on ground of mere carelessness or want of prudence on part of legal owner |
| **A** | * Insuff evidence of fraud - Πs didn’t collab w/ C to induce Δ to lending money and they never knew it occurred * It might have been carelessness but that’s not fraud * Was C an agent? No. Even though he had the key, Δs didn’t give enough evidence that the key was evidence of agency |

### PA O’Connor – Security of Property Rights and Land Title Registration Systems

* Equitable interest not enforced against bona fide purchaser of legal estate who has given valuable consideration and had no notice of the prior interest
* Constructive notice – created to disincentive wilful blindness toward possible prior interests; if a purchaser didn’t show due diligence in their search, they could be deemed to have constructive notice ∴ if they did their due diligence, they were protected against any prior interest they failed to find
* Onus on purchasers to show there was no notice
* There is a practical justification for putting limit on purchasers’ search costs b/c equitable interests entail modes of creation that make it difficult for purchasers to discover
  + Less likely to be evidence in documentary form or by possession than legal interests
* Posner justifies through efficiency argument: original owner is a lower cost avoider of mistake (i.e. takes less for them to reveal that there may be a prior interest) ∴ bona fide purchaser rule provides incentive for earlier owner to take steps to avoid mistake b/c they can do so more cheaply than purchaser
  + O’Connor thinks this is wrong and that actually it’s more accurate to say that costs are split between earlier owner and purchaser w/ purchaser bearing most + earlier owner only bearing risk of loss if her equitable interest is one that would not be revealed by the usual inquiries

### Rice v Rice 1853 All ER:

|  |
| --- |
| In a contest between A and B where **both hold equitable title**, if equities are in all other respects equal, **priority of time gives the better claim**; i.e. if no other sufficient ground of preference exists between them.  In examining who has the better claim in adverse equitable interests, the points to be examined include: circs and manner of acquisition, and whole conduct of each party w/ respect thereto  There’s no other particular rule other than the same principles of right and justice applied whenever equity deciding contested rights |

# 2. The Advent of Registration:

* Prior to land registration, priority rules governed
* Purchaser of a fee simple interest responsible for determining:
  + who else held other interests in the property
  + the person purporting to sell the fee simple was actually the person who held that interest
  + that transfer instruments not forged;
  + that the instruments that had est’d seller’s title were also valid b/c otherwise a previous owner could emerge and claim

### “The Length of a Title Search in Ontario” – T.G. Youdan

* In the absence of kual provision to the contrary, vendor req’d to show title back to a good root of title at least 60 y.o.
* Good root: instrument of disposition dealing with or proving on the face of it (w/o the aid of extrinsic evidence) the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified + showing nothing to cast any doubt on title of the disposing parties
* Provided starting point for the abstract (collection of docs to prove title)
* Exceptions to the rule:
  + Only in the absence of contrary kual prov
  + Title proof didn’t affect claims of third parties
  + Didn’t determine quality of the title to which purchaser entitled; didn’t extinguish the title of third party; if the interest was legal it was enforceable regardless

### Deeds Registration

* Central repositories of deeds
* Provide no guarantee that seller has a valid title; just a collection of info about interests in land
* Purchasers still req’d to conduct search of the chain of title and est veracity of each link
* Value of a deeds system is that it encourages registration of interests and makes the process of searching title easier than it had been in the past
* 3 types:
  + race system: based on who registered first
  + notice system: purchaser deemed to have notice of any prior interests that have been reg’d
  + Race-notice system: hybrid of the two; priority accorded where two circs exist: second interest must be acq’d w/o notice of the 1st (constructive notice usually insuff) & subsequent interest must be reg’d first

### Harris – Advent of the Torrens System in Canada:

* Canada is a collection of title registration jurisdictions
  + Spread unevenly, given prov’l jurisdiction over land
  + BC: Instead of institution of expensive torrens land commission to validate each title on first registration, intro’d 2-tier system where a titleholder acquired ‘absolute’ title on 1st registration but could only acquire ‘absolute and indefeasible’ title (state guarantee of title) five years after 1st registration
    - Resulting in one registry of absolute titles that were not indefeasible (∴ vulnerable to competing claims) and one registry of absolute + indefeasible
    - Allowed opportunity for challenge
* Unlike CL or deeds registration systems where the holder of an interest in land is always subject to the claim of the person wrongfully deprived of that interest, title registration guarantees that the person registered as the holder of the title *is* the title holder
* Draws a line between prior transactions + title reg where prior trans are irrelevant to existing state of title
* Cures any defects in title
* Also, to varying degrees, abolishes CL doctrine of notice; holder of registered interest unaffected by notice of unregistered interests
* System that gives purchasers and lenders (who take prop interests as loan securities), greater confidence in the veracity of interests they acquire
* Designed to simplify + facilitate the transfer of interests in land
* But obvious benefits for certain interests does not mean it was a good story; title reg is part of a long process of decoupling land from est’d social bonds and of reconstructing it as a commodity like any other
* Torrens title provided security for local purchasers but also helped to bring the land of British colonies w/in ambit of British capital
* ∴ came to prevail not b/c of inherent superiority but b/c of usefulness in repositioning land w/in an emerging liberal order
* radically new land system adopted in one corner of the world adopted in another corner = function of empire; torrens title was a favoured instrument of rational colonialism

## Title Registration:

* a veneer; doesn’t create titles in land but puts them in a system and may affect the priority of interests
* Reorganizes risk
* Fee simple interest registered first // All other interests registered against the fee simple as charges (which encompasses all other lesser interests in land)

## General principles of title registration: *Land Title Act,* ss. 20, 23(2), 29(2), 37(1), 296(2) GO TO STATUTORY SUPPLEMENT

**Questions must be answered ‘yes’ in order for claimant to receive compensation from assurance fund (according to section 296(2):**

1. Deprived of any estate or interest in land?
2. B/c of the conclusiveness of the register?
3. Would be entitled to recover absent a title registration system?
4. In consequence of fraud or wrongful act?
5. Barred from bringing an action to recover land?

[S. 25(2): an action for recovery of land for which indefeasible title has been reg’d must not be commenced or maintained against the reg’d owner of indefeasible title]

## Indefeasible Title and Fraud

### *Land Title Act,* s. 23(2(i) – FRAUD:

**2 questions the registration system must grapple with:**

1. Should perpetrators of fraud be protected by indefeasible title? NO; it will always be subject to the claim of the person who has been wrongfully deprived
2. What about the bona fide purchaser for value who acquires an interest in land on the basis of a fraudulent instrument? → the real question is when does that interest become indefeasible? (immediate or deferred)

## 25.1– Void Instruments: STATUTORY SUPPLEMENT

## Lawrence v Wright, 2007 Ont CA

Ownership of a person’s home fraudulently transferred; property then mortgaged. Between the two innocent parties (homeowner and lender), who wins? → Homeowner

Remember that the whole purpose of land title registration is to simplify land transfers, to provide guarantees

|  |  |
| --- | --- |
| **F** | Lawrence is original owner, wrongfully deprived of title by Wright. Wright then acquires a loan, mortgaging the property to Maple Trust. Bank innocently acquired its interest in the property in good faith, for valuable consideration and w/o notice of any fraud. Forgery then discovered. |
| **I** | Is the charge against the property valid and enforceable as against the true owner of the property, despite having been acq’d from a fraudster?  Does Maple Trust hold indefeasible title? Is their mortgage guaranteed? |
| **D** | Wright never took valid title to the property b/c he obtained it by fraud. He ∴ wasn’t a registered owner. In accordance w/ s.68(1) of the act, only a reg’d owner may give valid charges on land. The bank didn’t take from a registered owner. Therefore, despite registering its charge, Bank loses in a contest w/ the true reg’d owner, Lawrence. |
| **RA** | **REGISTRATION OF A VOID INSTRUMENT DOES NOT CURE ITS DEFECT, THEREFORE NEITHER INSTRUMENT NOR ITS REGISTRATION GIVES GOOD TITLE. HOWEVER, GOOD TITLE CAN BE OBTAINED BY A DEFERRED OWNER FROM AN INTERMEDIATE OWNER.**  **TITLE BECOMES INDEFEASIBLE ONCE THE TRANSACTION IS ONE STEP REMOVED FROM THE ROGUE.** |
| **RE** | * Bank says its charge was immediately indefeasible on registration b/c it took from Wright, the person that the register showed to be the registered owner ∴ Wright’s fraud is irrelevant insofar as the validity of the bank’s charge is concerned * Bank maintains that assurance fund is meant to cover these types of losses to innocent parties so Lawrence should go there for relief   **Deferred indefeasibility theory:**  3 classes of parties:   1. Original owner [LAWRENCE] 2. Intermediate owner – person who dealt w/ the party responsible for the fraud [BANK] 3. Deferred owner – bona fide purchaser or encumbrancer for value w/o notice who takes from intermediate owner [NONE IN THIS CASE]   → only a deferred owner would defeat original owner’s title b/c the intermediate owner had an opportunity to investigate the transaction and avoid the fraud whereas deferred owner didn't  **Possible to construe act w/ immediate or deferred indefeasibility → which is preferable?**   * Deferred accords w/ s. 155 which recognizes that a fraudster can’t take good title but also recognizes the ability of bank to be registered owner for purposes of the deferred owner * Also consistent w/ hx analysis of s. 78 which wasn’t meant to supplant the substantive law but rather intro’d as minor change * Most importantly, it is preferable for policy reasons: unfair that innocent homeowner could only seek damages where mortgagee could be entitled to house. [real property w/ house not seen as fungible] ∴ better to compensate the lender monetarily. * homeowner has no way of avoiding the fraud vs. bank made the choice; this encourages lenders to be vigilant and places burden appropriately |

**REVIEW QUESTION:**

1. A held fee simple interest in Z. S, believing he was dealing w/ A, contracted to purchase fee simple interest but he was actually dealing with W who was posing as A. W forged A’s signature on the transfer instrument and S reg’d his interest. At this point, A discovers the fraud and claims title…

Can A recover title:

* 1. If S has participated in the fraud?

→ 23(2)(i) No. Party to a fraud ≠ indefeasibility

* 1. If S is a bona fide purchaser for value w/in a system of immediate indefeasibility?

→ No.

* 1. If S is a bona fide purchaser for value w/in a system of deferred indefeasibility?

→ Yes. One step away from the fraud

1. A held fee simple interest in Z. S, believing he was dealing w/ A, contracted to purchase fee simple interest but he was actually dealing with W who was posing as A. W forged A’s signature on the transfer instruments and S reg’d his interest. S then contracts to sell the interest to B. At this point A discovers the forgery.

Assuming that both S and B are bona fide purchasers for value, can Andy recover title:

* 1. W/in a system of immediate indefeasibility?

→ No. As soon as title is reg’d, the person on the title is the owner.

* 1. W/in a system of deferred indefeasibility?

→ Yes. *Until* B is on title, A can still recover. If A had discovered the forgery after B had been reg’d on title, then A would be out of luck.

## Indefeasible Title in BC: A Comment on the November 2005 Amendments to LTA – Harris

Title reg system in BC still labours under controversy re: whether it’s based on immed or deferred indefeasibility

**Indefeasibility:**

* In title reg system, this principle secures the registered owner’s interest unless that person has participated in fraud to acquire it
* With that exception, then, it operates on the principle that person named in registry as owner is the owner ∴ prospective purchasers need go no further than the registry
* Simplifies transfers and reduces risk for purchasers (dynamic security)

**Example**:

Rogue (R) contracts w/ Buyer (B) to sell fee simple interest in Blackacre. R is representing herself as O, the registered owner of the fee simple interest. R forges O’s signature on the transfer instrument, which B registered.

→ immediate = B holds indefeasible title; O cannot reclaim an interest – just compensation

→ deferred = B’s interest subject to O’s claim to recover title

If B then sold to C, before any fraud discovered, b/c they dealt with the registered owner, would hold indefeasible title even in deferred system

**Immediate indefeasibility in BC:**

* 2005 elimination of s.297(3) which provided that no person taking under a void instrument acquires no interest, seems to confirm immediate indefeasibility esp. w/ reassertion in 23(2)(i) that it is only the reg’d owner who has participated in fraud that doesn’t hold indefeasible title
* But s.25.1, unlike s. 23(2), which establishes that “indefeasible title...is conclusive evidence at law and in equity...that the registered owner is indefeasibly entitled to the estate in fee simple”, states that the person acquiring on the basis of a void instrument is only “deemed to have acquired that estate” → important distinction that may weaken the protection for fee simple interests acquired under a void instrument
* ‘deemed’ in this context comes close to conclusively establishing that reg’d owner of fee simple holds indefeasible title even if it was acq’d on basis of a void instrument
* **but** gov’t chose not to use language of indefeasibility ∴ maybe still circs where purchaser wouldn’t acquire that interest
* holders of registered property interests other than the estate in fee simple are “deemed to be entitled” to their interests; they are not “indefeasibly entitled” to those interests.
* Based on this distinction, the courts have treated registered fee simple interests and charges differently.
* ∴ the holder of a lesser interest such as a mortgage, which must be registered as a charge, will always hold that interest subject to the claim of the person wrongfully deprived of that interest.
* → distinction between fee simple interests and all others remains
* 2005 amendments stop short of fully adopting immediate indefeasibility b/c of the ‘deeming’ language
* reallocate risk rather than increasing security of the system

## Registration of Charges ss. 26, 27(3), 197, 297: STATUTORY SUPPLEMENT

***Charge:*** Means an estate or interest in land less than the fee simple; includes strata units (s.179) and encumbrances

### Credit Foncier Franco-Canadien v Bennett 1963 BCCA

|  |  |
| --- | --- |
| **F** | * Δs (Bs) reg’d as owners of an estate in fee simple * Allen forged mtg to Todd Investments – Todd registered mtg * Todd assigned mtg to Stuart – Stuart registered mtg * Stuart assigned mtg to Credit Foncier – registered * Bennetts made no payments * Credit Foncier began foreclosure proceedings * Bennetts sought to clear title |
| **I** | Is Π as a purchaser of a mortgage entitled to claim compensation from Δ owners of the property if the mortgage was forged *but* registered and twice sold?  What does ‘deemed to be entitled’ mean? → conclusive evidence or a rebuttable presumption that the interest is held? |
| **D** | Appeal allowed, mortgage discharged. |
| **RA** | **THE MORTGAGE WAS A NULLITY BY FORGERY AND REMAINED A NULLITY NOTWITHSTANDING THE REGISTRATION OF THE ASSIGNMENT TO STUART AND THE FURTHER ASSIGNMENT BY STUART. EVEN IF IT WERE A VALID INSTRUMENT IN PLAINTIFF'S HANDS, IT WOULD SECURE NOTHING, AS THE MORTGAGORS HAD RECEIVED NOTHING THEREUNDER AND HENCE OWED NOTHING.**  **“DEEMED” MEANS THAT THE INTEREST HOLDER HAS A REBUTTABLE PRESUMPTION.** |
| **RE** | The plaintiff contends that by virtue of [s.26(1)] it is to be "deemed entitled" and therefore "irrebuttably presumed:" (1) That the mortgage is a valid charge, owned by the plaintiff, the registered assignee; (2) That there is owing, according to the tenor and intent of the instrument, the named amount of $7,400 and interest.  → **depends on the meaning of ‘shall be deemed’**   * Capable of meaning ‘rebuttably presumed’ * Along w/ the fact that the leg’n uses ‘shall be conclusive evidence’ elsewhere [s.23(2)], omission taken to = meaningful * Rebuttable by evidence of fraud – if there is forgery *anywhere* in the chain of title, then it’s a rebuttal. * Also an error that registration of an assignment makes the mortgage conclusive as to an amount; mortgage is not determined by nominal amount but rather by the amount of actual advances made by the mortgagee and payments made on acc’t by mortgagor and that never happened here |

### Canadian Commercial Bank v Island Realty Investments Ltd., 1988 BCCA

|  |  |
| --- | --- |
| **F** | * Park Meadows held reg’d fee simple * 1st mtg to Imperial life – reg’d * 2nd mtg to Island realty – reg’d * 3rd mtg to Almont – reg’d * Director of Park Meadows forged discharge of 2nd mtg held by Island Realty * Almont assumed position of 2nd mtg * Almont advanced loan to Park Meadows * Park Meadows filed for bankruptcy protection * Island realty sought to re-establish its 2nd mtg * All of the mortgage holders are bona fide purchasers |
| **I** | As between Island Realty and Almont, who should be given priority?  i.e. as between two innocent parties, which of the two has priority? |
| **D** | Almont given priority. |
| **RA** | **HOLDER OF A VALID MTG GRANTED BY AN OWNER WITH A VALID TITLE IS ENTITLED TO THE INTEREST IN RESPECT OF WHICH IT IS REGISTERED. FRAUD SOMEWHERE DOES NOT = FRAUD EVERYWHERE.** |
| **RE** | * No forgery in the chain of Almont’s title – there is no void instrument in their chain of title; the void instrument is the discharge of Island Realty’s mtg * ∴ distinguishable from Credit Foncier: the reasoning in Credit Foncier would apply if Almont had taken under a forged assignment of mtg from Island realty b/c the forgery would go to the root of the validity of the interest held by Lamont. Put another way, Almont would not have had a valid interest b/c the original assignment was of no force and effect. That is not the case here. * Almont is entitled to 2nd mtg and to recover * What does Island realty do now? → assurance fund (suit against Director + ministry) |

\*\*\*if we looked at this today, based on what we know from Gill v Bucholtz, this would be decided differently b/c there is no deferred indefeasibility for charges – rather it is a rebuttable presumption

### Gill v Bucholtz, 2009 BCCA 137

|  |  |
| --- | --- |
| **F** | Π: Gill, reg’d owner of Lot 4   * Fraudulent transfer of fee simple interest by a rogue to a rogue (GG) * GG, now on title, transfers mortgages to secure loans to Innocent mortgagees * Mortgagees held title insurance * GG purports to grant mortgage to B (another Δ) who advanced $40K to GG in reliance on transfer. Transfer + mortgage reg’d at same time * GG negotiated a 2nd mortgage in favour of corporate Δ, filed for registration the following day → registration refused b/c Π had filed a caveat stopping any further action on the title, but parties decided to go ahead as if it had been registered * Original owner seeks to order to restore title unencumbered by mortgages |
| **I** | Are the mortgages valid?  If the mortgages are valid, then what? (What is the state of title)  Where the holder of the fee simple is a rogue and registered on title because of forgery or other fraud, do innocent mortgagees - who take their mortgages from the registered title holder (the rogue) - hold interests that are impervious to the claim of the person wrongfully deprived of his or her title because of fraud?  Or, are the mortgages invalid because the mortgagees dealt with a rogue who, under the common law doctrine of nemo dat quod non habet, had nothing to give?  What is the nature of an interest acquired from a registered title-holder who, herself, does not hold indefeasible title? → Can someone who deals with her, |
| **D** | Title returned to Mr. Gill (23(2)(i)). Mortgages cancelled as encumbrances against Π’s title. |
| **RA** | The exception in s. 23(2)(i) to the indefeasibility of title applies and the phrase "void instrument" in s. 25.1(1) includes a mortgage taken from a person who obtained her title by fraud or forgery, as occurred in this case. The Act preserves the nemo dat rule with respect to charges — even where the holder has relied on the register and dealt bona fide with a non-fictitious registered owner. The mortgagees in this case did not acquire any estate or interest in Lot 4 on registration of their instruments because having been granted by a person who had no interest to give, those instruments were void, both at common law and under s. 25.1(1).  Registering a charge (defined in BC’s LTA as any property interest less than a fee simple) does not cure a defect in the charge (*Credit Foncier*). The holder of a mortgage created w/ a forged instrument is always subject to the claims of the person deprived of his or her interest no matter how many times that mortgage is transferred to bona fide purchasers. Even when the instrument creating the mortgage is apparently valid, it will be invalid if the registered title holder is fraudulently on title. |
| **RE** | **If mortgages valid:** Π would’ve been entitled to recover from assurance fund (s. 296(2)) and could discharge the mortgages that way  **If mortgages invalid:** Π would hold title unencumbered by the mortgages; Would the mortgagees be able to recover from assurance fund? No, they were acquired based on an invalid interest. (But they held title insurance, so it’s fine)   * Charges, dealt with in s. 26(1) only states that the reg’d owner of a charge is ‘deemed to be entitled’, subject to appropriate exceptions and 26(2) warns that registration of a charge does not constitute a determination by the registrar that the charge in fact creates an interest in land or that it is enforceable * Mortgage was granted by the reg’d owner who held title in her true name but in both situations, the mortgage is ineffective at CL to pass any interest (nemo dat); s. 25.1(1) reinforces the point that the mortgage remains void notwithstanding registration * 25.1(2) and (3) contain exceptions for bona fide purchasers for value but they only apply to instruments purporting to transfer fee simple estates * The act does not purport to validate every grant of interest carried out by a fraudster who is a registered owner, nor to protect every person relying on the register   If Bucholtzs had bought the fee simple interest from GG, what would be the nature of their title?  25.1(2) + 23(2) → they would hold good title, based on a combo of the prov’ns |

### Case Comment on *Gill v Bucholz –* Harris & Mickelsen

**INDEFEASIBILITY AND CHARGES AFTER *GILL.* COMMON LAW PRINCIPLE OF *NEMO DAT* STILL APPLIES UNDER THE *LAND TITLE ACT* FOR ALL INTERESTS IN LAND LESS THAN FEE SIMPLE (CHARGES).**

One of the results of *Gill* will likely be **increased use of title insurance**, because the holders of charges are subject to the claim of a person wrongfully deprived of their fee simple interest, even if the holder of a charge acquired their interest from the registered holder of title. Another possible outcome from *Gill* is a **larger destabilizing effect on the title registration system = a diminishment of public confidence.** Achieving the goal of **facilitating transfer of interests** in land **requires public confidence** in the title registration system. Public confidence in the system is established primarily through the state guarantee of title in s. 23(2) of the *Land Title Act*, the **principle of indefeasibility** for registered fee simple interests acquired in good faith and for value. But *Gill* confirms that there is **no state guarantee for charges**. Before *Gill,* holders of charges could at least benefit from the state guarantee when they dealt with the registered holder of the fee simple interest, per *Island Realty.* But after *Gill,* holders of charges cannot have the same confidence because even if they acquired their interest from the registered holder of the fee simple interest, their **charge might actually be void if the registered holder is a rogue**. Harris & Mickelson’s proposed solutions: amend *LTA* to enhance protection for charge holders, either extending indefeasible title to mortgages or compensating mortgagees for losses b/c of fraud from the assurance fund. Another solution: just more title insurance?

#### Rundown on Fraud:

1. If you’re a party to a fraud, you’re not protected by a title registration system – embodied in s.23(2)(i)
2. If you acquire a fee simple interest on the basis of a void instrument and if you’ve acquired it in good faith and for valuable consideration, you have acquired good title – s.25.1(2) → even though a forgery may be involved, you still acquire good title
3. If you acquire a lesser interest, on the basis of a forged instrument, and you register that interest, you are deemed to be entitled – s. 26(1) + Credit Foncier → raises a rebuttable presumption, subject to someone showing fraud
4. If you acquire a charge from the registered owner of the fee simple, even though you’ve dealt w/ the person on title, if they do not themselves hold indefeasible title (e.g. b/c they’re a party to the fraud – s. 23(2)(i)) then your charge will always be subject to the claim of the person who’s been wrongfully deprived of their interest in land b/c of fraud – s. 25.1(1) Nemo dat restatement + Gill v Bucholtz

## Abolition of Notice

**Equitable fraud:**

Does not involve forged documents, rogues, imposters, assumed identities – instead it simply requires notice of a prior unregistered interest

→ Remember back to the common law priorities

[first in time w/ exception of where the person who acquires legal interest w/ notice of a prior equitable interest **but** if the party had notice, it was against the conscience of the court to allow the subsequent legal interest-holder to take priority]

### Notice of Prior Unregistered Interest

Common law doctrine of notice: if a person takes a legal interest without notice of a prior equitable interest, they take that interest unencumbered by the prior equitable interest; if a person takes a legal interest with notice of a prior equitable interest, they take that interest subject to the prior equitable interest; this principle was articulated in *Tulk v Moxhay,* in the context of notice of a restrictive covenant.

Notice in the Title Registration System: the title registration system **abolished the common law doctrine of notice via s. 29(2), except in the case of fraud.** But it is not clear whether “except in the case of fraud” in s. 29(2) refers to the concept of fraud understood by the Courts of Equity (where notice or knowledge is sufficient to amount to fraud), or the concept of fraud understood by common law courts (where there must be something more than mere notice or knowledge, like deception, an intent to deceive, or some other clear fraudulent conduct, in order to amount to fraud).

### *Holt Renfrew & Co v Henry Singer Ltd* (1982) ABCA

|  |  |
| --- | --- |
| **F** | * Thompson & Dynes owned a building, which was leased to Holt Renfrew. * After several renewals, HR signed a 17 yr lease which was never registered. * Singer & T+D enter into negotiations to buy T+D’s company; once they realized that Holt’s lease wasn’t registered, they offered to buy the building instead (if they bought the company * BUT – stated that Holt’s lease wasn’t a problem with buying the building * sale documents stated that the sale was subject only to those encumbrances listed on the certificate of title (HR’s 17 yr lease was not there) // if we were in BC, we would know immediately that we’re outside the statutory exception * After acquiring the building, Singer immediately registered an interest to try to defeat HR’s unregistered 17 yr lease > Singer’s charge got priority over HR’s charge (once HR realized what had happened and registered its lease). * Singer was a purchaser for value who had prior notice of HR’s lease. |
| **L** | *s.203 LTA*, RSA: abolishes notice except for fraud and also states that knowledge of an unregistered interest is in existence shall not of itself be imputed as fraud |
| **I** | Whether Singer had perpetrated fraud |
| **D** | Majority found there was no evidence of misrepresentation, so lack of proof of fraud. But Singer’s charge was nevertheless fatally flawed, so did not take priority over HR’s lease. |
| **RA** | **FRAUD REQUIRES SOMETHING MORE THAN SIMPLY KNOWLEDGE (“NOTICE” PLUS), “DISHONESTY OF SOME SORT, MUST BE SHOWN”.** |
| **RE** | * Was there an additional action – i.e. the lawyer’s rep that the lease wasn’t a problem? * Yes, it was the lawyer’s duty to correct but the other party didn’t rely upon the misrep and so wasn’t misled ∴ irrelevant to the transaction b/c offer was crystal clear that it was only to be encumbered by reg’d interests and so the vendor had sold on the basis of that offer, not the previous rep * One of the purposes of the title registration system is to abolish the common law doctrine of notice ∴ even if a *bona fide* purchaser for value takes a legal interest with notice of a prior unregistered interest, they are not subject to the prior unregistered interest. |
| **Min** | * The statement that the lease wasn’t a problem, once it became erroneous, must be corrected by the lawyer * Not correcting the statement amounted to fraud |

### Alberta (Ministry of Forestry, Lands and Wildlife) v McCulloch (1991)

|  |  |
| --- | --- |
| **F** | * Single title w/ 2 parcels of land: millsite and residential * Millsite land was sold to Δ, but govt retained the option to repurchase and this option (a charge) was registered. * Δ then purchased residential parcel and caveat on that parcel discharged (discharge = gets rid of the caveat) * Mistake at LTO and the govt’s charge on millsite property was accidentally discharged too   (govt was left with a non-registered prior equitable interest).   * As soon as McCulloch became aware of the error, he transferred the millsite to a numbered company, which he was also the director of * Dept registered a new caveat // note that a caveat in AB operates as a charge would in BC and in BC, a caveat operates differently |
| **I** | **Whether title to the millsite parcel was acq’d by Δ’s company in circs amounting to fraud** |
| **D** | For there to be fraud, knowledge must be used for an unjust or inequitable purpose. Δ used the knowledge to defeat dept’s interests and relieve Δ from obligations to dept. |
| **RA** | **KNOWLEDGE ITSELF CANNOT BE IMPUTED AS FRAUD. HOWEVER, WHERE ONE USES KNOWLEDGE OF AN UNREGISTERED INTEREST IN LAND TO FURTHER AN IMPROPER PURPOSE, THE CIRCUMSTANCES FOR FRAUD HAVE BEEN MADE OUT.** |
| **RE** | * McCulloch clearly had notice of the govt’s unregistered interest * Δ transferred title to the company the week after he learned of the mistake and ct finds that he did so for the express purpose of defeating the caveat * Δ stated it was for tax purposes and to repay a loan from his mom but this could’ve been effective while his title was still subject to the original caveat or after the new caveat was filed by the dept |
| **ETC** | Alberta’s *Land Title Act* has a provision that states that “knowledge that any trust or unregistered interest is in existence shall not itself be imputed as fraud” > expressly saying knowledge is not sufficient to amount to fraud. But BC doesn’t have similar provision to bring clarity to meaning of fraud in s. 29(2) *LTA* |

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| --- |
| Land Title Act, s. 29(2) ABOLITION OF COMMON LAW DOCTRINE OF NOTICE, EXCEPT IN CASE OF FRAUD – Statutory Supplement |
| ***Is a purchaser’s notice of a prior unregistered interest sufficient to amount to fraud under s. 29(2)?*** |
| 1. **First, look at what *type* of notice the purchaser had of the prior unregistered interest.**     1. ***Express notice?*** If a purchaser had express notice of the prior unregistered interest, courts will be more likely to construe the purchaser’s notice as “fraud” under s. 29(2).    2. ***Implied notice?***    3. ***Constructive notice?*** (should have known; would have known had they made inquiries) If a purchaser simply had constructive notice of the prior unregistered interest, courts will be less likely to construe the purchaser’s notice as “fraud” under s. 29(2). 2. **Next, look at *when* the purchaser had notice of the prior unregistered interest.**     1. If the purchaser had notice of the prior unregistered interest during negotiations/before the contract for purchase and sale was finalized, courts will be more likely to construe the purchaser’s notice as “fraud” under s. 29(2).    2. If the purchaser did not have notice of the prior unregistered interest until *after* the contract for purchase and sale was finalized (before the transfer of title), courts will be less likely to construe the purchaser’s notice as “fraud” under s. 29(2). 3. **Finally, consider as a whole where the purchaser’s notice was sufficient to amount to “fraud”.**     1. ***Should the common law definition of fraud apply?***Knowledge of the prior unregistered interest is not sufficient, as in Alberta’s land title act and the case *Holt Renfrew v Singer.* Something more than knowledge is required to amount to “fraud”, for example some dishonesty or misrepresentation. Example of BC case where something more than constructive notice was required: In *Szabo v Janeil* (2006), the BCSC held that the purchasers’ constructive notice of an unregistered pipeline easement was not sufficient to amount to fraud, and therefore purchasers did not acquire title subject to the easement (court noted the purchasers did nothing “sufficiently dishonest to deprive them of the protection of s. 29”). In BC, it appears courts becoming willing to apply the CL defn of fraud, rather than the equitable defn.    2. ***Should the equitable definition of fraud apply?*** Knowledge of the prior unregistered interest is sufficient to constitute fraud. \*\*\*Problem: the equitable definition of fraud seems to undo what BC’s title registration system is trying to achieve in s. 29(2), doing away with the common law doctrine of notice. Possibility: if a purchaser has express notice of the prior unregistered, before the contract for purchase and sale was finalized, a BC court might be willing to stray from their approach in *Szabo v Janiel* (which involved constructive notice, not express notice, and apply the equitable definition of fraud, rather than common law defn. |

### 

### Title Registration and the Abolition of Notice in BC – Harris & Au

Two basic approaches to application of fraud exception:

1. Acknowledges that title reg’n eliminates equitable doctrine of notice & a person who acquires an interest w/ notice of prior unreg’d interest and attempts to defeat the prior interest by registering their interest doesn’t commit fraud → i.e. req’s **actual fraud** *OR*
2. Still allows the equitable doctrine of notice to operate w/in title registration system

**Title registration, notice, and fraud in BC:**

* On its face, the leg’n appeared to abolish any form of notice
* **but** w/ *Hudson’s Bay Co v Kearns and Rowling* BCSC held that there was a distinction between express and constructed notice → if the holder had express notice of prior unreg’d interest, the doctrine of notice would be revived, importing the equitable understanding of fraud
* But some add’l act beyond registering the interest was req’d if the purchaser were to take the interest subject to the prior unreg’d interest
  + Construed narrowly, the case stands for the proposition that BC’s LTA abolished constructive notice
  + More broadly, it appears to resuscitate the relevance of express or actual notice, although some passages of the judgment suggest that if one is simply acting in the ‘ordinary course of business’ in defeating a prior unreg’d interest of which one has express notice, it may not be fraud
* 1921: BC amended notice provision to include anyone taking an interest in land (not just purchasers) but didn’t include fraud exception common elsewhere ∴ left the issue of notice unresolved

|  |  |
| --- | --- |
| *Re Saville Row Properties Ltd.* (1969) | *Danica Enterprises Ltd. V Curd* (1976) |
| Reg’d holder of FS in a parcel of land transferred an option to purchase same to one party; then transferred FS to another party, Saville Row, who reg’d its interest  → SR knew of the prior unreg’d option before purchasing but ct found that it hadn’t acted in bad faith merely b/c it relied upon the provisions of the statute | Purchaser of FS in a residential lot who sought to defeat a prior unreg’d FS interest of which he knew or should have known  Ct sided w/ the holders of the unreg’d FS |

* **1978:** Rewrote prov’n abolishing notice (29(2)), adding an explicit fraud exception; still no inclusion of notice alone not being enough to be fraud // Decisions after this are still murky:

***Jaeger the Cleaner v Li’s Investments, [1979] BCSC: fraud requires notice plus something else***

* Prior unreg’d lease; purchaser of FS had actual knowledge of the lease
* Ct found that knowledge may amount to fraud but is not conclusive in every case
* Fraud must be established by the particular facts of the case and **cannot be presumed**

***Woodwest Developments Ltd. v Met-Tec Installations, [1982] BCSC: equitable fraud still exists***

* Prior unreg’d lease; purchaser of the fee simple had notice
* Π didn’t request the lease agment; raises question of whether they were a bona fide purchaser
* Fraudulent to allow purchaser to defeat prior unreg’d interest; s.29(2) doesn’t change the equitable doctrine of notice
* Timing was important – w/in days of registration being completed, Π attempted to use LTA prov’ns to defeat Δ’s interest → this is odd b/c registering an interest is the normal course of biz

***Szabo v Janeil, [2006] BCSC;*** ***Fraud cannot be presumed; it must be strictly alleged and strictly proven***

* Π held FS in lot A; Hansen held FS in lot B → underground pipe crosses B to service A; previous owner had built the pipe but there was no reg’d easement to allow for the pipe to cross B
* Szabo sued for specific performance to have the easement recognized
* Notwithstanding notice, there is no evidence from subsequent conduct can be said to amount to fraud for the purposes of s. 29.

Cts appear more likely to find fraud where:

1. There’s **express rather than constructive notice**
2. Timing of notice is important; if notice comes after the reg’d holder has changed its position on the absence of a prior reg’d interest, notice is likely irrelevant
3. If the prior unreg’d interst is fee simple

*→ none of these principles can be found in s. 29(2)*

To abolish or not to abolish notice:

* BC’s title reg system neither abolishes nor affirms the doctrine of notice
* Unresolved tension between statute and CL but more fundamentally a system caught between competing desires to create certainty for purchasers and security for owners
* Failure to resolve or make choices between the different values that animate the desires for dynamic or static security
* Either a clear statement from BCCA or leg’ve intervention necessary to resolve the uncertainty

# COMMON LAW LEASES

**Leaseholder:** holds the right to possess the land for a certain period (duration of lease)

**Landlord:** owner either of FS/LE, carves out the leasehold interest from their larger estate. They retain a FS/LE reversion and the right to sell and profit from the property; ability to take action or destroy property is circumscribed; lease will only last for duration of LE

# The Nature of a Lease

**4 types of lease recognized by CL:**

|  |  |  |  |
| --- | --- | --- | --- |
| 1. Fixed Term | 1. Period Lease | 1. Tenancy at Will | 1. Tenancy at Sufferance: |
| * Starting date must be ascertainable and maximum duration must be certain or ascertainable at the commencement of the term // otherwise, may last for any interval * Valid if it has a stated fixed terminal date, but which may be ended prematurely on the happening of a specific event | * For some recurring period of time (weekly, monthly, yearly) * Continues until terminated by notice (generally) * At CL: notice = length of tenancy (except for yearly tenancy which req’s 6 mos) | * May be terminated at any timem8 by either LL or T * No set period or term * May also be converted to a periodic tenancy * Can be created or ended by implication   + In terms of ending – if by conduct the tenancy is ended, then the tenant becomes a **trespasser**   + Can also be ended with ‘reasonable notice’ whether implied or express termination * T still liable for use/conduct | * Arises when a tenant overholds after the expiration of a term (not really a *true* tenancy) * Does not create an estate (no right in the land) * Non-consensual ∴ LL an evict T at any time |

Perpetual Leases:

* Can only be created by statute or crown grant (not permissible at CL)
* An attempt to grant a perpetual lease will create either:
  + Yearly periodic tenancy
  + Outright sale of the property w/ a monthly charge called a rentcharge (basically just rent)
  + Rentcharge will run w/ the land - it’s a condition of the land, not of the particular K of sale
  + The former owner to whom the rentcharge is owed, can go to ct if the new owner stops paying
  + There is no accumulation of rentcharge (i.e. rent-to-own)

# Essential (Substantive) Requirements for a Valid Lease at CL

* Grant of exclusive possession
* Identity:

1. Lease must relate to a given property between ascertained persons
2. Property
3. Term (max duration must be certain or ascertainable at beginning of term of lease)
4. Date of commencement (can take effect in future)
5. Rent, if any (rent is not an essential ingredient; leasehold may be given as a gift)

* A lease must also contain a grant of the leasehold interest (called a demise)
* **Formalities for lease are modified by statute: ss. 5(1) and (2) of the *Property Law Act***
  + Standard for provided by LTO (includes signatures and terms of agment)
  + But if lease is under 3 yrs, doesn’t have to be in writing as long as there is ‘actual occupation under the lease or agreement’

# Rights Conferred by Granting a Tenancy

## Lease or license:

* License = permission to do that which would otherwise amt to a trespass
* Lease = grant of an interest
* Tenant has right to exclusive possession; licensee does not

### *Fatac Ltd. (in liquidation) v. Commissioner of Inland Revenue,* [2002] NZCA

|  |  |
| --- | --- |
| **F** | Puhinui owner of property, part of which was a quarry  1991 – granted Atlas right to operate quarry for 12 years, renewable for +3 years  1996 – Puhinui agreed to sell to Wellington |
| **I** | Which of the parties to the sale agreement was liable for the payment of GST  → depended on whether the lands were ‘tenanted property’ as described in the sale document or whether the agreement was |
| **D** | Atlas’ right of occupation was far from exclusive ∴ a license, not a tenancy. |
| **RA** | The fundamental distinction between a tenant and a licensee is that the former alone has the right to exclusive possession. Intent of the parties is only significant insofar as determining if there was an intent to create this right. The particular labels that the parties use in their contract are not relevant unless they provide evidence of exclusive possession. |
| **RE** | * Conventionally, tenancy is an interest in land conferring the right to possess it for a ltd period whereas a licence is a mere permission to be on the land, w/ or w/o add’l permission to perform specified acts there – T creates an estate in land, L does not * Absent any express indications to the contrary, when the parties used ‘tenancy’ they use it in the sense usually understood by lawyers   **The right to exclusive possession is the current test for tenancy:**   * Exclusive possession allows occupier to use and enjoy the property to the exclusion of strangers; even reversioner is excluded except to the extent that a right of inspection or repair is expressly reserved by K or statute * Licensees lack the right to exclusive possession and can merely enter upon and use the land to the extent that permission has been given   ∴ reversal of starting point = rationale for recognizing an estate in case of tenancy only   * It remains **unaffected by whatever label the parties chose** to place on the transaction **unless it provides evidence of exclusive possession** * The only intention of the parties that matters is the intention as to substantive rights, not intention as to legal classification * For exclusive possession to be meaningful, there must be a minimum finite term, whether fixed or periodic. * Rent is an important indicator of an intention to be legally bound but its absence does not per se negate a tenancy. * Limitations on the purposes for which the occupier can use the land don’t negate tenancy   + Right to exclusive possession does not mean unqualified ability to do whatevs * No tenancy where: owner prevented from granting a tenancy, LL’s right of entry is inconsistent w. excl poss, or where right can be terminated pursuant to some legal rel’nship extraneous to that of LL and tenant (b/c owner has legal right to terminate occupation for reasons extraneous to any conventional relationship as LL and tenant)   → These all reflect the idea that where an occupier is found to have a mere license, it will be b/c the initial appearance of a right to exclusive possession is found to be critically undermined by the potential for termination for reasons extraneous to the occupation of the exclusively occupied area |

#### Why might a landlord want to characterize a living situation as a licence as opposed to a lease?

* LL can enter anytime
* Not wanting to transfer the right to more than they intended
* Makes it easier to evict
* Taxes
* Licensee can’t sue in trespass
* License Not binding on a purchaser if they purchase the land
* To revoke license is diff
* May not enjoy all the rights of tenants

# The Nature of the Landlord’s and Tenant’s Interests:

* Under a tenancy, the lessee obtains a leasehold interest
* This confers a right of exclusive possession, a right that is good against even the lessor
* At CL, right of the lessor to enter the premises must be negotiated w/ the lessee
* Interest held by the lessor is referred to as a reversion
* Both interests may be transferred
* Transfer of lease hold can occur in 2 ways: tenant may transfer remainder of the term (assignment) or some smaller portion (sub-lease)
  + When an assignment is made, the assignee will be placed in a direct tenurial rel’nship with the original landlord; No privity of K between these two parties but rather ‘privity of estate’
    - An assignee’s liability as against LL is controlled by privity of estate that exists between them
  + For sub-leases, the original tenant retains an interest in the lease and now wears 2 hats: as tenant under original (head) lease and as sub-landlord to the sub-tenant; neither privity of K nor estate between LL
* ***Spencer’s Case* rule:** all of the ‘real covenants’ in the lease run w/ an assignment; comparable principle applies to assignees of the LL (*Grantees of Reversions Act*)
  + Real covenant: one that is said to touch and concern the leased property
  + Concerns the automatic running of benefits and burdens; presupposes that the parties can be taken to have intended – expressly or impliedly – that these obligations should run
  + Benefits (but not the burdens) may be assigned under general law of contract (∴ obviating the need to rely on Spencer’s case)
* Default by a sub-T gives LL no direct recourse against that person but it may not always matter in practice b/c when a breach of a sub-lease leads to a breach of the head lease, the LL can pursue a remedy against the head-T that can redound to the detriment of the sub-T

## Obligations of Landlords and Tenants:

**Some terms are implied by CL:**

* Covenant by LL for quiet enjoyment; not to derogate from the lease
* Covenants by the tenant to:
  + Pay rent
  + Keep up and deliver promises in repair
  + Pay certain taxes (not req’d by law to be paid by LL)
  + Allow LL to enter/view state of the property
* If there are express terms that negate implied terms, the express terms will override CL (b/c terms of lease are matter of kual intention w/ freedom of K being guiding concept)

### Tenant's right to quiet enjoyment:

* Often explicitly set out in leases (regardless, implied by CL)
* Includes:
  + Direct physical interference (e.g. *Kenny v Preen)*
  + Indirect action in certain circumstances (*e.g. Pellatt v Monarch*)
  + May include regular excessive noise

**Expansive definition from *Caldwell v Valiant Property Management*:** [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.

#### Southwark LBC v Tanner, [2001] HL

|  |  |
| --- | --- |
| **P** | Π Tanner + Bacter – tenants of block of property owned by Δ |
| **F** | * Π complains of being able to hear sounds of neighbours * Neither tenancy agment contains any warranty by LL that there is sound insulation or is in any way fit to live in * Action on the covenant for quiet enjoyment |
| **I** | Whether neighbours’ noise constitutes a breach of the covenant for quiet enjoyment |
| **D** | It could have amounted to a breach only if the cause of the noise was some act of the LL or tenant claiming under him which couldn’t have fairly been w/in the contemplation of the parties when the Π took the lease. |
| **RA** | The covenant for quiet enjoyment promises that the tenant’s lawful possession of the land will not be subst’lly interfered w/ by the acts of the lessor or those lawfully claiming under him. |
| **RE** | **Quiet:** does not mean undisturbed by noise but rather w/o interference/interruption of possession  **Enjoy:** refers to the exercise and use of the right and having the full benefit of it, not deriving pleasure from it.  **Substantial Interference: interfering w/** ability to use property in an ordinary lawful way; cannot be elevated into a warranty that the land is fit to be used for some special purpose; mere interference w/ the comfort by creation of a personal annoyance is not enough   * States, though, that regular excessive noise could in principle constitute subst’l interference   **Lease must be construed against background facts reasonably known to parties at time it was granted:** The tenants must have reasonably contemplated that there would be other Ts in neighbouring flats. If they cannot complain of the presence of other tenants as such, then their complaint is solely w/ lack of soundproofing which is an inherent structural defect for which LL assumed no responsibility |

Can disturbances by other tenants result in breaches of the covenant? → 2 conflicting approaches:

1. Disturbances caused by Ts in circs where LL could have taken action but didn’t constitute a breach (*Albamor Construction & Engineering Inc v Simone,* 1995 Ont.)
2. Where Ts cause a disturbance, in order for a breach to have occurred, LL must have consented or actively participated (*Curtis Investments v Anderson,* 1981 MB)

#### Pellatt v Monarch Investments Ltd., (1981) Ont. Co. Ct.

|  |  |
| --- | --- |
| **F** | Π lived in small apt and during her tenancy, extensive renos to property were undertaken by LL  Ts invited to terminate leases but Π chose to stay  Disruptions caused by renos made living conditions intolerable and she commenced action claiming breach of covenant of quiet enjoyment |
| **I** | Whether the renos were a breach of the covenant of quiet enjoyment |
| **L** | No act of a lessor will constitute an actionable breach of a covenant for quiet enjoyment unless it involves some physical or direct interference with the enjoyment of the demised premises. |
| **D** | Yes. The construction w/ respect to the tenant’s apt itself and in a larger sense to the whole apt building, as a result of the noise, odours, and mess, constituted an invasion of Π’s right to the peace and comfort of her apt. |
| **RA** | Covenant not confined to direct physical interference but rather extends to any conduct that results in interference w/ the place or comfort of the tenant or his family |

* Persistently noisy tenants may be a breach of the covenant; CDN cts differ
* Seems to be more likely where LL was in position to take action but stood idly by but not certain

#### Curtis Investments Ltd. v. Anderson (1981) Man Co Ct

* Action founded on intolerable noise from upstairs apt not remedied by LL→ not a breach
* LL not liable simply b/c he knows other lessee is causing nuisance and takes no steps to prevent is; must be consent or active participation to make him liable

## Termination and Remedies

**Termination**

* Lease for set term can expire once terminating date has been reached
* Periodic lease can be ended w/ either party giving appropriate notice (period of lease or if it’s a year, then 6 mos)
* T at will? → reasonable notice (either implicit or explicit)
* Doctrine of frustration triggered (something happens that means K can no longer be performed; e.g. building burns down) → termination
* Also ends if T buys freehold or a 3rd party acquires the leasehold and freehold entitlements (the separate estates would merge into one)
* LL may reacquire property where T surrenders lease if the surrender is accepted by LL
  + Can arise under an express agreement or impliedly (i.e. if the T has abandoned premises)
* Breach of terms can also lead to termination:

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### Land Title Act, Section 247: Breach Leading to termination:

|  |  |
| --- | --- |
| **247 (1)** In this section, "derivative charge" means a sublease or other charge derived through a lease and includes a mortgage or judgment registered against the lessee or sublessee.  (2) If a lease is registered, the registrar may,  (a) on application,  (b) on proof to the registrar's satisfaction of a breach of a covenant and re-entry and recovery of possession by the lessor or owner of the reversion,  (c) after 30 days' notice of the application to the lessee, and  (d) on hearing all parties attending on the hearing of the application,  cancel the registration of the lease on the register, and the estate of the lessee in the land described in the lease, and the lease, so far as it affects the land, ceases.  (3) Cancellation of the lease does not release the lessee from liability in respect of an express or implied covenant in the lease.  (4) If a person appears on the register as holder of a derivative charge, the registrar may require the applicant for cancellation to give 30 days' notice to that person.  (5) If the registrar cancels the registration of the lease the registrar may cancel the derivative charge, and the estate of the holder of the derivative charge in the land described in the instrument under which the derivative charge is registered, and the instrument, so far as it affects the land, ceases, but the cancellation does not release a party to the instrument from liability in respect of an express or implied covenant in it. | → provides a mechanism through which the landlord can apply to the registrar to have a lease removed from title. This application will only be successful if the criteria set out in s. 247(2) are satisfied.  Three of these criteria (s. 247(2)(a), (c), and (d)) are procedural steps.  The landlord must also establish (s. 247(2)(b)) that the tenant has breached a covenant (ie consistent non-payment of rent) and that the landlord has repossessed the property (that is to say, that the lease is terminated).  The tenant is still liable for any outstanding payments or other liabilities. This provision would be used where the tenant has either disappeared or isn’t co-operating. It is an extraordinary remedy.  Usually, leases are removed from title by filing a Form C discharge, signed by the tenant. Lastly, in practice in BC, it is fairly unusual to have leases registered on title. |

**REMEDIES**

* Breach of terms can lead to action for damages or an action in debt to collect unpaid rent
* If T fails to pay rent, LL can levy **distress** which means T's goods on the premises may be seized until rent is paid; leg'n also now allows that the goods can be sold to make up the shortfall in rent
* If there is a failure to follow appropriate steps for recovery of possession or the actions of the lessor suggest that the right of forfeiture is not being exercised, this may preclude LL from terminating

→ Significant legislative restriction in this area

# Residential Tenancies:

Reforms to residential tenancy laws have been reformed in past 40 years b/c of a felt need to strengthen the rights of tenants by providing > security of tenure;

* Main themes:

Underlying theme: shelter as a human right right, not commodity

* + Rebalance inequality of bargaining power
  + Lessen preference for LL in CL
  + Create new forms of dispute resolution

## Main elements:

1. Increased security of tenure for tenants and lodgers
2. Increased termination notice periods
3. Fixed standard obligs of both LL and T to allocate responsibilities and rights fairly and rationally
4. Increase in T’s remedies
5. Curtailment of LL’s self-help remedies
6. Est of dispute resolution procedures that are designed to be informal, effective, expeditious and inexpensive
7. Est of prohibitions on bargaining away statutory rights
8. Elimination of anachronisms in the law
9. Creation of LL and T advisory boards
10. Rent control mechanisms

*→ Rent control regulations not common b/c of various issues:*

* Market governs rent but if market removed, how to set rent?
* Allowing for fixed annual increases possible but not fair to all concerned (some rents may have been hx low, LL introducing upgrades, entitled to increase income) ∴ administrative mechanism also needs to be est’d to deal w/ unconventional circs
* Faced w/ cap on income, LL might reduce maintenance
* Controls for current renters are good, but they’ll likely stay put b/c of their low rent, and if rents are controlled, fewer inducements to build more rental properties ∴ future renters have fewer options
* But on the flip side, if you allow LLs to have free rein, they can just gouge Ts; and b/c of inertia, it might take a lot to get a T out, even if there are other options available

## *Residential Tenancy Act,* SBC 2002, ss. 1, 4-7, 12-20, 22-35, 37-39, 43-47. 49-52, 57-60, 62, 63, 65-70, 91, 94.1, 94.11, 94.2, 95, and 96

## Residential Tenancy Regulation, BC Reg 477/2003, ss. 4, 5, 7, 11-13, 22-23 and Schedule

### Section 2 and 4 are where you go if there’s an unusual living situation in order to see what the act applies to

# CONDITIONAL AND QUALIFIED ESTATES:

# Steps to Follow When Interpreting a Gift in a Will

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| Start with the 5 rules of construction (the anchors!):   1. **Testator’s intention is paramount in construction of wills:** Crt in *HJ Hayes* said, “[t]he cardinal rule of interpretation of wills is that effect must be given to the intentions of the testator. Those intentions must be ascertainable from the language of the will.” Look at the language of the will as a whole, per *Re Taylor,* as well as the surrounding circumstances, per *Christensen v Martini.* Example: providing for children. 2. **Presumption against intestacy:** if a will can be constructed in a way to find a home for property, the court will adopt this construction to avoid (partial) intestacy, per *McKeen Estate* and *HJ Hayes*. Example: if condition precedent + void, gift would be incomplete = intestacy; if condition subsequent + void, gift would be total; if determinable interest subject to determining event + void, gift would be incomplete = intestacy (so presumption in favour of condition subsequent > immediate vesting, subject to divestment). 3. **Presumption in favour of early vesting:** as between a contingent interest (condition precedent) and a vested interest (condition subsequent, determining event) courts will prefer the vested interest, per *Sifton v Sifton* (affirmed in *HJ Hayes*) 4. **Rule from *Browne v Moody*:** a gift (remainder interest, gift over) is *prima facie* vested if that interest is being delayed to allow for a prior life estate; this rule was applied by the Court in *McKeen Estate*. Example: “to A for life, and remainder to C if they are both alive at time of A’s death”. 5. **Rule from *Re Francis*:** where the reason for postponing a gift is one personal to the recipient/donee, the gift is *prima facie* contingent > presumed to be a condition precedent. Examples: “to the first daughter to marry”, “to the first child to reach age of 25”, “if B attains the age of 19 years”, “to the survivor of them”. But note: in *McKeen v McKeen,* the Court declined to apply the rule from *Re Francis* to the gift of a remainder in fee simple to the testator’s sisters “if they are both alive” at the time of his wife’s death, finding that the reason for postponing the gift was not personal to the sisters.   *Prima facie* = *contingent (upon condition precedent)? or vested (Is it a defeasible interest subject to condition subsequent? Or a determinable interest subject to determining event?)*  If the interest is *prima facie* vested, is the vested interest is **defeasible or determinable?**   * Language that indicates the conditional gift is for a **defeasible interest subject to a condition subsequent**, per *Caroline (Village) v Roper* [words of a defeasible interest connote an abrupt end, that the interest will end if the condition subsequent occurs]:   + “if”   + “but if”   + “but when”   + “provided that”, “providing that”   + “if it happens that”   + “if it should occur that”   + “on the condition that” * Language that indicates the conditional gift is for a **determinable interest subject to a determining event**, per *Caroline (Village) v Roper* [words of a determining event connote the flow of time, that the interest will continue until it reaches its end]:   + “while”, “whilst”   + “during”   + “so long as”, “as long as”   + “until”   Next ask: *is the condition* ***invalid?***   * **CONDITION PRECEDENT:** if a condition precedent is invalid, the transfer fails (b/c condition precedent = words of limitation, so if no words of limitation, nothing can be transferred).   + ***Is the condition precedent contrary to public policy?*** A condition will be void as against public policy if it discriminates on the basis of race, sex or religion, as per *Re Leonard Trust.* A condition also may be void as against public policy if it prohibits marriage.   + ***Is the condition precedent a restraint on alienability?*** If a condition imposes a restraint on alienation, that condition will be void, as per *Trinity College.* In *Trinity College,* the school’s second option to buy the Bennetts’ land for a nominal fixed price, far less than fair market value, was held by the court to constitute an improper restraint on alienation, effectively transforming the Bennetts’ fee simple interest into a life estate.   + ***Is the condition precedent uncertain?***Test for uncertainty of a condition precedent: the condition precedent must be “capable of being given some plausible meaning” > the requirement for certainty is knowing whether the claimant has met the condition.   If condition precedent is void as against public policy, void as an improper restraint on alienation, or void for uncertainty, the transfer fails and the transferor retains the interest (the transferee gets nothing). In the case of the will, the gift would remain with the testator’s estate (= intestacy).   * **CONDITION SUBSEQUENT:** if a condition subsequent is invalid, the transfer is total and the interest is vested unconditionally (b/c the condition subsequent is severed from the grant, and the property transfers unconditionally, destroying the grantor’s right re-entry and rendering the transfer absolute).   + ***Is the condition subsequent contrary to public policy?*** A condition will be void as against public policy if it discriminates on the basis of race, sex or religion, as per *Re Leonard Trust.* A condition also may be void as against public policy if it prohibits marriage.   + ***Is the condition subsequent a restraint on alienability?*** If a condition imposes a restraint on alienation, that condition will be void, as per *Trinity College.* In *Trinity College,* the school’s second option to buy the Bennetts’ land for a nominal fixed price, far less than fair market value, was held by the court to constitute an improper restraint on alienation, effectively transforming the Bennetts’ fee simple interest into a life estate.   + ***Is the condition subsequent uncertain?***Test for uncertainty of a condition subsequent: “the donee must be able to see clearly and distinctly from the outset those actions that will lead to a loss of the interest”. In *Re Down,* “arrives at the age of 30 years providing he stays on the farm” = void for uncertainty b/c staying on farm was a proviso that could be given no legal effect; in *HJ Hayes,* the condition that son live on land and cultivate it = void for uncertainty.   If condition subsequent is void as against public policy, void as an improper restraint on alienation, or void for uncertainty, the transfer is total and unconditional > the transferor loses their right of re-entry.   * **DETERMINING EVENT:** if a determining even is invalid, the transfer fails (b/c determining event = words of limitation, defining nature + extent of estate, so if no words of limitation, nothing can be transferred).   + ***Is the determining event contrary to public policy?*** A condition will be void as against public policy if it discriminates on the basis of race, sex or religion, as per *Re Leonard Trust.* A condition also may be void as against public policy if it prohibits marriage.   + ***Is the determining event a restraint on alienability?*** If a condition imposes a restraint on alienation, that condition will be void, as per *Trinity College.* In *Trinity College,* the school’s second option to buy the Bennetts’ land for a nominal fixed price, far less than fair market value, was held by the court to constitute an improper restraint on alienation, effectively transforming the Bennetts’ fee simple interest into a life estate.   + ***Is the determining event uncertain?***Test for uncertainty of a determining event is not clear. Could be that the test is the same as the test for certainty of a condition precedent (“capable of being given some plausible meaning”) because the consequence of invalidity is the same (transfer fails). The test of certainty is knowing what event will cause the grantee’s interest to revert the grantor.   If determining event is void as against public policy, void as an improper restraint on alienation, or void for uncertainty, the transfer fails and the transferor retains the interest (the transferee gets nothing). In the case of the will, the gift would remain with the testator’s estate (= intestacy). |
| * **Contingent interest subject to condition precedent:** vesting is delayed pending the occurrence of the condition precedent. * **Defeasible interest subject to condition subsequent:** vesting is immediate but subject to divestment because the transferor retains a right of re-entry (should the condition subsequent occur, the transferor has the option of exercising their right of re-entry; not automatic). Remember: condition subsequent is an independent, additional clause > not words of limitation. * **Determinable interest subject to determining event:** vesting is immediate but subject to divestment because the transferor retains the possibility of reverter (should the determining event occur, the determinable interest ends and the interest transfers back to the transferor automatically). Remember: the determining event of a determinable interest are words of limitation b/c the determining event defines the nature and extent of the estate. |

# Conditions of Eligibility: Contingent Interests and Vested Interests

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| 5 Rules of Construction to Determine if a Gift is Contingent or Vested |
| 1. **Testator’s intention is paramount in construction of wills:** Crt in *HJ Hayes* said, “[t]he cardinal rule of interpretation of wills is that effect must be given to the intentions of the testator. Those intentions must be ascertainable from the language of the will.” 2. **Presumption against intestacy:** if a will can be constructed in a way to find a home for the property, the court will adopt this construction to avoid intestacy, per *McKeen Estate* and *HJ Hayes* 3. **Presumption in favour of early vesting:** as between a condition precedent (a contingent interest) and a condition subsequent (a vested interest), courts will prefer the vested interest (so courts are inclined to interpret conditions as conditions subsequent), per *Sifton v Sifton* (affirmed in *HJ Hayes*) 4. **Rule from *Browne v Moody* = gift is *prima facie* vested if postponement is to allow for a prior life estate:** remainder interest is *prima facie* vested if that interest is being delayed to allow for a prior life estate 5. **Rule from *Re* Francis = where the reason for postponing a gift is one personal to the recipient/donee, the gift is *prima facie* contingent:** a condition that is personal to the recipient is presumed to be a condition precedent (a contingent interest), e.g. “to the first daughter to marry”, “to the first child to reach the age of 25” |

………………. HINT: practice how these terms work and go together

## Three ways to hold a property interest

1. **Vested in possession:** being seised of the property
2. **Vested in remainder:** where property is granted, e.g. holding remainder in FS following LE
3. **Vested in reversion:** an interest that reverts back to the transferor

A party can be vested “in interest” or vested “in possession”, or both. Example: “to A for life, remainder to B in fee simple” = A is vested in interest and possession, and B is vested in interest only.

### Stuartburn (Municipality) v Kiansky (2001) [MBQB]

**MULTIPLE ESTATES MAY EXIST SIMULTANEOUSLY BUT NOT ALL CONCURRENT OWNERS ARE IMMEDIATELY ENTITLED TO POSSESSION > EXAMPLE: HOLDER OF CURRENT LIFE ESTATE IS VESTED IN POSSESSION + HOLDER OF REMAINDER IN FEE SIMPLE IS VESTED IN INTEREST.** K sought to be elected to municipal office but all elected officials were required to be an “owner of land” per s. 5(1) of MB *Local Authorities Elections Act.* Definition of “owner of land” = the present owner of a freehold estate. Remember: freehold estate is a measure of the nature and degree of person’s interest in land (the “quantity”), and includes life estates and freehold estates. K’s grandmother held a life estate in property in the municipality, and K held the remainder interest in fee simple for this property. *Is K “owner of land” for purpose of s. 5(1)?* Yes! K’s remainder interest in fee simple means that he is **vested in interest** (= present entitlement to future enjoyment of the freehold estate). K’s grandmother is **vested in possession** for the duration of her life (= present entitlement to present enjoyment of the freehold estate.)

*Forestall*: seisin = possession and the right to immediate possession; cannot be divided (∴ holder of a life estate is the one who has possession and the seisin)

### McKeen Estate v McKeen Estate (1993)

**PRESUMPTION AGAINST INTESTACY, AND PRESUMPTION IN FAVOUR OF VESTING (BOTH REBUTTABLE W/ EVIDENCE TO CONTRARY). A GIFT IS *PRIMA FACIE* VESTED IF POSTPONEMENT IS TO ALLOW FOR A PRIOR LIFE ESTATE, PER *BROWNE V MOODY*.** Testator died, leaving his wife a life estate and the remainder in fee simple to be divided b/w sisters “if they are both alive” at time of wife’s death. Neither sister survived the wife. *Did testator intend that gift to sisters be contingent on them surviving his wife (partial intestacy, residue of estate to be distributed to relatives), or did he intend that the gift to his sisters create vested interest (property would pass to their estates)?* **Intention of testator of paramount importance** when interpreting wills. **Presumption against intestacy:** presumption that a testator intends to dispose of all of their property by will to avoid partial intestacy. **Presumption in favour of vesting:** presumption that testators intend to create vested rather than contingent interests. **Rule from *Browne v Moody*:** a gift is *prima facie* vested if the reason for postponement is to allow for prior life estate. Applying presumptions + rule from *Browne v Moody* = ct determined that testator’s intention was to leave the residue of his estate to his sisters (vested). Ct declined to apply rule from *Re Francis*, finding that the reason for postponing the gift was not personal to the sisters. [NBQB]

Transferability: what can you transfer?

→ essentially every type of property interest; interests vested in possession, remainders, reversions, also contingent interests (s. 8(1)(a)) and right of entry on the land (s. 8(1)(b)), possibilities of reverter

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| Practice Questions: contingent or vested? |
| 1. “to A and B for their lives, and then to B in fee simple” 2. “to A and B for their lives and then to the survivor of them in fee simple” 3. “to A for life and then to C in fee simple if C marries D” 4. “to A for life and then to B in fee simple if, and only if, B attains the age of 19 years”   \**What is the blue part, and what is the green part?* |
| 1. A and B both hold a life estate that is vested in interest and in possession; B holds a fee simple interest that is **vested in interest** but not in possession (rule from *Browne v Moody*: gift is *prima facie* vested if postponement is to allow for a prior life estate) 2. A and B both hold a life estate that is vested in interest and in possession; A and B both hold the remainder in fee simple as a contingent interest subject to the condition precedent of one of them being the survivor (rule from *Re* Francis: where the reason for postponing a gift is one personal to the recipient/donee, the gift is *prima facie* contingent) 3. A holds a life estate that is vested in interest and in possession; C holds remainder in fee simple as a contingent **interest subject to the condition precedent** of C marrying D; if C marries D while A is still alive, the remainder in fee simple becomes vested in interest, but not in possession while A is still alive; there is also a contingent reversionary interest to the donor if C does not marry D (rule from *Re* Francis: where the reason for postponing a gift is one personal to the recipient/donee, the gift is *prima facie* contingent) 4. A holds a life estate that is vested in interest and in possession; B holds the remainder in fee simple as a contingent interest subject to the condition precedent of attaining the age of 19; if A is still alive, B’s contingent remainder in fee simple becomes a fee simple interest vested in interest; there is also a contingent reversionary interest to the donor if B does not reach the age of 19 (rule from *Re* Francis: where the reason for postponing a gift is one personal to the recipient/donee, the gift is *prima facie* contingent)   \*Blue = words of transfer/purchase \*Green = words of limitation |

# Conditions of Forfeiture: Defeasible and Determinable Interests

Defeasible: **might** be brought to a premature end upon the occurrence of a specific event (condition subsequent) // not automatic; must be exercised by the holder of the right of re-entry (vs. determinable interest) // any estate can be defeasible by a condition subsequent (not just FS)

- must have a formal entry and demand for possession

- limit on how far into the future a right of re-entry can be exercised?

(CL: no limit; no limit, s. 3(1)(d), *Limitation Act,* BC)

**e.g. Harry grants property to Hermione, on the condition that if she studies more than 14** hours/day on a regular basis, my estate may re-enter

- Hermione: Defeasible FS; or FS subject to condition subsequent

- Harry’s estate: retains a right of re-entry // if the stated event comes to pass, then Harry’s estate may exercise right of re-entry

- but *until* Harry’s estate claims it, Hermione’s estate remains

Determinable:

**e.g. From Harry to Hermione until Hermione begins to study for 14 hrs a day on a regular basis**

- Hermione: determinable FS

- Harry’s estate: possibility of reverter

Upon occurrence of ‘determining event’, Hermione’s FS ends automatically // no entry or demand for possession req’d to be exercised

Always slightly less than it could be, b/c there is **always an event which demarcates the end** of the property interest; a natural limit to the estate

**e.g. 2: To Harry for life while Harry remains a Quidditch player**

- Harry: determinable life estate

- Grantor (or heirs): reversion in fee simple // not a possibility of a reverter b/c at the end of Harry’s life, the LE would end anyways

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| **Practice Questions: defeasible or determinable?** |
| 1. “To my son STEWART BERNARD all my estate, real and personal, of whatsoever nature and kind and whatsoever situate to be his absolutely subject only that should my son Floyd Bernard decide to return to live here, that a lot of land three acres along highway No. 2 be transferred to him” > *Contingent interest subject to condition precedent, or defeasible interest subject to a condition subsequent?* |
| Start with the 3 rules of construction (= the anchors!):   1. **Testator’s intention paramount** [to provide for both sons > give land to Stewart but also give his other son a place to live if he ever decided to return] 2. **Presumption in favour of early vesting** [presumption in favour of condition subsequent, so interest vested immediately w/ Steward upon son’s death] 3. **Presumption against intestacy** [if condition precedent + void, gift would be incomplete = intestacy; if condition subsequent + void, gift would be total to Stewart > so presumption in favour of condition subsequent]   *Prima facie* condition subsequent. Next ask: *is the condition void?*  No public policy concerns, no restraint on alienability, not impossible. But possibly uncertain. Test for uncertainty for condition subsequent: “the donee must be able to see clearly and distinctly from the outset those actions that will lead to a loss of the interest”. Sufficiently clear that 3 acres of land would be transferred to Floyd if he ever returned, so condition subsequent not void for uncertainty. |
|  |
| 1. “to my widow for life, so long as she remains unmarried” 2. “to my widow for life, providing that she does not remarry”   \**What is the blue part, and what is the red part?* |
| 1. This conditional gift creates a determinable life estate. The determining events = the widow remarrying, and death. If either of the determining events occurs, the life estate ends and the fee simple interests reverts automatically to the transferor (= possibility of reverter). 2. This conditional gift creates a defeasible life estate. The condition subsequent = the widow remarrying. If the condition subsequent occurs, the transferor has the option of exercising their right of re-entry. Remember: condition subsequent is an independent clause.   \*Blue = words of transfer/purchase \*red = words of limitation \*Black = independent clause |

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## Three Types of Conditional Gifts/Transfers

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| **Conditional Gifts/Transfers** | |
| **Contingent interest subject to a condition precedent** | A contingent interest is subject to a **condition precedent.** Vesting is delayed pending occurrence of the condition precedent → **the condition precedent must occur before the interest vests.** |
| **Defeasible interest subject to a condition subsequent**  “on the condition that”  “if”  “but if”  “but when”  “provided that”  “if it happens that”  “if it should occur that” | A **defeasible interest** is subject to a **condition subsequent**. Vesting is immediate.  With a defeasible interest, the transferor retains a **right of re-entry**. This **right of re-entry is a contingent interest (contingent on the transferor exercising their right).** Should the condition subsequent occur, the transferor has the option of exercising their right of re-entry (not automatic).  The condition subsequent of a defeasible estate is an *independent, additional clause* (the condition subsequent are not words of limitation!).  \*Words of defeasible interest connote an abrupt end, that estate will end if condition subsequent occurs.  **If a condition subsequent is invalid, the condition subsequent is struck and the property transfers to the transferee unconditionally.** |
| **Determinable interest subject to a determining event**  “while”  “whilst”  “during”  “so long as”  “as long as”  “until” | A determinable interest is **subject to a** **determining event. Vesting is immediate.**  With a determinable interest, the transferor retains a **possibility of reverter.** This possibility of reverter is not a contingent interest.Should the determining event occur, the determinable interest ends and the interest transfers back to the transferor automatically.  The determining event of a determinable estate are *words of limitation* (b/c the determining event defines the nature and extent of an estate).  \*Language has a temporal sound; limited by the condition → gives something less than a full FS  **If a determining event is invalid, the transfer itself is defeated > the whole transfer becomes void, so the transferor retains everything and the transferee gets nothing** [nothing transferred b/c the determining event defines nature and extent of the estate, words of limitation]. |

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### Caroline (Village) v Roper (1987)

**GRANT = DETERMINABLE FEE IF IT INCLUDES LANGUAGE LIKE “WHILE”, “DURING”, “AS LONG AS”, “UNTIL”. GRANT = DEFEASIBLE FEE SUBJECT TO A CONDITION SUBSEQUENT IF IT INCLUDES LANGUAGE LIKE “PROVIDED THAT”, “ON CONDITION THAT”, “BUT IF”, “IF”.** Mr. Roper allowed community group to build community hall on his land on strict understanding that it would only be used for community purposes. After Mr. Roper died, Mrs. Roper transferred title in the land to the community group on condition that hall would continue to only be used for community purposes (document stated land would revert to Mr. Roper’s estate if used for any other purpose = “The acre…shall revert to the Late Thomas Roper Estate if used for other than a community centre”).

→ what kind of estate is this? Determinable or defeasible?

Mrs. Roper died, son inherited her estate, and then the community hall burnt down. The current title holder (the Village) wants to sell land to use for commercial purpose. *Does the condition in question offend the rule against perpetuities?***Where a grant is for determinable fee subject to right of reverter, the rule against perpetuities does not apply b/c the determining events sets the limit for the estate granted. Where grant is for a fee simple subject to a condition subsequent, the terminating event (condition) may or may not occur > this offends rule against perpetuities.** Word “if” in the grant suggests that the deed gives rise to a fee simple subject to a condition subsequent > therefore, the deed violates the rule against perpetuities. But Crt says common intention of parties was that land would revert back to Ropers should it not be used as community hall > so Crt rectified deed to express this intention + property conveyed back to Ropers. [ABQB] // Good example of answering whether something is determinable vs defeasible

## Different consequences flow from choice of determinable v defeasible:

* Effect of breaching the clause
  + Determinable event occurs: estate is lost automatically
  + Condition subsequent breached: grantor or estate must take action to exercise their right of re-entry
* Effect of invalidity of forfeiture clause
  + Determinable event:
    - If invalid, the entire grant/estate is invalid:
    - ~~To the Community Hall for so long as it is used as a community centre~~
  + Condition subsequent:
    - If invalid, clause is struck out; defeasible FS (e.g.) becomes FS
    - To the Community Hall, ~~but if it is used for something other than a community centre, my estate may re-enter.~~
* Applicability of the rule against perpetuities (RAP)
  + **Vested:** when no limitations or conditions obstruct enjoyment of the property interest (aside from the natural end of another estate)
    - i.e. To Harry for life
    - i.e. To Harry for life, then to Hermione
  + **Contingent:** something has to happen before the interest can vest
    - i.e. X grants to Harry for life, but if Harry stops playing Quidditch, [Harry’s interest is vested; nothing needs to happen in order for him to get the interest // LE // defeasible: “but if”] then to Hermione [Hermione’s interest is contingent; no guarantee that Hermione is ever going to get it; subject to a condition precedent] // X’s estate’s right of
  + **RAP:** invalidates future interests that may vest beyond the perpetuities period // it only applies to contingent interests ∴ if you encounter a contingent interest like a right of re-entry, all you have to state is “there is a possibility of RAP operating here.”
    - i.e. interests that would vest too far into the future
    - wants to restrict the extent that the dead hand of the past can reach into the future
    - Perpetuities period not defined in # of years by CL, but rather, the ‘lives in being + 21 years’; if it’s *guaranteed* that the interest would vest w/in that period, then it’s fine; if it’s possible that the interest could vest o/s that period, then it’s void from the very start
* Possibilities of reverter:
  + In Canada, seen as vested interests
  + RAP does not apply to vested interest (i.e. not to possibilities of reverter)
* Rights of re-entry:
  + Contingent interest
  + Must be framed to as to comply w/ RAP
  + See Roper
* Vested:
  + No limitations or conditions obstruct enjoyment of property interests
  + Conditions:
    - 1) Person(s) entitled to take interest is ascertained (i.e. ‘to Harry’ vs. ‘to Hogwarts’ top Quidditch player.’
    - 2) no conditions before interest can be enjoyed (subject to termination of prior LE) [e.g. ‘to A, then to B’ – both are vested]
  + Devise by Harry to Hermione for life, then to Ron
    - Interests of Hermione and Ron are both vested
    - Hermione’s LE = vested in possession
    - Ron’s remainder = vested in interest
* Contingent interest:
  + Vesting delayed, pending the occurrence of a condition precedent (e.g. if someone enters law school; if someone stops smoking)
  + Conditions precedent = conditions of eligibility
  + A bridge that must be crossed before the estate can be enjoyed
  + E.g. From Harry: To Hermione for life, remainder to Ron but only if and when Ron marries
    - Hermione = LE vested in possession
    - Ron = contingent fee simple remainder
    - Harry = reversion in FS, vested in interest (can be divested if satisfied before Hermione dies; i.e. it can be lost in the event that Ron gets married – the condition precedent is satisfied before Hermione dies)
* Devise from Harry: To Hermione until she reads all of the books in the school library:
  + Hermione = determinable fee simple
  + Harry’s estate = possibility of reverter
* Devise from Harry: To Hermione on the condition that she read one book per month
  + Hermione = defeasible FS (or FS subject to a condition subsequent) – vested but may be divested if condition breached **and** right to re-entry exercised)
  + Harry’s estate = right of re-entry (Contingent)

### St Mary’s Indian Band v Cranbrook (City) (1997)

**WHERE NOT CLEAR WHETHER CLAUSE GIVES RISE TO DETERMINABLE OR DEFEASIBLE INTEREST, CRTS SHOULD LOOK AT INTENTION OF PARTIES AND NOT BE BOUND BY FORMALITY.** Clause: “that should any time the said lands cease to be used as an airport, they shall revert to the Band”.SCC decided that this particular form was not determinative. SCC concluded it would be fundamentally unjust for them to find that this clause was a condition subsequent, just b/c Band made mistake of using “should” rather than “until” > Court must look at the respective intention of the parties and not be bound by formality. [SCC]

# State Limitations on Private Power

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

* Uncertainty
* Public Policy
* Restraints on alienation

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| --- | --- |
| Things that invalidate conditions | |
| **Contingent interest subject to a condition precedent** | **Invalid condition precedent = transfer fails.** If a condition precedent is invalid, no transfer can ever actually occur [condition precedent = words of limitation that define nature and extent of estate; if no condition precedent, no words of limitation so nothing can be transferred].  **A condition precedent will be invalid if it is:**   * **Contrary to public policy** (e.g. discriminatory on basis of race, sex, religion, as per *Re Leonard Trust* ; if condition prohibits marriage) * **Uncertain** (the requirement for certainty is knowing whether a claimant has met the condition; the condition precedent must be “capable of being given some plausible meaning”) * **Impossible** (exception to general rule: *Unger v Gossen*) * **Restraint on alienation** (*Trinity College*) |
| **Defeasible interest subject to a condition subsequent** | **Invalid condition subsequent = transfer total, unconditional.** If a condition subsequent is invalid, the condition subsequent is severed from the grant and the property transfers to the transferee unconditionally. Severing a condition subsequent destroys the grantor’s right of re-entry, rendering transfer absolute.  **A condition subsequent will be invalid if it is:**   * **Contrary to public policy** (e.g. discriminatory on basis of race, sex, religion, as per *Re Leonard Trust* ; if condition prohibits marriage) * **Uncertain** (the requirement for certainty is knowing what events will give rise to grantor’s right of re-entry; “the donee must be able to see clearly and distinctly from the outset those actions that will lead to a loss of the interest”); e.g. *Re Down* [“providing he stays on the farm” = void for uncertainty], *HJ Hayes* [condition that son live on land and cultivate it = void for uncertainty] * **Impossible** (exception to general rule: *Unger v Gossen*) * **Restraint on alienation** (*Trinity College*) |
| **Determinable interest subject to a determining event** | **Invalid determining event = transfer fails.** If a determining event is invalid, the transfer itself is defeated > the whole transfer becomes void, so the transferor retains everything and the transferee gets nothing [nothing transferred b/c the determining event defines nature and extent of the estate, words of limitation]. Both determinable interest and the grantor’s possibility of reverter are destroyed.  **A determining event will be invalid if it is:**   * **Contrary to public policy** (e.g. discriminatory on basis of race, sex, religion, as per *Re Leonard Trust* ; if condition prohibits marriage) * **Uncertain** (the requirement for certainty is knowing what event will cause the grantee’s interest to revert to the grantor > but not clear what standard to apply) * **Impossible** (exception to general rule: *Unger v Gossen*) * **Restraint on alienation** (*Trinity College*) |

## Effect of invalidity

* FS subject to a CS: CS struck out if invalid
* Determinable FS: if the determinable limitation is invalid, the entire grant/devise will fail
* Condition precedent: condition, if invalid, will be voided; entire grant/devise may fail

## Uncertainty

* Conditions attaching to property transfers that are too imprecise may be found to be void
* Policy reason: need for certainty in property dealings
* Concerned with conceptual uncertainty, not evidential uncertainty
* Courts apply objective tests:
  + 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
  + Condition precedent: lower threshold than CS/DL: need to show that the condition is capable of being *some* meaning // is the condition so vague as to be meaningless?
    - E.g. to A if he is tall → can give this a plausible meaning (e.g. if A is over the average height)
    - Policy reason for lower threshold? If there’s a presumption of wanting to find the property a home, then the barrier should allow that to happen. It’s also reflective of testator’s intention to give property to A. Whereas with conditions of forfeiture do not affect the property finding a home.
    - Result: CS/DL is more vulnerable to invalidity than CP

### Unger v Gossen (1996)

**EXCEPTION TO RULE THAT GIFT WILL FAIL IF CONDITION PRECEDENT INVALID. WHERE A CONDITION PRECEDENT IS IMPOSSIBLE, CRTS MUST CONSIDER TESTATOR’S INTENTION. WHERE IT IS CLEAR THAT TESTATOR’S DOMINANT CONSIDERATION WAS THE GIFT, NOT THE PERFORMANCE OF THE CONDITION, THE CONDITION SHOULD BE DISREGARDED.** Aunt left $50k to three nephews subject to stipulation that they become Canadian residents w/in three yrs of her death (= condition precedent). Crt found testator’s intent was to benefit nephews and prevent money from going to Communist state; not her dominant intention that they become Cdn residents. If condition precedent remained, transfer could not occur b/c nephews now too old to qualify as Cdn residents > this would frustrate testator’s intention. Crt severed the condition precedent, but allowed money to vest in interest and in possession to nephews (= exception to general rule that the severing of a condition precedent will cause a transfer to fail). [BCSC]

### HJ Hayes Co v Meade (1987)

**PRESUMPTION IN FAVOUR OF EARLY VESTING. WHERE THERE IS UNCERTAINTY WHETHER A CONDITION IS A CONDITION PRECEDENT OR SUBSEQUENT = CONDITION IS *PRIMA FACIE* A CONDITION SUBSEQUENT TO ALLOW FOR IMMEDIATE VESTING SUBJECT TO TRANSFEROR’S RIGHT OF RE-ENTRY. IF CONDITION SUBSEQUENT IS UNCERTAIN, IT IS VOID > INTEREST IS VESTED UNCONDITIONALLY.** Testator provided son James was to receive property on condition that he live on the land and cultivate it, and if James did not want to live on the land and cultivate it, property could go to testator’s other son upon Harold paying James $1000. James did not live on land, and Harold took property but never paid $1000 to James. *Did testator intend to create contingent interest subject to condition precedent, or a defeasible interest subject tot a condition subsequent?* If condition precedent, disputed property would vest in neither James nor Harold b/c condition precedent never met > disputed property would go to residue of testator’s estate = partial intestacy (\*presumption against intestacy!). Also presumption in favour of early vesting, so Crt concluded that condition = a condition subsequent. Crt noted: “The cardinal rule of interpretation of wills is that effect must be given to the intentions of the testator. Those intentions must be ascertainable from the language of the will.” But Crt found condition subsequent was uncertain and therefore void, per *Re Down* [ONCA found condition that son “arrives at the age of 30 years providing he stays on the farm” void for uncertainty b/c staying on farm was a proviso that could be given no legal effect] > property in this case vested unconditionally in James. [NBQB]

How would you draft a condition that wouldn’t be void for uncertainty that would effectively keep James on the farm? → make it specific – i.e. James must reside for X number of days out of the year ∴ meets the threshold that J knows from the outset exactly what would invalidate his interest.

## Public Policy

* Conditions that contravene public policy will not be enforced
* Has been said that conditions should be declared invalid on public policy grounds only in clear cases where the harm to the public is ‘substantially incontestable’
* Cts are reluctant to create new ‘heads’ of public policy; new grounds could be added and est’d ones can be reconfigured
* See *Re Millar* (1938, SCC) – ‘stork derby’: guy left residue of his estate to the female resident of TO who could have the most children in the 10 years following his death
  + SCC could not find that the harm would be substantially incontestable; the fact that some people might act in a way that was harmful to kids/spouse was not enough (∴ Condition upheld)

Heads of public policy:

* **Restraint on marriage:** 
  + Total restraint on marriage will generally be held to contravene public policy but partial restraints may be allowed
* **Breach of statute/civil wrong** 
  + Invalid if req’d to breach statute/commit civil wrong/encouraged to violate the criminal law
  + See *Kent v McKay,* (1982 BCSC): will that split up property to a family on the condition that if anyone institutes any judicial actions on the will (other than interpretation), their interest would be revoked → if the party’s goal is to take away the court’s jurisdiction cannot be upheld; essentially the goal was to make the *Wills Variation Act* inapplicable to the will
* **Race and religion:** 
  + *nb: charter does not apply directly to private transactions, absent gov’t action; can apply indirectly through doctrine of public policy*
  + See *Leonard* Foundation: public/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 respect

### Re Leonard Foundation Trust (1990)

**A CONDITION THAT DISCRIMINATES ON BASIS RACE, RELIGION, SEX IS VOID AS AGAINST PUBLIC POLICY.** Terms of charitable trust/scholarship established by Reuben Wells Leonard in 1923 discriminated on basis of gender (mostly men, fewer women), race (whites only), religion (Protestant Christians only), citizenship (British Nationality) = conditions precedent for receiving a scholarship (not void for uncertainty b/c they had been followed for 65 yrs w/o any trouble). Crt found the charitable trust “void on the ground of public policy to the extent that it discriminates on grounds of race…, religion and sex” > Found that the **doctrine of Cyprès** applies (allows ct 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) ∴ Crt struck out those conditions precedents that were void for public policy. But Crt noted: “This case should not be taken as authority for the proposition that all restrictions amount to discrimination and are therefore contrary to public policy” (e.g. scholarships restricted to visible minorities, women, other disadvantaged groups) // Validity of 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. [ONCA] //

Both judgments restrict the scope of the decision to trusts with a public dimension. Do you agree with this aspect of the decision?

### Ziff, “Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust”

**PRIVATE/PUBLIC DISTINCTION + WHEN CONDITIONS ARE VOID AGAINST PUBLIC POLICY.** Ziff argues that distinction b/w private and public is unhelpful when trying to draw the line b/w permissible and non-permissible discrimination. For most part, owners are entitled to do whatever they wish with their property, even to extent of destroying it. In private realm, rights of ownership continue to prevail over public policy values like equal treatment (e.g. not against public policy to only allow white people into your home). But in *Re Leonard Trust,* Crt made clear that condition precedents were void for public policy if they discriminated on basis of race, religion, sex. *How was this different from Reuben Leonard choosing who or who not to let into his home?* Foundation had a “public” dimension > unlike the home, the Foundation was a charitable trust that was not purely private, like the family home. Ziff notes three forms of actions characterized by public/private divide: (1) state action = public, (2) private conduct in the public domain = public, (3) private conduct outside the public domain = private. But dividing line b/w these categories is blurry. A private family gift may require legal enforcement > so even though gift is private, it may be public in the sense that crts will enforce all valid testamentary gifts (and crts are public institutions).

### Re Ramsden:

* Scholarship at UPEI only available to Protestant students → Upheld
* Can it be distinguished from *Leonard Foundation?*
* Can the distinction between private and public be justified?

## Restraints on Alienation

* Doctrine of repugnancy: restraints are invalid if they are inconsistent with an inherent attribute of ownership (i.e. right to transfer property freely)
* i.e. “to A on the condition that the property never be sold, leased or mortgaged” → **invalid**
* What are some policy issues that arise?
  + Again, dead hand of the past fettering freedom of future owners // balance of freedom of grantor vs. that of grantee
  + Whether this could be used to frustrate creditors’ intentions
  + To what extent
    - Re Rocher: got a devise of blackacre subject to a proviso that he couldn’t sell it w/o giving option of first refusal to mom for 3,000L; at time he wanted to sell, worth >15
  + Further and promote economic efficiency // concentration of wealth, prevents improvements of property
  + The market provides the best mechanism to ensure the best allocation of resources

**Note re Restraints on Alienation:** issue = *to what extent should the law allow the current holder of a property interest to limit its alienability?* This issue reflects tension b/w desire of property holder to fetter subsequent uses of property, desire of present owner to be as free as they can to do as they please w/ the property. A push for removing fetters as land transforms into an increasingly fungible commodity > push towards free alienability and transferability, away from restraints on alienation. Justifications for increasing fungible nature of property: personhood justification (people should be free to do what they want with their property), and economic justification (economically efficiency > private property is best able to distribute property most efficiently).

### Trinity College School v Lyons (1995)

**IF CONDITION IMPOSES A RESTRAINT ON ALIENATION, THAT CONDITION IS VOID.** Bennetts and TCS residential school made agreement that gave option to TCS to purchase Bennetts’ land for fixed price ($9375) upon their death. When Bennetts died, TCS sought to exercise their option (by this time, fair market value = $135k). But Bennetts had already transferred the land to their children. *Was option to purchase for fixed price void as improper restraint on alienation?* Crt said alienation should not be restrained for two reasons: (1) keeps property out of commerce and tend to result in concentration of wealth; (2) tend to prevent improvements to property b/c landowner would be reluctant to make improvements if they cannot sell the property. Right of first refusal is not void, even though specifying a fixed price; the post-mortem option = void as restraint on alienation.

### Blackburn v. McCallum (1903, SCC)

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

**Test:** does the condition take away the **whole power of alienation substantially**?

Look at:

* Mode of alienation: can’t be sold or mortgaged
* Class of recipients: Total
* Time period: 25 years
* Price

→ Ct held that the condition was void // this is a big change for how the cts deal with issues like this.

# ABORIGINAL TITLE

# History of Aboriginal Title and Indian Reserves in BC

## Royal Proclamation (1763), “Indian Provisions”

**MAIN SOURCE OF CROWN’S FIDUCIARY OBLIGATION TOWARDS ABORIGINAL PEOPLES. JUSTIFICATION: ABORIGINAL PEOPLES BEING TAKEN ADVANTAGE OF ∴ NEED FOR CROWN PROTECTION, CONTROL OVER RELATIONSHIP B/W ABORIGINAL PEOPLES + SETTLERS; NEED TO ESTABLISH, PRESERVE TRADE + EXPAND COLONY. FORMAL RECOGNITION OF ABORIGINAL TITLE.** Justifications for “Indian Provisions”: “it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations and Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed”; “And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians”. Hunting grounds: the Indians shall not “be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds”. No private purchases of land from Indians: “no private Person do presume to make any purchase from the said Indians of any Lands reserved against the said Indians… but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians”.

Question of whether RP applies to BC doesn’t necessarily matter b/c Aboriginal title exists independently of RP. // Wampum belt: confirming parallel but sovereign independent nations [Indigenous representation of what the RP was]

## Douglas Treaties (1850-54)

**THE BEGINNING AND END OF TREATY-MAKING IN BC.** Beginning in 1850, Governor Douglas negotiated treaties on behalf of HBC, the Douglas Treaties, with aboriginal peoples on Vancouver Island = 14 total b/w 1850 and 1854. Single page: first para described location, second para described terms (“The condition of our understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of children…”), third para set out price. Chiefs marked blank pieces of paper with Xs, and these Xs were then appended to the template treaty text provided by colonial authorities months later). Took the form of a land transfer doc.

Why no more treaties after 1854? Maybe cost prohibitive if crown wouldn’t support them; seen as unnecessary.

→Treaties provided land would be surveyed and set aside as reserve land (subsequently, Douglas adopted a very generous reserve allocation policy // Reserves seen by Douglas as being a ‘jumping off’ point for Aboriginal peoples to enter into the colonial economy > but this policy was undone by Douglas’ successor, Joseph Trutch, who became the BC Land Commissioner in 1864). Trutch representative of a settler society versus Douglas (trader background); settlement mentality has a greater degree of conflict and // before land surveyed, you could acquire it and then title could be confirmed if improvements had been made = pre-emption; standard amt of pre-emption land is 160 acres. Reserve land was 10 acres per Indigenous families and precluded participation in pre-emption.

## British Columbia Terms of Union (1871), Article 13 – relinquishment of control to dominion

**DOCUMENT ADMITTING COLONY OF BC INTO DOMINION OF CANADA. ARTICLE 13 GAVE FED GOVT RESPONSIBILITY OVER INDIANS AND LAND RESERVED FOR INDIANS BASED ON “A POLICY AS LIBERAL AS THAT HITHERTO PURSUED BY THE BRITISH COLUMBIA GOVT”.** Article 13: “The charge of the Indians, and the trusteeship and the management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and *a policy as liberal as that hitherto pursued by the British Columbia Government* shall be continued by the Dominion Government after the Union.” “To carry out such policy *tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate* for that purpose, shall from time to time by conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government...”

### 

## House of Commons Committee, 1927 – Amends Indian Act:

Reflected on the report of the Royal Commission on Aboriginal Affairs for the Province of BC (1913-16) no more treaties, no additional land will be set aside – so begins the Indian Land Reserve Policy // prohibition on raising funds to bring an Aboriginal title claim w/o prior permission from DIA // Fixes the reserve geography of BC: small, scattered reserves, toe holes in traditional territory

## Constitution Act (1867), ss. 91(24), 109

**FED GOVT JURISDICTION OVER “INDIANS, AND LANDS RESERVED FOR INDIANS”. PROV JURISDICTION OVER “LANDS, MINES, MINERALS AND ROYALTIES”.** Section 91(24): “Indians, and Lands reserved for Indians.” Section 109: “All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union… shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise…”

## Constitution Act (1982), s. 35, “Aboriginal and Treaty Rights”

**CONSTITUTIONAL RECOGNITION AND AFFIRMATION OF ABORIGINAL RIGHTS AND TREATY RIGHTS.** Recognition of existing aboriginal and treaty rights, s. 35(1): “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Definition of “aboriginal peoples of Canada”, s. 35(2): “In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.”

# Key Cases in the Development of CL re: Aboriginal Title

St Catherine’s Milling (1888): arose out of dispute b/w ON and fed govt, and fed govt’s grant of timber licence to St Catherine’s Milling. JCPC: **Aboriginal title flows from RP 1763** = not inherent, **alienable only to the Crown**; dependant on goodwill of the sovereign (i.e. could be extinguished at any time); a **personal and usufructuary** right (= a non-proprietary right of occupation; aboriginal title as merely a burden on Crown land); **starting point** of Cdn jurisprudence on aboriginal title.

Calder v BC (1973):case brought by Nisga’a, seeking declaration that their aboriginal title not extinguished**;** SCC held aboriginal **title was not derived from RP 1763 (title is inherent) and >“personal and usufructuary right”** = aboriginal title as a legal interest. ∴ Nisga’a had Aboriginal pre-existing title to the land in question. Has title been extinguished? 3 of 6 judges said yes; 3 said no; 1 judge dismissed Nisga’a claim on a technicality. Despite the outcome, the recognition of Aboriginal title as an inherent right in this decision prompted fed govt to initiate comprehensive and specific land claims processes including the Nisga’a final agreement, concluded in 1990.

R v Guerin (1984):aboriginal title is *sui generis* and exists in conjunction w/ underlying Crown title; b/c inalienable except to the Crown, surrender of aboriginal title to land gives rise to Crown’s **fiduciary duties**.

R v Sparrow (1990):fiduciary duty identified in *Guerin* imported into the constitutional framework, requiring justification for any infringement of aboriginal rights (*Sparrow* was the first SCC case to interpret the new s. 35) → s. 35(1) protects rights in existence as of April, 1982 and rights that have been extinguished can’t be revived; doctrine of frozen rights rejected. and articulated 4-stage test for interpreting s. 35:

(1) *Is there an aboriginal right?*

(2) *If the Aboriginal right existed, does it still exist, or was it extinguished? →* Onus on Crown

(3) *If the right still exists, but is regulated, does that regulation prima facie interfere with the Aboriginal right?*

(4) *If there is a prima facie interference, can the infringement justified?* → Onus on Crown

a. Must be a pressing and substantial objective

b. Must be in accordance w/ Crown’s fiduciary obligations

R v Van der Peet (1996):building on *Sparrow,* SCC further developed test for defining an aboriginal right → to be an aboriginal right “an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the group claiming the right”.

R v Gladstone (1996):herring roe on kelp + aboriginal right to a commercial fishery; SCC held that compelling and substantial legislative for infringement of aboriginal right could include “the pursuit of regional and economic fairness, and the recognition of the historical reliance on and participation in the fishery by non-aboriginal groups”; SCC concerned that aboriginal right to commercial fishery had no internal limitation (= potential to be exclusive).

Delgamuukw v BC (1997):definition of aboriginal title, test for proof of aboriginal title, test for justification of infringement of aboriginal title; Crown argued aboriginal title was not more than an amalgam of aboriginal rights; Hereditary Chiefs argued aboriginal title amounted to an inalienable fee simple interest in land > SCC held aboriginal title was something in b/w these two positions = a *sui generis* property right. . First time *adaawk* (formal oral histories of territorial acquisitions) and *daxgyet* (body of law defining Gitksan relationship w/ animals, land introduced into courtroom. BCSC and BCCA held that thirteen colonial land ordinances extinguished claimants’ right to land

Haida Nation v BC (2004):the Crown’s **duty to consult** aboriginal peoples where an aboriginal right has been **claimed but not yet proven** or formally recognized under the law.

R v Bernard, R v Marshall (2005):building on *Delgamuukw* = exclusive occupation standard > moving away from aboriginal perspective, back towards common law perspective.

## Tsilhqot’in Nation v British Columbia 2014 SCC 44

|  |  |
| --- | --- |
| **F** | Underlying propositions:   * Radical or underlying crown title is subject to Aboriginal land interests where they are established * Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits * Gov’ts can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown’s fiduciary duty to the group * Resource development on claimed land to which title has not been established requires the gov’t to consult with the claimant Aboriginal group * Gov’ts are under a legal duty to negotiate in good faith to resolve claims to ancestral lands   Recall test for AT (from *Delgamuukw*) is based on ‘occupation’ prior to assertion of European sov’ty possessing 3 characteristics:   1. Must be sufficient 2. Must be continuous (where present occupation is relied on) 3. Must be exclusive |
| **I** | What constitutes sufficient occupation to ground title?  How should the courts determine whether a semi-nomadic Indigenous group has title to lands? |
| **RA** | Kinds of acts necessary for such a demonstration depend on the manner of life of the people and the nature of the land (land of Tsilhqot’in is v. harsh and capable of only supporting sparse populations) |
| **RE** | **Sufficiency of Occupation:**   * Must be approached from both the common law perspective and the Aboriginal perspective →ct cannot lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts * Aboriginal perspective focuses on laws, practices, customs and traditions of the group – in considering this for Aboriginal title, must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed * CL imports the idea of possession and control of the lands; at CL possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised * Aboriginal group in question must show that is has historically acted in a way that would communicate to third parties that it held the land for its own purposes; doesn’t need to be standard for claim of adverse possession // i.e. doesn’t have to be the ‘intensive’ occupation but also must be at least somewhat objectively ascertainable * But, there must be **evidence of a strong presence on or over the land claimed**, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question **belonged to or was controlled by or was under the exclusive stewardship** of the claimant group * notion of occupation must also reflect the way of life of the Aboriginal people including semi-nomadic or nomadic * Likened to the requirements for showing general occupancy at CL * Different from doctrine of constructive possession b/c the goal is not to attribute possession but to define the quality of physical acts of occupation that demonstrate possession at law * Regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources could suffice. A claim to title must show effective control over the land but claims are not confined to continuously occupied village sites or farms.   THIS IS THE KEY  **Continuity of Occupation** **between present and pre-sovereignty occupation:**  Does not require evidence of an unbroken chain of continuity between current practices and those that existed pre-contact ∴ same applies for showing title; current occupation must be rooted in pre-sovereignty times  **Exclusivity of Occupation:**  Should be understood in the sense of intention and capacity to control the land  → Is this sufficiently flexible enough or does it erroneously narrow the group of prospective title-claimants? Exclusivity may not have been necessary hx times  Could we phrase this differently? In order to recognize presence and use pre-sovereignty?  → In the absence of competing claims, should this even be a consideration? Communal rights to use land may be possible among different Aboriginal groups. In order to define boundaries around what can be considered title land b/c there will always be a competing claim – that of the crown   * Must be approached from both the common law and Aboriginal perspectives; context-specific * Fact that other groups doesn’t negate exclusivity * Should consider Aboriginal legal system for dealing with trespass, e.g. proof others were excluded, that others were only allowed access w/ permission, treaties w/ other groups, lack of challenges to occupancy |
| **A** | **Whether Title has been established**   1. Sufficiency: while population was small, the land was regularly used by the Tsilhqot’in 2. Continuity: Continuous Tsilhqot’in presence in the claim area est’d by direct evidence of recent occupation alongside archaeological, hx, and oral evidence from elders, and the geographic proximity between hx occupation sites and current occupation sites strengthened inference of continuity 3. Exclusivity: Repelled others from their land and demanded permission from outsiders wishing to pass over it, showing that they treated the land as being exclusively theirs   \*\* it is TJ’s job to sort out evidence; this is a question of fact and requires the weighing of conflicting evidence; the standard of review is palpable and overriding error – there was no such error. The evidence supports TJ’s conclusions.  **What rights does Aboriginal title confer?**  From Delgamuukw: right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes (but purposes must be reconcilable with the communal and ongoing nature of the group’s attachment to the land)  *Legal Characterization:*  Aboriginal interest in land that burdens the Crown’s underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown  In simple terms, title-holders have the right to the benefits associated with the land and the Crown does not retain a beneficial interest in Aboriginal title land; the crown retains a fiduciary duty and the right to encroach if justified  The characteristics of Aboriginal title flow from the special relationship between the Crown and the group in question – it is this relationship that makes Aboriginal title sui generis – title is the unique product of that historic relationship  \*\*How is terra nullius not being applied if there is both a recognition that Aboriginal occupancy pre-dated sovereignty and that the Crown could assert ‘radical or underlying title’ in spite of this? How can this be asserted?  *Incidents of Aboriginal Title:*  Confers **ownership rights** similar to those associated w/ fee simple including rights to:   * decide how land will be used, * enjoyment and occupancy, * possess, * economic benefits of the land * proactively use and manage the land   **Restrictions:**   * b/c it is collective title held for all succeeding generations, it cannot be alienated except to the crown // remember the refusal of ct to enforce a grant which restricts the right of alienation. * can’t be encumbered in ways that would prevent future generations of the group from using and enjoying it * land can’t be developed or misused in a way that would substantially deprive future generations of the benefit of the land   The right to control the land means that gov’ts and others seeking to use the land must obtain the consent of the title-holders and if the group does not consent, the gov’ts only recourse is to establish that the incursion is justified under s. 35  *Justification of Infringement:*  To justify overriding Aboriginal title-holding group’s wishes on the basis of the broader public good, the gov’t mush show:   1. It discharged its procedural duty to consult and accommodate   Isn’t this inimical to the fact that this justification means that the group has *not* consented (and therefore has not really been accommodated)?   * Arises from the honour of the crown prior to confirmation of title * Where there is real or constructed knowledge of potential/actual aboriginal title and contemplates conduct that might adversely affect it, the crown must consult with the group and if necessary, accommodate that right * The degree of consultation and accommodation req’d lies on a spectrum – in general it is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated gov’tal action would have on the claimed right * Where title is proven, the Crown must not only comply w/ the procedural duties but must also ensure that the proposed action is substantively consistent with the other two reqments  1. That it’s actions were backed by a compelling and substantial objective; and  * Must be considered from the Aboriginal perspective as well as from the perspective of the broader public b/c in order to constitute a compelling and substantial objective, the broader public goal asserted by the gov’t must further the goal of reconciliation between the two groups   This seems like a backdoor built in for the gov’t; while it requires the crown to frame the incursions in this sense, there is no narrowing of the Delgamuukw list of possible objectives.  What is the “Aboriginal perspective”   1. That the gov’tal action is consistent with the Crown’s fiduciary obligation to the group  * The crown’s underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown’s fiduciary or trust obligation to the group * How is this made out? If underlying title is held for benefit of Aboriginal group, and if the sui generis nature of Aboriginal title results from the relationship of the Crown as holding underlying title where Aboriginal title exists as a burden, doesn’t this beg the question of why full fee simple shouldn’t be granted?   **The fiduciary relationship impacts the justification process in two ways:**   1. Means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land   What does this mean or what could it mean in the future jurisprudence? Could be framed in such a way that it’s meaningless; it also removes self-government if the court is the one adjudicating this rather than allowing Aboriginal groups themselves to determine how the land will be used. Reflective of continuing colonial attitudes. If we reflect on the Ellickson article about the justification for fee simple, one of those justifications is that FS is the best way to ensure best uses of land for current and future generations.   1. Infuses an obligation of proportionality into the justification process:    * 1. Incursion must be necessary to achieve the gov’t’s goal (rational connection)      2. Gov’t goes no further than necessary to achieve it (minimal impairment)      3. Benefits expected to flow from the goal are not outweighed by the adverse effects on the Aboriginal interest (proportionality of impact)   *Remedies and Transition – differ for pre- versus post-declaration of Aboriginal title:*  **Before** title est’d, if Crown fails to discharge its duty to consult IGF, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out  **After** title has been est’d, Crown must seek consent and absent consent, it can only proceed if Crown has discharged duty to consult and the Crown justifies intrusion under s. 35  Remedies that lie for breach of interests in land are available  → result could be a spectrum of duties owed over time in a single case    *What duties were owed by the Crown at the time of Gov’t Action?*   * Prior to the declaration, Province had duty to consult re: proposed uses of the land and accommodate the claimed Tsilhqot’in interest in the land * B/c they had a strong prima facie claim to the land at the time of the impugned gov’t action and the intrusion was significant, the duty to consult owed was on the high end of the spectrum * Now that tile has been proven, Aboriginal title is not merely a right of first refusal w/ respect to crown land management or usage plans; rather, it is the right to proactively use and manage the land   *Provincial laws of general application apply to land held under Aboriginal title but:*   1. Provincial power to regulate land held under Aboriginal title is limited by test previously described (i.e. duty of consultation and congruence w/ fiduciary duty) 2. Province’s power to regulate lands under Aboriginal title may be limited for division of powers reasons   *Breach of the duty to consult:*   * Breach in this case arises from the issuance by the Province of licences permitting forestry activity and construct related infrastructure – the honour of the Crown req’d that the province consult them on uses of the lands and accommodate their interests * Easiest way to discharge duty is to obtain consent |

### Responses to the Decision:

**Bruce McIvor:** putting to rest the postage stamp idea and giving profound rights to Indigenous groups [CA in Tsilhqot’in demonstrated this approach that **to** prove sufficient occupation, an Aboriginal group must prove that its ancestors **intensively** used a definite tract of land. Leads to a Higher threshold and ignores nomadic configurations]

**Miller Titerle:** dramatic shift to the resource development milieu in BC: will spurn more litigation; treaty process will be indefinitely stalled; meaningful concessions; leverage of Tsilhqot’in for more meaningful participation and greater protection for ways of governing land in ways that accord with tradition

**Letter of Understanding between Tislhqot’in Nation Chiefs and BC Premier Clark:**

Leading to 5-year framework outlining land negotiation

Major issues taken up by the commentary:

* Economic impact esp. re: resource development vs. justification test: gov’ts can still justify ∴ resource development not hampered
* Criticism of the idea of underlying Crown title to Aboriginal title lands; still remains unexplained; why is it characterised as a burden?
* Critical of aspects which put onus on claimant group to prove title or inability of province to regulate title lands

# Rundown on Aboriginal Title

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| --- |
| Characteristics of Aboriginal Title |
| **Lamer CJ in *Delgamuukw* described aboriginal title as a right in land (a property interest):** “Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right, *per se;* rather, they are parasitic on the underlying title. However, the range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title.”  **Aboriginal title is a *sui generis* proprietary interest**, distinct from other proprietary interests like fee simple b/c can only be explained by reference to common law *and* aboriginal legal perspectives.  **Three characteristics of aboriginal title:**   1. **Inalienable:** lands held pursuant to aboriginal title cannot be sold or surrendered to anyone other than the Crown; lands held pursuant to aboriginal title are inalienable to third parties; remember that one of the rights in the bundle is alienability > but property right can exist w/o the full bundle of sticks > so the limit on alienability does not preclude aboriginal title from being a property right. 2. **Source is prior occupation of land:** source of aboriginal title is prior occupation of Canada by aboriginal peoples, (not RP 1763, as Privy Council suggested in *St Catherine’s Milling*).    1. *Physical occupation*: “What makes aboriginal title *sui generis* is that it arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.”    2. *Relationship b/w common law + pre-existing aboriginal legal systems*: aboriginal title has as its source in aboriginal legal systems prior to assertion of sovereignty, but only emerges out of interaction w/ the common law > aboriginal title is a result of the intersection b/w aboriginal law and common law. 3. **Communal:** aboriginal title cannot be held by individuals; aboriginal title is a collective right to land held by the community of an aboriginal nation as a whole. Though SCC did not grapple w/ self-govt in *Delgamuukw,* the fact that aboriginal title is a collective right suggests that some measure of self-govt must exist (need collective body to determine how aboriginal title land is to be used) = implicit recognition of aboriginal self-govt.   Chief Joan Ryan, Hanamuxw: “it is not your personal property, but rather you are designated as the person to manage that property not just for yourself but for all members of your house.” |
| Content of Aboriginal Title |
| 1. **The right to exclusive use and occupation of the land. Right to the land itself.**     1. not restricted to those uses that are elements of a practice, custom, or tradition that is integral to distinctive culture of aboriginal group claiming the right.    2. But aboriginal title does not “amount to a form of alienable fee simple either” – ultimate sov’ty and underlying FS lie w/ Crown    3. Title is a sui generis right – more of a signalling term than one which has specific content; we just know that it’s an amalgam of Aboriginal laws and patterns of landholding and CL property rules    4. Title does not flow from a Crown grant but rather is inherent 2. **The right to choose to what uses the land can be put, subject to the ultimate limit that those uses cannot be irreconcilable with the nature of the group’s attachment to land (uses cannot destroy ability of land to sustain future generations of that community) = inherent limit on aboriginal title → tension between this concept and the fact that the Crown can expropriate title lands to do the very same thing (i.e. destroying the value of the land for future populations)** 3. E.g. if occupation established w/ reference to use of land as a hunting ground, group who has successfully claimed aboriginal title cannot use that land in a manner that destroys its value for such a use, for example by strip-mining it. 4. E.g. if group claims a special bond to the land b/c of its ceremonial or cultural significant, it may not use that land in a way that would destroy that relationship, for example by turning it into a parking lot. 5. “What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself… The community cannot put the land to uses that would destroy that value.” 6. This limitation does not restrict use of aboriginal title land to traditional activities > “[t]hat would amount to a legal straitjacket”. |
| How Aboriginal Title is Protected by s. 35(1) |
| Section 35(1) did not create aboriginal rights. Rather, it constitutionalized aboriginal rights, which were recognized well before 1982. Aboriginal title “is one species of aboriginal rights recognized and affirmed by s. 35(1)” (Lamer CJ, *Delgamuukw*). The range of aboriginal rights protected and affirmed by s. 35(1): aboriginal rights that are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming them; aboriginal rights that are site-specific; aboriginal title, which confers more than the right to engage in site-specific activities that are aspects of the practices, customs, traditions of a distinctive aboriginal culture. **Aboriginal title confers a right to the land itself.** |
| Test for Proof of Aboriginal Title |
| **1. The land must have been occupied prior to sovereignty.**   * 1. Date of assertion of sovereignty in BC: 1846 (Oregon Boundary Treaty).   2. “Aboriginal title is a burden on the Crown’s underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.”   \*\*Aboriginal title, as a ‘burden on Crown title’ crystallized at sovereignty but what about Aboriginal title or property rights as a consideration in itself? Further, how can Crown title be ‘underlying’ Aboriginal title at the same time as stating that title arises out of prior occupation of the land by aboriginal peoples? Were Crown title and Aboriginal title then created *simultaneously*?   * 1. need consider both aboriginal + common law perspectives when understanding meaning of **“occupation”** > common law understanding of occupation built around physical occupation, aboriginal understanding of occupation more expansive (“occupied by a system of law”).  1. **If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation.**    1. No need to establish an unbroken chain of continuity, but there must be “substantial maintenance of the connection” b/w the people and the land    2. The fact that the nature of occupation may have changed b/w sovereignty and present does not matter, as long as substantial connection b/w people and land is maintained 2. **At the time of sovereignty, occupation must have been exclusive.**    1. Lamer CJ said that proof of exclusivity must rely on both the common law and aboriginal perspectives.  * Presence of other aboriginal groups can reinforce finding of exclusivity b/c this suggests aboriginal group claiming title had exclusive control of land (other groups had to ask for and be granted permission to use the land); e.g. Professor MJ told us Wetsuwet’en had 7 words for trespass, which suggests they took concept seriously). * Joint aboriginal title, shared between multiple aboriginal groups, also possible. * If the group claiming the right cannot show that they occupied a piece of land exclusively, “it will always be possible to establish aboriginal rights short of title. These rights will likely be intimately tied to the land and may permit a number of possible uses. However, unlike title, they are not a right to the land itself. Rather… they are a right to do certain things in connection with that land.”   1. But SCC in *R v Bernard; R v Marshall* shifted away from aboriginal perspective, back towards common law perspective, shoe-horning the aboriginal perspective into the common law perspective (not what the SCC envisioned in *Delgamuukw*!); McLachlin CJ said: “exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources… The ultimate goal is to translate the pre-sovereignty aboriginal right to a modern common law right.” |
| Extinguishment of Aboriginal Title |
| **Pre confederation:** British gov’t could extinguish  **Post confederation – pre-1982:** only the federal gov’t (due to s. 91(24))  *How was/is extinguishment to be accomplished?*  **Pre-1982:** bilaterally or unilaterally  **Post-1982:** only with consent |
| Justification Test for Infringement of Aboriginal Title |
| Justifiable infringementcame out of *Sparrow,* was embellished in *Gladstone*, and dealt with in the context of aboriginal title in *Delgamuukw.*  General justification test for infringement of aboriginal rights set out in *Sparrow* and *Gladstone*:   1. **Infringement must be in furtherance of compelling + substantial legislative objective**   For example:   * + Development of agriculture, forestry, mining and hydroelectric power   + General economic development of the interior of BC   + Protection of the environment or endangered species   + Building of infrastructure   + Settlement of foreign populations to support these principles   **\*\* ct states that the compelling and subst’l objectives are those that are directed at either (a) recognizing prior occupation of Aboriginal peoples or (b) reconciliation of aboriginal occupation with the assertion of the Crown (which are also the reasons for affirming aboriginal rights under s. 35(1)). When justifying an infringement, it states that limits and rights are of equal importance to reconciliation. Very interesting acrobatics to define recognition and reconciliation of Aboriginal rights as being concerned with the goals and needs of the larger community**   1. **Infringement of aboriginal title must be consistent with the Crown’s special fiduciary relationship with aboriginal peoples, which gives rise to two requirements:**    1. **Duty to Consult:** where there is infringement of aboriginal title, the Crown has a duty consult the aboriginal group to determine whether the infringement is justified; “The nature and scope of the duty of consultation will vary with the circumstances.” Sometimes, where the breach is “less serious or relatively minor” the duty to consult will involve “no more than a duty to discuss important decisions”. But in most cases, the duty to consult will require more: “Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.” In all cases, consultation must be in good faith, “and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue”.    2. **Fair Compensation:** “The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests are accommodated”.   **\*\*planning** to infringe a constitutional right and to breach fiduciary duty seems to be in pretty bad faith; how is this reconciliation? When we talked about quantifying the damages for infringing airspace property rights, one of the cases noted that it would be counterproductive to the protection of rights to set up a ‘fee schedule’ for infringement. How is this different? And how is it in the nature of reconciliation to find that the fee schedule should also be determined unilaterally by the *infringing* party?  Towards Reconciliation  Lamer CJ in *Delgamuukw* said that reconciliation entails recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community.” The underlying purpose of s. 35(1) is “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the crown” (Lamer CJ, *Van der Peet*). Lamer CJ’s closing words in *Delgamuukw*:“Let us face it, we are all here to stay.”  Vickers J (BCSC) in *Tsilhqot’in* said: “Reconciliation is a process”. In the interest of all Canadians to begin to engage in this process as soon as possible to achieve honourable settlement w/ Tsilhqot’in [and other aboriginal peoples, more generally]. |

# Property Rights on Reserves and Nisga’a Property Interests

## Overview of Aboriginal Interests in Land & Land Rights on Reserves

* S. 91(24) of *CA* gives fedl gov’t authority over “Indians, and Lands reserved for...Indian”
* Under this authority, Parl passed the *Indian Act* (in place since 1876)
* Deals w/ a wide range of issues, many of which address property rights on reserves
* For many property transactions, there is a large role played by fed’l gov’t and by the Minister for Indigenous and Northern Affairs - supervisory, overseer role
* Reserve land and band defined in s. 2(1) of the Act

***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; (*bande*)
* Types of aboriginal interests in land: (1) aboriginal title lands, (2) reserve lands, (3) treaty lands.
* Legal title to reserve lands held by Crown

**Reserves to be held for use and benefit of Indians:**

**18** **(1)** Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

* Bands recognized under Act have an interest in reserve land
* Can’t be seized, can’t be mortgaged to a non-band member
* Minister must approve or grant most land transactions under the Act
* Two types of interests in reserve land
  + Collective interest of bands
    - Band has the right to the use and benefit of reserve land
    - Collective interest can not be transferred to another entity except by following strict statutory provisions (e.g. s. 37)
  + Interest of individual band members
    - Interest referred to as an allotment (right to use and occupy a parcel of reserve land) – s. 20(1)
    - Minister may issue a certificate of possession as evidence of a person’s right to possession of the land (but legal title remains w/ 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*)
  + A person can lose their allotment if they cease to be a band member
* 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 (s. 28(2), *Act*)
    - Permit: right to use reserve lands in a limited, specific way for a defined period of time (ie 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))
* Implementation of land codes do not affect the treaty process

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 // prov’l laws relating to matrimonial property don’t apply on reserves
* “Conflicts with the way that Aboriginal communities have traditionally understood their land holdings” (Legal Services Society of BC)

### *The Indian Act’s Challenge to Aboriginal Governance – Rotman + Borrows (pp. 47-51)*

* Act potentially threatens all trad’l gov’nance structures
* Many First Nations blended trad’l gov’nance forms w/ elected req’ments of the IA whereas others have attempted to keep 2 systems separate or to subjugate IA structures to traditional forms or values and principles ∴ variety of structures exist
* IA’s provisions narrowly define and heavily regulate their citizenship, land rights, succession rules, political organization, economic opportunities, fiscal management, educational patterns and attainment
* Fact that many Indian bands continue to function under a degree of their own inherent authority demonstrates that maybe IA could be interpreted as recognizing and affirming pre-existing governance powers
* No individual FS ownership of reserve land b/c it is owned by the crown
* Most bands have acted as though IA permitted a choice about how lands were to be used: collectively or individually
  + Those opting for individual rights-holders often adopted certificates of possession – often allotted lands to individuals who were hx in possession of what later became land parcels under IA
  + Others have interpreted it to mean only common use and benefit
  + ~1/2 individually allotted lands on reserves are not held by certificate procedures but in accordance w/ band’s customs
    - Some cts have found that custom or band action can’t grant a legal interest to an individual enforceable under IA but other cts have not found this.
* Under. S. 81 of IA, band can exercise gov’nance through by-laws (but v. limited)
* 1983 Special Committee on Indian Self-Government – saw First Nations as equivalent to provs; sought to have tripartite gov’tal structure throughout Canada where First Nations given full gov’tal powers [neither fed nor prov’l backed the proposal]
* Subsequent Royal Commission on Aboriginal Peoples crafted similar proposal which would take away Fed’l powers under 91(24) which were sought by Aboriginal nations and that would identify other areas fed’l gov’t would recognize as ‘core’ Aboriginal gov’tal powers
* Debate around whether IA should be reformed/supplemented by other fed’l legislation
  + Resistance b/c it looks like a delegation of authority from fedl gov to first nations
  + Leg’n passed by CDN gov’t can always be amended or repealed ∴ many nations sought to protect their rights to gov’nance under s. 35(1)

### Negotiating Governance Agreements – Rotman + Borrows (pp. 65-90)

1995 inherent rights policy (policy guide issued by fed’l gov’t)

* Lists the areas of gov’nance the fed’l gov’t thinks Aboriginal peoples have w/in the scope of their jurisdiction.
* Jurisdiction extends to: matters that are internal to the group, integral to distinct culture, and essential to its operation as gov’t
  + Areas include: internal constitutions, elections, membership, marriage, adoption and child welfare, language, culture, education, health, social services, administration and enforcement of Aboriginal laws, policing, internal land management, agriculture, taxation of members, housing, transportation, and licensing of local businesses
* Was directly implemented for the first time w/ 1999 Nisga’a Final Agreement [an interesting study of the interaction of First Nation traditional laws and structures w/ the broader Canadian const’l framework]

Clans

Within each Wilp

House Groups

* Wilp Chiefs are responsible for transmitting adaawks and associated prerogatives from one gen to the next – usually through a series of feasts to make the prerogatives public and to have them validated by other chiefs
* Each wilp has an adaawk that dexcribes how their ancient territories were acquired; also describe ancient migrations, territorial defense, major events in the life of the house (natural disasters, epidemics, war, arrival of new peoples, est’ment of trade alliances and major shifts in power), records property rights (fishing sites, hunting territories, gathering grounds), details family law rights and responsibilities and how they were to be passed on to next gen
* Assistance for remembering adaawks by ref to ayuukhl – ancient legal code that has guided social econ and political relationships
* Ayuukhl + adaawk hx governed land ownership, succession, citizenship, institutions of the chieftain and matriarch, education, marriage and divorce, war, peace, trading rel’ns and restitution
  + They connect Nisga’a people to their territories, families, and past

## Nisga’a Final Agreement:

* Post-Calder, comprehensive land claims policy introduced
* First modern day treaty in BC
  + Mechanism for accepting and implementing Nisga’a governance
* 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

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| Four basic components | |
| Substitution for Aboriginal title w/ a grant of FS to the Nisga’a Nation | Lands   * + 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 (but limited)   + Mineral rights owned by Nisga’a Government within parcel of Nisga’a Lands   + Replacement interests (Chapter 3, paras. 30-40)   + Land title: Nisga’a can apply to have the Provincial Torrens System apply to parcels of Nisga’a   + Cultural artifacts and heritage: Certain provisions addressing cultural artifacts and heritage |
| Defines existing hunting, fishing and trapping rights in the lands | |
| Payment of money over a period of years | |
| Recognition of Nisga’a gov’t | Lisims: governs the nation and responsible for relations between gov’ts  Village: governs the village |

#### Campbell v BC (AG), [2000] BCSC [decision dismissing Liberal party’s challenge to the treaty]

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| **F** | Libs argues it was invalid to the extent that it purported to provide the Nisga’a gov’t w/ leg’ve jurisdiction or provides that the Nisga’a gov may make laws that prevail over fed’l and prov’l laws |
| **I** | Whether the Nisga’a Treaty was inconsistent with the division of powers between fed and prov through ss. 91 and 92. |
| **D** | Found that self-gov’t was a constitutionally protected right w/in the Nisga’a Agreement. |
| **RA** | Post-1982, Aboriginal rights cannot be extinguished, but they may be defined (given content) in a treaty. The Nisga'a Final Agreement does the latter expressly. Section 35 of the *Constitution Act, 1982,* then, constitutionally guarantees, among other things, the limited form of self-government which remained with the Nisga'a after the assertion of sovereignty. The Nisga'a Final Agreement and the settlement legislation give that limited right definition and content. The Nisga'a government, subject as it is to both the limitations set out in the treaty itself and to the limited guarantee of s. 35 of the *Constitution Act, 1982*, does not have absolute or sovereign powers. It is not a ‘new order’ of government. |
| **RE** | Nisga’a gov’t has power to make laws in areas that can be divided into 2 groups:   1. When Nisga’a law conflicts with federal or provincial law, the Nisga’a law will prevail, although in many cases only if it is consistent w/ comparable standards est’d by Parl, prov, or relevant admin tribunals   → generally the subjects here concern identity of Nisga’a people, their education, preservation of their culture, the use of their land and resources, and the means by which they will make decisions in these areas   1. When Nisga’a law conflicts, the CDN law will prevail   → areas like crim law, police services must have approval of prov’l cabinet, establishing a court must be approved by prov’l cabinet and appeal of a decision would go to BCSC, etc.  → leg’ve powers are significantly limited by the Treaty itself, w/o considering effect of s. 35   * Argument that right to self-gov’t or leg’ve power was extinguished @ confederation ∴ Πs distinguish aboriginal title and other rights from self-governance; * When BNA enacted, all legislative power was divided; gov’t can delegate power but cannot give up or abdicate authority →leads to two questions:   **Was all leg’ve power distributed through ss. 91 and 92**? **No.**  No, the preamble has been interpreted by SCC as encompassing a number of principles and powers not set out in writing which are NTL fund’l to the constitution. Imperial policy reflected in instructions given to authorities in NAm prior to confed recognized a limited form of aboriginal self-gov’t which helps to ‘fill in’ the gaps of the express terms.  Non-exhaustive list – what was distributed in 91 + 92 was all but no more than the powers which, until 1867, had belonged to the colonies  Confederation was done in order to provide room for diversity, not to extinguish Aboriginal rights  → all to suggest that aboriginal right to self-gov’t akin to leg’ve power survived as an unwritten value of the Constitution o/s of the powers distributed to fed and prov  **Is the leg’ve power granted in the agreement a new order of gov’t? No**   * CDN courts in Canada have enforced laws made by aboriginal societies → demonstrates at least a limited right to self-government, or a limited degree of legislative power, remained with aboriginal peoples after the assertion of sovereignty and after Confederation * also that such rules, whether they result from custom, tradition, agreement, or some other decision making process, are "laws" in the Dicey constitutional sense. * framers of s. 35(3) considered that a form of self-government yet to be defined was to be included in the bundle of rights protected by that section, and that the Crown in right of Canada accepted treaties as a method of defining such rights as part of its policy * ∴ not establishing a new order of gov’t |

**Conclusion:**

The existing framework of the *Indian Act* does not provide a sound base on which to build healthy and productive communities. Aboriginal law and philosophies can — and should — be given a more central place with in First Nations communities.

#### Implementation:

**Land:**

* Nisga’a Individual Land Holding Project
* 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

**Chapter 3 of Nisga’a FA:**

(a) Nisga’a Nation owns Nisga’a lands in fee simple, the largest estate known in the common law; (b) Nisga’a Nation may dispose of whole of its estate in fee simple, or any parcel, to any person; (c) Nisga’a Nation may also dispose of any lesser estate in the land, to any person.

The Nisga’s fee simple interest in their land describes the longest time in land known to the common law (= estate). But Nisga’a were not prepared to accept the common law doctrine of tenure, which holds that all interests in land emanate from Crown. Remember: doctrine of estates determines “quantity” of interest in land; doctrine of tenure determines “quality” of interest in land. Nisga’a willing to accept doctrine of estate, but not doctrine of tenure.

Nisga’a Landholding Transition Act passed in 2009 but not yet in force. Nisga’a Treaty Lands are divided up b/w land held by Nisga’a Nation and land held by 4 Nisga’a Villages. Act proposes to grant Nisga’a Villages the power to transfer fee simple interests to individual Nisga’a (provided land does not exceed 0.2 hectares and principal use of land is residential).

Desirability of the Individual Landholding System?

# SHARED OWNERSHIP: JOINT TENANCY AND TENANCY IN COMMON

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| Joint tenancy or tenancy in common? per Ontario Law Reform Commission | |
| 1. **Common law presumption in favour of a joint tenancy.** If the four unities are satisfied, there is a presumption at common law that a transfer of title to co-owners creates a joint tenancy, per *Re Bancroft.* Presumption rebuttable w/ any evidence of testator’s intention to create a tenancy in common: “[a]nything which in the slightest degree indicates an intention to divide property must be held to abrogate the idea of a joint tenancy and to create a tenancy in common” (*Re Bancroft*). Words of severance that indicate testator’s intention to create TinC:  * “equally” * “equally amongst them” * “equally to them” * “to share and share alike” * “severally” * “to be divided between” * “to be distributed in joint and equal proportions”  1. **Statutory presumption in favour of tenancy in common.** Section 11(2) of BC’s *Property Law Act* creates presumption in favour of tenancy in common (reversing common law presumption in favour of joint tenancy). But **s.** **11(2) statutory presumption only applies to land** “transferred or devised in fee simple, charged, or contracted to be sold” (does not apply to personal property); also, presumption does not apply to partnership property. | |
| **JOINT TENANCY** | **TENANCY IN COMMON** |
| **The Four Unities**   1. **Unity of Possession:** requires that each JT be entitled to *possession of the whole land*, concurrently w/ other JTs 2. **Unity of Interest:** requires each JT hold *same interest, in extent, nature + duration* 3. **Unity of Title:** each JT’s title must be derived from the same act/instrument 4. **Unity of Time:** each JT’s title must be vested at the same time (exception: unity of time not required if joint tenancy create by will or conveyance employing a use)   Joint tenants are seised “*per mie et per tout*” = each JT holds the whole jointly, not separately.  **Right of Survivorship (*jus accrescendi*)**  The right of surviving JTs to take the interest of a pre-deceasing JT. When on JT dies, the survivors get a bigger “slice of the pie” (sharing the whole interest with one less person). Legal fiction underlying joint tenancy = there is really one tenant. In *Re Bancroft,* two siblings found to be joint tenants > after Paul’s death, all $ to Jean.  **Process of Severance**  A joint tenancy can be converted to a tenancy in common through the process of **severance.** Severance denotes transformation of an existing JT into a TinC. Per *Williams v Hensmand* (1861) and Lord Denning in *Burgess v Rawnsley* (1975), affirmed in *Sorenson,* JT may be severed in three ways:   1. One party acting on their own [but declaration by one party that is *not communicated* to other party is not sufficient to operate as severance] 2. Mutual agreement 3. Any course of dealings sufficient to intimate tinterests mutually treated as constituting TinC   Onus of demonstrating that JT is severed lies w/ the party who contends it has been severed. | **Only Required Unity is of Possession**  The only required unity for a tenancy in common is the **unity of possession (other unities may/may not be present)**: tenants in common must be entitled to possession of the whole land, concurrently with other TinC.  **Distinct, Separate Interests**  Tenants in common hold distinct, separate interests (no unity of interest, no unity of title, and no unity of time).  **No Right of Survivorship**  When a TinC dies, his or her interest in the land forms part of the deceased’s estate and passes in accordance to his/her will or intestacy rules. Only tenants in common can transfer their share on death (joint tenants are constrained by the right of survivorship).  **Words of Severance**  Tenancies in common are characterized by words of severance, e.g. “share and share alike”, “equally”, “equally amongst them”, “equally to them” [\*note: words of severance are different from process of severance]. |
| **How to Terminate Co-Ownership** |
| * Divide co-owned whole into parcels to be individually owned by former co-owners. * Sell undivided property to third party, and then divide proceeds amongst co-owners. * One or more co-owner(s) can sell their interest(s) to remaining co-owner(s). * One co-owner sells their interest in the co-ownership to a third party, so that third party becomes a co-owner w/ the remaining co-owners. * Co-owner can apply to courts for partition or for sale of the property. |
| **Steps for determining whether co-ownership is joint tenancy or tenancy in common** | |
| 1. ***What was parties’ intention? What does the instrument indicate?***    1. *Does the instrument expressly indicate that the co-ownership is a joint tenancy?* If yes, the form of co-ownership will be a JT so long as the four unities are present and none of the parties have severed the JT.    2. *Are there words of severance?* Words that indicate testator’s intention to create TinC: “equally”, “equally amongst them”, “equally to them”, “to share and share alike”, “severally”, “to be divided between”, “to be distributed in joint and equal proportions”    3. *Is there any other evidence of testator’s intention to create a tenancy in common?* “Anything which in the slightest degree indicates an intention to divide property must be held to abrogate the idea of a joint tenancy and to create a tenancy in common” (*Re Bancroft*) 2. ***If parties’ intention is unclear, what presumption applies?***    1. If land, presumption is of a tenancy in common, per *Property Law Act,* s. 11(2)    2. If personal property, presumption is of a joint tenancy, per common law presumption (*Robb v Robb*: husband and wife were co-owners in a housing co-op > the occupancy agreement did not specify whether parties held as JTs or TinCs, so CL presumption of a JT applied b/c the property interest was shares in the co-op, not real property) 3. ***If the common law presumption of a joint tenancy applies, does one of the equitable exceptions apply?***    1. *Did co-owners contribute unequally to the purchase price?* If co-owners contributed unequally, equity creates a trust where beneficial/equitable interest held in proportion to contribution (legal title would remain as a joint tenancy).    2. *Were co-owners in a business relationship, in a commercial context?* If co-owners were business partners, equity presumes that they hold as tenants in common.    3. *Were co-owners mortgage lenders?* If co-owners lent money as part of the mortgage, equity presumes that the co-owners hold as tenants in common (to ensure that a co-owner does not lose their security in the loan if they die). 4. ***If parties intended to create a joint tenancy, does it fail b/c lacking one of 4 unities?***    1. *Unity of possession:* each co-owner must be entitled to possession of the whole land, concurrently with other co-owners    2. *Unity of time*: each co-owner’s title must be vested [exception: JT created in a will]    3. *Unity of interest*: each co-owner must hold same interest, in extent, nature, duration    4. *Unity of title*:each co-owner’s title must be derived from the same instrument/event 5. ***If there is a joint tenancy, has one of the parties severed the joint tenancy?***     1. *Has one of the co-owner acted on their own to sever the JT, and communicated this action to the other co-owners?* (*Williams v Hensman,* affirmed in *Sorenson*)       1. *Has the co-owner transferred their interest to a third party?* = severance       2. *Has the co-owner transferred their interest to themselves?* = severance, per *Property Law Act,* ss. 18(1) and 18(3)       3. *Has the co-owner mortgaged their interest?*At common law, transferring interest to mortgagee as security for loan = the same as transferring interest to a third party. But under BC title registration system, no longer clear that mortgages involve transfer of interest.       4. *Has the co-owner granted a lesser interest, e.g. life estate, lease?* = severance    2. *Did co-owners mutually agree to sever?* (*Williams v Hensman,* affirmed in *Sorenson*) Per *Havlock* (cottage property co-owned by uncle and niece as joint tenants)*,* negotiations not sufficient > for severance, there must be actual mutual agreement.    3. *Any course of dealings/pattern of behaviour sufficient to intimate parties understood their co-ownership was a TinC?* (*Williams v Hensman,* affirmed in *Sorenson*)    4. If a party has done everything in their power to sever a JT, a court may find that the JT was severed, per *Feinstein v Ashford* (property in Pitt Meadows held by co-owners as JTs; Ashford signed application to sever but lawyer never filed this application until right after Ashford’s death; Feinstein sought declaration of joint tenancy but Crt found Ashford had done everything his power to act on his share, so JT was severed)   \*Note: you cannot sever a JT in a will b/c transfer to surviving JTs takes place at time of death. | |

### 

### Re Bancroft Eastern Trust v Calder (1936) NSSC

|  |  |
| --- | --- |
| **F** | Samuel Bancroft left a gift of money to be divided “into four equal shares”, three portions to go to children Percy, Aubrey and Florence, and fourth portion “to the children of my deceased daughter Minnie” (Minnie’s children = Paul and Jean). Trustee paid ¼ of money to Paul and Jean, who each got equal shares, but then Paul died. |
| **I** | *Did Paul and Jean hold the gift as joint tenants (right of survivorship > $ to Jean upon Paul’s death) or as tenants in common (no right of survivorship; is $ to be distributed per Paul’s will/to his estate)?* |
| **D** | Crt concluded Jean and Paul were joint tenants ∴ all money to go to Jean following Paul’s death |
| **RA** | **COMMON LAW PRESUMES THAT GIFT W/ MULTIPLE RECIPIENTS W/O EXPLANATORY WORDS CREATES A JOINT TENANCY; BUT IF ANYTHING SUGGESTS TESTATOR INTENDED OTHERWISE, COMMON LAW PRESUMPTION REBUTTED > TENANCY IN COMMON EXISTS** |
| **RE** | Crt began w/ common law presumption that gift without accompanying explanatory words creates a joint tenancy  Crt then looked **for evidence of testator’s intention to rebut** presumption and create tenancy in common, but found none (no words of severance like **“equal”, “equally amongst them”** qualifying the giftto Jean and Paul)  Would clause c be enough to rebut the presumption? There is a distinction between clause b and c. It’s not inconceivable that there are differences between the intention of the testator to do one thing while the wife was alive and another thing after she had died.  Share that had been paid to Paul while he was alive now given to Jean. |

### 

### Property Law Act, s. 11(2) Tenancy in common

CL presumption modified by statute in BC:

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

* **If land is transferred/devised to 2+ people – other than personal reps or trustees – the persons are presumed to be tenants in common unless a contrary intention appears in the instrument**
* **One consequence is that property given to a trustee will be held by JT; why? B/c diff roles played by trustees and benes; trustees have to fulfil certain obligations. If one of your trustees dies, you would prefer that the other trustee take on stewardship of the property rather than allow the trustee to determine how *they* would like the property to be distributed in their will → done to reflect the different obligations**

### McEwen v. Ewers & Ferguson

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.

Q: did the will create a joint tenancy or a tenancy in common?

* Main statutory provision – very similar to s.11(2) BC (tenant in common unless expressly declared to be in joint tenancy)
* Is the use of the word jointly enough to rebut the presumption of TC? No, while the word ‘jointly’ could’ve been enough to rebut the presumption of TC, the second part which mentions ‘equal shares’ rebalances it and takes us back to TC
* Useful guidelines about words used, estates which result
* Jointly and equally? → Tenancy in common
* Words of division/distribution such as “to be divided” or “equally”? →Tenancy in common
* Any intention to divide the property? → Tenancy in common

# How to Create a Joint Tenancy: The 4 Unities + Express Declaration

**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
* Choosing not to exercise the right to possession does not, by itself, destroy the unity of possession
* E.g. grant: East half to A, west half to B ≠ unity of possession ∴ not JT b/c neither are entitled to the entire property (which also means that it’s not a TC)

**Unity of Interest:**

* Co-owners must have the same estate in the land, equal share in that estate, and the same quality of the estate (legal, equitable or both)
* E.g. One person has a life estate, one person has remainder ≠ unity of interest

**Unity of Time:**

* All co-owners receive their estates at the same time (i.e. vesting takes place simultaneously)
* Some exceptions (i.e. remainder to children as joint tenants)
* NB: s. 18(1) PLA: you can convey land to yourself jointly with another person:
  + Conveyance from A to “A and B”
  + Why would you want this? Allows unity of time + title ∴ the conditions for JT and gives B the right of survivorship

**Unity of Title:**

* Co-owners have to acquire their estates from the same instrument, whether will or deed.

|  |
| --- |
| **Practice Questions D: what is the form of co-ownership?** |
| 1. A transfers Strawberry Fields to “B, C, and D as joint tenants for the life of A” (B, C and D = life tenants *pur autre vie*… the life of A). Then D dies. In her will, D leaves all her property to E. 2. C transfer SF to “A and B, and their heirs”. 3. “To A for life and to B for 10 years as joint tenants.” 4. “To A for life, remainder to B for life.” 5. “One-third to A, two-thirds to B as joint tenants.” 6. R transfers “to C for life, remainder to C’s children and heirs when they reach the age of 21” 7. Will says: “To A for life, remainder to the children of A as joint tenants.” 8. “SF to B, C and D as joint tenants in fee simple”. C then transfers her interest to E. |
| 1. B and C hold the whole interest in SF as joint tenants for the life of A b/c of right of survivorship. E holds nothing. A holds the reversionary interest. 2. Applying the common law presumption: A and B hold SF in fee simple as joint tenants. C holds nothing (no reversionary interest, b/c transfer was of fee simple). 3. Unequal duration = no unity of interest, so A and B cannot hold as joint tenants but can hold as tenants in common. 4. Successive life estates = no unity of interest, so A and B cannot hold as joint tenants but can hold as tenants in common. 5. Unequal share in estate = no unity of interest, so A and B cannot hold as joint tenants but can hold as tenants in common. 6. No unity of time, so no joint tenancy. 7. No unity of time, but there is an exception to the requirement for unity of time if property is transferred in a will (when a JT created in a will, no need for unity of time) > each child will be vested in interest when born, but all children not be vested in possession until after A dies. 8. No unity of title between E, and B and D. E holds as a tenant in common against B and D. B and D continue to hold as joint tenants as between themselves. If E dies, their interest goes to their estate. If B dies, B’s interest goes to D through the right of survivorship. |

# Severance of Joint Tenancies into Tenancies in Common

* By one person acting on his or her own share
* By mutual agreement
* By any course of dealing sufficient to indicate that the interests of all were mutually treated as constituting a TC

### **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?
* Ex2: A, B and C hold jointly. C conveys to D. What are the interests? → A+B = JT; 1/3 portion held as a sole TC by D
  + B dies…what happens? Tenancy in common where A owns 2/3 and D owns 1/3
* Ex3: A & B are joint tenants. A conveys the property from A to A. What is the result? Why is this the case?
  + Time and title are broken so new title results so A&B hold as TC
  + S. 18(3): you can transfer title to yourself
* Right of survivorship trumps a will

### Re Sorensen & Sorensen (1977) ABCA

|  |  |
| --- | --- |
| **F** | * Husband and wife owned land as joint tenants in Calgary. * They separated, and wife continued to live in family home, paying rent of $1/yr to husband. * Wife became ill with cancer and worried about the financial security of her son who suffered from a mental disability. * Wife executed a trust deed, which left her interest in land in trust for her son (equitable interest to son; legal interest remained w/ wife). * Wife then filed motion to partition the lots (= to sever the joint tenancy), but died before motion heard. * After wife’s death, husband claimed sole ownership of property as surviving joint tenant (this would leave no property to support son’s trust). * Daughters were the trustees of their mother’s estate. |
| **I** | *Was JT severed before wife’s death? Were any actions sufficient to sever the JT?*  Options: (a) separation agreement, (b) $1/yr lease, (c) family home as security for support payments, (d) execution of trust deed, first to herself and second to daughters in trust for her son, (e) execution of wife’s will, (f) Bringing an action for partition (subsequently discontinued), (g) Declaration of trust (one party’s intention to sever (w/ no acts, no acceptance)) |
| **D** | Crt found only (d) was an act sufficient to sever the joint tenancy > the transfer of legal interest to herself was sufficient to sever her interest via statute (think: s. 18 of *Property Law Act*), and transfer of equitable interest to son was sufficient to sever JT at common law |
| **RA** | **SEVERANCE OF A JOINT TENANCY THROUGH CO-OWNER’S TRANSFER OF HER LEGAL INTEREST TO HERSELF (STATUTE), AND THE TRANSFER OF HER EQUITABLE INTEREST TO HER SON (SUFFICIENT AT COMMON LAW) – B/C of presumption of advancement (bene is dependent child), the gift stands; declaring herself to be trustee of the beneficial interest.**  **Use this case for showing what *WON’T* count as severing JT.** |
| **RE** | Three traditional means of severence:  1) Operate on your own share such as to create a severence-unilateral; anything that destroys one of the unities brings the JT to an end.  2) Sever by mutual agreement  3) Sever by mutually treating (common intention)  the parties mutually treat the impugned property as a TinC  A declaration of severance, to be effective, needs to be heard by the other tenant.  Here there are 5 proffered severances:  -The lease was not; although some fixed term leases may sever (they are binding after death), here it was a lifelong lease, and the death of either would convert the other’s share to fee simple-no intention to affect severance. She presumed that the tenancy was not severed, and the lease.  -the securing of the loan was not; though arrears would be payable by the husband’s estate had he died, there was no affectation of the primary thing, survivorship. It again, did not affect survivorship in any way. This mortgage, like the leasehold, was only to exist within the life of the property holder; it would not be heritable, so it did not affect survivorship.  -The trust deed was; the declaration was never shown to have been communicated, BUT the gift was completed; this case was 1977, where the presumption of advancement was still thought to work to adult dependants.  A gift can be successfully made by a declaration that “I am trustee for x, the donee” IF the presumption of advancement applies; this is a gift of beneficial interest in the property.  -The will was not; survivorship is preferred over a will, and a will can only be evidence of 3, the common intention (i.e. if both parties have in their will that they devise their shares).  -The partially completed action is not, because it was partially completed.  There was severance, in the gift-the gift was accepted because of the weight of the presumption of advancement (which would not operate to fix the gift now, for this person-)  Crt noted (b) and (c) would have qualified had the lease or security been to a third party; but between one co-owner to another co-owner, these acts do not constitute severance.  Outcome: daughters held legal interest as tenants in common w/ their father, in trust for their brother (who held the equitable interest as tenant in common). |

### 

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

**18**  *(1) A person may transfer land to himself or herself in the same manner as to another person, and, without restricting that power, a joint tenant may transfer his or her interest in land to himself or herself. […]*

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

# Rights and Responsibilities of Co-owners:

* First check: Resoled by Agreement?
* General rule: no obligation to account for benefits b/c each are entitled to the whole
* Exceptions: Ouster; waste?
* Joint Expenses: Can claim reimbursement for certain expenditures – if it relates to a joint obligation, it should be split between all of the co-owners

## Ending Co-ownership:

* Can apply for court order partitioning property or for its sale w/in a division of the proceeds

### *Partition of Property Act,* RSBC 1996, c. 347 ss. 2(1), 4(1), 7, 10)

* S. 2(1): All tenants may be compelled to partition or sell the land as provided by the act (can apply to legal or equitable estates)
* In order to determine who is eligible to petition for partition, read s. 4 in light of the joint tenants of FS or PaP or TIC
* Must be owners of a *present* interest ∴ owners of a future interest (e.g. JT of a remainder that follows a LE) can’t go to the ct to apply for partition/sale
* Ct will grant partition where eligible, unless justice would prevent it
* Sale is more practical than partition ∴ sale is primary remedy
* S. 7 allows ct to order sale in place of partition if that would be more beneficial for the parties based on the factors set out in the section
* S. 10 allows co-owners and others interested in the property to bid in a sale

Potential reforms to joint tenancy law in BC

* + Should the possibility of severance in secret be eliminated?

*BENEFITS:*

* Allows for degree of independence; especially in certain relationships, this is beneficial
  + Enhances personal autonomy rights of the pro-severance person
  + But also decreases autonomy of the person who doesn’t want severance
    - Could ensure certainty in results so that at least everyone is aware of their rights
  + Rogues could take advantage

→ How could we modify to create system/apparatus that would allow a person to avoid coercion (currently protected by the secrecy)

* Maybe using LTO so that there is a system to find out if there are potential issues, for example, during estate planning to allow a degree of certainty/stability but also ensuring freedom/autonomy
  + Should the four unities rule be eliminated (which would leave the right of survivorship as the only feature distinguishing joint tenancy from tenancy in common)? The terms joint tenancy and tenancy in common could be replaced by co-ownership with survivorship, and co-ownership without survivorship.

### “Accounting for Benefits of Occupation”, Ontario Law Reform Commission

* General rule: **a co-owner does not have the obligation to account to other co-owners for the benefits derived from possession, b/c the occupying co-owner is lawfully exercising his or her rights** (unity of possession applies to joint tenancies + tenancies in common: each co-owner has right to possession of the *whole land* concurrently with other co-owners).
* **Occupation rent.** In exceptional circumstances, an occupying co-owner may need to account to other non-occupying co-owners for the benefits of occupation**.** Occupation rent can arise in the following circumstances:
  + Ouster: where co-owner unlawfully ousts another co-owner by making it intolerable for other co-owner to remain (e.g. threats, violence, intolerable conditions), or physically expulsing them.
  + Agreement: where co-owners have agreed to one having sole possession on the terms of making rental or other payments (e.g. in *Sorenson v Sorenson,* husband and wife agreed that wife would have sole possession in exchange for rent payments), or where one co-owner has agreed to act as “agent” or “bailiff” for other co-owner.
  + Statute of Anne: where a co-owner has received a benefit from third parties related to the property, that co-owner may have to pay other co-owners occupation rent for the amount of that benefit (but not benefits received from the property/land itself).
  + Waste: co-owner may be liable to compensate other co-owners for conduct that “would unreasonably diminish the value of the property”, or any act amounting to “destruction” of the property (e.g. digging clay for making bricks) > what constitutes waste not clear.
  + Equitable Accounting: courts have equitable jurisdiction to require that a co-owner pay occupation rent to another co-owner if the former has made extra mortgage payments that increase the value of the latter’s equity, or the former has done renovations that increase the selling value of the property (\*unless these payments or improvements done as gifts from one co-owner to another).
* *How to calculate occupation rent?* No clear method. In *Irsack v Irsack* (1978), occupation rent set at half market rent. In *Dennis v McDonald* (1982), occupation rent set at the “fair rent” value, factoring out scarcity. In *Leake v Bruzzi* (1974), occupation rent made equivalent to the interest on mortgage payments made by co-owner in possession. In *Baker v Baker* (1976), occupation rent set at amount of mortgage payments made by co-owner in possession.
* **Right of reimbursement.** Co-owner may be able to obtain reimbursement from other co-owners for expenditures related to the property, including mortgage payments, improvements, taxes, fire insurance premiums, upkeep, expenses from litigation w/ a third party. But right of reimbursement can only be claimed at time of partition or sale, when improvements become “liquid assets” (b/c some improvements may be done w/o consent of other co-owners, and co-owners should not be liable for costs that they were not a liberty to refuse).

## Co-Ownership in Family Property Law

* Family assets are subject to the presumption of equal sharing
* But the obligation to share property with a non-title holding spouse only arises w/ occurrence of specific event, like separation, divorce, death of spouse
* Ontario’s *Family Law Act* treats all property acquired during marriage as subject to equal division b/w spouses, unless property was received by gift to one spouse only (exception: family home), as damages for personal injury, or under a life insurance policy
* Parties entitled to leave marriage w/ equal share of accumulated property, unless on spouse can establish that equal division would be unconscionable (= more than just “unfair”)
* **Right to possession of family home.** No matter which spouse holds title, both spouses have equal right to possession of the family home.

## Co-Ownership in Condominiums & Cooperatives

* Equity co-ops: property is owned by the corporation, members hold shares in corporation, and their right to live in a specific unit is set out in an occupancy agreement
* Non-profit co-op housing: members have right to occupancy + security of tenancy provided they comply w/ co-op’s by-lses; each member has one vote to participate in governance
* Condominiums: individual owners of units are tenants in common wrt common areas (e.g. roof, parking garage, elevator); condo corporation owns the common property, and each individual owner is a member shareholder of the corporation; remember, condos are creatures of statute

# Strata Property Law – Guest Lecture Kevin Zakreski

Strata Property Law

* Strata = condominium
* Collective ownership interest in property in corporate admin framework.
* 1960s – strata properties in BC
* Strata properties are not restricted to residential housing… more and more important for commercial and recreational use.

1) Overview of the Basics

Strata property law is a creature of statute.There is a body of case law but it’s mainly concerned with interpreting the govt statute – not articulating fine principles.

* BC has had three generations of strata property legislation.
  + **1966** Strata Property Act – skeletal statute w. 25 provisions which enabled people to create strata prop
  + **1974** – 57 provisions, more than enabling statute, but dealing with issues arising
  + **1998** – in force in 2000, governing legislation in this area today. ~300 provisions now.

2) Perennial Legal Issues from Strata Property Legislation

3) Emerging Issues in Strata Property Law

1. **Always in a state of renewal**
2. **Access to justice issues (“swept into BCSC”)**
   1. Made sense historically bcoz property rights litigation is higher value due to property.
   2. Not really appropriate if they’re trivial neighbour disputes that don’t require extensive
   3. Access to justice issue
   4. Civil resolution tribunal ONLINE – hasn’t gone live yet, in the process of testing
3. **Terminating Strata**
   1. Unusual areas of strata property law at odds with basic property law principles
   2. Property law doesn’t really deal with terminating property interests
   3. Must get unanimous consent from strata owners
      1. Can’t give everyone the veto?
   4. Not really a concern at the moment bcoz don’t get a lot of desires to terminate strata properties
   5. If less than unanimous consent, how to reconcile consumer protection.
   6. Air space subdivision… commercial wants to terminate but dependent on the other strata corps?
      1. Rare for other commercial enterprises will want to buy commercial strata that can’t dvp

**1966**

* Widely hailed as revolutionary in property law as a radical departure bcoz of changes to subdivision procedures – vertical and horizontal boundaries dealt with.
* Distinctive conception of property ownership

Fusion of collective and individual ownership of property

* Land title office – strata plan
  + Strata lots – apartments, building, living spaces
  + Common property – lobby, stairwells, common areas
* **Goals and Aims for Strata Property Law**
* Combat urban sprawl with higher density structures
* Gives simple, clear, and uniform way to subdivide property
* **Prior to Strata**

1. Person owns building, tenants lease the units.
2. Cooperative Association owns the lands in the buildings but the residents all hold shares in the co-op and they alternate long-term leases in the building.

* **Subdivision**s usually require easements, series of transactions at common law.
* **Unit entitlement** – surveyor’s calculation of habitable area of the strata lot (“measurement of size of strata lot”).
  + common expenses that are shared among strata lot owners
  + tenants in common?
* Collective and individual interests can’t be separately dispensed with 🡪 under Strata Property Act.
* Emphasizes individual autonomy – everyone should have a veto power.
  + Strata turned to commercial law
  + Strata owners auto-become members of strata corp
  + Decisions are made with voting in general meetings (“majority rule”) or sometimes “super majority”

1974

* Preserved three basic building blocks from 1966
* Deals with some of the legal issues that were cropping up from the previous Act
  1. **Provisions in relation to consumer protection**
     1. Acts interests springs from the distinctive property ownership conception.
     2. Individual ownership interest was liniked to collective property interest.
     3. Strata lot owners had significantly less autonomy than owners of single family dwellings.
        1. Interests often overwritten by majority.
     4. Give consumers notice of this fact and the implications of it.
     5. SPA addresses it in two points
        1. Period immediately after strata is established. Original land-owner holds title to strata property and then they are individually sold thereafter.
           1. Act puts a lot of restraints on owner developer
        2. Incoming purchaser is coming to own interest in strata lot…
           1. Buyer beware rule is tempered bcoz buyers get disclosure about the strata lot – finances, state of common property, turn mind to more than just the strata lot bcoz they are entering into corporate relationship
           2. Happens before the buyer closes the sale… can still bow out.
     6. By-laws are registered in the land title office so technically public
  2. **Governance**
     1. Legislative recognition of strata council – smaller group that are elected from the members… executive of board of directors responsible that the strata is meeting responsibilities under act
     2. Requirement that strata has contingency reserve fund
        1. Financial cushion for emergencies that may arise…
        2. Long-term preservation
  3. **Mixed-use Stratas**
     1. Don’t have to use it only for residential housing.
     2. Office parks, recreational complexes, industrial plants, hotels, etc.
     3. Beneficial to combine two or more of these uses into one strata property.
        1. Encouraged by urban planners and policy makers.
     4. Legal issues arise from these mixed-use stratas
        1. As a general rule, common expenses and voting etc – strata law owners are all in it together…
        2. One vote per strata lot = equality.
        3. There are people with different interests so that strains the ‘in this together’ mentality.
        4. Everyone is sharing the costs of these expenses, but not often benefiting everyone.
     5. SPA gives series of tools to decrease the tension.
        1. Creates mini strata corporation for a strata corporation

1998 Three more changes

1. **Plain language statute** – more and more people living in stratas so they should be able to grasp the basic ground rules of the strata
   1. Has to more explicit to explain these things in plain language… step-by-step of the rule
2. **Enhance consumer protection and governance standards**
   1. Not really breaking from the past, but do more
   2. More disclosure, more provisions to nudge owners to plan for the future
3. **Govt’s desire to give strata corp’s more flexibility to respond to changing circumstances**
   1. … conflicts with the desire to standardize procedures?
      1. Supports consumer protection rationale – easier to compare strata properties if know the basic ground rules
      2. Mixed-use stratas want to be able to craft the rules so that they make sense in immediate circumstances
   2. This new Act tries to have it both ways… host of substantive rules, but if motivated, the Act is flexible – can get around some things.

Property and Contract law doesn’t want to STOP people from doing something… but give them the tools to figure it out.

* Given tools and make the most of it.

If long-term tenant in a strata lot, can get a strata council voting power assigned.

* **Forced sales in strata lots** – intersection between individual autonomy, exclusivity in private property

# SERVITUDES OVER PROPERTY

* 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)
* Ex: easement
  + Imagine a piece of construction paper (this is the possessory entitlement), and then place a small strip of paper over top (this is the servitude) – it is a burden on the possessory entitlement
* Also referred to as incorporeal hereditaments
  + The right to do something or the right to prevent someone from doing something else on their own land

# Easements

An easement is a non-possessory interest in land; a type of servitude (other types of servitudes: *profit a prendre,* restrictive covenants, charges) that confers a proprietary interest in land falling short of possession. Easements travel w/ the land. Person who holds an easement is never seised of the land (being seised = holding the possessory interest. Most common form of easement = a right of way.

Easement and covenants have been described as a form of **“private zoning”** > used by private parties to construct relationships between themselves, to either allow or restrict the activities of others. Easements and covenants often used to maintain the particular characteristics of buildings or neighbourhoods.

**Two Main Categories of Easements (\*but list not closed; courts can create new easements)**

1. **Positive easements:** gives the owner of land (A) a right to do something on or to their neighbour B’s land, e.g. right of way, right to take water, right to have drainage pipes and sewers under land
2. **Negative easements:** gives A the right to stop their neighbour from doing something on or to neighbour B’s own land, e.g. erecting a building that would cut off the sunlight on neighbouring property [\*very few negative easements // obviously significantly limit the ability for people to benefit from their own property]

**\*\*\*Note that neither can impose positive obligations on B**

**Contrast in Context: crossing someone else’s property to get to the bike path**

|  |  |  |
| --- | --- | --- |
| **Gratuitous licence** | **Contractual licence** | **Easement** |
| * Your neighbor 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 | * 10 yr licence for $100/yr * Revocable by neighbor at any time (but must pay damages) * Injunctions/sp. perf. 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 * If you sell to another party, the neighbour with whom you signed the contractual licence need not let the new party use the licence [limitations on just regular privity of K] | * Your neighbour grants you an easement by deed * Assumed to be permanent, unless expressed to be otherwise * You have a property interest * 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 of your neighbour * The easement runs with the land * unless it is extinguished at some point, the benefit of the easement will always run w/ the dominant land and the burden will always run with the servient land |

## Re Ellenborough Park (1956):

|  |  |
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| **F** | * Imagine a frame around a painting – the painting is the park and the frame consists of the plots * park was the servient tenement and homeowners were the dominant tenement. * War office took control of park and paid compensation to park’s former owners for loss of use of property. * Homeowners claimed compensation too, on the basis of their easement (= a property interest) |
| **I** | V granted to P: “the full enjoyment . . . in common with other [Ps] of the pleasure ground.”  do they have an interest in the park (i.e. an easement) ∴ entitling them to compensation? |
| **D** | Homeowners held an easement b/c access to benefited them. |

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| Steps for identifying an easement, per Re Ellenborough Park (England CA) |
| 1. **Dominant and servient tenements** > need not be side by side, but must be in reasonable proximity.   **Exception** to dominant/servient tenement rule in **s. 218 of *Land Title Act****,* which allows for a “statutory right of way” – i.e. an easement w/o a DT necessary for the grantee’s maintenance of their property (but general rule still applies to private landowners).   1. **Easement must accommodate the dominant tenement** > easement must be “reasonably necessary for the better enjoyment of that tenement” (something that enhances the monetary value of a dominant tenement is a factor to consider, but not determinative of an easement). “Connected w/ the normal enjoyment of DT” – perhaps should be more broadly stated as a “better and more convenient property”   **Reasonably proximate + enhances enjoyment**   1. **Dominant and servient tenements cannot be owned by the same person** > at common law there must be separate owners.   **CL rule changed by statute**: s. 18(7) of *Property Law Act* provides that “common ownership and possession of the dominant and servient tenements does not extinguish an easement”.  Why would this have been changed? Ease of commerce   1. **Right must be capable of forming the subject matter of the grant** > the transfer of an easement must occur by way of grant (express or implied), whereby the transferor carves out some portion of his or her estate and transfers it to the dominant tenement.    1. ***Too vague?***Must be sufficiently defined. In *Re Ellenborough Park,* Crt held that “the full enjoyment… at all times hereafter in common with other persons… of the pleasure ground” was not too vague.    2. ***Mere recreation and amusement?***The reciprocal benefit of an easement must have some utility, and cannot be for “mere recreation and amusement”. In *Ellenborough Park,* ct held that a park/garden is “the purest of pleasures” but has utility and is not merely for recreation and amusement. Appears to be a very low standard.    3. ***Does the easement extinguish the possessory interest?*** The grant of an easement cannot be so extensive that it extinguishes the servient tenement’s right of possession. In *Re Ellenborough Park,* ct held that the easement benefiting the homeowners did not extinguish the servient tenement’s possessory interest b/c they could access the park/garden too. In *Shelf Holdings v Husky Oil Operations* (1989), ABCA held that a pipeline, despite its permanent presence on the servient tenement’s land, qualified as an easement b/c servient tenement (landowner/farmer) retained “a high degree of possession and control with only a low level of interference from the dominant tenement” (pipeline) > farmer could still graze cattle over pipeline   **Does it substantially interfere w/ the ST’s possessory rights?**   * 1. ***Cannot require servient owner to spend money***   2. ***The subject of the easement must be acceptable to the cts*** Class of easements is not closed, but cts are reluctant to recognize new property rights – remember numerus clausus principle, based on the public interest. |

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### “Report on the Basic Principles of Land Law,” Ontario Law Reform Commission

Four Necessary Elements of an Easement, per Re Ellenborough Park

1. **There must be a dominant and a servient tenement.** An easement cannot exist in gross. In order to have an easement, there must be a property burdened by the easement and another property that benefits from the easement (rationale: reciprocal benefit for each burden).

* **Dominant tenement:** the property that benefits from the easement; e.g. holder of dominant tenement is the one who has right to cross onto someone else’s property
* **Servient tenement:** the property burdened by the easement; e.g. holder of servient tenement is the one who owns the property through which the holder of the dominant tenement has the right to pass through

1. **The easement must “accommodate” (benefit) the dominant tenement.** The easement must provide some benefit to the dominant tenement (rationale: burdening a property only makes sense if another party benefits). Measure of benefit = what is “reasonably necessary for the better enjoyment of that tenement”. In *Re Ellenborough,* CA found that access to the park (a “garden”) benefited the homeowners, therefore accommodated the dominant tenement.
2. **There must be reasonable proximity b/w the dominant and servient tenement.** The dominant and servient tenements must be close, but need not be right next to each other.
3. **Dominant and servient tenements must not both be owned and occupied by the same person (= common law rule).** This common law has been reversed by statute, s. 18(7) of *Property Law Act,* which states: “Common ownership and possession of the dominant and servient tenements does not extinguish an easement.”
4. **The right must be capable of forming the subject matter of a grant.** The easement must be created by a grant, either express or implied, whereby the grantor (holder of the servient tenement) carves out a portion of their estate and transfers it to the grantee (holder of the dominant tenement).
   1. **The right conferred in the easement cannot be too vague.**
   2. **The right conferred in the easement cannot be a mere right of recreation.**
   3. **The grant of the easement cannot extinguish the right of possession of the holder of the servient tenement.**

## Three Ways that Easements Can Be Created

1. **Express grant of an easement:** A (owner/occupier of the servient tenement) gives B (the owner/occupier of the dominant tenement) a non-possessory right to make use of A’s like for the purpose identified in the easement. // A’s land is the servient land (the land over which the easement is exercised) // B gets a parcel **+** easement over A’s parcel
2. **Express reservation of an easement:** A subdivides their land and reserves **for themselves** the right to continue to exercise an easement over land transferred to B to enable access to A’s remaining land // B gets parcel **but** A retains easement over B’s parcel
3. **Grant or reservation of an easement by implication:** 
   1. Rule from *Wheeldon v Burrows* (1879) is that crt must consider how a parcel of land was used before it was divided into separate parcels under separate ownership to determine if there are any implied easements (aka quasi-easements). Three criteria to be an implied grant of easement: (1) quasi-easement must have been used by owner/occupies of whole property at time of grant for the benefit to be granted, (2) existence of quasi-easement must have been “continuous” and “apparent”, e.g. there must be some observable physical evidence of its existence, like a road, (3) quasi-easement must be necessary for reasonable enjoyment of property granted. If criteria from *Wheeldon* not met, parties may still be able to acquire an implied right to an easement if they can establish that the easement is necessary to give effect to the common intention of the parties.
   2. **Easement of necessity:** easement must be necessary for enjoyment of the alleged dominant tenement (it cannot merely make property more convenient or efficient); e.g. if property would otherwise be landlocked, with not access to public way, easement of necessity may be implied
   3. **Easement by prescription:** where use of the alleged servient tenement is “as of right” (w/o force, w/o secrecy, w/o permission > *nec vi, nec clam, nec precario*); right to acquire a prescriptive easement has been abolished completely by virtue of **s. 24 of LTA**
   4. **By Estoppel**
   5. **By statute (ss. 218, 219):**

### Components of a Well-Drafted Easement

1. Identification of the dominant tenement
2. Identification of the servient tenement
3. Definition of the nature and scope of the easement
4. Definition of the time period for which the easement continues
5. Any rights and responsibilities either party has wrt the easement

## Termination of Easements:

1. **Express Release:** owners of DT can register a discharge in favour of the burdened land, thereby extinguishing an easement (see s. **241, LTA)**
2. **Court order:** If you are the owner of the ST, you can go to the ct and the ct can modify or cancel charges **(see s. 35(1) PLA**)

# 2. Profit à Prendre

* Non-possessory right to go onto somebody else’s property to cut wood, catch fish, dig turf, extract minerals, etc.
* A profit à prendre travels w/ the land (if land is burdened by profit à prendre, the profit à prendre transfer to the new owner when the land is sold).
* May be held in gross
* May be extinguished if the holder of the profit either becomes the owner of the land on which the profit subsists or the holder of the profit releases it in favour of the owner of the land

### British Columbia v Tener (1985)

**DEFINITION OF PROFIT A PRENDRE.** Profit à prendre defined by Wells J in *Cherry v Petch* (1948) as: “a right to enter on the land of another person and take some profit of the soil such as minerals, oils, stones, trees, turf, fish or game, for the use of the owner of the right. It is an incorporeal hereditament, and unlike an easement it is not necessarily appurtenant to a dominant tenement but may be held as a right in gross, and as such may be assigned and dealt with as a valuable interest according to the ordinary rules of property”. E.g. holder of a profit à prendre does not own minerals *in situ* (part of the fee); rather, the holder of profit à prendre owns the mineral claims and the right to exploit the minerals. [SCC]

# COVENANTS RUNNING WITH PROPERTY

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| Restrictive covenants that run w/ land |
| **Covenant** = valid contractual undertaking made by a covenantor (who assumes the burden of the promise) in favour of a covenantee (who obtains the benefit)   * Servient tenement = land burdened by the covenant * Dominant tenement = land that benefits from the covenant   A restrictive covenant (agreement) is a condition in a K for the sale of land which benefits the vendor by restricting the purchaser’s use of the land in some way.  Covenants benefit one party (covenantee) and burden the other (covenantor)  They bind the parties to the initial contract, but can also create rights that are enforceable upon subsequent owners – when this happens, this moves from being a contract right to being a property right.  Two types of covenants:   1. **Positive covenants** (compel holder of land to take positive action) 2. **Restrictive covenants** (compel holder of land *not* to do certain things)   **The principles at law are different from the rules at equity…** Cts of equity mitigate the harshness of the common law.  If you want damages, you have to claim the right at the courts of law ∴you have to be entitled to the benefit at law and the other party has to be seen as having the burden at law. Similarly, if you want an injunction, you have to be entitled to the benefit at equity and the other party has the burden.  Anytime a claimant **other than the initial contracting parties** wants a remedy, must answer the following:   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.     Once this happens, the burden does not run and so is no longer enforceable  This process can continue on ad infinitum and the benefit is still enforceable  As contractual promises, covenants raise the following issue: *to what extent does a contractual promise in the form of a covenant run w/ the land?*   * **Burden of a positive covenant does not run with the land, neither at law nor in equity**. *Why?* Crts are hesitant to impose positive burden on future land holders (privity). * **Burden of a restrictive covenant does not run with the land at law, but may run with the land in equity as per *Tulk v Moxhay*.**   Requirements for burden of restrictive covenant to run w/ the land, per *Tulk v Moxhay*   1. **Covenant must be negative in substance** 2. **Must be intended that the burden will run with the servient land** > intended by who? 3. **Burden must be for the benefit of the servient land**    1. **The burden must enhance the dominant tenement**    2. **The burden must touch and concern the land** [burden must affect the nature, quality or value of the land, or its mode of use]       1. **Covenant that is only a restriction on alienation will not run** [an alienation restriction does not touch and concern land]       2. **Restraints on trade will be subject to rule of “strict construction”** [crts will not read restrictive covenants that restrain trade expansively b/c of underlying policy argument that restraints on trade are bad]    3. **All general limitations on equitable principles will apply** [*bona fide* purchaser for value without notice of a restrictive covenant will not take their interest burdened by that restrictive covenant, per *Tulk v Moxhay*]   Restrictive covenant will be void if it discriminates on basis of “account of the sex, race, creed, colour, nationality, ancestry or place of origin of a person”, per s. 222(1) of BC’s *Land Title Act.* In *Re Drummond Wren* (1945)*,* crt held that a covenant restricting land from being “sold to Jews, or persons of objectionable nationality” was void because of public policy. |

## Re: Drummond Wren (1945) ONCA

|  |  |
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| **F** | Dispute in Drummond concerned a residential lot in Toronto that was subject to a stipulation that the property could never be sold to Jewish people or “persons of objectionable nationality”. |
| **I** | Wren applied to the court for a declaration that the covenant was invalid. |
| **D** | Order granted:   * Covenant void for uncertainty * Void as a restraint on alienation * Void as being contrary to public policy |
| **ETC** | See s. 222, Land Title Act (BC): cannot make covenants that restricts sale of land on discriminatory grounds |

*Why create a restrictive covenant?*

Covenants are a method of private zoning, a method of local and private control > like defeasible and determinable limits, covenants provide another mechanism for landholders to place limits on and to control the use of land.

Specific reasons: can allow owners to regulate commercial tenants in a shopping centre; restrict future uses of the property (i.e. to suppress competition w/in a specific zone); regulate the nature and quality of land development (preserving ‘character’ of the neighbourhood and increasing property values)

Policy issues for consequences: ‘food desert’, NIMBYism – can be used to prevent the building of specific *types* of sites like methadone clinics, youth shelters, etc. ∴ can lead to a gov’t’s inability to create a comprehensive service-delivery program, impact on personhood values (losing some power of self-determination)

**NB:** different principles apply to covenants in law as opposed to in equity

# Restrictive Covenants at Law:

1. Benefit runs only if:
   1. Successor in title holds same estate as original covenantee (e.g. original was FS, subsequent is FS)
   2. It was intended that the covenant would pass automatically (can’t be intendd that it only be applicable to the specific covenantee, it has to be intended that the promise intended for any successor title-holders)
   3. Covenant must “touch and concern” the land (i.e. it is directly related to its use; directly benefit the value/use of the land)
   4. Must describe the land adequately; must actually have an interest
   5. Benefit runs whether the covenant is positive or negative in nature
      1. Positive: covenant obliging a party to do something (e.g. maintain something)
      2. Negative: promise not to do something – compliable by person doing absolutely nothing (e.g. empty plot of land, req’d not
2. Burden does not run
   1. At law, a burden can only be enforced against the original covenantor

*Exceptions to rule that burdens do not run*

* + Modern condo laws
  + Conservation legislation
  + Exception to running of burden of negative covenant overcome in equity

*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 can enforce against original P if benefit runs
* P sells land to P2 – V can’t enforce against P2 (burden doesnt run)
* Remedies at law only apply when a new owner of the benefited land tries to bring a suit against the original covenantor

# Restrictive Covenants in Equity

Difficult to protect land during periods of rapid urban growth

### *Tulk v Moxhay,* 1848: Birth of equitable doctrine of restrictive covenants

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| --- | --- |
| **F** | Vendor wanted to maintain open space in Leicester Square, London, for the enjoyment of the surrounding property:   * V sells open space with equestrian statue to P in 1808, who covenants not to build. V retains some plots around the square. * Successor in title of P takes with notice of 1808 covenant in 1845, proposes to build in defiance of it – burden doesn’t run at law…does it run in equity? * Vendor able to get an injunction in the court of Chancery: birth of restrictive covenants |
| **RA** | A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice independently of whether it runs with the land (making it binding against all subsequent purchasers @ law) |

## A. Running of Benefits Automatically with Land in Equity:

1) P holds interest in DT (same estate)

2) Benefit intended to run with the land

3) Benefit must touch and concern the 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. Each parcel can be

→ *this is the same test for the running of the benefit in law or equity*

## B. Running of the Burden in Equity:

1) negative in substance

- Look past the form of the words, and ask if the obligations are positive or negative

2) burden intended to run w. covenantor’s land

- The promise can’t be intended to be applicable only to the specific covenantor

3) covenant taken for the benefit of dominant lands

- Touch and concern req’ment: does it affect the mode and occupation, the use of the land?

- e.g. restricting use of the land as residential = okay, they touch and concern the land

*BUT* restricting use of the land for only certain group = not okay, doesn’t affect mode and use of the land (also precluded for public policy reasons)

- e.g. covenants restricting certain business activities = okay, they touch and concern the land

4) burden runs only in equity

But see s. 219 of LTA: you can have positive covenants, you don’t have to have a dominant tenement; available to Crown and certain municipalities, etc. *but* also available upon application by private individual or corporation if able to show a ‘legitimate business interest’ in the covenant.

Is it appropriate for restrictive covenants to be used as instruments of land use control?

### Ziff, “Restrictive Covenants: The Basic Ingredients”

Under common law, covenants cannot run w/ the land b/c of the doctrine of privity of K; but in equity, covenants can run w/ the land, per *Tulk v Moxhay* (1848)

Four Requirements for Covenant to Run with the Land

1. Covenant must be negative in substance

* Good rule is it must be compliable by the burdened owner doing nothing

1. Burden of covenant must have been intended to run w/ the servient land, and that land must be sufficiently described in the covenant document.

* Cannot be in gross; contiguity not necessary but proximity is req’d

1. Covenant must be taken for the benefit of the dominant lands > the covenant must “touch and concern” the dominant land.

* Promise must actually be capable of benefiting dominant land
* Balancing of respective proprietary interests: demand that there be a good reason to enforce a burden once original covenantee has parted w/ property ∴ req’ment that there is some direct and palpable benefit to the dominant holder

1. Equity must be able to enforce the covenant.

* Application of equity’s general rules about priorities

Acceptable Forms of Covenants

* + Restricting a property to residential uses
  + Preserving land for use of amenities, e.g. parking
  + Restricting competitive business activities
  + Conservation and heritage covenants

Benefits in Equity and Law

* **Annexation**: covenant runs automatically w/ benefited land
  + The benefit is attached to the land - it must touch and concern the land
  + Intended that the benefit run with the land
  + Transferee must acquire entire interest of the original holder
* **Assignment**: the benefit can be transferred from one parcel to the other
* **Building schemes**: creates a reciprocal set of rights and obligations – a local law under which each property owner is subject to the burdens and is entitled to the benefits of the relevant covenants
  + req’ment that the relevant covenant touch + concern the land + 4 more req’s:
    1. Titles to properties in issue are derived from a common vendor
    2. Vendor must have laid out the relevant parcels subject to restrictions that could only be consistent w/ a general scheme of development
    3. Restrictions must be intended to be for the benefit of all the parcels w/in the scheme
    4. Affected parcels must have been purchased on the understanding that the restrictions would enure to the benefit of all other parcels; area of the scheme must be properly defined

### “The Impact of Restrictive Covenants on Affordable Housing…”, P Filion

* Covenants can be effective instruments to protect and enhance neighbourhood amenities b/c they can narrow the broad development standards set by planning law, and focus on detailed obligations beyond the purview of municipal zoning by-laws
* Some argue that zoning should be privatized b/c it represents excessive public sector involvement in the land development process (e.g. Houston, TX, has no zoning legislation > some attribute Houston’s abundance of affordable apartments to this lack of zoning by-laws b/c by-laws tend to severely confine the areas in which multi-unit buildings can be built)
* Restrictive covenants are better alternative to public sector zoning b/c they are unaffected by the political system, and more efficient at protecting land value (b/c restrictive covenants are created for economic, not political, reasons)
* Shortcomings of restrictive covenants:
* Restrictive covenants are inflexible. Difficult to delete or alter a restrictive covenant once it is in place (unlike zoning by-laws, which are more easily updated).
* Restrictive covenants are only enforceable if owner of dominant land takes legal action. But high cost of litigation can be a deterrent to enforcing restrictive covenants.
* Restrictive covenants are not concerned w/ broad society-wide needs or objectives (unlike zoning by-laws, which can be designed to address the current and future needs of neighbourhoods and cities, and broader social objectives, e.g. affordable housing).
* Filion suggests potential clash b/w public policy planning objectives and restrictive covenants. e.g. in a city like Waterloo, restrictive covenants might burden most single-family residential property, leaving only multi-unit housing unburdened (= often low income residential areas) thereby creating “ghettos”
* Capacity of restrictive covenants to allow for private zoning > more affluent communities are able to put restrictive covenants (can only erect buildings, need marble staircases instead of concrete… you cannot say no Jews, but you can say no trailer parks) > so you can create an exclusive community by putting neutral restrictions (so privately zoning a residential community) > communities that don’t have these restrictions attached will become “the home of everyone else” (in US, restrictive covenants used to construct racial divisions > on their face, the restrictive covenants are neutral, but the effect is to divide communities along coloured lines) > so need to be conscious of this capacity to privately zone, and its possible larger effects on communities, cities

# Positive Covenants [don’t run at law or equity]

## Amberwood Investments Ltd. V Durham Condominion Corp. No. 123 [2002 ONCA]

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| --- | --- |
| **F** | * Amberwood= R; successors in title to original covenantor // DCC: original covenantee under reciprocal agment * Parties are reg’d owners of adjoining parcels of land; originally parcels were one and owned by developer (WHDC) * WHDC planned to build 2 condos on the land, in two phases: phase 1: condo completed and DCC reg’d as a result; phase 2: WHDC ran into $ issues * WHDC intended that the project would share certain facilities and expenses and that each phase would have easements over the land of the other for the purposes of support and access – this was all set out in reciprocal agment which was was reg’d on title of both parcels * Rec facility located in DCC’s building, but owned by Amberwood and DCC * No building on Amberwood’s parcel * Agment was that WHDC would pay interim expenses until 2nd condo built |
| **I** | Whether a covenant to pay certain interim expenses contained in a reciprocal easement and cost sharing agment between owners of adjoining parcels of land is enforceable against the successor in title to the covenantor   * 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? * **Yes:** heritage conservation (can be done through s. 219), ecological conservation * **No:** restricting the dead hand of the past; a bridge too far; autonomy issues; financial burdens unfair * **Neutral:** Maybe should be applicable but only w/ notice in order to allow subsequent * Applicability of *Halsall v. Brizell* exception? * If you enjoy the benefit, then you should share the burden. But, must be able to reject the good. ONCA says inapplicable here. * Availability of conditional grant exception? If the reason you have the benefit is itself conditional upon assuming the positive obligation, then that is binding. ONCA says it’s doubtful whether this should be useful. |
| **D** | Amberwood not bound by the positive covenant to pay the interim expenses b/c positive covenants do not run with the land. |
| **RA** | Positive covenants on land do not pass to the purchaser upon a sale of the land; even if the purchaser agrees to abide by the covenant, they are not required to do so. |
| **RE** | * In the case of leaseholds, diff rule applies: as between LL + T, both the burden and the benefit of a covenant, which touched or concerns the land, and is not merely collateral, run at law w/ the reversion and the term of the lease whether the covenant is positive or restrictive * Otherwise, enforcement of a positive covenant lies in contract b/c it compels an owner to exercise his rights whereas enforcement of a negative covenant lies in property and deprives the owner of a right over property. → to compel positive obligs would be to contradict privity of K   ∴ Amberwood not obligated to pay // any changes to the rule must come from leg  **Benefit & Burden:**  Basically an exception to the positive easements rule that holds if there is a deed which relates to a benefit, the person obtaining that benefit cannot get out of a burden. But there has to be some kind of relationship between the burden and the benefit gained. Re: rec facilities: DCC has not shown that there is any use or enjoyment of the benefit by Amberwood  **Conditional Grant:**  None of the grants of easement or benefit contained in the agment are framed as being conditional upon the performance of the positive obligations ∴ rule does not apply. |
| **DIS** | MacPherson, in the dissent, defines the benefit and burden doctrine in more detail and states that it applies in this case. For this doctrine to apply, the assignee of the positive covenant (Amberwood) must have notice of the covenant. This burden must also be accompanied by a benefit. There might be a qualitative threshold to the benefits and burdens, and there does not need to be a direct link between the two. However, the assignee must be able to exercise a choice about assuming the burdens and benefits. MacPherson argues that these all apply in the case at bar, and thus Amberwood must pay the costs. |

## Invalidity

* Even when req’ments for running of covenants have been met, validity may be affected by extraneous principles:
  + Void for uncertainty b/c it imposes unacceptable restraint on alienation
  + Contrary to statute (see s. 222, LTA)
  + Contrary to public policy (e.g. covenants restricting classes of purchasers)

## Termination

* Valid restrictive covenant may come to an end by:
  + All parties involved agree to terminate
  + Intended to only last for a specified time
  + If no specific time period defined, then may deemed to have been terminated
  + Statute provides that a charge can be modified or cancelled, according to s. 35, PLA
  + Unity of ownership and possession – would terminate at CL, but not in BC, according to s. 18(1) of PLA
* Enforcement may be refused when:
  + Π guilty of delay or acquiescence