LAW 130: Property Law

# Chapter 1 – The Legal Concept of Land

* What is “property”
	+ Ordinary meaning – physical things
	+ Legal meaning – rights in things (physical or otherwise)
* Characteristics of **“property rights”**
1. **Definable** – you can define what the right of a person is when they have the right in property
2. **Identifiable** – the item/thing can be identified (has a *legal description*)
3. **Transferable** – can be sold to another person or given away (or disposed of by will)
4. **Permanent and stable**
5. **Valuable** – is worth something

## A. Cujus solum ejus est usque ad coelum et ad inferos

*The owner of the land owns everything up the sky and down to the centre of the earth.*

### 1. Ad Coelum

(a) Common Law

* Characteristics applied to *Kelsen v Imperial Tobacco Co*
1. Definable
	* Improved Industrial Dwellings (lessor) holds the freehold (a fee simple) for an indeterminate period
		+ *Freehold* – ownership of property without restrictions on the period of ownership (highest degree of property)
		+ *Indeterminate period* – property is owned for infinite period of time
		+ *Fee simple* – major type of freehold
			- Life estate – other type of freehold (limited to a person’s life)
	* Kelsen has a leasehold
		+ Has the right of possession of the property (whereas the lessor/landlord has no right of possession)
		+ For a fixed period of time (7 years)
2. Identifiable
* 407 and 407b, City Road, Islington (civic address)
* 10’ x 20’ – *definable boundaries*
1. Transferable
* The property had a previous tenant (assignor) who transferred the interest in the property to Kelsen (assignee)
1. Permanent and stable
* Improved Industrial Dwellings has a permanent interest (the fee simple)
* Kelsen also has a semi-permanent interest (7-year lease)
1. Valuable
* Rent is charged for the airspace (75*l*/year)
* **Trespass**
	+ Trespass occurs when someone steps over the property line (close/geographical boundary) without the consent of the person in possession of that property
	+ Trespass – violation of right of possession
	+ Permission to go on someone’s property does not give the owner of the permission any right to possession
		- Example – a movie ticket gives you permission to enter the theater, but does not give you a right to possession of the theater
	+ *Trespass quare clausum fregit* – D unlawfully enters P’s land
* **Real property**
	+ Real property – rights in land (above and below the surface)
	+ *Real action* – recovering real property
* **Personal Property**
	+ Personal property – rights in all other things (chattels)
	+ *Personal action* – recovering personal property
* Choses in possession – moveable possessions (*e.g.* furniture)
* Fixtures – things attached to buildings (*e.g.* lights)
	+ Start as chattels, but installation makes them part of the realty
* Choses in action – intangible rights that do not have a physical presence (*e.g.* computer program)
* Some assets are **fungible** (more or less the same, *e.g.* beer)
* Personal property is not registrable
	+ Even the Motor Vehicle Registry does not guarantee indefeasibility
* Chattels can be co-owned
* A trust in personal property can exist
* Can have a legal life estate in personal property (*Re Fraser*)
* **Philosophical Views**
	+ *Legal positivism* – property rights are created by the government
	+ *Natural law theory* – property rights arise in nature as a matter of fundamental justice
	+ *Utilitarianism* – property rights serve useful societal purposes

|  |
| --- |
| Kelsen v Imperial Tobacco Co |
| Facts – Kelsen was a lessee of a tobacco shop. Imperial Tobacco Co mounted a 20’ x 10’ advertisement sign that protruded out over Kelsen’s shop by only 8”. The cost of the sign was 220*l* (and 30*l*/year to Kelsen’s neighbor). Imperial Tobacco Co had asked for permission to mount the sign from Kelsen’s neighbor (whose property the sign hung-off of) and the holder of Kelsen’s freehold (Improved Industrial Dwellings Co Ltd). Kelsen alleged that Imperial Tobacco Co trespassed on Kelsen’s airspace and claimed a mandatory injunction.Plaintiff – KelsenDefendant – Imperial Tobacco CoWho won? KelsenIssue – Is an invasion of airspace an action in trespass?Holding – The invasion of the sign created a trespass and a mandatory injunction that it be removed should be ordered.Ratio – Ownership of land includes the airspace above the land. Invasion of the airspace creates a trespass (as opposed to a nuisance). *Lord Cairns’ Act (1858):*Damages in substitution for an injunction may given if:1. The injury to P’s legal rights is small
2. The injury is capable of being estimated in money
3. The injury can be adequately compensated by a small money payment
4. It would be oppressive to D to grant an injunction

Equitable damages (damages that deal with the future and past) can also be given in substitution for an injunction. Reasoning – The legislature indicated that trespassing could occur in airspace by expressly negating the action of trespass or nuisance arising from an airplane passing through airspace. Although the injury to Kelsen’s legal rights was small, Kelsen could not be adequately compensated by a small sum and it would not be oppressive to Imperial Tobacco Co to grant an injunction because, although the sign was expensive, Imperial Tobacco Co received good value for the expenditure.  |

***Property Law Act*, s 36**

* Where an encroachment (trespass) involves a fence or a building, the law allows for:
1. *Easement and compensation*
	* Allows owner of Lot A permission to encroach upon Lot B for compensation
2. *Vest title and compensation*
	* Gives owner of Lot A a chunk of Lot B (actual property line is moved) for compensation
3. *Removal (mandatory injunction)*
	* Owner of Lot A forced to remove fence/building that encroaches

|  |
| --- |
| Bernstein (Lord of Leigh) v Skyviews |
| Facts – Skyviews took aerial photographs of property and sold them to property owners. Skyviews took photos of Bernstein’s property. Bernstein wrote Skyviews, demanding that they hand over or destroy all of the photos and negatives. Skyviews never responded, and Bernstein sued Skyviews for trespass. Plaintiff – Bernstein (Lord of Leigh)Defendant – SkyviewsWho won? SkyviewsIssue – Do property owners own the airspace above their property “up to the heavens”?Does it constitute trespass to fly over someone’s house without permission?Holding – Skyviews did not trespass into airspace at a height that interfered with Bernstein’s ordinary use or enjoyment of the land.Ratio – Ownership of land includes the airspace above the land **only to the height necessary for ordinary use and enjoyment of the land and the structures on it**. Above that height, the property owner has no greater right to the airspace than members of the general public. Above the height necessary for ordinary use or enjoyment, a nuisance can be caused. Within the height necessary for ordinary use or enjoyment, a nuisance *or trespass* can be caused. Reasoning – Skyviews flew many hundreds of feet above the ground and it is not suggested that by its mere presence in the airspace it caused any interference with any use to which Bernstein put or might wish to put his land. The mere taking of a photograph cannot turn an act which is not a trespass into one that is a trespass.Note – This case limited *Kelsen v Imperial Tobacco Co.* |

(b) Legislation

***Land Title Act, ss 138-143 (p 1-16)***

* Section 138
	+ Airspace parcel – a volumetric parcel, whether or not occupied in whole or in part by a building or other structure, shown as such in an air spasce place
	+ Geodetic elevation – corresponds to the curvature of the earth
	+ Airspace plan – plan for how space is divided
		- There can be multiple airspace parcels (and multiple owners) in an airspace plan (*e.g.* retail on the ground floor, apartments above)
* Section 139
	+ Air space constitutes land and lies in grant
* Section 140
	+ (1) – A grant of an airspace parcel does no transfer to the grantee an easement of any kind whatsoever nor does it imply a covenant restrictive of use nor a covenant to convey another portion of the grantor’s land
	+ (2) – Unless expressly granted, the title to the airspace above the upper limits and below the lower limits of an airspace parcel remain in the grantor
* Section 141
	+ (1) – An owner in fee simple whose title is registered under this Act may, by the deposit of an airspace plan, create one or more airspace parcels separated by surfaces and obtain indefeasible titles for them
	+ (2) The airspace parcel created by the plan devolves and may be transferred, leased, mortgaged or otherwise dealt with in the same manner and form as other land the title to which is registered under this act
	+ (3) An airspace parcel may be subdivided in accordance with the *Strata Property Act*
* Section 142 – Airspace parcels in respect of highways
	+ The Crown or municipality may create airspace parcels and deal with them in accordance with this Act
	+ Earliest example – skywalks above the street

***Strata Property Act (p 1-18)***

* Strata – subdivision of fee simple or leasehold land or airspace into strata lots
	+ Registration of the “strata plan” in the Land Title Office
		- Document describes:
			* Physical dimensions of individually owned units (“strata lots”), jointly owned facilities
			* Financial contributions from each owners towards common expenses
	+ Individual ownership (of units)
		- Owners may sell, mortgage, lease or otherwise deal with individual spaces
		- May remove all or part of a wall with prior written approval of the strata corporation – s 70(1)
	+ Co-ownership (of common property)
		- Proportionally owned (expenses in maintenance are allocated proportionally as well) – s 66
* Government for strata development
	+ Operation and management is carried out through a corporation
		- Comes into existence upon registration of the strata plan
		- Each owner of a strata lot is a member
		- At general meetings the corporation can:
			* Amend the by-laws
			* Vote on a budget
			* Elect a board of directors (**“the council”**)
	+ Governed by **strata council**
		- Elected group of people
		- Makes rules and passes bylaws (which must be voted on by strata owners)
		- Usually hires building management company
		- Charges strata owners a monthly management fee
		- Maintains a contingency fund for various repairs
		- Cannot make a “significant change” to the common property without a ¾ vote (of all strata lot owners) – s 71
		- Owners may not deal separately with their shares of the jointly owned facilities
	+ Distinction between:
		- Common property – s 72(1)
			* Strata corporation is responsible for maintenance
		- Limited common property – common property allocated to a certain unit (*e.g.* parking stalls, patios) – s 72(2)
			* Strata lot owner is responsible for maintenance
* Two types of strata:
1. Bare land strata (*Land Title Act*, s 1)
* Bare land – no buildings, boundaries are defined on a horizontal plane
* Individual unit holders construct their own buildings
	+ Own the airspace above their lot
* Strata council sets the building constraints (size, style, etc.)
* Roadway and other spaces are common property
	+ Upkeep of common areas is charged to individual lot owners
1. Building strata (*Strata Property Act*, ss 66-67)
* More common in urban areas
* Common property – landscaping, foundation, exterior, windows, roof, parking, etc.
* Boundary of strata lot is **middle of wall** unless otherwise indicated in the strata plan (s 68)
* **Implied easements** (s 69)
	+ Strata corporation has the right to go into walls and other areas owned by strata owners to do maintenance
	+ Vertical and sideways support
* Strata disputes
	+ *The Civil Resolution Tribunal Act*
		- Governs dispute resolution in strata property
	+ Strata lot owners can also go to small claims court or other courts
	+ Disputes occur for a variety of reasons:
		- Non-payment of monthly strata fees or fines
		- Unfair actions by strata corporation or people who own more than half of the strata lots
		- Uneven, arbitrary enforcement of strata bylaws
	+ Can be resolved using online dispute resolution system (CRT)

## B. Fixtures

* ***Quicquid plantatur solo, solo credit****Whatever is attached to the soil becomes part of the soil*
* When a chattel is brought onto land it may retain its character as a chattel (personal property) or become a fixture (real property)
* Fixtures become property of a landlord when a lease comes to an end, even if they were installed by a tenant
	+ But, tenants can remove fixtures if they can be brought back to chattel-state, and no damage is done to property
* Tenants’ fixtures
	+ Trade fixtures
		- Example – shelving in a shoe store
	+ Ornamental fixtures
		- Example – chandelier
* A **mortgagee** (lender) is entitled to fixtures if **mortgagor** (borrower) defaults
	+ Mortgagee is not entitled to chattels
* A **remainderman** (person who gets property after a tenant for life dies) is entitled to fixtures
	+ If there is no remainderman named, the property goes back to the person who granted the life estate (reversion) and this person is entitled to fixtures
	+ Remainderman is not entitled to chattels (those pass to whoever has the right to the tenant for life’s personal property)
* A **purchaser** (buyer of land) is entitled to fixtures unless expressly included in contract
	+ Vendor (seller of land) keeps chattels unless expressly included in contract
	+ Purchaser and vendors may alter the **standard contract of purchase and sale** to include chattels or exclude fixtures
	+ Generally
		- Things resting of their own weight = chattels
		- Things attached to the property = fixtures
		- Things attached to a fixture (*e.g.* vacuum hose) = appurtenances
			* Also included in the purchase price in the standard contract of purchase and sale (purchaser gets these)
			* If they have no use without something attached to the property, they must stay

|  |
| --- |
| Re Davis |
| Facts – A wife survived her husband and had claims against his real estate through her “dower”. Six bowling alleys had been installed in the building before the husband purchased the building, and they could be unfastened easily. The degree of affixation was not of much permanency and their removal was a matter of comparative ease.Issue – Should things like bowling alleys be considered as fixtures or chattels?Holding – The value of the bowling alleys should be deducted from the valuation of the dower, because the bowling alleys are not part of the real estate. Ratio – If chattels are affixed to improve the freehold, then even if the chattels are only slightly affixed to the realty, they become part of the realty. If chattels are affixed for better enjoyment of the chattels, then the affixiation does not make them part of the realty. Two factors to consider in determining whether something is a chattel or fixture:1. Method and **degree of affixation/annexation**
* Permanent or temporary?
* Easily removal or serious damage or destruction?
1. **Object** and purpose **of affixation/annexation**
* To improve freehold or to enjoy the item?
* Objective test

Reasoning – Bowling alleys are affixed in order that bowling might be more efficiently carried on. |

|  |
| --- |
| La Salle Recreations Ltd v Canadian Camdex Investments Ltd |
| Facts – Villa Motor Hotel Ltd built an operated a hotel. Villa borrowed money for construction and furnishing from Canadian Camdex Investments Ltd. Villa bought carpet from La Salle Recreations Ltd, but paid for carpet in installments. Villa did not file this agreement in the land registry office. Until installments were paid, La Salle owned carpeting and had the right to repossess on default in payment. Villa defaulted in payment to Camdex, and Camdex commenced foreclosure proceedings and sold the property. La Salle claimed that it was the owner of the carpeting, and that the carpeting was personal property (as a chattel). The carpet was installed through “Robert’s smoothedge” (rubber undermatting was placed inside lath stripping and stapled to the floor, and the carpet was stretched into position). Both the carpeting and undermatting could be removed with little difficulty and without causing more than trifling damage. Who won? Canadian Camdex Investments LtdIssue – Does wall-to-wall carpeting and rubber undermatting become affixed to property in such a manner and under such circumstances to constitute fixtures?Holding –The chattels became fixtures and are therefore property of the mortgagee. Five principles from *Stack v Eaton*1. Chattels not attached to realty (other than by their own weight) 🡪 presumed to be chattels
2. Chattels attached to realty (even slightly) 🡪 presumed to be fixtures
3. Evidence (circumstances which show the degree of annexation and object of annexation and are “patent to all to see”/objectively determined) can rebut the presumptions in (1) and (2)
4. Intention of person affixing chattel is material only so far as it can be presumed from the degree (how) and object (why) of affixation
5. Tenants’ fixtures for the purposes of trade can be brought back to the state of chattels again (as long as the tenant restores the premises)
* This also applies to ornamental fixtures of residential tenants

Reasoning – The degree of annexation was slight and the object of the annexation (installation of the carpet) was the better and more effectual use of the building as a hotel and not the better use of the goods as goods. |

|  |
| --- |
| CMIC Mortgage Investments Corp v Rodriguez |
| Facts – Rodriguez bought a large Cover-All building bolted to rods to use as a barn. She later bought a second Cover-All building that she intended to be portable that was bolted to large concrete blocks resting on their own weight. Rodriguez did not pay for the second Cover-All in full and Cover-All repossessed the building. CMIC petitioned for a declaration that it was entitled to foreclose on the second Cover-All as within its mortgage over the land.Who won? Rodriguez/Cover-All BuildingIssue – Was the second Cover-All building a chattel or a fixture?Holding – The second Cover-All building was at all material times a chattel.Assessment of what is a fixture and what is a chattel (*Royal Bank of Canada v Maple Ridge Farmers Market Ltd*)1. Items unattached to property, except by own weight, and can be removed without damage 🡪 chattel
2. Items plugged in which can be removed without damage 🡪 chattel
3. Item attached even minimally 🡪 fixture
4. If equipment is attached to fixture, a part of which could be removed but which would be useless without the attached part 🡪 entire piece of equipment is fixture**If an item will lose its essential character unless attached to a permanent and substantial improvement 🡪 fixture**
5. Tenant’s fixtures can be removed
6. In exceptional circumstances, courts can resort to the purpose test

Reasoning – The second Cover-All building was not affixed to the land so it was presumptively a chattel (rule 1). Rodriguez’s evidence is that she wanted a portable building, so the presumption was not rebutted.  |

|  |
| --- |
| Elitestone Ltd v Morris |
| Facts – Morris lived in a bungalow that he purchased from the previous occupier. Morris also paid an annual license fee to the freeholders. If the bungalow were part of the realty, the *Rent Act* of 1977 would protect Morris in his possession. If not, Elitestone could evict him. Who won? MorrisIssue – Was the bungalow part of the realty?Holding – The bungalow was part and parcel of the land itself.Ratio – A house which is constructed in such a way so as to be removable, whether as a unit or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel.The intention of the parties is only relevant (for the object of annexation) to the extent that it can be derived from the degree and object of the annexation. The subjective intention of the parties cannot affect the question whether the chattel has become part of the freehold. |

## C. Water

### 1. Riparian Rights

* Littoral owner – ocean-side property owners
* Riparian – to do with streams/river banks
	+ **Riparian rights** – rights relating to the shore or bank of any body of water
* **Current riparian rights**
1. Access to and from the water
2. Protection from “erosion” (*e.g.* can “sandbag” to protect property)
3. Acquisition by “accretion”
4. Use of water of undiminished flow and quality for “domestic purposes”
* Subject to other people’s licenses
* **Riparian rights at common law**/*current law*
	+ Now, these rights are subject to legislation
	+ In common law, riparian owner had riparian rights (no right of ownership of water)
	+ Now, non riparian owners can have rights to water if they have a license
1. **Right to access (to and from the water)**
2. **Right of drainage (self-protection from flooding)**
3. Right to reasonable use
* *Now affected by WA, ss 2(1), 42; WPA s 3(1) – you must have a licence to use water for non-domestic purposes (other than fire-fighting; WA, s 42)*
1. Right to undiminished flow
* *Now affected by WA, s 2(1); WPA s 3(1) – no longer have this right, but still have the right to flow for domestic purposes*
1. **Right to undiminished quality of water (unpolluted)**
2. **Right of accretion**
* Comes with the risk of erosion
* Accretion must be “gradual and imperceptible” and must follow the contours of the property (owner must own “wavy line” property as opposed to “fixed strip” property)
* The Crown’s ownership of a riverbed moves with the water
1. Right of ownership of bed (up to midpoint)
* *Now affected by Land Act, ss 55-56 – Crown ownership of water bed, no private ownership*
* **What is “water” under common law?**
	+ For riparian rights at common law:
		- Water in a stream/natural watercourse (defined in banks)
			* Common law did not include surface water, groundwater, of percolating water
		- Water flows naturally and should be allowed to flow

***Water Act***

* Section 2 – the provincial government owns the water in a stream
	+ Unless a license is acquired
* Section 4 – the water license system allocates right to divert, extract, use, or store water
	+ People can apply to the province for a license
	+ Except for a purpose described in s 1, a person who is not registered under the *Water Protection Act* must not divert, extract, use or store any water from a stream
* Sections 1, 42 – use of water for a domestic purpose does not require a water license, unless water is recorded and the domestic use conflicts with the licensed owners’ use
	+ Use of water can be for household requirements, sanitation and fire prevention, irrigation of a garden less than 10002 metres, watering of domestic pets
* Sections 2, 42 – unrecorded water can be used for domestic purposes or for prospecting for minerals, but person diverting water must prove it is unrecorded in prosecution
* If you take water you are not entitled to, you are infringing the *Water Act*
* **Domestic use without a license is lawful, but someone else may get a license and overtake the domestic user**
* **HA Maclean, “Historic Development of Water Legislation in British Columbia”**
1. The original right to the use of water is vested in the Crown
2. The right to the use of water is dependent upon the holding of a license
3. A license which is not used is subject to cancellation (there is an appeal to the CA from any order of cancellation)
4. Priorities as between licenses are determined by priority of date of licenses
5. The holder of a water license has the right to expropriate land on which to construct his pipe lines or other works (compensation is settled by arbitration, or in some cases, by the Comptroller of Water Rights)
6. Disputes between licensees as to the mechanics of diversion of water are settled by engineers on the ground (with a right of appeal to the Comptroller) and then to the Minister of Lands

***Water Protection Act***

* The provincial government owns the groundwater and the percolating water
	+ **Groundwater** – water below the surface of the ground (in underground aquifers)
	+ **Percolating water** – rain/snow moving from surface to groundwater through soil

First in time, first in right – water rights rank from time of creation of water license

(b) The Conjunction of Common Law and Statutes

|  |
| --- |
| Johnson v Anderson |
| Facts – Anderson diverted the flow of a stream that would have flown through Johnson’s property. Johnson previously used the water for domestic stock-watering purposes. Johnson had no water license. Anderson had a license, but it did not authorize the diversion. Johnson sought damages, an order for demolition of the works diverting the flow, and an injunction. Plaintiff – JohnsonDefendant – AndersonWho won? Johnson Issue – Has legislation taken away the right of a riparian owner to have the continuance of the undiminished flow of water that would have naturally flown by or through the owner’s land?Holding – Johnson had a right to the continuance of the undiminished flow of water and Anderson’s diversion should be demolished. Ratio – Riparian owners still have the right to the continuance of the undiminished flow of water, unless licenses have been granted for all the water flowing by or through the owner’s land. Riparian owners deprived of their right to the continuance of the undiminished flow have remedies (an order for demolition or an injunction). **All common law riparian rights apply unless legislation takes away the right.**Reasoning – Anderson’s water license did not cover the right to divert. |

|  |
| --- |
| Schillinger v H Williamson Blacktop & Landscaping Ltd (No 2) |
| Facts – Silt from H Wiliamson Blacktop & Landscaping Ltd’s gravel pit was added to water used by Schillinger. Schillinger had a license to divert water for her commercial game fish farm but Hairsine Creek, but not from Barres Creek. The license to divert was at a point upstream from where Barres Creek and Hairsine Creek converged. Schillinger claimed damages in negligence, because the water was rendered unfit for his use. Plaintiff – SchillingerDefendant – H Williamson Blacktop & Landscaping LtdWho won? H Williamson Blacktop & Landscaping LtdIssue – Was Schillinger entitled as a riparian owner of licensee to have the benefit of the flow of spring water from H Williamson Blacktop & Landscaping’s lands and to divert and use said water?If Schillinger was not entitled to divert and use the water, was he entitled to recover damages for the deterioration of quality of the water?Holding – Schillinger was not entitled to divert and use the water, so his claim must fail.Ratio – Riparian rights can only exist for a person lawfully using the water. The only way to acquire the right to the use and flow of water in any stream in BC is under the provisions of the *Water Act*.Reasoning – Schillinger’s diversion of the water violating s 41(1) of the *Water Act*, which makes it an offence to divert water from any stream without authority, or to use any water when not lawfully entitled to do so.  |

|  |
| --- |
| Steadman v Erickson Gold Mining Corp |
| Facts – Steadman piped water to his house from a spring-fed dugout on his land. He did not have a water license. Erickson Gold Mining built a road immediately uphill from Steadman’s land, causing silt and mud to contaminate Steadman’s water system. Steadman sued in nuisance. Erickson Gold Mining claimed that s 42(2) (it is not an offence to divert unrecorded water for domestic purpose or for prospecting a mineral) does not apply because Steadman was not using the water only for domestic purposes and the dugout and piping constituted works.Plaintiff – SteadmanDefendant – Erickson Gold Mining CorpWho won? SteadmanIssue – Was Steadman using the water lawfully within the *Water Act*? Holding – If the water in question was groundwater, Steadman could sue in nuisance Erickson Gold Mining Corp would be liable.Even If the water was not groundwater, Steadman was using the water for domestic purposes (the insignificant amount of water used when operating his diamond saw did not change the use to another purpose), and his diversion was not considered to be “works”. Steadman is entitled to the water and Erickson Gold Mining cannot contaminate it. Ratio – If the water is groundwater, people can use it to the extent that it causes their neighbor’s well to go dry, but cannot contaminate it.If the water is not groundwater, until the Crown issues a license, people are entitled to use the water and are entitled to claim that others not make it unusable.  |

### 3. Ownership of the Beds of Watercourses, Lakes and Ponds

* Where surface water (in a stream or pond) straddles land owned by several owners…
	+ Usually subdivision of land will be determined by survey and legal descriptions
	+ In the absence of prior determination, common law applies “*ad medium filum*” 🡪 owners own to the middle line of the surface water
	+ ***Land Act (ss 55-56)*** – p 1-56
		- Section 55 – If a Crown grant shows a lake, river, stream or other body of water colored, outlined or designated in a color other than red, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the grant (unless there is an express provision to the contrary or the minister endorses a declaration)

### 4. Accretion and Erosion

|  |
| --- |
| Southern Centre of Theosophy Inc v South Australia |
| Facts – Southern Centre of Theosophy Inc was the registered proprietor of land lying west of Lake George. When the perpetual lease was grant, Southern Centre’s land adjoined the lake, but the high-water mark has since receded (20 acres). Southern Centre brought an action to establish that its land still had water frontage.Who won? Southern Centre of Theosophy IncIssue – Can the doctrine of accretion apply to cases of windswept sand?Holding – The doctrine of accretion can be applied to Southern Centre’s property.Ratio – **Doctrine of Accretion:**Where changes in the boundary between land and water are **gradual and imperceptible** (not a sudden change like a volcano eruption or flood), the title of the land is applicable to the land as it may be changed from time to time.Accretion can be caused by fluvial action (water), wind, and man-made operations (other than deliberate actions of the claimant).  |

## D. Support

|  |
| --- |
| Gillies v Bortoluzzi |
| Facts – Gillies was the tenant of a building and operated a grocery store. Bortoluzzi owned the building east of Gillies store. Bortoluzzi hired Benhamin Bros Ltd to excavate the basement of his building. A few days after the excavation, the east wall of Gillies building collapsed. Gillies sued for damages. The excavators went over the property line (removing the vertical support), but even if they hadn’t they were negligent in removing the lateral support. The excavators broke the stone footings. Plaintiff – GilliesDefendant – Bortoluzzi Who won? GilliesIssue – Does an entitlement to lateral support for land in its natural state exist? Does an entitlement to lateral support for land not in its natural state exist?Holding – The collapse of the wall was caused by Bortoluzzi’s negligence (the vertical and lateral support being removed).Ratio – Everyone is entitled to lateral support for their land in its natural state, but is not entitled to support when there is a change in the property (weight of a building superimposed upon the land). To recover for subsidence when the property is no longer in its natural state, the plaintiff must show negligence. In itself, the removal of lateral support of a wall does not give rise to a cause of action.Reasoning – The wall was well-constructed and was not overloaded, and pressure of prevailing winds did not cause the collapse.  |

|  |
| --- |
| Rytter v Schmitz |
| Facts – Rytter owned a lot with a concrete building next to Schmitz’s lot. Schmitz excavated his property, and dug along the property line (at a depth of 10’). Removal of the soil caused a subsidence (shifting of earth downward) by loss of lateral support for Rytter’s property, allowing subsoil to fall away leaving no support for Rytter’s building. Rytter’s building was damaged, and he sued Schmitz. After the collapse, Schmitz told Rytter he would look after his property, but he didn’t (and the cracks radiated). Shoring done by Schmitz made the situation worse. Schmitz claimed he did not act negligently in reasonably excavating on his own property. Plaintiff – RytterDefendant – SchmitzWho won? RytterIssue Holding – Rytter gained a right to lateral support by prescription, and he was entitled to vertical support. He was deprived of both. Therefore, he did not need to show intent or negligence on the part of Schmitz. Ratio – Prescription rights ceased to exist in 1976. Before then, after 20 years of uninterrupted enjoyment of a building, the owner gained a right to lateral support (created by prescription). **In cases where no prescriptive right exists buildings and the land may not be entitled to the same lateral support, but are entitled to vertical support.** **The right to protection by way of support is strict.** Reasoning – The excavation should have been done piecemeal, and the excavators should have shored as they dug.  |

# Chapter 2 – The General Principles of Land Law

## A. Real and Personal Property

* The common law divides property into two types: **real property (land)** and **personal property**
* **Real property/realty**
	+ Land, real estate, immovable
	+ Real action – an action to determine title
	+ Includes fixtures
* **Personal property/personalty**
	+ Chattels, moveables
	+ Choses in possession (*e.g.* tables, chairs)
	+ Choses in action (*e.g.* intellectual property rights, financial assets)
	+ Personal action – action to determine damages
* **Chattels real**
	+ Leaseholds
	+ Formerly considered to be part of personal property, now considered to be part of real property
	+ Chattel element – it’s contractual
	+ Real element – tenant has an interest in land
* *54% of household wealth is comprised of real property*

## B. Reasons for Studying the Law of Real Property

* Land law attempts to do two things:
1. Control the disposition of land
2. Control the use of land

### 1. Dispositions

* A property owner may dispose of that property (realty or personalty), either ***inter vivos*** or **on death**
* ***Inter vivos*** (between living persons)
	+ Property may be:
		- Sold
			* Transfer of ownership is receded by a **contract of sale**
			* **Contract of sale**
				+ Land – transfer form (conveyance by deed in the past)
				+ Chattels – bill of sale (chattels are not registered)
		- Disposed of by gift
* **On death**
	+ Property may be:
		- Disposed of by will
			* By maker of a will/testator
		- In the absence of a valid will, passed according to the rules for intestate succession set out in *Estate Administration Act* (which will be replaced by *Wills, Estates and Succession Act* [*WESA*])
		- *People can die testate (with a will), intestate (without a will), or partial intestate (with a will, but omitting some property)*
* In any transfer, tax considerations are important
	+ The purpose of the transaction may be to avoid tax
* Document of transfer must transfer what the party intends to transfer
* Technically, **no one owns land, only an interest in land**
	+ *Doctrine of tenure*

### 2. Use of Land

* Restrictions on use fall intro three rough categories:
1. Common law
2. The law governing private arrangements
3. Legislation

(a) Common Law

* Nuisance – controls noise, smell and other like discomforts

(b) Private Arrangements

* Restrictive covenants – private land owners can exercise control over their neighbours’ use of land without direct public intervention
	+ Anyone who buys the property is burdened by the covenant
* Easements – right to the use of property without possessing it

(c) Legislation

* For example – *Agricultural Land Commission Act*
	+ Under this act, most of the land in BC is “designated” as “agricultural land reserves”
	+ Prevents urban swell and restricts use of agricultural property
* Municipal zoning
	+ The **power to zone** is held by municipalities
	+ Building by-laws
		- For example, regulates the type of materials which may be used in construction of buildings

## C. Some Basic Principles of Land Law

### 1. Tenure

* **Doctrine of tenure – all land is held by the Crown, either directly or indirectly**
	+ Individual owners only “hold an estate” (interest, time) in the land
		- This interest is called a fee simple
* Crown Grants – private ownership
* Tenures remaining in British Columbia
1. **Escheat** – property reverts to overload (Crown) if an owner dies intestate without heirs
2. **Forfeiture** – Crown can claim the land of anyone guilty of treason

### 2. Corporeal and Incorporeal Interests in Land, and the Doctrine of Estates

* **Corporeal interests** – entitle a person to possession of land
	+ Includes – fee simple, life estate, tenancy
* **Incorporeal interests** – entitle a person to some rights in respect of a piece of land that fall short of a claim to possession (*e.g.* a right of way)
	+ Examples – restrictive covenant, easement

(a) Corporeal Interests

* **Fee Simple**
	+ Fee – inheritable (estate does not die with present owner)
	+ Simple – no qualification on the type of heir who can inherit
		- Descendants, ascendants, and collaterals succeed to the estate on death
	+ In most respects, equivalent to absolute ownership
* **Fee Tail**
	+ It is no longer possible to create fee tails in British Columbia
* **Life Estate**
	+ A time in the land for the lifetime of the holder of the estate
	+ Upon the death of the holder the estate comes to an end
	+ Can be sold (but hard to find a buyer)
	+ Not inheritable on death
		- Land will revert to past owner or to whoever is expressly named (remainderman)
	+ **Estate Pur Autre Vie**
		- Type of life estate
		- Measured not by the life of the owner of the estate but by some other life
* **Future Interests**
	+ *“To A for life, and then to B in fee simple”*
		- B holds a future interest (a remainder)
	+ Vested interest
	+ Certain to become possessory
	+ Can be subject to a condition precedent
		- Example – *“To A for life, and then to C if he graduates”*
			* In this case, C would have a **future contingent remainder**
			* If C did not graduate, property would return to the grantor (reversion)
* **Leasehold Estates**
	+ A time in the land of a fixed duration
	+ Tenant (lessee) usually pays rent to the landlord (lessor)
	+ Can be regarded as an interest in land
		- It is protected against the whole word and treated as realty
	+ Differs from freehold estates
		- In duration
		- Less strictly controlled by law
* Concurrent estates/co-ownership
	+ Tenants in common
		- *Example – strata lot owners*
	+ Joint tenants (with right of survivorship)
		- Right of survivorship – in the event that one person dies in a cohabitating arrangement, the ownership of the deceased transfers to the living

(b) Incorporeal Interests

* Do not confer the right to possession of the land
	+ Instead, they confer a right of use or control over someone else’s property
* Examples – easements, covenants, mortgages
	+ Mortgagee has incorporeal interest in property while mortgagor is paying off mortgage
		- The mortgagor (fee simple holder) gives the mortgagee a future possessory interest if they were to default

### 3. Legal and Equitable Interests

* Historically, there were two systems of case law
1. Common law
2. Equity
* Now, courts have merged into the BC Supreme Court
* People can have **legal interests** or **equitable interests** in property
	+ Both are registrable under the Torrens System

(d) Emergence of Modern Trust (“To A in trust for B”)

* A settlor (owner of a fee simple) creates a trust by transferring assets to a trustee
* A **duty of loyalty** is imposed on the trustee
	+ The trustee owes a fiduciary duty to the beneficiary (*cestui que trust*)
* A settlor must “complete the gift”
* **Trust instrument** – contains the terms of the trust
* Trusts can be inter vivos or testamentary
* Trust property can be
	+ Land
	+ Goods
	+ Money
	+ Corporate shares
	+ Etc.
* **Purpose of a trust**:
	+ To make a gift without burdening the beneficiary
	+ To protect the property from creditors
	+ To reduce taxes
* **A trust divides the legal interests (belonging to trustee) from the equitable interests (belonging to beneficiary)**
* A beneficiary can sell what they have (for example, a life estate)
* A beneficiary can sometimes terminate a trust, forcing the trustee to give them legal title

Trust – a settlor entrusts a trustee with property, but the benefit of the beneficiary

1. The legal title always remains with the trustee. The beneficiary relies on the courts to see that the trustee holds the legal title for his benefit.
2. The holder of an equitable estate gets the same benefits as the holder of the equivalent legal estate.
* The **beneficiary** is entitled to the income and capital, the assets in the trust– they have an equitable/beneficial interest in the property
1. A trustee, being the legal owner, may transfer legal title to a third party. However, it is against “good conscience” for the trustee, who had expressly accepted the trust, not to honor it.
* A third party who was a volunteer (did not give value) could not, on becoming aware that the property was trust property, refuse to recognize the trust.
* If the third party paid for the property, everything depended on the state of the third party’s knowledge at the time of the transfer.
	+ If the third party knew of the trust and knew that the transfer was in breach of the trustee’s obligations, then the beneficiary could still enforce the trust.
	+ If the third party either did not know of the trust, or knowing, did not realize that the transfer was in breach of the trustee’s obligation, the beneficiary could not enforce the trust.
		- **An equitable interest is not good against the whole world (like a legal interest). An equitable interest is not good against a bona fide purchaser for value without notice (an innocent purchaser).**
		- **Elements of a bona fide purchaser for value without notice:**
			* **Bona fide – honest**
			* **Purchaser – of legal estate**
			* **For value – provided consideration**
			* **Without notice – without actual knowledge, or constructive notice (what a reasonable person ought to have known after making out the investigation that the reasonable person ought to have made out)**
* Standard of Loyalty
1. Fiduciary (highest standard of trustworthiness; trustee standard)
2. Good faith (contractual standard)
3. Unconscionability (lowest standard of trustworthiness above the marketplace)
	* *Can’t commit equitable fraud, can’t mislead people*
4. Caveat emptor (marketplace standard) 🡨 Common law standard
	* *Let the buyer beware/everyone for themselves*

### 4. Freedom of Alienation

* **Freedom of alienation** – freedom to sell/dispose of one’s interests
* Three requirements must be satisfied to achieve freedom of alienation:
1. An owner must have **technical freedom of disposition**
2. An owner must **not have the power to impose excessive restraints** on the freedom of alienation of any transferee
3. The actual **mechanics of transfer must be as simple as possible**

(a) Freedom of Disposition

* Holder of fee simples or other interests can dispose of land inter vivor or on death
* Holders have the right to transfer to anyone, and set the terms of transfer within parameters (*e.g.* they can’t tie up the property for future generations)

(b) Restraints on Alienation

* Transferees attempted to curtail alienation in others by the types of transfers they made
1. Direct restraints
	* Putting a clause in a transfer purporting to prohibit disposition
		+ This cannot be done – it is contrary to public policy
	* Restraints on the assignment of a leasehold interest are valid
	* BC *Land (Wife Protection) Act*
		+ To prevent a man owning property from selling it and leaving his wife high and dry
		+ Wife has to consent to sale before it takes place
	* BC *Family Law Act*
		+ Give notice of marital breakup that may affect property by filing on the title
	* **Freedom of Testamentary Disposition**
		+ Everyone is free to give their property to anyone on their death, but has difficulty disinheriting their spouse and children
	* *Wills Variation Act*
		+ Protects spouse and children from being disinherited
		+ Continues under *WESA* ss 60-72

(c) Mechanics of Transfer

* A landowner used to have to “establish a good root of title”
* **Methods of transfer:**
1. Deeds
* Purchaser establishes chain of title (going back 60 years), legal title protected by *nemo dat quod non habet*
1. Registration by deeds
* Principle of *nemo dat* still applies
1. **Title by registration (Torrens System)**
* ***Property Law Act* – s 15(1)**
	+ Land must be transferred in freehold only by an instrument expressed to transfer land
	+ Transfer of land by livery of seisen is no longer possible

**The Torrens System**

* **Advantages**
1. **Registered interests in the property can easily be seen by searching the title in the Land Title Office (gives constructive notice) – conclusive public registry**
	* People can no longer be bona fide purchasers for value without notice
2. **Title by registration/certainty of title**
	* Improvement from common law system of deeds
	* The owner of the fee simple gets **security of tenure**
	* In previous systems, registered charge holders were vulnerable to *nemo dat*
		+ If there was a “break in the chain” the registered owner would have nothing
3. **Simplification of forms**
	* Deeds are no longer necessary (they are replaced by “agreements of transfer and sale”)
		+ “Transferring” as opposed to “conveyancing”
		+ There are “short forms” which are very straightforward
4. **Efficiency**
	* Searching for the title is no longer necessary
		+ The title stays in the Land Registry
	* An original certificate of indefeasible title and a duplicate exist
5. **Fairness and justice**
	* Unregistered interests are not enforced
6. **Land can be used as collateral security for credit (*e.g.* mortgages)**
	* A duplicate indefeasible title cannot be issued if the title is subject to either a registered mortgage or an agreement for sale
* After closing date, the purchaser applies to the LTO for registration
* The purchaser gets a **certificate of indefeasible title** from the Registrar
	+ This certificate is from the province, as opposed to the vendor
		- Each registered owners essentially gets a new Crown Grant
	+ Any missing links/documents are irrelevant
* The **title** includes:
	+ The registered owner(s)
	+ Charges – interests less than a fee simple (mortgages, life estates, easements, restrictive covenants)
	+ Don’t get indefeasibility, but give notice to the world of their interests
	+ Are ranked chronologically by order of the applications to register
		- It’s important to register early
* Certificate holder is the registered owner and has the fee simple
* Adopted by Vancouver Island and the mainland in **1861**
	+ *Land Registry Act* 1860 – Vancouver Island
	+ *Land Registry Ordinance* 1870 – combined colony of British Columbia
* If someone has not registered, their interest is not enforceable against any third party
* **Three principles underlie the Torrens System**
1. Mirror principle
* The certificate of title mirrors accurately and completely the state of the title and interests – *LTA* ss 20, 23(2)
	+ *If something isn’t on the title, don’t worry about it*
1. Curtain principle
* All necessary information is on the certificate of title
	+ *You don’t have to look behind the curtain, the title tells you the whole story*
* *Nemo dat* is gone
* Registered owners get a certificate of indefeasible title
	+ But, this only applies to bona fide purchasers for value
		- Registration by fraud is **defeasible**
1. Insurance principle
* An **assurance fund** compensates you if there’s an accident in the Torrens System – *LTA, ss 294.1-294.9*
	+ Only applies to fee simple holders
* Compensation is provided for fraud and mistake
* An innocent victim can apply to recover from the insurance fund
* **The Cadastral Concept**
	+ Digital records
	+ Each parcel of land has a separate title (and a separate parcel identifier number) and can have separate ownership
	+ Title gives dimensions of lot
		- Given by surveyors, but not guaranteed by the province
			* The dimensions are **not indefeasible**
* **The Torrens System involves two documents**
1. Certificate of title
2. Map or plan – identifies boundaries
* But, only about 5% of the land in BC is registered

## D. Relationship Between Real and Personal Property

|  |
| --- |
| Re Fraser (1974)(BCCA) |
| Facts – Fraser left a will giving his wife a life interest in his estate and real and personal property, and the remainder of his estate and property (real and personal) to the Creston Valley Senior Citizens Housing Society. The executor sued, arguing there can be no life estate in personalty, the widow had the power to encroach, and that the remainder was invalid, to lessen the succession duties. Who won? Minister of Finance (the provincial government)Holding – The widow should not have the power to encroach upon the *corpus*, the charity can have a future interest in the personal property, and there can exist a life estate in personalty. The succession duties must remain as assessed. Issues – Can there be a life estate in personalty? Can a future interest exist in personalty? Ratio – A future interest can exist in **personal property** in addition to real property.A life estate can be had in personal property. A recipient of a life estate may enjoy the revenue derived from the *corpus* and no more unless the testator has expressly or impliedly indicated an intention that the recipient of the life estate should have the power to encroach.Note – A trust can be created to give a spouse like the widow in this case the power to encroach.  |

## E. The Relevance of English Law

* Application of English law in British Columbia
	+ *Law and Equity Act*, s 2
		- The Civil and Criminal Laws of England, so far as they are not from local circumstances inapplicable, are in force in British Columbia, but those laws must be held to be modified and altered by all legislation that has the force of law in British Columbia
* Received law from England
	+ Whole law of England
	+ Common law and equity
	+ Legislation of general application

# Chapter 4 – Acquisitions of Interests in Land

## Introduction

* Everyone has the capacity to own and dispose of property *inter vivos* or on death, except:
	+ Minors (people under the age of 19)
		- Minors may take title to property but any disposition *inter vivos* is voidable when the minor reaches 19
		- Ordinarily, property would be held by a trustee
		- *WESA* (s 36) lowers age of capacity to make a valid will from 19 to 16
		- *Evidence Act* – a witness to a will must be over 14 at the time of testifying
	+ If at the time of making the will (or *inter vivos* disposition), the maker lacked mental capacity, the will is void (p 4-1)
	+ People lacking mental capacity
		- May require somebody to act on their behalf (a substitute decision-maker)
			* If no one is available the public appoints a trustee
				+ Public Guardian and Trustee
		- *Patients Property Act*
			* Nomination and/or court appointment of a committee of the estate of a mentally disordered person
		- *Power of Attorney Act*
			* Enduring power of attorney authorizing an agent to act for a person despite intervening loss of mental capacity
			* Principal – mentally incapacitated person
			* Attorney – agent (not a lawyer)
		- *Representation Agreement Act*
			* Representation agreement authorizing management of a person’s financial affairs (excluding real estate)
			* In advance of incapacity, a person can appoint someone to look after their personal medical care, and their financial affairs (stocks, bonds, etc.)
		- *Adult Guardianship Act*
			* Court appointment of adult guardian for a mentally disordered person
			* Prevents elder abuse and neglect
* **There are four ways of acquiring an interest in land:**
1. **Crown grant**
2. **Inter vivos transfer**
3. **Will or intestacy**
4. **Proprietary estoppel**

## A. Crown Grant

* The Ministry of Environment, Lands and Parks administers Crown grants
* Every property owned by private persons and companies can be traced in the LTO to a Crown Grant
* A Crown Grant usually gives a fee simple to a private owner
* 94% of BC – BC Crown Land
* 1% of BC – Federal Crown Land
* 5% - Private ownership
* *Land Act*, s 50 “Exceptions and reservations”
1. Right in government to resume any part of the land necessary for making roads, canals, bridges or other public works
* Not more than 1/20 part of the whole land
* No resumption on which a building or garden exists
1. Right in government to enter any part of the land, and to raise and get out of it any geothermal resources, minerals, coal, petroleum, and gas or gases
* Paying compensation
1. Right in any person authorized by the government to take and occupy water privileges and to have and enjoy the rights of carrying water over, through or under any part of the land granted, as may be reasonably required for mining or agricultural purposes in the vicinity
* Paying compensation
1. Right in any person authorized by the government to take gravel, sand, stone, lime, timber or other material that may be required in the construction, maintenance or repair of a road, ferry, bridge or other public work
* Without compensation
* Usually, owner of the property gets surface rights (access rights, agriculture and timber rights, development rights, and air rights), and the government gets riparian rights and mineral rights

## B. Inter Vivos Transfer

* An *inter vivos* transfer may be made by gift or by sale
* In a gift, the donor gives the property to the donee
	+ There is no consideration given, and there is no contract

### 1. The Contract

* To have a valid contract, the “three Ps must be identified”
1. **Property**
	* A proper description of the property
2. **Price**
	* The total price
3. **Parties**
	* Names of the purchaser and vendor

#### 1. Contract of Purchase and Sale

* Contracts often precede *inter vivos* transfers
	+ Vendor agrees to transfer an interest in land to a purchaser
	+ A “contract of purchase and sale”
* **Purchaser fills out the contract initially, negotiations occur, then the vendor accepts and signs the contract of purchase and sale**
* **The contract must be in writing and signed by the party to be charged**
	+ Charge – an accusation that a party is reneging on the contract
		- The vendor or the purchaser can be charged
	+ *Statute of Frauds* – statute aimed to protect the vendor from fraud
		- But, the Court of Equity began enforcing oral agreements against vendors if there was evidence of an agreement between the vendor and the purchaser
			* Example of evidence – painting the vendor’s house
		- Oral contracts must be supported by part performance or estoppel to be enforced – ***Law and Equity Act* s 59 (p 4-4)**
	+ Short term leases (leases of less than three years) do not have to be in writing and signed by the parted to be charged
* A closing date is specified in a binding contract
	+ At this date, the transferring title document is prepared
* Validity and enforceability is governed by the law of contracts
* *Law and Equity Act*, s 59 – contracts relating to land must be in writing
* *Electronic Transactions Act* – contracts can be electronic
	+ This Act does not apply to documents that create or transfer interests in land that require registration to be effective against third parties

#### 2. Completion/”The Closing” of the Contract

* **The vendor is required to transfer clear title and the buyer is required to give the payment of the balance (the total less the deposit) on the closing date**
* The purchaser’s interests are still unregistered
* The vendor has a bare legal title
	+ In equity the property belongs to the purchaser

#### 3. Registration of Transfer in the Land Title Office

* **Registration is a two-step process:**
1. **Application to register**
2. **Within six days, the LTO registers the application and makes a post-registration statement of title**
	* **The purchaser will then get a statement from the LTO that they have been registered**
* If the property had a mortgage, this must be registered as well
* Buyer bears the costs of registering
* Sellers bears the costs of clearing the title
	+ For example, if there is a mortgage on the property, the seller must clear it

### 2. The Transfer - Form

(a) Writing and Sealing

* **Writing** – the contract must be in writing
	+ *Law and Equity Act*, s 59(3)(a)
* **Signing** – the contract must be signed by the part to be charged
	+ *Law and Equity Act*, s 59(3)(a)
* Sealing is not required
	+ *Property Law Act, s 16*

(b) Registration – Prescribed Forms

(c) Standard Forms

* Many of the clauses found in transfers are “standard clauses” (they are usually included in a transfer)
* ***Land Transfer Form Act***
	+ Simplifies transfers by making it unnecessary to set out in each transfer some of the most common standard form clauses

### 3. The Transfer – When is it Operative?

* Under the Torrens System, a transfer does not take effect until **registration**
	+ *Land Title Act*, s 20(1)
* Exceptions to this rule:
	+ ***Land Title Act*, s 20(1)** Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, the land unless the instrument is registered in compliance with this Act.
		- When a vendor signs a contract of purchaser and sale, the document is effective against the vendor who signed it, even if it has not been registered
			* In this case, equity gives a decree of specific performance, ordering the vendor who refuses to perform to go through with the agreement and transfer the title to the purchaser
	+ ***Land Title Act*, s 20(2)** An instrument referred to in subsection (1) confers on every person benefited by it and on every person claiming through or under the person benefited, whether by descent, purchase or otherwise, the right
		- (a) to apply to have the instrument registered, and
		- (b) in proceedings incidental or auxiliary to registration, to use the names of all parties to the instrument, whether or not a party has since died or become legally incapacitated.
	+ ***Land Title Act*, s 20(3)** Subsection (1) does not apply to a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement.
		- Short term leases don’t have to be in writing (or be registered)
		- Short term lessees have a valid legal interest and short term lessors must allow their lessees to occupy the land for the period of the lease
	+ ***Land Title Act*, s 22** – An instrument is operative as from time of registration
	+ ***Land Title Act, ss 27-28*** – priority of instruments is given according to date and time of applications for registration

|  |
| --- |
| Ross v Ross (1977)(NSSC) |
| Facts – Mrs. Lynds owned a property and contacted her solicitor to prepare a deed to convey it to her grandson, Donald Ross. Mrs. Lynds executed the deed in the presence of her solicitor and a secretary. She understood that the deed would convey the property to her grandson, and wanted him to have the property. She told her solicitor that she wanted to record the document herself. Mrs. Lynds died 20 months later and the deed was found in her purse.Who won? Donald RossIssue – Was the deed delivered?Holding – The deed from Mrs. Lynds to Donald Ross was “signed, sealed and delivered” by Mrs. Lynds in the presence of a secretary, and this constituted an effective delivery of the deed, notwithstanding it remained in her possession.Ratio – *Equity looks to the intent, not to the form.*Physical delivery of a deed to the grantee is not necessary to constitute effective delivery.Elements of a complete gift\*1. The donor must have **requisite intention**
2. **Acceptance** by the donee
3. **Delivery** – the donor must wish to make himself immediately and unconditionally bound by the gift (actual physical delivery is not necessary)

\*A gift is **incomplete** without these elementsReasoning – Mrs. Lynds intended to be immediately and irrevocably bound when she signed the document. She retained the legal title and kept an equitable life estate for herself, but she intended to make an immediate gift of the equitable remainder to Donald Ross. Mrs. Lynds could have destroyed the deed, but instead, she treated it as a valuable document.  |

|  |
| --- |
| Zwicker v Dorey (1975)(NSSC) |
| Facts – Angus Zwicker conveyed land by deed to his former wife’s son, Mr. Dorey. The deed stated, “this deed is not to be recorded until after my passing away.” Angus Zwicker was married to Gladys Zwicker when he died. After creating the aforementioned deed, Angus Zwicker conveyed land which formed part of the property originally conveyed to Mr. Dorey to third parties, himself, his wife, and Mr. Dorey. Plaintiff – Gladys ZwickerDefendant – Mr. DoreyWho won? Gladys ZwickerIssue – Should the original deed take effect?Holding – The deed conveying property to Mr. Dorey was testamentary (but was not executed in accordance with the formalities of a will) and cannot take effect.Ratio – A gift in escrow (a deed that is delivered to a grantee only after the fulfillment of the conditions specified) cannot be subject to one’s own death. If a person wants to give a gift upon their own death, they must make a **will**. Reasoning – Angus Zwicker’s conduct was inconsistent with the gift, suggesting it was not **his intention to be immediately and unconditionally bound by the gift**. |

#### Deathbed Gifts (Donatio Mortis Causa)

* Gifts made in contemplation of death are conditional on the donor’s death as contemplated
* Four requirements:
1. The gift must be made during the donor’s lifetime
2. The gift must be made in expectation of death in the near future
3. There must be intention to give up dominion or the power of an owner over the property (*e.g.* keys, passbook to bank account)
4. The gift must be intended to take effect on death and not before
* Deathbed gifts take effect on death, but reverts back to donor upon recovery

|  |
| --- |
| MacLeod v Montgomery (1980)(ABCA) |
| Facts – Hattie Montgomery executed a transfer of land to her granddaughter, Donna MacLeod. The transfer document was delivered to MacLeod, but not the duplicate title, so she was unable to register the transfer. MacLeod asked Hattie Montgomery for the duplicate, but Montgomery never got it from her solicitor. MacLeod filed a caveat on the title, claiming the title to the property. Plaintiff – MacLeodDefendant – Montgomery Who won? MontgomeryIssue – Does the execution of the transfer with its delivery but without delivery of the duplicate title, although delivery was promised, constitute a complete or an incomplete gift?Did Hattie Montgomery intend to make a gift?Holding – Hattie Montgomery did not have the requisite intent to make a gift.Ratio – To complete a gift, a donor must do everything that can be done to perfect the gift. Equity will not assist a volunteer. There is no equity to perfect an imperfect gift. Reasoning – Hattie Montgomery could have easily gotten the duplicate from her solicitor and given it to MacLeod. The fact that she didn’t suggests that she wanted to prevent MacLeod from registering the transfer. Note – This is a Torrens System case (whereas the previous two cases are not). |

### 4. Transfers to Volunteers

* In the absence of words of gift (then donor’s intention to make a gift), a transfer to a volunteer is a **transfer without consideration**
* Equity applies presumptions in these situations
	+ **Presumption of Resulting Trust**
	+ **Presumption of Advancement**
* **Presumption of Resulting Trust**
	+ *Equity assumes bargains, not gifts*
	+ In the absence of evidence to the contrary, it is assumed that the receiver of a gift (a volunteer) gets the legal title, but the giver retains the beneficial interest (equitable title)
		- The receiver/volunteer becomes a **trustee**, and the donor a **beneficiary**
	+ If intent can’t be determined, courts will impose a resulting trust
	+ This presumption also applies to situations in which a purchaser buys property from a vendor, and puts the title in someone else’s name
		- A (purchaser) puts title in B’s name
			* A becomes beneficiary and B becomes trustee
	+ The receiver can rebut this presumption by providing proof that the donor did intend to make a gift (confer an absolute title)
		- The receiver is not confined to the wording of the transfer (an express statement of intention need not be made)
			* Although language such as “for the use or benefit of” would by proof of donative intention
		- Surrounding circumstances can rebut the presumption
		- *Property Law Act*, s 19(3) – allows volunteers to rebut the presumption
* **Presumption of Advancement**
	+ A reverse presumption exists if a donor and receiver are in specific relationships (**parent and minor child** or **husband and wife**)
		- This does not apply to adult children
	+ Rebuttable – this presumption can also be rebutted by the transferor by evidence of an intention to keep legal interest

## C. Will or Intestacy

* *Wills, Estates and Succession Act* (*WESA*)
	+ In force March 31, 2014
	+ **Will – a will, testament, codicil or other testamentary disposition other than the designation of beneficiary**
* Will maker may supplement it by a “codicil”
* A will does not become operative or transfer any interest in property until the death of the maker
* A will may be revoked or replaced or not, but further wills until the maker’s death
	+ “Last will and testament” takes effect
* Property can also be put into **joint tenancy**
	+ Creates **right of survivorship**
		- When an owner of a joint tenancy dies, 100% of ownership is transferred to the living joint tenant
	+ Protects property from probate and creditors
* Can die
	+ Testate – with a will
		- Can choose an executor, a guardian for children and beneficiaries, give bequests (gifts of personal property) and legacies (gifts of cash)
	+ Intestate – without a will
		- A court will appoint an administrator and property will be divided by closeness of relationships
		- *WESA* divides property in a way that the deceased would probably want
	+ Partial intestate – with a will that doesn’t cover all assets
* *WESA*
	+ Section 37(1) A will must be in writing, signed at the end by the will-maker, and signed by 2 witnesses in the presence of the will-maker
	+ Section 40(2) Beneficiaries should not witness the will (any gifts that they receive may be void unless the court validates it)
	+ The executor/administrator of the will must distribute property in the “executor’s year”

## D. Proprietary Estoppel

* Proprietary estoppel estops the owner of property from denying another person from having an interest in that property, when the owner has created a situation in which it would be inequitable for him to assert his strict ownership of the property
	+ Occurs when an owner’s conduct creates an expectation, and then the owner reneges
* Proprietary estoppel can create a cause of action (can be used as a sword)
* The claimant must
	+ Be reasonable
	+ Have a belief of entitlement over the registered owner’s real property
	+ Show reliance/detriment
* The registered owner must
	+ Encourage the claimant
	+ Acquiescence to the claimant
	+ Deny/refuse the claimant (renege)
* **Equitable remedy – the minimum necessary to make good on the belief**
	+ Example – an order against the registered owner to transfer the whole title

|  |
| --- |
| Zelmer v Victor Projects Ltd (1997)(BCCA) |
| Facts – The Zelmers and two companies, adjoining landowners, wanted to develop their land and needed a reservoir to be constructed at a higher elevation to provide a water supply. Victor Projects Ltd, controlled by Mr. Bennett, agreed that the reservoir could be built on his land at a meeting. Mr. Bennett said the reservoir could be built where it eventually was built. Mr. Bennett did not respond to a proposal for the reservoir, but his worker said they did not have any concerns. Mr. Bennett also said he would not ask for compensation. Mr. Bennett later said the reservoir was in the wrong place and refused to sign the necessary documents. The Zelmers sued for a declaration that they were entitled to an easement for the reservoir.Plaintiff – ZelmerDefendant – Victor Projects LtdWho won? ZelmerIssue – Can the doctrine of proprietary estoppel apply?Holding – The words or conduct of Mr. Bennett, including those of his agent, taken as a whole, led the Zelmers to believe that they had the approval of Mr. Bennett to construct the reservoir and would be granted an easement. The equitable doctrine of proprietary estoppel has been established. Ratio – When A to the knowledge of B acts to his detriment in relation to his own land in the expectation, encouraged by B, of acquiring a right over B’s land, such expectation arising from what B has said or done, the court will order B to grant A that on such terms as may be just. Test – The Five Probanda of *Willmott v Barber*1. **Erroneous belief** – P must have made a mistake as to his legal rights
2. **Detriment** – P must have expended some money or must have done some act (not necessarily upon D’s land) on the faith of his mistaken belief
3. **Knowledge** – D, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by P
4. **Knowledge** – D must know of P’s mistaken belief of his rights
5. **Encouragement/acquiescence** – D must have encouraged P in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right

**If these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it.**  |

# Chapter 5 – Registration of Title: An Overview

## A. Historical Background

*See “The Torrens System”*

## B. The General Pattern of Registration

### 1. Land Title Districts

* For the purposes of the *Land Title Act*,the Province is divided into seven land title districts
* Land Title Offices serve one or more districts
	+ New Westminster serves Vancouver and New Westminster Districts

### 2. What Can Be Registered?

* General rule – only those interests which were recognized as interests in land at common law (including equity) can be registered under the *Act*
	+ Legal estates
		- Fee simples
		- Lesser interests – as charges
	+ Equitable interests – as charges
		- Equitable remainders (*Ross v Ross*)
		- Equitable easements (*Zelmer v Victor Projects Ltd*)
		- Restrictive covenants
* *LTA*, s 180
	+ **Trusts can be registered under the BC Torrens System**
		- Registered with the phrase “in trust” and a reference number to the trust instrument document
			* Notifies people of the trust document without cluttering up the title
* *LTA*, s 33 – **an equitable mortgage or lien created by the deposit of a duplicate indefeasible title** or other instrument, whether or not accompanied by a memorandum of deposit, **is not registrable**
	+ A mortgagor gives the duplicate title to a mortgagee as a form of security for the retainment of a loan
* **Charges – all interests other than the legal fee simple in the surface of the land, a strata lot or an air space lot (includes encumbrances)**
	+ **Caveat – a warning of a claim of an unregistered interest**
		- Created by the Torrens System
		- Expires after 2 months in BC
		- Not an interest in the property itself, an indication that someone is claiming an interest
		- Prevents registration of subsequent interest
			* “Freezes” the title
		- Caveats did not exist at common law
		- The registered owner’s consent is not required to register a caveat
		- **Creates a possibility of priority from the time of the application for the caveat if the claim is successful**
			* Caveat will rank ahead of any subsequent transaction
		- If the claim fails, the caveat is removed
		- Example – *MacLeod v Montgomery*
	+ **Certificates of pending litigation (lis pendens) – registration of notice of commencement of litigation affecting the land**
		- Created by the Torrens System
		- Not an interest in the property (instead, notice of a claim of interest)
		- A CPL should be filed before the caveat expires
			* This technique would be used in BC, because caveats expire in 2 months
			* The outcome of the litigation will relate back to the date of the original caveat
		- Prevents registration of subsequent interest
			* “Freezes” the title
	+ **Collateral security**
		- If a mortgagor defaults, the mortgagee has a right to foreclose the property
			* If a mortgage is “under water”, then total amount of the loan cannot be realized by the physical property
			* In this case, the mortgagee becomes an unsecured creditor to the extent that the vale is below the amount outstanding
	+ **Execution of monetary judgments**
		- A creditor who received a monetary judgment from a court may execute the judgment against the debtor
			* Execution – seizing and selling the debtor’s assets
		- Judgment creditors are unsecured creditors
		- Creditor’s remedies:
			* Garnishment of bank accounts and wages
			* Writ of seizure and sale
			* Court-ordered sale of judgment debtor’s land
			* Pre-judgment attached – ensures assets aren’t removed or hidden before the judgment is obtained
	+ **Agricultural land reserves**
		- Individual titles to property may indicate that they are a part of an agricultural land reserve, and use of the land is restricted
	+ **Triggering event**
		- *Family Law Act*
			* After a marital breakup, filing on property may indicate that the property is involved in a family asset dispute
	+ **Heritage designation**

What cannot be registered?

* Licenses – personal permission that do not create any interest in property
	+ *For example, a movie ticket*
* Short-term leases (less than 3 years)
* Property taxes
* Zoning bylaws
* Provincial Crown Lands
* Federal Crown Lands
	+ First Nations Reserves
		- *Constitution Act, 1867*, s 91(24) – “Indians and Lands Reserved for Indians” is a federal power
		- *LTA* is inapplicable to First Nations Reserves
* Equitable mortgages by deposit of title

|  |
| --- |
| Skeetchestn Indian Band v British Columbia (2000)(BCSC) |
| Facts – The Skeetchestn Indian Band made a title claim against 1000 miles of land in BC. The land was privately owned in fee simple by Kamlands and had been registered for decades. The Registrar refused to register the Band’s certificate of pending litigation and caveat. The Band appealed this decision.Who won? British ColumbiaIssue – Can the Band register their claim of aboriginal title?Holding – The Band cannot register their claim of aboriginal title.Ratio – In order to register a certificate of pending litigation or a caveat, an interest in property known to the common law (a registrable interest) must be claimed (the claim must be within the Torrens System). The “sui generis” nature of aboriginal title has no place in the Torrens System. Aboriginal people are not being discriminated against because they receive better protection under the *Charter*. Differences between Aboriginal title and Torrens title:* **Marketable** – Aboriginal title cannot be sold, Torrens title can
* **Alienable** – Aboriginal title can only be surrendered to the Crown, Torrens title is alienable
* **Communal/individual** – Aboriginal title is held communally, Torrens title is held individually
* **Chronology** – Aboriginal title has rights of prior occupation before the Crown, Torrens title derives from a Crown Grant
 |

### 3. The Basic Scheme of Registration

* For the purposes of registration interests can be divided into two categories:
1. Certificate of indefeasible title (held by the legal fee simple holder)
2. Charges (all other registrable instruments)
* **Why register?**
	+ **Indefeasibility** – for the fee simple holder
	+ **Gives notice** – for all other interests (charges)
		- Gives protection against bona fide purchasers for value without notice

### 4. The Legal Fee Simple

(a) Initial Application

* Initial application – transfer of title of land from the Crown to private ownership
	+ This transaction **must** be registered in the LTO (unlike subsequent transfers)
* Procedure to be followed
1. **The boundaries of the land must be sufficiently described**
* The property must be **surveyed**
1. **The Registrar must be satisfied that the instruments produced by the applicant confer “a good safeholding and marketable title in fee simple”**
* **Safeholding** – a title conferring possession that is safe from attack and cannot be displaced
* **Marketable** – a title that is freely alienable, and not so defective that a reasonable purchaser could refuse it
1. **Applicant must (1) ensure that the documents supporting the application are attested and executed as required, by the *Act*, and (2) file a completed property transfer tax form**
2. **When applications are received at an LTO, they are scrutinized**
3. **The final step involves the production of an “indefeasible title”**
* The “Register” refers to either
	+ The books in which the certificates of indefeasible title are bound
	+ The information stored by entry in a computer respecting the title
* Duplicate indefeasible title
	+ When a duplicate is taken out of the LTO, the title “freezes”
		- Nothing can be registered on the title until the duplicate is returned
		- Can take out the duplicate to prevent a fraudulent transfer or mortgage
	+ The duplicate title can be given by a bank to provide security for a loan

(b) Transfer Inter Vivos

* Essentially the same procedure as initial application
	+ There must be sufficient description of the land and a good safe holding and marketable title
* Priority is given ***“first in time, first in right”***
	+ There may be a “race to the register” if two people are sold a property

(c) Transmission on Death

* Transmission – involuntary change of ownership, change of ownership by operation of an Act or law
* Title to the deceased’s property passes by law to the personal representatives (executors or administrators), who hold the property in trust for the benefit of those entitled by will or on intestacy
* The personal representatives transfer title to the appropriate beneficiary, who may then secure their own registration as owner

### 5. Charges

(a) General

* Registration of charges
	+ Gives notice of the charge to the whole world
	+ Creates a **rebuttable** presumption of validity
		- No guarantee
* Charges rank in chronological order based on time and date of application to register (*LTA*, s 28)
	+ This is why it is unwise to register a mortgage after a judgment is registered on a property (the mortgagee becomes an unsecured creditor)

(b) Caveats; Certificates of Pending Litigation; Judgments

* Caveats – unregistered instrument incapable of immediate registration
	+ If someone can’t get on the title, the next best thing is to file a caveat
	+ It is **implicit that the caveat is capable of eventual registration**
		- A caveat can’t be filed to protect a claim of Aboriginal title
	+ Purposes of lodging a caveat
1. Protects unregistered, equitable, and other vulnerable interests
2. Gives notice of the estate or interest claimed
* Certificates of Pending Litigation
	+ Anyone who wishes to buy the title must do so subject to the litigation
	+ Purposes of filing a CPL
1. Protects litigant and litigation process from third persons
2. Gives notice to the registered owner, prospective purchasers, and lenders
	* *Land Title Act*, s 216
		+ After registration of a CPL, the Registrar cannot make any entry that charges, transfer, or affects the land described in the certificate until the CPL is cancelled
	* *Land Title Act*, s 217
		+ The Registrar may, despite s 216, make an entry in the register to complete the registration of an indefeasible title or charge that was applied for before an application to register a CPL was received by the Registrar
3. Agreement of purchase and sale
4. Completion
	* If a CPL is registered after completion and before application, the title is frozen
5. Application to register transfer
	* If an application has been made, it’s too late to register a CPL
6. Registration of transfer purchase
* Judgments
1. *Type of Judgment That Can Be Registered*
	* A **money judgment** can be registered
	* The judgment creditor is still an **unsecured creditor**, but registering the judgment allows the creditor to move to the next step, execution (*e.g.* a **court-order sale**)
	* Money judgments expire after 10 years, but can be renewed
	* Many judgment creditors keep their judgment on the title until the debtor wants to sell the land or he/she passes away
2. *Manner of Registration*
	* A judgment, or the renewal of a judgment, is registered by its being endorsed in the register in the same manner as a charge
	* *Court Order Enforcement Act*, s 89-90
		+ The Registrar notifies the owner of the land or the charge against whose title has been effected
		+ If the owner is not the judgment debtor, can make an order accordingly (judgment creditor may be liable to compensate the owner)
3. *General Effect of Registration*
	* *Court Order Enforcement Act*, s 86(3)
		+ The judgment forms a lien and charge on the land of the judgment debtor
4. To the extent of his beneficial interest in the land
5. If an owner is registered as a personal representative or trustee, to the extent of the interest of a beneficiary who is a judgment debtor
	* + - A discretionary or “sprinkling trust” can be created to protects a beneficiary’s trust property (the trustee excludes the beneficiary from the property until the situation is resolved)
6. Subject to the rights of a purchaser who, before the registration of the judgment, has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgment
	* + - A money judgment attaches to the judgment debtor’s interest in the land below an unregistered bona fide purchaser for value without notice

## D. The Assurance Fund

* **Part 20 (ss 295-307) of the *Land Title Act*** establishes an assurance fund out of which, if certain preconditions are satisfied, a person may be able to claim compensation for the loss of an interest in land.
	+ These preconditions are not always easy to satisfy, and in fact there are few reported cases in which the fund has been held to be liable.
	+ If claims are made they are generally settled without litigation.
	+ The key sections are 296, 297, 298, 303

Assurance Principle

* Since January 2005, the Land Title and Survey Authority has established and maintained the **Land Title and Survey Authority Assurance Fund** (*LTA*, ss 294.1-294.9)
	+ Claims prior to 2005 – Government Assurance Fund (*LTA,* s 294.1-307)
* It is very difficult to recover from the assurance fund
* Limit of the fund
	+ Used to be $50,000 (excess of a claim out of Consolidated Revenue: s 306)
	+ Now $8,000,000 (excess of a claim must be paid by BC LTSA: s 294.8)
* Fund is now clarified only to help **registered fee simple holders who lose their title due to fraud or mistake**
	+ Nobody who holds a mortgage or any lesser interest is eligible to claim from the fund
		- Mortgagees should consider private mortgage insurance from a private insurer like BCAA if they want to be protected

What is the purpose of the Assurance Fund?

*LTA*, s 296(2) A person, who in this Part referred to as the “claimant”,

1. who is deprived of any estate or interest in land
	1. because of the conclusiveness of the register, in circumstances where, if this Act had not been passed, the claimant would have been entitled to recover the land from the present owner, and
	2. in consequence of fraud or a wrongful act in respect of the registration of a person other than the claimant as owner of the land, and
2. To compensate innocent persons who have been deprived of their ownership of land [fee simple] ~~or an interest in land~~ because of the conclusiveness of the register: ss 296(2)(a)(i), 294.1(1)(a)(i)
* “because of the **conclusiveness** of the register” – because the register says the person who gets on the register is the title holder (“dark side” of indefeasibility)
* “where, if this Act had not been passed” – back at common law nemo dat quod non habet applied and if there was a defect in the transaction (including fraud) then any subsequent holder of that property had a defective title under the principle of nemo dat
1. To compensate innocent persons who have been deprived of their ownership of a fee simple in consequence of a fraud or wrongful act resulting in incorrect registration [fee simple]: ss 296(2)(a)(ii), 294.1(1)(a)(ii)
* Innocent person – holder of the fee simple
* Wrongful act – mistake of the Land Title staff (inadvertently registering the name of another person when they shouldn’t have done so, for example)

LTSA Website

“The LTSA has an Assurance Fund available to compensate property owners in the very unlikely case that they lose an interest in land by a title registration error or become the innocent victim of title fraud” – government

* Who is the insurer?
	+ The BC LTSA Assurance Fund (created 2005)
* What is the premium?
	+ Included in registration fees
* What is insured?
	+ Registered title – fee simple (*Gill v Bucholtz*)
* Who has the superior right to the property?
	+ The purchase on the register (“immediate indefeasibility”: *LTA*, s 25.1)
		- Must be/have
			* Good faith (honest)
			* Paid value
			* No notice of the true owner’s claim without knowledge of the fraud
			* Relied on the register
* The Claimant
	+ Must be a true owner/former registered owner of the fee simple
	+ Must have **no dealing with the fraudster**
	+ How does the claimant protect himself/herself?
		- File a caveat
			* This will prevent the innocent purchaser from being a BFPV w/o N (they will have notice)
	+ Must join the Minister or LTSA (*LTA*, s 296(3), 294.2(2))
		- If unsuccessful,
			* Claim against the Assurance Fund
				+ The Assurance Fund is a remedy of **Last Resort**
			* First recourse = wrongdoer/other insurance
	+ Limit for going after the Assurance Fund is 3 years (*LTA*, ss 296(8), 298(2), 294.2(7), 294.22(3))

Exceptions/Limitations – LTA, ss 303, 294.6

The assurance fund or the minister as nominal defendant is not under any circumstances liable for compensation for loss, damage or deprivation occasioned to or suffered by/occasioned by

* **Equitable mortgage by deposit of duplicate certificate of title** (ss 303(a)(ii); *Royal Bank*)
* **Breach of trust** (ss 303(b)(i))
* **Misdescription of boundaries or parcels** (ss 303(b)(ii))
* **Shortage in area or volume (airspace parcel)** (ss 303(d))
* **Claimant’s notice or knowledge and failure to take preventive action** (ss 303(e))
* **Claimant’s contributory negligence** (ss 303(f))

|  |
| --- |
| McCaig v Reys (1978)(BCCA) |
| Facts – South Transport purchased a ranch in 1964, and sold it to Reys in 1968. Reys granted an option purchase 24 acres of the land. McCaig, the principal shareholder of South Transport, wished to acquire the optioned lands and register it, but this was never done because the original unpaid vendor not consent until it was paid. Reys sold the ranch to Rutland in 1969. This agreement did not mention the unregistered option, but Jerome (the principal officer of Rutland) indictaed he would honour it. Rutland sold the land to Javin and the interest of South Transport was expunged from the title. Jabin took title bona fide and for value without notice of any interest in McCaig or South Transport. McCaig/South Transport claimed damages and costs from the Assurance Fund.Torrens Fraud* McCaig: Prior unregistered interest
* Jerome/Rutland: Actual notice and dishonest conduct
* Reys (RO #1): Vendor
* Rutland (RO #2): Fraudulent Purchaser

Who won? The Assurance Fund (BC AG)Issue – Can McCaig/South Transport collect from the Assurance Fund?Holding – Even in the absence of the Act, Jabin would have secured a superior title to the equitable interest of the RESPs and the operation of the Act was therefore not the cause of the loss and the claim against the fund must fail.Ratio – The bona fide purchaser or realty without notice of prior equitable interests has always been protected in equity (“equity follows the law”).Test – In order to succeed against the Assurance Fund, a claimant must show:1. That he has been deprived of land or an estate or interest therein
2. The loss was occasioned as a result of the operation of the statute (the *Land Registry Act*)
3. That it was occasioned by fraud, misrepresentation, or some wrongful act in the registration of any other person as owner of the land or interest in land
4. He is barred from bringing an action for rectification of the register

Reasoning – The interest in the land was lost; it was lost because of fraud, misrepresentation and wrongful conduct on the part of Rutland and it resulted in registration of another person, and; the RESPs were barred from bringing an action for rectification, but; **they did not suffer as a result of the operation of the statute.** |

|  |
| --- |
| Royal Bank of Canada v British Columbia (AG) (1979)(BCSC) |
| Facts – Walsh deposited a duplicate certificate with Royal Bank but the delivery was not entered in the Land Register Office. Walsh then granted a mortgage to the Bank of Nova Scotia and it was registered in the Office even though the duplicate could not be located. Royal Bank made a claim against the Assurance Fund when it could not recover loans from Walsh after the registration of the Bank of Nova Scotia mortgage, submitting that had the Registrar not been negligent, they would have become aware of the deceitful conduct of Walsh and not advance further money to him.* Royal Bank: Claimant, unregistrable equitable mortgage by deposit of duplicate title
* Walsh: Fraudster
* Bank of Nova Scotia: BFPV w/o N, registered mortgageee

Who won? British Columbia (AG)Issue – Can mortgagees collect from the Assurance Fund?Holding – Royal Bank cannot collect from the Assurance Fund.Ratio – **Mortgagees cannot collect from the Assurance Fund**, nor can those whose losses do not result from the mistake of the Registrar.Those who seek to rely on equitable mortgages must accept the risks inherent in such securities.Reasoning – The Registrar owed no duty to Royal Bank but only to those seeking to utilize the services of the Registrar (one cannot obtain compensation built up by others’ contributions; Royal Bank cannot be given the protection afforded by registration); the person alleging loss as a result of mistake of the Registrar must show that the loss flows naturally and directly from the mistake. |

# Chapter VI – Registration

## Introduction

* There is nothing in the *Act* that specifically compels registration. However, the *Land Act* does require registration in certain cases.
	+ Section 54(1): A Crown grant… must, on its issue, be transmitted to the proper land title office for registration.
	+ “Bringing land under the register”
		- Once land is under the register, no one ever *has* to register again
* Even if registration is not compulsory, **it is wise to register because of the advantages that flow from registration** (despite the fact that registration is not always as conclusion as it might be).
* Although unregistered documents may have some effect, it is dangerous not to register.

## A. Registration: The Fee Simple

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

* Charges on the register prior to purchase
* Unregistered interests
	+ Usually do not affect the purchaser
	+ Some items (a)-(j) can affect the registered purchaser even though they’re not registered (exceptions to the mirror principle)

*LTA*, s 23(2) Exceptions

1. **Crown Grant** – The Crown has reserved out of the fee simple certain rights, those rights bind subsequent purchasers of the land
* Mineral rights, water, timber, subsurface rights
* Crown’s right of resumption up to 1/20 without compensation for road construction, etc. (*Land Act*, s 50(1)(a)(i))
1. **Taxes** – Local government taxes can be a lien and charge against the title
* Unpaid taxes can be attached to property even if they don’t appear on the title
* The vendor/RO’s tax arrears can pass as burdens to the purchaser
1. **Municipal charge, rate or assessment** – e.g., local improvement charge
2. **Lease or agreement for lease** – original term of lease including options to renew less than or equal to 3 years + actual occupation
* Short term lease
	+ Unregistered tenant has priority over purchaser (RO #2)
* Long term lease
	+ Unregistered tenant has priority over purchaser (RO #2) **only if purchaser has notice/knowledge of tenant**
1. **Highway or public right of way, watercourse, right of water or other public easement**
* Easements are across everyone’s property so that utility companies can come in and inspect and do their work
* Highways may also be subject to a public right of way
1. **Right of expropriation or to an escheat under an Act**
* Right to expropriate property overrides indefeasibility
	+ Provincial or local government can take over property compulsory if the RO won’t sell and have to pay compensation
* No owner = Crown’s right to escheat (*Escheat Act*)
1. **Certain charges registered before or after registration of purchaser’s title**
* Builders lien (*Builders Lien Act*) – *Carr v Rayward*
	+ Sometimes a contractor is unable to pay a material supplier (for example), but because of privity of contract the material supplier has no contract with the general contractor. In this case the material supplier has a right to **file a lien against the property**, and the owner of the property is **subject to the lien** that can result in the sale of the property to satisfy the lien obligations
	+ Limitation period – 45 days from completion, abandonment, or termination of the construction contract to file a lien, once a lien claim is filed, have 1 year to start a lien action
		- If property is bought shortly after completion, could be subject to a lien
1. **Correction of “wrong boundaries”**
2. **Fraud/forgery** – McCaig v Reys
* RO #1 (person deprived of land) 🡪 RO #2 (fraud/forgery)
	+ If RO#2 participated in any degree (personal or by agent) 🡪 defeasible title

**Limitations on indefeasibility; mirror principle**

* + **Zoning**
		- Regulated by local government bylaws
	+ **Public utilities easements**
	+ **Pre-1973 Agricultural Land Reserves** (*Agricultural Land Commission Act*, p 6-6)

### 1. The General Principle of Indefeasibility

|  |
| --- |
| Creelman v Hudson Bay Insurance Co (1919)(PC) |
| Facts – Hudson Bay (vendors of real estate in Vancouver) brought action for breach of contract of sale against Creelman, the purchaser under the contract. The fee simple title was registered in Hudson Bay’s name. Creelman’s defence was that, by virtue of the federal act under which it was incorporated, Hudson Bay could not acquire or hold real property unless it was required for the purposes, use or occupation of the company; that Hudson Bay had not acquired the land for its purposes, use or occupation (Hudson Bay had bought the property for speculative purposes); and therefore it had no power to hold or dispose of the land.* Hudson Bay: RO#1
* Creelman: “Reneging” Purchaser

Who won? Hudson Bay Insurance CoIssue – What is the effect of the certificate Hudson Bay Insurance held?Holding – Creelman is bound to accept the certificate, and consequently to comply with all the obligations under the contract.Ratio – A purchase is unaffected by unregistered “defects” in the seller’s title; Torrens reverses nemo dat.Reasoning – The purpose of registration was to get away from nemo dat; as long as Hudson Bay is registered, it is presumed to have a good title and Creelman could not complain that the title was defective (because it was protected as indefeasible under the *LTA* of the time).  |

### 2. Indefeasibility and Adverse Possession

* Title by adverse possession was based on the fact that if a landowner did not bring an action to recover possession of the land from a wrongful occupier within a specified period of time defined by statute, the right to do so was lost.
* Title by adverse possession (“a squatter’s title”) is at odds with the concept of indefeasibility of title based upon registration.
* **Adverse possession – occupation of land without permission**
	+ Bust be hostile (without consent), actual (living on the land), exlcusive (keeping others off the land), continuous (throughout 20 years), open and notorious)
* *Land Act*, s 8(1) – Can’t acquire adverse possession in Crown land or any land against the government’s interest in it even while it is not registered
* Under the Torrens system, a squatter cannot acquire any rights of ownership no matter how long they live there
* There is also the possibility of acquiring land (even registered land) by acquiescence/proprietary estoppel by encroachment (*Kelsen*)
	+ Right of adverse possession in BC is only allowed against the first grantee form the Crown while unregistered, but encroachment is possible against a register owner

### 3. Statutory Exceptions to Indefeasibility

#### (a) Section 23(2)(d) – Leases

* Landlord RO #1 sold to purchaser RO#2 (sight unseen) and reported that tile was clear
* RO #2 moved onto property to find property in occupation (tenant)
* If lease was for less than or equal to 3 years 🡪 tenant can stay
* If lease was for more than 3 years 🡪 tenant cannot stay
	+ Unless in writing and signed (*Law and Equity Act*, s 59) or fraud occurred
		- Actual notice = fraud on unregistered tenant (*LTA*, s 29(2))

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

|  |
| --- |
| Carr v Rayward (1955)(BC Co Ct) |
| Facts – Carr took a contract to do plumbing and filed a mechanics’ lien before the completion of the work, but after the land had been sold to Bell (D), and a certificate of indefeasible title issued in his name.* Rayward: RO #1/Vendor 🡪 Bell: RO #2/Purchaser
* Rayward had a contract with Carr (unpaid plumber)

Who won? CarrIssue – Can a mechanics’ lien be effective against the lands if not filed in the land registry office until after the owner for whom the work was done and material supplied has sold the lands and the purchaser has obtained a certificate of title from the land registry office showing him as owner free of encumbrances?Holding – Carr is entitled to a mechanics’ lien and personal judgment against Rayward.Ratio – In BC, D holds his lands under a certificate of title which expressly excepts mechanics’ liens registered after his application to register.Note – A way to avoid this problem is to postpone the closing and search the title to see if any lien has been filed after 45 days have passed.  |

#### (c) Section 23(2)(h) - Boundaries

* Misdescription of boundary lines – problem of surveying the property line

|  |
| --- |
| Winrob v Street (1959)(BCSC) |
| Facts – The Winrobs purchased property that was surrounded by hedges and a fence, and retained Street (a lawyer) as their conveyance. Street searched the title but did not search maps or plans in the LTO, or take steps to verify the parcel dimensions. Two years after purchase, the City of Vancouver claimed rent from the Winrobs because the hedge and fence extended 26 feet onto the City’s land. The Winrobs sued street for damages in professional negligence.Who won? StreetIssue – Are conveyancers responsible for verifying dimensions?Holding – Street was not responsible for verifying dimensions.Ratio – Conveyancers are not responsible for verifying dimensions unless special instructions are given and accepted.Reasoning – Under the usual retainer, a conveyance advices the client on the state of title (registration in the name of the vendor, free of or subject to charges, etc.), but has no duty to ascertain or advice on the dimensions of the property. The client must give and the conveyance must accept a special instruction to become responsible for verifying dimensions.Note – The Winrobs may have had a claim against the vendor for negligent misrepresentation. |

#### (d) Section 23(2)(i) – Fraud

* Under a Torrens system, **title fraud** can happen to innocent property owners
* *LTA*, s 23(2)(i) – Despite registration, a fraudster has a defeasible rather than an indefeasible title, and an innocent owner of the fee can recover the property

Two types of fraud

1. **Forgery (fraud against registered owner)**
* RO #1 (person deprived of land) 🡪 RO #2 (defeasible title, registered interest acquired by fraud/forgery, participated in any degree)
	+ RO #2 personally or by agent committed fraud
* **Fraud – dishonesty of some sort** (not equitable fraud—carelessness)
1. **Notice of unregistered interests (fraud against holder of unregistered interest)**
* *LTA*, s 29(2) – **Except in the cause of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner** (a) a transfer of land, or (b) a charge on land, or a transfer or assignment or subcharge of the charge, **is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied or constructive, of an unregistered interest affecting the land or change** other than…
	+ If you commit fraud 🡪 what you know outside the registry affects you (unregistered interest is binding)
	+ If you do not commit fraud 🡪 what you know outside the registry does **not** affect you
* **What is fraud?**
	+ Actual fraud/actual dishonesty by the party (RO #2) or agent (with RO’s authority)
	+ Anything above or including willful blindness (must be greater than reckless disregard)
		- Can’t “abstain from making inquiries”
* **When must the fraud occur?**
	+ Preceding the agreement of purchase and sale

**When does “indefeasibility” protect the innocent purchaser from the fraudster against RO #1?**

* Two judicial interpretations:
1. **Deferred indefeasibility** (*Gibbs v Messer*)
	* Fairer to RO #1 – not only can you get the title back from the fraudster, the original title holder can get the title back from the first purchaser
2. **Immediate indefeasibility** (*Frazer v Walker*)
	* Drastic to RO #1 but protects public confidence in the register
	* *LTA*, s 25.1(2), (3) – immediate indefeasibility in a codified form
		+ Even though an instrument purporting to transfer a fee simple estate is void, a transferee who (a) is named in the instrument, and (b) in good faith and for valuable consideration, purports to acquire the estate, is deemed to have acquired that estate on registration of that instrument.
		+ Even though a registered instrument purporting to transfer a fee simple estate is void, a transferee… is deemed to have acquired that estate on registration of that instrument.
		+ Extinguishes nemo dat for the fee simple holder
		+ Section 25.2(1) – nemo dat for life estate, mortgage, etc.
	* But what about people who are not purchasers (people who got property by a gift, for example)?
		+ Not protected under s 25.1 because they’re not purchasers/did not give valuable consideration
		+ **Can get property back from volunteers**

##### (i) Forgery

|  |
| --- |
| Gibbs v Messer |
| Ratio – If fraud occurs, A (innocent owner of the fee) should recover title, because although both A and C (innocent victim) were innocent of B’s (fraudster) fraud, C actually dealt with fraudster B, and A had no involvement.“Deferred indefeasibility”: A could not recover the title from D (innocent purchaser). Once D became registered, Torrens principles protected the indefeasibility of D’s title as against attack by D.Reasoning – C could have investigated further; A has a longer-term attachment to the property; C would have a claim for compensation against B or possible the assurance fund. |

|  |
| --- |
| Frazer v Walker |
| Ratio – “Immediate indefeasibility”: Once C became the registered holder of the fee, C keeps the title, and A should be the innocent victim left to seek monetary compensation from B/assurance fund.Reasoning – This preserves public confidence in the Torrens system (otherwise would return to common law nemo dat). |

|  |
| --- |
| Gill v Bucholtz  |
| Facts – Mr. Gill owned “Lot 4”. A fraudster forged Mr. Gill’s signature on a transfer of Lot 4 to Gurjeet Gill, who was working in concert with him. Gurjeet Gill purported to grant a mortgage to the Bucholtz, who in reliance on the register advanced some $40,000 to Gurjeet Gill and filed the mortgage with the LTO. Gurjeet Gill later negotiated a second mortgage in favour of the corporate D. Mr. Gill filed a caveat before the second mortgage could be registered (but the corporate D had already advanced $55,000 under it). None of the mortgagees had had knowledge of fraudulent root of title and they had sought and confirmed Gurjeet Gill’s identity before advancing funds.* Mr. Gill: RO #1
* Gurjeet Gill/fraudster: RO #1
* Bucholtz: private investors/innocent mortgagee (registered first mortgage to Gurjeet Gill)
* Number company: innocent mortgagee

Who won? GillIssue – Will the Ds’ mortgages continue to encumber P’s title as valid charges?Holding – The mortgagees 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 at common law and under s 25.2(1). The mortgages should be cancelled as encumbrances.Ratio – A registered charge does not obtain the same quality of indefeasibility as the registered fee simple.The *Land Title 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.Reasoning – The phrase “void instrument” in s 25.2(1) includes a mortgage taken from a person who obtained her title by fraud or forgery, as occurred in this case.  |

**How do you avoid fraud?**

* Deal locally with folks you can meet in person
* Never wire funds via Western Union, Moneygram or any other wire service – anyone who asks you to do so is likely a scammer
* Fake cashier checks and money orders are common, and banks will cash them and then hold you responsible when the fake is discovered weeks later
* Craigslist is not involved in any transaction, and does not handle payments, guarantee transactions, provide escrow services, or offer “buyer protection” or “seller certification”

##### (ii) Notice of Unregistered Interests

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

1. A transfer of the land, or
2. A charge on land, or a transfer or assignment or subcharge of the charge, **is not**, despite a rule of law or equity to the contrary, **affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge** other than (a BFPV w/o N is not affected by anything not on the register)
3. An interest, the registration of which is pending,
4. A lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement, or
5. The title of a person against which the indefeasible title is void under section 23(4).
* Fraud = actual knowledge of unregistered interest + dishonesty

|  |
| --- |
| McCaig v Reys |
| Facts – McCaig (holder of an unregistered interest (option to purchase 24 acres granted by Reys; victim of fraud) 🡪 Reys (RO #1) 🡪 Jerome/Rutland (RO #2) 🡪 Jabin* **Rutland/Jerome**: **Actual notice** of McCaig’s unregistered interest + promised Reys to honour the interest (deception) + obtains registration to defeat the interest (**fraudulent intention**)
* **McCaig**: interest was extinguished
* **Jabin**: took property as a BFPV w/o N (w/o notice + not dishonest)

Who won? JabinHolding – Reys should never have sold to Rutland and is guilty of breach of contract because he created the situation that caused McCaig to lose his option.Rutland’s title is defeasible because he got it through fraud. However, the title was flipped to Jabin, and McCaig has no remedy against Jabin.Ratio – An **intending purchaser** who learns of an unregistered interest (gets express notice) is estopped from claiming the benefit of s 29(2).* Any who gets past the agreement of purchase and sale stage and has a binding agreement is not guilty of fraud.
* However, full notice + entering into agreement of P&S to defeat the unregistered interest = actual fraud
	+ There must be an element of dishonesty (intention to extinguish the unregistered interest)

An agent’s fraud is imputed to the principal (but a real estate agent is **not** an agent in this sense).Reasoning – Jerome carried out a scheme of deception that enabled him to dispose of the interest without disclosing to the purchaser.If Rutland had gotten notice **after** agreeing to purchase 🡪 would not be committing fraud. |

|  |
| --- |
| Hudson’s Bay Co v Kearns and Rowling |
| Facts – Kearns (registered fee simple owner) owed Hudson’s Bay $800. She mortgaged her interest to the company to secure her debt, delivering her title deeds. The mortgage was not prepared for 15 months, and in that time Kearns offered the property to Rowling. Rowling searched the title and entered into a verbal agreement and gave Kearns a promissory note for half the purchase price. Rowling asked to see the title deeds and Kearns said that they would be produced. Kearns gave Rowling a transfer of her title (which was registered). Rowling later paid the other half of the price, without seeing the deeds.* Hudson’s Bay: unregistered equitable mortgage “by deposit of title deeds”
* Kearns: RO/mortgagor
* Rowling: transferee; **not a fraudster because he did not have full knowledge or dishonest intent before the agreement of P&S was made** (he was just careless (grossly negligent/possibly reckless)

Who won? Rowling Issue – Can an equitable mortgagee by deposit of title deeds acquire a better title to registered real estate than a purchaser for valuable consideration, who, without actual fraud or express notice of the equitable mortgage, takes a conveyance unaccompanied by delivery of title deeds?Holding – Rowling, as purchaser for valuable consideration of registered real estate, shall be unaffected by notice of any unregistered title. Ratio – **Section 35 of the *Land Registry Act* (now s 29 of the *LTA*) absolutely protects a purchaser for value against attack on the ground of notice of any character or nature whatsoever**; but its otherwise absolute effect is subject to this qualification: **a man who in consequence of any knowledge constituting actual notice of a prior unregistered title or interest does any act for the direct purpose of bringing himself within the words of the section**, as distinguished from any act in the ordinary course of business or in the natural course of any pending dealing or transaction, and thereby prejudicing the holder of the unregistered title, **is guilty of actual fraud and is estopped from invoking the protection of the enactment**.Reasoning – An Act of Parliament shall not be used as an intrustment of, or in defence of, actual fraud. |

|  |
| --- |
| Vancouver City Savings v Serving for Success Consulting |
| Facts – KKBL No 315 Ventures and Serving for Success Consulting operated businesses as tenants in a hotel owned by City Center Manor Holdings under unregistered leases. Vancouver City Savings and Safety First Savings & Mortgage advanced loans to City Center, who subsequently defaulted. VanCity and Safety First petitioned for orders for foreclosure with vacant possession, which would remove the tenants. KKBL and Serving for Success claimed the right to remain as tenants arguing that the petititoners’ conduct in seeking vacant possession despite their knowledge of the tenancies amounted to “fraud” under s 29(2) of the *LTA*.Who won? VanCity and Safety FirstIssue – Can a finding of Torrens fraud be made? Holding – The mortgages rank over the unregistered interests of KKBL and Serving for Success. Test – To prove equitable fraud it must be established that:1. The party acquiring a registered interest in land had sufficient actual knowledge of the conflicting interest in the property to cause a reasonable person to make inquiries as to the terms and legal implications of the prior instrument, and
2. There must be some other circumstance to take the matter out of the ordinary course of business or to show some clear intention to use the statute to defeat the RESPs’ interests in circumstances contrary to common morality such that it would be inequitable for the court to allow reliance upon the statute as protection. **Something more than simple knowledge is required.**

Reasoning – There is no evidence to suggest the petitioners acted outside the normal course of business or violated any principle of common morality (they were simply using their rights as mortgagees). |

|  |
| --- |
| Greveling v Greveling |
| Facts – Mrs. Greveling, a registered fee simple holder, delivered a transfer of her interest to her husband, but the transfer was not registered (Mr. Greveling became an unregistered interest holder). Mrs. Greveling sold the property to Blackburn, who secured registration. The lawyer who acted for Blackburn was also Mrs. Greveling’s lawyer, and he knew of the transfer to Mr. Greveling.Who won? BlackburnIssue – Should the solicitor’s knowledge be imputed to Blackburn?Holding – The solicitor’s knowledge should not be imputed to Blackburn, so he derived his title bona fide for value.Ratio – Except under certain circumstances, a solicitor’s knowledge is to be considered equivalent to the personal, actual knowledge of his/her client.Reasoning – The solicitor’s knowledge should not be imputed to Blackburn if the solicitor was helping Mrs. Greveling to perpetrate a fraud or if he was honest (in believing that the deed from Mrs. Greveling to Mr. Greveling could not be enforced).  |

|  |
| --- |
| Re Saville Row Properties Ltd |
| Facts – Eldred, the registered owner, gave an option to purchase to Ian H Frew & Associates Ltd (real estate develops) that was open until March 27, 1969 with an opportunity to renew for $100. On April 25, 1969, Eldred conveyed the deed to the petitioner (Saville Row), and the deed was tendered for registration at the LTO. It was discovered that an application to register the option had been made on April 23, 1969. The Registrar gave notice to Ian Frew & Associates, but nothing was done and the application ws rejected. Ian Frew & Associates commenced an action against Eldred for a declaration that it had an option open for acceptance and filed a lis pendens. The Registrar declined to register the Saville Row’s deed.Who won? Saville RowIssue – Was Saville Row a bona fide purchaser for valuable consideration?Holding – The lis pendens must be vacated and the deed of conveyance registered.Ratio – The law presumes against fraud and impropriety and in favour of honourable conduct unless the contrary be shown, and findings against a person’s integrity should not be lightly made. Reasoning – The evidence adduced does not prove bad faith. While Saville Row knew of the existence of the option, it also knew of the rejection of the application to register it and it could not, then, be affected by notice of the unregistered interest. Saville Row is not in bad faith merely because it relies upon the provisions of the statute (the *Land Registry Act*). |

### 3. “In Personam” Claims

* There is an exception to indefeasibility (certainty of title) for unregistered personal rights against the registered owner
* In personam claims
	+ *Examples*
		- **Occupier’s liability** – if an owner or occupier is negligent in not maintaining the safety of the sidewalk, and somebody slips and falls, the owner is liable for negligence (an in personam remedy)
		- **Nuisance**
		- **Builder’s lien** – can be an in rem remedy or an in personam remedy (breach of contract)
* Although s 20(1) of the *LTA* says an unregistered instrument has no effect either at law or in equity, **an unregistered transfer gives a title in equity (against the transferor)**
	+ Remedy in personam for damages (and could generate remedy in rem against the owner’s title; *Zelmer*)

**Torrens mortgage**

* **Mortgagor/borrower/legal owner has possession; grants mortgage/loan/security (charge) 🡪 mortgagee/lender**
	+ This gives mortgagee the right of foreclosure (the right to take title in law if mortgagor defaults)
	+ The mortgagor can sell, give, or mortgage the equity of redemption (ability to pay off the loan and get their title back)
		- They can also put a second mortgage on the equity of redemption and put up what remains of their interest in the property
* Mortgage contains
1. **Contract/loan = in personam**
* Assignment of rights to payment
* “Subject to the equities” (*Credit Foncier*) – if a mortgagor doesn’t get anything, the mortgage is nothing
1. **Collateral security/encumbrance = in rem**
* Transfer – registration on title
* **If the mortgagor defaults – mortgagee’s usual remedies:**
1. Action on the covenant (promise to repay loan)
2. Possession (of property)
3. Foreclosure – mortgagee takes title from mortgagor and the mortgage is discharged from the title; registers title in own name or sells it
4. Judicial sale (court-ordered sale)
* The Court of Equity allows the mortgagor in default a reasonable time period to redeem the property/regain title by paying the debt
	+ Usual 6 month redemption period (mortgagee must wait 6 months before exercising the right of foreclosure)
	+ Additional period in the court’s discretion

**Assignment (transfer)**

* A mortgagee can assign the mortgage and right to payment to an assignee
	+ Can only assign the rights (positive sides of contract)
		- Assignment cannot make the assignee liable to repay the mortgage
	+ Not the same as novation (a transfer of both the rights and the obligations)
* Came up in *Credit Foncier*

**Example – FMV (fair market value) = $100,000 RO/Mortgagor**

* Charges
	+ #1 mortgage ($75,000)
	+ #2 mortgage ($20,000)
* **Foreclosure down:** Mortgagor defaults on #1
	+ #1 mortgage would be paid in full;#2 mortgage would be paid the balance up to the amount owing; extra $5,000 would go to mortgagor
	+ #2 mortgage could also redeem mortgage redeem #1 mortgage by paying $75,000 to the mortgagee (amount outstanding)
		- #2 mortgage would then rank as the only mortgage on the property (for $95,000), saving them from getting nothing on their mortgage for $20,000
* **Redeem up:** Mortgagor gets windfall ($30,000)
	+ Pay off #2 mortgage in full first, then would have another $10,000 to apply to #1 mortgage
* Aside: Judgments
	+ Judgments must rank equally (get so many cents on the dollar: ratable sharing) – because of this, a judgment registered after a mortgage (which is after a judgment itself) will hop over the mortgage
		- Both judgments will be paid in full before the mortgagee receives any money

|  |
| --- |
| Pacific Savings and Mortgage Corp v Can-Corp Developments |
| Facts – The mortgagors (appellants) granted a mortgage to the mortgagees (RESPs). The mortgagees commenced foreclosure proceedings on November 24, 1980, and obtained an order absolute on September 28, 1981, and a certificate of indefeasible title on October 1, 1981. In October the mortgagors gave notice they intended to redeem, and filed a notice of motion to re-open the final order, and obtained a lis pendens (filed on November 20, 1981 at 9:15 am; the 6 months redemption period had already expired at this point). The mortgagees accepted an offer to purchase the property on November 20, 1981 at 4:58 pm.* Pacific Savings: registered mortgagee
* Can-Corp: RO #1/registered mortgagor in default

Who won? Can-Corp (mortgagors)Issue – Are the mortgagors entitled to redeem?Holding – The mortgagors are entitled to redeem on the payments of all monies due.Ratio – **Equity abhors a forfeiture**; it will give a mortgagor every chance before forcing it to give up property.**The issuance of a certificate of indefeasible title**, while offering absolute protection to a bona fide purchaser for value, **is not a bar to claims at law or equity against the registered owner made by persons asserting an interest in the lands described in the certificate of title.**A mortgagee must in equity permit a defaulting mortgagor to redeem (an equitable reopening of foreclose). If the mortgagor can find another source of funding, then the foreclosure will be reversed and title will go back from the mortgagee to the mortgagor (and the potential purchaser will get nothing).Reasoning – The rights of the mortgagor rank ahead of the rights of the purchaser because the mortgaggor filed a CPL on the property (with that CPL they gave notice to the world that the mortgage was going to be reopened and that if the court was sympathetic, they would be given a second chance to redeem the property).Note – If an innocent third party purchaser had bought the property before the CPL was filed, then the CPL would have been too late and the agreement would have been enforceable.  |

|  |
| --- |
| McRae v McRae Estate  |
| Facts – In 1924, Mr. Fraser died and left property to his wife Harriet, on trust for herself for life, remainder to their children, John, Catherine and Farquhar. Mrs. Fraser was registered as fee simple owner, with an “on trust” notation on the title. In 1949, Mrs. Fraser transferred the property to Farquhar for valuable consideration, and Farquhar was registered as fee simple owner without any notation. He died in 1989, leaving his property to his wife and his siblings. In 1990, John and Catherine found out about the terms of their father’s will and commenced proceedings.Who won? John and CatherineIssue – Was Farquhar a bona fide purchaser for value without notice?Holding – John and Catherina had in personam rights against Farquhar.Ratio – A beneficiary has in personam rights against a trustee, even if the trust is unregistered. Even if a trust is not registered on the title, the RO is bound by the trust. Reasoning – Farquhar is not a BFPV w/o N because he cannot be said to not have had notice because the words “in trust” were on the title. He had constructive notice, and probably had actual knowledge too. Harriet and Farquhar commited a breach of truth, and the transfer from Harriet to Farquhar should not have occurred. Note – If Farquhar had sold the property to a BFPV w/o N that would have extinguished the rights of the beneficiaries.  |

## B. Registration: Charges

### 1. Meaning of Registration

* **“Registration” = acceptance + recording in a public office**

*LTA*, s 197(1) On being satisfied from an examination of an application and any instrument accompanying it that the applicant is entitled to be registered as the owner of a charge, the registrar must register the charge claimed by the applicant be entering it in the register.

* “On examination of the cover letter and any **instrument** accompanying it”
	+ Examination
		- Application + “instrument”
			* **Instrument** = legal document (containing terms of a trust, court order, contract, etc.)

What does it mean to be registered?

* Not defined in the *LTA*
* Registration has its ordinary meaning: acceptance by the powers that be

**Title contains**

* **Legal notations** (s 180(2))
* **Charges, liens and interests**
	+ **Nature of charge:**
		- What the LTO puts there is not determinative **(not a legal determination, only an administrative determine; does not mean it’s valid)** – the staff may make mistakes in doing this and the purchaser cannot complain because they should have got the instrument that contains the charge to find out what it says
			* This creates a big distinction between charges and fee simple; a fee simple is conclusively valid once registered, but the registrar does not have determinate power over charges
	+ **Charge number date time:**
		- Charges may not appear in order of priority (*LTA*, s 28)
	+ **Duplicate indefeasible title:**
	+ **Transfers:**
	+ **Pending applications:**

|  |
| --- |
| Dukart v Surrey (District) |
| Facts – The appellant’s (Dukart) predecessors in title bought a residential lot from a development company. The transfer to them provided that the grantee would comply with restrictive covenants and that the foreshore reserves would be held by the grantor for the purpose of giving free access to the persons purchasing sub-divisions. The appellant’s title contained no reference to any right or interest with respect to the foreshore reserves. The developer later transferred title to a trustee subject to the restrictive covenants, and the trustee registered its title. The RESP municipality (Surrey) acquired the foreshore reserves at tax sales and registered its interest. On the certificate of title issues to it there was no reference to deeds or filings referenced in the trust, nor was there any indication of the existence of a trust. RESP commenced construction on the foreshore reserves and the appellant sought an injunction on the basis that the construction obstructed her right of access.Who won? Appellants (Dukart)Issue – Was the title acquired by Surrey at the tax sales free from the easement?Holding – The certificates issued to Surrey should have continued to reflect the “trust” status and the easement granted survives the tax sale and continues to be binding upon Surrey.Ratio – Is “Registration” of the “instrument” or of the “interest”?**Instruments what is registered – the content/terms of these instruments are for the courts to determine**Reasoning – The easement was registered on the title because it was part of the trust and the trust was filed. Although it was called a “trust” on the register, that’s not determinative; it’s what is contained in the document that’s important.*LTA*, s 20(1) Except as against the person making it, an **instrument** purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the **instrument** is registered in compliance with this Act.  |

### 2. Indefeasibility?

*LTA*, s 26

1. A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.
2. **Registration of a charge does not constitute a determination** by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.
* Registration of charges creates a **rebuttable presumption of validity**
* **Indefeasible fee; defeasible charge**
	+ The fee simple holder’s title is conclusive, but the registered owner of a charge is only “**deemed**” to be entitled to the estate (rebuttable presumption)

|  |
| --- |
| Credit Foncier Fraco-Canadien v Bennett |
| Facts – The Bennetts (Ds) were registered in fee simple. A mortgage for $7,400 and interest was registered against the lands, purportedly from the Bennetts to Todd Investments. Allen, an officer of Todd Investments, had forged that mortgage. There was then an assignment of the mortgage from Todd Investments to Allan Kilbee Stuart, a real estate agent and mortgage broker. Stuart then assigned the mortgage to Credit Foncier (P). Before completion of the purchase, Credit Foncier had its solicitors search the title and found the mortgage registered. Credit Foncier wrote to Bennett notifying him of the assignment and requesting an acknowledgment of the amount owing; Bennett did not receive the letter. Credit Foncier send a second letter, but the Bennetts ignored it thinking it a mistake. Credit Foncier brought action against the Bennetts for foreclosure.* Bennetts: mortgagors
* Credit Foncier: assignee

Who won? Bennetts (Ds)/BC AGIssue – Was Credit Foncier’s mortgage valid?Holding – The mortgage was invalid, but Credit Foncier would not have succeeded even if the mortgage had been valid because it is only security for the amount actually owing and the mortgage in this case secured nothing as no loan had been made to the Bennetts. The presumption that the mortgage was valid is rebutted.Ratio – **Registration does not guarantee the enforceability or validity of a charge** (while it does guarantee that for a fee simple).* Nemo dat applies to anything less than the fee simple
* Anything less than a fee simple is presumed to be valid, but that presumption is rebuttable (can adduce evidence to show fraud or other defect in the mortgage)

**A mortgage is only security for the amount actually owing.** Reasoning – The words “shall be deemed” have a variable meaning depending upon the context. The omission of “conclusive” in s 41 (now *LTA*, s 26), together with the use of the word “deemed,” which is capable of meaning “rebuttably presumed” implies that the legislature intended such omission to be observed by assigning a meaning not “conclusive” and raising only a rebuttable presumption.Note – The ratio of this case is now codified in s 25.1(1) of the *LTA* “nothing validates an invalid charge or anything less than the fee simple”.  |

|  |
| --- |
| Canadian Commercial Bank v Island Realty Investment Ltd |
| Facts – Park Meadow Estates was the registered owner. The Imperial Life Assurance Company held a first mortgage, and Island Realty held a second mortgage (which was registered). Cowan, a lawyer and director of Park Meadow, contacted Almont Holdings and Avis Mortgage Company (Almont) seeking a mortgage, with the understanding that the Island Realty mortgage was to be discharged. Almont was unaware that Cowan was a director of Park Meadow. Cowan executed a mortgage in favour of Almost on 7 February 1984 and registered a forgery discharge of the Island Realty mortgage on 10 February. Cowan then sent Almont a copy of the state of the certificate showing the Island Realty mortgage being discharged, and Almont advanced funds. Cowan absconded and Park Meadow filed bankruptcy. There were insufficient funds to pay both Island Realty and Almont.* Park Meadow: RO/mortgagor
* Imperial Life: 1st mortgagee (registered)
* Island Realty: 2nd mortgagee (registered)
* Almont: 3rd mortgagee or 2nd mortgagee?

Who won? AlmontIssue – Is Almont’s mortgage valid?Holding – The mortgage of Almont should be declared to be a valid charge in preference and priority to any interest of Island Realty.Reasoning – The reasoning in *Credit Foncier* does not apply because Almont was a valid mortgage granted by an owner with a valid title (Almont did not take a forged assignment of mortgage from Island Realty). Once the Island Realty mortgage was discharged it could no longer affect the land in respect of which it was registered. Note – This decision is wrong and since the enactment of s 25.1(1) cannot be reconciled. |

### 3. Priorities

* **“First in time, first in right”**

*LTA*, s 28 **Priority of charges based on priority of registration** – If 2 or more charges appear entered on the register affecting the same land, the charges have, as between themselves, but subject to a contrary intention appearing from the instruments creating the charges, priority according to the date and time the respective applications for registration of the charges were received by the registrar, and not according to the respective dates of execution of the instruments.

* Receipt of application to register – it’s not the date of the creation of the charge, but **the date of the application to register the charge that takes priority under the Torrens system**
* Chronological order
	+ “Subject to contrary intention”
		- Can change priority based on subordination

# Chapter III – Aboriginal Title

## B. The Current Law

* Prior to *Delgamuukw*
	+ Aboriginal groups had brought in expert evidence (anthropologists, sociologists, archeologists, etc.) to explain for the court the role of the band and what it was doing that area at the time of sovereignty (1846)
* *Delgamuukw*
	+ The bands called evidence of oral history (legends, songs, stories, etc. within the band)
* **Spectrum of rights in land**
	+ AR 🡪 site-specific (rights to establish fishing camps, hunting bases, etc.) 🡪 AT
	+ Ascending significance
	+ Difficulty of proof rises as they rise
* **Basic principles of nemo dat quod non habet (first in time, first in right)**
	+ AT 🡪 Crown title (1846) 🡪 Crown grant 🡪 grantee
	+ Crown grant cannot give any greater title than it possesses – if it’s possession is subject to prior aboriginal title, that will pass automatically with any Crown grant to any grantee and subsequent purchaser (“burden” or subtraction from title)
* **Aboriginal title (AT)**
	+ AT is a species of AR; but distinct from aboriginal rights
	+ **A right to land itself** – not merely a right hunt, for example
	+ *Sui generis* (unique) form of ownership
		- Has different qualities than common law ownership
	+ Very difficult to prove (has never been proven for a parcel of land so far)
	+ Can be either site-specific or territorial (*William*)
	+ Arises “where the connection of a group with a piece of land ‘was of a central significance to their distinctive culture’” (*Delgamuukw*, para 137)
* **Aboriginal rights (AR)**
	+ Rights to follow practices, customs and traditions and to conduct activities on specific sites (e.g., hunting, fishing)
	+ AR falls short of AT (smaller entitlements); easier to prove AR than AT
	+ Rights are recognized and firmed by the *Constitution Act, 1982*, s 35(1)
		- ”The existing aboriginal and treaty right of the aboriginal peoples of Canada are hereby recognized and affirmed.”
		- Confers constitutional status on “existing” (in 1982, but rights can be proven today which will extend back to 1982)
		- **Does not create or define AR or AT** but protects them
		- The Province cannot extinguish AR but the federal government can (with the agreement of the band) extinguish AT by treaty
		- The provincial and federal government can “infringe” AT if it is justified by “substantial and compelling public objectives” (*Mitchell*)
* **Duties to consult and accommodate** (accommodation: potentially paying compensation)
	+ **Crown conduct** (giving rights to somebody to build a mine, for example) **+**
	+ **Potential to adversely impact on** (aboriginal) r**ights** (or claims of aboriginal rights) **+**
	+ **Existence of potential** (can be going through the courts or negotiating a treaty under the BC Treaty Commission) **or established aboriginal or treaty rights =**
	+ **Duty to consult** (band’s interests are disclosed to the government, consultation must be directed in good faith)
* **Sources of AT**
	+ *~~Royal Proclamation of 1763~~*
	+ Prior (exclusive) occupation at the time of sovereignty (1846; signing of the Oregon Treaty), **and**
	+ Relationship between common law and pre-existing systems of aboriginal law
		- AT arises pre-sovereignty, whereas normal estates like the fee simple arose afterwards (***sui generis***)

|  |
| --- |
| Delgamuukw v British Columbia (1997)(SCC) |
| Facts – The appellants (Gitksan or Wet’suwet’en hereditary chiefs on behalf of their “Houses”) made territorial claims to separate portions of 58,000 square kilometers in British Columbia. The claim was based on their historical use and “ownership” of one or more of the territories. Both the Gitksan adaawk (a collection of sacred oral tradition) and the Wet’suwet’en kungax (a spiritual song or dance performance) were entered as evidence. The most significant evidence of spiritual connection between the Houses and their territory was a feast hall where the people tell and re-tell their stories and identify their territories.Who won? Appellants (Delgamuukw)Issues – What is the content of aboriginal title? How is it protected by s 35(1)? What is required for its proof?Holding – Factual issues require a new trial.Ratio – **Oral evidence is admissible** (songs, dance, legends to prove proof of aboriginal occupation of these areas prior to European settlement)**.*** The evidence should be considered and weighed – should be considered **favourably**
1. **Admissibility** – Oral evidence is admissible
2. **Weight?** – Didn’t talk about weight to give it

**The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title.*** **Dimensions:**
1. **Inalienability** – incapable of sale except to the Federal Crown
	* Can be surrendered to the Federal Crown by treaty
	* Incapable of sale to third persons
2. **Source – arises from prior occupation of Canada by aboriginal peoples**
	* AT survives British sovereignty
	* AT applies only to land of **central significance** (to their distinctive culture)
3. **Held communally**
	* AT is a collective ownership (members of the community)
	* Cannot be held by individual persons, it is a collective right to land

**The content of aboriginal title can be summarized by two propositions**1. Aboriginal title encompasses the right to **exclusive** use and occupation of the land held pursuant to that title for a **variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which were integral to distinctive aboriginal cultures.**
2. Those protected uses must **not be irreconcilable with the nature of the groups’ attachment to that land.**

The existence of an aboriginal right at common law is sufficient, but not necessary for the recognition and affirmation of that right by s 35(1).Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s 35(1), including site-specific rights to engage in particular activities.Settlement by treaty is encouraged – litigation is extremely costly and slowTest – The proof of aboriginal title1. **Prior occupation** – the land must have been occupied before Crown asserted sovereignty (1846)
	* Both the common law and the aboriginal perspective on land should be taken into account in establishing the proof of occupancy
2. **Continuity** – if descendants’ present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation
	* There is no need to establish an unbroken chain of continuity
3. **Exclusivity** – band had ability to exclude others at sovereignty
	* Proof of exclusivity must rely on the perspective of the common law and the aboriginal perspective
	* Exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands

**Government infringement of AT**: AT is not absolute and the government is entitled to infringe (develop) if justified (aboriginal groups do not have a veto)1. If the government can show **compelling and substantial legislative objectives**
	* The development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.
2. And the infringement is consistent with **special fiduciary relationship the government is in with the bands**
	* In dealings with the bands the governments are supposed to act as a fiduciary
	* Property can be developed but things have to be done first:
		+ Opportunity to participate in the development
		+ Duties of **consultation** and **accommodation** (the government must consult and accommodate the band)
		+ Payment of fair compensation

Reasoning –  |

|  |
| --- |
| Mitchell v MNR (2001)(SCC) |
| Facts – Chief Mitchell, a Mohawk of Akwesasne, crossed the border from the US into Canada with goods purchased in the US. He declared the goods but asserted that he had **aboriginal and treaty rights** that exempted him from paying duty. The customs agents notified Mitchell that he would be charged duty, and permitted him to continue. Mitchell presented everything to the Mohawk community of Tyendinaga (except motor oil, which was taken to a store for resale to members of that community). Mitchell was later served with a Notice of Ascertained Forfeiture. Who won? MNRIssue – Has Chief Mitchell an aboriginal right that precludes the imposition of duty under the *Customs Act* on certain imported goods?Holding – The aboriginal right claimed has not be established—there is insufficient evidence to prove pre-contact Mohawk trading north of the Canada-US boundary and such trade was clearly incidental regardless.Ratio – A court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in.**Admissibility of evidence:**1. The evidence must be **useful** in the sense of tending to prove a fact relevant to the issues of the case
2. The evidence must be **reasonably reliable**; unreliable evidence may hinder the search for the truth more than help it
3. Even useful and reasonably reliable evidence **may be excluded in the discretion of the trial judge** if its probative value is overshadowed by its potential for prejudice

Aboriginal oral histories are admissible as evidence where they are both **useful** and **reasonably reliable**, subject always to the exclusionary discretion of the trial judge.* **Usefulness** – May meet the test on two grounds:
1. They may offer evidence of ancestral practices and their significance that would not otherwise be available
2. Oral histories may provide the aboriginal perspective on the right claimed
* **Reliability** – Does the witness represent a reasonably reliable source of the particular people’s history?
	+ The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness’s ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.
* Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective.

**Weight of evidence:****Equal and due treatment** should be given to evidence presented by aboriginal claimants. * While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they related to the valuing of evidence, are often synonymous with the “general principles of common sense”
1. **Admissibility** is a question of law for the judge
2. **Interpretation or weight** – question of fact (appeal court’s deference to trial judge’s findings of fact; equal and due weight to other evidence)

Test – Establishing an aboriginal right (*Van der Peet*)1. What is the Aboriginal Right Claimed?
* Three factors that should guide the court’s characterization of a claimed aboriginal right:
	1. The nature of the **action which the applicant is claiming was done pursuant to an aboriginal right**
	2. The nature of the **governmental legislation or action alleged to infringe the right** (i.e. the conflict between the claim and the limitation)
	3. **The ancestral traditions and practices relied upon** to establish the right
1. Has the Claimed Aboriginal Right Been Established?
* The claimant is required to prove:
1. The existence of the ancestral practice, custom or tradition advances as **supporting** the claimed right
2. That **this practice**, custom or tradition **was “integral” to his/her pre-contact society** in the sense it **marked it as distinctive**
3. Reasonable continuity between the pre-contact practice and the contemporary claim

Reasoning – 1. What is the aboriginal right claimed?
* The *Van der Peet* factors all suggest **the claim here is properly characterized as the right to bring goods across the St. Lawrence River for the purposes of trade.**
1. Has the claimed aboriginal right been established?
* The aboriginal right claimed has not been established.

Binnie J (concurring) – The trading/mobility right is incompatible with the historical attributes of Canadian sovereignty (territorial integrity/sanctity of borders) and the claimed aboriginal right never came into existence.* There is a s 35(1) constitutional limitation: AR or AT cannot conflict with Canadian sovereignty (cannot conflict with national boundaries of Canada)
* Canadian sovereignty prevails over (extinguishes) AR

Note – Chief Mitchell later took his case to the Inter-American Commission of Human Rights, which stated, “taxes, tariffs and restrictions imposed on imported goods, per se, are reasonable limits that cannot be held to infringe cultural rights… they are not discriminatory.” |

|  |
| --- |
| R v Marshall; R v Bernard  |
| Facts – Bernard, a Mi’kmaq person, cut timber for commercial purposes on Crown lands in New Brunswick without provincial authorization. He was charged under provincial legislation, and in his defence claimed that the provincial authorization was not required because of **treaty rights and Aboriginal title to a watershed area that included the lands where the cut blocks were located**. Marshall, a Mi’kmaq person, cut timber without provincial authorization in Nova Scotia, also for commercial purposes. He claimed entitlement to cut timber on the basis of **Aboriginal title to Nova Scotia**.Who won? CrownIssue – Do the Mi’kmaq people in NS and NB have treaty rights or Aboriginal title entitling them to engage in commercial logging on Crown lands without authorization?Holding – The accused have no established their claim of entitlement to engage in commercial logging on provincial Crown lands either by treaty or by Aboriginal title.Ratio – Two concepts are central to determining the aboriginal rights:1. Both aboriginal and European common law perspectives must be considered.
* The court must (1) examine the **pre-sovereignty aboriginal practice** and (2) **translate that practice into a modern right**. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right. In this way, the process determines the nature and extent of the modern right and reconciles the aboriginal and European perspectives.
	+ Look for equivalent indicia of common law title in aboriginal culture
1. The range of aboriginal rights
* Taking the aboriginal perspective into account does not mean that a particular right, like title to the land, is established. The question is **what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective.**

**To establish title, claimants must prove “exclusive” pre-sovereignty “occupation” of the land by their forebears (*Delgamuukw*).*** **Occupation** – physical occupation
	+ May be established in a variety of ways ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources
* **Exclusive** – the intention and capacity to retain exclusive control
	+ Not negated by occasional acts of trespass or the presence of other aboriginal groups with consent
	+ Shared exclusivity may result in joint title
	+ Non-exclusive occupation may establish AR “short of title”
* Must be sufficiently **regular** and **exclusive** occupation to comport with title at common law
* Seasonal = AR
	+ Seasonal hunting and fishing exercised in a particular area will be AR, not AT
		- They will transfer into the common law right of easement or profit a prendre, for example

Reasoning – 1. Did Mi’kmaq have AT to Crown lands?
* Not proven
1. Could Mi’kmaq carry on commercial logging on land within claim of AT w/o provincial authorization?
* No
 |

|  |
| --- |
| William v British Columbia (2012)(BCCA) |
| Facts – Chief William, a representative of Xeni Gwefin and Tsilhqot’in peoples, sued the federal and provincial government for declarations of Aboriginal tile and Aboriginal rights over areas in the Cariboo-Chilcotin region of BC in response to the Province’s approval of logging in the contested area. William’s case was based on a **territorial theory** of Aboriginal title. He postulated that “occupation” could be established by showing that his group had moved through the territory in various patterns at and around the date of the assertion of sovereignty.Who won? British ColumbiaIssue – Has the claim for title been made out?Holding – The claim to Aboriginal title, as it was advanced, is not sustainable.Ratio – The territorial theory of Aboriginal title is rejected. Aboriginal title can only be demonstrated over smaller tracts of land (like village sites, cultivated fields, and specific trapping or fishing sites) that were occupied by a First Nation intensively and, if not continuously, at least regularly.  **A “territorial” basis for a claim does not form a viable foundation for a title claim.*** AR – territorial basis
* AT – site-specific (AT must be regular and intensive, and specific sites)

Reasoning – This claim is a territorial one—except in respect of a few specific sites, the evidence did not establish regular presence on or intensive occupation of particular tracts of land within the Claim Area. * They lived in various encampments at different times
* They hunted, trapped and fished at various places
* On a seasonal basis, groups would transit over trails covering most regions of the Claim Area (“well-defined network of trails and waterways”)
* There were no permanent village sites
* They did not cultivate or enclose fields
 |

# Chapter VII – Failure to Register