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| *LAW 120* | PROPERTY | |
|  | | Condensed Annotated Notes |

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# SOME DEFINITIONS

**Choses in action**: a right to sue. Exists in physical objects, intellectual property rights, brand names, trademarks and stocks.

**Clausum**: property line.

**Conveyance**/**Conveying:** An instrument in writing which creates/transfers an interest in land.

**Covenants**: agreements to restrict or permit future uses of neighboring pieces of property.

**Fee simple**: “To X and their heirs” – an estate in land without end. Simple means no qualification on the type of heir who could inherit. In earlier days, table of consanguinity classified family members as ascendants, correlates and descendants, as well as proximity of relations.

**Incorporeal interests**: rights to pass over or use of some property, but not ownership.

**In personam claims**: claims against a person.

**In rem claims**: claims against a piece of property.

**Joint Tenancy/Co-ownership:** two people owning property in concert. This carries with it the right of survivorship - if one tenant passes away, that interest is vested in the remaining tenant, automatically, without any documentation or wills.

**Leasehold Interest:** creates a lessee and landlord relationship and a tenancy for a term of years.

**Life Estate Interest**: interest in property for the extent of a person's lifetime.

**Livery of seisin**: an archaic legal conveyancing ceremony, formerly practiced in feudal England and in other countries following English common law, used to convey holdings in property.

**Mandatory injunction**: Require some positive act to correct bad behavior and return state of affairs to a just state.

**Prohibitory injunction:** Prevent some future unjust act from occurring.

**Real Estate:** Land plus permanent human-made additions.

**Real Property**: Real estate plus bundle of legal rights.

**Tenancy in common:** two co-owners, but without the same identity of interest that joint tenancy carries, so each co-owner can dispose of their interest after death as they see fit.

# CHAPTER I: THE LEGAL CONCEPT OF LAND

## AIRSPACE

BC TORRENS SYSTEM

The BC Torrens System is a 2-dimension, surface based system. In Land Title Office, titles are represented as 2-dimensional cadastral overlays. This information is maintained by a Crown corporation: the BC Land Title and Survey Authority.

In 1960s, legislation allowed for the creation of volumetric 3-dimensional airspace parcels above property. Airspace parcels are based on **geodetic** (taking into account the surface of the earth) elevation. These parcels can be registered with the Land Title Office to create an air space plan of fee simple air space ownership above property. There is a geographical plan corresponding to this title in the Land Title Office and available electronically.

### KELSEN v IMPERIAL TOBACCO (1957) UK

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| **FACTS** | Kelsen, the **P,** was the lessee of a tobacconist’s shop from Improved Industrial dwellings consisting of a one-storey building. The **D** owned the building adjacent to Kelsen’s premises and for many years had a sign on the wall of their building that encroached 3 inches into the airspace above Kelsen’s shop. At some point of time this sign was replaced with a new sign that encroached some 8 inches into his airspace. After some differences between the **P** and the **D** company, the **P** gave notice that the sign must be removed. The **D** declined and the **P** sought an injunction for the removal of the sign. |
| **RULING** | Ruling for the **P**. Kelsen's lease included the airspace as well and so the intrusion of the sign into the airspace constituted a trespass, rather than a nuisance. TJ provided a mandatory injunction for the removal of the sign as substituting nominal damages for an injunction would not have adequately compensated **P** for the trespass and an injunction would not have been oppressive to **D**. |
| RATIO | *Cujus est solum ejus est usque ad coelum et ad inferos*: ownership extends up to the heavens and down to the center of the Earth. |

### BERNSTEIN (LORD OF LEIGH) v SKYVIEWS (1978) UK

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| **FACTS** | **D**'sbusiness consisted of flying over properties and taking pictures, then selling these photos back to the property owners. **D** went to Bernstein, the **P,** and tried to sell him a photo of his house. **P** thought this was an invasion of his privacy and asked **D** to destroy the negatives**. D** sent **P** an application to purchase the negatives. **P** argued that he “owned the heavens” above his property – he sued in trespass. |
| **RULING** | Ruling for **D**. TJ found that **D** had flown over **P**'s land for the purpose of photographing his house and done so without **P**'s permission. But technological advances had made the traditional view of *ad coelum* untenable - there must be limits on the property owner's rights to the airspace*.* |
| RATIO | Property rights extend up and down only so far as necessary for the ordinary use and enjoyment of the land and structure upon it. |

Mineral rights are reserved to the Crown. BERNSTEIN principle applies downward as well as upward - ownership rights only extend downwards as necessary for "ordinary use and enjoyment." What qualifies as ordinary use? Geothermal technologies, underground parking, etc.

Land Title Act [1-16]

s 139Airspace constitutes land and lies in grant.

You can buy, sell and give away airspace parcels. You can also have airspace parcels **below ground** or **above water** (eg. Underground parkades, Vancouver Terminal at Canada Place).

s 140Covenant to grant easements or to convey restrictive covenants not implied.

There is no right of *ad coelum ad inferos* with an airspace parcel, nor is there any right to access the parcel - no easements. Consequence: owner of the surface can sell an airspace parcel above the land, yet retain ownership of other airspace parcels above the first parcel.

s 141Subdivision of land into air space parcels.

Today it is common for the land owner to retain ownership of the land and grant airspace parcels above it - enter the Strata Property Act.

s 142Air space parcels in respect of highways.

Government (provincial and municipal, depending on highway ownership) can create airspace parcels above the road. This section determines which government owns which and when.

Strata Property Act [1-18]

"The common law recognizes that an owner may subdivide into smaller parcels not only the surface of his land but also buildings on or the air space above it. Accordingly, it is possible for different owners to own different floors or rooms in a building (IREDALE v LOUDEN [1908] SCC)."

Under a strata title, each owner owns his or her own personal space and half way through the adjoining walls, floor and ceiling (unless determined otherwise by the strata plan), and together with the other owners, jointly owns a proportional share of the common areas (lobbies, elevators, etc.).

s 71**:** requires any "significant change" to receive 3/4 majority of strata council before taking action.

s 72(1)**:** the strata corporation is responsible for repair and maintenance of common property and assets (like elevators or hallways).

s 72(2)**:** the strata corporation can charge a unit owner with repair and maintenance of limited common property that the owner has a right to use (such as parking spaces).

**Bare land strata plan**:

A strata plan on which the boundaries of the strata lots are defined on a horizontal plane by a reference to survey markers and not by reference to the floors, walls or ceilings of a building, or any other strata plan defined by regulation to be a bare land strata plan. In other words, a strata plan on the ground, rather than of airspace parcels within a building. Rural areas are often developed in this way. Each strata lot has a monthly management fee, and has to contribute proportionally to the contingency fund. Vendor-purchaser relationship is complicated - strata financial documents are crucial look inside the governance of the building.

## FIXTURES

**Chattel**

Tangible, moveable property.

**Fixture**

Whatever is affixed to the soil belongs to the soil (*quicquid plantatur solo, solo cedit*). Relevant questions include: how was the chattel attached to the soil? Has it become a fixture? What was the purpose in attaching the chattel?

### STACK v EATON [1902] ONT

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| RATIO | **Test to determine whether chattel has become fixture:**   1. What is the degree of annexation?  * If a chattel rests on its own weight, it is presumed to be personalty. * If a chattel is attached, it is presumed to be a fixture.  1. What is the object or purpose of the annexation?  * Objective Test: Would a reasonable person, familiar with the customs of the time and place, conclude that the parties intended that the item remain a chattel, or become part of the real estate? * Objective test: intention is material only so far as it can be presumed from the degree and object of the annexation. |

### RE DAVIS [1954] ONT HC

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| **FACTS** | Removable bowling lanes at issue. |
| **RULING** | Degree of affixation = slight.  Object/purpose of affixation = not for better use of the building but to enjoy the item (ie. bowling). Therefore, bowling alley was not a fixture, but a chattel. |
| RATIO | Example of **STACK** analysis. |

### LA SALLE RECREATIONS LTD v CANADIAN CAMDEX INVESTMENT LTD [1969] BCCA

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| **FACTS** | Were the carpets in a hotel installed by a tack-less method a chattel or a fixture? |
| **RULING** | Ruling for **D** – carpets were a fixture. While the degree of attachment was not great, the purpose was to improve the realty, not for its own enjoyment. Why? Infer from circumstances. The flooring beneath the carpeting was unfinished plywood - suggesting the carpet was installed to protect the floor. |
| RATIO | That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant. |

**NOTE:** La Salle Recreations failed to register the original conditional sales agreement with Villa Motel in the Land Title Office. Therefore, conditional sales agreement of La Salle was null and void against future *bona fide* purchasers, like White Spot after Villa Motel went bankrupt and was forced to sell the property. La Salle failed in its action because it hadn't registered its conditional sales agreement in the Land Title Office.

**EXAMPLE AGREEMENT RE FIXTURES**

"**INCLUDED ITEMS**: THE PURCHASE PRICE INCLUDES any buildings, improvements, fixtures, appurtenances and attachments thereto and all blinds, awnings, screen doors and windows, curtains and rod, tracks and valances, fixed mirrors, fixed carpeting, electric, plumbing, heating, air conditioning, fixtures and all appurtenances and attachments thereto…

INCLUDING [*all curtains and drapes, dishwasher, clothes washer and dryer,* ***BUYER*** *wants to purchase other chattels, etc.]*

BUT EXCLUDING [***SELLER*** *wants to keep specific fixtures*]

FIVE PRINCIPLES

These principles depend crucially on *circumstances* and *intention*.

1. Personal property not attached to realty = chattels [eg. a bench]
2. Personal property attached to realty = fixtures unless intended to remain fixtures
3. Degree and intention of attachment is necessary to change prior definitions
4. Only obvious intentions (that can be presumed) are material
5. Tenants have right to sever fixtures they install from the soil

The degree of affixation creates a presumption - in other words, it shifts the burden of proof to the other side to demonstrate intention for permanency, in which case it would be a fixture.

### CMIC MORTGAGE INVESTMENT CORP v RODRIGUEZ [2010] BCSC

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| **FACTS** | Rodriguez had two buildings on her property (Cover-Alls), one affixed and the other resting on concrete blocks. Mortgage went into default and property was foreclosed. Rodriguez had agreement with Cover-All company that they would retain title, and so she returned the Cover-All (#2) that was resting on the ground. |
| **RULING** | Held for the **D** - Cover-All #2 was a chattel at all times because under the first principle of STACK v EATON, it was never attached to the realty. Furthermore, Rodriguez intended to keep the Cover-All portable at all times and the material facts support this intention. |
| RATIO | Example of **STACK** analysis. |

## RIPARIAN RIGHTS

**Littoral**: seaside or lakeshore.

**Riparian**: stream and riverbanks.

**Riparian rights**: rights relating to the shore or bank of **any** body of water.

Water Act, 1996

Under the Water Act, to have use of water one must apply for a license from the Crown, except for domestic purposes (household requirements, sanitation, fire prevention, watering of domestic animals, poultry, irrigation of a garden not larger than 1012 m2 next to a home).

Section 42(1) also allows a stream to be diverted for the purposes of extinguishing a fire, but the original channel must be restored after the fire is extinguished.

Section 42(2) allows a person to divert unrecorded water (not subject to a prior water license) for domestic purposes and for prospecting for minerals. The burden lies on the defendant to prove the water is unrecorded in a prosecution. Water licenses function on a "first in time, first in right" basis.

**What is "water"?**

From the common law perspective, water is that water contained within a natural watercourse (streams, rivers, etc.), and can be aboveground or belowground. Water flows naturally and should be allowed thus to flow (p. 1-40 to 1-41).

**What is groundwater?**

"Water percolating through underground strata, which has no certain course and no defined limit, but oozes through the soil in every direction in which the rain penetrates" (CHASEMORE v RICHARDS, 1-52).

"The authorities are clear that you can use groundwater even to the extent that it causes your neighbor's well to go dry, but you cannot contaminate it" (STEADMAN v ERICKSON GOLD MINING CORP, 1-52). This water is now also expropriated by the Crown by the WPA s 3(2).

**Percolating Water**

Water in transit through the water cycle: rainwater, water travelling through the ground. At common law, this was unowned, but it has now been expropriated by the Province.

### JOHNSON v ANDERSON [1937] BCSC

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| **FACTS** | Anderson diverted water unilaterally with dam. Anderson had a license, but was outside the terms of his license in constructing his dam - the dam was unlicensed. Johnson had no license, but he was using the water for domestic purposes. |
| **RULING** | Ruled for the **P**. Johnson's use is unlicensed, but it is a valid use. As such he has rights and is entitled to a remedy until such time the water is recorded and a license is required. Johnson's rights are dependent on the absence of the license. Mandatory injunction requiring the demolition of the dam. Prohibitory injunction preventing construction of a similar dam without a valid license. |
| RATIO | Sufficient vestigial right at common law for domestic use that domestic use of unrecorded water is protected. License will extinguish this right. |

REMAINING WATER RIGHTS

At common law, subject to legislation (federal and provincial), only those property owners with waterfront property had riparian rights. No one owned the water. Water ownership has now been expropriated by the Crown, and it is not necessary to have waterfront property to apply for a water license in the nearby stream.

1. Right of **access** to and from the water across the whole of waterfront. At common law, no one could do anything that blocks the riparian owner's access to the water's edge.
2. Right of **drainage**: self-protection from flooding
3. Right to **reasonable** **use**: now expropriated by Crown: ***Water Act*** s. 2(1), 42; ***Water Protection Act***, s. 3(1). Use requires a license, except as defined by ***Water Act***: s. 42 (1) firefighting; (2) domestic use of *unrecorded* water.

Riparian right to undiminished **flow** (body of water retaining the same volume) has been expropriated by the Crown as well – ***Water Act*** s. 2(1), ***Water Protection Act***, s. 3(1). Without a water license, riparian owner has no right to complain about reduced flow (unless the water is unrecorded and is being used under WA s. 42).

1. Right of **accretion** (boundaries of property grow due to the accumulation of silt and dirt around the body of land): this accumulation must be "gradual and imperceptible" to qualify (SOUTHERN CENTRE). Property line must constitute a "wavy line" rather than a "fixed strip" (SOUTHERN CENTRE). Must update Land Title Office (LTO) plan. There is a risk of erosion.
2. Right of ownership to **waterbed**. Under common law, ownership extended to the midpoint of a riverbed (*ad medium filum*). Under the Land Act, ss.55-56, this right has been expropriated by the Crown. If you affix a dock to the bed, it becomes the property of the Province unless you apply for an easement. Further, everything below water belongs to the Crown. Where you have variable water heights, the intertidal zone shifts ownership.

### SCHILLINGER v H WILLIAMSON BLACKTOP AND LANDSCAPING LTD [1977] BCSC

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| **FACTS** | Schillinger operated a fish hatchery. This is considered a commercial or industrial use of water. He had a license to divert water from Hairsine creek, but mistakenly was diverting water from Barrie's creek, and by doing so, exceeded his license. Upstream was the Williamson Blacktop and Landscaping company which was excavating a gravel pit, thereby creating a great deal of sediment which entered both creeks and killed Schillinger's fish. |
| **RULING** | Ruled for the **D**. Schillinger had no standing in court as his water use was illegal and as such he had no right to complain about pollution of the water. |
| RATIO | If one is in breach of the **Water Act**, they have no basis for a claim. No common law right to unpolluted flow aside from those granted by license. |

### STEADMAN v ERICKSON GOLD MINING CORP [1989] BCCA

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| **FACTS** | Steadman had a home near Cassiar, BC, where there are significant gold deposits nearby. Erickson Gold Mining got a license from the provincial government to develop an ore body in the area. To access the ore deposits, Erickson built a road which caused runoff which came down and filled Steadman's water source, a small spring-fed dugout. Steadman had no license but sued anyway. |
| **RULING** | Ruled for the **P**. Steadman did not have a license, but his use of the groundwater was domestic and his use and enjoyment of the water was protected under s. 42 of the Water Act, and therefore entitled to damages against Erickson for the loss of his dugout. Steadman's right was *fragile* in that it could vitiated if someone else got a license to use that water. |
| RATIO | Unlicensed domestic use can be protected under s. 42 of the **Water Act**. |

### SOUTHERN CENTRE OF THEOSOPHY v SOUTH AUSTRALIA [1982] PC

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| **FACTS** | Lake George evaporates and reappears on a seasonal basis. Southern Centre of Theosophy retained a lease on the banks of Lake George and as the lake evaporated, the Centre claimed the new land, as did the government. Lower courts ruled for the government, Southern Centre of Theosophy appealed. |
| **RULING** | Ruled for the **P**. The boundary along the lake is a fixed boundary that cannot be changed (i.e. **P** has a right to claim land along the border of the lake based on the doctrine of accretion), the doctrine was not excluded by the terms of the lease. |
| RATIO | 1. Accumulation must be "gradual and imperceptible" to be accretion. 2. Property line must constitute a "wavy line" rather than a "fixed strip". 3. The doctrine of accretion applies to inland lakes, but may be excluded by the use of clear words. |

## RIGHT OF SUPPORT

Under common law, there are rights to lateral (horizontal) support and vertical (underneath) support. Neighbors are strictly liable to torts for depriving others of either horizontal or vertical support, though proof of negligent action, trespass or nuisance is required if the land has been improved. Property line extends underground as well - improving land underneath someone else's property qualifies as trespass and the tortfeasor is **strictly liable** (no subjective fault required, defence of due diligence allowed).

On unimproved land, automatic rights to lateral and vertical support. On improved land, weight of buildings causing subsidence is relevant, and negligence must be shown (liability is not strict). Property owners have right of excavation, unless expropriated by statute (eg. Heritage Act).

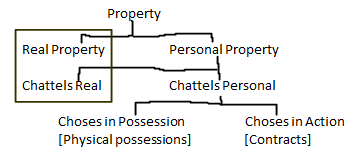
### GILLIES v BORTOLUZZI [1953] MB QB

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| **FACTS** | Bortoluzzi, the **D**, excavated a basement. 3-4 days after **D** was finished, the wall of the building standing on the land next to the excavation collapsed into the excavated basement. The building was leased by Gillies, the **P**, for a grocery store- lost shelves, products, furnishings, fixtures. **P** claims damages. |
| **RULING** | Ruled for the **P**. The collapse of the wall was caused by the negligence of **D**. The excavation extended under the bottom of the wall, and as a result, *both* the vertical and lateral support of the wall was removed, and that removal caused the wall to collapse. |
| RATIO | Land in its natural state is entitled to lateral support. If the land has been improved, must establish that subsidence would have occurred even without the buildings there. |

### RYTTER v SCHMITZ [1974] BCSC

|  |  |
| --- | --- |
| **FACTS** | **P** and **D** own adjacent buildings. In the process of excavating on his lot, D dug along the property line between the two lots. Removal of the soil caused a subsidence by loss of lateral support for **P**’s property, allowing the subsoil to fall away and so leaving no support under the western side of **P**’s building. As a result, a chimney and a wall collapsed. **P** alleges trespass and claims damages. |
| **RULING** | Ruled for the **P**. **P** was denied lateral and vertical support to which he was entitled for both land and building. There was deliberate trespass and the excavation went well over **P**’s property. |
| RATIO | Right to vertical support is limited to land in its natural state, but can be extended to vertical support for a building by applying the rules of trespass rather than the but-for-the-buildings subsidence test. |

# CHAPTER II: GENERAL PRINCIPLES OF LAND LAW



The bulk of wealth in North America is contained in land. Ownership of land is organized around legal title. Each separate unit of land is tracked separately based on its location. Land titles are maintained in a register by the Provincial government (Torrens system) in Canada (except Quebec and PEI). No one owns land, only an interest in land. The Crown (Prov. Govt.) owns all property. Highest interest in land is known as the fee simple/freehold.

**Crown Grants**: creation of private ownership; each **registered** transfer of the fee simple.

**Fee simple**: ownership for an indefinite period.

Every parcel has a fee simple holder, otherwise the title comes to an end and the property returns to the Crown. This is called **escheat**: the right of the lord to claim the land of a tenant who died without anyone to succeed to his interest or who committed a felony.

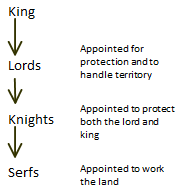
**Fee Tail**: ownership restricted to the original owner and their descendants. This is longer possible in BC (PLA, s 10) and will be regarded as a fee simple.

**Life Estate**: ownership restricted to the owner’s lifespan.

**Estate Pur Autre Vie**: ownership restricted to the lifespan of some other person.

**Leasehold Estate**: time in the land of a fixed duration, and in respect of which a tenant usually pays rent to the land lord.

## PROPERTY RIGHTS IN THE FEUDAL SYSTEM



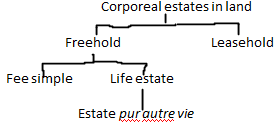
The statute of ***Quia Emptores, 1290*** [p 2-6] (*because the buyers*) abolished **subinfeudation** (tenants creating sub-tenures), and also made estates in land transferable.

**Tenure**: a holder of an estate or interest in land.

The Tenures Abolition Act, 1660 abolished incidents of tenure and replaced it with an excise tax. Doctrine of tenure continued (estates in land are owned by individuals from the Crown). All land is held of the Crown, directly or indirectly. All estates and interests in land are transferable.

## CORPOREAL/INCORPOREAL INTERESTS & THE DOCTRINE OF ESTATES

**Corporeal interest**: The right of possession - exclusive occupation of the property for some period of time. (eg. Fee simple, leasehold, life estate). Can be an **immediate** or **future** interest.



Property bought on campus is not owned via fee simple, but fixed term leasehold. Unlike a fee simple, leasehold interests tend to depreciate as the expiration of the lease approaches. Leasehold condominiums don't show up in Land Title Office - drawback of Torrens system.

**Freehold**: indefinite term of possession.

**Leasehold**: fixed term of possession.

1. **Fee Simple:** An estate in land without end. Simple means no qualification on the type of heir who could inherit. In earlier days, table of consanguinity classified family members as ascendants, correlates and descendants, as well as proximity of relations.

**Fee**: capable of inheritance (will or intestacy), **simple**: capable of inheritance by anyone.

1. **Fee Tail**: An estate in land which is limited to the lineal descendants of the original owner. Obsolete as it has been abolished. A fee tail male is the basis of Jane Austen's *Pride and Prejudice*.
2. **Life Estate**: An estate in land limited to the extent of the life of the estate-holder. Estate-holder cannot dispose of property by will as a life estate is not inheritable. Upon death, possession reverts to original grantor of life estate.

"To A for life, remainder to B"

A = life tenant

B = remainderman

* A has right to income, possession during A's lifetime.
* B has right to corpus or capital on A's death in fee simple.

1. **Estate *Pur Autre Vie***: An estate in land limited to the extent of the life of someone **other** than the estate-holder.

  "To A for B's life"

Duration = as long as B lives

If A dies before B, then a life estate continues in B's name

If B dies before A, then estate reverts to original grantor

1. **Leasehold Estates**: Right to exclusive possession for a **fixed term**, in exchange for rent. Originally considered a contractual relationship, evolved to be considered an estate in land.
2. **Future Interests**: "To A for life, and then to B in fee simple." A has a life estate, while the remainderman, B, has a *future interest*.

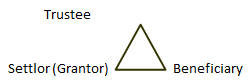
* Vested in interest
* Certain to become possessory
* Future possession

### RE FRASER [1974] BCCA

|  |  |
| --- | --- |
| **FACTS** | Testator died and left his life estate (which consisted of realty and personalty) to his wife and wished to give the remainder to a Christian Society after she died. **Does the widow have the right to encroach on the property?** |
| **RULING** | Widow has a **fiduciary duty** to preserve the personalty in its entirety for the ultimate recipient or remainder (in this case, the Christian Society). The recipient of a life interest can enjoy revenue derived from the **corpus** (the amount of property left when an individual dies) and no more unless the testator expressly or impliedly indicated an intention that recipient have power to encroach – there is no such intention in the testator’s will in this case. |
| RATIO | You can’t piss away the life estate if the remainder is left to a third party – there is a fiduciary obligation to preserve the property for its eventual owner. |

**Incorporeal interest**: easement or restrictive covenant - access for a purpose or limit on use but not possession. (eg. Oil and gas lease, mortgages, easements, rights-of-way).

## TRUSTS

The settlor makes a transfer of the legal title of property to the trustee with a requirement for the trustee to act in a fiduciary manner to the beneficiary. The trustee has the legal title while the beneficiary has the equitable interest. Trust can be created *inter vivos* or on testamentary basis. Trusts are descended from uses.

**Example:**

"To B and his heirs to use of C and his heirs"

B is legal owner of the estate in fee simple – C has no legal interest. This was the position taken by the Courts of Law – the Courts of Chancery would enforce C's interests. While B is the legal owner, B owes fiduciary duties enforceable in equity to C.

The ***Statute of Uses 1535*** attempted to "execute the use", by shifting the legal title from B to C. This statute did not accomplish its goal as lawyers created uses upon uses (SAMBACH v DALSTON), and only the first use was executed.

The equitable interest is inferior to the legal title in one crucial respect: it is vulnerable to the *bona fide* purchaser for value. "*Nemo dat quod non habet*" : no one may give that which one does not have. Thus even if a transferor and transferee both honestly but mistakenly thought that the transferor had title, a transfer by the transferor would not confer any interest on the transferee. Good faith purchase of stolen or lost goods doesn't matter - legal title stays with the original owner.

What happens when the trustee, in breach of trust, sells the property to a third party? Being the legal owner, the trustee can do so. The Court applied **the test of "good conscience":**

1. 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.
2. If the third party did not know of the trust or did not know the transfer was in breach of the trust, their "conscience was clear" and the beneficiary could not enforce the trust.

Statutory notice of trust relationship in title transfer registration would enable the beneficiary to enforce the trust as the third party purchaser would be unable to claim ignorance.

1. **Bona fide/good faith** [honest]
2. **Purchaser** of legal estate
3. **For value** [consideration]
4. **Without notice** [without actual knowledge or **constructive notice**]
5. **Constructive notice** [deemed or presumed knowledge of the third party purchaser]
6. **Equitable** [put upon inquiry and reasonable person test]
7. **Statutory** [based on LTA registration]

Equitable interest is *in personam* (toward a particular person), not *in rem* (towards a thing).

## FREEDOM OF ALIENATION

Policy of the common law. Freedom of disposition means that the holder of a fee simple or other interest [except life tenant or joint tenant] has the right to transfer to anyone and the right to set terms of transfer. There are limits on restrictions that can be placed on terms of transfer.

**RESTRAINTS ON ALIENATION**

1. **Aboriginal title**: inalienable except to the Federal Crown.
2. **Transfer inter vivos:** "To A, but if A ever tries to sell the land, then to B" is void because it is contradictory – it attempts to restrict the fee simple. Fee simple prevails and this transfer would be found repugnant, and so the restraint can be ignored.
3. ***Land (Wife Protection) Act*** (B.C.) -> ***Family Relations Act*** (B.C.)

Spouse can register a claim of spousal interest in property owned by the other spouse.

1. **Freedom of Testamentary Disposition**

Restrictions in BC on disinheriting spouses and heirs.

## THE RELEVANCE OF ENGLISH LAW

BC was a colony. All colonies received English law (both case law and statutes) as of a certain data (November 19, 1858, in BC's case). Only civil law was received, due to the federal government's jurisdiction over criminal matters.

***Law and Equity Act, s. 2***

Received English Law into BC, as of November 19, 1858, "so far as they are not from local circumstances inapplicable", in which case "laws must be held to be modified and altered".

**RELEVANT RECEIVED LAWS**

1. ***Chancery Amendment Act, 1858, s. 2*** ("Lord Cairns Act")

Created equitable damages.

1. ***Statute of Quia Emptores, 1290***

Allowed the sale and purchase of land.

1. ***Tenures Abolition Act, 1660***

Shifted away from feudalism.

1. ***Statute of Uses, 1535***

Executed the first use.

All of these were received into BC law in 1858 and form the foundation of our property law. The BC ***Land Title Act*** adopted the Torrens system in 1870s.

# CHAPTER IV: ACQUISITIONS OF INTERESTS IN LAND

There are 5 ways to acquire an interest in land:

1. Crown Grant
2. *Inter vivos* transfers: sales
3. *Inter vivos* transfers: gifts
4. Will or intestacy
5. Proprietary estoppels

Legal capacity or incapacity is crucial. Everyone has capacity to own and transfer land, except:

* + **Minors < 19 years**, defined by ***Age of Majority Act*** (BC)
* **Mental disability:** require substitute decision-maker (Public Guardian and Trustee)

The ***Evidence Act*** determines **competency as a witness**. Witnesses have to be at least 14 years at time of testifying to be competent.

1. **Possible to have a statutory or court appointment after the loss of mental capacity**

Under the ***Patients Property Act*** - "committeeship order"

"committee of the person" and/or "committee of the estate"

1. **Power of Attorney**

In advance of incapacity, appoint someone to act on their behalf as their agent. Don't have to appoint an actual lawyer. Unless expressly noted otherwise, these powers will lapse when the principal has lost mental capacity. "Enduring power of attorney" endures after principal has lost mental capacity – governed by the ***Power of Attorney Act.***

1. **Representation agreement / "living will"**

Allows the determination of personal medical or health care in advance of incapacity. Doesn't cover representation with regard to conveyancing (ie. Transfer of property). Governed by the ***Representation Agreement Act***, 2000.

## CROWN GRANTS

**Crown grants** is a title to land granted by the Ministry of Forests, Lands and Natural Resources Operations. Statute which governs Crown land is the ***Land Act.*** 94% of BC is Crown land, 1% is federal crown land (first nations reserves), and 5% is in private ownership.

***Land Act, s 50*** dictates the rights granted under a Crown Grant: "Excepts and reserves the following interests, rights, privileges and titles..." The Crown reserves a **right of resumption** (use of up to 5% to build roads and other public works, without compensation), according to s 50(1)(a)(i)**.** Mineral rights, water rights and resource rights (geothermal, petrochemical, etc.) are also reserved by the Crown. *Essentially crown grant gives you surface rights only.*

Indefeasible title is conclusive against all (LTA, ss 23(2)(a), (e) and (f), 6-2).

Bringing land under the Torrens system requires transfer by Crown Grant, Land Act, s 54.

## INTER VIVOS TRANSFERS: SALES

A successful sale requires **a contract of purchase and sale** between the vendor and the purchaser. This contract must be **written** and **signed** by the party to be charged or by that party's agentaccording to the Law and Equity Act, s. 59(3)(a). Leases under 3 years in duration are not bound by this requirement.

Before 1677, people would make false claims that they had an agreement to purchase land and would trick the Courts into granting them title. In 1677, English Parliament passed the ***Statute of Frauds*** to avoid this issue.

It is also possible to have an oral contract that is enforceable. "Equity will not allow a statute to be used as an instrument of fraud" - vendors attempted to use the Statute of Frauds to defraud purchasers. If specific performance is requested and performed, then an oral contract will be enforced. The Statute of Frauds was replaced by s. 59 of the Law and Equity Act in 1985.

**Section 59(3)(b), Part Performance:** If vendor has allowed an act of the party alleging the contract that indicates the existence of said contract, that is enforceable.

**Section 59(3)(c), Proprietary Estoppel:** If party alleging the contract has reasonably relied upon it and so changed their position that not enforcing the contract would create an inequitable result, then the contract will be enforced.

If the Court can't order the vendor to sell the property (perhaps because it is already sold to a *bona fide* purchaser), then the Court can order restitution and/or reliance damages.

**Completion of the contract**

The closing is the completion of the contract [p.4-51, 4-55 to 57]. Vendor is obliged to transfer clear title to purchaser. Purchaser is obliged to provide payment of balance. Vendor is saying there are no unregistered interests – in other words, nothing will affect this title.

**Registration of transfer in LTO**

If there is a mortgage, that will be registered in Appendix D [p. 4-55 to 57].

Other requirements than just that the transfer of title is written and signed by the parties to the contract – other rules of contracts hold.The party to be charged is the reneger, and the party who is trying to enforce the contract is the one who has the burden to prove the existence of a valid contract.

Valid contract requires 3 Ps : who are the parties, what is the property and what is the price?

"Equity will not allow a statute to be used as an instrument of fraud" - this means the Court of Chancery would not allow the Statute of Frauds to be used as a means of defrauding others in turn. Courts of Equity would enforce promises that are not in writing/signed if it would be inequitable not to do so. Remedy would be an order for specific performance (performance of the contract).

**EXCEPTIONS TO REQUIREMENTS FOR WRITTEN & SIGNED TRANSFERS**

**Sections 59(3)(b), (4):** Oral contract + part performance is sufficient to prove the contract without it being signed and in writing.

**Sections 59(3)(b):**Acquiescence (proprietary estoppel) can also be sufficient.

**Section 59(3)(c):** Someone relies on promise to sell, and reneging would result in inequity (estoppel) - also sufficient.[p. 4-41 to 42]

**Section 59(5):** If specific performance is not possible (eg. Property has been sold to another bona fide purchaser for value), restitution and/or reliance damages will substitute.

**OTHER PROVISIONS IN S. 59**

**Section 59(2):** Provisions don't apply to leases < 3 years - they don't have to be in writing, can be oral.

s. 59(1) Testamentary dispositions

s. 59(6) Guarantee and indemnity (promise - another's debt or obligation)

s. 29 of the Interpretation Act: **"land"** includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning; leases, mortgages, easements, rights of way

What is writing? Can it be in electronic form? This was at issue inDRUET v GIROUARD [2012] NBCA: exchange of emails between parties **did not** make an enforceable agreement of purchase and sale.In theory, it is possible to have a transfer via email, though unlikely - need to prove intention to create legal relations. The facts of this case (lack of inspection, for instance) suggested a lack of intention to create legal relations.

**THE PROCESS OF CONVEYANCING**

1. Negotiation
2. Offer: the purchaser makes a written and signed offer according to the Law & Equity Act, s. 59(3)(a): parties, property, price. The **contract of purchase and sale** (Appendix B, p. 4-50) is binding on acceptance. Deposit (earnest money) is offered, normally 5-10% of the price. Money is lost if purchaser can't come through with the balance.
3. Acceptance or counter-offer
4. Terms and Conditions: "Subject-to" clauses -make the contract conditional based on building inspections, satisfactory financing, etc. The CBA recommends to "include a statement saying the offer is subject to your lawyer's approval” so that the lawyer can conduct a title search, research outstanding property taxes, zoning, etc.
5. Remove the "subject-to" clauses: this makes the contract is binding.
6. Completion date (closing): the vendor transfers clear title, while the purchaser transfers balance of price (cash or mortgage). The purchaser will need proof that the vendor's mortgage has been cleared on the land title prior to closing. This is a recent change due to Martin Wirick’s conveyancing fraud scheme – before the purchaser only required an undertaking from the vendor to pay off the mortgage. This change has shifted risk from the banks to the purchaser. The purchaser also has to get their own insurance coverage.
7. Application to register in the Land Title Office
8. Registration
9. Post-registration: state of title is now reflected in the LTO. After the Wirick debacle, the state of title certificate must be produced.

**THE TRANSFER - FORMS**

Writing and sealing used to be required by the common law – livery of seisin. Writing and signing are still required, but the ***Property Law Act, ss. 15-16*** changed the common law so that a transfer will be valid without seal. Corporations are marked by "c/s". **Instruments in the Torrens system**: documents or digital communications.

***LTA, s. 168.5***

Electronic filing is required.

**Registrable Form**: Prescribed/approved standard forms necessary for registration in the LTO.

Form A, Appendix C, p. 4-55

Form B, Appendix D, p. 4-56

Vendor's lawyer clears title, except as agreed otherwise, then receives funds. **Execution or acceptance**: removal of "subject-to's". The purchaser's lawyer prepares all documentation, and the purchaser gets the funds and insurance. Risk passes to purchaser on midnight of the date of closing, and the purchaser applies for transfer of title registration in the LTO.

**THE TRANSFER - WHEN IS IT OPERATIVE?**

* + If it isn't on the register, it doesn't matter. If it's on the register, it becomes operative. ***LTA, s. 20(1)***
  + Legal title doesn't pass at execution, but upon registration. ***LTA, s. 22***

The courts didn't like these rules, as it hurt unregistered interests. Exceptions to the above:

* What about a person who signs a document and the other party doesn't register it? This is enforceable according to ***s. 20(1)***. This is known as the *in personam* exception: "Except as against the person making it.”
* Distinction between enforceable between original parties and enforceable between third parties. What if the property is sold again? If it's unregistered, it is only enforceable against the original vendor/purchaser, not against third parties.
* ***s. 20(2):*** Person with the unregistered instrument is entitled to apply for registration, unless the instrument is refers to an interest that is unregistrable.
* ***s. 20(3): s. 20(1)*** doesn't apply to leases not exceeding 3 years if there is actual occupation. In other words, if you bought property and granny was in the attic, can't kick her out if these conditions are met.

Agreement of purchase and sale creates a title in equity for the purchaser (even though they are an unregistered interest), but legal title remains with the vendor.

## INTER VIVOS TRANSFERS: GIFTS

Under the Torrens system, can Equity apply this same principle to gifts? The seal imports consideration, thereby making a gratuitous promise binding without consideration. But according to the Torrens system, a completed gift requires the following:

* Intention to donate
* Acceptance of the gift (onerous gifts can be denied)
* Sufficient act of delivery to the donee, and donor delivers a registrable transfer (***PLA, ss. 4, 5, 7***)
* Registration in LTO of title to donee with a written Form A provided by the donor

If donor gave donee all the documents necessary for registration (without registering), this would be sufficient to be enforceable under equity.

Even if the donor dies before the transfer is complete (before registration), the Court of Equity can perfect the gift and order registration. When a gift is completed, it is not revocable. Strong evidence of intention can substitute for completion of a gift, but an incomplete gift can also be revoked.

 Two maxims are in conflict here:

"Equity looks to the intent, not to the form” - see ROSS v ROSS

"Equity will not assist a volunteer" – see MACLEOD v MONTGOMERY

Under a deeds system, an *inter vivos* gift of land required "delivery" of the deed. Delivery is the passing of possession and control. According to equity, words of "delivery" showing donor's intention of gift to take immediate effect, even if not communicated to donee.

**PRE-TORRENS**

### ROSS v ROSS (1977) NS SC

|  |  |
| --- | --- |
| **FACTS** | Charlotte Lynds signed a deed of conveyance of her property to her grandson. Opposite her signature was: "Signed, sealed and delivered in the presence of Susan L Legge." Ms. Lynds did not tell her grandson that the transaction had occurred, and did not physically deliver the deed either. Donald argued that the property belonged to him, while the estate argued that the gift was incomplete. |
| **RULING** | Ruling for the **P**, Donald Ross. The Court can substitute words for actions - delivery was stated on the document, and there was no doubt as to the intention of Ms. Lynds. As such the Court ruled there was sufficient delivery. Interpreted Ms. Lynds' retention of the deed as the reservation of a life estate in the property. |
| RATIO | Words of "delivery" showing donor's intention of gift to take immediate effect, even if not communicated to donee. |

**Q:** What if there are two equitable interests in conflict?

**A:** The one that is first in time is first in right.

**Q:** What if X made an unregistered gift to Y, but then left the same property to Z in his will?

**A:** A will takes effect at death - one cannot give what one doesn't have, so Z is out of luck.

### ZWICKER v DOREY [1975] NS SC

|  |  |
| --- | --- |
| **FACTS** | Mr. Zwicker was married four times. During his third marriage, he conveyed his property to his step-son, Mr. Dorey, the **D**. The term of the deed said it was not to be recorded until after his death, and was not recorded until he died. During Mr. Zwicker's lifetime, he purported to convey the same property a number of times, finally to himself and his fourth wife in joint tenancy. |
| **RULING** | Ruling for the **P**. Provision that deed was not to be recorded until after death means the conveyance functioned as a testamentary intention (like a will) - can only transfer what he possessed on death. As such, Mr. Zwicker had no interest in the property to transfer to Mr. Dorey - his title extinguished upon death. |
| RATIO | Transfer of property upon death must be done in accordance with the Wills Act, otherwise it is ineffective. |

**EXCEPTION TO THIS RULE**

***Donatio mortis causa***: a gift made in contemplation of death, conditional on the donor's death.Requires an intention to make gift in contemplation of the donor's death and sufficient delivery to done. The gift takes effect only on donor's death, reverts on donor's recovery.

*In conclusion, in pre-torrens common law:*

* Delivery was required to complete transfer.
* When intention was clear, equity will attempt to fulfill that intention. (ROSS)
* When intention was muddled, first in time is first in right.
* Testamentary intentions must be in the form of a will. (ZWICKER)

**IN TORRENS**

**Q:** Equity overcomes lack of delivery in the deeds system - can this apply in the Torrens system vis a vis registration?

### MACLEOD v MONTGOMERY [1980] AB CA

|  |  |
| --- | --- |
| **FACTS** | Hattie Montgomery had life estate, gave remainder interest to Donna MacLeod. Montgomery executed transfer form and delivered it to Donna MacLeod. MacLeod took it to LTO, where they said they could not register her interest because Montgomery had taken the duplicate certificate of title from the LTO. Montgomery said she would return the duplicate certificate, but never did and then she died. Donna (caveator) filed a caveat (an unregistered interest) at the LTO - notice of claim to be registered. |
| **RULING** | Ruling for the **D**. "To complete a gift effectively, the donor is obliged to do what can be done." Conduct must indicate intention to complete a gift. Hattie Montgomery's failure to return the duplicate certificate to the LTO suggests there was no intention to complete the gift, so the Court will not carry it out. |
| RATIO | Equity will only complete a gift when it is satisfied that the donor has done everything to indicate there was intention to complete the gift. |

**Notice of claim to be registered**: indicates disputed title in LTO**.** While caveat is in existence, title is frozen according to LTA, s. 288. Caveat lasts 2 months unless a Certificate of Pending Litigation (CPL) is filed - LTA, s. 293.

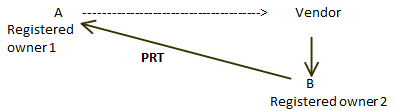
*In conclusion, in torrens common law:*

* Transfer requires registration in LTO.
* For Court to override this requirement, the donor must intend to complete the gift. Court will look to donor's conduct to indicate this intention. (MACLEOD)

**Q:** Could estoppel apply?

**A:** If donor has created a false expectation in donee of a transfer which they have in turn relied upon, then donor may be estopped from denying the transfer if it would cause a detriment (proprietary estoppel/acquiescence).

**Presumption of Resulting Trust (PRT)**

When one purchaser buys property and then gives it to someone else, there is a presumption that the donor held the property in trust for the donee. This is rebuttable by evidence. Where there is no expression of intention, PRT applies. While the trustee holds legal title, the beneficial interest returns or "results back" to the beneficiary.

PRT applies here: why is A giving property to strangers? Presumption is that B holds the property in trust for A. "Equity assumes bargains, not gifts."

How to rebut PRT? Evidence of A's intention to make a gift to B. Burden of proof is on B that A intended gift making B the absolute owner. Don't have to use any particular words or documentation – just need some proof, according to PLA s. 19(3).

**Presumption of Advancement (RPA)**

Converse presumption of a gift when transfers are between spouses or between parent and child. Again, is rebuttable, given sufficient evidence.

## WILLS AND TESTAMENTARY DOCUMENTS

* Will speaks at death (not date of execution), and so has no effect prior to death.
* Changes are made by **codicil** (change to original document).
* Wills are revocable during the testator's lifetime, either by destroying the document or making a new one.
* The last will prevails (thus the relevance of "last will and testament").
* The executor can charge up to 5% of the estate for administration.
* Will is automatically revoked on divorce.

On individual's death...

|  |  |
| --- | --- |
| **Testate (with a will)** | **Intestate (without a will)** |
| Choice of executor | Administrator |
| Choice of guardian for children | Statutory system of distribution to heirs-at-law (***Estate Administration Act***) |
| Choice of beneficiaries | Relationships (next-of-kin) |
| Bequests (gifts of personal property) | Statutory shares (1/3 to the spouse, 2/3 to the children) |
| Legacies (gifts of cash) |  |
| Trusts |  |
| Charities |  |
| Devices (gifts of land) |  |

EXAMPLE OF WILL

This will, dated Wednesday 10 May 2009, is *made by me*, John Smith of 3 Brown Street, Vancouver, BC, truck driver.

I revoke all former testamentary dispositions. (r**evocation clause**)

I appoint as my executor my son, Peter Smith of 4 Black Street, Jonesville. (**optional appointment of executor**)

I give the whole of my estate to my wife, Grace Smith. (**dispositive clause**)

Signed by the testator in our joint presence and attested by us in the presence of him and of each other. (**attestation clause**)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(**testator's signature**)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(**two witnesses sign here**)

If the will doesn't cover all assets in the estate, this is **partial intestacy**.

If the will gives assets to a predeceased person, this is will initiate intestacy as well - advanced wills often bequeath in the alternative.

Wills Act Requirements:

**s. 3**: must be in writing

**s. 4 (a):** testator or amanuensis (someone who signs on behalf of testator) signs at the end

**(b):** 2 witnesses present at the same time

**(c):** 2 witnesses sign in the presence of testator and each other. Beneficiaries should not witness the will.

Property given in the will does not pass directly to the beneficiary - there is a process of administration. Personal representatives (executor & administrator) must find the will, gather the assets of the deceased, pay any remaining debts, **then** can distribute the remaining assets to the beneficiaries. During this intermediate state of **transmission**, the personal representative is the legal owner of the property. In BC, they can hold the property in trust for the beneficiary (optional).

**Executor's year**

The executor is given one year from the death of the testator to administer the estate, according to the Estate Administration Act, s. 79(4).

EAA, s. 77(1)

In situations of **joint tenancy** (legal fiction of a single owner - ownership is split equally between real people), property passes by survivorship to remaining tenant, not via testacy. This property is not available for payment of the deceased's debts and is unavailable to their creditors.

In situations of **tenants in common** (separate ownership of variable shares of property with shared possession), deceased's share of property passes under their will or on intestacy, **not** by survivorship. If two names are on title, it's assumed to be a relationship of tenants in common unless explicitly described as a joint tenancy.

If after administration, beneficiaries of deceased tenant in common do not want to share possession, they have to partition the property (sell it and split up the return).

## PROPRIETARY ESTOPPEL

Following acquiescence (apparent assent) or encouragement, beneficiary has an equitable interest in someone else's property. Proprietary estoppel can function as a cause of action.

**Cause of action**: set of facts sufficient to create a right to sue.

### ZELMER v VICTOR PROJECTS LTD [1997] BCCA

|  |  |
| --- | --- |
| **FACTS** | Adjoining landowners, the **P**,wished to develop their lands, required a reservoir at higher elevation. Russell Bennett (related to Bennett premiers), the **D**,had suitable land nearby. Had a meeting where **D** was amenable, as well as a phone call. **D** sees reservoir, argues it is in wrong location and refuses to sign necessary documents**. P** sued to save the reservoir.TJ granted the **P** an easement for the reservoir under proprietary estoppel. |
| **RULING** | Appeal dismissed - ruling for **P.** By his conduct, **D** was found to have encouraged the **P** to develop the reservoir on his property. TJ's findings of fact were not to be disturbed in the absence of an error of law, and the equitable remedy of an easement should stand. **P** had lots of witnesses and a paper trail of **D**'s acquiescence. |
| RATIO | 1. Proprietary estoppel can be used as a sword (a cause of action). 2. Remedy is minimum equitable interest necessary to make good on the claimant's belief. 3. Equity acts *in personam* - court order for equitable easement against the D. |

Can **P** protect this easement in order for it to transfer if they sold their property? Yes, if they register the easement in the LTO with the judgment ordering the equitable remedy. Easement will then be registered on the **D**'s title as well, and it will be enforceable no matter who buys either property. *This is why you have to search the title before purchasing a property - never know what restrictive covenants or easements are on the title.*

Having that easement probably knocked a quarter off the value of the **D**'s land. The burden in easement law (not to obstruct access to the pipes) lies on the owner of **D**'s land. **D** could have protected himself if he had gotten a formal easement in writing, signed and registered on titles, as this would have avoided confusion over the location.

Law and Equity Act, **s. 59:** Requirements for the application of proprietary estoppel

|  |  |
| --- | --- |
| **Claimant** | **Registered Owner** |
| Reasonable belief of entitlement | Encouragement or acquiescence |
| Reliance or detriment | Denial or refusal |

Court must make judgment that the conduct of the RO is unconscionable or inequitable.

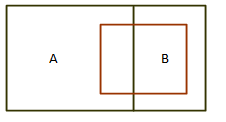
**Equitable remedy**: equitable interest in the RO's property, minimum necessary to make good on the belief. Often a lesser interest like an equitable easement, but can go as high as the fee simple.

**5 probanda of** WILLMOTT v BARBER(p. 4-46)

1. **P** must have made mistake as to his legal rights.
2. **P** must have expended some money or done some act (detriment) based on mistaken belief (reliance).
3. **D** must know of his own right which is inconsistent with the right claimed by **P** (knowledge)
4. **D** must know of the **P**'s mistake (knowledge)
5. **D** must have encouraged or acquiesced to the **P**'s reliance/detriment.

Property Law Act,**s 36**

Remedy when B's building or fence is built over the property line due to equitable fraud on the part of A - Court can move the property line, with a forced purchase from A to B.



Equitable remedies can go all the way up to the fee simple.

# CHAPTER V: REGISTRATION OF TITLE

## HISTORICAL OVERVIEW

3 SYSTEMS

1. Deeds (common law conveyancing)

* Title comes from the vendor - problem of *nemo dat quod non habet* (no one gives what they don't have).

1. Registration of Deeds (recording system) - statutory

* Recording in transactions registry - no vetting of registration (ZWICKER v DOREY)

1. Title by Registration (Torrens system)

* Title comes from the Crown and is guaranteed to be a valid title. LTO vets registration.
* Advantages:

1. Security of tenure
2. More efficient transfers, searching of title
3. Land as collateral security for credit - mortgages
4. Search only the register - don't have to do historical searches
5. Simple transfer forms, lends itself to digitization

TORRENS SYSTEM INTRODUCTION INTO BC

Land Title Act- Torrens system in BC

Property Law Act - changes to substantive law, legal and equitable interests, fee tail (2-8)

Land Act - Provincial Crown land

Strata Property Act – condominiums

## ADMINISTRATIVE STRUCTURE

* 7 land title districts: Vancouver, Victoria, New Westminster, Prince Rupert, Prince George, Kamloops, Nelson
* *Land Title and Survey Authority Act (2004)*
* 3 Land Title Offices (New Westminster, Victoria, Kamloops)
* 3 Registrars of Land Titles

Each parcel has...

1. Certificate of indefeasible title - legal fee simple (5-14)
2. Charges - all other estates and interests in land (5-17)

WHAT CAN BE REGISTERED?

1. Legal estates
2. Equitable interests

What about people who can't get on the register? Non-common law interests can also be registered on the title.

COMMON LAW CHARGES

1. **Legal estates**
2. **Equitable interests:** equitable easements, proprietary estoppel, restrictive covenants
3. **Trusts:** LTA, s 180 allows beneficial interests to be registered (unique to BC). This allows the beneficiaries to be protected from a breach of trust by the trustee by the use of the phrase "in trust" on the title. ***However, the terms of the trust are not on the title to prevent cluttering up the title.*** Beneficiaries must face the fact that the trust is now a public document - trusts can't be secret.

**Settlor/testator** creates the trust, then drops out as a general rule.

**Trustee** holds the legal title as registered owner of the fee simple, owing fiduciary duties to the beneficiary.

**Beneficiary** has equitable interest in the property, can enforce fiduciary duties against the trustee.

Registration of beneficial interests means bona fide purchaser for value is deemed to have notice of any trust - terms of the trust are deemed to be known by the world at large [R v KESSLER].

NON-COMMON LAW CHARGES

What about people who can't get on the register? **Non-common law interests** can also be registered on the title. The Torrens system initially attempted to abolish unregistered interests, but the courts found this to be inequitable and equity interfered.

1. **Caveats**

Charge/warning: claim of unregistered interest, expires after 60 days without a court order*. Not an interest in property*.Most common non-common law interest. **Caveator**: the person filing the caveat.

1. **(Legal) Mortgage (p. 5-6)**

**Mortgagor** (borrower): registered owner of the property

**Mortgagee** (lender): registered holder of a charge. "Secured creditor". Has right of foreclosure.

A mortgage is a loan offered by a mortgagee to a mortgagor If the mortgagor defaults, the mortgagee can foreclose (take title from) the borrower and recover what they can by selling the property on the open market. In BC, if this is insufficient to settle the loan, then there can be a personal judgment against the mortgagor. Law of equity does not allow immediate foreclosure of mortgagor's interest - mortgagee has to wait 6 months before the mortgage can be foreclosed.

A **legal mortgage** is the typical arrangement made by a formal, written document according to Form B (in appendix). Banks insist that mortgagees buy title insurance to protect from any defects in the title, as they do not hold the indefeasible title.

**Equitable mortgages** are informal arrangements between lender and borrower and **cannot be registered**. Generally arranged by the borrower as giving duplicate title and completed transfer to the lender and then telling them to file the transfer with LTO if they default on the loan. Deposit of duplicate certificate of title serves to prevent fraudulent transfer or mortgage and can provide security for a loan. If the duplicate certificate is lost, the property cannot be sold or dealt with, and a new duplicate must be created by the LTO (pricy!).

1. **Certificates of pending litigation (CPL) / Lis Pendens**

Charge - notice of litigation affecting the land [5-22]. Not an interest in property. Prevents registration of subsequent interests - only one can be on the title at any time.

1. **Execution of Monetary Judgments**

At common law, non-payers of debts could be thrown into debtor's prison.

Today, unsecured creditors can get a court order to pay a sum of money. Monetary judgments are registered on the title. If debtor won't pay, then creditor has to take steps to collect: execution of the judgment. Options: garnishment of bank accounts and wages, writs of seizure and sale, court ordered sale of judgment debtor's land. [R v KESSLER]

STATUTORY CHARGES

**AGRICULTURAL LAND RESERVE SYSTEM**

***Agricultural Land Commission Act***

Agricultural land must be maintained as agricultural land.

This registration is filed on the title.

**FAMILY EVENTS**

***Family Relations Act***

Triggering event can be filed on the title (separation, divorce, etc.)

**HERITAGE DESIGNATION**

***Local Government Act***

***Vancouver Charter***

***Heritage Conservation Act***

Heritage designation can be filed on the title

**CLAIM OF BUILDERS LIENS**

***Builders Lien Act***

Can register liens (link) on the title. Could be a painter, electrician, etc. - can file lien if they are not paid.

Interests can be divided into two categories: the legal fee simple and charges, all other estates in land.

**The Curtain Principle** of the Torrens System

One does not need to go behind the Certificate of Title as it contains all the information about the title. This means that ownership need not be proved by long complicated documents that are kept by the owner, as in the Private Conveyancing system. All of the necessary information regarding ownership is on the Certificate of Title.

Once it's registered, the government is guaranteeing validity of the title.

**What is capable of registration?**

Legal estates, fee simple (joint tenancy must be explicitly noted), charges.

**What is incapable of registration?**

* License to enter property
* Lease for 3 years or less
* Zoning
* Property taxes owing
* Provincial Crown lands

 What about claims of Aboriginal title? According to the Constitution Act, 1982, s 35(1), Canada recognizes existing aboriginal and treaty rights (proven in court or by agreement in treaty), as well as future rights to be proven in court or by agreement in treaty.

**Aboriginal title** is non-transferrable (in conflict with alienation of title in Torrens system) and communal (it is not held individually but by the band for the benefit of future generations).

### DELGAMUUKW (UUKW) v BRITISH COLUMBIA [1987] BCCA

Claims to aboriginal title are not registrable.

### JAMES SMITH INDIAN BAND v SASKATCHEWAN (MASTER OF TITLES) [1995] SCC

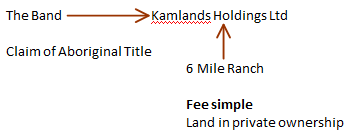
Leave to appeal to SCC dismissed.

### DELGAMUUKW (UUKW) v BRITISH COLUMBIA [1997] SCC

SCC obiter explained how to go about claiming aboriginal title. Did not explain how to reconcile aboriginal title with the Torrens system.

### SKEETCHESTN INDIAN BAND v BRITISH COLUMBIA [2000] BCCA

|  |  |
| --- | --- |
| **FACTS** | **P** claims aboriginal title on lands that are part of agricultural reserve, but removed from reserve development. **P** attempted to launch CPL but the Registrar refused under s. 168 (discretion) because s. 215 requires a CPL to possess an interest in land and aboriginal title is not an interest in land. |
| **RULING** | Ruling for **D** – aboriginal title is *sui generis*, and while an interest in land at common law, it does not come under LTA, as it does not emanate from the IT or provincial legislation.   1. AT preceded TT   TT is based on Crown's title, fee simple at CL and equity   1. AT is *sui generis* 2. AT is inalienable and can only be surrendered to the Federal Crown   TT is marketable   1. AT is held communally, no individual ownership   TT is held individually   1. AT is not registrable under LTA s 23(2)(a), not an exception or reservation from Crown grant [p 5-11] because reservation requires ownership in the first place, and aboriginal title is an obligation on the Federal Crown and not owned by the Provincial Crown, from which the TT emanates. 2. AT - rights of prior occupation before the Crown   TT - registration and transfer of legal and equitable title derived from the Crown grant   1. AT is not registrable as an encumbrance   AT is not discriminatory under s 15 of the Charter because of s 35 protection against BFPV w/o notice. But this only offers protection **after** the establishment of AT. In the meantime… the Federal and Provincial Crown owe aboriginals fiduciary duties (ie. meaningful consultation and accommodation). |
| RATIO | Aboriginal land claims and title cannot be registered in the LTO because only interests in land created by the provincial government can be registered, and aboriginal title predates Crown ownership. Further there are conflicts in principle with the Torrens system (alienability, individual ownership). |



## THE BASIC SCHEME OF REGISTRATION

1. Legal fee simple (indefeasibility guaranteed)
2. Charges: ***LTA, s 1*** "charge": life estate, leasehold, easement
3. Encumbrances (eg. Mortgages)

 LTA, s 20 allows registration of legal or equitable interests (good against anyone except the bona fide purchaser for value, or BFPV). **Equitable Interest** [4-30]: Unregistered interest capable of registration.

### LEGAL FEE SIMPLE

**Indefeasible**: the principle of *nemo dat quod non habet* does not apply - in other words prior defects will not break the title. The accuracy of the title is guaranteed. ***LTA, s 23(2)***

**State of the title certificate**: LOOK IT UP. Used when searching title.

LTA, s 378

**Duplicate indefeasible title**: LOOK IT UP. While this is outstanding, title cannot be transferred and the property cannot be mortgaged. To protect themselves against fraud, the owner of the IT can remove duplicate. Can create complications if duplicate is lost or owner dies, as seen in earlier cases.

LTA, s 176(1)

Indefeasibility only applies to the fee simple holder –prior defects DO affect registered charge holders (only in BC). The certificate of indefeasible title will show the registered owner, the plan for the property and any charges.

Previously, the fee simple came with airspace and subsurface rights. In the 1960s, additional types of fee simple were created by statute (***LTA, s 179*:** except as provided by the ***Strata*** Property Act, the owner of the fee simple has airspace rights), such as airspace parcels (LTA, s 141) or bare land stratas (LTA ss 239, 244).

**Initial application**: when title is being registered for the first time, the procedure to be followed is in part 11 of the LTA, specifically s 169(1)(a). Initially, land is held by the Crown and not held under the Torrens system. Land enters the Torrens system via a crown grant to a private owner.

**Marketable**: so far as its antecedents are concerned, title may at all times and under all circumstances be forced upon an unwilling purchaser. In other words, if the purchaser makes a bogus attempt to back out of the deal, the court can force them to accept it [SMITH v GRAHAM (BCCA 2009)]. Aboriginal title is not "marketable" because it is inalienable – it can only be given up to the Crown.

**Transfer Inter Vivos**, p 5-20

The process is essentially the same as for initial application (Form A). Charge is registered in the LTO. Applicants are ranked chronologically ("first in time, first in right") by the date and time of application to register. This creates what is sometimes called a *race to the register*.

It is not attestation and execution that is crucial in the Torrens system, unlike in previous system.

Application to register takes between 4 and 6 business days. Once registration occurs, it relates back to the time and date of application - registration takes effect from the date of application. This rule forms the basis for the chronological ranking of applications.

Transferor Transferee

**EXECUTION**

**|**

**APPLICATION TO REGISTER**

**|**

**REGISTRATION**

**Transmission on Death**, p 5-20

Transmission is a transfer that occurs involuntarily (due to death, mental incapacity, etc.)

**DECEASED**

**|**

**Personal Representative in case of death, Committee in cases of mental incapacity**

**(registered owner, holder in a fiduciary capacity)**

**"Y, executor of the will of X"**

If there is no one to act as a personal representative or committee, then the property will escheat to the Crown.

### CHARGES

LTA, s 1defines charges as all estates less than the fee simple, which includes life estates, leases, trusts, and the like.

**EXECUTION**

**|**

**APPLICATION TO REGISTER**

LTA, ss 27(1), 28(1)

**|**

**REGISTRATION**

Registration is not conclusive evidence of validity, it merely creates a rebuttal presumption of validity – this is what the word “deemed” means (LTA, s 26(1)).

LTA, s 26(2): There is no guarantee of validity.

LTA, s 28: Charges are also ranked chronologically by the date and time of their application.

|  |  |
| --- | --- |
| Fee simple | FMV $100,000 |
| Judgment1 | $100,000 |
| Mortgage2 | $100,000 |
| Easement3 |  |

In this case, the FMV of the property would be nothing, as the judgment wipes out the value of the property. Furthermore, the mortgagee would lose out to the prior judgment.

### CAVEATS

Caveats serve to protect claimants of unregistered registrable interests (SKEETCHESN, MACLEOD) from BFPV by giving notice. Caveats may also be lodged by the registered owner (perhaps if they discovered that there was a fraudulent mortgage on the property), and the Registrar.

The effect of a caveat is set out in LTA, s 288. Once a caveat is registered, it freezes the title and prevents future transactions in property from displacing the interest of the caveator for the duration of the caveat. Caveats last for 2 months. Caveats can be lodged by the owner or the Registrar, if either suspects there has been fraud and wants to freeze the title.

**Q:** What are the purposes of a caveat?

* 1. Prevents registration of any transaction while caveat is on title
  2. Protects unregistered, equitable and other vulnerable interests (capable of registration)
  3. Gives notice of the estate or interest claimed - if something is on title, everyone is deemed to have notice of it

**Q:** How are time periods legally determined?

**A:** Times are determined by the Interpretation Act:

Caveat expires in 2 months, *unless* caveatee gives notice to caveator to commence action in 21 days (LTA, s 293). Then the caveator has 21 days to do so or the caveat will lapse.

Caveats can be discharged by court order (LTA, s 289) or formally withdrawn by caveator (***LTA, s ????***).

LTA, s 288(1) freezes title 'as long as it remains in force'. It is assumed that if the caveator is serious, they will come up with a law suit and file a CPL within 2 months.

If the claim to which the caveat relates is established, that claim would relate back to the date of lodging the caveat (LTA, s 31).

### CERTIFICATES OF PENDING LITIGATION (CPL) / LIS PENDENS

This instrument prevents registration of any transaction while it is on the title (LTA, s 216(1)). This prevents the defendant from doing an end run around pending litigation by selling the property at issue to a BFPV.

**Q:** What are the purposes of a CPL?

* 1. Protects litigant and litigation process from sale to BPFV
  2. Notice to the owner

***LTA, s 215(3)***: prospective purchasers and lenders are buying into litigation and the outcome might affect them.

**Vendor & Purchaser**

(caveat/CPL)

* 1. Agreement of P&S executed

(caveat/CPL - vendor's title?)

***LTA, s 216(1)***

* 1. Completion: title not "clear" [4-51]

Smart purchaser would search the title before completion to protect themselves - they can then back out, retrieve their deposit.

But what if the purchaser has paid the vendor, and the CPL/caveat isn't discovered until afterwards? LTA, s 217(1) - legal snarl.

* 1. Application to register transfer (caveat/ CPL?)

Prior to s 217(1), BFPV would approach the Registrar for help and they would say "No can do" according to s 216.

### RUDLAND v ROMILLY [1958] BCSC

|  |  |
| --- | --- |
| **FACTS** | **D** conveys property to **L**, makes proper app to register. **L** gets loan from **P** using property as collateral. Same day as **P** gets title (in collateral), **D** files CPL against property saying their original conveyance was a fraud. |
| **RULING** | Held for the **P**, as they are the BFPV w/o notice and filed with a clear conscience.” |
| RATIO | The Registrar must go ahead and register the BFPV w/o notice in this situation on the register, despite the CPL. |

Race to the register between:

* 1. Application to register BFPV w/o N
  2. Application to register CPL

**Gap of 4 days between the application to register transfer and actual registration of the transfer.**

* 1. Registration of transfer purchaser

CPL is too late, overridden by application to register transfer.

Purchaser and donee don't have equivalent status - so if you were trying to register a gift of property, you would not be protected by s 217.

### **JUDGMENTS**

Judgments express a monetary claim (as in from contract, debt, tort). An unsecured creditor has no right to take any assets, even with a monetary judgment. In order to collect a monetary judgment, need to proceed with execution of the judgment. In olden times, writ of *fiera facias* would put debtor in debtor's prison. Now, garnishment of wages or bank accounts, seizure and sale are main methods of collection. If the debtor has an interest in real estate, that interest can be taken and sold by registering the judgment on the title to which the land relates (***Court Order Enforcement Act, s ?????***).

* 1. Registration on title of judgment against debtor's interest in land
  2. Court-ordered sale (involuntary). Registration of purchaser (***LTA, s 261***).

*Nemo dat quod non habet* applies to these sales - whatever interest purchased in a court ordered sale is whatever interest the debtor had. Execution purchaser is not protected by registration under Torrens - not considered a BFPV. Their title can be affected by unregistered charges that the vendor incurred previously.

COEA, s 86(3): "subject to the equities"

All the creditor can sell is whatever beneficial interests the debtor has in the property - if they have other debts which wipe out their equity, sale won't get the creditor anything...

The judgment, when it's registered, forms a lien. . All that registration gives the creditor is the right to go to court. Many creditors don't bother, just leave the judgment on there to encumber the title and incentivizes the debtor to pay their debt. It does not create a secured debt.

COEA, s 86(3)(b): If the debtor is a beneficiary of a trust, that interest can be sold.

COEA, s 86(3)(c): If the debtor has previously made an agreement with a purchaser or creditor that is not registered on the title, and then the judgment creditor registers their judgment on the title, the execution sale is subject to the rights of the prior purchaser or creditor. No time limit on the unregistered interest to emerge.

Judgment creditor doesn’t get the protection of relying on the register - unregistered interests can still apply. Upon sale, want to flip the property as quickly as possible, as sale to BFPV will extinguish the equitable interests that are not on the register.

## THE ROLE OF THE REGISTRAR

### RE LAND REGISTRY ACT, RE EVANS APPLICATION [1960] BCSC

|  |  |
| --- | --- |
| **FACTS** | Land parcel registered as 66 ft ‘more or less’. ½ is transferred to S, ½ to Evans. Mr E dies so Mrs. E applies to update certificate of indefeasible title (CIT), but registrar refuses to register land until uncertainty of exact boundaries is rectified. |
| RATIO | 1. Not the duty of the registrar to determine: (a) boundaries; or (b) adjudicate on property rights; this is under inherent jurisdiction of CL (provincial and supreme courts). 2. BUT registrar doesn’t have to perpetuate errors with the boundaries and can step in to attempt to correct them; he has an option, not an obligation to correct registrar. Registrar has quasi-judicial duties as he must be satisfied of good safe‐holding and marketable title before issuing CIT (cannot do this until boundaries are fixed). |

### RE LAND REGISTRY ACT AND SHAW [1915] BCCA

|  |  |
| --- | --- |
| **FACTS** | Father gave son power of attorney. Son attempted to transfer father's mortgage to himself to himself. Registrar refused to register the transfer until notified by the father. Son appealed the decision. |
| **RULING** | Held for Registrar. Power of attorney doesn't give power to transfer to yourself unless there is:   * 1. Full disclosure   2. Fair consideration   3. Good faith   All of which the donee has the burden of establishing. |
| RATIO | 1. Prima facie title requires evidence to the full extent of the interest sought to be registered. 2. Someone with power of attorney can't sell to themselves (now **Property Law Act, s 27**). |

### HELLER v BC (REGISTRAR) [1963] SCC

|  |  |
| --- | --- |
| **FACTS** | Heller was registered fee simple owner of land in Vancouver. He executed a transfer to his wife and she registered as the fee simple owner. Then he applied to the Registrar to cancel his wife's registration and have his own interest reinstated on the basis that when his wife had applied for registration, the Registrar had assumed the duplicate certificate of title was on deposit in the LTO. In fact, it was in the possession of Cuff, to whom Heller had transferred a one-half interest in the property. The Registrar refused to correct the register and Heller appealed the decision. |
| **RULING** | Registrar's powers are derived from the LTA***.*** They aren't a s.96 Constitutional judge, and therefore can't adjudicate the contested rights of parties – you need to go to court for that. As H gave the deed to his wife, this showed the intention to transfer the land to her (she acquired gift in good faith), to restore his title Heller would have to show this was void, otherwise the registrar will not affect the wife’s rights she acquired by changing the register. |
| RATIO | 1. Registrar has discretion to cancel or correct mistakes (**LTA, s 383**), and has no obligation to correct errors which are not their fault. 2. Registrar doesn't need to receive duplicate certificate in order to execute transfer. |

LTA s. 383: Registrar to correct or cancel instruments

* 1. If the registrar finds an instrument is issued in error/has a misdescription or an endorsement is made/ omitted in error, the registrar***may***, so far as is practicable, without prejudicing rights acquired in good faith and for value cancel the registration/instrument or correct the error.
  2. Registrar has discretion, and therefore no duty to enforce a party’s rights if error exists.

## THE ASSURANCE FUND

At common law, if person thought they had acquired title but they actually were not the owner of the interest, their only remedy was a civil action. They might have difficulty collecting damages, esp. in cases of fraud. The LTA establishes assurance fund from which a person may be able to claim compensation for the loss of an interest in land, if they satisfied certain preconditions. However, these preconditions are not easy to satisfy; few reported cases of success.

The Assurance fund is available in two cases:

1. Fraud (s 296), and
2. Mistake of Registrar (s 298)

Before you can make a claim under AF, preconditions to be met:

1. Bring an action against the person who’s holding your land right now – s.296(2)(b)
2. File a CPL. If unsuccessful after litigation, then you must launch an action in BCSC (s.296)1) against the person who defrauded you. Simultaneously, join the AG as a nominal party defendant – s.296(3).
   1. If fraudulent person cannot be found, or cannot pay full damage award, or that person is dead, then claimant can try to collect from the AF –s.296(5), 296(4).
3. Under s.296(2)(a), claimant must prove deprivation – must show you lost your land for THREE reasons:
   * 1. Lost your land due to conclusiveness of register? Would claimant have succeeded in CL if the Torrens system hadn’t been enacted? – s.296(2)(a)(i)
     2. Fraud operating? – s.296(2)(a)(ii)
     3. Claimant barred by the Act or any other Act, or otherwise precluded from recovering or having title rectified?

LTA s. 296 – Remedies of person deprived of land

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

LTA s. 298 – Fault of registrar

* "Solely or partially, as a result of an omission, mistake or misfeasance of the registrar"
* This is new – previously, loss or damage must have been caused solely by fault of registrar
* Limitation period: within 3 years after the loss or damage is discovered by claimant

LTA s. 303 – Limitation of liability of assurance fund

* Fund not liable for compensation for loss "in respect of the proportion of the loss … caused or contributed to by the act, neglect or default of the plaintiff"
* This is new – used to refer to "loss caused or contributed to by the claimant" (more onerous)
* Limits on what can be compensated: can recover no more than value of the land at the time of the loss, damage or deprivation. Value of buildings or other improvements made subsequent to that time must be excluded

### MCCAIG et al v REYS et al [1978] BCCA

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| **FACTS** | Farwest sold land to South Transport (headed by Mr. McCaig). South Transport sold to Reys by sub-agreement. Reys offered option to sell back 24 acres in a separate instrument; McCaig agreed. Option was never registered. Reys then sold by sub-agreement to Rutland. Rutland knew of option, said they would honor it, but then registered their own interest. Rutland then sold to Jabin without notifying Jabin of the option. Jabin took title bona fide and for value without noticed; acquired a good safeholding and marketable title. Final transaction with Jabin extinguished any rights McCaig or S.T. would have had. |
| **RULING** | In order to succeed against Fund, claimant must show:   1. Were they deprived of land or an estate or interest therein? YES 2. Was their loss occasioned as a result of the operation of the statute? NO, because McCaig's interest was not registrable. 3. Did they suffer fraud, misrepresentation, or some wrongful act of any other person as owner? YES 4. Are they barred from bringing an action? YES.   McCaig was deprived of his interest by breach of contract of Reys and fraud of Rutland (***s. 29(2)*** of the ***LTA***). Bona fide purchaser without notice (Jabin) has always been protected in equity. BFPV has superior title both in equity and law. McCaig cannot succeed in his claim against the Fund, but is awarded damages against Rutland. McCaig is barred from a claim against the Assurance Fund because his interest was not registrable. |
| RATIO | In order to succeed against Fund, claimant must show:   1. They were deprived of land or an estate or interest therein; 2. Their loss was a result of the operation of the statute; 3. They suffered fraud, misrepresentation, or some wrongful act of any other person as owner; and 4. They are barred from bringing an action against the wrongful actor. |

### ROYAL BANK v BRITISH COLUMBIA [1979] BCSC

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| **FACTS** | Registered owner was Walsh. Walsh had an arrangement with Royal Bank of Canada to obtain an equitable mortgage secured by a duplicate certificate of title. Walsh signed off on transfer documents, and if he didn't pay the loan he'd forfeit the property to Royal Bank upon production of the duplicate certificate of title. Under s 33 of the LTA, equitable mortgages are not registrable transactions, but it is supposed to be noted on the title by the Land Title staff that the duplicate title is outstanding, thereby freezing that title (s2. 176(4), 187, 195). The LTO staff screwed up, making the wrong notation on the certificate's title (instead of saying duplicate certificate outstanding to Royal Bank, said duplicate certificate was missing), and Walsh's title was not frozen. Walsh got a second mortgage from the Bank of Nova Scotia, representing himself as having clear title. This mortgage was registered on the title, and ranked ahead of the Royal Bank's equitable mortgage. As the property was not valuable enough to cover the value of both mortgages, RBC went to the assurance fund to recoup for their losses at the hands of the LTO staff. |
| **RULING** | Ruling for D - this is an unenforceable claim against the Assurance fund. Because RBC failed to search the title, and RBC was taking a shortcut by taking a form of security that is non-registrable, it is no able to recover from the fund. Section 47 of Act expressly states that holder of an equitable mortgage does not entitle the holder to registration under the Act.The person alleging loss must show that loss flowed naturally and directly from Registrar's mistake and this is not the case here, where the chain of liability is too tenuous.   * + No case can be founded on procedural error on the part of the Registrar   + Those who seek to rely on equitable mortgages must accept the risks inherent   + Strict adherence to the Torrens systems provides certainty and security and makes this type of litigation unlikely |
| RATIO | Assurance fund won't allow plaintiffs to recover for equitable mortgages. Now by statute, **LTA s 303(a)(ii):** The Assurance Fund is not liable for any damages to an equitable mortgagee (lesser interest than a fee simple). |

LTA, s 297: Rejects claims for interests less than a fee simple

LTA, s 298: Anyone who has suffered loss or damages at the hands of the Registrar's wrongful act or omission has a cause of action.

***LTA, s 303(f)***:The Assurance fund is not liable for any damages flowing from their own default (like failing to search the title).

# CHAPTER VI: REGISTRATION

## INTRODUCTION

FEE SIMPLE

What is the effect of registration? Being on the register is conclusive evidence against the Crown and all others that you have indefeasible title to that fee simple. The effect is to create a **title by registration** - unlike a deeds system where the deed passes from the vendor to the purchaser, the title is received from the LTO. So any defects in the vendor's title are wiped out by the creation of a new title for the purchaser. In a deeds system, prior defects run down to the current owner of the property by the principle of *NDQH* - this cannot occur in a Torrens system.

Registered owner has estate in fee simple subject to charges on the register prior to purchase. To get a clear title, have to pay off judgments on title. Unregistered interests do not affect the purchaser.

LTA s 23(2): Fee simple is an indefeasible title: conclusive evidence in law and in equity against the Crown and all other persons that the person named in the title is the registered owner. BUT it is subject to overriding interests...

### CREELMAN v HUDSON BAY INSURANCE CO. [1920] PC

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| **FACTS** | Creelman agreed with the Hudson's Bay Insurance Company to buy some property. Creelman then wanted to back out of the purchase agreement, asserted there was a defect in the title. Creelman's defence: under federal act, insurance companies could not acquire or hold real property as an investment; since HBI did not acquire land under these requirements, it had no power to hold or dispose of land. |
| **RULING** | Held for HBI –title by registration means that Creelman can't back out of the deal for this reason, as title comes from the province, not the vendor. "Certificate [of title] which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept." To claim otherwise would "defeat the very purpose and object of the statute of registration". Creelman is therefore bound to accept certificate and comply with all their obligations under the contract. |
| RATIO | 1. Torrens system grants title by registration, and registration grants indefeasible title. 2. *Nemo dat* does not apply, so defect in vendor's title doesn't transfer to BFPV's title. |

What if a fraudster sells an innocent owner's property to another innocent purchaser? Purchaser gets to keep the title, while the original owner gets money (but probably not from the assurance fund).

Under the LTA, s. 54, after a Crown grant, there is compulsory registration of title in the LTO (since 1968). Not compulsory to register for subsequent owners of the property. Even though unregistered documents have some weight through equity, it is dangerous not to register. Chapter 7 deals with the consequences of failure to register: you can have your interests extinguished.

ADVERSE POSSESSION (SQUATTER'S TITLE)

Back in the old common law days, a squatter could acquire title from the true owner by possession ("possession is 9/10th of the law"). This is at odds with the concept of IT based on registration, but the exact relationship between the two in BC is not completely clear - most likely, it does not have a future.

LTA s 23(3): it is not possible to establish title to privately owned land through length of possession - no squatters.

Limitation Act, s 3(4)(a): there's no limitation period on a registered owner to bring an action against a squatter.

Land Act, s 8: a squatter can't acquire an interest in Crown land.

**BUT!**

LTA s 23(4): Despite subsection 3, adverse possession is not abolished in cases of initial application. If someone gets a Crown grant, **and hasn't yet registered**, squatters could acquire title in that period if they are "rightly entitled". How to establish that you are "rightly entitled" if you're not on the register? P 6-10: Land Title Inquiry Act, make application to BCSC to prove right entitlement. In this way, the unregistered owner's title is defeasible prior to registration. This is an anomaly in the Torrens system in BC, that there is an unregistered interest which can prevail.

CHARGES

LTA, s 1: defines "charge" - judgments, mortgages, leases > 3 years, easements, covenants, etc.

In BC, charges do not receive indefeasibility from registration. Registration affects the fee simple, but does not confer indefeasibility or validity. There is a rebuttable presumption of validity and registration of charges is construed as constructive notice for all BFPV.

If fraudster use innocent owner's property as security for mortgage with BFPV, then absconds with the money, then innocent owner wins. Mortgagee's charge on the title is defeasible, and loses to innocent owner's IT.

ENCROACHMENT

Under a statutory provision (PLA s 36(2)(a)), it is possible to obtain land through trespass. If there's a building or fence that is on adjoining land, a party can get application to Supreme Court to grant title to the encroached property in exchange for compensation to the original owner. This application is granted at the Supreme Court's *discretion*. This can also occur via acquiescence and proprietary estoppel (ZELMER).

PLA s 36: Statutory grant *of very* broad equitable discretion. An encroachment is a fence or building.

Court can grant one of the following three:

PLA s 36(2)(a): easement and compensation

PLA s 36(2)(b): vesting order and compensation

PLA s 36(2)(c): removal order - statutory equivalent of mandatory injunction to remove encroachment.

Discretion depends on looking at the **equities between the parties** (what is the moral position of the two parties relative to each other?) and the **balance of convenience** (cost-benefit analysis).

### GAINER v WIDSTEN [2006] BCCA

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| **FACTS** | The Gainers built a workshop 27 feet over the property line. Widsten bought the vacant lot next door for $12,500. Widsten had the property surveyed after purchase and the two parties went to court. The Gainers applied for an order under PLA, s 36(2)(a) or (b) as they acted in good faith. |
| **RULING** | Cost of tearing down the workshop was more expensive than the cost of the property, so TJ ordered that the entirety of Widsten's lot to be transferred to the Gainers for FMV based on the balance of convenience. |
| RATIO | Example of application of **s. 36 of the PLA**. |

### PHILLIPS v KEEFE [2012] BCCA

Indefeasibility does not extend to the location on the ground of the boundaries as depicted in the registered map or plan.

### FOWLER v HENRY [1902] BCCA

Instead of relying on the accuracy of a plan previously filed in the land title office or on the siting of physical objects such as fences, hedges or walls as delineating boundaries, a survey should be undertaken.

STATUTORY EXCEPTIONS TO INDEFEASIBILITY

**Overriding interests** are interests not on the register that holder of fee simple is still subject to – that can, in other words, override the register. Implicitly limits curtain principle, mirror principle (there are things behind the curtain, not everything is reflected in the mirror of the register). Principle of indefeasibility is subject to these exceptions. Some are listed inLTA s 23(2), (3), (4). Other exceptions are not:

* 1. Pre-1973 agricultural land reserves,
  2. Zoning (have to go to City Hall, consequence of the Vancouver Charter)
  3. Public utilities easements

LTA s 23(2)(a)

Exception for Crown grants - if you wish to, can go back to original Crown grant to determine what rights Crown reserved (some old Crown grants didn't reserve mineral rights).

LTA s 23(2)(b)

If donor gave property to recipient, and donor was in arrears on their taxes, under the Income Tax Act, s 160, in a **non-arm's length transfer** where the transfer price is less than fair market value, those taxes become a lien on the property and the responsibility of the donee. If the donee then sells the property to a BFPV, the lien could still persist on the title. How the vendor acquired the property is not on the register... BFPV needs to look behind the curtain, but not clear where… CRA wouldn't divulge vendor's tax information, due to privacy. Has to be filed prior to registration of IT.

***LTA s 23(2)(c)***

Municipal charge rate or assessment, local improvement charge. If vendor is in arrears on any of these municipal charges, those outstanding taxes canbecome responsibility of BFPV. BFPV needs to look behind the curtain into municipal records. *Has to be filed prior to registration of IT.*

LTA s 23(2)(d)

Purchaser is supposed to inspect the property to determine if there is a short term tenant in the property. If there is actual occupation, then original term of lease including options to renew applies to the BFPV, even though it's not registered. If there is a lease longer than 3 years, it needs to be registered in order to receive this protection, otherwise it can be extinguished by the BFPV. Therefore, 3+ year term leases should be registered. Some leases have the provision that they cannot be registered, thereby allowing the owner to sell the building without obtaining the consent of all the tenants. **REMEMBER**: Leases under 3 years don't have to be in writing, can be an oral agreement.

If the purchaser has actual notice of the short term tenant or the long term tenant who is registered, then an attempt to evict them by saying that the purchaser was ignorant of the lease can constitute fraud.

**KEY EXAM POINT:**

**Leases** are defined in LTA, s 1 - term of the lease is ***not*** the time remaining, but the original length of the lease and ***includes*** the length of any options to renew (eg: 2 year lease + option to renew for 2 years = 4 year term).

LTA s 23(2)(e)

Highway or public right of way, watercourse, right of water or other public easement.

LTA s 23(2)(f)

Highway Act, Water Act provide right to expropriate property that prevails over indefeasible title.

LTA s 23(2)(g), Builders Lien Act

Builders Lien Act can override the LTA. A builder who was not paid by the property owner can file a claim of lien on the property (builders’ lien in BC, construction lien in Ontario). "Certain charges registered before **or after** registration of purchaser's title" means that builders liens can be registered after registration of BFPV's title.

Builders Lien Act can also override privity of contract– instead of suing their contracting party, subcontractors and suppliers can file liens on the project within 45 days of project completion (irrespective of whether BFPV has registered title). The lien has priority over all other judgments, but is extinguished after the 45 day limitation period.

* 1. Lien
  2. Holdback (10%): 10% of construction funds are held back at every level of contracting
  3. Trust: the general contractor is under a statutory duty of trust

### CARR v RAYWARD [1955] BC County Court

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| **FACTS** | **P** did plumbing work on land, filed lien with registry but original owner already sold land to BFPV, Bell (who didn’t know about **P**). Bell got a CIT from registry without the lien on it. Original owner did not pay **P**; then **P** files a builders' lien against Bell's title within 30 days of the completion of the work. At this time, the time limit was 30 days, instead of 45 days like today. |
| **RULING** | Held that **D** has to pay **P** under s. 23(2)(g) of the ***LTA***. A mechanics (builders) lien is effective against lands if not filed in land registry office after owner for whom the work was done sells the land and purchaser has obtained a CIT from LTO. **P** gets personal judgment against **D** and lien on property. |
| RATIO | Builders Lien Act (1997) (s. 2): workers have a lien against the interest of land for $$ not paid for their work. This gives workers a real interest in land + personal interest (under their K).  Section 20: a lien may be filed within 45 days of completion of work; if not it is extinguished. After filing, filer has 1 year to file CPL and bring action. Lien has effect from time work began and has priority over all judgment, executions, attachments and receiving orders recovered, issued or made after that date.  Section 23(2)(g): a builder’s lien put on title before OR after date (within 45 days of “completion, abandonment or termination of work,” which can make it difficult to determine this deadline) of registration is a restriction on IT. Have 1 year to file CPL for lien on title. |

LTA s 23(2)(h)

This provision allows for the correction of "wrong boundaries.” The registered owner doesn't enjoy indefeasibility when it comes to boundary errors and is not entitled to any compensation, unless they can prove that the surveyor fucked up. Proprietary estoppel can still help the RO, however, if they built on or improved the land. **Note:** the Assurance Fund doesn't protect against boundary errors, have to get private title insurance. Torrens system does not guarantee accuracy of title.

### WINROB v STREET [1959] BCSC

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| **FACTS** | **P** contracted to purchase a residential property in Vancouver after physically inspecting it. The property was surrounded by a hedge of trees and fence, conforming to the appearance of neighboring lots. Vendor represented to **P** that the hedge and fence were correctly placed. **P** retained **D**, a lawyer, as their conveyancer. **D** searched title but did not search any maps or plans in the LTO, or take any steps to verify the dimensions of the property. Two years later, **P** discovered that the hedge and fence overlapped City property by 26 feet and the City asserted ownership, claiming rent. |
| **RULING** | Court dismissed the action - under the usual retainer, a conveyancer advises 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 advise on the dimensions of the property. The client must give and the conveyancer must accept a special instruction to become responsible for verifying dimensions. |
| RATIO | **Lawyers are responsible for the state of title, but not for the dimensions of the property without special instructions.** |

**NOTE:** The **P** in this case may have had a claim against the vendor in damages for negligent misrepresentation.

LTA s 23(2)(i)

The right of a person deprived of land to show forgery or fraud in which the registered owner participated in any degree, personally or through their agent [p 6-14 to 28] - in which case, the RO's title is defeasible (MCCAIG v REYES). The LTA doesn't prohibit the transfer from the fraudster to another purchaser - if the latter is a BFPV, then they have indefeasible title. Deprived person should file a caveat as soon as they find out about the fraud (GILL).

### GILL v BUCHOLTZ [2009] BCCA

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| **FACTS** | Gill took out legitimate mortgage from bank. Random rogue who claimed to be Gill took out a later mortgage from Bucholtz. Real Gill sued Bucholtz. TJ's holding: Mortgagee protected b/c couldn't have known weren't dealing with real Gill. Gill can recover from fund, give that money to Bucholtz. |
| **RULING** | Overturned TJ's holding. Mortgage is invalid, subject to principle of *nemo dat*. Protection of indefeasibility only applies to fee simple holder, and not to lesser interests like mortgagees. Bucholtz had private insurance and recovered fully from them, and not from common law system or Assurance Fund. |
| RATIO | **Fraudster doesn't have indefeasible title; charges can't piggyback from fraudulent title onto BFPV's title.** |

LTA s 23(2)(j)

The licenses granted under the Forest Act have conditions on them, which if broken grants the Crown the right of reversion. So the Crown will grant fee simple to Crown land to forestry company under a license with conditions (which will be endorsed on the title), and if the company breaches these conditions then the exception to indefeasibility will kick in.

Escheat Act

If a property has no owner, then the Crown has right to escheat (reversion of ownership) under the Escheat Act. There is an Escheats Officer in the Ministry of the AG, Legal Services Branch in Victoria.

Land Act, s 50(1)(a)(i)

**Crown has right of resumption**: Crown can take back up to 1/20th of the property without compensation (unlike expropriation) for public purposes like road construction and so on.

***"In Personam" Claims***

Exception recognized in all Torrens system: IT does not protect against contractual and equitable obligations. *In Personam* claims are claims against the registered owner, when something that a registered owner does creates personal liability on them. Examples: (1) the RO makes a contract of sale with a purchaser and then reneges, then the purchaser can get an order for specific performance of the contract and transfer of the title; (2) proprietary estoppel can create an equitable interest in the property up to the fee simple.

***Registration of a Volunteer***

Section 23(2) says that the registered owner is indefeasibly entitled to an estate in fee simple. So it was an open question until s. 25.1 was enacted until 2005 - s. 25.1(3)(c) requires "in good faith and for valuable consideration" for an individual to acquire IT. Therefore, a volunteer's title is defective according to the interaction of s. 25.1(1) and s. 25.1(3)(c).

It's always open to the legislature to create new overriding interests. Back in the 1970s, urban sprawl was a major concern in BC as property development started to encroach on agricultural land. In 1973, the provincial government enacted the Agricultural Land Commission Act, intended to preserve agricultural lands in their current state, functionally creating a system of partial provincial zoning. Agricultural land reservation could be imposed on the land without endorsement on the title (according tos. 60 of the Agricultural Land Commission Act). Nowadays, this is registered on the title, according to s. 60(2):

"This certificate of title may be affected by the agricultural land commission act, see Plan m11379."

## TORRENS FRAUD

**This will definitely be on the exam!** There are two key types of Torrens fraud.

* 1. **Forgery**

Fraud against the registered owner (LTA, s 23(2)(i)). According to the Torrens system, **fraud** is outright dishonesty, and not equitable or constructive fraud (ASSETS v MERE ROIHI, 6-044). **Outright dishonesty** is characterized by knowledge and scheme of deception (Jerome and Rutland in McCAIG).

**EXAMPLE**

**A** is a registered FS owner of Blackacre. A Rogue ("**R**") forges **A**'s signature to transfer Blackacre to **B**. **B** is registered as the new FS owner. Should **A** be able to recover Blackacre from **B**? Depends on whether **B** gets indefeasibility immediately, or only after they have sold their property to another BFPV (deferred)? In 2005, BC Legislature passed statutes resolving in favor of the former. Express legislation only in BC. Legislation is retroactive back to 2005.

**Argument for Deferred Indefeasibility**

The BFPV is person in best position to detect the fraud, and the equities favour the original RO.

### GIBBS v MESSER [1891] UK

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| **FACTS** | Messers owned property; left it in custody of solicitor Cresswell (duplicate title, power of attorney). Cresswell committed fraud by transferring title to fictitious person's name; got mortgage. Messers discovered this, made claim against registrar, Cresswell. Wanted order for cancellation of certificate and to be free for mortgage, and if not, claim from assurance fund. |
| **RULING** | Cresswell was acting as agent to fictitious person, and so registration didn't exist and therefore mortgage based on this transfer couldn't exist. Test: fictitious person must be dealing with actual registered fee simple. Identity is a different inquiry altogether. PC said this was fundamentally different and thus Torrens system principles don't apply. End result: no mortgage, but no claim against fund. "Skipped over link in chain"; real purchaser did not acquire title, land stays with Messers. |
| RATIO | A should recover title, because although both A and B were innocent of R’s fraud, B actually dealt with the fraudster and should therefore bear the risk of loss of title, as they could have investigated further. |

**Argument for Immediate Indefeasibility**

The Torrens system is based on principle of registration and indefeasibility, so registration of BFPV's title should grant indefeasibility.

### FRASER v WALKER [1967] NZ PC

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| **FACTS** | Frazer's wife registered mortgage with forged signature. When Frazers didn't pay principal, mortgagee exercised power of sale and transferred property to another party. Frazer said his signature was forged, wanted property put back in his name. |
| **RULING** | Application of general Torrens principles. If purchaser has not participated in forgery/fraud, he has guarantee of indefeasibility as soon as he is on title (i.e. the indefeasibility is immediate). In the example, **B** would be protected. **A** will have to seek recovery against the Assurance Fund. |
| RATIO | Once B becomes the RO, B’s title is good and A, while an innocent victim, should seek compensation from R and/or the Assurance Fund. |

Prior to the enactment of the Torrens system, at CL and EQ the true owner could set aside the transfer; recover title ("no one can profit from their own fraud"). Similarly, now **B** would have void title **if** they are not BFPV w/o notice (fraudulent transfer); ***LTA, s 23(2)(i)***.

Normally though…

LTA, s 25.1(2), (3): BFPV of fee simple estate gets immediate indefeasibility.

LTA, s 25.1(1): No protection for lesser interests.

Immediate indefeasibility is therefore statutorily required in BC. Once a BFPV is on the register, they get immediate indefeasibility. What about donees – do they get immediate indefeasibility? No, *s. 25.1(1)* requires both good faith and valuable consideration.

**Q:** But what about if the fraudster doesn’t transfer to a BFPV, but takes out an equitable mortgage or creates another type of unregistered interest?

A: LTA, s 29: Effects of notice of unregistered interest.29(2)(b): Knowledge acquired outside of the register of the existence of unregistered interest is of no effect if the person is guilty of fraud.  Question is whether they have fraudulent intention.  If not, the knowledge they may have of the unregistered interest is of no force and effect.  This also applies to agents.

### GILL v BUCHOLTZ [2009] BCCA

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| **FACTS** |  |
| **RULING** | Mortgages are void under s 25.1(1) and the mortgagees get nothing from the true owner. Mortgagees recovered from private mortgage insurance. Banks will now insist on this insurance. |
| RATIO | **LTA, s 25.1(1)** does not allow mortgages to attach back to the title of the true owner in cases of fraud. Contradicts the mirror/curtain principles - suggests mortgagees have to look behind the register. |

**BOTTOM LINE**

In BC, registration of fee simple is granted immediate indefeasibility. However, registration of lesser interests and charges are subject to the principle of *nemo dat quod non habet* and has no claim against the true owner *or* the Land Title and Survey Authority (LTSA) Assurance Fund.

LTA, s 26 explicitly states that the effect of registration of a charge is not the same as registration of a fee simple and confers only a rebuttable presumption of validity. This presumption can be rebutted by evidence of fraud or forgery.

LTA ss 297, 294.21 (1) and (2)

Section 1: "acquires an estate or interest in land less than a fee simple"

Section 2: "no transferee is subject to a proceeding under this Part"

In other words, in BC mortgagees cannot rely on the register or the Assurance Fund, and so must obtain private insurance and be very conscientious regarding possible fraud.

**Q:** How to prevent fraud?

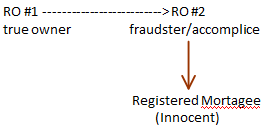
**A:**  Verifying identity of parties (identifying documents), witnessing signatures in person and mortgagees should verify the validity of the RO's title.

One proposed amendment to the current system of immediate indefeasibility would allow judicial discretion to give the property to whoever has the greater connection to the property (more likely the true owner in most circumstances). This is how it works in NB.

* 1. **Notice of Unregistered Interests**

When in the course of a transfer, unregistered interests get fucked over despite notice to the BFPV.

Common law = *Nemo dat*

Equity = BFPV w/o N

So what happens?

Torrens (BC) = *Nemo dat* (***LTA, s 25.1(1)***)

Mortgage is void - true owner gets property back and mortgagee gets nothing.  
Could argue that the true owner gets property back subject to this mortgage and get the true owner to turn to the Assurance Fund to pay off the mortgage (argued in GILL v BUCHOLTZ) - didn't work.

### McCAIG et al v REYS et al [1978] BCCA

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| **FACTS** | SIMPLIFICATION |
| **RULING** | Jerome has notice of the unregistered interest, buys the property on behalf of Rutland. But what if then Rutland refused to honor McCaig's option? The Torrens System purports to abolish concepts of notice outside the register - personal knowledge or constructive notice outside the register doesn't matter. But the courts interceded in cases where the fraudster not only has notice but promises to honor the unregistered interest. Rutland's conduct amounts to fraud in this context, and after this decision the BC legislature expressly amended the LTA, s 29(2) to reflect this rule. Test: was knowledge of the fraud brought home to BFPV w/o N (Jabin) or its agent? If not, fraud did not affect him. **Big question is what did he know and when did he know it.** |
| RATIO | In cases of fraud, notice outside the register will affect title. Fraud requires actual knowledge of unregistered interest and dishonesty, as per the *LTA, s 29(2)*. Constructive knowledge will not suffice. |

Even if Jabin had notice of McCaig, s 29(2) would hold that the interest would not be enforceable against Jabin, as they were a BFPV w/o N.

So, as always, it’s risky to be a holder of an unregistered interest (McCaig’s interest was extinguished). BFPV w/o N is protected (this further demonstrates we should be able to rely on the register). McCaig could potentially have grounds for an *in personam* claim against Rutland.

**Constructive or equitable fraud**: C or EF means that somebody should have made inquiries and if they had they would have discovered the fraud. “The mere fact he might have found out fraud if he had been more vigilant” if he’d gone behind the register is not enough to satisfy the threshold for fraud.

### HUDSON'S BAY v KEARNS & ROWLING [1895] BCCA

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| --- | --- |
| **FACTS** | Hudson's Bay is the holder of an unregistered interest (equitable mortgage/mortgage by deposit of duplicate CIT). Kearns owed $800 to HBC. Kearns sells property to Rowling for $300, half its market value. Rowling was aware at the time of the transaction that the duplicate CIT was outstanding, but not why as Kearns didn't tell him about the equitable mortgage. LTO staff registered transfer to Rowling **despite** the absence of the duplicate CIT. Kearns defaults on HBC loan, and HBC argues that as their interest was first in time, it should be enforced before Rowling's . TJ held for HBC because Rowling *should have* inquired further about the transfer (constructive notice). |
| **RULING** | There was not sufficient notice to constitute fraud - fraud requires actual knowledge or express notice, constructive notice is insufficient. HBC needs to establish with clear evidence that Rowling had either actual notice or express notice, which they could not do. Rowling would have to commit actual fraud in order to have his indefeasible title set aside in favor of HBC's unregistered interest.  Equity will not allow a statute (the LTA, in this case) to be an instrument of fraud - if HBC could establish actual fraud, the LTA would not protect Rowling's interest. But where the equities are equal, legal title prevails. Rowling would only have been bound if there was  (1) **express notice** of the unregistered interest and (2) **actual fraud** (not clear what is defined as actual fraud).  **Note:** The LTO's error in executing the transfer could qualify as a compensable mistake under the Assurance Fund. |
| RATIO | Constructive notice is insufficient to establish fraud - actual knowledge/express notice is required.  Equitable fraud can be sufficient to set aside registered interest in favor of unregistered interest. |

There are two competing interpretations of this case (see VANCOUVER CITY SAVINGS, 6-37):

WOODWEST line of authority: a purchaser who has express notice before signing a binding agreement of purchase and sale, and who then attempts to rely on Land Title Act, s 29 may be found to have committed equitable fraud.

SZABO line of authority: something more than knowledge is required; usually conduct that constitutes some form of dishonesty or shows a "lack of common morality".

### VANCOUVER CITY SAVINGS v SERVING FOR SUCCESS CONSULTING [2011] BCSC

|  |  |
| --- | --- |
| **FACTS** | City Center Manor was part of the Traveller's Inn motel chain and leased out space to Serving for Success. Serving for Success had a 5 year lease, renewable for another 5 years, but lease was not registered. VanCity leant money to Traveller's Inn with mortgage as security. Traveller's Inn went under and VanCity began foreclosure proceedings. VanCity took ownership of the motel, and found a buyer who wanted vacant possession (no tenants). So VanCity tried to boot the tenants out, and the tenants argued that VanCity couldn't do this because they had express notice of the tenants. Tenants sued on this basis, as they had a number of fixtures on the property, not to mention moving costs. |
| **RULING** | VanCity argued that while they had notice of the tenants, s 29(2) of the LTA says that notice only matters when the purchaser has participated in fraud. The BCSC agreed - while VanCity had express notice of the unregistered interests, they lacked either an intention to extinguish the leases at the relevant time or other dishonesty. Thus, the unregistered interests of the tenants were extinguished by the transfer.  But wasn't there dishonest intent on VanCity's part? **Not at the right time**. According to the WOODWEST line, what matters is intention before the transfer of title and VanCity wanted to keep the tenants paying rent at that time. According to the SZABO line, conduct outside common morality is required and nothing VanCity did was outside normal business practices.  The operating agreements were to be treated as leases and therefore are enforceable *in personam* (equitable remedy of specific performance) against City Center - while the leases are enforceable against the mortgagor, they are not enforceable against a third party like the mortgagee, VanCity. The only way to affect the third party is to make an agreement with them or register your interest. So City Center could be liable to Serving for Success for the breach of their lease… but the reason this all happened is City Center is broke! As damages are the only available remedy, Serving for Success is out of luck. And if City Center declared bankruptcy, they would be released from all liabilities. |
| RATIO | In addition to express notice, either a fraudulent/dishonest intention or an intention to extinguish the leases prior to the transfer is required. |

**Q:** So what should the sad sack tenants have done to protect themselves?

**A:** REGISTERED THE LEASE, or made an agreement with VanCity to honor the lease.

Womp womp. Too bad their lease wasn’t shorter, because...

**Unregistered leases for 3 year or less + actual occupation** would be valid and enforceable against City Center and Van City [***s 29(2)(d)***], even w/o registration or any notice to VanCity [***s 23(2)(d)***].

This case was a surprise to the legal community in BC, as there was an expectation that the Courts would enforce the lease.

## FRAUD & AGENCY

LTA, s 29

**Except in the case of fraud in which he or she has participated** *(purchaser or mortgagee, agents included)***,** a person contracting or dealing with or taking or proposing to take from a registered owner… a transfer of land… 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 an interest, the registration of which is pending, a lease not exceeding three years if there is actual occupation, or the title of a person against which the indefeasible title is void under s 23(4).

The Torrens scheme was designed to abolish equitable notice, as such knowledge not on the register should have no effect. This opened up new opportunities for Torrens fraud, so the courts allowed equitable notice to have effect in these circumstances given:

* + 1. Actual knowledge before signing the interim agreement of P&S
    2. Either (a) Purchase intended to defeat unregistered interest [p 6-39 para 71]

(b) Some act of dishonesty or deceit [p 6-39 para 72]

Transferee "not affected by a notice, express, implied or constructive of an unregistered interest"

In the case of Rutland and Jerome, Jerome's knowledge of the unregistered interest was attributed to Rutland [top of p 5-44]. Jerome's fraudulent intention to extinguish the unregistered interest by sale to the BFPV, Jabin, is also attributed to the principal, Rutland. Because of the principle of vicarious liability, the knowledge and fraud of the agent is attributed to the principal.

### GREVELING v GREVELING [1950] BCCA

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| --- | --- |
| **FACTS** | Mr. Blackburn was the purchaser of a piece of property. He retained a solicitor to act for him in this. This solicitor had, 7 years previously, sold the property from Mrs. Greveling to Mr. Greveling in the process of their divorce. Mr. Greveling never registered the transfer, so Mrs. Greveling is still on the title as the registered owner. So Mrs. Greveling decides to sell the property again (FRAUD!), and uses the same solicitor. This sets up a weird situation where Blackburn is an innocent purchaser but the solicitor is an agent of fraud. |
| **RULING** | **ROBERTSON:** The knowledge of the solicitor did not affect Mr. Blackburn because his fraud was not for his benefit, but for that of Ms. Greveling. Therefore, Blackburn gets IT and Mr. G's interest is extinguished. The solicitor breached his fiduciary duty to Mr. Blackburn.    **O'HALLARAN:** Blackburn was the principal and he hired this solicitor to carry out the transaction - his solicitor had the authority from Blackburn to investigate the state of title, and committed fraud for the benefit of a third party. But this doesn't matter, if an agent commits a fraud within the scope of his authority, this is binding on the principal, no matter for whose benefit the fraud was committed. **This is more consistent with previous authority.**    **SMITH:** Sided with Robertson on another issue entirely (Mr. Greveling's interest is invalid), Blackburn wins out. |
| RATIO | MAJORITY (ROBERTSON): A principal is only liable for the fraud of their agent that is committed for their benefit, and not for fraud committed for the benefit of a third party.  **MINORITY (O'HALLARAN): A principal is liable for the fraud of the agent acting under their authority, no matter who benefits from the fraud.** |

If O'Hallaran's view had won out, and Blackburn had lost, he could seek remedies against the solicitor, and then against the Assurance Fund - unlike McCaig, his interest was registrable and thus his loss occurred as a result of the operation of the ***LTA***.

ASSETS CO v MERE ROIHI [1905] UK[6-44]

“Fraud in the act meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud, that fraud by persons from whom he claimed did not affect him unless knowledge of it was brought home to him or his agents…”

The fraud must be brought home to the principal or to his agent.

**Actual Knowledge**

As described in MCCAIG, VANCITY or WOODWEST, actual knowledge is full knowledge of the relevant circumstances.

**Q:** Can interests with notice but uncertain validity be ignored?

**A:** Yes.

### RE SAVILLE ROW PROPERTIES LTD [1969] BCSC

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| --- | --- |
| **FACTS** | Frew and Associates try to register their option, but the LTO refused to register it. Frew didn't do anything. Eldred then sold property to Saville Row. Did Saville Row get IT or was the title subject to the unregistered option in favor of Frew? |
| **RULING** | Held for Saville Row. If there's good reason to believe that the unregistered interest is invalid or unenforceable, then you are entitled to ignore it. While Saville Row did know about Frew's unregistered interest, they also knew that it had been bounced by the LTO, and so could ignore it. Another point in Saville Row's favor, not mentioned by the TJ - they only found out about Frew's unregistered interest when they applied to register, *after* the completion of the sale. Saville Row did not meet either of the requirements for fraud - insufficient notice and intent. |
| RATIO | **If there's good reason to believe that the unregistered interest is invalid or unenforceable, then you are entitled to ignore it.** |

## *IN PERSONAM* CLAIMS

***In personam*** **claims** allow an exception to indefeasibility for **unregistered** personal rights against the RO. Unregistered interests are enforceable against the parties making them, as contracts. *In personam* claims are only going to become *in rem* rights through the action of the courts (unless the RO settles w/o litigation).

***s 20(1)*** "**Except as against the person making it**"

The person making it is the person who signs a legal document. This rule allows for *in personam* claims, which can have *in rem* implications. While this provision originally held that unregistered interests had no effect either at law or in equity [4-17], case law held that unregistered transfer can give a title in equity against the transferor, and s 20(1) was amended to reflect this in the 1970s.

**EXAMPLE**: ZELMER**:** proprietary estoppel is an *in personam* claim. If Victor Projects had sold the property to a BFPV before the enforcement of Zelmer's unregistered interest, Zelmer would have been out of luck!

MORTGAGES

**Equity of redemption** is the fair market value – the value of the mortgage.

**The right of redemption** is the mortgagor’s equitable right to pay mortgage within 6 months after foreclosure. This 6 month period can be reopened or extended at the court’s discretion.

If the mortgagor defaults, the Mortgagee's usual remedies are:

* Action on the covenant
* Order of possession
* Foreclosure: mortgagee takes title from mortgagor (strict foreclosure) and the mortgage is discharged from the title. Generally sell the property afterwards (foreclosure).
* Judicial sale (court-ordered sale)

### PACIFIC SAVINGS v CAN-CORP DEVELOPMENTS [1982] BCCA

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| **FACTS** | Pacific Savings begin foreclosure proceedings in 1980 after skyrocketing interest rates collapsed real estate values and put Can-Corp into default. Pacific Savings got an **order nici**, 6 months period of redemption elapsed, and Pacific Savings got **order absolute** (grants title and discharges mortgage). In 1981, Pacific Savings got CIT, free of the mortgage. Then Can-Corp gave notice that they intended to redeem! TJ held for Pacific Savings. |
| **RULING** | Held for Can-Corp as there is a relationship *in personam* that remains between the mortgagor and mortgagee. This relationship can allow the mortgage to be reopened and give the mortgagor another opportunity at redemption. Indefeasible does not preclude *in personam* claims against the RO. |
| RATIO | **Redemption period can be reopened even after strict foreclosure, based on the discretion of the court.** |

This is another reason why mortgagees want to sell property to the BFPV! Then there is no longer any in personam claim against the property. But the mortgagor could file a CPL on the property, as Can-Corp did, and then any prospective purchaser would have notice and their IT would be subject to the mortgagor's possible interest.

Other examples of *in personam* rights that can lead to *in rem* rights (6-51) include:

* Rectification of the register for mistake can change title
* Fraud: ***LTA s 23(2)(i)*** explicitly provides that title gained by fraud is defeasible
* CPL: *lis pendens* of unregistered interest
* Caveat: unregistered interest

TRUSTS

Beneficiaries can enforce the trust against the trustee, even if the trust is not on the register (which they aren't allowed to be in most provinces). LTA, s 180 allows a trust to be registered on the title with the words "in trust (REFERENCE NUMBER)".

### McRAE v McRAE ESTATE [1994] BCCA

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| **FACTS** | Farquhar Fraser Sr. set up a trust for his children with his wife, Mrs. Fraser, as trustee. She transferred title of the property to one of the children, Farquhar Fraser Jr., who took the title in his own name, removing the mention of the trust from the register. Farquhar Fraser Jr. then passed away, leaving the property to his children and wife. Brother and sister, John and Catherine, challenged this for their 2/3 interests for the property. |
| **RULING** | LTO should have registered Farquhar Fraser Jr.'s title with the "in trust" notation. Despite this mistake, he did not have absolute ownership of the property and his mother committed a breach of trust by not ensuring . The trust continues to be enforceable, even when unregistered, as an *in personam* claim. |
| RATIO | **Unregistered trusts can form the basis for a successful in personam claim.** |

If Farquhar Fraser Jr. had sold the property to a BFPV w/o N, the beneficial unregistered interests would have been extinguished. John and Catherine would be out of luck, because they only had a beneficial interest and not the full fee simple, and so the Assurance Fund would be unlikely to allow them to recover.

## REGISTRATION: CHARGES

**Registration**: acceptance + recording in a public office [p 6-60]. Can be entry on the certificate of title (register) or entry in a register or a filing (not expressly on the certificate of title).

LTA, s 1: **Register**: each property certificate of indefeasible title (fee simple).

LTA, s 1: **Charge**: any estate less than fee simple.

***LTA, s 28***: The priority of charges is determined by the date of application. Charges may not appear in order of priority on the register.

Registration of a fee simple offers indefeasible title. Registration of a charge offers much less legal protection, as it is not indefeasible (GILL v BUCHOLTZ, ***LTA s 197***).

***LTA s 197***: The LTO staff examines the application to register a charge, and any accompanying instruments.

***LTA s 197(2)***: The LTO can accept or refuse registration. It is a purely administrative determination, not a judicial one. The LTO registers instruments, not legal interests - need to look at the instrument to determine what legal interests are involved.

In BC, trusts can be registered (optionally) according to LTA, s 180. This registration serves to protect beneficiaries & notice to purchasers from the trustee.

### DUKART v SURREY (DISTRICT) [1978] SCC

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| **FACTS** | Land developed for residential lots. Developer transferred foreshore reserves to a trustee, with a trust notation. In that trust, the easements of the individual property owners were contained. The LTO registered the instrument solely as a trust, no mention of the easement on the register. Foreshore reserves purchased by municipality of Surrey on a tax sale and **no trust notation was entered**. Surrey built public toilets along Dukart's unregistered easement. Section 25 of ***LRA*** (now: ***LTA, s 276***) provided that when land is sold on a tax sale, title is "purged" of all charges, with exceptions that included "any easement registered against the land". **Issue**: Did Dukart's easement survive the tax sale? |
| **RULING** | Held that Dukart's easement survives, as the Act does not define registration; terminology of s 25 referred to easements and right of way as "registered as a charge against the land". Therefore, the Act contemplates different kinds of registration. What might be considered one type of charge administratively might include other kinds of legal interests as determined judicially. The Dukarts were then able to get an injunction forcing Surrey to take the washrooms down. |
| RATIO | **SHEPPARD: If a document is on file at the LTO, anything included in that document is registered.** |

**NOTE:** Had there been a mortgage prioritized over the easement, it would have been extinguished by the tax sale.

### CREDIT FONCIER v BENNETT [1963] BCCA

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| **FACTS** | Bennetts were the registered owners of property, and the unknowing victims of fraud at the hands of Allen. Allen, an officer of Todd Investments, forged a mortgage on the property of the Bennetts and got it registered in favor of Todd Investments in the amount of $7,400. Allen assigned the mortgage to BFPV Stuart in exchange for $5,500. Stuart got the mortgage registered on the title, then assigned it to Credit Foncier in exchange for $6,600. At CL, this mortgage is a nullity according to the principle of *nemo dat*. Credit Foncier sent two letters to the Bennetts informing them of the mortgage reassignment, and the Bennetts ignored them. Credit Foncier initiated foreclosure proceedings - the issue at trial was whether this mortgage was indefeasible through registration or did the principle of *nemo dat* apply? |
| **RULING** | At the time of the decision, many assumed that a registered charge was indefeasible. But the court rejects this, holding that the registration of a charge does not determine whether it is valid and therefore does not offer indefeasibility. A registered holder of a charge is **deemed** to be the holder of the interests contained in the instrument, but this presumption can be rebutted. In this case, the Bennetts were entitled to attack the validity of Credit Foncier's mortgage, and they were successful in doing so.  Credit Foncier would not have succeeded even if the mortgage had been valid - the onus is on the mortgagor to establish that they advanced money to the mortgagee, and the mortgage is only good for as much as was advanced. A mortgage is only security for the amount advanced under it. As no one had advanced the Bennetts anything in exchange for the mortgage, Credit Foncier could recover nothing. |
| RATIO | **Registration of charges creates only a rebuttable presumption of validity and not indefeasibility.**  **Another example that the fraud of an agent is the fraud of the principal.** |

Would the result be the same today? Yes, the same reasoning applied in GILL v BUCHOLTZ, and the BCCA came to exactly the same conclusion. Furthermore, ***LTA, s 25.1(1)*** states that a void instrument creates no legal interests, unless it is a fee simple.

The mortgage is constructive notice to purchasers of its existence, but it is only security for the amount advanced under it and if it is obtained fraudulently then it is a void instrument.

**Novation**

(1) Replacing an obligation to perform with a new obligation; or

(2) replacing a party to an agreement with a new party.

### CANADIAN COMMERCIAL BANK v ISLAND REALTY INVESTMENTS [1988] BCCA

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| **FACTS** | Charles Cowan, acting on behalf of the owner of the property, Park Meadow, forged a discharge of the mortgage in favor of Island Realty and substituted as mortgagee Almont Holdings. Almont Holdings didn't want to be a second mortgagee due to the increased risk. Island Realty argued that there is only a rebuttable presumption of validity - the discharge was a fraud and thus their mortgage should be prioritized. |
| **RULING** | Held that the forged discharge was valid, and distinguished CREDIT FONCIER on the basis that it involved an assignment, not a novation. Therefore, Almont's mortgage ranked first, and Island Realty's mortgage ranked second. |
| RATIO | **Novations can make things screwy.** |

**SHEPPARD’S PEPPER**

This decision is a mess, and not just because it ignores his father’s precedent. It ignores the rules regarding fraud! This fraud was perpetrated by the agent of Park Meadow, and the fraud of an agent (and their knowledge) is attributed to the principal (McCAIG, GREVELING). And a statute cannot be used as an instrument of fraud, so the discharge should not have been recognized. This point was not argued at the Court of Appeal. **Instead, the fraudster was successful!**

This decision has also been statutorily overruled by LTA s 25.1(1), which says nemo dat applies to charges, and so Almont's mortgage would be subject to Cowan's fraudulent discharge.

**Notice**: knowledge outside the register.

Constructive notice is abolished, but express notice (actual knowledge, as per McCAIG) still functions in the Torrens system. The fraudulent purchaser is subject to express notice, as equity will not allow a statute to be used as an instrument of fraud.

Only the holder of a fee simple who got on the register and was deprived of their interest by fraud or mistake can recover from the Assurance Fund - charges are not protected.

Why was Almont so keen to be assigned as the first mortgage? Because Park Meadow was going into bankruptcy (and contributed to bankrupcty of Canadian Commercial Bank) and the value of the property was not enough to cover both mortgages. All that remains to the second mortgagee is the **equity of redemption** (FMV - first mortgage).

***LTA s 28***: Priority of charges is based on the date of application for registration, not based on date of execution of the instruments. Application of the principle of "first in time, first in right".

## PRIORITY OF MORTGAGES

At common law, priority was based on the date of execution. Foreclosure extinguishes subsequent financial charges (both private, like mortgages, and statutory, like tax liens). Second mortgages are riskier due to these rules.

In America, Wall Street split the security from the debt of mortgages and sold them as separate instruments - this was a contributing factor to the GFC.

**Foreclose down**

If the first mortgage forecloses and the property is sold, then later mortgages are extinguished. If the second mortgage forecloses and the property is sold, then the property would still be subject to the first mortgage.

**MORTGAGE #1**

FORECLOSE DOWN

Foreclosure extinguishes subsequent financial charges (private, like mortgages, and statutory, like tax liens).

**FORECLOSURE**

**EXTINGUISHES**

**LATER MORTGAGES**

**MORTGAGE #2**

**Redeem up**

If the first mortgagee initiates foreclosure, and the FMV dips below the value of the mortgage, then they have to sue the mortgagor (who is liable on their covenant to pay) for the remainder. The second mortgagee would get nothing, but would only be entitled to sue the mortgagor based on their promise to pay, OR they could redeem mortgage #1 by paying its full value to the first mortgagee, and preserve their security.

**MORTGAGE #1**

REDEEM UP

The second mortgagee redeems (pays off) the first mortgage to prevent foreclosure and the extinguishment of their interest in the second mortgage.

**FORECLOSURE INITIATED**

**MORTGAGE #2**

# CHAPTER VII: FAILURE TO REGISTER

## THE GENERAL PRINCIPLE

The Torrens principle holds that unregistered interests in Torrens land are unenforceable. The courts would not accept this, so the ***LTA*** was amended so that unregistered interests could be recognized against the person making it. The result is that unregistered interests are unenforceable against innocent third persons (both purchasers and charge holders). Innocent in this context means that they have no notice of the unregistered interest (and unless there is fraud, notice means registration).

Registration is voluntary (except for the initial grantee of the fee simple from the Crown), but without registration you are vulnerable to the BFPV.

***LTA, s 20(2)***: right to apply for registration

***LTA, s 20(3)***: lease up to 3 years (including periods of renewal) with tenant in actual occupation cannot be registered, but still must be respected

***LTA, s 20(1)***: "Except as **against** the person making it" - a party to the unregistered instrument cannot extinguish it for that reason. Unregistered interests are enforceable *in personam* against a party to the relationship, and this can have consequences *in rem*.

### SORENSON v YOUNG [1920] BCSC

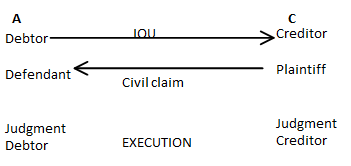
|  |  |
| --- | --- |
| **FACTS** | Sorenson owned lot 1 and Roch owned lot 2. Sorenson had an unregistered easement across lot 2. Roch sold lot 2 to Young. After four years, Young cut off Sorenson's easement and Sorenson pursued action. |
| **RULING** | Held for Young - fraud could not be brought home on her part, so she was entitled to block the easement. Couldn't prove that Young knew the legal implications of Sorenson driving across the property meant there was an unregistered easement prior to the purchase of the property. Sorenson's interest was not registered, and so was unprotected. |
| RATIO | **Except for a few exceptions (fraud, estoppel, etc.), unregistered interests are unprotected, with few exceptions.** |

**SHEPPARD’S PEPPER**

Today, following ZELMER, Sorenson could argue that Young's behaviour amounted to acquiescence and could pursue action based on proprietary estoppel. Or Sorenson could pursue an *in personam* claim against Roch for damages, but Roch was not guilty of fraud so it would be hard to win.

This kind of situation is no longer possible, as "landlocked" properties are prevented - there must be an easement to access public roadway, and these easements must be officially recorded on the register. If one is making an application to register, as per ***LTA, ss 181, 182***. If one is subdividing lots, need to get approval from the Approving Officer, as per ***LTA, s 75(1)***.

## JUDGMENTS



**A** is holder of the fee simple, and a debtor to **C**. **C** is an unsecured creditor who has no **rights in collateral** (a claim on any specific assets of the debtor to satisfy their debt to the creditor).

From the time of registration, the (unsecured) judgment obtained from court forms a lien and charge on the debtor's property to the extent of the debtor's beneficial interest in the land (as per Court Order Enforcement Act, s 86(3)).

A registered judgment entitles the judgment creditor to obtain a court-ordered sale of the property. But the principle of *nemo dat* applies, and the court ordered sale can only sell the value of the creditor's interest in the property.

This judgment is subject to the rights of a purchaser (including mortgagees), who acquired an interest in the property in good faith and for valuable consideration before the registration of the judgment, even if the purchaser has not registered their interest (per Court Order Enforcement Act, s 86(3)(c)).

If the purchaser makes an agreement with the debtor **AFTER** the registration of the judgment, they will be subject to it, as they had **statutory constructive notice** from the register.

**Fraudulent Conveyance** is when a debtor transfers their interest to a property to a friendly third party in order to defeat the creditor's interest. For instance, a debtor may give their property to a spouse. Creditor can make application to set aside the transfer in order to execute on the property.

### MARTIN COMMERCIAL FUELING INC v VIRTANEN [1997] BCCA

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| --- | --- |
| **FACTS** | Debtor agrees to sell the property (unregistered agreement). Registration of money judgment on debtor's title. The purchaser, Virtanen, registered its interest, and the LTO left the judgment on the title. |
| **RULING** | Held for Virtanen. *Nemo dat* applies, and as judgment was not registered at the time purchaser's interest was created in the debtor's property, the purchaser's interest cannot be subject to the judgment. The LTO made a mistake. |
| RATIO | **Judgments are subject to *nemo dat*, so they can only collect to the extent of the debtor's beneficial interest in a property.**  **Prior to registration, judgments are merely in personam claims.** |

A court-ordered sale is involuntary, and the purchaser only gets the interest of the debtor in the property. There might be unregistered interests out there that rank ahead of theirs.

## OTHER INTERESTS

### L&C LUMBER v LUNDGREN [1942] BCCA

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| --- | --- |
| **FACTS** | Lundgrens sold timber rights too cheaply to McDonald. Timber rights contained by unregistered *profit a prendre* in gross right of taking and easement. McDonald turned around and assigned (sold) these rights to L&C Lumber and gave notice to the Lundgrens. Lundgrens argued that contract was unenforceable due to assignment and L&C had no rights to the timber. |
| **RULING** | Held for L&C Lumber – "as against the person making it" means that L&C Lumber can enforce their unregistered agreement against the Lundgrens, as they were one of the persons making it. |
| RATIO | **Unregistered interests with a contractual aspect (everything except trusts, pretty much) are enforceable against the person making the original agreement, even if the other party was not originally party to the agreement but later assigned to it.** |

**NOTE:** If Mrs. Lundgren had sold her property to the BFPV, L&C Lumber's unregistered interest would have been extinguished and they would have to pursue action against her *in personam* instead.

TOP LINE (BCCA) was an anomalous case where an unregistered long-term lease was unenforceable as against the initial parties.