Table of Contents

[Joint Tenancy 3](#_Toc386012731)

[Tenants in Common 3](#_Toc386012732)

[Adverse Possession (squatting 3](#_Toc386012733)

[LEGAL CONCEPTS OF LAND 4](#_Toc386012734)

[AIRSPACE RIGHTS 4](#_Toc386012735)

[Cases: 5](#_Toc386012736)

[BELOW THE LAND 6](#_Toc386012737)

[WATER/RIPARIAN RIGHTS 6](#_Toc386012738)

[Ownership of Water Beds 7](#_Toc386012739)

[Cases: 7](#_Toc386012740)

[Access by Riparian Owners 8](#_Toc386012741)

[Case: 9](#_Toc386012742)

[ACCRETION 9](#_Toc386012743)

[FIXTURES AND CHATTELS 9](#_Toc386012744)

[SUPPORT 11](#_Toc386012745)

[REAL AND PERSONAL PROPERTY 11](#_Toc386012746)

[The doctrine of estates 11](#_Toc386012747)

[ACQUISITIONS OF INTERESTS IN LAND 12](#_Toc386012748)

[Inter Vivos Transfer: Sale of Land 12](#_Toc386012757)

[Inter Vivos Gifts 13](#_Toc386012758)

[Will or Intestacy 14](#_Toc386012759)

[Intestacy 14](#_Toc386012760)

[Proprietary Estoppel 15](#_Toc386012761)

[REGISTRATION OF TITLE 16](#_Toc386012762)

[Guarantees Upon Registration Under LTA 16](#_Toc386012763)

[Duties of the Registrar 17](#_Toc386012764)

[Registrable Interests 17](#_Toc386012765)

[Non-Registrable Interests 18](#_Toc386012766)

[INDEFEASIBILITY 18](#_Toc386012767)

[EXCEPTIONS TO INDEFEASIBILITY 19](#_Toc386012768)

[IN PERSONAM CLAIMS 20](#_Toc386012769)

[REGISTRATION OF INSTRUMENTS 21](#_Toc386012770)

[APPLICATION TO REGISTER 22](#_Toc386012771)

[PRIORITY OF REGISTRATION 22](#_Toc386012772)

[FAILURE TO REGISTER 23](#_Toc386012773)

[Registered Judgments- Creditor’s Remedies 23](#_Toc386012774)

[Short Term Leases 24](#_Toc386012776)

[LAW AND EQUITY ACT (deals with short-term leases) 24](#_Toc386012777)

[DOCTRINE OF ESTATES 25](#_Toc386012778)

[Words of Limitation 25](#_Toc386012779)

[Wills 25](#_Toc386012780)

[Repugnancy 26](#_Toc386012781)

[THE LIFE ESTATE 26](#_Toc386012782)

[TYPES OF CO-OWNERSHIP 27](#_Toc386012783)

[ABORIGINAL LAW IN PROPERTY 27](#_Toc386012784)

[Aboriginal Right 28](#_Toc386012785)

[Aboriginal Title 28](#_Toc386012786)

[ASSURANCE FUND 29](#_Toc386012787)

**OVERVIEW**

***Cuius est solum eius est usque ad coelum et ad inferos*-** ownership up to heaven and down to hell

***Land Act***- deals with Crown land, crown grants (s.50), the 7 land districts, and surveying

***Land Title Act***- sets up the BC torrens land registration system and requires that all transfers must be made on the prescribed form (Form A) and on a single page (s.185), unless the registrar accepts a different form

***Property Law Act***- deals with everything else

***Land Transfer Form Act***- deals with the meaning to given words in prescribed forms.

|  |  |
| --- | --- |
| Real Property- land, air, timber, water, mineral etc. | Personal Property |
| Corporeal-tangible (right to possession)   * Estate owner owns a time in land only  1. Feesimple- main type of freehold 2. Life estate (freehold)- a time in land for lifetime of holder 3. Estate Pur Autre Vie- life estate measured by some other life other than owner of estate 4. Leasehold estate- time in land for fixed duration   Incorporeal-intangible (right to use)   * Easements, covenants, profits a prendre, mortgages | 1. Chattels Real or 2. Chattels Personal 3. Choses in possession-tangible (chattels) 4. Choses in action-intangible (IP, money)  * Free and alienable bother inter vivos and upon death. No registration required. * A holder of a life estate in personalty owes a fiduciary duty to preserve the estate for the ultimate recipient (*Fraser*) |

Joint Tenancy**:** Joint interest with right of survivorship (not compartmentalized) – must be stated in title

Tenants in Common**:** Tenants under the same roof but compartmentalized, can sell own part of property, no need to state on title.

A,B,C,D are joint tenants and must own the same fractional share

A dies- then B, C,D split each third

D sells his interest to E- E takes D's third, but is now a tenant in common, B,C, are still Joint Tenants

B dies- C then owns two thirds and is tenant in common with E

**Law of Finding**/ “Finders keepers, losers weepers”- The finder of chattel (personal property acquires title that is good against the entire world except for the true owner. Not indefeasible title since true owner can always reclaim his interest

**Aboriginal Title** – is *sui generis* (of its own class or kind). Exclusive occupation of land is sufficiently similar to the common law concept of possession to impose aboriginal title.

Adverse Possession (squatting):

* *LTA* s.23 abolishes the concept of adverse possession in BC, except against land which has never had an indefeasible title imposed before (i.e. crown grant)
* If the land is registered, no adverse possession possible
* Only arises in narrow window of land being granted by crown but not registered
  + Must have lived on for 20 years without registration
* Court can adjudicate adverse possession claims (*Land Title Inquiry Act*, s.171)
* Can arise by mutual mistake and where claimant is a knowing trespasser
  + Must be open and notorious, adverse (not with permission), exclusive, peaceful, and continuous

Alienability

* Capitalist society likes to make sure that our land is freely alienable (can always sell and dispose land)
* Fee tails, future interests, and strict settlements were broken by *PLA s.10*
  + Wills and inter vivos transfer allow for alienability

# LEGAL CONCEPTS OF LAND

* Surveying required in BC (*LTA s.* 58)
  + Horizontal and vertical plane
  + Registrar can also accept a metes and bounds description without a plan (s.99)
* Indefeasible title is subject to the right of a person to show that land is wrongly described (*LTA* s.23)
* No obligation on lawyers to investigate whether the plan & boundaries of land are correct (*Winrob*)
* Boundaries can be changed by accretion or erosion (must be then registered on plan)

# AIRSPACE RIGHTS

An owner has a right to the air space above his land only in the enjoyment of that land, and in preventing anyone else from acquiring a right in that air space.

* Owners and leasors who have possessory interests in the building can also have possessory interests in the airspace above the building (*Kelsen*)
* Airspace rights extend only up to the “ordinary use & enjoyment” of the plaintiff (*Bernstein v Skyviews*)
* Owner has no property right or legislative jurisdiction in relation to airspace above the land (*Manitoba*)
* Owner has right to fell overhanging branches and remove protruding roots of trees grown on a neighbouring property
* Intrusion into airspace by a land-based object likely constitutes trespass (*Didow v Alberta Power*)

**Statutory Principles:**

* *Civil Aviation Statutes* recognize airspace rights by parties other than the owner
* *LTA,* s. 138- recognizes air space parcels and air space plans
  + s. 139 – title to airspace is recognized
  + s. 140- A grant of an airspace parcel to a grantee does not allow that grantee to interfere with that grantor’s interest in land or remaining airspace parcel
  + s. 142- Minister of transportation can grant airspace parcels above highways for power lines, billboards, Skytrain, education etc.
  + **Title**: Fee simple owner of airspace parcel receives a separate title. Does not normally appear as a charge on the surface landowner in question, but will appear as an easement if one is required to access the airspace
* ***Strata Property Act***- permits a person to acquire a fee simple ownership in a multi-unit building situated on land that they do not own
  + Grants a strata lot owner an airspace right
  + Each strata lot owner gets a series of rights (access, support, services)
  + **Bare land strata plan** (s.1) permits the subdivision of a horizontal plane
  + **Building strata plan** (s.68) allocates strata lots to an individual owner (vertical)
  + **Title:** Strata owner’s title includes both the condo & a part interest in the common area. No separate title for the land on which the condo building sits. Registered in LTO.
  + Creates government body (Strata Corporation):
    1. Corporation is made up of all members
       - Several members elected to council
       - Council passes bylaws (must obtain a ¾ majority from members, 1 vote/lot)
       - Non major or immediate changes require 51 of majority at annual meeting
  + s.69 implied easements- support walls, passage of water, sewage, drainage, gas, oil, electricity, garbage, heating, telephone, radio, by pipes, wires, cables, chutes for use by strata lot
    1. not registered on title at LTO
  + s.70 changes to strata lot- strata corp. must approve of change unless falls under (2)(a)
  + s.72 repair of property- strata corp. must repair and maintain common property and assets
  + **NOTE:** 2014 *Civil Resolution Tribunal Act* will provide dispute resolution w/o court

## 

## Cases:

***Kelsen v Imperial Tobacco* *Co.* (1957) UK QB ­**– advertising sign

**Facts:**

* Kelsen, a leasehold store owner of “407”, sues Imperial Tobacco for trespass of overhanging sign; wants an injunction to remove sign
* 1st sign: During Kelsen’s first lease, IT puts sign on neighbouring building that protruded 4 inches from wall. NO objection from Kelsen
* 2nd sign: IT gets permission from freehold owner’s of Kelsen’s place to but a bigger sign = “Players Please”, **8 inch protrusion**, 20 feet wide by 8-10 feet high. IT pays owners of neighbouring “409” money for sign.
* **Kelsen’s airspace extends to 40 or 50 feet**
* Kelsen allowed employees of IT to access the sign using his shop
* **Sign there for three years before Kelsen began to object ..implied permission?**

**Issue:**

* *Did the overhanging sign constitute a trespass by invasion of air space, or just a nuisance?*
* *Does the lease holder also have airspace rights?*

**Decision:**

* P-Kelsen wins. Yes was a trespass on the leaseholder’s rights
* Judge Considers:

*Pickering v Rudd*: D had a board that hung several inches over P’s garden = NO trespass (gun shots fired over not trespass unless hits land)

*Gifford v Dent:* **sign projected 4ft 8” was a trespass on tenants**

*Wandsworth District Board of Works v United Telephone*: a telephone line running across a street was not a trespass on the city b/c city only had rights to air space required to use street as a street.

Judge follows reasoning from *Gifford* and *Wandsworth*

**RATIO**

In a leasehold situation, a tenant can bring an action in trespass against the person who overhands a sign over his demised land

***Bernstein* (*Lord of Leigh*) *v Skyviews***(1977) UK QB – aerial photographer

**Facts:**

* Skyviews took an aerial photograph of Bernstein’s house as part of their business to take such photographs and offer to sell them to the homeowner.
* Skyviews offered to sell photograph to Bernstein. This angered him.
* Bernstein wrote letter accusing invasion of privacy, demanding destruction of negatives.
* Letter did not reach Skyviews manager
* Bernstein sues for trespass
* Skyviews claim photographs taken from adjoining land

**Issue:**

* *Is this a trespass or a nuisance? How high do a landowner’s air space rights extend?*

**Decision:**

* D wins; judge does not adopt *accursium maxim –“up to heaven”*
* Judge found D did fly over land to photograph Ps house; done w/o permission.
* no support in authority that landowner’s rights in the air space above his property extend to an unlimited height.
* Kelsen does not apply because that was height at a low level
* Applies rule in *Wandsworth Board of Works v United Telephone Co*: owner “can cut and remove a wire placed at any height above his freehold” subject to any statutory limitations.

**RATIO**

* Owner’s rights to airspace above land are limited to the height as is **“necessary for the ordinary use and enjoyment of his land and the structures on it.”** from *Wandsworth Board of Works v United Telephone Co*

***Manitoba v Air Canada* (**1980) SCC – Air Canada not required to pay tax for use of Manitoba’s airspace

**Facts:**

* Air Canada flies over Manitoba, sometimes lands
* Manitoba sees their airspace as lands and wants Air Canada to give it sales tax.

**Issue:**

* *Does Manitoba have legislative authority over the airspace above it in order to levy a tax in connection with the operation of aircraft within such airspace (whether the aircraft lands in Manitoba or travels above Manitoba without ever landing)?*

**Decision:**

* NO, Air Canada wins
* Judge disagrees with conception of airspace from the Manitoba CA: air space is the same as air which is “*res onmium communis”* – “thing held in community”
* 3 Main ideas on airspace

Airspace is not land (Lord Ellenborough- *Pickering v. Rudd*)

Airspace as land (*Pickering v. Dent)*

Airspace can be land but only to the reasonable use: Bernstein case and *Commissioner for Railways et al. v. Valuer-General*

Case took a stab at “ad coelum” maxim. UK case but influential

# BELOW THE LAND

Everything of value stays with the crown. Check title for mineral rights.

*Mineral Tenures Act*- allows fee miners with proper licenses to come onto public and private land to prospect for Crown mineral rights. You must obtain license but don’t need permission from actual owner.

Mineral rights: Fee simple owner of mineral rights appears as a charge on the title

# WATER/RIPARIAN RIGHTS

**Sources of Water Rights**:

* **Common Law**:
  + Use of the water for domestic purposes while on your property is allowed
  + If multiple users share body of water, surveys set boundaries to middle line (ad medium filum)
  + Obligation not harm other riparian owners by diminishing the flow, quantity, quality of water
  + Use of water must be connected to the property where the water exists
  + A riparian owner maintains the common law rights to clean and flowing water until license removes them
* ***Water Act*:** Use of flowing water
  + S.2 all “streams” in BC are vested in the government, except for private rights under licensing or approvals given under the act
    1. “stream” means a natural watercourse or source of water supply, whether usually containing water or not. i.e. lake, river, creek, spring, ravine, swamp, gulch
  + **s.4 a person who is not registered under act must not divert, extract, use or store any water from a stream except for domestic use** 
    - * + (s.1)“use of water for household requirements, sanitation and fire prevention, watering of domestic animals and poultry and the irrigation of a garden not exceeding 1012 m2 adjoining and occupied with a dwelling house.”
  + s.5 licensing rights allows:
    1. divert and use beneficially, for the purpose and during or within the time stipulated, the quantity of water specified in the license
    2. Store water
    3. Construct, maintain and operate the works authorized under the license and necessary for the proper diversion, storage, carriage, distribution and use of the water or the power produced from it
    4. Alter or improve a stream or channel for any purpose
    5. Construct fences, screens and fish or game guards across streams for the purpose of conserving fish or wildlife
  + Right to unrecorded water, s.42:
    1. (1) To extinguish a fire, but flow must be promptly restored
    2. (2) For domestic purpose or for prospecting a mineral. Person using must prove that the water is unrecorded
* ***Water Protection Act***
  + s.2 purpose is to foster sustainable use of BC water resources in continuation of the objectives of conserving and protecting the environment
  + s.3 vests all water in the government except those under license
    1. includes percolating and ground water

## Ownership of Water Beds

1. Freshwater (non-tidal)
   * **NO** rights in B.C. to navigable or non-navigable river bed of shore (*Land Act* s.55(1)) unless specifically granted or never taken away (s.56)
2. Saltwater (tidal)
   * In BC today the foreshore (between high and low water mark) is owned by the provincial crown
   * Riparian owners have rights to high water mark, marked by change in vegetation
3. **Streams- after 1961 based on the *Land Act*, c 245, s. 55**
   1. Now nobody owns the bed of the stream unless the crown explicitly gives you this on the land grant.
      1. 2 exceptions in section: *ad medium filum* can apply if 1) there is an express provision in the grant to the contrary or 2) the minister endorses a declaration on the plan (of the property) under s. 58
      2. can apply to the registered owner of land to whom an indefeasible or absolute title has issued before March 27, 1961 that specifically includes the bed of the body of water coloured […{ on the map or a plan attached to a Crown grant (s. 56)
         1. Also applies to land in subdivision

## Cases:

***Johnson v Anderson* (1937) BCSC- D wrongly diverted water for construction upstream, P wins**

**Facts:**

* Defendants were diverting flow, **had licence, but not for that purpose**
* Plaintiff used water for domestic and stock , had no licence
* Question over rights of the plaintiff (found to have riparian rights for domestic use)
* Defendant found to have abused his rights
* Injunction and prohibition against Johnson

**Issue:**

* Do the rights of a riparian owner prohibit unauthorized diversion of water flowing through their land?

**Decision:**

* YES 🡪 P is granted his order for the diversion and construction by D to stop, but this is subject to a future license that D could be granted.
* **There was still some unrecorded water on the stream – so riparian law prevails for this water.**

**RATIO**

* One cannot divert water from a riparian owner’s land and negatively impact the riparian’s use of the water for domestic purposes

**Other:**

Court wants to respect the common law. There is probably a good reason for this common law.

***Schillinger v H Williamson Blacktop & Landscaping* (1977) BCCA – Fish farm case**

**Facts:**

* P claims damages from D’s construction upstream that resulted in silt being added to the stream used by P in his fish farm
* P was granted a licence to divert water from Hairsine Creek.
* P diverted water from Barres Creek (unrecorded) w/o a license, this was the creek where the silt came from D’s operation and entered P’s fish farm, killing fish

**Issue:**

* Was P entitled as riparian owner or alternatively as a licensee of the stream to have the benefit of spring water from the lands of D, and to divert said water for purpose of fish cultivation?
* If no to above, is P entitled to recover damages for deterioration of water quality assuming P can prove this resulted from D’s actions?

**Decision:**

* NO, D wins b/c P was getting water from wrong stream, violated *Water Act*.

**RATIO**

* Riparian rights to use water no longer exist per se in BC. The only rights that exist are for those that lawfully use the water by first acquiring the right to the use and flow of water governed by *The Water Act*

Salmon farm is not a “domestic” use in BC, is an industrial use

***Steadman v Erickson Gold Mining Corp* (1889) BCCA – guy overrides poor guys water**

**Facts:**

* D built a road immediately uphill of P’s land. The construction contaminated P’s water, piped to his house from a small, spring-fed dugout on his land,
* P mainly used unrecorded water for “domestic purposes”, even with saw use
* P sued for nuisance
* **Can exhaust water but not pollute it**

Decision: P wins since he has riparian rights to groundwater and was only using it for domestic purposes

## Access by Riparian Owners

Right of access is distinct from the public right of navigation and does not depend on ownership of the water bed.

* Includes right to moor vessels on the shore
* Riparian owner must not interfere with any public right of navigation and cannot impede access by building a structure on the foreshore (*Saanich*)
* A pier-causeway is an acceptable means of access as long as it doesn’t interfere with foreshore owner’s rights

***Hals* States Law in BC (stated in *North Sannich*)**

**1)   General rights of riparian owners:** a riparian owner is entitled to access and regress to and from the water adjacent to his land

**2)   Nature of rights access**: riparian owner’s right is private & not a public right and interference is actionable without proof of damage; does not depend on ownership of bed of river or other water in question and is distinct from public navigation rights

**3)   Exercise of rights access**: in exercising his right a riparian owner must not interfere with any public right of navigation in the water *or* ***put anything down that disturbs the foreshore***. If there is something erected, must be used as a means of access

**4)   Incidental rights**: riparian owner’s rights include: right to land, or pass over shore at all states of water for the purpose and right to moor vessels adjacent to land for period as necessary to load or unload them and keep them there till complete.  Must not moor vessel to interfere with another owner’s right to access or to interfere with any public right of navigation

## Case:

***North Saanich* (*District*) *v Murray* – wharf across foreshore not OK**

**Facts:**

* Riparian owner built wharf/dock that allowed for access to sea shore
* Dock was a permanent construction
* North Saanich District objected

**Issue:**

* Can Riparian owner build a wharf across the “sea shore” to ensure they have an easy access to the tidal water?

**Decision:** Yes, but need permission from Government.

**RATIO**

* Riparian owners need permission to construct wharves across foreshore
* Complicated as a riparian owner has a general right to access the water
* **Owner must not interfere with any public right of navigation**
* Riparian owners have the right to pass over the shore to access the water and to store a boat to unload.

# ACCRETION

Accretion/erosion applies to both riparian owners and leaseholders, and to inland lakes or rivers

* Must be gradual and imperceptible
* Human action (except that of the owner) can produce accretion
* **For doctrine to apply to your property – the land grant must indicate on the map or have a parcel clause that your property abuts the water**
* A new plan must be registered to show changes

***Southern Centre of Theosophy v South Australia* (1981) – Lake George receded w/accretion, P wants the new land as part of the property- P wins**

* Accretion must be slow and imperceptible

# FIXTURES AND CHATTELS

Quicquid plantatur solo, solo credit – whatever is affixed to the soil belongs to the soil

Three possibilities: 1) Chattel 2) Fixture 3) Part & Parcel of the Land

**Fixture:** A chattel so fashioned or connected to the land that in law it forms part **of the land**

**Chattel:** On land, but not part of the land

**Common Law Rule:** A transfer of an interest in land included all the fixtures on the land

**Bottom line:** Evaluate the degree of annexation and the object of the annexation

*Stack v Eaton* – USE THIS

1. What is the degree of annexation (how is it affixed)?
   1. If it is own weight, it is presumed to be personal property, unless intention can be shown otherwise
   2. If a chattel is attached (“even slightly”), it is presumed to be a fixture
2. What is the object/purpose of the annexation (more important than how it is attached)?
   1. 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
   2. If it’s for the better enjoyment of the thing – chattel (*La Salle*, *CIMC*)
   3. If it’s affixed to improve the freehold – fixture (*La Salle, CIMC*)
3. Intention is only relevant if it can be presumed from the degree & object of annexation.
4. **Tenants' Fixtures:** Tenants' fixtures (attached for trade) become fixtures unless the tenant wants to take them back.

**Maczko's 6 principles in *Royal Bank of Canada*** (*restaurant-equipment*) (best to cite ***Stack***)

1. *Chattel -* If an item is unattached and can be removed w/o damage to the item or land.
2. *Chattel -* If an item is only plugged in and can be removed w/o damage to the item/land
3. *Fixture -* If an item is even minimally attached (i.e. not just plugged in)
4. *Fixture -* If an item would be useless without a certain removable part
5. **Tenant's Fixture -** A fixture may only be removed if it is a tenant's fixture, provided the premises are restored
6. **Purpose test** - If the item is unattached, but the party can establish that the intent was that it be a fixture, then it is a *fixture*

***Re Davis (1954) Ont. HC* – Bowling alleys as chattel, found were chattel because intent to remove**

**Facts:**

* Bowling-alleys installed in deceased husband’s building- before the testator purchased the building. Bowling-alleys installed using bolts, raised about 6 inches above floor and could be dismantled and moved.

**Issue:**

* Had the bowling- alley changed it’s status from a chattel to a fixture?

**Decision:**

* NO = Bowling-alleys were chattels.

Method of Annexation: Although it was affixed, it was a mild form of fixture; not permanent.

Object of Annexation: They were not affixed for the better use of the building; constructed for the purpose of being portable.

***La Salle Recreations v Canadian Camdex* (1969) BCCA – hotel carpets as fixtures- ruled to be fixtures**

* Carpets were predominantly resting on own weight, but ruled to be fixtures because they were there for the better enjoyment of the hotel building

***CMIC Mortgage Investment Corporation v Rodriguez* – Cover-all case, one found chattel, other fixture**

* Cover-all 1 fixture because it had secured cement blocks in the ground- intent to be permanent
* Cover-all 2 chattel because metal arches rested on concrete blocks above ground- intent to be portable

***Elitestone Ltd v Morris* (1997) UK- bungalow- part and parcel to land**

* Bungalow rested on concrete pillar for about 50 years
* Bungalow became part and parcel of the land (fixture)
* **Tenant fixtures**: fixtures that are a part of the land but may be removed by the tenant in the course or end of the tenancy.

# 

# SUPPORT

An owner of land is entitled to have his land left in **its natural plight and condition** without interference by the direct or indirect action of nature facilitated by the direct action of the owner of adjoining land (or subsurface owner) (*Cleland*)

* If **no building** on land then strict liability
* If **building** then negligence/trespass must be proven by plaintiff

An **absolute right**: exists independent of any claim in negligence (*Rytter*) Properties need not be adjoining to have a duty of support.

Lateral Support: Right of support between adjoining surface owners

* No one can interfere with land by removing lateral support (can occur even with vertical movement)
* **Land must be in natural state**
  + Unless obtained by easement or unless it can be shown that subsistence would have occurred even absent buildings on that parcel (*Bortoluzzi*)

Vertical/Subjacent support: Subsurface owner’s duty to support surface owner

* Also limited to land in its natural state, but usually involves trespass to remove vertical support

***Cleland v Berbarick*- neighbours removed a lot of sand which affected plaintiff’s beach**

* Subjacent support
  + Every land owner has a right to have their land in its natural plight and condition without interference by the direct or indirect action of nature facilitated by the direct action of the owner of the supporting land

***Brenner v Bleakley* (1924) Ont Ca – dug holes caught sand- owner of land entitled to all nat. advantages**

* Ruled that digging of holes did not cause the sand to be removed from the plaintiff’s land, the wind did
* Therefore it is different than *Cleland*, where the actions of the neighbor directly caused the movement of the sand

***Gillies v Bartoluzzi* (1953) – excavation next to grocery store causes store to collapse- held liable**

* In itself, the removal of lateral support of the wall would not give the plaintiff a cause of action
* Ruled that excavation by D was negligent, and D is therefore liable

***Rytter v Schmitz* (1974) BCSC – north van excavation – P ensures structure of house by trespassing- valid**

* D removed lateral support for P’s property
* D trespassed onto property
* Was also negligent in not shoring property properly

# REAL AND PERSONAL PROPERTY

## The doctrine of estates

* Personal property operates under **absolute ownership**
  + No concept of tenures for personal property
* Free and alienable both inter vivos and upon death
* Courts allow estates to be created in personalty through trusts
  + A holder of a life estate in personalty owes a fiduciary duty to preserve the estate for the ultimate recipient (*Fraser*)

***Re Fraser* (1974) BCCA – A holder of a life estate in personalty owes a fiduciary duty to preserve the estate for the ultimate recipient**

* Man gave life interest to estate to wife upon death, and then to charity after her life
* Wife only has an interest in obtaining any revenue from estate
  + Fiduciary duty to maintain estate for charity as trustee

# ACQUISITIONS OF INTERESTS IN LAND

**Four ways to transfer land:**

1. **Crown Grant**
2. **Inter Vivos Transfer (sale or gift)**
3. **Will or Intestacy**
4. **Proprietary Estoppel**

Crown Grant – governed by Part 5 of the *Land Act* (ss. 48-58)

1866: Provincial crown of BC created and acquires ownership of all land in BC.

1870: *Land Title Act* sets up present system of land ownership

All lands in BC are owned by the Provincial Crown, except:

* Federal Crown Lands (public harbours, national defence lands, reserves, railway)
* Privately owned lands (though crown still “owns” fee simple lands)
* Aboriginal title lands (granted via treaty, or lands contingent on settlements)
* Grants normally given for **leases, rights of way, licenses of occupation**

**s.50 of *Land Act***

a. Crown reserves these interests:

* 1. Resume any part of the land deemed necessary by the gov for public works (roads etc), but not more than 1/20 of the whole land
  2. Government agents have right to enter property to appraise for minerals
  3. Government has water privileges – carry over water or under your land for mining and agriculture
  4. Gov can take part of the land such as gravel, lime, timber that may be required for maintenance of public works such as (bridges

b. Crown retains all geothermal, mineral and energy interests

c. Crown gives no right or interest to any highways that existed through or over land at time of disposition

d. Government can also create a right of way through your property if it is necessary to a government undertaking

## Inter Vivos Transfer: Sale of Land

Transfer of equitable and legal interest takes place by sale/contract via the 1) Contract/Executory stage and 2) the transfer/executed stage

1. **Contract**
   * **Must include 3 P’s (Parties, Property, Price)**
   * **Equitable interest passes**: Vendor becomes a trustee for the purchaser (beneficiary)
     1. **Vendor retains legal interest until completion** (registration)
   * **Rights of Vendor:** Vendor retains right to possession until purchase money is paid, has right to money and can sue for breach of contract or impose lien on property if unpaid
   * **Obligation of Purchaser**: Purchaser must pay purchase money. Has right to sue for specific performance. Should ensure that insurance begins upon transferral.
   * Implied covenants (clauses) on contracts are binding
2. **Transfer or Executed Stage**
   * **FORM A registration must be used (**s. 185 *Land Title Act*)
   * **Transfers legal interest from vendor to purchaser**
   * **First to register wins (time of registration)** (s. 22 *LTA*)
   * **Also requires duplicate title if exists**

*LTA,* s*.*185- transfer **must be in writing**, in prescribed form and on single page (Form A)

* ***s.185(2)(a)-(b)*** **(Other Forms):** Registrar has discretion to accept alternate forms and/or historical documents for registration
* ***s***.***43-45*** **(Witnessing):** Officer's signature required to certify identity of transferor as person named in title (individual > corporation > POA)
* ***s.186(2)* (Meaning of Words):** Words of Form A deemed to be words in Part 1 of ***Land Transfer Form Act*** with the meaning given in Column 1 of Schedule 2
* ***s.186(4)* (No Express Words of Transfer):** Form A legally transfers the interest even without express words of transfer (X transfer to Y)

***PLA:*** additional Form A requirements

* ***s.5(1):*** Vendor must provide Form A
* ***s.5(2):* Leases over 3 years must be registered**
* ***s.15:*** Transfer need not include word "grant" or other terms of art. Transfer may occur without livery of seisin (no actual entry required)
* ***s.16(1)*: No seal required** to effect transfer

**LTA 20** – equity can be held against the person making it

(1)  (Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.

(2) An instrument referred to in subsection (1) confers on every person benefited by it and on every person claiming through or under the person benefited, whether by descent, purchase or otherwise, the right

(a) to apply to have the instrument registered, and

(b) in proceedings incidental or auxiliary to registration, to use the names of all parties to the instrument, whether or not a party has since died or become legally incapacitated.

(3) Subsection (1) does not apply to a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement.

## Inter Vivos Gifts

Requires that:

1. There is **intention to donate** without return consideration
   * Must have “sufficient intention” and mental capacity to appreciate donation
   * **Words must be “unequivocal”**
   * **Testamentary gifts are revocable** (*Zwicker*)
2. **Sufficient act of delivery** to donee
   * Transfer of possession to donee is required
   * Delivery is both evidence of intention and a required element of the gift itself
   * Delivery can be something other than parting with physical possession (*Ross*)
   * Still operative even though grantor may have retained it for a long time up to death (*Zwicker*)
3. **Acceptance** of Donee
   * Donee **must accept** gift. Anything short of outright refusal =acceptance
   * Donee must decide within reasonable time if they do not wish to accept
4. **Registration** (*LTA* s.20):
   * The donor **must have done everything that needs to be done** in order for the transfer to take place.
   * A written form A is required (no oral gifts). Donor must provide Form A.
   * Unregistered gifts are valid between the original parties, but not against subsequent BFP (*PLA* s.20)

Can be transferred **inter vivos, upon death (donation mortis causa)**

**Presumption of Resulting Trust with Gifts:**

* Common law presumes that a gift (without returning consideration) transfers only legal interest and not the equitable interest. Donee holds gift in trust for donor. No one gives something for nothing
* Rebutted by **Presumption of Advancement**- Gifts to spouse/children can be presumed. SCC declares presumption **only valid between father or mother to young or disabled child**

## Will or Intestacy

Statutes governing testamentary gifts/wills:

* Common law Rule: personal property to PR, real property to eldest male heir (modified by EAA, s.77(1))
* *Wills, Estates and Succession Act* (WESA): Formal requirement for wills
* *Estate Administration Act*: Intestacy
  + s.77(1): Both real & personal property go to personal representative
* *Trustee Act*: Governs how trustees (executors/administrators) act
* *Wills Variation Act*: Allows the court to vary an otherwise valid will

**Testamentary transfers**

* Death triggers transfer
* Testamentary gifts **revocable** until death
* Subject to debts against the estate
* Real property may be sold off in order to provide assets for descendants
* **Transfer of Assets**: When testator dies, the legal interests in their assets are transferred to the PR who must distribute the legal & equitable interests according to the will

Wills (*WESA* March 31, 2014)

* A declaration made by a testator **in writing** in the form required by law of what they desire to be done after his or her death. May establish a trust. Unless court orders it effective under s.58. (s.37)
* s.4 allows for extrinsic evidence if there is ambiguity
* **Personal representative** established
* **Will speaks from date of death**
* Contains name, division of assets, funeral arrangements, children’s guardian
* **NO special words required**
* **Intention** must be explicit and express desire only after death (s.39)
* **Must be in writing** (can be electronic)
* Testator and two witnesses must sign in presence of each other, beneficiaries should not witness (s. 40)

## Intestacy

Occurs when the deceased dies without a will. Governed by the ***EAA*** which determines administrator and division of estate.

* **Administrator**: spouse > next of kin (beneficiaries) > other indvls > gov't official
* **Distribution** (***EAA, s.10***): (1) spouse if 2 years before death and (2) lineal issue
  + If no spouse/issue, then intestate's estate goes to parents
* ***Survivorship and Presumption of Death Act***: If 2 people die close in time, but you can't tell who died first, it is assumed that the oldest person died first**.**

*Example*: A (24) & B (25) are spouses with no children. A's parents are still alive. Only B's brother & sister are alive. While driving up to Whistler, A & B die in a car crash together.

* If B dies first (assumed), then B's estate goes to A, and then to A's parents.
* If A dies first, then A's estate goes to B, and then to B's brother and sister.

**Donatio Mortis Causa**

* CANNOT be revoked
* Gift MUST be made in contemplation of death and delivered
* MUST show or infer that gift was to become absolute upon death of donor

## Proprietary Estoppel

Where it would be inequitable and unconscionable for the defendant to assert his rights, the plaintiff can claim proprietary estoppel as a cause of action

Six following conditions must exist:

1. Plaintiff must have made a **mistake** to his legal right
2. Plaintiff must have **expended money or and on faith** of his or her belief
3. Defendant must **know** **of his legal right and that it is inconsistent w/P’s claimed right**
4. Defendant must **know** of the **plaintiff’s mistaken** belief of right
5. Defendant must have **encouraged P** in expenditure of money or other actions either **implicitly** or by **abstaining from asserting** his/her legal right
6. Defendant’s actions were **unconscionable**, inequitable, or unjust equitable fraud

**Cases:**

***Ross v Ross* (1977) NSSC – grandmother puts signed deed in purse then dies some time later**

* **“Equity looks to the intent, not the form”**
* Grandmother writes deed properly with witnesses etc.
* Dies with deed in purse
* Court looks to intent, rules that she intended to be immediately and unconditionally bound by deed
* **Physical delivery of a deed to the grantee is not necessary to constitute effective delivery**

***Zwicker v Dorey* (1975) SC – Multiple deeds after deed to stepson- goes to widowed wife**

* **“Equity will not assist a volunteer”**
* A document purporting to be a deed of conveyance by a person of his own property, which is delivered by him on a condition that it shall become operative only on death, is a testamentary document, and cannot be an escrow
* An escrow becomes operative on the happening of a stipulated event
* Court rules that there were multiple deeds set in place, and either way the deed was testamentary and ineffective
  + Title passed to plaintiff in subsequent deed
* Non Torrens System Case (land not registrable), which caused main problems in this case

***MacLeod v Montgomery* (1980) – Granddaughter loses because doesn’t have duplicate certificate**

* **Land transfer requires duplicate title**
* **Has the owner (Patty, D) done everything they can do to convey title? In this case, no.**
* Macloed couldn't get on register
  + Filed a caveat (warning) on the property
  + Caveat is a warning, claim that there is unregistered interest
    - Expires after 2 months in B.C.
    - Prevents registration of subsequent interest
    - Creates priority over other transactions to property if the caveat is successful
* The donor must do what can be done
  + Not everything that could be done was completed to perfect the gift
    - All Montgomery had to do was tell her solicitor
* Court ruled in favor of Montgomery, property did not go to MacLeod
* LTA s. 282
  + Notice of claim to be registered
* LTA s.288 - freezes title
* Equity looks to intent
* Caveat lapses after two months: LTA s.293

***Zelmer v Victor Projects* (1997) BCCA – Zelmer builds water reservoir, Victor says no after- Zelmer wins**

* P negotiated with D a spot to build reservoir
* Acquiescence- (apparent assent, or encouragement)
  + Has led other party to reasonably rely on it
* Victor Projects, after reservoir had been built, sued for building in wrong spot
* All indications were that there was a go ahead for Zelmer to build
  + Emails from agent of Mr. Bennett (respondent) etc.
* Court ruled that Zelmer was led to believe that they were under contract
  + Therefore proprietary estoppel existed
  + Judgment in favor of plaintiff, easement for reservoir allowed
* Remedy is minimum necessary

# REGISTRATION OF TITLE

**The Torrens System (governed by *LTA*)**

TITLE BY REGISTRATION aka BEST THING SINCE JESUS

* Does not come from the vendor, comes from the LTO
* Involves **Cadastral Concept** (survey/map-computer-certificate of registration)
* Legal effect given by registration due to:
  + **Creation of indefeasible title**
  + **All relevant information related to a title given**
* **Registration required to transfer legal interest**
* 7 LT districts- Kamloops, Nelson, New West, Prince George, Prince Rupert, Vancouver, Victoria
  + - No central registry in BC
    - Only open mon.-fri. 9-3pm
* Registrar determines whether title can be registered
* Federal/Aboriginal lands may not be registered
* s.29 Abolishes the doctrine of notice except for fraud in which he or she has participated

**3 Underlying Principles:**

* + **Mirror Principle-** Title is a complete and accurate reflection of all interests affecting the land. If it is not on a register, then it is not binding on a 3rd party
  + **Insurance Principle**- If mistake or fraud occurs, compensation is available (Assurance Fund) (LTA, ss. 294.1 to 294.9)
* **Curtain Principle**- Under pure Torrens, the curtain drops on registration. all the necessary information is on the certificate of title

## Guarantees Upon Registration Under LTA

s.54 (1) - A Crown Grant issued after April 5, 1968, for land sold or for the issue of which provision is made under this Act or any other Act, general or special, must on its issue, be transmitted to the proper land title office for registration

s.23 (2) An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the crown and all other person, that the person named in the title as registered owner is indefeasibly entitle t an estate in fee simple to the land described in indefeasible title, subject to the following

s.23- registration of charges only guarantee a rebuttable presumption of validity (confers constructive notice)

## Duties of the Registrar

* Only register interests that are good, safe holding, and marketable
* To check errors in title as to not perpetuate them
* Refuse bad documents
* Administer Assurance Fund
* ***s.296(3):*** AG must be joined as a party in any claim against the Assurance Fund
* ***s.296(8):*** 6 year limitation period
* ***s.303:* Liability is limited**: the following owners cannot claim against AF
  + ***s.303(a)(i):*** Undersurface rights owners
  + ***s.303(a)(ii):*** Equitable mortgagees by deposit of duplicate indefeasible title
  + ***s.303(d):*** Errors in airspace plan
  + ***s.303(f):* Contributory Negligence:** New ***LTA*** amendments will lower plaintiff's damages in the even of contributory negligence (previously, contributory negligence would bar a claim)

## 

## Registrable Interests

* An earlier, unregistered interest that is bona fide and valid, is entitled to priority over a later, registered interest
* “Except against the person making it” applies to both registrable and unregistrable interests
* Application date is noted on title as notice to the world of application – if successful, backdated to app. Date
* A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered (*LTA* s.26)

1. Fee simple
2. Charges:
   1. **Caveats** (***LTA, s.282-294***)
      * Can be lodged by a person who has an unregistered instrument which is incapable of immediate registration
      * Expires after 2 months s.293
      * Registrar can lodge indefinite caveat s.285
      * Once caveat is lodged all other instruments cannot be registered
   2. **Certificate of Pending Litigation** (lis pendens) (***LTA, s.215-217***)
      * Slower than caveat
      * Registrar cannot allow any instrument to be registered after
      * Operates in same way as caveat (nothing can happen until it is completed)
      * If successful, ranks interest above any other BFPFV
      * If there is application to register fee simple/mortgage, fee simple/mortgage is considered first, (unless they are party to caveat or judgment), can be registered but subject to later charges
   3. **Judgments** (***LTA, s.210-214***)
      * Monetary Judgements (money owed)
      * Non-Monetary Judgements (alter title to land)
      * Expire after 2 years
   4. **Easements**
      * *Property Law Act s.36*
        + Award an easement with compensation – must be neighbouring land
        + Vest Title- moving property line with compensation
        + Removal- mandatory injunction
        + Does not include right to take from land, and cannot require servient to do something more, no further obligation. They can, however, be banned from entry to easement
   5. **Covenant-** Controls the use of the land but does not involve physical access to the land
   6. **Statutory Right of Way** (***LTA, s.218***): Allows certain gov't bodies & others to acquire a right to use another's land for a certain purpose. Different from the CL **easement** which allows adjoining land owners to obtain access through their neighbour's land.
   7. **Restrictive Covenants** (***LTA, s.219***): Imposes restrictions on the use to which land may be put. Frequently restrictive (negative), but may also be positive (benefits).
   8. **Statutory Building Scheme** (***LTA, s.220***): Restricts use of land. Enforcement comes from adjacent property owners (or developers) rather than from the municipality.
   9. **Agricultural Land Reserve Parcels** (***Agricultural Land Commission Act***): While zoning bylaws are not registerable as an interest in land, ALR parcels are. Appears on title under "notations". Examples: prohibitions on subdivision and prohibition on uses which will destroy agricultural capability
   10. **Marriage / Co-Habitation Agreements** (***Family Relations Act, s.17***): Rarely used agreements which allow non-titled individuals to acquire some interest in the property (i.e. veto rights over land dealings // prevent severance of joint tenancy).

## Non-Registrable Interests

1. **Equitable mortgages** (***LTA, s.33***): where you mortgage your home and provide security by leaving your duplicate title with the bank
2. **Licenses**
3. **Zoning bylaws (*Kessler*)**
4. **Details of a trust** (***LTA, s.180***): while the trustee is listed on the title, you cannot specify who the trust is being held for. But the trust document is usually deposited at the LTO.
5. **Sub-right to purchase** (***LTA, s.200***): All sub-rights after 1979 cannot be registered. A sub-right to purchase occurs where an agreement for sale is registered on a title, and the owner of that agreement for sale enters into another agreement for sale with a 3rd party (the subsequent agreement cannot be registered).
6. **Aboriginal Title (*Skeetchestn***): Because aboriginal title is inalienable except to the Crown, it does not provide good safeholding and marketable title and therefore cannot be registered. Therefore, caveats and CPLs relating to aboriginal title also cannot be registered. But encumbrances relating to Nisga'a lands **can** be registered (***LTA, s.1***).

# INDEFEASIBILITY

* Indefeasible title, as long as in force and uncancelled (registrar has the power to correct defects in registration), is conclusive, irrefutable evidence, against the Crown and all other persons (aside from AT), that the person named in the title as the registered owner has indefeasible title to an estate in FS.
* If the prospective purchaser searches the title, they see on the title registered charges, they are subject to charges on the register prior to purchase
* Nemo dat, or looking behind the curtain, does not apply to land that is registered

*Creelman v Hudson Bay*- HB was RO of the property in Vancouver. Creelman made an agreement with HB to purchase the property, but then had buyer’s remorse. He argued that HB bought the property contrary to the statute under which they bought it (title was defective). Court rules that it doesn’t matter; HB had indefeasible title from registration according to the LTA of the time.

*Hudson’s Bay v Kearns*- Kearns RO got into debt with HB, gave duplicate certificate of title with completed transfer as security on the payments of her debt. HB did not register the mortgage. Kearns turned around and sold the property to Rowling. Rowling did not see anything, asked about DCT and title deeds and were told they would be produced. Rowling was dumb, but not dishonest, and gained indefeasibility. **Has to be actual knowledge and dishonesty*.***

*Vancouver City Savings* *v Serving for Success*- Serving for success and other tenant had unregistered lease in the motel for 5 years. Motel was sold and tenants kicked out since lease was longer than three years. Even though VanCity had knowledge of the tenants, there was no dishonesty, so they were allowed to kick tenants out. Putting a caveat on the property might have saved the tenants. (*LTA* s.20)

# 

# EXCEPTIONS TO INDEFEASIBILITY

* Under s.23(2) of *LTA*
* Title is good against the crown and all other persons subject to the following:
* s.23(2)(a)- Original Dispositions of the Crown
  + *Land Act,* s.50
  + Crown’s statutory right of resumption allows Crown to take up to 1/20th of undeveloped/unimproved land without compensation
* s.23(2)(b)- Federal or Provincial Taxes, Rates, or Assessments
  + Property tax situation may not be on title, should check before buying the property w/ local gov.
  + Property may be sold if taxes not paid for 3 years
  + Purchaser is required to pay arrears on taxes
  + Includes improvement charges (paving the lane, curbs etc.)
* s.23(2)(c)- Municipal Charges
  + Imposed at date of, or after registration- don’t appear on title
* s.23(2)(d)- Leases or Agreements for Lease Not Exceeding 3 years
  + Tenant must be occupying property, visible to purchaser inspecting property
  + Options to renew are included in determining length of lease
  + If purchaser doesn’t inspect, he is presumed to have knowledge of the lease
  + This is one unregistered interest that cannot be ignored (cannot kick out lease under 3 yrs)
  + Granny in the attic scenario (never look at property sight unseen)
  + Reason for this clause is that a short lease could make property harder to sell
* s.23(2)(e)- Highways or other public rights of way, watercourses, public easements
  + *Highway Act, Water Act*, right to expropriate property overrides indefeasibility
  + Not on title
* s.23(2)(f)- Right of Expropriation/Escheat
  + Property without an owner goes back to the Crown by escheat, who can then resell the property or hold onto it
  + Often happens if someone dies intestate without an heir (*Escheat Act*)
* s.23(2)(g)- Caveats, Charges, Liens, Judgements etc.
  + Limitation period of 45 days from completion, abandonment, or termination of contract
  + 1 year to start lien action (file says CPL)
  + Stops ability to sell property, ranks ahead of purchaser’s registration (potentially retroactively)
  + If filed after a new purchaser gets on title, it is binding on that purchaser (*Carr v Rayward*)
  + Purchaser has a cause of action against the vendor, though he could be insolvent
  + Head contractor has to hold back 10% of the amount of any work, or amount of payment made
  + A BFPFVWN is only liable for 10% after purchase
* s.23(2)(h)- Wrong description of boundaries
  + The correction of wrong boundaries- must check before purchasing
  + Might claim misrepresentation from vendor, but not likely, can’t claim from AF (not LTO’s job to check boundaries), maybe from private title insurance
  + Lawyers do not have a duty to confirm boundaries of land parcel (*Winrob v Street*)
* s.23(2)(i)- Right of a person to show fraud (including forgery)
  + If you obtained your land by fraud, you do not have an indefeasible title
  + Two types:
    - Forgery: fraud against registered owner, registered owner being the victim
    - Notice of unregistered interests: fraud against holder of unregistered interest
  + Ordinarily fraud must occur before getting on title (signing), cannot rely on equity
  + Onus of proving lack of notice is on purchaser (if signed fraudulently title is defeasible)
  + Must be an act of dishonesty, knowledge alone is not always enough (*Van City*)
* s.23(2)(j)- *Forest Act*- imposed tenures or agreements regarding use of forest land
  + Imposed tenures or agreement regarding use of forest land (endorsed on title)
  + Similar to *Agricultural Land Commission Act*
    - A system of zoning to protect agricultural land from creeping urban sprawl
    - Governed by the Agricultural Land Commission
    - Approval to develop the land will only be granted to things that will keep the land open, like golf courses for instance
    - Lands transferred since 1973 often have designations on title, lands not, don’t
    - Can apply to commission for exclusion of land from agricultural use
* s.23(3)- Unregistered In Personam Claim/Volunteer
  + Inequitable conduct, personal contract, proprietary estoppel claims
  + A volunteer who is on the register’s title is attackable (defeasible)
    - May be in cahoots with someone
  + Encroachment is movement of property line (not hedges, but buildings or fences)
  + Easement is access to something on the property, must be neighbouring
  + Vesting order- where title is transferred and compensation is higher
* s.23(4)- Adverse Possession
  + See first page

*Carr v Rayward*- Rayward did not pay Carr for the work on property. Then sold property to Bell. Bell was RO. Carr then filed a builder’s lien on the title, Bell’s title was no longer a clean one. Bell argued that he bought it with a clean title, and nemo dat applies. However, builder’s lien applies. If Bell wanted a clean title, he would have paid more for it. Carr could claim from either Rayward or Bell, whoever had the money. If Bell pays, he can claim from Rayward. In BC a new owner’s liability is limited to 10 percent of contract if acting in good faith. If acting in bad faith, then new owner is liable for full cost.

*Winrob v Street*- Winrob purchased property boundaries were smaller than what he’d been told by the vendor. He’d paid too much money for the property. City demanded rent because he was on their property. Winrob tried to go after his lawyer but it was not his problem, it was for a surveyor. It is the purchaser’s responsibility to hire a surveyor.

*Gibbs v Messier*- Overruled by *Gill v Bucholtz*, and s.25.1(2-3), which imposes immediate indefeasibility for fee simples. RO #1 lost the house to innocent RO#2, who dealt with the fraudulent person. Court rules that the house should go back to RO #1 since he is completely innocent (didn’t deal with any fraud at all). Had #2 sold the house to a RO #3 then that RO would have indefeasibility from RO#1 and RO#1 would be SOL. All this doesn’t matter anymore but it is the principle of deferred indefeasibility.

*Greveling v Greveling*- Mrs. Greveling was being naughty and fraudulent. She sold the property once to her husband, then sold it again to Blackburn. Blackburn did not know about previous sale. The lawyer for Blackburn knew of the previous sale, but thought there was a defect in the transfer so it could be sold to Blackburn. Blackburn was committing imputed fraud through his lawyer, got away by the skin of his teeth because he was already registered owner. (*LTA* 29.2)

*Re Saville Row*- Frew and Associates were real estate developers, acquired an unregistered option from RO Eldred. Option was to purchase property until March 27th. In the meantime Eldred sells the property to Saville Row. After payment but before registration Frew puts on a certificate of pending litigation. Saville saw that there had been an attempt at registration but assumed LTO denied it (they had in fact). Saville keeps title, Frew should have corrected his application so it could be registered, he was too lazy.

# IN PERSONAM CLAIMS

* Exception to indefeasibility in that it creates in interest in equity against unregistered personal rights
  + I.E. suing someone in nuisance if they are being boisterous in the neighbouring property
* Can get an order for specific performance to transfer the title
* Have in rem implications which affect title
* Courts are not permitted to order that the title of one party be cancelled and that another party be given title
* Rectification- the registrar can correct the register after registration, with no effect to indefeasibility

Example: B, a bank, forecloses on A's land. B is now the registered owner of A's land. A launches an in personam claim (that is, a lawsuit) against B to get his land back. Because B is not a BFPFVWON, B's registration does not grant indefeasible title, and therefore, A's in personam claim is not extinguished by registration. However, if B then sells the land to C, a BFP, A can't launch an in personam claim against C because their claim is extinguished by C's registration and consequent indefeasible title.

*Pacific Savings v Can-Corp*- Can Corp is RO and in default of their mortgage. Pacific Savings is registered mortgagee. PS became the registered owner of the property as a result of the foreclosure procedure, is NOT a BFPFVWON, and their title is therefore defeasible. Court of equity allows the mortgagor in default a 6 month time period to regain title, or to obtain another 6 month period. Can Corp filed CPL at 9am on Nov. 20th. PS accepted offer for property at 5pm that day. Charge ranks ahead of application to register and buyer had constructive notice.

*McCrae*- Farquhar Fraser Sr. RO #1 Purchased 3 lots. Dies, and leaves a will, stating that his spouse Harriet would receive the properties on trust: a life estate for herself with the remainder to three children. She was registered as FS holder with “on trust” notation on the title. She passes title to FF Jr. for $1 consideration. “On trust” remains on title, LTO staff made a mistake, and it is removed. He then tried to place his spouse as a beneficiary, a breach of trust. Argues that there was nothing on his title and could sell it if he wanted. Court says his brother and sister have actions in personam against him. He also had constructive notice when he became RO, so was fraudulent.

# REGISTRATION OF INSTRUMENTS

* Any applicant may register a charge, and the registrar must put it on the register (s.197.1)
* The registrar may refuse the charge if it thinks that (a) a good, safeholding and marketable title has not been established by the applicant, or (b) that the charge claimed is not an estate or interest in land registrable under the *Act* (s.197(2
* Application date is noted on title as notice to the world of application – if successful, backdated to app. Date
* Rights included on a registered instrument are considered to be registered even if the title is wrong
* Trusts are registrable as charges (s.180 (1-4))
  + Particulars of the trust must not be entered on the title
* Wills are generally deposited with LTO and can be accessed by the public
* Interests affecting land cannot be registered if prohibited under the trust or document or will
* What the title of the charge says is whatever the LTO staff choose to put on the title
  + There may be other interests that are also registered by reference to that charge
* Registration is acceptance by the LTO staff, it is administrative validity, not legal validity
* Registration doesn’t guarantee validity, just acceptance as apparently valid, but can be disputed
* No immediate indefeasibility for charges: RO of a charge is “deemed to be entitled” to the estate
* Priority is determined by date/time of registration “subject to contrary intention” (*LTA* s.28)

*Dukart v Surrey*- Developer in 1912 setting up the properties created a trust which held easements, strips of land connecting properties to the foreshore. Title simply said “on trust”. The property taxes were not paid, and Surrey acquired the land in the tax sale. By statute, on tax sale, all charges on the title are wiped off, except easements. LTO mistakenly wiped off the “on trust” from the title. Surrey built a comfort station on the foreshore and Dukart sought an injunction. Ruled that easement remains, since it was contained in the trust.

*Credit Foncier v Bennett*- Allen of Todd Investments forged a mortgage and put it on the Bennett’s property, with no money advanced as his plan was to sell the forged mortgage. Allen sold to mortgage to Stuart who flipped it to Credit Foncier. Bennetts ignored the claims since they didn’t know what was going on. Credit Foncier cannot claim against AF since were not a fee simple holder. Credit Foncier started foreclosure proceedings, and Bennett started claim. Indefeasibility does not apply to charges, assignee must verify mortgage.

*Canadian Commerical Bank v Island Realty*- Park Meadow owns a piece of property, and had first mortgage with Imperial Life. Took out second mortgage to Island Realty to secure loan of 240 000. Charges rank in order of their registration, not of application. If Imperial Life were to foreclose, they’d sell to a purchaser with clear title, would get paid first and Island Realty would get any remaining money. Park Meadow wanted third borrower, forged Almont (third borrower) in as second mortgagee. Then defaulted, not enough equity to pay off last two mortgages. CA ruled that this was a novation, which distinguishes it from *CF*, instead of an assignment. Still considered good law even though totally opposite to *CF*, since it allows for forged discharge of mortgage.

Novation- Contractual obligations assigned to another party. Second party assigns contractual obligations to third party (forged in *CCB*), allows them to bow out. If the third party doesn’t perform, first party has no rights against second party. The contract is now between first and third party with third party substituting for second.

# APPLICATION TO REGISTER

* Date and time of application is noted when the application is received, if registration is successful it is backdated to being registered at time of application – doctrine of relation
* During application period there is no legal interest
* Application is received, endorsed on register as “pending application”
* Goal is 6 days, actual is 4.3 days
* Priority over intervening interests during that time (s.29(2)) (where the equities are equal the law prevails)
* If there is application to register fee simple/mortgage, fee simple/mortgage is considered first, (unless they are party to caveat or judgment), can be registered but subject to later charges (s.217)
* Fee simple holder > applicant to register > Caveator and CPL

*Breskvar v Wall*- Use of equitable principles in ranking of interests. Breskvars took a 12 month loan from Petrie Wall. Petrie filled out blank forms given to him by Breskvar as collateral, and then fraudulently sold the property to Alban. Alban did not have notice. Breskvar lodged a caveat before Alban’s application to register. Breskvar is ranked ahead according to “first in time first in right”, however, there is also the principle of “where the equities are equal, the law prevails”, “equity follows the law”. Interests must be balanced. Breskvar did not claim his caveat properly, and allowed the fraud to occur through giving unsigned documents to Petrie. Alban was closer to being a BFPFVWON, was further away from being fraudulent.

*Canada Permanent Mortgage*- Vorsteher is first victim. Vistica is alleged fraudster. Vistica put a mortgage on the property in favour of CPM. Vorsteher filed a CPL, which was filed after the application to register the mortgage. Mortgage ranks ahead of CPL and can be registered. S.217

*Rudland v Romily*- Romilly was RO #1, victim #1. Sold to Lindsay RO#2, fraudster. Quickly flipped the property to Rudland, BFPFVWON. Romilly registered CPL (does not create any legal interest, only a form of notice), which tied up Rudland’s title, after Romilly had applied, but before Romilly had the certificate of title. Where the equities are equal, the law prevails. Since Romilly and Rudland are equal in equity, the law prevails. Rudland is the BFPFVWON and wins.

# PRIORITY OF REGISTRATION

* Rank in the order of application to be registered received by the registrar (*LTA s.28*)
  + Not date of execution -“First in time first in right”- Common Law
* Fee simple holder > applicant to register > Caveator and CPL
* Mortgages can have a subordination clause (mentioning change in ranking of mortgage)
* Mortgage can only be registered if a fee simple is registered (s.155 and 198)
* LTO has six day window between application and registration to examine the application
* If Mortgages default, the can wipe out any mortgages below them
* “Foreclose down”, people below the first mortgage are vulnerable, as they can get wiped off the title if there’s a foreclosure, even if there’s no money to pay them off
* “Redeem Up”, if you want to pay off your mortgage, you pay off the most recent one first and go up
  + Pay third mortgage first and first mortgage last
  + Mortgagees can buy a mortgage below them to move up, but cannot leap frog
* Judgements can leap-frog mortgages and be grouped together (*Court Order Enforcement Act*)

# FAILURE TO REGISTER

Torrens: unregistered interests in Torrens land are equitable

* + Unenforceable against innocent third parties (will be defeated by a BFPFVWON)
  + Apart from original acquisition of Crown Grant, registration is entirely optional
  + Exception is: “as against the person making it”- in personam (s.20(1))
    - Unregistered instrument creates personal obligations against RO who made it
    - Unregistered purchaser can obtain a decree of specific performance/damages for breach in contract
    - The person making the instrument could expressly require registration of the instrument as a condition precedent to enforceability of the obligation, to avoid s.20(1)
  + Lack of registration means the instrument does not create a legal interest in the property
  + s.20(1) In Personam- are enforceable despite lack of registration
    - In Rem- against the land, are only enforceable against third persons, when registered
* Scenario:
  + Bob and Kevin agree in writing that Bob can cross Kevin's land and fail to register instrument
  + Bob sells to X (X can enforce it "except as against the person making it" (Kevin))
    - "In personam"
  + Kevin is the party making it, so it can be enforced against him, cannot enforce against a BFPWON
  + Kevin sells to Y (Bob cannot enforce it against Y)
* Right to apply for registration if the instrument is registrable (LTA s.20(2))
* Indefeasibility protects the RO against prior defects in title
  + But does not protect against civil claims based on the RO's conduct in personam (like clearing the sidewalk)
* Failure to register does not affect enforceability between the initial parties or against one of them

*Sorenson* *v Young*- Sorenson owned property and subdivided into lot 1 and lot 2. Sold lot 2 to Roach, and had oral understanding of an easement across lot 2 to get to the road. Roach sold lot 2 to Young. Young saw some ruts in the land but that is not constructive notice, built a fence across property. Held that fence could stay since agreement was not with Sorenson but with Roach. Young was BFPFVWON.

## Registered Judgments- Creditor’s Remedies

* A is a debtor, owes money to C
* C is an unsecured creditor -- registration of the judgment does not confer priority over unregistered interests
  + This is unlike other registrations
* A secured creditor is a mortgagee because the property is collateral
* Unsecured creditor has no collateral- NEVER creates interest in a land
  + Can obtain a money judgment and register it against A's interest in land
  + Unsecured judgment creditor can apply to court for an order of sale because of "nemo dat"
  + It effectively ties it up because no one will buy the title if it is on there, expires after two years
  + Many creditors stop there and just re-apply every two years, big hitters apply for execution sale
  + Anyone buying property with judgment on it would be liable to pay if wanted clear title
* Practical example:
  + Small claims court judgement upper limit is 25,000
    - Go after the creditors paycheck through garnishing his accounts
  + If the FMV of the debtor's interest in the land is 10000 it would be sold for that and have to find other ways to get the remaining money from the owner
  + If it is 25000 then it is sold for that and the judgement would be fully satisfied
  + If it is worth 50000 then 25000 would go to the creditor and the other half would go to the debtor
  + If there is a prior unregistered sale you wouldn't get anything out of it (worth 0 dollars)
* Creditors can apply to set aside a fraudulent conveyance transfer to defeat credit
* Fraudulent conveyance- debtor aware of pending judgment passes title so they won’t be owner by the time judgment is registered
  + If it’s not fraudulent and person gets good title, then the creditor can’t go after property directly, must go after debtor directly
  + If agreement is valid nemo dat applies, claim is subject to the principle that debtor doesn’t own the property, and even though it is not registered, purchaser’s claim ranks above creditor
  + If the purchaser has constructive notice, and pays less than market value, it is fraud
* Judgement creditor stands in the shoes of the judgment debtor

## Martin Commercial Fuelling- Complication due to the fact that the purchase transaction was just going through completion at the time that the judgment was registered. Purchaser did not search the title and did not see Martin had registered a judgment between closing and completion of the deal. They had an unregistered interest. The unregistered interest ranks ahead of any money judgment. Had purchaser checked and seen judgment, they would have had option to back out. Debtor was personally bound by his contract to sell, and this contract preceded registration of money judgment.

*L&C Lumber v Lundgren*- Mr. Lundgren RO of fee simple, granted profit-a-prendre to McDonald to enter her property, to cut and remove for sale standing timber on the land. Profit-a-prendre is like an easement whereby the owner permits someone else to come onto their land to remove something. Can be registered, but wasn’t in this case. McDonald then sold PaP to L&C Lumber, unregistered. This sale was enforceable and maintained PaP since Mr. Lundgren was the person making it. If Mr. Lundgren had sold the property then new RO in FS could have removed PaP.

*International Paper v Topline*- Dealt with leasing a part of the land. Parties sketched their own boundaries and did not register the lease. s. 73 deemed lease illegal since it was more than 3 years long. Also required subdivision of land, which was seen as impractical for many farmers. S.73.1 was enacted in 2007 making leases of this nature enforceable “between the parties”, rather than just “against the party making it”.

## Short Term Leases

* Exceptions in that they cannot be registered (*LTA* s.23(2)(d))
* Do not have to be in writing (*Law and Equity Act,* s.54)
* A tenant under lease of less than 3 years, including options for renewal, can enforce the lease against the landlord or innocent purchaser from the landlord, even after purchaser may become registered FS holder
* Tenant under unregistered lease has both *in rem* and *in personam* rights (*LTA* s. 20(3))
* If it is over three years landlord must provide documentation to register, and lease must be registered to maintin occupation

# LAW AND EQUITY ACT (deals with short-term leases)

**Enforceability of contract:**

**59**

* 1. In this section, “**disposition”** does not include
     1. The creation, assignment or renunciation of an interest under a trust, or,
     2. A testamentary disposition
  2. This section does not apply to

1. A contract to grant a lease of land for a term of 3 years or less,
2. A grant of a lease of land for a term of 3 years or less, or
3. A guarantee of indemnity arising by operation of law or imposed by statute
   1. A contract respecting land or a disposition of land is not enforceable unless
      * 1. There is, in a writing signed by the party to be charged or by that party’s agent, both an indication that it has been made and a reasonable indication of the subject matter
        2. The party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or,
        3. The person alleging the contract or disposition has, in reasonable reliance on it, so changed the person’s position that an inequitable result, having regard to both parties’ interests, can be avoided by only enforcing that contract or disposition

# DOCTRINE OF ESTATES

Doctrine of Estates- duration of the rights in land

## Words of Limitation

* You are now allowed to say what you wish in a Will (*WESA*)
  + If there are no express wordings then highest estate that the transferor has passes
* Qualifications such as reservations “during, while, until”, impose termination that revert to Crown
  + Conditions: less than a fee simple in that it is determinable, it will end if condition is not met
* Fee Simple: “O to A and his heirs”, or “O to A”
  + Perpetual, exclusive posession
  + Equivalent to ownership
  + Non Conditional
  + Right to immediate enjoyment
  + Alienable, have a disposition to transfer inter vivos or on death
* Life Estate: “O to A for life”
* Leasehold: “O to A for ten years”

# Wills

* “To Fred and his heirs” confers upon Fred a fee simple. If Fred dies before the testator, his heirs get nothing. If it was “To Fred or his heirs”, then if Fred dies can still go to heirs.
* Exception: if there is a divorce then all gifts to spouse are void
* If there is a promised gift in the will but it no longer exists, tough luck
* The most recent will is the one that takes effect upon death
* If there is a charity (church, foundation) that no longer exists, court will find a substitute most often
* Rule of construction should give way to an attempt to construe each will according to its circumstances (*Re Shamas*)
* If a spouse dies intestate, property passes to surviving spouse and children, each with 1/3 (*Estate Admin Act*)
  + 2 years cohabitation of marriage-like counts
  + Spouse gets all household furnishings, all chattels, and life estate
  + *Land (spouse) Protection Act*- declares homestead, one spouse who owns cannot sell without consent
    - * On death of owning spouse, life estate for other spouse
      * Supercedes any testamentary intention until LT dies
      * If there is a mortgage that falls into arrears then the mortgagee can sell, overrides LE
* Residuary Clause: deals with all lapsed (residual) gifts that could not be completed, allocates someone
  + If no clause or residual clause person has died then goes on intestacy
* Substitution Clause: used to avoid lapse of residuary. Places another in receipt of gift. “To B, but if she predeceases me, I leave the house, residue, to her daughter, X”.
* Revocation Clause: “I revoke all previous clauses”
* Appointment of executor and Trustee: Instructions to pay debts and taxes

## Repugnancy

* Arises when there is a legal impossibility, testator tries to do something that cannot be done
* Example is fee tail: “to B and on B’s death to C”
* Cannot give someone a fee simple, then demand a following fee simple to another
* Remedies:
  + Try to get as close as possible to the testator’s clear intention as is possible under the law
  + First option: life estate to B, remainder to C in fee simple
  + Second option: fee simple to B, and gift to C invalid (preferred)
  + Third option: life estate to B, with power to encroach (right to access the capital)
    - * B can then sell out remainder interest if necessary, C only gets if not sold

*Tottrup v Otterwell*- Dealt with lapse. Frank left almost everything to his twin brother, Fred, who predeceased him. Question was over intention of “and his heirs”. It was ruled that the sole heir of Fred could not get all of the gifts. It would be divided up among 8 other next of kin.

*Re Walker*- John Walker tried to give property to his wife in fee simple and then divide up the remainder. Ruled that everything after she dies is void since she is obtaining a FS.

# THE LIFE ESTATE

* Finite but indeterminate
* Right to possess and use for lifetime of original grantee
* Not inheritable or divisible
* Express words required to create a life estate (*Property Law Act* s.19(2)
* “To A for life” – life estate, reversion to O upon death of A
* “To A for the life of B” – estate pur autre vie
* “To A for life then to B” – A has life estate, B has the remainder in fee simple

**Rights**

* Right to occupation, possession, use, and profits (income)
* Right to remove fixtures, but must keep the property at a reasonable standard
  + Fiduciary obligations for remainder/reversion
* Can transfer estate, but transfer is still subject to grantor’s life, and remains LE (nemo dat)
* If the life estate person were to sell as fee simple, divide, remainderman/reversion would have claim

**Obligations**

1. Devolution
   * To not divide or sell property
   * LT’s interest ends at death
   * LT cannot leave property on his intestacy or in will
2. Law of Waste
   * Permissive waste (not responsible): Passive conduct which permits decay
   * Voluntary waste: Positive acts which diminish the value of the property
   * Equitable waste: Severe and malicious destruction. Hard to distinguish from voluntary waste
   * Ameliorating waste: Changes improving value, only responsible if a burden is then placed on rem./rev.
3. Pay Taxes
   * Entitles to homeowner grant
   * Must pay interest payments on mortgage, insurance for own goods
   * Property taxes (*Mayo v Leitowski*)

**No Obligation**

* Property/fire insurance/premiums
* Major repairs

**Trust as Preferable to Life Estate**

* Trustee can give power to encroach, which is the preferred solution to the life estate, it is an equitable LI
* Common for someone wanting to reduce taxes on gifts to leave all the property to the spouse, or to a trust where spouse has life estate and the remainder to the children (spousal trust).

*Vane v Lord Barnard-* **Equity looks to the substance rather than the form**. Son had a life estate in remainder, father had life estate. Father was wrecking the property, no common law remedy. Equitable remedy served as an injunction to stop vandalising and to repair damages. Father was required to rebuild and restore to original condition.

*New Westminster (City) v Kennedy*- Similar to *Vane*. Owner in LE was not paying property taxes. Court ordered sale proceeded and no one wanted it, city bought it. Kennedy had one year to redeem the property, but just sold everything in the property. City got an injunction to repair the property and restore it to its original condition.

# TYPES OF CO-OWNERSHIP

* Joint Tenancy
  + Tenancy as a whole, each person owns the whole property
  + When a co-owner dies the survivors right of survivorship automatically applies
  + Sole survivorship owns the whole
  + Must be explicit in transferring to multiple transferees
* Tenants in-Common
  + Regarded as separate persons
  + When co-owner dies their interest passes according to their will, or the rules of intestate succession
  + Decide percentage of ownership
  + Have identical rights to possession of the whole property
  + Regardless of the proportions of ownership
  + One TiC cannot exclude another
  + An excluded TiC can claim compensation for the period of time excluded
  + If only on TiC lives there, the others are entitled to rent
* Three Unities (all must be present in joint tenancy)
  + Unity of title- TiCs can take under different instruments
    - * Transfer or will
  + Unity of interest- TiCs can hold different estates or interests
  + Unity of time - TiCs can arise at different times
    - * Joint tenants must all vest simultaneously (except for use or gift by will)

# ABORIGINAL LAW IN PROPERTY

**Historically**

* Courts held that *Royal Proclamation of 1763* had extinguished Indian title
* Aboriginals had only a “personal and usufructory right” to land (*St. Catherines*, timber license, 1889)
  + Was not equal to a legal and equitable interest in land
    - * Personal: a right or interest less than an estate in fee simple
      * Usufructory: a right of enjoyment of some land owned by another
* *St. Catherines* was overturned by *Calder*: the courts no longer considered aboriginal title to be a “personal and usufructory right”
* *Calder* SCC 1973 held that aboriginal rights and title have always existed under the common law
  + Protected in s.35, AT is grounded in the reality of pre-sovereignty occupation
* The crown owes a fiduciary duty to Aboriginal peoples (*Guerin*)

## Aboriginal Right

* *Van der Peet* originally held that in order to be an aboriginal right, an activity had to be an element of a practice, custom, or tradtion integral to the distinctive culture of the group claiming the right.
* *Delgamuukw* overturned this rule, which held that the use did not have to be integral
* **AR fall short of AT**
  + Rights to fish, cross land, agriculture etc.
  + Easier to prove, only need to be seasonal or territorial
  + Protected by s.35 of the constitution
  + Province cannot extinguish rights but federal government can
* Factors of an Aboriginal Right
  + Continuity is required (From pre-contact traditions to current times)
  + The activity must be a feature of the culture, but does not need to be unique
  + Perspective of aboriginal people themselves
  + The precise nature of the claim being made
  + Central significance to the society in question
  + Evidentiary differences for AR, including oral testimony
  + It is site specific (only for that community, not for all)

## Aboriginal Title

* AT: Right of use and exclusive occupation of land
* Has yet to be proven (almost was in *William*)
* Site specific
* Courts must take into account both common law and aboriginal perspectives (*Delgamuukw*)
* Only aboriginal practices that indicate a degree of possession similar to common law possession will impose AT (*Marshall/Bernard*)
* There is an inherent limit on the land use due to the nature of the group’s attachment to the land (*Delgamuukw*)
  + If a native band wants to use lands for non-reconcilable use, they must convert it to fee simple through treaty surrender to the crown
* It is ***sui generis***
  + It is inalienable- cannot be transferred to anyone else
  + Cannot be filed through any claims with the LTO
  + It is still a legal title, arising from the common law, and is therefore not defeated by BPFVWON
    - * Nemo dat applies- Crown cannot give a better title than it has and so he title that passes is subject to AT
  + **TEST:** It comes from pre-sovereignty occupation (1763)
    - * Proof is based on physical occupation and exclusive possession
      * Sense of intention and capacity to control
      * Connection to land must have been of central significance to their distinct culture
      * Exclusion can be shown by the right to control the land, and if necessary, to exclude others
      * Continuity can be shown by proof of pre-sovereignty and current practices
      * Colonial separation will not affect continuity
      * Hearsay rule- oral evidence is inadmissible in CL, allowed in AL
  + Held communally and a collective ownership
  + Government is allowed to infringe on AT if justified
    - * Must be a compelling and substantial legislative objective
      * The infringement must be in accordance with the special relationship between R and Abos
      * The government has a fiduciary duty, reconciliation is preferable to negotiation

*Delgamuukw –* Attempted to claim title to over 58000 square km. SCC rejected claim entirely based on the vast area claimed, even though AT was actually proven over part of the area.

*Mitchell*- Bought goods into the country for trade, did not pay customs duties. Claimed AR and treaty rights of trade across the St. Lawrence River. Court had to balance Crown’s fiduciary duty. Found that the right was not distinctive to the culture or identity of the band. Binnie went one step further and stated that AR cannot conflict with crown sovereignty. Imposing non-discriminatory taxes on import goods did not discriminate against only this group.

*Marshall/Bernard*- Two members of the Mi’kmaq band claimed AT over area and that title gave them the right to harvest resources in that area. Logging did not form the basis of Mi’kmaq culture and identity.

# ASSURANCE FUND

* One of the three principles of the Torrens System (Assurance Fund, Mirror Principle, Curtain Principle)
* Branch of the AG before 2005, since Jan. 2005 it has been the Land Title and Survey Authority Assurance Fund
* **Purpose:**
  + To compensate innocent persons who have been deprived of their ownership of land [fee simple] because of the conclusiveness of the registrar (ss. 196)
  + To compensate innocent persons who have been deprived of their ownership of a fee simple in consequence of a fraud or wrongful act resulting in incorrect registration
* Limit of the fund used to be $50k, now up around 8M dollars
* 3 claims paid in fee simple title fraud, 14 claims paid for fraud of lesser interests
* Compared to the deed system where nemo dat protected an innocent BFPVWON under common-law
  + Innocent purchaser loses out to the owner, if the fraudster cannot be found SOL
  + **Where the equities are equal the law prevails (***McCaig v Reys*)
* Should be used as a last resort
* **Must be a registered owner of a fee simple, and not received by gift**
* **Lesser interests ineligible to claim from assurance fund** (*LTA* ss. 303)
  + Equitable mortgagee by deposit of duplicate certificate of title
  + Breach of trust
  + Misdescription of boundaries or parcels
  + Shortage in area or volume (air space parcel)
* **Must be claimed within 3 years of the discovery of the fraud**
  + Can be claimed even if the fraudster has gone
* **Must be completely innocent from the fraudster**
  + Acted in good faith
  + Paid value
  + Relied on registrar
* A person who got on the title by fraud will be subject to the notice of an unregistered interest (*Gill*)
  + Unregistered interest = equitable interest capable of specific performance (*McCaig*)

*Gill v Bucholtz* 2009 BCCA- A fraudster and a collaborator impersonated Gill and talked Bucholtz into lending money as a private mortgage transaction on Gill’s property. Then a company registered a second mortgage. Both were innocent. Court held that the mortgage was invalid as indefeasibility and registry only worked for fee simple holder, not a charge holder. Their mortgage was lost to nemo dat, not the register. Property went back to real Mr. Gill without any mortgages on it. Their remedy would be to sue John Doe or Gurjeet Gill, or get private title insurance.

*McCaig v Reys*- McCaig buys property, then sells to Reys, and wants an option. Reys says he understands the option and will honour it. McCaig finds that he cannot register the option because there must be a subdivision of the property and a new boundary line. Reys sells to Rutland, who says they will honour the option (agreement, though, made no mention of it). Rutland (Jerome as agent) sold to Jabin, without mention of option to get better price. Jabin is BFPFVWON Jabin registers title innocently. Where two innocent people are victims of fraud, law prevails (**where equities are equal, law prevails**). Jabin was registered on title, McCaig wasn’t. McCaig cannot claim against AF since he was not fee simple holder. Can claim in personam against Reys and Rutland. Should have lodged a caveat or taken a right of first refusal (to be able to purchase property first for same price).

*Royal Bank* v *British Columbia*- Walsh RO and removed duplicate certificate of title from the LTO in order to obtain equitable mortgage from Royal Bank. Then went to Bank of Nova Scotia for second mortgage, and could because LTO only stated that duplicate title could not be located. If this had been done properly he would have not been able to obtain second mortgage. Bank of Nova Scotia sells property and gets mortgage paid off, after Walsh disappears. Royal Bank tries to claim against AF, but cannot, weren’t RO of fee simple, did not pay anything to AF, cut corners by not registering mortgage.