HISTORY OF PROPERTY LAW

Land Title Act

* Derived from Australia (Torrens System) in the 1850’s, passed by BC in 1870
* Also derives from the feudal system; the government of the province (crown) owns the property and we hold interest in that property for a period of time
* Serves as a public registry for property ownership; establishes legal title across lands in Canada

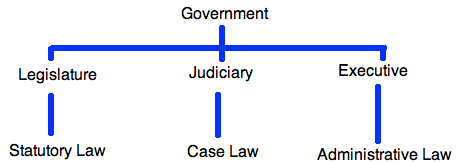
History of Court Systems

* Common Law – bound by precedent; offered damages only
* Court of Chancery – court of discretion; offered equitable remedies such as injunctions or specific performance
  + Exceptional circumstances warranted equitable remedies; must demonstrate that damages are inadequate
  + Types of Injunctions (where imprisonment is available for non-compliance):
    - Prohibitory – prevent an action
    - Mandatory – positive order; requires an action
  + Courts operated independently of one another – chose your court based on remedy sought
  + The passing of *Chancery Amendment Act*, 1858 (UK) (“Lord Cairns’ Act”), s. 2 allowed for equitable damages – meaning damages could be offered in addition to (+) or in substitution for specific performance
    - In other words, the Court of Chancery was able to provide damages and/or equitable remedies
* Courts merged in 1873 – Created trial court (with the powers of the common law) and a superior court of general jurisdiction (with the powers of both the common law and equity)
  + Reflected in the trial courts and the BCSC (superior court of general jurisdiction)
* Per the *Law and Equity Act* – **“rules of equity prevail**

**The Relevance of English Law**

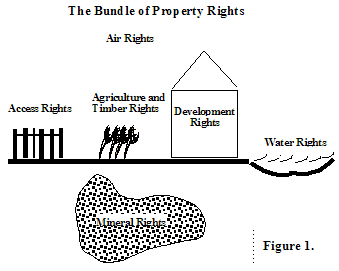
* BC adopted English Law on November 19, 1858; meaning Imperial legislation inapplicable after this date
  + Now appears in the Law and Equity Act, s. 2
* However, the BC *Land Title Act* expressly and implicitly repeals English property law; although many of the systems and concepts are evident in the Torrens system

RELEVANT LEGAL CONCEPTS



What is “**law**”?

* Rules and procedures for the orderly resolution of disputes
* Define as private and public law
* Sources of law – statutes, common law and administration
* Two types of courses:
  + Substantive law – rights/obligations and defenses
  + Procedural law – how you enforce or defend such rights and obligations
    - Includes the registration of title, how thing are proven in court, criminal procedure
* Law of Remedies
  + Court orders are called remedies; what the court can do for the parties
  + May be difficult to determine the appropriate remedy – damages/monetary or equitable remedies

What is **property**?

* Ordinary meaning = ownership of things
* **Legal meaning = rights in things**
* Land – Earth’s surface to the center of the earth and the airspace above the land, including the trees and water
  + *Cujus est solum ejus es usque ad coelom et ad inferos*
  + *Ad coelum* (‘the heavens’)
  + *Ad inferos* (‘center of the earth’)
  + That is, there is no upper or lower limits to ownership

Interpretation Act

* s. 29 “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 > 3 years
  + Mortgages
  + Easements
  + Restrictive covenants

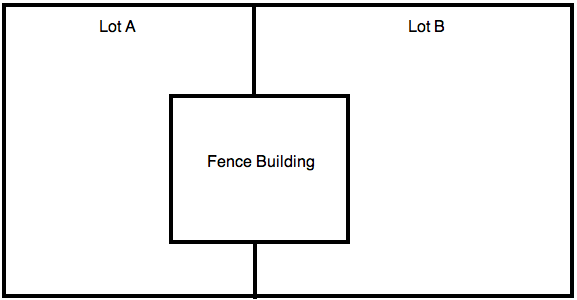
Types of Property

* Real Estate – land + permanent man-made additions (physical improvements & fixtures)
* Real Property – land and fixtures attached to the land
* Personal Property – often known as chattels or “tangible personal property”
  + Transferred differently from interests in real property (bill of sale)
  + Includes **‘choses (things) in action’**
    - Term used to describe a property right or the right of possession of something that can only be obtained or enforced through legal action (suing through the courts)
    - Things that are not physically tangible such as the right of an heir to interest in the estate, intellectual property rights (patents), the right to sue for damages, to injury and the right of an employee to unpaid wages.
* Fixtures – objects physically attached to the land
* Examples:
  + Trees – permanent fixtures until cut down, then they’re personal property (chattel)
  + Mobile Homes – chattels while on wheels; able to register interest under the Mobile Home Act; but still not a permanent fixture on the land

Philosophical Views of Law

* **Legal Positivism** – property rights created by government; judges, as ministers of the Crown, resolve disputes and hand out punishments
* **Natural Law Theory** – property rights arise in nature as a matter of fundamental justice [p. 1-41 &1-44]
  + Humans have personal dignity; we should have certain human rights available to us
* **Utilitarianism** – property rights serve societal purposes; *“the greatest good for the greatest number”*
  + Law should maximize our resources among as many people as possible; maximize utility

COMMON LAW



Trespass to Property – Property Law Act, s. 36 [p.6-10]

* Owner A has built a building that encroaches (trespass) on the land of Owner B
  + Particularly common in rural areas; lands are not well surveyed
* Three options to address this under section 36(2)
  + **easement** – compensation
    - Permission granted to Owner A to keep the building while providing compensation to Owner B
  + **vest title** – compensation
    - Move the property line; Owner B receives large compensation
  + **removal** [=mandatory injunction]
    - Can force the removal of half the building
* Kelsen:
  + At common law, fee simple holders have the right to the airspace above and below their property.
  + Injunctions will be provided as an equitable remedy only if:
    - If the injury to the plaintiff’s legal rights is small;
    - And is one which is capable of being estimated in money;
    - And is one which can be adequately compensated by a small money payment;
    - And the case is one in which it would be oppressive to the defendant to grant an injunction
* Bernstein Principle: Landowners own the airspace above and below the land to the height or depth necessary for use or enjoyment of the land

AIR SPACE LEGISLATION

**Land Title Act (LTA)**

* Permits the creation by statute of ‘**air space parcels**’
  + *A volumetric parcel(s), whether or not occupied in whole or in part by a building or other structure, shown as such in an ‘****air space plan****’*
  + Unlike the Cadastral concept, uses 3D (geodetic elevation) – includes the topographical features of the earth
  + Do not have to be above the surface; they are 3D parcels of space that are subdivided from the surface
* Per Kelsen, the fee simple owner of land owns the air space above and below
  + Can create, sell lease the “air space parcel(s)” with separate title(s); like subdividing your airspace
    - *“Obtain indefeasible titles for them”*
  + Results in different ownership for the physical (surface) land and the airspace above
* Section 140(2) – Ownership
  + Makes air space parcels a form of land which lies in grant
  + However, owners of air space parcels do not have fee simple rights – no right to the reasonable use of air space above and below their parcel; this is sold to other owners or remains with the fee simple holder
  + Creation of pathways, driveways and means of access to the air space parcel must be accounted for in the sale or lease of air space parcels
* Section 141(1) – Air Space Plan
  + Air space parcels created through the submission of an air space plan to the LTO
  + Multiple owners; may allow for multiple uses (i.e. residential and commercial)
  + May be further subdivided (i.e. sell half my condo) or sold the same way the land was sold (i.e. sell my whole condo)
* Section 142(1) – Government Rights to Air Space
  + Province (with the consent of the municipality where necessary) is able to divide the air space above highways/streets into air space parcels
  + Some of the first uses of crown air space parcels was for walkways and public areas

Ad Inferos – Sub Surface Rights

* Now reserved by statute to the Crown – specifically mineral rights
  + However, those lands that were sold in fee simple continue to include sub-surface rights in the title
  + Note: This is unlike riparian rights which were expropriated for utilitarian purposes
* Grants anyone the right to tunnel below the level required for “reasonable use and enjoyment” by the surface owner. No legal action exists for the surface owner to stop tunnelling, unless nuisance can be proved (i.e. your driveway cracks).

**Strata Property Act** (p. 1-18 to 1-20)

* Further regulates the subdivision of fee simple land and/or air space plans/parcels
* Applies when you have multiple units with individual ownership (i.e. condos)
  + Can generally deal with strata lot in the same manner as a conventional owner of land, but cannot deal separately with their shares of the jointly owned facilities
* Similar strata title acts exist in all provinces
* The common property/assets are all co-owned by unit holders, this includes such things as:
  + Hallway
  + Stairways
  + Elevators
  + Parking areas
  + Greenspace
  + Roofspace
  + Exterior
  + Pools
  + Fitness Areas
  + Common assets – i.e. couches in lobby
* Legislation establishes a governance structure to manage the common property (jointly owned facilities – known as a **strata council/corporation** (i.e. homeowner’s association) (s. 66-67)
  + “**Strata plan**” is submitted to the Land Title Office which describes both the physical dimensions of the individual air space parcels (units) known as “**strata lots**” and the “**common property”**
  + It also defines the financial contributions (monthly management fee) required by each strata lot owner (HOA fees)
  + Each strata lot owner owns the common property in proportion to the size of their unit(s)
* Section 1 – Bare Land Strata Plan
  + Strata plan drawn on bare land; where boundaries are defined on a horizontal plane by reference to survey markers and not floors, wall or ceilings
  + Can be used for high rise condominiums or for townhouse style condos
* Section 68 – Strata Lot Boundaries
  + *“the boundary of the strata lot is midway between the surface of the structural portion of the wall, floor or ceiling that faces the strata lot”*
  + Basically you own to halfway between the wall – if the wall is 4” thick, I own up to 2”
* Section 69 – Implied Easements
  + An automatic easement (right of access) exists for structural requirements and for the passage/provision of services and facilities such as water, sewage, electricity, etc.
  + Also grants a right of entry to inspect, maintain and repair – i.e. owners must allow service provider access to their property to address issues affecting other individual within the strata
* Section 70 – Strata Corporation
  + Council is made up of a subsection of strata lot owners; it does not own the common property, only regulates the property on behalf of all the strata lot owners
  + Frequently hire building management company
  + Pass by-laws regarding the management use of the property (i.e. pet, age and rental restrictions)
    - Can force eviction/involuntarily sale for non-compliance
  + Charges fees – used to pay for common expenses
    - Such as insurance and the maintenance of a ‘contingency fund’ for major or emergency repairs
  + Special assessments
  + N.B. Information regarding the strata council is typically requested during the sale of a strata lot/condo, including by-laws, financial statements, depreciation report, meeting minutes, strata plan, etc.
* Section 71 – Change in use of common property (s. 71)
  + Cannot make significant changes to “common property” without ¾ of votes at AGM; may also be done if change required immediately for safety/loss of damage
  + Term “significant change” may be subject to interpretation; can cause dispute
* Section 72 – Repair of Property
  + The strata corporation must repair and maintain common property and assets
  + However, by-laws may make owners responsible for repairs to common property or to “limited common property”
  + Where lmited common property is common property allocated by the strata council for use by individual owners – such as parking spaces, ground level gardens and storage units

Strata Dispute Resolution

* Under the jurisdiction of the BC Supreme Court or small claims court (where the claim is small enough)
* The Civil Resolution Tribunal Act, allows these claims to be dealt with by the **Civil Resolution Tribunal**
* Provide online dispute resolution
* Handles several claims for non-compliance with strata council by-laws or the Strata Property Act

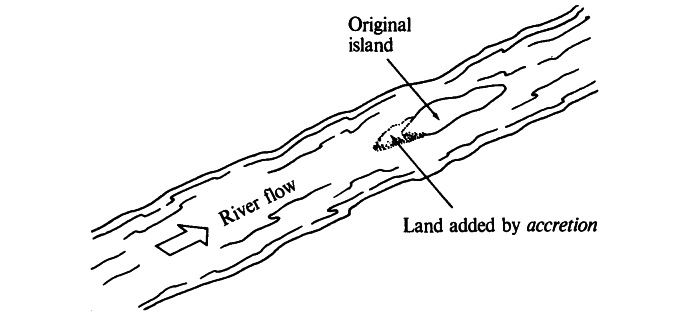
WATER RIGHTS – COMMON LAW AND STATUTORY

What is water?

* Common law defines water as a natural watercourse with definite boundaries (i.e. puddles, swamps and percolating water underground are not included)
  + Above or below ground
  + Water flows naturally and should be allowed thus to flow (pp. 1-40 & 1-41)
* WA, WPA define water, ground water, stream, surface water
* Ground Water
  + Under common law, no private entity had ownership of ground water. All individuals had rightful access.
  + Ground water rights were expropriated by WPA s. 3(2)
* Water rights are generally “**first in time, first in right**”

What are riparian rights?

* Riparian Rights = rights relating to the shore of any body of water
  + Granted to individuals with property adjacent to water bodies (waterfront property)
* Littoral = seaside or lakeshore
* Riparian = stream/river bank



**Riparian Common Law Rights**

1. Across the entire frontage to and from the water
   * Means no one can building anything that blocks access to the water
2. Right of drainage & self-protection from flooding (erosion)
3. Right to reasonable use\*
   * Expropriated by the WA ss. 2(1) & 42 and WPA s. 3(1)
   * Now require a licence for all use of water, Water Act s. 42
   * s. 2(1) “…in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences…”
   * Exception under s. 42: Use of unrecorded water for domestic purposes or use of any water in emergency fire situations
4. Right to undiminished flow\*
   * Expropriated by the WA s. 2(1) and WPA s. 3(1)
   * Domestic or unlicensed user has no cause of action if the diminished flow is a result of a licensed activity
5. Right to undiminished quality of water\*
   * Expropriated by the WA and WPA
   * However, many provincial and federal statutes exist to protect the quality of water
6. Right of Accretion
   * Acquisition must be: “gradual and imperceptible” (p. 1-61) and a “wavy line” rather than a “fixed strip” (p. 1-58)
   * Results in the boundaries of a property changing at common law; must update LTO plan to be effective
7. Right of ownership of bed\*
   * Common law rule is *ad medium filum* (to the middle line)
   * Expropriated by the *Land Act*, ss. 55-56

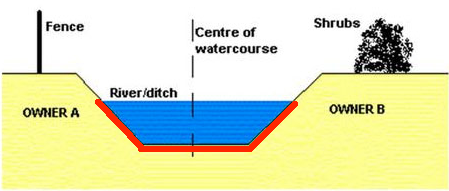
**Water Legislation**

* **Water Act RSBC 1996**
  + Requires all users to obtain a licence – do not have to be a riparian owner
    - Exception: Use of unrecorded water for domestic purposes or in emergency fire situations
  + Provides definitions of domestic purpose, ground water, stream and unrecorded water
    - Where “**unrecorded water**” means water not held under a licence or under a special or private Act
  + Ownership of water vested in the government – “the property in and the right to the user and flow of all the water at any time in a stream in BC are for all purposes vested in the government”
    - Available for public use – “the greatest good for the greatest number”
  + NOT governed by the Torrens system
  + Like land, the owner of all water in the province in the provincial government
* Property Edge
  + Property owner owns above the high water mark; this changes with fluctuation in water levels
  + Government owns anything below the high water mark and the river/water bed
* **Water Protection Act RSBC 1996**
  + Adds percolating water and groundwater the governments ownerships

**Cases: Common Law and Water Statutes**

* Johnson v Anderson: Domestic rights in common law remain intact subject only to any licensed users. Therefore, civil claims are still available between unlicensed users.
* Schillinger v Williamson Blacktop: Common law riparian rights can only be exercised by an individual lawfully using the water – either through domestic use of unrecorded water or by compliance with the terms WA license.
* Steadman v Erickson Gold Mining: In the absence of a licensed user, common law rules (including the right to undiminished quality) are applicable to domestic users of unrecorded water including surface, ground and percolating water.

**Percolating Water**

* Common Law: Not included – “first in use, first in right”
* However, rights to percolating water were expropriated by the WPA

**Special Cases: Water Beds & Accretion**

(a) Beds of Waterbodies, Lakes and Ponds

* Common law rule is *ad medium filum* (to the middle line)
  + In Rotter v. Canadian Exploration (1961), the SCC held that the common law rule applied despite the *Land Act, RSBC 1961* which attempted to make conclusive that which is on the title
* Expropriated by the *Land Act*, ss. 55-56
  + “…no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the grant…”
* Crown owns the water bed below the high water mark; unless there is an express provisions
  + NO private ownership or control over beds
  + Legal boundaries change with fluctuating water levels (Southern Centre of Theosophy v. South Australia)
* Example: Boat Docks
  + Fixed docks which are attached to the water bed are illegal structures; unless the riparian owner has applied for an easement on Crown title
  + However, floating docks are within the rights of the riparian owner to the middle line

(b) Accretion and Erosion

What is accretion and erosion?

* Accretion is the gradual build up of soil; acquisition of land by accretion must be:
  + “wavy line” rather than a “fixed strip” (p. 1-58)
  + “gradual and imperceptible” (p. 1-62) – in the sense that one cannot observe it while it is happening (in progress). Generally occurs over the passage of time however, there is no temporal requirement.
* Erosion/diluvion is the gradual removal of soil
  + A gains land; B loses, but no compensation for erosion
* Can be caused by several actions:
  + Fluvial action
  + Precipitation/evaporation
  + Wind
  + Man-made operations
* Where water bodies form the property boundary, the boundaries may change at common law due to these processes
  + However, must update LTO plan to be effective
  + If not registered, the Crown can claim right to the accreted land (cannot infringe on owners access to water)
* **No compensation will be paid for accretion or erosion**
  + Results in riparian owners absorbing the risk of erosion
* Southern Centre of Theosophy v. South Australia (1981): Doctrine of accretion can be applied for all accretion and erosion that occurs by fluvial, precipitation/ evaporation man-made and wind operations. The requirement for gradual and imperceptible change requires only imperceptible progress; no temporal component.

LATERAL AND VERTICAL SUPPORT

Support

* Property owners possess the right to excavate right up to the property line
* At common law, property owners possessed a right to lateral vertical support
* Available actions and liability dependent on the state of the land:
  + “Natural State”
    - Strict liability torts – P required to show causation only (no negligence)
  + “Altered State” – where fixtures such as a building change support requirements
    - Vertical support remains strict liability
    - Lateral support actions require demonstration of **negligent excavation, trespass during excavation or a an acquired right to lateral support** (through agreement with neighbouring landowner)
* Where negligence can be difficult to demonstrate – what if your house sinks months after your neighbour excavates?
* Loss of support can be caused in other ways:
  + Natural reasons such as erosion or lowering of groundwater levels (subsidence)
  + Vibration from machinery can cause collapse
* Gillies v. Bortoluzzi [1953]: Property owners have the right to excavate up to the property line. However, crossing the property line will result in a trespass. If it causes a loss of vertical support (re: right to vertical support is strict), the D will be held liable for all resulting damages.
* Rytter v. Schmitz: Even if the intentions of the defendant were good, the right to vertical support and trespass torts are strict liability. However, damages will reflect the conduct of the parties.

GENERAL PRINCIPLES OF LAND LAW

**Real and Personal Property**

* Two types of property:
  1. Real Property/Realty – includes land, real estate, immovables

Land related – e.g. leasehold interests traditionally

* + - A.k.a chattels real
    - Transferred by bill of sale
    - Most of household wealth in Canada is in land /realty (54%)
  1. Personal Property/Personalty/Chattels – including personalty, movables
     + Chattels Personal
       - Choses in Possession (physically possessed personal chattels or things)
       - Choses in Action (intangible goods – contracts or tort liabilities such as stock certificates)
     + Transferred by bill of transfer

Cadastral Concept

* Each parcel of land has distinct title of “ownership”; individual ownership as opposed to collective ownership (exception of First Nations lands)
* The land title and accompanying plans (mapping out plans) are summarized on separate documents
* Example: Crown Corporation
  + BC Land Title provides legal side; registration of ownership
  + Surveying providing mapping and property dimensions ‘on the ground’

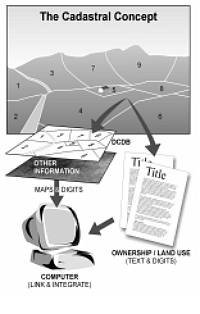
**Fixtures**

* *Quicquid plantatur solo, solo credit* – 'whatever is affixed to the soil belongs to the soil’
* Fixture disputes are common between landlord and tenant, mortgagor and mortgagee, vendor and purchaser and the executors of a tenant for life and those entitled in remainder or on reversion (will discuss in later chapters)
* Where contracts for sale can specify:
  + The included items: fixtures and chattels
  + The excluded items: fixtures and chattels
* Chattel or Fixture? Per Stack v. T Eaton (1902):
  1. Articles attached to the land by their own weight are chattels, unless the circumstances show that they were intended to be part of the land
  2. Articles affixed to the land even slightly are fixtues, unless the circumstances show that they were intended to continue chattels.
  3. The circumstances necessary to alter the *prima facie* character of the articles are circumstances which show the degree of annexation and object of such annexation, which are patent (visible) to all to see.
     + Must demonstrate how well attached the item or the intents of the patries
  4. The intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.
     + Have to determine the intention using logical reasoning; not a ‘he said, she said’ type of argument
* Chattel or Fixture? Per RBC v Maple Ridge Farmers (1995) BCSC:
  1. Tenants can remove fixtures from the premises during the currency of the tenancy provided that he/she leaves the premises in the condition received
  2. Commercial/business tenants can remove fixtures and return them to chattels by severing them from the realty without additional agreement b/w the landlord and tenants
     + Creates an exception – fixtures removable by tenant
     + Does not apply to residential tenancies; require permission from the landlord
* Determining the status of an object is dependent on the circumstances and the intentions of the parties
  + Method & Degree of Annexation
    - Factual inquiry
    - Permanent/temporary
    - Ease of removal/serious damage or destruction (p. 1-22)
  + Object/Purpose of Annexation
    - Subjective determination of purpose; mental state must be established using objective evidence
    - Fixture – object of affixation is to improve freehold
    - Chattel – object of affixation is better enjoyment of the item
* Re Davis [1954]: An objective assessment of the degree and object of annexation/affixation can be used to categorize items as fixtures or chattels.
* La Salle Recreations v Canadian Camdex Investments (1969): Where the primary object of affixation is for the better use of the property, and not the better use of the chattel (even if the degree of annexation is slight) the item will be considered a fixture.
  + The *Conditional Sales Act* allows vendors pending payment to register their agreement on the land title
* CMIC Mortgage Investment Corp v Rodriguez (2010): Case establishes that the purpose of affixation should be resorted to only in very exceptional circumstances (i.e. very large or expensive items). However, it was accepted in this case.

What about modular structures?

* Portable/Modular Homes
  + Sits on top of the concrete; remains a chattel
  + Hooked up only temporarily to plumbing and electricity
* Laneway Houses – permanently affixed; therefore the title belongs to the land owner (two houses and one title)
  + However, permanently affixed homes can be severed from the land and made to be a chattel
* Case Study: Olympic Village
  + City owned the surface land; the developer continued to own the building
  + No subdivision of airspace
  + However, property law states that the above agreement is null and void; cannot sell only the rights to the building (without the subdivision of the airspace)

LAND OWNERSHIP & THE TORRENS SYSTEM

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BC Torrens System

* Represented as a 2D surface; meaning that the 3D aspects of the land are not included (see right)
* Crown land is not registered in the Land Title system
* Regulated by the BC Land Title & Survey Authority

1. System requires a legal record of title;
2. Physical representation of property;
3. And a computer record

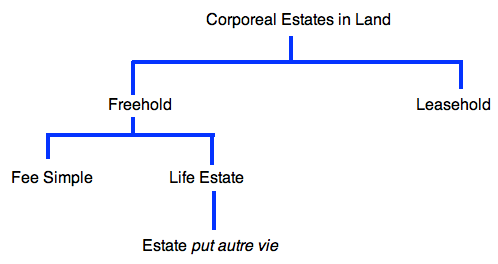
**Ownership of Land**

1. Common Law
   * The Crown “owns” real property (provincial gov't)
   * Private individuals hold only estates or interest in real property derived from the Crown
2. Legislation: **Land Titles (Torrens) System**
   * Utilized by provincial government to maintain registration system for record of title and other interests

* Pieces are known as “parcels” or “lots”
  + Like common law, the Crown “owns” all real property (provincial government)
  + Private individuals hold only **estates or interests** in real property derived from the Crown (see below)
* Every parcel has a “registered owner”; this is the holder of the fee simple
* BUT multiple estates or interests can be held in one piece of property
* Lesser interests are known as “**charge**s” (i.e. a mortgage or easement)
* *“the land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time…”*

**Types of Ownership/Interests in Torrens System**

Corporeal Interests = right to possession (immediate or future)

* **Fee Simple** –ownership of land in perpetuity; indefeasible title
  + Fee simple continues as long as next of kin/heirs are available; family members therefore have future interests (will is pre-eminent); if no heirs, the land “escheats” or goes back to the Crown
  + ~~~~Table of Consanguinity: Determines the degree of relationship required to serve as ‘next of kin’ when an individual dies intestate
* **Concurrent Estates/Co-ownership**
  + Tenants in Common
    - Two people share ownership of property, but each has distinct interest they can leave by will and dispose of to other people
    - i.e. each owns 50% of the building
  + Joint Tenants (right of survivorship)
    - When one dies, their interest passes automatically to the surviving tenant
    - i.e. collectively own 100% of the building
* **Other Lesser Interests**
  + Known as **“charges**”; defeasible in BC
  + Can be sold by the fee simple owner or the holder of a lesser interest due to the right to disposition
  + Leasehold – an estate with a certain duration (see below)
    - Example: Leasehold condominiums on campus; do not possess fee simple
  + Life Estate – “to A for life”
    - Individual has rights to exclusive possession; estate not inheritable upon death (see Future Interests)
  + Estate *Pur Autre Vie* – “to A for B’s life”
    - Type of life estate measured by some other life
    - Duration as long as B lives; B = “measuring life”
      * A dies before B: life estate continues (inheritable, right of reversion, A’s estate)
      * B dies before A: estate ends
  + Leasehold Estates – “to A for *x* years”
    - Right to exclusive possession for a fixed duration
    - Lessor (landlord) grants possession to the lessee (residential/commercial tenant) in exchange for rent; developed in contract law
* **Future Interests**
  + “to A for life, and then to B in fee simple (remainder)”
    - A – life estate; right to income and possession during lifetime
    - B – future interest (remaindermen); possession delayed until A dies
      * Vested in interest
      * Right to corpus or capital on A’s death
    - Where a remainder is a future interest held by one person in the real property of another that will take effect upon the expiration of the other property interests created at the same time as the future interest.
      * “rest and residue” means remainder” (Re Fraser)
  + “to A for life, and then to C if C graduates from law school”
    - Subject to a condition precedent: C’s graduation from law school
      * C = future contingent remainder
      * C does not have a vested interest; it is only a possibility of interest
    - Where a condition precedent is an event which has to occur before the title (or other right) to the property will actually be in the name (vest) of the party receiving title
    - Where a contingent remainder is an interest which will go to a person only upon a certain set of circumstances existing at the time the title-holder die
    - Before graduation and during A’s lifetime, A has possession
    - On A’s death:
      * C has not graduated yet = reversion; contingent expectation of reversion
      * C graduates before A dies; C’s remainder vested interest becomes vested possession

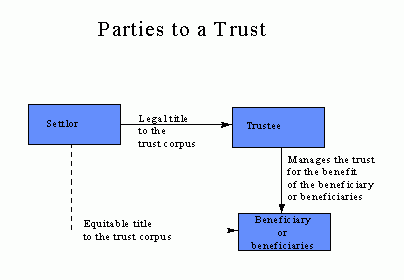
Incorporeal Interests = Access for a purpose or limit on use but not possession

* May impact the value of the land gaining the interest and the land affected by it
  + Re: power lines through your property
* Examples:
  + Easements or restrictive covenants
  + Mortgagor/borrower/property owner uses their houses and collateral security
  + Mortgagee/lender able to take possession if the mortgagor defaults

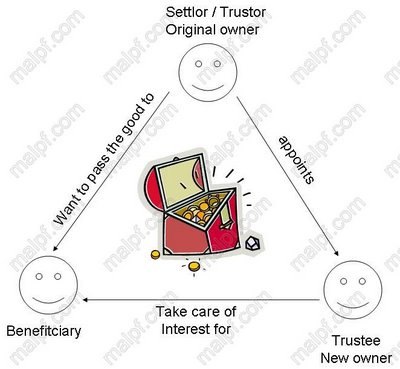
Examples of Torrens Ownership & Interests

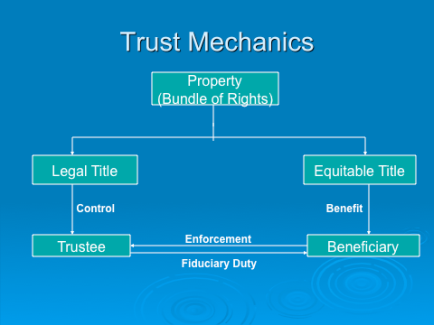
* Fee simple holder grants life estate to his wife. He dies and the fee simple transfers to his son. The wife’s possession continues passed the transfer of the fee simple. She can further dispose of her interests by creating shorter-term leaseholds to have farmers farm the land. When she dies and the leaseholds end, the heir (next of kin) gains possession; have the only interest in the property.
* Mortgage – type of charge. Fee simple is subject to this lesser interest whereby the bank insists on security for amount of loan. Once payments are fulfilled, the mortgage will ultimately be discharged and have a clear title. If in default, mortgagee can foreclose and sell property. This charge gives mortgagee the right to enforce interest and issue court order to mortgagor.
* *nemo dat quod on habet*
  + “no one may give that which one does not have”
  + i.e. if the life estate holder dies before the ended of the leasehold they granted, the fee simple holder is not required to honour the leaseholds

**Equitable Interests – The Trust**

* Developed in the Court of Chancery – hence name “equitable interest”
  + Area of substantive law – rights in property (trust) remedies
  + Originally known as the “use”
  + Henry VIII attempted to “execute the use” by turning all equitable interests (uses) into legal title via the *Statute of Uses* (1535)
  + Loopholes allowed the use to re-emerge as the modern trust within 100 years

1. Purpose of the Trust
   * To make a gift to benefit the beneficiary(ies) without burdening them (i.e. children)
   * Administration by the trustee
     + *Trustee Act* outlines the compensation required for the trustee
   * To protect property from creditors
   * To reduce taxes
2. Modern Trust – “to A in trust for B”

* Dictionary definition of the term trust is “voluntary vulnerability, “dependence” or “reliance”
* Legal title remains with the trustee; the beneficiary relies on the courts to see that the trustee holds the legal title for his/her benefit (fiduciary duty)
* N.B. In Canada, the trust can be registered on the legal title.
* “settlor” – creates the trust by transferring assets to the trustee
* Occurs *inter vivos*, testamentary (by will) or intestate
* “trustee” –receives the assets and holds the legal title for the value and benefit of the beneficiary; controls and manages the assets
  + Form of fiduciary duty
  + Relies on the “good conscience” of the trustee
* “trust instrument” = contains the terms of the trust
* “beneficiary(ies)” – entitled to the income and capital; assets in the force
  + Have an equitable or beneficial interest in the trust property; “equitable/beneficial interest in fee simple”
  + Posses right of enforcement against the trustee; trustee has a fiduciary duty

1. Legal Title in the Trust
   * Legal title always remains with the trustee

* Rights *in rem*; good against the whole world
  + A trustee, being the legal owner, may transfer legal title to a third party
  + If the purchaser is aware of the trust, they are required to honour the equitable interest
* If trust registered on the title, then notice provided via transfer of title; registration/ statutory notice
* If trust not registered on the land title, it is possible that the equitable interest can be defeated if the purchaser is unaware
  + Known as a *bona fide* purchaser for value (consideration) without notice (knowledge)
  + In this case, only the trustee commits a breach of trust (not contract); therefore action only available against trustee
* However, constructive notice (presumed knowledge) is considered; generally this net is cast fairly widely
  1. Equitable – put upon inquiry/reasonable person
  2. Statutory – LTA registration

1. What is a “trust in law? Standards of trustworthiness:
   * Fiduciary (highest standard of trustworthiness)
   * Good Faith (middle standard)
   * Unconscionability (lowest standard of trustworthiness above the marketplace)
   * Caveat Emptor (let the buyer beware – standard of trustworthiness in an ordinary marketplace)

Limits to Use of Land

1. Common Law: Nuisance – right to quiet enjoyment of your own land
2. Private Arrangements:
   * Personal rights (contracts)
     + Not enforceable after sale
   * Easements (right) and restrictive covenants
     + Enforceable after sale; interests in land are registrable on both titles and can exist in perpetuity
3. Legislation
   * *Agricultural Land Commission Act*: creates agricultural land reserves that can only be used for agricultural purposes; no residential, commercial or industrial purposes
   * Municipal By-Laws
     + Zoning
     + Building: how far from the street, how big can the building be, laneway homes, etc.
     + Fire & graffiti by-laws

**Freedom of Alienation/Disposition**

* Where ‘freely alienable’ is defined as the ability to be transferred to new ownership

1. General Rights
   * The owner of the fee simple estate in land has the right to:
     + Sell, mortgage, lease or devise (by will) the estate or grant a life estate;
     + Use and occupy the land to the exclusion of others; and
     + Dispose of rights that are connected to the fee simple estate
       - e.g. an easement or restrictive covenant (“fragmenting”)
   * *Inter vivos* the property may be:
     + Sale of Land: vendor-purchaser
     + Gift of Land: conveyance by deed/transfer (Form A, p. 4-55)
     + Chattels: bill of sale
   * On death the gift of land/chattels pass by:
     + Will – no legal effect until death
     + Intestacy (without a will)
       - To die “intestate”; estate will be handled by standard distribution as set out by statute
     + Jointure (joint tenancy; by right of survivorship)
2. Freedom of Disposition
   * A property owner may dispose of their property either *inter vivos* or upon death
   * Right to transfer to anyone and to set terms of transfer
   * Exception: Aboriginal title which is inalienable except to the Federal Crown
3. Restraints on Alienation
   1. Direct Restraints (transfer *inter vivos*)

* Attempts to put a clause in a transfer purporting to prohibit any disposition – “to A, but if A ever tries to sell the land, then to B”
* Declared void by the common law
* Exception: Land (Spouse Protection) Act, that allows spouses to register an interest on their spouses land
  1. Direct Restraints (testamentary transfer)
     + *Wills Variation Act* – allows spouses or children to contest the will; restrains alienation of the testator
     + *Wills, Estates and Succession Act* ss. 60-72
     + *Family Relations Act,* LTO requires constructive notice

**Relationship Between Real and Personal Property**

* Personalty has the same or similar types of property ownership as real property
* Such as joint ownership, trust, life estate/right of reversion, remainder, etc.
  + No succession duties or federal estate tax in Canada
* Can also be used as collateral for loans
* Applicability of Concepts:
  + Doctrine of Estates – does not apply to personalty
  + Alienability – freely alienable; cannot apply direct restraint
  + Devolution on Death – pass by will (testate succession) or by general rules of law (intestate succession)
* Successive interests in personalty/chattels can be created by will – however the first owner is absolute with a fiduciary duty to preserve the property (Re Fraser)

INTER VIVOS TRANSFER OF INTERESTS IN LAND

Mechanics of Land Transfers

* Establish a Good Root of Title
  + Deeds System w/ No Registration (Common Law Conveyancing)
    - Documents of title were held privately by the individual owners
    - Difficult to determine interests in the land; to determine the interest held by the vendor
    - Required research to investigate the deeds and wills to established a “good root of title”; typically 60 years back
    - Where equitable interests were subject to a *bona fide* purchaser for value without notice
  + Deeds System w/ Registration (Statutory Recording System)
    - Registered instruments took priority over unregistered and subsequently registered instruments
    - Registry only stores documents, government does not grant titles
    - However the gov’t does not verify or ‘vet’ documents; often resulted in conflicts
      * Many documents could be registered on one title
  + Torrens System
    - **Torrens System:** creates a conclusive public register which provides for certainty of title, simplicity, efficiency – purchaser, mortgagee
    - “title by registration”
    - Provides indefeasibility of title (in BC, applies to fee simple only)
    - Prior defects of title became irrelevant (*~~nemo dat quod non habet~~* does not apply)
* Methods of Transfer
  + *Inter vivos* by sale (contract to purchase) or by gift (transfer form)
  + Registration in LTO “completes” the transfer and the purchaser becomes fee simple owner
  + New certificate of indefeasible title is issued from the registrar (not the vendor) with the name of purchaser (registered owner)
* Registered Owner
  + Fee simple owner – possesses indefeasibility upon registrations
  + Other interests (charges) appear secondary (such as mortgages, leaseholds, easements, etc.)
  + Registration serves as constructive notice of other interests
* Principles
  + Mirror Principle – certificate of title (register) mirrors accurately and completely state of interests on title
  + Curtain Principle – all the necessary information is on the certificate of title; no need to go behind the certificate of indefeasible title
    - In BC, registration confers indefeasibility only to BFPW W/ON of the fee simple
    - Registration by a fraudster is defeasible
  + Insurance Principle – innocent victim relying on the register may receive compensation for loss due to fraud/mistake
    - Assurance fund, LTA ss. 294.1 to s. 294.9
    - System offers no guarantee or compensation for errors in boundaries (surveyors work)
    - “relying on register” threshold means that the fund is not commonly dispensed

Capacity

* Legal capacity (competency) is required to dispose of or transfer property rights; several acts outline the capacity of several groups of individuals:
* Age of Majority Act (BC) – minors are those less than 19 years of age
  + Minors may take title to property; but cannot dispose of property by will or i*nter vivos* until age 19
* Evidence Act
  + Establish the requirements for competency as a witness
  + Impact the execution of *inter vivos* transfer or will
  + “child of tender years” including children under 14 years of age at time of testimony
* Public Guardian and Trustee Act
  + Provide substitute decision-maker for adults with mental disability and infants
* Patients Property Act
  + (1) “committeeship order”
    - Appointment by court of “committee of the estate” and/or “committee of the person” after loss of mental capacity to handle the affairs of the incompetent individual
* Power of Attorney Act
  + (2) power of attorney
    - An agent assigned by the individual in advance of incapacity that have the ability to handle financial and legal affairs on their behalf
    - Ordinarily they will cease to operate in the event of incompetency; however an “enduring power of attorney” expressly provides for the POA to continue in the event of incompetency
* Representation Agreement Act (2000)
  + (3) representation agreement/”living will”
  + Provided by the individual in advance of incapacity to an agent for the purposes of personal medical or health care

**Crown Grants**

* Crown Grant – grants private ownership of Crown land in the form of various estates and interests; forms root of title
* Crown Land Register Services of the Ministry of Forest, Lands and Natural Resources Operations administers grants
* Grantee must register transfer by Crown grant
  + “bringing land under the Torrens system
* *Land Act*, RSBC 1996, c 245, s 50
  + Explains what one gets from the Crown when a land grant is given (see p. 4-48 for example)
  + s. 50(1)(b&c) outlines the several exceptions and reservations that pass with the Crown grant/title – continue through successive owners and lesser interests
    - Where “excepts” are things that are not provided in the crown grant and “reserve” means rights retained by the crown
    - Crown grant provides surface rights only; sub-surface rights including geothermal resources, minerals and placer minerals, coal, petroleum, and gas are not transferred
    - s. 50(4) allows the Crown to make additional exceptions and reservations in any grant
    - ”
  + s. 50(1)(a)(i) Right of Resumption
    - Government may expropriate up to 1/20 or 5% of the property without compensation; not requirement for ‘fair market value’

11/07/2012

**Inter Vivos Transfer**

* An *inter vivos* transfer may be, and often is, preceded by a contract under which a vendor agrees to transfer an interest in land to a purchaser
  1. Written contract to sell property (vendor to purchaser) (example p. 4-50)
     + A short term agreement that sets out the terms of the sale; including all necessary contract components
     + However, requires written agreement including signature party to be charged (purchaser)
  2. Completion of the contract
     + Occurs on the specified completion date or “closing date”
     + The vendor is obliged to transfer clear title; the purchaser is obligated to provide balance of payment
       - Clear title = no unregistered, unknown interests on the title
     + Can be done electronically
  3. Registration of transfer
     + Must be registered at the LTO (see Appendix C for transfer document)
     + Purchaser will complete the mortgage arrangements separately; that will also be registered on the title
     + Can be done electronically; now filed digitally
* However, transfer may take place without prior agreement by way of gift; made voluntarily and without consideration. This requires only transfer form and registration of the transfer at the LTO.

*Law and Equity Act*, RSBC 1996, c 253, s 59

* Previously possible to transfer non-possessory interests by grant (a document under seal)
  + Still available in general contract law, not in property law
* To prevent the potential for fraud on the “vendor,” British Parliament passed An Act for the Prevention of Fraud and Perjuries known as the “Statute of Frauds” 1677
  + Established the requirement of formalities in property transfers/property contracts

To be enforced, sales contracts MUST:

* s. 59(1) Trust and wills (transfer intestate) are not required to meet these (below) standards
* s. 59(2) Any lease less than three years does not need to meet these standards (oral agreement sufficient)
* **s. 59(3)(a) Land transactions require a written proof of contract that is signed by or on behalf of the party to be charged or by that party’s agent**
  + Evidence of **parties**, **property** and **price**
  + Or the party being sued – so if B is the vendor and signs the document, even if A (as the party to be charged) has not signed, they are able to sue B. But B cannot sue A.
* However “equity will not allow a statute to be used as an instrument of fraud”. To avoid further issues of exploitation (fraud on the “vendor”), parties may request specific performance for an oral contract when:
  + s. 59(3)(b) when the vendor engages in, or acquiesced in an act of the purchaser, that indicates that a contract exists
  + s. 59(4) including a payment of deposit on the purchase price
    - These sections have been interpreted to mean that Courts will enforce an oral contract (offer and acceptance) when part performance has begun
  + s. 59(3)(c) when the purchaser has acted in reasonable reliance on the promise made and not enforcing the contract would be inequitable
    - Acquiescence, proprietary estoppel or estoppel (see 4-41,42,45)
    - i.e. paid legal fees, got zoning approval, etc. and would lose out if not enforced
* s. 59(5) If the court does or cannot enforce the contract, the purchaser may be entitled to restitution and/or reliance damages (compensation)
* s. 59(6) Guarantee and indemnity (promise regarding another’s debt or obligation) must meet similar standards of formality
  + i.e. co-signer guarantees another individuals debt
* Question: What constitutes a written contract?
  + Electronic Transactions Act (2001), s 2(4)
    - Permits most types of contracts to be formed online
    - Does it include fax or email?
    - Does the electronic form or an electronic signature count?
  + Excerpt: Druet v Girouard, 2012 NBCA 40
    - Exchange of emails between parties did not make an enforceable agreement of purchase/sale
    - The Court found that there was no ICLR; purchaser had not seen the property and had indicated that their negotiations would be the terms of a contract
  + Ratio: In theory, the transfer of property through electronic form is possible, but unlikely.

***Inter Vivos* Sale/Purchase Process (Conveyancing Process)**

1. Purchaser completes a Contract of Purchase and Sales – see Appendix B, p. 4-50
   * That is, they create a written and signed offer; recall the 3 “P’s” of parties, property and price
   * Deposit required of 5-10% of the purchase price; “earnest money”
   1. Title – Vendor agrees to transfer clear title
   2. Completion or “closing date
      * Purchaser pays balance of price (through cash or mortgage)
      * Purchaser may forfeit deposit if performance of obligations not completed
   3. Costs
      * Purchaser bears all costs of registering title, mortgage, appraisal, etc. (closing costs)
      * However, vendor bears the cost of discharging their own mortgage and clearing title
   4. Possession Date
   5. Insurance Coverage
      * Purchaser required to obtain insurance on the property because the risk to the property will occur as of the date of completion
   6. Chattels and Fixtures
      * Understood that fixtures will pass, but must specify the chattels to be included or fixtures which will be included
      * Such as appliances, curtains, area rugs, pictures, mirrors, etc.
   7. Terms and Conditions
      * Protect the purchaser and make the agreement condition on certain clauses; such as “subject-to” clauses (i.e. building inspection, satisfactory financing, review of strata documents, etc.)
      * CBA suggests including “statement saying the offer is subject to your lawyers approval”
2. Purchaser presents the offer (vendor accepts or comes back with counter-offer)
3. Acceptance by party to receive offer (can be purchaser if vendor provides counter-offer)
4. Lawyer – completes title search, researches outstanding property taxes, and examines zoning
   * Vendors lawyer clears title except as agreed, and accepts funds from purchaser
   * Purchaser’s lawyer prepares all documents, provides fund to vendor lawyer, confirms insurance and applies for registration in the LTO
5. Remove the “subject-to” clauses
6. Transfer and Mortgage

* Freehold transfer – see Appendix C, p. 4-55
* Mortgage – see Appendix D, p. 4-56

1. Application to register with LTO (submitted electronically)
2. Registration completed at LTO
3. Post registration – ensure accurate state of title at the LTO; certificate of title

Summary: Rules of Property Transfer

* There must be a valid contract. There is no value in having it in writing if there is no contract in the first place.
* The writing can be in any form, for example, a letter, a will, or a telegram (*quaere* a fax or an email). The writing need not have come into existence to satisfy the requirement of the section, and it may come into existence after the contract has been entered into.
  + The writing must be signed by the party to be charged (purchaser) or that party’s agent.
* The section is concerned only with the enforceability of the contract, not its existence.
* Two documents, if they expressly or impliedly refer to each other, may be combined to satisfy the requirements of the section.

Practice Questions – see pp. 4-6 & 4-7

1. NE: The written contract was not signed by the party to be charged. ss. 59(b & c) would not apply – no reliance on the promise (estoppel) or part performance.
2. E: The party to be charged signed the document; (a) applies. Even though there is discrepancy with respect to the terms of payment, the 3 P’s are met.
3. NE: Although this would be valid in standard contract law, a property law contract requires written proof with the signature of the party to be charged or part performance has begun or there is proprietary estoppel.
   * See rule 5 above. The letter written by A could be used to satisfy the requirements of s. 59.
4. In both options, no written agreement exists for the property contract. However, part performance/acquiescence exists (deposit and receipt given). Both are able to enforce the obligation.
   1. A did not sign the receipt as an agent of D’s estate. Issue of agency. XYZ cannot sue A.
   2. A can sue XYZ.

**Voluntary Transfer of Title (Gifts)**

* Gratuitous promise is binding without consideration when a seal is included
  + Often included as a formality (black dots on forms act as seals)
  + “c/s” stands for corporate seal; not required
* At common law, a valid *inter vivos* gift required:
  1. Intention to donate (in the present)
  2. Sufficient act of delivery to the donee, and
  3. Acceptance by the donee (onerous gift)
* Property Law Act, ss. 15 & 16 – requires transfer be done through a Torrens “instrument”
  + Donor must deliver a “registrable transfer” (per simplified, standard forms)
    - PLA, ss. 15, 16, 4, 5, 7
    - Removed complex deeds and wording
    - Form A, Appendix C, p. 4-55
    - Form B, Appendix D, p. 4-56
  + Donee must obtain registration in the LTO (per LTA s. 20)
    - This will ‘complete’ the gift of real estate
  + LTA, s. 168.5 – Since 2012, electronic filing now required
* Incomplete gift occurs when donor dies before transfer is complete (before registration)
  + Torrens (LTA, s. 20)
    - Maintains that the gift is incomplete if not yet registered
  + What role does Equity play?
    - Can declare a failed gift; the property remains with the donor’s estate
    - Or they can perfect the gift; order the title to be transferred to the done

Transfers to Volunteers

* In the absence of express words and without consideration, equity applies a rebuttable resumption
  + Equity assumes the original owner intended to retain the benefit of the property
  + Rebuttable because the presumption can be displaced; if A’s intention to make a gift to B can be proved; onus of proof on B
    - Documentation PLA, s. 19(3)
  + “Equity assumes bargains, not gifts
  + Known as a **Presumption of Resulting Trust** (PRT)
  + Returns or “results back” to A
* Example: Property is transferred from A to B; and B is a voluntary transferee
  + A: intends to retain a beneficial interest
  + B: is the registered/legal owner, holding the land in trust for A (trustee)
  + “To B for the use of A”
* **Exception: Presumption of Advancement (RPA)**
  + Rebuttable reverse presumption; presume that A intended a gift or partial gift to B
  + Based on the relationship between A and B
    - Husband > wife
    - Parent > minor child
  + B is the registered owner; hold the “whole title” without a resulting equitable interest

**When is it a transfer operative?**

* Torrens systems established that title is operative on registration – see LTA, ss. 20(1), 22
  + Meaning until it is registered, the title has no effect
* **Equitable Exception**: “except as against the person making it” – LTA s. 20(1)
  + When the vendor has signed the contract of purchase and sale but prior to registration
  + Distinction between enforceable between the parties and enforceable against third parties
    - Prior to registration, enforceable only b/w parties
    - After registration, the purchasers interest is enforceable against everyone
  + Known as the “*in personam*” exception (see p. 6-49)
* Prior to Registration
  + Vendor has legal title
  + Purchaser possesses “a title in equity”; an equitable interest enforceable only against the vendor
* Land Title Act
  + s. 20(2) entitles purchaser to apply for registration
  + s. 20(3) does not apply to a lease less than 3 years
* **Does equitable title/interest apply to gifts?**
  + Donor is the registered owner > provides a voluntary transfer > donee has an equitable interest
* Equitable maxims for “perfecting a gift”:
  + “there is no equity to perfect an imperfect gift”
  + Equity “looks to the intent, not the form” (Ross v Ross)
    - Clear intent can complete a transfer without registration of title
  + Equity will not perfect a gift that lacks donative intention; “will not assist a volunteer” (Zwicker v Dorey)
    - Equity will not complete a gift where the intentions are unclear. Terms such as “effective after death” make the form a testamentary document – take effect on death and apply only to remainder interests.
  + “the donor must do what can be done” and “everything that could be done to perfect the gift” (MacLeod v Montgomery)
    - If possible, delivery of the gift and registration of title are required to complete a gift (in contrast to Ross); the actions of the donor are seen as relevant to their intentions

*Donatio Mortis Causa*

* Gift made in contemplation of death
* Conditional on the donor’s death as contemplated
  1. Intention to make gift in contemplation of the donor’s death
  2. Sufficient delivery to donee
  3. Gift takes effect only on donor’s death, reverts on donor’s recovery

How do incomplete gifts interact with wills?

* That is, what if an incomplete transfer was initiated before death to A, and the will indicates that the land is transferable to B upon death.
* “first in time, first in right”
  + However, the “time” of the will is not until death – irrespective of when the will was signed
* Relates to the intention of the donor (Ross)
  + The donor has the right to revoke the gift prior to completion

WILL OR INTESTATE TRANSFER OF INTERESTS IN LAND

**Will or Intestacy**

* When the “will speaks of death”; “last will and testament”
* Takes effect on death, not on the date on execution
  + Only the last one made is effective; as determined through the date of execution
  + Amended through a document known as a “codicil”
* Contents of the will are revocable during the testator’s lifetime
* If the will doesn’t cover all assets in the estate = partial intestacy

*Wills Act*, RSBC 1996, c 489, ss. 3 & 4

* s. 3 required to be in writing
* s. 4: requires 2 witnesses to be present and sign; cannot be beneficiaries
  + Testator/amanuensis signs at its end – where amanuensis signs for someone who can’t sign for themselves
* Testate (with a will)
  + Choice of executor
  + Choice of guardian for children
  + Choice of beneficiaries
  + Bequests (gifts of personal property)
  + Legacies (gifts of cash)
  + Trusts
  + Charities
* Intestate (without a will)
  + Administrator as appointed by the court
  + Statutory system of distribution to heirs-at-law (*Estate Administration Act*) based on relationships (next-of-kin)
  + Statutory shares
* Example:
  + This will, dated Wednesday May 10, 2009 is made by me, John Smith of Brown Street Vancouver, BC truck driver.
  + I revoke all former testamentary dispositions (standard revocation clause)
  + I appoint as my executor my son, Peter Smith of Black Street Jonesville (optional appointment of executor)
  + I leave the whole of my estate to my wife, Grave Smith (dispositive clause)
    - If the wife died and no alternative was available, the *Estate Administration Act* would fill in the gap
  + Signed by the testator in our joint presence and attested by us in the presence of him and each other (attestation clause)
  + Testator and two witnesses sign

**Transfer of Property by Will/Intestacy**

* See *Estate Administration Act*, RSBC 1995, c 22, ss 77-79
  + Requires a process of administration of the estate, whereby the executor or appointed administrator (known as personal representatives) will be required to administer the estate of the deceased
* Per s. 77 – real estate is vested in the deceased’s personal representative as if it were a chattel real in order to pay off the debts of the estate
  + Debts must be paid off before the assets can be distributed
* Per s. 78 – real estate goes into intermediate state known as “transmission”; whereby ownership is invested in the executor or administrator prior to transfer to the beneficiary
* Per s. 79(4) – executor/administrator is given one year to administer the estate; “executors year”
  + Trustee testamentary trust
  + Devisee/heir next-of-kin or intestacy
* What about joint tenants or tenants in common?
  + Joint Tenancy: the tenants share ownership as one entity/owner. Therefore, when one of them dies, that person’s interest expires and the surviving joint tenant(s) take full ownership of the property.
    - This arrangement does not pass via the will, passes by common law of survivorship. Not part of the administration of the estate; deceased cannot dispose of this interest by will.
      * Called a “right of survivorship”
    - Advantage is that the creditors of the deceased cannot access the capital in this property.
    - See EEA s. 77(1)
  + Tenancy in Common: the tenants share ownership as separate entities/owners. On their death, their share of the property will pass under their will – will be part of the administration of the estate.
    - Shares do not have to be equal (i.e. 30/70)
  + N.B. These forms of ownership are explicit on the registered title. If not explicitly registered as joint tenancy, then it is assumed to be a tenancy is common.

PROPRIETARY ESTOPPEL

D. PROPRIETARY ESTOPPEL

* Form of “equitable fraud” – two forms:
  + By encouragement – promisor ensures promisee that they will receive property interests; created a belief in the other
  + By acquiescence (apparent assent) – promisor is aware that the promisee was relying on the promise and by virtue of their inaction, has lead them to believe they have an interest in the land
* Similar to other forms of estoppel, the promisee must have relied on the promise to their detriment
  + Claimant – reasonable belief of entitlement over registered owners real property; through reliance/detriment
  + Registered owner – via encourage or acquiescence; then denies or refuses the interest
* Can be used as the sole basis for a cause of action (civil claim)
  + “sword vs. shield” per p. 4-41
* When applied, creates an equitable interest in someone else’s property (without complying with the written requirements of the LTA)
  + Applied only if it would be unfair, unconscionable or inequitable not to acknowledge this interest, the court will estop the promisor from going back on their promise
* Remedy: discretionary; equitable interest as minimally necessary to make good the belief
  + Estoppel will be applied only as necessary “to satisfy the equity”
* Excerpt: Wilmott v Barber (1880) p. 4-45

1. The P must have made a mistake as to his legal rights (erroneous belief);
2. The P must have done some act of reliance (to his detriment);
3. The D (registered owner), the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the P;
   * Doctrine is based in knowledge
4. The D (registered owner) must know of the plaintiff’s mistake belief (knowledge)
5. The D must have encouraged/acquiesced in the P in his act of reliance

* Zelmer v Victor Projects (1997): Example of both encouragement and acquiescence. An easement, not ownership of the land, was granted.
  + To avoid miscommunications, an easement could have been registered on the land title.

Property Law Act, s. 36 – **E****ncroachment on adjoining land**

1. If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application
   1. grant an easement – with compensation payable to the land owner
   2. transfer ownership of the portion of land
   3. order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

REGISTRATION OF TITLE: AN OVERVIEW

A. HISTORICAL OVERVIEW

* Previously there were three systems – Deeds without registration (common law conveyancing), deeds with registration (statutory registration) and now Torrens (title by registration)
  + Registration is the key; title is passed upon registration
  + In BC this system only applies to the registered fee simple holder; although other lesser interests can be registered, they are not indefeasible
* **Advantages of the Torren System**
  + Security of tenure
  + More efficient transfer
    - One stop for searching title
    - Simple transfer forms
  + Land as collateral security for credit; mortgages
* Ontario
  + Northern Ontario uses the Torrens System
  + However, Southern Ontario used a recording system
    - Sold title insurance to compensate
  + The province is in the process of moving to the Torrens System
* Only three Provinces in Canada are non-Torrens recording system:
  + Quebec – in 1991 tried to adopt Torrens; repealed in 2001
  + PEI
  + Newfoundland & Labrador
  + However they are moving to computerized systems
* Used in UK, Australia and New Zealand

The Torrens System in British Columbia

* Applicable Legislation:
  + Land Title Act – establishes the Torrens system in BC
  + Property Law Act – changes to substantive law; established legal and equitable interests, abolishes fee tail
  + Land Act – Provincial Crown land
  + Strata Property Act – airspaces & condominiums
* The Ministry of Agriculture and Lands issues Crown land tenures and sells Crown land on behalf of the Province of British Columbia
* “bringing land under the register”
  + Require title verification and boundary certification
  + Focus is on private property; Crown land is simply ‘everything else’
* There are 7 land title districts in the province
* Land Title and Survey Authority Act (2004)
  + Director of Land Titles
  + 3 Land Titles Officers: New Westminster, Victoria and Kamloops
  + Head of each office is the Registrar of Land Titles

CHAPTER 5: OVERVIEW OF REGISTRATION OF TITLE

A. HISTORICAL OVERVIEW

1. Deeds (Common Law Conveyancing)
   * Documents of title were held privately by the individual owners
   * Transfer were difficult because a “good root of title” had to be established for each transfer; recourse to the courts might be necessary
   * Custody of deeds against fire, loss or theft was an issue
2. Registration of Deeds (Statutory Recording System)
   * Government retained documents, but deed system remained in place
   * However, government does not verify the documents on each property; meaning several documents on one title may contradicting each other
     + No “vetting of documents
   * Principle of *nemo dat* was invoked regularly
3. **Title by Registration (The Torrens System)**
   * Registration is the key; title is passed upon registration
   * BC system grants indefeasibility to fee simple only; other registrable lesser interests are defeasible
   * **Advantages of the Torren System**
     1. Security of tenure (*nemo dat* does not apply to fee simple holder)
     2. More efficient transfer
        + One stop for searching title
        + Simple transfer forms
     3. Land available as collateral security for credit (mortgages)

4. The Torrens System in British Columbia

* Land Title Act – establishes the Torrens system in BC
* Property Law Act – changes to substantive law; established legal and equitable interests, abolishes fee tail
* Land Act – Provincial Crown land
* Strata Property Act – airspaces & condominiums
* The Ministry of Agriculture and Lands issues Crown land tenures and sells Crown land on behalf of the Province of British Columbia
* When implementing the system, individuals were required to “bring land under the register”
  + Required title verification (similar to deeds system) and boundary certification
  + Focus of system is on private property; Crown land is simply ‘everything else’

B. GENERAL PROCESS OF LAND TITLE REGISTRATION

1. Land Title Districts

* Per the Land Title and Survey Authority Act (2004), there are 7 land title districts and 3 land title offices:
  + Districts: Kamloops, Nelson, Prince George, Prince Rupert, Victoria, Vancouver, and New Westminster
  + Offices: New Westminster, Victoria and Kamloops
* Statute creates the Director of Land Titles
  + Head of each office is the Registrar of Land Titles

2. What Can Be Registered?

* General Principle per R v Kessler (1961) BC Mag Ct
  + Any recognized interests in land at CL and any interests created by the LTA can be registered under the LTA
  + This includes **legal estates** (such as the fee simple or joint tenancy) and **equitable interests** (charges such as an easement granted via proprietary estoppel per Zelmer v Victor Projects)

1. *The Legal Fee Simple*
   * Certificate of Indefeasible Title (Cadastral concept)
   * Whereby *nemo dat* does not apply to the holder of the fee simple
2. *Charges – all other estates and interests in land*

* “In Trust” (beneficial interests) per s. 180 of the LTA
  + - Registrable in BC only; trustee’s name appears on title w/ reference number linking to terms of trust
      * Makes the trust a viewable pubic document (often the testator’s will or an agreement)
    - Protects beneficiaries from a BPFV w/o N due to constructive notice provided at the time of transfer
    - **Settlor/testator** creates the trust, then ‘drops out’ as a general rule
    - **Trustee** holds the legal title as RO of the fee simple, owing fiduciary duties to the beneficiary
      * Type of *in personam* relationship
    - **Beneficiary** has equitable interest in the property, can enforce fiduciary duties against trustee
  + Caveats per LTA ss. 282-294
    - Torrens creation – registered in the LTO as a warning of claim of unregistered interest/estate by private parties that expires after 60 days (in BC only; do not expire in other provinces)
    - Prevents registration of subsequent interests
    - The interest being claimed must be registrable under Torrens (Skeetchestn)
    - Not an interest in property; simply a statement or warning of a **caveators** claim to the property
  + Certificate of Pending Litigations/*Lis Pendens* per LTA ss. 215-217
    - Torrens creation – registration in the LTO as notice of commencement of litigation affecting the land/title; usually a claim of interest
    - Prevents registration of subsequent interests
    - The interest being claimed must be registrable under Torrens (Skeetchestn)
    - Not an interest in property; simply a statement or warning of pending litigation
  + Legal Mortgage (known as an **encumbrance**)
    - Used where individuals use their property as **collateral security for a loan**
    - Mortgagee registers interest on the title; if the mortgagor defaults, the mortgagee has the right to foreclose (legal proceedings) and receive a court-ordered sale of the property to recover towards the mortgage debt
      * Generally the mortgagee must wait 6 months before foreclosing
    - Mortgagor (borrower) = RO of the property
    - Mortgagee (lender) = registered holder of a charge [**secured creditor**]
    - Can have multiple mortgages; registered in order
    - An **encumbrance** is a right to, interest in, or legal liability on real property that does not prohibit passing title to the property but that diminishes its value
  + Execution of Monetary Judgements per LTA ss. 210-214 [Torrens Creation]
    - Allows the judgement creditor to register a money judgement on the title of the judgement debtor; allows the judgement creditor to execute against the property
      * Requires additional legal proceedings (i.e. small claims court) which can:
        + Garnish bank accounts and wages (N.B. scannot garnish against a joint bank account)
        + Writ of seizure and sale of personal property (i.e. car, jewellery, etc.)
        + Court-ordered sale of judgement debtor’s land
    - Not an interest in the property; judgement creditor is an **unsecured creditor**

1. *Registrable Statutory Interests* 
   * Other legislation provides for the registration of interests not in existence at common law or in the LTA
   * *Agricultural Land Commission Act* allows for the registration of agricultural land reserves
     + Freezes title and prevents land from being sold or subdivided; must be used for agriculture purposes
     + Designed to preserve agriculture in the province and prevent urban sprawl
   * *Family Relations Act*
     + In the event of a marital breakdown, a spouse who does not possess joint tenancy with their ex-spouse is able to file their interest on the ex-spouses title; known as a “triggering event”
   * *Heritage Conservation Act*, *Local Government Act*, *Vancouver Charter*
     + Allows building to be registered as heritage building; receive a heritage designation
   * *Builders Lien Act*
     + Allows for Claim of Builders Lien to be registered if bills not paid

3. What Cannot be Registered?

* Without registration, these interests are not adequately protected by the LTA/Torrens system
  + i.e. individuals litigating w/ respect to non-registrable interests cannot file a caveat or CPL (Skeetchestn)
* Equitable Mortgage
  + Informal arrangement; mortgagor gives the mortgagee the duplicate certificate of title
    - Convenient; avoids formalities of registration
    - Duplicate Certificate of Title – “freezes the title”; prevents the transfer of the property
      * To prevent fraudulent transfer or mortgage
      * To provide security for a loan
  + Mixed case law regarding the meaning of the duplicate certificate of title – for safekeeping or to create an equitable mortgage (RBC v Mesa Estates Ltd (1986) BCCA)
* Licenses – no proprietary interest; simply a personal right
* Short-Term Leases (less than 3 years)
  + However the LTA, s. 23(2)(d) requires the fee simple holder (purchaser) to recognize an unregistered, short term lease if the tenant is currently occupying the property
* Zoning By-Laws (R v Kessler (1961) BC Mag Ct)
* Property Taxes – not required to be registered per LTA s. 23(2)(c)
  + Purchaser is responsible for any outstanding taxes; must contact local government to ensure “clear title”
* Provincial Crown Lands not subject to a Crown grant
* Will be registered by the recipient of a Crown grant upon receipt
* Federal Crown Lands
  + Including First Nations Reserves – i.e. lands under the Nisga’a Treaty; administered by the band but not registered
* Aboriginal Title – not an interest known at common law or equity; not contemplated by the Torrens system
  + Cannot be defined as an encumbrance because it does not “emanate from the indefeasible fee or those specifically authorized by legislation” (Skeetchestn)

3. The Basic Scheme of Registration

* Per LTA, s. 20 accommodates the registration of both **legal** and **equitable interests**
* Per LTA, ss. 20(1) – 22, unregistered equitable interests are not enforceable under the Torrens system
  + However, the courts have held that an unregistered interest capable of being registered will be considered an equitable interest by the courts; where the equitable interest is good against all except the BPFV w/o N
* Effect of indefeasible title per LTA, s. 23(2)
  + …**conclusive evidence at law** and in equity that the person named in the title as RO is **indefeasibility entitled** to an estate in fee simple…
    - Meaning that *nemo dat* does not apply
    - Prior defects do not affected the registered fee simple; accuracy guaranteed
  + However, obviously exceptions exist to this rule (i.e. fraud)
* Per LTA, s. 1 “charge” means an estate or interest in land less than the fee simple
  + Example: Leasehold
    - Landlord is the “lessor” – possess fee simple
    - Tenant is the “lessee” – possess leasehold estate
* Per LTA, s. 179 the rights of the fee simple owner are confirmed except as provided by the *Strata Property Act*
  + If the processes of the *Strata Property Act* are not engaged, an individual with an interest in the air space above the property can only register their interest as a charge (i.e. an easement into the airspace)

4. Why Register?

* Fee Simple – title is indefeasible; meaning it cannot be lost, annulled or overturned
* Charges – registration provides protection against the BFPV w/o N

Certificate of Title

* Includes names of fee simple holders; include the type of tenancy (presumption of tenants in common)
* Includes registration number, dates and types of charges (“Encumbrances, Liens & Interests”)
  + The registration date lists the date the instrument was registered; the date it was received by the LTO
  + In BC, statutory easements are not registered on title; this varies from province to province

5. The Legal Fee Simple

*(a) Initial Application*

* When registering title of a piece of property for the first time, the process outlined in LTA, s. 169 must be followed (contemporarily applies only to Crown grantees)
* Two concerns when registering:
  1. **Survey Authority** – boundaries of the property
  + Per LTA, s. 169(1)(a) requires that the land be appropriate surveyed to ensure “the boundaries of the land are sufficiently defined”
  1. **Land Title**
  + Per LTA, s. 169(1)(b) a “good safe holding and marketable title in fee simple” must be presented
    - “safe holding” – possession of the person on title is safe from attack and cannot be displaced
    - “marketable” – so far as its antecedents (prior owners) are concerned, title may at all times and under all circumstance be forced upon an unwilling purchaser (Smith v Graham (2009) BCCA)
  + N.B. Where the lack of “marketability” is one of the issues preventing registration of Aboriginal title (Skeetchesn)
* **Indefeasible Title** – Concept is at the heart of the Torrens system; but not defined by the LTA

At the Land Title Office

* Unlike deed systems, registration under the LTA allows LTO staff to scrutinize and question all applications to register
* The actual Certificate of Indefeasible Title stays within the LTO (electronic records)
* However you can purchase from the LTO:

1. State of the Title Certificate per LTA, s. 378
   * + Certifies the state of the title in the land in question
2. Duplicate Indefeasible Title per LTA, s. 176(1)
   * + Can cause additional issues if the RO passes away; specifically if they die intestate
     + Cannot be issued if the title is subject to a registered mortgage or an agreement for sale

*(b) Transfer Inter Vivos*

* Per LTA, s. 153, the ranking/priority of interests are ranked by the date and time of application to register
  + “First in time, first in right”
* Per LTA, s. 37 registration becomes effective at the time and date the application to register was submitted to the LTO
  + i.e. if fraudulent vendor sells to multiple purchasers, the first purchaser to register instrument gains title

*(c) Transmission on Death*

* Addressed by LTA, ss. 263-268
* Per LTA, s. 1 “transmission” is the “involuntary change of ownership (due to death, mental incapacity, etc.)”
  + Upon death, the personal representative (executor or statutorily appointed administrators) secures registration as the fee simple owner
  + “Y executor of the will of X”
* On completion of the administration of the estate, title is transferred to the appropriate beneficiary

**6. Charges**

*(a) General*

* LTA, ss. 197-237 outline the processes to be followed to register a charge on the title
* Upon submission of instrument, LTA, s. 197 allows the registrar to scrutinize applications and refuse to register charge if:
  1. A good, safe holding and marketable title to it has not been established by the applicant, or
  2. The charge claimed is not an estate or interest in land that is registrable under this act (Skeetchesn)
* However, registration creates only a rebuttable presumption of validity per LTA, s. 26(1)
  + And per s. 26(2), charges in BC are not guaranteed indefeasibility
* Per LTA, ss. 27 & 29 the ranking/priority of interests are ranked by the date/time the LTO receives application to register
  + Often relevant where there are multiple mortgages on at title
  + Subsequent charges are vulnerable in the chronological order in which the applications to register were received

*(b) Caveats; Certificates of Pending Litigation; Judgements*

**Caveats**

* Per LTA, s. 288 a caveat may be lodged by any person who claims to be entitled to a registrable interest in the property
  + Can also be lodged by the RO or the Registrar – if they are concerned about fraudulent activity on the title
  + In BC, the caveat expires after 2 months (see *Interpretation Act, RSBC*)
* Purpose of lodging:
  + Prevents registration of any transaction while caveat is on title (“freezes the title”)
    - Unless the interest attempted to be registered is expressed to be subject to the claim of the caveator per LTA, s. 288(2)
  + Protects unregistered, equitable and other vulnerable interests (must be capable of registration)
  + Provides constructive notice of the estate or interest claimed (BPFV w/o N cannot exist; are provided notice when they attempt to register their interest on the title)
* Process:
  + Caveat is filed at the LTO
  + Upon any judgements/orders/or admissions by the land title holder, the caveat will be registered as the appropriate interest – effective as of the date of registration of the caveat
    - It “relates back” to the original application per LTA, s. 27
  + Any applications filed during the period of the caveat or during the CPL will be subject to the interest registered by the caveat per LTA, s. 31

**Certificate of Pending Litigation/*Lis Pendens***

* Registered in the same way as any charge per LTA, s. 215
  + Must be “an estate or interest in land” capable of registration on the per LTA, s. 215(1)(a)
  + Or if required by “another enactment” per LTA, s. 215(1)(b)
    - For example, when a judgement creditor is seeking to enforce a judgement
* CPL remains on the title until cancelled per LTA, s. 216(1) [contrast w/ caveats]
  + Usually when the outcome of the litigation is complete
  + Despite s. 216, the registrar may complete the registration of an interest applied for before the CPL was received by the LTO (recall that this is based on the time and date received by the LTO)
* Purpose of lodging:
  + Prevents registration of any transaction while CPL is on title per LTA, s. 216(1); “freezes the title”
    - Protects litigant and litigation
  + Prevents the vulnerability of the claimant(s) to the defendant selling to a BPFV w/o N
  + Provides notice to owner that claim being filed per LTA, s. 215(3)
* How does it work?
  1. Vendor and purchaser arrange for the sale of property (P&S agreement)
     + If a caveat or CPL have been lodged, the vendor is incapable of transferring title as they “freeze the title” and prevent the registration of any interests
     + Vendor is then in breach of the sales K; must guarantee “free and clear” title
  2. If the sale is completed (payment is provided); the title is found to be “free and clear”
  3. Purchaser must make application to register transfer
     + Per LTA, s. 217(1) the CPL too late, overridden by application to register transfer which “relates back” to the date and time received by the LTO
  4. The LTO then registers the transfer to the purchaser (RO)
* Rudland v Romilly – “race to the register rule”
  + If the application to register by the BPFV w/o N is received by the LTO prior to the application to register CPL, the individual filing the CPL “loses out”
  + Where a donee is not equivalent to a BFPV w/o N; have not provided consideration (payment) are “not as protected as a purchaser”

**Judgement**

* If a judgement creditor obtains a monetary judgement (via K, debts or tort) against the RO, they can register as a charge
  + Lapses after 2 years; must be re-registered
  + Judgement creditor known as an unsecured creditor
* Purpose:
  + Grants the judgement creditor the right to go to court; they have no right to enforce monetary claim against debtor’s assets until after the judgement
    - Requires enforcement or “execution” of the money judgement via collections process
  + Forms a lien on the property that will prevent the judgement debtor from transferring or effectively dealing with the property
* Process:
  1. Registration on title of judgement against judgment debtor’s interest in land
  2. If necessary, P can get a court ordered/involuntary sale of the property to satisfy the judgement
* The “execution purchaser” is not protected under Torrens
  + That is, someone purchasing a property at a property auction is not guaranteed free and clear title; they are taking the property “subject to the equities”; or purchasing the title “as is”
  + Not considered a BPFV w/o N
* Ideally, an individual purchasing a property at an auction would “flip the property” and sell it immediately. This subsequent purchaser becomes a BPFV w/o N and this would annul all unregistered equitable interests.

D. THE ASSURANCE FUND

* **Curtain Principle** – the certificate of indefeasible title gives the holder full legal title and charges; making it unnecessary to “look behind the curtain” or to examine previous transactions
* **Mirror Principle** – the register “reflects” all the interests in the property; the information on the title has been vetted by LTO staff and in that sense is viewed as infallible; purchasers can rely on the register
  + Register is reliable, infallible, and provides a guarantee
* **Assurance Principle** – where individuals have relied upon the infallibility of the register to their detriment, compensation may be available through the Assurance Fund
  + Claims prior to 2005 were against the Government Assurance Fund (LTA, ss. 294.9 – 307)
  + Since 2005, claims are against the **Land Title and Survey Authority Assurance Fund** (LTA ss. 294.1 - .9)
  + Very few claims are successful (17 claims/16 million transactions in the past 20 years)
  + “Premiums” for the fund are included in registration fees
* Purpose:
  + To compensate innocent persons who have been delivered of their ownership of land [fee simple] ~~or of an interest in land~~ **because of the conclusiveness of the land title register**
    - Meaning the loss must be caused by the operation of the Torrens system (LTA, 294.1(1)(a)(i)
    - “where, if this Act had not been passed, the claimant would have been entitled to recover the land from the present owner”
      * Where the common law (*nemo dat*)would have allowed the rightful owner to recover the property from an innocent purchaser (LTA, ss. 296(2)(a)(i)
      * Because “registered titles are assured for good faith purchases”
  + To compensate innocent person who have been deprived of their ownership of a fee simple in consequence of a fraud or wrongful act
    - Per LTA, ss. 296(2)(a)(ii), 294.1(1)(a)(ii)
* Why would Torrens result in a loss?
  + Under common law and equity, the true owner (in fee simple) is able to recover the property against a BPFV w/o N
  + Under common law and equity, the owner of an equitable interest could not recover against a BPFV w/o N
  + Under Torrens the true owner (fee simple) and the owner of an equitable interest “lose out” to the BPFV w/o N
    - If Torrens had not been implemented, the true owner (fee simple) would not have lost title to the land
  + Even in the absence of Torrens, unregistered equitable interests are subject to the BPFV w/o N. The operation of the LTA is not the cause of a loss for equitable interests. The Assurance Fund protects fee simple owners only (McCaig v Reys).
* Who is insured/claimant?
  + **Only the registered fee simple holder is protected**; all lesser interests are ineligible to claim (Gill v Bucholtz)
  + Requires a “good faith and for valuable consideration”; volunteers and fraudsters not included
  + After McCaig v Reys, the LTA, ss. 297 & 294.21 was amended to make this explicit
* **Making a Claim under the Assurance Fund**
  + Must make a claim within 3 years of discovering the loss or damage (limitation period)
    - Per LTA, s. 296(2), 298(2), 294.2(7), 294.22(3)
  + First recourse is against the wrongdoer/fraudster or another insurance provider (LTA, s. 296(2)(b)
    - Claimant must exhaust all other remedies before claim against the Fund
    - Insurance might include the malpractice insurance of a solicitor
    - Must include the Minister as a nominal defendant per LTA, s. 296(3) in order to recover against the fund
  + If the wrong doer is dead or cannot be found, the claimant may proceeds against the Minister to recover against the Fund; a remedy of last resort
  + **CLAIMANT MUST BE ABLE TO SHOW:**
    1. He has been deprived of land or an estate or interest therein
    2. That the loss was occasioned as a result of the operation of the statute
    3. That the loss was occasioned by fraud, misrepresentation, or some wrongful act in the registration of any other person as owner of the land or interest in land
    4. That he is barred from bringing an action for rectification of the register
* Cannot recover for:
  + Breach of trust – LTA, ss. 303(b)(i), 294.6(b)(i)
  + Misdescription of boundaries or parcels – LTA, ss. 202(b)(ii), 294.6(b)(i)
  + Shortage in area or volume (air space) – LTA, ss. 303(d), 294.6(d)
  + Claimant’s notice or knowledge and failure to take preventative action – LTA, ss. 303(e), 294.6(e)
    - i.e. should have filed a caveat immediately
  + Claimant’s contributory negligence – LTA, ss. 303(f), 294.6(f)
  + Equitable mortgage by deposit of duplicate certificate of title – LTA, ss. 303(a)(ii), 294.6 (RBC v BC)

Assurance Fund & Equitable Mortgages (RBC v BC AG)

* Equitable mortgages (by deposit of duplicate certificate) are not registrable per LTA, s. 33
* LTA, ss. 303(a)(ii) prohibits equitable mortgagees from recovering under the Assurance Fund
  + AND under s. 297 equitable interests are not protected by Torrens
  + AND under ss. 303(f), 294.6(f) individuals cannot collect if they “neglect” to secure their loan with a registered mortgage
    - Where RBC “neglected” to search Walsh’s title prior to advancing funds
* Registrar’s Error – under s. 298(1) to collect under the Act requires that the person sustained “loss or damages caused, solely or partially, a result of an omission mistake or misfeasance of the registrar”
  + TJ ruled that registrar’s failure to request the duplicate title was merely a “procedural error”
  + In contrast to Gordon v Hipwell – court held Assurance Fund liable for removing a caveat

**Added Provision:** LTA, s. 23(2)

* Provision was meant to confirm indefeasibility of fee simple and to abolish equitable property interests; meaning unregistered interests would not be protected by Torrens
  + Meaning Rutland should not have been affected by notice of McCaig’s unregistered interest
* **Exception: Fraud**
  + LTA, s. 29(2)(i): “Except in the case of fraud in which he or she has participated…”; **declares fraudulent title void**
* In McCaig v Reys, Rutland/Jerome committed fraud in two circumstances:
  1. The original purchase transaction plus Rutland’s subsequent state of mind
     + Fulfilling the actual notice + dishonest conduct = fraud
     + Dishonest Conduct: His decision to renege on his promise to Reys (dishonest intent)
  2. By inducing an unknowledgeable officer of South Transport to sign the quitclaim deed

CHAPTER 6: EFFECT OF REGISTRATION

A. REGISTRATION: THE FEE SIMPLE

* The effect of an indefeasible title under Torrens per 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 persons, that the person named in the title as RO is* ***indefeasibly entitled to an******estate in fee simple*** *to the land described in the indefeasible title*
  + Meaning cannot be contested, attacked or rebutted; cannot produce evidence to the contrary (Creelman v HBC)
  + Indefeasibility applies **only** to fee simple holders
* Known as “**title by registration**”
  + Meaning the certificate of indefeasible title is issued by the register
  + The **register** is the source of title (as opposed to the person; where *nemo dat* applied)
* Always “wise to register”

Initial Registration – Crown Grant

* Crown grant excepts and reserve several interests, right privileges and titles as specified in the Land Act, s. 50
  + The Torrens land title is **conclusive evidence at law and equity**; this title cannot be attacked or rebutted. The vendor does not pass “good title,” it is transferred by registration
* Per s. 23(2)(a) exceptions and reservations are present in all Crown grants
* Such as the Crown’s “right of resumption” – can expropriate up to 1/20th of the land without compensation

**2. Indefeasibility and Adverse Possession**

* Per LTA, s. 171 **adverse title cannot be registered/does not exist under the Torrens system**
  + Where title is acquired through occupation of land without permission (i.e. “squatters title”) [BC only]
* Under the *Land Act*, s. 8 squatters cannot get an interest in Crown land by “occupation not lawfully authorized”
* Under the *Limitation Act*, s. 12 no land can be acquired by adverse possession
  + Further, s. 3(4) there is no limitation period for an action “for possession of land if the person entitled to possession has been dispossessed in circumstances amounting to trespass”
  + Meaning there is no limitation period on taking action against squatters
* **Limited Exception:** Under LTA, s. 23(4) adverse title may be acquired “in the case only of the first indefeasible title registered” (Crown grant) if the person is in actual possession of the land and is “rightly entitled to the land”
  + Provides a very limited opportunity –where a Crown grant went unregistered for a long period of time and another individual gained possession of the land
  + Per LTA, s. 171 must be supported by a declaration of title under the *Land Title Inquiry Act*

But what about encroachments or easements?

* **Encroachment is possible** – re: Property Law Act, s. 36
* Broad equitable discretion granted to the courts
  + Equities between the parties – including acquiescence/proprietary estoppel
  + Weighing the balance of convenience – what is the best outcome on both sides?
    - Where appropriate, could order the transfer of the entirety of lot B to A at FMV
* Examples of remedies:
  + Kelsen v Imperial Tobacco – ordered the sign torn down; form of mandatory injunction and/or equitable remedies
  + Zelmer v Victor Properties – granted equitable easement; due to reliance on encouragement (acquiescence)
  + Gainer v Widsten – forced sale of property to neighbour; based on the “balance of convenience”

**3. Statutory Exceptions to Indefeasibility**

* Torrens does not confer indefeasibility or validity to a charge; need for private insurance (i.e. mortgage insurance)
* Registered charges:
  + Possess only a rebuttable presumption of validity
  + Provide constructive notice per LTA, s. 27
  + Have priority over subsequently registered charges based on the date/time of application per LTA, s. 28
* Meaning that the fee simple purchaser is subject to registered charges
  + Per mirror & curtain principles, generally not subject to unregistered interests
* Nevertheless, some unregistered “overriding interests” may still have effect after purchase. Requiring solicitors to look “off the register” to other sources of information
  + Creates a limitation on indefeasibility; conflicts with the mirror principle

*a) Property Taxes s. 23(2)(c)*

* Applied by the local government; includes municipal charge rate, assessments or local improvement charges
* Register owner may be in tax arrears; form of tax debt

*b) Leases s. 23(2)(d)*

* Short Term lease (less than three years)
  + Defined under LTA, s. 1 – requires that the original term of lease (including options to renew for another term or month to month) is less than three years and the tenant is in actual occupation of the property\*\*\*\*\*
  + Tenant has priority over the purchaser; right to exclusive occupation
* Long Term Lease (more than three years)
  + Under the L&E Act, s. 59(2) long term leases must have written evidence to take effect
  + Unregistered lessee does not have priority over the purchaser; require registration to be effective
  + Unless, the new RO has notice/knowledge of the current long-term tenant. Would be fraud to ignore the unregistered interest per LTA, s. 29(2) (VanCity Savings CU v Serving for Success)

*c) Highway or Public Right of Way, Watercourse, Right of Water or Other Public Easement s. 23(2)(e)*

* Form of statutory, unregistered easement; provides a right of way for water & sewage lines on the property

*d) Right of Expropriation/Escheat s. 23(2)(f)*

* Under the *Highway Act* and *Water Act*, the Crown’s right to expropriate property prevails on indefeasibility
  + Not the same as the right to resumption
* AND where no owner/heirs are available, the Crown has a right for the land to escheat (under the *Escheat Act*)

*f) Builders Lien s. 23(2)(g)*

* A builders lien can be **registered after** the purchase by a BPFV w/o N; can “override” the LTA (Carr v Rayward)
  + In BC, a certificate of land title expressly excepts mechanics’ liens (builders liens) registered after his application to register under s. 23(2)(g)
* Builder who is not paid by the RO can file a “**claim of lien**” against the property to create a builders/construction lien
  + Builder = **lien claimant**
* *Builders Lien Act* imposes a limitation period of 45 days from “completion”
  + Includes filing anytime from the start of work to 45 days after completion
  + After filing, builder has 1 year to begin an action under the lien. Builder can then file a CPL on the title.
* Important policy decision:
  + Contractors often operate on credit; assuming they will be paid by the RO
  + RO and subsequently the purchaser have benefitted from the work done
  + Other options to prime and sub-contractors are flawed on the basis of privity of K

*g) Boundaries s. 23(2)(h)*

* No correction of “wrong boundaries”; indefeasibility or conclusiveness does not extended to the location on the ground of the boundaries as depicted in the registered map or plan
  + Solicitors also under no duty to ascertain information or advise clients on the dimensions of the purchased property. This is beyond their expertise (Winrob v Street)
* Purchaser must be wary of relying on physical landmarks as boundaries
* i.e. Gainer v Widsten – P could not recover against the Assurance Fund for the wrong boundaries leading to forced sale

*h) Forest Act s. 23(2)(j)*

* Rights under Forest Act, **endorsed on title** consistent with indefeasibility of title
* It the conditions of the license are not met, the province has the right to remove the interest

*i) Unregistered* In Personam *Claim*

* Occurs when the RO has conducted themselves in an unconscionable or inequitable way; the other party may take action against them (Zelmer v Victor Projects)
  + May affect their title even if they are indefeasible
  + Personal liability on the RO due to their inequitable conduct
* Though these claims are not enforceable against the BPFV w/o N; the enforceability against the RO may be effective

*j) Fraud & Forgery s. 23(2)(i)*

* A title obtained by fraud/forgery or participation in any degree thereof, is defeasible
  + “the right of a person deprived of land **to show fraud, including forgery**, in which the registered owner has participated in any degree”
  + Equity will not allow statutes to be used as “instruments of fraud”
* Occurs where the fraudster gains or sells fee simple title via fraud or impersonation of the RO (Gill v Bucholtz)
  + **The title of the fraudster is defeasible**
  + Despite registration, their participation in fraud makes the title vulnerable to attack by the RO
  + However, this defeasible title can be transferred to a BPFV w/o N. Their title will be indefeasible.
* To avoid confusion in the law, BC passed expressed provision in LTA, s. 25.1:
  + (1) Subject to this section, **a person who purports to acquire land or an estate or interest in land by registration of a void instrument** does not acquire any estate or interest in the land on registration of the instrument.
  + (2) **Even though an instrument purporting to transfer a fee simple estate is void**, a transferee who
    - (a) is **named** in the instrument, and
    - (b) in **good faith and for valuable consideration**, purports to acquire the estate, is **deemed to have acquired that estate on registration of that instrument.**
  + Grants “immediate indefeasibility” where the purchaser did not participate in the fraud; meaning that innocent purchaser gains an indefeasible title
    - Requires “good faith and valuable consideration” meaning the provision applies to purchasers only
* Provision considered in Gill v Bucholtz with unfavourable results
  + Lesser interests (including mortgages) granted by a void instrument (fraudster) are defeasible under s. 25.1(1)
    - Mortgagee is removed from the register when the true owner regains possession
  + The interest in fee simple granted by a void transfer to an innocent purchaser is indefeasible under s. 25.1(2)
    - Immediate indefeasibility applies only to fee simple interests

*k) Fraud & Notice s. 23(2)(i)*

* Per LTA, s. 29(2) unregistered interests are not binding against a BPFV w/o N
  + Meaning the BPFV w/o N is not affected by notice – express, implied or constructive – of unregistered interests
* Unless, the BPFV w/o N is guilty of participating in “fraud” (McCaig v Reys; Gill v Bucholtz)
  + Means an unregistered interest is binding against a “person contracting or dealing with or proposing to take a transfer or charge” who has participated in fraud to some degree
  + Again, equity will not allow a statute (LTA) to be an “instrument of fraud”
* What is “fraud”?
  + **Fraud = express notice + dishonest intent**
    - The purchaser must have “express notice of the unregistered interest” prior to the transfer
    - Dishonest intent by the party or agent must exist prior to the agreement (VanCity Savings CU v Serving for Success)
    - However, the law presumes good faith; must be able to demonstrate cogent evidence (Re Saville Row Properties)
  + Express Notice & Agency – conflict case law
    - Re: McCaig v Reyes, Rutland (principal) granted authority to Jerome (agent); Jerome’s knowledge was attributed to Rutland. The fraud of the agent became the fraud of the principal.
    - Re: Greveling v Greveling, Blackburn (principal) granted authority to the solicitor (agent); the knowledge of the solicitor was not attributed to Blackburn. The fraud of the agent was not the fraud of the principal.
      * Case is conflicting; ratio is difficult to determine
* Asks what the party knew and when – did he/she have a fraudulent intention?
  + Innocent – no notice or dishonesty; not fraud
  + Negligent/Careless – no notice or dishonesty; not fraud (Hudson’s Bay v Kearns and Rowling)
    - Where mere notice or suspicious circumstances (such as those faced by Jabin or Rowling) is not enough to ground a finding of fraud; does not include “equitable or constructive” fraud
    - This includes notice of a unregistered interest with uncertain validity (Re Saville Row Properties; in this case notice of an expired option rejected by the Registrar)
  + Wilful Blindness – no notice, but strong suspicion lack of inquiry amounts to dishonesty; fraud
  + Fraud – notice and dishonesty; fraud
* Per s. 29(3), a purchaser with notice of a financing statement registered under the *Personal Property Security Act*, is not affected by the unregistered interest unless clear evidence of fraud or bad faith is available
* “Where the equities are equal, legal title prevails” – Rowling was on the register as RO, he extinguished the HBC interest

Two Situations Arise for Torrens Fraud:

1. Option 1:
   1. Purchaser has express notice before signing a binding agreement of purchase and sale
   2. Purchaser becomes registered owner to deliberately extinguish the unregistered interest

* Example: If Rowling had received express notice of the unregistered interest before the signing of the agreement, and chose to register the transfer with the intent of extinguishing the unregistered interest.

1. Option 2:
   1. Purchaser has express notice before signing a binding agreement of purchase and sale
   2. Purchaser is dishonest or shows a “lack of common morality”; deceit
   * McCaig v Reys – where Rutland/Jerome had express notice and deceived someone to extinguish McCaig’s unregistered option

* N.B. Be careful with the phrase “equitable fraud” – this covers a large range of conduct at common law. Better to refer to things as “Torrens fraud”

*l) Volunteers*

* Registration of a volunteer (as distinct from a purchaser) does not confer indefeasibility; no protection for a donee
* Per s. 25.1 protects a **purchaser only** – “in good faith and for valuable consideration”

*m) Other Examples Not Listed in the LTA*

* *Agricultural Land Commission Act*, SBC 2002
  + Independent government body that establishes agricultural land reserves to limit urban sprawl
    - Established province wide zoning for the purpose of preserving farmland; “agricultural land reserves”
  + Normally registered; however pre-1973 are not registered per LTA s. 60
* Crown Liens
  + Creates an unregistered Crown lien when the donor has outstanding federal or provincial income taxes in connection w/ the property under the federal Income Tax Act, s. 160
  + Requires that the vendor/current owner is a donee, meaning that they paid less than fair market value

**4. *In Personam* Claims**

* Exception to indefeasibility for unregistered personal rights against the RO
  + s. 20(1) **Except as against the person making it**, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.
* An unregistered instrument has no effect either at law or in equity *in rem*
* BUT, **an unregistered transfer gives a title in equity enforceable against the transferor**; based on breach of K
  + Allows an equitable personal claim/cause of action
* Conduct of the registered owner or agent *in personam* > remedy may affect registered owner’s title *in rem*

Foreclosed Mortgage (Pacific Savings v Can-Corp Developments)

* Mortgagee (lender) has a legal and enforceable charge upon registration with the LTO
* If a mortgagor defaults, the mortgagee has several remedies including **foreclosure**
  + An equitable remedy which transfers title to the mortgagee and discharges the mortgage from the title
    - Unusual choice; may only do so where the FMV of the property has dropped
  + However, the mortgagor retains an equitable right enforceable against the mortgagee (*in personam*) to redeem or pay off the mortgage within 6 months and regain title; known as the **equity of redemption**
  + The mortgagee can sell, give or mortgage the equity of redemption; through a second mortgage
* Mortgagee cannot ignore this *in personam* claim – transfer to a BPFV w/o N can be overturned by the courts
  + Rectification of the a land title (register) can be done by the courts or the registrar to rectify errors in the title
  + PS becoming a RO did not extinguish Can-Corps *in personam* claim; this claim can affect the title (via mortgagor attempting to re-obtain property)

Trusts (McRae v McRae Estate)

* Trustee owes an *in personam* obligation to beneficiaries (fiduciary obligation)
* An unregistered trust is not enforceable against a BPFV w/o N
* However, beneficiaries can register their trust; provide a notation on the land title which links to the trust document and creating constructive notice
  + Becoming RO (indefeasible title), *even w/o trust instrument registered to your interest*, does not extinguish those rights/obligations created by trust

B. REGISTRATION OF CHARGES

* Per LTA, s. 1 a “charge” is any estate or interest less than fee simple
  + Includes “encumbrances”, caveat, CPL, mortgage or a judgement
* “registration” = acceptance by the LTO plus either:
  1. entry on the certificate of title (“register”)
  2. entry in a register or a filing (not expressly on the certificate of title)
* “instrument” refers to the documentation utilized to register the charge in the LTO
* Land Titles include:
  + Legal notations
  + Charges, liens and other lesser interests including:
    - Nature of the charge – term or phrase describing the interest held (Dukart v Surrey)
      * The nature of the charge listed on the title may not provide a complete description of the registered interest. Should always check the additional documentation related to charges on the land title.
    - Charger number – a record of the instrument creating the charge; provides a full description of the charge held (Dukart v Surrey)
    - Date & time of application to the LTO
    - Reference to related documentation – such as trust documents or easement information
  + Duplicate Indefeasible Title (none outstanding)
  + Transfer
  + Pending Applications
* Registration of the charge does not grant indefeasibility (Gill v Bucholtz)
  + Per LTA, s. 197 the LTO staff may examine the instrument and accept or reject the application based on:
  1. a good safeholding and marketable title and;
  2. the charge claimed is an estate or interest in land registrable under the LTA (Skeetchesn)
* Per LTA, s. 26(2) registration gives constructive notice of the interest and its contents to individuals dealing with the title
  + The instrument creating the charge is registered on the title
* Per LTA, s. 180 (3) “in trust” should include a “reference number” to the trust instrument
  + Per McCrae, the advantage of registering the trust protects beneficiaries from a breach of trust and provides notice to the purchaser for the trustee

**1. Meaning of Registration**

* Registration of charges creates a rebuttable presumption of validity only (Credit Foncier v Bennett)
  + Can be rebutted through proof of fraud/forgery
  + Because under LTA, s. 23, the registration of a charge “is deemed to be entitled” to the interest in question
* Seemingly overturned by Canadian Commercial Bank v Island Realty Investments Ltd
  + Court upheld the deregistration of a mortgage through a fraudulent instrument; because registration of a charge does not confer indefeasibility, the charge holder is vulnerable to valid transactions under the Torrens system
    - A forgery of discharge for a mortgage is valid & sufficient to remove the mortgagee from the title
    - Difference b/w the forgery of the mortgage itself & the forgery of a discharge of a mortgage
  + LTA provides protection for mortgagees who acquire their interest bona fide and for value from the RO
* Case Criticism:
  + As Cowan acted as an agent for Park Meadow, Park Meadow was party to the fraudulent action (McCaig v Reys). The discharge of the Island Realty mortgage should have been held invalid
  + Per LTA, s. 25.1(1) common law principles (*nemo dat*) applies to charges; the fraudulent novation should have invalidated the registration of Almont’s mortgage
* Need to reconcile:
  + Island Realty: Fraudulent discharge of 2nd mortgage + registered valid mortgage = valid charge
  + Reconcile w/ Gill v Bucholtz: Forged transfer of fee simple + registered fraudulent mortgage = invalid charge
  + Reconcile w/ Credit Foncier: Forged mortgage + transferred fraudulent mortgage = invalid charge

CHAPTER 7: FAILURE TO REGISTER

A. The General Principle

* Object of Torrens to give certainty to land title; the title is “everything”
  + The register of title should contain a state of title that is complete, accurate and up-to-date
* Registration is not compulsory
  + Initial registration of the Crown grant is required (LTA, s. 54)
  + All other registrations are voluntary; but unregistered interests are vulnerable to the BPFV w/o N
* Incentives created to encourage registration and system punishes failures to register
  + Fee simple registration confers immediate indefeasibility
  + Registration of charges confers notice to the world and priority based on chronological order of application to the LTO (LTA, ss. 27 & 28); not indefeasibility (Credit Foncier & Bucholtz)
    - Priority is relevant when assets are insufficient to pay creditors; mortgagees are paid in order of registration – “first in time, first in right” (Credit Foncier)
* Failure to register results in uncertainty; LTA, s. 29 prevents/abolishes constructive notice and limits an individual to take action for fraud
  + Requires express notice/actual knowledge prior to the transaction (McCaig v Reys, HBC, Serving for Success) by the principle or agent (McCaig v Reys, Greveling v Greveling, Island Realty)
  + Re: equity won’t permit the statute to be used as an instrument of fraud
* Limited protections for unregistered registrable interests:
  + Caveat
  + CPL
  + Assurance Fund – applies to fee simple interest holders only

**Aside:** Is it possible for the priority of instruments to be changed?

* Can be done through a subordination clause (subject to a contrary intention); agreement reorders the priority of charges
  + Foreclosure removes only financial charges from the title; easements and statutory rights of way remain on title
* Example: FMV = $100K, Mortgage #1 – $75K, Mortgage #2 – $20K
* Based on “foreclose down and redeem up”
  + **Foreclose Down** – When mortgagor #1 forecloses, subsequent mortgagee (#2) receives only the remainder
    - Forces the sale of the house for $80K; only the remaining $5K goes to the second mortgagee
  + **Redeem Up** – means the subsequent mortgagee can redeem or pay out the value of prior mortgages
  + Why? If the value of the property dips down, it may be in the interest of the secondary mortgagee to pay off the first mortgage to “improve” their interest holding
    - FMV falls to $60K; mortgagee #1 would recover by foreclosure. No remainder to mortgagee #2.
    - Alternatively, mortgagee #2 could redeem mortgage #1 by paying $75K to mortgagee #1.
    - Mortgagee #2 does this to compensate for the temporary dip in the value of the price of the property; where the foreclosure down principle would cause them to lose out
  + Does not happen commonly; risky move that requires only a temporary dip in housing prices

**Registration and its Effects – LTA, s. 20**

* Registration is required before an interest in the land has any effect in law or equity; “unless the instrument is registered in compliance with this Act”
* LTA, s. 20 expressly provides for three exceptions:
  1. **“Except against the person making it”**
     + A judicial exception that was brought in by amendment meaning that a transaction is enforceable against the maker without registration – *in personam* claims
  2. **Unregistered Registrable Instrument**
     + Applies where the holder of an unregistered registrable instrument applied to the registrar for registration of the instrument under LTA s. 20(2) prior to the registration of a sale to a BPFV w/o N
     + Does not apply to unregistrable interests – such as a license or equitable mortgage
  3. **Short Term Lease (less than 3 years)**
     + Do not have to be in writing per *L&E Act*, s. 54
     + Do not require registration and cannot be registered per s. 23(2)(d)
     + Requires actual occupation of the property + lease < 3 years (including options to renew)
     + Tenant can enforce the lease against the landlord or a BPFV w/o N under s. 20(3)
       - Gives the tenant in actual occupation under an unregistered short-term lease both *in personam* and *in rem* rights
     + Despite the explicit wording of s. 20(1), courts can give limited effect to an unregistered interest **in equity** to prevent “fraud”; a legal estate can only take effect on registration

**B. “Except Against the Person Making It” per LTA, s. 20(1)**

* Under Torrens and Equity the BPFV w/o N takes the property free of prior unregistered interests
  + Failure to register prevents a *legal* (*in rem*) interest in the property enforceable against BPFV w/o N
  + Making registration critical – the priority of interests are determined by the chronological order of registration of instrument.
  + All unregistered interests are equitable
* Personal obligations or “personal equities” are enforceable against the RO who made the instrument irrespective of the lack of registration
  + Individual assumed the obligation and remains personally bound
  + *In personam* claim with *in rem* implications – prior to sale, Sorenson could have gained legal right of way from Roch
    - Creates an equitable interest in the land – i.e. an equitable decree of specific performance against the Vendor creates an equitable interest in the property in favour of Purchaser, even though legal ownership remains with the Vendor
* Examples:
  + Purchaser’s interest in the property is enforceable against the vendor prior to registration; can obtain an order for specific performance and/or damages for breach of an unregistered sales K
  + Beneficiaries interest in the property is enforceable against the trustee without registration; can seek a remedy for breach of trust
    - Lack of registration does not affect the enforceability of the trustee’s obligations
* An aspect of the “*in personam*” qualification to indefeasibility is that personal equities can be enforced as personal rights of action against the registered interests of those bound personally to perform obligations, but not against innocent purchasers of the land (Sorenson v Young)
  + Note: Amendment to LTA, s. 75 requires that all subdivisions ensure “sufficient highway to provide necessary and reasonable access” to all lots to avoid “landlocked” properties
    - LTA, ss. 181, 182
    - LTA, s. 75(1) subdivision approving officer – broad discretion and powers to enforce
* However, 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)

1) Judgments

* Judgment creditors are not purchasers; they rank after prior unregistered interests based on the date of execution
  + Registration and enforcement of money judgment is “subject to the equities” – encumbered by previous obligations
* Personal equities in an unregistered instrument bind not only the initial maker of the instrument but also the judgment creditor of the maker

Process for a Judgment Creditor

* C has a monetary claim against A – A must obtain a monetary judgment on the claim, as the essential first step in **enforcing or executing** payment of unsecured debt
  + A is known as the **judgment debtor**
  + C is known as the **judgment creditor [unsecured creditor]**
* If A does not pay the amount owing under the judgment, C can employ execution remedies to seize and sell A’s assets including interests in land
* C can register the money judgment against A’s interest in land
  + Money judgment forms a lien on the property to the extent of his or her beneficial interest in the property
  + **This does not transfer any interest in the debtor’s assets to the judgment creditor** – provides statutory constructive notice to the world that it encumbers the property and gives C the legal option of applying for a court-ordered sale of the debtor’s interest.
* To initiate a court-ordered/execution sale, C must register a CPL on title

**How do judgments rank relative to other charges? Combination of CL and Torrens**

* Common Law: *nemo dat* applies and priorities are ranked according to the chronological order of creation
  + Monetary claim is a CL claim; subject to *nemo dat* system of priority
  + This means that C can only seize and sell A’s interests in the assets as they exist the time of seizure and sale under the execution remedy. Two steps:
    - Seizure of the A’s property to take away the A’s right of possession; grants C right to sale
    - Forced sale to dispose of the A’s interest in the property to the purchaser at the execution sale
  + The judgment creditor (C) then receives payment out of the proceeds of sale
* Torrens: priorities determined by ranking instruments by order of their registration
* So what governs judgments?
  + Previously created, but unregistered interests rank ahead of the registered judgment, deferring to the common law system of ranking
  + Any subsequently created or registered interests will rank after the registered judgment, deferring to the Torrens system of priorities based on LTA, s. 28
  + Prior unregistered interests created against the debtor’s land are not extinguished by registration of the judgment, and rank ahead of it despite the possible application of s. 28, and as codified in the COEA, s. 86(3)
    - Example: A sells/mortgage the interest to B **before** C registers the judgment. B is unregistered. Unregistered B ranks ahead of registered C. (Martin Commercial Fueling v Virtanen)
  + Example: A sells property to B **after** C registers the judgment. B is unregistered. C (judgment creditor) ranks ahead of B (purchaser).
* Why?
  + Re: Registration of the judgment does not grant an “interest” in the land – “stand in the shoes” of the debtor
  + Judgments function as personal liability; the creditor can only get access to whatever interest the debtor has in the property at the time of registering the judgment
  + *Nemo dat* means the creditor can only gain access to the interest in the property held by the debtor; cannot “squeeze more” out of the property
* **Exception:** If the debtor (A) agrees to sell the property for the purpose of paying off the judgment, the purchaser of the property takes title subject to the registered judgment (purchaser ranks after the judgment because they’re deemed to have constructive notice).

Fraudulent Conveyance – transfer property to defeat creditor

* Where a friendly 3rd party takes possession of the property in order to prevent a creditor from registering their judgement, the creditor can apply to set aside the transfer. Applies only to volunteers.
* Creditors can then execute on the property

2) Other Interests

* If RO enters into a K with personal obligations concerning land, the courts can compel the parties to abide by their bargains on a personal level even if unregistered (L&C Lumber v Lungdren)
  + Personal enforcement can have the indirect consequence of affecting the land
  + This applies to assignees under the K
  + Applies to any interest with a contractual aspect – where every type of interest has a contractual aspect except for a trust
* Where an individual assigns their interest in the property is enforceable against the RO by the assignee
  + RO > K (for performance) > assignor > assignee

3) “Prohibited Transactions”

* s. 20(1) leaves open the possibility that the instrument creating a trust or K affecting land could be unenforceable as a personal obligation on grounds other than lack of registration – i.e. violating public policy, common law, or equitable and statutory prohibitions
  + Such as for noncompliance with LTA provision regarding subdivision and lessees (International Paper v Top Line); think illegality/public policy via K

Criticism of International Paper v Top Line

* Attacked as illogical and impractical; imposing subdivision was an unnecessary hardship of parties seeking to make efficient use of rural, agricultural land
  + Informal lease were common at this time
* Critics of the decision persuaded the Legislature to reverse it; enacted LTA, s. 73.1 but it has also been criticized as failing to solve the problem
  + Restored the possibility of *in personam* enforcement
  + However BCCA interpreted it as have prospective effect only (Idle-O Apartments v Charlyn Investments); meaning it only applies to transactions created post May 2007
* Per s. 73.1, the lease is “not unenforceable between the parties to it”. This wording overlooks the possibility of enforcement by an assignee of the contractual obligations in the lease (L&C Lumber v Lungdren)

CHAPTER 3: ABORIGINAL TITLE

**a. Introduction**

* Aboriginal Rights:
  + Are exclusive of and easier to prove than Aboriginal title – including rights to engage in practices, customs and traditions (in their modern form) and to conduct activities on specific sites (i.e. hunting, fishing)
* Aboriginal Title:
  + Is a right to the land itself; *sui generis* (unique) form of ownership;
  + Very difficult to prove – Aboriginal title has not been proven for a parcel of land in Canada
  + Per Skeetchestn Aboriginal title is inconsistent with and cannot be registered under the Torrens system
    - Form of title not contemplated by Torrens
    - Torrens is derived from the notion that the Crown is the absolute owner of the land and individuals purchase interests derived from the Crown
* Source of Aboriginal Rights & Title
  + ~~Royal Proclamation, 1763 rejected as the source of Aboriginal title in Canada~~ (St. Catherine’s Milling)
  + Prior [exclusive] occupation at the time of sovereignty and the relationship between common law and pre-existing systems of aboriginal law (Delgamuukw)
* What about s. 35?
  + *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed*
  + Does not create aboriginal title or aboriginal rights, but confers constitutional status on “existing” rights as of 1982
    - This is evident through case law or treaties
    - Does not create or define these rights, but give them constitutional protection
  + Existing rights must be proven in court or by agreement in a treaty

**b. Extinguishment**

* Province cannot extinguish Aboriginal title or rights, but can justifiably infringe
* Federal gov’t under s. 91(24) can extinguish Aboriginal title (Delgamuukw) but only through treaty negotiations or agreement with the particular Aboriginal group or band
* Both governments can infringe aboriginal title if justified via “substantial and compelling public objectives” (Mitchell v MNR)

Justifying Infringement

* Infringement must be consistent w/ fiduciary relationship 🡪 via opportunities to participate
* Federal and provincial governments owe a duty to consult and accommodate (Haida Nation)
* If FD interpreted as priority (Sparrow), then the right to exclusive use and occupation cannot be applied strictly
  + Gov’t must show resource allocation process & *actual* allocation reflect the prior interest of AT holders = duty to accommodate
* If FD in another form, must consider AT right to choose land use – duty to consult with respect to decisions re: lands,
  + Nature & scope of consultation varies but always *in good faith*
  + ≠ veto over development projects
* FD ordinarily requires fair compensation for infringement & breach of FD: based on economic aspect of AT (Delgamuukw)

Encouraging Settlement through Negotiations (Delgamuukw)

* **Recommendations** 
  + Involve other FNs with stake in territory claimed.
  + Crown has moral, if not legal duty to enter into & conduct negotiations in good faith (“honour of the Crown”)
  + Reconciliation ultimately achieved through treaty process
* **Current Status of Treaty Negotiations:**
  + Only four modern treaties have been struck since Delgamuukw
  + Williams v BC***:*** left status of AT unclear – negotiations ground to a halt (leave to SCC granted)
  + **Conflicts of Interest:** Feds have fiduciary duty, but are party to the negotiation. Prov lending money to Ab bands to pay for legal costs of treaty negotiation.

Delgamuukw Summary:

1. **Recognized the existence of Aboriginal title** – a right in land – exclusive use and occupation for purposes, with limit that activities can’t be irreconcilable with nature of attachment to land. Characteristics: *sui generis,* inalienable, communally held, source is prior occupation, “inherent” limit
2. **Established the test for proof of Aboriginal title** – requires proof of prior occupation before the Crown asserted sovereignty (1846), continuity and exclusivity
3. **Established a framework for justifiable government infringement of Aboriginal rights** – requires a ‘pressing and substantial’ legislative objective and must be in accordance with fiduciary duty
   * The Court encouraged settlement by treaty negotiation as preferable to litigation
4. **Set precedent through the admissibility of oral history** – Aboriginal perspective should be given “equal and due treatment”

a) Aboriginal Title

* *A right in the land*; not merely an Aboriginal right with a site specific component (such as hunting or fishing)
* Per the equitable doctrine *nemo dat quod non habet* (first in time, first in right), Aboriginal title is derived from exclusive occupation of the land preceding Crown sovereignty in 1846
  + Has been viewed by the CL as a burden on Crown title and any subsequent Crown grants; “encumbers” Crown title
  + It automatically binds successors to title from Crown without assignment (“runs with the land”)
* What does *sui generis* mean?
  1. **Inalienable** (incapable of sale) to 3rd persons, can only be surrendered to the federal Crown by treaty
     + Whereas purpose of Torrens is to facilitate the marketability and sale/transfer of land (Skeetchesn)
  2. **Held collectively by the band**; no individual holds the interest in the land
     + Form of communal stewardship; held for the benefit of current and future band members
     + Does not conform to common law system of individual ownership (Cadastral concept), transferability and benefit for the current owners (not for future generalizations)
  3. **Arises from prior occupation before assertion of British sovereignty** (1846 in BC)
     + Precedes Crown sovereignty and the implementation of the Torrens system
     + Applies only to land of central significance to their distinctive culture
     + Requires exclusive occupation – “Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources…”
       - **Q:** To what extent is the concept of “exclusive occupation” derived entirely from the common law? Likely that aboriginal groups do not define this the same way. Does not adequately account for “aboriginal perspectives”.
     + Types of Claims: “site specific” v. “territorial basis” per William v BC
       - Emphasis should be on smaller, site specific claims; rather than broad territorial claims (too difficult to establish exclusive occupation)
       - This has significant implications for nomadic and semi-nomadic peoples
  4. **Contains an “inherent” limit”**
     + Rights of use are not “frozen in time” to strictly traditional uses (possibility of new uses)
     + But uses must be reconcilable with the nature of the claimed attachment to the land (traditional use)
* Why could it not function through some other method?
  + Per Skeetchestn, it is not an exception or reservation from Crown grant per LTA, s. 23(2)(a)
    - Reservations require the fee simple holder to retain some interest in the land; in order to retain the interest they must have held it in the first place
  + Per Skeetchestn, it is not an “encumbrance”
    - LTA s. 1 requires that “encumbrance” emanate from the fee simple or be specifically authorized by legislation

b) Proof of Aboriginal Title

* What is required to established Aboriginal title:
  1. **Prior occupation before the Crown asserted sovereignty**
  2. **Continuity**
     + Where descendants’ present occupation can be relied upon
     + Can be interrupted – many Aboriginal groups in Canada were removed or relocated by the government
     + Requires only “substantial maintenance of the connection”
  3. **Exclusivity**
     + Band must show exclusive use and possession of the land

c) Infringement and Extinguishing Aboriginal Title

* When can governments infringe on Aboriginal title?
  + Bands must be consulted and accommodated; granted the opportunity to participate in development
  + Does not entail a right to veto any government development
    - However, governments must make a reasonable and good faith effort to consult and accommodate bands in order for projects to go ahead
  + As a part of their **fiduciary duty**, governments have a duty to provide fair compensation
* When can governments extinguish Aboriginal title?
  + Pre-1982, “plaint and clear intent” is required to extinguish Aboriginal title
  + Post-1982, **only the federal government** can extinguish Aboriginal title through treaty making
* **II Part Test for Justifying Infringement:**
  1. Justifiable if aimed at further ‘pressing and substantial’ legislative objective: either recognition of prior occupation or reconciliation
  2. Must be consistent with **fiduciary relationship** (determine form & standard of scrutiny)
* Negotiation preferable to litigation; s. 35 is about “reconciliation”
  + However, nearly 40% of bands in BC have refused to enter into treaty negotiations. The evolving area of law has created a disincentive to entering into permanent treaties.

d) Admissibility of Oral Evidence

* Must give equal weight to the Aboriginal perspective; adapt rules of evidence to put Aboriginal history/legal systems on an ‘equal footing’; courts must admit “hearsay evidence”
  + Inadmissible at common law (known as the hearsay rules)
  + **Hearsay Evidence**: Information gathered by one person from another person concerning some event, condition, or thing of which the first person had no direct experience; evidence must be from original source
    - Considered to be unreliable and the appropriate weight to be given to is difficult to assess
* In the case of litigation regarding Aboriginal title and rights (under s. 35), a statutory and common law exception exists – based on a respect for the oral traditions of other societies
  + Including spoken words (stories and songs)

**Admissibility of Oral Evidence Revisited** (Mitchell v MNR)

* Despite Delgamuukw, court sets out a **common law formula** for admissibility of evidence
  + Admissibility (Law)
    1. Useful – must be relevant and of probative value
    2. Reasonably Reliable – “unreliable evidence may hinder the search for the truth, rather than help”
    3. Judicial Discretion – TJ may exclude evidence where prejudicial effect exceeds probative value
  + Weight Evidence (Fact)
    - Oral evidence should be given “equal and due treatment” (Delgamuukw) based on the “general principles of common sense”
      * Where common sense is derived from Eurocentric ideas
    - Though Aboriginal perspective is valued; cannot artificially strain its evidentiary value
* Ability of Appellate Courts to Interfere With Fact
  + SCC establishes that deference is not necessarily shown to the TJ’s finding of fact in s. 35 jurisprudence due to the nature of the cases
    - “This practice was not on the evidence a ‘defining feature of the Mohawk culture’ or ‘vital to the Mohawk’s collective identity’ in pre-contact times.”; reject Aboriginal rights claim
  + Case appears to demand a “higher standard of proof” and gives the appellate courts the ability to re-weigh the findings of the TJ in these cases
* *Mitchell seems to tilt towards to the common law side of the balance*; case demonstrates the courts lack of commitment to incorporating aboriginal perspectives
  + Admissibility requirements may curtail the ability of Aboriginal bands to prove their cases; broadens the courts ability to limit evidence

Relationship with Sovereignty (Binnie J Dissent)

* International trading/mobility right claimed by Mohawk is incompatible with/contradicts Canadian sovereignty
  + Borders are essential to national sovereignty; including territorial integrity and the sanctity of international borders
    - Flow of people and goods over borders
    - Canadian sovereignty prevails over and extinguishes Aboriginal rights
  + Section 35(1) must have a constitutional limitation
  + **Meaning:** Aboriginal rights claims may be extinguished for the purposes of sovereignty
    - If an Aboriginal right had been demonstrated, it would have been extinguished by Canadian sovereignty
* Chief Mitchell brought case to Inter-American Commission on Human Rights under the Organization of American States
  + International forum governing countries in the Americas, Canada is not a signatory
  + Meant to resolve disputes between indigenous peoples and sovereign governments
  + Found that non-discriminatory taxes on imported goods did not violate petitioner’s “right to culture”

Standard of Occupation (Marshall & Bernard)

* Exclusive Possession – need intention and capacity to control; requires regular and intensive physical occupation
* Continuity – connection to land of central significance to culture – can show through ‘substantial connection’ to land
* Case seems to reject any potentially for territorial claims to land and claims by nomadic/semi-nomadic peoples
  + “Not every nomadic passage or use will ground title to land”
* Must be able to translate an Aboriginal practice, custom or traditional into a modern legal right; must look for equivalent indicia of common law title in aboriginal culture

Territorial vs. Site Specific Claims (Williams v BC)

* Eliminates basis for territorial claims to Aboriginal title; must be site specific
  + Proof of defined boundaries & regular or intensive occupation of a particular area. Difficult standard of proof.
  + Results in a “postage stamp” view of Aboriginal title
* Rejects on three grounds:
  + A territorial claim for AT does not met the test in Delgamuukw and in Marshall & Bernard
    - Must show “exclusive” occupation
  + “I do not see a broad territorial claim as fitting within the purposes behind s. 35 or the rational for the common law’s recognition of A”
  + Claim is antithetical to the goals of reconciliation; cannot place unnecessary limitations on the Crown or Canadian society at large
* Again shifts strongly towards the CL perspective