**Property CAN**

Law 231

April 2016

Airspace 4

Strata Property 6

Fixtures & Chattels 7

Water Rights 9

Accretion and Erosion 13

Support 15

Equity 16

Equitable Interests 16

Equitable Maxims 16

Restraints on Alienation 17

General policy of the common law 17

Requirements for freedom of alienation/disposition 17

Crown Grant 18

Rights reserved [Land Act 50(1)(a)]: 18

Sale of Land 19

1. Contract of purchase and sale 19

2. Completion (“closing”) 19

3. Registration of transfer (+ mortgage to finance purchase) 19

Inter Vivos Gifts 20

Incomplete Gifts 21

Testate Disposition 23

Validity Requirements: 23

Witnesses: 23

Court order curing deficiencies: 23

Survivorship: 23

Lapsed Gifts: 23

Intestate Disposition 25

Intestacy 25

Partial Intestacy 25

Mental capacity for disposition 26

Minors 26

People lacking mental capacity 26

Proprietary Estoppel 27

Requirements – “modern approach”: Clarke v Johnson 27

Unjust Enrichment 28

Requirements (Clarke v Johnson): 28

Remedies 29

Equitable damages vs. injunction/specific performance 29

A. Building/fence encroaching on land/airspace (Property Law Act, 36) 29

B. Any other situation: injunction, unless… (Shelfer Test) 🡪 Kelsen 29

C. Unjust enrichment 29

D. Proprietary estoppel 29

Leases 30

Short-term lease (<3 years) 30

Long term lease (>3 years) 30

Assignment/Sublease/Novation 30

Trusts 31

The Torrens System 32

Torrens Principles: 32

Mirror principle 32

Curtain principle 32

Insurance principle 32

Advantages: 32

Torrens Process 33

The Cadastral Concept 33

Previous Systems: 33

Common law conveyancing: 33

The recording system: 33

Title by registration (Torrens) 34

Effect of Registration 35

What can be registered? 35

Fee Simple 36

Indefeasibility 36

Adverse possession does not affect registered title (LTA 23(3)) 36

Exceptions to indefeasibility - statutory 36

Agricultural Land Commission Act 37

Exceptions to indefeasibility - common law 37

Registration 37

Duplicate Certificate of Title 38

Charges 39

Effect of Registration 39

Charge obtained by fraud: defeasible: LTA s 25.1 39

Ranking of Charges 39

Builder’s Lien 42

Caveat 43

Certificate of Pending Litigation 44

Judgments 45

Mortgages 46

Equitable Mortgages 46

Assurance Fund 47

Unregistered Interests 50

Fraud 54

Fraud against registered owner (forgery) 54

Fraud against holder of unregistered interest 57

In Personam Claims 61

Applications to Register 63

Fee Simple 65

Creation of Fee Simple 65

Types of Fee Simple: 65

Repugnancy 66

The Life Estate 68

Creation of life estate: 68

Rights of a life tenant: 68

Responsibilities of a life tenant: 68

Refrain from Waste 68

Liability for Taxes, Insurance, etc. 68

Waste 70

Voluntary waste: 70

Equitable waste: 70

Co-Ownership – Concurrent Estates 72

Four Unities 72

Tenants in common 72

Joint tenants (with right of survivorship) 72

Aboriginal Title 74

Basic Principles 74

Aboriginal Rights 74

Aboriginal Title 75

Features of Aboriginal Title (Delgamuuwk) 75

Test for AT (Delgamuuwk): 76

Duty to consult (Tsilhqo’tin) 77

Extinguishment & Infringement 77

Evidence 77

TABLE OF CASES 79

Airspace

1. Airspace rights belong to owner of land below (Kelsen)
2. Rights extend only to height of ordinary use and enjoyment (Bernstein)
3. Airspace is land, and may be sold, subdivided, etc. (Land Title Act - below)

**Misc. class notes:**

* Air space parcels may project over water (e.g. Vancouver terminal)
* Airspace parcels may be underground
* Things that require easement/licence for use of airspace:
	+ Signs overhanging sidewalks
	+ Booms on cranes above property
	+ Utility lines (generally have statutory easements)

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| Kelsen v Imperial Tobacco Tobacco shop sign; D had permission from owner, not lessee; injunction granted. |
| Airspace rights belong to owner of land below**Shelfer test to determine whether equitable damages should be substituted for an injunction or specific performance:**  1. Is the injury to the plaintiff's legal rights small? (Yes)
2. Is it capable of being estimated in money? (Yes)
3. Can it be adequately compensated by a small money payment? (No)
4. Would it be oppressive to the defendant to grant an injunction? (No - Imperial Tobacco had received good value for its investment in the sign.)

All requirements must be met. Most cases where damages are granted are accidental trespasses.**Lord Cairn’s Act:** Equitable damages (damages that deal with the future and past) can be given in substitution for an injunction. **Laches**: Because the situation had changed (from 4" to 8" encroachment), his delay was not unreasonable 🡪 waiting too long to have right remedied.  |

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| Bernstein v SkyviewsAerial photos; P sues D for trespass; no trespass found. |
| Air space rights extend only to the height necessary for **ordinary use and enjoyment** of the land and the structures on it. Above that height, property owner has no greater right to the airspace than members of the general public. Vague standard. Above this limit, could be **nuisance**. |

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| **Land Title Act** |
| **Air space parcels:*** are land (139)
* do not automatically grant an easement for access to parcel – requires an easement (140)
* can be created by registering plan (141(1))
* may be transferred, leased, mortgaged, etc. (141(2))
* may be subdivided (141(3))
* may be created above highways by the Crown (1) or municipality (2-3).

Rules for depositing an air space plan (143) |

Strata Property

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| **Strata Property Act** |
| * Parcel of land = unit + share of common property/assets (67)
* **Boundary** of the lot is midway through the wall, floor, or ceiling (68(1)) OR as shown on the strata plan (68(2))
* **Implied easements:** Property owners and strata corp. have implied easements through walls to inspect, maintain, repair, and replace structural supports, water, sewage, gas, electric, etc., as necessary (69)
* **Combining lots:** okay w/approval of the strata corp. Unless it violates gov’t regs or interferes with provision of services to other lots, corp must approve (70).
* **Significant changes** to appearance or use of common property requires ¾ vote at AGM (unless necessary for safety) (71)
* **Maintenance** to common property presumptively done by strata corp., unless bylaws assign maintenance to owners (72)
	+ “Limited common property”: e.g. balconies & decks 🡪 common property, but accessible only by one unit owner.
 |

**Misc. Strata Notes:**

* Strata **disputes** can be settled through agreement of the parties, litigation, or arbitration. In 2014, the Civil Resolution Tribunal was created as to provide online negotiation and settlement assistance. Strata owners and corporations in a number of dispute categories can make use of the CRT.
* Governance:
	+ Strata council passes bylaws binding unit holders
	+ Charges fees to unit holders for common expenses
	+ Prepares depreciation report: outlines upcoming major expenses, available for prospective purchasers.
	+ Special assessments: fees for special projects.
* Bylaws can restrict:
	+ Rental conditions (based on age, family status)
	+ Pet ownership (by type, weight, size, etc.)
	+ Noise and behaviours (e.g. smoking)
	+ External appearance standards (curtain colours etc.)
* Remedies for bylaw violations:
	+ Restrict use of common property
	+ Impose fines

Fixtures & Chattels

**Fixtures:** part of the land. Real property. [Interpretation Act s 29]

* Presumed to be included in sale/mortgage.
* *Quicquid plantatur solo, solo credit*: Whatever is attached to the soil becomes part of the soil

**Chattels:** not part of the land. Personal property.

* Presumed to be excluded in sale/mortgage.

**Appurtenances:** things attached to a fixture (e.g. vacuum hose). Have no use without something attached to the property.

* Presumed to be included in sale/mortgage.

**Test**

Stack v Eaton Test (Zellstoff Celgar; CMIC v Rodriguez)

1. Attached only by own weight: presumed to be chattels
2. Attached (even slightly): presumed to be fixtures
3. Presumptions above be rebutted by circumstances which indicate otherwise
* To better enjoy chattels: presumed to be chattels (Davis)
* To better enjoy realty: presumed to be fixtures (Davis)
* Intended to remain affixed for the duration of their reasonable life (e.g. carpets): presumed to be fixtures (La Salle)
1. Intention of owner relevant only so far as it can be presumed from degree/object of annexation
2. Tenants fixtures for the purpose of trade are part of freehold, but can be removed

Examples:

* Carpets in hotels, intended to be used for duration of usable life, are fixtures in spite of small degree of affixation. (La Salle, qtd. in Zellstoff Celgar)
* Bowling alleys are affixed in order that bowling might be more efficiently carried on (Re Davis).

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| Re Davis (1954)Bolted down bowling alleys: **chattels** or fixtures? Chattels. |
| Pre-Stack v Eaton, but uses **object** test:* Where object of affixation is to improve freehold, it’s a fixture.
* Where object of affixation is to better enjoy chattel, it’s a chattel.
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| Zellstoff Celgar v BC (2014)Pulp mill equipment: chattel or **fixture**? Fixtures. |
| Industrial equipment is a fixture because **degree of affixation** is substantial. The **object** of affixation is to better use land as pulp mill. Items are fixtures if they are intended to remain affixed for the duration of their reasonable life. (E.g. carpets are a fixture.) (LaSalle) |

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| CMIC Mortgage Investments Corp v Rodriguez (2010)Tent that is not fixed in cement blocks: **chattels** or fixtures? Chattels. |
| **Evidence** demonstrates that owner **intended** tent to remain as chattel.* Cover-All 1: Bolted to concrete
* Cover-All 2: Not bolted

Backs owners stated **intention**.  |

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| Elitestone v Morris (1997) HLBungalow resting on concrete pillars. Been there since 1945. Chattel or fixture? Neither. |
| “Part and parcel”: chattels that are effectively part of the land 🡪 marginally persuasive in Canada. |

Water Rights

**Summary:**

* **Ownership vested in Crown**
* Ownership and use rights are vested in the Crown. (WSA 5; WPA 3)
* Percolating/ground water is owned by the government.
* Rain, snow owned by Crown as soon as they hit the ground; before that, up for grabs.
* Riparian rights areenforceable to the extent that they do not conflict with licenses (Johnson v Anderson; Steadman v Erickson)
* A party using/diverting water unlawfully cannot collect damages for interference with use (Schillinger v H Williamson Blacktop)
* Pollution is never lawful (Steadman v Erickson Gold Mining Corp.)
* Water licence passes with land when it’s sold (where notice is given to water manager before sale) (WSA 25)

**Riparian Rights:**

**Current riparian rights (indefeasible):**

1. Right of access (to and from the water)
2. Right of drainage (flood-proofing land)
3. Right to undiminished quality of water (unpolluted)

**Permissions (defeasible by licence):**

1. Right to reasonable use of water for domestic purposes
* Use/divert any unrecorded (i.e., unlicenced) water for domestic purposes [WSA 6(3)]
	+ “Domestic Purposes”(Water Sustainability Act s 2):
		- Single family dwellings only
		- Drinking water, food prep, sanitation, fire prevention, water for animals (pets or household use), and irrigation (plot under 1000 m2)
* Other uses require licence [WSA 6(1)]
1. Right to undiminished/unaltered flow for domestic purposes

**Extinguished rights:**

1. Right of ownership of bed (up to midpoint)
* Crown owns beds, no private ownership [LTA 55-56]

**Precedence of licences** (Water Sustainability Act s 22)**:**

1. Date of authorization; then
2. Type of use:
* Domestic;
* Waterworks
* Irrigation
* Mineralized water

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| **Water Sustainability Act** |
| **Domestic use:**6(3) A person is not prohibited from diverting, in accordance with any applicable regulations, and beneficially using unrecorded water(a) from a stream for domestic purpose or for prospecting for a mineral, or(b) from an aquifer for prospecting for a mineral.6(4) A person may, in accordance with the regulations, divert, and **beneficially** use, including store, groundwater from an aquifer for domestic purpose **Other use:*** No diversion of water from streams or aquifers without a license or regulatory authorization (2) or it’s used for fighting a fire (6)
* Water licence passes with land when it’s sold (where notice is given to water manager before sale) (25)

**Licensee rights: 7(1)*** Divert & use water;
* Construct works required to divert water/create hydro;
* Make changes in the stream necessary for the diversion;
* Construct fences/screens to conserve fish or wildlife

**Precedence of licences: 22**1. Date of authorization; then
2. Type of use:
	1. domestic;
	2. waterworks
	3. irrigation
	4. mineralized water

Where both date and use are the same, precedence is equal.Property and use rights of streams, aquifers, and groundwater belong to the government, except where authorizations for use have been given. (WSA 5; WPA 3) |

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| Johnson v Anderson [1937] BCSC Unlawful stream diversion interferes w/unlicensed riparian right |
| **Ratio:** Common law riparian rights stand to the extent that they do not conflict with licences.* “Unless and until records or licenses have been granted for all the water flowing by or through the plaintiff’s land, which I find is not the case here, the plaintiff still has the right to use the water flowing by or through his land subject of course to any rights granted.”

Facts:* D diverted the flow of a stream that flowed through P’s property.
* P used water from stream for domestic and stock-watering purposes.
* P sought damages, an order for the demolition of the works diverting the flow, and an injunction.
* P had no water license. The D had a license, but it did not authorize the diversion in question.

Issues: Does the traditional riparian right to make use of the water flowing by a property owner’s land in a way that does not interfere with recorded rights of other parties still hold? If it does, did the D’s actions interfere with P’s right to use the stream?Decision: For the PRemedy: Order to demolish dam (=positive injunction) + prohibit it from being rebuilt (=negative injunction) granted, no damages.Reasoning: The D had no license to divert the flow of the stream, and, as such, the P’s riparian rights hold.  |

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| Schillinger v H Williamson Blacktop [1977] BCCAP using creek illegally. D pollutes creek. No remedy.  |
| Ratio1. A party using water unlawfully cannot collect damages for the pollution of that water. 2. Siltation is never lawful.Facts* P used Barre creek for commercial fish cultivation.
* P has a water use licence, but it only authorized use of Hairsine Creek (a tributary of Barre).
* D (upstream from P) deposited silt into the water, which killed off P’s fish.
* P brings negligence and nuisance suit against D.
* P’s licence did not cover the location of his diversion. Riparian owners are entitled to use water, but not divert it.
* The siltation was a consequence of P’s diversion of Barres creek, which was unlawful under the Water Act.

Decision: P is not entitled to damages. |

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| Steadman v Erickson Gold Mining Corp [1989] BCCAP uses water domestically. D pollutes water. Remedy. |
| 1. Riparian rights are enforceable, unless the rights of a licencee supersede them.2. You cannot contaminate water. Facts:* P’s home was supplied with water from a spring-fed dugout, which was lawful.
* P did not have a licence.
* D built a road uphill from P, the construction of which caused silt and mud to contaminate the water system.
* P operated a diamond saw commercially, but only used a bit of the water so okay.

Action: P sued for damagesDecision: D found liable for contamination of the water* Groundwater: **“The authorities are clear that you can use ground water even to the extent that it causes your neighbour’s well to go dry, but you cannot contaminate it.”**
* Surface water: P’s riparian right is enforceable (though can be superseded by a licence).

**NB**: once WSA comes into affect, you will need a licence to dig a well (unless domestic user).  |

Accretion and Erosion

**Natural boundary**: wavy line on plan

**Fixed boundary**: straight line on plan

**Doctrine of accretion** (Theosophy):

* If accretion/erosion is “gradual and imperceptible,” rights given/taken away to/from riparian owner.
	+ Imperceptibility measured on a day-to-day scale. (Theosophy)
* Applies to both natural and manmade changes, except intentional changes made by the claimant (Theosophy)
* To benefit from accretion, owner must own “wavy line” property as opposed to “fixed strip” property (as drawn on plan in LTO).
* The doctrine can be overridden by a contractual exclusion, but that exclusion must be explicit.
* Sudden and perceptible erosion does not shift property line in favour of Crown (Yukon Gold v Boyle Concessions Ltd. [1916] BCCA)
* Where the Crown reserves a strip of foreshore, accretion goes to Crown unless grant specifies to the contrary (Monashee Enterprises v BC (1981) BCCA)
* Raising of river bed = vertical process; rights retained by Crown (BC (AG) v Neilsen, [1956] SCR)

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| Southern Centre of Theosophy v South Australia [1982]Lake boundaries move. Do property lines?Property boundaries are tethered to high water mark. |
| Facts:* P’s land abutted the shore of Lake George when it was purchased in 1911.
* The lake’s high water mark receded by 20 acres over the years.
* The P gets declaration that the property boundary is tethered to the high water mark.
* P = perpetual leaseholder.

Doctrine of accretion: Where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water. Where these changes are gradual and imperceptible, the law considers the title to the land as applicable to the land as it may be so changed from time to time.Decision: For the PRemedy: Declaration that property boundary is tethered to high water mark.Misc. Findings:* The doctrine can apply to inland lakes;
* There is no reason why the doctrine cannot apply to land leased by the Crown;
* The doctrine can be overridden by a contractual exclusion, but that exclusion must be explicit.
* The doctrine applies to all natural (fluvial or wind action) and man-made changes to the high water mark (except those brought about by deliberate actions of the claimant).
* What is ‘imperceptible’ can be subject to dispute; measured on a day-to-day scale, not changes over long periods of time.
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Support

**Lateral support:**

* **Natural state:** absolute liability (no need to show negligence)
* **Improved:** onus on P to show negligence (land would not have collapsed w/o removal of lateral support (Gillies v Bortoluzzi)
	+ **Improved** includes soil brought onto the land to raise it (Welsh v Marentette)

**Vertical support**:

* **Natural or Improved**: is an absolute liability tort regardless of whether the property is improved or in natural state.
* Requires **authorization**; otherwise, trespass
* Discharge of water that undermines vertical support = trespass (Engemoen Holdings v 100 Mile House – failure to maintain pipe causes leak, undermines support)

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| Gillies v Bortoluzzi, 1953, Manitoba |
| If **developed**, must show that land would have subsided regardless of extra weight of structure.Facts:* D (= two parties) excavated basement next to building P leased.
* Following the excavation, the wall of P’s store parallel to site collapsed.
* P sued for damages, claiming that the excavation was done negligently.
* D says it was the P’s own negligence which led to the damages.
* J finds that D dug under the bottom of Ps wall, thereby undermining both its **lateral and vertical** support.

Decision: For the P; damages assessed.Ratio: If not in natural state, must show that land would have subsided regardless of extra weight of structure. |

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| Rytter v Schmitz |
| Removal of lateral support: strict liabilityRemoval of **vertical** support: absolute liability* D excavated next to P’s building, which caused the building to partially collapse.
* D excavated over property line and didn’t underpin as he went.
* P had right to vertical support. Damages assessed.
 |

Equity

# Equitable Interests

* The interests that can be created in equity are the same as those that can be created at common law.
* **Trusts**
* **Unregistered interests** (e.g. before title is registered, but after document of transfer is signed)
* **Donee of an imperfect gift**
* **Proprietary Estoppel**
* **Restrictive Covenant**

# Equitable Maxims

* Equity follows the law (as in Zwicker)
* Equity will not assist a volunteer (MacLeod; Ross)
* Where equities are equal the law prevails
* Parties must come to equity with clean hands 🡪 unconscionability
* Nemo dat quod non habet: no one can transfer a better title in property than he or she has.
* Equity will not force a donor to complete that which is incomplete (MacLeod)
* Equity regards as done that which ought to be done (Ross v Ross; )
* Equity looks to the substance rather than the form (Ross v Ross

Restraints on Alienation

## General policy of the common law

Interests in land are freely alienable (i.e. may be sold/given away).

## Requirements for freedom of alienation/disposition

1. Owner must have technical freedom of disposition.
2. Transferor must not have the power to impose excessive restraints on the freedom of alienation of transferee.
3. The mechanics of transfer must be as simple as possible.

**Direct restraints: PROHIBITED** (One exception: a lessor may restrain a lessee from alienating or disposing his leasehold).

**Indirect restraints: PERMITTED**

* **Trusts**: Cannot dispose of property held in trust without permission from trust beneficiary. To do so is breach of trust.
* **Future interests** (e.g. life estate remainderman)
	+ Rule against perpetuities: max. 80 years of granting rights
* **Certificate of pending litigation** (“lis pendens”): Signals that litigant may own the property. Purchase is subject to outcome of litigation.
* **Caveat**: Caveator is a warning that registrant intends to claim interest in property.
* **Land (Spouse Protection) Act**: Allows spouses to put notation on title requiring their permission for disposition of land.
* **WESA**: Prevents disinheritance of spouse/child, except with permission of court
* **Family Law Act**:
	+ Provides for allocation of resources in case of divorce
	+ Lis pendens will be filed on title to notify of pending litigation

Crown Grant

* Document that changes public land to private.
	+ Usually fee simple, but could be other estate.
	+ May be subject to land use requirements (e.g. must be used as a ski hill)
* Usually, owner of the property gets surface rights (access rights, agriculture and timber rights, development rights, and air rights), and the government gets riparian rights and mineral rights
* Initial crown grant must be registered; subsequent transfers do not need to be (but should).

## Rights reserved [Land Act 50(1)(a)]:

1. **Resume any part of the land** necessary for making roads, canals, bridges or other public works.
* Not more than 1/20 part of the whole land
* No right to resumption on which a building or garden exists
* No compensation
1. **Subsurface rights:** Enter, raise, and get out of land any geothermal resources, minerals, coal, petroleum, and gas or gases.
* Compensation
1. **Water** + carrying water through land as required for mining or agricultural purposes in the vicinity.
* Compensation
1. **Public works materials:** Gravel, sand, stone, lime, timber or other material that may be required in the construction, maintenance or repair of a road, ferry, bridge or other public work
* No compensation

(b) No subsurface rights conveyed.

(c) If **highway** through land at time of grant, no rights.

**NB: Crown can alter above terms by expressly stating it is doing so on grant [LA (3) & (4)], but will otherwise reserve rights described in Act.**

Sale of Land

# 1. Contract of purchase and sale

* + Enforceability requirements (makes xfer enforceable against vendor): Law and Equity Act 59(3):
		1. In **writing & signed** by party to be charged (incl. **3 Ps:** property, price, and parties)OR [a]
		2. **Part performance:** Party to be charged has done an act or acquiesced to an act that indicates that a contract has been made (e.g. payment/acceptance of payment[4]), OR [b]
		3. **Reliance:** Party making charge has **relied** on it & only equitable resolution (w/regard to both parties’ interests) is to enforce [c]

🡪 MAXIM: “Equity will not allow a statute to be used as an instrument of fraud” (hence relaxation of written/signed requirements)

🡪 MAXIM: “Where equities are equal, first in time prevails”

* + Can include:
		1. **Deposit** (non-refundable; deducted from purchase price)
		2. **Liquidated damages clause** (damages in excess of deposit for breach)
		3. **Conditions**: inspection, solicitor’s approval, financing, etc.
		4. **Closing date**
	+ May be electronically written and signed
	+ Terms of art (e.g. “grant” or “contract of purchase or sale”) [PLA 15] and sealing are not necessary [PLA 16]

# 2. Completion (“closing”)

* + Vendor delivers signed registrable transfer instrument (form A) to buyer (PLA 4-5 requires delivery).
		1. Title must be cleared of all charges by vendor (unless otherwise agreed upon)
		2. To transfer title, transferor must register title. [PLA 6]
	+ Buyer pays vendor in full.

# 3. Registration of transfer (+ mortgage to finance purchase)

* + Registration is not compulsory, but if you don’t register, the instrument doesn’t confer legal or equitable interests [LTA 20]
		1. Unregistered interest is only good against the person making the transfer, but not the world
		2. Vulnerable to BFPFVWON (seller would be liable for fraud/breach of contract).
	+ “First in time” starts upon application to register. [LTA 22]
	+ Once registered, the purchaser gets a **certificate of indefeasible title** from the LTO.

Inter Vivos Gifts

**NB: In the absence of proof, equity applies a rebuttable presumption that the transferor intended to create a trust, not to give property away. [19(3) Property Law Act] – exception: spouses, kids**

**Requirements:**

* Intention to donate immediately, not on death (Zwicker)
* Sufficient act of delivery to the donee (PLA 5)
	+ Registrable instrument of transfer (Form A) [LTA 5(1)]
	+ Unregistered instrument is enforceable against the person making it, but not against the whole world [LTA 20(1)]
* Acceptance by the donee.
* The donor has the right to revoke the gift prior to completion
* NB: s 59 does not apply.
* Check for proprietary estoppel!

**Gifts on Death:**

* Must follow WESA. Equity will not enforce a gift made on death unless it complies with WESA (“equity follows the law”) (Zwicker)

**Donatio Mortis Cause (DMC):** Deathbed gift

* “I won’t need \_\_\_\_\_\_ anymore”
* Requirements:
	+ Intention to make gift in contemplation of imminent death
	+ Sufficient delivery to donee
	+ Death as contemplated (i.e., of same cause)
* Courts view DMC with suspicion.
* If DMC is found to be valid, it will be given effect over will

Incomplete Gifts

* Retaining possession of a deed will not render it inoperative, unless there is strong evidence that the transferor’s intention was to do so (Ross)
* An inter vivos gift cannot take effect on death. If a person wants to give a gift upon their own death, they must make a will (Zwicker)
* Where there is evidence that a transferor did not intend to complete gift, court will not give effect to it (MacLeod)

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| Ross v Ross (NB: pre-Torrens – PLA requires delivery) |
| Maxims:Equity looks to the intentEquity regards as done that which ought to be done.Equity looks to the substance (intent) rather than the form (delivery).Equity may complete an incomplete gift. Facts:Deed signed, witnessed, and attested to, but not delivered. Discovered upon death.Reasoning:Deed held to be valid on the basis of intention to give immediate gift, but retain life estate:* Close relationship w/grandson
* Her wish to remain in house until death
* Kept it w/important documents
* Opportunity to change her mind

Ratio: Retaining possession of a deed will not render it inoperative, unless there is strong evidence that the transferor’s intention was to do so.  |

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| Zwicker v Dorey |
| Gift to take effect on death; not in a will.An inter vivos gift cannot take effect on death. If a person wants to give a gift upon their own death, they must make a **will**.Facts: Mr. Zwicker conveyed land to Dorey, but included clause: “not to be recorded until after my passing away.” Later conveyed same land to himself & his wife. Gift invalid as a result. |

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| MacLeod v Montgomery – POST-Torrens – fussier with registration |
| Gives transfer form but doesn’t deposit duplicateDuplicate certificate of title freezes title.Where there is evidence that the D did not intend to complete a gift, the court will not give effect to it.Maxims:* Equity will not assist a volunteer.
* There is no equity to perfect an imperfect gift (i.e., without intent).
* Donor must do what can be done (“everything that could be done to perfect the gift”)

Facts:D gives P transfer form. D can’t register because P’s solicitor has duplicate certificate of title, which prevents transfers/registration on title. Court won’t enforce transfer, because there is evidence D did not intend to complete gift. Didn’t instruct solicitor to give P duplicate certificate. |

Testate Disposition

* Will **speaks at death**, not date of execution
* **Disinheritance** of a spouse or child is subject to judicial review: WESA ss 60-72.
* Changes by “**codicil**” 🡪 document executed as a will that changes 1 provision of a will
* **Revocable** during testator’s lifetime.
* If there are multiple wills, **last one takes effect**.
* “To X, his heirs” creates fee simple
* If testamentary gift lapses because of death of donee, it will pass according to WESA, s 46(1)(b)

## Validity Requirements:

WESA s 37-39

* In writing [37(1)(a)]
* Signed at the end by the will-maker [37(1)(b)] or signed elsewhere in such a way that intent of will-maker is clear [39(1)]
* Signed by 2+ witnesses [37(1)(c)]
* OR, the court orders it to be effective under s 58 [37(2)(a)]

## Witnesses:

WESA s 40

* Witness must be 19+ [40(1)]
* Witnesses may take a gift, but gift may be void under s 43 [40(2)]
* Will is not invalidated by incapacity of witness [40(3)]

## Court order curing deficiencies:

WESA s 58

* If a court determines that a record represents the testamentary intentions of deceased/ intention to revoke/alter of will [58(2)], it may be declared to be a will under 58(3)
* Record incl. docs that are electronic & can be read by a person [58(1)]

## Survivorship:

WESA s 162

* Right of survivorship 🡪 share of property held by deceased joint tenant passes automatically to other joint tenant(s). Does not go to probate.
* Tenants in common do not enjoy right of survivorship. Portion of property held by deceased tenant passes in accordance with will.

## Lapsed Gifts:

WESA s 46

(1) If a gift in a will cannot take effect for **any reason**, including because a beneficiary dies before the will-maker, the property that is the subject of the gift must, **subject to a contrary intention appearing in the will**, be distributed according to the following **priorities**:

* To the alternative beneficiary of the gift, if any, named or described by the will-maker
* If the beneficiary was a brother, sister or descendant of the will-maker, to their descendants
* To the surviving residuary beneficiaries, if any, named in the will, in proportion to their interests.

 (2) Applies whether the beneficiary's death occurs before or after the will is made.

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| Tottrup v Ottewell Note: Result legislated by WESA, s 46(1)(b) |
| **Facts** | Will beneficiary dies before testator; who gets estate?* Frank left the residue of his estate to his twin Fred: “To Fred, to hold unto him, his heirs, executors and administrators, absolutely and forever”.
* Fred died before Frank. Frank’s testators proceeded with dividing up the estate as if he died intestate. Fred’s only daughter (his heir apparent) sued Frank’s estate.
* Argument hinges on wording:
	+ “Fred and his heirs” would pass fee simple and gift would fail
		- Why? Because intention is to create a personal gift to Fred, not to his heirs
	+ “Fred or his heirs” would make Fred’s heirs alternative beneficiaries
 |
| **Issues** | Who is entitled to the estate? |
| **Decision** | The gift lapsed and passed back into the residue of the estate. |
| **Reasons** | * Daughter argues that the comma should be read as “or,” not “and”
* Court finds that it should be read as “and,” not “or.”
* As a result, the gift lapses, falls into the residue of Frank’s estate, and passes according to rules of partial intestacy.
 |
| **Ratio** | 1. “To X, his heirs” creates fee simple2. If a fee simple lapses because of death of donee, it will pass into residue of estate.3. Result legislated by WESA s 46 |

Intestate Disposition

## Intestacy

* Property disposed of in accordance with WESA (part 3)
* If no family member can be found:
	+ Real property **escheats**
	+ Personal property becomes **bona vacantia**.
	+ Both mean that they are returned to the Crown.
* Financial assets like pensions and life insurance can be disposed of by designating a beneficiary. This avoids probate (in the case of a will) and administration (in the case of intestacy).

## Partial Intestacy

* Some property disposed of by will
* Some property disposed of in accordance with WESA

Mental capacity for disposition

## Minors

People under the age of 19

* Minors may take title to property. Ordinarily, property would be held by a trustee.
* Inter vivos transfers are voidable – subject to review at 19.
* 16+ can make will [WESA 36]
* 14+ to witness & testify to a will (at time of testifying) [Evidence Act]

## People lacking mental capacity

* If at the time of making the will (or inter vivos disposition), the maker lacked mental capacity, the will is void.
* May require somebody to act on their behalf (a substitute decision-maker):
	+ If no one is available the public appoints a trustee (Public Guardian and Trustee)
	+ “Committee of the estate/person” (Patients Property Act)
		- Court appointed
		- Cares for property/medical decisions
	+ “Enduring power of attorney” (Power of Attorney Act)
		- Authorizing an agent to act for a person despite intervening loss of mental capacity
	+ “Representation agreement”/“living will” (Representation Agreement Act)
		- Authorizing management of a person’s financial affairs (excluding real estate) and medical care in advance of incapacity
	+ “Adult Guardian” (Adult Guardianship Act)
		- Court appointment of adult guardian for a mentally disordered person
		- Prevents elder abuse and neglect
	+ “Public Guardian and Trustee”
		- Appointed if no one else is available.

Proprietary Estoppel

**Can be used as a sword.**

## Requirements – “modern approach”: Clarke v Johnson

1. Owner of land induces, encourages, or allows claimant to believe that he has/will have some right/benefit over land.
2. In reliance on this belief, claimant acts to his detriment to the knowledgeof the owner.
	1. Includes expenditures and countervailing benefits
	2. May be express or inferred
3. Owner seeks to take unconscionable advantage of claimant by denying him the right or benefit.

The court has broad discretion to fashion an appropriate remedy.

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| Clarke v Johnson |
| Clarke owns camp. Johnson uses & maintains camp over 20+ years. Clarke seeks to evict Johnson following a dispute about children’s access to camp. Proprietary estoppelFinds proprietary estoppel on the basis of test above: 1. The appellant **induced** and encouraged the respondent to believe he would own the camp by **acquiescing** in his use of it.
2. In **reliance**, the respondent contributed significantly to the construction, maintenance, and improvement of the camp with the **knowledge** and consent of the appellant.
3. Denying the respondent use of the camp would be **unconscionable** because he invested significant emotional and financial resources in the property in belief that his usage would continue.
 |

Unjust Enrichment

## Requirements (Clarke v Johnson):

1. Enrichment
2. Corresponding deprivation
3. Absence of a juristic reason for enrichment
	1. “No reason in law or justice for the defendant’s retention of the benefit conferred by the plaintiff, making its retention ‘unjust’ in the circumstances of the case.”
	2. May take into account parties’ expectations.

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| Clarke v Johnson |
| Unjust enrichmentClark owns camp. Johnson uses & maintains camp over 20+ years. Clark seeks to evict Johnson following a dispute about children’s access to camp. Finds unjust enrichment on the basis of test above: 1. Enrichment: Johnson made significant contributions to the camp.
2. Deprivation: The benefit of using the camp did not offset contributions.
3. Absence of juristic reason for enrichment: appellant offered no such reason.
 |

Remedies

# Equitable damages vs. injunction/specific performance

**Lord Cairn’s Act:** Equitable damages (damages that deal with the future and past) can be given in substitution for an injunction.

## A. Building/fence encroaching on land/airspace (Property Law Act, 36)

If party A builds structure/fence built on party B’s land, the Court may:

* Grant an easement to A and compensation to B (for a period to be determined by the court);
* Vest title to the encroached land to A and compensation to B
* Order that A removes the encroachment/enclosure

## B. Any other situation: injunction, unless… (Shelfer Test) 🡪 Kelsen

1. Is the **injury** to the plaintiff's legal rights **small**?
2. Is it capable of being **estimated in money**?
3. Can it be adequately compensated by a **small money payment**?
4. Would it be **oppressive** to the defendant to grant an injunction? (No - Imperial Tobacco had received good value for its investment in the sign.)

All requirements must be met. Most cases where damages are granted are accidental trespasses.

## C. Unjust enrichment

1. First, consider monetary award.
2. If monetary award is inappropriate or insufficient, proprietary award (incl. licence, fee simple, constructive trust, etc.) is available.

## D. Proprietary estoppel

1. Equitable remedies are **flexible**, and should be chosen to “respond appropriately to the substance of the problem put before [the court].” (Clarke v Johnson)
2. “The court must look at the circumstances in each case to decide in what way the **equity can be satisfied**.” (Clarke v Johnson)
3. Award should be **minimally intrusive**.

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| Clarke v Johnson |
| Remedy for proprietary estoppel* Reimbursement would be inadequate b/c of **emotional** attachment to camp.
* Constructive trust reflects **legitimate expectations** of parties
* Minimally intrusive award.
* Awarded a personal license, which would not be effective if the owner sold the property.
 |

Leases

# Short-term lease (<3 years)

* Cannot be registered
* If there is actual occupation, not vulnerable to BFPFVWON (LTA 20(3))
* Does not need to be in writing (Law and Equity Act s 59 (2))

# Long term lease (>3 years)

* Landlord must deliver a registrable instrument (PLA 5(2))
* If unregistered, vulnerable to BFPFV (Serving for Success)
	+ To be given effect after sale, purchaser must have:
		- Notice
		- Dishonesty + immorality (i.e. deliberately misleading vendor about intent)
	+ Example: Serving for Success: lease extinguished by purchaser w/notice

# Assignment/Sublease/Novation

**Assignment**

* Transfer of entire interest
* Lease usually stipulates that landlord’s consent is required, but will not be unreasonably withheld. Otherwise, consent is not required 🡪 freedom of alienability.
* After assignment, the original tenant is still ultimately responsible for payment of rent because of their contract w/landlord.

**Sub-lease**

* Head-lessee signs lease with landlord, and in turn signs lease with sub-lessee.
* Consent of landlord is required only if the lease requires it.

**Novation**

* Original lease is cancelled in its entirety with consent of both parties.

Trusts

* Trustee can register title. “In trust” noted on title. (LTA 180 (3))
* Trust instrument number also noted on title. Instrument held by LTO.
* Trustee can be compelled to register trust on title.
* This protects trustees from BFP

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| McRae v McRae Estate |
| **Facts** | Trust notation removed from title on transfer. Do beneficiaries have rights?In 1924, Mr. Fraser died and left property to his wife Harriet, on trust for herself for life, remainder to their children, John, Catherine and Farquhar. Mrs. Fraser was registered as fee simple owner, with an “on trust” notation on the title. In 1949, Mrs. Fraser transferred the property to Farquhar for nominal consideration, and Farquhar was registered as fee simple owner without any trust notation. He died in 1989, leaving his property to his wife and his siblings. In 1990, John and Catherine found out about the terms of their father’s will and commenced proceedings. |
| **Issues** | Do John and Catherine have in personam rights against Farquhar? |
| **Decision** | Yes |
| **Reasons** | Farquhar is not a BFPFVWON because “in trust” was on the title. He had constructive notice, and probably had actual knowledge too. Harriet and Farquhar committed a breach of truth, and the transfer from Harriet to Farquhar should not have occurred.  |
| **Ratio** | A beneficiary has in personam rights against a trustee, even if the trust is unregistered. Even if a trust is not registered on the title, the RO is bound by the trust.  |

**The Torrens System**

# Torrens Principles:

## Mirror principle

* The certificate of title mirrors accurately and completely the state of the title and interests – LTA s 29; note exceptions in 23(2)
* If something isn’t on the title, don’t worry about it
* Exceptions:
* Surrey v Dukart: register of instruments, not interests

## Curtain principle

* All necessary information is on the certificate of title
	+ You don’t have to look behind the curtain, the title tells you the whole story
* Registered owners get a certificate of indefeasible title
	+ But, this only applies to bona fide purchasers for value. Registration by fraud is **defeasible**

## Insurance principle

* An **assurance fund** compensates you if there’s an accident in the Torrens System – LTA, ss 294.1-294.9
	+ Only applies to fee simple holders
* Compensation is provided for fraud and mistake
* An innocent victim can apply to recover from the insurance fund

## Advantages:

1. **Equitable interests not vulnerable to BFPFVWON**
	* Registered interests = constructive notice
* Everyone has right to register their interest (except leases, which aren’t vulnerable)
1. **Title by registration/certainty of title**
* Not vulnerable to defects = security of tenure
* Improvement from system of deeds
* In deed systems, registered charge holders were vulnerable to nemo dat
	+ - If there was a “break in the chain” the registered owner would have nothing
1. **Simplification of transfer**
* Livery of seisen is ridiculous
* Deeds are no longer necessary (they are replaced by “agreements of transfer and sale”)
	+ - “Transferring” as opposed to “conveyancing”
		- There are “short forms” which are very straightforward
1. **Efficiency**
* Searching for the title is no longer necessary
1. **Fairness and justice**
* Unregistered interests are not enforced (except in equity)
1. **Land can be used as collateral security for credit (e.g. mortgages)**
* A duplicate indefeasible title cannot be issued if the title is subject to either a registered mortgage or an agreement for sale

# Torrens Process

* After closing date, the purchaser applies to the LTO for registration
* The purchaser gets a **certificate of indefeasible title** from the Registrar
	+ This certificate is from the province, as opposed to the vendor
		- Each registered owners essentially gets a new Crown Grant
	+ Any missing links/documents are irrelevant
* The **title** includes:
	+ The registered owner(s)
	+ Charges – interests less than a fee simple (mortgages, life estates, easements, restrictive covenants)
		- Don’t get indefeasibility, but give notice to the world of their interests
	+ Are ranked chronologically by order of the applications to register
		- It’s important to register early
* Certificate holder is the registered owner and has the fee simple

## The Cadastral Concept

* Digital records
* Each parcel of land has a separate title (and a separate parcel identifier number) and can have separate ownership
* Title gives dimensions of lot
	+ Not guaranteed/indefeasible (LTA 23(2)) (Winrob v Street)

# Previous Systems:

## Common law conveyancing:

* + Expensive because necessary work had to be repeated each time a transfer occurred.
	+ Transfers were delayed while root of title was established.
	+ Subject to defects in prior transactions.
	+ No central place to hold all deeds. Left with legal titleholder. As a result, could be lost.
	+ Nemo dat

## The recording system:

* + No scrutiny of deeds by staff, so nemo date continues.
	+ Requires title insurance.
	+ However, solves issue of holding documents centrally.

## Title by registration (Torrens)

* Originally, registration of title was a 2 step process:
	+ Registration of absolute fee: title was registered, but subject to a 7 year holding period during which title could be disputed.
	+ Registration of indefeasible fee: if absolute fee was not disputed, title would become indefeasible.
* Absolute fee no longer exists

Effect of Registration

# What can be registered?

Registration is for interests in land, not anything that merely affects title (Kessler)

Aboriginal title cannot be registered (Skeetchestn)

* Legal estates
* Equitable interests
* Trusts
	+ Trustee can register title. “In trust” noted on title. (LTA 180 (3))
	+ Beneficial interests/other particulars of trust are not registered on the title.
	+ Trust instrument number also noted on title. Instrument held by LTO.
	+ Trustee can be compelled to register trust on title.
	+ This protects trustees from BFPVWON
* Caveats
* Judgments
* Foreclosures
* ALR designation
* Land (Spouse) Protection Act/Family Law Act, s 99 claim by spouse on family property
* “Green Zone” designation
* Heritage designation
* Builder’s lien

What cannot be registered?

* Personal licenses
	+ Exclusive or shared occupation
	+ No interest in property
	+ Personal, not transferrable.
* Short term lease
* Aboriginal Title (Skeetchestn)
* Zoning bylaws (Kessler)
* Property taxes (are they up to date?)
* Equitable mortgages/lien (LTA s 33)
	+ There is a notation on title, because of withdrawal of duplicate indefeasible title. However, mortgage is not registered.
	+ No right to file caveat or CPL, because you must be claiming a registrable interest in the property to do so (Skeetchestn)
* Particulars of trust (beyond trustee, “in trust”, reference to trust instrument number)
* Federal Crown Lands (First Nations Reserves) 🡪 not part of the Torrens system, in spite of the fact that Crown is trustee

# Fee Simple

* Fee simple owner = owner of land surface. (LTA 179 (1))
* Owner of land above or below surface can only register as a charge. (LTA 179 (1))
	+ Exceptions:
		- Strata lots are registrable if they comply with SPA (Strata Property Act 239(2))
		- Airspace parcels are registrable (LTA 141)

## Indefeasibility

**Fee simple is guaranteed/indefeasible** (LTA s 23(2))

* Indefeasibility granted to BFPFV on registration (regardless of whether instrument is valid/void) (25.1(2))
* Crown grants must be registered, unless issued before April 6, 1968 (LTA 54)
	+ NB: Once land is under the register, no one ever has to register again
* Indefeasibility means that registered owner is not subject to defects in history of title (Creelman v HBC: the fact that HBC took its title contrary to its rules of incorporation does not affect its title once issued.)

**Registration of a volunteer does not confer indefeasibility:** (LTA 25.1(2)(b))

* This is debatable – no cases have dealt with it yet

### Adverse possession does not affect registered title (LTA 23(3))

* Exception: initial registration may be affected by adverse possession: LTA 23(4)
* Exception: if a squatter can demonstrate adverse possession existed for 20 years before the first registration (LTA 23(4))
* Exception: if a property has never been registered and a squatter can demonstrate possession for 20 years before July 1, 1975 (LTA s 28)
* True owner can bring action for possession at any time (Limitation Act s 3(4))
* Adverse possession doesn’t exist except as specifically provided for by statute (Limitation Act s 28)
* Encroachment is a form of adverse possession that may yield rights in rem: see remedies (PLA 36)

## Exceptions to indefeasibility - statutory

**Land Title Act** (LTA 23(2))

1. Crown Grant
2. Taxes
* Provincial and federal government taxes can be a lien and charge against the title
* Unpaid taxes can be attached to property even if they don’t appear on the title
* Taxes run with the land (third party becomes liable for tax debt)
1. Municipal charge, rate or assessment
* Property tax debt
	+ Can inquire at City Hall about the state of property tax
	+ If the tax hasn’t been paid in 3 years, the city will take steps to sell (e.g. New West)
* Local improvement charge (for sidewalks, curbs, etc.)
1. Short term leases
* Original term of lease including options to renew less than or equal to 3 years + actual occupation
1. Highway or public right of way, watercourse, right of water or other public easement
* Easements exist across everyone’s property so that utility companies can come in and inspect and do their work (sewers, telephone lines, etc.)
* Can’t build on top of sewer mains, because the government will occasionally require access.
1. Right of expropriation or to an escheat under an Act
2. Certain charges registered before or after registration of purchaser’s title
* Most common: builders lien
1. Correction of “wrong boundaries”
* Boundaries are not guaranteed. Where boundaries are proven to be incorrect, the LTO may correct them. Title is subject to this correction.
* Conveyancers are not responsible for verifying dimensions unless special instructions are given and accepted. Purchasers should engage a surveyor to verify lot lines (Winrob v Street)
1. Fraud/forgery

**Crown Right of Resumption:** (LTA 50(1)(a))

* Crown can take up to 1/20th without compensation for road construction, other public works.
* Crown grant transfers surface rights
* Crown grant reserves to the Crown subsurface rights, water rights.

### Agricultural Land Commission Act

* Cannot use ALR land for non-farm purposes (20)(1)
* Soil removal and replacement is non-farm purpose (20)(2)
* Cannot subdivide ALR land unless permitted in the act (21)(1)
* Can apply to commission to subdivide land (21)(2)
* If a parcel of land contains both ALR and non-ALR land, the regulations apply only to the ALR portion (28)
* ALR does not need to be recorded on title if issued before June 29, 1973. After that date, ALR must be registered on title. (60)

## Exceptions to indefeasibility - common law

* Unregistered personal claim (like in Clark) – *in personam* only
* Bylaws (Kessler)

# Registration

**Crown grant must be registered**

* This is the only statute that compels registration; otherwise, owner can decide whether they want to register or not. (Land Act s 54)

**Procedure for filing application**

* Ensure that all the documents supporting the application are attested to and executed as required by (LTA s 41-50)
* File a completed property transfer tax form
* Pay fees to LTO
* Once these requirements are met, the application is received by LTA (stamped with date and time of receipt and assigned a serial number). It then goes to the registrar for scrutiny.

**Procedure for registering title** (LTA 169 (1))

The registrar must register the title if satisfied that:

1. The boundaries of the land are sufficiently defined by the description or plan on record/provided by the applicant
2. A good safe holding and marketable title in fee simple has been established by the applicant.
3. “Safe holding” means a title conferring possession that is safe from attack and cannot be displaced
4. “Marketable” means a title that is freely alienable, and not so defective that a reasonable purchaser could refuse it.

**Effect of Registration**

* Registration is “conclusive evidence at law and in equity” that the person named is “indefeasibly entitled to an estate in fee simple.” (LTA S 23(2))

**Date of Registration**

* Registration takes effect from date/time application was received (LTA s 37)

**Priority of Registration**

* Date application was received (LTA 153)

# Duplicate Certificate of Title

* If an application for a mortgage/agreement for sale is received when duplicate is withdrawn, duplicate must be returned before it will be registered (LTA 195)
* When duplicate is withdrawn, the title is frozen – nothing will be registered on it.
* Criteria for issuance (LTA 176)
	+ (1) Registrar must issue duplicate upon application, unless the title is subject to either a registered mortgage or agreement for sale.
	+ (2) Contains all the information in the register relating to the land in question, including all conditions, exceptions, reservation, charges, liens, or other interests to which the title may be subject.

# Charges

**Charge means an estate or interest in land less than the fee simple** (LTA s 1).

### Effect of Registration

* LTA s 26: Charges “deemed” valid. Interpreted in Credit Foncier: this creates a rebuttable presumption that the owner of the charge is entitled to an interest in property.
	+ Charge is scrutinized, but not guaranteed by LTO.
	+ Registration does not confer indefeasibility.
	+ Nemo dat applies to anyone who is taking the charge. Registered charge may be defeated by past defects.
* Notation on title is not guaranteed to be accurate. Only the content of the instrument to which notation refers is relevant (Dukart v Surrey)
* Gives notice of existence of contents of interests creating a charge to every person dealing with the title to the land (LTA s 27)

### Charge obtained by fraud: defeasible: LTA s 25.1

* Nemo dat applies: registration of void instruments do not confer any interest on charge-holders, even if:
	+ They were not party to fraud
	+ They relied to their detriment on the register 🡪 exception to mirror principle
* No compensation to bona fide charge holder
* E.g. Gill v Bucholtz: mortgage obtained by fraud struck off the title

**Registered charges are binding on purchasers of title.**

**Cannot be created by someone other than the registered owner** (LTA s 198)

An instrument purporting to create a charge executed by someone who is entitled to be registered as owner of fee simple must not be registered unless/until that person has been registered as the owner of the fee simple.

### Ranking of Charges

* Charges rank in chronological order based on time and date of application to register (LTA s 28)

**Assignment vs. Novation**

* Assignment: unilateral action by the person entitled to the rights. Like a lease assignment or a mortgage assignment 🡪 mortgagor has no right to prevent it.
* Novation: cancellation of existing agreement and replacement with a new one

**Procedure for registering charges:** (LTA 197)

1. Registrar must register charge when satisfied by inspection of instrument that applicant is entitled to it.
2. May refuse if:
	1. Good safe-holding and marketable title is not established;
	2. The charge is not registrable under the Act.

**Evidence of “good safeholding and marketable title”:**

* Instrument from fee simple owner creating a charge in favour of the applicant
* Assignment to the applicant of an existing charge
* Creation of a sub-charge in favour of applicant.

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| Dukart v Surrey  |
| **Facts** | Notation incorrect (says trust not foreshore reserve), removed as a result. Effective?* Land on Crescent Beach in front of Dukarts’ property got into hands of District of Surrey by tax sale
	+ Land owned privately, but the owners didn’t pay taxes
	+ Three years outstanding permits the municipality to step in to take title and sell it
	+ In this case, Surrey didn’t sell the title, just held it.
* Ultimately used it to build a “comfort station”
* Dukarts looked into the history of the title, found restrictive covenant providing them with access to Boundary Bay (“foreshore reserve”). Contained within instrument described as trust on title. Dukarts argue that the toilet violates restrictive covenant.
	+ HOWEVER, purchaser of title in a tax sale takes it free of a trust. So when Surrey obtained the title, the reference to holding the property in trust was wiped off the title.
 |
| **Issues** | What is the effect of misdesciption of a charge?  |
| **Decision** | For Dukarts: should not have been removed from title. |
| **Reasons** | * SCC says that although the title describes the instrument as a trust, the instrument actually contained within it an easement providing free access to the beach/Boundary Bay. Furthermore, it expressly says in the statute regarding tax sale that all charges are removed from a title, except for any easements registered against the land and any restrictive covenants registered against the land. So it was a mistake of the LTO staff to remove the trust from the
* Surrey says that it must be registered on the title, which it wasn’t once the trust notation was removed from the title. SCC doesn’t accept this argument: says it was taken off by mistake, can be corrected.
* Torrens purists will say that this is forcing Surrey to go beyond the title. This is true, but fairness demands that we go behind the title and respect the easement.
* Certificate did not accurately reflect the registered instrument
* Surrey was not a purchaser, so not BFPFVWON. If they were, result would be opposite.
 |
| **Ratio** | Register of instruments; notation on title not guaranteed to be correct. |

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| Credit Foncier v Bennett  |
| **Facts** | Forged mortgage assigned to BFP. BFP tries to foreclose. Result?* The Bennetts (Ds) were registered in fee simple.
* A mortgage for $7,400 and interest was registered against the lands, purportedly from the Bennetts to Todd Investments.
* Allen, an officer of Todd Investments, had forged that mortgage.
* Allen assigned mortgage from Todd Investments to Stuart.
* Stuart then assigned the mortgage to Credit Foncier (P).
* Before completion of the purchase, Credit Foncier had its solicitors search the title and found the mortgage registered. Credit Foncier wrote to Bennett notifying him of the assignment and requesting an acknowledgment of the amount owing; Bennett did not receive the letter. Credit Foncier send a second letter, but the Bennetts ignored it thinking it a mistake. Credit Foncier brought action against the Bennetts for foreclosure.
 |
| **Issues** | Is Credit Foncier’s mortgage valid, given that it was created by fraud? |
| **Decision** | No |
| **Reasons** | * Registration of a charge only creates a rebuttable presumption of validity. In this case, presumption rebutted.
* A mortgage is only security for the amount advanced. In this case, no $ advanced.
 |
| **Ratio** | Registration does not guarantee the validity of a charge. Now codified in s 25.1* Nemo dat applies to anything less than the fee simple
* Anything less than a fee simple is presumed to be valid, but that presumption is rebuttable (can adduce evidence to show fraud or other defect in the mortgage)

A mortgage is only security for the amount advanced.  |

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| Canadian Commercial Bank v Island Realty |
| **Facts** | Fraudster forges and registers discharge of mortgage in order to register another mortgage. What is the effect?* Park Meadow Estates (RO, Mortgagor)
* Imperial Life (1st mortgage - registered) 🡪 senior mortgage; ranks first, based on date of application to register. Paid off in full out of the proceeds of sale before Island realty will get anything out of it.
* Island Realty (2nd mortgage - registered) 🡪 junior mortgage; has mortgage on equity of redemption. Riskier than the 1st mortgage, so higher rate of interest.
* Almont (2nd/3rd mortgage?) 🡪 based on misrepresentation by Park Meadow’s solicitor, Cowan, believed that Island Realty’s mortgage was going to be discharged and replaced by Almont, making it rank 2nd.
* Island Realty had not agreed to have mortgage discharged
* Cowan forged and registered a discharge of the Island Realty mortgage & then sent Almont a copy of the certificate of title showing the Island Realty mortgage being discharged.
* Almont advanced funds. Cowan absconded and Park Meadow filed bankruptcy. There were insufficient funds to pay both Island Realty and Almont.
 |
| **Issues** | Is Almont entitled to 2nd place? Or any place? |
| **Decision** | Almont gets 2nd place. Discharge given effect. |
| **Reasons** | * TJ held that Credit Foncier applied: the fraud was not effective to discharge the mortgage.
* CA distinguished Credit Foncier because it was an assignment, not a discharge/novation.
* In this case, forgery was effective to remove the charge from the title, which means that Island Realty dropped off the title and was replaced by Almont.
* NB: novation/discharge requires the agreement of both parties.
* NO LONGER GOOD LAW BY VIRTUE OF s 25.1 🡪 the discharge of Island Realty’s mortgage was done by fraud, which makes it a void instrument.
 |
| **Ratio** | Now, governed by s 25.1: discharge by void instrument not effective.  |

## Builder’s Lien

* **Exception to indefeasibility of title** (LTA 23(2)(g))
* Example: Carr v Rayward: title is subject to builder’s liens filed after application to register.
* Builders, material suppliers, contractors, sub-contractors, etc. have a right to file a lien against the property for debts owing for construction.
* Limitation period:
	+ 45 days from completion, abandonment, or termination of the construction contract to file a lien.
	+ 1 year from date a lien claim is filed to start a lien action. Must file a CPL.
* Can be registered after the title has been purchased.
* Can result in the sale of the property to satisfy the lien obligations.

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| Carr v Rayward (1955 BC) |
| Facts: Lien filed for unpaid work done for previous RO. Legit? Carr took a contract to do plumbing and filed a mechanics’ lien before the completion of the work, but after the land had been sold to Bell (D), and a certificate of indefeasible title issued in his name.* Carr: Unpaid plumber
* Rayward (RO#1) contracts Carr for plumbing, doesn’t pay
* Rayward sells property to Bell (RO #2)

Decision: For CarrIssue: Can a mechanics’ lien be effective against the lands if not filed in the land registry office until after the owner for whom the work was done and material supplied has sold the lands and the purchaser has obtained a certificate of title from the land registry office showing him as owner free of encumbrances?Holding: Carr is entitled to a mechanics’ lien and personal judgment against Rayward.Ratio: Mechanics liens can be registered after title has changed hands.Note: A way to avoid this problem is to postpone the closing and search the title to see if any lien has been filed after 45 days have passed.**Bell can pursue an action against Rayward.****Carr must file a CPL on Bell’s title when he starts the action.**  |

## Caveat

* Can be lodged by:
	+ Any person who claims to be entitled to an interest in registered land (LTA 282)
	+ Registered owner (LTA 283)
	+ Registrar (LTA 285)
* Expires after 60 days (LTA 293)
* Title holder may force person filing caveat to file suit within 21 days or withdraw the caveat (LTA 293)
* Can only be lodged in respect of registrable common law, equitable, or statutory interest in property (Skeetchestn).

Effect of Caveat (LTA s 288 (1))

* Prevents registration of any instrument affecting the land described in the caveat
	+ Exception: if the instrument is expressed to be subject to the claim of the caveator
		- Exception to the exception: an instrument expressed to be subject to the claim of the caveator may be registered unless the claim of the caveator, if successful, would destroy the root of title of the person against whose title the caveat has been lodged
* Prevents any change in boundaries affecting the land described in the caveat, unless consented to by the caveator.

Purposes of lodging caveat:

* Protects unregistered, equitable, and other vulnerable interests
* Gives notice of the estate or interest claimed.

## Certificate of Pending Litigation

**Registration of CPL** (LTA s 215)

* Can be filed by claiming a registrable estate or interest in land
* Registration done in same manner as charges.
* Must file supporting documents.
* Must mail a copy of CPL to owner against whose title CPL has been registered.

**Effect of registered CPL** (LTA 216)

* Prevents registration of anything, except:
* Lodging a caveat (2)
* Indefeasible title or charge if subject to outcome of litigation (2(a))
* Assignment of a charge, if registered before CPL was registered (2(d))
* Sublease, if lease was registered before CPL (2(e))
* A certificate of judgment, order, notice, claim of builders lien, CPL or any other involuntary charge (2(f))
* NB: Anything registered when CPL is in effect may be subject to outcome of litigation. (3(b))

**Effect of CPL if prior application is pending** (LTA 217)

Applications received prior to CPL may be registered (1)

* If prior applicant is party to CPL litigation, title will be subject to outcome of CPL (2(a))
* If prior applicant is not party to CPL litigation, CPL will be cancelled (2(b))

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| Rudland v Romilly Received legislative approval: LTA s 217  |
| **Facts** | Nov 21: Romilly executed a deed conveying fee simple to Lindsay for considerationDec 14: Lindsay applied to register that deedDec 16: Lindsay executed a deed to Rudland as collateral for a loan due December 23rdDec 29: Lindsay obtained a certificate of title free of chargesDec 29: Rudland applied to the deed from Lindsay Jan 16: Romilly lodged a CPL on the title, claiming that Lindsay’s registration was fraudulent Because of the CPL, Registrar refused to complete the registration of Rudland’s title. Rudland sues to expunge CPL.  |
| **Issues** | Where a CPL is lodged after an application to register title by a BFPFVWON is filed, but before the BFP’s title is registered, whose claim takes effect? |
| **Decision** | For Rudland |
| **Reasons** | * If there is something that is not registered, the highest you can say is that they have equitable claims to the property.
* Equitable rules apply: first in time, first in right/where the equities are equal, the law prevails.
 |
| **Ratio** | If a prior application to register title is pending, CPL does not take effect.  |

## Judgments

**Who can obtain a money judgment**

* If a P obtains a money judgment against a D, P may register it as a charge against D’s title
* NB: applies to money judgments only. Judgments which create an interest in land will be reflected by direct alteration of title.

**Effect of registration**

* Allows creditor to obtain a writ of seizure and sale
* Nemo dat applies:
	+ Registered and unregistered interests that rank ahead of the judgment will limit the amount that the creditor can get out of the property
	+ If, e.g., the property is subject to a mortgage (whether registered or not), the judgment creditor can only sell the interest of the debtor in the asset. 🡪 COEA S 86(3)(c)

**Court Order Enforcement Act** (s 86 (3))

* Once registered, the judgment creditor holds a charge on the land of the judgment debtor.
* Nemo dat applies:
	+ Judgment can be enforced only to the extent of the judgment debtor’s interest in the land (86(3)(a))
	+ If the registered owner is a trustee, judgment can only be executed to the extent of the beneficiary’s debt and interest (86(3)(b))
	+ **If BFPFVWON purchases the title/acquires an interest in the land before judgment is registered on the property, BFP’s interest takes precedence (even if BFP has not registered) (86(3)(c))**
* If a judgment is registered after a sale is agreed to, but before the sale closes, purchaser takes property free of creditor’s interest (Martin Commercial Fueling)

## Mortgages

* Property serves as loan security.
* If the mortgagor defaults on their loan, the mortgagee has the right of foreclosure, i.e. seizing and selling the title to recover debt (“real recovery”). Requires order for the sale of the property.
* Mortgagee only gets to recover amount of debt; any surplus will be returned to the mortgagor.
* Strict foreclosure: holding the title until the property rises in value so that the mortgagee can recover loan principle.
* Foreclosure wipes charges registered after the mortgage off the title.
	+ If an easement is created after a mortgage, the person seeking the mortgage should require it to be given priority ahead of the mortgage so that it will not be wiped of in foreclosure. This would require the consent of the mortgagee.
* Mortgagor can sue mortgagee in negligence if they sell property at too low a value/sell without following normal market practices.

Credit Foncier v Bennett 43

Forged mortgage assigned to BFP. BFP tries to foreclose. Result? 43

Registration does not guarantee the validity of a charge. Now codified in s 25.1 44

A mortgage is only security for the amount advanced. 44

Canadian Commercial Bank v Island Realty 44

Fraudster forges and registers discharge of mortgage in order to register another mortgage. What is the effect? 44

Now, governed by s 25.1: fraudulent discharge DN take effect. 44

Gill v Bucholtz 57

Fraudster forged transfer to an accomplice. Accomplice took out 2 mortgages. Effect? 57

Registered charges are not indefeasible. Nemo dat applies. 58

Charges obtained by fraud will be struck off the title. 58

## Equitable Mortgages

* Cannot be registered on title (LTA s 33)
* There is a notation on title of withdrawal of duplicate indefeasible title.
* Created by deposit of duplicate title.
* Legal effect of depositing duplicate title is unclear:
	+ Royal Bank of Canada v Mesa Estates (BCCA 1986)
		- Where a duplicate title is deposited, it may be
			* For safe keeping;
			* To ensure a borrower does not deal with the land;
			* With the intention of creating an equitable mortgage.
		- It is for the party alleging the existence of a mortgage to prove that was what was intended.
	+ North West Trust Co (Alta CA 1990)
		- Deposit of duplicate creates presumption of intention to create an equitable mortgage.

Assurance Fund

Who can make a claim? (LTA 297)

* Current or former registered fee simple holders only
* Must have acquired the title in good faith for valuable consideration

**What is covered?**

* Cost (not value) of land (excluding buildings & other improvements)

**Under what circumstances can someone make a claim?** (LTA 296(2))

1. A person who is deprived of an estate or interest in land
2. Because of the conclusiveness of the register, AND
* I.e., if you would have been able to re-acquire land under common law, but due to immediate indefeasibility, it is impossible to do so.
* E.g. McCaig v Reys – no claim because the loss would have happened even without Torrens (option lost because title sold to BFP)
1. Due to fraudulent/wrongful registration of someone other than the owner, AND
2. Who is unable to bring an action for
* Possession/recovery of the land, OR
* Rectification of the register (Registrar can only rectify minor mistakes, NOT allocation title)

**- OR -** A person who sustains loss or damage as a result of an omission, mistake, or misfeasance of the registrar (LTA 298)

**How does it work?** (LTA 296)

* P must bring claim against person whose wrongful act deprived them of land.
* Must join the minister as a nominal defendant in the suit.
* Minister may use any/all defences to protect the fund.
* If person liable for damages is dead/not found in BC, claimant may proceed against minister.
* The minister must pay the balance out of the assurance fund on the account of person liable if:
	+ Final judgment in proceedings is given, and
	+ The court certifies that the plaintiff has taken all reasonable steps to recover the amount of judgment from the person liable, but has been unable to do so (in part or in whole).

**Time limitation** (LTA 296(8))

* 3 years after the deprivation is discovered.

**Assurance fund is a remedy of last resort**

* First recourse: wrongdoer/other insurance: (LTA 296(2)(b))
* Malpractice coverage/law society (in case of lawyer error): (LTA 296)

**Who cannot make a claim?** (LTA 303)

1. Types of owners not covered:
2. Undersurface rights owners
3. Equitable mortgagee (Royal Bank; now in statute: 303(a)(ii))
4. Types of losses not covered:
5. Breach of trust (trust beneficiaries not covered by fund) (303(b)(i))
6. Misdescription of parcel boundaries (303(b)(ii))
7. Improper use of corporate seal/signing authority
8. Dissolution of a corporation
9. Issue of a provisional certificate of title
10. Mistakes in Crown Grant (e.g. multiple grants were issued for the same piece of land)
11. Shortage in air volume
12. **If the plaintiff knew that the registrar was about to alter title improperly, unless the P took appropriate steps to prevent the error from occurring**
13. If the P contributed to the loss/damage/deprivation
* Volunteer/donor (LTA s 297)
* Charge holders (LTA s 297)
* Mortgagees (Gill v Bucholtz)

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| McCaig v Reys |
| **Facts** | McCaig lost option to land because of the dastardly Jerome. Claim to Assurance Fund denied. |
| **Issues** | Can McCaig recover from the fund? |
| **Decision** | No |
| **Reasons** | Test – In order to succeed against the Assurance Fund, a claimant must show:1. That he has been deprived of land or an estate or interest therein
2. The loss was occasioned as a result of the operation of the statute (the *Land Registry Act*)
3. That it was occasioned by fraud, misrepresentation, or some wrongful act in the registration of any other person as owner of the land or interest in land

He is barred from bringing an action for rectification of the register because of 2: he would have suffered the loss if the common law governed (because the BFP takes precedence over unregistered interests). Note that now, statute bars recovery for interests less than fee simple.  |
| **Ratio** | Loss must be occasioned by operation of the register.  |

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| RBC v BC |
| **Facts** | Equitable mortgage granted, but duplicate removal not recorded. Subsequent mortgage registered. Walsh deposited a duplicate certificate with Royal Bank but the delivery was not entered in the Land Register Office. Walsh then granted a mortgage to the Bank of Nova Scotia and it was registered in the Office even though the duplicate could not be located. Royal Bank made a claim against the Assurance Fund when it could not recover loans from Walsh after the registration of the Bank of Nova Scotia mortgage, submitting that had the Registrar not been negligent, they would have become aware of the deceitful conduct of Walsh and not advance further money to him. |
| **Issues** | Can mortgagees recover from the fund? |
| **Decision** | No |
| **Reasons** | The Registrar owed no duty to Royal Bank but only to those seeking to utilize the services of the Registrar (one cannot obtain compensation built up by others’ contributions; Royal Bank cannot be given the protection afforded by registration); the person alleging loss as a result of mistake of the Registrar must show that the loss flows naturally and directly from the mistake. |
| **Ratio** | 1. Mortgagees cannot collect from the Assurance Fund, nor can those whose losses do not result from the mistake of the Registrar.2. Those who seek to rely on equitable mortgages must accept the risks inherent in such securities. |

Unregistered Interests

**Unregistered instrument does not pass estate** (LTA 20)

* Unregistered instrument is only effective against the person making it 🡪 creates rights in personam…
	+ Third parties who acquire unregistered interests will be given effect against the person making them (L&C Lumber – timber license)
	+ E.g. If A grants interest to B, and B grants it to C, it is effective against A
* Unregistered instrument not effective at law or equity against anyone else 🡪 …not in rem
	+ Third party purchasers are not encumbered by unregistered interests (Sorenson v Young – easement across land)
	+ E.g. if
* Exception: granny in the attic (LTA 20(3)).

**Effect of notice of unregistered interest** (29(2))

* Notice has no effect, except:
	+ Fraud
	+ A lease of three years if actual occupation.
* Having suspicions raise and failing to ask questions not enough to constitute fraud (Sorenson)

**Judgments**

* Registration creates (COEA s 86)
* If a judgment is registered after a sale is agreed to, but before the sale closes, purchaser takes property free of creditor’s interest (Martin Commercial Fueling)

**Before Torrens:**

* Legal interests effective against the whole world
* Equitable interests effective against everyone but the BFPFVWON

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| Sorenson v Young  |
| **Facts** | Unregistered easement across land; property sold; new owner builds a gate.* Sorenson purchased lot and subdivided it into two. Sold one plot to Roch.
* One of the plots didn’t have access to the public road. Sorenson owned this lot; Roch owned the other
* Sorenson created easement and built road across Roch’s property. Roch agreed not to impede access.
* Roch sold lot to Young
* Three and a half years later, Young built a gate across road.
 |
| **Issues** | Is Young’s title encumbered by the easement? |
| **Decision** | Young was BFPFVWON and took title free of easement |
| **Reasons** | * Sorenson alleges fraud: Young had actual knowledge/wilful blindness. Problem: he who asserts must prove: Sorenson did not adequately discharge this burden. Only showed circumstances that would have raised Young’s suspicions (tire tracks across property; garage at end of road), which is not enough.
* BUT if he had been suspicious, he would have gone to the LTO and found that it wasn’t on the title.
* Could argue estoppel or implied license, given that Young permitted Sorenson to cross the property for three years.
 |
| **Ratio** | Unregistered interests do not have effect against a purchaser. |

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| Martin Commercial Feuling v Virtanen  |
| **Facts** | Judgement registered after sale agreement, but before sale closes.* On October 10, 1991, a registered vendor agreed to sell to the Virtanen.
* On October 25,1991, a judgment creditor, Martin, registered a judgment against the vendor’s interest.
* On November 6, 1991, the sale closed.
* Virtanen registered title. Received title subject to judgment
 |
| **Issues** | Is the purchaser’s interest subject to the judgment. |
| **Decision** | The purchaser’s interest is not subject to the judgment. |
| **Reasons** | * Applying s 20(1), the phrase “except against the person making it,” meant the debtor, as registered owner, was personally bound to perform the unregistered contract of sale, despite lack of registration.
* The binding obligation made by the debtor, or “equity,” preceded registration of the judgment.
* The unregistered purchaser had an *in personam* claim against the vendor arising on the making of the binding agreement.
* **Registration of a judgment creditor means the creditor takes its ranking on the register “subject to the equities”**, i.e. the creditor can only seize and sell the debtor’s interest remaining after taking into consideration the debtor’s unregistered personal obligations indirectly affecting title.
 |
| **Ratio** | If a judgment is registered after agreement for sale, but before close of sale, purchaser gets title free of judgment (unless it is a scheme to defeat judgment) |

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| L& C Lumber v Lundgren  |
| **Facts** | Timber license assigned to 3rd party; what is the effect?* Lungdren sold standing timber on her land with a right to enter and cut (a *profit-a-prendre*; type of easement) to McDonald.
* McDonald assigned all his rights under the agreement to L&C Lumber, who gave due notice in writing to Lungdren.
* Neither the agreement nor the assignment was registered.
* When L&C Lumber attempted to cut, the Lungdrens refused entry and tried to justify their refusal under the *Land Registry Act* (now s 20(1) of the *Land Title Act*), because of the failure to register.
 |
| **Issues** | Is the profit a prendre enforceable by a 3rd party against the person making it? |
| **Decision** | L&C Lumber could enforce the personal rights in the instrument against Lundgren as she was the initial party to the *profit-a-prendre*. |
| **Reasons** | * The purpose of section 34 (now s 20(1) of the *Land Title Act*) is to protect purchasers for value without notice, and enable them to rely on the state of the register when they search the title.
* Because of the lack of registration, s 20(1) prevents enforcement only of rights *in rem*, but permits enforcement of otherwise valid personal rights against the party.
* The assignment of contractual rights to L&C Lumber was valid and enforceable against Lungdren personally.
* As Lungdren was still the RO, personal enforceability of the contractual rights had the same effect for practical purposes as indirectly enforcing an interest in property.
 |
| **Ratio** | Unregistered instruments are enforceable by 3rd party purchaser against the person who created them.  |

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| International Paper v Top-Line |
| **Facts** | * International Paper Industries agreed to sell building to Top Line Industries.
* The building would be moved to Top Line’s property, and International Paper would lease a portion of that property, including the building
* The parties prepared their own lease for a term of 51 months subject to a right of renewal.
* No mention was made of whether the lease was to be registered.
* Top Line argued that the lease unenforceable or void because of s 73 of the *LTA*.

*LTA*, s 73 1. Except on compliance with this Part, no person shall subdivide land into smaller parcels than those of which he is the owner for the purpose of (a) transferring it; or (b) leasing it, or agreeing to lease it for a life, or for a term exceeding three years.
2. No instrument executed by a person in contravention of this section confers on the party claiming under it a right to registration of the instrument or a part of it.
 |
| **Issues** | What is the effect of s 73 on the validity of proprietary and personal rights, if any, arising under a lease agreement entered into by parties who were unaware of the provision? |
| **Decision** | For Top Line |
| **Reasons** | The written but unregistered agreement to lease part of a larger parcel of vacant land illegally bypassed s 73(1), zoning imposed by local government, and registration required by the Torrens system.Note: Critics of this decision persuaded the Legislative Assembly of BC to reverse it. The result was enactment of s 73.1 (which restores the possibility of *in personam* enforcement of leases of portions of raw land, despite the lack of subdivision), but it has also been criticized as failing to solve the problem (the BCCA interpreted s 73.1 as having prospective effect only; *Top Line* applies to invalidate pre-2007 transactions as illegal and unenforceable).Under s 73.1, only initial parties to the lease of a portion of a larger parcel of vacant land can enforce it against each other even though the lease is unregistered and was not preceded by subdivision. |
| **Ratio** | An unregistered lease of part of a vacant, or undeveloped, lot is contrary to public policy and unenforceable. Section 73 requires the formality of subdivision as a matter of public policy. Now overruled by s 7 |

Fraud

Despite registration, a fraudster has a defeasible title and an innocent owner of the fee can recover the property (LTA 23(2)(i))

Two types of fraud in the Torrens system:

* 1. Title fraud/fraud on the registered owner
* E.g. Gill v Bucholtz: mortgage obtained by fraud struck off the title.
	1. Fraud on the holder of an unregistered interest
* E.g. McCaig v Reys: Jerome committed this type of fraud by selling property without ensuring the unregistered interest will be honoured.
* LTA 29(2): notice of unregistered interest is relevant in the case of fraud

**Fraudulent Conveyance 🡪 transfer to defeat creditor**

* Where debtor sells title in attempt to protect it from money judgment to someone who is in cahoots with them.
* Can apply to set aside the transfer and can execute on the property.
* Indicators (“badges”) of fraud:
	+ Was the transfer to an insider?
	+ Was the transfer hidden?
	+ Was the transfer around the time a substantial debt was incurred?
	+ Did the debtor retain possession or control of the property?
	+ Was the debtor insolvent at the time?

# Fraud against registered owner (forgery)

**Effect of registration of void instrument** (LTA, s 25.1)

* (1) Registration of a void instrument does not confer estate/interest in land
* (2) HOWEVER, if fee simple is transferred to a BFPFV, they get indefeasible title
	+ Does not apply to volunteers (e.g. if a fraudster dies, person who inherits the property will not benefit from immediate indefeasibility. Title will be defeasible until it’s sold).

**Title obtained by fraud**

LTA s 25.1(2): Even though an instrument purporting to transfer a fee simple estate is void, a BFP is deemed to have acquired that estate on registration of that instrument

LTA s 23(i): Title defeasible if taken by fraud in which the registered owner has participated in any degree

🡪 If title is held by…

* Fraudster: defeasible (LTA s 23(i))
* Held by accomplice of fraudster: defeasible (LTA s 23(i))
* Held by volunteer: defeasible (LTA s 25.1(2))
* Held by BFPFV: immediately indefeasible (LTA s 25.1(2))(e.g. Frazer v Walker)

**Charge obtained by fraud: defeasible** (LTA s 25.1) (Gill v Bucholtz: mortgage obtained by fraud struck off the title)

* Nemo dat applies: registration of void instruments do not confer any interest on charge-holders, even if:
	+ They were not party to fraud
	+ They relied to their detriment on the register 🡪 exception to mirror principle
* No compensation to bona fide charge holder

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| Frazer v Walker |
| Ratio: “Immediate indefeasibility”: Once C became the registered holder of the fee, C keeps the title, and A should be the innocent victim left to seek monetary compensation from B/assurance fund.Reasoning: This preserves public confidence in the Torrens system (otherwise would return to common law nemo dat).Note: No facts given |

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| Gill v Bucholtz  |
| Facts: Fraudster forged transfer to an accomplice. Accomplice took out 2 mortgages. Effect?* Mr. Gill owned Lot 4.
* A fraudster forged Mr. Gill’s signature on a transfer of Lot 4 to Gurjeet Gill, who was an accomplice of the fraudster.
* Gurjeet Gill purported to grant a mortgage to the Bucholtz, who, in reliance on the register, advanced $40,000 to Gurjeet Gill and filed the mortgage with the LTO.
* Gurjeet Gill later negotiated a second mortgage in favour of the corporate D.
* Mr. Gill filed a caveat before the second mortgage could be registered (but the corporate D had already advanced $55,000 under it).
* None of the mortgagees had had knowledge of fraudulent root of title and they had sought and confirmed Gurjeet Gill’s identity before advancing funds.
* Mr. Gill’s title was restored to him under the fraud exception to indefeasibility (LTA s 23)

Parties: * Gill: RO 1, victim of fraud
* John Doe: fraudster
* Gurjit Gill: RO 2, accomplice
* Bucholtz: registered mortgagee holders

Decision: For GillIssue: Will the Ds’ mortgages continue to encumber P’s restored title?Reasoning: * LTA 26(1): A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.” 🡪 creates a **rebuttable presumption** that the registered owner of a charge is entitled to that charge.
* 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.” 🡪 if the instrument is void, so is your estate or interest
* The phrase “void instrument” includes a mortgage issued by a person who obtained title by fraud or forgery.
* The mortgagees did not acquire any estate or interest in Lot 4 on registration of their instruments because they were void under s 25.1(1).
* In this case, Gill was able to rebut the presumption created by s 26(1).

Ratio: Registered charges are not indefeasible. Nemo dat applies. Charges obtained by fraud will be struck off the title.  |

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| Gibbs v Messer – overruled by Frazer |
| Ratio: If fraud occurs, A (innocent owner of the fee) should recover title, because although both A and C (innocent victim) were innocent of B’s (fraudster) fraud, C actually dealt with fraudster B, and A had no involvement.“Deferred indefeasibility”: A can recover the title from the first purchaser (the person who dealt with the fraudster. Only becomes indefeasible after second transfer.Reasoning: Strictly a common law rule. No basis in statute. Many courts felt that this was fairer. 1. C is dealing with the fraudster and could have taken measures to ensure that the person they were dealing with were not fraudsters
2. A has a longer-term attachment to the property
3. C would have a claim for compensation against B or possible the assurance fund.

BUT, this would mean that everyone would have to go behind the register, which is contrary to the mirror and curtain principles of the Torrens system. **Note: No facts given. Not current law.**  |

# Fraud against holder of unregistered interest

**Test for fraud** (Serving for Success)

1. Actual knowledge/wilful blindness of unregistered interest
* Constructive notice is not enough (Kearns)
* Knowledge must arise prior to entering into agreement for purchase (Saville Row)
* Imputed knowledge without dishonesty on the part of agent is not enough to constitute fraud (Grevling)
* If you have notice of a registered option but Registrar has refused it, then you may disregard it (Saville Row)
1. Dishonesty/dishonourable conduct that violates common morality (Serving for Success)
* Fraud: doing “any act for the direct purpose of bringing himself within the words of the section […] and thereby prejudicing the holder of the unregistered title” (Kearns)
* Not fraud: interest extinguished in the “ordinary course of business” (Kearns) 🡪 e.g. Serving for Success

🡪 Burden of proof is on person alleging fraud

**Effect of notice**

* Fraudster is affected by notice.
	+ 29(2)(b) abolishes effect of notice of unregistered interests, but makes an exception in the case of fraud.
	+ E.g. McCaig v Reys: actual notice of McCaig’s unregistered interest + promises Reys to honour the interest (deception) + subsequent sale to defeat the interest.
* BFPFV is not affected by notice of interest in the absence of dishonesty.
	+ E.g. HBC v Kearns and Rowling:
		- Rowling may have had his suspicions raised by the discounted price of the property, but did not have actual notice.

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| McCaig v Reys  |
| **Facts** | Unregistered option sold by the nefarious JeromeMcCaig (holder of an unregistered interest (option to purchase 24 acres granted by Reys; victim of fraud) 🡪 Reys (RO #1) 🡪 Jerome/Rutland (RO #2) 🡪 FRAUD to Jabin |
| **Issues** |  |
| **Decision** | For Jabin |
| **Reasons** | * Jerome carried out a scheme of deception that enabled him to dispose of the interest without disclosing to the purchaser.
* Jerome’s dishonesty was that he promised to honour the unregistered interest, but then deliberately suppressed the existence of the option when he sold the property to Jabin.
* If Rutland had gotten notice **after** agreeing to purchase 🡪 would not be committing fraud.

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

An agent’s fraud is imputed to the principal |

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| Hudson’s Bay Co v Kearns and Rowling  |
| **Facts** | Purchaser takes land w/o seeing title deeds (which are deposited w/mortgagee). BFP?* Kearns (registered fee simple owner) owed Hudson’s Bay $800.
* She mortgaged her interest to the company to secure her debt, delivering her title deeds (duplicate certificate of title). Unregistrable under s 33
* The mortgage was not prepared for 15 months. In that time Kearns offered to sell the property to Rowling at half its value.
* Rowling searched the title and entered into a verbal agreement and paid half the purchase price.
* Rowling asked to see the title deeds and Kearns said that they would be produced.
* Kearns gave Rowling a transfer of her title (which was registered). Rowling later paid the other half of the price, without seeing the deeds.
 |
| **Issues** | Can an equitable mortgagee by deposit of title deeds acquire a better title to registered real estate than a purchaser for valuable consideration, who, without actual fraud or express notice of the equitable mortgage, takes a conveyance unaccompanied by delivery of title deeds? |
| **Decision** | For Rowling (BFP unaffected by equitable mortgage) |
| **Reasons** | * Actual notice prior to purchase = fraud, maybe.
	+ “I am fully prepared to hold that an intending purchaser who enters upon and proceeds with his purchase after express notice of an unregistered title or equity might be estopped from claiming the benefit of section 35.”
	+ “If B, with knowledge of facts which would render a purchase a fraud upon A, deliberately carries out the purchase, which, without the aid of a statute aimed at the suppression of fraud would be null and void, a Court of Equity will hold B estopped from setting up the provisions of such statute when to permit him to set it up would be to enable him to commit fraud.”
* Anything less than express notice /= fraud.
	+ “I am not prepared to hold that a purchaser whose only fault is a failure to procure the title deeds, or to insist upon their non-production being accounted for, and whose bona fides otherwise are unassailed, is to be deprived of the protection intended to be extended by section 35 to bona fides purchasers. To deprive a purchaser of the benefit of section 35, or rather, to hold that section inapplicable to him, he must, I think, be guilty of conduct equivalent to fraud…”
* Fraud will not be imputed in the absence of express notice.
* The effect of s 35 is to grant absolute protection to a purchaser for value against attack on the ground of notice of any character or nature whatsoever.
	+ However, it is subject to the qualification that a person with actual knowledge of an unregistered interest and registers his title to benefit from the indefeasibility of s 35, must be held guilty of actual fraud and estopped from invoking the protection of the enactment.
* This is because equity will not permit a statute to be used as an instrument of fraud.
 |
| **Ratio** | 1. Definition of fraud: “a man who in consequence of … actual notice of a prior unregistered title or interest does any act for the direct purpose of bringing himself within the words of the section, as distinguished from any act in the ordinary course of business or in the natural course of any pending dealing or transaction, and thereby prejudicing the holder of the unregistered title, is guilty of actual fraud and is estopped from invoking the protection of the enactment.”2. Constructive notice is not enough to undermine s 35 (now s 23) protection. Must be actual notice. 3. Negligent/Careless – no notice or dishonesty; not fraud  |

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| Vancouver City Savings v Serving for Success  |
| **Facts** | Mortgagee forecloses on property, which extinguishes rights of unregistered lessors.Vancity granted City Centre a mortgage. Vancity was aware of the existence of unregistered leases to Serving for Success (for the pub) and KKBL (for the restaurant). City Centre defaulted on the loan, and Vancity filed for foreclosure with vacant possession (which would extinguish the unregistered leases). |
| **Issues** | Does the fact that Vancity had actual knowledge of the unregistered leases deprive it of the benefit of s 29? |
| **Decision** | No (for Vancity). |
| **Reasons** | “The important time for the purposes of assessing what the petitioners knew is the time City Centre granted the mortgages, or at the latest, the time when the mortgages were registered on title.” At that time, they did not intend to interfere with the leases.The law requires more than simple notice of the respondents’ unregistered interest in the property. To prove fraud, it must be established that:* The party acquiring the interest in land had sufficient actual knowledge of the conflicting interest in the property to cause a reasonable person to make inquires as to the terms and legal implications of the prior instrument.
* There was some other circumstance to take the matter out of the ordinary course of business or to show some clear intention to use the statute to defeat the respondents’ interests in circumstances contrary to common morality such that it would be inequitable for the court to allow reliance upon the statute as protection.
 |
| **Ratio** | Knowledge is not enough to constitute actual fraud. Fraud requires actual knowledge prior to entering into the agreement and dishonesty/dishonourable conduct that violates common morality |

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| Grevling v Grevling  |
| **Facts** | Same property transferred twice. Effect on BFP?As part of divorce settlement, Mrs. G transfers title to Mr. G. Mr. G did not register his interest. 7 years later, Mrs. G re-sells the same property to Blackburn using the same lawyer that originally handled the transfer to Mr. G. The lawyer’s knowledge of Mr. G’s title is imputed to Blackburn. |
| **Issues** | What is the effect of the lawyer’s knowledge of the previous transfer? |
| **Decision** | For Blackburn |
| **Reasons** | The solicitor’s knowledge should not be imputed to Blackburn if the solicitor was helping Mrs. Greveling to perpetrate a fraud or if he was honest (in believing that the deed from Mrs. Greveling to Mr. Greveling could not be enforced). |
| **Ratio** | 1. Assets v Mere Roihi: defines “actual fraud” as including wilful blindness without dishonesty: “if his suspicions were arouse, and he abstained from making inquiries for fear of learning the truth […] fraud might properly be ascribed to him.”2. Solicitor’s knowledge can sometimes be imputed to client.  |

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| Saville Row Properties  |
| **Facts** | Attempt to have option registered denied. Effect if BFP knows this? Eldred is the registered owner. Frew and Associates had an unregistered option. Eldred sold the property to Saville Row, which registered its title. After completion of the deal between Eldred and Saville Row, Frew tried to get the option registered, but the Registrar refused to register it. Two months later, Saville filed a CPL. |
| **Issues** | 1. Can Saville Row take title to the property free of Frew’s unregistered option?
2. Was Saville Row a party to Eldred’s fraud? Or a BFPFVWON?
 |
| **Decision** | For Saville Row |
| **Reasons** | The court says that Saville Row was not disentitled to the protection of registration, because: * Saville Row knew of the fact that the Registrar had challenged the validity of the unregistered interest. Therefore, it was entitled to ignore it as unenforceable.
* Saville Row did not get any notice before it committed to purchase the property.
 |
| **Ratio** | If you don’t have notice of interest until after you purchase property, you can disregard it. If you have notice of a registered option but have reason to think it’s void, then you may disregard it. The burden of proving fraud rests with the person alleging it.  |

In Personam Claims

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| Pacific Savings and Mortgage Corp v Can-Corp Developments |
| **Facts** | Mortgagee forecloses on property. Mortgagor files CPL to have redemption period extended. * Pacific Savings = mortgagee
* Can-Corp = mortgagor
* P defaulted on the mortgage.
* D obtained an order absolute (strict foreclosure 🡪 instead of selling property, D takes title to property and holds it until market improves) on the P’s property.
* 6-month redemption period lapsed and mortgagor was unable to redeem the title.
* D obtained a certificate of indefeasible title.
* P subsequently obtained funds to redeem mortgage, and went to court and asked to have order re-opened. Filed CPL
* D said this was impossible, because they had obtained indefeasible certificate of title.
 |
| **Issues** | Are the mortgagors entitled to redeem? |
| **Decision** | For Can-Corp: mortgagee’s title subject to mortgagor’s right of redemption |
| **Reasons** | * Court says that as a mortgagee, you have right of foreclosure, but you also have the responsibility of right of redemption.
* Mortgagor still held the property (though had accepted an offer). If it had sold it to a BFPFVWON, mortgagee would have had no claim against it.
* The rights of the mortgagor rank ahead of the rights of the purchaser because the mortgagor filed a CPL on the property (with that CPL they gave notice to the world that the mortgage was going to be reopened and that if the court was sympathetic, they would be given a second chance to redeem the property).
 |
| **Ratio** | After foreclosure, rights in property in favour of the mortgagee, but subject to personal rights (right of redemption) of mortgagor. |

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| McRae v McRae Estate |
| **Facts** | Trust notation removed from title on transfer. Do beneficiaries have rights?In 1924, Mr. Fraser died and left property to his wife Harriet, on trust for herself for life, remainder to their children, John, Catherine and Farquhar. Mrs. Fraser was registered as fee simple owner, with an “on trust” notation on the title. In 1949, Mrs. Fraser transferred the property to Farquhar for nominal consideration, and Farquhar was registered as fee simple owner without any trust notation. He died in 1989, leaving his property to his wife and his siblings. In 1990, John and Catherine found out about the terms of their father’s will and commenced proceedings. |
| **Issues** | Do John and Catherine have in personam rights against Farquhar? |
| **Decision** | Yes |
| **Reasons** | Farquhar is not a BFPFVWON because “in trust” was on the title. He had constructive notice, and probably had actual knowledge too. Harriet and Farquhar committed a breach of truth, and the transfer from Harriet to Farquhar should not have occurred. Farquhar |
| **Ratio** | A beneficiary has in personam rights against a trustee, even if the trust is unregistered. Even if a trust is not registered on the title, the RO is bound by the trust.  |

Applications to Register

After application has been submitted, but prior to registration on title

* Creates equitable interest only.
* To resolve competing claims, consider:
	+ **Who was first?** If the equities are equal, first in time prevails. Based on date of execution. (Rudland v Romilly)
	+ **Are the equities equal?** Is one person culpable in the creation of their situation? (Breskvar v Wall)
	+ **Is one an equitable interest and one a legal interest?** If the equities are equal, the law prevails

**Effect of CPL if prior application is pending** (LTA 217)

Applications received prior to CPL may be registered (1)

* If prior applicant is party to CPL litigation, title will be subject to outcome of CPL (2(a))
* If prior applicant is not party to CPL litigation, CPL will be cancelled (2(b))

🡪 About protecting the purchaser who has relied on the register

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| Rudland v Romilly Received legislative approval: LTA s 217  |
| **Facts** | CPL lodged after title registration application submitted. Nov 21: Romilly executed a deed conveying fee simple to Lindsay for considerationDec 14: Lindsay applied to register that deedDec 16: Lindsay executed a deed to Rudland as collateral for a loan due December 23rdDec 29: Lindsay obtained a certificate of title free of chargesDec 29: Rudland applied to register the deed from Lindsay Jan 16: Romilly lodged a CPL on the title, claiming that Lindsay’s registration was fraudulent Because of the CPL, Registrar refused to complete the registration of Rudland’s title. Rudland sues to expunge CPL.  |
| **Issues** | Where a CPL is lodged after an application to register title by a BFPFVWON is filed, but before the BFP’s title is registered, whose claim takes effect? |
| **Decision** | For Rudland |
| **Reasons** | * If there is something that is not registered, the highest you can say is that they have equitable claims to the property.
* Equitable rules apply: first in time, first in right/where the equities are equal, the law prevails.
 |
| **Ratio** | If a prior application to register title is pending, CPL does not take effect. Now legislated: s 217. |

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| Canada Permanent Mortgage Corp. v BC (NOT GOOD LAW)  |
| **Facts** | Mortgage attempts to register before FS holder that granted the mortgage. CPL filed against FS holder. Who wins? Dec. 14: Vistica purchased fee simple from VorhesterDec. 29: Vistica took out a mortgage w/Canada Permanent, which advanced $3500.Jan. 6: Vistica applied to register fee simpleJan. 7: Canada Permanent applied to register mortgageFeb. 3: Vorsteher files CPL, claiming fraud by Vistica & seeking rescission of the transfer |
| **Issues** | Should the mortgage be registered? |
| **Decision** | The mortgage should be registered. |
| **Reasons** | This result is contrary to:198: An instrument purporting to create a charge executed by someone who is entitled to be registered as owner of fee simple must not be registered unless/until that person has been registered as the owner of the fee simple (Vistica was not the registered owner)25.1(1): a void instrument purporting to create a charge does not do so (was void because not made by RO) |
| **Ratio** | Overruled by statute: 198 (charge can only be created by RO) and 25.1 (void instruments have no effect) |

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| Breskvar v Wall  |
| **Facts** | Blank xfer form as security; fraud; BFP; ranking of BFP vs caveat* Breskvars were joint tenants and registered owners in fee simple.
* Petrie gave Breskvars a loan. As security, Breskvars gave an instrument of transfer with the transferee left blank. Breskvars were to pay back the loan in a year, at which time Petrie would return the document.
* Petrie registered the title in the name of his grandson, Wall.
* Petrie then negotiated the sale of the land from Wall to Alban (BFPFVWON)
* Oct 31: transfer executed
* Dec 13: Breskvars registered a caveat
* Jan 8: Alban filed application to register
 |
| **Issues** | What is the interest of the Breskvars vs Alban? |
| **Decision** | For Alban |
| **Reasons** | Both Breskvars and Alban have equitable (unregistered) interests in the property:* Breskvars because of fraud
* Alban could not registrar because of the Breskvars’ caveat
* The equities are not equal: the conduct of the Breskvars was more blameworthy by virtue of being insufficiently vigilant:
	+ Giving Petrie blank transfer
	+ Delaying registration of the caveat
* Equity aids the vigilant, not those who sleep on their rights
* Where the equities are equal, the law prevails
 |
| **Ratio** | Where there are two unregistered interests/equitable claims, consider equities/first in time* **Who was first?**
* **What are the equities?** First in time, first in right only applies if the equities are equal.
* **Is one an equitable interest and one a legal interest?** Where the equities are equal, the law prevails
 |

Fee Simple

## Creation of Fee Simple

**Common law**: to pass FS, needed to say “to B and his heirs.” Otherwise, presumed to transfer life estate. This format is no longer required: “to B” passes greatest estate that transferor can give (PLA s 19)

**Words of purchase**: “To B”

**Words of limitation**: “and his/her heirs”

## Types of Fee Simple:

* Fee simple (absolute)
* Determinable fee simple: if condition comes to pass, property automatically reverts
	+ Chronometric language: “while,” “during,” “as long as,” “until”
	+ You have the right to alienate the property
* Fee simple on condition subsequent: if condition comes to pass, reversionary interest holder has the right of reentry, but it is not automatic.
	+ Conditional language: “provided that,” “on condition that” “but if” “if that happens”
* **NB: conditional and determinable fee simple cannot be tied to one of the incidents of the fee simple (e.g. sale of property) or something that will definitely happen (e.g. death)**

Repugnancy

Fee simple absolute, followed by a gift over.

* Where there is a repugnant gift, the court will determine the testator’s predominant intention and subordinate intention. (Re Walker)
* Different possible outcomes of a repugnant gift (Re Walker):
1. Gift to the first-named person prevails, gift over fails as repugnant
2. Gift to the first-named person is a life estate, the gift over of the remainder prevails
3. Gift to the first named person is a life estate, with a power of sale/encroachment on the principal, to maintain the recipient, with a gift over of the remainder (usually a trust)
* Where a will is unclear or contradictory, construction is based on the testator’s intentions (Re Shamas)
	+ Intention is determined by “sit[ting] in the testator’s armchair,” i.e. “gathered from the language of the will read in light of the circumstances in which the will was made.”
	+ Note that this means that if you create a will giving your property to your spouse (S1), then split with S1 and have a different spouse at death (S2), the property will go to S1

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| Re Walker  |
| **Facts** | Will gives fee simple absolute and gift over* John Walker dies in 1903. His will creates a fee simple absolute: “I give and devise unto my said wife all my real and personal property…”
* But also a gift over: “…and also should any portion of my estate still remain in the hands of my said wife at the time of her decease undisposed of by her such remainder shall be divided as follows…”
* Problem: If you create a fee simple absolute, you can’t then control an aspect of the owner’s rights. In this case, the gift over purports to take away right of testamentary disposition.
 |
| **Issues** | How should the repugnant gift be dealt with? |
| **Decision** | For the wife |
| **Reasons** | Where there is a repugnant gift, the court will determine the testator’s predominant intention and subordinate intention. To do so, look at the circumstances at the making of the will. Here, asks: who was closer to testator? Who was he intending to favour? Different possible outcomes of a repugnant gift:1. Gift to the first-named person prevails, gift over fails as repugnant
2. Gift to the first-named person is a life estate, the gift over of the remainder prevails
3. Gift to the first named person is a life estate, with a power of sale/encroachment on the principal, to maintain the recipient, with a gift over of the remainder (usually a trust)

In this case, the testator’s predominant intention was to give a fee simple to his wife. |
| **Ratio** | Where there is a repugnant gift, the court will determine the testator’s predominant intention and subordinate intention.  |

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| Re Shamas  |
| **Facts** | Will gives everything to wife until kids turn 21: LT w/right of encroachment* Will: “I give all I own to my wife. I want her to pay my debts-raise the family. All will belong to my wife until the last one comes to the age of 21. If my wife remarries she should have her share like the other children if not, she will keep the whole thing and see that every child gets his share when she dies.
* Wife believes this gives full estate to her
* Children believes it gives everything to them after age 21
 |
| **Issues** | How should the repugnant gift be dealt with? |
| **Decision** | Will gives wife a life estate (with power of encroachment until children turn 21). Children get a remainder interest. |
| **Reasons** | * Where a will is unclear or contradictory, construction is based on the testator’s intentions.
* Intention is determined by “sit[ting] in the testator’s armchair,” i.e. “gathered from the language of the will read in light of the circumstances in which the will was made.”
* In this case, the testator’s intention was for his widow to use the estate to provide for their children. Because the estate was worth very little, this would require that she be able to encroach on the principle (she could not get by on investment income alone).
* Based on the language and intent, the court determines that the testator’s intent was to create a life estate with power of encroachment to wife and remainder interest to children.
 |
| **Ratio** | Intention is determined by “sit[ting] in the testator’s armchair,” i.e. “gathered from the language of the will read in light of the circumstances in which the will was made.” |

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| Cielein v Tressider  |
| **Facts** | Will gives fee simple, dictates what distribution of profits in event of sale* The will-maker lived with Ms. Rich and her son for 12 years
* Problematic clause: “All the rest and residue of my estate I devise and bequeath to Naturcia Rich. However, upon the sale or disposal of the real estate [on Saturna], the proceeds shall be divided equally between her son and my children.
 |
| **Issues** | Who is entitled to the estate? |
| **Decision** | Mrs. Rich |
| **Reasons** | * The testator’s intention is manifest: he intended to give property in fee simple to Mrs. Rich. Made clear by a clause giving her the property and another giving her the residue.
* The testator’s attempt to dictate the division of proceeds upon sale is a repugnant to the fee simple.
 |
| **Ratio** | Can’t control an incident of fee simple ownership |

The Life Estate

Life estate appears as a charge on the property (LTA s 1, “charge”)

# Creation of life estate:

By Act of the Parties

* Must be made explicitly: “To A for life” 🡪 without this, will pass greatest estate held by transferor [PLA, s 19(2) and WESA s 41(3)(b)]
* Estate pur autre vie: “To A for the life of B”

By Statute

Land (Spouse Protection) Act:

* Married or unmarried spouses can make a filing on the title of the spousal home (“homestead”) that is in the name of the other spouse.
* Once the entry is filed, any disposition made of the property without the consent (in writing) of the spouse who filed the entry is void (s 1)
* Filing entitles spouse to life estate in the property on the death of the title holder (s 4(2)).
* This applies despite any testamentary disposition to the contrary (s 4(2))
* However, life estate is subject to the rights of foreclosure and judgment creditors (s 4(1))

# Rights of a life tenant:

* Possession, occupation, use, and profit
* Alienable inter vivos: life tenant can transfer, but ONLY to the extent of their interest (i.e. for the remainder of their life)
* Devolution on death:
	+ If A has estate for the life of B (estate pur autre vie) but predeceases B, then estate can pass according to A’s will.
	+ Otherwise, cannot be passed by will/intestacy
* At end of measuring life, will revert to fee simple holder (reversionary interest holder or remainderman)

# Responsibilities of a life tenant:

## Refrain from Waste

See next section

## Liability for Taxes, Insurance, etc.

* LT is responsible for property taxes. If they are not paid, the property may be taken and sold by the taxing authority (Mayo v Leitovski)
* Mortgages
	+ A portion is interest and a portion is principle.
	+ Remainderman is responsible for principle
	+ LT is responsible for interest payments.
* Remainderman/reversionary interest holder is responsible for liability and fire insurance

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| Mayo v Leitovski |
| **Facts** | LT doesn’t pay taxes, sold at tax sale, extinguishes remainderman’s interest* LT didn’t pay property taxes, so property was seized and sold at a tax sale.
* LT’s daughter purchased the property and gave it to the LT.
* LT applied to register the fee simple.
* Remainderman filed suit: interest had been defeated by non-payment of taxes.
 |
| **Issues** | Can an LT extinguish a remainderman’s interest by purchasing after tax sale? |
| **Decision** | No; LT and remainder restored to original position |
| **Reasons** | * LT has a duty to protect remainderman’s interest
* Equity looks on that as done which ought to have been done/imputes an intention to fulfill an obligation
	+ Court assumes that the transaction in which the LT got the property was a fulfillment of obligation to pay taxes/to restore the remainderman to original position.
* Note that if the property had been sold in tax sale to someone other than the LT, the remainderman’s right would have been extinguished.
 |
| **Ratio** | LT cannot defeat remainderman’s interest through default on taxes  |

Waste

Applies to life tenants (Vane) and any other holder with future vested interest (New West)

## Voluntary waste:

* Waste that results from the activities of the life tenant (cutting timber; exploiting mines; demolishing or altering buildings; changing the use to which the land is put).
* **Ameliorating waste** (making property more valuable): permitted
* Remedies: injunction or damages
* Exception: Reversionary interest holder may expressly permit LT to commit voluntary waste by specifying that the LT is “unimpeachable for waste” in the instrument creating the life estate.

## Equitable waste:

An estate for life without impeachment of waste does not confer […] on the tenant for life a legal right to commit equitable waste, unless an intention to confer that right expressly appears by the instrument creating the estate (Law and Equity Act, s 11)

* Any deliberate action that is destructive of the property is equitable waste. Main thing: vandalism or wilful damage.
* E.g.: Vane v Lord Barnard:
	+ Lord had LT in Raby Castle.
	+ Stripped the castle of all its , but was unimpeachable for waste, so no common law remedy.
	+ Court of Equity prohibited equitable waste and forced him to repair the property.
* Applies in any situation in which a future interest is vested in the property
	+ E.g. New Westminster v Kennedy: owner whose house had been sold at a tax sale prevented from stripping the house during the period in which the owner could redeem the property by paying the outstanding taxes.

NB: LT not responsible for permissive waste:

* Passive – e.g. permitting decay/normal wear and tear.
* Life estate holder is not responsible for preventing this, unless it occurs through their negligence.

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| Vane v Lord Barnard  |
| **Facts** | LT is unimpeachable for waste. Strips castle’s valuables.D, on marriage of his son (P), settled a castle on himself for life, remainder to his son for life. After taking some displeasure against his son, D stripped the castle of the lead, iron, glass-doors and board to the value of 3,000*l*.* Vane: son/life estate in remainder
* Lord Barnard: father/life tenant
* LT unimpeachable for waste; no common law remedy
 |
| **Issues** | Can an LT unimpeachable for waste strip the building for valuables? |
| **Decision** | For the P.  |
| **Reasons** | The Court granted an injunction to stay committing the waste, and then held that the injunction should continue and the castle should be repaired and put into the same condition it was in. |
| **Ratio** | Even if a life tenant is unimpeachable for waste, they can be liable for equitable waste. Now in s 11 of the *Law and Equity Act*: “An estate for life without impeachment of waste does not confer and is deemed not to have conferred on the tenant for life a legal right to commit equitable waste, unless an intention to confer that right expressly appears by the instrument creating the estate.” |

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| New Westminster v Kennedy  |
| **Facts** | House sold at a tax sale stripped the house during the period in which the owner could redeem the property by paying the outstanding taxes. |
| **Decision** | Equitable waste; repair ordered |
| **Ratio** | The principles of equitable waste also apply to a landlord and tenant and property in foreclosure.One in possession will be restrained from using his legal power unfairly (unconscientiously) so as to destroy or depreciate the subject matter. This can be applied to tenants, mortgagor and mortgagee, partners, against a purchaser who “is in equity by the effect of the contract the owner of this estate,” having taken possession under contract, at the suit of the vendor who is in the “situation of an equitable mortgagee.” |

Co-Ownership – Concurrent Estates

**Transfer of property to multiple people presumptively creates TIC: (PLA s 11)**

* Exception: housing co-ops/leases (Robb v Robb) 🡪 common law presumption of JT applies
* Common law presumed joint tenancy

## Four Unities

* Time: must take title at same time
* Title: must take under same instrument
* Interest: must hold the same kind of estate
* Possession: equal right to possess and use property

## Tenants in common

**Creation**:

* Presumptively created where property is transferred to multiple people.
* Unless otherwise indicated on the title, tenants in common will hold equal shares
* Language indicating creation of tenancy in common:
	+ “To A B and C in equal shares” 🡪 there are no shares in joint tenancy
	+ “To A, B, and C equally” 🡪 implies shares

**Features**:

* Tenants hold separate shares. Shares can be of unequal value.
* Each tenant can dispose of their part of the property inter vivos or on death
* No right of survivorship
* Share unity of possession: all TICs have identical rights to possession of the whole property, regardless of the proportions of ownership.
	+ One TIC cannot exclude another.
	+ An excluded TIC can claim compensation for the period of the exclusion.
	+ If only one TIC lives on property, other TIC is entitled to rent.
* Can hold separate certificates of title
* If property produces income, it is shared in accordance with proportion of shares.

**Termination:**

* 1 TIC buys out the other(s)
* Sell the property and divide the proceeds in proportion to their ownership
* Physically subdivide the property
* If they cannot agree on how to end TIC, the court can order partition or sale in place of partition. Partition = physical division of the property.

## Joint tenants (with right of survivorship)

**Creation**

* Must be expressly on the title/transfer document:
	+ To A and B jointly
	+ To A and B as joint tenants
	+ Does not arise by implication where co-owners have four unities.

**Features**

* Each tenant owns the entire estate (not divided into shares).
* Four unities must be present
* No separate shares
* Right of survivorship without probate (jus accrescendi: acquisition by accretion, not inheritance).
	+ Property cannot pass by will (with the exception of the last remaining joint tenant). Attempts to dispose of estate by will are repugnant and will be void.
* Creditors cannot get at survivor’s interest

**Termination**

* Can be severed (i.e. terminated and turned into TiC) without notice to other tenant: PLA s 18
* Occurs upon:
	+ Act of alienation (e.g. mortgaging or transferring interest)
	+ Divorce
	+ Partition (physical division of property) or sale in place of partition, if partition isn’t feasible

Aboriginal Title

# Basic Principles

**Source of Aboriginal Rights & Title**

* ~~Royal Proclamation, 1763~~ rejected as the source of Aboriginal title in Canada
* Prior [exclusive] occupation at the time of sovereignty and the relationship between common law and pre-existing systems of aboriginal law (Delgamuukw)

**Constitution Act 1982, S 35(1)**: “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 and 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

**Honour of the Crown** (Mitchell)

* Obligation to treat AP “fairly and honourably, and to protect them from exploitation.”
* The Crown has a fiduciary duty to aboriginal peoples

**Reconciliation**

# Aboriginal Rights

**Aboriginal Rights** (Delgamuuwk)

* Rights to follow practices, customs, and traditions and to conduct activities on specific sites (e.g. hunting, fishing) – integral to the distinctive aboriginal culture of the claimants (at para 138, p 3-20)
* Easter to establish than title (at para 139, p 3-20)

**Establishing an aboriginal right** (Mitchell)

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

**Establishing the content of AR** (Marshall)

* Both aboriginal and European common law perspectives must be considered.
* The court must:

(1) Examine the pre-sovereignty aboriginal practice and

(2) Translate that practice into a modern right.

* How to do this?
1. Examining the nature and extent of the pre-sovereignty aboriginal practice in question.
2. Seek a corresponding common law right.
3. Determine the nature and extent of the modern right.
4. Goal: reconcile the aboriginal and European perspectives.
* The range of aboriginal rights
* Taking the aboriginal perspective into account does not mean that the particular right claimed, like title to the land, will automatically be established.
* The question is what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective.

# Aboriginal Title

**Fee Simple v Aboriginal Title**

|  |  |  |
| --- | --- | --- |
| **Fee Simple** | **Aboriginal Title** |  |
| Derived from the Crown | Precedes Crown ownership  | Delgamuuwk, Para 114 |
| Marketable-alienable | Inalienable, except to Federal crown  | Delgamuuwk, Para 113, 129 |
| Ownership and possession individual | Ownership and possession communal or collective  | Delgamuuwk, Para 115 |
| Freedom of use | Restricted use – cannot use the land in a way that would disadvantage later users  | Delgamuuwk, Paras 125-128 |
| Registered on title | Not on title – can’t file a caveat or CPL if you are asserting a claim over property |  |

## Features of Aboriginal Title (Delgamuuwk)

* Sui generis form of ownership
	+ not fee simple, but similar to it
* Arises from prior occupation before assertion of British sovereignty. Predates crown grant.
* Held communally
* Inalienable: cannot be transferred, sold, or surrendered to anyone other than the Crown.
	+ Because Aboriginal title has a non-economic component: the land has inherent and unique value in itself.
	+ Also because fee simple can only derive from a Crown grant.
* Inherent limitation: cannot be used in a way that deprives future generations of the control and benefit of the land.
	+ E.g., if it’s established with reference to hunting, the group that establishes that claim cannot use it in a way that makes such a use impossible (e.g. strip mining).
	+ E.g., if group claims a special bond w/land for ceremonial purposes, certain types of developments may be forbidden (e.g. a paved parking lot).
* Inconsistent with and cannot be registered under the Torrens system (Skeetchestn)
	+ 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 derive from the Crown
* Not site-specific, but territorial: title can exist not only over villages/settlements, but territories that are traversed/used regularly (Tsilhqo’tin)

## Test for AT (Delgamuuwk):

1. **Occupation** prior to 1846 (sovereignty)
	1. Occupation must be sufficient.
		1. The key to sufficiency: establish that the Aboriginal use of the land “evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.” (Tsilhqo’tin)
	2. The notion of occupation must reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.
	3. 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 (Marshall)
	4. Must be sufficiently regular and exclusive occupation to comport with title at common law (Marshall)
	5. Seasonal occupation = ~~AR~~ (Marshall) 🡪 Tsilhqo’tin overturns this.
		1. Seasonal hunting and fishing exercised in a particular area will be AR, not AT
		2. They will transfer into the common law right of easement or profit a prendre, for example
2. **Continuity**
	1. If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation (Tsilhqo’tin)
	2. “Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times.” (Tsilhqo’tin)
	3. Can be interrupted if there is “substantial maintenance of the connection” (Delgamuuwk)
3. **Exclusivity**: ability to exclude others at sovereignty
	1. Exclusivity is the “intention and capacity to retain exclusive control.”
	2. The fact that other groups were on the land does not necessarily negate exclusive occupation.
	3. Intention and capacity may be demonstrated by:
		1. Exclusion of others from land;
		2. Granting or refusal to grant of permission for others to access land;
		3. Treaties;
		4. Lack of evidence of challenges to occupancy

## Duty to consult (Tsilhqo’tin)

Before AT is established (claim stage):

* Crown has a duty to consult and accommodate in good faith about proposed land use
* If appropriate, must accommodate the interests of such groups.
* Level of consultation and accommodation varies with the strength of Aboriginal claim and the seriousness of the effect upon the interest claimed.
* Remedies for failure to consult
	+ Includes damages
	+ Order that consultation be carried out
	+ Injunctive relief

After AT is established:

* Crown must seek consent
* Establishment of AT is retroactive – invalidates prior consultation, accommodation, and legislation.
* If consent is not given, Crown must justify infringement.

## Extinguishment & Infringement

**Extinguishment** (Delgamuuwk at para 172)

* Province cannot extinguish aboriginal rights.
* Federal government can, but only with the consent of the band or where justified.

**Infringement**

Justification (Tsilhqo’tin; Delgamuuwk)

The Crown must show:

* That it discharged its procedural duty to consult and accommodate;
* That its actions were backed by a compelling and substantial objective;
* That the governmental action is consistent with the Crown’s fiduciary duty to the group.

Infringement of AT will ordinarily require compensation (unlike infringement of AR).

## Evidence

**Evidence** (Delgamuuwk)

1. FN rely on songs, legends, myths, figures on totem poles that surround the occupation of the land can be adduced in support of claim.
2. SCC said that failing to acknowledge this evidence was dismissive and disrespectful of the types of proof that FN had access to.
3. SCC did not give guidance on how to assess this evidence.

**Admissibility of oral histories** (Mitchell)

* Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective.

Admissible as evidence where:

* **Useful** in the sense of tending to prove a fact relevant to the issues of the case
* They may offer evidence of ancestral practices and their significance that would not otherwise be available
* Oral histories may provide the aboriginal perspective on the right claimed
* **Reasonably reliable**; unreliable evidence may hinder the search for the truth more than help it.
1. Does the witness represent a reasonably reliable source of the particular people’s history?
	1. TJ should inquire as to the witness’s ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.
* Even useful and reasonably reliable evidence **may be excluded in the discretion of the trial judge** if more prejudicial than probative

🡪 Common law rules of evidence must be applied flexibly.

**Weighing evidence** (Mitchell)

1. Equal and due treatment should be given to evidence presented by aboriginal claimants.
2. Evidence adduced in support of aboriginal claims must not be undervalued
3. Should not be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they related to the valuing of evidence, are often synonymous with the “general principles of common sense”
4. **Admissibility** is a question of law for the judge
5. **Interpretation or weight** – question of fact (appeal court’s deference to trial judge’s findings of fact; equal and due weight to other evidence)

TABLE OF CASES

Airspace 4

Kelsen v Imperial Tobacco 4

Airspace rights belong to owner of land below 4

Bernstein v Skyviews 4

Air space rights extend only to the height necessary for **ordinary use and enjoyment** of the land and the structures on it. 4

Strata Property 6

Fixtures & Chattels 7

Re Davis (1954) 8

Bolted down bowling alleys: **chattels** or fixtures? Chattels. 8

Zellstoff Celgar v BC (2014) 8

Pulp mill equipment: chattel or **fixture**? Fixtures. 8

CMIC Mortgage Investments Corp v Rodriguez (2010) 8

Tent that is not fixed in cement blocks: **chattels** or fixtures? Chattels. 8

Elitestone v Morris (1997) HL 8

Bungalow resting on concrete pillars. Been there since 1945. Chattel or fixture? Neither. 8

Water Rights 9

Johnson v Anderson [1937] BCSC 11

Unlawful stream diversion interferes w/unlicensed riparian right 11

Common law riparian rights stand to the extent that they do not conflict with licences. 11

Schillinger v H Williamson Blacktop [1977] BCCA 11

P using creek illegally. D pollutes creek. No remedy. 11

1. A party using water unlawfully cannot collect damages for the pollution of that water. 11

2. Siltation is never lawful. 11

Steadman v Erickson Gold Mining Corp [1989] BCCA 12

P uses water domestically. D pollutes water. Remedy. 12

1. Riparian rights are enforceable, unless the rights of a licencee supersede them. 12

2. You cannot contaminate water. 12

Accretion and Erosion 13

Southern Centre of Theosophy v South Australia [1982] 13

Lake boundaries move. Do property lines? 13

Property boundaries are tethered to high water mark. 13

Support 15

Gillies v Bortoluzzi, 1953, Manitoba 15

If **developed**, must show that land would have subsided regardless of extra weight of structure. 15

Rytter v Schmitz 15

Removal of lateral support: strict liability 15

Removal of **vertical** support: absolute liability 15

Equity 16

Restraints on Alienation 17

Crown Grant 18

Sale of Land 19

Inter Vivos Gifts 20

Incomplete Gifts 21

Ross v Ross (NB: pre-Torrens – PLA requires delivery) 21

Deed signed, witnessed, and attested to, but not delivered. Discovered upon death. 21

Retaining possession of a deed will not render it inoperative, unless there is strong evidence that the transferor’s intention was to do so. 21

Zwicker v Dorey 21

Gift to take effect on death; not in a will. 21

An inter vivos gift cannot take effect on death. If a person wants to give a gift upon their own death, they must make a **will**. 21

MacLeod v Montgomery – POST-Torrens – fussier with registration 22

Gives transfer form but doesn’t deposit duplicate 22

Duplicate certificate of title freezes title. Where there is evidence that the D did not intend to complete a gift, the court will not give effect to it. 22

Testate Disposition 23

Tottrup v Ottewell 24

Note: Result legislated by WESA, s 46(1)(b) 24

Will beneficiary dies before testator; who gets estate? 24

1. “To X, his heirs” creates fee simple 24

2. If a fee simple lapses because of death of donee, it will pass into residue of estate. 24

3. Result legislated by WESA s 46 24

Intestate Disposition 25

Mental capacity for disposition 26

Proprietary Estoppel 27

Clarke v Johnson 27

Clarke owns camp. Johnson uses & maintains camp over 20+ years. Clarke seeks to evict Johnson following a dispute about children’s access to camp. 27

Proprietary estoppel 27

Unjust Enrichment 28

Clarke v Johnson 28

Unjust enrichment 28

Remedies 29

Clarke v Johnson 29

Remedy for proprietary estoppel 29

Leases 30

Trusts 31

McRae v McRae Estate 31

Trust notation removed from title on transfer. Do beneficiaries have rights? 31

A beneficiary has in personam rights against a trustee, even if the trust is unregistered. Even if a trust is not registered on the title, the RO is bound by the trust. 31

The Torrens System 32

Effect of Registration 35

Dukart v Surrey 40

Notation incorrect (says trust not foreshore reserve), removed as a result. Effective? 40

Register of instruments; notation on title not guaranteed to be correct. 40

Credit Foncier v Bennett 40

Forged mortgage assigned to BFP. BFP tries to foreclose. Result? 40

Registration does not guarantee the validity of a charge. Now codified in s 25.1 41

A mortgage is only security for the amount advanced. 41

Canadian Commercial Bank v Island Realty 41

Fraudster forges and registers discharge of mortgage in order to register another mortgage. What is the effect? 41

Now, governed by s 25.1: discharge by void instrument not effective. 41

Carr v Rayward (1955 BC) 42

Lien filed for unpaid work done for previous RO. Legit? 42

Mechanics liens can be registered after title has changed hands. 42

Rudland v Romilly 44

If a prior application to register title is pending, CPL does not take effect. 44

Assurance Fund 47

McCaig v Reys 48

McCaig lost option to land because of the dastardly Jerome. Claim to Assurance Fund denied. 48

Loss must be occasioned by operation of the register. 48

RBC v BC 48

Equitable mortgage granted, but duplicate removal not recorded. Subsequent mortgage registered. 48

1. Mortgagees cannot collect from the Assurance Fund, nor can those whose losses do not result from the mistake of the Registrar. 49

2. Those who seek to rely on equitable mortgages must accept the risks inherent in such securities. 49

Unregistered Interests 50

Sorenson v Young 50

Unregistered easement across land; property sold; new owner builds a gate. 50

Unregistered interests do not have effect against a purchaser. 51

Martin Commercial Feuling v Virtanen 51

Judgement registered after sale agreement, but before sale closes. 51

If a judgment is registered after agreement for sale, but before close of sale, purchaser gets title free of judgment (unless it is a scheme to defeat judgment) 51

L& C Lumber v Lundgren 51

Timber license assigned to 3rd party; what is the effect? 51

Unregistered instruments are enforceable by 3rd party purchaser against the person who created them. 52

International Paper v Top-Line 52

Fraud 54

Frazer v Walker 55

“Immediate indefeasibility”: Once C became the registered holder of the fee, C keeps the title, and A should be the innocent victim left to seek monetary compensation from B/assurance fund. 55

Gill v Bucholtz 55

Fraudster forged transfer to an accomplice. Accomplice took out 2 mortgages. Effect? 55

Registered charges are not indefeasible. Nemo dat applies. 56

Charges obtained by fraud will be struck off the title. 56

Gibbs v Messer – overruled by Frazer 56

McCaig v Reys 57

Unregistered option sold by the nefarious Jerome 57

Example of true fraud (but no remedy, because in the hands of BFP) 58

Hudson’s Bay Co v Kearns and Rowling 58

Purchaser takes land w/o seeing title deeds (which are deposited w/mortgagee). BFP? 58

1. Definition of fraud: “a man who in consequence of … actual notice of a prior unregistered title or interest does any act for the direct purpose of bringing himself within the words of the section, as distinguished from any act in the ordinary course of business or in the natural course of any pending dealing or transaction, and thereby prejudicing the holder of the unregistered title, is guilty of actual fraud and is estopped from invoking the protection of the enactment.” 59

2. Constructive notice is not enough to undermine s 35 (now s 23) protection. Must be actual notice. 59

3. Negligent/Careless – no notice or dishonesty; not fraud 59

Vancouver City Savings v Serving for Success 59

Mortgagee forecloses on property, which extinguishes rights of unregistered lessors. 59

Knowledge is not enough to constitute actual fraud. Fraud requires actual knowledge prior to entering into the agreement and dishonesty/dishonourable conduct that violates common morality 59

Grevling v Grevling 60

Same property transferred twice. Effect on BFP? 60

1. Assets v Mere Roihi: defines “actual fraud” as including wilful blindness without dishonesty: “if his suspicions were arouse, and he abstained from making inquiries for fear of learning the truth […] fraud might properly be ascribed to him.” 60

2. Solicitor’s knowledge can sometimes be imputed to client. 60

Saville Row Properties 60

Attempt to have option registered denied. Effect if BFP knows this? 60

If you don’t have notice of interest until after you purchase property, you can disregard it. If you have notice of a registered option but have reason to think it’s void, then you may disregard it. The burden of proving fraud rests with the person alleging it. 60

In Personam Claims 61

Pacific Savings and Mortgage Corp v Can-Corp Developments 61

Mortgagee forecloses on property. Mortgagor files CPL to have redemption period extended. 61

After foreclosure, rights in property in favour of the mortgagee, but subject to personal rights (right of redemption) of mortgagor. 61

McRae v McRae Estate 61

Trust notation removed from title on transfer. Do beneficiaries have rights? 61

A beneficiary has in personam rights against a trustee, even if the trust is unregistered. Even if a trust is not registered on the title, the RO is bound by the trust. 62

Applications to Register 63

Rudland v Romilly 63

CPL lodged after title registration application submitted. 63

If a prior application to register title is pending, CPL does not take effect. Now legislated: s 217. 63

Canada Permanent Mortgage Corp. v BC (NOT GOOD LAW) 63

Mortgage attempts to register before FS holder that granted the mortgage. CPL filed against FS holder. Who wins? 63

Overruled by statute: 198 (charge can only be created by RO) and 25.1 (void instruments have no effect) 64

Breskvar v Wall 64

Blank xfer form as security; fraud; BFP; ranking of BFP vs caveat 64

Where there are two unregistered interests/equitable claims, consider equities/first in time 64

Fee Simple 65

Repugnancy 66

Re Walker 66

Will gives fee simple absolute and gift over 66

Where there is a repugnant gift, the court will determine the testator’s predominant intention and subordinate intention. 66

Re Shamas 67

Will gives everything to wife until kids turn 21: LT w/right of encroachment 67

Intention is determined by “sit[ting] in the testator’s armchair,” i.e. “gathered from the language of the will read in light of the circumstances in which the will was made.” 67

Cielein v Tressider 67

Will gives fee simple, dictates what distribution of profits in event of sale 67

Can’t control an incident of fee simple ownership 67

The Life Estate 68

Mayo v Leitovski 69

LT doesn’t pay taxes, sold at tax sale, extinguishes remainderman’s interest 69

LT cannot defeat remainderman’s interest through default on taxes 69

Waste 70

Vane v Lord Barnard 70

LT is unimpeachable for waste. Strips castle’s valuables. 70

Even if a life tenant is unimpeachable for waste, they can be liable for equitable waste. Now in s 11 of the *Law and Equity Act*: “An estate for life without impeachment of waste does not confer and is deemed not to have conferred on the tenant for life a legal right to commit equitable waste, unless an intention to confer that right expressly appears by the instrument creating the estate.” 71

New Westminster v Kennedy 71

House sold at a tax sale stripped the house during the period in which the owner could redeem the property by paying the outstanding taxes. 71

The principles of equitable waste also apply to a landlord and tenant and property in foreclosure. 71

Co-Ownership – Concurrent Estates 72

Aboriginal Title 74

TABLE OF CASES 79