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CONCEPT OF LAND

* Property= rights in things
* Real Property
	+ Surface/land rights, air rights, ~~mineral rights~~
	+ Corporeal right 🡪 tangible
	+ Incorporeal right 🡪 intangible (ex. easement – right of use)
	+ Fixtures
* Personal Property (Personalty, movables, intangible or tangible personal; chattels)
* ***Law and Equity Act***
	+ s.2 – Receive laws of England in BC
* Surveying required in BC (*LTA* s*.*58) 🡪Horizontal and vertical plane
* Registrar can also accept a meters and bounds description without a plan (s.99)
* Indefeasible title is subject to the right of a person to show that land is wrongly described (*LTA* s.23)
* No obligation on lawyers to investigate whether the plan & boundaries of land are correct (*Winrob*)
* Boundaries can be changed by accretion or erosion (must be then registered on plan)
* Definable, identifiable, transferable, valuable, permanent ands stable
* **Torrens system:** 2-dimension, surface based system. In Land Title Office, titles are represented as 2-dimensional cadastral overlays.

|  |  |  |
| --- | --- | --- |
|  | NUISANCE | TRESPASS |
| **DEFINE:** | **Interference with use or enjoyment of property (that doesn’t take place on your property)** | **Enters property deliberately without consent of owner; violates the right of possession**  |
|  | P must prove they deserve compensation Less serious | Damages assumed (monetary compensation)More serious  |
| WHERE: | Intrusion above the owned airspace or outside property line  | Intrusion within owned airspace (above surface) |
| TYPES: |  | Encroachment ***Property Law Act***s.36 (1) owner = interest, right to land (2) if there is an encroachment, or fence improperly located **fence or building**, court may:(a) Easement + compensation (right of way/occupation)(b) Vest title + compensation(c) Mandatory injunction (*Kelsen* 🡪 money is not a substitute)🡪 Expands *Shelfer* (only for building or fences) |
|  | Equitable Remedies: Legal Remedies: 1.Equitable damages Damages \*Now merged2.Specific performance3. Injunctions Dependent on the behaviour of both the P & D (disentitlement) |

THE RELEVANCE OF ENGLISH LAW

* *Colonial Laws Validity Act* 🡪 gave validity to legislation passed by logical legislative assemblies November 19, 1858, in BC's case)
	+ *Law and Equity Act,* s.2
		- Received English Law into BC, as of November 19, 1858, "so far as they are not from local circumstances inapplicable", in which case "laws must be held to be modified and altered".
* *Chancery Amendment Act* 1858 *“Lord Cairns Act”*
	+ Equitable Damages
	+ This act allows Courts to decide damages to the party injured in addition to or in substitution for an injunction, or specific performance
	+ This also made it possible to assess future damages
* *Statute of Quia Emptores,* 1290
	+ Allowed sale and purchase of land
* *Tenures Abolition Act,* 1660
	+ Shifted away from feudalism
* *Statute of Uses,* 1535
	+ Executed the first use
* All received into BC law in 1858 and form the foundation of property law. The BC *Land Title Act* adopted the Torrens system in the 1870s.

CUJUS EST SOLUM EJUS USQUE AD COELUM ET AD INFEROS

Who owns the soil, owns up to the heavens, and downward to hell

1. Ad Coelum

Kelsen v Imperial Tobacco Co, [1957]

Facts: P was lessee of shop with flat roof (never used by P); D owned adjacent building had signed fixed flush to wall (4 inches), wanted to put up new sign, P approved. Sign was 8 inches from wall. P gave D notice to remove, then told them it could stay. Formal letter to remove sign. P sued for trespass on his airspace 🡪 claimed a mandatory injunction for removal.

Issue: Is an invasion of airspace a trespass?

Decision: Verdict for P. Injunction to remove.

Reasons: *Shelfer v City of London* – when P’s legal rights are invaded *prima face* entitled to injunction (unless P has disentitled🡪damages).

**Rule for damages instead of injunction**: (1) Injury to P’s legal rights is small (yes) (2) Capable of being estimated in money (yes) (3) Adequately compensated monetarily (In this case 🡪 damages would be nominal, not adequate compensation) (4) Oppressive to D to grant injunction (Yes)

Most cases injunction not granted 🡪accidental invasion

In an instance where a case for an injunction made out 🡪 if P disentitled himself, court can award damages instead

Bad behavior by D

Just because damage is nominal doesn’t mean injunction shouldn’t be granted

Still valid 🡪 in guiding the courts deciding equitable damages for an injunction/specific performance but overtaken as far as fences/buildings in s.36

Ratio: Invasion of airspace above property 🡪 trespass. Damages can be awarded instead of an injunction (conduct of parties, how oppressive the injunction is)

Bernstein (Lord of Leigh) v Skyviews (1977)

Facts: D take and sell aerial photos to property owners. Took photo of P’s house. Offered to sell him photo. P wrote to complain (invasion of privacy🡪handover/destroy negatives). D did not receive letter, answered by someone else (sell negatives). P wrote: trespassed on airspace, invaded privacy, give negatives/prints, never do it again, apologize. No answer.

Issue: Do property owners also own unlimited airspace above the property? Right to exclude entry?

Decisions: Verdict for D.

Reasons: Rights to airspace more founded in nuisance. P relies on *Kelsen* to assert trespass. Absurd connotations if ownership extends to unlimited height. Balance rights of owner with general public.

Ratio: A property owner has legal rights from the ground to the height at which ordinary/use/enjoyment of that land. Above that: same rights as public **Limited *Kelsen*.**

 **Sheppard thinks this is vague.**

**Mineral rights are reserved to the Crown. *BERNSTEIN* principle applies downward as well as upward - ownership rights only extend downwards as necessary for "ordinary use and enjoyment” BUT some case-law that says you own to centre of earth.**

Land Title Act (1-16)

s.138 – recognizes **airspace parcels** (volumetric, geodetic elevation – corresponds to curvature of the earth, airspace plan (how space is divided, can be multiple parcels within a plan)

s.139 – **title** to airspace recognized

s.140 – easements/restrictive covenants not implied (1) grant not airspace **does not transfer an easement**; (2) above upper, below lower remain in grantor

s.141

* + (1) can create airspace plan (geodetic 🡪 complying with curve of the earth) with **indefeasible title**
	+ (2) can sell/mortgage/lease/grant interest in property
	+ (3) can be **sub-divided** (***Strata Property Act****)*

s.142(3) – if title is vested in municipality 🡪 can create airspace parcels

* + Skywalks above street, power lines, billboards, sky-train

Strata Property Act (1-18) – owner may subdivide airspace or land, each owning each individual title

* **Title:** Strata owner’s title includes both the condo & part interest in the common area. No separate title for the land on which the condo building sits. Registered in LTO (physical dimensions, jointly owned facilities, financial contributions from each owner for common expenses)
	+ Can rent/sell/mortgage etc.
	+ Each strata lot owner gets a series of rights (access, support, services)
	+ Common assets: chattels
* Monthly management fee + contingency fund (emergency/infrequent expenses)
* Creates government body (Strata Corporation)
	+ Corporation made up of all owners, some elected to council
	+ Changes in appearance or uses to common property need:

¾ vote (of those in attendance) at an annual or general meeting (s.71)

OR

Reasonable grounds to believe that immediate change is necessary to ensure safety or prevent loss or damage s.71(a) and (b)

* + Non major or immediate changes require 51 of majority at annual meeting
* **Bare land strata plan** (s.1) – subdivision on a horizontal plane
	+ the boundaries of the strata lots are defined on a horizontal plane by a reference to survey markers
* **Building strata plan** (s.68) – subdivision on a vertical plane
* Disputes: settlement/arbitration/litigation/resolution (2014 *Civil Resolution Tribunal Act* will provide dispute resolution w/o court 🡪informal/faster)

s.66 – proportionally owned

s.67 – property tax 🡪 individual unit valued + common property/assets divided amongst owners

s.68 – own to center of the walls

s.69 – implied easements - support walls, passage of water, sewage, drainage, gas, oil, electricity, garbage, heating, telephone, radio, by pipes, wires, cables, chutes for use by strata lot

* + NOT registered on title

(1)(a) easements on hallways, elevators

* s.70(1) – may remove all or part of a wall with prior written approval of the strata corporation
* s.72(1) corporation responsible for repair/maintenance of common assets (2) can charge unit with repair and maintenance that they have the right to use (ex. parking spaces)

Requirements of Strata plan:

* S.244(1) Strata plan must:
	+ (a) show the boundaries of the land included in the strata plan and show the location of the buildings
	+ (b) contain a description sufficient to identify the title to the land, including plan
	+ (c) show the boundaries of the strata lots, distinguished with numbers or letters (consecutive order)
	+ (d) show the area in square meters of each strata lot
	+ (e) comply with rules of s.75 of Land Surveyors Act
	+ (g) be signed by (i) the person applying to deposit the plan under s.240 (ii) each holder of a registered charge on all or part of the land included in the strata plan
	+ (h) be endorsed by a approving officer
* (2) Parking stalls, garage areas, storage areas, and similar areas or spaces intended to be used in conjunction with a residential strata lot must not be designated as separate lots, must be included as part of a lot or as part of common property

FIXTURES AND CHATTELS

**“land"** includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning (*Interpretation Act*)

Chattels = tangible, moveable personal property

Fixtures = chattels attached to the land or buildings, real property

* Common law rule: transfer of interest in land assumes includes all fixtures, excludes chattels
* “Once a fixture is a fixture, it stays that way” (*Rodriguez*) – except Trade (*Stack v Eaton)*

Re Davis (1954)

Facts: A wife survived her husband and had claims against his real estate through her “dower”. 6 bowling alleys installed in building before husband purchased building. Installed using bolts, raised 6 inches above floor, affixed without much permanency could be dismantled/moved easily.

Issues: Are the bowling alleys chattels or fixtures?

Decision: Bowling alleys🡪 chattels. Value deducted from value of dower (not part of real estate)

Reasons: Mild affixation/not permanent, not affixed for better use of land, for purpose of being portable

Ratio: Chattel v fixture test, to factors:

* + Method and **degree** of affixation/annexation
		- Permanent or temporary?
		- Easily removal or serious damage or destruction?
	+ **Object and purpose** of affixation/annexation **(PRIMARY CONSIDERATION,** *Stack* principle 1**)**
		- **as supported by the objective facts (method/degree)**
		- “better use”: to improve freehold or to enjoy the item?
			* raising value/usefulness of land & slightly affixed 🡪 fixture
			* improvement of chattel 🡪 chattel
				+ if this object & affixed 🡪 chattel
		- Objective test (vs. subjective)

Zellstoff Celgar Ltd v BC (2014) \*Controlling authority

Facts: P appealing. P disputing property transfer tax for mill (286k v 4.5mil); constructed in 60s, equipment installed in 90s. Almost every item fixed, could be dismantled & removed. Entire plant could not be relocated as a unit. Removal of large machinery🡪 considerable expense (could be non-viable).

Issues: Should use of land be considered when determining chattel v fixture? What is the “better use” test?

Decisions: Machinery & equipment 🡪 fixtures (degree: substantial, object: better use of land as mill)

Reasons: Equipment intended to remain for rest of its useful lifetime

*Stack v Eaton*

1. Attached only by own weight (degree) 🡪 **chattels**, unless shown they were meant to be part of land (purpose)
2. Affixed to land slightly (degree) 🡪 **fixtures**, unless intended to be chattels (purpose)
3. Degree and purpose of affixation (circumstances) can alter the prima facie character in 1 or 2 (**purpose is primary) 🡪 Rebuts factor 1 or 2**
4. The intention of the person is only relevant to the extent it can be presumed from the degree (how) and nature (why) of affixation
5. Trade fixtures 🡪 remain personalty (become chattels at lease end); leasehold improvements 🡪 fixtures, belong to landlord
	* Fixtures installed can be converted into chattels, if they repair damage.

Ratio: “Better use” test should also consider objective intention (duration of annexation & use of lands)

* + Occasional/temporary v permanent (permanent =item would remain as long as it serves its purpose – ex. carpets fixtures even though slight degree *La Salle Recreations v Canadian Camdex*

CMIC Mortgage Investment Corp v Rodriguez (2010)

Facts: D bought first Cover-All building, where concrete blocks were buried (fixture). Bought 2nd building, without paying for it, which rested on its own weight, intended to be portable. Bankrupt. CMIC wanted a declaration that 2nd building could be foreclosed (within mortgage on her land)

Decisions: For D🡪2nd building a chattel.

Reasons:

*Royal Bank of Canada v. Maple Ridge Farmers Market Ltd* \*\*DON’T USE

1. Chattel 🡪 Unattached, except by own weight, removed ~~damage~~
2. Chattel 🡪 Plugged in, can be removed ~~damage~~
3. Fixture 🡪 Attached minimally
4. Fixture 🡪 Attached to part of structure which could be removed, but rendered useless (lose essential character)

Chattel 🡪 Removed ~~damage~~, without rendering useless (does not lose essential character)

1. Tenant’s fixtures can be removed
2. In exceptional circumstances, can resort to **purpose test** - If the item is unattached, but the party can establish that the intent was that it be a fixture, then it is a *fixture*

Ratio: 2nd building is unattached to property except by own weight (rule #1) 🡪 chattel; P wanted it portable (intent) so the presumption is not rebutted

* + Rebuttal presumption: degree of affixation, the size, value and nature of the object are factors in rebutting the presumption

Applied *Re Davis, Stack v Eaton*

WATER

RIPARIAN RIGHTS

* Littoral owner 🡪 ocean side/lake shore property owners
* Riparian owner 🡪 streams (any flowing body of water)
	+ Stream = natural watercourse (lake, river, swamp, spring, creek)
	+ Riparian rights = “natural” rights to use a lake/stream in its natural state, quantity and quality, entitled to make certain use of the water
		- Qualifications: no material injury to other riparian owners, no use unconnected to riparian property (domestic purposes), if not using for d.p. 🡪 cannot appropriate it for other uses, cannot transfer/sell riparian rights to others
		- **Obligation not to harm other riparian owners in flow/quantity/quality of water**
		- **Maintains common law rights to flowing/clean water unless licence removes this right**
* **Water licences 🡪 first in time, first in right**
* Crown owns:
	+ All water, other than riparian uses (*WSA* s.5; *WPA* s.3(1) & (2))
	+ All land under water (*Land Act* s.55 & s.56)
		- Unless Crown specifically gives stream-bed unless explicitly given on land grant (then *ad medium filum)*
	+ All groundwater (*WPA* s.3(2))
	+ All percolating water (*WPA* s.3(2))
* No one owns snow/rain while falling
* **Current riparian rights:** Natural rights continue, unless replaced by statute
	+ 1. **Access** to and from the water
	+ 2. Right of **drainage**
	+ 3. ~~Right of reasonable use~~ (***WSA*** ss. 2, 5, 6, 7; ***WPA*** s.3(1))
		- But you have permission
		- Crown owns
		- Must have licence for non-domestic purposes
	+ 4. ~~Right to undiminished flow (volume)~~ (***WSA*** ss. 2, 5, 6, 7; ***WPA*** s.3(1))
		- Crown owns flow, Crown owns use of groundwater
		- **Right to flow for domestic uses**
			* Unless licenced, as no right to complain about reduced flow (*Johnson v Anderson)*
	+ 5. Right to **undiminished quality of water (contamination/pollution)**
	+ 6. Right of **accretion**
		- **gradual/imperceptible 🡪 property line changes**
		- sudden/perceptible 🡪 if water rises, you lose land to the Crown
		- **ONLY** if property line is “wavy line” property (vs. fixed strip)
	+ 7. Right to protect land from **erosion**
		- if you are trying to protect your land from erosion, and this effects the land downstream that is alright
	+ 8. Right to **flood-proof land**

**🡪For domestic purposes: use of water of undiminished flow and quality for domestic purposes**

* + - Subject to other people’s licences

Water Act 1996

* s.4 - **a person who is not registered may not divert/extract/use/store water from stream except for domestic purposes**
	+ Other than for domestic purposes, must apply for licence to have use of water (otherwise, infringing on *WA)*
	+ **As soon as someone licenses water 🡪 license supersedes domestic use**
	+ s.1 - domestic purposes = household requirements, sanitation, fire prevention, watering of domestic animals, poultry, irrigation of a garden not larger than 1012 m2 next to a home
* s.25 water license attaches to land, automatically transfers with title (ex. of before: *Schillinger*)
* s.42(1) stream to be diverted for the purposes of extinguishing a fire, but the original channel must be restored after the fire is extinguished; (2) owner can divert unrecorded water (not subject to prior license for domestic purposes and for prospecting for minerals (burden on D to prove water is unrecorded)

Water Sustainability Act

* s.2 – No license is required for domestic use
* s.22 – protects domestic users (domestic user comes first in ranking) –domestic, waterworks, irrigation, mineralized water

Johnson v Anderson (1937)

Facts: D diverted flow of stream that went through P’s property. D had license, but not for diversion. P used water for domestic purposes, has no license. P sought damages, injunction and demolition of works diverting flow.

Issues: Does the *Water Act* abrogate riparian rights?

Decision: For P 🡪 mandatory injunction (demolish works), prohibitory injunction (restraining D from interfering/diverting natural course of the stream)

Ratio: Unless licenses have been granted, **riparian owner still has right to quality and quality of flow** and **has a remedy** against wrongful, unauthorized diversion of a stream which deprives them of the right to use water for domestic purposes (unless statutes specifically take this right away)

\* Now, common law riparian right to flow is in the Crown, but would still get an injunction because has domestic rights to flow

Schllinger v H Williamson Blacktop & Landscaping Ltd (1977)

Facts: P claims damages for negligence/nuisance. D added silt to unrecorded water that P used for fish farm. P had license for different creek.

Issues: Was P entitled as a riparian owner to have the benefit of the flow, divert & use the water? If he was not entitled, can he recover damages for deterioration of quality?

Decision: For D.

Reasons: P was not entitled to divert and use the water for industrial purposes, D cannot be liable for deteriorating quality of unlawful diversion. Riparian rights only exist or person lawfully using water (violated *Water Act*)

Ratio: **A party using water unlawfully cannot collect damages for contamination of that water by another party.**

Steadman v Erickson Gold Mining Corp (1989)

Facts: P sued in nuisance. P’s water was piped into house from dugout. D built a road, causing mud & silt to contaminate P’s water system. D claimed P had no right to sue in nuisance🡪P did not have water licence and no right to divert the water. Judge found only minor industrial use (doesn’t count)

Issues: Does a party have a right to use ground water for domestic use?

Decision: For P. Appeal dismissed.

Reasons: Right to appropriate in natural state. Can sue in nuisance (right to use and enjoyment of land)

Ratio: A riparian owner can have a claim in nuisance **if a party makes the use of unlicensed water unusable (by contaminating it) if used for domestic purposes.**

v. *Schillinger* – this is ground water (not diversion from Crown-owned stream), this is not for industrial purposes.

Ground water is owned by Crown (**can exhaust it, but can’t contaminate it)**

***Land Act* 1996**

s.55 (1) Crown land disposed of that is shown a body of water outlined in a colour other than red, no part of the bed below its natural boundary belongs to the new owner (a) unless there is an express provision

 (4) All land under water is the Crown’s

s.56 (2)(b) does not affect a registered owner who got indefeasible/absolute title before March 27 1961 that includes a body of water in a colour other than red (c) or a subdivision before same date

ACCRETION & EROSION

* Fluvial (water), wind, and man-made operations (except owner)
* Applies to all water
* To apply to property: MUST indicate on map (wavy line)
* New plan must be registered to show changes

Southern Centre of Theosophy Inc v South Australia

Facts: P/A is proprietor of perpetual lease from Crown. Want declaration that the high water mark of the lake forms the boundary of its land. Lake subject to tidal influences. Accretion has taken place. P wanted new land as part of property.

Decision: For P.

Reasons: All natural cases of accretion are valid (wind or water). **Gradual imperceptible 🡪 accretion applies. Rapid/perceptible 🡪 ~~accretion~~**

Ratio: Accretion can apply to lakes when they are tidal; windswept sand is accretion. Natural boundaries of land can move.

In BC:

* Gradual rise of river-bed is seen as vertical process. Different than accretion, the property in raised land remains in Crown.
* *Monashee Enterprises Ltd v BC* (1981)
	+ Crown had reserved a narrow strip running parallel to high water mark. Accretion occurred and Crown claimed title. Court held “an ambulatory strip” was impractical and unless Crown grant had specifically provided for it 🡪 accretion belonged to Crown.

SUPPORT

* Common law: adjacent owner entitled to lateral & vertical support
* Lateral:
	+ Land in natural state 🡪 Strict liability (just have to prove action on other side affected the property)
	+ If building/weight distribution changed (“improved”/”developed”)🡪 P must prove negligence
* Vertical:
	+ Natural or improved 🡪 Strict liability

Gillies v Bortoluzzi (1953)

Facts: D excavated for a basement. Wall of P’s grocery store (tenant) on adjoining property collapsed. Stock damaged/destroyed. Suing for loss of business, cost of repairs, trespass and negligence in excavation. D counter-claims.

Decision: for P.

Reason: Excavators went over property line (removed vertical support), if if they hadn’t 🡪 negligent in removing lateral support.

Ratio: Plaintiff is entitled to lateral support for its land in its natural state but not entitled to support when there is superimposed on the land the weight of the building, unless there is negligence

Rytter v Schmitz (1974)

Facts: D constructed building on property adjacent to P. During excavation, loss of lateral support in P’s property🡪collapse. D denied excavating over property line, just entered property after to prevent further damage, had to excavate more for shoring. P suing for trespass & damages

Decision: For P.

Reasons: A right of lateral support from adjoining land may be acquired by 20 years of uninterrupted enjoyment (*Dalton v Angus)* – Act was repealed, but prescriptive rights remain until 1976; where no prescriptive rights exist, not entitled to same lateral support but entitled to vertical support.

Ratio: Removal of lateral support 🡪 must prove negligence; removal of vertical support🡪strict liability

CHAPTER III: ABORIGINAL TITLE

ABORIGINAL RIGHTS:

* Easier to establish than AT
* Source: Prior occupation, *~~Royal Proclamation of 1763~~* (*Delgamuukw*)
	+ **First in time, first in right**
	+ Aboriginal title automatically binds successors to title from Crown without assignment (AT runs with the land)
* Rights to follow practices, customs, traditions and conduct activities on specific sights (ex. Hunting, fishing)
* Protected by s.35 of the *Constitution Act* 1982
	+ Does not *create* rights, just recognizes and affirms them (*Delgamuukw*)
	+ Once established by treaty or litigation 🡪 existing rights
* Aboriginal title is NOT absolute
* **Extinguishing** title/rights can only be done by:

A. Treaty with **Federal government** (~~provincial government~~)

* **Infringement** on title/rights can be done by **both** Provincial and Federal government with:

A. Consent

**OR**

B. Justification (*Tsilhqot’in*) \*\*\* CHECK THIS

* + - A. Duty to consult and accommodate
			* No veto
		- B. Compelling and substantial objective
		- C. Consistent with Crown’s fiduciary obligation

Spectrum: AR ----------->Site specific (*Marshall, Bernard*)--------->Territorial Claims (*Tsilhqot’in*) ------>AT

ABORIGINAL LANDS:

1. Reserves

* Allocated under the *Indian Act*
	+ Administered by Indigenous and Northern Affairs Canada (INAC)
* Approximately 176 in BC, 0.4% of BC land mass
* Uses:
	+ Can get a long-term lease (must be approved by INAC & band)
	+ Tenure

2. Treaty Settlement Lands

* Treaty negotiation with federal & provincial government
* Allocation of fee simples
* Protected by s.35 of the *Constitution Act*
* Provincial laws apply
* Option of registration in LTO 🡪 would become regular fee simple (can sell it)

3. Aboriginal Title Lands

* A right to land itself, right of ownership (*Delgamuukw*)
	+ Proprietary right
* Sui generis: inalienable (inherent and unique value in itself), explained by both common law and aboriginal law (*Delgamuukw*)
* CANNOT be extinguished by provincial government (s.91(24) protects core Aboriginal Rights including title)

Delgamuukw v BC (1997) SCC

F: A/P claim ownership & jurisdiction over separate portions of land, based on historic use and ownership. TJ did not accept oral histories. Appealed 🡪 claimed aboriginal title and self government, amalgamated claims (two communal claims)

D: For appellants 🡪 new trial (encouraged settlement by treaty)

R: AT is a right in land, to use land for various activities, sui generis (fee simple)🡪 CL and AL perspectives, inalienable, communal.

CONTENT OF AT**:**

1. **Right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies;**

+ mineral rights, not defined in terms of specific practices

1. **Protected uses must not be irreconcilable with the nature of the group’s attachment to the land**

Sui generis, inherent limitation on use (cannot destroy its value), inalienable, **inherent limit on use**

TEST FOR AT:

1. Land must have been **occupied prior to sovereignty (1846)**
	* Because it is a burden of Crown title 🡪 did not gain title until sovereignty
	* More certainty
2. **If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation**
	* No need to establish unbroken chain 🡪 substantial maintenance of connection (precise nature may have changed)
3. **At sovereignty, occupation must have been exclusive**
	* Intention + capacity to retain control (can be established even if other groups present or frequented land)
	* CL: factual reality of occupation

INFRINGEMENT JUSTIFICATION FRAMEWORK**:** (provincial or federal)

1. In furtherance of a legislative objective that is compelling and substantial, directed at either one of the purposes underlying the recognition and affirmation of aboriginal rights (recognition, reconciliation, etc.)
2. Requires assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples
	* Priority: Aboriginal interests placed first
	* Standard depends on nature of right:
		+ Minimum: consultation in good faith and with intention of addressing concerns (some may require full consent 🡪 hunting/fishing regulations)
		+ Compensation for breaches in fiduciary duty

Encouraged settlement by treaty. Established possibility of establishing Aboriginal Title; common law rules of evidence should be flexible considering the importance and unique position of Aboriginal Peoples, allowing oral tradition (which would normally be hearsay). Do not say much about evidence weight (🡪 *Mitchell)*

Mitchell v MNR (2001) SCC

F: Mitchell brought items into Canada from US and did not pay duty. Presented items to Mohawk community to symbolize renewal of historical tradition of trading. Served with Notice of Ascertained Forfeiture for $361.64 for unpaid duty. Argues aboriginal right ousts Canadian custom law.

D: AR claim is not established 🡪 rejected claim to bring in goods duty free

R: Tenuous evidence advanced (incidental not integral to culture); underlines fiduciary duty, AR were absorbed into CL unless (1) incompatible with sovereignty (2) extinguished by government (3) surrendered voluntarilty through treaty process.

TO ESTABLISH ABORIGINAL RIGHT under s.35(1): \*Onus on claimant

1. Modern practice/tradition/custom has continuity with practice that existed prior to contact
2. Must be integral (defining feature, would be fundamentally altered without it)
	* Cannot be: marginal, incidental
3. Reasonable continuity
	* Can find modern expression (not frozen)

TO CHARACTERIZE NATURE OF AR:

1. Nature of action which applicant claims was done
2. Nature of government legislation or action to infringe on right (conflict between claim & limitation)
3. Traditions/practices cannot be either artificially broadened or narrowed
	* Too narrow: risks dismissal of valid claims
		+ Mitchell narrows claim (finding something minimally accepted)
	* Too broad: distorting right, neglects culture/history

🡪 In this case: nature of claim: bringing goods across Canada-US border for trade, would also confirm mobility right

EVIDENCE:

1. Admissibility, 3 rules:
	* **(1) evidence must be useful to prove a fact relevant to the issues**
	* **(2) evidence must be reasonably reliable**
	* **(3) even useful and reasonably reliable evidence may be excluded in the TJ’s discretion if its probative value is less than potential for prejudice**
2. Weight
	* Question of fact, general principles of common sense
	* Flexible application of rules of evidence to facilitate justice (**equal and due treatment**)
	* Not undervalued, not contravening evidence law (balance between CL and AL)
	* **Oral histories can be used**
		+ Useful: offer evidence otherwise not available
		+ Reliable: do not reject for lack of detail, possessing mythology

🡪 Mitchell went to Organization of American States (OAS) an international forum in DC; other panel: Inter-American Commission on Human Rights

R v Marshall, R v Bernard (2005) SCC

F: Bernard cut timber without provincial authorization, charged under provincial legislation. Argued authorization was not required because of treaty rights and AT.

I: What is the standard of occupation required to prove title? Type of evidence required?

D: Treaty rights did not extend to commercial logging; no aboriginal title

R:

* Sufficient occupation: look at group size, manner of life, material resources, technological abilities, character of the lands claimed
* AR can be claimed if traditional practice engages idea of modern right
* Standard of occupation:
	+ AT does not preclude consensual arrangements (can have joint title)
	+ Must demonstrate effective control of land (*could* have excluded others🡪 intention + capacity)
	+ Nomadic/semi-nomadic peoples can claim title if there is sufficient physical possession (Q of fact)
	+ **Q is whether a degree of physical occupation or use equivalent to common law title has been made out**
* Practice of cutting timber cannot establish AT (in CL does not confer right to occupy/possess land)
* Looking for site-specific rights

Tsilhqot’in (2014) SCC

F: Tsilhqot’in Nation claimed territory after BC issued licence for a logging company to cut trees.

D: Established Aboriginal Title, BC to pay costs

R: Minor defects should be overlooked (in absence of prejudice); **Affirmed *Delgamuukw* test for AT.**

1. **Sufficient occupation at sovereignty** – consider carry capacity of land, manner of life (nomadic 🡪 if establish physical possession (*Mitchell*); acts which indicate an intention to hold/use for one’s own purposes are evidence of occupation. Balance conceptions of CL with perspectives of aboriginal group.

This case 🡪 small population, regular use

1. **Continuity**

This case 🡪 continued presence, archaeological evidence

1. **Exclusivity** – depends on similar factors as above

This case 🡪 treated land as exclusively theirs (could not sustain larger population)

ABORIGINAL TITLE:

* AT confers **right to decide how the land will be used, right of enjoyment and occupancy of the land, right to possess and economic benefit, right to proactively use and manage the land**
	+ **INHERENT LIMIT**
* Entire First Nation holds communal title
* Anyone desiring use of land **must get consent**, if don’t get consent:
	+ Justification (**raised the standard of justification)**
		- **1. Discharged procedural duty to consult and accommodate (this is a spectrum based on level of intrusion and strength of claim)**
			* 🡪 in this case, high intrusion, strong prima facie claim (high end of consultation/accommodation)
		- **2. Actions were backed by a compelling and substantial objective**
			* Must be in the public interest – always subject to judicial review.
		- 3. Governmental action **is consistent with the Crown’s fiduciary obligation** to the group
		- Remedies: injunction relief, damages, or an order that consultation or accommodation be carried out

\*\***CONSENT IS ESSENTIALLY REQUIRED 🡪 IF ESTABLISHED, AT IS ESSENTIALLY ABSOLUTE**

* Even if legislation was validly enacted before title established 🡪 may be rendered inapplicable w/ extent of unjust infringement, may cancel continuation of project
	+ Before AT established: duty to consult/accommodate, remedies for failure
	+ After AT established: retroactively invalidates previous government decisions, Crown must seek consent, constitutional protection from unjustifiable infringement,
* **Allows territorial approach (v. site specific)** – regular use and exclusive control

|  |  |
| --- | --- |
| **FEE SIMPLE**  | **ABORIGINAL TITLE** Right to exclusive use and occupation of the landRights of use and occupation (*Delgamuukw*) |
| Derived from Crown | Precedes Crown ownership* Arises from prior occupation before assertion of British sovereignty; survives British sovereignty
* Sui genesis
* Beyond scope of Torrens System
* Is it registrable? 🡪 NO
 |
| Marketable, alienable* Can get mortgage, etc.
 | Inalienable except to federal Crown (treaty arrangement)* Cannot be sold to third parties
* If surrendered to Crown via treaty, can then pass to private ownership (3-13)
* Can lease the land (these leaseholders have contractual rights, not property rights)
 |
| Ownership and possession individual | Ownership and possession communal or collective * No such thing as private ownership, for the benefit of the current occupants of the area (those with right of occupation) and those with future interests (keep in mind future members)
* Present and future (therefore must maintain land for use by future generations of Aboriginal peoples)
 |
| Freedom of use | Restricted use |
| Registered on title | Not on title (AT, Caveat, Certificate of Pending Litigation)* Therefore, any claim or litigation is also not registrable (the only thing that can be caveated is something that can be registered under the Torrens system
 |

CHAPTER IV: ACQUISITIONS OF INTERESTS IN LAND

* Everyone has the capacity to own/dispose of land (must be over 19)
	+ Minors can take title to property but any disposition inter-vivos is voidable (subject to review when they reach 19)
	+ Aliens can own land
* Those **lacking mental capacity**:
	+ If no one available 🡪 public trustee
	+ *Patients Property Act*
		- Nomination/court appointment of a committee of the estate of a mentally disordered person
	+ *Power of Attorney Act*
		- Financial and legal affairs in advance of incapacity
		- Endures throughout deterioration 🡪 need not go through *Patients Property Act*
	+ *Adult Guardianship Act*
		- Adult guardian for a mentally disordered person
	+ *Representation Agreement Act*
		- Representation agreement authorizing management of a person’s financial affairs (excluding real estate)
		- In advance of incapacity, a person can appoint someone to look after their personal medical care, and their financial affairs
* Four ways to transfer land:
	+ **1. Crown Grant**
	+ **2. Inter Vivos Transfer (sale or gift)**
	+ **3. Will or Intestacy**
	+ **4. Proprietary Estoppel**

1. CROWN GRANT

* Normally a fee-simple
* Only 5% private ownership in BC (94% Crown Land in BC)
* Every property owned by private persons and companies can be traced in the LTO to a Crown Grant
* Must apply to LTO for registration (brings land under Torrens system) (*Land Act* s.54)
	+ Verified title
	+ Boundaries certified, not guaranteed
* Everything is either owned by the Crown or by a private individual (s.179(2))

*Land Act* 1996

s.50(1) Dispositions of Crown land:

a**. Excepts and reserves** the following interests/rights/privileges (every person who owns land is subject to these reservations/subjects):

i. Right in government **to resume land** necessary for making roads/canals/bridges/public works –

- Up to 1/20th, where no building erected/garden used

- No compensation

ii. Right of government to enter the land to get geothermal resources, **minerals**, coal, petroleum, gas 🡪 reasonable compensation

iii. Right of any person authorized by the government to take and occupy **water privileges** and carrying water over and under, or through 🡪 reasonable compensation

iv. Gov can take part of the land such as gravel, lime, timber that may be required for maintenance of public works

b. Crown retains all rights to resources, minerals, etc. found under the land

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

(2) Applies no matter if express words are used subject to (3) and (3.1)

(3) Disposition of Crown land under another Act that expressly authorizes the disposition on terms different from those referred to in (1) may be made

(4) A disposition of Crown land may, by express words, except or reserve more extensive privileges

(5) Every disposition is deemed to contain express words making exceptions in (1) except in (3) and (3.1)

(6) Power under (4) to except and reserve rights and privileges includes **power to create a right of way, if this is done:**

 a.government is a grantee

b. right of way is deemed necessary for the operation and maintenance of the governments undertaking

2. INTER-VIVOS TRANSFER

* Can be gift or sale
1. The Contract **(can be valid, void or unenforceable)**
	* Validity/enforceability determined by contract law
	* If buyer does not complete 🡪 deposit is forfeited (but not required)
		+ “subject to’s” 🡪 favour purchaser (oral conditions not enforceable)
	* < 3 year lease cannot be registered under LTA (*Law and Equity Act* s.59(2)(a)(b))

\*s.59 does not apply to wills/trusts

* + “Party to be charged” the party that reneged on a contract
	+ Contract of Purchase and Sale
		- Must be **(1) written/signed (***~~Statute of Frauds~~* ~~s.59~~, *Law and Equity Act* s.59(3)(a))
			* Must include 3 Ps 🡪 Price, Parties, Property
		- Exceptions to requirements for written & signed transfers:*Law and Equity Act:*
			* s.59(3)(b), s.4: The party to be charged has done an act, or acquiesced in an act of the party alleging the contract that indicates a contract existed (violator has done something or been silent while plaintiff did something) = **(2) “act”/part performance/payment**
			* s.59(3)(c): the plaintiff has relied on the contract and changed their position so that there would be an inequitable result if the contract was not enforced = **(3) acquiescence/proprietary estoppel**
				+ Can create interests in property in favour of someone who is not the owner of the property

1. Owner of the land induces/encourages/allowed the third party to believe he will have some interest in the property

2. Claimant acts in reliance, to his detriment

3. Owner reneges

* + - s.59(5) – if court decides that the contract **cannot be enforced** 🡪 can order either (a) restitution; or (b) compensation for money spent in reliance
			* **final option for remedy**
	+ Completion of the contract – “the closing”
		- Vendor required to transfer clear title
		- Purchaser required to pay balance
		- While unregistered 🡪 equitable interest in property (in equity 🡪 belongs to purchaser)
			* Overrides *LTA* s.22
		- Vendor retains legal interest until completion/registration (becomes a trustee for the purchaser)
	+ Registration of the title – LTO
		- 1. Application to register in the Land Title Office (This is the date that the document operates on after registration)
		- 2. Registration
			* “Nothing can be registered which is not expressly authorized by statute” (Torrens Concept)
		- Mortgage must be registered as well
		- Buyer bears cost of registering
		- Seller bears cost of clearing the title (ex. must clear mortgage)

The Transfer

* + Writing and Sealing
		- Must be **writing** (*Law and Equity Act*, s 59(3)(a))
		- Must be **signed** by the party to be charged (*Law and Equity Act*, s 59(3)(a))
		- In EQUITY: doesn’t have to be signed, or in writing (can be part performance, estoppel)
	+ The Form – Form A (*Land Title (Transfer Forms) Regulation)*
		- Doesn’t have to be sealed (*Property Law Act* s.16)
		- Doesn’t have to be delivered (grantor’s intent is what is important, (*Ross v Ross)*
			* *Property Law Act* s.4, 5 (says must be delivered)
		- *Land Title Act*
			* s.185
				+ (1) prescribed form on a single page
				+ (2) does not apply: (b) if it would be proper to accept another form of transfer
				+ (8) can only transfer the estate you possess
		- Standard Forms
			* *Land Transfer Form Act*
				+ Simplifies transfers by making it unnecessary to set out in each transfer some of the most common standard form clauses
	+ When is it operative? **Torrens System**
		- *Land Title Act*
			* s.20(1) Except against the vendor, an instrument does not operate to pass an estate or interest, **either at law or in equity**, in the land unless the instrument is registered in compliance with this Act
				+ (3) subsection (1) does not apply to lease < 3 years (don’t have to be registered, but have a valid legal interest, as long as actual occupation
				+ When a vendor signs a contract of purchaser and sale, the document is effective against the vendor who signed it, even if it has not been registered

Courts hold that it takes effect on execution, before registration (is effective against the person making it)

Equity gives a decree of specific performance, ordering the vendor who refuses to perform to go through with the agreement and transfer the title to the purchaser

* + - * + **Status of unregistered instrument:**

**Equitable interest (**goes against s.20)

Courts have allowed equitable remedies for unregistered instruments

“Equity regards as done that which ought to be done”

* + - * s.22 – Operation of instrument as from time of registration
				+ An instrument purporting to transfer/charge/deal with land/interest in and passes the estate or interest, in law or equity, created or covered by the instrument at the time of its registration, irrespective of its date of its execution

Ross v Ross (1977)

Facts: Mrs. Lynds prepared a deed with solicitor conveying her property to her grandson Mr Ross. Executed the deed, witnessed. Intended him to have the property. Put the deed in her purse, never delivered or told Mr. Ross about it. Did not take effect as a duly executed instrument

Issues: Does non-delivery make a deed unenforceable?

Decisions: Valid. For D.

Reasons: Intention is what matters. Must be strong evidence to set aside a valid deed on the grounds of non-delivery. Simply wanted to maintain a life-estate for herself. Had amply opportunity to destroy the deed.

Ratio: Deeds **do not need to be delivered** to take effect. **Substance over form.**

2. Inter-Vivos gift

* + No consideration
	+ Common law, valid gift required:
		- 1. **Intention to donate (immediate, not on death) - The donor must intent to make a gift**
			* Cannot sign a deed that says that you will have it on death
			* Has to be in the form of a will
		- 2. ~~Sufficient act of~~ **~~delivery~~** ~~to done~~
			* doesn’t actually have to be delivered (*Ross v Ross)*
		- 3. **Acceptance** by donee
		- 🡪 once met, donee can reclaim gift (otherwise gift = incomplete)
	+ **Torrens:**
		- **MORE requirements:**
		- **4. Donor delivers a registrable transfer** (*PLA*, s.4, 5)
		- **5. Donee obtains registration at LTO**
			* Formal transfer of title
			* At registration 🡪 get legal title
			* Before, have equitable interest
	+ Equity follows the law 🡪 “**will not perfect an imperfect gift”** (*Ross v Ross)*
		- BUT: will not interfere with the requirements of making a will (formality over substance for wills)
		- Imperfect/Incomplete Gift (lacking formalities required in common law)
			* Imperfect gift can only be made perfect if the intent was there
				+ Maxim: **“equity looks to the intent of the donor**”

Looks at the substance rather than the form

The form was the physical delivery, the intent is the mental state of Mrs. Lynds

* + - * + Ex. Donor dies before transfer complete (registration)
				+ Court of law🡪 gift fails
				+ Court of equity 🡪

Failed gift = donor’s estate/~~donee~~

Perfect the gift = ~~estate~~/donee

Donee gets an equitable interest in the property 🡪 complete the gift, permit registration

**If the intention is clear that the donor wanted to give effect to the gift** (*Ross v Ross*)

 “**Equity will not assist a volunteer”**

No concern for intention of donee, ONLY donor (*MacLeod v Montgomery)*

* + - * **“Equity regards as done that which ought to be done”**
				+ The law (common law or statute, *LTA*, ss 20(1), 22) requires an act (registration) to give legal effect to transaction
				+ Equity can assume the act occurred when it should have but did not, and build equitable interests accordingly

Zwicker v Dorey (1975) (Pre-Torrens)

Facts: Zwicker signed deed of conveyance to 4th wife’s son, Mr. Dorey. Contained clause “this deed is not to be recorded until after my passing away”. Gives deed to Dorey, Dorey gave $1. Argues it was effective on delivery. Zwicker then conveyed the same land to himself and P (wife) as joint tenants. Also deed a number of lots to third parties, and part to defendant. Dorey says he was first in time.

Decisions: Deed void. For Zwicker.

Reasons: The deed conveying property to Mr. Dorey was testamentary (but was not executed in accordance with the formalities of a will) and cannot take effect Intention was a problem: also conveyed same land to himself and others. **“Equity follows the law**”🡪 equity respects the legal title holder.

Ratio: A gift in escrow cannot be subject to one’s own death (must make a will if want to give a gift upon own death). Intention to make an immediate/unconditional gift was not there.

Deathbed Gifts (Donatio Mortis Causa)

* Inter-vivos gift in contemplation of imminent death (conditional on death)
* 1. Intention to make gift in contemplation of donor’s death
* 2. Sufficient delivery to donee
* 3. Gift takes effect only on the donor’s death as contemplated, would revert on recovery
* Courts are reluctant to accept these
* Would take effect before the will (first in time, first in right)

MacLeod v Montgomery (1980) Torrens

Facts: D (appellant’s estate) owner of land in Alberta (also Torrens), husband wanted to give property to P. Hattie (donor) promised land to P (donee) to retain a life estate, gift of the remainder. Promise to give duplicate, never turned it over (freezes the title). Couldn’t register in LTO. MacLeod filed a caveat (frozen).

Issues: Does execution without delivery of duplicate title constitute a complete or incomplete gift?

Decision: Appeal allowed, trial judgment set aside. Caveat wiped off title. Can dispose of property or give it to Montgomery’s beneficiary (will).
Reasons: Where land registration is required, registration must be completed to ownership to pass (equity until registration🡪 overrode statute *LTA* s.22 ); could have easily completed gift.

Ratio: To complete a gift “**the donor must “do what can be done**” 🡪 look at the **substance not the form** (look at **intention**); equity will not force a donor to complete a gift that is not complete: “**equity will not assist a volunteer**”, only interested in the donor’s intention (where intent is not clear, will not force donation)🡪”**there is no equity to perfect an imperfect gift**”

* Caveats – in BC they lapse after 2 months. Before lapse, you could file a Certificate of Pending Litigation, claiming entitlement to an equitable interest (CPL transfers with property)

Transfers to Volunteers/ Trusts

* In the absence of proof of the donor’s intent, equity applies rebuttal presumptions
* *Property Law Act* (1996) “**Equity assumes bargains, not gifts**”
	+ 19(3) A voluntary transfer need not be expressed to be for the use or benefit of the transferee to prevent a resulting trust (personalty and realty)
		- Attitude to volunteers 🡪 assumption that people do not give away their land for free, gave effect to that assumption by creating certain presumptions
		- Assume that the volunteer is given legal title, held in trust for the donor
		- Ex. A enters into a contract to buy property, A directs the seller to transfer title to B, a volunteer (B legal title, A has equitable title)
		- Onus on transferee to prove that intention was to confer absolute title by offering evidence proving donative intention
			* Just need some proof
* “Until and to the use of B” 🡪 B assumed legal owner in trust for transferor
* In some cases, (father-son, husband-wife) there is a presumption not of a resulting trust, but of gift or advancement

3. WILL OR INTESTACY

* Speaks at death, not on date of execution
* Must be 16+, mentally capable
* After making a will, can add/change provisions by a codicil
* Can be replaced by further wills “last will and testament”

Wills, Estates and Succession Act (WESA) (2009)

s.37 (1) to be valid, a will must:

(a) In writing

(b) Signed by the will-maker, the signature acknowledged by will-maker as his or hers with **2 witnesses present at the time**

 (2) A will that doesn’t comply with (a) is invalid, unless:

 (a) the Court orders it to be effective under s.58 (curing deficiencies)

 s.39 Clarification of doubt about signature placement

(1) Deemed to be signed if on the face the will-maker intended to give effect to the will

 s.40 Witnesses to wills

(1) Witnesses must be 19 years or older

(2) Witness can also receive a gift under the will, but the gift may be void under s.43

(3) Will is not invalid because a witness was at the time, or after, legally incapable of proving the will

 s.58 Court order curing deficiencies

(1) “record” includes data that (a) is recorded or stored electronically (b) read by a person (c) is capable of reproduction in visible form

(2) Court may make an order under (3) if they determine that a record, document or writing represents:

 (a) testamentary intentions of deceased

 (b) intention of deceased to revoke, alter or revive a will

(c) intention of deceased to revoke, alter or revive a will or testamentary disposition contained in a document other than a will

(3) Even though making, revocation, alteration or revival of a will does not comply with this Act, a court may order that a record or document or writing or marking on a will to be fully effective as though it has been made

 (a) as the will or part of the will

 (b) as a revocation, alternation or revival of a will of the deceased

 (c) as the testamentary intention of the deceased

s.162 Devolution and administration of land

(1) Unless there is a right to **land by survivorship** **(**will pass directly from deceased to surviving joint tenant), on death of landowner, the land devolves and is vested in the deceased’s representatives in the same manner as personal property

(2) Subject to this Act:

(a) personal representative holds land as a trustee for beneficiary

(b) beneficiary to land has the same power as a beneficiary to personal property to require a transfer from the personal representative

(3) Subject to this act, land must be administered in the same manner as personal property

* Residual clause: “everything that is not otherwise disposed of by the previous provisions will go to \_\_\_\_”
* If the deceased did not dispose of their property by will, both realty and personalty will pass in intestacy (*WESA)*
	+ There can be partial intestacy
* Administrator/Executor: collect assets, pay debts/expenses, distributes net assets according to will, or intestacy

4. PROPRIETARY ESTOPPEL

* Requires fulfillment of a promise (formalities not required)
* May form a basis of a cause of action (*Clarke v Johnson)*
* Remedies: Court has broad discretion “minimum equity to do justice” (*Clarke v Johnson)* – least intrusive to D, while still doing justice

Equitable compensation ------ equitable license ------- equitable fee simple

(vulnerable to bona fide purchaser for value)

Clarke v Johnson (2014)

Facts: Camp owned by D/A, P/R Clarke occupies the camp. Contributes to & maintains & emotional connection (20 years). When tried to bar son from camp, D barred P. TJ found parties intended it to be permanent (realty), ownership🡪D. Equitable interest🡪P.

Decision: Financial & emotional attachments 🡪 equitable rights🡪 irrevocable license (not proprietary)

Ratio: Proprietary Estoppel requires 3 elements: **(1)** Owner **induces/encourages/acquiesces** claimant to believe they have a right or benefit over the property (given reason to believe would occupy during lifetime, encouraged to expend resources) **(2) To detrimental reliance** of C, expressed or inferred (improved property) **(3)** Owner takes **unconscionable** advantage by denying right/benefit

REGISTRATION OF TITLE: AN OVERVIEW

Dispositions (realty or personalty):

* Presumption: giving maximum interest that they have in property (otherwise have to specify)
1. Inter vivos
	* Transfer
		+ Chattel 🡪 bill of sale
		+ Land 🡪 transfer
		+ Contract of purchase and sale, then transfer form
	* Gift
		+ No contract, no consideration
		+ Go straight to transfer form (title is transferred after registration)
2. On Death
	* 1. Will
		+ Testator (leaves will)
		+ Filed with probate registry (proof of validity)
		+ Administration of estate 🡪 executor
	* 2. Intestacy (without will)
		+ Property goes to next of kin, decided by rules under *Wills, Estates and Succession Act (WESA)*
		+ Deceased = intestate, received = next of kin
		+ If no next of kin 🡪 Crown
	* 3. Partial intestacy
		+ Some assets covered by will, some not
	* 4. Jointure, by right of survivorship
		+ Two people own property, if one dies the other gets the rest of the property
		+ If do not want survivorship 🡪 do tenancy in common

Limits of Land-use:

(1) Common law – nuisance, trespass

(2) Contracts – personal rights (not registrable), proprietary rights (binding of registered), easements & restrictive covenants (control neighbours land) (registrable), interests (registrable)

(3) Legislation (ex. *Agricultural Land Commission Act*), power to zone (municipalities)

Corporeal v Incorporeal Interests

* **Corporeal:** entitle a person to possession of land
	+ Immediate or future
1. **Fee Simple – “To A”**/“To A, in fee simple”/“To A and his/her heirs”
	* + - Ownership goes on indefinitely (as long as there is some heir 🡪 estate continues)
			- Owner has right of disposition to anyone
			- Heirs have no rights while owner living
			- See page 39
2. ~~Fee Tail – “To A and the heirs of his body”~~
	* + - Lineal descendants only
3. **Life Estate – “To A for life”,** A=life tenant
	* + - Time in the land for the lifetime of the holder of the estate
			- More common in equity
			- Life tenants 🡪 right of possession, right to income
				* Must maintain for remainderman (*Re Fraser*)
			- Fee simple holder has right of reversion
			- “To A for life, remainder to B and his heirs” 🡪 A = life tenant, B = remainderman (take possession on A’s death) has right to corpus or capital on A’s death in fee simple
				* If B dies first, estate reverts to original grantor
			- See page 42
			- **Estate Pur Autre Vie – “To A for B’s Life”**
				* Measured by someone else’s life
				* A grants a life estate to B, C is granted an estate pur autre vie for B’s life.

As long as B is alive, estate continues

C dies 🡪 goes to whoever C leaves it to in will, for remainder of B’s life

C dies, then A dies 🡪 A’s heirs ownership (reversion)

C dies, A dies, B dies 🡪 A’s heirs ownership (reversion)

1. **Leasehold – legal interest in land**
	* + - Time in the land for a fixed duration
			- More contractual in nature in determining terms
			- “Chattel real” – Now, an interest in land/realty
2. **Future Interest**
	* + - Corporeal or incorporeal
			- Remainderman have future interests
* **Incorporeal:** entitle a person to some tights in respect to land (falls short of claim of possession)
	+ Ex. Mortgage, easement, restrictive covenant
	+ Restrictive Covenants – agreements that restrict the use of real property; bind subsequent owners of property, enforceability depends on purpose/nature/scope

Doctrine of Tenure: Crown is the absolute owner. Tenure: hold an estate/interest in land for a time.

* Crown grants: private ownership
* Freehold: indefinite term of possession
* Leasehold: definite term of possession
* Escheat: property reverts to Crown if owner dies intestate without heirs
* Forfeiture: Crown can claim the land of anyone guilty of treason
* Once a fee simple interest is entered on the Register, that is conclusive evidence that the person named on the Register is the owner of the interest = **indefeasible title** (creates security in Torrens)

The Trust “To A in trust for B” settlor ---- disposal ------>trustee------for the benefit of ------>beneficiary

* Legal ownership: A; equitable interest: B
* **Purpose:** make gift without burdening beneficiary, protect property from creditors, reduce taxes
* Trust instrument – contains terms of the trust
* Can be inter vivos or testamentary (will)
* Can be property “res” (lands, goods, money, corporate shares)
* Once the settlor disposes of property 🡪 their interest in that property ends
* Settlor/trustee can be the same person – settlor/beneficiary can be the same person
	+ Trustee 🡪 holds legal title **for the benefit of** the beneficiary (**fiduciary duty**, the duty of loyalty); must put beneficiary’s interest above their own
		- **Beneficiary entitled to income & capital, the assets in the trust**
		- May transfer legal title to a third party, “against good conscience” for trustee not to honour it
			* **Third party volunteer** 🡪 cannot refuse to recognize trust when becoming aware
			* **Third party buyer** 🡪 depends on state of their knowledge at the time of transfer
				+ Knew about trust & that transfer breached trustees duties 🡪 beneficiary can enforce
				+ Did not know about trust or did not know trustee was breaching obligation 🡪 beneficiary could not enforce trust
				+ “An equitable interest is not good against the whole world”
* Before Torrens: beneficiary is vulnerable to the ***bona fide* purchaser for value without notice**
	+ - Bona fide = good faith, honest; purchaser = of legal interest; for value = consideration (real value); without notice = being “put in inquiry” (~~notice, imputed, constructive, wilful blindness~~)
			* 🡪 Innocent purchaser
			* Torrens system 🡪 replaces “equitable notice” with registration
	+ Can take property without having to honour the trust
	+ **Still relevant for personal property and unregistered interests in land**
	+ “Equity follows the law” 🡪 whoever has legal title in common law also has the legal title in equity (when equal, law prevails)

|  |  |  |
| --- | --- | --- |
| Legal | Legal | First in time prevails (by applying for registration); factual inquiry“Granny in the attic” |
| Legal | Equitable | Legal first in time 🡪 first in right**Registered takes free of unregistered interests****(can ignore the unregistered interests)**No matter what the unregistered interest is, you can ignore it.Torrens says 🡪 if you don’t have notice, or do, it doesn’t matter. Only differentiates between unregistered and registered interests.The courts have changed this, some cases say that if the purchaser behaves in a dishonest way, and have notice of the existence of this trust (outside the register), the equitable interest can be enforced. |
| Equitable | Legal | Innocent purchaser 🡪 Equitable interest cannot be enforced**Registered takes free of unregistered interests, notice not relevant**Classic trust situation 🡪 under this situation the equitable interest loses out to the legal title holder “where the equities are legal, the law prevails”Bona fide purchaser for value without notice s.29(2) 🡪 Torrens system says that notice is not relevant But the courts did not accept this 🡪 wrote notice back into the statute (**notice has to be before execution**) |
| Equitable  | Equitable | Not resolved by the Act |

Freedom of Alienation

* Holder of a fee simple or other interest (~~life tenant & joint tenant~~) has right to transfer to anyone and set terms of transfer
* Restraints:
	+ Aboriginal Title (inalienable, except to Crown)
	+ *Land Act* allows spouse (with no interest on title) to put a filing on title, requiring consent, protecting their interests -- gives constructed notice to anyone who wants to buy it (file in LTO claiming as homestead)
	+ *Testators Family Maintenance Act* 🡪 *WESA* or *Family Law Act* spouse or child can make claim if disinherited (within 6 months), registered at LTO, giving notice that the title was in dispute
* 3 requirements from common law:
	+ 1. Owner for a time must have **technical freedom of disposition**
	+ 2. In disposing of property, owner must **not have the power to impose excessive restraints** on the freedom of alienation of any transferee
		- i. Direct restraint (void in common law 🡪 cannot restrain a transferee from transferring it)
	+ 3. Actual mechanics of transfer must be **as simple as possible**
		- **3 requirements: Property, parties, price**
		- Registration in LTO (desirable, not required)
		- Pre-Torrens: buyer had to establish “good root of title” by *nemo dat* (no defect)*,* no system of registration

SYSTEMS OF REGISTRATION:

* DEEDS - COMMON LAW CONVEYANCING
	+ Required for the transferor to establish a “good root of title”
	+ Disadvantages:
		- Expensive 🡪 work done for every transfer
		- Delays in establishing “good root of title”
		- Recourse to courts sometimes necessary
		- Purchaser took subject to all legal interests
		- Purchaser took free of all equitable interests
* RECODING - REGISTRATION OF DEEDS
	+ Recorded deeds in recording office
	+ Only had to search public records; usually statute deemed purchasers not to be affected by an unrecorded title
* TORRENS – TITLE BY REGISTRATION
* Title by registration (not purchase), previous dealings with land irrelevant, *~~nemo dat~~*
	+ Purchaser applies for registration (each new owner essentially gets new Crown grant)
	+ Cadastral concept 🡪 each parcel of land has a separate title (and parcel ID number), title gives dimensions of lot
* Deeds replaced with “agreements of transfer and sale”) 🡪 straightforward
* Indefeasibility of title (in BC fee simple only)
	+ Only to the *bona fide* purchaser of value without notice (fraudsters 🡪 defeasible)
* 3 Principle:
	+ 1. Mirror Principle (*LTA* ss20, 23(3))
		- Title accurately and completely reflects the state of title and interests (prior defects don’t matter)
		- See exceptions on page 28
	+ 2. Curtain Principle (*LTA* s20(1))
		- All necessary information in terms of ownership is on title (not concerned with unregistered interests)
			* Exception: Leases of less than 3 years are not registered – if you know about them 🡪 you have to honour them, if not, you don’t (due diligence)
	+ 3. Assurance Principle (*LTA* ss294.1-294.9)
		- Compensation to a person affected by flaws in the register – “Innocent victim”
		- ONLY available to the fee simple holder
* Advantages:
	+ Certainty of title/security of tenure (before: vulnerable to *nemo dat*)
		- BUT: granny in the attic (lease under 3 years, legal interest 🡪 first in time first in right)
	+ Simplified forms (deeds not necessary🡪 now agreements of transfer and sale, short forms, straightforward)
	+ Efficiency (title stays in LTO)
	+ Fairness/justice (unregistered interests are not enforced, but enforced in equity)
	+ Can be used as collateral security (ex. mortgage🡪duplicate title available)
	+ What can be registered?
		- **Only those interests which were recognized as interests in land at common law can be registered (includes equity)**
		- **1. Legal Fee Simple**
		- **2. Other interests – “charges”**
			* \*charges are subject to defects and therefore nemo dat applies
			* Legal Interests
				+ Life estate
				+ Leasehold > 3 years
				+ Easements
			* Equitable interests
				+ Trustee (not beneficiary) can secure registration (no particulars of trust registered though) (LTA s.180)
				+ Restrictive Covenants
				+ Equitable life estate
			* Caveats or CPL – claim of unregistered interest
				+ Expires after 60 days in BC
				+ States nature of interest claimed, grounds which its founded and the land against its lodged
				+ Must be an estate or interest in property
			* Agricultural land reserves
				+ ***Agricultural Land Commission Act***
				+ s.16 – Agricultural land to remain in reserve unless excluded

Land included in an agricultural land reserve remains agricultural land in the agricultural land reserve unless excluded under this Act

* + - * + s.20 – Use of Agricultural Land Reserves

(1) A person must not use agricultural land for a non-farm use unless permitted under this Act

(2) For the purposes of (1) except as provided by regulations, the removal or soil and the placement of fill are non-farm uses

* + - * + s.21 – Subdivision of agricultural land reserve

(1) A person must not subdivide agricultural land unless permitted under this Act

(2) An owner of agricultural land may apply to the commission to subdivide agricultural land

* + - * Triggering event (under *Family Law Act,* protects position of filing spouse, cannot sell it)
			* Legal Mortgage
			* Execution of Monetary Judgments
				+ Judgment 🡪 execution 🡪 remedy (involuntary sale) 🡪 proceeds to creditor
			* Heritage destination
			* Builder’s Lien (*Builder’s Lien Act*)
		- **EXCLUDES:**
			* License (*Clarke v Johnson*)
				+ If property sold, out of luck
				+ Exclusive or shared occupation
				+ Not transferable, personal interest
			* AT (*Skeetchesen*)
			* Leases < 3 years
				+ Legal interests (interest in property) 🡪 **bind purchaser** if: (1) actual occupation (LTA s.23(2)(d)); (2) don’t have to be in writing, signed (*L&E Act* s59(2)(a)(b))
				+ Transferable
			* Zoning (*Kessler*)
			* Property Taxes (if not up to date)
			* Provincial/Federal Crown lands (including reserves, Crown as trustee)
			* Sub-agreement, sub-right to purchase land (*LTA* s.200)
			* **Equitable mortgage** or lien created by deposit of duplicate title
				+ *LTA* s.33 An equitable mortgage or lien created by the deposit of a duplicate indefeasible title or other instrument, whether or not accompanied by a memorandum of deposit, is not registrable
				+ Lender cannot protect themselves 🡪 there can be a notation (no right of caveat/CPL)

R v Kessler (1961)

F: A argued that the zoning & development bylaw because they affect the use of land, must be registered in the LTO. Failure of the city to register it makes the bylaw inapplicable to real property in the jurisdiction.

* **Not conveying an interest in land – cannot be registered.**

Skeetchestn Indian Band v British Columbia (2000)

F: Was being held as agricultural lands, released and sold to third party, wanted to develop it. Refusal to register CPL and a caveat pertaining to AT on the title. Appeal. Allege the development will interfere with AT.

* Seek declaration of AT, titles held are void, transfer a breach of fiduciary duty🡪void, temporary and permanent injunction and CPL over lands.
* Registrar argues that to lodge a caveat or CPL must be claiming an interest in land capable of registration; nothing can be registered which is not authorized by statute.
* CA found that even if it was an interest in land, not registrable 🡪 b/c inalienable

D: Cannot be registered

R: Does not fit with Torrens system (sui generis). Idea of notice 🡪 inconsistent with Delgamuukw (cannot register, cannot lodge caveat/CPL). Does not violate s.15 of the Charter. In Torrens, priorities are based on the date of registration instead of the date when the right is acquired and therefore, cannot accommodate aboriginal title which has its source in the occupancy and use of lands prior to the assertion of sovereignty

🡪 Therefore for AT and AR, must give ACTUAL PERSONAL notice, cannot create statutory/constructed notice.

LEGAL FEE SIMPLE

* If trust is registered 🡪 equitable fee simple

REGISTRATION:

* ***Land Title Act***
	+ s.169(1) If an application is made for the registration of indefeasible title to land, the registrar must register the title claimed by the applicant, if the registrar is satisfied that:
		- (a) the **boundaries of the land are sufficiently defined by description/plan on record**
		- (b) **good safe holding and marketable title in fee simple have been established** by applicant
			* Marketable: Title that is freely alienable, and not so defective that a reasonable purchaser could refuse it
			* Safeholding: Safe from attack and cannot be displaced
	+ (2) If registrar considers it advisable, can before registration, direct that a person is is notified that they are trying to register, unless within that person the person served lodges a caveat and registers a certificate of pending litigation contesting the applicant’s right to registration
	+ (3) If a caveat is lodged or a CPL is registered under (2), may defer consideration of the application until the caveat expires or is withdrawn or the adverse claim is disposed of
	+ In addition to s.169, applicant must ensure that the documents supporting the application are attested and executed as required and file a completed property transfer tax form
	+ Application is deemed received when s.153 has been complied with (s.168(30))
		- Then it is scrutinized by an examiner of titles, if satisfied, on common law and statutory principles applied in accordance with registry procedures, that the applicant has good safe holding and marketable title
* Final step: production of an indefeasible title; two forms: (1) certificate (2) computerized version
* **Once the title has been registered this constitutes, in the words of s.23(2) “conclusive evidence at law and equity” that the person name in the title is indefeasibly entitled to an estate in fee simple**

Duplicate Title

* When a duplicate is taken out of the LTO, the title “freezes” (prevents fraudulent transfer or mortgage)
* Duplicate title must contain all the information in the register relating to the land in question, including all conditions, exceptions, reservations, charges, liens or other interests to which the title may be subject (s.179(2))
	+ Duplicate cannot be issued if the title is subject to either a registered mortgage or an agreement for sale (s.179(1))
		- Must be produced to the registrar, if an application to register a mortgage or an agreement for sale is entered
		- Once duplicate is taken out of the LTO, there is notation put on the title

Inter-vivos Transfer

* Same process, must produce the duplicate title if one has been issued for cancellation (s.189)

Transfer on Death

* Personal representatives secure registration of themselves as owners of fee simple in a fiduciary capacity 🡪 then transfer title to appropriate beneficiary who can then register (*WESA* s.162-163)

CHARGES

* LTA s.28 🡪 charges ranked in chronological order, time and date of applications to register
* Not indefeasible (LTA s.26(1)), just deemed to be entitled = rebuttably presumed
	+ Burden of proof is on party alleging invalidity
* s.197 Registration of charges
	+ (1) Applicant is entitled to registered as the owner of a charge, registrar must register the charge claimed by the applicant by entering it in the register
	+ (2) Despite (1) the registrar may refuse to register the charge if the registrar is the of the opinion that:
		- (a) a good, safe holding and marketable title to it has not been established by the applicant
			* can establish this by (1) an instrument from a fee simple owner creating a charge (ex. mortgage) in favour of the applicant (2) assignment of the applicant of an existing charge (ex. lease) (3) creation of a sub-charge (ex. sub-lease) in favour of the applicant
		- (b) charge is not an estate or interest in land that is registrable
* s.195 – on an application to register a mortgage or agreement of sale, any duplicate indefeasible title must be surrendered for cancellation
* Where there is a certificate of title, the charge is registered by being entered on the front of the certificate, when it is on the computer, it is registered as an addition

MORTGAGES

* There are two aspects:
	+ (1) Loan (personal right between mortgager and mortgagee, this can be sued on); and
	+ (2) Security (where they can take the title away from the mortgager (mortgage foreclosure) and sell it to a new purchaser, anything registered below the mortgage would be wiped off the title as well as the mortgage itself
* Form B to register mortgage on the title as a charge

LEASES

* Assignment of lease (entire interest)
	+ Can assign the balance of the term, but landlord consent is required
	+ But there is still privity between the landlord and the first tenant, assigning the interest of the tenant therefore does not free them of financial responsibility for payment of the lease
* Sub-lease (anything less than entire interest)
	+ A and B lease a house from L, B sub-leases her room to C.
* Novation: original lease terminated, with consent of landlord

CAVEATS

* Purpose: **Protects unregistered, equitable and other vulnerable interests, gives notice of the estate or interest claim, protects against a bona fide purchaser for value without notice (imputes notice)**
* Registered by the Registrar entering an endorsement of it and of the time of its receipt in the Register (s.287)
* Can be lodged by any person who claims to be entitled to an interest in registered land (s.282)
	+ Has to be an interest known to CL or equity (~~AT~~) and claiming an interest that can be registered
		- *MacLeod v Montgomery* vs. *Skeetchestn v Registrar*
* Can be lodged by the registered owner (s.283) and Registrar (s.285)
* LTA s.288 – **Effect of Caveat**
	+ (1) Register must not
		- (a) register another instrument affecting the land described in the caveat, unless the instrument is expressed to be subject to the claim of the caveator
		- (b) deposit a plan of subdivision or otherwise allow any change in the boundaries affecting the land described in the caveat
	+ (2) An instrument expressed to be subject to the claim of the caveator may be registered or deposited, 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
* **Caveats lapse**: either **2 months** after the date it is lodged with the Registrar or, if notice is served to registrar during that period then 21 days from serving notice, unless in both instances there is evidence filed that proceedings have been commenced (s.293)
	+ Discharge (s.289)
	+ Withdrawal (s.290)
	+ One further caveat, after other withdrawn (s.291)

CERTIFICATE OF PENDING LITIGATION

* Purpose: Protects litigant from third parties, notice to the owner, prospective purchasers, lenders, buying into litigation 🡪 outcome might affect them
* S.215 – **REGISTRATION OF CPL SAME AS A CHARGE**
	+ (1) a person who has commenced or is party to a proceeding and who is:
		- (a) claiming an estate or interest in land, or
		- (b) given by another enactment a right of action in respect of land
		- may register a CPL against the land in the same manner as a charge is registered
	+ (2) the land affected by the CPL must be described in a manner satisfactory to the registrar
	+ (3) On registration of a CPL, the registrar must mail a copy to the owner against whose title the certificate has been registered
	+ (4) If, after registration of a CPL, a change of parties occurs, the registrar:
		- (a) on receiving CPL showing the new party
		- (b) on compliance with this act
		- Must register the certificate of change in the same manner as a modification of charge
	+ (5) Despite (1) if a person entitled to enforce a restrictive covenant or building scheme may register a CPL in the form approved by the director against land in respect of which a breach is alleged to have occurred
	+ (6) A party to a dissolution of marriage or judicial separation or declaration that a marriage is null and void 🡪 CPL in respect to an estate or interest in land which could change as a result
	+ (7) Despite (1) a person who has commenced an action under the WESA, may register a CPL
	+ (8) A judgement creditor who….may register a CPL
* s.216 **THE EFFECT OF REGISTERED CPL**
	+ (1) After registration, the registrar must not make an entry into the register that has the effect of charging, transferring or otherwise affecting the land described in the certificate until registration of the certificate is cancelled
	+ (2) (1) **does not apply to** the lodging of a caveat, or to the registration of:
		- (a) an indefeasible title or a charge, if the instrument is expressed to be subject to the final outcome of the proceeding
		- (b) an indefeasible title or a charge in respect of which the applicant:
			* (i) elects to proceed to registration subject to the final outcome of the proceeding
			* (ii) authorizes the registrar to register the title or charge claimed subject to the CPL
		- (c) a priority or postponement agreement
		- (d) an assignment of a charge, if the charge was registered before the CPL was registered
		- (e) a sublease, if the lease from which it is derived was registered before the CPL was registered, or
		- (f) a certificate of judgement, order, notice, claim of builders lien, CPL or any other voluntary charge
	+ (3) Registration under (2)
		- (a) does not constitute a determination by the registrar, does not affect the final outcome of the proceeding
		- (b) is subject to the final outcome of the proceeding
* s.217 **Effect of a CPL if prior application is pending**
	+ (1) The registrar may, despite section 216, make an entry in the register to complete the registration of an indefeasible title or charge that was applied for before an application to register a certificate of pending litigation was received by the register
		- If BF purchaser signed purchase documents, its executed, form A is completed to transfer the title, the transfer form is in the LTO to be registered and THEN the LTO received a CPL
			* S.216 would prevents the new fee simple owner from registering
			* S 217 overrides 🡪 says that the new-owner should be registered, because the BF purchaser is innocent (when filed application there was no CPL on the title).
			* CPL is essentially, too late.
			* UNLESS prior application is party to the proceedings… (2)(a)
	+ (2) If, in the circumstances described in (1)
		- (a) the prior application is a party to the proceedings, the registrar must register the indefeasible title or charge claimed by the prior applicant subject to the certificate of pending litigation
		- (b) the prior applicant is not a party to the proceeding, the registrar must, on registration of the indefeasible title claimed by the prior applicant, cancel the registration of the CPL and give notice to to the applicant of it
		- (c) the certificate relates to a proceeding:
			* (i) in respect of a charge, or to enforce, foreclose or cancel a registered charge
			* (ii) referred to in 215(6) or (iii) 215(7)

The registrar must register the indefeasible title or charge claimed by the prior applicant, subject to the certificate of pending litigation, whether or not the prior applicant is a party to the proceeding

* If the claim to which the CPL relates is established eventually, the person who registered the certificate is entitled to claim priority over an application, deposit or filing made after the date of registration of the certificate (s.31)

JUDGMENTS

* Monetary claims
* No property rights in itself
* Expire after 10 years, can be renewed
* (1) Judgement against debtor (2) Register judgement (3) Enforcement “execution” (court ordered sale)
* Can only sell the interest the debtor has
* Registered the same as all charges (s.210), gives the judgement creditor security
* Registrar must notify owner of land
* If there is an unregistered interest in the land, the judgement does NOT rank in priority of it (CAEA s.86(3)(a))

Effect:

* ***Court Orders Enforcement Act***
	+ s.86 (3) From the time of its registration the judgement forms a lien and charge on the land of the judgement debtor specified in the application referred to in section 88 in the same manner as if charged in writing by the judgement debtor under his or her signature and seal
		- (a) to the extent of his or her beneficial interest in the land
		- (b) if an owner is registered as a personal representative or trustee, to the extent of the interest of a beneficiary who is a judgement debtor
		- (c) subject to the rights of the purchaser who, before registration of the judgement, has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgement
		- NEMO DAT: still applies on judgement laws 🡪 first in time first in right
			* Can only enforce a judgement to the extent that the debtor has an interest in the assets – subject to the equities
			* Subject to unregistered interests

THE ASSURANCE FUND

* Compensation for a loss of an interest in land
* Generally settled w/o litigation
* Registered titles are assured (only fee simple holders)
* **ONLY PROTECTS FEE SIMPLE HOLDERS** (s.297, s.303) from risk of:
	+ (1) **registrar’s wrongful act/fault** (s.298) (*McCaig v Reys*)

or

* + (2) **title fraud** (s.296(2)(ii))
* Remedy of last resort: person deprived must exhaust remedies against fraudster (s.296(2)(b), (3), (4), (5))
* **POLICY: Immediate indefeasibility 🡪 for a bona fide purchaser for value w/o notice is immediately protected upon registration**
	+ **Down side of indefeasibility**
	+ **Would have had a claim before the LTA**
	+ 🡪 volunteers are not subject to immediate indefeasibility (s.25.1(2)) **“equity will not assist a volunteer”**

Statutory Provisions:

* ***Land Title Act***
	+ 296 (2) Claimant refers to:
		- (a) any person who is deprived of an estate or interest in land (**only fee simple**)
			* (i) **because of the conclusiveness of the register**, if this act had not been passed the claimant would be entitled to recover the land from the present owner
				+ You would have been able to recover under nemo dat,
				+ If they could have recovered before the Torrens system, looking at old common law and equitable principles, then B can make a claim under the Torrens system because B has been deprived of an estate because of the conclusiveness of the register (giving title to C)
			* (ii) in **consequence of fraud or wrongful act**
		- (b) who is barred by this Act or by any other Act, or otherwise precluded from bringing an action (**must exhaust other remedies first**)
			* (i) for possession, or any other remedy for the recovery of land
			* (ii) for rectification or the register
			* **REMEDY OF LAST RESORT**
		- (3) the minister must be joined as a nominal party defendant as a condition for recovering damages under the assurance fund
		- (4) if the person liable is dead or cannot be found, may proceed against the minister as a nominal defendant and recover the amount of damages and costs against the assurance fund
		- (5)(b) as long as the court is satisfied that the plaintiff has taken all reasonable steps to recover the amount of damages and costs awarded by the judgement from the person so liable, but the plaintiff has been unable to recover all or part of them
		- (8) **MUST be within 3 years after the deprivation 🡪** this is from discovery of fraud/error by LTO
	+ s.297 Protection of Purchaser in good faith and for value
		- **ANYTHING LESS THAN A FEE SIMPLE CANNOT MAKE A CLAIM AGAINST THE ASSURANCE FUND**
			* (1) transferee means someone who in good faith and for valuable consideration, acquires an estate or interest less than a fee simple estate
			* (2) Despite anything in this act, no transferee is subject to proceedings of an estate or interest in land of which the transferee is the registered owner for (a) recovery of land (b) deprivation of land (c) damages in respect of the land
			* on the ground that the transferor (d) may have been registered as owner through fraud, error or wrongful act; or (e) may have derived title from or through a person registered as owner through fraud, error or wrongful act
	+ s.298 Fault of the registrar
		- (1) Person sustaining loss through partial or sole omission, mistake or misfeasance of the registrar can make a claim against the minister as the nominal defendant for the purpose of recovering the amount of the loss or damages and costs from the assurance fund
		- (2) Despite the Limitation Act, an action may not be brought against the minister unless the action is commenced **within 3 years after the loss or damage**
			* This is from discovery of fraud/error by LTO
		- (3) under (1), registrar of the court must certify to the minister charged the fact of the judgement and the amount of the damages and costs recovered
		- (4) Must charge the amount to the assurance fund
	+ s.303 **DOES NOT APPLY TO**
		- (1) The assurance fund or the minister as nominal defendant is not under any circumstances liable for compensation for loss, damage or deprivation
		- (a) occasioned or suffered by
			* (i) the owner of **undersurface rights**, or
			* (ii) an **equitable mortgagee by deposit of the duplicate indefeasible title, whether or not accompanied by a memorandum or deposit**
				+ *Royal Bank case* 🡪 under s.297(1) wouldn’t be able to make a claim
		- (b) occasioned by
			* (i) the breach by a registered **owner of a trust**, whether express, implied, constructive or statutory
			* (ii) land being used under an indefeasible title with other land through **mis-description of boundaries or parcels** of land
			* (iii) the improper use of a seal or a corporation
			* (iv) dissolution of a corporation, or its lack of capacity to hold or dispose of land
			* (v) the issue of a provisional certificate of title
		- (c) If the land in question may have been included in 2 or more grants form the Crown
		- (d) Because of an error or shortage in the area of a lot, block or subdivision or in the volume of an airspace parcel, according to the plan
		- (e) If the plaintiff
			* (i) was served with notice in any manner permitted by this act, or
			* (ii) not being served with notice, had knowledge that the registrar or a person was about to commit the act through which the P claims to have suffered damages
			* If they had notice or knowledge of the claim, A’s fraud or anticipated A’s fraud and failed to take preventative action, they cannot claim against the assurance fund.
			* Solution: File a caveat as soon as you become aware that there is a fraud (for B)
		- (f) In respect of the proportion of the loss, damage or deprivation caused or contributed by this act, neglect or default of the P
			* Claimant’s fraud or contributory negligence
				+ Ex. Left duplicate lying around, careless with identification documents
			* In Royal bank 🡪 “neglect” to secure loan with a registered mortgage
				+ “neglect” to search Walsh’s title prior to advancing funds
		- (g) If the loss, damage, or deprivation arises out of a matter in respect of which the registrar is by any Act or law not required, either expressly or implied, to inquire, or:
		- (h) Occasioned by an act or omission of the government, agent or employee of the government

McCaig v Reys (1978) BCCA

F: Reys was the registered owner of the property, granted an option to purchase 22 acres to McCaig (unregistered, equitable interest). Reys sold the property to Rutland Ag Soc through Jerome (fraudster), told them about the unregistered option, said they would honour the option to purchase. Jerome sold it to an innocent purchaser (Jabin Investments) who had no knowledge of the option.

* This is Torrens fraud (**actual fraud**) = actual knowledge + dishonesty
	+ No longer innoncent

R: **Whether an interest is legal or equitable matters.** The option was unenforceable against Jabin, who was an innocent purchaser. Could have pursued Rutland for specific performance (equitable remedy), but the equitable right was lost once it was sold to a BF purchaser.

Pre-Torrens and Torrens lead to the same result (did NOT result **from the statute)** 🡪 Could not collect from the assurance fund.

**Bona fide purchaser has always been protected in equity (equity follows the law)**

Royal Bank of Canada v British Columbia (AG) (1979) BCSC

F: Walsh was registered fee simple owner, LTO gave him a duplicate title, and deposited it with the Bank as security for loans. Delivery of duplicate was not marked in the registry. Walsh got a mortgage from Bank of Nova Scotia, registered it in to LTO, they noted the duplicate could not be located (thought it was still in LTO). P advanced money to Walsh after registration of other mortgage. P was unable to recover the loans from Walsh, made a claim in the Assurance Fund.

* P argues that if the LTO wasn’t negligent, would have known it was not at the LTO when BNS mortgage was registered, and P would have become aware of deceitful conduct of Walsh.

D: Against P

R: If Registrar owed a duty to P would indirectly give P the protection of registration. Must show that loss flowed naturally and directly from the mistake – this case is too tenuous. **Mortgagees cannot collect from the Assurance fund.**

Gordon v Hipwell

Gordon filed a caveat after Hipwell payed him for land w/ smuggled diamonds, diamonds were seized. Hipwell got the caveat removed and sold the land to a BFP. Claimed against the assurance fund. Court decided that his interest was akin to that of a beneficiary under a trust 🡪 caveat was “permanent”

See questions on last page

REGISTRATION

* Nothing compels registration, but it is advantageous
* Unregistered documents have some effect, but it is dangerous not to register

***Land Act***

* **s.54(1)** A Crown grant must be registered, transmitted to the LTO for registration
	+ (2) If registrar is satisfied that the land is sufficiently defined by the description, the registrar must:
		- (a) register the title granted in the register
		- (b) give notice to the grantee

FEE SIMPLE

* First crown grant must register
* Title **by** registration
* Conclusive evidence
* If trust is registered 🡪 equitable fee simple in beneficiary

REGISTRATION:

* ***Land Title Act***
	+ s.169(1) If an application is made for the registration of indefeasible title to land, the registrar must register the title claimed by the applicant, if the registrar is satisfied that:
		- (a) the **boundaries of the land are sufficiently defined by description/plan on record**
		- (b) **good safe holding and marketable title in fee simple have been established** by applicant
			* Marketable: Title that is freely alienable, and not so defective that a reasonable purchaser could refuse it
			* Safeholding: Safe from attack and cannot be displaced
	+ (2) If registrar considers it advisable, can before registration, direct that a person is is notified that they are trying to register, unless within that person the person served lodges a caveat and registers a certificate of pending litigation contesting the applicant’s right to registration
	+ (3) If a caveat is lodged or a CPL is registered under (2), may defer consideration of the application until the caveat expires or is withdrawn or the adverse claim is disposed of
	+ In addition to s.169, applicant must ensure that the documents supporting the application are attested and executed as required and file a completed property transfer tax form
	+ Application is deemed received when s.153 has been complied with (s.168(30))

PRINCIPLE OF INDEFEASIBILITY

* Applies to corporations, trusts, mentally incompetent/minors 🡪 If you are in the title it is conclusive

Creelman v Hudson Bay Insurance Co (1920)

F: HBC brought a claim for breach of contract against Creelman, who was a purchaser under the contract. Fee simple was in HBC’s name. Creelman argued P could not acquire/hold property unless it was required for use of the company.

D: **Holding a certificate of indefeasible title is conclusive evidence at law**

ADVERSE POSSESSION

* At odds with Torrens indefeasibility of title by registration
* Virtually wiped out
* “you use it you lose it” – Sheppard
* Still effective:
	+ Before 1970: possession for 60 years = claim on Crown land
	+ After 1970: ~~adverse possession~~
		- ***Land Act* s.8** If no disposition
			* + (1) A person may not acquire by prescription, occupation not lawfully authorized or a colour of right, an interest in Crown land, or in any land as against the government’s interest in it
	+ OTHER than the first registered owner, once title is registered 🡪 ~~adverse possession~~ LTA s.23(3)
		- ***Land Title Act***
			* s.23 Effect of indefeasible title
				+ (3) **After an indefeasible title is registered**, a title adverse to or in derogation of the title of the registered owner is not acquired by length of possession

Squatters rights are abolished on land that is owned by someone

* + - * + (4) Despite (3), in the case only of the first indefeasible title **registered**, it is void against the title of a person adversely in actual possession and rightly entitled to the land included in the indefeasible title at the time registration was applied for and who continues in possession

To first registered owner: squatter can show on BOP required elements of AP: possession 20 years **before owner applied for first registration** & obtain declaration from BCSC

* + If no certificate of indefeasible title ever issued (unregistered fee simple holder): squatter for 20 years before 1975 can claim AP & apply for registration against the unregistered title (*Limitation Act* s.28)
		- s.28 Adverse Possession
			* (1) Except as specifically provided by legislation, no right or title in or to land may be acquired by adverse possession
			* (2) Nothing in this act interferes with any right or title to land acquired by adverse possession before July 1 1975
* *Limitation Act*
	+ s.2(2) Does not apply to proceedings for AB and treaty rights
	+ s.3 Exempted claims (**Protects true owner)**
		- (1) Does not apply to the following
			* **(b) a claim for possession of land if the person entitled to possession has been dispossessed in circumstances amounting to trespass**
			* **(h) a claim for the title to property by any person in possession of that property**
	+ s.5 Rules of equity not overridden
		- **Nothing in this Act interferes with any of the following:**
		- (a) a rule of equity that refuses relief on the ground of acquiescence, to a person whose right to commence a court proceeding is not barred by this Act
		- (b) a rule of equity that refuses relief, on the ground of excusable delay, to a person
			* (i) **who claims equitable relief in aid of a legal right**
			* (ii) whose right to commence a court proceeding in respect of a claim that is not barred by this Act
	+ While right of adverse possession is only allowed against the first grantee from the Crown while unregistered, encroachment is possible against a registered owner
		- Acquiescence/proprietary estoppel
		- ***Property Law Act***
			* s.36 Encroachment on adjoining land (*Kelsen)*
				+ (2) if, on the survey of land, it is found that a **building** on it encroaches on adjoining land, **or a fence** has been improperly located so as to enclose adjoining land, the SCC may on application:

(a) declare that the owner of the land has for the period the court determines on making the compensation to the owner of the adjoining land that the court determines, **an easement** on the land encroached or enclosed

(b) **vest title** in the land encroached on or enclosed in the owner, on making **compensation** that the court determines

(c) order the owner to **remove the encroachment** or the fence so that it no longer encroaches on or encloses any part of the adjoining land

STATUTORY EXCEPTIONS TO INDEFEASIBILITY

Exceptions to the Mirror Principle:

* Some unregistered interests (that are not on the title) bind the registered purchaser
* Lack of registration does not affect enforcement
* ***Land Title Act* s.23**
	+ (2) An indefeasible title, as long as it remains in force and uncancelled, it conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple, **subject to the following**:
		- (a) subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties
			* These run with the land, they pass transfer-transfer
			* Nemo dat does apply
		- (b) federal or Provincial tax, rate or assessment imposed or made a lien
			* Unregistered Crown Lien
			* Government tax debt or statutory liens
			* Vendor (registered owner) 🡪 purchaser
			* Third party becomes liable for the tax debt
			* On non-arms length transfer of the transfer price < FMV
			* Can’t really find out about this.
			* Income Tax Act
				+ If a person owes back income taxes to the government and then gives a property to the donee or sells it to them at lower than market value, they can take it from the donee and recover the taxes owed by the donor
		- (c) municipal charge, rate or assessment at the date of the application for registration imposed that may after that date be imposed on the land
			* Property Taxes
			* Local government (tax debt)
			* Unregistered municipal charge rates or assessment, local improvement charge
			* If they haven’t paid taxes for 3 years, the local government take measures to sell the property
			* Sidewalks, curbs 🡪 impose charges on the local property owner
				+ It just appears on your tax bill, it is not on the register
		- (d) a lease or agreement for lease for a term **not exceeding 3 years if there is actual occupation under the lease or agreement**
			* (s.1 “lease or agreement for lease” less than 3 years)
			* Original terms of leave including option to renew
			* **Must be less than 3 years + actual occupation**
			* “Granny in the attic”
			* This applies even if there is no notice, you’re supposed to be able to figure it out on your own
			* This is a legal right
			* *Vancouver City Savings Credit Union v Serving for Success Consulting Ltd.*
				+ Long term unregistered lease 🡪 IS vulnerable to a bona fide purchaser for value without notice

If the purchaser had notice (actual knowledge) AND acting dishonestly/immorality = would be recognized

Ex. McCaig v Reys

* + - * + They lost to the purchaser
		- (e) a highway or public right of way, watercourse, right of water or other public easement
			* This affects every home, particularly in the urban areas; has easements along the street
			* They are not on the plan or the title
			* There are also private right of ways 🡪 THESE have to be registered if you want to be protected. Must be found to be consistent with the legal requirements of an easement.
				+ Registered on both A and B’s property
		- (f) a right of expropriation or to an escheat under an Act
			* *Escheat Act*
			* Expropriation 🡪 must pay compensation
				+ Must evaluate the worth of the property for the “highest and best use of the property”
			* Escheat: if you die without a will and they have no surviving spouse or next of kin can be identified 🡪 provincial government
				+ This also happens when you die intestate
				+ *Bona vacantia* 🡪 no one can claim (vacant goods)
		- (g) a caution, caveat, claim of builder’s lien, condition entry, exception, judgement, notice, pending court proceeding, reservation, right of entry, transfer or other matter noted or endorsed on the title or that may be noted or endorsed after the date of the registration of the title
			* **Charges and other entries**
			* Before or after registration of the purchaser’s title
			* Most common: builder’s lien
				+ A builder’s lien must be filed within 45 days between the certificate of completion and filing a lien
				+ Then they have 1 year to start a lien action, to file a CPL on the title

CPL when title is an issue (builder’s lien does affect the title)

Filing the lien doesn’t prove their claim, then they have to prove the claim in court if disputed)

* + - * + *Builders Lien Act* (6-11)

Must be filed within 45 days of work completed (s.20)

Has priority of all judgements, executions made after that date

* + - * + *Carr v Rayward*

P took contract to do plumbing and filed lien before completion of the work but AFTER the land was sold to D and certificate of title issued

Entitled to lien and personal judgement against D

* + - * ***Land Act*** 50(1) – Crown exceptions and reservations

(a)(i) can resume 1/20th of land, without compensation

(ii) geothermal resources, minerals

(iii) water privileges

(iv) take gravel, sand, stone, timber that is required for construction, maintenance of repair of a road, ferry, bridge, or other public work

(b) Conveys no right, title or interest to:

(i) geothermal resources

(ii) minerals

(iii) coal

(iv) petroleum)

(v) gas

that may be found under the land

(4) may by express words reserve more extensive rights/privileges

* + - (h) The right of a person to show that all or a portion of the land is by wrong description
			* Indefeasibility does not extend to the location on the ground of the boundaries as depicted on the registered map or plan
			* Registration does not preclude error
			* *Winrob v Street*
				+ Vendor made representation to purchaser that hedge/fence were correctly placed, did not search maps or plans in LTO
				+ Were 2 feet over property line, and City asserted ownership, claimed rents
		- (i) right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated to some degree (to ANY degree 🡪 if the person is not innocent, their title is not indefeasible
			* Fraud🡪 not constructed or equitable, not negligence or carelessness, must be actual fraud or dishonesty
			* TITLE FRAUD = Fraud on registered owner
				+ Ex. Can put a mortgage on it (borrow money against registered owner’s title, get a mortgage and abscond with the money)

MORTGAGE

Registered owner #1 🡪 Fraudster gets the title through ID theft & fraud and seeks a loan, giving “title” for advance, gets a mortgage on the property and can even register it

The mortgagee is out of luck (23(2)(i) allows the original owner to get the title back, free of the mortgage)

Cannot get restitution from the assurance fund

*Gill v Bucholtz*

INNOCENT PURCHASER:

Buys from fraudster 🡪 Original owner out of luck

Original owner can recover while fraudster still holds property (Fraudsters have defeasible title)

To protect public confidence in the Torrens System

If the innocent purchaser had to investigate the legitimacy of the seller (fraudster’s) interest, would return to nemo dat

Immediate indefeasibility (s.25.1)

**Does not protect volunteer**

**Does not protect any lesser interests**

Vs Deferred indefeasibility 🡪 innocent purchaser directly after fraudster didn’t get indefeasibility

* + - * (2) Fraud on the holder of an unregistered interest (Notice of an unregistered interest)
				+ *McCaig v Reys*
				+ Unregistered interest 🡪 fraudster (notice + dishonesty) 🡪 purchaser

**Notice and dishonesty applies to both unregistered and registered interests**

* + - * **To prevent fraud: withdraw duplicate title from LTO, or get private title insurance**
		- (j) restrictive condition, right of reverter, or obligation imposed on the land by the *Forest Act*, that is endorsed on the title
	+ If there is nothing in the LTO, nothing in the local government offices, the owner declines, but you have a suspicion that there is an easement etc. (this, in equity, would be constructed notice) but under the Torrens system this doesn’t matter.
		- What comes first is the sanctity of the register
		- If the unregistered interest does not get in the register, the interest is not secure. That is their choice.
		- Equity does not come in here.
	+ (4) Despite section (3) in the case of the first indefeasible title registered, it is void against the title of a person adversely in actual possession of and rightly entitled to the land included in the indefeasible title at the time registration was applied for and who continues in possession

FRAUD

* 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** (by fraud) **does not acquire any estate or interest in the land on registration of the instrument** (except fee simple for BFPs)

TRADITIONAL FRAUD

Gill v Bucholtz (2009) BCCA

F: Gill was registered owner, fraudster forged his signature on a transfer to Gurjeet (RO#2), who then granted a mortgage to Bucholtz who advanced $40 000 to Gurjeet (private mortgage), was filed in LTO at the same time as the forged transfer. Gerjeet negotiated a second mortgage which was executed and filed for registration the following day. Before it was filed, P filed a caveat. 2nd mortgagee had already advanced $50 000.

D: 23(2)(j)🡪 title is defeasible 🡪 Gill gets title back. **Bucholtz’s mortgage is rendered void**. Nemo dat only goes to the current registered owner.

* **Bucholtz’ relied on the title which by 23(2) is conclusive evidence at law & equity**
* s.25.1 🡪 charges do not get indefeasibility
* The holder of a charge that has been registered as merely “deemed” by s26(1) to be entitled to the interest reflected in the instrument
	+ “deemed” is capable of meaning “rebuttably presumed” implies the the legislature intended such omission to be observed by assigning a meaning not conclusive and raising only a rebuttable presumption

NOTICE OF UNREGISTERED INTERESTS

*Land Title Act*

* s.29 Effect of notice of unregistered interest
	+ (2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner
		- **Notice is only relevant if the registered P:**
			* **(1) Guilty of actual fraud** (~~BF~~) “dishonesty”, “breach of common morality”
			* **(2) N = actual knowledge or wilful blindness of the registered P or P’s agent** (imputed knowledge)
				+ wilful blindness = actual notice + dishonesty, satisfies both conditions
		- (a) a transfer of land, or
		- (b) a charge on land, or a transfer or assignment or sub-charge of the charge

is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than:

 **Exceptions (when notice IS relevant):**

* + - (c) an interest, the registration with is pending
		(d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement
		- (e) the title of a person against which the indefeasible title is void under s.23(4)

McCaig v Reys

* Actual notice of McCaig’s unregistered interest + promise Reys to honour the interest (deception) + obtains registration to defeat the interest
* For McCaig, monetary remedies are the only ones available, but he cannot get the property back because it is in the hands of the BFV
	+ Could only get damages against Rutland and Jerome

Hudson’s Bay Co v Kearns and Rowling

F: Kearns owed $800, gave them a mortgage by deposit of a duplicate certificate of title to HBC; cannot register equitable mortgage. In the mean time, offered property to Rowling who searched the title and found it clear. He gave her three months advance for the purchase price. Inquired about deeds, then paid over hald of price. Never seen title deeds.

R: Carelessness is not fraud. In the absence of actual notice and of fraud, a later registered deed will have priority over a prior unregistered charge, even though that the purchaser knew that the title deeds were not in the possession of the vendor, but were in the lands of certain other persons and abstained from enquiry

* s.35 protects the purchaser
* **If no fraud 🡪 unaffected by notice (express, implied or constructed) of an unregistered interest affecting the land**
	+ In equity 🡪 would have been out of luck because there is constructed notice

Vancouver City Savings Credit Union v Serving for Success Consulting Ltd (2011) BCSC

F: City Center became the registered owned of the land and building; under an unregistered 5 year lease, SFS operated a pub. Invested time/money. Vancouver City Savings advanced money to City Centre, by registered mortgages on the hotel, they defaulted on the loans. VanCity foreclosure with vacant possession. SFS claimed right to remain as tenants under unregistered lease. Say petitioners were aware of the rentals, added revenue to the hotel. Argue seeking vacancy despite knowledge = fraud under 29(2) (equitable fraud)

R: **Requires something more than knowledge. Before a finding of equitable fraud can be made there must be evidence of actual notice coupled with some act of dishonesty or deceit on the part of the person seeking the protection of s.29 of the LTA.**

* **29(2) does not apply**

Greveling v Grevling

F: Mrs Grevling fee simple owner, delivered to her husband a transfer of interest, wasn’t registered. She sold the property to Blackburn, who registered. Lawyer for Blackburn was also Grevling’s lawyer and knew of the other transfer. Mr Grevling sued his wife and Blackburn

R: **The solicitor was Blackburns’ solicitor, and that his knowledge (except under certain circumstances) would be imputed to Blackburn** 🡪 **equivalent to actual personal knowledge of Blackburn.**

* **BUT must be dishonesty 🡪 none here.**
* **Blackburn BF Purchaser 🡪 took free of Mr Grevling’s interest**

Saville Row Properties (1969) BCSC

F: Registrar declined to register a deed of conveyance. Registered owner gave an option to purchaser to Frew. Then executed a deed to the petitioner who applied to register, then discovered an application to register an option 2 days before they purchased. Registrar gave notice to Frew, didn’t amend the application, application was rejected.

R: **Saville row was entited to assume it was void, didn’t get notice of the unregistered interest until they signed to buy the property**. Not in bad faith simply because he relies on the provision in the statute (despite notice)

* Not fraud to register transfer with intent to defeat an invalid unregistered interest

IN PERSONAM CLAIMS

* Claims against registered owner because of own conduct
* *Clark v Johnson*

Pacific Savings and Mortgage Corp v Can-Corp Development (1982) BCCA

F: Mortgagors granted a mortgage, the mortgagees commences foreclosure proceedings Nov 1980. Oct 1981, certificate of indefeasible title was issued to the mortgagees. Soon after, mortgagors gave notice that intended to redeem, filed a lis pendens. Mortgagors found money where they could restore the title, went to court and wanted to take off the foreclosure and wanted another chance to repay the mortgage

R: Court said that when you lend money on a mortgage, you must accept your position as a mortgagee and the responsibilities that go with that, you have the rights of foreclosure but also the obligation to allow the mortgagor the equity of redemption, which includes the option/right of the mortgagor to extend the mortgage period.

* If they would have sold it, it would have been too late for the mortagors to redeem
* It creates **rights in the property (in rem)** for the mortgagor (once they got financing)

McRae v McRae Estate

F: Fraser left a property to his wife on trust for herself for life, remainder to their children. Wife was registered owner with “on trust” on title. She transferred the property to her son for 1 dollar. FF was registered as the fee simple owner, without notation. He died, left the property to his wife and brother and sister. Siblings then commenced proceedings ordered that they be vested according to Fraser’s will.

R: FF was not a BFP 🡪 had knowledge of “in trust”.

* The failure to carry onto his title the note in the register of the trust does not defeat the trust nor does it free FF and his personal representatives of the burden of the trust which he had notice
* As there has been no intervening conveyance to an innocent third party the trust is still capable of being performed
* Could get in personam against the trustee

REGISTRATION: CHARGES

* Charges rank in order of application, like fee simples (not in the order of entry on the title) (s.28)

***Land Title Act***

* s.197 Registration of Charges
	+ (1) On being satisfied from an examination of an application and any instrument accompanying it that the applicant is entitled to be registered as the owner of a charge, the registrar must register the charge claimed by the applicant by entering it into the register
		- examination application + instrument
	+ (2) Despite (1), the registrar may refuse to register the charge claimed if the registrar is of the opinion that
		- (a) a good, safe holding and marketable title to it has not been established by the applicant
		- (b) the charge claimed is not an estate or interest in land that is registrable under this Act
		- Determination is administrative, nor judicial s.26(2)
* s.180 Recognition of trust estates
	+ This section is talking about trusts, it refers to the instrument in (2) (3) (4) (5) (7) and (9) 🡪 it’s all about the instrument
		- For example, in McRae it was FF Sr’s will that creates the interest, it is a matter of construction and interpretation what interest that document creates
		- The most important thing is the registration of the instrument and everything that is in that instrument is registered on the title (even a mortgage, an easement)
	+ (1) If land vests in a personal representative or a trustee, that person’s title may be registered, but particulars of a trust created or declared in respect of that land must be be entered in the register
	+ (2) In effecting registration in the name of a person representative, the registrar must add, following the name and address of the personal representative, an endorsement containing any additional information that the registrar considers necessary to identify the estate of the testate or intestate and a reference by number to the trust instrument
	+ (3) Must add an endorsement containing the words “in trust”
		- “reference number” to the trust instrument
	+ (4) The trust instrument must be filed with the registrar with the application for registration of title
	+ (5) if an instrument, other than a will, creating or declaring a trust has been executed outside BC, and also effects or deals with land or other property outside BC, or the trusts of the instrument are being administered outside BC, the registrar:
		- (a) on satisfactory proof of the facts and that the original instrument is required for use outside BC
		- (b) on production of the original or a copy certificate by the officer in charge of the public record office in which the original is filed
		- may accept for filing the certified copy, or a copy certified by the officer in charge of the public record office in which the original is filed,
	+ (6) A copy certified under (5) has the same effect as the original
	+ (7) If an endorsement has been made in the register under (2) or (3), an instrument purporting to transfer, mortgage or otherwise deal with the land must not be registered unless:
		- ex. McRae v McRae Estates (endorsement of the trust)
			* The LTO staff violated this section by allowing Harriet to transfer it to FF Junior
		- (a) expressly authorized by law or by the instrument creating or declaring the trust, or
			* There was nothing n FF Sr’s will that provided for the transfer
		- (b) an order has been obtained by the SC construing the instrument as authorizing the transfer, mortgage or other dealing, or ordering and directing the transfer, mortgage or other dealing and a certified copy of the order has been filed with the registrar
	+ (8) (7) does not apply to a dealing in land by the Public Guardian and Trustee
	+ (9) If
		- (a) A registered owner appears on the face of the register to be beneficially entitled to land, and
		- (b) From an instrument creating or declaring a trust, it is established to the satisfaction of the registrar that the registered owner was at the time that person became registered and the person still is a trustee on the trusts set out in the instrument
			* Can file for a trust to be reinstated (but in McRae they didn’t because they didn’t know about the trust, he kept them in the dark)
		- The register,
		- (c) On application, may make an endorsement in the register similar to that required under (3), and of the date on which it is made, or
		- (d) if, in the registered opinion, the circumstances require, may register a new indefeasible title in the name of the trustee
	+ (10) If registration has been completed in accordance with this section and an instrument produced and filed is effective
		- (a) to modify the terms of conditions of the trust, or
		- (b) for the purpose of evidencing an alteration of or among the beneficiaries by operation of law, or on the happening of an event contemplated by the trust instrument, and not being a transfer or assignment of the rights of a beneficiary made while the transferor or assignor is living
* The register, on application, may add to the existing endorsement a note of the fact of the modification or alteration and of the filing number of the instrument

Dukart v Surrey (1978) SCC

F: Development company deposited a subdivision plan in LTO. Appellant’s predecessors in title bought one lot. Dukarts had an easement and are now claiming they have a right to cross the foreshore reserve. Developer transferred title to a trustee (subject to conditions already there). New trustee was appointed. Surrey acquired the reserves at a tax sale and registered the interest, no reference to deed or trust.

* The appellant sought an injunction on the basis that the construction obstructed her right of access

R: Held that the right of access granted to the appellant’s predecessor in title amounted to a valid easement and that the easement had been validly created

* **Easement was registered within requirements – still valid, was taken off title by mistake**
* **Restore register and put easement back on**
* **THIS IS GOING BEYOND THE REGISTER 🡪 fairness**
* **Wouldn’t be the same for a voluntary buyer – this was not a BFP**

***Land Title Act***

* **s.26 Registration of a charge**
* (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 into the register
	+ **Can adduce evidence to show fraud or other defect in the charge**
	+ presumed valid (Credit Foncier v Bennet)
	+ Normally the P has the burden of proof, but it is presumed to be valid here but can be attacked
		- Then the principle of nemo dat would apply, subsequent people would be subject to the original defect in the charge and would apply to anyone taking the charge
		- It has been accepted by the courts and appears in Gill v Bucholtz – charge does not get the benefit of indefeasibility by being registered and applied to a mortgage
* (2) Registration of a charge does not constitute a determination by the registrar, that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable
	+ - Rebuttabley presumed
* s.27 LTA Notice given by registration of charge
	+ (1) the registration of a charge gives notice, from the date and time the application for the registration was received by the registrar, to every person dealing with the title to the land affected, of
		- (a) the estate or interest in respect of which the charge has been registered, and
		- (b) the contents of the instrument creating the charge so far as it relates to that estate or interest
		- but not otherwise
	+ This gives notice 🡪 statutory constructive notice to third parties
		- People are presumed to know everything on the registered even if they don’t have actual knowledge of it and haven’t looked at it
* s.28 LTA Priority of charges based on priority of registration
	+ If two or more charges appear entered on the register affecting the same land, the charges have, as between themselves, but subject to a contrary intention appearing from the instruments creating the charges, priority according to the date and time the respective applications for registration of the charges were received by the registrar and not according to the respective dates of execution of the instruments
	+ Registration – ranking ahead of later interests
		- Mortgagor does not pay the first mortgagee, the effect will be to extinguish all charges below it in the process of foreclosure 🡪 If there isn’t enough money, not all mortgages are secure

Mortgage:

* (1) Contract – loan (in personam)
	+ Assignment of rights to payment
		- This can be transferred 🡪 can sell the mortgage to a purchaser and will get a lump sum, instead of waiting for the mortgagor to pay the mortgage off over time
		- The defect also passes to the assignee
		- Assignee must give notice to the mortgagor to make payments to them and that they have the right of foreclosure
		- Owes a duty to them
		- Assignee “stands in the shoes of the oblige/assignor subject to the equities”
		- The basic principle is that an assignment only confers on the assignee whatever rights the assignor had; so if the assignor had no rights then the assignee gets no rights
			* NEMO DAT applies
			* Only thing that can affect this is s.26(1)
	+ Subject to the equities
		- Subject to any defects in the original contract
* (2) Security interest – encumbrance (in rem)
	+ Transfer, registration on title
		- You can register, and this gives the assignee the right to foreclose if the original mortgagor does not pay off the debt
		- Once registered, can sell the property but the purchaser would take the property subject to that mortgage
	+ Enforcement of the judgment may not lead to a recovery of the amount owing, so to get ahead of the other creditors they can take a security interest in the debtor’s land, taking away the interest from the mortgagor and recover what is owing on the loan from selling the property
		- This is a backup to a personal judgement

Credit Foncier (1963) BCCA

F:Bennetts (RO, “mortgagors”) -------(Allen) void: forgery; registered mortgage on title under Todd Investments ---------assigned to Stuart (registered #1) ------- assigned to Credit Foncier (registered #2)

* P wrote to Bennet notifying him of assignment, Bennet did not receive notice. Wrote again, he thought it was a mistake. Brought action against the Bennets.

R: *­*Held that the P would not have succeeded even if the mortgage had been valid 🡪 a mortgage is only security for the amount actually owing. No loan had been made to the Bennetts and therefore the mortgage secured nothing

* The onus is on the assignee of a mortgage to check the amount actually owing
* **This is now 25.1(1)**
	+ s.25.1  - Void instruments — interest acquired or not acquired
		- (1) Subject to this section, a person who purports to acquire land or an estate or interest in land **by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument.**
		- (2) Even though an instrument purporting to transfer a fee simple estate is void, a transferee who
			* (a) is named in the instrument, and
			* (b) in good faith and for valuable consideration, purports to acquire the estate,
			* **is deemed to have acquired that estate on registration of that instrument**
		- Void instruments are not valid (person does not acquire any estate or interest in land by registration) except BFP
		- (3) Even though a registered instrument purporting to transfer a fee simple estate is void, a transferee who
			* (a) is named in the instrument,
			* (b) is, on the date that this section comes into force, the registered owner of the estate, and
			* (c) in good faith and for valuable consideration, purported to acquire the estate,
			* is deemed to have acquired that estate on registration of that instrument.
	+ **Anything less than a fee simple**
		- **Mortgage = charge**
		- **Registration does not = indefeasibility**
		- **Nemo dat applies**
		- **Entire risk of mortgage is on the mortgagee**

Canadian Commercial Bank v Island Reality Investments Ltd (1988) BCCA

F: Park meadow was registered owner of land, Imperial life held first mortgage. Granted a second mortgage to respondent, IRI (registered). Director contacted appellants seeking loan saying the second mortgage was to be discharged and replaced with them. Forged a discharge of the IRI mortgage. Filed for bankruptcy, the land was sold and after the first mortgage payment, were insufficient for the other two.

R: To rectify the title by restoring Island Realty on the title in property to that of the mortgage of Almont would remove the protection provided by the LTA for mortagees who acquired their interest BF and for value from the registered owner

* This is dealing with a novation 🡪 The discharge of their mortgage, was a forgery, but nevertheless but if the act says that if you register a discharge takes effect (statute says this) – this is using it to perpetuate a fraud
	+ Sheppard says this was wrong.
	+ This case wouldn’t hold based on 25(1) – this makes it clear that Credit Foncier case has overtaken it

FAILURE TO REGISTER

As a rule – unregistered interests are only effective against the parties making it. Judgement creditors are subject to unregistered interests (priority for unregistered interests including mortgages and leases if executed before judgement)

*Land Title Act* s.20**Unregistered instrument does not pass estate**

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

* “Except against the person making it”: unregistered instruments are effective against the original person who makes it (X) by the person who they created it with (Y) and all subsequent transferees, but not against future purchasers.
* HOWEVER, cases establish that unregistered instruments create equitable interests (in spite of what this section says). Equitable interests have effect against third parties, except BFPFV
* A third party can enforce something AGAINST the person making it – but not the other way around (*L&C Lumber*)

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

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

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

* A person with an instrument can use it to get registered

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

* Granny in the attic has a legal interest without registration
* Before Torrens:
	+ Legal interests effective against the whole world
	+ Equitable interests effective against BFPFVWON

***L&C Lumber Co Ltd v Lungdren* (1942) legal interest**

F: Appellant agreed to sell McDonald timber on land with right to enter and cut (had right to assign, not just personal right). Mcdonald assigned all rights to L&C. Appellant refused to let company enter, tried to justify under s.34 of LRA b/c of failure to register

D: Dismissed

R: Right to cut timber = interest in land. Enforceable against the party making it (but NOT against assignee b/c of s.20).

* If a third party purchased from Lundgren 🡪 if that person was NOT a BF purchaser (actual knowledge/wilful blindness + fraud) 🡪 can enforce it (*Serving for Success*)

EX. If X and Y make an agreement for themselves and transferees that X can cross Y’s land. They register. Then both sell to different people. The person X sells to can enforce because there is **NOTICE.** Even if it was unregistered, X and Y would still be bound because of s.20(1)

* If the DIDN’T register 🡪 and X sells to B, B can still enforce the easement against Y because “except against the person making it” 🡪 Y made it.
	+ If Y sells to C, B cannot enforce against C (C does not have notice b/c not registered)
		- Unless notice (wilful blindness + actual knowledge
* This is in personam

Sorenson v Young equitable interest

Facts: P suing for declaration of a right of way and for fraud for deprivation of the right of way. P formerly owned 2 lots, sold 1 to Roch, reserving a right of way to his own lot. P built garade and made other improvements. D purchaser lot from Roch. P continued to use right of way for 4 years, then D erected a fence. D claimed he was a BF purchaser.

D: For D.

R: Easement was not registered. D was a BF Purchaser. P did not adequately prove that there was actual knowledge/wilful blindness.

* After this decision, s.181 was enacted:
	+ S.181 **Interest or right reserved to transferor**
		- (1) On an application to register a person as owner in fee simple of land under an instrument by which
			* (a) a estate or interest in the land transferred remains in the transferor
			* (b) a restrictive covenant is entered into by the transferee for the benefit of other land registered in the name of the transferor, or
			* (c) a condition, exception, reservation, easement, statutory right of way or other right in or on the land covered by the application is imposed, reserved, or created that, despite this section, could be registered as a charge under s.197

The existing indefeasible title must be cancelled and the estate or interest remaining in, and the rights reserved to the transferor or imposed or created must, on application, be registered as a charge against the new indefeasible title

Judgement Creditors and Unregistered Interests

* Unregistered interests rank ahead of the judgement creditor (b/c can only take as much as the debtor had)

Yeulet v Matthews

Facts: Matthews holds from her son an equitable mortgage by deposit of duplicate title. After the mortgage came into existence, Yeulet registered a judgement against the son.

* Equitable mortgage and charge has priority over the judgement

s.86 **Registration of judgments after October 30, 1979**

(1) In this section, "purchaser" **includes lessee or mortgagee** 🡪 **NOT GIFTS**

(3) From the time of its registration the judgment forms a lien and charge on the land of the judgment debtor specified in the application referred to in section 88 in the same manner as if charged in writing by the judgment debtor under his or her signature and seal,

(a) to the extent of his or her beneficial interest in the land,

* + - * I.e., nemo dat 🡪 judgment can only be executed to the extent of the debtor’s interest in that land

(b) if an owner is registered as a personal representative or trustee, to the extent of the interest of a beneficiary who is a judgment debtor, and

* Trustee’s interest cannot be sold to satisfy his/her debts; the real owner of the property is the trust beneficiary
* Can sell property to satisfy trust beneficiary’s debts

(c) **subject to the rights of a purchaser who, before the registration of the judgment, has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgment**

Monetary judgements form lien/charge on the land of the debtor to the extent of the debtor’s interest subject to the rights of BFP of fee simple/lessees or mortgagees

**PRIORITY IS ON THE DATE OF THE CREATION OF THE INSTRUMENT**

* If A sells to B, unregistered. C registers money judgement on A’s title. B applies for registration. B ranks ahead of C b/c judgement creditor
	+ NEMO DAT
* Fraudulent Conveyance to defeat creditor:
	+ If debtor sells title to protect it form a money judgement to someone who knows, credit can apply to set the transfer aside and can excute on the property

PROHIBITED TRANSFERS

International Paper Industries v Top Line Industries

F: Unregistered lease

D: tenant cannot enforce personal or proprietary rights in the lease

R: Court holds that despite 20(1) – s.73(1) requiring formalities of subdivision was given effect to by the court. Therefore, the agreement was illegal because they didn’t go through the formalities. **Ignorance is not an excuse**.

Legislature reversed this decision…

 s.**73 Lease of a part of a parcel of land enforceable**

* (1) A lease or an agreement for lease of a part of a parcel of land is not unenforceable between the parties to the lease or agreement for lease by reason only that
	+ (a) the lease or agreement for lease does not comply with this Part, or
		- This statute would reverse the case for leases made now (or any lease made after 2007)
	+ (b) an application for the registration of the lease or agreement for lease may be refused or rejected
* (2) this section does not apply to an airport lease, as defined in s.41 of the Municipalities Enabling and Validating Act
* If the lease is longer than 3 years, you have to go through the formalities of a subdivision
* Restores the possibility of in personam enforcement of leases or portions of raw land, despite the lack of subdivision
	+ But only has prospective effects: 🡪 after 2007

APPLICATION TO REGISTER

* Until registration, interest is equitable
	+ Unregistered interests are ranked based on execution of instruments (s.28)
	+ “**When the equities are equal, the first in time prevails”**
		- **If the equities are NOT equal 🡪which has the stronger position (ethical)**
		- **“Equity follows the law”** 🡪 vulnerable to a BF purchaser (*Rudland*, *Canadian Permanent Mortgage*)

Process:

1. Transation
2. Registration Process
	1. Application
	2. Scrutiny
	3. Refusal/Acceptance
3. Registration (date relates back to time of application)

**What if someone registers a caveat/CPL after application but before registration?**-

* Two equities competing
* First in time prevails
	+ If equal in equitable status, can come down to the claims (judge decides)

*Land Title Act*

* S.31 – Priority of caveat or certificate of pending litigation
	+ If a caveat has been lodged or a CPL has been registered against the title to land
		- (a) the caveator…is entitled to claim priority for that person’s application for registration of the title or charge so claimed over a title, charge or claim, the application for registration, deposit or filing of which is made after the date of the lodging of the caveat or registration of the certificate of pending litigation
		- (b)…relates back to and takes effect from the time of the lodging of the caveat or registration of the certificate of pending litigation…must be endorsed by the register

Rutland v Romilly (1958)

F: D executed a deed conveying to Lindsay, who became RO. Lindsay executed a deed to P, innocent purchaser, for the sale lands. Certificate free of charges issued to Lindsay, but the same day the application was lodged to register the transfer from Lindsay-Rutland. Romilly filed a CPL, registrar refused to register certificate of title till CPL disposed of. P commenced action that D had no interest in lands.

D: for P, Rudland got to be the owner of the property, free of Romilly’s claim

R: P was BFP (Lindsay had clear title). First notice to P was 2 weeks after applying to register. No proof of fraud.

s.217 – Now the registrar can complete the registration – Rudland could go to register (if not party to litigation under CPL) and get them to remove the CPL.

***Canada Permanent Mortgage Corporation v British Columbia (Registrar of Titles)***

F: Registered owner transferred interest to Vistica. Vistica (alleged fraudster) granted mortgage to CPMC. Vistica applied to register the transfer, CPMC applied to register mortgage 1 day later. Original owner filed a CPL for fraud against Vistica. Registrar did not complete registration of the mortgage.

R: CPMC I a BFP, no notice of the fraud when granted mortgage. Therefore. entitled to be registered.

THIS DECISION IS BAD 🡪 cannot register a mortgage in favour of Vistica on someone else’s property (contrary to s.155, s.198)

**A mortgage is not equivalent to a BF purchaser**

*Land Title Act*

* S.155 – Application for registration of charge
	+ (1) If the title to an estate in fee simple has been register or registration has been applied for, a person not entitled to be registered in fee simple, claiming to be registered as owner of a charge on the land…if registration of the fee simple has been applied for by an application that is pending, the application for registration of a charge must await the result of the application for registration of the fee simple
* s.198 – Registration of person creating charge
	+ An instrument purporting to create a charge on land executed by a person who is entitled to be registered as owner of the fee simple must not be registered, unless that person has first been registered as owner of the fee simple

Breskvar v Wall (1971)

F: A were registered joint tenants of a fee simple. Signed a transfer (expressed as absolute transfer), but had really wanted a loan (he said he wanted security). He inserted grandson’s name into blank space on transfer, registered in favour of grandson. Then sold to Alban (BFP), but wasn’t registered then a caveat was filed and the transfer was applied to be registered.

 **Both equitable interests**.

R: If original owners had taken action before third party transfer they would have succeeded, If Alban had registered first it would have prevailed.

* Chronologically A were first, but Judge seens problem with their equitable position 🡪 is one more blameworthy?
	+ A placed fraudster in position to do what he did, and Alban was innocent.
	+ Alban is closer to the BFP.
* **Once Alban had signed to purchase the property, then caveats and CPLs are TOO LATE to be enforceable**

THE FEE SIMPLE

1. ABSOLUTE FEE SIMPLE

2. DETERMINABLE FEE SIMPLE

* May last forever, may be cut short by a specified but unpredictable event (vs. life estate – must happen eventually)
* While/during/as long as/until
* Ends automatically when the event occurs

3. CONDITIONAL FEE SIMPLE

* Does not end automatically
	+ Requires the original grantor right of re-entry and take the fee simple away from B (END THE ESTATE – FORFEITURE), do not have to exercise that right
* Provided that/on condition that/ but if/if it happens that

***Property Law Act***

* S.19 **Words of Transfer**
	+ (1) To transfer a fee simple, it is **sufficient to use the words “in fee simple”** without “and his heirs”
	+ (2) The transfer of land to a person without limiting the interest transferred….passes the fee simple or the greatest estate or interest in the land that the transferor has power to transfer, unless the transfer expressly provides that a lesser estate or a particular interest is being transferred

Sufficient to say “in fee simple” – if no limitation 🡪 passes greatest estate or interest that the transferor has the power to transfer

***Land Title Act***

* s. 186 **Implied Covenants**
	+ (4) Subject to (5) and (8) a transfer of a freehold estate for valuable consideration and in the approved form that is completed and executed in the manner approved and witnessesd…operates to transfer the freehold estate of the transferor to the transferee whether or not it contains express words of transfer
	+ (5) Subject to (8) if the transfer does not contain express words of limitation….operates to transfer in fee simple
	+ (6) subject to (8) if the transfer contains express words of limitation…tranfers in accordance with the limitation
	+ (7) Subject to (8) if the transfer contains an express reservation or condition, the transfer operates to transfer the freehold estate of the transferor to the transferee subject to the reservation or condition
	+ (8) Subsections (4) - (7) do not operate to transfer an estate greater than the estate in respect of which the transferor is the registered owner

The transfer of a freehold for consideration operates to transfer the whole estate whether or not it contains express words; if no limitation words 🡪 whole fee simple; if limitation 🡪in accordance w/ limitation etc.

***Wills Estates and Succession Act (WESA)***

* s.41 Property that can be gifted by Will
	+ (3) a gift in a will
		- (a) Takes effect according to its terms, and
		- (b) subject to the terms of the gift, gives to the recipient of the gift every legal or equitable interest in the property that the will-maker had the legal capacity to give

LAPSE

* If something is left to A, but A dies before testator 🡪 ends up in the residue of the estate NOT in A’s will

***Tottrup v Ottewel Estate*** **(1969)**

A: Frank left a will: “unto my brother Fred, the balance and residue of all my estate, both real and personal, whatsoever, and wheresoever found or situate, to hold unto him, his heirs, executors, and administrators absolutely and forever”. Fred died before Frank, Fred’s daughter wanted the whole estate.

R: **Gift to Fred fails 🡪 goes to residue (back to Frank’s estate). Because it is the residual clause it passes intestate**

* Fred, his heirs = Fred and his heirs (not OR 🡪 which would have been a alternative beneficiary)

**THIS REVERSES THIS DECISION**:

 *WESA*

* + s. 46 **When gifts cannot take effect**
		- (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:
			* (a) to the alternative beneficiary of the gift, if any, named or described by the will-maker, whether the gift fails for a reason specifically contemplated by the will-maker or for any other reason;
			* **(b) if the beneficiary was the brother, sister or a descendent of the will-maker, to their descendants, determined at the date of the will maker’s death, in accordance with section 42(4)**
				+ If Frank died today, the daughter of Fred would get the gift.
				+ Doesn’t matter the cause of the lapse – if Fred refused the gift, or there was a condition that wasn’t met, then it goes to the daughter
			* (c) to the surviving residuary beneficiaries, if any, named in the will, in the proportion to their interests
				+ If you leave X to Fred (a specific gift), if Fred has died and does not get X and his daughter doesn’t get the car, then it would go to the residuary beneficiary
				+ This only happens if it doesn’t pass according to (b)
		- (2) If a gift cannot take effect because a beneficiary dies before a will maker (1) applies whether the beneficiary’s death occurs before or after the will is made

If beneficiary died: Goes to alternative 🡪 then, if the beneficiary was the brother/sister/decendent of will-maker, to their descendents 🡪 then to surviving residuary beneficiaries.

Still applies if there is no mention of heirs

* s.42 **Meaning of particular words in a will**
	+ (1) This section is subject to a contrary interpretation appearing in a will
	+ (2) A gift of property in a will to persons described as "heir" or "next of kin" of the will-maker or of another person takes effect as if it had been made to the persons among whom and in the shares in which the estate of the will-maker or other person would have been divisible if the will-maker or other person had died without a will

REPUGNANCY

RE: Walker

F: Walker died with widow as executrix, “A give and devise unto my said wife all my real and personal property [except a watch and jewelry]…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 a remainder shall be divided as follows….”

D: Gift to wife prevails, “gift over” 🡪 repugnant

Reasons:

* Absolute gift to wife, but said if she dies and hasn’t disposed of a portion it will go to newphews
	+ **Repugnancy 🡪 cannot have a fee simple absolute with a gift over left**
	+ **3 things can happen:**
		- **(1) Gift to the person first name prevails and the gift over falls away as repugnant**
		- **(2) The first named takes a life estate only, and so the gift over prevails**
		- **(3) First takes a life estate and life tenant is given power of sale which may be exercised at any point**
			* **Usually a trust w/ power of sale/encroachment**

RE Shamas

Facts: Testator’s will: “I give all I belong 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 years old. If my wife marries again 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”. Has not remarried, all children are over 21 years old.

R: **Have to look to entire document.**

* Intention of the testator that his estate vest in his children in equal shares subject to a life interest to his widow (subject to the interest being divested on her remarriage and that in such case she would take an equal share with the children)…and ability to encroach, in her discretion, upon the capital of the estate for the support and maintenance of herself and the children, until the youngest child should reach the age of 21 or remarriage 🡪 if not, into widowhood
* Look to circumstances when the will was made
* The gift/beneficiary (if vague) is at the time of death (ex. “my car” or “my wife”)

***Cielein v Tressider* (1987)**

F: Van Essen died, he and Rich lived together with Rich’s son. He was also survived by 5 children from previous marriage. Used form will 🡪 inserted provisions that Rich was to have property, and all other assets. Then said “all the rest and residue of my estate I devise and bequeath to…” where he wrote in Mrs’s Rich. Also said “However, upon the sale or disposal of the real estate as described above the proceeds shall be divided equally between her son…and my children”

R: Clear intention to benefit Rich, Intended absolute ownership. Gift over is repugnancy

Blackburn v McCaullum

Where a property is given absolutely, a condition cannot be annexed to the gift inconsistent with its absolute character…must be void

THE LIFE ESTATE

* Type of freehold, will come to an end
* Not inheritable
* Appear as a charge/registered 🡪 therefore there is constructive notice
* Can be alienated – but all that can be transferred is the life interest
* Can be for the life of the holder of the estate, or someone else’s life
* Must be done expressly (default is fee simple WESA 43(3)(b))
* Life estate holder has all the rights of a fee simple holder
* *WESA*
	+ S.96 – gave to the surviving spouse, in addition any any other rights on intestacy all of the household furnishing and a life estate in the matrimonial home (spousal home)
		- But this created problems: was not marketable and impossible to value
		- If the surviving spouse could not afford to maintain the family home to the standard expected of a life tenant, they recommended abolition of the life estate and replacement with the surviving spouse’s option to purchase the spousal home from the estate of the deceased
* *Family Law Act*
	+ In breakdown of relationship, spouses decide who will live under the roof temporarily
		- Can apply to BCSC for an order of temporary, exclusive right of occupying the spousal home (compel other spouse to leave)
		- Temporary measure, pending division of family assets – does not amount to granting of a life estate
* *Land (Spouse Protection) Act*
	+ Married or unmarried spouses can make a filing to prevent the registered owner from selling it without notice to the spouse
		- On the death of the other spouse, the filing spouse acquires a life estate in the property (s.4(2))
	+ s.4 – **Application of the WESA**
		- (2) **despite any testamentary disposition** or rule of law and subject to the liability of the land comprising the homestead for foreclosure or the payment of debts, a personal representative holds the homestead in trust for an estate for the life of the surviving spouse
			* It is protected for the surviving spouse
			* Only subject to mortgage foreclosure or judgment creditors (payment of debts)
			* Spouse includes those married, common law relationships, living 2 years in a marriage like relationship
				+ Includes same-gender spouses
			* This supersedes the will for the life of the surviving spouse
			* This is a LEGAL life estate (the personal representative has the legal right) then the surviving spouse has a equitable life estate
				+ A statutory right to property is a legal estate

RIGHTS OF A LIFE TENANT

Occupation, Use and Profits

* Holder of the life estate is entitled to occupy and use the property and to retain any profits arising from its exploitation

Transfer Inter-vivos

* Life estate may be transferred inter-vivos

Devolution on Death

* Ordinary life tenancy (to A for life) ends with the death of the life tenant
* Likewise, an estate pur autre vie (to A for the life of B) ends with the death of the other person, B
* Now, if A dies before B and A is intestate, the estate for the life of B devolves on intestacty like other real property until B dies

OBLIGATIONS OF A LIFE TENANT TO THOSE ENTITLED IN REVERSION OR REMAINDER

* A life tenant is entitled to possession of the land, to any rent and profits arising from it and can use the land to the same extent as a fee simple owner
	+ Those entitled in reversion or remainder are entitled to have the land pass into their possession on the termination of the life estate, in substantially the same form as it was when received by the life tenant
	+ Life tenant must assume the financial responsibilities of the property (ex. pay mortgage interest, pay property taxes) *(Mayo*)
		- Sometimes given the right to encroach to raise cash as needed to maintain the property or the spouse

*Re Fraser* (1974)

* + - * Facts: Deceased left will which revoked all formed wills, giving wife life-estate in estate and property. All the remainder was left to charity. Executor sued, arguing there can be no life estate in personalty, the widow had power to encroach and the remainder was invalid
			* Issues: Can there be a life estate in personalty? Can a future interest exist in personalty?
			* Decisions: Appeal allowed.
			* Ratio: A future interest can exist in personal property and real property. A life estate can exist for personal property. **You can’t give the life-estate away if the remainder is left to a third party, you have to maintain the personalty in its entirety (fiduciary duty) for the eventual owner, can’t encroach if not granted the right. Must look at entire will to determine intention.**
	+ This is a fiduciary duty between the life tenant and the remainderman
	+ Remedies: equitable damages, injunction to prevent waste or correct the waste (Van v Lord Bernard)
* Waste
	+ Reversionary interest holder has a present right to future possession; right to receive the property in substantially the same condition as when received by LT
	+ (1) Permissive waste
		- Passive conduct which permits decay
		- Life tenant is not responsible for this
		- Forces of nature – “normal wear and tear”
	+ (2) Voluntary waste
		- Life tenant is liable for this
		- Waste that results form the activities of the life tenant
		- May be required to pay damages to those entitled in reversion or remainder and may be restrained by an injunction from committing acts of waste
		- Complicated by two factors:
			* Voluntary waste is any act of the life tenant which causes permanent damage to the land
			* Is any act of the life tenant which changes the nature of the land, whether for better or worse
				+ This poses restraint on the life tenant in the use and occupation of the land
				+ It is qualified by the doctrine of ameliorating waste – even though a change for the better is technically waste, it it improves the land it will not render the life tenant liable in damages and usually an injunction will not be awarded
				+ Qualified by ameliorating waste, will lead to the same results as the first definition

Ameliorating waste is permissible

* + - Examples:
			* Cannot cut timbre
			* May not open mines or extract minerals unless those activities were being carried on at the commencement of the life tenancy
			* Demolishing or altering buildings
			* Changing the use to which the land is put (agriculture 🡪 residential)
	+ (3) Equitable waste
		- Creator of a life estate may expressly permit the life tenant to commit voluntary waste
			* Can make them “unimpeachable for waste”
			* However, Equity may still restrain the life tenant from making an unconscionable use of the apparent legal right to commit waste at will

Vane v Lord Barnard (1716)

* + - * Facts: D’s son got married (P), granted himself a life estate without impeachment of waste and the remainder to his son for life. D was displeased with son, stripped castle.
			* Decisions: Castle should be repaired and put into the same condition it was in
* The equitable rule now appears in statutory form:
	+ ***Law and Equity Act***
		- s.11 **Equitable waste**
			* 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 instruments creating the estate
	+ In *Kennedy* (not read), the doctrine was used to restrain an owner whose house had been sold at a tax sale from stripping the house during the period in which the owner could redeem the property by paying the outstanding taxes
* **Applies to:**
	+ **Tenants under a lease**
	+ **Tenants in common and joint tenants**
	+ **Mortgagor and mortagees**
	+ **Against a purchaser who is “in equity by the effect of the contract the owner of the estate” having taken possession under the contractor, at the suit of the vendor who is in the situation of an equitable mortgage”**
* Liability for Taxes, Insurance etc.
	+ ***Mayo v Leitovski***
		- Facts: P is the ower of an estate in fee simple in the remainder of the lands in question expectant on the death of the D who holds a life estate and is in possession of the lands. P as remainderman challenges the right of the life tenant to acquire the tax title to the lands so as to defeat the plaintiff’s remainder or otherwise than as in trust for the P as to the remainder
			* Tenant didn’t pay the property taxes
		- Reasons:
			* A life tenant can do nothing during the continuance of his estate to impair the estate in remainder and on the other hand, the remainderman can not do any act which will effect the life estate
			* The life tenant is responsible for property taxes – have a fiduciary duty
				+ If they don’t pay, the property will be taken and sold by the taxing authority
				+ They hold the property as a trustee
			* In deciding the remedy, they mention certain maxims:
				+ **“Equity looks on that as done which ought to have been done”**

Should have paid property taxes

* + - * + “**Equity imputes an intention to fulfil an obligation”**

Assume the best on the party of the party in breach and say that the life tenant should be regarded as getting the property back if they got the property for the remainderman

* + - * Everything is as it was before the tax sale
			* What about a mortgage?
				+ What is the position of the LT?
				+ The LT is only responsible for mortgage interest payments (only the interest portion)
	+ A life tenant may not be responsible for insurance premiums
		- These are the responsibility of the remainderman
	+ LT must pay for upkeep and repairs, operating expenses: property taxes and mortgage interest payments

STATUTORY POWER

* The *Land (Settled Estate) Act* empowered a life tenant to grant leases not exceeding 21 years which bound the life tenant and also the remainderman. The court was also given the power to authorize other types of leases, and sale and mortgages of the property. Where there was s sale the interest that existed in the land became interests against the proceeds of the sale

CO-OWNERSHIP

1. ~~Coparcenary~~
* In the absence of a male heir, property descended to the female relatives, and if there were more than one in the same degree of kinship, they succeeded jointly
* This has been abolished

 2. Tenancy by the Entireties

* When land was transferred to a husband and wife in circumstances where (if they had not been married) they would have taken as joint tenants, they took it as tenants by the entireties
* Single and indivisible title, survivor taking title absolutely
	+ Subject to a contrary intention

*Property Law Act*

* S.12 Spouses separate
	+ A husband and wife must be treated as two persons for the purposes of acquisition of land under a disposition made, or coming into operation before or after this section comes into force

 3. Tenants in Common

* There can be unequal shares in the property (this cannot happen with a joint tenancy)
* **There is a presumption of a tenancy in common, must expressly say “joint tenants” if you want a joint tenancy**
* Their unity of possession entitles each to in conjunction with the other to possession of each and every part of the property
	+ General tendency is to treat them the same way as it would single owners and, on death, the interest in the tenancy in common **passes either by will or intestacy in the same way as any other property owned by the deceased**
* Each individual can mortgage, sell, give, etc. their individual share without permission of the other cotenant
	+ Can have separate certificates of title and sell their shares separately
	+ Undivided possession but otherwise they are treated as distinct owners
	+ An excluded TIC can claim compensation for the period of time excluded (cannot exclude each other)
	+ If only one TIC lives there, the others are entitled to rent
	+ A TIC can buy out the other TICs
	+ TICs can sell the property and divide the proceeds to the proportion of their interests
	+ They can physically divide the property if they agree
	+ If the TICs can’t agree, court can order partition and sale – two separate titles, two separate boundary lines
* Each co-tenant is entitled to possession of entire premises
* “To A, B and C in equal shares” “To A, B, C equally” “To A in the proportion of a 60% share and to B in the proportion of a 40% share)

4. Joint tenancy

* Two essential elements: the **right of survivorship** (jus accrescendi) and the need for the existence of the **three unities in addition to the unity of possession**
	+ Acquisition by accretion, not by inheritance if one JT dies, the surviving JTs continue
		- There is no probate (delay or fees)
		- And the creditor of the deceased joint tenant cannot go after the debts of the deceased
		- The person gets the title clear of the debt
* Right of survivorship
	+ The survivor will become the absolute fee simple owner as a matter of law by the right of survivorship (if haven’t severed the JT)
	+ **The operation of the right of survivorship takes priority over the normal rules of descent on death**.
		- The deceased joint tenant cannot dispose of his or her interest by will and any attempt to do so will be of no force and effect
* Cannot exclude each other (like TIC)
* Have the right of survivorship
* **Must be expressly on the title that it is a JT**
	+ Even if the 4 unities are present, and it is not explicit 🡪 TIC
* Can have JT over a property, over stock, a bank account
* No probate of the interest passing, and the creditors of one party (if they die) they can’t get to his interest, it passes automatically to the other party
	+ Ex. 3 joint tenants, so each owns the whole . When a co-owner dies their interest is automatically absorbed with the surviving owners’. Each continues to own the whole. When one co-owner is left, they may dispose of it how they wish – including through their will.
	+ Whereas tenants in common, when a co-owner dies their interest passes according to their will, or the rules of intestate succession
* Three unities:
	+ Each one of the following is essential to the existence of joint tenancy, if one is missing, it must be a tenancy in common and not joint tenancy
	+ **1. Unity of Title**
		- Must derive their titles from the same instrument
		- “To B, C and D as joint tenants in fee simple” Later C transfers all her interest to E. What is the nature between the ownership between B, D and E?
			* This can be done unilaterally or in secret
			* B & D are joint tenants
			* So the right of survivorship is still between them
			* Then the surviving one would be a tenant in common with E
			* E is a tenants in common
			* B and D 1/3 continue as JTs between themselves, with E (1/3) and B and D as TIC
			* “Severance” terminates C’s JT (unities of time and title)
			* Creates a TIC
	+ **2. Unity of Interest**
		- The interests of the joint tenants in the property must be the same (equal)
		- One co-owner cannot have a fee simple and another a life estate – that would be a tenancy in common
		- “A grants Blackacre to B for life and to C for 10 years as JT”
			* A grants Blackacre to B for life and to C for 10 years as joint tenants
			* They are NOT joint tenants
			* B has a life estate (freehold)
			* C has a leasehold
			* For the period of time of co-ownership they would be tenants in common
			* B would carry on as sole owner after C’s tenancy ends
	+ **3. Unity of Time**
		- The interests of the co-owners must all vest simultaneously
		- Must arise at the same moment
		- If one is subject to a contingency and the other is vested, there is no unity of time
		- If two children have a remainder interest in land when they reached 21 years, there could be no unity of time (unless they were twins)
		- “A transfers Blackacre to B for life, and then to C and to the first child of D in fee simple”
			* When the transfer occurs, D has no child
			* 2 years later, D has child E
			* C and E are TIC
			* Unity of time required at CL, but not in equity or gifts in wills

CREATION OF CONCURRENT INTERESTS

* It is necessary to consider the combined effects of the CL, equity and legislation The CL has been modified by equity and the CL and equity have been modified by legislation
* 1. Common Law
	+ **Presumption of JT if 4 unities present, if not TIC**
		- If one of the three is absent 🡪 tenancy in common
	+ A grantor can indicate an intention to create a tenancy in common even if all the unities existed
	+ ***RE Bancroft, Eastern Trust Co v Calder***
		- Facts: Calder is the sole executor of the will of the deceased. Eastern Trust (P) is the sole trustee under the testator’s will
			* Under the will the widow is given use and enjoyment of the house and furniture during her lifetime and after her death they fall into the residuary
			* The residue is supposed to go to the trustee upon certain trusts, the trustee is to convert the residue into money and dispose of it as follows:
				+ Two equal shares and invest one and pay the income to the widow; the other share income divided into 4 shares to children (one of the shares divided in two for the deceased daughter’s children)

Then one of the daughter’s children died

* + - * Did the children of the deceased daughter take it as joint tenants or as tenants in common?
		- There is nothing in the will which indicates an intention to divide the income between the children of the deceased daughter which can be held to abrogate the idea of a joint tenancy and to create a tenancy in common
* EQUITY
	+ **Equity dislikes the joint tenancy, and preferred tenancy in common**, gave effect in two ways:
		- More likely to find an **intention to create a tenancy in common, especially where concurrent interests were held by members of a family, ex. children**
		- In some cases, while co-owners might be joint tenants at law. Equity would treat them at tenants in common in equity
			* **If two or more persons bought land and provided the purchase price in unequal share**s 🡪 though JT at law, they were treated as TIC in equity. If the purchase price was provided in equal shares, the co-owners would be joint tenants at law and in equity
			* **In commercial transactions**, no matter what shares were contributed, Equity regarded the right of survivorship as being incompatible with the concept of partnership. Thus, prima facie partners would hold the property as TIC in equity
			* **When two or more persons lent money on the security of the mortgage of land, and the borrowers transferred the land by way of mortgage to the lenders at law, the lenders held as joint tenant**s.
				+ But if one of the mortgagees died, equity would compel the surviving JT to hold the legal title arising as a result of the operation of the right of survivorship on trust for the deceased’s estate and the survivor, so that the estate would not lose its security for the repayment of the loan
		- ***Robb v Robb* (1993) BCSC**
			* Facts: Mrs. Robb declared that she is the sole owner of the shares of the Towers and the leasehold interest; Respondents, her deceased husbands children, are claiming an interest in the assets
			* I: Is Mrs Robb’s interest as a co-owner or JT?
			* Robbs purchased the leasehold interest, the money came entirely from Mrs Rob but the assignment of the lease was in favour of both, was no indication of whether it was meant to be JT or TIC
			* Some evidence that they intended JT
			* 1 year later, Mr Robb transferred a California property to Mrs Robb, consideration was expressed as the fact that she had purchased the Condo and named him as co-owner
			* Mr Robb died, left all assets to Mrs Robb
			* If JT 🡪 go to Mrs Robb by right of survivorship and the children cannot claim an interest
			* If TIC 🡪 pass to Mr Robb’s estate and are subject to an order varying Robb’s will
			* At CL 🡪 joint tenancy
			* Equity and legislature 🡪TIC 🡪 although at law the survivor is entitled to the whole estate, they will hold in part as trustee for the represntiatves of the deceased. The presumption arises in 3 cases
				+ Unequal shares of purchasing money
				+ Where property is mortgage and co-owners are mortgagees
				+ Where they are business partners
				+ Transfer of the California property rebuts the presumption at equity that he was holding his interest in the shares and lease in trust for Mrs Robb
				+ No basis in equity for TIC
			* Therefore Mrs Robb is the sole legal and beneficial owner of the shares and leasehold
			* This case shows that where there is a housing coop, the individual units are in effect, personal property rather than realty
				+ Therefore the provisions of the LTA and the PLA and the presumption of TIC do not apply to coop shares
				+ **Therefore the only CL presumption in favour of JT applies**
* Housing Co-ops
	+ Different than strata
	+ In housing cooperative – a corporation owns a building and the land, and the title is registered in the name of the corporation
		- The individual units are part of the building, and the members of the co-op get shares in the corporation and get a leasehold interest for their particular unit
			* Just have the rights of a tenant