**CH1:PROPERTY LAW**

* real property = immovables eg. land, realty, fixtures
* personal property = movables eg. Personalty, chattels
* corporeal or incorporeal interests (can see & touch)
* law = rules &procedures for the orderly resolution of disputes
  + substantive (rights) vs procedural law (how to establish rights)

**PHILOSOPHICAL PRINCIPLES**

* legal positivism – property rights created by gov't (statutes)
  + law must be obeyed, just or injust
* natural law theory – property rights arise in nature as a matter of fundamental justice
  + if morally justified, obey
* utilitarianism – property rights serve useful societal purposes
  + “the greatest happiness of the greatest number is the foundations of moral and legislation”

**AIRSPACE PARCELS & TRESPASS**

Common law: “ *Cujus solum ejus est usque* ***ad coelum*** *et* ***ad inferos***” = “*The owner of the land owns everything up the heavens and down to the centre of the earth.”*

**Trespass** = intentional intrusion of property w/o consent (assume damages)

**Nuisance** = outside property, but interferes w/ reasonable use & enjoyment of property (prove damages)

***Property Law Act s36(2)*:** If building or fence **encroach** (trespass) on adjourning land, court may

*(a)****:*** easement w/ compensation (right to occupation for a period determined by court)

*(b):* vest title of land encroached/enclosed w/ compensation (permanently)

*(c)*: removal (= mandatory injunction)

|  |
| --- |
| Kelsen v Imperial Tobacco Co (1957) |
| Facts – Kelsen was a lessee of a tobacco shop. Imperial Tobacco Co mounted a 20’ x 10’ advertisement sign that protruded out over Kelsen’s shop by only 8”. The cost of the sign was 220*l* (and 30*l*/year to Kelsen’s neighbor). Imperial Tobacco Co had asked for permission to mount the sign from Kelsen’s neighbor (whose property the sign hung-off of) and the holder of Kelsen’s freehold (Improved Industrial Dwellings Co Ltd). Kelsen alleged that Imperial Tobacco Co trespassed on Kelsen’s airspace and claimed a mandatory injunction.  Plaintiff – Kelsen  Defendant – Imperial Tobacco Co  Who won? Kelsen  Issue – Is an invasion of airspace an action in trespass?  Holding – The invasion of the sign created a trespass. Mandatory injunction for its removal.  Ratio – Ownership of land includes the airspace above the land (*ad coelum*). Invasion of the airspace constitutes a **trespass** (as opposed to a nuisance).  **Equitable Remedies** (injunction & equitable damages)  ***Lord Cairns’ Act (1858)****:* may award equitable damages in addition to/substitute for injunction or specific performance, depending on court's discretion   * received by BC in *LEA s2* in 1858   **Shelfer Principle** (too strict; broader *PLAs36*)  Damages in substitution for an injunction if:   1. The injury to P’s legal rights is small [yes] 2. The injury is capable of being estimated in money [yes] 3. The injury can be adequately compensated by a small money payment [no] 4. It would be oppressive to D to grant an injunction [no]  * look at **conduct** of defendant and plaintiff (moral positions)   Reasoning – The legislature indicated that trespassing could occur in airspace by expressly negating the action of trespass or nuisance arising from an airplane passing through airspace.   * As lesee, Kelson has right of exclusive possession and occupation of property   + landlord's consent doesn't count   + has *ad coelum* rights |

|  |
| --- |
| Bernstein (Lord of Leigh) v Skyviews (1977) |
| Facts – Skyviews took aerial photographs of property and sold them to property owners. Skyviews took photos of Bernstein’s property. Bernstein wrote Skyviews, demanding that they hand over or destroy all of the photos and negatives. Skyviews never responded, and Bernstein sued Skyviews for trespass.  Plaintiff – Bernstein (Lord of Leigh)  Defendant – Skyviews  Who won? Skyviews  Issue – Do property owners own the airspace above their property “up to the heavens”?  Does it constitute trespass to fly over someone’s house without permission?  Holding – Skyviews did not trespass into airspace at a height that interfered with Bernstein’s ordinary use or enjoyment of the land.  Ratio – Ownership of land includes the airspace above the land **only to the height necessary for reasonable use and enjoyment of the land** and the structures on it (limited *ad coelum*). Above that height, the property owner has no greater right to the airspace than members of the general public.  Above the height necessary for ordinary use or enjoyment, a nuisance can be caused. Within the height necessary for ordinary use or enjoyment, a nuisance *or trespass* can be caused.  Reasoning – Skyviews flew many hundreds of feet above the ground and it is not suggested that by its mere presence in the airspace it caused any interference with any use to which Bernstein put or might wish to put his land. The mere taking of a photograph cannot turn an act which is not a trespass into one that is a trespass.  Note – This case limited *Kelsen v Imperial Tobacco Co.* |

**\* some go w/ Bernstein's principle (own to reasonable use & enjoyment), some go w/ *ad coelum* (own to the heavens)**

***Land Title Act s138-143***

*s138*: “**air space parcel**” = volumetric parcel; “air space plan”; “geodetic elevation”

*s139*: can grant interests in air space parcels

*s140(1)*: no implied easement or restrictive covenant w/ granting of air space parcel

*(2)*: right of way must be expressly granted (no title to above or below air space parcel)

*s141(1)*: registered owner of fee simple may create 1+ air space parcels from air space plan, with **separate** indefeasible titles

*(2)*: air space parcel can be devolved, transferred, leased, mortgaged, just like land title

*(3)*: can divide air space parcel w/ *Strata Property Act* (multiple titles/owners & uses for mixed-use buildings)

*s142*: Prov govt or municipality can create air space parcels for highways

*s143*: accept air space plan only if title of land is registered

* often, developers sell air space parcels (condos), but retain ownership of land and lease it out to get rent
  + problem when the lease runs out
* air space parcels can be underground (eg. Parking), above Crown lands (Vancouver terminal above sea)

***Strata Property Act***

= subdivide surface or airspace into **strata lots** (separate titles)

*s1*: “bare land strata” = boundaries of strata lots defined on horiz plane

*s66*: own **common property & assets** as tenant-in-common proportional to unit size owned

* unit holders share right to occupation & possession

*s67*: property tax based on share in common property & assets + own strata lot

*s68*: own strata lot to middle of wall *(1)* or according to boundary on strata plan *(2)*

**Implied Easements** *s69*:

*(1)*: implied easement for owner of strata lot vertical&sideways support *(a)*, passage of services&facilities (**utilities**) *(b)*, shelter *(c)*

*(2)*: implied easement for owner of common property vertical&sideways support *(a)*, passage of services&facilities (utilities) *(b)*, shelter *(c)*

*(3)(a)*: easements exist w/o registration

*(e)*: rights&obligations to give effect & enforce easements (incl. **Right of entry** to maintain utilities)

*(4)*: easements enforceable by strata corporation

*(5)* no easement of shelter for bare land stratas

*s70*: can change strata lot (remove wall) w/ written approval from strata corporation

*s71*: strata corporation can't make **sig.** change to use/appearance of **common property** unless w/ 3/4 vote *(a)* or to ensure safety/prevent sig loss or damage *(b)*

*s72(1)*: strata corporation must repair&maintain common property/assets

*(2)*: by bylaw, owner can repair&maintain of limited common property *(a)* or specified common property *(b)*

* limited common property/asset – common ownership but accessible/used by a few eg. Balcony

*(3)*: by bylaw, strat corporation can repair&maintain specified portions of strata lots

**Strata Corporation**

* manage building (no ownership)
* hire building managers to fix common property/assets
* monthly management fees for common expenses
* special assessments
* contingency funds – for unexpected emergencey
* depreciation report – for potential buyers (incl fire insurance, repairs)
* pass bylaws (eg. Rental restrictions, pets, external appearance)

- **Civil Resolution Tribunal Act** – resolve strata property issues w/o court (online)

**Ad Inferos**

= down to the center of the Earth

* not clear; Bernstein's principle?
* Crown has mineral rights

**CH1: FIXTURES**

*Interpretation Act BC s29*: land includes all buildings & houses affixed to it

* + shed is fixture by statute, but can be chattel in common law

**Chattels** = movable property not annexed to realty; tangible

**Fixtures** = chattels attached to property

* can't change inherent property of fixture by contract [*Rodriguez*]
  + protect agreement by registering it as a charge in title at Personal Property Security Registry (constructive notice)
* included in contract when purchasing property
  + chattels assumed excluded from sale, unless included
  + fixtures assumed included in sale, unless excluded

Two factors to consider in determining whether something is a chattel or fixture [*Re Davis*]:

1) **Degree & Method of annexation**

* degree of attachment
* temporary or permanent (Carpet case: “so long as it serves its purpose” NOT forever or even a long time)
* ease of removal/serious damage if removed

2) **Object/purpose of annexation** [**\*overriding\***]

* improve the freehold? (inc value of land) [better use of building]
* better enjoyment of chattel? [better use of good]
* Objective intention based on facts/circumstance

**Stack v Eaton, 1902 – Classic Principle**

\* depends on circumstances/intention

1. object not attached to land other by own weight is *prima facie* chattel unless circumstances show different intention

2. object affixed to land even slightly is *prima facie* fixture unless circumstances show different intention

3. circumstances necessary to be shown to alter the *prima facie* character of object should show the **degree & obejct** of annexation, patent for all to see

* objective test based on facts

4. **intention** of the person affixing the article is material if **possible to presume** from the degree & object of annexation

* draw rational conclusion (presume) intention from facts

5. tenant's fixtures for the purposes of trade are fixtures (trade fixtures), but tenant has right to severe them during lease or termination of lease→ownership revert to tenant

* if attached after lead-end→ownership pass to landlord
* leasehold improvements are fixtures
* ornamental fixtures (UK) attached by tenant for domestic purposes (no case in Canada, but assume ok?)

|  |
| --- |
| Re Davis (1954) |
| Facts – A wife survived her husband and had claims against his real estate through her “dower”. Six bowling alleys had been installed in the building before the husband purchased the building, and they could be unfastened easily. The degree of affixation was not of much permanency and their removal was a matter of comparative ease.  Issue – Should things like bowling alleys be considered as fixtures or chattels?  Holding – The value of the bowling alleys should be deducted from the valuation of the dower, because the bowling alleys are not part of the real estate.  Ratio – If chattels are affixed to improve the freehold, then even if the chattels are only slightly affixed to the realty, they become part of the realty.  If chattels are affixed for better enjoyment of the chattels, then the affixiation does not make them part of the realty.  Reasoning – Bowling alleys are affixed in order that bowling might be more efficiently carried on. |

|  |
| --- |
| Zellstoff Celgar Limited v British Columbia (2014)(BCCA) |
| Facts – Zellstoff purchased a pulp mill and BC assessed its property transfer tax to include the machinery and equipment as fixtures part of the realty.  Issue – Are machinery & equipment chattels or fixtures?  Holding – The machinery and equipment are fixtures because they are permanent, and improve the freehold.  Ratio – Tax consequences follow legal consequences.  Reasoning – Applied the Stack principles and Re Davis ratio (degree & object) |

|  |
| --- |
| CMIC Mortgage Investments Corp v Rodriguez (2010)(BCSC) |
| Facts – Rodriguez bought a large Cover-All building bolted to rods to use as a barn. She later bought a second Cover-All building that she intended to be portable that was bolted to large concrete blocks resting on their own weight. Rodriguez did not pay for the second Cover-All in full and Cover-All repossessed the building. CMIC petitioned for a declaration that it was entitled to foreclose on the second Cover-All as within its mortgage over the land.  Who won? Rodriguez/Cover-All Building  Issue – Was the second Cover-All building a chattel or a fixture?  Holding – The second Cover-All building was at all material times a chattel.  **Maczko's 6 Rules** (*Royal Bank of Canada v Maple Ridge Farmers Market Ltd*):  \*degree of affixation prevails over intention (rigid rules); too arbituary   1. Items unattached to property, except by own weight, and can be removed without damage  chattel 2. Items plugged in which can be removed without damage  chattel 3. Item attached even minimally  fixture 4. If equipment is attached to fixture, a part of which could be removed but which would be useless without the attached part  entire piece of equipment is fixture **If an item will lose its essential character unless attached to a permanent and substantial improvement  fixture** 5. Tenant’s fixtures can be removed 6. In exceptional circumstances (large and expensive items), courts can resort to the **purpose test** eg. Mobile homes   Reasoning – The second Cover-All building was not affixed to the land so it was presumptively a chattel (**rule 1**). Rodriguez’s evidence is that she wanted a portable building, so the presumption was not rebutted. |

|  |
| --- |
| Elitestone Ltd v Morris (UK LAW) |
| Facts – Morris lived in a bungalow that he purchased from the previous occupier. Morris also paid an annual license fee to the freeholders. If the bungalow were part of the realty, the *Rent Act* of 1977 would protect Morris in his possession. If not, Elitestone could evict him.  Who won? Morris  Issue – Was the bungalow part of the realty?  Holding – The bungalow was part and parcel of the land itself.   * A 3rd category: not a fixture b/c resting on the ground (Rule #1) * but obviously a part of realty eg. House, building, green house   Ratio – A house which is constructed in such a way so as to be removable, whether as a unit or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel.  Same results in:  Canada – purpose of affixation  Australia – common sense |

**CH1: WATER**

**Ownership**

* English law (1858 in BC): no one; **riparian rights**
  + *natural law theory*: rights relating to shore or bank of any body of water
* BC statutes “*the property in*” *[WPA s3; WSA s5*]: **Provincial Crown**
  + *utilitarian system*: water licenses to protect interests of people not bordering water (no riparian rights)

**A. Riparian Right**

* littoral= seaside/lakeside; riparian= stream/river banks
* owner of real property bordering stream entitled(proprietary right) to use water in its natural state in flow, quantity & quality, not diminished or increased
  + natural law rights to receive water in its natural state as to quantity & quality
    - entitled to reasonable uses for domestic purpose (only? Or also commercial thus problem w/ gold mines)
  + natural law duty to pass water downstream in its natural state as to quantity & quality
    - no diversion/contamination/obstruction
* **NO** ownership/exclusive rights
* riparian owner cannot grant right to non-riparian owners

**Natural rights continue unless replaced by statutes**

1. **right of access** to/from water

2. r**ight of drainage** – flood-proof land-based eg.dykes

3. **~~right to reasonable use~~** – WSA s5(1),6,7;WPA s3(1) except **domestic use** of unrecorded water [WSA s2]

4. **~~right to undiminished flow~~** – WSA s5(1),6,7;WPS s3(1) except domestic use? (*Johnson*)

5. **right to undiminished quality** – no contamination

6. **right to accretion** – *Southern Theosophy*

* “gradual and imperceptible” moving water line (wavy line)
* risk of erosion (right to protect against erosion)

7.**~~right of ownership of waterbed~~** (*ad medium filum* = to the middle line) – now Provincial crown [Land Act s55,56]

**B. What is Water?**

CL: water in a natural watercourse flows naturally & should be allowed to flow

* did not include groundwater (WA 1960), perculating water(WPA 1995) [*WSA s5(2); WPA s3(2)*]

*WSA s1*: “stream” = a natural watercourse

“groundwater” = water below surface of ground

***Water Sustainability Act, 2014* (former *Water Act*)**

*s2*: water may be diverted from stream/acquifer for **domestic purpose**

* drinking water, food prep, sanitation, fire prevention, animals/poutry for household use/pets, irrigation not > 1000m2
* partially exempted from licensing (not an offence) [*WSA s6(2),22(7)*]
* license supersedes unlicensed domestic use (vulnerable) (possible to license domestic use?)

*s5: (1)*provincial gov't owns + has right to use & flow of all water in stream, unless authorized

*(2)* provincial gov't owns + has right to use percolation & flow of groundwater, unless authorized

*s6: (1)* cannot divert or use water from stream/acquifer unless authorized (1909)

*(2)* can divert,store,use to extinguish fire

*s7*: rights acquired under licenses

* divert & use quantity specified
* construct, maintain, operate works authorized/necessary work
* make changes in and about stream for (b)
* construct fences, screens, fish/game guards to conserve fish/wildlife

*s22*: *(1)* precedence of rights authorized to divert water from stream according to authorization date

* 1939 priority of licenses
  + in chronological order from issue date [*1st in time, 1st in right*]
* perpetual rights

*(2)* if same date, by water use purposes ranking

*(3)* if same date and purpose, equal precedence

*(4-6)* same as *(1-3)* but for acquifer

*(7)* **ranking of water use purposes**:

* **unlicensed** uses superceded by priority of licenses; emergency can use this

1. domestic

2. waterworks

3. irrigation

4. mineralized water

*s25*: water licenses appurtenant (attaches) to land.

* transfer of land→automatic transfer of water license w/ written notice to comptroller/water manager

***Water Protection Act, 1996***

*s3*: *(1)* the property in & right to use&flow water in stream for all purposes vests in gov't, unless license

*(2)* ......use percolation&flow of ground water......

|  |
| --- |
| Johnson v Anderson (1937)(BCSC) |
| Facts – Anderson diverted the flow and quantity of a stream that would have flown through Johnson’s property. Johnson previously used the water for domestic stock-watering purposes. Johnson had no water license. Anderson had a license, but it did not authorize the diversion. Johnson sought damages, an order for demolition of the works diverting the flow, and an injunction.  Plaintiff – Johnson  Defendant – Anderson  Who won? Johnson  Issue – Has legislation taken away the right of a riparian owner to have undiminished flow and use of water that would have naturally flown by or through the owner’s land?  Holding – Johnson had a right to the use and undiminished flow of water. Anderson ordered mandatory injunction to remove the dam and prohibitory injunction to never build a dam unless license granted, to restore flow & quantity of water.  Ratio – Riparian owners still have the right to the continuance of the use and undiminished flow of water, unless licenses have been granted for all the water flowing by or through the owner’s land.   * Unlicensed user for domestic purposes has precedent over any other unlicensed users   Riparian owners deprived of their right have remedies (an order for demolition or an injunction).  **All common law riparian rights apply unless legislation takes away the right.**  Reasoning – Anderson’s water license did not cover the right to divert. |

|  |
| --- |
| Schillinger v H Williamson Blacktop & Landscaping Ltd (No 2)(1977)(BCCA) |
| Facts – Silt from unlicensed H Wiliamson Blacktop & Landscaping Ltd’s gravel pit was added to water used by Schillinger. Schillinger had a license to divert water for her commercial game fish farm for Hairsine Creek, not Barres Creek. The license to divert was at a point upstream from where Barres Creek and Hairsine Creek converged. Schillinger claimed damages in negligence, because the water was polluted and unfit for his use.  Plaintiff – Schillinger  Defendant – H Williamson Blacktop & Landscaping Ltd  Who won? H Williamson Blacktop & Landscaping Ltd  Issue – Was Schillinger entitled as licensee to have the benefit of the flow of spring water from H Williamson Blacktop & Landscaping’s lands and to divert and use said water?  If Schillinger was not entitled to divert and use the water, was he entitled to recover damages for the deterioration of quality of the water?  Holding – Schillinger was not entitled to divert and use the water, so his claim must fail. He has no remedy b/c any downstream owner who has legal use can sue defendant for pollution.  Ratio – Riparian rights can only exist for a person lawfully using the water. The only way to acquire the right to the use and flow of water in any stream in BC is under the provisions of the *Water Act*.  Reasoning – Schillinger’s diversion of the water violating s 41(1) of the *Water Act*, which makes it an offence to divert water from any stream without authority, or to use any water when not lawfully entitled to do so. |

|  |
| --- |
| Steadman v Erickson Gold Mining Corp (1989)(BCCA) |
| Facts – Steadman piped water to his house from a spring-fed dugout on his land (no license). Erickson Gold Mining built a road uphill from Steadman’s land, causing silt and mud to contaminate Steadman’s water system. Steadman sued in nuisance. Erickson Gold Mining claimed that s 42(2) (it is not an offence to divert unrecorded water for domestic purpose or for prospecting a mineral) does not apply because Steadman was not using the water only for domestic purposes and the dugout and piping constituted works.  Plaintiff – Steadman  Defendant – Erickson Gold Mining Corp  Who won? Steadman  Issue – Was Steadman using the water lawfully within the *Water Act*?   * Unlicensed domestic user vs unlawful industrial user (no license to pollute!)   Holding – If the water in question was groundwater, Steadman could sue in nuisance  If not groundwater, Steadman was using the water for domestic purposes (the insignificant amount of water used when operating his diamond saw did not change the use to another purpose), and his diversion was not considered to be “works”. Steadman is entitled to the water and Erickson Gold Mining cannot contaminate it.  Ratio – If the water is groundwater, people can use it to the extent that it causes their neighbor’s well to go dry, but **cannot contaminate it**.  If the water is not groundwater, until the Crown issues a license, people are entitled to use the water and are entitled to claim that others not make it unusable. |

**C. Percolating Water**

= water flowing thru the soil

* common law: no one owns
* *WPA s3(2)*: Crown owns
  + need license to dig well

**D. Ownership of Beds**

* common law: *ad medium filum* (to the middle line)
* *Land Act s55,56*: Crown owns
  + in BC, own up to the **natural boundary** (may **move**!)
* tidal water – up to medium high water mark

**E. Accretion/Erosion**

|  |
| --- |
| Southern Centre of Theosophy Inc v South Australia(1981) |
| Facts – Southern Centre of Theosophy Inc was the registered proprietor of land lying west of Lake George. When the perpetual lease was grant, Southern Centre’s land adjoined the lake, but the high-water mark has since receded (20 acres). Southern Centre brought an action to claim the land.  Who won? Southern Centre of Theosophy Inc  Issue – Can the doctrine of accretion apply to cases of windswept sand?  Holding – The doctrine of accretion can be applied to Southern Centre’s property and they have the **benefit/detriment** of the boundary land.  Ratio – **Doctrine of Accretion:**  Where changes in the boundary between land and water are **gradual and imperceptible** (don't see it happening, but perceptible over time), there is moving boundary line.   * Can record new natural boundary line in map in LTO (surveyor) * not a sudden change * if change in winter/summer, property tax take the mean   **Accretion** (gradual build up of soil) can be caused by fluvial action (water), wind, and man-made operations (other than deliberate actions of claimant), precipitation/evaporation  **Erosion/Diluvion** (gradual removal of soil) – no compensation; owner can rebuild/fill property  **Boundary Lines in LTO**  - **wavy line**= natural boundary (formed be water)  - fixed line = fixed boundary (eg. Bare land strata) |

**CH1: SUPPORT**

1) Everyone is **entitled** to lateral support of their land in its natural state

* if land is in natural state, subsidence is in **strict liability** (don't have to prove negligence)
  + just show excavation caused the subsidence
* if not, owner must prove subsidence is caused by **negligence**
  + removal of lateral support not cause of action; negligence is
* **natural state** = land w/ improvements (eg. buildings, fence)
  + burden w/ additional weight
* may be liable for (negligent) removal of lateral support
* possible to cause subsidence w/o crossing boundary line (b/c changes in weight distrN)

2) Everyone is **entitled** to vertical support of their land in its natural state

* strict liability for subsidence regardless of natural state
* trespass (eg. Tunnelling over boundary line w/o easement)

|  |
| --- |
| Gillies v Bortoluzzi (1953)(ManQB) |
| Facts – Gillies was the tenant of a building and operated a grocery store. Bortoluzzi owned the building east of Gillies store. Bortoluzzi hired Benhamin Bros Ltd to excavate the basement of his building. A few days after the excavation, the east wall of Gillies building collapsed. Gillies sued for damages.  The excavators went over the property line (removing the vertical support), but even if they hadn’t they were negligent in removing the lateral support. The excavators broke the stone footings.  Plaintiff – Gillies  Defendant – Bortoluzzi  Who won? Gillies  Issue – Does an entitlement to lateral support for land in its natural state exist? Does an entitlement to lateral support for land not in its natural state exist?  Holding – The collapse of the wall was caused by Bortoluzzi’s negligence (the vertical and lateral support being removed).  Ratio – Everyone is entitled to lateral support for their land in its natural state, but is not entitled to support when there is a change in the property (weight of a building superimposed upon the land). To recover for subsidence when the property is no longer in its natural state, the plaintiff must show negligence.  In itself, the removal of lateral support of a wall does not give rise to a cause of action.  Reasoning – The wall was well-constructed and was not overloaded, and pressure of prevailing winds did not cause the collapse. |

|  |
| --- |
| Rytter v Schmitz (1974)(BCSC) |
| Facts – Rytter owned a lot with a concrete building next to Schmitz’s lot. Schmitz excavated his property, and dug along the property line (at a depth of 10’). Removal of the soil caused a subsidence (shifting of earth downward) by loss of lateral support for Rytter’s property, allowing subsoil to fall away leaving no support for Rytter’s building. Rytter’s building was damaged, and he sued Schmitz. After the collapse, Schmitz told Rytter he would look after his property, but he didn’t (and the cracks radiated). Shoring done by Schmitz made the situation worse. Schmitz claimed he did not act negligently in reasonably excavating on his own property.  Plaintiff – Rytter  Defendant – Schmitz  Who won? Rytter  Issue  Holding – Rytter gained a right to lateral support by prescription, and he was entitled to vertical support. He was deprived of both. Therefore, he did not need to show intent or negligence on the part of Schmitz.  Ratio – **Prescription rights** ceased to exist in 1976 b/c Torrens. Before then, after 20 years of uninterrupted enjoyment of a building, the owner **gained a right to lateral support** (acquired right from adjourning land). [LTA ss23(3), (4), 24]  In cases where no prescriptive right exists, buildings and the land may not be entitled to the same lateral support, but are entitled to vertical support.  The right to protection by way of support is strict.  Reasoning – The excavation should have been done piecemeal, and the excavators should have shored as they dug. |

**CH2: GENERAL PRINCIPLES OF LAND LAW**

**A. Real and Personal Property**

* real property = land, real estate, immovables, subject for title
* personal peroperty = personalty, chattels, movables, subject for damages
* lease holds = “chattel real” historically

**Ownership of Land**

**\* Crown owns the land**

\* private ownership = only an interest in land

History: 1066 William the Conquer feudal system→King has absolute ownership→infeudation: grant land/protection in exchange of loyalty/service/crops→sub-infeudation to sub-tenants who have tenure (hierarchy)

* **Tenure** – hold interest in land for a time; hold an estate
  + **estate** = a time in the land
* *Statute of Quia Emptores, 1290*: abolished sub-infeudation; estates transferable

Now: Doctrine of Tenure and Doctrine of Estate

* hold estate or interest in land from Crown; estates & interests transferable
* upon purchase and registration, title granted by Prov, not grantee (a new grant; past irrelevant)
* no hierarchy (horizontal structure)
* every holder of fee simple holds from and guaranteed by Crown

**B. Uses of Land (limits)**

a) **Common law** – nuisance (right to quiet enjoyment)

b) **Private Arrangements** to protect interests

* personal interests (eg. License; not binding) vs proprietary interests (binding if registered)
* easements (right to cross) & restrictive covenants (restrict use of neighbour's property)
  + registrable & pass w/ land

c) **Legislation** control use of property

* affect value & use of property
* *Agricultural Land Commission Act* – Agricultural Land Reserves to prevent encroachment of agricultural land from urban sprawl; can apply for relief
* municipal zoning – zones w/ consistent usage (limit use)
  + delegated power from Prov to make bylaws (zoning, building, graffiti, fire)

**C. Corporeal & Incorporeal Interests**

* **corporeal** = tangible; possession
  + **freehold** = ownership for indefinite time eg. Fee simple, life estate
  + **leasehold** = ownership for fixed time
  + can be immediate or future interests (“to A for life then to B” B has future interest in right of possession)
* **incorporeal** = intangible; right to use or control someone's property
  + NOT possession; limit on use (restrictive covenant) or right to access for a purpose (easement)

**Fee Simple**

* “fee” = inheritable; “simple” = no qualification of who inherits (pass to heirs generally; incl. Collaterals, ascendants, descendants)
  + heirs no rights until holder dies
* no ownership; “holds the land” in perpetuity
* *historically* (abolished), “to B and his/her heirs” not “to B in fee simple”
  + heirs determine continuity of estate
  + “to B” = purchase words
  + “his/her heirs” = limitation words
* now by statute, ***“to B”*** = the **highest interest**
* every property has fee simple; escheat (tenure ends & revert to Crown) if gap (no heir, no will)
* holder has rights to sell, mortgage, lease, devise estate; grant life estate; use, occupy land exclusively; dispose of rights (fragmenting eg. easements, restrictive covenant)

**Fee Tail**

* abolished in BC in 1921 by *Property Law Act s10*
* “to B and the heirs of his body” - lineal descendants
* fee tail male

**Life Estate**

* ***“to B for life”***
* B = life tenant has right of possession; not inheritable
  + registered as charge (registered holder)
* O gave up possession to B's lifetime; O has fee simple and all other rights (registered owner)
* right of reversion (when B dies, go back to grantor)
* If O dies, fee simple to O's heirs

**Estate Pur Autre Vie**

= for the life of another

* ***“to B for C's life”***
* measured on C's lifetime

**Leasehold Estate**

* [lessor/landlord-lessee/tenant]
* lesser estate than owner b/c only right of occupation and exclusive possession in fixed terms
* long term (>3 years) registrable as charge

**Future Interests**

* ***“to B for life, remainder to C and his heirs”***
  + C = remainderman; has fee simple; right to **corpus**/capital on A's death
  + B = life tenant; right of possession; right to income & enjoyment during B's life
  + C is vested in future interest
  + B may be liable to C for “waste” (must maintain property) [*Re Fraser*]
* “to B for life, then to C if C graduates” - conditional
  + C = future contingent remainder; not vested in interest

**Incorporeal Interests**

* mortgage [mortgager(owner)-mortgagee(lender)]
  + registered charge
  + mortgagee exercise right to foreclosure if no payment (incorporeal →corporeal interest)

**D. Legal and Equitable Interests (Trust)**

* 2 legal systems:
  + Common Law (1066)
  + Equity (16c) – Court of Chancery created to correct injustices & supplement gaps in common law
    - King's Conscience – ethics, morals, fairness, flexibility
    - equitable estates and interests
      * trust beneficiary, restrictive covenant, unregistered interest, donee of imperfect gift, proprietary estoppel
* In BC 1873, merged into courts of general/inherent jurisdiction (superior courts)
  + laws still distinct, but power to give legal and equitable remedies

**1. Development of the Use**

* **use** = legal title held by a person for the benefit of another (**trust beneficiary**)
* history: Crusades, risk of dying so transfer property to friend for use of family
* If breach of trust:
  + common law: trustee/feofee to uses holds fee simple, so TB has not interests
  + equity: friend's conscience, so TB has equitable interest/title, legal title held by trustee

**Equity vs Law**

* registration doesn't change LI to EI, just gives notice to the world
* *s44 Law and Equity Act*: if conflict b/w common law & equity, **equity prevails**
  + ***Equity follows the law*** (unless there's a problem in law to give fair outcome)
    - breach of trust: inequitable, so equitable remedies

**2. Modern Trust**

* ***“ to A in trust for B”*** in title
* trust property = “res”; trust instrument contains the terms

- all 3 parties could be anyone (same person)

**Testator/Settlor**: creates trust, inter vivos or testamentary, by splitting legal and equitable interests (split admin & enjoyment)

....transfers to....

**Trustee**: legal title; control & manage assets; can charge for service

.....for the benefit of...

**Beneficiary**: equitable interest; entitled to assets/income/capital

* can enforce **fiduciary duties** against trustee
* can transfer trust unless discretionary trust
* beneficiary interest can be any duration (fee simple, life estate, leasehold)
  + same benefit as holder of legal interests

**Doctrine of Notice (Third Party)**

**Before Torrens**

* **legal interest** – binding on any purchaser automatically (acted “*in rem*”=against title)
  + good against the whole world
  + ***No one may give that which one does not have (nemo dat quod no habet)***
    - if transferor has no title but sell to purchaser, both owner&purchaser equally innocent, ineffective transfer and owner prevails
* **equitable interest** – not binding on **bona fide purchaser for value without notice** (acted “*in personam*”=against people)
  + **vulnerable** to innocent purchaser from trustee w/out knowledge of trust
    - both beneficiary & purchaser equally innocent, purchaser prevails b/c “***where the equities are equal the law prevails***” and “***Equity follows the law***”
  + if not innocent, beneficiary can enforce trust
  + if 3rd party volunteer (no consideration), presumption of resulting trust (3rd party becomes trustee)

bona fide = good faith/honest

purchaser of legal interest

for value = gave consideration

**without notice** = no actual notice, constructive notice, or imputed notice

* actual notice = actual knowledge
* constructive = reasonable person would be suspicious & make inquirers (willful blindness)
* imputed = presume knowledge of agent (lawyer, surveyor, inspector) imputed to principal

**Torrens**

* replace equitable notice w/ registration
* notice still applicable to unregistered interests (equitable interests)
* notice still relevant b/c Torrens too harsh

|  |  |  |
| --- | --- | --- |
| **Competing Interests** | **Common Law Rules** | **Land Title Act Rules** |
| Legal vs legal | 1st in time, 1st in right | 1st registered prevails |
| Legal followed by equitable | 1st in time, 1st in right | 1st registered prevails |
| Equitable followed by legal (BFP) | 1st in time, 1st in right | 1st registered prevails except purchaser w/ notice of trust (fraud) |
| Equitable vs equitable | Sometimes 1st in time prevails  look at **conduct** of parties (moral positions) | Not resolved |

**E. Freedom of Alienation**

* interest in land is **freely alienable** (right of alienation to anyone), subject to restrictions

**1. Restraints on Alienation**

* restrictions registered on title
  + agricultural land reserve
  + trust (can't sell unless beneficiary agrees)
  + certificate of pending litigation/Lis Pendens – title disputed
  + caveat – warning of claim of interest against property
* Aboriginal Title – not alienable except to Federal Crown b/c collective ownership
* direct restraints on alienation
  + against public policy
  + no ruling from the grave “to A, but if A tries to sell the land, then to B”
  + void!
* Statutory restraints
  + *Land (Wife Protection) Act*– spouse can file title under homestead
    - can't sell land w/o wife's consent (constructive notice)
  + *WESA ss 60-72* – can't disinherit spouse & child unless court approval (construc.notice)
    - contest the will
  + *Family Law Act* – divorce →lis pendens on title (constructive notice)

**2. Methods of Transfer**

- 3 methods to prove ownership

- historically, “*feoffment w/ livery of seisin*” = public leaving of tangible possession

**Deeds System**

* **deed** = doc *under seal* transferred to purchaser or by will on death
* to prove legal title, must establish good root of title
  + trace back **60** years to verify validity of transactions
  + following “*nemo dat quad no habet”*
  + =( difficult in BC, inefficient, too much work
* defect in chain of transfers→no valid title

**Deeds Registration System (US)**

= transactions registry for “registration of deeds”

* =( staff didn't check validity of deeds (problem if 2 docs conflict)
* registered instruments **prevail** over unregistered instruments and subsequently registered instruments
* *nemo dat* principle: title from grantor vulnerable to defects→title insurance

**Title by Registration: Torrens System**

* The **Cadastral Concept** – land is broken into individual parcels defined by boundary lines w/ **distinct title**
* used to be 2D surface rights, now 3D geodedic elevation (correspond to Earth's surface curvature) defined by Surveyor General
  + register interests in surface land and airspace parcels [*LTA s139*]
* registered owner of fee simple (highest estate) has **certificate of indefeasible title** in *perpetuity*
  + BC gov't guarantees (indefeasible) title, so land is secure & no title insurance
  + need mortgage insurance; indefeasible title to fee simple and purchaser only in BC
  + =) prior defects irrelevant, easier, faster
* BC Land Title & Survey runs register system
* register ownership & charges (lesser interests that can be registered on title eg.mortgage, long term leasehold)
* charges are defeasible, but registration gives constructive notice =))
  + validity still disputable, but stronger
* unregistered interests – courts give equitable interests using **Doctrine of Notice** (superseded by registration)
* map of plans (boundaries)
* electronic titles & maps

**3 Principles of Torrens Registration:**

1) **Mirror Principle** [*LTA ss20,23(2)*]

* certificate of title accurately & completely reflect state of title & interests
  + if not on title, irrelevant

2) **Curtain Principle** [*LTA s20(1)*]

* all necessary info to determine ownership are **on title**
  + unregistered interests irrelevant
  + don't need to search beyond/behind the curtain

3) **Assurance Principle** [*LTA s29(4)*]

* compensation from assurance fund to innocent person for flaws in register (fraud/mistakes)
* =( only for *fee simple* holder; **rare**
  + none for errors in boundaries

**The Title**

* application received date, not registration date
* mailing address = street address (vs absentee owner)
* presume tenants-in-common unless stated as joint tenants
* **Priority Agreement** – eg. Morgage give up priority to covenant holder (city)
* **Duplicate Indefeasible Title** outstanding – title frozen & nothing registered (vs fraud)
* Transfer? Pending Application?

**F. Personal Property**

* no registration for personalty except cars, ships, mobile homes
* Personal Property Security Registry – eg. Register un-paid fixtures, stock, valuable paintings
* joint accounts – right of survivorship
* trust of personalty
* life estate w/ right of reversion or remainder [*Re Fraser*]

|  |
| --- |
| Re Fraser (1974)(BCCA) |
| Facts – Fraser left a will giving his wife a life interest in his estate and real and personal property, and the remainder of his estate and property (real and personal) to the Creston Valley Senior Citizens Housing Society. The executor sued, arguing there can be no life estate in personalty, the widow had the power to encroach, and that the remainder was invalid, to lessen the succession duties (inheritance&gift tax abolished in Canada).  Who won? Minister of Finance (the provincial government)  Holding – The widow should not have the power to encroach upon the *corpus*, the charity can have a future interest in the personal property, and there can exist a life estate in personalty. The succession duties must remain as assessed.  Issues – Can there be a life estate in personalty? Power to enchroach?  Can a future remainder interest exist in personalty?  Ratio – A future interest can exist in **personal property** in addition to real property.  A life estate can be had in personal property.  A recipient of a life estate may enjoy the revenue derived from the ***corpus*** and no more unless the testator has expressly or impliedly indicated an intention that the recipient of the life estate should have the power to encroach.   * Testator must grant power to encroach, or else need to maintain for remainderman   Note – A trust can be created to give a spouse like the widow in this case the power to encroach. |

**G. Relevance of English Law**

**Nov, 19 1858**:***s2 Law and Equity Act***

* BC received all statutes & case laws from England
  + *Statute of Quia Emptores, 1290; Statute of Uses; Statute of Fraud*
  + ***Lord Cairn's Act, 1858*** - award equitable damages
* Imperial Parliament could legislate for Empire until *Statute of Westminister, 1931*
* UK laws can be modified by subsequent BC laws (eg. Torrens)
* UK laws may be inapplicable to local circumstances

**CH4: ACQUISITIONS OF INTERESTS IN LAND**

Disposition by inter vivos sale, gift, on death

Statutory presumption that party intends to dispose of the **max**

* must state if less than max
* ie. transfer the largest interest they have

**A. Legal Incapacity**

* capacity to own & dispose of property governed by Provincial statutes

*Age of Majority Act* (BC) = 19 years

* minors can take title but *inter vivos* disposition reviewable & voidable

*WESA s36*: testamentary capacity = 16 years

*Evidence Acts*: witness competency (in execution of will/transfer) = 14 years

* witness can't be beneficiary to will

**Mental Disability**

* no mental capacity to **appreciate** the situation, recognize ppl, formulate rational plan for dist'n; determined by doctor
* void or voidable
* will valid if subsequent deterioration

a. *Public Guardian and Trustee Act*: substitute decision maker

b. *Patients Property Act*: court appointment of committee of estate or of the mentally disabled person (medical decisions)

c. *Power of Attorney Act*: agent has power to act in absence of principle for financial & legal affairs

* usually revoked on mental deterioration
* enduring power of attorney: agency continues despite intervening loss of mental capacity
* bypass courts; done locally; family members

d. *Representation Agreement Act*: representation agreement (living will) authorizing management of financial & personal medical affairs

* in advance of incapacity
* no real estate

e. *Adult Guardianship Act*: court appointment of adult guardian for mentally disordered person (elder)

**B. Crown Grant**

* 95% public ownership under crown (not in Torrens)
* Crown grant→private ownership
  + “*bring land under Torrens system*”
  + initial grantee **must register** in LTO
  + can be fee simple or other interests eg. Fee determinative
  + ppl apply to registry to purchase Crown land
* administered by Integrated Land Management Bureau & Ministry of Environ, Lands, Parks
  + make sure no conflicts & legal survey before issuing

**Exceptions (withholding) and Reservations (retention)**

***Land Act s50:***

*1a(i)*: **right of resumption** of <1/20 of land for public works (build roads, bridges)

* expropriation w/o compensation
* only on undeveloped land (no building,garden, etc)

*1a(ii)*: under-surface rights to enter, raise, get out minerals, geothermal resources, coal, petroleum, gas

* reasonable compensation
* private ownership have surface & airspace rights only

*1a(iii)*: take & occupy water privileges; carry water over/through/under land reasonably required for mining or agricultural purposes

* reasonable compensation

*1a(iv)*: right to take materials (stone, gravel, etc) for construction,maintenance, repair of public works w/out compensation

*1b*: no right/title/interest to minerals, etc.

*1c*: no right/interest/estate to highways

*2*: *s1* doesn't have to be expressed in disposition

*3*: disposition expressly authorized by another Act OK

*4*: gov't can except or reserve additional rights if expressed

*5*: Crown dispositions deem to contain express words in s1

*6*: *s4* power includes power to create a right of way

**C. Inter Vivos Transfer**

* transactions b/w living ppl by sale of land [vendor-purchaser]
* Land: **Transfer Form A** (formerly *conveyance by deeds*); registered; guaranteed
* Personalty: Bill of Sales; no registration

1) **Negotiation** – offers & counter-offers

2) **Contract of Purchase and Sales** = temp *interim agreement (1 month);* never registered

* gifts no contract b/c no consideration
* validity & enforceability determined by contract law
* **in BC, must be in writing + signed by person to be charged** [*LEA s59(3)(a)*]
  + *Statute of Frauds (1677)*: prevent fraud
* after signing binding agreement & deposit, purchaser has equitable interests enforceable by equitable remedies
* Title (clear at closing date); Completion date; Costs (purchaser = conveyance; seller = clear title); Possession Date; Adjustments (taxes, utilities); Risks (when insure; closing date); Included Items; Assignable: Parol evidence rule (no representation outside agreement; no oral); Buyers sign+witnesses; Receipt of Deposit; Sellers sign+witnesses (point of binding agreement; residency for tax)

3) **Completion of Contract** = the **Closing**

* transfer of clear title (transfer form; no outstanding payments) + payment of balance
* unregistered interests (vendor still registered owner)
* Closing/Completion date “*time is of the essence*”

4) **Registration of Transfer** – LTO

* purchaser becomes registered owner
* can register mortgage as charge

***Law and Equity Act s59* (Statute of Frauds)**

* make contracts & other dispositions (inter vivos gifts) more **enforceable**
  + **prove existence of a valid contract (meeting of the minds) by writing or part performance**
  + applies to fixtures, LT leases, mortgages (except equitable mortgage by deposit of duplicate title), inter vivos transfer of interests (FS or less)
* purchaser usually puts out deposit (part payment)
  + if purchaser doesn't complete by Completion Date, deposit forfeited as liquidated damages as seller's sole remedy (the max.); not-disputed
  + usually <10%
  + purchaser can put “subject to” conditions (eg. Obtain finance, pass building inspection)
* can create contracts electronically
  + *Electronic Transactions Act (2001) s2(4)(d)*: not fax/email
  + but common law applies if parties intend to create legal relations, signed electronically
* can combine multiple docs
* don't have to specify contract

Inapplicable:

*s59(1)*: disposition **not** trust *(a)* or testamentary disposition *(b)*

*s59(2)*: not contract of lease < 3 years

*s59(2)(c)*: not guarantee or indemnity arising from law/statute

Contract/disposition enforceable if:

*s59(3)(a)*: written, signed by party to be charged + indication of contract/disposition + reasonable indication of subject matter (**3 Ps**)

* “indication” = doesn't have to be full contract

**Part Performance**

***Equity will not allow a statute to be used as an instrument of fraud***

* eg. promise to transfer land if build house (not signed/written)
* statute allows owner to fraud
* Equity **enforce** obligation b/c unconscionable conduct
  + 2 techniques to prove contract w/o writing
  + liberalized traditional equitable requirements + non-compliance w/ required statutory formalities

*s59(3)(b)*: party to be charged *done or acquiesced in an act* that indicates existence of contract

* oral contract + act/part performance
* Doctrine of part performance & law of unjust enrichment

*s59(3)(c)*: person alleging contract reasonably *relied + changed position* so inequitable if not enforce contract

* oral contract + act/acquiescence/proprietary estoppel
* Doctrine of part performance & proprietary estoppel
* detrimental reliance →inequitable to retract promise→owner estopped from denying existence of contract
* **compromise** indefeasible title (creates interest in property to for other parties)
  + sword (cause of action)

*s59(4)*: *3b* act includes payment or acceptance of deposit or part payment

*s59(5)(a,b)*: if not enforceable, court can order restitution of benefit received and compensation for $ spent in reliance

* specific performance unavailable
* oral contract is **valid** (not void) but **unenforceable**
  + **valid** = legally good & binding
  + **void**= no legal effect b/c missing elements of contract (eg. Lack of intention to create legal relations)
  + **unenforceable** = court doesn't uphold contract b/c rule of law (eg. Statute of limitation)
    - no specific performance

*s59(6)(a,b)*: guarantee or indemnity must be in writing, signed by guarantor/indemnitor or done an act indicating so

* financial transactions (no real estate)
* promise to pay obligation of primary debtor

*s59(7)*: writing sufficient despite term left out or wrong

* liberate

**Granny in the Attic Clause** (**Short Term Lease < 3 years; not registrable**)

- *LEA s59(2)*: contract doesn't have to be written (**oral** lease)

- *LTA s1*: if there's **actual occupation** under the lease or agreement

* valid & enforceable (can stay for 3 years even after sold)
* personal inspection for actual occupation

- PLA s5(2): landlord doesn't have to deliver registrable instrument

- LTA s20(3): can pass estate even if not registered

**2. Transfer Form**

* *CL*: deed of conveyance must be **written, signed, sealed, and delivered**
  + execution of deed
* *Torrens*: **Transfer Form A**

**a) Writing, Signing, Sealing**

- *LEA s59(3)(a)*: writing, signing

- *PLA s16(1)*: abolished sealing

***Property Law Act s15,16***

*s15(1)*: transfer freehold by instrument expressed to transfer the land; not necessary to use “grant”

*(2):* can transfer w/o actual entry

*s16(1)*: instrument doesn't have to be executed under seal

*s16(2)*: corporate seal same effect as individual w/o seal unless expressly state as deed

**b) Delivery – Registration**

* traditionally, physical delivery (livery of seisin)
* **Presumption of intent of grantor to deliver**
  + **Equity looks to the intent not the form**
  + *Ross v Ross*
* vs....*.PLA ss4,5*: delivery of Transfer Form A **required** to complete process
  + general practice: purchaser prep docs & vendor signs
  + Torrens increased standard (not flexibility)

***Property Law Act ss4-7***

*s4*: vendor must deliver registrable instrument

*s5(1)*: transferor must deliver registrable transfer (fee simple)

*s5(2)*: landlord for long term lease must deliver registrable instrument

* not lease less than 3 years with actual occupation

*s6*: vendor/transferor must register *own title* to allow purchaser/transferee to register instrument

*s7*: landlord must provide *registrable description*

* if fail for 30 days, may obtain description & recover expenses

**c) Registration (Transfer) Form**

* prescribed forms [*LTAs185(1)*]
  + Transfer Form A [*Land Title (Transfer Forms) Regulation*]
  + Mortgage From B [*LTA s225 and Regulation*]
* nothing can be registered unless expressly authorized by statute (p5-9)

***Land Title Act s39, 185,186***

*s39*: registrable instrument sufficient unless form required by Act

*s185(1)*: prescribed form & single page of transfer of freehold estate

*(2)*: ok if prescribed from by another enactment or registrar deem proper

*(3)*: can add additional party to prescribed form

*s186(2)*: unless expressly excepted, transfer of freehold estate deemed part of *LTFA*

*(5)*: transfer fee simple if no express limitation [presume max]

*(8)*: transferor can't transfer estate greater than one he's registered owner of [nemo dat]

**d) Standard Forms**

* standard clauses in transfer to simplify
* read specific words as if containing the longer clauses (Schedule 2 of LTFA)

***Land Transfer From Act Part 1***

*s2*: deed of land in *Schedule 1* form containing forms of words in column 1 of *Schedule 2* has same effect & construed as forms of words in column 2 of *Schedule 2*

*s3*: *s2* deed includes all buildings, reversions, estate, unless exceptions

*s4*: if deed fails to take effect this Part, still effectual and binding

**3. Transfer – Operative**

***Land Title Act s20-22***

*s20(1)*: **unregistered instrument** doesn't pass estate/interest

*(2)*: right to apply for registration & use names of parties

*(3)*: doesn't apply lease under 3 years if actual occupation

*s22*: instrument passes estate at time of registration (not execution)

**4. Transfers to Volunteers**

* **complete gift** – registered in Torrens
* **incomplete gift** – doner dies b4 registration
  + look at **intent** of donor to make immediate gift →*Equity will complete it*
    - **intend to be immediately and unconditionally bound** by gift
  + only equitable interest (vulnerable to *bona fide* purchaser)

|  |
| --- |
| Ross v Ross (1977)(NSSC) [Delivery of Gift] |
| Facts – Mrs. Lynds owned a property and contacted her solicitor to prepare a deed to convey it to her grandson, Donald Ross. Mrs. Lynds executed the deed in the presence of her solicitor and a secretary. She understood that the deed would convey the property to her grandson, and wanted him to have the property. She told her solicitor that she wanted to record the document herself. Mrs. Lynds died 20 months later and the deed was found in her purse.  Who won? Donald Ross  Issue – Was the deed delivered?  Holding – The deed from Mrs. Lynds to Donald Ross was “signed, sealed and delivered” by Mrs. Lynds in the presence of a secretary, and this constituted an effective delivery of the deed, notwithstanding it remained in her possession.  Ratio – ***Equity looks to the intent, not to the form.***  **Physical delivery** of a deed to the grantee is not necessary to constitute effective delivery.  **Elements of a complete gift\***   1. The donor must have **requisite intention** 2. **Acceptance** by the donee 3. **Delivery** – the donor must wish to make himself **immediately and unconditionally bound** by the gift (actual physical delivery is not necessary)   \*A gift is **incomplete** without these elements  Reasoning – Mrs. Lynds intended to be immediately and irrevocably bound when she signed the document. She *retained the legal title* and kept an *equitable life estate* for herself, but she intended to make an immediate gift of the *equitable remainder* to Donald Ross. Mrs. Lynds could have destroyed the deed, but instead, she treated it as a valuable document.  - Need strong evidence to justify setting aside valid deed due to non-delivery  - Retention of deed doesn't necessarily show defective execution |

|  |
| --- |
| Zwicker v Dorey (1975)(NSSC) |
| Facts – Angus Zwicker conveyed land by deed to his former wife’s son, Mr. Dorey. The deed stated, “this deed is not to be recorded until after my passing away.” Angus Zwicker was married to Gladys Zwicker when he died. After creating the aforementioned deed, Angus Zwicker conveyed land which formed part of the property originally conveyed to Mr. Dorey to third parties, himself, his wife, and Mr. Dorey.  Plaintiff – Gladys Zwicker  Defendant – Mr. Dorey  Who won? Gladys Zwicker  Issue – Should the original deed take effect?  Holding – The deed conveying property to Mr. Dorey was testamentary (but was not executed in accordance with the **formalities of a will**) and void.  --> ***Equity follows the law (will respect WESA)***  Ratio – A gift in escrow (a deed that is delivered to a grantee only after the fulfillment of the conditions specified) cannot be subject to one’s own death. If a person wants to give a gift upon death, they must make a **will**.  Reasoning – Angus Zwicker’s conduct was inconsistent with the gift, suggesting it was not **his intention to be immediately and unconditionally bound by the gift**. |

**Middle Ground/ *Donatio mortis causa* (DMC)**

= inter vivos gift in contemplation of imminent death “*death bed gifts*”

* too sick to complete gift

**Requires:**

1. **intention** to make gift in contemplation of donor's imminent death

* Equity satisfied w/ intent

2. sufficient **delivery** to donee

3. gift takes effect only (conditional) on **death as contemplated**

* *void* if other causes of death
* *revert* if recover
* takes into effect b4 will, so *1st in time, 1st in right*

|  |
| --- |
| MacLeod v Montgomery (1980)(ABCA) |
| Facts – Hattie Montgomery executed a transfer of land to her granddaughter, Donna MacLeod. The transfer document was delivered to MacLeod, but not the **duplicate certificate of title**, so she was unable to register the transfer. MacLeod asked Hattie Montgomery for the duplicate, but Montgomery never got it from her solicitor. MacLeod filed a **caveat** on the title, claiming the title to the property. Montgomery later leased property to MacLeod.   * Warning to protect unregistered title [*LTA s282*] * freezes property [*LTA s288*] * in BC, caveat lapses after 2 months [*LTA s293*] * should file **Certificate of Pending Litigation (CPL)**   Plaintiff – MacLeod  Defendant – Montgomery  Who won? Montgomery  Issue – Does the execution of the transfer with its delivery but without delivery of the duplicate title, although delivery was promised, constitute a complete or an incomplete gift?  Did Hattie Montgomery intend to make a gift?  Holding – Hattie Montgomery did not have the requisite intent to make a gift.  Ratio – **To complete a gift, a donor must do everything that can be done to perfect the gift**. (intention backed by conducts) (everything = absolute or in the circumstances?)  **Equity will not assist a volunteer.** (b/c want to help intention of donor)  **There is no equity to perfect an imperfect gift.** (will not force donor to complete gift)  Reasoning – Hattie Montgomery could have easily gotten the duplicate from her solicitor and given it to MacLeod. The fact that she didn’t suggests that she wanted to prevent MacLeod from registering the transfer. (insufficient proof of intentions)  - statutory form of transfer gives equitable title  - registration gives legal title  Note – This is a Torrens System case (whereas the previous two cases are not). |

**Presumption of Resulting Trust**

Gift = valid transfer of legal title **w/o consideration** (*PLA s19*: doesn't need express words of gift)

* no contract, just transfer form
* presume that transferee holds **resulting trust** for transferor
  + transferee – legal title; transferor – equitable title
  + onus on transferee to prove transferor's intention to confer absolute title (rebut)

***Property Law Act s19***: allows volunteer to **rebut presumption**

**Presumption of Advancement**

* some voluntary transfers of realty/personalty (husband-wife; parent-minor child)
* **presumption of gift/advancement**
  + presume transferor intend to confer both legal and equitable title to transferee
  + onus on transferor to rebut

**D. Wills or Intestacy**

* “*will speaks at death*” (not on execution)
* **codicil**: executed as will to change 1 provision
* revocable during lifetime
  + “*gift that lapses*” = no longer own asset
* “*last will and testament*” = most recent and the one registered to probate
  + probate – will filed in registry in *BCSC* to prove validity (can challenge)
* execution according to *WESA*
* includes revocation clause, appointment of executor, dispositive clause, attestation clause, signed by testator & 2 witnesses
* land: [divisor-divisee]; money: [legasee-legatee]

***Wills, Estates and Succession Act***

*s37(1)*: valid will must be **written and signed** by testator and 2 witnesses (all present)

*(2)*: invalid unless court order under *s58*

*s39(1)*: signature placements deem to be signed at the end (as long as intention clear)

[**incompetent witness**] *s40(1)*: witness must be 19 years

*(2)*: witness can receive gift , but may be void

*(3)*: will not invalid b/c witness legally incapable of proving will

[**remedial defects**] *s58(1)*: **record** can be electronic, read by person, reproduced in visible form

*(2)*: court can determine record represents **testamentary intentions** *(a)*, intention to revert/alter/revive a will *(b)* or another document *(c)*

*(3)*: court can **order** record fully effective even though non-compliance with Act

**Intestacy [*WESA Part 3*]**

= dying w/o a will (no or invalid will)

* partial intestacy – some assets covered by will
  + residuary clause “*everything not otherwise disposed of goes to beneficiary*”
* court appointment of administrator (often family)
  + follow rules in *WESA* to distribute to next-of-kins
  + fees
* executor entitled by statute up to 5% of capital&income
* administration of estate: gather assets, pay debts/taxes, distribution of net assets within “executor's year”
  + no guarantee receive estate b/c may sell it to pay debts

***WESA s162 (1)***: unless right of survivorship, land devolves & vested in personal reps

* **Joint tenancy** – property passes on death automatically (right of survivorship)
  + pros: outside of will or intestacy; bypass probate & administration; avoid expenses of probate (creditors); faster; efficient
  + **explicit** in title
  + equal shares
  + can't dispose of by will
* vs. **Tenancy-in-common** – no right of survivorship
  + dispose of by will
  + **assume** on title if doesn't say “joint tenant”
  + proportionate shares on title

**E. Proprietary Estoppel** [see *LEA s59(3)(c)*]

= estoppel by representation

* when owner behaves in a way to create/encourage other people belief of equitable interest in property
* **acquiescence** = standing by while a wrong occurs (knowledge of wrong)
  + violation of a legal right with “permission”
  + owner creates expectation of interest in property, so enforceable
  + based on owner's **behaviours**
* estopped from denying expectation b/c unconscionable/inequitable behaviour
* **sword** – cause of action that creates interest in someone else's property
* basis of claim to an equitable remedy
* express or implied representation (*Clarke*)

|  |
| --- |
| Clarke v Johnson (2014)(ONCA) |
| Facts – Johnson co-owns an island. Clarke married her daughter and errected a pre-fabricated unit. After their separation, Clarke continued to use, contribute, maintain, improve the camp for 20 years. Clarke refused to let his son, Westley, to stay there. Johnson revoked his license claiming that Clarke's use is conditioned on allowing his children to use the camp.  Plaintiff – Donald Clarke  Defendant – Martha Johnson  Who won? Donald Clarke  Issue – Does Clarke have an equitable right to use the camp during his lifetime based on proprietary estoppel or unjust enrichment? If so, what is the appropriate equitable remedy?  Holding – Clarke has a personal, exclusive license to occupy the camp during his lifetime. PE and unjust enrichment are established.  Ratio –  **Modern Approach (more flexible) to Proprietary Estoppel** *(Taylor Fashions,Erickson in BC)***:**  1. the owner induces, encourages or allows claimant to believe right or benefit over property (**assurance**)  2. in reliance on the belief, claimant acts to his detriment to the knowledge of owner (**detrimental reliance**)  3. the owner seeks to take **unconscionable advantage** of claimant by denying the right or benefit he expected to receive  4. If **estoppel** established, court has broad discretion to give **remedy**  **Traditional Approach to PE (Willmott v Barber's 5 Probanda):**  1. claimant made mistake to legal right  2. claimant expended $ or done some act on faith of mistaken belief  3. owner know existence of his right, which is inconsistent w/ claimant's belief  4. owner knows claimant's mistaken belief of right  5. owner encouraged the claimant to spend $ or do other acts, either directly or by abstaining from asserting his legal right.  **Unjust Enrichment:**  1. an enrichment (finding of fact)  2. a corresponding deprivation (finding of fact)  3. absence of juristic reason for the deprivation (contextual: reasonable expectations, moral, policy)  **Remedy:**  “**minimum necessary to satisfy expectation**”   * least intrusion on Johnson to do justice   **\*broad discretion** by court  [equitable compensation....equitable license....equitable fee simple]   * personal or proprietary interest * can't register/protect personal interests (contractual), so vulnerable to purchaser   Reasoning –  Clarke's emotional attachment make monetary compensation inappropriate remedy. Trial judge imposed constructive trust to reflect expectations of both parties. |

#### **CH5: REGISTRATION OF TITLE OVERVIEW**

**A. Different Systems**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Common Law Conveyancing | Recording System | Torrens System |
| Method of Transfer | Delivery of deeds (doc under seal) | Recording of deeds in recording office |  |
| Requirements | - prep abstract of title  - establish good root of title | - search public records to prep abstract |  |
| Places Used |  | Maritimes, parts of Ont |  |
| Pros | - ?? | - more efficient, cheap  - statutes: not affected by unrecorded deeds |  |
| Cons | - expensive b/c repeated work; delays; court to settle doubts  - equitable interest not enforceable against BFPVw/oN | - judicial interpretation of the statutes differ in effect of notice of unrecorded deed |  |
|  |  |  |  |

**Land Title Districts**

* 7 districts in BC; 4 LTO
* must register interest in district it's located in
* system administered by Crown corporation [*BC Land, Title & Survey Authority Act*]
* LTO business conducted by Registrar & Registry staff [*LTA ss9,10*]

**B. What Can Be Registered?**

\*all legal & equitable interests in land recognized at common law [***LTA s20***]

**Non-Registrable Common Law Interests**

**\*purchaser vulnerable**

- against Mirror Principle b/c not everything relating to property is on title

1. **Licenses** [*Clark*]

* = exclusive or shared occupation = NOT interest in property → NOT registrable/caveat/CPL
* just personal interest/right b/w grantor(owner) & licensee
* not transferable

2. **Short-term Leases**

* lease = exclusive occupation for a term = interest in property → registrable except....
* leases < 3 years not registrable b/c may clutter system [*LTA ss1,23(2)(d); LEA s59(2)(a),(b)*]
  + ST tenants have no legal interests
* transferable

3. **Zoning Bylaws** [***R v Kessler****, 1961 BC* – no registration unless interest in land]

* power delegate to municipalities by legislation (*Vancouver Charter, Municipal Act,* etc)
* affect land usage – group activities for harmony eg. Industrial, single-family, etc
* at local gov't office Zoning Department

4. **Federal Crown Land** (**Aboriginal Title**)

* = “Indians & Land Reserved for Indians” [*CA s91(24)*]
  + Federal Crown = FS holder & trustee; First Nations = beneficiary
* *CA s35(1)* recognizes existing Aboriginal & treaty rights
* claims of AT & AR not registrable b/c not common law interests (inalienable under Torrens; LTA inapplicable) [*Delgamuukw*]

|  |
| --- |
| Skeetchestn Indian Band v British Columbia (2000 BCSC) |
| Facts – Skeetchestn claim Aboriginal Title of land around Kamloops (6 Mile Ranch), which was under private ownership of Kamlands Holdings and was released from Agricultural Land Reserve to be developed as resort. Band alleged development infringes their AT & applied for declaration of AT and remedies: temporary & permanent injunction, lis pendens.  Plaintiff – Skeetchestn Indian Band  Defendant – BC  Who won? BC  Issue – Can the CTL for claim of AT be registered?  Holding – No, b/c must claim a registrable estate or interest [***s215***]  Ratio – Aboriginal Title is **not** registrable in any form  Reasoning – AT not registrable b/c inalienable & sui generis → **CTL/caveat** not registrable  - injunction as remedy to prevent development of land is not registrable → give formal personal notice to prospective purchaser (eg. attach sign on property, public notice)  - provincial gov't has fiduciary duties to protect land from BFPV w/o N (need declaratory order(?))  Notes:  - appeal to SCC discontinued b/c prior case's leave to appeal dismissed [*James Smith Indian Band v Saskatchewan (Master of Titles)*]  - now, developed as retirement home |

**5. Outstanding Property Taxes**

* State of Property Tax from tax department → Statement of Adjustment

6. **Equitable Mortgage** by deposit of duplicate certificate of title [***LTA s33*** *expressly*]

* = informal arrangement in Court of Chancery to avoid formalities
* give **Duplicate** & sign **Transfer Form** as security → mortgagor can't change property
* notation on title of absence of Duplicate “duplicate held by xxx”
* if not repaid → lender complete & register Transfer Form
* no right of caveat/CPL b/c no claim for registrable interest
* [*Royal Bank of Canada v Mesa Estates Ltd*, 1986 BCCA] duplicate title deposited b/c (1) safe-keeping (2) ensure debtor don't deal w/ land (3) intend to create equitable mortgage; onus on party alleging mortgage to prove intent
* [*North West Trust Co West*, 1990 AltaCA] refused RBC decision; presumption of intention to create equitable mortgage by deposit of duplicate title

**8. Trust Properties** [***s180***]

\*property held **“in trust”** can be registered, but **no particulars**/details of interest

* notation on title indicating land held “in trust” = notice
* registered owner = trustee + reference to trust instrument (doc # filed w/ Registrar eg.will)
* beneficiary: security, can force trustee to register, name NOT on title
* [***Dukart v Surrey***] BFPV w/o N subject to trust even though no notation on title
  + beneficiary argue there was notice b/c trust doc in Registry
  + protect B from breach of trust

**Registrable Non-Common Law Interests**

**1. Caveats** [*LTA Part 19 ss282-294*]

= warning to claim unregistered interests; doesn't establish claim

* purpose = to protect interests that can't be registered & give notice
* BC: expires after **60** days; start civil proceedings before deadline
* LTO determines if claimed interest registrable

“*registration of any transfers or changes in borders prohibited until*...

a) withdrawal

b) court order, or

c) after 21 days from service of notice of claim under *LTA s293*”  must start proceedings in 21

Wording on title includes:

1) legal description of property

2) nature of estate or interest claimed

3) grounds of claim – the facts relied on & alleged consequences of theses facts

**2. Certificate of Pending Litigation (CPL)/ Lis Pendens** [*LTA Part 14 Division 3 ss215-217*]

= notice to the world of litigation affecting the land & purchaser subject to outcome of litigation

* can file action w/o caveat; file caveat first if urgent
* doesn't freeze title
* tie up land of debtor

a. Claim of Builder's Lien [*Builders Lien Act*] - contractor not paid; need connection b/w builder's claim & property

* right of action given by enactment other than *LTA*
* remedy = sale of property

b. “triggering event” eg. Divorce [*Family Law Act, BC 2012*]

c. Execution of Money Judgement

d. Mortgage – use property as security for loan

* pay or foreclosure (get order for sale)
* mortgagee has higher interest (security interest) than judgement creditor

3. **Money Judgement** [*LTA Part 14 Deivision 2 ss210-214*]

4. **Agricultural Land Reserve** [*Agricultural Land Commission Act s17]*

* prevent urban sprawl by prohibiting land development, limiting use, can't sub-divide below certain area
* may get permission from Commission to use for related purposes eg. cemetery

5. Family Relations Act s63 (?)

6. **Heritage Designation** [*Heritage Conservation Act*]

* limits development

**C. Basic Scheme of Registration**

\*registration of **legal and equitable** interests [s20]

* unregistered interests = equitable interests [*McLeod]*
* signing agreement to purchase = equitable interest
* close and pay full price = legal interest

**D. Registration of Legal Free Simple**

\*legal FS guaranteed indefeasibility [***s23(2)***]

* “conclusive evidence at law and equity”  validity is irrefutable
* “indefeasibly entitled” to estate in FS  protected from defects; nemo dat doesn’t apply

Note: **equitable fee simple** = charges in Torrens eg. beneficiary

- Duplicate Certificate of Title [*Montgomery,* ***s176(1)***]

* owner apply to LTO to take out → notation on title & freezes transactions

- State of Title Certificate [*s378*]

* issued by LTO
* states what's on the title w/o legal status as Duplicate
* give purchaser after registration – prevent fraud (indicate clear title & free of charges)

*S179(1):* only owner of surface is entitled to be RO in FS; owner of parts above/below surface are entitled to register as charges

*(2)* – only Crown can create surface FS through Crown grants (Crown can be put in register as owner of surface if no Crown grant has been registered)

*S141(1)* RO of surface in FS can create airspace parcels, which becomes separate FS (indefeasible, alienable, registrable)

***Strata Property Act*** *s239, 244*: can subdivide airspace parcels, not creating new FS

**a. Initial Application**

***s169 & LA s54***– initial grantee of Crown is required to register ie. “bring the land under Torrens”  passes from public to private ownership

***s169 Registration of title***

1. if application to register indefeasible title, registrar must register if satisfied that:
   1. boundaries are sufficiently defined by description/plan in LTO or provided by applicant
      * surveyors from LT & Survey Authority
   2. a good safe holding and marketable title in FS has been established by applicant
      * good safe holding = possession of person on title is safe from attack & can’t be displaced
      * marketable = after registration complete, purchaser can’t refuse title due to its defect (valid point in common law b/c nemo dat; no effect in Torrens b/c get clear title)
2. Registrar may serve notice to person of the registrar’s intention to register the title of applicant by the end of a deadline, unless the person lodges a caveat or registers a CPL contesting the claim
3. If **caveat** lodged or **CPL** registered, registrar must defer consideration of application until caveat expires/withdrawn or CPL disposed of

**b. Transfer Inter Vivos**

- same procedure as initial application: boundary + instruments gave GSH&marketable title  if not established = no clear title/there’s a defect  purchaser not bound to take title

- **ranking** by date & time of application to register b/c “1st in time 1st in right” [*s153*]

* “race to the Register”
* *S29(1), 27(1):* registration “relates back to application”

**c. Transmission on Death**

- transmission = involuntary change of ownership (death, mental capacity, etc) [*s1*]

- title passes to personal representative (administrator, executor)  registered as owner

- possibility of wills variation – court has discretion to re-locate estate to be **fair** =(((

- **sole ownership** (FS absolute) – property passes on death under terms of will, trust, or intestate law

- **tenants in common** – shared possession; each co-owner dispose as they wish; partition of sale if conflict

- **joint tenancy** – one owner in law; by right of survivorship, not transmission; no wills variation, probate fee, automatic

**E. Registration of Charges**

\*charges = all **estates & interests** in land other than FS, incl life estate, leasehold, **encumbrance** [***s1]***

* NOT indefeasible/guaranteed – nemo dat applies to charges; rebuttable presumption of validity after registration b/c “deemed” not “conclusive” [***s23(2), s26***]
  + Burden of proof on party alleging invalidity
* Provides notice
* Ranked chronologically by time&date of application, not by nature of the interest (jmt may be before mortgage even thou mortgage has security) [***s28***]

🡪Lease

* FS holder assigns right of exclusive occupation for a term to Tenant
* 2 aspects: contract & property interest
* Assignment of Lease – must assign whole interest to assignee (transfer entire remaining term)
  + T2 pays rent to L
  + If T2 defaults, T1 must pay b/c has privity of contract
  + L usually impose a term in lease to require his consent for assignment, which won’t be unreasonably withheld
* Sub-Lease – sub-tenant gets less than T’s entire interest – smaller space/shorter term (8yrs)
  + ST2 pays T1, who pays L
  + Consent not required unless explicit in contract (freedom of alienation)
* Novation – original lease terminated w/ L’s consent🡪 T1 discharged from any financial liability

Encumbrance = **monetary** claims against an estate/interest in land (using land as substitute of $)

* includes money judgement, mortgage, lien, Crown debt, easements, restrictive covenents

Mortgage

* created by FS owner to use property as security for loan (2 aspects)
* register w/ LTSA Form B
* if default, mortgagee can execute the mortgage thru foreclosure – take possession & title from owner and sell it
  + “strict foreclosure” – mortgagee retains title until value goes up
* foreclose down – all charges below are wiped out and sold w/ clear title 🡪 judgement/easement holders may ask mortgagee for priority [***s28***]

Lien eg. Builders Lien

* requires link b/w the $ owned & the land

Crown Debt = taxes

* authorized by tax legislation; gov’t may put certificate on title w/o judgment until paid off

Restrictive Covenants

* limits use of someone’s property by paying them
* registrable & enforceable in equity by injunction
* runs with the land (expressly provided)
* removable by contract

Easement

* right of access
* registrable on BOTH titles
* lowers value of property

***S197 Registration of Charges***

1. If satisfied from examination of application & instrument that applicant is entitled to be registered as owner of **charge**, registrar **must register** it by entering it in the register
2. Registrar may refuse to register the charge if:
   1. A good, safeholding and marketable title had not been established by applicant
      * By instrument from FS owner creating charge, by assignment of existing charge, by creating of sub-charge
   2. Charge is not an estate/interest registrable under LTA

***S180*** – alternate method to register (trust) [*Dukart*]

**a. Caveats**

- can be lodged by any person who claims to be entitled to an interest in registered land [s282] or by RO [*s283*] or by Registrar [*s285*]

- registration = Registrar enters endorsement of it at time of its receipt [*s287*]

- if found claim is established, caveator gets priority over applications/filings made after date of lodging [*s31*]

Purposes:

1. Protects unregistered, equitable and other vulnerable interests
2. Gives notice of an unregistered instrument incapable of immediate registration, but may be capable of eventual registration (notice of the estate/interest claimed)

***s288 Effect of caveat***

1. When caveat lodged with the registrar (ie. on the title), registrar can’t
   1. Register another instrument affecting the land, unless it expresses to be subject to caveator’s claim (ie. gets no priority)
   2. Deposit subdivision plan or allow any changes to boundaries, unless caveator consent
2. Such instrument may be registered unless the registrar thinks successful claim of the caveator would destroy the root of the title of the person who the caveat is lodged against

Termination:

- expires in 2 months or if notice is served from caveatee to caveator to commence action, within 21 days of serving [*s293*]

- discharged by court order [*s289*]

- formally withdrawn by caveator [*s290*]

- commence proceedings (CPL)

- possible to lodge 1 further caveat after initial one withdrawn [*s291]*

**b. Certificates of Pending Litigation**

***s215 Registration of CPL in same manner as charge***

1. Any person who has commenced or is party to a proceeding who is (a) claiming an estate/interest in land or (b) another enactment gave them right of action, may register CPL in same manner a charge is registered
2. Must sufficiently describe the land affected by CPL
3. Registrar must mail a copy of registered CPL to owner \*gives notice – prospective purchasers are subject to outcome
4. If change of parties, can register as modification of charge
5. Can register if entitled to enforce a restrictive covenant or building scheme
6. Can register if party to marriage separation proceeding
7. Can register if commenced action under WESA
8. Judgement creditor can register judgement = remedy

- Must be filed in correct jurisdiction

***S216 Effect of registered CPL***

1. After registration, can’t affect the land until CPL cancelled, which follows outcome of proceeding \*prevents any transactions
2. (1) doesn’t apply to lodging caveat or registration of:
   1. Title/charge if instrument expressed to be subject to outcomes of proceeding
   2. Title/charge if applicant writes to be subject to outcome & authorize registrar to register it so
   3. Priority or postponement agreement
   4. Assignment of charge, if charge registered before CPL
   5. Sublease, if lease registered before CPL
   6. Certificate of judgement, order, notice, claim of builders lient, CPL, or any other involuntary charge
3. Registration under (2) is subject to final outcome of proceeding

***S217 Effect of CPL if prior application is pending*** \*overrides s216

1. Complete registration of title/charge that was applied **before** application to register CPL was received \*BFPVw/oN wins
2. If
   1. The prior applicant is party to the proceeding, register title/charge subject to CPL
   2. The prior applicant isn’t party to the proceeding, upon registration of the title/charge, cancel the registration of the CPL and give notice to applicant
   3. If CPL relates to a proceeding re a charge, or to enforce/foreclose/cancel a registered charge, or s215(6), or s215(7), register the title/charge claimed by prior applicant subject to the CPL, irregardless if prior applicant is party to proceeding

- if found claim is established, gets priority over applications/filings made after date of reg [*s31*]

**c. Judgements**

* judgement creditor can **register** judgement against judgement debtor  becomes *encumbrance*
  + binding on subsequent purchaser – need to pay off to get clear title
* judgement holder must renew every 2 yrs
* if buy, value is decreased b/c some $ go towards creditor
  + account for within statement of adjustments, or
  + agreement w/ owner to provide clear title (owner debtor pay off before sale)

1. get money judgement for unsecured creditor (tort, contract, etc) – get certificate of judgement to apply to register to get SECURITY
2. **registration of judgement** – right to get court order to **enforce judgement** by enforcing claim gainst debtor’s interests (execution); no right of possession/ownership
   * registrar must give notice to owner [*COEA s89*]
   * if owner clams not to be jmt debtor, registrar can investigate 🡪 if satisfied that owner isn’t debtor, can make order 🡪 creditor can appeal to SC
   * jmt creditor liable to compensate owner if registered jmt w/o reasonable cuase
3. **execution** if non-payment ie. Put judgement into effect

* remedy = order for involuntary sale (distress/fire sale)
  + title pass by court from debtor to purchaser, who can register [*s261*]
  + pay creditor
  + \*file **CPL** to give notice

\*nemo dat - creditor can't seize and sell **greater interest** than what debtor owns

***Court Order Enforcement Act***

***s86(3) Registration of judgements after Oct 30, 1979***

From time of registration, judgement forms a lien and charge on the land of jmt debtor

* 1. To the extent of their beneficial interest in land
  2. If an owner is reg as personal rep or trustee, to the extent of the interest of a beneficiary who is a jmt debtor
  3. Subject to rights of purchaser who acquired interest in the land in good faith for valuable consideration before registration of jmt, but not registered at time of reg of jmt 🡪 vulnerable to **BFPVw/oN even if unregistered (equitable)**

**F. Assurance Fund**

- person may be able to claim compensation for loss of interest in land if satisfy preconditions in Act

***S296 Remedies of person deprived of land***

(2) a person (a) who is deprived of any estate or interest in land

(i) b/c of “conclusiveness of the register”, where if no LTA, claimant would have been entitled to recover the land from present owner, AND

(ii) in consequence of fraud or wrongful act that registered another person as owner AND

(b) who is barred by LTA or other Act from bring action (i) for possession or any other remedy for recovery of land, or (ii) for rectification of the register

may proceed in court to **recover damages** against the person who by fraud or wrongful act deprived the claimant of land

(8) must start w/in 3 years of discovery of deprivation

***S297 Protection of purchaser in good faith and for value***

1. Transferee = transferee who in good faith and for valuable consideration, acquired an estate/interest in land LESS than a FS
2. **No** transferee is subject to proceeding under this Act

***S298 Fault of registrar***

1. Person who sustained loss/damages caused, solely or partially, by registrar’s omission, mistake or misfeasance in the executive of their duties under this Act, may proceed against the minister to recover the amount of loss/damages and costs from assurance fund
2. Must commence action within 3 years from discovery of loss/damage

***S303 Limitation of liability of assurance fund***

Assurance fund is not liable for compensation for loss/damage/deprivation

1. Suffered by
2. Owner of undersurface rights, or
3. Equitable mortgagee by deposit of duplicate
4. Occasioned by
5. RO’s breach of trust
6. Misdescription of boundaries or parcels
7. Improper use of corporation seal
8. Dissolution of a corporation, or its lack of capacity to hold & dispose of land
9. Issue of a provisional CoT
10. If the land may have been included in 2 or more Crown grants
11. Due to error or shortage in area of a parcel, according to a plan filed in LTO
12. If plaintiff was served with notice or had knowledge, unless they took & maintained proper proceedings or to prevent the act \*if **fraud**🡪 file caveat ASAP
13. In respect of the damage contributed by the plaintiff’s neglect/act/default 🡪 eg. lost duplicate
14. The loss is caused by something registrar is not required by law to inquire
15. Occasioned by act/omission of govt, or agent/employee of govt

|  |
| --- |
| McCaig v Reys (1978 BCCA) |
| Facts – McCaig has unregistered option to purchase Reys’(RO#1) property  sold to Rutland/Jerome (RO#2, fraudster) after telling them of the option and Jerome promised to honour it  sold to Jabin (BFPVw/oN, RO#3)  \*McCaig has equitable interest 🡪 may seek equitable remedy for specific performance of option  Holding – Jabin is innocent purchaser, so the option is extinguished. McCaig cannot claim against Assurance Fund.  Ratio – McCaig can’t claim assurance b/c didn’t suffer lost as a **result of the operation of LTA, but by Rutland’s fraud and Reys’ breach of contract.** Did not file caveat or give notice to Jabin. No transferee can claim against Assurance Fund for **interests less than FS** [***s297***]  Reasoning – McCaig claimed Assurance (now impossible) under ***s296(2)(a)(i)*** – Jabin relied on “conclusiveness of the Registrar” so his title can’t be attacked   * E**quitable (McCaig – innocent) followed by Legal interest (Jabin – innocent)**   + Common law: Jabin wins b/c ***where the equities are equal, the law prevails***/ ***equity follows the law***   + Torrens: Jabin wins b/c registered owner takes free of unregistered interest |

|  |
| --- |
| Royal Bank of Canada v BC (AG) (1979 BCSC) |
| Facts – Walsh deposited Duplicate to RBC as security for loan (**equitable mortgage**) 🡪 LTO mistakenly thought Duplicate still in office 🡪 Walsh **registered mortgage** with Bank of Nova Scotia using same security 🡪 RBC advanced further loan to Walsh  Issue – Can RBC, holder of equitable mortgage, claim against the Assurance Fund?  Holding – No b/c   * Registrar doesn’t owe duty to RBC, just to those ppl seeking to utilize the services of the Reg * Ludicrous for RBC to recover b/c they chose to not bring themselves under protection of LTA * RBC chose to not register and accept equitable mortgage, so should assume risks * RBC’s loss does not flow “naturally and directly” from Registrar’s mistake – they contributed to the loss due to their “neglect” to register & search title prior to advancing [s303(f)]   Ratio – Cannot recover from Assurance Fund **equitable mortgages** [s303(a)(ii)]  Reasoning – |

#### **CH6 REGISTRATION**

\*initial grantee must register\* ... but dangerous to not register

***Land Act, 1968***

*s54: (1)* Crown grant before April 5, 1968 must be registered

*(2)* If satisfied boundaries sufficiently defined by description, registrar must *(a)* register title w/o application for registration *(b)* give notice of reg to grantee

*(4)*Crown grant before April 5, 1968 is registrable for indefeasible title

**A. Registration: Fee Simple**

**Exceptions to Mirror Principle:**

* unregistered interests that bind registered purchaser (“overriding interests”)
* State of Certificate Title subject to **LTA s23(2)** & **LA s50,55-58** (**Crown Grant limitations**)
* **Agricultural reserves** not in s23 (on title now)→ look in other sources eg. Zoning bylaws, planning department

***Land Title Act* –** effect of indefeasible title

*s23(2)* indefeasible title is conclusive evidence at law & equity that owner is indefeasibly entitled to estate in FS, but is subject to...

(a) exceptions and reservations of Crown grant

* **LA s50** - Crown's right of resumption; Crown Grant transfer only surface rights (no subsurface rights – mineral, water, timber)

(b) unregistered Crown lien – tax arrears/tax debt/statutory lien

* new owner liable for tax debt
* if >3 yrs property tax arrears, gov't can sell property
* eg. Income Tax Act s160 – if transfer price < FMV, gov't can take property (non-arm's length transfer)

(c) unregistered municipal charge, rate, or assessment/local improvements

* billed in annual property tax statement; pass w/ title

(d) lease < 3 years w/ actual occupation

* has exclusive occupation; priority over purchaser
* LT tenant vulnerable to BFPV w/o N
  + [*Success*]: purchaser extinguished unregistered LT lease b/c no fraud

(e) highway, public right of way, watercourse, right of water, public easement

* on plan in local gov't office
* = utilities easements (public right of way) maintained by gov't
* private easements – dominant tenant (benefited; gained value) should register to protect right against purchaser of neighbouring property (servient tenant; reduced value)

(f) right of expropriation/escheat

* gov't pay fair compensation to expropriate [*Highway Act, Water Act*]
* escheat = “bona vacantia” - FS in public or private ownership & personal assets revert to Crown [common law codified in *Escheat Act*]

(g) certain charges registered before or after registration

* eg. can file claim of builder's lien after purchaser registers as new owner [*Builders Lien Act*]
  + must file w/in 45 days from completion of work/abandonment/termination of contract
  + must start lien action (file CPL) w/in 1 year of completion
  + privity of contract b/w RO & general contractor; (sub)contractors can file lien anytime after work begins b/c improvement to property

(h) right to show wrong description of boundaries/parcels

* get private title insurance to cover wrong boundaries
* sue surveyer for malpractice

(i) right of person deprived of land to show **fraud/forgery** that **RO participated in any degree**

(j) Forest Act endorsed on title

***Agricultural Land Commission Act***

s1: farm use = occupation or use of land for farm purposes, incl farming of land/plants/animals, similar activity designated as farm use by regulation, incl farm operation

s16: agricultural land remains in reserve unless excluded

s20: (1) can’t use for non-farm use unless permitted (2) removal of soil & placement of fill = non-farm uses

s21: (1) no subdivision unless permitted (2) owner must apply to commission to subdivide

s28:

***s60(1):*** CoT issued b4 June 29, 1973 is subject to this Act even though no endorsement on CoT

***(2):*** must be on title if after June 29, 1973

- unregistered in personam claim [Clarke] – proprietary estoppel if inequitable conduct or personal contract b/w RO & in personam claimant

* trustee has fiduciary duties even if unregistered

- registration of volunteer confer indefeasibility? Debatable b/c s25.1(2) requires “valuable consideration”

**a) General Principle of Indefeasibility**

|  |
| --- |
| Creelman v Hudson Bay Insurance Co (1920 PC) |
| Facts – Hudson Bay Insurance’s Charter prohibits buying land for speculative purposes, but HB bought land not for the purpose of developing  sold to Creelman (signed contract of P&S)  value went down  purchaser’s remorse & refused to complete the deal  Issue – Is HB’s title void b/c they violated their own Charter?  Holding – Hudson Bay Insurance has valid title, so Creelman must perform the contract  Ratio – Registered owners of fee simple have **indefeasible** title – don’t have to worry about **defects** and can’t be **attacked** [***s23(2)***]  \*don’t have to look beyond the **VEIL**  - applies to corporations, trusts, partnerships, mental incompetence, minors |

**b) Indefeasibity and Adverse Possession (Squatter’s Right)**

- adverse possession = occupation of land w/o owner’s permission

- in common law, title passes to squatter w/o compensation if occupation for a period of time

 wiped out in BC, except against 1st grantee from Crown, b/c contrary to Torrens registration

\*if unregistered private land (didn’t register initial Crown grant)  possible to acquire land by adverse possession if 20 years continuous occupation, but never for Crown land

* onus of proof on BoP – 20 years continuous occupation before owner applied to register  get declaration of title from SC [***S171***]
* if purchaser of land that has never ben registered also doesn’t register, may claim adverse possession if for 20 years before July 1, 1975 [***s28***]

***s23 (3)***after indefeasible title registered, a title adverse to or in derogation of the title is not acquired by length of possession  no squatter’s right

***(4)***however, the 1st indefeasible title registered is void against the title of a person adversely in actual possession of & rightly entitled to the land…

***S171*** registrar can’t accept application founded on adverse possession , unless permitted by LTA and supported by declaration of title under Land Title Inquiry Act

***S28(1)*** no right of title can be acquired by adverse possession, except if specifically provided for by an Act

***(2)*** the Act doesn’t interfere with right/title acquired by adverse possession before July 1, 1975

***LA s8***: can’t acquire interest in Crown land by prescription, occupation not lawfully authorized or colour of right

***Limitation Act***

*S2 (e)* Act doesn’t apply to court proceeding to enforce local judgement for possession of land

(2) Act doesn’t apply to court proceedings of existing aboriginal and treaty rights

***S3 (b)*** true owner can bring action for possession any time (Act doesn’t apply to claim for possession if person entitled to it has been disposed due to trespass)

(h) Act doesn’t apply to claim for title to property by any person in possession of it

S5 Rules of equity not overridden…

Note: encroachment is possible against RO

***Property Law Act s36 – encroachment on adjoining land***

(2) If building or fence on land encroaches on adjoining land, SC can

(a) declare easement w/ compensation (b) vest title w/ compensation (c) injunction to remove [*Kelson*]

**c) Statutory Exceptions to Indefeasibility**

**S23(2)(d) Leases**

***LTA s1*** def = lease or agreement for lease for a term not exceeding 3 yrs if there is actual occupation under the lease or agreement

**S23(2)(g) Charges and Other Entries – Builder’s Lien**

***Builders Lien Act***

***S2*:** worker, contractor, subcontractor who has done work or supplied materials has a lien against interest of the owner for any $ not paid

* lien has effect from time the work began
* lien has **priority** over all judgement, executions, attachments and receiving orders made after that date

|  |
| --- |
| Carr v Rayward (1955 BC) |
| Facts – Rayward (RO#1, vendor) contracted Carr (unpaid plumber)  sold property to Bell (RO#2, purchaser)  Issue – Is the subsequent purchaser subject to lien claim?  Holding – Yes, can file claim of lien within 45 days of certificate of work completion *[****BLA s20****]* = a **charge**; Must begin lien action and register CPL within 1 year of completion   * lien is extinguished if not filed within times specified [***BLA s21***] * Carr **improved** Bell’s land (added value to it)  can enforce payment even if no privity of contract * **Onus** on claimant to prove claim * No statutory projection for purchaser – may use special hold-back for condo purchasers   **Remedies:** (can’t double dip)   * + Carr gets personal judgement against Rayward as unsecured creditor, OR   + Carr has statutory security interest in Bell’s property\*     - If necessary, sale of property to fill the line |

**S23(2)(h) Boundaries**

* Accuracy of map or plan depicting the physical dimensions of parcel is within surveyor’s expertise, not lawyers (limited to state of title)
  + Do a survey instead of relying on the plan or physical inspection [*Fowler v Henry*]

|  |
| --- |
| Winrob v Street (1959 BCSC) |
| Facts – Winrob (RO#2, purchaser) discovered that lot was smaller than indicated by hedge  City demanded rent  sued lawyer (Street)  Ratio – Street (**conveyancer)** is not legally responsible for ascertaining plans in office or how it relates to the actual topography (only responsible for **state of** **title**)   * Surveyor’s duties * Purchaser should verify dimensions * Lawyer may assume the duty (rare) |

**S23(2)(i) Fraud**

2 types of Torrens fraud:

**1. Title Fraud/Forgery – fraud against RO**

- forger, imposter, identity theft  transfer or mortgage

a) Transfer

RO#1 [**person deprived of land**] → RO#2 [**fraudster**] → RO#3 [**innocent purchaser**]

 innocent RO #3 (“*transferee*”) has title b/c immediate indefeasibility [***s25.1(2)***]

* b/c gives security to those who relied upon the register

 if RO#3 is not innocent → **defeasible** [***29(2)*** - “except...”]

 if title still under fraudster → **defeasible** – original owner can recover[***s23(2)(i)***]

b) Mortgage

→ innocent mortgagee **not protected** by *s23(2)* b/c no FS

* private mortgage insurance

 RO#1 **recovers** property w/o mortgage [*Gill*]

***S25.1 Void instruments – interest acquired or not acquired***

1. person doesn’t acquire land or estate or interest in land by registration of a **void instrument**
2. even though instrument transferring FS is void, transferee who is named in the instrument, and in good faith & for valuable consideration is **deemed** **to have acquired** that estate on registration  **immediate indefeasibilty**
3. even though instrument transferring FS is void, transferee who is named in the instrument, is **RO** at the time of this sections’ enactment, and in good faith & for valuable consideration is deemed to have acquired that estate on registration
   * immediate indefeasibility retroactive

**\*IMMEDIATE DEFEASIILTY** in BC (2005 – s25.1(2)) [*Frazer v Walker*] innocent purchaser of FS gets title upon registration b/c protect conclusiveness of register is more important than fairness to original owner

* victim may seek assurance fund or sue
* doesn’t apply to charge holder or volunteers b/c need “valuable consideration”

**Deferred Indefeasibilty** [*Gibbs v Messer*] – RO#3 defeasible by true owner, but RO#4 is innocent purchaser and indefeasible

* person dealing w/ fraudster’s title is vulnerable
* BAD – every purchaser has to go behind the register  undermines Mirror Principle
* Rationale: fair to RO#1 who has LT attachment, RO#3 should bear risks b/c can take preventative measures to ensure RO#2 isn’t fraudster

|  |
| --- |
| Gill v Bucholtz (2009 BCCA) |
| Facts – Fraudster **transferred** property from Gill (RO#1, victim) to Gurjit (RO#2, accomplice)  Fraudster got 2 **registered mortgages** from Bucholtzes (mortgagee)  Issue – Is the transfer void? Is the mortgage void?  Holding – Gill gets title back free of mortgage b/c the RO, Gurjit, participated in fraud, and charges are defeasible [s23(2)(i)]  Reasoning –   * Bucholtzes = mortgagees  void b/c defeasible and right to rescind for fraud [s25.1(1)]   + If they were transferees of FS  indefeasible title [s25.1(2)]   + Charges are presumed to be valid unless evidence to the contrary [s26] * Gill can recover title if the current RO is the fraudster \*nemo dat only goes back to present RO [s23(2)(i)] |

**2. fraud against holder of unregistered interest =** purchaser dishonestly buys property to extinguish unregistered interest **[McCaig]**

\*actual fraud, not constructive or equitable fraud

\* fraudster = “participated in any degree” = principle (RO) or agent (with RO’s authority; imputed to principle)

\*requires **actual notice + dishonesty** (mere notice is insufficient to constitute fraud) [*McCaig*]

* Dishonesty is violation of common morality and includes wilful blindness or deceptive intent [*Serving for Success*]
* Inadvertence, good faith negligence, reckless disregard, and carelessness are NOT fraud [*Kearns*]
* Actual notice = actual knowledge, not constructive notice  see Fraud #2 [*Kearns*]
  + Knowledge can be imputed [*Greveling*]

Equitable Interest

* EI created first  if registered  can be legal or equitable interest
* **EI followed by LE**
  + Pre-Torrens - notice affects equity
    - If the holder of LE is BFPV w/o N --> LE prevails
    - If holder of LE is fraudster or had notice (actual, constructive, implied) --> EI prevails
    - [*equity follows the law; where the equities are equal, the law prevails*]
  + Torrens - registered holder takes free of all unregistered interests; notice abolished [s29(2)]
    - Bad policy to allow fraudster to use registration to defeat victim of fraud --> carved out exception --> s29(2) modified by cases "except in the case of fraud"
      * [*equity will not allow statue to be an instrument of fraud*]
    - Notice is only relevant if registered purchaser participated in fraud:
      * Guilty of "actual fraud", "dishonesty", or "breach of common morality" ie. Not BF
      * Had notice (actual, wilful blindness, or implied [Greveling])

**\*notice** (= knowledge acquired outside of title) is abolished except in the case of fraud

 if RO still fraudster, holder of UI can file caveat/CPL and recover

 if RO is innocent purchaser, UI is extinguished  holder of UI may sue fraudster for monetary remedies, not property

\*must acquire knowledge **BEFORE** signing interim agreement (agreement of P&S)

* Notice or fraud after signing doesn’t affect purchaser

***s29 Effect of notice of unregistered interest***

*(1)* RO = person who made app to register and becomes a RO

***(2)*** **Except** in the case of **fraud** in which he or she has participated, a person taking from RO ***(a)*** a transfer of land, or ***(b)*** a charge/transfer/assignment/subcharge is **NOT**, despite rule of law or equity to the contrary, affected by notice (express, implied, or constructive) of unregistered interest

EXCEPT

***(c)*** an interest which is pending registration

***(d)*** lease < 3 years if actual occupation

***(e)*** title of a person against which the indefeasible title is void under s23(4)

(3)…

(4)…

\*page 4 of notes

|  |
| --- |
| McCaig v Reys (1978 BCCA) |
| Facts – McCaig has unregistered option for Reys’(RO#1) property  sold to Rutland/Jerome (RO#2, fraudster) after telling them of the option and Jerome promised to honour it  sold to Jabin (BFPVw/oN, RO#3)  Holding – Jabin is innocent purchaser, so the option is extinguished and Jabin keeps title  Ratio – Actual notice is relevant for fraud b/c should not receive benefit of the protection of s29(2)   * Constructive notice is not enough b/c sanctity of Registrar– may seem unfair to unregistered interest holder, but they assumed risks by not registering   Mere notice is not enough to make purchaser a fraudster; need **dishonesty.**  Reasoning –   * Rutland/Jerome had (1) actual notice of McCaig’s unregistered option (2) deception by promising Reys to honour the interest (3) registered to defeat the interest  **FRAUDSTER**   Remedies:  McCaig may sue Reys for breach of contract and Jerome for fraud  Cannot get assurance b/c no FS |

|  |
| --- |
| Hudson’s Bay Co v Kearns and Rowling (1895 BCSC) |
| Facts – HB had unregistered equitable mortgage by deposit of title deeds (unregistrable per ***s33***) of Kearns’ property. Kearn sold to Rowling at half market value.  Rowling knew missing duplicate  K said no problem  R consulted w/ lawyer & paid 1st payment  asked and told no problem again  R paid full amount  R finds out mortgage  Plaintiff – Hudson’s Bay (mortgagee)  Defendant – Kearns (mortgager) and Rowling (transferee)  Who won? Kearns and Rowling  Issue – Did Rowling commit fraud, rendering the equitable mortgage enforceable?  Holding – No. Rowling has indefeasible title not affected by notice b/c not participant of fraud. Equitable mortgage is extinguished.  Ratio – Carelessness is not dishonesty. Constructive notice is equitable fraud, but is insufficient to constitute **actual fraud**.  *\*maxim****: equity will not allow a statute to be an instrument of fraud*** codified into ***s29(2)***  can’t use indefeasibility to deliberately defeat unregistered interest  Reasoning –  Rowling isn’t a fraudster b/c not “deliberate”  not affected by notice   * was just careless, not dishonest * no express notice or wilful blindness; had constructive notice & recklessness * **timing** of notice not before signing agreement of P&S – had no reason to be suspicious b4 signing; could not back out of deal after 1st payment b/c likely cashed   **Equitable fraud**: in Equity, R has constructive notice (RP would be suspicious & make further inquiries) and wouldn’t be BFPV w/o N   * abolished by Torrens except if fraud with actual notice (actual fraud; s29(2)) b/c *equity will not allow a statute to be an instrument of fraud*   Actual knowledge w/out dishonest conduct “to bring himself within the words of the section” is not fraud. It’s just the “ordinary course of business”. [additional requirement of dishonesty ambiguous here; affirmed in Success] |

|  |
| --- |
| Vancouver City Savings Credit Union v Serving for Success Consulting Ltd. (2011 BCSC) |
| Facts – Serving for Success has unregistered lease for 5 years + option to renew for 5 years to operate a pub in motel owned by City Center Manor. VanCity advanced & registered mortgage to City Center with actual knowledge of long term tenants. Motel foreclosed to VC and purchaser wants to extinguish SS’s unregistered interest.  Plaintiff – Serving for Success  Defendant – Vancouver City Savings  Who won? Vancouver City Savings  Issue – Did VC commit fraud in extinguishing SS’s unregistered lease, despite actual notice?  Holding – VC did not participate in fraud and SS’s unregistered lease is extinguished  Ratio – Fraud requires **actual notice** or **wilful blindness** (not constructive notice) + **dishonesty** (violation of common morality)  **\*actual fraud vs equitable fraud\***  Reasoning – ***s29(2):*** VC must participate in fraud for notice to take effect  if no fraud  notice does not affect title  title clear of unregistered interest  - VC had actual notice but no dishonesty or deceit (didn’t “deliberately” extinguish lease; simply followed normal legal process)  - constructive notice is not dishonesty, just unreasonable (RP would have made further inquiries)  - wilful blindness is dishonesty (deliberately abstain from making inquiries b/c had strong suspicion of answers)  - if SS had registered lease  have legal right & *nemo dat* applies to purchaser  - ambiguous judgement on critical time to determine knowledge  \*party claiming fraud has onus to prove fraud  Notes: Mortgagee has 2 options:   * + 1. foreclosure (enforce the security)     2. personal judgement (enforce the debt) |

|  |
| --- |
| Greveling v Greveling (1950 BCCA) |
| Facts – During divorce, Ms. G, the RO of property, transferred title to Mr. G thru Lawyer. Mr. G did not register title. 7 years later, Ms. G transfers same property to Blackburn thru same Lawyer.  Issue – Can the knowledge of the Lawyer be imputed to Blackburn? Is Blackburn an innocent purchaser or did he commit fraud?  Holding – Blackburn didn’t commit fraud b/c no evidence of dishonesty  Ratio – Actual knowledge and/or dishonesty can be **imputed** to principle.  Reasoning –  Imputed knowledge unless:  1. Lawyer was committing fraud  2. Lawyer didn’t think previous transfer was valid  - no evidence that Lawyer intended to commit fraud  Notes: Ms. G committed fraud |

*In Equity,* ***purchasing with willful blindness of the unregistered interest is dishonest in itself (or fraud****), so logically would not require further dishonesty to impose on the purchaser the unregistered interest.  It would ironic if willful blindness was enough to constitute dishonesty but purchasing with actual knowledge of the unregistered interest required a further element of dishonesty.  Here is the key.  If a* ***purchaser has actual knowledge of the unregistered interest or is willfully blind and purchases with the intention to extinguish the unregistered interest that intention is the extra element of dishonesty or lack of common morality****.  If one purchases with actual knowledge of the unregistered interest or with willful blindness but without the intention to extinguish the unregistered interest, and the interest is extinguished by operation of the Torrens system there is no element of additional dishonesty on the part of the purchaser and the purchaser gets a good title. – Tony* ***\*objectively determine intent, looking at all the circumstances***

|  |
| --- |
| Re Saville Row Properties Ltd (1969 BCSC) |
| Facts –   * Eldred - RO gave **option** to Frew & Associates --> Registry refused to register --> Eldred sold to Saville Row --> searched the register (option not on title as charge) --> Row **agreed** to buy --> found out option on property * Row applied to register on April 28 & found out about Frew's failed application to register on April 23 * Frew claim they are entitled to option & Row can't register     **Issue**: Can Saville Row get good title to this property? Was Eldred a fraudster? Was Row a party to fraud?    **Decision**: Row was not a fraudster, and is entitled to register the property    **Ratio**: Purchasers are not affected by notice of invalid claims of unregistered interests.    **Analysis**   * Validity of unregistered option is challenged by register  not affected by notice of the unregistered interest as the claim is invalid   + Row entitled to assume that option was invalid & disregard the unregistered interest * Row didn't get notice of unregistered option until after signing agreement (too late)   + April 25: completion & closing   + April 28: Row applied & found out   + July: Frew files CPL to challenge title based on existence of option * Row didn't act in bad faith simply for relying on indefeasibility of title  not a fraudster  option extinguished   + \***not fraud** to register transfer with intent to defeat an **invalid** unregistered interest * Option - pay a premium to RO; RO bound to let purchaser exercise option   + To protect right to buy   + Enforceable by specific performance --> so, **equitable interest**   + Right to first refusal * For Frew to enforce option, must file caveat/CTL before Row signs (give actual notice) * Row not expected to know more than what's reasonably know-able (don't need to investigate) |

**d) “In Personam” Claims**

= personal right against **person** (RO), not subsequent purchaser

* No interest in property
* Claims against RO due to RO’s own inequitable conduct
* Enforced by personal judgement
* Eg. Fraud on part of RO causes victim to have rights against RO (exception to indefeasibilty)
* Eg. Injured on RO’s property entitles victim to damages
* Eg. **Clark** had in personam right to occupation due to Johnson’s conducts; no in rem claim

\*can become right **in rem** = against the property itself; right enforceable against everyone

Builder's lien - 2 aspects

* In personam rights = head contract
  + - Subcontractor has in personam claim against general contractor
    - Get personal judgement against contractual party
* In rem rights = statutory lien [*Builder's Lien Act*]
  + - Subcontractor also has in rem claim against owner of property
    - Get lien against the property
* Can happen in equity or in law

Mortgage - 2 aspects

* Loan contract - in personam
  + - Mortgagee can get personal judgement against mortgagor if default
* Charge on title - in rem
  + - Mortgagor gives mortgagee a property interest as a form of collateral security (right to foreclosure)
* Equity of redemption = **mortgagor's equity** 
  + - mortgagor has right of redemption within 6 months of default (given reasonable time to recover property by paying off debt)
    - b/c Court of Equity wanted to protect debtor, recognizing imbalance of power
    - Court can extend period of redemption further
    - Can sell this equity to purchaser or put second mortgage second mortgagee - more vulnerable & demand higher interest
* Foreclose down - all charges below the mortgage will be cleared
  + property sold with clear title  1st mortgage paid in full  2nd mortgage gets leftover  mortgagor gets leftover
* Mortgagee's remedies:
  + - Action on the covenant (contract) for personal judgement (in personam)
    - Possession
    - Foreclosure (mortgagee takes title from mortgagor)
    - Judicial sale

|  |
| --- |
| Pacific Savings and Mortgage Corp v Can-Corp Developments (1982 BCCA) |
| **Facts** Can-Corp (real estate developer, mortgagor) got mortgage from Pacific Savings (mortgagee)  CC couldn't proceed with development b/c market collapsed  defaulted on mortgage  PS foreclosed, but no market for property  no point to settle property, so exercise strict foreclosure (take title & hold property instead of selling)   * CC given standard 6 months for redemption couldn't redeem  strict foreclosure  PS got title (**registered**) * CC able to pay and asked court to re-open strict foreclosure & restore their title & right to redeem * PS refused b/c redemption period lapsed & title passed (have indefeasible title)   **Decision**: Court granted extension of redemption period; PS still held legal title    **Analysis**   * If sold to innocent purchaser, then too late  1. loan is a personal relationship b/w lender & borrower (***In personam***)  * Mortgagees have personal obligation to allow mortgagor to redemption and extend the period  1. Mortgage created a charge (***in rem right***)  * Mortgagees have right to foreclosure * Started of as loan (in personam)  turned into in rem |

|  |
| --- |
| McRae v McRae Estate (1994 BCCA) |
| Facts – Farquhar Sr (RO#1) left property in **testamentary trust** for wife (RO#2) for **life** (as equitable beneficiary and trustee), **equitable remainder** to 3 sons. Harriet sold to one son, Farquhar Jr, for nominal consideration. Farquhar Jr (RO#3) registered w/o notation of trust and left property to 2 brothers and his wife (RO#4)  Plaintiff – 2 other sons  Defendant – F Jr – RO, trustee, beneficiary  Who won? 2 sons  Holding – Reinstated the trust b/c F Jr and wife are not BFPV w/o N  Ratio – Trusts apply even if **not on title**. **Beneficiary** can make ***in personam* claims** in equity to order performance of trust, which can turn in to ***in rem* rights**. (\*exception to indefeasibility)  Reasoning –   * Harriet breached trust by selling to FF Jr and by not ensuring notation of trust * FF Jr breached trust by leaving property to wife, since he’s just a trustee, not absolute owner * If FF Jr had sold to BFPVw/oN  valid b/c immediate indefeasibility **\*no** *in rem* rights   + B can seek in personam remedy for equitable compensation against trustee * Beneficiary has *in personam* claims in equity b/c trustee owes fiduciary duties to beneficiaries   + *In personam* morphs into in rem rights b/c beneficiary’s interests followed * If due to **registrar’s mistake** ***[s180(7)],*** B can apply to court to re-instate trust [***s180(9)]*** |

**B. Registration: Charges**

**a) Meaning of Registration**

\*registration = acceptance + recording in public office [*Dukart*] (ordinary meaning b/c undefined)

* Entry on certificate of title, in registrer or filing (doesn’t have to be expressly in certificate)

\*registration of **INSTRUMENTS**, not interests

* Instrument **creates** the interest, determined by LTO
* Still valid if name is wrong b/c the document is right
* *S180* “trust instrument”, *s197* “instrument”, *s20(1)*
* Judicial determination of validity of instrument vs administrative determination to accept or refuses to register instrument

- **charges** = any estate/interest less than FS, including encumbrances (caveat, CPL, judgement, mortgage) [*s1*]

* No immediate indefeasibility [*s25.2(1)*]

***S197 Registration of Charges***

1. If satisfied from examination of application & instrument that applicant is entitled to be registered as owner of **charge**, registrar **must register** it by entering it in the register
2. Registrar may refuse to register the charge if:
   1. A good, safeholding and marketable title had not been established by applicant
   2. Charge is not an estate/interest registrable under LTA

***S180 Recognition of trust estates***

1. Can register trustee or personal rep’s title, but **not particulars** of trust ** registration is optional; register to protect beneficiary and give statutory notice to purchasers from trustee
2. *..*
3. To register trustee, registrar must add “in trust” and a reference number to the trust instrument following name & address of trustee
4. File trust instrument with application
5. …
6. …
7. If endorsement made in the register under (2) or (3), **can’t register** instrument purporting to transfer, mortgage or deal with land unless
   1. Expressly authorized by law or the trust instrument
   2. Order from SC construing the instrument as authorizing the dealing, or ordering the dealing, and file certified copy of order to registrar
8. …
9. …
10. …

|  |
| --- |
| Dukart v Surrey (District) (1978 SCC) |
| Facts – Surrey took title from Foresee Reserves in tax sale  propose to build washroom, which is in front of Dukart’s house.  Dukart found provisions giving **easement** (free access) to water in an instrument that LTO labeled as **“trust”**  Surrey: not on title!  \*Purchaser of tax sale gets title free of all charges (trust), except easements and restrictive covenants  Holding: Dukart  Issue – Registration of interest or instrument?  Ratio – Registration of instrument, not interest. Interest determined/created from instrument. Charge is still valid even though LTO mistakenly accepted it as something else b/c valid instrument is at the office.  Reasoning –   * Interest described as trust, but instrument includes an easement * Fair: **purchaser** should look at the instruments at the office, not just the title \*exception to Mirror Principle * Surrey is not BFPV w/o N b/c did not buy off of market |

**b) Indefeasibility?**

***S26 Registration of a charge***

1. RO of charge is **“deemed to be entitled”** to the estate/interst/claim created or evidenced by the instrument, subject to exceptions
2. Registration of a charge doesn’t constitute a determination by the registrar that the instrument creates or evidences an estate/interst or that the charge is enforceable

**\*statutory constructive notice** – presumed to know everything on the register, including **instruments**

***S27*** ***Notice given by registration of charge***

1. Registration of charge gives notice, from time of application to reg, to 3rd parties of:
   1. The estate/interest of the registered charge
   2. Contents of the instrument creating the charge

***S28*** ***Priority of charges based on priority of registration*:** priority according to application to register, not dates of execution of instruments, subject to contrary intention appearing from the instruments

**Mortgage**

1. **contractual rights** – the loan (*in personam*)

* Can assign rights to payment to assignee unilaterally w/o mortgagor’s consent  assignee must give notice to mortgagor
* Assignee is “subject to the equities” – subject to the defects and rights of assignor (*nemo dat*) b/c charges are not indefeasible [*Credit Foncier*]
* Entitled to personal judgement

2. **securities interes**t – encumbrance (*in rem*)

* Entitled to right of foreclosure
* Mortgage is only security for the amount **advanced**  **assignee** must go behind the register to check the actual amount owing
  + Credit Foncier: even if valid mortgage, Bennets still not subject to it b/c no amount advanced
* Mortgagor can sell their equitable interests in the property (ie. sell the house)  purchaser is subject to the mortgage, original mortgagor still liable under contract

|  |
| --- |
| Credit Foncier Franco-Canadien v Benentt (1963 BCCA) |
| Facts – Bennets (RO , mortgagors)  Allen from Todd Investments registered a forged mortgage of $7400 (but $0 advanced)  Stuart (registered assignee #1)  Credit Foncier (registered assignee #2)  CF gave notice to Bennets of assignment  Bennets thought was mistake  CF sued for personal judgement and foreclosure  Who won? Bennets. Registered mortgage is void for forgery. Charges are not indefeasible and are subject to nemo dat  later codified in s25.1(1)  Reasoning – **assignee takes rights of assignor (*nemo dat*),** who had no rights b/c void for forgery  S26: “deemed” = rebuttable presumption of the validity of a charge |

2 Ways to **Transfer Contractual Rights**:

1. Assignment = transfer of rights only
   * Unilateral, except for leases
2. Novation = transfer of rights and obligations
   * Both parties must agree (lendor #1 must discharge liability)
   * Cancels 1st deal, substitute new deal (substitution of a new agreement/party)

|  |
| --- |
| Canadian Commercial Bank v Island Realty Investment Ltd (1988 BCCA) **\*overruled** |
| Facts – Cowen (lawyer, fraudster) from Park Meadow (RO, mortgagor) told Almont will discharge Island Realty’s mortgage  forged IR’s discharge  registered discharge  Almont advanced $ to Cowen  disappeared  Park Meadow bankrupt  1st registered mortgage: Imperial Life  2nd registered mortgage: Island Realty – higher interests b/c less secure [s28]  3rd registered mortgage: Almont  Issue – What’s the priority of the registered mortgages?  Holding – Almont is 2nd mortgage. Forged discharge is valid.  Reasoning –  Trial judge followed *Credit Foncier*: the forged discharge is nullity and thus void  1,2,3  CA: distinguished *Crediti Foncier* based on assignment vs novation  forged discharge is effective in removing Island Realty’s charge  1,3  \*bad b/c gave effect to fraud vs “equity will not allow statue to be instrument of fraud” [*Rowling*]  \*overruled by **s25.1** |

##### **CH7: FAILURE TO REGISTER**

**\*unregistered interests** are **equitable interests**, which are **unenforceable against BFPV w/o N** [***s20(1)***]

* Possibly enforceable if fraud [*s29(2)]*
* equitable rights bind the whole world except BFPV vs. legal interests bind the whole world
* lease <3 year confers legal binding title even if unregistered

***S20 Unregistered instrument does not pass estate***

1. **Except as against the person making it**, an unregistered instrument does not pass an estate or interest either at law or in equity
2. Person has right to apply to register the instrument
3. (1) doesn’t apply to lease < 3 yrs with actual occupation

|  |
| --- |
| Sorenson v Young ( ) |
| Facts – Sorenson (RO#1) had easement (unregistered) to cross Roch’s land (RO#2) 🡪 Roch sold to Young (RO#3) 🡪 Young built a fence, restricting Sorenson’s easement  Issue – Is the unregistered easement enforceable? [s20(1)]  Did Young commit fraud in defeating Sorenson’s unregistered interest, with actual knowledge/wilful blindness and deceit? [s23(2)(i)  Holding: No, Young takes free of unregistered interests. Failed to prove faud |

***S181 Interest or right reserved to transferor***

1. **On application** to register a FS under an instrument in which
   1. An estate/interest in the transferred land **remains** in the transferor
   2. Transferee entered into a restrictive covenant for the benefit of other land registered under the transferor, or
   3. Condition, exception, reservation, easement, statutory right of way, or other right in/on land is reserved in the application

the estate/interest remaining must be **registered as a charge** against the new title.

**“Except Against The Person Making It” = unregistered instrument is effective against the person making it (the original parties to the agreement)**

🡪**In Personam**

\*unregistered instrument doesn’t affect innocent 3rd parties

* If 3rd party had notice (actual notice aka fraud) of the unregistered agreement/land 🡪 the are bound b/c they agreed to be bound when they bought it

Example: Easement

* A&B agree in writing for themselves and transferees that A has easement to B’s land + REGISTERS instrument on both titles 🡪 if A sells to X & B sells to Y 🡪 X can enforce against Y
  + A/X = dominant tenement (gets benefit)
  + B/Y = subordinate tenement (gets burden)
* If NOT REGISTERED 🡪 still binding on A&B (“the person making it”)
  + If A sells to X, X can enforce it against B (who made it)
  + If B sells to Y who is BFPV w/o N (ie. no fraud), A/X can’t enforce it against Y

**1. Judgements**

\*common law principle of ***nemo dat***: jmt creditor can’t take away greater interest than what jmt debtor has

***Court Order Enforcement Act***

***s86(3) Registration of judgements after Oct 30, 1979***

From time of registration, judgement forms a lien (links $ claimed against with A’s land) and charge on the land of jmt debtor

1. To the extent of their beneficial interest in land
   * + Against debtor’s property interests
2. If an owner is reg as personal rep or trustee, to the extent of the interest of a beneficiary who is a jmt debtor
   * + Against debtor’s property interests
3. Subject to rights of purchaser who acquired interest in the land in good faith for valuable consideration **before** registration of jmt, but not registered at time of reg of jmt
   * + Against debtor personally
     + If A transfers to B in fee simple, but B did not register. C registers a judgement against A 🡪 B’s unregistered instrument takes priority over C’ registered judgement if B is BFPVw/oN
     + Registration of jmt protects against subsequent interests, not **prior unregistered**

\*vulnerable to BFPVw/oN even if unregistered(equitable)

|  |
| --- |
| Martin Commercial Fueling Inc v Virtanen (1997 BCCA) |
| Facts – Vendor and innocent Purchaser entered into agreement to sell 🡪 jmt creditor registered jmt against Vendor’s interest 🡪 sale closed 🡪 Purchaser registered interest  Issue – Is the Purchaser subject to the registered judgement?  Holding: No b/c s86(3)(c) – purchasers acquire interest in property at **agreement of P&S**, not closing  Reasoning – Purchaser had acquired interest in the land in good faith and with valuable consideration prior to the registration of the jmt. Their interest has priority over the jmt even though it was not (and could not be) registered.  Must be **INNOCENT**: close to fraudulent transaction if debtor transfers to defeat creditor 🡪 creditor can apply to set aside the transfer & execution   * Circumstances that indicate fraud:   + Sold to “friendly 3rd party” – agree to not register until creditor attempts   + Transfer is hidden   + Around time a substantial debt was incurred   + Debtor retains possession/control of property   + Debtor insolvent at the time |

**2. Other Interests**

🡪**assignment of property interest** – assignee can enforce against original parties

|  |
| --- |
| L&C Lumber Co Ltd v Lungdren (1942 BCCA) |
| Facts – Lungdren (original party) sold right to enter her property and cut tree to McDonald (assignor) **\*unregistered easement** 🡪 assigned to L&C Lumber (assignee) 🡪 Lungdren regret b/c sold at low price and refused access  Holding – L&C has right of access b/c agreement is enforceable against the person making it (Lung). It can’t be enforced against L&L (assignee without notice)  Reasoning – assignment of property interest b/c severing trees = chattels   * If agreement included term 🡪 assignee has notice 🡪 not BFPVw/oN 🡪 is enforceable by agreement   Notes:  Type of easement = profit a prendre in gross   * Profit a prendre = rights to enter land and remove timber, turf, gravel, fishing, hunting, crops * In gross = not necessarily the neighbouring property (in appurtenance) |

**3. Prohibited Transactions**

\*original parties **aren’t bound** by unregistered instrument if it’s **illegal**

|  |
| --- |
| International Paper Industries v Top Line Industries Inc (1996 BCCA) |
| Facts – International Paper Industries entered into agreement to lease a part of Top Line’s vacant land to build recycling depot 🡪 lease not formalized  Issue – Is the unregistered lease of > 3 years of undivided land enforceable?  Holding: No b/c the lease was not legal. Top Line (original party) isn’t bound by it.  \*departed from s20(1)  Law– Leases > 3 years of **vacant land** must go through **formalities of subdivision** (survey property, draft lease including terms, attach sketch of the part of the undivided land, apply to local govt for approval for subdivision)  Response – Legislature tried to reverse Top Line with **s73.1** that the lease is enforceable 🡪 limited success b/c courts in other cases upheld Top Line + s73.1 does not apply to any leases made before 2007 (prospective, not retrospective) |

***S73.1 Lease of part of a parcel of land enforceable***

\*overturned Top Line & restored **in personam** enforcement of leases

1. A lease or agreement for lease of a part of a parcel of land is NOT UNENFOCEABLE simply because (a) it doesn’t comply with this Part, or (b) its application for reg is refused or rejected

##### **CH8: APPLICATIONS TO REGISTER**

1. Transaction

2. Pending period b/w application & execution of registration\*\*\* 6 days; actually 4 days

a. Application

b. Scrutiny by LTO

c. Refusal or acceptance

3. Registration

\*registration relates back to application

\*application falls short of registration – does not confer the same rights

* b/c unregistered interests = equitable interests, notwithstanding s20(1)

***S31 Priority of caveat or CPL***

If caveat has been lodged or CPL registered:

1. If the claim established, the caveator/plaintiff is entitled to claim priority over applications that are made **after** the date of the lodging or registration
2. Their claims “relate back” to date of registration

What if 3rd party registers caveat/CPL during lapse time?

**🡪Equitable Interest vs Equitable Interests**

* Applicant not on register yet = unregistered interest = equitable interest
* Filer of caveat/CPL are claiming unregistrable, but potentially registrable, interests = equitable
* \*follow common law maxims:
  + **where the equities are equal, the law prevails**
  + **where the equities are equal, 1st in time prevails**
* assess equities by the moral rights/ethical positions of parties

|  |
| --- |
| Rudland v Romily (1958 BCCA ) \*legislative approval of s217 |
| Facts – Romily (RO#1, victim #1) defrauded of title by Lindsay (RO#2, fraudster) 🡪 sold to Rudland (innocent purchaser, victim #2)  \*Romily applied for CPL on the **same day** Rudland applied to register FS  Issue – Who’s interest prevails?  Holding: Rudland wins b/c innocent purchaser who relied on Register (not “party to the proceeding”). Romily’s claim extinguished.   * + where the equities are equal, the law prevails 🡪 Rudland\*\*\*   + where the equities are equal, 1st in time prevails 🡪 Romily |

***S217 Effect of CPL if prior application is pending*** \*overrides s216

1. Complete registration of title/charge that was applied **before** application to register CPL was received \*BFPVw/oN wins
2. If
   1. The prior applicant is party to the proceeding, register title/charge subject to CPL
   2. The prior applicant isn’t party to the proceeding, upon registration of the title/charge, cancel the registration of the CPL and give notice to applicant
   3. If CPL relates to a proceeding re a charge, or to enforce/foreclose/cancel a registered charge, or s215(6), or s215(7), register the title/charge claimed by prior applicant subject to the CPL, irregardless if prior applicant is party to proceeding

|  |
| --- |
| Canada Permanent Mortgage Corporation v BC (Registrar of Titles) ( ) \*\*\*BAD |
| Facts – Vorseher (RO, victim #1)  Vistica (fraudster) – applied to register FS (Jan 6) - put mortgage on property before registration \*s119 prohibits  Canada Permanent (victim #2, mortgagee) – applied to register mortgage (Jan 7)  Holding: CP wins b/c is innocent purchaser (Rudland) 🡪 weird b/c allowing CP to put mortgage on property not owned by mortgager! 🡪 violates s119   * “per incurion” – judge decided wrongly b/c didn’t know law   \*overridden by s25.1(1) – charges are not indefeasible; are not valid b/c void instrument |

***S155 Application for registration of charge***

1. If title to FS has been registered or applied, a person claiming to be registered as owner of a charge must apply for registration of the charge; if registration of FS is pending, the app for reg of a charge must wait
2. If a registered charge (a) is transferred absolutely or conditionally, or (b) by agreement b/w the parties (i) is modified/extended, or (ii) is postponed to another charge, the transferee of a party of the agreement may apply for registration

***S198 Registration of person creating charge***

Can’t register an instrument purporting to create a charge, executed by a person who is entitled to be registered as FS owner, until the person has been registered as FS owner

|  |
| --- |
| Breskvar v Wall (1971 AusHC ) |
| Facts – Breskvar (RO#1, victim #1) got equitable mortgage from Wall (lawyer, fraudster) by signing Transfer Form 🡪 flipped property and registered under grandson 🡪 sold to Alban (victim #2) Oct 31   1. Breskvar filed caveat – Dec 13 2. Alban applied to register FS – Jan 8   Holding – Alban wins b/c more innocent (also b/c Alban receives clear title at time of **signing**)  Reasoning – competing unregistered/equitable interests   * + where the equities are equal, the law prevails 🡪 Alban   + where the equities are equal, 1st in time prevails 🡪 Breskvar * Equities are NOT equal – Breskvars were stupid for signing blank form, trusting lawyer, delaying caveat \*maxim “equity aids the vigilant, not those who slumber on their legs” |

##### **CH9: THE FEE SIMPLE**

**1. Common Law**

- **legal** = at common law (not equitable); **fee** – inheritable; **simple** = by any relative in perpetuity

- duration of estate = as long as there are heirs to inherit (blood relatives of grantee) 🡪 could last forever

* Ends if die w/o heir = escheats
* Freehold interest (like life estate) b/c uncertain duration

- only Crown can create FS [*s179(2)]*

- transfer by strict wording “to B and his/her heirs in FS”, otherwise LE 🡪 overturned by PLA s19

**2. Statute**

***Property Law Act s19 Words of transfer***

(1) sufficient to use “in fee simple” without “and his heirs”

(2) without limiting words = passes the FS or greatest interest/estate transferor has power to transfer

🡪 “to B” or “to B in fee simple”

***S186:* Freehold Estates**

(4) transfer of freehold estate for valuable consideration in approved form, completed, executed, witnessed in accordance to Act transfers the estate, irregardless of express words of transfer

(5) if transfer doesn’t have express limitation words 🡪 fee simple

(6) if transfer has express limitation words 🡪 transfer in accordance with limitation

(7) if transfer has express reservation or condition 🡪 subject to them

(8) (4) – (7) doesn’t transfer an estate greater than what transferor has

* Fee simple absolute
* Life estate
* Determinable FS
  + May last forever, but may be cut short by specified, but unpredictable, event
  + “while”, “during”, “as long as”, “until”
  + Ends automatically when event occurs
  + Eg. to B in FS until she passes exam
* FS on condition
  + May last forever, but may end in the event of a condition subsequent
  + “provided that”, “but if”, “if it happened”, “a condition that”
  + Does not end automatically – grantor exercise right of re-entry or forfeiture
  + Eg. “to B in FS on condition that she doesn’t pass exam”, ski resort
  + Condition cannot invade rights of FS eg. right of sale

|  |
| --- |
| Tottrup v Ottewell Estate (1970 SCC) |
| Facts – Frank gave residue *“to Fred…, his heirs*, executors, and administrators absolutely & forever”   * Fred (brother, intended residual beneficiary) predeceased Frank   Holding: Gift goes back to Frank’s estate (partial intestacy) – to Franks’ next-of-kin  Ratio – **Lapsed gift** (gift failed) b/c assumed as **personal gift** to Fred (didn’t intend to give his heirs)   * + Eg. if predeceased 🡪 doesn’t pass to Fred’s heirs   + Eg. doesn’t have asset anymore at death   + Eg. beneficiary refused gift   🡪 lapsed gift falls into **residue** of estate 🡪 lapsed residue passes on **intestacy**  Reasoning   * Fred’s daughter claims whole interest as alternative gift – “to Fred or his heirs” * Court found it to mean *“to Fred and his heirs”* b/c traditionally used “his heirs” as words of limitation for FS [***s42***] – “heir” = person inheriting property on death of will-maker or other person dying without a will   + Just personal gift to Fred   + Frank could’ve explicitly put “Fred or his heirs” if wanted to |

***WESA s41(3) Property that can be gifted by will***

A gift in will (a) takes effect according to its terms, and (b) gives recipient every legal & equitable interests in the property the will-maker had the legal capacity to give

\*changes *Tuttrup* result b/c want to **give effect** to will & **avoid intestacy**

***WESA s46 When gift cannot take effect***

(1)When gift cannot take effect for any reason, including if B predeceased will-maker, property distributed according to following priorities, subject to contrary intention in will:

* 1. Alternate beneficiary of the gift specifically named by will-maker
  2. If B = brother, sister or descendant, to their descendants \*Fred’s daughter prevails
  3. Surviving residual beneficiaries (specific gift falls to residual estate)

(2)If gift failed b/c B predeceased, doesn’t matter if B died before or after will was made

**3. Problems of Interpretation – Repugnancy**

= contradictory or inconsistent provisions

* When testator wants to control property after death
* Eg. **FS absolute, followed by gift over** 🡪 impossible b/c gave ALL ownership to done
* DIY wills bad b/c costs of parties payable out of estate in litigation (on solicitor-and-client basis; complete indemnity)
  + Vs. party-and-party basis; partial indemnity

|  |
| --- |
| Re Walker (1926 ONCA ) |
| Facts – FS absolute to wife, followed by gift over to nephews = repugnancy  Issue – **What did the testator intend? Will gives effect to the testator’s intentions**  Holding: gift to wife in FS; gift over to nephews are void  Ratio – Courts can **construe** the testator’s subjective intentions at the time of making the will in light of the **circumstances**.   * **WHO** was the named person – determined by circumstances at **time the will was made** * **WHAT** was the intended gift – determined at **time of death**   Reasoning – Possibilities:   * **Gift to wife prevails, gift over fails as repugnant** * Gift to wife as LE, gift over of remainder * Gift to wife as LE, with the power of sale/encroachment, with gift over of the remainder   + Trustee may sell property (usually spouse) * Circumstances: testator was closer to wife than nephews 🡪 intended to favour wife |

|  |
| --- |
| Re Shamas (1967 CA) |
| Facts – all to wife until the last children becomes 21yo; if remarry, wife gets her share like the kids  Holding: Wife gets life estate w/ power of encroachment until the youngest child is 21; go to children upon her death  Reasoning – minimal assets at time of will-making 🡪 didn’t intend wife & family to survive on just the income of the estate 🡪 has power of sale |

|  |
| --- |
| Cielein v Tressider (1987 BCCA) |
| Facts – all to Ms. Rich; upon sale or disposal of real estate, proceeds divided equally b/w her son and my children 🡪 repugnancy b/c gave FS to Rich, but not the proceeds  Holding: Gift over to children is void  Reasoning – lived with Rich and her son for 12 years |

##### **CH10: THE LIFE ESTATE**

**= right to possession and use for the lifetime of original grantee; not inheritable**

- freehold estate (indeterminate duration)

- appears as charge in Torrens [s1]

**A. Creation**

**1. By Act of the Parties** – inter vivos gift or will

* Need express words to create LE [default is FS ***PLA s19(2), WESA s41(3)(b***)]
  + “to A for life” “to A for the life of B”
* Not inheritable on A’s death 🡪
  + **Reversion** to original owner or their heirs, or
    - No express wording required b/c automatic since original owner has FS
  + To **remainderman** (named recipient)
    - Need express wording “remainder to C in fee simple”
    - Holds FS during the LE, but no right of possession, has **vested interest**

**2. By Statute** - rare

- dower & curtesy abolished in BC in 1925

- *WESA*: abolished surviving spouse’s life estate – has option to purchase

* Receive household furnishing (chattels usually associated w/ enjoyment by the spouses of the spousal home)

- *Family Law Act* – divorcing spouse can apply for order of temporary, exclusive right of occupying spousal home; doesn’t create interest

***Land (Spouse Protection) Act s4*** – if deceased spouse has all prop rights, other spouse can file an entry in a LTO against a homestead

* On death, surviving spouse gets life estate, held in trust by personal rep
  + Only subject to mortgage foreclosure and judgement creditors
* Can’t sell w/o spouse’s consent
* Spouse = married, common law, or at least 2 yr cohab in marriage like relationship, incl homo

***S4(2):*** despite any testamentary disposition or rule of law, subject only to foreclosure or payment of debts, a personal rep hols the homestead in trust for surviving spouse for life estate

**B. Rights of a Life Tenant**

**1. Occupation Use and Profits** – right to exclusive possession for lifetime, right to ordinary use, right to retain profits arising from its exploitation (income, not capital) eg. rent, live

**2. Transfer Inter Vivos** – right to transfer rights for the lifetime of original grantee (creates estate pur autre vie) \*nemo dat; may be given power to encroach to provide maintenance of prop [*Re Walker*]

**3. Devolution on Death** – reversion or remainder \*nemo dat

**C. Obligations of a Life Tenant to Those Entitled in Reversion or Remainder**

\*b/c has vested/future interests – right to receive property is substantially the same form as b4

\*applies to lease tenants & any future interests

**1. Waste**

**-** must refrain from engaging in waste & activities that prevent future use (controls exploitation by present owner injuring future owner)

- LT not liable for 3rd party acts or ameliorating waste (increases value of property)

a. **Permissive Waste** – passive conduct which permits decay

* LT not responsible unless expressly made so or negligent

b. **Voluntary Waste** – action by LT caused waste

* LT liable
* remedies: injunction, equitable damages
* nature of voluntary waste described as either or: (same results)
  + act of LT that causes permanent damage to land
  + act of LT that changes the nature of the land, for better or for worse
    - qualified by doctrine of ameliorating waste – not liable in damages, and usually injunction for changes that improve the land
  + *Burn* classified into: timber, mines & minerals, demolishing/altering buildings, changing the use

c. **Equitable Waste**

* Grantor can exonerate LT from voluntary waste (unimpeachable for waste) 🡪 **Court of Equity** might still restrain LT from making unconscionable use of the legal right to commit waste

***Law and Equity Act s11***: life estate without impeachment of waste does not confer on the life tenant a legal right to commit equitable waste, unless expressed in the instrument (unimpeachable for **legal and equitable waste**)

|  |
| --- |
| Vane v Lord Barnard(1716 UK) |
| Facts – Lord gave himself life estate of castle without impeachment of waste; remainder to son 🡪 unhappy w/ Vane’s wife 🡪 stripped the castle = waste  Holding: mandatory injunction to repair castle + prohibitory injunction to stop committing waste  Ratio – Cannot commit equitable waste even if unimpeachable for waste |

New Westminster (City) v Kennedy – used equitable waste to restrict owner whose house sold at tax sale from stripping the house during period of possession after sale

**2. Liabilty for Taxes, Insurance, etc**

\*LT has **fiduciary duty** to Reversioner/Remainderman to assume financial responsibilities of property:

* Property taxes
* Mortgage interest payments
* Operating expenses
* Minor upkeep & repairs

|  |
| --- |
| Mayo v Leitovski (1928 Man) |
| Facts – Leitovski had life estate, remainder to Mayo   * Daughter of life tenant bought property at tax sale 🡪 assigned interest to LT 🡪 effectively defeated remainder   Holding: Leitovski restored as life tenant b/c obtained FS by breaching fiduciary duties  Ratio – LT has fiduciary duties to Rem/Rev  Reasoning –  maxims: “equity looks on that as done which ought to have been done” & “equity imputes an intention to fulfil an obligation” 🡪 equity **presumes** that LT acquired the tax title with the intention to fulfill her obligation |

**D. Statutory Powers**

#### **CH11: CO-OWNERSHIP – CONCURRENT ESTATES**

**A. Types of Co-Ownership**

- sole ownership = “*in severalty*”; successive ownership eg. LE & Rev/Rem

- co-ownership/ concurrent = **unity of possession** - tenancy in common or joint tenancy; 2+ “tenants”

**1. Coparcenary – abolished**

**2. Tenancy by the Entireties – abolished**

Property Law Act s12

**3. Tenancy in Common**

- rights to occupy & possession whole property

\*unity of possession = all TiCs have identical rights to possession regardless of proportions owned

\*no unity of title (take under diff instruments), interest (hold diff estates/interests), or time (can arise at diff times)  may be present depending on intentions

- **distinct owners** w/ separate proportional **shares** (separate interests & can get separate CoT)

- each tenant can dispose interest by will/gift/sale w/o permission

- cannot exclude; can claim compensation

- if provide income, share & takes expenses proportionally, subject to contrary agreement eg. Taxes, mortgage

- create by any language of **“*shares*”** eg. To A, B and C in equal shares/equally/in proportion of…

- **assumed** on title

- termination by terminating unity of possession by **agreement** or court “**order of partition and sale**” [***Partition of Property Act***]; court fight b/c partition may reduce property value

* partition = physically divide by boundary line, separate titles
* sale (in place of partition) = sell property & divide proceeds proportionally; by buy out, agreement or court order

**4. Joint Tenancy**

- single estate (realty or personalty) w/ multiple owners treated in law as **one** owner

- own equally (one certificate of title, one property interest)

- cannot exclude; claim for damages

- **explicit** to create and on title “to A and B jointly”; not implied by co-owners + 4 unities

- **right of survivorship (*jus accrescendi*)** – acquisition by accretion, not by inheritance

* pass free of deceased’s debts (avoid creditors/judgements) b/c *nemo dat (*JT precedes)  creditor may apply to court for severance (difficult)  not form of security for debt
* pass automatically upon death  no probate; no delay of executor’s year, no will variation
* cannot pass by will (invalid)

**\*PITT unities of possession, interest, title, time** (so, very restrictive to create)

1. **unity of title** = take interest under same instrument eg. Will, transfer

* B,C,D in joint tenancy  C transfers (1/3) to E  severed unity of time & title  B&D in joint tenancy, C in tenancy in common

1. **unity of interest** = hold same interest eg. FS, LE

* A cannot create joint tenancy by leaving B life estate and C 10 years lease hold  during period of co-ownership, B&C are TiC

1. **unity of time** = interest arise at same time

\*required in inter vivos transfer in common law; not in transfers of uses (equity) or gifts by will

* 1 subject to contingency & 1 has vested interest  no U of time
  + Eg. A to B for life, then to C and to 1st child of D in fee simple  D has child E 2 yrs after transfer  C&E = TiC
* eg. Remainder to 2 children when 21yo  no U of time unless twins

- ***PLA s18***: JT can alienate interest unilaterally & secretly  severed into TiC

- termination by:

* sole surviving co-owner  dispose any way incl by will
* **severance** terminates JT & creates TiC – by transferring to 3rd party or themselves or if 1 JT puts mortgage, essentially treating it as sale of a separate “share”
* partition or sale by agreement or court order

**B. Creation of Concurrent Interests**

1. **Common law**: ~~presumption of JT if 4 unities present~~

**2. Equity**: presumption of TiC

* when interpreting doc, equity more willing to find intention to create TiC
* sometimes even though JT at law, Equity treat them as TiC
  + when 2+ ppl bought land as JT but paid unequal shares
  + commercial transactions (partnership), regardless of shares b/c Equity thought right of survivorship incompatible w/ partnership; prima facie TiC
  + lenders (mortgagees) prima facie JT; if one die, surviving mortgagee hold the legal title on trust for deceased’s estate and survivor

3. **Statute** – presumption of TiC, unless explicitly JT

***PLA s11 Tenancy in common***

(2) if transferred in FS to 2 or more persons, they are TiC unless contrary intention on instrument

(3) if interests of TiC not on instrument, presumed to be equal

***Partnership Act s25 Partnership property treated as personalty***

Partnership property is treated as personal or movable b/w the partners, not real or heritable estate, unless contrary intention

4. **Transfer to Self and Co-Ownership**

- impossible in common law

***PLA s18 Rules for transfer and ownership to oneself***

1. JT can transfer his/her interest in land to themselves
2. Trustee or personal rep can transfer to themselves within their capacity
3. Transfer by JT to themselves effectively severes joint tenancy
4. …
5. Owner in FS/registered lease/sublease may grant to themselves an easement or restrictive covenant over land they own for the benefit of other land they own
6. …
7. Common ownership and possession of dominant & servient tenements doesn’t extinguish easement
8. Common ownership and possession of the burdened & benefited land doesn’t extinguish restrictive covenant

**Housing Co-operatives vs Strata Titles** (separate title; TiC for common property)

* corporation is registered owner of building & land  **members of co-op** own shares in corporation & leaseholds in individual units
* co-op members elect board of directors to govern co-op’s affairs (approve budget, set policy)
* Board hires staff to manage day-to-day work
* ***Robb v Robb***: individual units in housing co-ops are personal property, not realty \*PLA presumption of TiC does NOT apply

###### **CH3: ABORIGINAL TITLE**

**1. Indian Reserves – *Indian Act***

* Can’t be sold
* Canada holds title (fiduciary) for use & benefit of Bands
* Must consult fed gov’t for use of reserve land eg. developers seek LT lease
* Not subject to provincial laws

***2.* Treaty Settlement Lands**

* Bands get FS through treaty negotiations w/ fed & prov govts
  + Claim of AT 🡪 negotiation 🡪 gets land
* fed & prov govt owe fiduciary duties to Bands (like trustees) 🡪 weird b/c fiduciary negotiating w/ beneficiaries
* land can be **brought under Torrens** 
  + can be sold
  + registrable under LTA as private ownership
* subject to provincial laws
* right to land protected by ***s35***

**3. Aboriginal Title Lands**

* band claims from prior occupation (before 1846) – had exclusive occupation b4 European colonization
* Degamuukw, 1997: can be recognized, but failed to prove (new trial never happened)
* Tsilhot’in, 2014: SCC recognized AT to land in BC!
* **Sui generis** b/c doesn’t correspond to CL property rights (combination of AL & CL)
  + inalienable

**Aboriginal Titles and Aboriginal Rights**

* AT = a right to the land itself = right to exclusive use & occupation 🡪 high end of spectrum🡪 difficult to establish [Delgamuukw]
* AR = rights of use & occupation 🡪 low end of spectrum 🡪 easier to establish
  + Doesn’t necessarily confer AT
  + Rights to follow practices, customs, traditions & conduct activities on specific sites eg. hunting, fishing
  + Integral to the distinctive aboriginal culture of claimants
* Protected by **s35**: “existing aboriginal and treaty rights are recognized and affirmed”
  + The only property right constitutionally protected
  + Does not create AR or AT – just recognize “existing” rights and protect it

**Extinguishment** [Williams]

* Provinces can’t extinguish AR or AT
* Federal may extinguish by
  + Consent of AT holders, or
  + Justify the infringement by “substantial & compelling public objectives” [Mitchell]
    1. Duty to consult & accommodate concerns eg. fair compensation
* Duty to consult = Crown conduct + potential to adversely impact rights + existence of potential or established A or TR (as long as Crown expects a claim)
  + 1. Compelling & substantial objectives
    2. Consistent w/ Crown’s fiduciary obligation to the Bands
* Should act in best interest of current & future Bands
* High standard of conduct

**Sources of AT**

\*prior (exclusive) occupation before assertion of sovereignty (1846 – Treaty of Oregon) = proof of possession in law

\*relationship b/w CL & pre-existing system of AL

|  |  |
| --- | --- |
| **Fee Simple** | **Aboriginal Title** |
| Derived from Crown (doctrine of estates)  “downstream” | **Precedes** Crown ownership (1846)  “upstream”  - arises from prior occupation b4 assertion of sovereignty  - runs from time of occupation, through Crown, to grantees automatically  **\*\*\*sui generis** 🡪 AT beyond the scope of Torrens (intended to deal w/ FS lands) |
| Marketable – right of alienation, facilitated by Torrens | **Inalienable** except to Federal Crown  - may surrender/sell to Crown 🡪 convert to FS  - Feds can get leasehold to develop land |
| Ownership & possession are individual rights  - can occupy, lease, etc | Ownership & possession **communal and collective** = inherent limit  - decision made by community  - no private ownership  - must consider future interests of band members |
| Freedom of use | **Restricted use**  - current occupants can’t use land in a way that’s disadvantageous to future users  - rights of use not frozen to strictly traditional uses 🡪 but, new use is prohibited if irreconcilable w/ nature of the claimed attachment to the land |
| Registrable on title | **Not registrable** on title  - b/c title not derived from Crown and not in Torrens  - can’t claim caveat/CPL  - long term leases not protected |

**Delgamuukw v BC**

**Facts**

* sought court advice for treaty negotiation
* claims of AT & self government

**1. Recognized AT**

\*AT is a right in land = right to exclusive use & occupation of land

* proprietary interest, not just right to hunt, etc
* confers formal ownership

Spectrum of rights in land:

AR 🡪 “site-specific” 🡪 AT (full ownership)

- *Delgamuukw*: claims of AT are specific to certain areas (small defined areas of dense pop’n)

* limited areas where using and occupying the land

- *Williams*: AT can be “territorial”, not just localized

* more expansive

\*CL maxims apply: **1st in time, 1st in right & nemo dat**

* AT predates Crown Title (🡪 Crown Grant 🡪 Grantee)
* If successfully claimed 🡪 nemo dat means Crown has no land
* AT “runs with the land” = automatically binds successors to Crown title w/o assignment
* So, all private ownership is subject to claim of AT
  + Usually thru treaty negotiations – compensation for releasing claims of AT

**2. Admissibility of Oral History**

- to establish occupation, presented evidence thru oral tradition/history (myths, songs surrounding their right of occupation over land, totem poles)

* traditional method of proof in common law system requires expert evidence (sociologist, archaeologists)
  + hear-say rule (exclusionary rule of evidence) – oral & written statements inadmissible b/c unreliable, not under oath, can’t see demeanour of witness
* shouldn’t apply CL rules of proof b/c dismissive of AL (no written tradition in FN culture)
* SCC didn’t explain how to weigh such evidence =(

**3. Test for Proof of AT**

1) prior occupation

2) continuity from 1846

* If descendant’s present occupation relied on in claim
* “substantial maintenance of the connection”
* Not strict compliance b/c various reasons may stop continuity

3) exclusivity

* Original occupants exclusively occupied = had ability to exclude others at sovereignty
* Problem: overlapping claims b/w bands

**4. Established a Framework for Justifiable Govt Infringement of AR**

- justified if (1) compelling & substantial legislative objective (2) gov’t in fiduciarly relationship w/ bands

- now, Williams standard 🡪 high standard requiring consent 🡪 AT is virtually absolute

**5. Encouraged Settlement by Treaty**

* Use treaty negotiations, not litigation to:
  + Establish AT (Williams still did)
  + Reconcile the 2 legal systems

**Mitchell v MNR, 2001**

* Case on AR, not AT

**Facts**

* Disputed govt from collecting import duties (success in lower courts, failed in SCC)
* Claim AR & treaty rights of trade across St Lawrence, so exempt from customs duty

Elaborated evidentiary guidelines from Delgamuukw 🡪 applicable to AT?

1. **admissibility** – question of law by judge

1. Useful – necessary for cultural identity – no other way to prove existence of AR
2. Reasonably reliable
3. Judicial discretion to exclude if prejudice > probative value

* Exclude despite useful & reliable if prejudicial (inflammatory, not probative) 🡪 may be misused by jury

2. **weight** – question of fact by jury (or performed by judge)

* “general principles of common sense” – what ordinary person thinks
* “equal & due treatment” – not unduly dismissive
* Appeal courts give deference to trial judge’s findings of fact

**Proof of AR**

1. ancestral practice, tradition or custom when Crown asserted sovereignty

2. integral to the distinctive culture

3. reasonable continuity

**Analysis**

* Purposes of trade NOT proved to be defining feature of the culture vital to collective identity (just incidental trading)
* Crown has fiduciary duty to treat AP “fairly & honourably, and to protect them form exploitation” VS
* Binnie J: right to bring goods across border interfered w/ Canada’s sovereignty (should have control over borders) = Constitutional limitation on s35
  + AR & AT can’t conflict w/ sovereignty 🡪 sovereignty prevails
* Tribunal also rejected Mitchell b/c non-discriminatory taxes on imported goods is reasonably if apply to all persons 🡪 doesn’t infringe cultural rights

**R v Bernard, 2005/ R v Marshall**

* Charged for removing timber from Crown land w/o license under Forestry Act [Marshall]
* Charged w/ unlawful possession of spruce logs [Bernard]
* Claim AT – don’t need provincial authorization b/c prov laws inapplicable to AT lands

**Holding**: AT not proven

* Rights of cutting & removing timber doesn’t confer ownership of land (can be given in common law by profit a pendre) \*need prior exclusive physical occupation
* SCC looked for site-specific areas
* Must consider CL & AL perspectives
* Failed b/c didn’t give sufficient distinction b/w right to use someone’s land & possession of land (confers title)

**William v BC (Tsilhqot’in)**

\*1st case that recognizes AT – successfully established title

\*territorial AT – travelling across for seasonal purposes could establish AT 🡪 just need regular use & exclusive control

**Facts**

* Claimed AT to Crown land – so province can’t regulate forestry
* Distinguished Marshall & Bernard