**Property CAN**

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Sale of Land

# Contract of purchase and sale

Enforceability requirements (make xfer enforceable against vendor):  
Law & Equity Act 59(3) contract must be written and signed:

1. In **writing & signed** with “reasonable indication of subject matter” (incl. **3 Ps:** property, price, and parties)Law & Equity Act 59(3a) OR
2. **Part performance: even if not in writing still enforceable** Law & Equity Act 59(3b)In equity – enforces oral agreement to sale of land indicates that a contract has been made (e.g. payment/acceptance of payment s[4] OR 59(3) [b] )  
   🡪 MAXIM: **Under torrens system – equity can apply**
3. **Reliance:** Party making charge has **relied** on it & only equitable resolution (w/regard to both parties’ interests) is to enforce Law and Equity Act 59(3c)

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

“Where equities are equal, first in time prevails”

Can include:

1. **Deposit** (non-refundable; deducted from purchase price)
2. **Liquidated damages clause** (damages in excess of deposit for breach)
3. **Conditions**: inspection, solicitor’s approval, financing, etc.
4. Closing date
   * May be electronically written and signed
   * Registrable form must be used, standard short forms that simplify the transactions, don’t require seals
   * Terms of art (e.g. “grant” or “contract of purchase or sale”) [PLA 15] and sealing are not necessary under Torrens system [PLA 16]
   * **Transfer is operative ON REGISTRATION** – LTA ss 20(1) 22 (previously in common law upon delivery and acceptance).
   * Common law makes transaction enforceable in equity until registration is complete. Registration is a formality, equity can give effect on a transaction in the meantime – contrary to LTA ss20(1).
   * Once registered has effect of a deed and effectively passes the legal title. Passes the equitable interest in the property to purchaser.

🡪 MAXIM: Until registered, an unregistered interest creates a valid interest in equity for the purchaser while the vendor has the legal title. When registered it is legally passed to purchaser.

# Completion (“closing”)

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

# Registration of transfer (+ mortgage to finance purchase)

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

Assurance Fund

* Under Torrens system – state guarantees fee simple holder is holder of title 297
* Financial mechanism of compensation backing up guarantee – Assurance Fund
* Prior to 2005 it was provided by province, since 2005 now operates by a Crown Corp in Land Title Survey Authority Assurance Fund
* Premium included in registration fees

# Torrens Principles:

## Mirror principle

* Register is reliable, guaranteed by LTSA 2005 (formerly the province)
* The certificate of title mirrors accurately and completely the state of the title and interests – LTA s 29;
* note exceptions in 23(2) charges that might affect the title,
* 50 and 55-58 mineral rights etc protected by Crown
* If something isn’t on the title, don’t worry about it
* LTA 23(2) Limitations to indefeasible title: zoning, public utilities easements, agricultural land reserves, Crown Grant LTA 23(2)(a)
* Exceptions:
* Surrey v Dukart: register of instruments, not interests

## Curtain principle

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

## Insurance principle

* An **assurance fund** compensates fee simple holders, registered titles are guaranteed once registered
* Fee simple title cannot be overturned as long as owner is a BFPFVw/oN who gave consideration if there’s an accident in the Torrens System –
* Compensation is provided for fraud and mistake
* An innocent victim can apply to recover from the insurance fund

**Who can make a claim?** (LTA 297)

* Current or former registered fee simple holders only – ASSURANCE FUND INCLUDED WITH REGISTRATION OF TITLE
* Must have acquired the title in good faith for valuable consideration

**What is covered?**

LTA, ss 294.1-294.9 FIND WHAT THIS IS REFERENCING

* Loss of fee simple
* Cost (not value) of land (**excluding** buildings & other improvements) LTA 296(2)
* Title fraud by third party or registrar’s wrongful act/fault ss 296 (2)(a)(ii)
* Fault (mistake) of the registrar (or staff) s 298

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

1. A person who is deprived of an estate or interest in land
2. Because of the conclusiveness of the register, AND

* I.e., if you would have been able to re-acquire land under common law, but due to immediate indefeasibility, it is impossible to do so.
* E.g. McCaig v Reys – no claim because the loss would have happened even without Torrens (option lost because title sold to BFP)

1. Due to fraudulent/wrongful registration of someone other than the owner, AND
2. Who is unable to bring an action for

* Possession/recovery of the land, OR
* Rectification of the register (Registrar can only rectify minor mistakes, NOT allocation title)

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

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

* Because registrar cannot rectify the error by registering the correct party if they had made an error and registered the wrong party, correct party who incurs loss because of error must make a claim against the Assurance Fund LTA 296(2)(b)
* P must bring claim against person whose wrongful act deprived them of land.
* Must join the minister as a nominal defendant in the suit.
* Minister may use any/all defences to protect the fund.
* If person liable for damages is dead/not found in BC, claimant may proceed against minister.
* The minister must pay the balance out of the assurance fund on the account of person liable if:
  + Final judgment in proceedings is given, and
  + The court certifies that the plaintiff has taken all reasonable steps to recover the amount of judgment from the person liable, but has been unable to do so (in part or in whole).

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

* 3 years after the deprivation is discovered.

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

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

**Who cannot make a claim?** (LTA 303) **Exceptions / Limitations**

1. Types of owners not covered:
2. Undersurface rights owners
3. Equitable mortgagee (Royal Bank; now in statute: 303(a)(ii) equitable mortgagee by deposit of duplicate certificate of title have no right of recovery under assurance fund)
4. Types of losses not covered: (COULD BE COVERED BY PRIVATE INSURANCE)
5. Breach of trust (trust beneficiaries not covered by fund) (303(b)(i))
6. Wrong description of parcel boundaries (303(b)(ii))
7. Improper use of corporate seal/signing authority
8. Dissolution of a corporation
9. Issue of a provisional certificate of title
10. Notice or knowledge + failure to take preventive action 303(3) – file a caveat asap
11. Claimants fraud or contributory negligence 303(f)
12. Mistakes in Crown Grant (e.g. multiple grants were issued for the same piece of land)
13. Shortage in air volume
14. If the plaintiff knew that the registrar was about to alter title improperly, unless the P took appropriate steps to prevent the error from occurring
15. If the P contributed to the loss/damage/deprivation

* Volunteer/donor (LTA s 297)
* Charge holders (LTA s 297)
* Mortgagees (Gill v Bucholtz)

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| McCaig v Reys 1978 | |
| **Facts** | * South Transport agreed to sell property to Reys with option to a parcel of the land to be sold to McCaig. McCaig did not register the option. Reys into sub-agreement to sell land to Rutland, owned by Jerome. Rutland registers the sub-sub-agreement to Jabin, with Jerome failing to disclose M’s option. Jabin pays off the property and is a BFPw/oN and registered title, with no option registered to M. * McCaig then loses the option to purchase the parcel of land due to Jerome’s fraud. * McCaig makes claim that statute took away his right to register so should have access to Assurance Fund. * **EXAM QUESTION - Jerome is the agent, Rutland is the principle – there is a relationship between them – knowledge to the agent is knowledge to the principle. Fraud of an agent is fraud by the principle. VICARIOUS LIABILITY** |
| **Issues** | Can McCaig recover from the ASSURANCE fund? |
| **Decision** | No, because his claim would have failed in common law. |
| **Reasons** | Test – LTA 296 In order to succeed against the Assurance Fund, a claimant must show:   1. That he has been deprived of land or an estate or interest therein 2. The loss was occasioned as a result of the operation of the statute (the *Land Registry Act*) 3. That it was occasioned by fraud, misrepresentation, or some wrongful act in the registration of any other person as owner of the land or interest in land 4. He is barred from bringing an action for rectification of the register  * He cannot bring claim because of 2: he would have suffered the loss if the common law governed (because the BFP takes precedence over unregistered interests). * The BFPFVw/oN had no notice of prior equitable interests and is protected in equity. * Legal rights, such as an easement, are enforceable even without notice, however this does not apply to equitable interests. * Legal title always trumps equitable title at common law and so will not be compensated. * Note that now, statute bars recovery for interests less than fee simple. * McCaig could have sued Reys for breach of the option agreement |
| **Ratio** | * **Loss must be occasioned by operation of the register.** * **303(b)(f) P failed to register but didn’t, their loss is their own bloody fault!** |

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

Registered Interests

# Charges

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

Charge is a life estate, equitable interest, easement, includes “encumbrances” caveat, CPL, mortgage, money judgment

### Effect of Registration

* LTA s 26: **Charges “deemed” valid. Interpreted in Credit Foncier (SHEPPARD’S DADS CASE?!): this creates a rebuttable presumption that the owner of the charge is entitled to an interest in property.**
  + Charge is scrutinized, but not guaranteed by LTO.
  + Registration does not confer indefeasibility. Can be challenged in court LTA s 26(2)
  + ***Nemo dat*** applies to anyone who is taking the charge.
  + Registered charge may be defeated by past defects.
* Notation on title is not guaranteed to be accurate. Only the content of the instrument to which notation refers is relevant (Dukart v Surrey)
* Gives notice of existence of contents of interests creating a charge to every person dealing with the title to the land (LTA s 27)

### Charge obtained by fraud: defeasible: LTA s 25.1 added in 2005 and retroactive

* Nemo dat applies: registration of void instruments do not confer any interest on charge-holders, even if:
  + They were not party to fraud
  + They relied to their detriment on the register 🡪 exception to mirror principle
* No compensation to bona fide charge holder
* **A BFPFVw/oN gets immediate indefeasibility upon registration of title**
* **Prior to 2005 you would have gotten “deferred indefeasibility”** – original owner had opportunity to get title back from purchaser – court would allow nemo dat, file a caveat, start a CPL and get the title back. the indefeasibility is deferred until a new bona fide purchaser arrives.
* E.g. Gill v Bucholtz: mortgage obtained by fraud struck off the title

**Registered charges are binding on purchasers of title – unregistered charges are NOT binding.**

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

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

**Ranking of Charges**

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

**Assignment vs. Novation**

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

### Procedure for registering charges: LTA 197

1. Registration = acceptance + recording LTA 197(1)
2. Can be officially recorded in the “register” without being on the title itself (in the files of the LTO) Dukart
3. Registrar must register charge when satisfied by inspection of instrument that applicant is entitled to it.
4. May refuse if:
   1. Good safe-holding and marketable title is not established;
   2. The charge is not registrable under the Act.
5. What is registered is an INSTRUMENT not an INTEREST LTA s 20(1)
   1. The interests are created by the instruments
   2. Rebuttable presumption of validity

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

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

# Trusts

* In BC trusts are registered per LTA s 180
* Optional, voluntary
* Protects beneficiaries and notice to purchasers
* If trust not registered, beneficial interest of beneficiaries extinguished in favour of interest of BFPFVw/oN

# Builder’s Lien

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

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| Carr v Rayward (1955 BC) |
| **Facts**:  Lien filed for unpaid work done for previous RO. Legit?  Carr took a contract to do plumbing and filed a mechanics’ lien before the completion of the work, but after the land had been sold to Bell (D), and a certificate of indefeasible title issued in his name.   * Carr: Unpaid plumber * Rayward (RO#1) contracts Carr for plumbing, doesn’t pay * Rayward sells property to Bell (RO #2)   **Decision: For Carr**  **Issue**: Can a mechanics’ lien be effective against the lands if not filed in the land registry office until after the owner for whom the work was done and material supplied has sold the lands and the purchaser has obtained a certificate of title from the land registry office showing him as owner free of encumbrances?  **Holding**: **Carr is entitled to a mechanics’ lien and personal judgment against Rayward.**  **Ratio**:   * **Mechanics liens can be registered after title has changed hands up to 45 days.**  **Note**: A way to avoid this problem is to postpone the closing and search the title to see if any lien has been filed after 45 days have passed. **Bell can pursue an action against Rayward.**  **Carr must file a CPL on Bell’s title when he starts the action.** |

# Caveat

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

Purposes of lodging caveat:

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

### Effect of Caveat LTA s 288 (1)

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

# Certificate of Pending Litigation

### Registration of CPL (LTA 215)

* Can be filed by claiming a registrable estate or interest in land 215(1)(a) or another enactment 215(1)(b)
* Gives notice to the world of litigation 215(3)
* An estate or interest in land 215(1)(a)
* Another enactment 215(1)(b)
* Gives you a fee simple until litigation is complete
* If starting with caveat, must be filed while caveat still effective
* Can be filed by claiming a registrable estate or interest in land
* Registration done in same manner as charges.
* Must file supporting documents.
* Must mail a copy of CPL to owner against whose title CPL has been registered

### Effect of registered CPL (LTA 216)

* Prohibits registration of anything while CPL is on title (216(1)), except:
* Lodging a caveat (216(2))
* Indefeasible title or charge if subject to outcome of litigation (216(2)(a))
* Assignment of a charge, if registered before CPL was registered (216(2)(d))
* Sublease, if lease was registered before CPL (216(2)(e))
* A certificate of judgment, order, notice, claim of builders lien, CPL or any other involuntary charge (216(2)(f))
* NB: Anything registered when CPL is in effect may be subject to outcome of litigation. (216(3)(b))

### Effect of CPL if prior application to register (ie. Land title transfer/sale) is pending (LTA 217)

* Applications received prior to CPL may be registered (217(1))
* If prior applicant is party to CPL litigation, title will be subject to outcome of CPL (217(2)(a))
* If prior applicant is not party to CPL litigation, registrar may make an entry in register to register indefeasible title and CPL will be cancelled – registration will be completed in favour of purchaser for BFPVw/oN (217(2)(b))

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

# Money Judgments

### Who can obtain a money judgment COEA 86(3)(a)

* Comes from a monetary claim (contract, debt, tort, personal injury claim, unsecured loan)
* Judgment makes the creditor an unsecured creditor – now called a judgment creditor
* Judgment creditor can search titles to see if the judgment debtor has an interest in land in the province, and if they do, they can register the money judgment as a charge on the title
* NB: applies to money judgments only. Judgments which create an interest in land will be reflected by direct alteration of title.
* Money judgment lasts 10 years
* Registration of money judgment only lasts two years, is renewable. You would lose your place in priority queue against other charges if you let it expired LTA 28 priority of registered charges

### Effect of registration

* Allows creditor to obtain a writ of seizure and sale if the creditor wishes
* Unsecured claim (can’t enforce a security interest in the property as a mortgagor could)
* Registration of judgment forms a lien and link to the land of the judgment debtor in the same manner as if it had been expressly agreed to by the debtor
  + Registered and unregistered interests that rank ahead of the judgment will limit the amount that the creditor can get out of the property
  + If, e.g., the property is subject to a mortgage (whether registered or not), the judgment creditor can only sell the interest of the debtor in the asset. 🡪 COEA S 86(3)(c)

### Court Order Enforcement Act (COEA s 86 (3))

* Once registered, the judgment creditor holds a charge on the land of the judgment debtor.
* *Nemo dat* you can’t sell property that isn’t yours! applies:
  + Judgment can be enforced only to the extent of the judgment debtor’s interest in the land – judgment creditor is not a BFPFVw/oN (86(3)(a))
  + If the registered owner is a trustee, judgment can only be executed to the extent of the beneficiary’s debt and interest (86(3)(b))
  + If BFPFVWON purchases the title/acquires an interest in the land before judgment is registered on the property, BFP’s interest takes precedence (even if BFP has not registered) (86(3)(c))
* **If a judgment is registered after a sale is agreed to, but before the sale closes, purchaser takes property free of creditor’s interest** (Martin Commercial Fueling)
* **FAILURE TO REGISTER WOULD NOT AFFECT THE PURCHASER IN THIS SITUATION**

Martin Commercial Fueling Inc v Virtanent (1997) 31 BCLR –

* Debtor sold a property to Virtanan, after the agreement to purchase, Martin Commercial Fueling registers a judgment against the property but can only collect on what the debtor’s interest in the property was.
* The debtor had a mortgage on the property that ate up the whole amount of the debtor’s interest. Martin Commercial Fueling only ended up getting $5,000.
* Applies 86(3) that shows from the time of registration of a judgment it forms a lien on the charge of the land to the debtors interest in the land.
* Virtanan had a binding agreement to buy the property from the debtor before the judgment was registered, so Virtanan got the title. Court ordered to remove the money judgment from the title.

# Mortgages

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

# Equitable Mortgages

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

Unregistered Interests

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

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

### Effect of notice of unregistered interest (LTA 29(2))

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

### Judgments

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

**Before Torrens:**

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

### Summary of Notice of Unregistered Interests

# Competing Interest in land

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| **Common law rules** | | **LTA rules** | **Remedies** |
| Legal | Legal | First in time prevails |  |
| Legal | Equitable | Registered takes free of unregistered interests |  |
| Equiable | Legal | Registered takes free of unregistered interests, notice not relevant |  |
| Equitable | Equitable | Not resolved by LTA |  |

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

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| Martin Commercial Feuling v Virtanen | |
| **Facts** | **Judgement registered after sale agreement, but before sale closes**.   * On October 10, 1991, a registered vendor agreed to sell to the Virtanen. * On October 25,1991, a judgment creditor, Martin, registered a judgment against the vendor’s interest. * On November 6, 1991, the sale closed. * Virtanen registered title. Received title subject to judgment |
| **Issues** | Is the purchaser’s interest subject to the judgment. |
| **Decision** | NO, the purchaser’s interest is not subject to the judgment. |
| **Reasons** | * Applying s 20(1), the phrase “except against the person making it,” meant the debtor, as registered owner, was personally bound to perform the unregistered contract of sale, despite lack of registration. * The binding obligation made by the debtor, or “equity,” preceded registration of the judgment. * The unregistered purchaser had an *in personam* claim against the vendor arising on the making of the binding agreement. * **Registration of a judgment creditor means the creditor takes its ranking on the register “subject to the equities”**, i.e. the creditor can only seize and sell the debtor’s interest remaining after taking into consideration the debtor’s unregistered personal obligations indirectly affecting title. |
| **Ratio** | * If a judgment is registered after agreement for sale, but before close of sale, purchaser gets title free of judgment (unless it is a scheme to defeat judgment) |

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

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| International Paper v Top-Line | |
| **Facts** | * International Paper Industries agreed to sell building to Top Line Industries. * The building would be moved to Top Line’s property, and International Paper would lease a portion of that property, including the building * The parties prepared their own lease for a term of 51 months subject to a right of renewal. * No mention was made of whether the lease was to be registered. * Relations broke down, several litigations in court. Top Line decided to get out of contract. * Top Line argued that the lease unenforceable or void because they did not get formal approval for subdivision and did not register the lease s 73 of the *LTA*.   ***LTA*, s 73**   1. Except on compliance with this Part, no person shall subdivide land into smaller parcels than those of which he is the owner for the purpose of (a) transferring it; or (b) leasing it, or agreeing to lease it for a life, or for a term exceeding three years. 2. No instrument executed by a person in contravention of this section confers on the party claiming under it a right to registration of the instrument or a part of it. |
| **Issues** | What is the effect of s 73 on the validity of proprietary and personal rights, if any, arising under a lease agreement entered into by parties who were unaware of the provision? |
| **Decision** | For Top Line – agreement unenforceable |
| **Reasons** | The written but unregistered agreement to lease part of a larger parcel of vacant land illegally bypassed s 73(1), zoning imposed by local government, and registration required by the Torrens system.  Note: Critics of this decision persuaded the Legislative Assembly of BC to reverse it. The result was enactment of s 73.1 (which restores the possibility of *in personam* enforcement of leases of portions of raw land, despite the lack of subdivision), but it has also been criticized as failing to solve the problem (the BCCA interpreted s 73.1 as having prospective effect only; *Top Line* applies to invalidate pre-2007 transactions as illegal and unenforceable).  Under s 73.1, only initial parties to the lease of a portion of a larger parcel of vacant land can enforce it against each other even though the lease is unregistered and was not preceded by subdivision. |
| **Ratio** | **An unregistered lease of part of a vacant, or undeveloped, lot is contrary to public policy and unenforceable. Section 73 requires the formality of subdivision as a matter of public policy.**  **\*\* Now overruled by s 7 – they are enforceable** |

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| Dukart v Surrey \* trust instrument on title (an easement registered under the name “trust”) mistakenly removed by LTO staff | |
| **Facts** | * The appellant is the registered owner of Lot 38, Plan 2200, being a lot fronting on the Foreshore Reserves. The respondent corporation, which had acquired the Foreshore Reserves by tax sales in 1949 and 1954, commenced the construction thereon of a large comfort station in July 1973. * The deed also included a covenant by the grantee in favour of the grantor developer and “its successors and assigns” and also “as a separate covenant with every owner or owners for the time being of any part of the said [development]” in which is set out a series of restrictive covenants applicable to the grantee’s lot. * Land on Crescent Beach in front of Dukarts’ property got into hands of District of Surrey by tax sale   + Land owned privately, in a trust, owners didn’t pay taxes   + Property sold in tax sale to pay three years outstanding taxes   + Easement of a local development was registered to have access to the beach * Surrey took the title from the owner by statutory rights of lien and took title * Purchaser got title clear of all encumberances, rights, titles, and interests. Land Title Office forgot to read the exception of “any easement registered on the land” that still exists. * Ultimately used it to build a “comfort station” * Dukarts looked into the history of the title, found restrictive covenant providing them with access to Boundary Bay (“foreshore reserve”). Contained within instrument described as trust on title. * Dukarts argue that the toilet violates restrictive covenant.   + HOWEVER, purchaser of title in a tax sale takes it free of a trust. So when Surrey obtained the title, the reference to holding the property in trust was wiped off the title. |
| **Issues** | **Was the easement validly removed from title? NO** |
| **Decision** | **For Dukarts: easement should not have been removed from title.** |
| **Reasons** | * **SCC says that although the title describes the instrument as a trust, the instrument actually contained within it an easement providing free access to the beach/Boundary Bay.** * **Furthermore, it expressly says in the statute regarding tax sale that all charges are removed from a title, except for any easements registered against the land and any restrictive covenants registered against the land. So it was a mistake of the LTO staff to remove the trust from the** * Surrey says that it must be registered on the title, which it wasn’t once the trust notation was removed from the title. SCC doesn’t accept this argument: says it was taken off by mistake, can be corrected. * Torrens purists will say that this is forcing Surrey to go beyond the title. This is true, but fairness demands that we go behind the title and respect the easement. * Certificate did not accurately reflect the registered instrument * Surrey was not a purchaser, so not BFPFVWON. If they were, result would be opposite. |
| **Ratio** | * Register of instruments; notation on title not guaranteed to be correct. |

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| Credit Foncier v Bennett | |
| **Facts** | **Forged mortgage assigned to BFP. BFP tries to foreclose. Result?**   * The Bennetts (Ds) were registered in fee simple. * A mortgage for $7,400 and interest was registered against the lands, purportedly from the Bennetts to Todd Investments. * Assignee paid $5,500 for it * Bennetts didn’t know about the mortgage or assignment * Allen, an officer of Todd Investments, had forged that mortgage. * Allen assigned mortgage from Todd Investments to Stuart. * Stuart then assigned the mortgage to Credit Foncier (P). * Before completion of the purchase, Credit Foncier had its solicitors search the title and found the mortgage registered. Credit Foncier wrote to Bennett notifying him of the assignment and requesting an acknowledgment of the amount owing; Bennett did not receive the letter. * Credit Foncier sent a second letter, but the Bennetts ignored it thinking it a mistake. Credit Foncier brought action against the Bennetts for foreclosure. |
| **Issues** | Is Credit Foncier’s mortgage valid, given that it was created by fraud? |
| **Decision** | No |
| **Reasons** | * Registration of a charge only creates a rebuttable presumption of validity. In this case, presumption rebutted. * A mortgage is only security for the amount advanced. In this case, no $ advanced. |
| **Ratio** | * **Registration does not guarantee the validity of a charge. Now codified in s 25.1** * *Nemo dat* applies to anything less than the fee simple * Anything less than a fee simple is presumed to be valid, but that presumption is rebuttable (can adduce evidence to show fraud or other defect in the mortgage) * A mortgage is only security for the amount advanced. * An assignment of mortgage is a document that indicates that a mortgage has been transferred from the original lender or borrower to a third party. Assignments ofmortgage are more commonly seen when lenders sell mortgages to other lenders. |

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

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| Carr v Rayward (1955 BC) |
| Facts:  Lien filed for unpaid work done for previous RO. Legit?  Carr took a contract to do plumbing and filed a mechanics’ lien before the completion of the work, but after the land had been sold to Bell (D), and a certificate of indefeasible title issued in his name.   * Carr: Unpaid plumber * Rayward (RO#1) contracts Carr for plumbing, doesn’t pay * Rayward sells property to Bell (RO #2)   Decision: For Carr  Issue: Can a mechanics’ lien be effective against the lands if not filed in the land registry office until after the owner for whom the work was done and material supplied has sold the lands and the purchaser has obtained a certificate of title from the land registry office showing him as owner free of encumbrances?  Holding: Carr is entitled to a mechanics’ lien and personal judgment against Rayward.  Ratio:   * Mechanics liens can be registered after title has changed hands.  Note: A way to avoid this problem is to postpone the closing and search the title to see if any lien has been filed after 45 days have passed. **Bell can pursue an action against Rayward.**  **Carr must file a CPL on Bell’s title when he starts the action.** |

Applications to Register

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

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

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

Applications received prior to CPL may be registered (1)

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

🡪 About protecting the purchaser who has relied on the register

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

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

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

Fee Simple

# Creation of Fee Simple

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

**Words of purchase**: “To B”

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

# Types of Fee Simple:

### Absolute

* 1. Bundle of rights: occupy and use, build, grant easements, mortgage, exclude others, sell, give away, rent or lease, license, devise by will, mine, drill, farm, grant covenant
  2. no conditions precedent/subsequent; perpetual, don’t have to wait for possession)

### Life Estate

### Determinable fee simple:

1. Might last forever, but might be cut short by an unpredictable event
2. If condition comes to pass, property automatically reverts or passes
3. Chronometric language: “while,” “during,” “as long as,” “until”
4. You have the right to alienate the property

### Fee simple on condition subsequent:

1. If condition comes to pass, reversionary interest holder has the right of reentry, but it is not automatic.
2. Conditional language: “provided that,” “on condition that” “but if” “if that happens”

NB: conditional and determinable fee simple cannot be tied to one of the incidents of the fee simple (e.g. sale of property) or something that will definitely happen (e.g. death)

# Registration of Fee Simple

**We get indefeasibility by registration of the title**

**Pre-Torrens chain of transactions -** Under common law, *nemo dat* prevailed, so a purchaser couldn’t register a title if there were defects in the title – *nemo dat* protected the owner. Fraudster cannot pass a title b/c it was defective so owner would get property back from a fraudulent seller.

**In the Torrens system, you get title by registration and a certificate of indefeasible title** – Torrens system protects the purchaser. Innocent owner would lose a title to an innocent purchaser in the case of fraud. Innocent owner would have a claim in the assurance fund to get remedy for loss. Focus is on the reliability and integrity of the register**. Creelman**

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| Creelman \*\* | |
| **Facts** | * Bought property from *Hudson Bay Insurance*, but then value dropped and wanted out of the deal * *Hudson Bay* brought action against Creelman for breach of contract * Creelman argued *HBI’s* owning the property itself was ultra vires - *HBI* wasn’t supposed to have acquired the land in the first place b/c it bought it for a purpose that was **beyond its powers** 🡪 so Creelman argued the deal was void. |
| **Issues** |  |
| **Decision** |  |
| **Reasons** | * Title of owner if indefeasible and cannot be defeated. So *HBI* was a rightful owner BFPFVw/oN * Therefore Creelman could not refuse to go through with the purchase on their argument as HBI had an indefeasible title. * Principle of *nemo dat* (can’t sell what you don’t own) does not apply to stop the title from being passed to HBI from previous vendor * The “defect” was not registered when *HBI* bought the property so there is no defect now 🡪 Creelman free to purchase * Appeal dismissed |
| **Ratio** |  |

**Crown grant must be registered**

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

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

**Procedure for filing application**

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

**The registrar must register the title if satisfied that**:

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

**Effect of Registration** “conclusive evidence at law & in equity” that person is “indefeasibly entitled to estate” (LTA S 23(2)) Disregards any interests not on the register, even if you know about them.

**Date of Registration** date/time application was received (LTA s 37)

**Priority of Registration d**ate application was received (LTA 153)

### Title certificate:

* Shows **name of fee simple holder** (could be single owner, joint tenants, or trust holder if deceased owner)
* Indicates **legal notations** LTA 180(2) ie. Reference to trust instrument if it applies
* **Charges, liens and interests** (caution may not appear in order of priority) LTA s 28 – if two or more charges appear, the charges have priority according to date and time applications for registration of charges were received not the dates of execution of instruments as listed on the title
  + **A charge is not the same as a fee simple it is a lesser beast entitled to less protection than the purchaser of a fee simple (Credit Foncier)**
  + Mortgage**s ss 26-27**
  + Easement
  + Statutory Right of Way
  + etc
* Duplicate indefeasible title: if any outstanding would be listed
* Pending applications: if any
* Current information only – no cancelled information shown

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

### Registration of title protects against adverse possession LTA 23(3)

* Adverse possessor may claim against Crown grantee who doesn’t register LTA 23(4)
* Crown property – passage of time (of adverse possession doesn’t count against the Crown Land Act s 8
* **Adverse possession –** acquiring title to land by occupation without owner’s permission “squatter’s rights” practically none in BC – you can stay there as long as you want but don’t earn title to propertyLimitation Act s 28(1)
* **Exception: initial registration may be affected by adverse possession**: LTA 23(4)
* Exception: if a squatter can demonstrate adverse possession existed for 20 years before the first registration LTA 23(4)
* **Exception**: if a property has never been registered and a squatter can demonstrate possession for 20 years before July 1, 1975 Limitation Act s 28(2) True owner did not bing action within 20 years before 1975, or crown land for 60 years – but nowadays it is unlimited.

### True owner can bring action for possession at any time – no limitation period Limitation Act s 3(4), s 28

* Adverse possession doesn’t exist except as specifically provided for by statute Limitation Act s 28
* Encroachment is a form of adverse possession that may yield rights in rem: see remedies PLA 36

# Exceptions to indefeasibility – statutorily endorsed charges

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

1. Crown Grant
2. Taxes

* Provincial and federal government taxes can be a lien and charge against the title
* Unpaid taxes can be attached to property even if they don’t appear on the title
* Taxes run with the land (third party becomes liable for tax debt)

1. Municipal charge, rate or assessment

* Property tax debt
  + Can inquire at City Hall about the state of property tax
  + If the tax hasn’t been paid in 3 years, the city will take steps to sell (e.g. New West)
* Local improvement charge (for sidewalks, curbs, etc.)

1. **Short term leases** LTA 23(2)(d) clarify page 6-11
   * Original term of lease including options to renew less than or equal to 3 years + actual occupation
   * Unregistered lease holder for period < 3 years including option to renew and actual occupation
   * OR lease > 3 years registered
2. Highway or public right of way, watercourse, right of water or other public easement

* Easements exist across everyone’s property so that utility companies can come in and inspect and do their work (sewers, telephone lines, etc.)
* Can’t build on top of sewer mains, because the government will occasionally require access.

1. Right of expropriation or to an escheat under an Act
2. Certain charges registered before or after registration of purchaser’s title

* Most common: builders lien

1. Correction of “wrong boundaries”

* Boundaries are not guaranteed. Where boundaries are proven to be incorrect, the LTO may correct them. Title is subject to this correction.
* Conveyancers are not responsible for verifying dimensions unless special instructions are given and accepted. Purchasers should engage a surveyor to verify lot lines (Winrob v Street)

1. Fraud/forgery

1. Builders Lien (see section)

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

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

### Agricultural Land Commission Act

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

# Assignment/Sublease/Novation

**Assignment**

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

**Sub-lease**

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

**Novation**

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

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

Fraud

### Two types of fraud in the Torrens system that affects title:

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

**If property is fraudulently registered by someone else, the original owner can get their title back. Fraudster has defective title.**

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

**If a seller obtained property by fraud, and the purchaser is a participant in the fraud,** **they are NOT a BFPVw/oN and only receive a defeasible title.**

* Victim recovers property from Purchaser.

**If purchaser is innocent they get an indefeasible title regardless of seller’s fraud.**

* LTA 25.1(2) If a seller obtained property by fraud, then sold it to an innocent purchaser, the purchaser is the BFPVw/oN and retains “**immediate indefeasibility**”. Victim can sue seller, claim on Assurance Fund.

**Fraudulent Conveyance 🡪 transfer to defeat creditor**

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

# Fraud against registered owner (forgery)

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

(1) Registration of a void instrument does not confer estate/interest in land

(2) HOWEVER, if fee simple is transferred to a BFPFV, they get indefeasible title

* + Does not apply to **volunteers** (e.g. if a fraudster dies, person who inherits the property will not benefit from immediate indefeasibility. **Title will be defeasible until it’s sold**).

# Title obtained by fraud

LTA s 25.1(1): No indefeasibility for any interest other than fee simple

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

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

🡪 If title is held by…

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

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

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

Nemo Dat: a person who does not own property, especially a thief, cannot confer it on another except with the true owner's authority.

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

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| Gill v Bucholtz |
| **Facts**:  Fraudster forged transfer to an accomplice. Accomplice took out 2 mortgages. Effect?   * Mr. Gill owned Lot 4. * A fraudster forged Mr. Gill’s signature on a transfer of Lot 4 to Gurjeet Gill, who was an accomplice of the fraudster. * Gurjeet Gill purported to grant a mortgage to the Bucholtz, who, in reliance on the register, advanced $40,000 to Gurjeet Gill and filed the mortgage with the LTO. * Gurjeet Gill later negotiated a second mortgage in favour of the corporate D. * Mr. Gill filed a caveat before the second mortgage could be registered (but the corporate D had already advanced $55,000 under it). * None of the mortgagees had had knowledge of fraudulent root of title and they had sought and confirmed Gurjeet Gill’s identity before advancing funds. * Mr. Gill’s title was restored to him under the fraud exception to indefeasibility (LTA s 23)   **Parties**:   * Gill: RO 1, victim of fraud * John Doe: fraudster * Gurjit Gill: RO 2, accomplice * Bucholtz: registered mortgagee holders   **Decision**:  Trial: mortgagee’s won  CA: Gill won, mortgagee’s struck off title (mortgagee’s ended up collecting the money back from their insurance)  **Issue**: Will the Ds’ mortgages continue to encumber P’s restored title?  **Reasoning**:   * LTA 26(1): A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.” 🡪 creates a **rebuttable presumption** that the registered owner of a charge is entitled to that charge. * LTA s 25.1(1): “Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a **void instrument does not acquire any estate** or interest in the land on registration of the instrument.” 🡪 if the instrument is void, so is your estate or interest * The phrase “void instrument” includes a mortgage issued by a person who obtained title by fraud or forgery. * **The mortgagees did not acquire any estate or interest in Lot 4 on registration of their instruments because they were void under s 25.1(1).** * In this case, Gill was able to rebut the presumption created by s 26(1).   **Ratio**:   * Registered charges are not indefeasible. Nemo dat applies. * Charges obtained by fraud will be struck off the title. |

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

# Fraud against holder of unregistered interest

* Purchaser has notice of an unregistered interest in the property
* Buy the fee simple of the property and get registered so they can ignore the unregistered property

Equity will not suffer a statute to be an instrument of fraud

### Test for fraud (VanCity)

1. **Actual knowledge/wilful blindness of unregistered interest**

* Constructive notice is not enough 🡪 must have full actual notice (Hudson Bay)
* Knowledge must arise prior to entering into agreement for purchase (Saville Row)
* Imputed knowledge without dishonesty (anything below wilfull blindness on the fraud-o-meter) on the part of agent is not enough to constitute fraud – benefit of doubt goes to purchaser (Grevling)
* If you have notice of a registered option but Registrar has refused it, then you may disregard it (Saville Row)
* Intention to extinguish the unregistered interest BEFORE the sale

1. **Dishonesty that violates common morality** (Serving for Success 🡪 no dishonesty on part of VanCity)

* Fraud: doing “any act for the direct purpose of bringing himself within the words of the section […] and thereby prejudicing the holder of the unregistered title” (Hudson Bay)
* Not fraud: interest extinguished in the “ordinary course of business” (Hudson Bay) 🡪 e.g. Serving for Success

🡪 Burden of proof is on person alleging fraud

🡪 Any doubt about purchaser’s fraud? Benefit of the doubt goes to the purchaser in the Torrens system Rowling and Van City

🡪 Need to show that the unregistered interest holder showed an intention to extinguish the unregistered interest by a “race to the register”

**Agent knowledge of fraud – depends whether lawyer is acting as agent for purchaser, or just advising (and not telling purchaser of fraud):**

* Difference of fraud of Jerome (agent) which was the fraud of Rutland (purchaser) 🡪 b/c Jerome was acting on behalf of Rutland so Jerome’s fraud was Rutland’s fraud
* However in Greveling, the lawyer was not acting as Blackburn’s agent 🡪 knowledge of the 3rd person (lawyer) was not imputed to be knowledge of the principal (Blackburn)

**NOTHING SHORT OF WILFULL BLINDNESS (a form of dishonesty – suspicious but deliberately not looking for more information in case you find out it isn’t favourable to you) WOULD COUNT FOR FRAUD: NOT gross negligence, reckless disregard, or negligence.** Hudson Bay

# Effect of notice

* Fraudster is affected by notice.
  + 29(2)(b**) abolishes effect of notice of unregistered interests, but makes an exception in the case of fraud.**
  + E.g. McCaig v Reys: actual notice of McCaig’s unregistered interest + promises Reys to honour the interest (deception) + subsequent sale to defeat the interest.
* BFPFVw/oN is not affected by notice of interest in the absence of dishonesty.
  + E.g. Hudson Bay and Rowling:
    - Rowling may have had his suspicions raised by the discounted price of the property, but did not have actual notice. He was careless but he still gets the title free of Hudson Bay’s equitable mortgage.

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| McCaig v Reys | |
| **Facts** | Unregistered option sold by the nefarious Jerome  McCaig (holder of an unregistered interest (option to purchase 24 acres granted by Reys; victim of fraud) 🡪 Reys (RO #1) 🡪 Jerome/Rutland (RO #2) 🡪 FRAUD to Jabin |
| **Issues** |  |
| **Decision** | For Jabin |
| **Reasons** | * Jerome carried out a scheme of deception that enabled him to dispose of an unregistered interest in land without disclosing to the purchaser. * Jerome’s dishonesty was that he promised to honour the unregistered interest, but then deliberately suppressed the existence of the option when he sold the property to Jabin. * If Rutland had gotten notice **after** agreeing to purchase 🡪 would not be committing fraud.   Result   * Reys should never have sold to Rutland and is guilty of breach of contract because he created the situation that caused McCaig to lose his option. * Rutland’s title is defeasible because he got it through fraud. However, the title was flipped to Jabin, and McCaig has no remedy against Jabin (BFP). |
| **Ratio** | * Example of true fraud (but no remedy, because in the hands of BFP)   An **intending purchaser** who learns of an unregistered interest (gets express notice) and acts dishonestly to defeat it is estopped from claiming the benefit of s 29(2).   * Any who gets past the agreement of purchase and sale stage w/o knowledge and has a binding agreement is not guilty of fraud. * However, full notice + entering into agreement of P&S to defeat the unregistered interest = actual fraud   + There must be an element of dishonesty (intention to extinguish the unregistered interest)   An agent’s fraud is imputed to the principal |

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

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| Vancity Savings v Serving for Success | |
| **Facts** | Mortgagee forecloses on property, which extinguishes rights of unregistered lessors.   * Vancity granted City Centre a $5.1 million mortgage. * Vancity was aware of the existence of unregistered leases to Serving for Success (for the pub) and KKBL (for the restaurant). * City Centre defaulted on the loan, and Vancity filed for foreclosure with vacant possession (which would extinguish the unregistered leases). |
| **Issues** | Does the fact that Vancity had actual knowledge of the unregistered leases deprive it of the benefit of LTA s 29? NO aware of unregistered interest but no element of dishonesty to make fraud |
| **Decision** | No (for Vancity). |
| **Reasons** | “The important time for the purposes of assessing what the petitioners knew is the time City Centre granted the mortgages, or at the latest, the time when the mortgages were registered on title.” At that time, they did not intend to interfere with the leases.  The law requires more than simple notice of the respondents’ unregistered interest in the property.  To prove fraud, it must be established that:   * The party acquiring the interest in land had sufficient actual knowledge of the conflicting interest in the property to cause a reasonable person to make inquires as to the terms and legal implications of the prior instrument. * There was some other circumstance to take the matter out of the ordinary course of business or to show some clear intention to use the statute to defeat the respondents’ interests in circumstances contrary to common morality such that it would be inequitable for the court to allow reliance upon the statute as protection. |
| **Ratio** | * **Knowledge is not enough to constitute actual fraud.** * **Fraud requires actual knowledge prior to entering into the agreement and dishonesty / dishonourable conduct that violates common morality** |

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| Grevling v Grevling | |
| **Facts** | Same property transferred twice. Effect on BFP?   * As part of divorce settlement, Mrs. G transfers title to Mr. G. Mr. G did not register his interest. 7 years later, Mrs. G re-sells the same property to purchaser Blackburn using the same lawyer that originally handled the transfer to Mr. G. * The lawyer’s knowledge of Mr. G’s title is imputed to Blackburn. |
| **Issues** | What is the effect of the lawyer’s knowledge of the Mrs. Grevlings fraud by knowing of the previous transfer? |
| **Decision** | For Blackburn – protects the purchaser. Mr Blackburn’s certificate of title protects him against unregistered interest. ***Blackburn did not know until after the purchase 🡪 If he had notice before entering deal, and going ahead with intention of extinguishing the unregistered interest could have been considered as fraud as it’s a violation of morality!*** |
| **Reasons** | The solicitor’s knowledge should not be imputed to Blackburn if the solicitor was helping Mrs. Greveling to perpetrate a fraud or if he was honest (in believing that the deed from Mrs. Greveling to Mr. Greveling could not be enforced). |
| **Ratio** | 1. Assets v Mere Roihi: **defines “actual fraud” as including wilful blindness without dishonesty**: “if his suspicions were arouse, and he abstained from making inquiries for fear of learning the truth […] fraud might properly be ascribed to him.” 2. **Solicitor’s knowledge can sometimes be imputed to client.** |

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| Saville Row Properties | |
| **Facts** | Attempt to have option registered denied. Effect if BFP knows this?  Eldred is the registered owner. Frew and Associates had an unregistered option.  Eldred sold the property to Saville Row, which registered its title.  After completion of the sale from Eldred to Saville Row, Frew tried to get the option registered, but the Registrar refused to register it.  Two months later, Saville filed a CPL. |
| **Issues** | 1. Can Saville Row take title to the property free of Frew’s unregistered option? YES 2. Was Saville Row a party to Eldred’s fraud? NO Or a BFPFVw/oN? YES |
| **Decision** | For Saville Row |
| **Reasons** | The court says that Saville Row was not disentitled to the protection of registration, because:   * Saville Row knew of the fact that the Registrar had challenged the validity of the unregistered interest. **Therefore, it was entitled to ignore it as unenforceable.** * Saville Row did not get any notice before it committed to purchase the property. |
| **Ratio** | * **If you don’t have notice of interest until after you purchase property, you can disregard it.** * **If you have notice of a registered option but have reason to think it’s void, then you may disregard it.** * **The burden of proving fraud rests with the person alleging it.** * The law presumes against fraud and impropriety |

In Personam Claims - Trusts

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

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

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

Repugnancy

Fee simple absolute, followed by a gift over.

* Where there is a repugnant gift, the court will determine the testator’s predominant intention and subordinate intention. (Re Walker)
* Different possible outcomes of a repugnant gift (Re Walker):

1. Gift to the first-named person prevails, gift over fails as repugnant
2. Gift to the first-named person is a life estate, the gift over of the remainder prevails
3. Gift to the first named person is a life estate, with a power of sale/encroachment on the principal, to maintain the recipient, with a gift over of the remainder (usually a trust)

# Where a will is unclear or contradictory, construction is based on the testator’s intentions (Re Shamas)

* + Intention is determined by “sit[ting] in the testator’s armchair,” i.e. “gathered from the language of the will read in light of the circumstances in which the will was made.”
  + Note that this means that if you create a will giving your property to your spouse (S1), then split with S1 and have a different spouse at death (S2), the property will go to S1

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

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

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| Cielein v Tressider \*\* Will gives fee simple, dictates what distribution of profits in event of sale | |
| **Facts** | * The will-maker lived with Ms. Rich and her son for 12 years * Problematic clause: “All the rest and residue of my estate I devise and bequeath to Naturcia Rich. However, upon the sale or disposal of the real estate [on Saturna Island], the proceeds shall be divided equally between her son and my children. * **Trial**: Mrs Rich gets life estate, her son and his kids get remainder. * **CA**: Mrs Rich gets absolute gift. |
| **Issues** | **Who is entitled to the estate?** |
| **Decision** | Mrs. Rich |
| **Reasons** | * **The testator’s intention is manifest**: he intended to give property in fee simple to Mrs. Rich. Made clear by a clause giving her the property and another giving her the residue. * The testator’s attempt to dictate the division of proceeds upon sale is repugnant to the fee simple. * If she sold the property, following the instruction in the will would cause her to lose her intended gifted interest which creates a repugnancy |
| **Ratio** | Can’t control an incident of fee simple ownership |

The Life Estate

* Life estate appears as a charge on the property (LTA s 1, “charge”)
* Life estate can go to cash/non-property assets 🡪 would be to put cash in investments and provide the investment interests to person holding life estate (Re Fraser)

# Creation of life estate:

### By Act of the Parties

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

### By Statute Land Act: (Spouse Protection)

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

# Rights of a life tenant:

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

# Responsibilities of a life tenant:

* **Refrain from Waste** See next section
* **Pay Taxes, Insurance, etc.** If they are not paid, property may be sold by taxing authority (Mayo v Leitovski)
* **Mortgages** A portion is interest (LT) and a portion is principle (OWNER).
* Remainderman/reversionary interest holder is responsible for liability and fire insurance

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

Co-Ownership – Concurrent Estates

**Both TIC and JT: Each co-owner has the right to undivided possession (use and enjoyment) of the whole property 🡪 either agree or partition property or sale of property and divide proceeds as per entitlement of co-owners**

**Both co-owners can use the whole property without paying rent to the other, but cannot exclude the others from doing the same (can’t change locks to exclude the other 🡪 breach of relationship 🡪 unlawful)**

**Transfer of property to multiple people presumptively creates tenants in common: (PLA s 11)**

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

**Partnership Act s 25**

* Two or more people to carry on business and share profits/expenses in accordance with business shares
* Presumption in favour of tenants in common

## Property can be transferred to yourself (PLA 18)

**18(3)** A transfer by a joint tenant to himself, whether by fee simple or by charge, is deemed to sever the joint tenancy

**18(5)** An owner in fee simple may grant himself an easement or restrictive covenant over land he owns for the benefit of other land that he owns

# Relations between co-owners

**Share of Profits Spelman v Spelman 🡪 wife sued husband for account of rents and profits derived from rooming house which they operated and owned as JT, and from rents from another house that she was 3/5 interest in**

* No obligation at Cl to account between co-owners unless one excluded the other from the property or one expressly contracted to act as the others bailiff (also in Bernard v Bernard)
* rent received by co-owner should be shared proportionately (passive rent only)

**Share of Expenses PLA s 13**

* co-owners must account for expenses before splitting balance proportionately **PLA 13.1** Registrar can inquire into account
* Some expenses, if not paid, can lead to loss of the property ie. Mortgage 🡪 foreclosure, arrears of rent 🡪 eviction, property tax arrears 🡪 tax sale Dukart v Surrey Court may order lien and sale **PLA 14**
* If one owner pays more than their proportionate share, such as extra rent, interest, etc may apply for relief against the other registered owners who are in default Remedy of co-owner **PLA 13**
* **“What is just and equitable depends on the circumstances of each case”** **Mastron v Cotton**
  + **If one tenant paid for improvements that increase value, the other tenant must pay for improvements as well in order to take advantage of increased value Leigh v Dickson**
    - **Improvements require advance notice and agreement of co-owners – if they don’t agree, and it doesn’t add value to the property, you’re SOL Not included in PLA 13**
  + **Co-owner cannot recover other disproportionate expenses from others for frivolous expenses during co-ownership**
  + **On application for partition or sale, co-owners can claim for paying a disproportionate share of expenses against a defaulting co-owner**
  + **Court can order sale and has a distraction to adjust the distribution of the proceeds of sale among co-owners**
  + **Necessary repairs are shared PLA 13**

**Bernard v Bernard**

* S 13 and 14 do not create new obligations, are merely procedural
* **Couple divorced, he moved to Yugoslavia. She put in claim to sell house. He agreed to equity not less than $27,000.** 
  + He listed contributions to the property.
  + He wanted rent for her occupation of premises. NOT ALLOWED – Court denied any recovery. Mr Bernard was a non-occupying owner – cannot recover value for rent that she “should have paid” as she had rent free accommodation in the property

# Tenants in common (Common law) PLA s 11

**All separate owners**

**Unity of possession**

**One or more of the 4 Unitites is absent (otherwise would be JT)**

**Equity prefers TIC over JT**

*Equally among them – equally – share and share alike – between – to each of their respective heirs – between - amongst*

## Creation:

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

## Features:

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

## Termination:

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

# Joint tenants (with right of survivorship)

**Single owner comprising several people (two people buy a home together)**

**Right of Survivorship is “the distinguishing feature of a joint tenancy”**

**Can avoid probate**

*“To A and B as joint tenants with right of survivorship and not as tenants in common”*

## Creation

* **Must be expressly on the title/transfer document**: **LTA 173, 177**
  + To A and B jointly
  + To A and B as joint tenants
  + Does not arise by implication where co-owners have four unities.
* **Four unities must be present -** Loss of one of the four unities will result in a separation out of a joint tenancy into a tenancy in common

## Features

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

## Four Unities – must exist at time of creation and until end

* **Time**: interest in title must be acquired at same time
* Title: must take under same instrument
* Interest: must hold the same equal interest in property in percent of ownership and duration equal – if in length of time of interest (both fee simple vs one fee simple/one life estate)
  + If unequal contributions, could be construed TIC.
  + Regardless of who contributes how much, if there are two of them, they each own 50%
* Possession: equal right to possess and use entire property – if severed into portions then it’s a TIC

## Termination

**Severance** - Can be severed (i.e. terminated and turned into TIC) without notice to other tenant: **PLA s 18**

**Major effect: deprives severed party of right of survivorship – now their interest passes as TIC**

**Three ways to sever joint tenancy:**

* + Destruction of one of the unities,
  + Agreement between joint tenants – becomes TIC Flannigan v Wotherspoon,
  + UK - Unilateral intention of one joint tenant (with written notice) Walker v Dubord UK Law of Property Act 36(2)
    - Although BCCA says can’t unilaterally sever Flannigan v Wotherspoon – you need an act (agreement to transfer) or a course of dealing (mutual agreement to sever by all JTs)

**One joint tenant cannot stop another joint tenant from ending their joint tenancy –** its an expectation of survivorship not a “right” Stonehouse v BC 🡪 wife transferred her interest in shared property to another party, didn’t tell husband, was unregistered until she died. 🡪 Court held legitimate and valid! JT severed, now TIC with third party

**Survival** - Passes immediately to remaining joint tenants, cannot be passed by will

**Occurs upon**:

* + **Act of alienation** (e.g. mortgaging or transferring interest – severs the JT – although a mortgage is just a charge not a transfer of title)
  + **Divorce** (from date of separation)
  + **Partition** (physical division of property) or sale in place of partition, if partition isn’t feasible
  + **Death** of one JT

**Robb v Robb**

**Strata** – unit owners share land and housing in common

**Coop** – society holds title to property, members own shares in the corporation, elect a board to govern affairs – tenant / landlord

Housing coop

The share ina coop is personalty so presumption of joint tenancy

PERSONALTY presumption of joint tenancy at common law

REALTY presumption of joint tenancy at common law overrided by statute to presumption of TIC

RE BANCROFT v Calder

Does a situation sever a JT?

* Lease for a term – severs J**T** Lyons v Lyons
* Lease for a lifetime – does not sever JTSorensen Estate v Sorensen
* Mortgage of interest = No severance
* JT arrears on mortgage of his/her interest – No severance
* Foreclosure - Severance

### Declaration of trust over his/her interest

* Only a transfer of beneficial interest to the beneficiary
* No severance of legal title; joint tenancy continues legal title
* Trust divides legal title (trustee) and beneficial interest (beneficiary)

# Partition and Sale

**Terminating concurrent ownership**

* Partition = Physically dividing the property into individually owned parcels
* Sale = Selling the property as a whole and dividing the proceeds into the fractional shares

**Can be done** Harmeling v Harmeling

Voluntarily (mutual agreement

Or

Compulsory (by court under the Partition of Property Act s 2)

* Any co-owner must start the process Harmeling v Harmeling
* Court has broad discretion, must be exercised “judicially” by weighing relevant factors, “facts and circumstances”, “justice”/fairness between parties, cost benefit analysis

Aboriginal Title “AT”

# Basic Principles

### Source of Aboriginal Rights & Title

* ~~Royal Proclamation, 1763~~ rejected in Delgamuukw as the source of Aboriginal title in Canada. While recognized in Royal Proclamation, its not the source of Ab title.
* 1846 Treaty of Oregon established 49th parallel as boundary between Canada and US. Used as date for establishment of Ab title, as having had exclusive occupation of the land prior to 1846.
* Source of Ab Title per Delgamuukw: Prior [exclusive] occupation at the time of sovereignty and the relationship between common law and pre-existing systems of aboriginal law (Delgamuukw)
* **Tsilchotin - Latest Case – Aboriginal Title** established by 1) court declaration or 2) agreement (treaty)
  + Court declaration – Tsilchotin – Remedy provided by court – declares/states rights of the parties.
  + No particular force of power
  + Does not order a party to do anything or provide for enforcement.
  + Further remedies provided by courts if “crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out”

**Constitution Act 1982, S 35(1)**: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

* Does not create aboriginal title or aboriginal rights, but confers constitutional status on “existing” rights as of 1982
  + This is evident through case law and treaties
  + Does not create or define these rights, but give them constitutional protection
* Existing rights must be proven in court or by agreement in a treaty
* Provides protection to First Nations, Metis, Inuit

**Honour of the Crown** (Mitchell)

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

**Indian Reserves**

* In BC approx. 200 Bands, 176 reserves covering 0.4% of land in BC
* Indian Act
* Indigenous and Northern Affairs Canda
* Canada holds title (fiduciary) for the use and benefit of the band
  + use of reserve lands 🡪 trustee federal govt, controls mgmt. of the lands, can only get leasehold but not fee simple. Govt determines what is in best interest of use of the lands.

### Treaty Process

* Formal agreement between First Nations and Govts
* BC Aboriginal Relations and Reconciliation, Federal Indian Affairs, First nations (is it subgroups? Bands? Individuals? A larger group? – Tsilhqo’tin says Ab group(s)

**Treaty Settlement Lands**

* Lands emerge from treaty process, given to First Nations who are parties to the treaty.
* BC Treaty Commission supervises negotiation of treaties.
* Band gets fee simple for the land
* Nisga’a 2000
* Tswwassen First Nation (2009 treaty), land and management rights of the land.
* Maa-Nulth 2011
* Tla’amin April 2016
* Lands protected by the Constitution s 35
* Provincial laws apply
* Option of registration through LTA or fee simple process, or whatever they want

**Section 35 \*\* in Delgamuuwk, doesn’t create or define AT/AR, just affirms existing rights through 4 treaties, but gives them Constitutional protection**

1. The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
2. In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
3. For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
4. Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

**Douglas Treaties**

* 13 negotiated treaties around Victoria / Vancouver Island areas
* Not aboriginal title
* Govt of Britain told Douglas to stop negotiating treaties b/c it ran out of money

# Aboriginal Rights

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

Delgamuuwk – recognizes AT existence, and sets test for proof of AT

* Recognized existence of AT (but didn’t recognize it as established in the particular case)
  + Said trial judge had erred by disallowing oral tradition history 🡪 oral history is admissible
  + Case sent back for a new trial (has never occurred b/c the FN rights have been subject to treaty negotiation since then)

**Establishing an Aboriginal right** (**Mitchell**)

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

### Establishing the content of AR

* Both Aboriginal and European common law perspectives must be considered.
* The range of aboriginal rights
* Taking the aboriginal perspective into account does not mean that the particular right claimed, like title to the land, will automatically be established.
* The question is what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective.
* The court must:

(1) Examine the pre-sovereignty aboriginal practice and

(2) Translate that practice into a modern right.

* How to do this?

1. Examining the nature and extent of the pre-sovereignty aboriginal practice in question.
2. Seek a corresponding common law right.
3. Determine the nature and extent of the modern right.
4. Goal: reconcile the aboriginal and European perspectives.

# Aboriginal Title

|  |  |  |
| --- | --- | --- |
| **Fee Simple – all treaties** | **Declaration of Aboriginal Title – only Tsilhqo’tin** |  |
| **Derived from the Crown**   * Common law – first in time first in right – Chronologically then AT precedes Crown ownership. Crown title is subject to First Nations title. * Crown is like a trusteeship, it is a fiduciary with obligations to the FN Tsilhqo’tin para 69 | **Precedes Crown ownership**   * Aboriginal title 🡪 Crown title 🡪 Subsequent purchasers (fee simple) * AT “runs with the land” (therefore called a “burden”) and passes as title passes. | Delgamuuwk, Para 114 |
| **Marketable-alienable**   * Fee simple ownership and possession on an individual basis | **Inalienable, except to Federal crown**   * AT is communal and collective Tsilhqo’tin 74 * Must be preserved for future generations * Some changes may be possible but decided case by case – can’t be misused * Cannot be alienated except to the Crown (would get back a fee simple) | Delgamuuwk, Para 113, 129 Tsilhqo’tin 74 |
| **Ownership and possession individual (or joint)**   * Cadastral system ownership of parcel * Site specific | **Ownership and possession communal or collective with no individual titles.**   * Collective title lies with the Band, entire group (not individual bands) owns the land for themselves and future generations Tsilhqo’tin 88 * **SCC rejects FS “site specific” as in fee simple/CL and used in Delgamuukw Marshall, Bernard – AT is “territorial” - extends to tracts of territory used collectively and regularly** Tsilhqo’tin 42-44 | Delgamuuwk, Para 115  Tsilhqo’tin 42-44, 50, 56 |
| **Freedom of use**   * Typically in CL a trustee has control/mgmt. of property * FS holder has: * mgmt. rights over their own property * right to enjoyment and occupancy of land * right to decide how it will be used * right to possess land * right to economic benefit of the land * right to proactively use and manage | **All CL fee simple rights, with a restriction**   * Right to exclusive use and occupation of the land, to use it enjoy it and profit from its economic development. Tsilhqo’tin 70 * Control and management is with the band, not Crown Tsilhqo’tin 18 * Band can decide how the land will be used Tsilhqo’tin 73, 94 * **Restriction** – AT is collectively held for present and future generations. Therefore cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it Tsilhqo’tin 74 Delgamuukw 125-128 | Delgamuuwk, Paras 125-128  Tsilhqo’tin 18  Tsilhqo’tin 70  Tsilhqo’tin 73, 94 |
| **Registered on title**   * First crown grant registered on title | **Not on title**   * Can’t file a caveat or CPL if you are asserting a claim over property | Tsilhqo’tin 74  Delgamuukw 131 |

**Marshall and Bernard:**

* emphasis on specific sites – overturned by SCC in Tsilhquot’in Nation 2014
* right to remove timber from Crown land, convicted at trial NS Prov Ct, overturned on appeal NSCA, SCC restored convictions 🡪 AT to Crown lands not proven 🡪 couldn’t prove exclusive occupation, therefore could not carry on commercial logging on land within claim of AT w/o prov authorization

# Features of Aboriginal Title (Delgamuuwk)

### Delgamuuwk opened up ability to establish/prove AT

* Before Delgamuuwk courts had not gotten very far with AT. Really started with Delgamuuwk in 1997.
* Ownership and control over the lands in question
* Goal to reconcile 2 disparate concepts of title – AT and English common law – into one coherent system
* Reconciliation overall goal, referred to throughout (ie para 14 Tsilhqo’tin the dual perspectives of the CL and of the Ab group bear equal weight in evaluating a claim for AT

**Sui generis unique form of ownership - not fee simple, but similar to it, has all rights of ownership inside of it**

**Arises from prior occupation** before assertion of British sovereignty. Predates crown grant.

**Inalienable**: Held communally, cannot be transferred, sold, or surrendered to anyone other than the Crown.

* + Because Aboriginal title has a non-economic component: the land has inherent and unique value in itself.
  + Also because fee simple can only derive from a Crown grant.

**Inherent limit**:

* **Cannot be used in a way that is inconsistent to their traditional use of the land** (can’t pave an area used previously for hunting)Delgamuuwk
* **Cannot be used in a way that deprives future generations of the control and benefit of the land**. **Examples:**
  + If it’s established with reference to hunting, the group that establishes that claim cannot use it in a way that makes such a use impossible (e.g. strip mining).
  + If group claims a special bond w/land for ceremonial purposes, certain types of developments may be forbidden (e.g. a paved parking lot).
* **Inconsistent with and cannot be registered under the Torrens system** (Skeetchestn)
  + Form of title not contemplated by Torrens
  + Torrens is derived from the notion that the Crown is the absolute owner of the land and individuals purchase interests derive from the Crown
  + **Not site-specific, but territorial**:
* SCC reversed CA and **affirmed** trial judge: AT had been affirmed over this area, and held that title can exist not only over villages/settlements, but territories that are traversed/used regularly (Tsilhqo’tin 🡪 contrasts with Marshall which emphasizes site specific)

# Test for AT (Delgamuuwk para 143) and Tsilhqo’tin 38-43?:

1. **Occupation** prior to 1846 (sovereignty) \*\* Not clear in Delgamuuwk, clarified in Marshall, clarified in Tsihlqo’tin as “regular use”
   1. Occupation must be sufficient.
      1. The key to sufficiency: establish that the Aboriginal use of the land “evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.” (Tsilhqo’tin)
   2. The notion of occupation must reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic. Tsilhqo’tin nomadic 🡪 a strict test of intensive use would be too limiting so “regular use of land” is sufficient,
   3. May be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources (Marshall)
   4. Must be sufficiently regular and exclusive occupation to comport with title at common law (Marshall)
   5. Seasonal occupation = ~~AR~~ (Marshall) 🡪 Tsilhqo’tin overturns this.
      1. Seasonal hunting and fishing exercised in a particular area will be AR, not AT
      2. They will transfer into the common law right of easement or profit a prendre, for example
2. **Continuous Use & occupation** para 152-154
   1. If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation (Tsilhqo’tin 57)
   2. “Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times.” (Tsilhqo’tin 57)
   3. Can be interrupted if there is “substantial maintenance of the connection” (Delgamuuwk)
3. **Exclusivity**: ability to exclude others at sovereignty – Delgamuuwk 155-159, Tsilhqo’tin 58
   1. Exclusivity is the “intention and capacity to retain exclusive control.”
   2. The fact that other groups were on the land does not necessarily negate exclusive occupation.
   3. Intention and capacity may be demonstrated by:
      1. Exclusion of others from land;
      2. Granting or refusal to grant of permission for others to access land;
      3. Treaties;
      4. Lack of evidence of challenges to occupancy

**Development of rights / beneficial interest** Tsilhqo’tin 70 (comes from VanderPeet)

1. AT gives rights to use and occupation of the land, not limited by traditional practices
2. AT is a beneficial interest in the land, title holders can use and enjoy and profit from its economic development
3. Crown does not maintain an economic interest – Crown only reserves bare legal title, but the true owners are the First Nations who have full beneficial interest (not allowed by CL beneficiary would have)
4. What remains for Crown? - A fiduciary duty to put interests of Aboriginal beneficiaries first, Crown may only use the land for the benefit of the First Nations, but there is right to ENCROACH on AT if the govt can JUSTIFY it.

# Duty to consult (Tsilhqo’tin)

### Before AT is established (claim stage):

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

### After AT is established by Court Declaration:

* Ab group has control over the use of land Tsilhqo’tin 90
  + If consent is not given, Crown must justify infringement
  + Crown must seek consent before infringing on AT or Ab lands
* Establishment of AT is retroactive – invalidates prior consultation, accommodation, and legislation.
* Constitutional protection

# Extinguishment & Infringement

### Extinguishment (Delgamuuwk at para 172)

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

### Infringement of AT (Tsilhqo’tin; Delgamuuwk)

**Either by CONSENT OR JUSTIFICATION** Tsilhqo’tin 97

**JUSTIFICATION of Infringement**: The Crown must show:

1. That it discharged its procedural duty to consult and accommodate
   1. ie Tsilhqo’tin 91, 94
   2. In Delgamuuwk Crown was permitted to infringe with justifications, but in Tsilhqo’tin not a possibility anymore, will not be justified without consent by Band Tsilhqo’tin 97
2. That its actions were backed by a compelling and substantial objective;
3. That the governmental action is consistent with the Crown’s fiduciary duty to the group.

* Will ordinarily require compensation (unlike infringement of AR).
* **Remedies**: injunctive relief, damages, or an order that consultation or accommodation be carried out Tsilhqo’tin 89

# Evidence

### Evidentiary Issue – Proven by Oral Traditions and Oral History Delgamuuwk

* SCC said trial judge should have taken more balanced view of FN history and system of traditional communication (not written! as relied on usually in CL)
* Hearsay rule
* Excludes evidence not proven in evidence
* Inadmissible at CL – considered to be unreliable as trier of fact cannot weight credibility of source or evaluate it
* Statutory and CL exceptions
  + Trial judge excluded most of the Ab oral evidence
  + SCC said hearsay rule does not apply to Ab evidence as otherwise they will never be able to establish their cases. How can they establish 1846 traditions today with allowing hearsay / oral traditions evidence

### Admissibility of oral histories

* Oral histories should be admissible Delgamuuwk
  + FN rely on songs, legends, myths, figures on totem poles that surround the occupation of the land can be adduced in support of claim.
  + SCC said that failing to acknowledge this evidence was dismissive and disrespectful of the types of proof that FN had access to.
  + SCC did not give guidance on how to assess this evidence
* Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Mitchell

**Admissibility - Admissible as evidence where:** Mitchell – sets aside hearsay rule for usefulness rule

* **Useful** in the sense of tending to prove a fact relevant to the issues of the case
* There is no other means of providing evidence
* Without such evidence it would be impossible to gain a true picture of Ab practices and their significance that would not otherwise be available
* Oral histories may provide the aboriginal perspective on the right claimed
* **Reasonably reliable**; unreliable evidence may hinder the search for the truth more than help it.
* Does the witness represent a reasonably reliable source of the particular people’s history?
* TJ should inquire as to the witness’s ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.
* Even useful and reasonably reliable evidence **may be excluded in the discretion of the trial judge** if more prejudicial than probative

🡪 Common law rules of evidence must be applied, continued with general principles of common sense. Should not be undervalued simply because it does not conform precisely to evidentiary standards that would be applied in common law civil cases. Mitchell para 38-39

**Weighing evidence** (Mitchell)

1. Equal and due treatment should be given to evidence presented by aboriginal claimants.
2. Evidence adduced in support of aboriginal claims must not be undervalued
3. Should not be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they related to the valuing of evidence, are often synonymous with the “general principles of common sense”

**Admissibility** is a question of law for the judge

**Interpretation or weight** – question of fact (appeal court’s deference to trial judge’s findings of fact; equal and due weight to other evidence)

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