

Law 640
Real Estate Trans
Kortbeek

Torrens System of Land Title Registration

- One of the most efficient land titles systems in the world
- Transfers property by way of registration of title
- Government has custody of all original land titles and documents registered against titles thus guaranteeing the title and protecting it from fraud and wrongful possession
- There are some essential components
 - Certificate of Title: gives the legal description of the land (name of registered owner, any rights of reservations to the Crown i.e. mines and minerals, interests registered against land i.e. mortgage)
 - In order to transfer title, you register a transfer of land. When certificate of title is issued, it is a guarantee by the government that this person owns the land

Primary Functions of the Land Titles Office

- Registration of Documents: Usually submit document with form and it gets put into queue
- Searches: Getting copies of what is registered against title. Typical things registered against title include mortgage, easement, and/or restrictive covenant

Easements	Allowing a right of access to the land. They can also be utility easements.
Restrictive Covenants	Building restrictions (how big the house can be, how many trees need to be there, etc.)

3 Fundamental Principles

1. Indefeasibility and Certainty of Title

- a. Mirror Principle: certificate of title accurately reflects all interests relating to the land at that point in time
- b. Curtain Principle: ensures a prospective purchaser does not have to look beyond the title to determine the existing interests in the land because the provincial government guarantees title

2. Compulsory Registration of All Transactions Relating to the Land

- If one wants the interest in land to bind subsequent owners, it must be registered against title to the land. The interest must however be an interest in land.

3. Compensation for Loss of Any Rights Resulting from the Use of the System

- A General Revenue Fund has been created by the provincial government which will compensate a party who suffers a loss as a result of any errors in the system

Registration

- You can register the instrument itself: once it is registered as an instrument, everyone can see it
- You can register it by caveat: primary disadvantage is that if there is a caveat on title, somebody can send notice to prove caveat. If you don't respond in 45 days, the caveat is discharged. Easier to discharge

Different Types of Ownership

- Freehold Interest: basic ownership
- Leasehold interest: right to use
- Life Estate: right of use and occupation

Joint Tenancy	If one dies, the deceased's interest automatically goes to the survivor. Example: Husband and wife, if one dies, it goes to the other.
---------------	--

Tenancy in Common	Each of you has your proportionate ownership and if you die, your interest remains with you and flows through your estate. So the property would be owned by your estate and the survivor. Example: siblings.
-------------------	---

Different Types of Listings

- Open Listing: Realtor will get commission only if sale results from that realtor
- Exclusive Listing: If sale occurs during currency of listing, then realtor gets commission even if sale had nothing to do with realtor
- Multiple Listing: Allows for sharing of the commission. Posted on a multiple listing service

Payment of Commission

- When is commission payable? It will depend on the wording of the listing agreement
- First Instance: If sale occurs during a listing period, then you have to pay
- Second Instance: If sale is outside listing period but within 60 days of that period provided additional requirements are met
- Third Instance: If realtor has lined up purchaser who is willing to complete and the seller has signed the agreement yet seller doesn't go through with deal

Duties of Realtors

- First Duty: Contractual
- Second Duty: Fiduciary
- Third Duty: Duty of Care

Contractual Duty: Whatever the listing agreement says sums up the contractual duties of the realtor

Fiduciary Duty: Obligation to act in the best interest of your client. Act honestly, full disclosure, confidentiality, reasonable skill and care, and full accounting of any funds

Duty of Care: Kind of Unclear (setting a listing price and doing title search/known zoning issues)

1.	Statement or representation needed
2.	There has to be reasonable and foreseeable reliance
3.	There has to be damages or some kind of loss

Dual Representation

- Situation where realtor is acting for both the seller and the buyer
- In order to do that, you have to limit fiduciary duty
- Dual Agency Disclosure has to be signed which limits the realtor's fiduciary duty
- Rule for realtor is to stay away from price issue altogether

Dual Agency in Law Profession

- Same rule does not apply since interests are completely opposite
- Dual Agency is still allowed in the law field but you have to meet certain requirements
 - Written consent of the parties
 - Full disclosure
 - Cease to act in the event of a conflict

Requirement of Writing and Statute of Frauds

A purchase of land or any interest in land must be evidenced in writing. It applies to any interest in land such as a lease interest, easement interest, etc. Statute of Frauds became a tool that people used to get out of contracts.

They could just argue that agreement was not in writing and therefore it became a way to get out of legitimate contractual relations. Court did two things to mitigate this effect:

- (1) Relax interpretation of what constitutes written indicia
- (2) Adopt a doctrine of part performance

Note: A completed contract cannot be undone based on the Statute of Frauds. It can only be used as a defence

- First Step: Was there an oral agreement? If not, then they don't go any further
- Written indicia does have to contain the essential terms (parties, purchase price, and property)
- Non-essential terms will be implied by the court (example: closing of transaction, interest payable, possession, date of closing)

SUMMARY TO DETERMINE IF STATUTE OF FRAUDS IS AN ISSUE

1. **Agreement:** If there was no written contract, was there an oral agreement between the parties?
2. **Interest in Land:** What is the subject matter of the agreement? If it is for the sale of an interest in land, then the Statute of Frauds may be an issue and you must go to step 3
3. **Statute of Frauds Satisfied through Written Memorandum:**
 - Was there one or more written memorandum or notes that contain essential terms?
 - If so, was one or more them signed or initialled by the party to be charged (or his/her/its agent, lawyer, realtor?)
 - If yes to both, Statute of Frauds is not an issue. If no, must go on to step 4
4. **Statute of Frauds Satisfied through Part Performance**
 - Was there part performance which supports the existence of the contract?
 - If so, Statute of Frauds is not an issue
 - If not, Statute of Frauds may be raised as a defence rendering the agreement voidable

Part Performance

If you cannot find any written indicia, you can look to see if there was any part performance. Test for part performance: Are the acts relied on unequivocally or in their own nature referable to some such agreement as alleged? Acts that would constitute part performance would include building improvements, paying taxes, working on a farm without remuneration, and possession of property

Requirements for Part Performance

1st	Plaintiff must have carried out certain acts to his detriment
2nd	Actions must be consistent with the alleged oral agreement
3rd	Defendant must be aware of those acts
4th	Plaintiff must have acted properly

Certainty of Terms

- Need certainty of terms for valid contract (meeting of the minds)
- Parole evidence can be introduced only if there is an ambiguity in the contract

- You look to surrounding circumstances to ascertain what the parties intended
- Parole evidence: discussion between the parties, emails, letters between counsel, etc.

Effects of Uncertainty

- If the uncertainty applies to an essential term, then the contract is void
- Even if the contract is done and the purchaser has paid money, the contract is undone
- Exception: Purchaser has transferred land to bona fide purchaser for value. Then it is a damages claim
- Essential terms: Parties, Purchase Price, and Property or any other term that would be considered unique in the circumstances

Non-Essential Terms

- If the term is not an essential term, the contract will not be void. Instead, the courts will imply the non-essential term
- In making these assessments, there will be an objective inquiry based on what is reasonable in the circumstances
- Non-Essential Terms include:
 - Closing dates (unless they are like 4 years away)
 - Possession Date
 - Mechanics of closing

Summary of Certainty of Terms

- In practice, the courts inclination is to not find an otherwise valid agreement void for uncertainty
- Rationale: Prefer not to hold an agreement freely entered into two parties invalid
- However, if an essential term of the agreement is ambiguous and incapable of being ascertained objectively through parole evidence, the agreement will be void for uncertainty
- Lawyer Considerations
 - Be careful to avoid uncertainty when drafting agreements. Ensure a clause is sufficiently certain and if not, ensure there is a clause which details how to remedy any uncertainty or agreement to agree
 - Consider the inclusion of a severability clause

Severability Clause	Any term that is invalid or unenforceable can be deleted from the agreement and the rest of the agreement remains in full effect
---------------------	--

DOWER RIGHTS

Dower Act was enacted to protect the wives and the husbands were left to their common law rights of curtesy. Purpose was and is to prevent a married person of disposing the homestead without the consent of the spouse. Historically, the spouse was meant to be the wife. The Adult Interdependent Relations Act provides some rights and entitlements but does not specifically refer to Dower. In most cases now, both spouses will be on title.

Legislation

The *Dower Act* gives two main rights to spouses (s. 1(c) and s. 18 DA):

- Prevent a Disposition
- Life Estate

- a. Prevent a Disposition - The right to prevent a disposition of the homestead by withholding consent;
and

- b. Life Estate - The right of a surviving spouse to a life estate in:
- the homestead of the deceased married person; and
 - the personal property of the deceased married person that is exempt from seizure under writ proceedings.

What constitutes a "DISPOSITION" (s. 1(b))?

- Any transfer, agreement for sale, lease for more than 3 years, or any other instrument intended to convey or transfer an interest in land.
- A mortgage or encumbrance intended to charge land with the payment of a sum of money.

What is a "HOMESTEAD" (s. 1(d))?

- A dwelling house occupied by the owner that consists of not more than 4 adjoining city lots in one block if urban (i.e. subdivided) land or not more than a ¼ section if rural (i.e. unsubdivided) land.
- Essentially at least one of the spouses must have lived in the property since the marriage (note that it does not require both spouses to have lived there since the marriage).

Homestead	It doesn't have to be a place where both the spouses have lived since their marriage. As long as one has, then you're okay. It doesn't even have to be their house that they live in. They have to reside there for some period of time (could be a weekend home etc.)
Note	<u>Dower does not apply if both parties are on title</u> since both would have to sign off. Dower will not apply also when the spouse owns the property with a 3rd party.

Requirements for Dower to Exist

The following requirements must exist in order for dower rights to arise:

- a. **Spouse**
- b. **Homestead**
 - At least one of the spouses has to have lived on it
 - It doesn't have to be actual residence provided they reside on it at times
- c. **Title**
 - It can only be in the name of the spouse in order for dower to apply
 - If both spouses are on title, you don't have to worry about dower
 - If the land is co-owned with the 3rd party, you don't have to worry about dower
- d. **Owner (not Lessee)**
 - It has to be a relation with land that is owned not leased

Documents Required Under Act (and Regulations) If a Disposition

If there is a disposition under the Act (sale or mortgage etc.) concerning land whereby only one spouse is on title, then the Act requires any one of the following (4 main options/scenarios):

1. **Consent and Acknowledgement (s. 4 and s. 5 DA) –**

(i) Consent of Spouse (signed by the spouse)

- must be given freely and voluntarily
- yet need *not* be given apart from his/her spouse

(ii) Acknowledgment of Spouse (signed by the Commissioner for Oaths/Notary Public)

- must be given freely and voluntarily
- dower rights must be explained to the spouse
- dower rights must be understood by the spouse
- it must be acknowledged apart from the spouse (before a Commissioner/Notary)
- a specific form is prescribed by legislation

2. **Release of Dower Rights and Affidavit (s. 7 and 9 DA) –**

REQUIREMENTS for Release of Dower Rights and Any Agreement Releasing Dower Rights:

- a. The "Release of Dower Rights" and accompanying affidavit shall be:
 - in prescribed form;
 - executed and sworn apart from the married person
 - before a lawyer that is not also acting for the spouse (i.e. independent legal advice).
- b. The Agreement releasing Dower Rights (s. 9) which is often given in conjunction with a. above must be:
 - in writing
 - must be for valuable consideration which is set out
 - it must be acknowledged before a lawyer that is not also acting for the spouse (and such lawyer must sign and attach an Acknowledgment to the agreement)
 - it may be contained in, or form part of, a separation or other agreement;
 - it can be general applying to all homesteads owned by other spouse or specific to simply one

3. **Court Order Dispensing with Consent (s. 10) – One can apply to the Court for an order dispensing with consent of the spouse if the Court considers it fair and reasonable under the circumstances. The application can be made in any of the following circumstances:**

- when the couple are separated/living apart
- when the spouse has not lived in Alberta since the marriage
- when the whereabouts of the spouse are unknown
- when the married person has 2 or more homesteads (in which case the court will consider which homestead such spouse would likely prefer)
- when the spouse has executed an agreement pursuant to s. 9 (Agreement Releasing Dower Rights - in which case the court will consider whether the other terms have been done and whether consideration has been paid)
- when the spouse is mentally incompetent

4. **Affidavit Regarding Dower (s. 4(6) DA) – The spouse may also file an affidavit stating:**

- that the person is not married or

- that neither the married person or the spouse have lived on the property at any time since their marriage.

Remedies

- Void: transaction can be undone at any time
- Voidable: can only be undone prior to its conclusion
- Current case law renders it uncertain as to how it would be applied if there is no compliance with the Dower Act

Damages

- Section 1(c)2 and Section 11 deal with the damage issue
- Equal to the greater of half of the disposition paid or half of the fair market value
- If judgement is granted consistent with the damage award and the spouse doesn't pay, then the deserving spouse is entitled to a claim from the general revenue fund
- Question: is the spouse restricted to damages? What if they want the property?
- Court says a choice does exist
 - Can set the transaction aside (suggests void)
 - Sue for damages

Example	A sells to B without spouse's permission and then B sells to a bona fide purchaser for value, then spouse cannot get the land but would still have a claim against the spouse and \$ from general revenue fund if spouse doesn't pay.
---------	---

Q: Can Dower Exist in All Real Property Owned by a Spouse?

- It has to be a homestead which means it has to be resided on
- Question of fact as to how long person has to reside on it

Q: Can a spouse have a dower interest in more than one piece of real property?

- You cannot have it in more than one property
- If you have a house and a few other properties which you reside on occasionally, technically the Dower rules apply to all of those

Q: Suppose you have a couple and the property is owned by the spouse and spouse's brother?

- No the dower rules will not apply

CONDITIONAL CONTRACTS

Conditions Precedent	Until an event occurs, the property does not pass.
Condition Subsequent	The property vests but if a condition does not occur, the property divests

What is a "condition precedent?"

- A condition precedent is an external condition upon which the existence of the obligation depends (*Turney v. Zilka*)

- Note: Agreement does not require condition precedent to be satisfied in order for it to exist. The agreement is subject to the condition precedent.

3 Main Conditions Precedent for Residential Sale

- Subject to the sale of your current home
- Subject to financing
- Subject to satisfactory inspection

Doctrine of Waiver

General Rule for the Doctrine of Waiver: One has an implied right to waive a right if solely for the benefit of such party and provided it can be easily severed EXCEPT if it is a condition precedent.

4 Requirements for Doctrine of Waiver to Apply

1. Must be for the benefit of one party
 - Nature of the clause
 - Who inserted it? Why?
 - Can the other side suggest a possible benefit to himself?
2. Must be capable of being severed
 - Does the agreement still make sense?
3. Communication Waiver within a specified time
 - (1) Must be communicated to the other side
 - (2) Communication must be prior to the date fixed for completion or performance
4. Provision being waived cannot be a condition precedent

If the condition precedent is not satisfied, the next question is was there substantial compliance with it? If there wasn't substantial compliance, then you have to look at whether the reasonable party took reasonable to ensure that compliance.

Reasonable Steps

- Responsible party took reasonable steps
- Did the other party actively thwart or impede the parties' actions

Factors That Determine Whether a Condition Precedent Exists

- How **external** the condition is (the greater the extent to which the active intervention of a 3rd party is required, the more likely it will be a condition precedent)
- How **essential** the condition is (the more essential, the more likely to be a CP)
- Is it a **matter of formation** (CP) or performance?
- What is the **character of the 3rd party function?** Judicial (CP) as opposed to routine or administrative action (cp)
- **Type of Wording** used for the condition that may suggest a condition precedent
 - ~~Subject to, Contingent upon, condition upon, on the condition that, only if (this one is sketchy)~~

Arguments to Keep the Agreement Alive Even if the Condition Precedent is not Satisfied

- 1) Waiver Clause
- 2) Substantial Completion

- 3) Breach of Contract to Take Reasonable Steps to Fulfill the Condition
- Court will imply duty upon parties to take reasonable steps to obtain satisfaction of a CP
 - Court will not allow one of the parties to frustrate the fulfillment of a condition, even a true condition precedent

Practical Advice Considerations if Client Wants to Insert a CP

- Agreement includes express waiver clause
- Condition precedent is worded as broadly as possible
- Condition precedent is sufficiently certain in wording
- Sufficient length of time is set out to ensure time for completion of CP

Practical Advice Considerations if Client is on the Other Side

- Tightly controlled condition precedent that has objective standards (not left to other party's discretion)
- Short time period is specified since don't want to tie up land for long period of time
- If more than 2 parties to agreement, express waiver clause inserted if other side wants to waive

In both cases, whether acting for purchaser or vendor, there are 2 additional considerations:

- **Mechanism of Notice:** how is notice going to be given
- **Time for Satisfaction** is sufficiently clear of closing date

Turney v. Zhilka	Defines what a condition precedent is. This case dealt with subdivision approval but the subdivision approval was not obtained. Courts acknowledge that they cannot do much even if there a legitimate argument. It was not actively pursued. Turney case is wrong for the fact that an agreement is in existence even prior to the condition precedent being satisfied but it terminates if the conditions precedent is not satisfied.
Beauchamp	This case dealt with substantial performance. Where there is substantial performance of a condition precedent, that may be satisfactory.

Planning Requirements

It used to be that there was a Planning Act but it got repealed. Essence of the legislation is that there is a general prohibition of the subdivision of land if there isn't subdivision approval. Government was trying to balance the private interests of an owner against the orderly development of land.

Things Considered:

- Is there a park reserve?
- Reserve for utilities?
- Environmental reserves?

Legislation

The two acts that are relevant are section 94 of the Land Titles Act and Part 17 of the Municipal Government Act. The main section is of Part 17 is section 652.

Section 652	A registrar may not accept for registration an instrument that has the effect or may have the effect of subdividing a parcel of land unless the subdivision has been approved by a
-------------	--

	subdivision authority.
Section 94	Sale of subdivided land: No lot shall be sold under agreement for sale or otherwise according to any town site or subdivision plan until a plan creating the lots has been registered

Effect of Non-Compliance

If you do not satisfy these provisions, section 94 states that it is unenforceable. What is subdivided land? Any land that is less than a 1/4 section would have to be subdivided in order to sell.

Factors in Determining if a Lease is Legitimate or not?

- Length of term
- Exclusive possession
- Intent: Is the intent to circumvent legislation or is this a legitimate leasing arrangement?
- Was there a large payment paid at the outset
- How many rights were reserved to the owner?

Summary of Planning

- If an arrangement (lease, transfer, right of occupation) only concerns a part of un-subdivided lands or of subdivided land, you have to look if there is a separate legal description for the area in question
- If there isn't, you ought to consider whether it contravenes planning legislation
- When making the assessment:
 - Nature of the arrangement in substance
 - Intention of the arrangement
 - Length of the arrangement
 - Extent of ownership rights
- Owners of land are free to do with their property what they wish but this has to be balanced against the Planning Legislation

Foreign Ownership of Land Regulations

Purpose

The purpose of these regulations is to preserve agricultural/rural land for Canadians.

Legislation and Application

The relevant legislation is the *Regulations Respecting the Ownership of Agricultural and Recreational Land in Alberta* passed in relation to the *Citizenship Act* (Canada) and the *Agricultural and Recreational Land Ownership Act* (Alberta)

Prohibition

RULE - The Regulations prohibit “**ineligible persons**” and “**foreign controlled corporations**” from acquiring or taking an interest in “**controlled land.**” This includes leasehold interests.

Exceptions

There are certain exceptions to this general prohibition. Some of these are as follows:

- Ineligible persons and foreign controlled corporations cannot acquire controlled land EXCEPT:

- leases for less than 20 years provided it cannot be renewed beyond that term, and it must be registered within 60 days (s. 6 of the Regulations)
 - land that is less than (both) 2 parcels and 20 acres (s. 5 of the Regulations) – Therefore an ineligible person or foreign controlled corporation can own controlled land that is not more than 2 parcels containing, in the aggregate, not more than 20 acres.
 - an option to purchase land if the option is exercisable within 1 year and the P, at the time of exercise of the option, is eligible (s. 7 of the Regulations)
- A transfer by a foreign controlled corporation of an interest in controlled land to a foreign controlled corporation that is associated with it (s. 12(1) of the Regulations).
 - ex. a subsidiary corporation transferring land ownership to its parent

Enforcement

Section 22 of the Regulations – This section requires a statutory declaration to be filed (in almost all circumstances) where controlled land is involved. There are at least 4 different prescribed forms attached to the Regulations. The circumstances dictate the appropriate form.

s. 28 Land Titles Act – This section provides that the Registrar of LTO shall refuse to register an instrument that is *not accompanied by* the documentation required under the Foreign Ownership Regulations.

Control of Land	Any land in Alberta excluding the following: Crown land, municipal land (land within cities and towns), and mines and minerals.
-----------------	---

Summary of Foreign Ownership of Land

If you are dealing with rural land whether or not it is subdivided, it is likely to be controlled land so make sure the purchaser is not an ineligible person. If the purchaser is an ineligible person or a controlled corporation, then you have to look to see if any exceptions apply. But in all cases, you have to make sure you follow the statutory declaration.

FIXTURES

Fixtures are attached to the land. Fixtures are known as attached goods and chattels are known as unattached goods. An owner of land doesn't just own the surface of the land but owns everything in it, below it, as well as everything that is permanently affixed to it.

Mirrors	Fixture
Chandeliers	Fixture
Wall Mounted TV	Fixture
Hot Tub (stand alone)	Chattel
Gazebo	Chattel

Dealing with Items that Start Out as Chattels but Become Fixtures

- Typically the PPSA which generally deals with chattels only but there is also a personal property notice that you register at the Land Titles Office
- PPSA: dealing with security interests
- Someone has a security interest in a chattel and gives it to an owner of property and that chattel becomes a fixture. La Salle case is an example of this. Person who supplied carpet was not paid in full. They had a security interest in the carpet. When you have that kind of situation where the carpet is a chattel until you actually affix it to the floor, person who has security interest has to register a personal security notice with the Land Titles Office against the land. Gives them priority over any other creditors.
- In the La Salle case, the person did not register at Land Titles and become the carpet was deemed to be a fixture, he was out of luck

Summary of Fixtures

- Fixtures pass with realty. Chattels do not.
- Purchaser gets the land plus anything affixed to it
- Purchaser is not automatically entitled to chattels
- There are some presumptions that apply to determine if something is a fixture or not
- Those presumptions are subject to the intention of the parties and in assessing whether those presumptions should be applied, you look to the object and degree of annexation

Real Property Reports

- Difficulty in quantification is the most common problem in real property reports
- Each municipality has certain zoning restrictions and those zoning restrictions include setback requirements that relate to the buildings on the land
- 2 things you are looking at
 - Location of the buildings
 - Are there any encroachments?
- Once the land surveyor does the real property report, you submit it to the city and they will advise whether it applies or not.
- 3 responses
 - It complies and therefore you get a compliance certificate
 - No it doesn't comply with the current requirements but it did comply with the form of requirements (non-confirming consent). At the time the property was built, it conformed to the requirements at that time. Disadvantage of this is that you cannot renovate the exterior of the property to change the properties. The building can remain as is but you can't add to it. For some people, that's not a big deal.
 - It doesn't comply and it is non-confirming so therefore you have a problem. Possible ramifications include the city asking you to remove the infraction. Example: if it is a garage or house that doesn't meet the setback requirements, could have a huge impact if you had to move the garage or house. If it doesn't comply, there is a problem. If the city wanted, they could make you move but usually only do that if 3rd party

Every transaction generally requires a real property report. Purchaser wants it to make sure the property conforms. Bank also wants it if the purchaser is getting financing. First step is to hire a surveyor. Once you get the report, you submit it to the city of the municipality in which the property is located in. Cost for residential deals for the report is about \$400-\$500. It is more expensive for commercial deals. Cost of compliance is about \$70. General trend is that vendors get the real property report and they are obligated to provide it. There is an expiry date on these reports. They don't last forever. If there are changes to the property, you have to get a new report.

Use of Title Insurance

- Suppose a garage or house is encroaching on an easement but just a little bit
- Potential of having them move the garage or house is very small but if that did arise and they had to, the cost would be huge. These situations are perfect for title insurance since you just pay about \$500 and they will assume the risk

Overall	Real property reports are used to see if there are setback requirements or encroachments.
---------	---

Commercial Transaction

- If you are acting for a purchaser, you want to find out what the zoning is and then you look to make sure that your use complies with it
- As a purchaser, you send a letter to the municipality to confirm the zoning description. Take that zoning description take it to the land use bylaws

Residential Transactions

- If you are buying in a residential area but want to use it as a business, then you have to check that zoning

INCOME TAX CONSIDERATIONS

In a residential transaction, it is rare for a tax lawyer or accountant to be involved but in a commercial matter, there will almost always be a tax lawyer and accountant

3 Income Tax Matters

- Capital Gains
- Income Tax Deductions
- Withholdings for Non-Residents

Capital Gains

- Increase in value above your cost
- You have your cost base which is usually what you paid for the property as compared with the current value
- The difference is your capital gain. 50% of the capital gain is taxed
- Exception: Residential Real Estate Exception
- If you qualify for the Principal Residency Exemption, you don't have to pay tax on your increase in value
- Principal Residence: You have to own it and you have to regularly inhabit it. You also typically have to be a Canadian resident
- A lot of people wanted to make their principle residence their cottages since cottages hiked up in value
- Generally you are allowed to claim cottage property as a principal residence provided you do inhabit it sufficiently. This means going out to it on the weekends or during the summer
- Generally, you only have to designate the principal residence when you sell. You pick the one that has the biggest increase in value since that is where you are going to get the biggest value
- You are allowed only one principal residence per family unit
- If a client comes to you and wants to put it in the surviving spouse and child's name, then you should suggest they get tax advice. If child is living in

Capital Gains for Qualified Small Business

- Corporations can own property and rather than having the corporation sell the property, they might decide to sell the shares in the corporation

- Shareholders will sell the shares in the corporation. Purchaser gets the property by purchasing shares in the corporation
- Vendor wants it this way since capital gains tax applies only to amounts over first \$750,000 (Qualified Small Business Exemption)

Deduction of Expenses if you have a Home Business

- Can allocate expenses such as phone bills, electricity bills, etc.
- Need to talk to an accountant to know what to deduct and talk to accountant when selling

Withholdings with a Non-Resident Vendor

- If you have a non-resident vendor that is selling property, then you have to look at section 116 of the Income Tax Act
- First of all, vendor has to notify the Minister of Revenue that he is selling the property and all the details relating to it (sale price, cost of acquisition, etc.)
- From there, Minister determines what tax is owing and then upon payment by vendor, a clearance certificate is issued to the vendor
- Typically the vendor will be required to pay 25% of the gain (difference between purchase price and the cost)
- If they do not pay that amount, they have to give security sufficient or acceptable to the Ministry
- If there is clearance certificate, as a purchaser you need to make reasonable inquiry
- If you make a reasonable inquiry and you determine that the vendor is in fact a resident of Canada, then you are off the hook
- If the purchaser doesn't get the certificate or doesn't make reasonable inquiry and turns out that vendor is a resident, then the purchaser is liable for that

Overall	Make reasonable inquiry. If you find out that person is a resident of Canada, you don't have to worry. If person is a non-resident, you need to get the clearance certificate. Reasonable inquiry requires something in writing from the vendor or vendor's lawyer indicating that he is a non-resident.
Note	You are supposed to withhold or remit when it comes to things such as lease payments, management fees, etc. Any times monies are paid to a non-resident, you should get some tax or accounting advice or just remit 25% to the government

Transfer of Land Document

- Basic document that transfers land title
- Affidavit of execution: witnesses swear in front of the commissioner that they saw the vendor sign and he was over the age of 18
- Affidavit signed by purchaser: describes the consideration. Third paragraph you talk about what your opinion of what the land is worth

GENERAL SALES TAX

GST: General Principles Regarding its Application and Exemptions

G.S.T. issues come up in many transactions, therefore it is important for lawyers to have a handle on potential G.S.T. issues. In general, and where possible, a G.S.T. accountant or tax lawyer should be consulted in any transaction where G.S.T. may be an issue.

Governing Legislation

The governing legislation is the *Excise Tax Act* (Canada). The current G.S.T. rate is 5% (reduced from 7% to 6% in July, 2006 and to 5% in Jan, 2008). Liability to pay is on the purchaser, however the responsibility to collect and remit is generally (but not always) on the vendor.

Two Primary Considerations

There are two primary considerations to be covered, each of which will be discussed in turn:

- When is G.S.T. payable?
- Who is responsible for paying and remitting same?

When is G.S.T. Payable?

GENERAL RULE	G.S.T. is payable on any supply/transfer of goods or services between 2 or more persons (s. 165 ETA). However are numerous exceptions.
-----------------	--

EXCEPTIONS (some of them):

- **Sale of Shares**
 - Considered exempt since they are like a financial instrument
- **Granting of a Mortgage**
 - Purchaser obtains a mortgage to finance the purchase of land
 - When purchaser is obtaining that mortgage, they don't have to pay GST on it since it is a financial instrument
- **Sale of all or Substantially all of the Assets of a Business (s. 167 ETA)**

Requirements:

 - Both parties must be GST registrants prior to the closing date.
 - "All or substantially all" is generally interpreted to mean 90% or more of the assets which form part of a *business*. [Note: There may be more than one business being operated by the same person/corporation.]
 - The election form (GST Form 44) must be filled out and jointly made/signed.

Note	If you have a sale of commercial land that is going to be sold as part of the sale of a business, you will typically fall under this exemption.
------	---

- **Transfers of assets on an Amalgamation or Liquidation (in most cases)**
 - If you have public companies that are going to amalgamate into one, if they own land, it will be in the new company's name and they won't have to pay GST on that
- **Real Property Exceptions (in Schedule V to the ETA)**
 - Sales of Farm Land to Relatives (in some situations)
 - Sales of "Personal Use" Property (ex. bare lots, cottages) – This is commonly referred to as the "personal use exemption".

Requirements:

- Vendor is an INDIVIDUAL not a corporation
- Land is not being used for any revenue generating purpose

[NOTE: the revenue generating activity does not have to make a profit]

- **Rent Payable by Lessees of Used Residential Property is Exempt**
- **Sale of Used Residential Real Property** .
EXCEPTIONS – If the residential complex has been “substantially renovated” or “input tax credits” were claimed in relation to it.

Requirements:

- Must be residential premises.
- Must be used.
- The land must be 1.25 acres or less.
- The above exceptions must not apply.

(Note that the land can be owned by an individual or a corporation.)

Types of Used Residential Complexes:

- Used Single family homes –****Caution:** If the land is more than 1.25 acres, further analysis must be done to determine if G.S.T. is payable.
 - If the vendor is an individual
 - If there was any revenue generating activity, G.S.T. will be payable on the sale of the excess land.
 - If there was no revenue generating activity, G.S.T. will not be payable because it can be sold as personal use property.
 - If the vendor is a corporation
 - The sale of the house will be G.S.T. exempt and 1.25 acres, yet G.S.T. will be payable in relation to the excess land. Therefore need to ALLOCATE the purchase price accordingly.
- Apartment buildings of all sizes
Except that one needs to find another exemption for any commercial space and chattels therein as otherwise G.S.T. will be payable on those aspects.

This exception (i.e. “used residential complexes”) does not include:

- Hotels, motels or similar buildings [however often another exemption will apply]
- New Residential Homes –
 - Therefore G.S.T. is payable yet, if the purchaser is an individual, a G.S.T. tax rebate may be applicable.

SECOND PRIMARY CONSIDERATION and general rule:

Who is responsible for paying and remitting same?

GENERAL RULE	The Purchaser is the party liable to pay the G.S.T., however the responsibility to collect and remit is generally on the Vendor (s. 221(1) ETA). If the Vendor fails to collect and remit, and
--------------	--

	the Purchaser does not thereafter pay, then the Vendor will be liable.
EXCEPTION	If the supply is the taxable purchase of REAL PROPERTY by a G.S.T. registrant (s. 221(2) ETA), the Purchaser, not the Vendor, has the obligation to account to CRA for the G.S.T. (s. 228(4) ETA).

Requirements for the Real Property Exception to Apply

- Purchaser must be a G.S.T. registrant by the closing date.
- It must be a sale of real property, not a lease.
- It must not be a sale of NEW residential real property to an INDIVIDUAL.

If chattels are considered incidental supplies, then they are treated as real property. Basically if a real property exemption applies and they are considered incidental, they will slide under that exemption. Suppose you have land where its non-residential commercial land but the purchaser is a GST registrant so vendor doesn't have to remit but they have a whole bunch of appliances in the basement that they wouldn't need, those extra appliances would not be considered incidental and therefore vendor would have to collect and remit on the purchase price amount attributable to those chattels. If they are incidental, then they will be treated the same as real property.

Basic Title Obligations of the Vendor

Two Primary Considerations When Purchasing Land (Title and Quality)

A Purchaser is concerned with two main aspects when purchasing land:

1. **TITLE to the Land** - A Purchaser is concerned about the title to the land in the sense that he/she wants to become the legal owner of land, subject only to the encumbrances that he has agreed to assume. [Focus is on the nature of the ownership (intangible).]
2. **QUALITY of the Land** - A Purchaser is concerned about the physical condition or quality of the lands (as well as the use to which they can be put) since a defect might restrict the use and enjoyment of the property. [Focus is on the nature/condition of the property.]

Summary

The STARTING POINT for title obligations is the strong presumption at common law that the Vendor should provide a **fee simple absolute title** (including mines and minerals), unless there is clear language to the contrary. If the Vendor doesn't, it's a title defect and historically, the Purchaser had a right to rescind.

[Now, as shown in the next section which deals with the "rescission remedy", the harshness of this rule has been mitigated by simply allowing nominal damages if the value of the title defect is nominal.]

APPLICABILITY OF THIS PRESUMPTION – When determining the applicability of this presumption, the courts will consider the following (some of which may limit or rebut the presumption):

Terms of the Contract

- If it is an OPEN contract such that title is not addressed in the contract, there is a presumption that perfect title will be provided by the Vendor. If there is no limitation in the agreement, this presumption applies (unless the knowledge exception applies).
- If it is a CLOSED OR COMPREHENSIVE contract (such that the nature of the title to be transferred is stated):

- While the terms of the contract govern, since any limitations on the title will be viewed as being inserted for the benefit of the Vendor, they will be subject to a restrictive interpretation as against the Vendor
 - To rebut the basic common law presumption, there must be clear, concise and unequivocal language; and
 - Any ambiguities will be resolved in favor of the Purchaser; and
- If it is a CLOSED OR COMPREHENSIVE contract (such that the nature of the title to be transferred is stated) a Vendor has a duty to disclose to the Purchaser any latent defects in title, known to the Vendor, of which the Purchaser is unaware unless it is a “typical title” defect.

Knowledge of the Purchaser – There is NO DEEMED knowledge of the Purchaser. Therefore the Purchaser is not deemed to have known what the title looks like at the Land Titles Office, even though a Purchaser is fully capable of pulling a title search. HOWEVER, if the Purchaser has ACTUAL KNOWLEDGE of a defect, the court may, in some cases, either:

- determine that the limitation on the title was consistent with the agreement between the parties such that there was no breach by the Vendor in its title obligations; and
 - limit the remedies available to the Purchaser by not allowing the rescission remedy and potentially limiting the remedy to nominal (or more substantive) damages [discussed in more depth in the next section]
- NOTE – One must focus on the substance of the knowledge.

Potential Title Issues

- Mortgage
- Easements and Restrictive Covenants
- Title Defect (encroachment)

NOTE: TITLE IS IMPORTANT BUT IT IS NOT AN ESSENTIAL TERM

4 Common Law Principles that Relate to Vendor’s Obligations

1. Strong presumption at law for the vendor to provide a **fee simple absolute** unless there is clear language to the contrary
2. If it is an **open contract**, then the courts will imply that vendor must provide the fee simple absolute with possession
3. If it is a closed contract and if the vendor includes restrictions as to what kind of title they will provide, then they must do so in clear terms and the **restrictions will be interpreted narrowly against the vendor**
4. If you have a closed contract and there is a **latent title defect** of which the vendor is aware, the purchaser can rescind if that defect was not disclosed to him. Exception: **Typical Title Exception**

Note: Typical Title Exceptions DO NOT APPLY to open contracts

- Only applies to closed contracts
- It would not apply to open contracts
- A vendor is not required to provide something that is typically reserved from title
- Most common examples are mines and minerals or dealing with some variant such as coal
- The second most common exception is common easements against property (utility easements for telephone, gas, electricity, etc.)

AVAILABILITY OF THE RESCISSION REMEDY

What is rescission?

- It is an equitable remedy that restores the parties to their pre-contractual position (therefore deposits will be returned to ensure that the parties are in the position in which they stood before the contract was entered into).

The rescission remedy allows:

- a. termination (in a sense) of the contract by putting the parties into their pre-contractual position
- b. recovery of deposit (and potentially interest thereon)
- c. recovery of incidental costs of searching title etc.

Rescission v. Repudiation:

Rescission – Typically, it is a remedy available to a representee, when the other party has made a false or misleading representation. For title issues, the Vendor is presumed to represent he/she will provide perfect title, except as clearly stated. If the representee decides not to proceed because of the misleading misrepresentation, then his election to refuse to be bound by the contract constitutes “rescission”. Rescission allows the rescinding party to treat the contract as if it were **void *ab initio***.

Repudiation – By contrast, repudiation, if accepted by the non-repudiating party, is essentially a **termination** of the contract (but it does not render the contract void *ab initio*). Repudiation occurs when words or conduct of a party show an intention that that party intends not to fulfill its obligations under the contract (or to be bound by the contract). It further requires the non-repudiating party to accept the repudiation. If the non-repudiating party instead elects to treat the contract as still being in force, the contract remains in force for the future and the parties can sue for past or future breaches. If the non-repudiating party elects to accept the repudiation, the contract is terminated and the parties are discharged from future obligations. However, rights and obligations that have already matured are not extinguished (therefore the contract is not void *ab initio*, in contrast to rescission).

When Does The Rescission Remedy Apply?

Generally, at law, rescission is considered a very strong remedy that is only granted in exceptional circumstances. However, the tradition of the courts to accord a strong reverence to the concept of a perfect title (a fee simple absolute) allowed the remedy to apply in all cases where there was a title defect, provided that the defect was not trivial.

The current trend of the courts is to broaden the category as to what constitutes “trivial” such that less title defects will allow the Purchaser entitlement to this remedy.

GENERAL RULE – The general rule is that a Purchaser will be entitled to rescind the transaction because of a title defect subject to the following:

1. **Materiality of the Defect** – The defect must be sufficiently material to justify rescission. It cannot be trivial or immaterial. If considered trivial, the remedy will be limited to monetary compensation in the form of an abatement of purchase price (if any). Rescission will not be justified.
2. **Is the title defect a “defect in conveyance” as opposed to a “defect in title” such that the Vendor has a reasonable period to remedy the defect?**

- “Defect in Title” - A title defect whereby the Vendor does not have the present means of enforcing, compelling or obtaining good title.
- “Defect in Conveyance” – A title defect whereby the Vendor has the present means to enforce or remedy good title, but has yet to pursue that means to conclusion.

Defect in Title

- Defect where the vendor itself cannot solve the issue. It is dependent on some 3rd party act or something out of the vendor’s control. Example: Vendor did not get dower consent or did not yet own the land before it committed to sell it or there is a mortgage against the land that exceeds the purchase price

Defect in Conveyance

- Vendor has the ability to remedy it. Example: A mortgage that can be paid off or there is an option to purchase land that it can exercise for a nominal amount and then it can sell the land

Vendor’s Quality and Fitness Obligations

GENERAL RULE FOR QUALITY DEFECTS

The GENERAL RULE for quality defects has two elements:

1) **Caveat Emptor (Buyer beware)**

Caveat emptor, qui ignorare non debuit quod jus alienum emit.

Let a purchaser, who ought not to be ignorant of the amount and nature of the interest, exercise proper caution.

IMPLICATIONS are twofold –

- A term as to quality or fitness of the subject matter being sold will not be implied into the contract. If a warranty is wanted, it must be expressed.
- Silence is golden. The Vendor is under no obligation to disclose defects, even if he/she is aware of the defects.

2) **Doctrine of Merger** – The terms of the contract are merged into the final conveyance and spent unless they can be said to clearly survive completion of the contract.

RATIONALE (behind Doctrine of Merger) – The courts wish to discourage resurrection of the contract once it has been completed and favour finality and certainty in business affairs.

These two principles of *caveat emptor* and the Doctrine of Merger significantly limit the protection afforded to the Purchaser and severely restrict the remedies of the Purchaser.

MITIGATION of the GENERAL RULE

The SEVERITY of the two aspects of the general rule are MITIGATED by the following:

- a. Limitations on the Doctrine of Merger – Executory contracts and contracting out of the doctrine of merger.

- b. Exceptions to *Caveat Emptor* – There are certain exceptions to *caveat emptor* which, if applicable, will allow a Purchaser to make a claim against the Vendor.

LIMITATIONS on the Doctrine of Merger

There are the following limitations to the Doctrine of Merger:

1. Executory Contracts – If the contract is still executory (as opposed to executed), the doctrine of merger is not applicable.
2. Contracting Out - If the contract expressly states that the terms of the contract do not merge in the final conveyance, one can avoid the strict application of the doctrine of merger.
3. Oral Collateral Obligation (survival of terms) – The parties may agree that certain terms in the first contract will not merge in the final conveyance. If so, the doctrine of merger does not apply to a collateral or independent undertaking (matters not going to conveyance issues).

EXCEPTIONS to or LIMITATIONS on *Caveat Emptor*

There are certain exceptions to the *caveat emptor* rule where a Purchaser can maintain an action against the Vendor for quality defects. These assume that the defect in question is sufficiently material to justify an action and (typically) include a minimal degree of disclosure as more particularly set forth below. The exceptions are as follows:

1. Terms/Wording of the Contract

- a. Is it a term of the contract?
- b. If so, consider:
 - i. Does the Doctrine of Merger apply to preclude a claim? If not, is there an exclusion clause?
 - ii. Is there an exclusion clause which precludes a claim (if the “term” is not in the contract ex. an oral term)?
 - When you are dealing with oral terms outside of the agreement, you have to consider if there is an exclusion clause. Clause that says this is the entire agreement between the parties that says this is what it is.
- c. Condition v. warranty and impact on the remedy.
 - If there is a claim under the contract, the remedy depends on if the term is considered a warranty or a condition
 - If it is a warranty, you only get damages and generally applies to less important terms
 - If it is a condition, its considered a very important term and then your remedies include rescission and/or damages
 - Inonimate terms: where the severity of the breach makes it one of the other. If it is a significant breach of a minor matter, it becomes elevated to a condition. Importance of the breach will determine the remedy

Innocent Misrepresentations

- a. Requirements
 - Vendor makes a representation about the quality of the property but the vendor does not know the representation is false
 - Requirements include

1. Representation by vendor
 2. Reasonable reliance by purchaser
 3. To the detriment of the purchaser
 4. Vendor doesn't know of the falsehood of the representation
- b. Remedy
- If these 4 requirements are met, the remedy is rescission
 - Problem: rescission is only available if the contract is executory meaning the contract cannot be completed. It is a very limited remedy
 - 2 problems with this remedy
 - You will not be able to see the problems until you get into the property
 - Most times there is going to be an exclusion clause in the contract that says there are no other oral representations or warranties which makes it difficult to get this remedy

Fraudulent Misrepresentations

- a. 4 Requirements
- There must be a false representation of fact
 - The purchaser must have relied upon this representation of fact
 - There must have been some damages suffered
 - Vendor knowingly made the false representation
- b. Remedy
- Vendor is vicariously liable for his realtor. Fraudulent misrepresentation is a very hard to prove. But if you are successful, you will get a whole array of remedies such as rescission, damages, etc. It doesn't matter if contract is executed or executory. The state of the contract is irrelevant

Error in *Substantialibus*

- a. Requirement in *Canada v. England*
- This is based on the common law mistake doctrine
 - You can only raise this when there has been a total failure of consideration
 - Total failure of consideration has to be resulting from a fundamental mutual mistake between the parties
 - If you want to make this claim, you have know that there is risk involved since it is unclear when it is going to apply
 - Defect has to be very substantial such that it radically transforms what the purchaser thought it was getting
- b. Remedy.
- Rescission and/or damages and doesn't matter if contract is completed or not
 - Typically it is going to be rescission

Implied term as to Reasonable Fitness for Human Habitation

- a. Previously occupied homes.
- There is no implied warranty that it will be fit for human habitation
 - If there is an express warranty, then the purchaser may have recourse. For example: an area purchase contract (it states that there are no latent defects rendering

property unfit for habitation). You will often see some kind of warranty relating human habitation and it requires the defect to be a latent defect. Most infestations are latent defects

- If it is a latent defect that vendor is aware of, you may have recourse
- b. New houses that are 100% complete yet not previously occupied (i.e. show homes)
 - No implied warranty even though it hasn't been previously occupied but is 100% complete
- c. New houses under construction (incomplete homes)
 - Implied warranty for human habitation
 - Rationale: courts feel that it would be ridiculous for purchaser to enter into a contract with a builder when the home isn't complete and not imply this warranty because then the builder could stop building the next day and say "here is your home". If it is an incomplete home, the obvious intention between the parties is that it has to be fit for human habitation
 - Also, purchaser could not do a proper inspection
 - But lets say the house is 97% complete, the implied warranty will still apply because the house is not 100% complete
 - If it is incomplete, implied warranty only applies where vendor was supposed to finish completing it. If purchaser is supposed to complete it, then warranty doesn't apply

The Duty to Reveal Latent Defects (goes against "silence is golden" principle)

1. **Dangerous Premises of which the Vendor is aware**
 - Vendor will most likely be liable if the latent defect renders the premises dangerous
 - Rawson Case
 - Argument that plaintiffs were relying on was that the defendants were not allowed to rely on caveat emptor because they concealed a latent defect. Court said it was irrelevant whether house was finished or unfinished
 - Court found that caveat emptor applies but was vitiated by a fraudulent misrepresentation. Court said that the failure to disclose the latent defect was a fraudulent misrepresentation (but really it isn't). Court equates failure to disclose a latent defect were the defect is dangerous to fraud
2. **Near Fraud Cases and/or Half Truth Cases (Latent defect of which the Vendor is aware where there is also conduct or comment that is more than simply silence)**
 - There has been active conduct by the vendor or his realtor that results in some sort of misunderstanding to the purchaser
 - Active concealment: have cracks and cover them up to disguise them (near fraud)
 - Half-truth: vendor says something or there is conduct to suggest a certain result when that is an incorrect implication
 - Court will find against the vendor even if the statement is literally true or if there was no statement but there was conduct that created some misunderstanding
3. **(Material) Latent Defect that is not dangerous of which the Vendor is aware**
 - Hasn't been active concealment or fraudulent misrepresentation
 - Directly challenges the silence is golden

- This category has not been developed very much; there are lower cases that suggests there might be recourse but premise that silence is golden is pretty strong in these kinds of situations
- Most cases deal with this fit for habitation

Tort Law – Negligence, Negligent Misrepresentations (Builder Cases)

Typically if we have a normal vendor who isn't a builder, it will be hard to sue for negligent misrepresentation . Cases that will allow negligent misrepresentation are cases in which the vendor is a builder. Vendor has to live up to the contractual and tort law duty.

- Duties of a Vendor who is also the builder of a house.
- Exclusion clauses.
- Extent of duty

Frustration of Contracts

3 Requirements

- i. Has to be a supervening event (condition cannot exist at the time that contract is entered into)
- ii. Beyond the control of the parties
- iii. Not contemplated by the parties

Closing the Real Estate Transaction

There are three main methods of closing

1. Closing Contingent on Title Registration
2. Protocol Closing
3. Title Insurance Closing

Trust Conditions

Typically, trust conditions are **imposed on the Purchaser's lawyer** and the undertakings (which are treated the same as trust conditions) are given by the Vendor's lawyer. If properly imposed and followed, the vulnerabilities of both the Purchaser and the Vendor are significantly (or completely) diminished.

The rules relating to trust conditions are set forth in the Law Society HANDBOOK (which has been created by the Benchers of the Law Society) in an effort to reduce the risk of the involved parties in a real estate transaction (commercial or residential).

Some of the formal RULES relating to trust conditions are as follows:

- (1) Trust conditions must be clear and unambiguous.
- (2) One cannot impose a trust condition that is impractical or manifestly unfair.
- (3) One cannot accept a trust condition over which it has no control.
- (4) If you are unable to comply with the trust conditions, you must return the trust property immediately or otherwise comply with the instructions in the trust letter.
- (5) If one uses the property, one must abide by all trust conditions imposed in relation thereto.
- (6) All amendments must be in writing.

- (7) If fairly construed as a trust condition, then the rules relating to trust conditions will be applied even if it is not specifically referred to as a “trust condition” or “undertaking”.

NOTE – Trust conditions/undertakings are imposed on lawyers, not on the Purchaser or Vendor directly. If you are imposing them on a non-lawyer, then you will not have the same recourse through the Law Society.

(1) Closings Contingent on Title Registration

- The Vendor’s lawyer provides the transfer of land to the Purchaser’s lawyer on certain trust conditions.
- Typically (in Alberta), the Purchaser does not pay the purchase proceeds until the title to the land is registered in its name.
- The Purchaser’s lawyer submits the transfer of land to the Land Titles Office in full compliance with the Vendor’s lawyer’s trust conditions.
- If there is a new mortgage, the lender will not advance any funds until title to the land is registered in the Purchaser’s name and the mortgage is registered on title.
- Once the above registrations are done, the Purchaser’s lawyer will request funds from the lender and upon receipt, pay the Vendor’s lawyer, in accordance with the trust letter, which trust letter should include an undertaking by the Vendor’s lawyer to payout any of the Vendor’s mortgages (or other charges on title).

(2) Title Insurance Closings

What is title insurance? Essentially its insurance obtained to cover potential defects in title (such as zoning non-compliance; irregularities on title etc.). If title insurance is obtained, generally the lender will advance the mortgage proceeds and the Purchaser’s lawyer will pay the purchase proceeds without first obtaining title registration (although the transfer is generally submitted for registration at the Land Titles Office).

Benefits of Title Insurance

- faster and more timely closings which avoid the delay caused by the Land Titles Office;
- there may be cost savings because a Purchaser may avoid the need for interim financing or paying interest on purchase proceeds owed etc. since can close on the closing date (yet remember, unlike a protocol closing, there is a premium to be paid)
- it can facilitate a closing in some cases

What is covered with Title Insurance

For owners:

- ✓ Protection against certain title defects (survey and zoning are included for residential yet not automatically included in commercial);
- ✓ Protection against prior intervening registrations; and
- ✓ Compensation for legal costs incurred in relation to the above.

For lenders (additional coverage):

- ✓ Protection against the invalidity or unenforceability of documents
- ✓ Protection against a lien having priority over the lender's mortgage
- ✓ Protection against survey and zoning on residential and commercial properties where the value is less than 5 million.
- ✓ Compensation for legal costs incurred in relation to the above.

Difference from Regular Insurance - Policy coverage includes title coverage up to the date of registration (when the status of title is finalized). Regular insurance covers events subsequent to obtaining the insurance. In contrast, title insurance covers anything up to the date specified.

Timing and Cost for Residential Transactions:

- it is quick to obtain the insurance because generally it is a standard policy;
- cost is fairly nominal (\$300 - \$500)

Timing and Cost for Commercial Transactions:

- the coverage is more tailor-made, therefore it takes more time to finalize;
- cost is generally more than residential and depends on the circumstances

Summary of Title Insurance

- ✓ Title insurance is really simple and fast; guarantees good title to the purchaser
- ✓ If there is a problem with your title, the insurance company is going to pay you for anything arising from it
- ✓ Title insurance is great for title defects. Title insurance is a one-time payment
- ✓ In addition to dealing with title defects, it deals with that period of uncertainty when the vendor gives the transfer documents to the purchaser who submits it to land titles (during this period, other registrations could go on to the vendor's property). **Gap coverage for intervening registrations**
- ✓ Title Insurance does not cover chattels, only deals with situations involving actual loss, doesn't cover environmental matters typically, issues that are known to be insured but not disclosed to insurer, and doesn't cover functionality issues

(3) Protocol Closings

Intention – It is hoped that protocol will encourage the continued use of lawyers in real estate transactions. The intention of the protocol is to allow for a more streamlined conveyancing practice in order to facilitate the full release of funds on the closing date (both purchase proceeds and mortgage proceeds) without having to first wait for registration of the transfer at the Land Titles Office. Specific steps are to be followed by the lawyer in order to do this.

Fundamental Principles –The core principles are:

- It allows for the advance and release of the mortgage proceeds and other purchase funds on the closing date (and prior to registration of the transfer at the Land Titles Office)
- It enables lawyers to satisfy the unique security requirements of lenders without the expense of obtaining a real property report (unless there is a known defect).
- It encourages the continued due diligence by Purchasers in relation to survey and zoning (because, as distinct from lenders, protocol only protects the buyer from intervening registrations, not survey/zoning defects).

How does it work if there is a claim?

Protocol is backstopped by the lawyer's mandatory insurance program. If a claim is made against a lawyer arising from the use of Protocol which:

- results in actual loss to a buyer due to an intervening registration which impairs the buyer's title; or
- results in actual loss to a lender:
 - o due to an intervening registration which takes priority to the lender's mortgage; or
 - o due to a survey defect which was unknown at the date of advance but which would have been disclosed by an up-to-date real property report with a compliance stamp

THEN the insurance program will accept liability on the part of the lawyer and move quickly to quantify damages. If one of the claims is made against a lawyer, the levy surcharge/deductible of that insured lawyer will be waived, provided the lawyer adhered to the protocol practices.

When can it be used?

It generally applies to residential transactions involving existing single family residential property having 4 or fewer units. It also applies to:

- residential purchases with or without mortgage financing (provided that the lender is a protocol lender)
- rental and vacation properties (as long as 4 or less in one transaction)
- existing condominiums (not new ones or newly converted condos due to special requirements on developers relating to holding the monies in trust under the *Condominium Act*)
- refinancings or new mortgages (if it is a protocol lender)
- acreage holdings with residential property and no commercial activity

When can it NOT be used?

It cannot be used in relation to:

- commercial real estate
- agricultural property
- multiple family dwellings
- construction mortgages (where it's a draw mortgage)
- new home construction (possibly)
- sale of a condo unit by a developer (because of s. 14(3) *Condominium Property Act* requirements)
- a party on the other side that does not have a lawyer

Cost : Unlike title insurance, it is available at no extra cost to the customer or lender.

Consents

- Generally you need the consent of all involved parties prior to doing a protocol closing. If a lender is involved, this includes the lender and the authorization will generally be set forth in the instructions.
- Also note that protocol only works where all parties are represented by lawyers. Otherwise, one cannot use it (this may be a good reason to convince a party to get a lawyer).

Summary of Protocol Closing

- ✓ Protocol is limited as it does not apply to commercial transactions
- ✓ It just deals with the mechanics of closing; it is all procedural
- ✓ You have to follow a certain protocol. If you do, you get a fast closing
- ✓ Once you get the transfer documents, you submit it to land titles. On the same day, you pull a title search to ensure no surprises on title, and then pay the purchase proceeds to the vendor's lawyer
- ✓ Must do three things on the same day:
 - Title Search
 - Submit to Land Titles
 - Pay out the Purchase Proceeds
- ✓ You need parties to consent to protocol; you need lawyers on both sides
- ✓ Protocol does not cost anything
- ✓ With protocol, issues with the title will be rectified. They will get it off if.

Possession

4 Common Law Rules for Possession

1. Pay money, get possession
2. Vendor is entitled to interest on purchase price if payment is delayed
3. Determination of the rate of interest
4. Closing date will be at a reasonable time, shorter for residential since less documentation. Typically will be a month.

Pay Money, Get Possession

- ✓ If vendor grants possession, vendor gets his purchase price unless they agree otherwise. If no closing date specified but date for possession, that will be the date for purchase price to be paid out

Vendor is entitled to interest on purchase price if payment is delayed

- ✓ If purchaser gets early possession, interest should be payable from then
- ✓ If purchaser is enjoying fruits of possession, they should be compensating vendor

Determination of Rate of Interest

- ✓ If the rate of interest isn't stated, subject to legislation, it would be either the rate of new mortgages or the rate of the current mortgage of the vendor, or the rate fixed by a judge
- ✓ Interest rate is specified as ATV prime plus 3%
- ✓ Interest Rate Act: If no rate fixed, it is 5%

Adjustments of Rents, Profits, Taxes and Other Payables

At common law, the vendor owns the property up to the beginning of the closing date. You can contract out of that. The current area contract under provision 4.2 states that the **vendor gets the closing date**. In a residential transaction, the only relevance is that one day becomes another day of property taxes paid. It is different for commercial transactions.

Common Law	Vendor does not get the closing date
Area 4.2	Vendor does get the closing date

Typical Adjustments

- Property Taxes
- Rents: usually collected in advance; if closing date on 15th, vendor will credit purchaser
- Damage Deposits: Generally vendor will just credit the purchaser for the amount of the damage deposit
- Utilities: lawyers don't typically get involved in adjusting the utilities unless the utilities haven't been paid and are charged against the land

Property Taxes

- Time consideration
- Taxes are typically paid once a year
- **If in November, after taxes paid, credit goes to vendor**
- **If before taxes paid, credit goes to purchaser**

Amount of the Adjustment

- Two things determine the rate of the adjustment
 - Mil Rate
 - Assessed value of the property
- Take last year's rate and add 5%. If the closing date is before the property taxes have been set for the year, you have to estimate by taking last year's rate and adding 5% to it
- In residential transactions, the parties will adjust themselves

INSURANCE

4 Main Principles

1. Personal
2. Indemnity
3. Relevance of a material change in risk
4. Transfer of risk

Personal

- Insurance is not a contract between the person obtaining it and the insurance company so it is not transferable
- Applying the strict principles of insurance law, the buyer of a home is not protected by the seller's policy
- Contract of insurance is between vendor and insurance company and has nothing to do with purchaser therefore the purchaser has no automatic right to it

Indemnity

- The policy covers suffered by the insurer's losses. If there are no losses, the insurance company does not pay (e.g. the vendor has coverage, the sale closes early, a fire occurs---the vendor has not suffered any loss since it has already received the purchase price)

Relevance of Material Change in Risk

- You must inform your insurer of any material changes in risk (e.g. you sell your home to someone and allow them early possession before the sale has closed)

Transfer of Risk

- The risk transfers upon payment of the purchase price (not necessarily at the time of title registration or purchaser possession)
- Common Law Rule: risk transfers with payment of proceeds (upon payment of purchase price)
- If the closing date is March 1 but you don't pay until March 30, the risk doesn't transfer until March 30

When Should the Vendor Cancel Insurance and the Buyer Obtain Insurance?

- The purchaser should get insurance on the earliest of the following:
 - Paying the purchase price
 - Entering into possession (most important!!!!)
 - Submitting the transfer of registration
- For the purchaser, an insurable interest usually arises upon paying a deposit and showing an interest in becoming an owner
- The vendor should maintain its insurance until the vendor (or his lawyer) obtains the purchase proceeds. But to be prudent, vendor should have insurance coverage until title transfers
- If you get caught in the situation where one has coverage and the other doesn't, the one with coverage receives the proceeds in trust for the other party. However, this has not been fully accepted in common law so it is best to always obtain appropriate insurance

Other Relevant Closing Matters

Both parties have an obligation to show that they are willing, able, and ready to close.

- A. Typical Closing Documents for Vendor and Purchaser**
- B. Tender of Documentation**
- C. Time of the Essence**

Typical Closing Documents for each of the Vendor and the Purchaser

- Common Law Rule: Purchaser prepares the transfer document. Vendor's lawyer typically prepares the transfer of land
- Main Documents prepared by the Vendors Lawyer
 - Transfer of Land
 - Statement of Adjustment
 - Direction to Pay
 - Unpaid Vendor's Caveat
- Purchaser's lawyer prepares
 - All mortgage documents
 - Miscellaneous purchase documents

Tender Documentation

- Common law tendering process doesn't work in Alberta because of the Land Titles System
- Idea was that you would meet at the property, vendor signs off on deed, purchaser pays money, Done!
- You have to show that you are ready, willing, and able to close. If you learn that the other side is not going to be willing to close, you want to make sure its clear that you are ready, willing, and able to close to

maximize your remedies. If the other party sends you a letter saying that they are not ready to proceed, then you don't have to show that you are ready, willing, and able

Vendors lien is a charge against the land or against title to preserve its interest in the property – so if for whatever reason, the purchaser doesn't pay, the vendor has top priority on title. The earlier registered caveats take priority over the later registered ones.

What is Proper Tender?

At common law a cheque would be provided and the vendor would give title to the purchaser – i.e. it would all be done simultaneously – this of course doesn't work under our land titles system because of the registration process

- **Typically have to show that you are ready, willing and able close the transaction**
 - The grey area becomes: what does that mean with respect to payment? Is it enough to have payment in the P's lawyers trust account or does it have to be in the vendors bank account
 - Is it enough for the vendor to have signed all the documents which are sitting in the V's lawyers office or do they have to be sent to the P's lawyer
 - At a minimum it has to be sitting at your respective lawyer's office **READY TO GO.**
 - This is a grey area
 - But the key is showing ready and willingness to complete – often shown by lawyers letters sent back and forth.

Time of the Essence

- **If Time is of the Essence then closing must occur on the closing date**
- **If there is nothing to intimate that TOTE then it can close within a reasonable time.**
- **If there is a TOTE clause, then you have to tender on the closing date (very common)**
- The presumption is that time is NOT of the essence unless there is a clause to the contrary
 - Can be waived either intentionally or unintentionally
 - Courts tend to apply the doctrine of good faith and fair dealing to mitigate against the harshness of the rule.
 - If a court finds it too harsh to impose strictly, they will impose the concept of fair dealing and good faith and allow for the closing date to be a little bit later.
 - Rationale: They don't want a slight infraction to ruin the deal
- Most agreements now will include the phrase "time is of the essence"
- Paragraph 7.1 in Area Contract.
- Canada has adopted a fairly liberal approach to this type of clause – has restricted the strict enforcement of the clauses by saying that there is a duty of fair dealing/good faith. Rationale: don't want a minor detail to frustrate an entire deal
- Can be impacted by waiver – if parties, by comment or conduct, either inadvertently or intentionally waive the TOTE clause then the other side won't have to comply with the strict enforcement of it.

