

MINOR REPORT ON PRACTICE IN RELATION TO THE CANCELLATION OF A CERTIFICATE OF LIS PENDENS (LRC 98)

November 18, 1988

Dear Mr. Attorney:

Re: Minor Report on Practice in Relation to the Cancellation of a Certificate of Lis Pendens

A. Introduction

The certificate of *lis pendens* is a familiar instrument. Its issuance is provided for in section 213 of the *Land Title Act*:

- (1) A person who has commenced or is a party to a proceeding, and who is
 - (a) claiming an estate or interest in land; or
 - (b) given by another enactment a right of action in respect of land,

may register a certificate of *lis pendens* against the land in the same manner as a charge is registered, ...

The registration of a certificate of *lis pendens* (hereafter CLP) may severely restrict the way in which a person with an interest in the land can deal with it. The CLP has the effect of preserving the status quo during litigation. The owner of property against which a claim is asserted cannot deprive the claimant of the fruits of the litigation by conveying the property to an innocent party.

The serious consequences of a CLP, and the relative ease with which it may be registered against land, make it a matter of concern that the law provide efficient machinery for the removal of a CLP from title in appropriate circumstances. Sections 231 to 237 of the *Land Title Act* are meant to provide that machinery. A CLP may be cancelled where the action is discontinued (s. 232) or dismissed (s. 233) or on the written request of the party who caused it to be registered (s. 234). Under each of these sections, a CLP may be cancelled on the production of sufficient evidence to the registrar.

There are also two circumstances in which a person may apply to a court for an order cancelling the registration of a CLP. Such an application may be made under section 231 where "no step has been taken in the action for one year." Under section 235, application may be made in cases of "hardship and inconvenience" and the court may order cancellation on sufficient security being given (s. 236). It is these sections which form the focus of this Minor Report. Our formal recommendations concerning various aspects of their operation is set out at the end of this Report. For convenient reference, selected provisions of the *Land Title Act* are appended.

B. The Requirement for a New Proceeding

Sections 231 and 235 both provide that application be made to the court in which the proceeding was commenced. On its face, this direction as to jurisdiction would appear to authorize either of the two different procedural devices by which a claim for relief might be brought before the court. First, it might authorize a wholly new proceeding in which cancellation of the CLP is sought (an originating application brought by petition). Second it would appear to authorize an application for such relief in the same proceeding in which the CLP was issued (an interlocutory application brought by notice of motion). It has

been held, however, that the second type of application is not sanctioned by the legislation and we understand that this has been the source of some inconvenience and expense.

Matsumoto Shipyards Ltd. v. Saggu, (unreported B.C.S.C. Van. Reg. No. C880302, July 29, 1988) is the latest in a series of decisions holding that relief under sections 231 and 235 of the *Land Title Act* is available only in a separate proceeding brought by petition. Until recently, there may have been some theoretical justification for that position. Before 1982, application to the Supreme Court was required in every case (including those in which the CLP was issued in a County Court proceeding). This may have influenced the view taken in some of the earlier cases which tended toward a strict separation of the original proceeding and the application for relief. The 1982 amendments might have provided the courts with an opportunity to reconsider this procedural issue, but that has not occurred.

To require that the applicant commence a fresh proceeding in every case if he is to obtain relief under section 231 or 235 has little to commend it in terms of policy. First, an application for cancellation of a CLP is inextricably linked with the action in which the CLP was issued. For example, a litigant may frequently wish to couple an application for cancellation with another application in the main proceeding. The connection between the issues raised in the two applications makes it sensible that they be heard at the same time and within the context of a single proceeding.

Even where a petition for cancellation is the only application before the court, it may require that the court canvass the merits of the applicant's claim. For example, in fixing the amount of security for the applicant's claim under section 236, the court may "take into consideration the probability of the party's success." In *Park and Tilford Canada Inc. v. Festival Markets Inc.*, (1986) 6 B.C.L.R. (2d) 160, 163 Gibbs J. commented on this link:

Although the petition [to cancel the CLP] is an originating process in a separate action, it is analogous to an interlocutory application in the Festival group's specific performance action, and it will be so treated.

It might also be observed that the requirement for a separate proceeding imposes an additional financial burden on the defendant which, in the light of recent increases in court registry fees, is no longer trivial.

Where an existing party to a proceeding seeks to have a CLP cancelled, there is no rational reason why legislation should not allow the matter to be brought before the court by a notice of motion in the original proceeding. The current view taken by the courts serves only to lay a trap for unsuspecting counsel. These thoughts were echoed by a correspondent, a lawyer practising in the interior of the Province, who first drew this problem to our attention:

With the greatest respect to the learned Judges making those decisions, it is my view that they are completely illogical. Nothing could make more sense than to allow litigants within a proceeding in which a *lis pendens* has been filed to file a Motion applying pursuant to the Sections for removal of the *lis pendens*.

C. Standing to Apply

Standing to apply for relief varies as between section 231 and section 235. Under section 231, "the party against whose land the *lis pendens* has been registered" may apply for cancellation. This would seem to preclude any other person who has an interest in the land, perhaps as the holder of a charge, from applying for cancellation where that person had not been joined as a party to the proceeding. It seems unacceptably narrow to confine standing in this way.

At first blush, section 235 seems to have resolved, at least in part, this problem. Under that section an application may be made by "a person against whose land a certificate of *lis pendens* has been registered." By substituting "person" for "party" it appears to provide for relatively wide rights of standing. The courts, however, have taken a contrary view and, in the result, standing to apply under section 235

seems to be confined to the registered owner who, in most cases, is a party to the proceeding. Charge holders have no status to apply. See *Re Fedoruk*, (1975) 65 D.L.R. (3d) 368 (B.C.S.C.).

It is our view that both sections should provide quite generous rights of standing.

D. Show Cause Procedure

An application under section 235 is for an order calling on the party who issued the CLP to show cause why it should not be cancelled. It is not clear to us why this provision has been framed in this way. The show cause procedure has a distinctly antique flavour and, moreover, is capable of causing mischief. In one case drawn to our attention, a CLP had been issued at the instance of a nonexistent company and there was no entity capable of being called upon to "show cause." We understand that in this particular case the judge did not deny the relief sought, but the language of section 235 created some anxious moments for all concerned.

We believe that the show cause procedure should be replaced by a simple application for cancellation on the grounds set out.

E. Security

Where a court, on an application under section 235, is prepared to order cancellation of a CLP the question of security arises. The fixing of security is regulated by section 236. What is the judge to do when the merits of the application clearly suggest that the proper result is to cancel the CLP without security? This might occur, for example, where the pleadings do not disclose any claim to land or where it is patent that its registration is an abuse of process.

At a technical level, the language of section 236 seems to permit the judge to order nominal security or, perhaps, security of \$0.00. One can, however, understand a judge having a certain reluctance to do that in the face of legislation which appears to contemplate that valuable security be given by the applicant if the CLP is to be removed. We believe it should be made explicit that a judge may, in an appropriate case, order cancellation of a CLP without ordering that the applicant give security.

F. Recommendations

We recommend that sections 231, 235 and 236 of the *Land Title Act* be amended:

1. To permit an application for relief under sections 231 and 235 to be brought either by interlocutory application in the proceeding in which the CLP was issued or by originating application.
2. To provide that any person who can establish a legal or beneficial interest in the land and who is prejudiced by the continued registration of the CLP has standing to apply for relief under sections 231 and 235.
3. To abandon the "show cause" procedure in section 235 in favour of a simple application to cancel the CLP.
4. To clarify that, under section 236, the court may, in an appropriate case, order cancellation of the CLP without requiring that the applicant provide security.

This letter is to be taken as a Minor Report (No. 98) of the Law Reform Commission recommending a change in the law as herein set out. This recommendation was approved by the Commission at a meeting on November 17, 1988.

Yours sincerely,

Arthur L. Close

Chairman

Annex to LRC 98

Land Title Act
R.S.B.C. 1979, c. 219
Selected Provisions

Registration of *lis pendens* in same manner as charge

213. (1) A person who has commenced or is a party to a proceeding, and who is

- (a) claiming an estate or interest in land; or
- (b) given by another enactment a right of action in respect of land,

may register a certificate of *lis pendens* against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced shall attach to his certificate a copy of the originating process, or, in the case of a *lis pendens* under the *Court Order Enforcement Act*, Part 3, a copy of the notice of motion or other document by which the claim is made.

(2) The land affected by the certificate of *lis pendens* shall be described in a manner satisfactory to the registrar.

(3) On registration of a certificate of *lis pendens*, the registrar shall forthwith mail a copy to the owner against whose title the certificate has been registered.

(4) Where, subsequent to the registration of a certificate of *lis pendens*, a change of parties occurs, the registrar,

- (a) on receipt of a certificate of a *lis pendens* showing the new party; and
- (b) on compliance with this Act,

shall register the certificate of change in the same manner as a modification of a charge.

(5) Notwithstanding subsection (1), where a person entitled to enforce a restrictive covenant or building scheme has commenced an action to enforce it, he may register under this section a *lis pendens* in the prescribed form against land in respect of which a breach is alleged to have occurred.

(6) A party to a proceeding for an order for the dissolution of marriage or judicial separation, or for a declaration that a marriage is null and void, or for a declaratory judgment under Part 3 of the *Family Relations Act* that spouses have no reasonable prospect of reconciliation with each other, may register under this section a certificate of *lis pendens* in the prescribed form in respect of any estate or interest in land the title to which could change as an outcome of the action.

(7) Notwithstanding subsection (1), a person who has commenced an action under the *Wills Variation Act* may register a certificate of *lis pendens* in the prescribed form against the and affected.

(8) A judgment creditor who

- (a) has made application under section 9 of the *Fraudulent Preference Act*, and
- (b) in the application, claims he is entitled to register the judgment against the land in respect of which the application was made, or against the judgment debtor's or another person's interest in the land,

may register a certificate of *lis pendens* in the prescribed form against the land.

Cancellation of *lis pendens*

231. (1) Where a certificate of *lis pendens* has been registered and no step has been taken in the action for one year, the party against whose land the *lis pendens* has been registered may apply to the court in which the action was commenced for an order to have the registration cancelled.
- (2) The registrar, on application and on production of a certified copy of the order of the court directing cancellation under subsection (1), shall cancel the registration.

Cancellation of *lis pendens* where action discontinued

232. Where an action in respect of which a certificate of *lis pendens* is registered has been discontinued, the registrar shall cancel the registration, on
- (a) application; and
 - (b) production of a certificate of the registrar of the court that issued the certificate of *lis pendens*, certifying that the action has been discontinued in whole or in part as to the land in respect of which the *lis pendens* is registered.

Cancellation of *lis pendens* where action dismissed

233. Where an action in respect of which a certificate of *lis pendens* is registered has been dismissed, the registrar shall cancel the registration as provided in the regulations, or, on
- (a) application; and
 - (b) production of a certificate of the registrar of the court that issued the certificate of *lis pendens*, endorsed by the registrar of the Court of Appeal, certifying that
 - (i) the action has been dismissed and that the time limited for appeal has expired and no notice of an appeal has been filed with him; or
 - (ii) a notice of appeal has been filed and has been finally disposed of, and the dismissal of the action has not been set aside by the Court of Appeal or the Supreme Court of Canada.

Where action neither dismissed nor discontinued

234. (1) Where an action in respect of which a certificate of *lis pendens* has been registered has neither been discontinued nor dismissed, the registrar, on application, may cancel the registration of a certificate of *lis pendens*, on the written request of the party initiating the proceedings or his solicitor.
- (2) The request shall be in a form satisfactory to the registrar, describe the land in respect of which the registration is to be cancelled, and, in the case of a party, witnessed and proved in the manner prescribed by Part 5.

Cancellation of *lis pendens* on ground of hardship

235. A person against whose land a certificate of *lis pendens* has been registered may, on setting out in an affidavit,
- (a) particulars of the registration of the certificate of *lis pendens*;
 - (b) that hardship and inconvenience are experienced or are likely to be experienced by it; and
 - (c) the grounds for those statements,
- make application to the court in which the proceeding was commenced for an order calling on the party in whose name the certificate of *lis pendens* has been registered to show cause, on sufficient security being given, why the registration should not be cancelled.

Power of court to order cancellation

236. (1) On the hearing of the application referred to in section 235, the court
- (a) may order the cancellation of the registration of the certificate of *lis pendens* either in whole or in part, on
 - (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of *lis pendens* has been registered; and
 - (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court; or
 - (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of *lis pendens*; and
 - (ii) to give security in an amount satisfactory to the court and conditioned on the fulfilment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
- (2) The form of the undertaking shall be settled by the registrar of the court.
- (3) In fixing the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of *lis pendens* was registered.

Cancellation of registration

237. On
- (a) application to the registrar for the registration of an order of cancellation of registration of *lis pendens* under section 236; and
 - (b) production of the order or a certified copy, and a certificate from the registrar of the court from which the certificate of *lis pendens* was issued certifying that the security required has been given,
- the registrar shall cancel the registration of the certificate of *lis pendens* as to the land affected by the order.