

## BACKGROUND

The common law doctrine of *lis pendens* ("a pending suit") initially affected a purchaser of land through the doctrine of notice. Notice of any litigation in respect of the land was imputed to the purchaser and the public at large so that the court's eventual decision would not be nullified through the acquisition of intervening rights. However, over time, the cases established that the purchaser and the public did not have knowledge of the litigation by virtue of the mere fact that an action had been commenced. (1) This development is reflected in the following quote:

"It may be noted that the doctrine as to the effect of a *lis pendens* on the title of an lienee is not founded on the principles of courts of equity with regard to notice but on the ground that it is necessary to administration of justice that the decision of a court in a suit should be binding not only on the litigant parties but on those who derive title from them *pendente lite* whether with notice of the suit or not. To ensure this result today and to limit and control the application of the former doctrine it is necessary that the plaintiff register a certificate of *lis pendens* under the relevant statutory provisions... But at common law neither the issue of the writ nor the registering of the certificate of *lis pendens* has any effect upon preceding and executed transactions." (2)

At present, "the right to register a certificate of *lis pendens* is wholly statutory and merely places on record the historical fact that litigation is pending in respect to a particular parcel of land". (3) Registration of the certificate of *lis pendens* ("C.L.P.") involves a determination by the Registrar as to whether or not it comes within the ambit of the statutory provisions. (4)

A person claiming an interest in any land, mortgage, or encumbrance may, in lieu of filing a caveat or after filing a caveat, proceed by way of an action to enforce his claim and register a C.L.P. in the prescribed form (FORM 30). A person who commences an action to call some title or interest in land into question may also register a C.L.P. (5) The registration of a C.L.P. is also expressly authorized by section 43 of the Builders' Lien Act, R.S.A. 2000, c. B-7 and section 35 of the Matrimonial Property Act, R.S.A. 2000, c. M-8.

## REGISTRATION PROCEDURE

### A. GENERAL REQUIREMENTS

1. C.L.P.'s relating to a builders' lien or caveat must come to the registration area in red folders in order to comply with the fixed time periods. Since removal of a caveat

does not terminate the interest protected by the caveat, a C.L.P. respecting a caveat may be registered even if the caveat to which it refers has been lapsed or discharged.(7)

2. The C.L.P. in a prescribed form ([FORM 30](#), Land Titles Act or [FORM 6](#), Builders' Lien Act) must be signed and sealed by the clerk of the court. The C.L.P. may be FAX FILED with the clerk of the court.

3. A C.L.P. against untitled land is not acceptable for registration unless it relates to a registered instrument.

4. Most C.L.P.'s will indicate that the court action relates to either a caveat, a builders' lien, a mortgage which is being foreclosed, or proceedings under the Matrimonial Property Act. If the action is in respect of some other matter, the C.L.P. should give a brief description of the title or interest which is being litigated. The lack of the description of the interest is not a reason for rejection. An example is the situation where the plaintiff is claiming that a real estate transaction was fraudulent. In this case, the plaintiff will have no direct interest in the land but will be bringing the action to have ownership restored to one of the defendants who is usually a debtor of the plaintiff. (6)

5. The endorsement of the certificate of title should indicate the matter being litigated. An example of a memorandum is:

"CERTIFICATE OF LIS PENDENS RE MORTGAGE 831000111".

Where the C.L.P. relates to a matter other than a registered instrument or caveat, the name of the person on whose behalf it is registered is also included in the particulars.

6. **Matrimonial Property Act** - A C.L.P. under the Matrimonial Property Act may be endorsed against a certificate of title even if there is a material difference between the name of the registered owner and the name of the person whose land is affected by the proceedings. The C.L.P. must contain a legal description.

7. More than one C.L.P. relating to an interest or arising out of one court action may be registered. Several parties may have an interest in the subject matter of a court action and each may file a separate C.L.P.

## **B. WITHDRAWAL OF CERTIFICATE OF LIS PENDENS**

1. A C.L.P. is cancelled upon registration of the following:

- a) a certificate under seal of the clerk of the court stating that proceedings for which the certificate was granted are
  - (i) discontinued, or
  - (ii) dismissed and the time for commencing an appeal has expired and no appeal has been commenced, or if commenced, has been finally disposed of or discontinued.

- b) a withdrawal of the C.L.P. in the prescribed form (**FORM 30A**), attestation must be complied with,
- (i) by the person on whose behalf the C.L.P. was registered, or
  - (ii) if the C.L.P. relates to a caveat or builders' lien which was signed by an agent, by the same agent, **(8)** or
- c) an order of the court discharging the document which is the basis of the C.L.P., this only applies to Builders' Liens.

2. Although a withdrawal of a C.L.P. should be presented with a discharge of the mortgage, builders' lien or caveat it is related to, failure to do so is not a reason for rejection of the discharge. A note to the registrant, advising that the C.L.P. is still registered against the title, should be made on the Customer Registration Notice.

### **C. INSTRUMENT HAVING SAME EFFECT AS CERTIFICATES OF LIS PENDENS**

1. **Notice Under the Securities Act** - The Alberta Securities Commission may send a notice to the Registrar that proceedings are being taken that may affect land belonging to the person or company referred to in the notice. The notice is registered against the land indicated in the notice and has the same effect as the registration of a C.L.P. or a caveat. The Commission may revoke or modify the notice in writing. **(9)**
2. In the above case, particulars of the notice to be endorsed on title are:

"NOTICE BY ALBERTA SECURITIES COMMISSION"

### **STATUTE AND CASE REFERENCES**

Statute references are to the Land Titles Act, R.S.A. 2000, c. L-4, unless otherwise indicated.

1. *Peck v. Sun Life Assurance Co.* (1905), 1 W.L.R. 302 (S.C.C.); *Lefty v. Moffatt*, 510 R. 260, [1925] 3 D.L.R. 825; *Fraser River Ventures Limited v. Yewdall et al.* (1958), 27 W.W.R. 368 (B.C. Co. Ct.)
2. V. DiCatri, *Thom's Canadian Torrens System*, 2<sup>nd</sup> ed., at p. 674
3. V. DiCatri, ed., *Law of Vendor and Purchaser*, at p. 432
4. *Ibid.*, at p. 433
5. s. 148
6. Fraudulent Preferences Act, R.S.A. 2000, c. F-24
7. *McFarland v. Hauser et al.* (1979) 7 Alta. L.R. (2d) 204 (S.C.C.); *Durish v. White Resource Management Ltd.* [1995] 3 W.W.R. 609 (S.C.C.)
8. s. 152; s. 43(4), Builders' Lien Act, R.S.A. 2000, c. B-7
9. s. 47(7) and (8), Securities Act, R.S.A. 2000, c. S-4