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Best Practices Relating to Court Orders
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Court orders are very effective ways to cure title issues. The need for a court order can arise in many situations and address many issues, so it is not appropriate to provide a “precedent” or “template” form of court order, but this collection of “best practices” may assist practitioners in crafting more effective court orders. While most of these best practices relate to vesting orders, the principles can be applied to a wide variety of real estate related court orders.

1. Parties to the Litigation

Subsection 57(13)(b) of the Act provides authority for the court to direct the rectification of the register if the court finds that a “fraudulent instrument” (as defined in section 1 of the Act) has been registered. Where the court is being asked to rectify a title pursuant to subsection 57(13)(b) of the Act, then subsection 57(14) of the Act requires notice be given to the Director of Titles and that the Director of Titles be made a party to the proceeding. The correct way to name the Director as a party (respondent or defendant) in this type of proceeding is “The Director of Titles pursuant to subsection 57(14) of the Land Titles Act”. If, however, the proceedings relate to a title issue that does not involve a “fraudulent instrument”, the Director of Titles is not to be made a party.

If a proceeding otherwise alleges wrongdoing on the part of the Director of Titles, the Land Registry Office and/or the Land Registrar, then the Director of Titles, the Land Registry Office (or any staff members thereof) and/or the Land Registrar are not to be made parties in pleadings. It is recommended that anyone wishing to bring such a claim review the *Crown Liability and Proceedings Act, 2019*, for guidance.

2. Addressing the Court Order

Court orders often deal with more than just title issues (including declaratory relief and the awarding of monetary damages, etc.). If it is not possible to obtain a separate court order strictly for the direction of the Land Registrar to amend the parcel register, then the relevant provisions addressing the Land Registrar should be placed in a distinct section of the court order, separate and apart from other, non-land related aspects of the court order. That part of the court order relating to land should be addressed to the Land Registrar (e.g. “the Land Registrar is hereby ordered and directed to...”).

3. No Endorsements, No Redactions, No Partial Court Orders

The court order to be registered on title should be an issued and entered type-written order of the court (typically, hand-written endorsements will not be registered on title). Furthermore, the court order being registered on title must be a complete copy thereof and may not have any parts

thereof redacted. If the parties feel that there is some private information that should not be available in a publicly searchable forum, and such information is not necessary for the Land Registrar, then they should consider splitting the court order into a real estate only court order for registration on title and another court order for other matters.

4. Registering the Court Order on Title

The court order must be registered on title. It is not appropriate to order the Land Registrar himself/herself to register the court order on title. Registration on title is the obligation of the party in whose favour the court order was granted. Court orders are registered on title electronically. Guidance on how to register documents in Teraview (including court orders) can be found in the Electronic Registration Procedures Guide, available without charge at www.teraview.ca. Court orders can be registered as an:

- (i) Application for Vesting Order (amends the ownership field of the parcel register – hereinafter referred to as the “PIN” - and becomes the current title document);
- (ii) Application to Register Court Order (causes no abstracting changes to the PIN, but stays in the document pool of the PIN as a record of the court’s decision in a matter);
- (iii) Application to Amend Based on Court Order (requires the Land Registrar to amend one or more fields of a PIN, typically other than the ownership field); or
- (iv) Application for Restrictions based on Court Order (where the court restricts dealing with the property).

5. Multiple Registration of Court Orders

In some cases, a court order will do multiple things relating to land. It is sometimes appropriate to register the same court order as different instrument types. For instance, an Application for Vesting Order will automatically record the vestee as the new registered owner of the relevant lands but will itself be deleted once the property is subsequently transferred (the Application to Register Vesting Order will always be available as part of the public record in a “deleted instruments”, but unlike under the *Registry Act*, land under the Act does not record a full chain of title, and the Application to Register Vesting Order will cease to be a current title document after the next transfer). In such cases where the court order vests title but also has declaratory or other value, such a court order can be registered twice: e.g. firstly, as an Application for Vesting Order; then, secondly, as an Application to Register Court Order. Both are discrete document types in Teraview, and since an Application to Register Court Order is not treated in the system as a conveyance, it will not be deleted from title on the next transfer. Instead, it will sit in the document pool as evidence of the court’s determination of certain matters until otherwise removed from title (typically by another court order). As a variation of the foregoing, such a court order can be split into two separate and distinct court orders, with the vesting language in the Application for Vesting Order and the declaratory relief and other expository language in the Application to Register Court Order.

6. Deletion of Court Orders

As aforesaid, a court order registered as an Application to Register Vesting Order is treated as a conveyance and will, therefore, automatically be deleted from the PIN upon a further conveyance

thereof. Court orders registered as any of the other document types will remain on title as part of the document pool unless:

- (i) the court order itself indicates when it may be deleted from title (after which time the owner may register an Application to Amend in order to delete the court order from title);
- (ii) another court order is registered ordering the Land Registrar to delete the earlier court order (i.e. generally speaking, “it takes a court order to remove a court order”, although there are separate rules for the deletion of certificates of pending litigation); or
- (iii) the court order implements a specific amendment to the PIN or authorizes a specific event, and, once implemented, the court order will not, by its nature, need to remain in the document pool (e.g., a court order deleting an instrument from title will itself be deleted from title concurrent with the relevant instrument that it had ordered be deleted and a court order that authorizes the signing of a document by specified parties will be deleted once the signed document has been registered, etc.).

7. Must Have Valid Legal Descriptions

In order for a court order to be registered, the lands dealt with therein must be described with a proper legal description compliant with O.Reg 43/96. The “whole of a PIN” is a valid description but, in almost all cases where the lands being addressed are less than the whole of the PIN, a deposited reference plan. Sketches, colloquial descriptions (e.g. “the pathway between the properties”, “the back 40 acres”, “the lands north of the river”, etc.) and municipal addresses (e.g. “20 Dundas Street West”) are all insufficient. The Examiner of Surveys has prescribed protocols and requirements for the submission, review and deposit of reference plans, the details of which should be familiar to an Ontario Land Surveyor. Whenever a court order addresses a part of a PIN only or creates easements across a part of a PIN, the court order must expressly reference specific part(s) on a properly deposited reference plan (e.g. “Part 1 on Plan 66R-XXX”, etc.).

8. Consolidation of PINs

A court order should not order the consolidation of PINs, even if the PINs are adjoining and even though the court vests all such adjoining PINs in the name of the same parties. An order that purports to consolidate PINs cannot be implemented. There are certain administrative issues to be resolved before consolidating adjoining PINs (principally that the qualifiers for both pieces match). The consolidation of PINs is an administrative prerogative available to the Land Registrar only, and there is an administrative process available for parties to apply for consolidation. It is not open to the court to order consolidation or non-consolidation. Similarly, the Land Registrar will not “import” encumbrances from adjoining PINs unless expressly ordered to do so (see below).

9. Conversion and Upgrade

A court order should not declare any PINs to have any particular qualifier (e.g. Land Titles Absolute or Land Titles Absolute Plus, etc.). Likewise, a court order may not declare lands under the *Registry Act* to be “converted” to Land Titles Conversion Qualified. As with consolidation, these are government prerogatives and they materially affect the nature and scope of the government’s guarantee. The court order should be silent as to qualifier, and the Land Registrar

will apply the requisite qualifier upon the registration of the court order on title. It is inappropriate for a court to vest and concurrently “upgrade” title, and it is always available to the parties to subsequently chose to upgrade their titles through the appropriate applications and processes.

10. “Swelling” PINs by Changing Legal Descriptions

If a court order vests lands in a new owner and that new owner has some nearby PIN (typically, an abutting PIN), such a vesting order should not alter the legal description on the new owner’s PIN to include the newly vested piece. This type of order cannot be implemented. Instead, where the lands being vested are the whole of a PIN, the new owner will become the registered owner thereof. Where the lands being vested are a part of a PIN, the Land Registrar will “split” the existing Source PIN so that the original Source PIN becomes inactive and gives rise to two new active PINs in its stead (one PIN to reflect the newly vested lands and one PIN to reflect any remnant of the Source PIN). The Land Registrar will record the new owner as the registered owner of the new PIN for the vested lands.

11. Encumbrances to be Deleted or Carried Forward

A court order can vest lands in the name of another owner for any reason that the court deems appropriate. The Land Registrar will not make any determinations as to what encumbrances the court intends to be carried forward. If the court intends to order the Land Registrar to delete all or certain encumbrances from the lands as they vest, then the court order must explicitly specify, by reference to the exact instrument number, which encumbrances are to be deleted from the lands being vested. The Land Registrar will not delete encumbrances that are not explicitly specified by reference to instrument numbers, even if the court order has generic descriptive wording (e.g. “free and clear of all encumbrances”, etc.). While such generic language is permissible (for instance, to deal with the deletion of non-registered encumbrances), if the court order does not explicitly order the Land Registrar to delete specific instrument numbers from the newly created PIN, then the lands will be vested inclusive of all the encumbrances registered on title to the PIN.

12. Encumbrances to be Imported

When vesting lands pursuant to a court order, if a new PIN must be created the Land Registrar will only carry-forward encumbrances (or not, as the case may be – see discussion above) from the Source PIN. The Land Registrar will not “import” encumbrances from other PINs. For instance, if the new owner (i.e. the neighbour) has a charge on his/her existing land, and a vesting order adds to that neighbour’s land holdings at that location, is the existing charge on the neighbour’s land intended to then extend to and be imported to the new lands being acquired through the vesting order? The Land Registrar will not import these encumbrances onto the newly created PIN unless ordered to do so. In this example, it would be necessary for the court order to: (i) deem the neighbour’s existing charge to also include the newly created PIN (or whatever parts thereof that the court deems appropriate); and (ii) order the existing charge, identified by instrument number, to be added to the newly crated PIN. If the court order does not explicitly order the Land Registrar to add specific instrument numbers to the newly formed PIN, then the lands will be vested only with the relevant encumbrances being carried forward from the Source PIN, even if the court order has generic descriptive wording (e.g. “subject to all encumbrances that are applicable to the neighbouring PIN”, etc.).

13. Pre-Approval of Complex Court Orders

The Land Registry Office staff will not draft court orders for parties (there are a variety of litigation precedent resources available from private sources). Clients may, however, have the Land Registry Office staff pre-approve the wording of complex court orders by going to the OnLand portal at <https://www.onland.ca>. At that point, the document in preparation will be assigned to staff for review in the ordinary course. The current lead-time is approximately ten (10) business days, but parties are always encouraged to provide as long a lead-time as possible. Pre-approval of the form of the court order is limited to registrability and form only -- the Land Registry Office, the Land Registrar, and the Director of Titles will not take any position or provide any legal advice on the substantive merits of the arguments being made in support of or in opposition to the court order itself. Litigators must not mislead the court by suggesting that “pre-approval” by the Land Registry Office indicates the support or endorsement of the substantive arguments in favour of the court order. Any complex court order submitted for pre-approval must include the relevant electronic application in preparation in Teraview and the pre-approval should be obtained prior to (not after) being presented to the court for issuance.

14. Writ of Mandamus

This bulletin sets out several things that cannot be added to or addressed by a court order. This is not to suggest that a court cannot ultimately order the Land Registrar to do such things, but where the relief sought would include things that this bulletin proscribes, then the pleadings should be framed as a prayer for a writ of mandamus or other similar actions against the Crown. If the prayer for relief contemplates anything that would, in effect, be a writ of mandamus (regardless of how the pleadings are framed), then the proceedings will need to strictly comply with the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17 (which as superseded the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27). As a procedural matter, the Land Registrar will alert the Ministry of the Attorney General whenever there are proceedings asserting a writ of mandamus, and a lawyer from the Crown Law Office (Civil) branch of the Ministry of the Attorney General will typically be appointed for service.

15. Extra-Provincial Court Orders, etc.

With very limited exceptions, the Land Registrar will not accept any court order other than an Ontario court order from the Ontario Superior Court of Justice or the Ontario Court of Appeal. For greater certainty, Ontario Small Claims Court orders may not be registered, nor, as a general rule, can any court orders from any other province or territory, any U.S. state, any other country, etc. There are only very limited exceptions to this, as follows:

- extra-provincial court orders that have been “re-sealed” by the Ontario Superior Court of Justice;
- Province of Quebec Letters of Verification, Certificates of Judgment, and Prothonotarial Wills;
- support orders as per Bulletin 2017-02; and
- court orders from the Supreme Court of Canada.

16. Get to the End Game

Court orders are often used to cure specific conveyancing errors. There is a natural tendency to go through the “chain of title” and make micro-adjustments to the instruments in the chain of title in order to reverse the original conveyancing error and to achieve a title that reflects the resulting corrected “chain of title”. While this is a natural and logical curative approach, it is more efficient and effective “to implement the end game” rather than trying to cure the entire chain of title. As a drafting principle, practitioners are encouraged to look at the current PINs and make the resulting changes to those PINs that would reflect, today, the “ultimate end game” that the parties are asking the court to approve. The applications of this principle are endless but the following are some examples of this “end game” drafting philosophy:

- an erroneous or defective power of sale – rather than trying to “unwind” the erroneous or defective power of sale, so that the mortgagee can re-convey properly under a new transfer under power of sale, simply vest the title in the ultimate purchaser under power of sale;
- missing lands – rather than trying to add in missing lands to various transfers in the chain of title, simply vest the missing lands (and re-vest the existing lands, if necessary – see below in “missing lands”) in the name of the owner who should own all the lands;
- joint tenancy intended when title reflects tenancy in common – rather than trying to re-characterize the parties as joint tenants, so that a survivorship application can then be registered, simply vest the title in the surviving joint tenant(s).

Again, the Land Registrar, the Land Registry Office, and the Director of Titles take no substantive position in the arguments on whether a court should order a given result, but if the court is otherwise prepared to order a certain outcome, then the parties should craft their court orders to “implement the end game” rather than trying to micro-cure the entire chain of title.

17. Retroactive Orders and Changes to Instruments.

While court orders can deem certain conveyances or events to have happened retroactively or at certain times, the Land Registrar cannot abstract timing issues (i.e. the Land Registrar cannot amend the PIN so that it said “X” as of this date, by “Y” as of another date, etc.). Similarly, while court orders can deem an instrument to say something that the instrument does not say on its face, the Land Registrar cannot literally go into a document and amend or redact parts thereof (e.g. delete section x, amend section y, etc.). Accordingly, such court orders cannot typically be registered as Applications to Amend Based on Court Order (because the Land Registrar literally cannot amend the PIN or instruments to reflect such matters). Parties are encouraged to “implement the end game” as aforesaid, and, where specific timing or specific wording is required in specific instruments for reasons other than simply to implement the “end game” solution, then such *nunc pro tunc* and instrument deeming court orders can be registered, but only as Applications to Register Court Order.

18. Missing Lands

A common use for court orders, especially vesting orders, arises when an owner has two (or more) adjoining PINs that were intended to be conveyed together, but the conveyancing has proceeded on only one such PIN, leaving the other PIN figuratively behind. Often, the “recognized” PIN is conveyed many times, leaving the “forgotten” PIN several conveyances back. As aforesaid, the parties should draft the vesting order to simply vest the “forgotten” PIN in the correct current owner’s name (rather than making micro-rectifications to the various transfers of the “recognized” PIN that should have included the “forgotten” PIN (but did not). While it is intuitive to simply vest the “forgotten” PIN (to bring it up to speed in terms of conveyancing) in the name of the putative owner of both PINs, some thought should be given as to whether or not the “recognized” PIN has been properly conveyed (if the “forgotten” PIN abuts the “recognized” PIN, then query whether the transfer of the “recognized” PIN while the owner still maintained the fee in the “forgotten” PIN may run afoul of the subdivision control provisions of the *Planning Act*). If this is the case, it might be prudent to concurrently vest both the “recognized” and the “forgotten” PIN in the name of the current owner. The Land Registry Office does not police the *Planning Act*.

19. Vague and “Basket Clause” Language

Many court orders are rejected at the pre-approval stage for having “basket clause” type language to facilitate registration of further assurances. For instance, some court orders submitted for pre-approval will order the Land Registrar to “...accept for registration such further and other instruments or assurances and take all steps and do all things that may be necessary or desirable to better to give effect to the true intention of this Order and the Court’s decision herein.” Of course, there are any number of variations of this type of “basket clause” language, all of which are too vague, and none of which may be included in a court order to be registered on title.

20. Receiver’s or Monitor’s Certificates

Vesting orders issued in connection with insolvency proceedings under the *Companies’ Creditors Arrangement Act* and the *Bankruptcy and Insolvency Act* are often structured as conditional vestings, effective on the delivery of a “receiver’s certificate” or “monitor’s certificate” in a prescribed form. These vesting orders can be registered as Application to Register Vesting Order if and only if there is a law statement confirming that the “receiver’s certificate” or “monitor’s certificate”, as the case may be, has been obtained. The actual receiver’s certificate” or “monitor’s certificate” may not be incorporated into the Application to Register Vesting Order.

21. Vesting Orders Must Specify the Name of the Intended New Registered Owner

The vesting order itself must always specify the exact party to be put on title. We do not permit vesting in a name not explicitly identified in the vesting order, so wording like “XYZ, or to whom they may direct”, “a company to be incorporated by XYZ”, “designated assignee of XYZ” or any other variation of the foregoing, will not be acted upon. The vesting order is the actual ownership document (in place of a Transfer), so it has to be precise. If the purchaser (often the case in insolvency-based vesting orders) intends on holding title in the name of a nominee or a subsidiary, it is incumbent upon that purchaser to incorporate such a company before seeking the vesting order.

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