



Off the Beaten Path

CBA-NB Mid-Winter Meeting
Patrick Windle – Land Registry Officer
February 9, 2013



Bankruptcy

- Bankruptcy and Insolvency Act (“BIA”) – federal legislation
- Section 71 - on bankruptcy order or assignment filed with official receiver, bankrupt ceases to have capacity to dispose of property and it vests in the trustee, subject to the rights of secured creditors
- Section 74(2) - on the registration of the bankruptcy documents (order or assignment), the trustee acquires title free of charges set out in section 70(1)
 - Attachments, garnishments, judgments, executions etc.
 - **NOT** mortgages or mechanics’ liens (secured creditors)

Bankruptcy

- We will add the trustee in bankruptcy as an owner with the “in trust” qualifier and will add the “estate” qualifier to the bankrupt owner
- We will remove Judgments etc. **only** if you request us to do so in your Certificate of Effect (CoE) – please do this
- If you have a Transfer by the trustee, you can either:
(1) register the Assignment and then e-sub the Transfer; or (2) obtain an exemption from Serge or me and register both on paper back-to-back

Bankruptcy

- Section 75 – if order or assignment is not registered, a bona fide purchaser from the bankrupt receives good title
- Section 20 – trustee can divest right, title and interest in real property of the bankrupt by notice of quit claim or renunciation which, when registered, operates as a discharge or release of documents previously registered by trustee
 - Disclaimer not Discharge

Bankruptcy

- Certificate of Discharge of bankrupt (or of trustee) does not have the effect of passing the property back to the bankrupt

MLA Northern Contracting Ltd. v. LeBrun (2007), 39 C.B.R. (5th) 95 (S.C.J.), affirmed 2008 ONCA 339 (CanLII), 2008 ONCA 339, para. 65

65 A discharged bankrupt has no right or entitlement to deal with his or her prior assets. The discharge of the Trustee and of the bankrupt does not have the automatic effect of reverting proprietary rights to the bankrupt. As noted in Solomon, "once property is vested in the trustee, it does not revert back to the bankrupt on discharge." There is no question that the claimed interest in question existed prior to the bankruptcy and that it was not claimed as part of the bankruptcy. I agree with the position that regardless of whether this was disclosed or not, LeBrun's Claimed MLA Interests passed to, and vested with, the Trustee on the date of bankruptcy and there is no automatic reversion of that asset back to LeBrun.

17945438

I certify that this instrument
is registered or filed in the
York County Registry
Office, New Brunswick

J'atteste que cet instrument est
enregistré ou déposé au bureau
d'enregistrement du comté de
York, Nouveau-Brunswick

FEB 24 2004

date

time - heure

17945438

number - numéro

book - livre

page

Carole Morin
Deputy Registrar - Conservateur Adjoint

In the matter of the
Bankruptcy and Insolvency
Act (the "Act")

And in the matter of the
bankruptcy of [REDACTED]

PID 75405159 and PID 75405167

DISCLAIMER BY TRUSTEE

Section 20(1)

WHEREAS [REDACTED] made an Assignment In Bankruptcy on the 11th day of April, 2001;

AND WHEREAS Allan D. Marshall was appointed Trustee In Bankruptcy of the Estate of [REDACTED] pursuant to the Summary Administration provisions of the Act;

AND WHEREAS there are no inspectors of the estate.

AND WHEREAS the said trustee caused to be registered a certified copy of the Assignment Indenture against any real property interest of the bankrupt, by registration of the same in the York County Registry Office on the 31st day of December, 2001 in Book 2316 at Page 620 under Official Number 13482865.

AND WHEREAS the trustee wishes to disclaim any interest he may have in and to the lands and premises described in Schedule "A" hereto annexed.

NOW THEREFORE know all men by these presents that Allan D. Marshall in his capacity as Trustee In Bankruptcy of the Estate of [REDACTED] a bankrupt, doth hereby release and disclaim any or all right, title or interest in and to the lands described in Schedule "A".

IN WITNESS WHEREOF the trustee has caused these presents to be duly executed this 23 day of February, 2004.

Receiverships

Private Appointment / Court Appointed

- Court (BIA/Judicature Act/Rules of Court)
 - Appointment only (ie no vesting provision) – register as encumbrance, no change to ownership field (eg doc 31372320)
 - Approval and Vesting (or Vesting) – reflect the appointed receiver as an owner with the “In Trust” qualifier and reflect the owner with the “Estate” qualifier (eg doc 29366185)
 - Order should say which encumbrances are to be deleted and which will continue on registration of the subsequent Transfer (eg easements, restrictive covenants)
 - Include a Schedule “D” in Transfer
 - Include a CoE (or Comment) with the Transfer specifying the encumbrances to be removed

Receiverships

Private Appointment / Court Appointed

- Private Appointment (Mortgage/Debenture)
 - Law Society of New Brunswick Standards for the Practice of Real Property Law:

36. Receivers and Managers

Deeds from receivers and managers must be executed by the receiver and manager and by the party holding the debenture security. If there are subsequent encumbrances against the property, the receiver and manager must comply with the power of sale provisions of the *Property Act*.

Receiverships

Private Appointment / Court Appointed

- Private Appointment (Mortgage/Debenture)
 - Transfer (eg doc 31215248)
 - Transferors will be: (1) Receiver with “In Trust” qualifier, (2) Owner with the “Estate” qualifier; and (3) Mortgage/Debenture holder
 - Include a Schedule “D” explaining security, default, appointment, owner not signing etc.
 - Include a CoE requesting the removal of the Mortgage/debenture being enforced (and related instruments such as Assignments, Amendments etc.)
 - Subsequent encumbrances **will not** be removed unless there is compliance with the power of sale provisions of the *Property Act*

Mortgage Sale – Removal of Encumbrances

- Property Act

47(1) A mortgagee exercising the power of sale conferred by section 44 may convey the property sold, for such estate and interest therein as is the subject of the mortgage, **freed** from all estate, interests and rights to which the mortgage has priority, but **subject to** all estates, interests and rights that have priority to the mortgage.

Mortgage Sale – Removal of Encumbrances

- General Rule – if registered after the Mortgage being enforced, the encumbrance can be removed
- Include CoE/Comments requesting removal
- Examples
 - Judgments
 - Other Mortgages
 - Mortgage being enforced
 - Assignment of Mortgage
 - Assignment of Rents relating to Mortgage being enforced
 - Life interest
 - Legal Aid Liens

Mechanics' Liens

- May or may not take priority even if registered after the Mortgage

9(1) A lien has priority over

(b)subject to subsection (2), all claims under conveyances, mortgages and other charges, and agreements for sale of land made by the owner before or after the lien arises.

9(2) Where a conveyance, mortgage or other charge or agreement for sale is registered before the filing of a claim of lien, a payment or advance made on account of the conveyance, mortgage or other charge or agreement for sale before the filing of a claim of lien or before notice in writing of the lien has been given to the person making that payment or advance has priority over the lien, but only to the extent that the total of all payments or advances made by the person, including that payment or advance, does not exceed the value of the land at the time that payment or advance is made.

Mechanics' Liens

- *ADI International v. New Brunswick Government Economic Development Fund II, Solutions International, Nova Electric, Prospect Contractors and Others*, 2003 NBCA 12 (CanLII)

[2] The fact that the Fund was not made a party to the appellant's mechanics' lien action is of no consequence in the present case. In those instances, where the lien claimant brings into issue the priority of advances made under the mortgage, as is true in the present case, there is no need for joinder. The obligatory service of a Notice of Trial on the Fund, prescribed by s. 40 of the Mechanics' Lien Act, is sufficient.

[3] Indeed, one must bear in mind that s. 9(1)(b) of the Mechanics' Lien Act states that, with one exception, a lien has priority over all mortgages made by the owner before or after the lien arises. The exception is found in s. 9(2) which states that a mortgage, registered prior to the filing of a claim for lien, has priority over the lien but only to the extent that advances do not exceed the value of the land at the time the payment or advance was made. Thus, the onus rests with the Fund to establish at trial that its mortgage advances take priority over liens properly filed. To require the appellant lien claimant to join the Fund as a defendant to the action would give the appearance, and wrongly so in our view, that the onus is on the former to establish that its lien has priority over the latter's mortgage.

Mechanics' Liens

- If Lien is registered relatively soon after Mortgage, we may question whether it should be removed
 - We have no way of knowing based simply on the registration of the Claim for Lien and Certificate of Pending Litigation whether priority is being claimed by the lien holder
 - Include paragraph in Schedule “D” and a CoE (eg doc 31256424)

AND WHEREAS as per Section 47(1) of the Property Act and Section 9(2) of the Mechanics' Lien Act the said mortgage has priority over the filed Claims For Liens(Mechanics Liens) Filed as numbers 30946231 and 31147714;

AND WHEREAS as per Section 47(1) of the Property Act the said mortgage has priority over mortgage registered as number 22349212 and Certificate of Pending Litigation registered as number 30968458;

Mechanics' Liens

- Deal with Certificate of Pending Litigation when discharging the Lien
- Include a CoE
- Overriding incident, *Land Titles Act*, s. 17(4)

17(4) Unless the contrary is expressly declared in the title register, all registered land is, by implication and without any special mention in the title register, subject to the following overriding incidents:

(e) any lien under the Mechanics' Lien Act where the time within which the claim of lien is required to be filed has not expired;

Legal Aid Liens

(New Brunswick Legal Aid Services Commission)

- Legal Aid Act
 - Memorial of Debt under section 16.1
 - Issued by Provincial Director
 - No statutory form
 - Must be verified by affidavit
 - Binds the lands of the debtor for 5 years
 - Not common

Legal Aid Liens

(New Brunswick Legal Aid Services Commission)

- *Legal Aid Act*
 - Certificate of Lien under section 44 of the Regulation
 - Form 27
 - Executed by applicant whereby he or she voluntarily grants a lien over the lands mentioned in the Certificate – essentially a mortgage
 - No expiration period – not governed by *Memorials and Executions Act*
 - Not discharged by bankruptcy – secured creditor
 - Released by Certificate of Discharge (Form 28)
 - More common

Affidavits Sworn Outside New Brunswick

- Registry Act, section 44(1)

(d) if the execution of an instrument is proved out of the Province such proof may be taken before and by:

(i) a commissioner for taking affidavits and administering oaths under the *Commissioners for taking Affidavits Act* including the officials thereby authorized to take affidavits;

(ii) a notary public, certified under his hand and official seal;

Affidavits Sworn Outside New Brunswick

- Land Titles Act, section 55

55(3) An affidavit of execution and an affidavit of corporate execution shall be in prescribed form and shall be made before

(b) a person authorized by any law of the Province to administer an oath or affirmation outside the Province for use within the Province, if made outside the Province.

Affidavits Sworn Outside New Brunswick

- Under section 78(1) of the ***Evidence Act***, the following persons are authorized to administer oaths or affirmations outside the Province provided the person is exercising his or her functions or having jurisdiction or authority as such **in the place where the oath, affirmation or affidavit is administered**, sworn, affirmed or made:
 - (iv) a commissioner for taking affidavits or other competent authority of the like nature,
 - (v) a notary public,

Affidavits Sworn Outside New Brunswick

- Requirements:
 - The office of the official should be clearly indicated with his or her signature
 - If the office or seal are in a language other than an official language, which cannot be adequately interpreted by someone in the Land Titles Office, a statutory declaration by someone who can interpret the language stating what the office and seal mean in an official language can be accepted and attached to the document
 - The official's name must be legibly printed or stamped near his or her signature or his signature must be legible, as it may be necessary to locate the official for evidentiary purposes if the execution of the document is challenged
 - **Defective Proof of Execution** – Under subsection 55(6) of the Land Titles Act, notwithstanding subsections 55(1) or (2), the Registrar General, upon being satisfied of the due execution of an instrument, may direct the registrar to register the instrument

Notarial Wills from Quebec

- Section 23(3) of the Registry Act

23(3) Where a will is a notarial will under the laws of the Province of Quebec or of South Africa, a notarial certified copy thereof with an affidavit of the officer, with whom such will is deposited, that such will is a valid and subsisting will under the laws of the province or country where the same was executed, sworn to before any of the persons authorized to take proof of the execution of instruments out of the Province, may, if it is accompanied by an affidavit of the death of the testator, be registered in the registry office for any county of the Province as other conveyances are registered, and the same when so registered shall have the same effect as if the original will had been registered therein.

Notarial Wills from Quebec

- Requirements:
 - Notarial certified copy of the will
 - Affidavit of the notary with whom the will is deposited that the will is valid and subsisting under the laws of Quebec
 - Affidavit of Death of the testator
- Also applies in Land Titles (ie Form 41)
- See document 31534572

Form 41 – Application for Registration of Transmission

- *Registry Act*

36(1) No party to an instrument shall

(a) witness the execution of the instrument by another party, or

(b) take an affidavit or acknowledgment of the execution of the instrument.

- Probate Rules, Rule 2.02(9)

(9) No affidavit of execution referred to in paragraph (3) or (6) and no affidavit of condition in Form 2L shall be sworn or affirmed by a witness to the will or codicil before another witness to the will or codicil.

Form 41 – Application for Registration of Transmission

- We apply these provisions in Land Titles
- The Commissioner of Oaths who takes the oath for the Affidavit of Execution cannot be a party or a witness to Will
- Reject Form 41 as proof of execution is improper
- Must get one of the witnesses to execute a new Affidavit in front of a non-party Commissioner of Oaths

Deceased Joint Tenants

- On Conversion (AFR)
 - See Directive 3900-002
 - Register the last surviving Joint Tenant's Will (no need to register the first)
 - Reflect the last surviving Joint Tenant with the "Estate" qualifier enabled by the Deed and the Personal Representative (of the last JT) with the "In Trust" qualifier enabled by the Will or Letters – no need to reflect first JT
 - Include a note in the AFR Comment field that the other JT predeceased the last and that proof of death will be included with any subsequent Transfer or the lawyer has it on file

Deceased Joint Tenants

- After Conversion
 - Both Form 41 (Application for Registration of Transmission) and Form 48 (Application of Survivor)
 - Form 41 relating to the last surviving Joint Tenant is registered first
 - Will include proof of death of last JT etc.
 - Will result in last JT with “Estate” and Personal Representative with “In Trust”
 - Form 48 signed by PR of last JT (adapt wording)
 - Attach proof of death of first deceased JT
 - See doc 30913215

Orders Authorizing Clerk to Sign

- Judicature Act, section 37

Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document or to indorse any negotiable instrument, the Court may, on such terms and conditions, if any, as may be just, order that such conveyance, contract or other document shall be executed or that such negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose; and in such case the conveyance, contract, document or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it.

Orders Authorizing Clerk to Sign

- Most often seen in family court orders
- One party is ordered to execute a Deed/Transfer conveying property to the other and, if they fail to do so, the Clerk of the Court is authorized to execute
- ADD the Clerk as an owner with the “In Trust” qualifier, enabled by the order
- DO NOT add the “Estate” qualifier to person (owner) for whom the Clerk is authorized to sign as that person is still able to sign

Orders Appointing Committee

- Infirm Persons Act

3(2)The court may make orders for the custody of mentally incompetent persons and the management of their estates, and every such order shall take effect as to the custody of the person immediately, and as to the custody of the estate upon the completion of the committee's security.

Orders Appointing Committee

- ADD the Committee/Trustee (can be either an individual or a trust company or the Public Trustee) as an owner with the “In Trust” qualifier, enabled by the order
- ADD the “Estate” qualifier to the mentally incompetent person (owner) for whom the Committee has been appointed
- For Orders involving the Public Trustee, ADD Chantal Landry with the “In Trust” qualifier

Powers of Attorney

- We **only** register originals - susceptible to fraud
- Exception if the original POA is registered in another jurisdiction – we will accept a copy certified by the Registrar from that jurisdiction
- If registered in the Registry system, the POA can be used to transfer (or to otherwise deal with) property in Land Titles system located **in that County**
- We are encouraging people to register in Registry rather than “general” Land Titles – cannot search by grantor

Powers of Attorney

- Do not need Form 44 as proof of execution to be registered in Land Titles (any proper proof will suffice)
- If POA is to be registered in Registry and is executed outside New Brunswick, proof of execution must comply with section 44(1)(b) or (d) of the Registry Act
 - Notary Public, not Commissioner of Oaths

Interest Holder enabled by AFR

- Unregistered interest
 - Eg. Power lines with no documented grant
- Must include an explanation in the AFR Comments box
- Should be rare

Title Rectifications

- Original Form 49s are to be sent to Serge or Patrick
- If it is a matter that is covered by section 69(a) of the Act, then a Form 49 Consent is not needed - email

The registrar may

(a) subject to the regulations, cancel any entry in the title register when he is satisfied that the entry has ceased to affect the title to the land to which the entry relates;

- Encumbrance is removed by operation of law
 - Judgments (5 years), Assignments and Assignments of Rent (after mortgage discharged), Mortgages (merger), Claims for Lien (no *CPL* within 90 days)