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To Vest or Not to Vest

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TO VEST OR NOT TO VEST

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To “vest” is to “belong”. A “vesting order”, in its simplest of forms, is an order that conveys the title of property to whom it belongs. A vesting order, therefore, has a dual character—“It is, on the one hand, a court order and, on the other hand, a conveyance vesting an interest in real or personal property in the party entitled under the order.”²

This article will (a) briefly recount the history of vesting orders before discussing (b) circumstances in which a vesting order—or the spectre of such an order—has been useful in a real property dispute, (c) Ontario courts’ jurisdiction to grant a vesting order, (d) how to obtain a vesting order, (e) elements commonly found in a vesting order and (f) how one gives effect to a vesting order once granted. As this article is intended for real estate professionals, it will focus on vesting orders used to transfer real property.

A. A Brief History of Vesting Orders

The remedy of a vesting order is equitable in origin and discretionary in nature.³ The remedy’s roots can be traced to the English Court of Chancery, which was a court of equity.⁴ In the past, the Court of Chancery could make an *in personam* order requiring that a person execute a deed or conveyance of property or otherwise deal with property in accordance with the judgment of the Court.⁵ However, the Court could not by order create rights *in rem*—a person to whom property

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² *Regal Constellation Hotel Ltd.*, Re, [2004 CanLII 206](#) (ON CA) [*Regal*].

³ *Chippewas of Sarnia Band v Canada (Attorney General)*, [2000 CanLII 16991](#) (ON CA).

⁴ *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para 34 [*Third Eye*].

⁵ *Regal*, *supra* note 2 at para 32.

was ordered transferred could only enforce the order against the person ordered to transfer the property, not the world at large. This changed in 1857 when the English Parliament enacted *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*.⁶ This act empowered the Court of Chancery to grant vesting orders, which allowed the Court to directly effect a change of title to real property.⁷

In twenty-first century Ontario, while equitable considerations remain of prime importance to a court tasked with determining whether to grant a vesting order, vesting orders are considered to be a creature of statute.⁸ In other words, an Ontario court seeking to grant a vesting order must find its jurisdiction to make a vesting order in legislation. Sections B and C below discuss circumstances where vesting orders were recently considered by Ontario courts and the sources of jurisdiction to which the judges looked for authority to grant the requested vesting order.

B. Circumstances Where Vesting Orders Have Recently Been Considered

Vesting orders may be granted in a myriad of circumstances dealing with real property. In recent years, Ontario courts have considered or granted vesting orders: (i) to complete real property transactions where a party refuses to meet its legal obligations, (ii) to resolve litigation over legal or equitable interests in the family law context, (iii) to support the sale of real property by companies subject to insolvency proceedings, and (iv) in circumstances where a transfer of real property would otherwise be subject to the subdivision control provisions of the *Planning Act*.

⁶ c 1857, c 56, s VIII; *Third Eye*, *supra* note 4 at para 34.

⁷ *Third Eye*, *supra* note 4 at para 34.

⁸ *Regal*, *supra* note 2 at para 32.

Vesting Orders as a Tool to Compel a Party to Close at Transaction

Vesting orders can be used to clear an impasse in an intractable real estate dispute or to complete a transaction where a party ceases to cooperate with an order or an agreement for the sale of real property. In such cases, in the words of Justice Perell, “more expensive direct court intervention is required.”⁹ The spectre of a vesting order can sometimes make the proverbial horse drink.

In the context of a simple real estate transaction, a vesting order can be used to compel a party to complete an agreed upon transfer. In *Paterson Veterinary Professional Corp. v. Stilton Corp. Ltd.*, the parties entered into a settlement agreement that contemplated the sale of real property.¹⁰ The purchaser complied with all terms of the agreement, but the seller refused to close the transaction on the date specified in the agreement because, among other reasons, the value of the property had increased. The purchaser was ready, willing and able to close and brought an action for specific performance. The facts of the case entitled the purchaser to equitable relief and the Court required the parties to transfer title to the property pursuant to the agreement within 30 days of the Court’s order, failing which the Court would vest the purchaser with the property.¹¹

While a vesting order may never have been granted in *Mammone Estate v. Mammone*, the saga that unfolded under that title of proceeding is a reminder of why the vesting order was a much-needed addition to a judge’s toolkit. The brothers Mammone co-owned a residential home; their jointly-held corporation owned another residential home.¹² One brother’s untimely death triggered disputes among the family over the properties. The late Mammone’s estate brought an application under the *Partition Act* for the sale of the two homes. The living Mammone responded with a

⁹ *Mammone Estate v Mammone*, [2017 ONSC 3403](#) at para 22 [*Mammone*].

¹⁰ [2019 ONCA 746](#).

¹¹ *Ibid* at para 35.

¹² *Mammone*, *supra* note 9.

counter-application seeking the enforcement of an alleged oral and partially performed agreement of purchase and sale of the homes.

The Court ordered that the homes be sold and dismissed the counter-application for want of evidence of the alleged agreement.¹³ The living Mammone unsuccessfully appealed the application judge's decision and then proceeded to be uncooperative with the estate's attempts to sell the homes. The estate returned to court for help in surmounting the impasse. Justice Perell varied the sale order to include, among other provisions, a provision entitling the estate to seek a vesting order without notice in the event that the estate receives an offer of which the Court approves but that the living Mammone refuses to sign.¹⁴

Justice Perell eventually approved of offers to sell both homes. The authors are not aware whether any vesting orders were ever granted to close either court-approved transaction. In any event, were it not for Justice Perell's ability to grant a vesting order, and His Honour's willingness to wield this power as a cudgel, the parties might still be embroiled in litigation.

Vesting Orders in the Family Law Context

Vesting orders are a remedy commonly requested by parties to family law disputes. A home is often the most valuable asset that a couple will own. When relationships fall apart, what to do with that home may find its way before a judge and, where the judge determines that material value ought to be transferred from one spouse to another, a vesting order might be an effective tool to effect and enforce that transfer.¹⁵

¹³ *Ibid.*

¹⁴ *Ibid* at para 24.

¹⁵ *Lynch v Segal*, [2006 CanLII 42240](#) (ON CA), at para 27 [*Lynch*].

In *Lynch v. Segal*, former spouses were litigating the ex-wife's entitlement to spousal and child support. According to Justice Blair of the Court of Appeal:

Moses Segal is an extraordinarily wealthy man. By his own admission he has a net worth exceeding \$100 million. Equally extraordinary, however, is his ability to organize his business affairs in a way that disguises his ownership (direct or beneficial) in the assets underlying this wealth. As far as his former spouses and his infant children are concerned, he would have it appear that he has no assets whatsoever.¹⁶

Ms. Lynch—Mr. Segal's ex-wife—discovered that Mr. Segal indirectly owned two parcels of development lands through two holding corporations. The trial judge determined that there was no distinction in law between Mr. Segal and his corporations, and pierced the corporate veil to vest the development lands in Ms. Lynch, thus ensuring that the spousal and child support to which she was entitled was paid.¹⁷

In *Keyes v. Keyes*, the parties had separated and were litigating the division of their property. Central to the dispute was their only significant asset—the jointly-owned matrimonial home.¹⁸ Both parties were experiencing medical issues that interfered with their ability to earn income and were falling deeper into debt. The husband sought immediate partition and sale of the home. The wife sought, among other things, a vesting order transferring the husband's interest in her name to secure his future support obligations. The Court found that a vesting order was not appropriate in the circumstances as it was not necessary to ensure compliance with support obligations.¹⁹ The record showed that the husband was voluntarily paying his support obligations.

¹⁶ *Ibid* at para 1.

¹⁷ *Lynch*, *supra* note 15 at para 70.

¹⁸ *Keyes v Keyes*, [2015 ONSC 1660](#) [*Keyes*].

¹⁹ *Ibid* at para 50.

In *Lynch* and *Keyes*, one party sought a vesting order to enforce the support obligation of another. The differing outcomes in those cases turned on whether the party owing the obligation was voluntarily trying to meet it. The Court in *Lynch* defeated Mr. Segal's attempts to creditor proof himself and vested his corporations' lands in Ms. Lynch.²⁰ The Court in *Keyes* declined to intervene where no enforcement steps were necessary.²¹

Vesting Orders in the Insolvency Law Context

Vesting orders are routinely used to support sales of real property in insolvency proceedings. In fact, the Court of Appeal recently recognized the granting of vesting orders as a "near daily occurrence on the Commercial List".²² One reason for this reliance on vesting orders is that, in insolvency proceedings, the interests of creditors or other stakeholders of the debtor company likely encumber the real property being sold. These interests will typically be 'vested off' the real property so that the purchaser obtains the property 'free and clear' of claims against the debtor company.²³ A related reason for the reliance on vesting orders in insolvency proceedings is that a vesting order made on a free and clear basis maximizes the value of the asset being sold: a purchaser will likely be far more willing to make a good offer for an asset of a debtor company if it can be assured that it will obtain clear title to the asset.

The use of vesting orders is so ubiquitous in insolvency proceedings that the commercial courts of several provinces have developed model approval and vesting orders, which, as their name suggests, contemplate the approval of transactions entered into by debtor companies and the vesting of title to the purchased assets in the purchaser. A copy of the model approval and vesting

²⁰ *Lynch*, *supra* note 15.

²¹ *Keyes*, *supra* note 18.

²² *Third Eye*, *supra* note 4 at para 81.

²³ *Ibid* at paras 80 & 81.

order used by the Commercial List of the Ontario Superior Court of Justice is attached herewith as Appendix “A” and is described in further detail below.

By way of example, in *Meridian Credit Union v. 984 Bay Street Inc.*, a receiver was appointed over real property owned by 984 Bay Street Inc., which had granted security to Meridian Credit Union.²⁴ Subsequent to granting Meridian the security but prior to the appointment of the receiver, 984 Bay entered into a series of leases with non-arm’s length parties. The leases contained generous rent-free periods and each provided that they were subordinate to Meridian’s security. The receiver sold the leased real property and sought an order vesting title to it in the purchaser free and clear of the leases, which order Justice Ground granted. His Honour’s decision was appealed. The Court of Appeal sent the matter back to Justice Ground and directed that His Honour consider the equities among the parties. In light of, among other things, the timing of entry into and generous nature of the leases, and the purchaser’s value-maximizing offer to purchase the real property, the His Honour held that the equities favoured vesting the real property in the purchaser free and clear of the leases.²⁵

In *Romspen Investment Corporation v. Woods Property Development Inc.*, Home Depot entered into an agreement of purchase and sale with Woods Property Development Inc. to acquire a portion of Woods’ property on which a new Home Depot store was to be constructed.²⁶ The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*. Woods defaulted on its mortgage over its entire property and Romspen, the mortgagee, sought the appointment of a receiver. The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot’s

²⁴ [2006 CanLII 26476](#) (ON SC) [*Meridian*].

²⁵ *Ibid* at para 20.

²⁶ [2011 ONSC 3648](#) [*Romspen*].

interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest.

Justice Wilton-Siegel concluded that a vesting order could be granted in the circumstances.²⁷ He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with. He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. His Honour concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.²⁸

Justice Wilton-Spiegel's decision to grant a vesting order was appealed and the Court of Appeal sent the matter back to His Honour for further factual determinations.²⁹ While the authors are not aware of the ultimate outcome of the *Rompsen* case, the Court of Appeal has considered it when deciding whether to uphold a vesting order extinguishing interests in property.³⁰

By way of further example, in *Re Terrace Bay Pulp Inc*, an insolvent pulp mill operator applied for and was granted protection from its creditors under the *Companies' Creditors Arrangement Act*.³¹ Justice Morawetz (as he was then known) approved a process for the sale of the mill's assets.

²⁷ *Ibid.*

²⁸ *Ibid* at para 193.

²⁹ *Ibid.*

³⁰ *Third Eye*, *supra* note 4 at paras 98 & 100; *Rompsen*, *supra* note 28.

³¹ *Terrace Bay Pulp Inc, Re*, [2012 ONSC 4247 \[Terrace Bay\]](#).

Through the sale process, the applicant identified a successful bid. That bid contemplated the purchase of certain real property that abutted property to be retained by the applicant. The applicant sought an order, among other things, (i) approving the sale transaction contemplated by the successful bid, (ii) vesting the purchased assets in the purchaser, (iii) declaring that the subdivision control provisions of the *Planning Act* do not apply to the vesting of title to the mill's assets and (iv) declaring that such vesting is not, for the purposes of section 50(3) of the *Planning Act*, a conveyance by way of deed or transfer.³²

Justice Morawetz approved the sale contemplated by the successful bid and vested the purchased real property in the purchaser, relying on the applicant's satisfaction the perennially cited *Soundair* principles³³ and their statutory equivalents, which are meant to guide judges tasked with deciding whether to approve a sale transaction and grant a vesting order in insolvency proceedings. However, His Honour refused to make the requested declarations pertaining to the *Planning Act*, holding (i) that the granting of a vesting order is not, for the purposes of section 50(3) of the *Planning Act*, a conveyance by way of deed or transfer and (ii) that it is unnecessary to issue a specific declaration that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title.³⁴

Vesting Orders and the Planning Act

Yes, vesting orders can be granted to indefeasibly transfer real property that might otherwise contravene the subdivision control provisions of the *Planning Act* without regard for those provisions or their effect. In *Terrace Bay*, Justice Morawetz was following the holding in *Lama v.*

³² *Ibid.*

³³ The *Soundair* principles are: (a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently; (b) the interests of all parties; (c) the efficacy and integrity of the process by which offers are obtained; and (d) whether there has been unfairness in the working out of the process. *Royal Bank of Canada v. Soundair Corp.* (1991), [1991 CanLII 2727](#) (ON CA).

³⁴ *Terrace Bsy*, *supra* note 31 at paras 71 & 72.

Coltsman, which provides that, while a vesting order has the same effect as a deed or conveyance of land, such an order is not a deed or conveyance.³⁵

That being said, where an applicant seeks a vesting order for the express purpose of avoiding the application of the subdivision control provisions of the *Planning Act*, case law suggests that judges ought to proceed with caution.³⁶

The case of *Nobrega and Elder v. Trustees of the Estate of M. Gasparovich* demonstrates the limits of using a vesting order to sever land that would otherwise require *Planning Act* consent.³⁷ On the mistaken belief that the *Planning Act* prohibited the transfer by will of adjoining parcels of land to separate beneficiaries, three adjoining parcels of land were devised to two beneficiaries to be shared as tenants in common. Those beneficiaries later applied for consent to a technical severance to re-establish the three parcels. When that consent was denied and the decision denying the consent unsuccessfully appealed, the beneficiaries brought an application seeking a vesting order.

Justice McArthur denied the application, stating:

Based on the limited information provided on the application, it seems that the proposed severance of the three properties will contravene the *Planning Act*. While such a contravention is not dispositive of the present application, it is a relevant factor to consider.

The law establishes that caution must be used before granting a vesting order that would conflict with the *Planning Act*. Unfortunately, I have little information about why the proposed severance of the title to re-establish three separate lots would conflict with the *Planning Act*. In my view, it would be inappropriate to grant the vesting order in the absence of a full understanding of the concerns of the City.³⁸

³⁵ *Lama v. Coltsman*, [1978] OJ No. 3395, 20 OR (2d) 98.

³⁶ *Holmsten v Karson Kartage Konstruktion Ltd.*, [1997 CanLII 16261](#) (ON SC); *Re Kuz and Kuz* (1980) 30 OR (2d) 756, 118 DLR (3d) 525 (Ont H Ct J).

³⁷ [2018 ONSC 2901](#) [*Nobrega*].

³⁸ *Ibid* at para 5.

In light of *Nobrega* and the cases cited therein, notwithstanding a court's jurisdiction to grant a vesting order that has the effect of circumventing the *Planning Act*, parties applying for a vesting order should be aware that judges are expected to exercise such jurisdiction with caution.³⁹

C. Ontario Courts' Jurisdiction to Grant a Vesting Order

Ontario courts are empowered to grant a vesting order by section 100 of the *Courts of Justice Act*:

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.⁴⁰

However, the Ontario Court of Appeal has suggested that section 100 of the *Courts of Justice Act* does not provide a freestanding right to property simply because the court considers the result equitable and that, in order to grant a vesting order, the court's jurisdiction must have some other root.⁴¹

In most of the cases discussed in this paper, the court's power to grant a vesting order under section 100 of the *Court of Justice Act* was supported by a freestanding right of one of the parties to a vesting order.

In *Mammone*—an application under the *Partition Act*—Justice Perell appears to contemplate that a vesting order is to issue solely based on the Court's jurisdiction under section 100 of the *Courts of Justice Act*.⁴² However, His Honour acknowledges that sales pursuant to orders made under the *Partition Act* are typically referred to masters (now associate justices). Such referees are expressly

³⁹ *Nobrega*, *supra* note 37.

⁴⁰ RSO 1990, c C.43; *Third Eye*, *supra* note 4 at para 33.

⁴¹ *Third Eye*, *supra* note 4 at para 39.

⁴² *Mammone*, *supra* note 9 at para 24.

empowered by rule 55.06(12) of the Rules of Civil Procedure to grant vesting orders to support sales conducted pursuant to references for the conduct of sale.⁴³

For example, in the family law disputes of *Lynch v. Segal* and *Keyes v. Keyes*, the Court looked to section 100 of the *Court of Justice Act* and sections 9(1)(d)(i) or 34(1)(c) of the *Family Law Act* for jurisdiction to grant a vesting order.⁴⁴ Sections 9(1)(d)(i) or 34(1)(c) deal with equalization of net family properties and orders for support, respectively. With respect to jurisdiction, in *Lynch v. Segal*, the Court stated that no useful purpose is served by attempting to categorize the types of circumstances in which a vesting order may issue in family law proceedings. Whether or not the court will make a vesting order depends on the particular circumstances of each case. The onus is on the person seeking a vesting order to establish that such order is appropriate.⁴⁵

The *Succession Law Reform Act* contains a provision similar to section 34(1)(c) of the *Family Law Act*, which allows a vesting order to be made in connection with an order for support of a dependant.⁴⁶

Judges presiding over insolvency proceedings have no shortage of jurisdiction to grant vesting orders. In receivership proceedings such as *Meridian* and *Rompsen*, section 243 of the *Bankruptcy and Insolvency Act* is a source of jurisdiction to grant a vesting order.⁴⁷ In restructuring proceedings under the *Companies' Creditors Arrangement Act* such as *Terrace Bay*, the Court's jurisdiction is rooted in section 36 of that act, which codifies the jurisdiction of a supervising court to grant a vesting order and enumerates factors to guide the court's discretion to grant such an order.⁴⁸ In restructuring proceedings conducted under the *Bankruptcy and Insolvency Act*, judges can look to

⁴³ *Rules of Civil Procedure*, RRO 1990, Reg 194, s 55.06(12) [Rules].

⁴⁴ *Lynch*, *supra* note 15 at paras 27 – 31; *Keyes*, *supra* note 18 at paras 47 – 49.

⁴⁵ *Lynch*, *supra* note 15 at paras 31 & 32; *Keyes*, *supra* note 18 at para 48.

⁴⁶ *Succession Law Reform Act*, RSO 1990, c S 26, s 63(3)(b).

⁴⁷ RSC 1985, c B-3, s 243 [BIA]; *Third Eye*, *supra* note 4 at para 87.

⁴⁸ RSC 1985, c C-36, s 36 [CCAA]; *9354-9186 Québec inc. v. Callidus Capital Corp.*, [2020 SCC 10](#) at para 45 and footnote 3.

section 65.13 of that act, which substantially mirrors section 36 of the *Companies' Creditors Arrangement Act*.⁴⁹

Several other legislative provisions in force in Ontario may be a root of jurisdiction sufficient to allow a judge to make a vesting order. For example, section 37(1) of the *Conveyancing and Law of Property Act* provides that a court may require that land upon which lasting improvements have been made be retained by the person who made the improvements in exchange for just compensation for the land.⁵⁰ While the authors are not aware of an Ontario court relying on section 37(1) as a source of jurisdiction to grant a vesting order, the courts of Saskatchewan have long recognized that a vesting order can be granted in connection with Saskatchewan's equivalent to section 37(1).⁵¹

D. Obtaining a Vesting Order

Vesting orders can be sought by way of a motion in connection with an existing action or application or via an independent proceeding. Where a proceeding already exists, a vesting order may be sought by notice of motion.⁵² A party may also commence an independent application or action for a vesting order by way of notice of application or statement of claim, respectively.⁵³

Notwithstanding how a vesting order is sought (*i.e.* action, application or motion), the party seeking such relief must provide the court with a proper evidentiary foundation to support the granting of the order, particularly given that vesting orders are an equitable and discretionary remedy. In all circumstances, however, the court will assess the evidence provided to determine if the granting of a vesting order is appropriate.

⁴⁹ *BIA*, *supra* note 47, s 65.13.

⁵⁰ RSO 1990, c C.34, s 37(1) [*CLPA*].

⁵¹ *Hanson v. Cook and Cook* (1989), [75 Sask R 66](#) (Sask CA); *Landswest School Division No. 123 v. Klein*, [2005 SKQB 272](#).

⁵² *Rules*, *supra* note 43, rule 14.03.

⁵³ *Ibid*, rules 14.03 & 14.05.

While the defendant or respondent to a proceeding wherein a vesting order is sought will typically be the title holder to the real property in respect of which vesting is sought, a court will expect that any party with a material interest in the property be served with the statement of claim, notice of application or notice of motion, as the case may be. Such parties may include secured creditors, lessees or lessors (if the real property being vested is a leasehold interest), taxing authorities or any other party with an interest registered against title to the real property.

Finally, a court will expect the party seeking the vesting order to submit a draft vesting order for review. In the case of insolvency proceedings, that draft order will typically be accompanied by a backline comparison to the model order approved for use on the Commercial List (a copy of which is included with this article as Appendix “A”).

E. Common Elements of a Vesting Order

To be a vesting order, an order needs vesting language along the lines of:

THIS COURT ORDERS AND DECLARES that all of the [transferor]’s right, title and interest in and to the Real Property shall vest absolutely in the [transferee].

The legal description of the property to be vested should be clear and precise so that all parties to the court proceeding, as well as the applicable Land Registry Office, know to which property the order relates.

When real property is transferred by vesting order, the order will commonly contain one schedule listing all instruments that are to be deleted from title, which instruments might include charges that will be satisfied by the transferor, notices of leases that will not be assumed by the transferee, restrictive covenants that are specific to the transferee or any notice or encumbrance relating to the proceeding in which the vesting order was granted. The order will commonly also contain a

schedule listing instruments that are to remain on title following the registration of the vesting order, which instruments might include notices of leases that will be assumed by the transferee, easements or other non-possessory property rights registered on title or restrictive covenants that are intended to persist. Rather than draft such schedules using basket terms such as “all charges” or “all notices of lease”, counsel should specifically identify each interest by instrument number, instrument type, date of registration and any other information that can allow the instrument corresponding to each interest to be clearly and precisely identified.

It likely goes without saying but the reason for such clarity and precision in describing the transferred property and any instruments to be deleted or to remain on title thereto is because, naturally, upon receipt of a vesting order transferring real property, the beneficiary thereof will want to have the transfer reflected in the applicable registry, and the applicable Land Registry Office will need to understand how the vesting order is to be implemented.

In order to avoid complications following the granting of a vesting order, the draft vesting order should include a clear and precise direction to the applicable Land Registry Office, describing how title to the real property is to be dealt with. If the real property being transferred does not have an independent legal property description, the order should also include a direction that an appropriate property identifier number be opened.

A direction to the Land Registry Office respecting a newly created parcel of land that ought to be in the Land Titles System may read as follows:

THIS COURT ORDERS that upon the registration in the Land Title Division for the Land Registry Office No. 65 for York Region (the “**Land Registry Office**”) of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and attaching a copy of this Vesting Order, the Land Registrar for the Land Registry Office is hereby directed to enter the [transferee] as the registered owners of the Real Property identified and described in Schedule “A” hereto in fee

simple, and open the appropriate Property Identifier Number for the Real Property in the name of the [transferee], subject only to the encumbrances, if any, identified and described in Schedule “C”, and is hereby directed to delete and expunge from title to the Real Property all of the encumbrances listed in Schedule “B” hereto, such that those encumbrances shall not appear on the Property Identifier Number opened by the Land Registrar for the Real Property.

As described in further detail in Section F below, the land registrar must obey vesting orders.

However, in order to obey a vesting order, the land registrar must know what the order requires.

In some circumstances, the parties to a proceeding where a vesting order has been granted may have considered and made provision for how each encumbrance and any claims related thereto are to be dealt with (mortgages repaid, restrictive covenants deleted on consent, etc.). In other circumstances, such as in insolvency proceedings, vesting orders are often granted before all possible encumbrances have been dealt with, or are even known to the parties. Such vesting orders may be made on a ‘free and clear’ basis. The following language vesting title to property on a free and clear basis is borrowed from the model approval and vesting order approved for use on the Commercial List (with some revisions to remove certain insolvency proceeding-specific and personal property-specific concepts):

THIS COURT ORDERS AND DECLARES that all of the [transferee]’s right, title and interest in and to the Real Property shall vest absolutely in the [transferor], free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “**Claims**”) including, without limiting the generality of the foregoing, those Claims listed on Schedule “B” hereto (all of which are collectively referred to as the “**Encumbrances**”, which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule “C” hereto) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Real Property are hereby expunged and discharged as against the Real Property.

The Court of Appeal has suggested in *obiter dicta* that, “provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.”⁵⁴ In any event, insolvency legislation provides jurisdiction to vest property in a purchaser on a free and clear basis.⁵⁵ Outside of the insolvency context, section 21 of the *Conveyancing and Law of Property Act* might provide a court jurisdiction to vest property in another on a free and clear basis.⁵⁶

Whether granted under insolvency law, section 21 of the *Conveyancing and Law of Property Act* or otherwise, where real property is vested in another free and clear of claims against it, the vesting order will typically provide that the net proceeds generated from the sale of the real property stand in the place and stead of the real property, and that any claims thereagainst maintain the priority that they enjoyed prior to the transfer. The language used to effect this result in the model approval and vesting order approved for use on the Commercial List is as follows (again, some insolvency proceeding-specific language has been revised):

THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Real Property shall stand in the place and stead of the Real Property, and all Claims and Encumbrances shall attach to the net proceeds from the sale of the Real Property with the same priority as they had with respect to the Real Property immediately prior to the transfer, as if the Real Property had not been transferred and remained in the possession or control of the person having that possession or control immediately prior to the sale.

⁵⁴ *Third Eye*, *supra* note 4 at para 41.

⁵⁵ *BIA*, *supra* note 47, ss 65.13(7) & 243; *CCAA*, *supra* note 48, s 36(6); *Third Eye*, *supra* note 4 at para 81.

⁵⁶ *CLPA*, *supra* note 50, s 21; *Third Eye*, *supra* note 4 at para 88.

F. Implementing Vesting Orders in Real Property Matters

Once a vesting order is granted, it must be obeyed by the land registrar.⁵⁷ Section 25(2) of the *Land Titles Act* directs the land registrar to register the order on title by either: (a) registering a proper application in favour of the party in the order as the owner of the subject property (described below) or (b) registering a transfer.⁵⁸ Until such registration is complete, the registered owner on title is deemed to remain the owner.⁵⁹ Once the registration is complete, the order is deemed “to be embodied in the register and to be effective according to its nature and intent”.

While the *Land Titles Act* requires the Land Registrar to register the vesting order on title, it is the responsibility of the successful applicant to facilitate and complete such registration by registering a proper application (where a transfer is not being registered).

There are four types of court orders that may be registered in the land titles system:

- i. an application to register court order, which is entered on the property;
- ii. an application for vesting order, which has the effect of conveying lands in accordance with the terms of the order;
- iii. and application to amend the register based on a court order, which specifies a particular amendment to be recorded on title; and
- iv. an application for restrictions based on a court order, which restricts dealings with the property.⁶⁰

⁵⁷ *Land Titles Act*, RSO 1990, c L.5.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, s 69(1).

⁶⁰ Remember that a certificate of pending litigation does not restrict dealings with the property. It simply gives notice of the existence of a legal proceeding that affects the land.

A vesting order can be registered either as an “Application for Vesting Order” (which essentially amends the ownership field of a parcel register and becomes a current title document) or an “Application to Amend based on Court Order” (which requires the Land Registrar to amend one or more fields of a parcel register as a record for the court’s decision in a matter) (hereinafter, the “**Application**”).⁶¹

The following is required for a complete Application:

- i. the Application must contain specific information, including:
 - a. a statement by the registering solicitor, which statement has been recently updated to the following:

[t]he applicant, who is authorized by court order [import order and, if applicable, land registrar’s approval] which is still in full force and effect and in which all parties affected by the order have been made a party to the cause or matter, or the applicant has furnished such evidence as is requisite to show that the person is bound thereby, as evidenced by the written approval of the Land Registrar, applies to have the register amended as follows: [insert proposed amendment for the application court order];⁶²

⁶¹ J Lem, “[Safeguarding Real Estate Transactions: Best Practices Relating to Court Orders](#)”, *Law Society of Ontario, 2019*.

⁶² The purpose of this statement is to: (i) ensure that the order remains valid on the date of registration (e.g. it has not been reversed on appeal); and (ii) demonstrate that the person(s) affected by the order received notice of it, if they are entitled to notice. This latter point can be achieved by naming the person(s) in the title of proceeding (which entitles them to service of the proceeding, unless the court orders otherwise) or providing evidence to the land registrar that the impacted parties are properly bound by the order. Such evidence might include a declaration from the court or evidence that the parties have been served with the order.

- b. where the property being vested is the “whole of a PIN”, a valid legal description (compliant with [O. Reg 43/96](#)) is required. It is insufficient to provide information such as, sketches, colloquial descriptions, municipal addresses, etc.;
 - c. where the property being vesting is less than the “whole of a PIN”, a proper legal description together *with a reference plan* describing the exact property being vested is required. The court order should expressly refer to the specific parts of the property on the reference plan being vested;
 - d. where certain encumbrances must be deleted from title, a list of the specific encumbrance identified by its instrument number must be included in the vesting order, in the absence of which, the Land Registrar will not delete said encumbrances. Generic references to “free and clear of all encumbrances” is not sufficient (unless referring to non-registered encumbrances); and
 - e. the vesting order (and all schedules) must be attached as a schedule to the Application. The order must be a complete and unredacted copy.;
- ii. the Application requires the payment of land transfer tax ensuing from the change in ownership. Therefore, a dollar amount, being the consideration, must be indicated to enable the printing of the applicable land transfer tax statements. If the consideration is nominal, the dollar amount must still be indicated (*e.g.* \$2.00); and
 - iii. the registering solicitor must perform a search for writs of execution immediately prior to registering the Application since an automatic writ search is not performed by the system upon registration of a vesting order. The Land Registry Office staff will perform this search

at the time the Application is certified and, if writs are found to be outstanding, they will contact the registering solicitor.

A practice tip on the form and registrability of a vesting order: A vesting order being registered on title should be an issued and typed court order. The Land Registrar will typically not register a hand-written endorsement on title. If the court order contains private information that the registering party does not want to make publicly available, then the registering party may wish to request the court to split the court order to keep the real estate-related order as a separate order. Furthermore, the vesting order must specify the exact name of the intended new registered owner. Vague wording such as “a company to be incorporated by ABC”, “designated assignee of ABC” etc. is not acceptable.

The registering party may also wish to request the Land Registry Office to pre-approve the registrability and form of the vesting order (before it is presented to the court for issuance) and this request must be submitted together with an electronic application in preparation. This is particularly important in the case of a complex vesting order. The request can be submitted through the [OnLand portal](#) and will be assigned to a staff member in the ordinary course. Note that this pre-approval process is limited to reviewing the registrability and form of the vesting order and is not meant to be a substantive review of the order.

Conclusion

It is clear that vesting orders can be obtained in a myriad of circumstances, however without the help of an experienced litigator, it may be difficult to ascertain if a vesting order is the appropriate remedy in a given case. If it is the appropriate remedy, it is important to engage an experienced

litigator to efficiently and effectively obtain a vesting order to secure your rights, otherwise the process can be expensive and time consuming.

If you are a party, other than the successful applicant, and are effected by the vesting order, you may also wish to engage an experienced litigator and act quickly. Note that in issuing a vesting order, a court may extinguish or cut out a third party's interest in the property. Once ordered, vesting orders may be difficult to reverse if not acted upon quickly. They are subject to appeal, however unlike other orders, the duality of a vesting order is such that once the order is granted and title is conveyed, the order is spent and the conveyance becomes valid. Therefore, the party who wishes to challenge the vesting of the title may find it difficult to appeal.⁶³ In fact, a party seeking appeal will be obliged to seek a judgment to stay the effect of the order as issuing a notice of appeal in itself will not automatically stay a court order.⁶⁴ Time, therefore, is of the essence.

⁶³ *Regal, supra* note 2.

⁶⁴ *Ibid.*