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## mcmillan litigation bulletin

### getting your priorities straight: BC Supreme Court decision interprets section 28 of the Property Law Act strictly

When a lender takes a mortgage on a property where a prior mortgage is already registered on title, one of the central concerns of the lender should be whether the prior mortgage secures a running account or is otherwise readvanceable. This is because further advances by the prior mortgagee that are made after the subsequent mortgage is registered may take priority over the subsequent mortgage unless one of four requirements of Section 28(2) of the *Property Law Act*<sup>1</sup> is met.

Section 28(2) of the *Property Law Act* provides:

(2) Despite the Land Title Act, after October 30, 1979, further advances made by a registered owner of a mortgage contemplated by and in accordance with the mortgage rank in priority to mortgages and judgments registered after his or her mortgage was registered if

(a) the subsequent registered mortgagees or judgment holders agree in writing to the priority of the further advances,

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<sup>1</sup> RSBC 1996, c 377, s 28(2).

(b) at the time the further advances are made, he or she has not received notice in writing of the registration of the subsequent mortgage or judgment, from its owner or holder,

(c) at the time the further advances are made, the subsequent mortgage or judgment has not been registered, or

(d) the mortgage requires him or her to make the further advances.

In *Paradigm Quest, Inc. v Chung*,<sup>2</sup> the interpretation of Section 28(2)(b) was at issue.

Paradigm registered a first mortgage on title to the property and commenced foreclosure proceedings when the mortgage went into default. Paradigm named as one of the respondents, B2B Trust, the holder of a second mortgage registered on title to the property. At the hearing on its foreclosure petition, Paradigm sought a declaration that the amount due under its mortgage was in priority to the interests of all respondents. B2B Trust opposed this relief and argued that advances made by Paradigm after B2B's mortgage was registered did not take priority over B2B's mortgage. B2B submitted that it had provided notice to Paradigm pursuant to Section 28(2)(b), and produced a letter sent from its solicitor's office which stated as follows:

"Please be advised that the writer acts on behalf of the above noted Owner in connection with placing a second mortgage in favour of B2B Trust in trust for on the above described property. Our search indicates that you currently have a mortgage registered on the property under No. LB32380.

Please provide a statement confirming the current balance owing under your mortgage and whether or not the same is in good standing.

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<sup>2</sup> 2012 BCSC 1646.

Please respond via return fax as soon as possible."

B2B Trust submitted that this letter was appropriate notice to Paradigm of registration of the second mortgage. Paradigm argued that the notice sent was neither actual notice of registration of the second mortgage nor was it sent by the holder of the second mortgage. Rather, it was merely a request for information by the solicitor of the registered owner of the property. Based on the letter, Paradigm would have no way of knowing if and when a second mortgage was registered.

Master Young took the opportunity to provide a helpful overview of the earlier jurisprudence in this area. These cases discussed the notice requirements where later charges on title purported to take priority over earlier encumbrances. The balance of these decisions indicated that actual notice of registration of the later charge would be necessary in order to assert priority. These decisions are consistent with the principle that in order to defeat the priority of a prior chargeholder only actual notice will be sufficient. Constructive, implied or anything short of actual notice cannot defeat the rights of the prior chargeholder.

Ultimately, Master Young held that "the first mortgage [sic] has no obligation to search the title every time they receive an inquiry or every time they advance funds. The onus is on the subsequent charge holder to provide actual notice. This was not done."

## the takeaway

If you are a lender or judgment creditor registering a subsequent mortgage or judgment on title to a property, ensure that you strictly comply with Section 28(2)(b). The letter should come from you (arguably, the letter could come from your solicitor), and must be sent only after registration of the subsequent mortgage or judgment is complete so the prior mortgagee can be notified of the date of registration of the mortgage or judgment. The onus is on the subsequent mortgagee or judgment creditor to ensure that proper notice has been provided.

by Aron P. Hochhauser and Samuel A. Hyman

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#### a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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