This paper was originally prepared for The Law Society of Ontario's Continuing Professional Development Program titled The Six Minute Real Estate Lawyer, held on November 17, 2020.

Cautions to the Wind: the Impending Need for CPLs

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Overview

This paper explores how Ontario courts have approached certificates of pending litigation ("**CPL**"), including during the COVID-19 emergency.

The first part of the paper provides an overview of the test for obtaining, and discharging, a CPL. The second part of the paper focuses on cases that were heard since the passing of the COVID-19 emergency order and the suspension of normal court operations.

The paper concludes with an update on court operations and discusses best practices for the use of cautions and CPLs as we continue to move through, and hopefully past, the COVID-19 emergency.

Part I – The Test for Certificates of Pending Litigation

A certificate of pending litigation provides notice to the world that title to a particular property (and, more precisely, the right to call for a transfer of that property) is under dispute. Parties seeking to register a CPL must seek leave of the court, as registration has the practical effect of restricting all further dealings with the property while the litigation is ongoing. In essence, a CPL puts the public on notice that title to the property is being litigated, and restrains dealings such as sale, refinancing or mortgage while the action is pending.

Courts often cite the test for granting a CPL, which is the same test for motions to discharge, from *Perruzza v. Spatone*[2]: (1) first, courts will determine whether there is a triable issue in respect of the moving party's claim to an interest in the property. The threshold for "interest in land" is set out at section 103(6) of the *Courts of Justice Act*.[3] The onus is on the party opposing the CPL to demonstrate that there is no triable issue. If the first step is met, courts next consider a list of factors to determine whether granting (or discharging) a CPL would constitute as equitable relief. Some of these factors include:

- whether the land is unique;
- the intent of the parties in acquiring the land;
- whether damages would be a satisfactory remedy;

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[2] 2010 ONSC 841 at p. 20 ["***Spatone***"].

[3] R.S.O. 1990, c. C. 43.

- the presence or absence of a willing purchaser;
- the harm to each party if the CPL is or is not removed with or without security;
- whether the interests of the party seeking the CPL can be adequately protected by another form of security; and
- whether the moving party has prosecuted the proceeding with reasonable diligence.

Overall, the governing test is that courts must exercise **discretion in equity** and look at all relevant factors to determine whether a CPL should be granted or vacated.[4] The presence or absence of these factors - and most notably, whether or not **alternative remedies** can adequately address the moving party's concerns - is often the turning point for whether a CPL is granted. This point is illustrated by the contrasting outcomes in the two 2019 cases discussed below.

***Pacione v. Pacione*[5]**

The moving party, Robert Pacione, loaned his brother Mario $250,000 pursuant to a promissory note. This promissory note stipulated that if Mario did not repay the loan, then Mario would authorize a third mortgage against the property in dispute. The promissory note further stated that the property was owned by a certain numbered corporation, where Mario purportedly acted as the sole principal.

As it turned out upon Mario's default of the loan, he was neither an officer nor director of the corporation when the promissory note was executed. At trial, the judge observed that the test for CPL had been met, and that it "was not even a close call".[6] On the first step of the test, the promissory note evinced Robert's reasonable claim to an interest in the property. Once this threshold step was met, the court considered the CPL factors as previously outlined, and ultimately arrived at the conclusion that Robert was entitled to have a CPL registered on title. Crucially in this case, the court recognized that the numbered company could easily dispose of its assets to other creditors and evade further judgment, making a CPL the only effective remedy.[7]

Notably, the court also stated that while Mario had no legal authority to bind the numbered company and the property in question, this fact did not defeat Robert's interest in the property, as there was no way Robert could have known Mario lacked this authority. As the court stated, Mario could not be allowed to benefit from his own misrepresentation[8], which was yet another reason why this form of equitable relief was appropriate.

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[4] *Ibid* at para. 20.

[5] *Pacione v. Pacione* [2019] ONSC 813 ["***Pacione***"].

[6] *Ibid* at p. 22.

[7] *Ibid* at p. 30.

[8] *Ibid* at p. 27.

***Bains v. Khatri*[9]**

In *Bains*, the court arrived at the opposite conclusion from *Pacione*, ultimately refusing to grant a CPL on the basis that other viable remedies were available. The issue in this case involved the moving party, a group of individuals who claimed that they jointly purchased the property in question with the defendant, and the defendant, who claimed that he was its sole purchaser.

In applying the CPL test, the judge found that the moving party had established their interest in the subject property, thereby fulfilling the first stage of the test. However, on the second step of the test, the moving party failed because it could not establish that a CPL was the *only* adequate remedy. In this case, the fact that there was no evidence suggesting the property was **unique** to the moving party - namely, because they purchased it as an investment, as opposed to a residence - was a significant point, as it meant that damages could adequately compensate the moving party.[10] Unlike in *Pacione*, where the defendant was a shell corporation that could quickly dispose of its assets, the defendant in this case was an employed individual against whom the moving party could seek other remedies to protect their investment, such as a *Mareva* order. The availability of these other effective remedies ultimately made the CPL unsuitable in *Bains*.[11]

Part II – CPLs and Cautions During COVID-19

When Ontario first passed its COVID-19 emergency order,[12] access to the court became severely limited and depended on the moving party's ability to demonstrate urgency.[13] While a number of real property cases were heard,[14] the decision to deem a case urgent was (and remains) discretionary. This left many applicants without a timely court date. For those that needed to protect an interest in real property, this meant a heavy reliance on the use of cautions, registered under the authority of section 71 or section 128 of the *Land Titles Act* [the "***LTA***"][15].

A caution acts in a similar manner to a CPL, by warning third parties that someone other than the registered owner has the right to call for the transfer of the property. Generally speaking, a caution lasts for sixty days from the date of its registration.[16]

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[9] *Bains v. Khatri* [2019] ONSC 1401 ["***Bains***"].

[10] Also see *Ram Dinary Inc. v. Dai et al*., 2020 ONSC 4846, and *Khanna v. Singh*, 2020 ONSC 4800, other cases where a lack of uniqueness defeated the moving party's motion for a CPL.

[11] *Ibid* at para. 37.

[12] S.O. 2020, c. 17, O. Reg. 73/20.

[13] *Wang v 2426483 Ontario Limited*, 2020 ONSC 2040.

[14] See, for example, *Oppong v Desoro Holdings Inc*, 2020 ONSC 1689. See also *Morris v Onca*, 2020 ONSC 1690 and *Bindaas Capital v. Chen*, 2020 ONSC 2313.

[15] R.S.O. 1990, c. L. 5.

[16] For cautions registered under s. 71 and pursuant to an agreement of purchase and sale, the required statement will permit the land registrar to delete the caution 60 days from the date of closing, which must be provided. Cautions based on an agreement of purchase and sale require that the cautioner pay land transfer tax. A caution is a taxable conveyance when tendered for registration. The value of the consideration is the full amount of the consideration set out in the caution. For more information, see "Guide to the Application of the Land Transfer Tax to Certain Transactions" by Ontario Ministry of Finance.

At the beginning of the COVID-19 pandemic (when access to the court was most restricted), the Director of Titles exercised his discretion under the *LTA* to extend the life of a caution under certain circumstances. As discussed in the third part of this paper, such extensions will be exceedingly difficult to come by now that courts are more accessible.

Unlike CPLs, cautions do not require judicial determination to be registered. They are relatively easy to register,[17] provided the registering solicitor is able to state that her client is entitled to call for a transfer of the property.

That said, not every dispute over real property entitles the applicant/plaintiff to a caution. Section 132 of the *LTA*[18] states that individuals seeking to register cautions must have **reasonable cause** to do so. The case below discusses the parameters of that requirement.

***Mendes v. Mendes*[19]**

In *Mendes v. Mendes*, Myles Mendes was the registered owner of the property in question. He sold the property with a closing date set for March 27, 2020. As it turned out, Myles' sister Myra registered a caution on title of the property, resulting in the closing being delayed by about two months until May 26, 2020.

Myra claimed that she had an unregistered interest in the subject property due to an alleged sum of money she lent Myles to purchase it.[20] The court disagreed, finding that even if there was such a loan (as the loan itself was contentious), its existence did not constitute an interest in land for the purposes of registering a caution under the *LTA*.[21]

Notably, in fixing costs, the court placed significant emphasis on the fact that Myra's conduct was unreasonable in registering the caution. According to the court, Myra acted unreasonably because even if Myles owed her money, the amount of consideration she set out in the caution did not actually reflect that sum (the alleged loan was for $2,925.00, as opposed to $415,458.53, which was the sum Myra registered). The judge determined that if Myra had only registered $2,925.00 on the caution, the entire issue may have been avoided without delaying the closing. As such, the court awarded Myles $30,000.00 in costs alone, despite Myra's argument that this amount was excessive.[22] This outcome evinces the importance of using cautions carefully, both in ensuring that they are only used to express legitimate interests in land, and in stating the accurate amount of consideration on the caution.

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[17] Note the requirement to pay land transfer tax when registering a caution pursuant to an agreement of purchase and sale. (See Note 16)

[18] R.S.O. 1990, c. L. 5, s. 132.

[19] 2020 ONSC 5205 ["***Mendes***"].

[20] *Ibid* at p. 11.

[21] *Ibid* at p. 15

[22] *Ibid* at p. 38-42

***Kirubakaran v. Tiller*[23]**

Tiller is exemplary of several other factually-similar cases where courts rendered similar decisions.[24] In this case, the defendant, Tiller, moved under s. 103(6) of the *Courts of Justice Act*[25] and Rule 42.02(1) of the *Rules of Civil Procedure*[26] to discharge a CPL and a caution registered on title.[27]

The central issue in this case was whether the plaintiff, Kirubakaran, took unfair advantage of the fact that the CPL motion was brought *ex parte*, which provided no notice to Tiller.[28] In particular, in his motion to register the CPL, Kirubakaran relied only on his own affidavit evidence with no other supporting documentation, which the court here commented was "somewhat unusual".[29] Further, the court noted that Kirubakaran's affidavit evidence supported *his* contention that the transfer of title from Kirubakaran to Tiller raised the presumption of resulting trust, with beneficial ownership residing with Kirubakaran.[30] On the other hand, Tiller contended that she paid all of the expenses of the property, including mortgage payments and other household expenses.[31]

Ultimately, the court found that Kirubakaran could not sustain the CPL in the face of his non-disclosure of several material facts.[32] A key fact that remained undisclosed, for example, was documentation relating to the transfer of title from Kirubakaran to Tiller, which he completely omitted from his motion record. As such, the court set aside the original order registering the CPL for this property on the basis that material facts were incomplete before the court,[33] citing its authority to vacate a CPL in the event that registration is brought about by abuse of the court's processes.[34]

***Jennifer Horrocks v. Bruce McConville et al*[35]**

This motion for a CPL was brought on an *ex parte* basis and involved allegations of fraud. In particular, the moving party Jennifer Horrocks alleged that her ex-husband Bruce McConville had sold his business, family cottage and investment properties without her knowledge, and with the intent to defeat her family law claims.[36]

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[23] 2020 ONSC 6101 ["***Tiller***"].

[24] See also *2676547 Ontario Inc. v. Elle Mortgage Corporation*, 2020 ONSC 2041, and *Asiyaban v. Aghdasi*, 2020 ONSC 6096.

[25] *Supra* note 2.

[26] R.R.O. 1990, Reg. 194.

[27] *Ibid* at p. 2.

[28] *Ibid* at p. 11.

[29] *Ibid* at p. 12.

[30] *Ibid.*

[31] *Ibid* at p. 8.

[32] *Ibid* at p. 19.

[33] *Ibid* at p. 4.

[34] *Ibid* at p. 11.

[35] 2020 ONSC 4645 ["***Horrocks***"].

[36] *Ibid* at p. 1-2.

As explained in *Horrocks*, the test for granting a CPL where there is alleged fraud is slightly different from the usual test. When CPLs are requested in such cases, they must satisfy the following test:

1. The claimant must satisfy the court that there is a high probability she could succeed in the main action;
2. The claimant must introduce evidence demonstrating that the transfer was made with the intent to defeat creditors; and
3. The claimant must demonstrate that the balance of convenience favours issuing a CPL in the circumstances of the case [*paraphrased*].[37]

In this case, the judge focused his analysis on the second step of this test. He found that modern courts' interpretation of the "badges of fraud" include, but are not limited to: whether the transaction was secret, whether there was unusual haste in making the transfer, if the consideration was grossly inadequate, and/or the existence of a close relationship between parties to the conveyance.[38]

Many of these "badges" were apparent on the facts of this case - one notable fact being that Bruce had sold his assets to his personal bookkeeper, without notifying Jennifer. Additionally, these transactions all took place in the midst of legal proceedings, and there was unusual haste in his getting rid of the assets, including a incident where Bruce set fire to over one million dollars in cash "because there was no law preventing him from doing so", which the court interpreted as an attempt to defeat a creditor's claim.[39] Finally, the fact that Jennifer would be left without recourse if the properties were sold again to a third-party purchaser without notice of the alleged fraud weighed the balance of convenience in her favour. As such, the judge granted her leave to issue a CPL on the subject properties.[40]

Conditional CPLs

In the following cases, courts either discharged or allowed the CPL to continue, but included additional conditions to ensure a fairer outcome for both sides. These cases evince the flexibility of CPLs as an equitable remedy, and highlight the discretion courts are afforded to fashion unique remedies using CPLs where appropriate.

***10381187 Canada Inc. v. Cherny*[41]**

In this case, the judge chose to discharge the CPL in question, on the condition that any equity arising from a potential sale of the property be protected from dissipation.

The facts of this case warranted its unusual outcome. Elena Cherny was the landlord and moving party seeking to remove the CPL so that she could lease, sell or refinance the property in

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[37] *Ibid* at p. 7.

[38] *Ibid* at p. 12.

[39] *Ibid* at p. 18.

[40] *Ibid* at p. 19-20.

[41] 2020 ONSC 4325 ["***Cherny***"].

question.[42] However, Elena had also had an agreement to lease the property to Elias Markos and his company, 10381187 Canada Inc. ("103") for 10 years. This lease required Elena to renovate the house into 6 units, which Elias and 103 intended to sublease as short-term rentals. Elias and 103 also had a right of first refusal if Elena decided to sell the property.[43]

Elena renovated the house and created the additional units, but did not obtain permission from the City of Toronto to do so. Eventually, the City issued an Order to Comply requiring Elena to either get a permit, or remove the additional illegal units. Believing that she would not get approval from the City, Elena removed the illegal rooms and restored the property to a single-dwelling unit. She subsequently changed the locks and refused to let Elias back onto the property.[44]

The events that transpired led to Elias and 103 issuing an application seeking specific performance of the lease, as well as damages. They were granted leave to register a CPL for the property, which Elena disputed. At this hearing, the judge was to determine whether or not to discharge the CPL pending trial of the application.

The test for discharging the CPL in this case followed a somewhat different trajectory than the previously discussed cases, since the remedy of specific performance was also factored into the analysis. As such, the first question considered by the court was whether damages were an adequate remedy for the breach of lease, and simultaneously, whether damages would be sufficient in lieu of specific performance.

An important consideration for the appropriateness of damages was the uniqueness of the property. Elias and 103 argued that the property was unique because it is a Victorian house that is conveniently close to public transit and the University of Toronto, and further, one that was divided into six units. On the other hand, Elena argued that the property was not unique, and supported this with evidence of properties in the neighbourhood or in similar neighbourhoods with multiple units for rent. Ultimately, the court sided with Elena and ruled that the property was not unique; given the commercial nature of lease and the short-term rental market, Elias and 103 could achieve the same business objective with other buildings in the area. As such, monetary damages could adequately compensate their losses.[45]

The second question the judge considered was the likelihood of success if specific performance was ordered, *i.e.*, the likelihood of the City granting the necessary permissions to allow the six-unit dwelling to be built. After considering the expert evidence, the judge found that the "mere possibility" that planning permission would be granted was insufficient to justify an order of specific performance. As such, he ruled out specific performance as an appropriate remedy, which significantly weighed in favour of discharging the CPL.[46]

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[42] *Ibid* at p. 8.

[43] *Ibid* at p. 2.

[44] *Ibid* at p. 3-6.

[45] *Ibid* at p. 27-33.

[46] *Ibid* at p. 51.

Finally, the judge considered whether a discharge of the CPL would be fair and equitable in the circumstances - similar to other cases, this was the "discretionary" aspect of the test and decision. In particular, he noted that Elena was at risk of losing the property altogether if the CPL was not discharged, as she would not be able to afford her obligations to the property without refinancing. This being the case, he discharged the CPL to allow her to refinance and generate income from the property, on the condition that (i) Elena could not use the property as collateral beyond refinancing, (ii) if she sold the property, she would pay those proceeds into court pending trial and finally, (iii) that she could not transfer title other than through a *bona fide* sale to a third party if she sold her property.[47] This unique exercise of discretion may be exemplary for future applications of CPLs, where the facts warrant.

***Elkholy v. Margos*[48]**

Similar to *Cherny*, this case is unique in that the presiding Master granted a somewhat unusual CPL, which was set to expire by a certain future date.

The background to this case involved a dispute regarding the disposition of the property in question between the moving party, Elkholy, and the defendant, Margos. In the facts leading up to the case, Elkholy had fallen ill with cancer and required assistance with financing her property.[49] She eventually met Margos, a real estate broker, and the two came to an agreement that Margos would sell the property and rent it back to Elkholy, One of the major points of contention was whether or not Margos agreed that he would eventually sell the property back to Elkholy once her finances were in better order, and at what price he would do so.[50] Elkholy eventually became a tenant to Margos, but ended up defaulting on her rent payments. Eventually, she began an action to reclaim the property and registered a CPL on title. This led to Margos and the other defendants requesting the court to remove the CPL.

In considering the defendants' request for the removal of the CPL, the court looked to s. 113 of the *Courts of Justice Act*, placing particular emphasis on its equitable and discretionary principles, as reproduced from the case below:

> *Order discharging certificate*
> **1.** The court **<u>may</u> make an order discharging a certificate,**
> a) where the party at whose instance it was issued,
> **i. claims a sum of money in place of or as an alternative to the interest in the land claimed,**
> ii. does not have a reasonable claim to the interest in the land claimed, or
> iii. does not prosecute the proceeding with reasonable diligence;
> **b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security;** or
> **c) <u>on any other ground that is considered just</u>,**

[47] *Ibid* at p. 52-55.

[48] 2020 ONSC 2831 ["***Margos***"].

[49] *Ibid* at p. 2.

[50] *Ibid* at p. 10-11.

> **and the court may, in making the order*, impose such terms as to the giving of security or otherwise as the court considers just*.**[51]

The court relied on the bolded and underlined principles to grant a "very last chance opportunity" to Elkholy to demonstrate that she had access to the appropriate and necessary financial resources to acquire the property for its current market value.[52] At least part of his reasoning for this leniency was due to the shutdown of the country **caused by the pandemic**, which prevented the parties from being able to obtain a proper valuation of the property, one of the central points of contention.[53] Interestingly, the court noted that although the property was a "run-of-the-mill" single-story bungalow with no unique qualities (recalling that uniqueness of the property was an important factor for granting a CPL in prior cases), the fact that the property had sentimental value to Elkholy seemed to justify her interest in it in this case.[54]

This being determined, the court's final order was that the Elkholy must assemble any proof of her ability to purchase the property by September 30, 2020 (*note these reasons were rendered on May 30, 2020), at which time the CPL would be withdrawn.[55]

Part III – Where Do We Go From Here?

When a dispute over the ownership of real property first arises, most cautious solicitors will protect their client's unregistered interest in land by registering a caution. As set out above, cautions are relatively easy to register and last for sixty days from the date of registration.[56] However, once that sixty day period expires, counsel should assume that the caution will be automatically, and promptly, deleted. After sixty days, a CPL is required.

At the beginning of the COVID-19 emergency, when courts were very difficult to access, some cautions were extended by the Director of Titles, to preserve the cautioning party's rights while the parties waited for a hearing date. That practice is very unlikely to continue.

As we continue to move further from the declaration of the COVID-19 emergency in Ontario, courts continue to expand their capacity to hear matters virtually. Counsel are expected to adhere to procedural deadlines and move matters forward.[57] That said, some courthouses are faced with a significant backlog and, as a consequence, it remains difficult to book new motions. Litigants with real property cases are cautioned to move expeditiously to court to seek a CPL.

A Note on Deleting CPLs

The general rule is that a CPL may be deleted if a court order authorizes the deletion. However, that is not the *only* way to delete a CPL.

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[51] R.S.O. 1990, c. C. 43, s. 113, as cited in *Margos* at p. 28.

[52] *Ibid* at p. 43.

[53] *Ibid* at p. 42.

[54] *Ibid* at p. 32.

[55] *Ibid* at p. 54.

[56] See also notes 16 and 17.

[57] Ontario limitation periods and procedural timelines were resumed on September 14, 2020. See S.O. 2002, c. 17, O. Reg. 457/20.

A plaintiff may apply to delete a CPL without a court order. Generally speaking, this will require an application to amend the register to delete the CPL, which will include a law statement confirming that all of the named plaintiffs wholly discontinue the action against all of the named defendants.

A registered owner may also apply to delete a CPL without a court order, but this typically requires more evidence. An application to amend the register to delete a CPL by a registered owner requires the same law statement (i.e. a law statement that confirms that all of the named plaintiffs wholly discontinue the action against all of the named defendants), as well as further evidence to the satisfaction of the Director of Titles. That evidence is generally comprised of: (i) a reference to the Notice of Discontinuance and the date of its filing (ii) a copy of the Notice of Discontinuance imported into the document; and (iii) a covenant to indemnify the Land Titles Assurance Fund imported into the document in statement 3640.[58]

The procedures set out in Section 1.1.6 of Bulletin 2008-05 continue to apply to the deletion of a CPL (formerly referred to as "Certificates of Lis Pendens") that is brought forward during conversion of a property from registry to LTCQ.[59]

[58] This is based on guidance provided by the Director of Titles as of the date of this paper.

[59] *Ibid.*