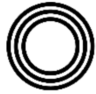

Law Society of Ontario | Barreau de l'Ontario

SIMPLIFYING THE COMPLEX MOTION

CHAIR

Jonathan Kulathungam
Teplitsky, Colson LLP

October 5, 2021

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Library and Archives Canada
Cataloguing in Publication

Simplifying the Complex Motion

ISBN 978-1-77345-402-3 (PDF)

SIMPLIFYING THE COMPLEX MOTION

CHAIR: **Jonathan Kulathungam,** *Teplitsky Colson LLP*

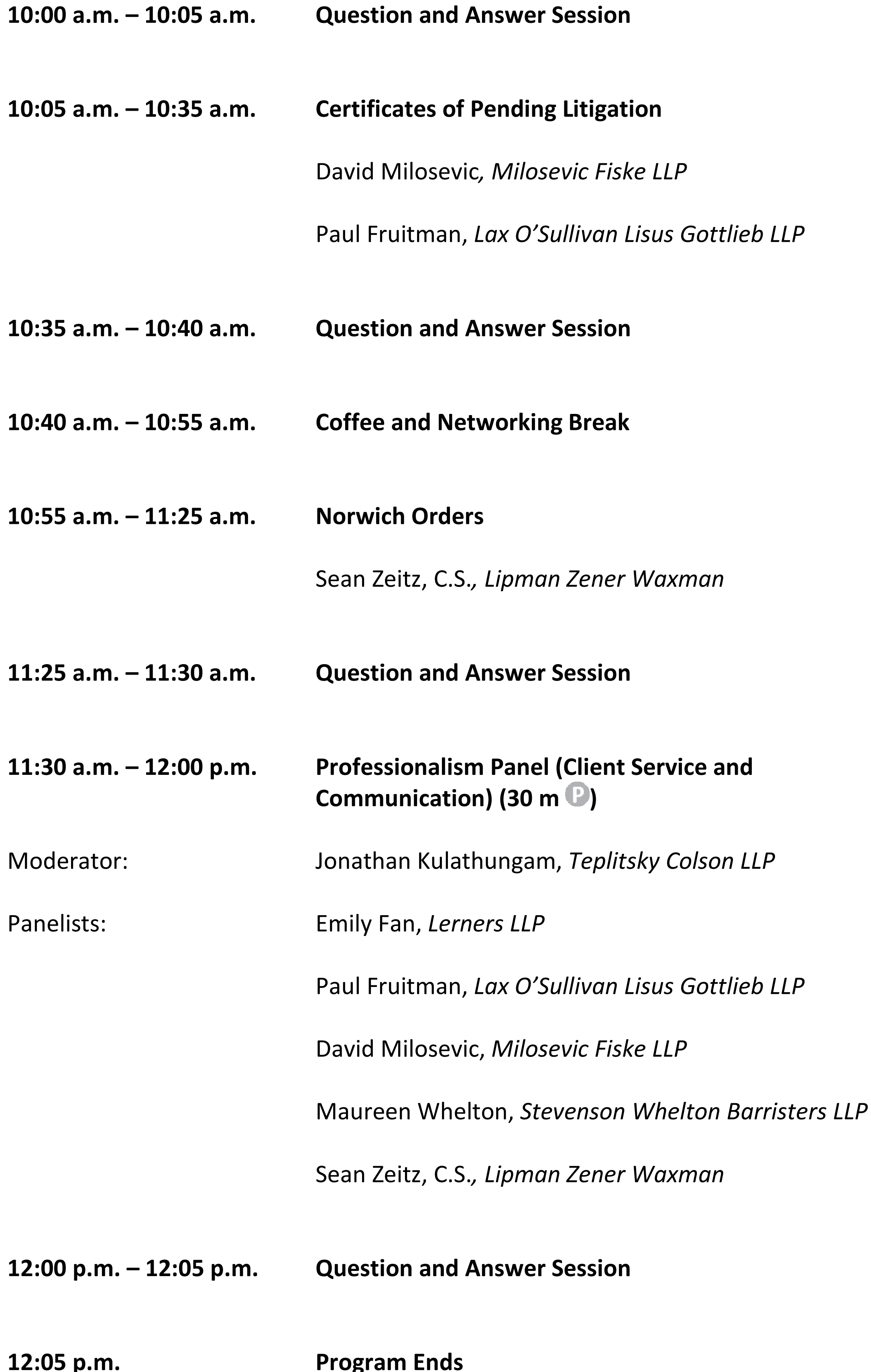
October 5, 2021
9:00 a.m. to 12:00 p.m.
Total CPD Hours = 2h + 30 m Substantive + 30 m Professionalism Ⓟ

Law Society of Ontario

SKU CLE21-01003

Agenda

9:00 a.m. – 9:05 a.m.	**Welcome and Opening Remarks**
	Jonathan Kulathungam, *Teplitsky Colson LLP*
9:05 a.m. – 10:00 a.m.	**Mareva Injuctions and Anton Piller Orders**
Moderator:	Jonathan Kulathungam, *Teplitsky Colson LLP*
Panelists:	Maureen Whelton, *Stevenson Whelton Barristers LLP*
	Emily Fan, *Lerners LLP*



10:00 a.m. – 10:05 a.m.	**Question and Answer Session**
10:05 a.m. – 10:35 a.m.	**Certificates of Pending Litigation**
	David Milosevic*, Milosevic Fiske LLP*
	Paul Fruitman, *Lax O’Sullivan Lisus Gottlieb LLP*
10:35 a.m. – 10:40 a.m.	**Question and Answer Session**
10:40 a.m. – 10:55 a.m.	**Coffee and Networking Break**
10:55 a.m. – 11:25 a.m.	**Norwich Orders**
	Sean Zeitz, C.S.*, Lipman Zener Waxman*
11:25 a.m. – 11:30 a.m.	**Question and Answer Session**
11:30 a.m. – 12:00 p.m.	**Professionalism Panel (Client Service and Communication) (30 m P)**
Moderator:	Jonathan Kulathungam, *Teplitsky Colson LLP*
Panelists:	Emily Fan, *Lerners LLP*
	Paul Fruitman, *Lax O’Sullivan Lisus Gottlieb LLP*
	David Milosevic, *Milosevic Fiske LLP*
	Maureen Whelton, *Stevenson Whelton Barristers LLP*
	Sean Zeitz, C.S.*, Lipman Zener Waxman*
12:00 p.m. – 12:05 p.m.	**Question and Answer Session**
12:05 p.m.	**Program Ends**

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*One Homewood Health e-learning course is eligible for the credit on a yearly basis.

SIMPLIFYING THE COMPLEX MOTION

October 5, 2021

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Laura Culleton, J.D., *Lipman Zener Waxman*

TAB 1A

SIMPLIFYING THE COMPLEX MOTION

Entry, Search, and Seizure of Evidence ...
A Brief on *Anton Piller* Orders

Maureen Whelton
Stevenson Whelton LLP

October 5, 2021

Entry, Search, and Seizure of Evidence … A Brief on *Anton Piller* Orders

Law Society of Ontario CPD: "Simplifying a Complex Motion", October 5, 2021

Maureen Whelton, Stevenson Whelton LLP

Consider this when seeking and carrying out an *Anton Piller* Order…

- Follow the model *Anton Piller* order drafted by the Commercial List Committee for the Superior Court of Justice: https://www.ontariocourts.ca/scj/files/forms/com/anton-piller-order-EN.doc.

- This model order incorporates the key principles enunciated in the SCC's seminal case on *Anton Piller* (*AP*) Orders regarding the rights of parties, the procedure for the search, and the procedure after the search: *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36.

***Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36** https://canlii.ca/t/1p0mm

- Plaintiff alleged industrial espionage against the defendant. Plaintiff's motion for an *AP* order was granted; however, the *AP* order did not contain a provision on how to deal with privileged information. Defendant sought to disqualify plaintiff's counsel from acting for the party since they were mistakenly granted access to privileged information. SCC found counsel could not continue to represent the plaintiff.
- The SCC recounted several issues with the execution of the order, including: a complete list of seized records was not made prior to removal and seal, and privileged records were reviewed by plaintiff counsel.
- *Celanese*, in para 35, outlined the four part test for granting a *AP* order: (1) Plaintiff must demonstrate a strong *prima facie* case; (2) Plaintiff must show the damage caused by the defendant's alleged misconduct, potential or actual, is very serious; (3) Plaintiff must provide convincing evidence that the defendant has in their possession incriminating documents or things; (4) Plaintiff must demonstrate the real possibility that the defendant may destroy those documents or things before the discovery process is completed. Courts have placed special emphasis on 4th criterion, with many *AP* orders set aside upon review based on lack of evidence to support the 2nd and 4th part of the test.

Consider the reasons why *Anton Piller* Orders have been set aside or discontinued …

***Factor Gas v. Jean*, 2010 ONSC 2454** https://canlii.ca/t/2blcr

- Plaintiff company brought claim against former sales manager for theft of confidential information and fraud/deceit. Court set aside the *AP* order because the plaintiff failed to demonstrate a threat of serious damage resulting from the defendant's alleged misconduct (*Celanese*'s 2nd criterion); and plaintiff failed to make full and frank disclosure.

***Nac Air, LP v Wasaya Airways Limited*, 2007 CanLII 51168 (ON SC)** https://canlii.ca/t/1twn1

- Plaintiff air travel company suspected that competing defendant air travel company was accessing the plaintiff's confidential fare information. Plaintiff was granted an *AP* order and over 800,000 documents were was seized.
- *AP* order was set aside for many reasons including the plaintiff's argument that computer files are inherently volatile was not sufficient to satisfy the 4th *Celanese* criterion and the *AP* order was executed too broadly (collecting from too long a period and beyond information strictly relevant).

***Bergmanis v Diamond & Diamond*, 2012 ONSC 5762** https://canlii.ca/t/ft5n0

- Plaintiff law firm argued defendant law firm and employees breached a contract that included an exclusive referral clause. *AP* order was set aside because any harm could have been addressed via damages (2nd *Celanese* criterion) and there was a lack of evidence the parties were at risk to destroy the evidence (4th *Celanese* criterion).
- Judge stated that it could have alternatively set aside the *AP* order on the basis that the judge who granted order did not put 10 day limit on it (per *Rule of Civil Procedure* 40.02(1)) and arguments suggesting the plaintiffs did not make full or frank disclosure on the *ex parte* motion.
- Judge stated that there is a difference between *AP* order and a Norwich order (procedure to seek equitable discovery against third parties before the commencement of proceeding) which may have been more appropriately sought here against the non-party respondents.

Consider this when challenging an *Anton Piller* Order …

***PricewaterhouseCoopers LLP v Phelps*, 2010 ONSC 1061;** [2010] OJ No 6296

- Plaintiff accounting company claimed for breach of contractual and fiduciary duty against three former employees who left to work for a competitor.
- Motion for continuance of an *AP* order denied. Court found it could not make an inference that the defendants were of "dishonest character" (to satisfy the *Celanese* test's 4th criterion) based on the evidence before the court that granted the *AP* order.
- Court found that since the defendants were challenging the continuance motion based on the record before the court when it granted the *AP* order, no party could adduce further evidence for the continuance motion, including the information the plaintiffs or ISS received during the search.
- Court clarified in para 30 that "opinion, supposition or the plaintiffs' "fear" that documents will be destroyed will not suffice" to satisfy the *Celanese*'s 4th criterion.

***Irving Shipbuilding Inc. v Schmidt*, 2014 ONSC 1474** https://canlii.ca/t/g62sf

- Plaintiff shipbuilder sought urgent *AP* order against a former employee who had left to work for a competitor. Plaintiff pleaded that the defendant had downloaded and left with information.
- Court clarified its power to review the order is conducted in a *de novo* hearing, and the court is entitled to consider the evidence obtained since the granting of the order, including the "fruits of the search", as well as the evidence before the judge who made the order.
- Court set aside the *AP* order it had previously granted because of fundamental errors on how the *AP* order was granted (no evidence of serious damage; no real risk of evidence being destroyed.; misstated facts by the applicant) and stated the applicant could have easily sought injunctive relief on notice to the defendant.

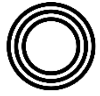
***Ontario Realty Corp v P. Gabriele & Sons Ltd.*, 2000 CanLII 5077 (ONSC)** https://canlii.ca/t/1cj5j

- Defendant challenged the *AP* order. Court allowed the defendant to review non-privileged information in order to challenge order.
- Later in *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2000] O.J. No. 4341 (ONSC), the motion for continuance of the *AP* order was granted. Problems with execution of order were discussed but court decided the order was property granted and should be continued with adjustments.

Consider this when acting as the Independent Supervising Solicitor (ISS) …

***Teledyne Dalsa, Inc v BinQiao Li*, 2014 ONSC 1422** https://canlii.ca/t/g62dp

- Court ruled the ISS appointed by an *AP* order is a peace officer under s. 2 of the *Criminal Code* and can seize controlled goods, without registering under the *Defence Production Act*.



TAB 1B

SIMPLIFYING THE COMPLEX MOTION

Mareva Injunctions (PowerPoint)

Emily Fan
Lerners LLP

Trishala Parikh
Lerners LLP

October 5, 2021

MAREVA INJUNCTIONS

LAW SOCIETY OF ONTARIO CPD:
"SIMPLIFYING A COMPLEX MOTION", OCTOBER 5, 2021

EMILY Y. FAN AND TRISHALA PARIKH, LERNERS LLP

Background

Mareva injunctions are a powerful remedy formally endorsed in Canada with the 1982 decision *Chitel v. Rothbart*. This decision was adopted by the Supreme Court of Canada in *Aetna Financial Services Ltd. v Feigelman*, which noted that *Mareva* injunctions must only be granted in circumstances where there is a real risk a defendant may remove assets from the jurisdiction to avoid judgement.

Over the years, case law has evolved and the current test for obtaining a *Mareva* injunction requires plaintiffs to establish the following: (1) a strong *prima facie* case against the defendants, (2) that the defendant has assets in the jurisdiction, (3) that there is a real risk that assets will be removed from the jurisdiction, (4) that they will suffer irreparable harm if the order is not made, and (5) that the balance of convenience favours granting the injunction.

As a starting point, a model *Mareva* order drafted by the Commercial List Users' Committee for the Superior Court of Justice can be found here: https://www.ontariocourts.ca/scj/files/forms/com/mareva-order-EN.doc

Recent Decisions Discussing *Mareva* Injunctions

HZC Capital Inc. v. Lee*, 2019 ONSC 4622 — *Beyond a Strong Prima Facie Case of Fraud

The plaintiffs brought a multi-party suit alleging complex commercial fraud and sought a *Mareva* injunction against several defendants. The case against one of the defendants was dismissed because the plaintiff failed to establish a strong *prima facie* case against them. With regards to the other two defendants, the court's analysis focused on whether there was a real risk of asset dissipation. Justice Pattillo referred to the decision in *Sibley & Associates LP v Ross* for guidance. According to *Sibley*, where all of the circumstances, including the circumstances of the fraud, indicate that a defendant may remove assets beyond the plaintiff's reach, dissipation can be inferred. The plaintiffs in this case successfully demonstrated a strong *prima facie* case of fraud against the defendants however, it was insufficient to support an inference that they would dissipate assets. In reaching this conclusion, the court considered numerous circumstances, for example, the defendants' "strong roots in the jurisdiction." The decision in *HZC Capital Inc.* serves as an important reminder that *Mareva* injunctions are an extraordinary remedy and affirms that a *prima facie* case of fraud is insufficient for courts to infer a risk of asset dissipation.

Ndrive v. Zhou*, 2020 ONSC 4568 — *Misconduct and Increased Costs

The parties in this matter were engaged in a private arbitration when the plaintiff sought a *Mareva* injunction to preserve assets for a future judgement. On May 6, 2020, the plaintiff was granted a *Mareva* injunction after an *ex parte* hearing and on May 22, 2020, the injunction was renewed and extended on consent. On June 19, 2020, an order to vary the original injunction was granted, though the defendant opposed this variation. Justice McCarthy remarked that the defendant's ability and propensity to transfer funds was the driving force behind the court's ultimate decision to issue the *Mareva* injunction.

The plaintiffs sought costs on a substantial indemnity basis for the two motions citing misconduct by the defendant. The court awarded costs on a partial indemnity basis for the first motion. However, the plaintiff was awarded costs on a substantial indemnity basis for the second motion because the conduct of the defendant "unnecessarily extended and complicated" the *Mareva* injunction proceedings. Justice McCarthy noted that the second would have been unnecessary if the defendant had not misled the plaintiff regarding his assets and the handling of the arbitral award funds. This case is notable because Justice McCarthy clarified that while a defendant may resist a *Mareva* injunction, there are limits and breaching those limits may lead to higher cost consequences.

Lonneberg v Onca*, 2021 ONSC 6196 –*The Importance of Enforcement

In late 2020, Justice Ramsay granted the plaintiffs a *Mareva* injunction, which prohibited the defendant and his companies from dissipating assets. A few weeks after the injunction, the parties settled. In a written settlement agreement, the defendant agreed to pay the amount claimed by the plaintiffs. The parties also agreed that the *Mareva* order would continue until the defendant paid the settlement amount. However, almost a year later, the defendant not only failed to pay, but also moved a significant amount of money out of the plaintiff's reach. Justice Myers found the defendant in contempt of court and stressed the importance of enforcing *Mareva* injunctions:

> *Today, money can be moved a half a world away at the click of an app. If funds are not frozen and trapped in Canada, the civil law provides no effective remedy for victims of fraud.*
>
> *For all the same reasons, Mareva injunctions must be rigorously enforced. A fraudster is not likely to be dissuaded from his greed and criminal bent by a piece of paper or a computer screen displaying a fancy red seal. If victims are to be able to obtain the enforceable remedies and compensation*

> *that the law promises, the court's Mareva injunctions freezing assets and requiring asset disclosure must be enforced with the court's full arsenal of authority and power. Otherwise, Canadians are sheep waiting to be fleeced.*
>
> *The law is not so feckless.*

Mareva injunctions are an extraordinary remedy subject to stringent requirements due to their impact on defendants. However, as articulated by Justice Ramsay once these injunctions are granted, their enforcement becomes extremely important for the protection of plaintiffs.

Law Society of Ontario | Barreau de l'Ontario

TAB 2A

SIMPLIFYING THE COMPLEX MOTION

Certificates of Pending Litigation:
Protecting a Litigant's Interest in Real Property

Certificates of Pending Litigation:
Protecting a Litigant's Interest in Real Property
(PowerPoint)

David Milosevic
Milosevic Fiske LLP

Joella Miller, (Articling Student)
Milosevic Fiske LLP

October 5, 2021

Certificates of Pending Litigation: Protecting a Litigant's Interest in Real Property

David Milosevic and Joella Miller (Articling Student)

Milosevic Fiske LLP

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1. Introduction to CPLs

Certificates of pending litigation (CPLs) serve as a notice that there is an outstanding claim against the property in question. A CPL itself does not confer any rights, rather it is intended to warn any interested party about the existence of pending litigation.[1] A purchaser can still purchase a property with a CPL registered on title, however this is not common in reality because the purchaser would be bound by the results of the litigation and is required to accept such a risk. Practically, a CPL prevents the sale or mortgage of the property prior to the conclusion of the litigation or the discharge of the CPL because there are very few purchasers who are willing to purchase a property with a CPL.[2]

This paper will provide a general overview on CPLs and important practice points for lawyers. Part 2 of this paper outlines the test for obtaining and discharging CPLs. Part 3 identifies three common situations in which CPLs are used: agreements of purchase and sale, equitable proprietary interests, and fraudulent conveyances. Part 4 discusses agreements between parties not to register CPLs. Part 5 considers the impact of COVID-19 on CPLs. Finally, this paper concludes with highlighting the risks of CPLs and key details clients should be advised of.

2. Obtaining and Discharging CPLs

The relevant statutory authorities governing CPLs are Section 103 of the *Courts of Justice Act*[3] and Rule 42 of the *Rules of Civil Procedure*.[4] A party seeking a CPL must have included a claim for it in the originating process that commenced the proceeding.[5] Alternatively, the originating process may be amended to include such a claim.[6] CPLs are obtained through a motion for an

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[1] *2254069 Ontario Inc v Kim*, 2017 ONSC 5003 at para 20.
[2] Francy Kussner and Tamryn Jacobson, "'We Always Wanted to Live on the Bridle Path': What's New With Certificates Of Pending Litigation?" (November 11, 2018) at 4-2, online (pdf): *Safeguarding Real Estate Transactions - Protecting Your Clients from the Dangers of Litigation*.
[3] *Courts of Justice Act*, RSO 1990, c C43 at s 103.
[4] *Rules of Civil Procedure*, RRO 1990, Reg 1994 at r 42.
[5] *Ibid* at r 42.01(2).
[6] Valerie Edwards, "Tying Up Land: Everything a Real Estate Lawyer Needs to Know About Certificates of Pending Litigation and Cautions" (April 19, 2012) at 1-2, online (pdf): *The Law Society of Upper Canada 9th Annual Real Estate Summit*.

order, which may be made without notice.[7] Additional requirements accompanying without notice, or *ex parte*, motions for CPLs are addressed in part 6 of this paper, "Risks and Advising Clients".

The statutory provisions governing CPLs only discuss procedure, notice, and registration. As a result, case law must be looked at for the test applied by the court in deciding whether to grant or discharge a CPL. This test is often cited from *Perruzza v. Spatone*.[8] The first step of the test places the onus on the moving party to show there is a triable issue as to a reasonable claim to an interest in the land. [9] This does not include an analysis of whether the moving party is likely to succeed.[10] Entitlement to a CPL does not require that the interest in land in question be claimed directly by the moving party for itself;[11] rather, what is required is that an interest in land be in question in the proceeding.[12]

If the first step is met, the test continues to step two. In the second step, the court considers a number of factors and exercises its discretion to determine whether a CPL should be granted.[13] These factors are commonly referred to as the "Dhunna factors" from the case of *572383 Ontario Inc v. Dhunna*[14] and include:

- Whether the plaintiff is a shell corporation
- Whether the land is unique
- The intent of the parties in acquiring the land
- Whether there is an alternative claim for damages
- The ease or difficulty in calculating damages
- Whether damages would be a satisfactory remedy
- The presence or absence of a willing purchaser

---

[7] *Rules of Civil Procedure*, *supra* note 4 at r 42.01(1), (3).
[8] *Perruzza v Spatone*, 2010 ONSC 841.
[9] *Ibid* at para 20.
[10] *Ibid*.
[11] *Chilian v Augdome Corp*, (1991) 44 OAC. 263 (CA), 1991 CanLII 7335 (ON CA).
[12] *Ibid*.
[13] *Perruzza v Spatone*, *supra* note 8 at para 20.
[14] *572383 Ontario Inc v Dhunna*, 1987 CarswellOnt 551, 24 CPC (2d) 287.

- The harm to each party if the CPL is or is not removed with or without security

The process for discharging a CPL is similar to that of obtaining one.[15] A party must bring a motion under Section 103(6) of the *Courts of Justice Act*[16] and Rule 42.02(1) of the *Rules of Civil Procedure*[17]. For the first step of the test, the onus switches to the opposing party who must show that there is no triable issue as to a reasonable claim to an interest in the land. The court considers the same factors as outlined above for obtaining a CPL. One argument commonly relied upon by opposing parties to discharge a CPL is the fact that the other party requested both monetary damages and a CPL.[18] However, this argument continues to be unsuccessful because if it were to succeed, it would prevent any mortgage holder who sues the debtor from obtaining a CPL. [19]

3. Common Situations in which CPLs are Used

There are three common situations in which CPLs are used: a purchaser in an agreement of purchase and sale (APS) claiming specific performance, where equitable proprietary interests exist, and where fraudulent conveyances are alleged.

3.1 Agreements of Purchase and Sale

When an APS for a property fails, the purchaser will often utilize a CPL while claiming specific performance.[20] In these cases, purchasers look to obtain CPLs in order to make it difficult for the vendor to find, and sell the property to, another purchaser while the property is involved in litigation. When deciding whether to grant a CPL, the court will consider if the purchaser's claim for specific performance would be rendered moot if the CPL is not granted.[21] If this would be the

[15] *Perruzza v Spatone*, *supra* note 8 at para 20.
[16] *Courts of Justice Act*, *supra* note 3 at s 103(6).
[17] *Rules of Civil Procedure*, *supra* note 4 at r 42.02(1).
[18] *Pacione v Pacione*, 2019 ONSC 813 at para 25.
[19] *Ibid*.
[20] *THMR Development Inc v 1440254 Ontario Ltd*, 2017 ONSC 5411.
[21] *Wilanmar Holdings Ltd v Meredith*, 2008 CanLII 63166 (ON SC), 173 ACWS (3d) 285 [*Wilanmar v Meredith*].

case, it supports the granting of a CPL.[22] If the court finds that there is no interest in land, there is no action for specific performance.[23]

3.2 Equitable Proprietary Interests

A party moving for a CPL will often try to demonstrate an interest in the property through the existence of constructive or resulting trusts.[24] Constructive trusts are based on an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment.[25] The courts have stated that a claim for a constructive trust is a claim for ownership in property[26] and may give rise to an interest in the property such as to be the subject of a CPL.[27] In addition, resulting trusts require a party to contribute to the property, acceptance of that contribution, and a common intention by the parties that the contribution entitles the contributor to some interest in the property.[28] A successful resulting trust claim may also allow the court to conclude that there is a triable issue with respect to the interest in the property.[29] Disputes about equitable proprietary interests often arise between spouses within the family law context.

3.3 CPLs with Fraudulent Conveyances

CPLs are often sought in cases where a fraudulent conveyance of the property is alleged and judgment has not been obtained yet in the main action. In these cases, the test for obtaining a CPL differs. This three-step test was set out in *Grefford v. Fielding* (2004) [30], and held in *Botiuk v. Campbell* (2015)[31] and *Jodi L. Feldman Professional Corporation v. Foulidis* (2018).[32]

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[22] *Wilanmar v Meredith*, *supra* note 21.
[23] *Cohen v Moore*, [2008] OJ No 261, 164 ACWS (3d) 704 at para 32.
[24] *Hupka v Aarts Estate*, 2003 CanLII 49303 (ON SC), 120 ACWS (3d) 702 at para 4.
[25] *Rawluk v Rawluk*, [1990] 1 SCR 70, 65 DLR (4th) 161.
[26] *Hupka v Aarts Estate*, *supra* note 24 at para 46.
[27] *First Leaside Wealth Management Inc v Phillips*, 2012 ONSC 5443 at para 36.
[28] *Hupka v Aarts Estate*, *supra* note 24 at para 53.
[29] *Sun Rise Elephant Property Investment Corporation v Luu*, 2018 ONSC 5247 at para 11.
[30] *Grefford v Fielding*, 2004 CanLII 8709 (ON SC), 70 OR (3d) 371 at para 26.
[31] *Botiuk v Campbell*, 2015 ONSC 694 at para 17.
[32] *Jodi L Feldman Professional Corporation v Foulidis*, 2018 ONSC 7766 at para 11 [*Jodi L Feldman*].

First, the claimant must satisfy the court that there is a high probability that they will successfully recover judgment in the main action.[33] This branch of the test will be satisfied if the claimant can show that a judgment in their favour is highly likely, even if the exact amount of the judgment is uncertain.[34]

Second, the claimant must introduce evidence demonstrating that the impugned transaction was made with the intent to defeat or delay creditors,[35] pursuant to Section 2 of the *Fraudulent Conveyances Act*.[36] The claimant must show positive evidence of the fraudulent intent, so the trial judge "could" conclude that there was fraudulent intent.[37] The first branch of the test necessitates a higher onus of proof, requiring a "high probability", whereas this second branch merely needs the claimant to provide evidence showing the existence of a triable issue.[38] Offering evidence that the transfer was for less than fair market value lightens the burden on the claimant.[39]

The courts have developed a number of objective "badges of fraud" that may be used to infer the transferor's subjective intention. In a recent 2020 decision[40], badges of fraud were described as including:

- The transferor continued in possession and continued to use the property as his own;
- The transaction was secret;
- The transfer was made in the face of threatened legal proceedings;
- The transfer documents contained false statements as to consideration;
- The consideration is grossly inadequate;
- There is unusual haste in making the transfer;
- Some benefit is retained under the settlement by the settlor;

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[33] *Grefford v Fielding*, *supra* note 30 at para 26.
[34] *Jennifer Horrocks v Bruce McConville et al*, 2020 ONSC 4645 at para 10 [*Horrocks v McConville*].
[35] *Grefford v Fielding*, *supra* note 30 at para 26.
[36] *Fraudulent Conveyances Act*, RSO 1990, c F29, s 2.
[37] *Jodi L Feldman*, *supra* note 32 at para 34.
[38] *Horrocks v McConville*, *supra* note 34 at para 11.
[39] *Grefford v Fielding*, *supra* note 30 at para 26.
[40] *Horrocks v McConville*, *supra* note 34 at para 12.

- Embarking on a hazardous venture; and
- A close relationship exists between parties to the conveyance.

In the third and final branch of the test, the claimant must demonstrate that the balance of convenience favours the issuance of the CPL in the circumstances of the case. [41]

4. Agreements not to Register CPLs

Contractual agreements may contain “no-registration” clauses, which intend to prohibit the parties from registering CPLs. The inclusion of a no-registration clause does not guarantee that the courts will give effect to the clause. Clarity is the key factor courts take into consideration. No-registration clauses are likely to be upheld if they clearly and precisely prohibit CPLs, even if it can be established that the party was in breach of the agreement or that the agreement is at an end.[42] Historically, clauses that used the words “notice”, “caution”, “lien”, or “charge” were deemed not to include CPLs and were not enforced by the courts to prohibit the registration of CPLs.[43] The courts have now determined that a no-registration clause is not determinative of a party’s ability to register a CPL, but is an important factor to be considered among others.[44] In addition to a clearly worded no-registration clause, the specific circumstances of the case influence the court’s decision for or against prohibiting a CPL.[45] Courts are more likely to give effect to a no-registration provision where the purchaser of the property acknowledges that the registration of a CPL would cause harm to the project.[46] Generally, where fairness and justice lean towards allowing a CPL to be registered, no-registration clauses will likely not survive the termination of the agreements they are included in.[47]

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[41] *Grefford v Fielding*, *supra* note 30 at para 26.
[42] *Chiu v Pacific Mall Developments Inc*, [1998] OJ No 3075, 81 ACWS (3d) 732 at para 35 [*Chiu v Pacific Mall*].
[43] *Ibid* at para 34.
[44] *1357202 Ontario Ltd v 1326046 Ontario Limited (Green Acres)*, 2007 CanLII 56476 (ON SCDC), 162 ACWS (3d) 744 at para 8.
[45] Kussner and Jacobson, *supra* note 2 at 16-17.
[46] *Chiu v Pacific Mall*, *supra* note 42 at para 33.
[47] Kussner and Jacobson, *supra* note 2 at 16-17.

5. CPLs during COVID-19

During the COVID-19 pandemic, access to the courts was limited and was based on a moving party's ability to demonstrate urgency.[48] Deeming a case urgent is discretionary and resulted in many applicants without a timely court date.[49] Consequently, many plaintiffs relied on the use of cautions through Sections 71 and 128 of the *Land Titles Act* to protect their interest in real property.[50] The registration of a caution allows a person claiming to have an interest in land to ensure that no dealing with the land or charge can occur by the registered owner or another person named in the caution without the consent of the cautioner.[51] Unlike CPLs, cautions under these sections have expiry dates. Under Section 71, the expiry date is 60 days after the date of closing.[52] A caution registered under Section 128 ceases to have effect 60 days from the date of its registration.[53] As explicitly stated in Section 128, cautions cannot be renewed.[54] A second caution by the same cautioner regarding the same matter may be issued under Section 130 of the *Land Titles Act* only with permission of the land registrar.[55] Normally, this requires the cautioner to demonstrate that bona fide efforts have been made to date to obtain a CPL or other judicial relief.[56] However, during COVID-19 while access to the courts was limited, it was very difficult for cautioners to demonstrate bona fide efforts.[57] As a result, the Director of Titles in Ontario declared that he was "prepared to consider granting permissions for second Cautions, and thereafter for successive Cautions until some reasonable time after the courts re-open, without requiring the cautioner to demonstrate bona fide efforts to obtain a CPL or other judicial relief".[58]

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[48] Sarah Turney and Anna Lu, "Cautions to the Wind: the Impending Need for CPLs" (November 17, 2020) at 11-3, online (pdf): *the Law Society of Ontario The Six-Minute Real Estate Lawyer 2020*.
[49] *Ibid*.
[50] *Ibid*; *Land Titles Act*, RSO 1990, c L5 at ss 71, 128.
[51] *Land Titles Act*, *supra* note 50 at s 128(1)
[52] Jeffrey W Lem, "The Treatment of Certain Timelines under the Land Titles Act During the Covid-19 Pandemic" (April 17, 2020), online (pdf): <https://www.oba.org/CBAMediaLibrary/cba_on/pdf/COVID19/LT-ody-and-merredith-re-cautions.pdf>.
[53] *Ibid*; *Land Titles Act*, *supra* note 50 at s 128(4).
[54] *Ibid*.
[55] *Land Titles Act*, *supra* note 50 at s 130.
[56] Lem, *supra* note 52.
[57] *Ibid*.
[58] *Ibid*.

6. Risks and Advising Clients

Lawyers should advise their clients of the risks involved with CPLs. Two of which are outlined below.

6.1 Bringing Motions Ex Parte

As noted above in Part 2, motions for a CPL may be made without notice, also known as *ex parte*. However, when a party moves for a CPL without notice, there are enhanced obligations they must undertake under Rule 39.01(6) of the *Rules of Civil Procedure*.[59] The moving party is required to make full and fair disclosure of all material facts and failure to do so is sufficient grounds for discharging a CPL.[60]

6.2 No Reasonable Claim

CPLs are a powerful tool that can cause significant hardship on the responding party and affect their ability to make decisions about their property. As a result, a party who registers a CPL without a reasonable claim to an interest in the property is liable for any damages sustained by any person as a result of its registration through section 103(4) of the *Courts of Justice Act*.[61] This provision is intended to discourage abuse of CPLs by moving parties.[62]

7. Conclusion

While CPLs themselves do not confer any rights and simply act as notice that there is an outstanding claim against a property, they remain a powerful tool that greatly impacts the property's owner. CPLs are governed by both Section 103 of the *Courts of Justice Act*[63] and Rule

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[59] *Rules of Civil Procedure*, *supra* note 4 at r 39.01(6); *Moses v Metro Hardware and Maintenance Inc*, 2020 ONSC 6684 at para 3 [*Moses v Metro*].
[60] *Rules of Civil Procedure*, *supra* note 4 at r. 39.01(6); *Moses v Metro*, *supra* note 59 at para 3.
[61] *Courts of Justice Act*, *supra* note 3 at s 103(4).
[62] *GPI Greenfield Pioneer Inc v Moore*, [2002] OJ No 282 (QL), 155 OAC 305 at para 16.
[63] *Courts of Justice Act*, *supra* note 3 at s 103.

42 of the *Rules of Civil Procedure*[64], while case law informs the test used by the court in deciding whether to grant or discharge a CPL. Agreements between parties not to register CPLs have been shown to be an important, but not definite, factor in the court's decision to grant a CPL. During COVID-19, court access was limited and many parties had to rely on cautions and second cautions instead of CPLs to protect their interest in property. It is crucial to remember that when a party moves for a CPL without notice, failure to make full and fair disclosure of all material facts is sufficient grounds for discharge and a party who registers a CPL without a reasonable claim to an interest in the property is liable for any damages sustained by any person as a result of its registration.

[64] *Rules of Civil Procedure*, *supra* note 4 at r 42.

Certificates of Pending Litigation:

Protecting a Litigant’s Interest in Real Property

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TRIAL AND APPELLATE LAWYERS

What are CPLs?

"A Certificate of Pending Litigation creates no interest in land, but is designed to protect unregistered interests in land, given that such interests could be defeated by transfers or conveyances made without notice to the holder of the unregistered interest. The Certificate of Pending Litigation serves as notice to non-parties."[1]

1. Bank of Montreal v Kennedy, [2008] OJ No 4685, 2008 CanLII 60697 (ON SC) at para 21.

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Benefits and Burdens of CPLs

BENEFITS

- Practically, a CPL prevents the sale or mortgage of the property prior to the conclusion of the litigation or the discharge of the CPL
- CPLs are almost an execution before judgment – the asset the parties are fighting over is ready for the moving party

BURDENS

- Responding party must pay to carry the property during litigation
- Responding party loses appreciation of property gained during the litigation
- Party seeking a CPL must have included a claim for it in the originating process that commenced the proceeding or amended it to include the claim

Statutory Authority

- Section 103 of the *Courts of Justice Act*
- Rule 42 of the *Rules of Civil Procedure*

Section 103 of the *Courts of Justice Act*

(1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2).

(2) Where a certificate of pending litigation is issued under subsection (1) it may be registered whether the land is registered under the *Land Titles Act* or the *Registry Act*.

(3) Subsections (1) and (2) do not apply to a proceeding for foreclosure or sale on a registered mortgage or to enforce a lien under the *Construction Act*.

(4) A party who registers a certificate under subsection (2) without a reasonable claim to an interest in the land is liable for any damages sustained by any person as a result of its registration.

(5) The liability for damages under subsection (4) and the amount thereof may be determined in the proceeding in respect of which the certificate was registered or in a separate proceeding.

(6) The court may 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) on any other ground that is considered just,
- and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just.

(7) Where a certificate is discharged, any person may deal with the land as fully as if the certificate had not been registered.[2]

2. Courts of Justice Act, RSO 1990, c C43 at s 103.

Rule 42 of the *Rules of Civil Procedure*

ISSUING OF CERTIFICATE

42.01 (1) A certificate of pending litigation (Form 42A) under section 103 of the *Courts of Justice Act* may be issued by a registrar only under an order of the court.

(2) A party who seeks a certificate of pending litigation shall include a claim for it in the originating process or pleading that commences the proceeding, together with a description of the land in question sufficient for registration.

(3) A motion for an order under subrule (1) may be made without notice.

(4) A party who obtains an order under subrule (1) shall forthwith serve it, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, on all parties against whom an interest in land is claimed in the proceeding.

DISCHARGE OF CERTIFICATE

42.02 (1) An order discharging a certificate of pending litigation under subsection 103 (6) of the *Courts of Justice Act* may be obtained on motion to the court.

(2) Each party to a motion under subrule (1) shall, unless the motion is made on consent, serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(3) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(4) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.[3]

3. Rules of Civil Procedure, RRO 1990, Reg 1994 at r 42.

Case Law

- The statutory provisions only discuss procedure, notice, and registration
- Need to look to case law for the test applied by the court in deciding whether to grant or discharge a CPL
- Two step test is found in Perruzza v Spatone, 2010 ONSC 841.

Step 1 of the Test

Is there a triable issue in respect of the moving party's claim to an interest in the property?

- Does not include an analysis of whether the moving party will be successful

Common Cases where Interest is Found

- The categories of cases in which an interest of land is found is not closed
- There are three common types of cases:

1. Purchaser from an APS is claiming specific performance[4]
2. Plaintiff is claiming there is a constructive or resulting trust[5]
3. Fraudulent conveyance actions[6]

4. THMR Development Inc v 1440254 Ontario Ltd, 2017 ONSC 5411.
5. Hupka v Aarts Estate, 2003 CanLII 49303 (ON SC), 120 ACWS (3d) 702.
6. Jodi L Feldman Professional Corporation v Foulidis, 2018 ONSC 7766.

Step 2 of the Test

- Court considers the "Dhunna Factors"[7] and exercises its discretion to determine whether a CPL should be granted

  - Whether the plaintiff is a shell corporation
  - Whether the land is unique
  - The intent of the parties in acquiring the land
  - Whether there is an alternative claim for damages
  - The ease or difficulty in calculating damages
  - Whether damages would be a satisfactory remedy
  - 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

- Court tries to balance the equities between the parties

7. 572383 Ontario Inc v Dhunna, 1987 CarswellOnt 551, 24 CPC (2d) 287.

CPLs During COVID-19

- Access to the courts was limited and based on demonstrating urgency
- Many plaintiffs relied on cautions to protect their interest in real property
- Unlike CPLs, cautions have expiry dates
- Second and successive cautions for the same matter were granted without requiring the cautioner to demonstrate bona fide efforts to obtain a CPL

Risks of CPLs

DAMAGES

- Party who registers a CPL without a reasonable claim to an interest in the land is liable for any damages sustained by any person as a result of its registration[8]
- Advise client of possible costs

MOTIONS MADE WITHOUT NOTICE

- When a party moves for a CPL without notice, there are enhanced disclosure obligations under Rule 39.01(6) of the Rules of Civil Procedure[9]
- Ensure client makes full and fair disclosure of all material facts as failure to do so is sufficient grounds for discharging a CPL

8. Courts of Justice Act, RSO 1990, c C43 at s 103(4).
9. Rules of Civil Procedure, RRO 1990, Reg 1994 at r 39.01(6); Moses v Metro Hardware and Maintenance Inc, 2020 ONSC 6684 at para 3.

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THANK YOU

TAB 2B

SIMPLIFYING THE COMPLEX MOTION

Certificates of Pending Litigation – An Update

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October 5, 2021

Certificates of Pending Litigation — An Update

By Paul Fruitman[1]

So you have decided to bring a motion for a certificate of pending litigation. Or perhaps you are responding to one. Clients are partial to CPLs because of the leverage they create. But there are risks to moving for a CPL, especially without notice.

Below is a guide to CPL motions, with consideration of the most recent case law.

General Principles

Recent case law affirms the general principles around CPL motions. In *Holt v. Greig*[2] and *1013012 Ontario v. Vercillo*,[3] the Ontario Superior Court of Justice summarized and applied the following principles from prior decisions:

1) The test on a motion for leave to issue a CPL is the same as the test for discharging one under section 103(6) of the *Courts of Justice Act*. The question for the court is whether the moving party has a reasonable claim to an interest in the land;

2) On a motion for leave to issue a CPL, the court need only be satisfied that there is a "triable issue" regarding the claimed interest in land;

3) The responding party has the onus of showing the absence of a triable issue; and

4) The governing test is that the court must exercise its discretion in equity and look at all relevant matters between the parties in determining whether a CPL should be granted or vacated.

In determining whether there is a triable issue, the court should not assess credibility or decide disputed issues of fact, but decide on the whole of the evidence whether there is a reasonable claim to an interest in the land.[4]

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[2] *Holt v. Greig*, 2021 ONSC 2683 ["***Holt***"] at para 22.

[3] *1013012 Ontario Inc. v. Vercillo*, 2021 ONSC 3514 ["***101 Ontario***"] at para 27.

[4] *Global West Developments Ltd. v. 16380 Jane Street Inc. et al.*, 2021 ONSC 4284 at paras 27 and 34; *Huntjens v. Obradovic,* 2019 ONSC 4343 ["***Huntjens***"] at paras 20-21.

Recent case law also confirms that a “triable issue” is a gateway requirement. If that requirement is met, the court will then consider the equities, including with reference to the factors first set out in *572383 Ontario Inc. v. Dhunna*:[5]

1) Whether plaintiff is shell corporation;
2) Whether land is unique;
3) The intent of the parties in acquiring the land;
4) Whether there is an alternative claim for damages;
5) Whether damages would be a satisfactory remedy;
6) The presence or absence of a willing purchaser; and
7) The harm to each party if the CPL is granted.[6]

A. Recent application of the *Dhunna* factors and assessment of “the equities”

In *Moses v Metro Hardware and Maintenance,* Myers J. accepted a corollary to the “shell corporation” factor—whether the moving party has given an undertaking as to damages.[7] In *101 Ontario*, de Sa J. made the CPL conditional on a personal undertaking for damages.[8]

Master McGraw’s decision in *Pauwa North America Development Group v. Skyline Port McNicoll* turned on *Dhunna* factors 6 and 7, and specifically the presence of an actual third party agreement. The court also noted the plaintiff’s delay in seeking the CPL.[9]

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[5] *572383 Ontario Inc. v. Dhunna,1987* CarswellOnt 551 (Master) at paras 10-18; *101 Ontario* at para 28; *Global West Developments Ltd. v. 16380 Jane Street Inc. et al.*, 2021 ONSC 4284 at paras 25-28; *RJM56 Holdings Inc. v. Treemart Farms Inc.*, 2021 ONSC 4422 (Master) at para 14.

[6] *Holt* at para 22; *572383 Ontario Inc. v. Dhunna,1987* CarswellOnt 551 (Master) at paras 10-18.

[7] *Moses v. Metro Hardware and Maintenance Inc.*, 2020 ONSC 6684 [“***Moses***”] at para 74, leave dismissed 2021 ONSC 877 (Div. Ct.). See also: *Belajac v. Belajac* 2008 CanLII 11638 (ON SC) at para 32, leave refused, 2008 CanLII 16463 (ONSC).

[8] *101 Ontario* at para 42.

[9] *Pauwa North America Development Group Co. Ltd. v. Skyline Port McNicoll (Development) Inc.*, 2021 ONSC 18 (Master) [*“**Pauwa**”*] at paras 64 and 66.

In *Pauwa* and in *Beygi v. Mahmoudzadeh*, the Ontario Superior Court also affirmed the skepticism towards CPL motions that look designed to secure a damages claim.[10] In dismissing the motion in *Beygi*, Woodley J. noted that it had been brought *after* the property was sold and despite the plaintiff seeking a sale in his Statement of Claim.[11]

In *Beygi* and in *Ghods Builders v. Sedona Place*, the Ontario Superior Court also considered commercial efficacy in deciding whether to grant leave to issue a CPL. Leave was granted in the latter case because it would help facilitate the development process.[12] In *Beygi*, the court declined to grant leave in part because doing so would cause all parties to suffer financial losses.[13]

Notwithstanding the application of specific factors, the equities writ large remain paramount. This is best shown by the recent decision of *Sparkman v. Sparkman*. Myers J. refused leave to issue the CPL because the plaintiff's claim to an interest in the subject properties contradicted his evidence in a separate family law proceeding. Without deciding "which version" of the plaintiff's narrative was true, Myers J. held that it was neither fair nor equitable to grant relief to a party who says "opposite things to different judges of this court when it suits his financial interest".[14]

Specific types of CPLs

B. Constructive trust claims

Recent case law confirms that a constructive trust arising from a breach of fiduciary duty or associated with a claim for unjust enrichment will support a claim for a CPL.[15] The constructive trust doctrine also includes a right to trace funds used to acquire land, which in turn supports a claim to a CPL over that land.[16]

To support a constructive trust for unjust enrichment, there must be a sufficient connection between the property and the misappropriated or wrongfully acquired

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[10] *Pauwa* at para 65; *Beygi et al v. Mahmoudzadeh*, 2020 ONSC 7944 ["***Beygi***"] at para 23. See also: *Kotler v. Kotler*, 2021 ONSC 548 (Master) at para 13.

[11] *Beygi* at para 13.

[12] *Ghods Builders Inc. et al. v. Sedona Place Co-Ownership Inc. et al.*, 2021 ONSC 1938 at paras 18-19.

[13] *Beygi* at paras 26-28.

[14] *Sparkman v. Sparkman*, 2021 ONSC 4843 at paras 34-37 and 43-46.

[15] *Holt* at para 24; *Li v. Li*, 2020 ONSC 7315 (Master) ["***Li***"] at para 21.

[16] *Li* at para 35; *Huntjens* at paras 42-43.

funds.[17] However, the lower, triable issue standard applies—the court need only be satisfied that there is a triable issue that a constructive trust will be available as a possible remedy at trial.[18]

C. Fraudulent conveyance claims

In *Fernandes v. Khalid*,[19] Doi J. summarized recent case law concerning CPLs sought in fraudulent conveyance claims. First, Doi J. noted that a CPL may issue in an action to set aside fraudulent conveyance, even if the plaintiff has no interest in the land and is not yet a judgment creditor.[20]

Doi J. further notes that there are two lines of applicable authority. The first requires the plaintiff to establish a *prima facie* case of fraud.[21] The second line of cases requires the plaintiff to satisfy a three part test:

1) A high probability that judgment will be recovered in main action;

2) A triable issue as to whether the transfer was made with an intent to delay or defeat creditors; and

3) The balance of convenience favours issuing the CPL.[22]

There is an important distinction between the first and second parts of that test. The high probability requirement regarding recovery in the main action does <u>not</u> carry over to the demonstration of fraudulent intent, which is assessed on “triable issue” standard.[23] In determining whether there is a “triable issue”, the court will compare the facts of the case to the traditional “badges of fraud”.[24]

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[17] *Li* at para 26; *Huntjens* at paras 41 and 44.

[18] *Li* at para 22; *Sun Rise Elephant Property Investment Corporation v. Luu*, 2018 ONSC 5247 at para 10.

[19] *Fernandes v. Khalid*, 2021 ONSC 190 [“*Fernandes*”].

[20] *Fernandes* at para 34.

[21] *Ibid*.

[22] *Fernandes* at para 35; *Jennifer Horrocks v. Bruce McConville et* al, 2020 ONSC 4645 (Master) at para 7; *Jodi L. Feldman Professional Corporation v. Foulidis*, 2018 CanLII 121633 (ON SC) at para 11.

[23] *Jodi L. Feldman Professional Corporation v. Foulidis*, 2018 CanLII 121633 (ON SC) at paras 17-21.

[24] *Fernandes* at para 36.

Standing

One of the more interesting decisions in recent years is the 2021 case of *Snook v. Royal Stone Interlocking Concrete*.[25] The plaintiff alleged that he was an equal partner in a landscaping business that had purchased, or had arranged to purchase, properties through nominee corporations. The defendants argued that the plaintiff lacked standing because he was seeking only a share of the corporations that in turned owned the land, rather than the land itself.

Dunphy J. rejected the standing argument on two grounds. First, the claim to an interest in the corporations was accompanied by a separate claim for a constructive trust over corporate profits into the land. As set out above, a constructive trust arising from a breach of fiduciary duty or associated with a claim for unjust enrichment will support a claim for a CPL.

Second, citing the Ontario Court of Appeal's 1991 decision in *Chilian v. Augdome*, Dunphy J. held that a CPL does not require a direct claim by the plaintiff to an interest in land; it is sufficient that "an interest in land [be] in question".[26]

In sum, a claim to shares in a corporation that owns land is sufficient to raise a triable issue regarding an interest in land to ground a CPL. Respondents to CPL motions are unlikely to find success relying on technical issues of standing.

Moving without notice

Moving without notice is risky. If the circumstances of your case allow for giving notice, do so. Also, some judges treat short notice as equivalent to no notice,[27] and will give moving counsel the opportunity to reschedule their motion to allow for proper notice. In those circumstances, moving counsel should try to secure interim terms, such as an undertaking not to encumber or sell the property before the return date.

If you do move without notice, you must make full and fair disclosure under Rule 39.01(6). That means disclosure of all facts that <u>might</u> have an impact on a decision to grant leave to issue a CPL.[28]

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[25] *Snook v. Royal Stone Interlocking Concrete Ltd.*, 2021 ONSC 3476 [Comm. List].

[26] *Snook v. Royal Stone Interlocking Concrete Ltd.*, 2021 ONSC 3476 [Comm. List] at paras 40-44, citing *Chilian v. Augdome* Corp., 1991 CanLII 7335 (ON CA) at para 55.

[27] See for example, *RJM56 Holdings Inc. v. Treemart Farms Inc.*, 2021 ONSC 4422 (Master) at para 26.

[28] *Moses* at paras 20-31; *Gong v. Newhaus Management Ltd.*, 2021 ONSC 531 ["***Gong***"] at para 44.

Recent case law has not settled whether a party moving without notice need only put forward all relevant facts or also “argue” the other side’s case.[29]

After the CPL is granted

A. Motion to discharge

Rule 39.06 allows a party to move to set aside a CPL on one or more of three grounds:

1) The plaintiff failed to provide full and fair disclosure on an *ex parte* motion;

2) The plaintiff has no reasonable claim to an interest in the land; or

3) The *Dhunna* factors do not support a CPL.

Discharge motions are often brought when the CPL was obtained without notice. Though a failure to make full and frank disclosure is in itself sufficient ground to set aside *ex parte* order,[30] Rule 39.01(6) does not *require* the court to set aside an order obtained without full and fair disclosure. The court retains discretion to maintain the CPL if doing so would be in the interests of justice.[31]

The court hearing a discharge employs a retrospective analysis. The question is whether the undisclosed information *could have* impacted the decision to grant leave to issue the CPL.[32] If the triable issue test *would* still have been met with the additional information disclosed, the CPL will likely being maintained.[33] However, if a court decides that relevant facts were withheld, it will almost certainly discharge the CPL.

B. Consequences of registering a CPL

Getting a CPL on title means leverage, but also exposure. Under section 103(4) of the *Courts of Justice Act*, a party registering a CPL without a reasonable claim to an interest in the land is liable for damages resulting from the registration.

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[29] *Gong* at para 36; *Costone Holdings Inc. v. Concept Lofts Ltd.*, 2020 ONSC 8055 (Master) at para 7; *Morris v. Lazaridis* 2009 CanLII 39491 (Ont. Master) affirmed 2009 CanLII 69796 (Ont. S.C.J.).

[30] *Makekzaeh v. Barron Homes Ltd.*, 2018 ONSC 5506 at paras 19 and 27; *Bassi v. Chowdry*, 2016 ONSC 691 at para 23.

[31] *K.A. v Mitchell*, [2013] OJ No. 2889 at para 19; *Moses* at para 72.

[32] *Gong* at para 45.

[33] *Costone Holdings Inc. v. Concept Lofts Ltd.*, 2020 ONSC 8055 (Master) at paras 13-18; *RJM56 Holdings Inc. v. Treemart Farms Inc.*, 2021 ONSC 4422 (Master) at para 30.

The fact that the court initially granted leave to issue the CPL does not necessarily mean the moving party had a reasonable claim to an interest in the land. Conversely, a subsequent successful discharge motion does mean that the CPL registration was unreasonable. This is because the test for both of those motions is a “triable issue” as to the whether there is a “reasonable claim to an interest in the land”.[34]

The party seeking damages on account of the CPL registration must show actual damages and must show that the CPL was registered without reasonable cause.[35]

[34] *WED Investments Limited v. Showcase Woodycrest Inc.*, 2021 ONSC 237 at paras 178-180.

[35] *WED Investments Limited v. Showcase Woodycrest Inc.*, 2021 ONSC 237 at paras 170-172.

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TAB 3

SIMPLIFYING THE COMPLEX MOTION

Norwich Orders (PowerPoint)

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October 5, 2021

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History of Norwich Orders

- Derives from the *Norwich Pharmacal Co. v. Customs and Excise Commissioners* 1974 House of Lords decision
- In that case, the Customs and Excise Commissioners notified Norwich Pharmacal that a patented compound they owned was being imported to the UK which was an infringement of the patent
- Norwich Pharmacal sought to compel the Customs and Excise Commissioners to identify the wrongdoer
- Identifying the wrongdoer was necessary to allow Norwich Pharmacal to commence proceedings to enforce its patent

lzw

What is a Norwich Order?

- Pre-action discovery tool that compels a third party to produce and/or preserve information in its power, care and control *York University v. Bell Canada Enterprises* et al. 99 O.R. (3d) 695
- The third party will be in some way, even unknowingly, connected to or involved in the misconduct alleged *York University v. Bell Canada Enterprises* et al. 99 O.R. (3d) 695
- An equitable, discretionary and flexible remedy but also an intrusive, extraordinary remedy to be exercised with caution (*GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619)
- Often requested *ex-parte* basis given the risk of moving with notice
- It is not a way to circumvent the normal discovery process; but a tool to be used when the ordinary discovery process would be inadequate or insufficient *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619

lzw

that the Defendants, or any one of them, have sustained damages by reason of this Order which the Plaintiff ought to pay; IT IS HEREBY ORDERED THAT:

1. The Defendants, Geeta Luthra and Sarjan Luthra (collectively, the "Luthras"), are hereby enjoined from dealing in any manner with any of their assets or revenues in Alberta or worldwide, other than for the purpose of meeting ordinary and reasonable personal living expenses, and without limiting the generality of the foregoing, the Luthras are restrained from transferring, mortgaging, charging, disposing of or creating an interest in their assets in Alberta or worldwide.

2. The Defendants, the Luthra Law Group, Top Star Properties Ltd., Vijay Sidhu, Rajiv Malhotra, Luthind Enterprises Inc., Sunita Verma, Sharuti Verma, Sonia Sharma, Amarjit Singh and Marjit K. Singh (collectively, the "Other Defendants"), are hereby enjoined from dealing in any manner with any of the assets identified in Schedule "A" hereto (the "Impugned Assets"), or any revenue or profits resulting therefrom, in Alberta or worldwide, and without limiting the generality of the foregoing, the Other Defendants are restrained from transferring, mortgaging, charging, disposing of or creating an interest in the Impugned Assets in Alberta or worldwide.

3. Without limiting the generality of the foregoing, the Defendant, Luthra Law Group, is further enjoined from dealing in any manner with any assets, properties or interests of or relating to the Luthras or the Other Defendants, or any revenue or profits resulting therefrom, in Alberta or worldwide, and is further enjoined from dealing in any manner with the assets, revenues or profits of the Luthra Law Group except in the course of ordinary and bona fide business or to meet ordinary and reasonable day to day expenses.

4. The Toronto-Dominion Bank shall:

   (a) disclose to and produce to the Plaintiff copies of any bank account statements for accounts in the name of Geeta Luthra or Sarjan Luthra occurring during the period May 1, 2014 to the date of this Order; and

   (b) following a review of the account statements by the Plaintiff, produce copies of any documents requested by the Plaintiff relating to transactions identified in the bank account statements.

5. The Bank of Montreal shall:

   (a) disclose to and produce to the Plaintiff copies of any bank account statements for accounts in the name of Geeta Luthra or Sarjan Luthra occurring during the period May 1, 2014 to the date of this Order; and

   (b) following a review of the account statements by the Plaintiff, produce copies of any documents requested by the Plaintiff relating to transactions identified in the bank account statements.

6. Upon being served with this Order, any bank or other financial institution which has received funds from, or deposited funds into accounts in the names of Geeta Luthra or Sarjan Luthra shall:

16528033.1

This is an example of an Order from the case of *Servus Credit Union Ltd. v. Greeta Luthra* et al.13 January 2016 Edmonton (ABQB) requesting in part, relief in the form of a Norwich Order.

The Norwich section of the Order is highlighted.

lzw

Norwich Order
Case Example #1

- Ex. *York University v. Bell Canada Enterprises* et al. 99 O.R. (3d) 695– Background
- York University's President Mamdouh Shoukri announced via press release that Professor Martin Singer was appointed as the inaugural dean of the Faculty of Liberal Arts & Professional Studies. The press release described Professor Singer's education and academic and administrative experience.
- After the announcement, an anonymous party sent an email to undisclosed recipients stating that President Mamdouh Shoukri committed a fraud by misrepresenting the knowledge and academic accomplishments of Professor Singer
- The email was then posted and recirculated. That was followed by a published press release from the U of T's newspaper titled "York U's President accused of fraud"

lzw

What is a Norwich Order? (Case Example #1)

- Ex. *York University* – Relief Sought
- York University sought a Norwich Order requiring Bell and Rogers to disclose information necessary to obtain the identity of the anonymous author of the defamatory emails
- The information sought would be to aid in the identification of the individual who created and sent the emails and blog post
- There was no other practicable way to identify the sender(s);
- Bell and Rogers enabled the authors to send the defamatory emails and articles such that it was an innocent, but involved, third party and not a mere witness;

lzw

What is a Norwich Order? (Case Example #1)

- Ex. *York University* – Application of the Test and Relief Granted
- The Court held the following:
- that there was a valid, bona fide or reasonable claim as York demonstrated a prima facie case of actionable defamation
- Bell and Rogers were the third parties involved and without the services they provide, the email could not have been sent
- Bell and Rogers possess the information about the identity of the group or individual who sent the email and posted the information online

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What is a Norwich Order? (Case Example #1)

- Ex. *York University* – Application of the Test and Relief Granted
- The Court then balanced the interests of York University in seeking the Norwich order and the prejudice against the alleged wrongdoer(s) and found that Bell and Rogers customers could contemplate that their identity would be revealed by order of the court based on the terms and service agreements of the respective service providers
- The Court granted the Norwich order

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What is a Norwich Order? (Case Example #2)

- Ex. *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 [GEA Group] - Background
- In GEA Group, a company known as FNG sought to purchase a subsidiary of GEA through a share purchase agreement
- In the offer to purchase, FNG made statements suggesting it had substantial assets
- FNG failed to close the transaction and GEA commenced arbitral proceedings
- Statements were made by FNG's counsel during a settlement meeting and a subsequent telephone conversation that suggested FNG had no substantial assets
- GEA determined that at some point after the offer, and before the telephone conversation, FNG transferred its assets to become judgment proof

lzw

What is a Norwich Order? (Case Example #2)

- Ex. *GEA Group* – The Relief Sought
- GEA applied to the Ontario Superior Court for ex parte relief in the form of a Norwich order
- In the notice of application, GEA alleged it required evidence related to the alleged fraudulent transfer of assets FNG made to shield itself from judgment
- GEA claimed the Norwich order would permit it to determine the circumstances under which the fraud was committed and prosecute the wrongdoing

lzw

What is a Norwich Order? (Case Example #2)

- Ex. *GEA Group* – Relief Granted and Subsequent Appeal
- The motion judge granted the Norwich order
- On appeal, Justice Cronk wrote that GEA Group failed to satisfy the "necessity" requirement
- First, none of the materials filed by GEA Group claimed that evidence was required to investigate whether GEA Group had a cause of action against the subsidiary or the legal counsel
- Second, if GEA Group wanted to pursue a fraud action against FNG, it had sufficient particulars to bring the cause of action against FNG
- Third, the Norwich order was not necessary to preserve evidence as there was no indication of potential destruction of evidence
- The Court of Appeal concluded that the purpose of the Norwich order in this case would be a tool for GEA Group's fishing expedition

lzw

When May a Norwich Order be Used?

- In *Alberta (Treasury Branches) v. Leahy*, the Alberta Court of Queen's Bench identified various circumstances where a Norwich order may be ordered:
  - To identify a wrongdoer
  - To discover and preserve evidence that may support an action against either known or unknown wrongdoers
  - To determine whether an action exists
  - To track assets and preserve them
- This was recently affirmed by the Ontario Court of Appeal in the GEA Group decision

lzw

Who Can You Obtain a Norwich Order Against?

- Magazine/Newspaper publishers *Hogan v. Great Central Publishing Ltd.* (1994), [1994] O.J. No. 135 (Gen. Div.).
- Website publishers *York University v. Bell Canada Enterprises* et al. 99 O.R. (3d) 695
- Internet service providers *Cohen v. Google Inc.* (N.Y.S.C. Index No. 100012/09, August 17, 2009)
- Employers (*P. v. T. Ltd* – an employee sought to identify an employee who made allegations against him to his employer to determine if he had a defamation action)
- Banks (*Bankers Trust Co. v. Shapira* – Norwich orders can be used to obtain information about identified individuals)

lzw

What is the Test for Norwich Orders?

- The Federal Court of Appeal articulated a four pronged test for Norwich Orders in *Glaxo Wellcome PLC v. Canada (Minister of National Revenue – M. N. R.)*
    1. The person seeking the order much show a bona fide claim against the unknown alleged wrongdoer
    2. The application must establish a relationship with the third party who possesses the information sought, such that it establishes that the third party is involved in the acts complained of
    3. Whether the third party is the only practicable source of the information available
    4. Whether the third party can be indemnified for costs to which the third party may be exposed to as a result of the disclosure

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Additional Considerations

- Although these are not components of the test, courts have recently included the following considerations in their decisions on Norwich orders
- Whether the interests of justice favour disclosure (this was recently considered in the *York University v. Bell Canada Enterprises* case where Justice Strathy identified the balance the court must weigh between the benefit of the applicant receiving the disclosure and the prejudice to the wrongdoer in the release of the disclosure)
- Whether this form of pre-action discovery is necessary
- The necessity consideration was interpreted by the Court of Appeal in the GEA Group case to require an applicant demonstrate that the disclosure sought is necessary for the action to proceed.

lzw

What should your order contain?

- The <u>specific</u> disclosure you are seeking from the third party
- The amount of time the third party has to produce the information sought in the order
- How the order will be served on the third party
- That there shall be no fees or disbursements payable by the moving party to the third party in respect of the disclosure
- How the order will be served upon the parties named or identified in the disclosure
- How the information you are seeking will be used in the proceedings
- Costs of the motion

lzw

Thank you!

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