

**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

## Table of Contents

1. Introduction to CPLs.....	2
2. Obtaining and Discharging CPLs.....	2
3. Common Situations in which CPLs are Used.....	4
3.1 Agreements of Purchase and Sale .....	4
3.2 Equitable Proprietary Interests.....	5
3.3 CPLs with Fraudulent Conveyances .....	5
4. Agreements not to Register CPLs.....	7
5. CPLs during COVID-19 .....	8
6. Risks and Advising Clients .....	9
6.1 Bringing Motions Ex Parte.....	9
6.2 No Reasonable Claim .....	9
7. Conclusion.....	9

## 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.<sup>1</sup> 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.<sup>2</sup>

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*<sup>3</sup> and Rule 42 of the *Rules of Civil Procedure*.<sup>4</sup> A party seeking a CPL must have included a claim for it in the originating process that commenced the proceeding.<sup>5</sup> Alternatively, the originating process may be amended to include such a claim.<sup>6</sup> CPLs are obtained through a motion for an

---

<sup>1</sup> 2254069 *Ontario Inc v Kim*, 2017 ONSC 5003 at para 20.

<sup>2</sup> 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*.

<sup>3</sup> *Courts of Justice Act*, RSO 1990, c C43 at s 103.

<sup>4</sup> *Rules of Civil Procedure*, RRO 1990, Reg 1994 at r 42.

<sup>5</sup> *Ibid* at r 42.01(2).

<sup>6</sup> 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 9<sup>th</sup> Annual Real Estate Summit*.

order, which may be made without notice.<sup>7</sup> 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*.<sup>8</sup> 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.<sup>9</sup> This does not include an analysis of whether the moving party is likely to succeed.<sup>10</sup> Entitlement to a CPL does not require that the interest in land in question be claimed directly by the moving party for itself;<sup>11</sup> rather, what is required is that an interest in land be in question in the proceeding.<sup>12</sup>

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.<sup>13</sup> These factors are commonly referred to as the “Dhunna factors” from the case of *572383 Ontario Inc v. Dhunna*<sup>14</sup> 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

---

<sup>7</sup> *Rules of Civil Procedure*, *supra* note 4 at r 42.01(1), (3).

<sup>8</sup> *Perruzza v Spatone*, 2010 ONSC 841.

<sup>9</sup> *Ibid* at para 20.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Chilian v Augdome Corp*, (1991) 44 OAC. 263 (CA), 1991 CanLII 7335 (ON CA).

<sup>12</sup> *Ibid*.

<sup>13</sup> *Perruzza v Spatone*, *supra* note 8 at para 20.

<sup>14</sup> *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.<sup>15</sup> A party must bring a motion under Section 103(6) of the *Courts of Justice Act*<sup>16</sup> and Rule 42.02(1) of the *Rules of Civil Procedure*<sup>17</sup>. 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.<sup>18</sup> 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.<sup>19</sup>

### 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.<sup>20</sup> 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.<sup>21</sup> If this would be the

---

<sup>15</sup> *Perruzza v Spatone*, *supra* note 8 at para 20.

<sup>16</sup> *Courts of Justice Act*, *supra* note 3 at s 103(6).

<sup>17</sup> *Rules of Civil Procedure*, *supra* note 4 at r 42.02(1).

<sup>18</sup> *Pacione v Pacione*, 2019 ONSC 813 at para 25.

<sup>19</sup> *Ibid.*

<sup>20</sup> *THMR Development Inc v 1440254 Ontario Ltd*, 2017 ONSC 5411.

<sup>21</sup> *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.<sup>22</sup> If the court finds that there is no interest in land, there is no action for specific performance.<sup>23</sup>

### 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.<sup>24</sup> Constructive trusts are based on an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment.<sup>25</sup> The courts have stated that a claim for a constructive trust is a claim for ownership in property<sup>26</sup> and may give rise to an interest in the property such as to be the subject of a CPL.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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)<sup>30</sup>, and held in *Botiuk v. Campbell* (2015)<sup>31</sup> and *Jodi L. Feldman Professional Corporation v. Foulidis* (2018).<sup>32</sup>

---

<sup>22</sup> *Wilanmar v Meredith*, *supra* note 21.

<sup>23</sup> *Cohen v Moore*, [2008] OJ No 261, 164 ACWS (3d) 704 at para 32.

<sup>24</sup> *Hupka v Aarts Estate*, 2003 CanLII 49303 (ON SC), 120 ACWS (3d) 702 at para 4.

<sup>25</sup> *Rawluk v Rawluk*, [1990] 1 SCR 70, 65 DLR (4th) 161.

<sup>26</sup> *Hupka v Aarts Estate*, *supra* note 24 at para 46.

<sup>27</sup> *First Leaside Wealth Management Inc v Phillips*, 2012 ONSC 5443 at para 36.

<sup>28</sup> *Hupka v Aarts Estate*, *supra* note 24 at para 53.

<sup>29</sup> *Sun Rise Elephant Property Investment Corporation v Luu*, 2018 ONSC 5247 at para 11.

<sup>30</sup> *Grefford v Fielding*, 2004 CanLII 8709 (ON SC), 70 OR (3d) 371 at para 26.

<sup>31</sup> *Botiuk v Campbell*, 2015 ONSC 694 at para 17.

<sup>32</sup> *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.<sup>33</sup> 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.<sup>34</sup>

Second, the claimant must introduce evidence demonstrating that the impugned transaction was made with the intent to defeat or delay creditors,<sup>35</sup> pursuant to Section 2 of the *Fraudulent Conveyances Act*.<sup>36</sup> The claimant must show positive evidence of the fraudulent intent, so the trial judge “could” conclude that there was fraudulent intent.<sup>37</sup> 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.<sup>38</sup> Offering evidence that the transfer was for less than fair market value lightens the burden on the claimant.<sup>39</sup>

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<sup>40</sup>, 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;

---

<sup>33</sup> *Grefford v Fielding*, *supra* note 30 at para 26.

<sup>34</sup> *Jennifer Horrocks v Bruce McConville et al*, 2020 ONSC 4645 at para 10 [*Horrocks v McConville*].

<sup>35</sup> *Grefford v Fielding*, *supra* note 30 at para 26.

<sup>36</sup> *Fraudulent Conveyances Act*, RSO 1990, c F29, s 2.

<sup>37</sup> *Jodi L Feldman*, *supra* note 32 at para 34.

<sup>38</sup> *Horrocks v McConville*, *supra* note 34 at para 11.

<sup>39</sup> *Grefford v Fielding*, *supra* note 30 at para 26.

<sup>40</sup> *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.<sup>41</sup>

#### 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

---

<sup>41</sup> *Grefford v Fielding*, *supra* note 30 at para 26.

<sup>42</sup> *Chiu v Pacific Mall Developments Inc*, [1998] OJ No 3075, 81 ACWS (3d) 732 at para 35 [*Chiu v Pacific Mall*].

<sup>43</sup> *Ibid* at para 34.

<sup>44</sup> *1357202 Ontario Ltd v 1326046 Ontario Limited (Green Acres)*, 2007 CanLII 56476 (ON SCDC), 162 ACWS (3d) 744 at para 8.

<sup>45</sup> *Kussner and Jacobson*, *supra* note 2 at 16-17.

<sup>46</sup> *Chiu v Pacific Mall*, *supra* note 42 at para 33.

<sup>47</sup> *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.<sup>48</sup> Deeming a case urgent is discretionary and resulted in many applicants without a timely court date.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> Unlike CPLs, cautions under these sections have expiry dates. Under Section 71, the expiry date is 60 days after the date of closing.<sup>52</sup> A caution registered under Section 128 ceases to have effect 60 days from the date of its registration.<sup>53</sup> As explicitly stated in Section 128, cautions cannot be renewed.<sup>54</sup> 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.<sup>55</sup> Normally, this requires the cautioner to demonstrate that bona fide efforts have been made to date to obtain a CPL or other judicial relief.<sup>56</sup> However, during COVID-19 while access to the courts was limited, it was very difficult for cautioners to demonstrate bona fide efforts.<sup>57</sup> 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".<sup>58</sup>

---

<sup>48</sup> 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*.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid*; *Land Titles Act*, RSO 1990, c L5 at ss 71, 128.

<sup>51</sup> *Land Titles Act*, *supra* note 50 at s 128(1)

<sup>52</sup> 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](https://www.oba.org/CBAMediaLibrary/cba_on/pdf/COVID19/LT-ody-and-merredith-re-cautions.pdf)>.

<sup>53</sup> *Ibid*; *Land Titles Act*, *supra* note 50 at s 128(4).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Land Titles Act*, *supra* note 50 at s 130.

<sup>56</sup> Lem, *supra* note 52.

<sup>57</sup> *Ibid.*

<sup>58</sup> *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*.<sup>59</sup> 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.<sup>60</sup>

### 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*.<sup>61</sup> This provision is intended to discourage abuse of CPLs by moving parties.<sup>62</sup>

## 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*<sup>63</sup> and Rule

---

<sup>59</sup> *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*].

<sup>60</sup> *Rules of Civil Procedure*, *supra* note 4 at r. 39.01(6); *Moses v Metro*, *supra* note 59 at para 3.

<sup>61</sup> *Courts of Justice Act*, *supra* note 3 at s 103(4).

<sup>62</sup> *GPI Greenfield Pioneer Inc v Moore*, [2002] OJ No 282 (QL), 155 OAC 305 at para 16.

<sup>63</sup> *Courts of Justice Act*, *supra* note 3 at s 103.

42 of the *Rules of Civil Procedure*<sup>64</sup>, 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.

---

<sup>64</sup> *Rules of Civil Procedure*, *supra* note 4 at r 42.



**Milosevic Fiske LLP**

TRIAL AND APPELLATE LAWYERS

# Certificates of Pending Litigation:

Protecting a  
Litigant's Interest in  
Real Property

---

DAVID MILOSEVIC

JOELLA MILLER (ARTICLING STUDENT)

MILOSEVIC FISKE LLP

## 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.”<sup>1</sup>

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

# 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.<sup>2</sup>

# 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.<sup>3</sup>

# 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<sup>4</sup>
  2. Plaintiff is claiming there is a constructive or resulting trust<sup>5</sup>
  3. Fraudulent conveyance actions<sup>6</sup>

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”<sup>7</sup> 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<sup>8</sup>
- 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<sup>9</sup>
- 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.



Milosevic Fiske LLP

TRIAL AND APPELLATE LAWYERS

THANK YOU