

Real Estate

Registrations of cautions on title

By **Steven Pordage and Katherine Trigiani**



Steven Pordage



Katherine Trigiani

(March 17, 2020, 1:14 PM EDT) -- The registration of a caution on title can serve two overarching purposes. First, it is a means of providing notice of one's interest in a property or charge, and second, it can prevent the registered owner from dealing with the property subject to the caution for a limited period.

This article will discuss cautions available under sections 71 and 128 of the *Land Titles Act*. As will be explained, s. 71 permits the entry of a caution on the register to protect an interest in land, but such protection is not as extensive as that afforded by s. 128.

A caution is registered on title upon receipt of an application under the Act, where the land registrar is satisfied that the cautioner claims a proprietary interest in land. Cautions registered under s. 71 of the Act require a statement by the cautioner authorizing the land registrar to delete the caution 60 days after registration.

For cautions registered pursuant to an Agreement of Purchase and Sale (APS), the required statement will permit the land registrar to delete the caution 60 days from the date of closing, which must be provided. While the caution cannot be renewed, another caution can be registered if the closing date in the APS is extended by an agreement.

Cautions authorized by s. 128 of the Act cease to have effect 60 days after registration — a period which the legislature considered sufficient to allow a cautioner to initiate an action and register a Certificate of Pending Litigation (CPL) against title, if necessary.

Registration of a caution on title can be particularly useful where dealings with a property are expected to become litigious. While a CPL is a tool which ties up the property for the duration of litigation or until it is discharged by order of the court, and thus provides longer-term protection than the 60-day shelf life of a caution, a CPL can only be obtained by court order. Therefore, the registration of a caution can prevent dealings with the land until a CPL can be obtained.

Proper Registrations

Section 71 cautions are either authorized under the Act or by the Director of Titles, and are generally available in three circumstances. First, a s. 71 caution may be registered where a creditor claims that a property has been conveyed with the intention to defeat creditors. Second, s. 71 cautions may be registered by a property owner challenging power of sale proceedings on the basis that he or she has redeemed the charge.

Both of these types of caution have been authorized by the Director of Titles. The third type, authorized under s. 71(1.1) of the Act, allows a cautioner to register their interest pursuant to an APS. This registration constitutes a taxable conveyance under the *Land Transfer Tax Act* and requires payment of land transfer tax.

Section 71 cautions may protect a cautioner's interest by providing actual notice of an interest in

land to any person when they are reviewing and relying on title; however, they do not prevent dealings with the land. On the other hand, after a caution has been registered under s. 128, the land registrar may not register any dealing with the land that is subject to the caution without the cautioner's consent.

Cautions under s. 128 remain limited to proprietary interests such as the right to receive a transfer or charge. For example, an interest in land granted to a beneficiary under a trust agreement can be registered under s. 128. A cautioner may also register a caution under s. 128 upon exercising an option to purchase the land in question.

Beyond the scope of this article are the circumstances in which a purchaser's lien or equitable mortgage, both of which have been stated to constitute an interest in land, may support the registration of a caution on title (*2254069 Ontario Inc v. Kim* 2017 ONSC 5003; *Pan Canadian Mortgage Group III Inc v. 0859811 B.C. Ltd.* 2014 BCCA 113).

Notice to owners

Section 71 states that where a caution is registered, owners are deemed to have notice of an unregistered interest in land referred to in the caution. There is no requirement in that section for the cautioner to serve notice on the owner. However, the Act requires a cautioner to serve a copy of a s. 128 caution and a notice containing particulars of its registration on the registered owner of the land, and on any other person with an interest in it.

Consider purpose before each registration

Under s. 132 of the *Land Titles Act*, a person who registers a caution without "reasonable cause" must compensate anyone who suffers damage as a result of that registration. Lawyers should consider the effects of registration in the particular circumstances in order to avoid adverse financial consequences for their client.

Additionally, registration requires a statement (or affidavit, for non-electronic registration) by the lawyer which corresponds to the type of caution being registered. For s. 128 cautions, the lawyer must state that the applicant is entitled to register a caution to prevent any dealing with the land without the applicant's consent and attest to the nature of the applicant's interest. In making such statements, lawyers should consider whether the purpose of registration is to preserve a proprietary interest in a property or charge.

Steven Pordage is a member of the commercial real estate practice at Pallett Valo LLP. His practice covers all aspects of real estate transactions including land acquisitions, disposition, development and financing of real property. Katherine Trigiani is an articling student at Pallett Valo LLP, where she enjoys learning about the practice of commercial real estate. She is a graduate of Osgoode Hall Law School.

Photo credit / martince2 ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Peter Carter at peter.carter@lexisnexis.ca or call 647-776-6740.