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Certificates of Pending Litigation: A Guide for Practitioners

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CERTIFICATES OF PENDING LITIGATION: A GUIDE FOR PRACTITIONERS

I. Introduction

One of the most frequently used pressure tactics in commercial litigation practice is the filing of a Certificate of Pending Litigation ("**CPL**").

In general terms, a CPL (formerly known as a *lis pendens* in British Columbia) is a charge on title that provides notice to the public indicating that the interest or title to a specific piece of land is subject to a court proceeding.

To have legal effect, a CPL must be issued by a court and registered on title to the land in question. Once registered on title, the claimant's filing of a CPL prevents the property owner from defeating the claim by transferring the land to a third party. As a result, it is a very important tool in a litigator's arsenal. For that very reason, clients are becoming more and more familiar with the advantages of a CPL and often can exert considerable pressure on a lawyer to register a CPL.

Once a CPL has been filed, the opposing party typically brings an urgent application to discharge the CPL, due to the prejudicial nature of a CPL.

Most commercial litigation counsel are well versed with the criteria set out in the *Land Title Act* and other statutes allowing for the filing and potential discharge of CPLs.

Given the serious consequences that flow from the registration of a CPL, courts carefully scrutinize whether the claim asserts an interest in land, particularly when the registered owner challenges the pleading. Courts hearing applications to discharge CPLs are often influenced by their perception of whether the claimant is weaponizing the CPL as leverage to achieve a result which is abusive of the ordinarily applicable legal processes.

Lawyers must be mindful of whether their client's dispute genuinely gives rise to a claim for an interest in land, and if so, ensure that the claim is properly articulated in the pleadings. To that end, the litigator seeking to file a CPL should be keenly aware of how the filing will appear to the court and take proactive steps to avoid the red flags associated with abusive CPLs.

A CPL must not be used to exert litigation pressure.

It is improper to file a CPL as leverage to secure a financial claim or as a negotiating tool in litigation, see *Drein v. Puleo*, 2016 BCSC 593.

In *Drein v. Puleo*, Macintosh J. stated:

> [8] Ms. Drein's position causes me to **suspect that she is not really asserting an interest in land and is instead using the CPL only as leverage to secure her financial claim** against the Puleos. **That would not be a lawful purpose** for employing a CPL (see *Drucker, Inc. v. Hong*, 2011 BCSC 905 at para. 19; see, as well, *D.K. Investments Ltd. v. S.W.S. Investments Ltd.*, [1984] B.C.J. No. 3077 (S.C.) at paragraphs 107-111, affirmed (1986), 6 B.C.L.R. (2d) 291 (C.A.)).
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> ...
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> [10] A reader will infer, from what is written above, the Court's concern about a party **seeking to use a CPL as a bargaining tool to extract prejudgment payment of a financial claim.** If the CPL was allowed to remain on the terms proposed by Ms. Drein, she would be obtaining a pre-trial enforcement of her monetary claim before she has established her case. As tempting a tactic as that might appear, that is not what CPLs are intended to protect. They are designed to preserve land claims pre-trial by preventing the land from passing to innocent third parties pre-trial, thereby undermining the claim. **If the claim in essence is not for an interest in land, CPLs are not intended to be one of the weapons in a claimant's war chest.** [emphasis added]

A CPL can also attract an order of special costs where there is no proper foundation for its filing and it is used to put pressure on the defendants, see *Basha Sales Co. Ltd. v. Adera Equities Inc.*, 2017 BCSC 1715.

Counsel advising their clients should, prior to filing a CPL, be mindful of how the filing will be perceived by the court. Nevertheless, it can be tempting to seize on an opportunity to obtain a perceived advantage particularly in exigent circumstances, without thinking through the potential consequences of doing so.

II. Authority to File - Statutory Requirements

Section 215(1) of the *Land Title Act* ("*LTA*") provides:

> A person who has commenced or is a party to a proceeding, and who is
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> (a) claiming an estate or interest in land, or
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> (b) given by another enactment a right of action in respect of land,

may register a certificate of pending litigation against the land.

One of the first questions counsel ought to consider is whether the claimant is asserting an interest in land or whether a right of action in respect of land is conferred by another enactment. (The most referenced statutes in this regard include the *Builders Lien Act*, *Family Law Act*, *Fraudulent Preference Act* and *Wills and Estates Succession Act*). The test is slightly different under those statutes.

III. Three Primary Ways in which to Cancel a CPL

In order of their utility for an applicant, they are as follows (as set out in *Sood v. Hans*, 2023 BCCA 138):

1) an applicant may apply for immediate cancellation of the CPL without security for failing to meet the requirements of s. 215(1) of the *LTA*;
2) an applicant may apply for immediate cancellation of the CPL with security for hardship and inconvenience, pursuant to ss. 256-257 of the *LTA*; and
3) an applicant may apply for cancellation of a CPL if either the action in which it was obtained or part of the action claiming an *in rem* remedy has been dismissed, and either the time limited for appeal has expired and no notice of appeal has been filed or a notice of appeal has been filed and has been finally disposed of, pursuant to s. 254 of the *LTA*.

The interplay between these grounds was addressed by Fenlon J.A. in *Berthin v. Berthin.* 2018 BCCA 57*:*

> [44] I conclude that a judge has jurisdiction to make an order immediately cancelling a CPL when the claim does not meet the threshold requirements of s. 215, or when the property owner affected by the CPL establishes hardship or inconvenience under s. 256. A judge does not have jurisdiction to make an order cancelling a CPL when a claim is dismissed under Rules 9-5, 9-6, 9-7, or following a full trial. In those circumstances, s. 254 of the *Act* governs and an order purporting to immediately cancel a CPL cannot be given effect and should not be made. In short, when a claim underpinning registration of a CPL is dismissed, the CPL must remain on title until the requirements of s. 254 are satisfied or a subsequent application under s. 256 establishes hardship or inconvenience.

IV. Non-compliance with s. 215 of the LTA

The jurisdiction to cancel a CPL for non-compliance with s. 215 is grounded in the inherent jurisdiction of the superior court. This jurisdiction is limited to a superior court judge, see *Sood v. Hans*, 2023 BCCA 138. The time in which the pleading is to be reviewed to ensure that the requirements of s. 215 are met is at the time of filing the CPL, see *Bilin v. Sidhu* 2017 BCCA 429. If a CPL was improperly registered from the start because the pleadings made no claim against the property, it is likely to be cancelled immediately, see *Tsuji v. Tsuji,* 2024 BCSC 370 citing *Bajwa v. Singh,* 2016 BCSC 916.

On an application to cancel a CPL for non-compliance with s. 215, the court does not analyze the merits of the underlying claim or assess its strength. Instead, the court considers only whether the pleadings contain a claim for an interest in land, assuming the facts pleaded are true, see *Porter v. Porter,* 2023 BCSC 2181. There must be a nexus or causative link between the facts alleged and the interest to which they would give rise if ultimately proved, see *Sonnenberg v. Sonnenberg,* 2023 BCSC 957. The analysis is based on the pleadings as they currently exist, not as they might be amended, see *Porter* citing *Bilin*.

Pleading rescission of a contract and a purchaser's lien are not inconsistent remedies and if pleaded correctly provide a proper foundation for a CPL, as the claim to a lien provides security for the return of deposit money, see *1332404 BC Ltd v. 1266685 BC Ltd.,* 2025 BCCA 46. The analysis for CPL compliance under s. 215 should begin and end with an examination of whether the pleadings are capable of supporting a claim to an interest in land, without assessing the merits of the claim, see *1332404*.

It is important to note that an associate judge's jurisdiction is limited and does not extend to cancelling a CPL for non-compliance with s. 215, as this requires the exercise of the inherent jurisdiction of the superior court, see *Sood v. Hans*, 2023 BCCA 138.

V. Common Pitfalls

The days of generic pleadings are behind us. Courts will not countenance vague assertions of 'constructive trust' or 'law of tracing' where a CPL threatens a multi-million dollar property transaction.

This is not to suggest that a lawyer needs <u>all</u> of the evidence in hand when registering a CPL. However, a lawyer should have a fully developed legal theory permitting the registration of the CPL.

Recent case law in British Columbia has demonstrated the challenges lawyers have experienced in drafting claims involving constructive trusts.

To advance a claim for a remedial constructive trust grounded in unjust enrichment, two requirements must be satisfied: 1) a substantial and direct link, a causal connection or a nexus between the claim and the property; and 2) demonstrate that monetary damages are an inadequate remedy, see *Nouhi v. Pourtaghi*, 2019 BCSC 794.

More recently, in *Treasure Bay HK Limited v. 1115830 BC Ltd.,* 2024 BCSC 294, Justice Walker did not follow *Nouhi* on that basis that the Court of Appeal has since rejected the suggestion that a plaintiff must specifically plead that damages are an inadequate remedy in order to sustain a CPL. Rather, the court must read the pleadings as a whole to determine if the plaintiff is truly claiming an interest in land.

VI. Family Law Considerations: a less strict view of the criteria for registering a CPL

Section 215(6) of the *Land Title Act* only allows a CPL in a family law proceeding to be registered concerning a division of property where there is a possibility that title to an interest in land could change due to the outcome of the proceeding.

In *Dhanani v. Kassam*, 2022 BCSC 200, the Court dealt with an application to strike under the SCFR that related to a Notice of Family Claim filed by the claimant mother.

The Court found that the Notice of Family Claim disclosed no cause of action against one of the respondents (her son) and property owner against which the CPLs were registered. While the Court found that the claim did not disclose a cause of action as against the son, the mother was permitted to amend her claim

In addressing the CPLs, the Court found that because the claimant had asserted that the subject properties were a family asset, then she did potentially have a claim to them which was sufficient to allow the filing of the CPLs.

Since this decision, in *Porter v. Porter,* the court noted that *Dhanani v. Kassam* is an anomaly and goes against the binding guidance from the Court of Appeal in *Bilin* and *Xiao,* which require the focus to be on whether the pleadings as they exist disclose a claim for an interest in land.

VII. Considerations for Discharge of a CPL: ss. 256-257 of the LTA

Section 256 of the *LTA* allows for the discharge of a CPL in circumstances where inconvenience and hardship exist, which reads in part:

> 256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
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> (a) particulars of the registration of the certificate of pending litigation,
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> (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
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> (c) the grounds for those statements,
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> apply for an order that the registration of the certificate be cancelled.

The hardship must be causally connected solely to the registration of the CPL, be more than 'trifling' or 'insignificant' and rise above general allegations of inconvenience, see *Save-A-Lot Holdings Corp. v. Christensen,* 2023 BCCA 35. The fact that a CPL impedes the ability to close a sale can constitute hardship, see *Ladhar v. Ladhar*, 2024 BCSC 153.

Section 257(1)(a) permits the court with the discretion, on hearing an application under s. 256(1), to order the cancellation of the CPL, in whole or in part, if it is satisfied that an order requiring security to be given is proper in the circumstances and damages will provide adequate relief to the party in whose name the CPL has been registered.

However, s. 257 also provides the court with a series of options, including refusing to order its cancellation which refusal may be conditional upon an undertaking and security from the party having registered the CPL.

VIII. Considering the Amount of Security: may be nominal or an undertaking as to damages

Determining the appropriate amount of security is a discretionary exercise for the court and not an exact science. Courts have nonetheless observed that the amount of security should be "tied to the claim to the interest in land that grounds the CPL, whether that claim forms all or part of

an action". In addition, courts are to consider: "[W]hat is relevant includes the probability of a party's success and the possible range of damages to which the party may be entitled, in relation to the claim involving an interest in land", see *Wosnack v. Ficych*, 2022 BCCA 139.

In *De Cotiis v. De Cotiis*, 2004 BCSC 1658 Sigurdson J. found that, in view of the need for caution and the "relatively low threshold", he was unable to say there was no triable issue but held the plaintiff's case appeared to be a weak one. He concluded that an undertaking to pay any damages resulting from the cancellation of the CPL constituted sufficient security.

IX. Specific Performance

To remove a CPL in an action in which specific performance is claimed, the applicant must satisfy the court that

1) the CPL is causing or will cause the owner to suffer hardship and inconvenience that is more than trifling or inconvenient; and

2) that it is *plain and obvious* that the party seeking specific performance at trial will not succeed.

At the second branch of the test, the court does not decide on the merits whether damages will be adequate, but rather only whether specific performance can be eliminated as having no reasonable chance of success. The plaintiff need only point to sufficient evidence to raise a genuine "uniqueness" argument at trial. Uniqueness simply means that the property has features that make an award of damages inadequate for that particular plaintiff. The threshold is low.

On the question of uniqueness, Newbury J.A. in *Youyi Group Holdings (Canada) Ltd v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 338 at para. 34 (citing *Aviawest Resorts Inc. v. Memory Lane Developments Inc.* 2004 BCSC 999):

> "...the court should consider the merits of the plaintiff's claim but only so far as doing so enables the court to determine that the plaintiffs' claim may be frivolous, a nuisance, an abuse of process, or, I would add, has no chance of success..."

The test is the "plain and obvious standard" whether the allegation of uniqueness can be said to have "no chance of success". Factual disputes are integrally intertwined with the question of specific performance and should be explored at trial, see *Montaigne Group Ltd v. St. Alcuin College for Liberal Arts Society,* 2025 BCSC 68.

The courts should exercise caution in depriving a plaintiff of a potential remedy at the interlocutory stage. If there is a triable issue as to whether damages would provide an adequate (or appropriate) remedy, the application should not be granted and the matter ought to be determined at trial.

The determination of whether damages will provide an adequate or appropriate remedy is largely fact-dependent and should not be determined by the application of a "presumption of replaceability of the property in question"; and that the court should "examine in each case, the plaintiff and the property, see *Youyi*.

If the parties were at the trial stage, the onus would be on the plaintiff, but at the interlocutory stage, the onus is on the applicant to show that it is plain and obvious damages would provide an adequate (or appropriate) remedy, considering both the property and the purchaser.

A plaintiff seeking specific performance must plead that they remain ready, willing, and able to complete the purchase, see *Wang v. Lu,* 2024 BCSC 126.

X. Rules 9-5, 9-6 or 9-7

When seeking to dismiss the claim under Rules 9-5, 9-6 or 9-7, you must always consider the 30-day appeal window. For that reason and if there is urgency in having the CPL discharged, consider only relying on these provisions in the alternative if you are not able to have the CPL discharged on other grounds, e.g., 215 or ss. 256-257.

XI. Section 252 of the LTA, a CPL may be Cancelled if no Step is Taken in the Proceeding for 1 Year

Section 252(1) of the *Land Title Act* states:

> 252 (1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.

The continued presence of a validly registered CPL is presumptively prejudicial to a property owner. Claimants are accordingly obliged to prosecute their claim diligently. Section 252 is intended to ensure that claimants do so without undue delay. The underlying rationale "is to keep property from being tied up in dormant litigation": see *Wiest v. Middelkamp*, 2004 BCSC 882.

Pursuant to s. 252, where an applicant establishes that no step has been taken in the proceeding for 1 year, the court still retains discretion to disallow the remedy. However, prejudice to the owner of the land will be presumed, and the respondent bears the onus of proving that the prejudice is not serious or is outweighed by other factors which would make it unjust to cancel the CPL.

The factors relevant to the exercise of the court's discretion in this type of application include the following:

a) whether the respondent has given an acceptable explanation for the delay in prosecuting the claim;

b) whether, despite the presumed prejudice, no actual prejudice would be incurred by the applicant if the order was not granted; and

c) whether the respondent's claim for an interest in the land has at least a reasonable prospect of succeeding.

In exercising its discretion, the court may also consider whether informal steps have been taken in the litigation (after the last formal step), see *GMC Properties Inc. v. Rampart Estates Ltd.*, 2023 BCCA 172.

Even if a CPL has already been cancelled, the court may still resort to s. 252 of the *LTA* in discharging security funds provided the rights of the parties are preserved under the *LTA*, see *Peat v. Raven*, 2014 BCSC 1756.

XII. Dealing with Abusive Filings

CPLs are frequently employed in matters involving subdivisions, re-developments or ongoing construction projects. It is commonly known that lenders will not advance funds against property encumbered by a CPL. Likewise, CPLs are commonly employed as leverage in an effort to frustrate a sale. The facts can be perceived in a way that a plaintiff is exploiting the landowner's vulnerability, in an attempt to extract a quick and favourable settlement which it otherwise could not expect.

Where a CPL is filed for an improper purpose collateral to the litigation itself, in addition to an application to cancel the CPL (which may include, under R. 9-5(1)(d), that the pleading is an abuse of process) the injured party (normally the landowner) may claim damages for the tort of abuse of process. As set out in *Oei v. Hui*, 2020 BCCA 214, "...the tort of abuse of process [is] less broad than abuse of process under Rule 9-5(1)(d)", also referred to as "the *procedural* fault of abuse of process".

In *Palmer v. Palmer*, 2015 BCCA 438, the Court of Appeal held that the tort of abuse of process may be established in cases where "the purpose for filing a lien or CPL or similar instrument was completely collateral to the litigation. It served no purpose other than extraneous to the litigation and realistically was substantively unsupportable". The court, at para. 51, cited with approval the following *dicta* of Fenlon J. (as she then was) in *Hundal v. Border Carrier Ltd.*, 2012 BCSC 447:

> [104] In considering whether Mr. Hundal had an unlawful or malicious purpose in filing the CPL, I set aside the question of whether the constructive trust pleaded by Mr. Hundal is Border Carrier's claim rather than his personally, and further set aside the question of whether there was any real prospect of recovery of an interest in property rather than an award of damages if unjust enrichment could be established. The question I am left with is not whether the plaintiff properly framed and pleaded his cause of action in unjust enrichment, but whether he framed his case in this way knowing that there was no basis for a claim against Mr. Bains' home and for the improper purpose of filing a CPL to inconvenience Mr. Bains and obtain an advantage in the litigation: *Seville Properties Ltd. v. Coutre, et al,* 2005 BCSC 1105. [emphasis in original.]

As the plaintiff had acted maliciously, damages for abuse of process were ordered.

The elements of this tort were examined in *Oei.* It was noted that the tort of abuse of process stands in tension with the public policy doctrine of absolute privilege (sometimes referred to as absolute immunity) which ordinarily permits the assertion of claims without fear in litigation.

Although *Oei* did not concern a CPL, the court addressed the requisite elements of the tort, in part, in the context of a *lis pendens* in *D.K. Investments Ltd. v. S.W.S. Investments Ltd.,* (1984), 1984 CanLII 398 (BC SC) finding "the gravamen of the decision ... to be that the action was for a collateral and improper purpose because the plaintiff never held the purpose of enforcing the contract for sale of the land."

The court in *Oei* further held that the tort of abuse of process has a narrow scope, and that merely advancing a false claim, for wrongful motives, may be insufficient to establish the tort:

> [35] ... The question before us is not whether intentionally false pleadings, if established, could attract opprobrium in the first action, but whether such pleadings can support a claim in tort for abuse of process by reason of the alleged knowing falsity of the allegations. **Such a claim in tort requires a pleaded purpose that is outside the ambit of the first action**, whereas procedural abuse of process is more widely discovered.
>
> [36] The tort of abuse of process is narrow, **intentionally so to foreclose the spawn of litigation wherein one failed action begets another action**, which may beget another action, and so on. [emphasis added]

The court further clarified whether an "overt act" is a necessary constituent of the tort:

> [63] In the other named case that seems to have prompted the doubt, *D.K. Investments*, Justice Finch dealt with a **tale of deceit of a plaintiff who sued for specific performance of an agreement, registered a *lis pendens*, and filed a caveat based on the defendant owner's alleged failure to provide title to fixtures.** The defendant counterclaimed, alleging amongst other wrongs, the tort of abuse of process. Justice Finch observed that D.K. Investments' claim for specific performance alleged a failure to convey title to certain fixtures but that **the principal of D.K. Investments testified the claim for specific performance was intended to bring pressure on a *third party* to provide a release of a petroleum agreement it had with the defendant.** Although the details of all of this are not spelled out in what is a complicated narrative of shifting positions, on my understanding of the reasons and comparing this to the original formulation of the tort in *Grainger*, **this appears to be a case of steps taken to obtain a release from a third party outside the ambit of the litigation in issue.** It is true that Justice Finch did not recount the two elements described by Professor Fleming, and instead described the essence of the tort as "the misuse or perversion of the court's process for an extraneous or ulterior purpose", saying, and referring to *Guilford*, "[t]here must be a purpose other than that which the process was designed to serve" (at 339). He held, however:
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> > ... The purposes behind the action were completely improper. **There has been ample overt conduct** by the plaintiff in its attempts to achieve its improper ends.
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> [emphasis added, except in indented quote in which the emphasis is in original]

The court in *Oei* summarized:

> [79] ... I conclude that absent a reasoned basis to diverge from the law first stated in British Columbia, that the tort conceptually requires more than a collateral and improper purpose, and that the "more" is an overt act or threat.

In summary, the Court of Appeal in *Oei*, by approving the decision in *D.K. Investments*, made it clear that the filing of a CPL may, where accompanied by a collateral and improper purpose and resultant damages, ground a claim in the tort of abuse of process. As in *Palmer*, this will occur where "the purpose for filing a lien or CPL or similar instrument was completely collateral to the litigation. It served no purpose other than extraneous to the litigation and realistically was substantively unsupportable".

This is precisely the type of scenario commented on by MacIntosh J. in *Drein*.

Where the necessary facts may be present, a promptly filed Counterclaim can serve as an effective means of causing an aggressive plaintiff to reconsider its strategy of maintaining a CPL and put the plaintiff on the defensive. It will be essential to plead the facts necessary to establish the requisite elements of the tort, namely, (a) a collateral and improper purpose, (b) an overt act in furtherance of that purpose, and (iii) damages resulting to the plaintiff from the wrongful use of the legal process.

XIII. Practical Conclusions:

1. Despite admonitions in *Youyi*, judges tend to apply the "plain and obvious" test on claims for specific performance quite liberally.
2. It is important to avoid the appearance that the CPL was filed for tactical purposes unrelated to claims relating to the land. CPLs that don't pass the "smell test" are quick to be discharged.
3. Counsel should take great care before filing a CPL to work closely with the client to assess the merits of their claim both on liability (e.g., is there a good claim for an interest in land?) and on the availability of an *in rem* remedy (usually specific performance).
4. Do not underestimate the required elements of a properly pled claim to an interest in land which may initially seem quite simple.
5. Despite the interlocutory nature of an application to discharge a CPL, give serious thought to conducting discoveries and obtaining comprehensive document discovery. The more admissions that can be obtained improves your chances in either supporting an application to discharge a CPL or resisting an application to discharge a CPL.
6. It is easy to undervalue the cost of applications to discharge CPLs. Counsel should always advise clients before filing a CPL of potential upfront costs in connection with an application to discharge a CPL. These discharge applications can be quite expensive and can turn into "mini-trials" with examination for discoveries and/or cross-examination on affidavits.
7. Be careful not to let an action with a CPL go dormant or you could risk having the CPL cancelled under s. 252 of the *LTA*.