



CAUTIONS:

Protecting Your Interests in Property

A caution is a document that gives notice to the world that a party has an interest in land. A caution is registered on title to the subject property. From an owner's perspective, a caution will adversely affect the ability of the owner to refinance, or even sell the property. If the registered owner of a property with a caution registered on title were to attempt to sell the property, the property owner would not be able to convey clear title to a purchaser without the removal of the caution. It is for this reason, a caution is good short term mechanism to give notice of an interest in a property, while, disastrous for a seller because the property cannot be conveyed unless the caution is removed.

Before any real estate purchase is made, there must be a search of the property's title. In Ontario, title searches start with obtaining a property's parcel register, which is an official record of a property's ownership as well as a list of registrations on title indicating third party encumbrances. Examples of encumbrances discoverable in the normal course of a real estate title search include mortgages, assignment of rents and other security agreements tied to the property. Such encumbrances are considered to be title defects required to be removed prior to the sale of a property.

However, no matter how thorough a title search is, it will only reveal third party interests relating to a property if they have been registered on title. In real estate law, someone that purchases property without being notified of third party interests can take the property without being burdened by those interests and are known as "bona fide purchasers for value without notice".

Cautions may be registered under section 71 of the *Land Titles Act* to protect interests in a property such as the interests of a purchaser through an APS, the interests of a creditor, or the interests of a registered owner challenging power of sale proceedings initiated by a mortgage lender. Cautions under this section cannot be renewed. If the interests relating to the caution are gained via an APS, the caution will be deleted by the Land Registrar 60 days after the date of closing, and other cautions under section 71 will be deleted by the Land Registrar 60 days after the date of the caution's registration. .

Cautions may also be registered under section 128 of the *Land Titles Act* to protect proprietary interests such as the interest of a beneficiary under a trust agreement, the interest of an optionee under an option to purchase, or an interest that may be protected by way of a caution pursuant to any *Act* of Ontario or Canada. Cautions under this section cannot be renewed, and will cease to have effect 60 days after the date of registration. Within the 60-day period, if the cautioner is able to convince a court that there is a triable issue in respect of their claim to interest in the property, a Certificate of Pending Litigation will be issued and can be registered on title.



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By looking at case law, we can see how a caution operates in practice. In the recent case of *Kennelly v. Hashemi* [2018] argued before the Ontario Superior Court of Justice and later the Court of Appeal, there was an Agreement of Purchase and Sale entered into by Christopher Kennelly (“Kennelly”) as purchaser, and Maryam Furney (“Furney”) as vendor for property in the Niagara-on-the-Lake area at a purchase price of \$800,000.00, and a deposit of \$40,000.00 (the “Kennelly APS”). The Kennelly APS included a standard provision that no existing encumbrances were to remain on title or be assumed by the purchaser or upon closing.

Upon execution of the Kennelly APS, the property was encumbered by, among other things, a caution registered on title by Albert Paul Mifsud (“Mifsud”), who had previously entered into an APS to purchase the property (the “Mifsud APS”) in a transaction that did not close. As the Kennelly APS transaction proceeded, the encumbrances, including the Mifsud caution, remained on title and Furney assigned her rights to one of the lenders, Hassan Hashemi (“Hashemi”) who had the right of power of sale. As the vendor was in breach of the Kennelly APS and not in a position to convey title to the purchaser free of encumbrances, the court concluded that the purchaser was entitled to a return of their deposit.

In essence, because cautions are not meant to be on title for more than a short fixed period of time, great care must be taken as to when a caution should be registered on title. The party that is subject to the caution should also be aware as to when and how a caution can be removed. Since a caution can have dire consequences to the property owner, the moment there is a threat of a caution, careful consideration by the property owner must be made as to how the caution will affect his/her/its ability to sell a property and/or obtain any financing.

