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ARTICLE

"Forever" means 40 years for Restrictive Covenants in Ontario-The Andrews v. Rago Decision

Introduction

A restrictive covenant is a private agreement, often contained in a transfer or lease, which restricts the use or occupancy of real property. Section 119(9) of the Ontario *Land Titles Act* (the LTA) states that a restrictive covenant drafted with no period or date fixed for its expiry is deemed to have expired 40 years following the date that the restrictive covenant was registered on title. However, what happens when a restrictive covenant does not include a period or date fixed for its expiry, but states that the restrictive covenant is to last "forever"? A recent decision from the Ontario Superior Court of Justice (the Court) has considered this question for the first time.

The *Andrews* Decision and Implications

In *Andrews v. Rago* (*Andrews*) the Court held that, pursuant to Section 119(9) of the LTA, a restrictive covenant drafted without an expressed end date and proposing to last "forever" will be deemed to expire 40 years after the covenant's initial registration.[1] This ruling has several implications for practitioners and interest holders in land:

- Existing covenants proposing to last "forever", or that remain silent as to a definite expiry date, are not sufficient to maintain the restrictive covenant's validity 40 years after the initial registration.
- The *Andrews* decision affirms the ability of an interest holder in land to delete a restrictive covenant with no fixed expiry date or proposing to last "forever" after the 40 year period by way of an Application to Amend (the Application) under Section 75 of the LTA. The Ministry of Government Services states, "The Application must be made by an interested party such as the registered owner or the owner of the registered interest."[2]
- The Court's interpretation of the LTA did not state that all restrictive covenants expire after 40 years. Rather, Section 119(9) of the LTA only expires those covenants with no fixed expiry or end date. As an example, a restrictive covenant with a term of 1,000 years would not be caught by Section 119(9) of the LTA or the *Andrews* decision.
- While a restrictive covenant drafted without an expressed end date will expire 40 years after the covenant's initial registration, the same is not true for an easement or right-of-way. In *Andrews,* the parties agreed that the respondents' property still had the benefit of a right-of-way over the applicant's property. This was despite the fact the right-of-way was registered at the same time and covered the same three-foot strip of land as the restrictive covenant. The Court found that the right-of-way "in, over, along and upon" the three-foot strip was an easement for ingress and egress. Unlike a restrictive covenant, an easement is subject to different rules affecting easements and is capable of lasting forever when it complies with those rules.

Recommendations and Considerations

- A beneficiary of an existing restrictive covenant that proposes to last "forever", or does not have a definite end date, should consider having these restrictive covenants re-granted and re-registered on or before the end of the 40th year after they were first registered so that the restrictive covenant remains valid following such period. The practical difficulty with this approach, however, is that there may be no further consideration available or likely to be granted from the benefitting party to the burdened party, and accordingly, there may be little incentive for the burdened party to agree to enter into a new restrictive covenant.
- Parties seeking to remove or modify a restrictive covenant can apply to the Court to have the restrictive covenant modified or discharged under Section 61(1) of the *Conveyancing and Law of Property Act* (the CPA). In *Icona Hospitality Inc. v 2748355 Canada Inc.*, the Court confirmed that the function of Section 61(1) of the CPA is to enable a court to lift a condition or restriction that is spent or that is so unsuitable as to be of no value, under circumstances where assertion of the condition or restriction would be clearly vexatious[3]. Accordingly, parties seeking to grant a restrictive covenant for a lengthy term (*e.g.,* 1000 years) should be aware that the restrictive covenant may be removed under Section 61(1) of the CPA if the Court determines that the restrictive covenant has become spent or so unsuitable to be of no value.
- Although a restrictive covenant granted for a term longer than 40 years would not be caught by Section 119(9) of the LTA or the *Andrews* decision, it is possible that a court or a future legislature would view the different results (*i.e.,* 1,000 years means 1,000 years, but "forever" means 40 years) to create a commercially absurd result and strive somehow to resolve the absurdity. In the meantime, from a practice standpoint, if the benefiting party wants the benefit of a restrictive covenant for more than 40 years, it is clear that there is less risk (at the present time) in stating a term of 100 years (or even 1,000 years), rather than "forever" or some other indeterminate period.
- In the Supreme Court of Canada (SCC) decision in *Bhasin v Hrynew*[4], it was established that parties in a contractual relationship have an obligation to deal with each other in good faith. It is possible that a court will be asked to consider whether this case creates any further obligations or restrictions on an individual seeking to unilaterally delete a restrictive covenant that such party agreed would last forever where the original parties to the agreement are the ones involved in the litigation. In circumstances where a restrictive covenant was granted "forever" and the parties to the restrictive covenant have remained the same since the restrictive covenant was granted, then it might be argued that the implied contractual duty of good faith should serve to prevent the initial grantor from proceeding with the application to delete the restrictive covenant without the consent of the grantee. As the SCC observed in *Bhasin*, a duty of good faith performance requires the contracting parties to cooperate in order to achieve the objects of the contract. If the expressed object of the contract was that the restrictive covenant would last forever, then the argument could be raised that the original grantor has an obligation to negotiate a long fixed term with the grantee or should not be permitted to apply to delete the restrictive covenant from title.

  We are not aware of any decision where a court has extended the duty of good faith performance to require the parties to amend a contract to avoid a statutory provision that would terminate such contract and believe that this would be a challenging position to take. While this rather novel legal argument was not raised in the *Andrews* case – perhaps insofar as neither the applicant nor the respondent were the original grantee and grantor of the restrictive covenant that was in dispute – it presents an interesting question on how the contractual duty of good faith could impact the interpretation of restrictive covenants and Section 119(9) of the LTA moving forward.

For those interested in the facts of the case, the parties' positions, and the trial judge's reasoning, an overview is provided below.

Background

The application was brought before the Court by Antonella Andrews (the Applicant) who owns a house at Street No. 99[5] (the 99 Property). The Applicant's neighbours (the Respondents) own the adjoining house at Street No. 97[6] (the 97 Property). The dispute concerned a three-foot wide strip of land between the two residential properties. It was not in dispute that the Applicant owned the three-foot strip of land. Rather, the dispute concerned whether the land was subject to certain restrictive covenants that confer rights on the Respondents as the owners of the 97 Property.

The 97 Property benefited from a right of way over the 99 Property. Moreover, title to the 99 Property was subject to restrictive covenants contained in the deed registered on March 3, 1966, which was registered by prior owners and not the Applicant or Respondent. At that time, the then-owners of the 97 Property conveyed the three-foot strip to the then-owner of the 99 Property, its heirs and assigns, to and for its sole and only use "*forever*", subject to the following restrictive covenants:

- the Grantee (the owner of the 99 Property) covenants not to interfere with, remove, damage, or otherwise alter existing or future structures and or landscaping within the three-foot strip, and
- the Grantee covenants not to erect, construct or maintain any interference or obstruction which will block the airspace above the right-of-way or interfere with or undermine the soil beneath the right-of-way.

The 99 property converted to the land titles system in 1967 and maintained the "Subj to Covenants" in the parcel's legal description. In 2018, the Applicant submitted an application to the land registrar to delete the restrictive covenants from the register. By virtue of the fact that more than 40 years had passed since the registration of the restrictive covenants the land registrar deleted them from the parcel register. The right-of-way in favour of the owners of the 97 Property remained in the legal description.

Positions of the Parties

- The Applicant argued that, pursuant to the terms of Section 119(9) of the LTA, the restrictive covenants expired on March 3, 2006 (40 years after they were initially registered). The legal basis for this position was that "forever", as contained in the initial deed, is not a period with a definite expiry or end date. As such, the Respondents, while still enjoying a right of way for ingress and egress, needed to remove their encroachments made in 2009 in the form of a 6-inch concrete curb and concrete walkway covering the three-foot strip on the Applicant's property.
- The Respondents argued that the restrictive covenants remained valid insofar as the initial deed's use of the word "forever" constituted a definite end date (never). As such, the Respondents maintained their legal right to place the encroachments pursuant to the restrictive covenants contained in the initial deed. The Respondents also argued to have the covenants on the parcel register reinstated.

The Court's Decision

In the view of Justice Stinson, the Applicant's case "stands and falls" on the interpretation of s. 119(9) of the LTA. Counsel for either party could not find a case where the subsection had been judicially considered, and it was deemed necessary to return to first principles. The Court relied on the principles of statutory interpretation recently discussed by Chief Justice Strathy in *Belwood Lake Cottagers Association Inc. v. Ontario (Environment and Climate Change)*, 2019 ONCA 70.[7] Specifically, the Court considered the grammatical and ordinary sense of the words with the scheme of the act, the object of the act, and the intention of the legislature.

Justice Stinson agreed with the Applicant that the covenants did not have either a period or date fixed for their expiry. Given the principles of statutory interpretation, the restrictive covenants were caught by the express language of Section 119(9) of the LTA. As such, the registrar properly deleted the restrictive covenants in 2018 as they expired on March 3, 2006 (40 years after the initial registration). In reaching this conclusion, Justice Stinson explicitly rejected the Respondents' position that "forever" amounts to a specified time period, or definite expiry date, within the meaning of Section 119(9) of the LTA.

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[1] *Andrews v. Rago*, 2019 ONSC 800 (CanLII).

[2] Ministry of Government Services, "Bulletin No. 2008 – 05", Service Ontario, accessible online.

[3] *Icona Hospitality Inc v. 2748355 Canada Inc.*, 2018 ONSC 4239 (CanLII).

[4] *Bhasin v. Hrynew*, 2014 SCC 71 (CanLII).

[5] This abbreviation was used by the Court.

[6] *Ibid*.

[7] *Belwood Lake Cottagers Association Inc. v. Ontario (Environment and Climate Change)*, 2019 ONCA 70 (CanLII).

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