

“THE GRASP OF THE DEAD HAND” A MODERN APPLICATION OF THE RULE AGAINST PERPETUITIES

The rule against perpetuities (the “**Rule**”) is a concept in Canadian real property law inherited from the British House of Lords. It is complex and frequently misunderstood, and a dreaded topic on a law school exam. Simply put, the Rule states that a conditional interest in land must be realized within 21 years from some certain point in time, or it will cease to exist.

Starting with the basics: where a contract deals with land (as opposed to any other type of asset), special concepts apply. An interest in land differs from a contractual right as the former is linked to the land itself and can affect a landowner’s rights to freely use, manage, develop or dispose of its property. A contractual right is a personal right that arises from a contract. The Rule only applies to contractual terms that create an interest in land, such as an option to purchase a specific piece of land. The Rule does not apply to a right to acquire land at some future date such as a right of first refusal, which is a contractual right only.

The public policy rationale underlying the Rule is that land should not be restrained from trade in a way that excludes it from commerce and development for long periods of time. Although abolished in a few provinces, the Rule continues to exist in Ontario, and violation of this Rule can have significant consequences on commercial transactions.

The Rule was recently considered by the Ontario Court of Appeal (the “**ONCA**”) in *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847.

ClubLink Corporation ULC (“**ClubLink**”) acquired land that was subject to various historical land development agreements affecting the permitted use of the land. The purpose of the development agreements was to allow the development of the land, while advancing the City’s public policy to protect and preserve green space. One of the agreements (the “**1981 Agreement**”) required ClubLink to permanently operate a part of the land as a golf course, failing which, the golf course lands would be transferred to the City of Ottawa (the “**City**”) at no cost (the “**Transfer Provisions**”).

ClubLink operated a golf course for over 24 years. In 2019, due to a decline in membership, ClubLink submitted planning applications to the City to develop the golf course lands for residential and open space uses. In turn, the City sought an order requiring ClubLink to withdraw its application, or alternatively, to transfer the golf course lands to the City, on the basis that the proposed change in use crystallized the City’s right to demand the transfer of the golf course lands under the 1981 Agreement.

ClubLink took the position that the Transfer Provisions were unenforceable as the City’s right to demand the transfer of the golf course lands did not occur within the 21-year period required under the Rule (which would have lapsed under this reasoning in 2002).

Applying the basic principles of contractual interpretation, the ONCA determined that the original contracting parties intended to create a conditional interest in the golf course lands in favour of the City. The ONCA clarified that conditional interests, by their very nature, may never materialize, so the parties' intention for the right to eventually become a reality does not play a role in deciding whether the right is a conditional interest in land or a mere contractual right. In other words, the Transfer Provisions were drafted such that the City's right to own the golf course lands if they were no longer used as a golf course created a conditional interest in the land.

In reaching this determination, the ONCA considered the following: (i) the development agreements, including the 1981 Agreement, imposed rights that were explicitly said to run with the land, and were registered on title, indicating that they were intended to create an interest in land; (ii) the transfer to the City would only occur if ClubLink ceased to use the golf course lands as a golf course (i.e. a condition or a contingent future event); and (iii) the Transfer Provisions intended to control, permanently, the use that can be made of the golf course lands.

The Transfer Provisions were therefore declared void and unenforceable as being contrary to the Rule because the City's right to demand the transfer of the golf course lands did not occur within the 21-year period required under the Rule.

The Supreme Court of Canada dismissed the City's application for leave to appeal.

This decision serves as an important reminder that: (i) an automatic right to compel a transfer of ownership triggered by the possibility of a future event, which may or may not occur, creates a conditional interest in land; (ii) such interest in land can be created without the explicit intention that it will one day materialize, but it will only be enforceable for 21 years; and (iii) contract drafters should be very wary of creating contingent interests in land with no expiry date. The decision upholds the public policy rationale underlying the Rule, namely that land should not be burdened in a way that discourages future dealings with land.



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