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Restrictive Covenants

For restrictive covenants, perpetuity means 40 years

By **Ray Mikkola**

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(March 29, 2019, 9:11 AM EDT) -- A new restrictive covenant case has struck down the enforceability of a perpetual restrictive covenant: see *Andrews v. Rago* 2019 ONSC 800.

In *Andrews*, the restrictive covenants prohibited the removal or altering of certain structures and improvements "forever" on a three-foot strip of residential land owned by the applicant/servient tenement owner and its successors and assigns forever. The respondent dominant tenement holder (and owner of the adjoining residence) enjoyed a right-of-way over the three-foot strip and was entitled to enforce the restrictive covenants.

The applicant brought an application to the Ontario Superior Court of Justice for an order that the restrictive covenants, which had been registered in 1966, had expired by 2006 by reason of s. 119 (9) of the *Land Titles Act* (LTA) which provides as follows:

"(9) Where a condition, restriction or covenant has been registered as annexed to or running with the land and no period or date was fixed for its expiry, the condition, restriction or covenant is deemed to have expired forty years after the condition, restriction or covenant was registered, and may be deleted from the register by the land registrar."

The court held that, as the restrictive covenants did not expressly contain a period or a date for their expiry, but rather purported to be permanent or perpetual, they fell within the scope of this section. Accordingly, the restrictive covenants were deemed to have expired and cease to have any legal force or effect on March 3, 2006, being the 40th anniversary of the date of their registration.

There appears to be no reason why, at common law, restrictive covenants should not be capable of operating in perpetuity. The law of restrictive covenants shares a common root with the law of easements. The requirement for a dominant and servient tenement applies to both, and both bind and benefit owners in the absence of privity of contract, for example.

The 40-year limit is a statutory imposition. It is important to note that the section only operates where the restrictive covenant does not otherwise stipulate an express period or expiry date. A restrictive covenant which has a term of 1,000 years would not be caught by the section.

The court briefly traced the history of the section. The right to delete and expired restrictive covenant from title was introduced in 1952. The 40-year period was first introduced in the early 1960s, and in 1979 the deeming provision was added thereby automatically terminating the restrictive covenant. The court concluded that the 1979 amendment brought the land titles system "into alignment with the registry system and facilitated the predominance of the land titles system."

Although not central to the decision, the court's reference to aligning the two systems seems curious. The 40-year period in the *Registry Act* is central to its operation — no search beyond the 40-year period is required and, absent the registration of a notice of claim under s. 113, the claim expires, with few exceptions. The 40-year rule applies to all interests, whether originally created for a limited period or expressed to be perpetual.

The point is that all such instruments and rights will expire at the end of the notice period. Of course,

there is no 40-year search rule in land titles.

There also appears to be no evidence of any motivation to align the two Acts. For example, the right to claim adverse possession or prescriptive easement ends on the conversion of the land from the registry system to the land titles system. This included the transfer of millions of registry parcels into land titles conversion qualified (LTCQ) parcels under the LTA over a couple of decades as a precursor to the introduction of electronic registration.

In that process, those owners whose properties were converted, and who were a few days short of satisfying the 10-year adverse possession requirement, or 20 years in the case of a claim for a prescriptive easement, lost their rights based on the entirely arbitrary decision regarding timing as to which streets or neighbourhoods would next be converted, and in each case without any notice to either of the parties.

The *Andrews* decision may reignite the debate about whether s. 50 (9) of the *Planning Act*, which exempts leases for part of a building from the subdivision prohibition provisions of the Act provided that the lease has been entered into for "any period of years", operates in the case of life leases. To better ensure the validity of such arrangements, it seems more important in the wake of *Andrews* to provide in a life lease a period of years which may be abridged by the death of the tenant.

Finally, this case reminds real estate lawyers that courts will interpret easements narrowly. In this case, the court specifically held that although the restrictive covenant was of no further force or effect, the easement in perpetuity for ingress and egress "in, over, along and upon" the three-foot strip survives. The court expressly noted that the easement did not include rights to construct or alter improvements or conditions or to park vehicles on the three-foot strip, or otherwise to interfere with the use of that portion of the applicant's property.

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