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Real Estate

Alberta Court of Appeal refuses to discharge restrictive covenant

By **Ray Mikkola**

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(September 9, 2021, 2:08 PM EDT) -- Would a recent Alberta restrictive covenant case have been decided differently in Ontario?

In *New Casa Holdings Ltd. v. Reference Re: Instrument 213AT* [2021] A.J. No. 507, the Alberta Court of Appeal held that the owner of land in a Calgary neighbourhood was subject to the terms of a registered 1912 restrictive covenant. The covenant limited the land to one house and required a minimum of a 25-foot setback from the street. Over the years, the land had been redeveloped, consolidated and subdivided so that in 2018, the covenant applied to 11 fee simple titles and seven mineral leases. In that year, the appellant owner obtained municipal approval to subdivide its property into two lots. This required the owner to apply to discharge the restrictive covenant from its title. The Court of Appeal held that the 109-year-old restrictive covenant was valid and enforceable and should not be discharged.

At common law, there would not seem to be any reason for an Ontario court to reach a different conclusion. The restrictive covenant was imposed by way of a "building scheme." This is an arrangement in which a subdivider binds each purchaser and their successor owners to restrictive covenants on the basis that each are bound by and may enforce the covenants against all other owners whose title is subject to the same restrictions. Since the Alberta Court of Appeal found that the 1912 building scheme was legally enforceable, this made each owner of lands to which the building scheme applied concurrently the dominant and servient tenement with respect to the registered covenants, as would have been the result in Ontario.

The relevant provincial statutes differ significantly. Restrictive covenants may be modified or discharged in Ontario under section 61 of the *Conveyancing and Law of Property Act* (CLPA). Although the CLPA is silent on the considerations to be taken into account by the court in determining if the restrictive covenant should be modified or discharged, Ontario jurisprudence requires that a restrictive covenant may be discharged only where the restriction is spent and so unsuitable as to be of no value such that its continued enforcement would be clearly vexatious (see *Ontario Lime Co. (Re)*, [1926] O.J. No. 505).

An Ontario court will not generally apply a balancing test (that is, balancing the inconvenience of having to comply with the restrictive covenant against the benefit of such compliance to the enforcing party) in determining whether a restrictive covenant should be modified or discharged. Section 48 (4) of the *Alberta Land Titles Act* provides that where the restriction "conflicts with the provisions of a land use by law", and the modification or discharge is "in the public interest" the court may modify or discharge the restrictive covenant. The court held on apparently purely procedural grounds that it was too late for the applicant to make arguments related to the conflict with the bylaws and the public interest.

The applicant's arguments in this regard had been raised for the first time at the Court of Appeal. It seems that these arguments might have been successful, and the result may have been the discharge of the covenant, had the court entertained such arguments. Generally, it seems that it may be easier to discharge a restrictive covenant under the Alberta statute if a land use bylaw has been made which is inconsistent with the restrictive covenant. In Ontario, there is no authority for a court

to discharge a restrictive covenant merely because it is inconsistent with a zoning bylaw.

However, the most obvious reason why the matter would almost certainly have been decided differently in Ontario is that s. 119(9) of the *Land Titles Act* deems a restrictive covenant for which "no period or date was fixed for its expiry" to have expired 40 years after its registration on title. No such limitation appears in the Alberta statute. It seems likely therefore that in Ontario the restrictive covenant in *New Casa* would have expired in 1952 (being 40 years after its registration).

Ray Mikkola is a partner with the firm of Pallett Valo LLP*. (The author wishes to thank Gagandeep Singh, student-at-law, for his assistance in the preparation of this commentary.)*

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