THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

Vol. 70 March 1991 mars No. 1

OPTIONS, RIGHTS OF REPURCHASE AND RIGHTS OF FIRST REFUSAL AS CONTRACTS AND AS INTERESTS IN LAND

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The Supreme Court of Canada has held that options to purchase land and rights of repurchase immediately create equitable interests in land but not so rights of first refusal. This substantial difference in the property law characterization of these essentially similar contractual rights results in problems in the enforcement of rights of first refusal.

This article discusses the nature of options, rights of repurchase and rights of first refusal as contracts and as interests in land. The first part of the article considers the nature of these rights as contracts and discusses such matters as contract formation, interpretation and assignability. The second part of the article examines the case law about these rights as interests in land, points out a number of inconsistencies, describes the problems of enforcement, and questions the merits of the theories advanced to justify the difference in the treatment of rights of first refusal.

La Cour suprême du Canada a décidé que l'option d'achat d'un bien-fonds et le droit de rachat donnent en équité un droit sur le bien-fonds, mais que ce n'est pas le cas pour le droit de préemption. Cette distinction importante que fait le droit des biens entre des droits contractuels semblables pour l'essentiel crée des difficultés dans l'application du droit de préemption.

Dans cet article l'auteur examine la nature des options d'achat, des droits de rachat et des droits de préemption considérés à la fois comme contrats et comme droits sur les biens-fonds. La première partie traite de la nature de ces droits en tant que contrats et examine des sujets tels que la formation, l'interprétation et la cession du contrat. Dans la deuxième partie l'auteur analyse la jurisprudence

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sur ces droits conçus comme des droits sur les biens-fonds. Il met le doigt sur un certain nombre de contradictions, décrit les problèmes que soulève l'exercice de ces droits et s'interroge sur le mérite des théories qui ont été avancées pour justifier la différence de traitement du droit de préemption.

Introduction

An option to purchase land is a contract that immediately creates an interest in land. The courts have held that a right of repurchase also immediately creates an interest in land. In contrast, a right of first refusal, although in many ways similar to an option or a right of repurchase, does not immediately create an interest in land. Rather, a right of first refusal is classified as a contractual right that may only subsequently create an interest in land. These differences in classification have considerable practical significance to the validity and enforcement of these types of agreements and to the rights of third parties who might purchase land subject to them.

How these differences in classification occur, their nature, practical significance, and juridical merits and weaknesses are the topics of this article. I will examine whether the explanations provided by the case law for classifying these types of agreement are adequate and whether other explanations might be more useful. In general, the article will explore options, rights of repurchase, and rights of first refusal as contracts (Part I) and as interests in land (Part II).

I. *Contractual Rights*

This section of the article explores the nature of options, rights of repurchase and rights of first refusal as contracts. This exploration is of interest in its own right but is also relevant to the very difficult problems associated with whether or not these agreements create interests in land.

A. *Options to Purchase*

In *Paterson* v. *Houghton*,[1] Cameron J.A. defined an option contract as "a right acquired by contract to accept or reject a present offer within a limited, or, it may be, a reasonable time in the future". The option contract may be described as an antecedent contract in the sense that the option contract precedes the contract for the sale of land that will result if the opportunity provided by the option is seized upon. In other words, the subject matter of the option contract is not the sale of land itself but rather the circumstances of the creation of the contract of sale.[2] The option

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[1] (1909), 12 W.L.R. 330, at p. 332, 19 Man. R. 168, at p. 175 (Man. C.A.).

[2] This analysis, where one contract governs the creation of another, may be noted in the construction bid case of *The Queen in Right of Ontario* v. *Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, (1981), 119 D.L.R. (3d) 267; in the

contract may also be described as unilateral in the sense that the grantee has no obligations until the option is exercised and the sale contract created.

The principal terms of the option contract are the irrevocability of the offer to sell, the specification of how the contract of sale may be created by the option holder and the obligation of the parties to enter into a sale contract if the option is exercised. While not usually an express term of the option, it is implicit that the irrevocable offer is exclusive; that is, the vendor agrees not to sell to anyone other than the option holder during the period of the option. The parties will discharge their obligations under the option contract by entering into the sale contract and then the sale contract will govern their contractual relationship.

An offer to sell land is sometimes described as an option since while the offer is outstanding and capable of acceptance, the party to whom the offer is made has the "option" of accepting the offer, communicating acceptance and creating a contract. However, unless the offer is under seal or given for consideration, the offer itself is not a binding contract. Many cases hold that an offer, even though expressed to be irrevocable for a period of time, may be withdrawn before acceptance if there is no consideration.[3] There being no consideration, actual or deemed, for the promise of irrevocability, the offer is not enforceable as a contract. By comparison, a true option contract is a complete contract in itself.

An important subtle point involving the role of consideration should be noted. The absence of consideration for an offer is relevant chiefly to the issue of whether the offer can be withdrawn. If the offer is accepted before it is withdrawn, the absence of consideration for an offer will not matter since with or without consideration for the offer, the acceptance of the offer creates the agreement of purchase and sale for which the consideration is the purchaser's promise to pay and the vendor's promise to convey.

This subtlety was noted in the English case of *Mountford* v. *Scott*,[4] where the Court of Appeal rejected the argument that specific performance

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rent review case of *United Scientific Holdings Ltd.* v. *Burnley Borough Council*, [1978] A.C. 904, [1977] 2 All E.R. 62 (H.L.); and in *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.*, [1968] 1 W.L.R. 74, [1968] 1 All E.R. 104 (C.A.), where Diplock L.J. described the option contract as a unilateral contract and the sale contract as a synallagmatic (that is, reciprocally binding) contract. See also Halsbury's Laws of England (4th), Vol. 9, Contract, para. 235.

[3] *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463 (C.A.); *Carton* v. *Wilson* (1906), 13 O.L.R. 412 (Ont. H.C.); *Davis* v. *Shaw* (1910), 21 O.L.R. 474 (Ont. Div. Ct.); *Archdekin* v. *McDonald* (1912), 1 D.L.R. 664, 1 W.W.R. 1014 (Man. K.B.); *Beer* v. *Lea* (1913), 29 O.L.R. 255 (Ont. H.C., App. Div.); *Pond* v. *Loblaw Groceterias Co. Ltd.*, [1947] 4 D.L.R. 716, [1947] O.W.N. 821 (Ont. H.C.); *Fraser* v. *Morrison* (1958), 12 D.L.R. (2d) 612, 25 W.W.R. (N.S.) 326 (Man. C.A.).

[4] [1975] Ch. 258, [1975] 1 All E.R. 198 (C.A.). The subtlety was also noted in *Bennett* v. *Stodgell* (1916), 36 O.L.R. 45, at p. 54 (Ont. App. Div.), per Meredith C.J.C.P.

of an agreement of purchase and sale should be denied because only nominal consideration was given for the option that was exercised.[5] Russell L.J. stated:[6]

> ... a valid option to purchase constitutes an offer to sell irrevocable during the period stated, and a purported withdrawal of the offer is ineffective. When therefore the offer is accepted by the exercise of the option, a contract for sale and purchase is thereupon constituted, just as if there were then constituted a perfectly ordinary contract for the sale and purchase without a prior option agreement. The court is asked to order specific performance of that contract of sale and purchase, not to order specific performance of a contract not to withdraw the offer: provided that the option be valid and for valuable consideration and duly exercised, it appears to me to be irrelevant to the question of remedy under the contract for sale and purchase that the valuable consideration can be described as a token payment: and so also if the option agreement be under seal with no payment....

In terms of its own contract formation, the problem area for options is usually this element of consideration. In general, the courts have been strict in requiring the presence of consideration. For example, a preprinted seal has been held to be inadequate consideration,[7] as has an acknowledgement of the receipt of money when the money was not in fact paid.[8] Where the option is contained in a lease, the courts have been more generous and have treated the creation or extension of the tenancy as providing consideration for the option contract.[9]

As a matter of contract law, time is of the essence for option contracts[10] and the courts have required timely and precise performance of the terms that specify how the option may be exercised and the contract of sale

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[5] It would appear that Riddell J. got this point wrong in *Riches* v. *Burns* (1924), 27 O.W.N. 203 (Ont. H.C.), following his own decision in *Savereux* v. *Tourangeau* (1908), 16 O.L.R. 600 (Ont. Div. Ct.). The other judges in *Savereux* appear to have got it right: "The agreement [a first right of refusal under seal], after acceptance of it by the plaintiff, can no longer be treated as voluntary", at p. 604, per Britton J. (Falconbridge C.J. concurring). See, A.H. Oosterhoff and W.B. Rayner, Anger and Honsberger—Law of Real Property (2nd ed., 1985), pp. 1157-1158.

[6] *Supra*, footnote 4, at pp. 264-265 (Ch.), 201 (All E.R.).

[7] *Solsberg and Solsberg* v. *McLaughlin and McMinn*, [1948] O.W.N. 408 (Ont. C.A.).

[8] *McKay* v. *Wayland* (1911), 18 O.W.R. 696 (Ont. H.C.); *McGregor* v. *Chalmers* (1913), 11 D.L.R. 157, 4 W.W.R. 256 (Man. K.B.); *Carlson* v. *Jorgenson Logging Co. Ltd. and Jorgenson*, [1952] 3 D.L.R. 294, (1952), 6 W.W.R. (N.S.) 298 (B.C.S.C.).

[9] *Matthewson* v. *Burns* (1913), 12 D.L.R. 236, 30 O.L.R. 186 (Ont. H.C.), rev'd on other grounds, (1913), 18 D.L.R. 287, 30 O.L.R. 186 (Ont. App. Div.), restored (1914), 50 S.C.R. 115, 18 D.L.R. 399; *Daku* v. *Daku* (1964), 49 W.W.R. (N.S.) 552 (Sask C.A.); *Friesen* v. *Bomok* (1979), 95 D.L.R. (3d) 446, [1979] 3 W.W.R. 132 (Sask. Q.B.).

[10] *Paterson* v. *Houghton*, *supra*, footnote 1; *Affiliated Realty Corp. Ltd.* v. *Sam Berger Restaurant Ltd.* (1973), 42 D.L.R. (2d) 191, 2 O.R. (2d) 147 (Ont. H.C.); *Krause* v. *Bain Bros. Ltd.* (1972), 29 D.L.R. (2d) 500 (Alta. T.D.), and the cases cited in footnotes 11 and 13, *infra*.

created. In *Pierce* v. *Empey*,[11] the leading case on this point, Duff C.J.C. stated:

> It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, as the result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfilment of them. . . .

An explanation for the policy about time of the essence was provided in *United Scientific Holdings Ltd.* v. *Burnley Borough Council*[12] by Lord Diplock:

> A more practical business explanation why stipulation as to the time by which an option to acquire an interest in property should be exercised by the grantee must be punctually observed, is that the grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee, and this without any guarantee that it will be disposed of to the grantee. In accepting such a fetter upon his powers of disposition of his property, the grantor needs to know with certainty the moment when it has come to an end.

It may be noted that Duff C.J.C.'s statement in *Pierce* v. *Empey* leaves room for the operation of equitable doctrines that relieve the option holder of the obligation to perform strictly the conditions of the option. In this regard, many cases about options turn on the issue of whether the vendor, by his or her words or conduct, has waived strict compliance with the terms of the option or is estopped from asserting that the option has not been properly exercised.[13]

In cases where there has been less than precise performance of the conditions for the exercise of the option, while the option holder may

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[11] [1939] S.C.R. 247, at p. 252, [1939] 4 D.L.R. 672, at p. 674. See also: *Forbes* v. *Connolly* (1857), 5 Gr. 657 (Ont. C.A.); *Archdekin* v. *McDonald*, *supra*, footnote 3; *Roots* v. *Carey* (1914), 49 S.C.R. 211, 17 D.L.R. 172, leave to appeal to P.C. refused, 6 W.W.R. 1060 (P.C.); *Stopforth* v. *Bergwall*, [1944] 1 D.L.R. 603, [1944] 1 W.W.R. 477 (B.C.S.C.); *Mus* v. *Matlashewski*, [1944] 4 D.L.R. 522, [1944] 3 W.W.R. 358 (Man. C.A.); *McGibbon* v. *Popoff*, [1977] 4 W.W.R. 685 (B.C.S.C.); *Turbo Resources Ltd.* v. *Paperny*, [1982] 2 W.W.R. 372, (1982), 17 Sask. R. 260 (Sask. Q.B.).

[12] *Supra*, footnote 2, at pp. 929 (A.C.), 71 (All E.R.). See also Lord Fraser of Tullybelton, at pp. 962 (A.C.), 97 (All E.R.).

[13] *Crosby* v. *Temple*, [1940] 2 D.L.R. 554, (1940), 14 M.P.R. 595 (N.S. App. Div.); *St. James R.M.* v. *Bailey* (1957), 7 D.L.R. (2d) 179, 21 W.W.R. (N.S.) 1 (Man. C.A.); *Baldwin* v. *Rhinhart* (1967), 63 D.L.R. (2d) 420 (Sask. Q.B.); *Fridor Invt. Ltd.* v. *Magee* (1968), 70 D.L.R. (2d) 461, [1968] 2 O.R. 733 (Ont. H.C.), aff'd (1969), 6 D.L.R. (3d) 176n, [1969] 1 O.R. 388n (Ont. C.A.); *Last Mountain Dev. Ltd.* v. *Oscar Fech Construction Ltd.* (1978), 7 Alta. L.R. (2d) 87 (Alta. T.D.); *City of Kamloops* v. *Interland Investments Inc.* (1979), 9 B.L.R. 130 (B.C.S.C.); *Antifave* v. *Tisnic* (1981), 7 Sask. R. 169 (Sask. C.A.); D.M. McRae, The Extension of Options and Equitable Estoppel (1978-79), 3 Can. Bus. L.J. 426. See also, *Petridis* v. *Shabinsky* (1982), 132 D.L.R. (3d) 430, 35 O.R. (2d) 215 (Ont. H.C.), where the discussion of waiver arose in the context of an option to renew a lease.

turn to the equitable law of waiver and estoppel, the courts have consistently held that equity's relief from forfeiture is not available. The explanation is that relief from forfeiture will not relieve performance of conditions precedent.[14] This explanation arguably is inadequate.

To understand the objection to the explanation for the absence of equitable relief from forfeiture, it is necessary to identify the underlying premises for the conclusion that relief from forfeiture is not available. The major premise is that there can be relief from forfeiture only if there is an interest to forfeit. In the case of unsatisfied conditions precedent, the sale contract does not come into existence and no interest in land is ever created, or so the explanation goes. In other words, the explanation is that the option holder never had an interest to forfeit and, accordingly, relief from forfeiture is not relevant. The problem with this explanation, however, is that it fails to differentiate between the antecedent option contract and the subsequent sale contract. The explanation fails to note that while the conditions precedent are in the option, they are conditions not to the creation of the option, which already exists, but rather to the creation of the contract of sale. The explanation fails to address the fact that before the conditions precedent are performed, the option by itself creates an interest in land. Thus, an interest in land may be lost and it is appropriate at least to speak about relief from forfeiture and not dismiss it out of hand. This does not mean, however, that relief from forfeiture should be available generally or in any particular case. The point is that the rule excluding equitable relief from forfeiture for options needs a better theoretical explanation.

The issue of satisfactory compliance with the terms of the option may also turn on the interpretation of the option contract. In this regard, a type of term frequently found in leases has caused problems. Typically, a lease with an option to purchase will provide that the option may be exercised only if the tenant has performed his or her obligations under the lease. The problem is how to interpret or measure what constitutes satisfactory performance. For example, in *Sparkhall* v. *Watson*,[15] to be entitled to exercise a right to renew a lease, a tenant had to show that he had "duly and regularly" paid the rent. (This type of term is frequently used for options to purchase). The court interpreted this provision to mean that payment of rent had to be punctual and on the due date. A contrary

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[14] *Sparkhall* v. *Watson*, [1954] 2 D.L.R. 22, [1954] O.W.N. 101 (Ont. H.C.); *Re Spiegel and Modernage Furniture Ltd.*, (1971), 23 D.L.R. (3d) 665, [1972] 1 O.R. 625 (Ont. C.A.); *Affiliated Realty Corp. Ltd.* v. *Sam Berger Restaurant Ltd.*, *supra*, footnote 10; *Birchmont Furniture Ltd.* v. *Loewen*, [1977] 3 W.W.R. 651 (Man. Q.B.), aff'd (1978), 84 D.L.R. (3d) 599, [1978] 2 W.W.R. 483 (Man. C.A.). But see: *Sheikh* v. *Sheffield Homes Ltd.* (1990), 73 O.R. (2d) 348 (Ont. H.C.).

[15] *Ibid.*

view is expressed in *McLaughlin* v. *Bodarchuk*[16] where the court held that "duly and regularly" meant systematically and this, in turn, meant that a few late payments would not disentitle the tenant.[17] As a general matter of contract interpretation, the courts have held that it requires clear language to make the option dependent on performance of the terms of the lease.[18]

With respect to options to purchase in leases it should be noted that the option is not an incident of the landlord and tenant relationship. Thus, if expressed to be available during the term of the lease, the option is not carried forward during any overholding tenancy.[19]

B. *Rights of Repurchase*

A right of repurchase may be simply an option contract that accompanies a contract of sale. In this form, the vendor sells his or her property and reserves a right to repurchase the property. In this simple form, there is nothing analytically different to distinguish a right of repurchase from the option contract discussed above.

A right of repurchase, however, may be more complex. In the more complex form, the right of repurchase will not be immediately available but will depend upon decisions or the conduct or status of the new owner of the land. An example of this complex type of right of repurchase may be found in contracts and deeds sometimes used by municipalities. In order to encourage the active use of the land, the municipality will sell its land subject to a right of repurchase that may be exercised by the municipality only if the purchaser does not build upon the land within a stipulated time. Another example may be found in sale of land contracts and conveyances sometimes used by employers with businesses located in areas

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[16] (1957), 8 D.L.R. (2d) 596, 22 W.W.R. (N.S.) 60 (B.C.C.A.). See also, *Finn* v. *Finn*, [1983] 3 W.W.R. 236, (1983), 24 Alta. L.R. (2d) 203 (Alta. Q.B.).

[17] Other cases about interpreting the standard of performance are: *Ball* v. *Canada Company* (1876), 24 Gr. 281 (Ont. Ch.); *North Central Expressways Ltd.* v. *MacCrostie*, [1979] 2 W.W.R. 747 (Sask. Q.B.); *Laakman* v. *CCWW 1982116 Holdings Ltd.* (1984), 34 R.P.R. 36 (B.C.S.C.); *Re Zangelo Investments Ltd. and Glasford State Inc.* (1987), 38 D.L.R. (4th) 395, 59 O.R. (2d) 510 (Ont. H.C.), aff'd (1988), 49 D.L.R. (4th) 320, 63 O.R. (2d) 542 (Ont. C.A.). See also, *Petrillo* v. *Nelson* (1980), 114 D.L.R. (2d) 273, 29 O.R. (2d) 791 (Ont. C.A.), a case about an option to extend a mortgage.

[18] *Kennedy and Shaw* v. *Baucage Mines Ltd.* (1959), 20 D.L.R. (2d) 1, [1959] O.R. 625 (Ont. C.A.); *Birchmont Furniture Ltd.* v. *Loewen, supra*, footnote 14; *Amyotte* v. *Urchyshyn* (1978), 86 D.L.R. (3d) 106, 6 Alta. L.R. (2d) 26 (Alta. T.D.); *Billie* v. *Mic Mac Realty Ltd.* (1977), 3 R.P.R. 48 (Ont. H.C.).

[19] *Re Devine and Ferguson*, [1947] 1 D.L.R. 76, [1946] O.R. 736 (Ont. H.C.); *Rafael* v. *Crystal* (1966), 58 D.L.R. (2d) 325, [1966] 2 O.R. 733 (Ont. H.C.); *Palmer* v. *Ampersand Invts Ltd.* (1986), 11 D.L.R. (4th) 294, 47 O.R. (2d) 275 (Ont. H.C.), aff'd (1986), 26 D.L.R. (4th) 640, 54 O.R. (2d) 339 (Ont. C.A.); *Budget Car Rentals Toronto Ltd.* v. *Petro-Canada Inc.* (1989), 60 D.L.R. (4th) 751, 69 O.R. (2d) 289 (Ont. C.A.).

where there is insufficient housing. The employer takes on the task of providing housing for its employees. The employer sells residential units but includes a right of repurchase that may be exercised if the employment relationship ends. As will appear from the discussion below, these complex types of rights of repurchase are analytically similar to a right of first refusal.

A complexity associated with a right of repurchase is that a right of repurchase may be a disguised mortgage. In other words, an examination of the factual background and the wording of the agreement may reveal that the initial sale was as security for a loan with the right of repurchase being an incident of the repayment of the loan. The classification of the agreement is a question of fact and the courts will determine whether the transaction is a disguised mortgage or whether the option or right of repurchase is an agreement independent of any loan.[20]

In *Herron* v. *Mayland*,[21] the Supreme Court of Canada held that while the evidence must be cogent, parol evidence is admissible to show that a sale with an option to repurchase is a mortgage transaction. In *Wilson* v. *Ward*,[22] Duff J. stated:

> It is quite true that, *prima facie*, a sale, expressed in an instrument containing nothing to show the relation of debtor and creditor is to exist between the parties, does not cease to be a sale, and becomes security for money, merely because the instrument contains a stipulation that the vendor shall have a right of repurchase.... But where the language of the instrument points to such a relation, the courts... have endeavoured to treat such instruments as securities.

If the transaction is characterized as a loan, then the vendor has a right of redemption in accordance with the law of mortgages and the vendor may regain his or her property without complying with the strict terms of the right of repurchase.

C. *Rights of First Refusal*

Rights of first refusal tend to present more difficulties of contract interpretation than do options or rights of repurchase. The principal ingredient of a right of first refusal is a commitment by the grantor to give the grantee the first chance to purchase should the grantor decide to sell. This commitment may be structured in a variety of ways. For example, the right may stipulate that where the grantor is prepared to accept an offer from a third party, then the grantor must provide the grantee with the opportunity to match the offer and complete the sale. As an

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[20] *Fleming* v. *Watts*, [1944] S.C.R. 360, [1944] 4 D.L.R. 353; *Kreick* v. *Wansbrough*, [1973] S.C.R. 588, (1973), 35 D.L.R. (3d) 275; *Creswell* v. *Raven Bay Holdings Ltd.* (1984), 53 B.C.L.R. 183, 32 R.P.R. 102 (B.C.S.C.); *Dical Investments Ltd.* v. *Morrison* (1989), 68 O.R. (2d) 550 (Ont. H.C.).

[21] [1928] S.C.R. 225, [1928] 2 D.L.R. 858.

[22] [1930] S.C.R. 212, at p. 220, [1930] 2 D.L.R. 433, at p. 440.

alternative, the right may stipulate that when and if the grantor decides to sell the land, the grantee has the first chance to purchase at a fixed price or at a price to be agreed upon or fixed by arbitration. Or, the right may provide that when and if the grantor decides to sell, he or she may fix a price and the grantee has the first right to purchase at that price but that if the first right is not exercised, then the grantor may not sell to a third party at a lower price without renewing the grantee's first right to purchase at this lower price. It should be noted that all these variations of rights of first refusal are analytically similar to complex rights of repurchase inasmuch as to become operational, these rights depend upon the decision, conduct or status of the owner of the land.

Many of the difficulties associated with rights of first refusal arise because of difficulties of interpretation. The very important case of *Manchester Ship Canal Company* v. *Manchester Racecourse Company*[23] provides an example.[24] In this case, the Manchester Ship Canal Company and the Manchester Racecourse Company were adjoining land owners. They entered into an agreement that should the Racecourse Company decide to use its lands for a dock, then the Racecourse Company would give the Ship Canal Company a right of first refusal to purchase the Racecourse Company lands. The Racecourse Company purported to satisfy this right of first refusal by offering to sell the lands to the Ship Canal Company at a price higher than the price the Racecourse Company was prepared to accept in contemporaneous negotiations with Trafford Park Company, a third party who planned to build a dock. After the Canal Company declined the higher offer, the Racecourse Company entered into an agreement to sell to Trafford Park Company at the lower price. The lower price was never offered to the Canal Company. The Ship Canal Company sued to stop the sale.

The parties presented the English Court of Appeal with two competing arguments as to the interpretation of the right of first refusal. The Racecourse Company argued that the right merely meant that it had to make a fair

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[23] [1901] 2 Ch. 37 (C.A.). The case is important on the issue of whether a right of first refusal is an interest in land. This aspect of the case is discussed *infra*.

[24] Debate about the operation of a right of first refusal has emerged in many cases. See, for example, *Re Texaco Canada Inc. and Paul Monaco Service Ltd.* (1982), 140 D.L.R. (3d) 299 (Ont. Div. Ct.); *Rusonik* v. *Texaco Canada Inc.* (1988), 63 O.R. (2d) 534 (Ont. H.C.); *Budget Car Rentals Toronto Ltd.* v. *Petro Canada Inc.*, *supra*, footnote 19; *Stellar Properties Ltd.* v. *Botham Hldg Ltd.*, [1990] 5 W.W.R. 673 (B.C.C.A.). See also, *This is It Drive-In Ltd.* v. *Teamsters Building Ltd.* (1971), 20 D.L.R. (3d) 697, [1971] 5 W.W.R. 310 (B.C.C.A.) ("right of first refusal of a renewal of lease"). While the debate will turn on the interpretation of each particular contract, there is a general view that a right of first refusal is not discharged unless the holder of the right is given the details of an actual competing offer. See, *Vancouver Key Business Machines Ltd.* v. *Teja* (1975), 57 D.L.R. (3d) 464, [1975] 5 W.W.R. 104 (B.C.S.C.); *Kopec* v. *Pyret* (1987), 36 D.L.R. (4th) 1, [1987] 3 W.W.R. 449 (Sask. C.A.); *Zouvgias* v. *Chang* (1986), 39 R.P.R. 221 (Ont. H.C.).

and reasonable offer to sell to the Ship Canal Company before entering into an agreement with a third party. The Ship Canal Company argued that the right meant that the Racecourse Company must provide the Ship Canal Company with the opportunity to match a third party's offer.

In the end result, the Court of Appeal ducked the interpretation issue and concluded that the Racecourse Company had failed to do what was required under the right of first refusal, however interpreted. In other words, the Racecourse Company's offer was not reasonable and the Racecourse Company did not provide the Ship Canal Company with the opportunity to match any offer.

A number of miscellaneous points about rights of first refusal should be noted. Like options, rights of first refusal require consideration in order to be irrevocable and the consideration may be found in the creation or extension of a landlord and tenant relationship.[25] As in the case of options, the exercise of a right of first refusal must accord strictly with the terms set out in the agreement.[26] A vendor does not breach a right of first refusal by entering into a conditional agreement to sell to a third party if the condition is that the right of first refusal is not exercised[27] and the third party does not have the right to challenge the adequacy of the exercise of the right of first refusal.[28] If a right of first refusal is breached, the measure of the right holder's damages is the benefit of the lost bargain; that is, the difference between the market value of the land and the price at which it could have been acquired had the right of first refusal been honoured.[29]

D. *Assignability*

The assignability of rights of first refusal, options to purchase and rights of repurchase may be considered together. Although the question of whether these rights are assignable raises many complicated and difficult problems[30] with an exception for the difference between these rights as interests in land, these rights are undistinguishable in terms of their assignability.

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[25] *Zouvgias* v. *Chang*, *ibid.*

[26] *Captain Developments Ltd.* v. *Nu-West Group Ltd.* (1982), 136 D.L.R. (3d) 502, 37 O.R. (2d) 697 (Ont. H.C.), rev'd on a different point (1984), 6 D.L.R. (4th) 179, 45 O.R. (2d) 213 (Ont. C.A.).

[27] *Lomac Holdings Ltd.* v. *Prijatelj, Prijatelj and Richmond Holdings Ltd.* (1982), 38 B.C.L.R. 238 (B.C.S.C.).

[28] *Farr* v. *Attwood* (1987), 62 O.R. (2d) 543 (Ont. Dist. Ct.), aff'd (1988), 63 O.R. (2d) 543 (Ont. C.A.).

[29] *McClement* v. *Lovatt* (1954), 13 W.W.R. (N.S.) 695 (Man. Q.B.), varied 15 W.W.R. 426 (N.S.) (Man. C.A.); *Peters* v. *Rocher* (1982), 15 Man. R. (2d) 169 (Man. Q.B.).

[30] See generally, R. Megarry and H.W.R. Wade, The Law of Real Property (5th ed., 1984), chap. 14; Oosterhoff and Rayner, *op. cit.*, footnote 5, chap. 17; Ontario Law Reform Commission, Report on Covenants Affecting Freehold Land (1989); England, The Law Commission, Transfer of Land—The Law of Positive and Restrictive Covenants (1984);

Contract law differentiates between the benefit of a covenant, that is, the right to sue, and the burden of a covenant, that is, the liability to be sued. As a general principle of contract law, the parties to a contract and their personal representatives may sue and be sued. The original parties and their personal representatives are said to have privity of contract and the right to enforce the contract. Assignability concerns the circumstances where contract law or the law of property (including both common law and equitable principles) will allow the benefits or the burdens of the contract, or both, to be transferred or assigned to others. In this regard, there are three situations that must be considered: (1) where the benefit would be assigned and the burden remain with a contracting party or his or her personal representative; (2) where the burden would be assigned and the benefit remain with a contracting party or his or her personal representative; and (3) where both the benefit and the burden would be assigned.

In the first situation, there is no transfer of the burden but a new party wishes to enforce the contract. As a general principle, contract law allows the benefit but not the burden of a contract to be assigned.[31] This principle makes the benefit of options to purchase, rights of repurchase and rights of first refusal assignable, unless the contract indicates that the right is to be exclusively personal to the grantee.[32] In England, the rights are *prima facie* assignable.[33] In Canada, options to purchase and the other rights are generally viewed as personal to the immediate parties and, therefore, if there is to be an assignment of the benefit of the right, the contract must state that the right is for the contracting party and for his or her assigns.[34] Where the right is contained in a lease, the general rule is that the landlord must consent specifically to the assignment of the right.[35]

Notice to the vendor of the assignment of the right may be necessary to make the right directly enforceable by the assignee. The theory here is that the rights associated with options, rights of repurchase and rights

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A.H. Oosterhoff, The Law of Covenants: Background and Basic Principles, in Law Society of Upper Canada, Easements and Restrictive Covenants (December 7, 1989).

[31] Equity and statutes (in Ontario, s. 53 of the Conveyancing and Law of Property Act, R.S.O. 1980, c. 90) permit the benefit to be assigned. For assignability at law, the benefit had to touch and concern land of the covenantee. See, Oosterhoff in Law Society of Upper Canada, *ibid.*

[32] *Farr* v. *Attwood*, *supra*, footnote 28; *Griffith* v. *Pelton*, [1958] Ch. 205, [1957] 3 All E.R. 75 (C.A.); *In re Button's Lease*, [1964] Ch. 263, [1963] 3 All E.R. 708 (Ch. D.); *Re Meewasin Valley Authority and Olfland Land Co.* (1987), 42 D.L.R. (4th) 730 (Sask. Q.B.), aff'd (1988), 51 D.L.R. (4th) 638 (Sask. C.A.).

[33] *In re Button's Lease*, *ibid.*

[34] *Canadian Pacific Railway Co.* v. *Rosin* (1911), 2 O.W.N. 610, 18 O.W.R. 387 (Ont. H.C.).

[35] *Mus* v. *Matlashewski*, *supra*, footnote 11; *Re Maynard & Regent Refining (Canada) Ltd.*, [1956] O.W.N. 251 (Ont. H.C.); *Zouvgias* v. *Chang*, *supra*, footnote 24.

of first refusal are legal choses in action, that is, personal rights of property that can only be enforced by action and not by taking physical possession. In particular, the right to specific performance is an equitable chose in action that, if absolutely assigned, may be enforced in equity by the assignee without the assignor being a party to the action. The right to claim damages is a legal chose in action that may be enforced at law by the assignee if the assignor is a party to the proceedings. (Equity, however, may exercise its *in personam* jurisdiction to compel the assignor to co-operate in the enforcement of the legal chose in action. In effect, equity directs the assignor to enforce the legal right on behalf of the assignee). The equitable right to specific performance or the legal right to damages may also be enforced at law by the assignee without the participation of the assignor under statutory provisions governing absolute assignments. These provisions operate where notice of the assignment is given to the vendor.[36]

In the second situation, an original contracting party seeks to enforce the contract against a new party. As already noted, contract law generally does not allow the burden of a contract right to be enforced against an assignee. There are three exceptions.

The first exception is where the contract creates an interest in land. This case will be considered in more detail in the next section of this article. For present purposes, it may be noted simply that option contracts and rights of repurchase immediately create an equitable interest in land that may be enforceable against assignees of the vendor.

The second exception is where there is privity of estate, that is, where a landlord and tenant relationship exists. If privity of estate exists, then covenants that "touch or concern" the land, that is covenants that affect the landlord and tenant relationship, may be enforced against the respective assignees of the landlord or the tenant. These covenants run with the land.[37] The courts, however, have concluded that options to purchase and rights of first refusal do not touch or concern the land but are merely personal rights.[38] In *Woodall* v. *Clifton*,[39] the English Court of Appeal stated that

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[36] *Di Guilo* v. *Boland* (1958), 13 D.L.R. (2d) 510, [1958] O.R. 384 (Ont. C.A.); *Warner Bros. Records Inc.* v. *Rollgreen Ltd.*, [1976] Q.B. 430, [1975] 2 All E.R. 105 (C.A.); *Torkington* v. *Magee*, [1902] 2 K.B. 427. In Ontario, see, Conveyancing and Law of Property Act, R.S.O. 1980, c. 90, s. 53.

[37] For a tenant, the benefit and burden of covenants that touched and concerned the land ran with the lease under the common law established by *Spencer's Case* (1583), 5 Co. Rep. 16a, 77 E.R. 72 (K.B.). For a landlord, the benefit and burden of covenants that touched and concerned the land ran with the reversion under statute law, that is, the Grantees of Reversion Act (1540), 32 Hen. VIII, c. 34, and now, for example, in Ontario, the Landlord and Tenant Act, R.S.O. 1980, c. 232, ss. 4-8. See, *Re Dollar Land Corp. Ltd. and Solomon* (1963), 39 D.L.R. (2d) 221, [1963] 2 O.R. 269 (Ont. H.C.).

[38] *Woodall* v. *Clifton*, [1905] 2 Ch. 257 (C.A.); *Re Albay Realty Ltd.* v. *Dufferin-Lawrence Developments Ltd.* (1956), 2 D.L.R. (2d) 604, [1956] O.W.N. 302 (Ont. H.C.); *Thompson* v. *Trepil Realty Ltd.* (1962), 34 D.L.R. (2d) 697, [1962] O.R. 956 (Ont. H.C.).

[39] *Woodall* v. *Clifton*, *ibid.*

an option to purchase did not directly affect or concern the land and was wholly outside the relationship of landlord and tenant. There is no reason to treat the other rights differently. Thus, the privity of estate exception is not available to make an option to purchase, a right of repurchase or a right of first refusal enforceable against an assignee.

The third exception where the burden may be enforced against an assignee is where the covenant is a restrictive covenant within the doctrine established by the case of *Tulk* v. *Moxhay*.[40] The requirements of this doctrine are described in the Ontario Law Reform Commission's Report on Covenants Affecting Freehold Land[41] as follows:

> For the burden of a restrictive covenant to run with the land in equity, five requirements must be satisfied: (1) the covenant must be negative in operation; (2) the covenantee must own land for the benefit of which the covenant was given; (3) the covenant must touch and concern the land of the covenantee; (4) the covenant must be intended to run with the land belonging to the covenantor; and (5) the assignee of the covenantor must not be a *bona fide* purchaser for value of the legal estate without notice of the covenant.

As for these requirements, options to purchase, rights of repurchase and rights of first refusal may be described as negative or restrictive inasmuch as they restrict the vendor from freely selling his or her land.[42] These rights, however, would not appear to comply with the third and fourth requirements for a restrictive covenant and, in most cases, the second requirement will also be absent. In *Re Albay Realty Ltd.* v. *Dufferin-Lawrence Developments Ltd.*,[43] an assignee of the benefit of a right of first refusal sought to enforce the right against an assignee of the burden. The court concluded that the right of first refusal did not run with the lands, was merely personal, was not a restrictive covenant, and could not be enforced against an assignee.

Turning to the third situation, where both the benefit and the burden would be assigned, this may be dealt with quickly in light of the conclusions reached so far. The conclusions about the assignability of the burden make it unnecessary to go further. Since the burden of an option to purchase, a right of repurchase and a right of first refusal cannot be imposed as an aspect of tenure of estate or as a restrictive covenant, it follows that

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[40] (1848), 2 Ph. 774, 41 E.R. 1143 (L.C.).

[41] *Op. cit.*, footnote 30, p. 26.

[42] *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, *supra*, footnote 23; *Pritchard* v. *Briggs*, [1980] Ch. 338, [1980] 1 All E.R. 294 (C.A.), at pp. 389 (Ch.), 304-305 (All E.R.), per Goff L.J., adopting *Mackay* v. *Wilson* (1947), 37 S.R. (N.S.W.) 315, at p. 325. In *London and South Western Railway Co.* v. *Gomm* (1882), 20 Ch. D. 562 (C.A.), discussed, *infra*, the text at footnote 60, Jessel M.R. stated that a right of repurchase did not qualify as a restrictive covenant because it was a positive obligation. This is, of course, true for the purchaser but the covenant is negative from the vendor's point of view.

[43] *Supra*, footnote 38.

regardless of the resolution of the difficult law associated with when a benefit may be assigned and enforced against an assignee of the burden, it will not be possible for an assignee of the benefit of an option to purchase, a right of repurchase or a right of first refusal to enforce these rights against an assignee of the burden, unless these rights may be enforced as interests in land.

The end result for all three situations then is that if the burden of an option to purchase, a right of repurchase or a right of first refusal is to be enforced against someone other than the original grantor of the right, it must be because the right is an interest in land. This question is considered in the next section of this article.

II. *Interests in Land*

An investigation of options, rights of repurchase and rights of first refusal as interests in land involves two investigations. The first concerns the nature of these rights when they form a part of a grant of an interest in land. This investigation involves a discussion of the difference between conditions and covenants and such matters as the illegality of restraints on alienation and the difference between a fee simple determinable and a fee simple upon condition subsequent. The second investigation concerns the nature of options, rights of repurchase and rights of first refusal as free-standing interests in land.

A. *As Part of a Grant*

For centuries, the law has had a rule against restraints on alienation. When a grantor transfers an absolute ownership in land (for example, a fee simple interest), he or she may not substantially restrain or limit the grantee's ability to alienate the land further. A restraint on alienation is thought to be repugnant or inconsistent with the rights of ownership being conveyed and the law treats the restraint as void. Although limited restraints may be permissible, the courts tend to view restraints strictly, leaving little scope for partial restraints on alienation.[44] Thus, a condition attached to a devise in fee simple by which the grantees are prevented from selling or mortgaging the lands during their lives except to one another[45] or to one specified person[46] is void as a restraint on alienation. A condition attached to a devise that the grantee may not convey without the consent

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[44] *Re Malcolm*, [1947] 4 D.L.R. 756, [1947] O.W.N. 871 (Ont. H.C.); *Stephens* v. *Gulf Oil of Canada Ltd.* (1975), 65 D.L.R. (3d) 193, 11 O.R. (2d) 129 (Ont. C.A.), leave to appeal to S.C.C. refused (1975), 65 D.L.R. (3d) 193n, 11 O.R. (2d) 129n.

[45] *Re Malcolm, ibid.*; *Re Buckley* (1910), 15 O.W.R. 329, 1 O.W.N. 427 (Ont. H.C.).

[46] *Re Metcalf* (1925), 27 O.W.N. 438 (Ont. H.C.); *Re Dowsett* (1926), 31 O.W.N. 353 (Ont. H.C.); *Re Buckley, ibid.*

of a named person is void.[47] And, of more immediate interest to this article, a condition attached to a devise that if the grantee wishes to sell, he or she must first offer the property to a specified person at a specified price is void as an absolute restraint on alienation.[48]

The above examples of illegal restraints are taken from testamentary conveyances but illegal restraints may also be found in *inter vivos* conveyances.[49] There is, however, a complication in the latter type of case. The complication arises because the rule against restraints on alienation does not apply to a person who already owns the land and wishes to alienate or sell. There is no objection to a person who already owns land agreeing to sell the land to a particular individual or granting options or rights of first refusal. Such agreements restrain alienation but the restraints are not annexed to the grant of the land. In other words, the restraints are independent of any grant and are not imposed on a grantee but rather are contractually negotiated by a grantor. But since a grantor can suffer a restraint as a matter of contract, can a grantee who will become the next grantor also contract in a similar manner? The answer to this question is yes. The law draws a distinction between imposed "conditions" to a deed which may be void if repugnant to the estate granted and "covenants" which are independent contract obligations, the breach of which will ground an award of damages.[50]

As the case law discussed below demonstrates, it is very difficult to differentiate between covenants and conditions, especially since covenants may be found in deeds. In general, the courts are very reluctant to construe a restrictive provision as a condition. Rather, unless the wording of the contract clearly and unequivocally indicates that a condition was intended, courts are inclined to characterize a restrictive provision as a covenant.[51]

In *Stephens* v. *Gulf Oil Canada Ltd.*,[52] two landowners gave each other second rights of refusal should Gulf Oil not exercise a first right of refusal. The first right of refusal was challenged as a restraint on alienation because the purchase price was at historic values and did not reflect the

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[47] *Blackburn* v. *McCallum* (1902), 33 S.C.R. 65; *McRae* v. *McRae* (1898), 30 O.R. 54 (Ont. Div. Ct.); *Pardee* v. *Humberstone Summer Resort Co. of Ontario Ltd.*, [1933] 3 D.L.R. 277, [1933] O.R. 580 (Ont. S.C.).

[48] *Re Rosher* (1884), 26 Ch. D. 801 (Ch. D.); *Re Cockerill*, [1929] 2 Ch. 131 (Ch. D.).

[49] *Laurin* v. *Iron Ore Co. of Canada* (1977), 82 D.L.R. (3d) 634, 50 A.P.R. 111 (Nfld. S.C.).

[50] *Paul* v. *Paul* (1921), 64 D.L.R. 269, 50 O.L.R. 211 (C.A.); *Stephens* v. *Gulf Oil Canada Ltd.*, *supra*, footnote 44.

[51] *Pearson* v. *Adams* (1912), 7 D.L.R. 139, 27 O.L.R. 87 (Ont. Div. Ct.), rev'd (1913), 12 D.L.R. 227, 28 O.L.R. 154 (Ont. C.A.), restored (1914), 50 S.C.R. 204. See also, *Re Sekretov and City of Toronto* (1972), 28 D.L.R. (3d) 661, [1972] 3 O.R. 534 (Ont. H.C.), aff'd (1973), 33 D.L.R. (3d) 257, [1973] 2 O.R. 161 (Ont. C.A.).

[52] *Supra*, footnote 44.

current increased value of the lands. The Ontario Court of Appeal concluded that the right of first refusal was a covenant and not a condition. The court, however, noted that had the right of first refusal been characterized as a condition, it would have been void as a restraint on alienation.

In *British Columbia Forest Products Ltd.* v. *Gay*,[53] a sawmill company sold a home to one of its employees. The grant contained a provision that should the employee, within a five-year period, wish to sell the home or should the employee cease to be employed, then the company had a right to repurchase the home at the original purchase price plus the increase in value of the home resulting from any additions made by the employee. The British Columbia Court of Appeal held that the provision was valid and enforceable by specific performance. The court concluded that the provision was a covenant and not a condition.

In *Laurin* v. *Iron Ore Co. of Canada*,[54] an employer sold a home to an employee subject to a right of repurchase. The right of repurchase was similar to that found in the *British Columbia Forest Products* case but from the employee's point of view contained a very unfavourable formula for calculating the purchase price. This time the right of repurchase was held to be a condition that was void as a restraint on alienation.

If the option, right of repurchase or right of first refusal is a condition, then its further classification may make a difference to its enforceability. In other words, a condition may not be void as a restraint on alienation but the condition may fail on grounds that depend on the specific nature of the condition. There are two types of conditions: conditions subsequent and determinable conditions.[55] A right classified as a condition subsequent is a right to claim an estate by re-entry if a defined event or contingency occurs. Since the right of re-entry may or may not occur, the vesting of any estate based on the right of re-entry is postponed and may or may not occur. Because of the possible delay in vesting, the condition subsequent may be void for offending the rule against perpetuities. By comparison, a right classified as a determinable condition does not involve any delay in vesting, there is no need for re-entry and the owner of the right has an immediate vested right of reverter. Although by statute the rule against

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[53] (1978), 89 D.L.R. (3d) 80, 7 B.C.L.R. 190 (B.C.C.A.).

[54] *Supra*, footnote 49.

[55] See generally, *McIntosh* v. *Samo* (1875), 24 U.C.C.P. 625 (Ont. C.A.); *Re Melville* (1886), 11 O.R. 626 (Ont. Ch. D.); *Matheson* v. *Town of Mitchell* (1919), 51 D.L.R. 477, 46 O.L.R. 546 (Ont. C.A.); *Re North Gower Township Public School Board and Todd* (1967), 65 D.L.R. (2d) 421, [1968] 1 O.R. 63 (Ont. C.A.); *Re McKellar* (1973), 36 D.L.R. (3d) 202, [1973] 3 O.R. 178 (Ont. C.A.), aff'g (1972), 27 D.L.R. (3d) 289, [1972] 3 O.R. 16; *Re Tilbury West Public School Board and Hastie* (1966), 55 D.L.R. (2d) 407, [1966] 2 O.R. 20 (Ont. C.A.); *Re Essex County Roman Catholic Separate School Board and Antaya* (1977), 80 D.L.R. (3d) 405, 17 O.R. (2d) 307 (Ont. H.C.).

perpetuities may be made to apply to rights of reverter,[56] at common law, determinable conditions did not offend the rule against perpetuities. Since any statutory provisions may not be retroactive, the difference between conditions subsequent and determinable conditions still may make a difference to the validity of the condition.

It is very difficult to differentiate and classify these two types of conditions. One of the more helpful attempts to provide guidance is in *Re Tilbury West Public School Board and Hastie*[57] where Grant J. states:

> The essential distinction appears to be that the determining event in a determinable fee itself sets the limit for the estate first granted. A condition subsequent, on the other hand, is an independent clause added to a complete fee simple absolute which operates so as to defeat it: Megarry and Wade [Law of Real Property, 2nd ed.], p. 76. At p. 77 it is stated:
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> > "Words such as 'while,' 'during,' 'as long as,' 'until' and so on are apt for the creation of a determinable fee, whereas words which form a separate clause of defeasance, such as 'provided that,' 'on condition that,' 'but if,' or 'if it happen that,' operate as a condition subsequent."
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> In Cheshire [Modern Real Property, 9th ed.] at p. 280, the words "until", "so long as", and "whilst", are stated to be expressions creating determinable interests while phrases such as "on condition", "provided that", "if", "but if it happen", raise interests subject to conditions subsequent.
>
> Cheshire at p. 281, points out the difference in the following words:
>
> > "In short, if the terminating event is an integral part of the formula from which the size of the interest is to be ascertained, the result is the creation of a determinable interest; but if the terminating event is external to the limitation, if it is a divided clause from the grant, the interest granted is an interest upon condition."

In *Re Essex County Roman Catholic Separate School Board and Antaya*,[58] lands were conveyed to a school board to be used for school purposes. The deed contained a provision that the grantor reserved for himself and his heirs the right to purchase the lands "at the current price should the same cease to be used for the purposes intended".[59] The court applied the guidelines from *Re Tilbury West Public School Board and Hastie* and determined that the right of purchase was a condition subsequent that offended the rule against perpetuities.

B. *As Independent Interests*

An investigation of options, rights of repurchase or rights of first refusal as free-standing interests in land may be approached deductively and inductively. Deductively, the investigation is whether any of these rights

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[56] See, for example, in Ontario, the Perpetuities Act, R.S.O. 1980, c. 374, s. 15. By s. 19, this provision only applies to instruments that take effect on or after September 6, 1966.

[57] *Supra*, footnote 55, at pp. 410 (D.L.R.), 23 (O.R.).

[58] *Supra*, footnote 55.

[59] *Ibid.*, at pp. 407 (D.L.R.), 309 (O.R.).

are within an already identified class of legal or equitable right that involves an interest in land. For example, restrictive covenants involve an interest in land. Deductively, the question becomes whether an option, right of repurchase or right of first refusal may be classified as a restrictive covenant. Approached inductively, the investigation is whether options, rights of repurchase and rights of first refusal manifest the characteristics of a proprietary interest in land. If they do, then it is arguable that they should be labelled as interests in land even though they may not fall within an already established class.

The investigation may begin with the pivotal case of *London and South Western Railway Company* v. *Gomm*.[60] In this case, the plaintiff railway company sold land to George Powell. The deed contained a promise by George Powell that should the railway company at any time require the land for railway purposes then the lands would be reconveyed to the company. George Powell's promise was made to bind himself and his heirs, assigns and successors in title. The defendant was a successor in title who acquired the land with notice of the provisions in the deed. The railway company gave notice that it wished a reconveyance; the defendant refused to reconvey. The railway company then sued for specific performance.

Pausing here, it should be noted that the provision in the deed to George Powell was analytically a simple option. The opportunity to exercise the right did not depend upon the conduct or will of the vendor and remained within the control of the purchaser.

The railway company succeeded at trial but lost upon appeal. In the trial court, Kay J. ordered specific performance on the ground that the right of reconveyance was enforceable as a restrictive covenant under the principle of *Tulk* v. *Moxhay*.[61] He also concluded inconsistently that the right of reconveyance was not an interest in land. This conclusion got around the defendant's argument that the right of reconveyance was void as contrary to the rule against perpetuities. The defendant's unsuccessful argument at trial was that the right of reconveyance created a contingent interest in land that might not vest until after the period for vesting stipulated by the rule against perpetuities.

In the Court of Appeal, the lead judgment was written by Jessel M.R. He disagreed with the conclusion that the right of reconveyance was a restrictive covenant and agreed with the defendant's argument that the right of reconveyance was an interest in land that offended the rule against perpetuities. He stated:[62]

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[60] *Supra*, footnote 42.

[61] *Supra*, footnote 40.

[62] *Supra*, footnote 42, at pp. 580-581.

> Whether the rule [against perpetuities] applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the ... [defendant] can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in land. The right to call for a conveyance of land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give the other an interest in the land.

It may be noted that while Jessel M.R. differentiates between the option contract and the sale of land contract, nevertheless, he concludes that an option is not different in its legal nature from a contract for sale. Although in the case of an option more steps are involved by the purchaser, from the vendor's point of view, as in the case of contracts of sale, his or her interest may be taken away. This possibility creates an equitable estate or interest of land. Although Jessel M.R. did not explain how the vendor's interest may be taken away or articulate the underlying theory for the equitable estate, the theory is that upon signing the contract, the purchaser acquires an equitable interest in the land commensurate with his or her right to obtain legal title by an action for specific performance.[63] Jessel M.R. applied the same theory to options.

In *Frobisher Ltd.* v. *Canadian Pipelines & Petroleums Ltd.*,[64] the Supreme Court of Canada applied the *Gomm* case to hold that an option creates an interest in land. Judson J., one of the majority judges, stated:[65]

> Does an option to purchase land give rise to an equitable interest in land? The question has usually been considered in connection with conveyances and leases

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[63] *Rose* v. *Watson* (1864), 10 H.L.C. 672, 11 E.R. 1187; *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499 (Ch. D.); *Cornwall* v. *Henson*, [1899] 2 Ch. 710, at p. 714 (Ch. D.); *Kloepfer Wholesale Hardware* v. *Roy*, [1952] 2 S.C.R. 465, at p. 477, [1952] 3 D.L.R. 705, at pp. 712-713; *Howard* v. *Miller*, [1915] A.C. 318, at p. 326, (1914), 22 D.L.R. 75, at pp. 79-80 (P.C.).

[64] [1960] S.C.R. 126, (1959), 21 D.L.R. (2d) 497. Other cases where options have been held to be interests in land are: *Woodall* v. *Clifton, supra*, footnote 38; *Re McKee and National Trust Co. Ltd.* (1975), 56 D.L.R. (3d) 190, 7 O.R. (2d) 614 (Ont. C.A.); *Reference re Certain Titles to Land in Ontario* (1973), 35 D.L.R. (3d) 10, at p. 28, [1973] 2 O.R. 613, at p. 631 (Ont. C.A.); *Roberts* v. *Hanson* (1981), 120 D.L.R. (3d) 299, 15 Alta. L.R. (2d) 11 (Alta. C.A.); *Miller* v. *Ameri-cana Motel Ltd.*, [1983] 1 S.C.R. 229, (1983), 143 D.L.R. (3d) 1; *Garont Investments Ltd.* v. *Dodds* (1990), 74 O.R. (2d) 771 (G.D.) where the option was a simple right to repurchase.

[65] *Ibid.*, at pp. 169-170 (S.C.R.), 532 (D.L.R.). Judson J. relied on the authority of the *Gomm* case and noted that it had been accepted on this point by Duff J. in his dissenting judgment in *Davidson* v. *Norstrant* (1920), 61 S.C.R. 493, 57 D.L.R. 377.

> and the rule against perpetuities, and it has been held that the option is too remote if it can be exercised beyond the perpetuity period. The underlying theory is that the option to purchase land does create an equitable interest because it is specifically enforceable. There is a right to have the option held open and this is similar to the right that arises when a purchaser under a firm contract may call for a conveyance. In both cases there is an equitable interest but in the case of an option it is a contingent one, the contingency being the election to exercise the option.

As interests in land, options have frequently been declared void for contravening the law against perpetuities. (This case law, however, should be reconsidered in the light of modern perpetuities legislation that introduces the wait and see principle to allow an interest to vest should it be possible to do so.)[66] The modern case law has rejected a once held view that options can be upheld as contract rights even if they offend the rule against perpetuities. Rather, the law is that if the option offends the rule against perpetuities, then the option is unenforceable both as an interest in land and a contract right.[67]

As noted at the outset, rights of first refusal have not been viewed as immediately creating an interest in land. This view can be traced back to the case of *Manchester Ship Canal Company* v. *Manchester Racecourse Company*,[68] the facts of which have been outlined above. In that case, after concluding that the particular right of first refusal had been breached, the court went on to discuss how the right could be enforced. Without offering any analysis, the court stated that the right of first refusal did not create an interest in land, nor was it a restrictive covenant. However, the right could be enforced by injunction and the court referred to the famous case of *Lumley* v. *Wagner*.[69] In that case, the defendant Wagner was an opera singer under contract to perform for the plaintiff's opera company during the London opera season. Her contract precluded her from performing for others. In breach of her contract, she entered into a more lucrative contract to perform on the continent. The court ruled that although the defendant could not be ordered to perform her performance contract, she could be enjoined from performing for others. The others could be joined as necessary parties to the proceedings. In a similar way, a right of first refusal can be enforced by injunction. While the court

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[66] See, for example, in Ontario: Perpetuities Act, R.S.O. 1980, c. 374, s. 4. The Ontario statute provides in s. 13 a specific provision for options contained in leases. They are outside the rule against perpetuities provided that the option is exercisable only by the tenant or its successors and if it ceases to be exercisable at or before one year following the end of the lease.

[67] *Harris* v. *Minister of Natural Revenue*, [1966] S.C.R. 489, (1966), 57 D.L.R. (2d) 403; *Politzer* v. *Metropolitan Homes Ltd.*, [1976] 1 S.C.R. 363, (1975), 54 D.L.R. (3d) 376, not following on this point *South Eastern R. Co.* v. *Associated Portland Cement Manufacturers (1900) Ltd.*, [1910] 1 Ch. 12 (C.A.); *Kennedy and Shaw* v. *Beaucage Mines Ltd.*, *supra*, footnote 18.

[68] *Supra*, footnote 23.

[69] (1852), 1 De G.M. & G. 604, 42 E.R. 687 (L.C.).

will not force the vendor to activate the first right of refusal, the court will enjoin the vendor from selling without having first honoured the right of first refusal.

Manchester Ship Canal Company was followed by the Supreme Court of Canada in *Canadian Long Island Petroleums Ltd.* v. *Irving Industries (Irving Wire Products Division) Ltd.*,[70] the leading Canadian authority that rights of first refusal do not create an immediate interest in land. In this case, Sadim Oil and Gas (Sadim) and Irving Industries were joint venturers in a petroleum property. Their agreement provided that should Sadim receive a *bona fide* offer for its interest which it was willing to accept, then Sadim was to give Irving Industries notice of the offer and Irving Industries was to be given the right to match the offer and purchase Sadim's interest. As it happened, Sadim did not receive an offer but rather offered to sell its interest to Canadian Long Island Petroleum, a company that had actual notice of the right of first refusal. Canadian Long Island argued that it was not bound by the right of first refusal because the right offended the rule against perpetuities. The Supreme Court of Canada disagreed.

Martland J. delivered judgment of the court. He referred to *Gomm* as authority that options are interests in land. The key to this conclusion, said Martland J., was that immediately upon the granting of the option, the optionee can use specific performance to compel a conveyance of the land. This was not true for rights of first refusal which depended on an initial decision by the vendor, a decision that might never come. Martland J. stated:[71]

> Clause 13 [the right of first refusal] did not give to the respondents any present right to require in the future a conveyance of Sadim's undivided one-half interest in the land. It was not specifically enforceable at the time the agreement was executed. The respondents were not given any rights to take away Sadim's interest without its consent. Their right under that clause was a contractual right, *i.e.* the covenant of Sadim that if it was prepared to accept an offer to sell its interest, the respondents would then, and only then, have a 30-day option to purchase on the same terms. The contingency in this clause is resolved solely upon the decision of Sadim to sell.

Martland J. characterized the right of first refusal as a negative covenant that was personal to the parties. This promise not to convey without giving a right of refusal did not create an immediate interest in land and accordingly was not subject to the rule against perpetuities.[72] The right of first refusal, however, could be enforced by injunction.

Before considering the difficulties associated with the conclusion that rights of first refusal do not create an immediate interest in land, three points should be noted. The first point is that Martland J.'s judgment provides

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[70] [1975] 2 S.C.R. 715, (1974), 50 D.L.R. (3d) 265.

[71] *Ibid.*, at pp. 732 (S.C.R.), 277 (D.L.R.).

[72] *Ibid.*, at pp. 735-736 (S.C.R.), 280 (D.L.R.).

the explanation that is lacking in *Manchester Ship Canal Company*. Rights of first refusal do not create immediate interests in land because: (1) specific performance is not immediately available; and (2) although negative, rights of first refusal are personal covenants between the parties; that is, they are not restrictive covenants running with the land.

The second point is that the creation of an equitable interest in land is significant because a purchaser with notice of the equitable interest takes subject to that interest. For example, a purchaser under an agreement of purchase and sale will be able to obtain specific performance against the vendor and against a second purchaser who takes with notice of the first agreement.[73]

The third point is that rights of first refusal nevertheless have the potential of creating an interest in land. This point is reinforced by the Supreme Court of Canada's decision in *McFarland* v. *Hauser*,[74] in another judgment written by Martland J. In this case, Hauser owned land which he leased to McFarland. The lease contained a right of first refusal for McFarland should Hauser decide to sell the land. Hauser did decide to sell and he gave one Sutherland an option to buy. Sutherland was aware of McFarland's first right of refusal and nevertheless purported to exercise his option. Both McFarland and Sutherland registered *caveats* to protect their interests. There was no doubt that Sutherland acquired an equitable interest with his option but Martland J. concluded that what had begun as a contractual right for McFarland had developed into an equitable interest that had priority over the equitable interest of Sutherland. Martland J. stated:[75]

> ... while McFarland's right of purchase was, initially, a contractual right, it was converted into an option to purchase upon Hauser's having received an offer which he was prepared to accept. McFarland thereupon had an equitable interest in land.

Rights of first refusal have been treated as only potential interests in land in a number of cases that followed the *Canadian Long Island Petroleum* and the *McFarland* v. *Hauser* cases.[76]

That there are juridical difficulties with the conclusion that rights of first refusal do not create an immediate interest in land may be demonstrated by comparing this treatment of rights of first refusal with the courts' treatment of the more complex form of right of repurchase. In *City of Halifax* v.

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[73] *Sanderson* v. *Burdett* (1869), 16 Gr. 119 (Ont. Ch.), aff'd without dealing with this point (1871), 18 Gr. 417 (Ont. Ch. App.); *Bennett* v. *Stodgell*, *supra*, footnote 4, at pp. 56-57, per Meredith C.J.C.P.; *Smith* v. *Ernst* (1912), 3 D.L.R. 736, 2 W.W.R. 498 (Man. C.A.); *Savereux* v. *Tourangeau*, *supra*, footnote 5. This last case involved a right of first refusal that had been exercised.

[74] [1979] 1 S.C.R. 337, (1978), 88 D.L.R. (3d) 449.

[75] *Ibid.*, at pp. 357 (S.C.R.), 449 (D.L.R.).

[76] *Powers* v. *Walter* (1981), 124 D.L.R. (3d) 417, [1981] 5 W.W.R. 169 (Sask. C.A.); *Kopec* v. *Pyret*, *supra*, footnote 24.

Vaughan Construction Co. Ltd.,[77] City of Halifax owned a property which it wished developed. It sold the property and the deed contained a provision that should the purchaser not commence construction within a stipulated time, then the City had a right of repurchase. Before any construction took place, the lands were expropriated. The City sought a share of the compensation for the expropriation based on the argument that its right of repurchase gave it an interest in land.

Judson J. upheld the City's claim. He stated:[78]

> What is the juridical nature of this right of reconveyance? I do not think that it is distinguishable from what has been called a right of pre-emption or a right of first refusal.

Having characterized the right of repurchase as similar to a right of first refusal, Judson J. next stated that it created an interest in land. He relied on *Gomm* and distinguished *Manchester Ship Canal*. That the right of refusal in *Manchester Ship Canal* did not create an interest in land could be explained by the uncertainties of the agreement there in question and, in Judson J.'s view, *Manchester Ship Canal* should not be taken as a withdrawal from *Gomm*.

Again in *Weinblatt* v. *City of Kitchener*,[79] Judson J., for the Supreme Court of Canada, held that a right of repurchase created an interest in land. In this case, once again a city conveyed land with a provision that the purchaser build within a stipulated time.

It is unfortunate that *City of Halifax* and *City of Kitchener* are not referred to in *Canadian Long Island* which came later. The lines of authority arguably are inconsistent. To illustrate, in *City of Halifax*, the right of repurchase was not under the absolute control of the City. The City could repurchase only if the purchaser did not build in a timely fashion. The City had no immediate right to specific performance, and applying the logic of *Canadian Long Island* it would seem to follow that the City did not have an immediate equitable interest but only one that might arise. This in turn would suggest that the *City of Halifax* case was wrongly decided and a right of repurchase should be treated as creating only a potential and not an immediate interest in land.

Indeed, a right of repurchase was treated precisely in this fashion in the recent case of *Jain* v. *Nepean*.[80] The case involved a right of repurchase similar to that found in *City of Halifax* and *City of Kitchener*. To this right of repurchase the court applied the logic of the *Canadian Long Island*

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[77] [1961] S.C.R. 715, (1961), 30 D.L.R. (2d) 234.

[78] *Ibid.*, at pp. 720 (S.C.R.), 238 (D.L.R.).

[79] [1969] S.C.R. 157, (1968), 1 D.L.R. (3d) 241. See also: *Marcrob Estates Ltd.* v. *Servedio* (1977), 1 R.P.R. 344 (Ont. C.A.); *Indust.-Dev. Mall Ltd.* v. *Barbieri* (1978), 88 D.L.R. (3d) 156, 20 O.R. (2d) 488 (Ont. H.C.).

[80] (1989), 69 O.R. (2d) 353 (Ont. H.C.).

case and concluded that no immediate interest in land was created. It may, however, be respectfully submitted that the court in *Jain* misread the *City of Halifax* and *City of Kitchener* cases and did not note their inconsistency with the *Canadian Long Island* case. The court in *Jain* viewed the former cases as examples of rights of repurchase that had been converted into options. This reading would rationalize the cases but it is clear that the courts in *City of Halifax* and *City of Kitchener* viewed the rights of repurchase as creating immediate interests in land. In *City of Halifax*,[81] Judson J. stated: "My opinion is that when ... [the purchaser of the land] acquired the fee simple, it did so subject to an equitable interest in the land held by the city as a result of covenant 6 [the right of repurchase]." In other words, there was an immediate equitable interest. Thus, the inconsistency between the treatment of rights of repurchase and rights of first refusal remains and the *Jain* case does not provide a satisfactory answer.

But there are other arguments that support the *City of Halifax* case and its conclusion that rights of repurchase are interests in land. The thrust of these arguments is that rights of repurchase *and* rights of first refusal should be treated in the same manner as options.

The first argument is that while specific performance may not be available for rights of repurchase or for first rights of refusal, nevertheless, the fact that injunctions are available to enforce these rights establishes their proprietary nature. Like specific performance, an injunction is a proprietary remedy.[82] The availability of an injunction means that the owner of a right of repurchase or a right of first refusal cannot be ignored. Because of the outstanding rights of purchase, the ability of the vendor to deal with the property is restrained. If the vendor wishes to free itself from this restraint, then it must obtain a release from the owner of the right. The owner of the right may demand payment for the release. Viewed in this light, a complex right of repurchase or a right of first refusal may be seen as proprietary in nature.

Another argument is that the underlying premise that specific performance is not available for rights of first refusal is wrong. Megarry and Wade[83] in their leading text on land law argue:

> [A right of first refusal] ... differs from an ordinary option in that it entitles the holder to be offered the land on certain terms only if the owner decides to dispose of it. But this is merely an additional condition, and in principle it ought not to prevent the holder acquiring an immediate interest in the land, since here also he has secured to himself a specifically enforceable though contingent right to complete a sale.

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[81] *Supra*, footnote 77, at pp. 719 (S.C.R.), 237 (D.L.R.).

[82] G. Calabresi and A.D. Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral (1971-72), 85 Harv. L. Rev. 1089.

[83] Megarry and Wade, *op. cit.*, footnote 30, p. 605. See also, M. Albery, Note: *Murray* v. *Two Strokes Ltd.*, [1973] 1 W.L.R. 823 (1973), 89 Law Q. Rev. 462; H.W.R. Wade, Rights of Pre-Emption: Interests in Land? (1980), 96 Law Q. Rev. 488.

They go on to point out the odd consequences of treating rights of first refusal as only a potential interest in land. This treatment means that a right of first refusal ultimately is a contingent interest in land that ranks not from its creation but from the occurrence of the contingency. This, in turn, means that the conversion of the right into an option may come too late to allow any remedy for the breach of a right of first refusal, other than damages. And this means that a right of first refusal will be vulnerable to a subsequent purchaser, even one who has notice of the right.

The possible unfairness of these odd consequences is demonstrated by the case of *Pritchard* v. *Briggs*.[84] In this case, Major Lockwood conveyed lands to Riddett and also granted Riddett a right of first refusal for other lands. The right was exercisable during their joint lifetimes. The lands and the right were subsequently sold twice and came to be owned by Mr. and Mrs. Briggs. In the meantime, Major Lockwood leased the lands that were subject to the right of first refusal to Pritchard who was also granted an option to purchase. The option was exercisable after Major Lockwood's death. The next event was that Major Lockwood's committee decided to sell the leased lands in order to raise money for the elderly and declining major. The plan was to sell the lands under the first right of refusal to the Briggs on the theory that this right had priority over the option during Lockwood's lifetime. Before this contract could be completed, Major Lockwood died and Pritchard exercised his option. The trial judge concluded that the right of first refusal had priority because it was an equitable interest in land. The trial judgment, however, was reversed on appeal. The English Court of Appeal permitted Pritchard to enforce his option notwithstanding that at all material times Pritchard was aware that a right of first refusal had previously been granted and registered against the title of the property. The court followed the line of reasoning that since the exercise of a right of first refusal depends upon the will of the vendor, it is different from an option to purchase and does not create an immediate interest in land. This meant that the option had priority because at the time of its creation as an interest in land there was no competing interest in land.

Spurred by this unfortunate result, the inductive argument may be added to the other arguments above. If rights of first refusal and complex rights of repurchase may be treated like property then they should be classified as property. In this regard, it may be noted that the proprietary nature of these rights has been recognized under expropriation legislation[85] and at least to the extent of being sufficient to allow the registration of

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[84] *Supra*, footnote 42. See also, *Murray* v. *Two Strokes Ltd.*, [1973] 1 W.L.R. 823, [1973] 3 All E.R. 357 (Ch. D.); *Municipal Savings and Loan Corporation* v. *Oswenda Investments Ltd.* (1989), 69 O.R. (2d) 521 (Ont. Dist. Ct.).

[85] *Harris* v. *Minister of Lands and Forests* (1975), 10 L.C.R. 243 (N.S.C.A.).

a *caveat*, caution or certificate of pending litigation.[86] In British Columbia, rights of first refusal are made equitable interests in land by statute.[87]

Further, rights of first refusal and complex rights of repurchase closely resemble options in their structure and commercial function and arguably these rights merit the same treatment in law. Professor G.V. La Forest set out the policy arguments for treating options as interests in law. The same policy arguments seem equally apt to rights of first refusal and complex rights of repurchase. He stated:[88]

> There are, it is submitted, clear advantages in holding the option an interest in land, whatever the theoretical differences between it and the ordinary agreement of sale. The optionor having paid valuable consideration acceptable to the optionee, his rights are entitled to protection. True, the law gives him an action for breach of contract, and, if the optionee has not disposed of the land, the contract may be specifically enforced; and he may also have an action against a purchaser who induced the breach. But the fact remains that what the optionor wants and has contracted for is the land, not damages. Again, holding an option to be an interest in land makes the rights acquired under it assignable without recourse to the complicated law respecting the assignment of choses in action. It also brings it within the operation of the Land Registry Acts, thus leading to a clearer determination of priorities as between the optionee and persons subsequently interested in the land. One disadvantage is that such an interest might tend to tie up land and remove it from commerce, but this tendency is limited, as in the case of other future interests, by the rule against perpetuities.

The argument against the underlying theory that precludes rights of first refusal from being treated as immediate interests in land may be pressed further. The underlying theory ties an interest in land to the availability of specific performance, but as already noted above, Megarry and Wade argued that specific performance should be available for rights of first refusal. An even more fundamental challenge may be made since it is arguable that this whole theory is suspect. In an article about equitable relief from forfeiture, Gummow[89] points out that since specific performance is a discretionary remedy, it is only after a trial that its availability can be absolutely determined. Thus, there is always uncertainty in basing an interest in land on the availability of specific performance. It follows from Gummow's analysis that the distinction between options and rights of first refusal as interest in land becomes tenuous since while specific performance may not be initially available for rights of first refusal, it is only with hindsight that it truly may be said that specific performance is available for options.

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[86] *Powers* v. *Walter*, *supra*, footnote 76; *Re Mactan Holdings Ltd. and 431736 Ontario Ltd.* (1980), 118 D.L.R. (3d) 91, 31 O.R. (2d) 37 (Ont. H.C.).

[87] Property Law Act, R.S.B.C. 1979, c. 340, s. 9.

[88] G.V. La Forest, Real Property, Options, Rights of Preemption, Equitable Interest in Land, Personal Contractual Obligation, Rule Against Perpetuities: Comment on *Frobisher Ltd.* v. *Canadian Pipelines & Petroleum Ltd.* [1960] S.C.R. 126 (1960), 38 Can. Bar Rev. 595, at p. 598.

[89] W.M.C. Gummow, Forfeiture and Certainty: The High Court and the House of Lords, in Essays in Equity (1985), Chapter 2, pp. 35-37.

If these arguments are correct, then perhaps the tide is turned and it is the *Canadian Long Island Petroleum* case that is incorrect and rights of first refusal should join options and rights of repurchase as immediate interests in land.

Conclusion

Whatever the merits of the above arguments, the *Canadian Long Island Petroleum* case establishes the current law. Thus, promisees of rights of first refusal and, perhaps, given the analysis used in *Jain*, promisees of complex rights of repurchase, will not acquire an interest in land until the owner of the land triggers the right. Although a promisee of a right of first refusal may be able to enjoin an imminent sale to a third party and thereby coerce the promisor to honour the right, the promisee of a right of first refusal (unlike the promisee of an option) will not have the protection of an interest in land. This means that if, before an injunction is obtained, the sale to the third party is completed, the promisee of the right of first refusal will be left only with a claim for damages, even if the third party had notice of the right of first refusal. The claim for damages will only be against the vendor unless the promisee can establish a claim for inducing breach of contract against the third party.

In *Bennett* v. *Stodgell*,[90] despite an option to sell to the plaintiff, a vendor sold land to third parties who were aware of the plaintiff's claim. The third parties sold to a *bona fide* purchaser for value without notice. The Court of Appeal rejected the plaintiff's claim for damages against the third parties because the third parties had no contractual relationship with the plaintiff. It may be noted that, given that the plaintiff had an interest in land, he would have been able to obtain specific performance against the third parties had they not conveyed to the innocent fourth party. In cases involving a right of first refusal, where there is no immediate interest in land, the plaintiff may have no remedy at all against a third party.

The absence of an interest in land may also mean that the promisee of a right of first refusal may not be able to register notice of his or her right against the title of the land. The ability to register will depend

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[90] *Supra*, footnote 4. See also, *Lavery* v. *Pursell* (1888), 39 Ch. D. 508 (Ch. D.); *Carter* v. *Irving Oil Co. Ltd.*, [1952] 4 D.L.R. 128 (N.S.S.C.); *Pearson* v. *Skinner School Bus Lines (St. Thomas) Ltd.*, [1968] 2 O.R. (2d) 329 (Ont. H.C.). In the *Bennett* case, the court rejected the argument that the fusion of law and equity brought about by the Judicature Act allowed a claim for damages. For a discussion of the fusion issue, see: P.M. Perell, A Legal History of the Fusion of Law and Equity in the Supreme Court of Ontario (1988), 9 Adv. Q. 472; J.M. MacIntyre, Equity—Damages in Place of Specific Performance—More Confusion About Fusion (1969), 47 Can. Bar Rev. 644.

on the statutory requirements of the particular jurisdiction's land registry system.[91]

Thus, while in many respects options, rights of repurchase and rights of first refusal are treated similarly, there are major differences in their enforcement rights. The differences turn on an ancient theory about the possibility of specific performance creating an equitable interest in land. Absent statutory intervention, for the law to change, the Supreme Court of Canada must reconsider the authority of *Canadian Long Island Petroleum* and its decisions in *City of Halifax* and *City of Kitchener*. Given the inconsistencies between these cases and the above arguments favouring treating all these rights as interests in land, it may be respectfully submitted that the Supreme Court of Canada ought to reconsider the law on options, rights of repurchase and rights of first refusal.

[91] For example, the issue of registrability under the English legislation and whether registrability meant that a right of first refusal should be treated as an interest in land arose in *Pritchard* v. *Briggs*, *supra*, footnote 42.