ONE RULE, LESS GOLF: CLUBLINK AND THE RULE AGAINST PERPETUITIES

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The article surveys the rule against perpetuities in Canada and its recent application by the Court of Appeal for Ontario in Ottawa (City) v ClubLink Corporation ULC. The application of the rule across Canada is a complex patchwork as the traditional common law rule has been modified or abolished by statute in many jurisdictions. The article summarizes the approaches that have been taken in the various Canadian provinces. The article concludes that the decision in ClubLink provides helpful clarity on determining whether an interest in land has been created and when the rule against perpetuities applies.

Cet article porte sur la règle d'interdiction de perpétuités au Canada et sur sa récente application par la Cour d'appel de l'Ontario dans Ottawa (City) v. ClubLink Corporation ULC. L'application de cette règle dans l'ensemble du Canada constitue une mosaïque complexe, la règle de common law traditionnelle ayant été modifiée ou abolie légalement dans de nombreux territoires de compétence. L'auteur de l'article résume les positions adoptées par différentes provinces, et conclut que la décision ClubLink donne des précisions utiles pour ce qui est de déterminer si un intérêt foncier est présent et dans quels cas la règle d'interdiction de perpétuités s'applique.

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The stubborn continued existence of arcane legal doctrines is, depending on who you ask, one of the great joys or banes of practicing law. Everyone loves the lawyer at a dinner party that interjects into a conversation about the aimless and unnecessary Season 2 of *Tiger King* by explaining the application of the rule in *Rylands v Fletcher* if one of the big cats were to escape and maul a neighbour, right?

Among its vexing brethren, there is perhaps no relic that is more infamous than the rule against perpetuities. It has been described as "arcane in origin, difficult to understand and apply, unintuitive, and seemingly random in its effect."[1]

A recent decision of the Court of Appeal for Ontario in *Ottawa (City) v ClubLink Corporation ULC*,[2] involving an attempt to turn the Kanata Golf and Country Club into a residential subdivision confirms that the rule remains alive and well in Ontario and provides helpful clarity on determining whether an interest in land has been created and when the rule applies.

1. Common Law Rule Against Perpetuities

Put most simply, the common law rule against perpetuities provides that if an interest in land may not vest absolutely in the recipient within the duration of a "life in being" (i.e. someone that is alive at the time the contingent interest in land is created) plus 21 years, it is void.

The rule was developed under English law in the 15th century for the purpose of restricting a person's ability to control property after their death. Or, put more colourfully, to prevent "the grasp of the dead hand to be kept on the hand of the living."[3] The rule has a public policy underpinning as tying up property with restrictions on its use and disposition for generations prevents it from being used for commerce and development (and taxation).

Under the traditional common law rule, the contingent interest is void *ab initio* (i.e. right away—the unnecessary use of Latin is another favourite in the lawyer's bag of tricks at dinner parties) if it is possible that it will not vest during the life-in-being plus 21 years period, regardless of whether it in fact vests during that period.

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1 Peter A Appel, "The Embarrassing Rule Against Perpetuities" (2004) 54:2 J Leg Educ 264 at 264.

2 2021 ONCA 847 [*ClubLink ONCA*]; leave to appeal to SCC refused, 40036 (4 August 2022).

3 *Canadian Long Island Petroleums Ltd v Irving Industries Ltd*, [1975] 2 SCR 715 at 727, 50 DLR (3d) 265.

For example, if a person (let's call him Joe) provides in a will that a piece of land is to be left to a spouse (let's call him John) for his life, then to John's children for their lives (let's say John has two children, Carole and Howard) and upon the death of the last child, to John's grandchildren, the contingent interest of John's grandchildren would offend the traditional rule and be void.

Why? John could have another child after Joe's death (thus not a life in being at the time the contingent interest in land is created) that outlives Carole and Howard by more than 21 years. It doesn't matter whether John actually has another child or not, or whether that child actually lives 21 years longer than Carole and Howard. The land will revert to Joe's estate after the death of John's last child.

2. Modern Application of the Rule in Canada

To soften the harshness of the common law rule and avoid the theoretical exercise of having to tease out every possible life, death, and procreation outcome for everyone involved (a task that frequently induces cold sweats in first-year law students), the common law rule has been altered or abolished by statute in many jurisdictions.

In Ontario, a "wait and see" approach has been imposed. Simply put, the contingent interest remains valid until it cannot vest within the life-in-being plus 21 years period.[4] In the case of Joe's will, the interest of John's grandchildren in the land will remain presumptively valid unless and until John has another child that outlives Carole and Howard by more than 21 years. If that eventuality does not come to pass, then John's grandchildren will inherit the land as intended.

Unfortunately, the various Canadian common law provinces and territories have not followed a uniform approach and the application of the rule against perpetuities in Canada is a complex patchwork:

1. Alberta,[5] Yukon,[6] Northwest Territories[7] and Nunavut[8] follow a similar "wait and see" approach as Ontario;

2. British Columbia[9] includes both the "wait and see" approach as well as the option to define a maximum vesting period of 80 years;

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4 *Perpetuities Act*, RSO 1990, c P.9, s 4(1).
5 *Perpetuities Act*, RSA 2000, c P-5, s 4(1).
6 *Perpetuities Act*, RSY 2002, c 168, s 4(1).
7 *Perpetuities Act*, RSNWT 1988, c P-3, s 5(1).
8 *Perpetuities Act*, RSNWT (Nu) 1988, c P-3, s 5(1).
9 *Perpetuity Act*, RSBC 1996, c 358, ss 7(1), 9(1).

3. New Brunswick and Newfoundland & Labrador follow the traditional common law rule;

4. Prince Edward Island[10] follows the traditional common law rule but has extended the period to a life-in-being plus 60 years;

5. Manitoba,[11] Nova Scotia[12] and Saskatchewan[13] have abolished the rule entirely.

In 2012, the Uniform Law Conference of Canada recommended that the rule be abolished across Canada, however no other jurisdictions have followed suit since that time.[14]

3. *ClubLink*: Use It as a Golf Course or Lose It

ClubLink Corporation ULC ("ClubLink") has owned and operated the Kanata Golf and Country Club for over 24 years since it was acquired in 1997 from Campeau Corporation ("Campeau"). The property is subject to several land development agreements that had been entered into between Campeau and the City of Kanata in the 1980s and were assumed by ClubLink and each registered on title. One of the agreements (the "1981 Agreement") provided, among other things, that:

1. 40% of the area of the overall development would be reserved for recreation and natural environmental purposes including an 18-hole golf course.

2. ClubLink would operate a golf course on the land in perpetuity.

3. ClubLink could sell the golf course if the new owners agreed to operate a golf course on the land in perpetuity on the same terms.

4. If ClubLink received an offer to buy the golf course, the City had a right of first refusal to buy it on the same terms and conditions.

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10 *Perpetuities Act*, RSPEI 1988, c P-3, s 1.

11 *The Perpetuities and Accumulations Act*, CCSM c P33, s 3.

12 *Perpetuities Act*, SNS 2011, c 42, s 3.

13 *The Trustee Act, 2009*, SS 2009, c T-23.01, s 58.

14 Uniform Trustee Act: Final Report of the Working Group (Paper delivered at the Uniform Law Conference of Canada: Civil Section, Whitehorse, August 2012), <www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2012/Uniform-Trustee-Act-Final-Report.pdf> at para 34.

5. If ClubLink wanted to discontinue operating the golf course, it would be required to convey the golf course to the City at no cost.

6. If the City accepted the conveyance, it would be required to operate a golf course on the land. If it ceased to do so, it would be required to convey the property back to ClubLink at no cost.

A later agreement (the "1988 Agreement") confirmed that the 1981 Agreement would run with and bind the golf course land. The City of Kanata amalgamated into the City of Ottawa in 2001.

Due to declining membership, ClubLink started exploring the possibility of developing a 1,480-home residential subdivision on the golf course lands. In October 2019, ClubLink submitted an application for the associated municipal planning approvals. The City of Ottawa brought an application seeking to block the approvals and requesting, among other things, a declaration that that ClubLink's obligations under the 1981 Agreement remained valid and enforceable.

4. Application Decision: Rule Against Perpetuities Does Not Apply

The application judge allowed the application and held that ClubLink's obligations under the 1981 Agreement remained valid and enforceable. The application judge relied on the fact that:

1. The parties did not intend to create an interest in land because they never expected the conveyances to materialize. The parties expected that the owner would continue to use the lands for a golf course thus the land would never be conveyed back to the City.

2. The City did not have any control over whether the conveyance would be triggered, it being solely up to the owner to decide whether to keep operating a golf course on the property or not.

On these bases, the application judge held that the 1981 Agreement did not create an interest in land, it was merely a contractual right. Thus the rule against perpetuities did not apply, and the provision requiring ClubLink to convey the golf course lands to the City at no cost if they ceased to operate a golf course on them continued to be valid and enforceable.[15]

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15 *City of Ottawa v Clublink Corporation ULC*, 2021 ONSC 1298.

5. Court of Appeal: Rule Against Perpetuities Applies

The Court of Appeal for Ontario overturned the application judge's decision. The Court of Appeal held that it did not matter:

1. whether the parties expected the interest in land to materialize; or

2. that the City had no control over the triggering of the conveyance.[16]

On the first point, the rule against perpetuities applies to contingent interests in land. The Court of Appeal noted that it is the nature of all contingent interests in land that they may never materialize.[17]

On the second point, using the demonstrative example of Joe and John above, the Court of Appeal decided that the fact that John's grandchildren have no control over the timing of Carole and Howard's death (absent a murder-for-hire plot of course) does not impact the application of the rule against perpetuities.

The Court of Appeal noted three precedents of "use it as intended or lose it" covenants requiring owners to build on a property within a specified period or reconvey the property to the municipal authorities[18] that were each held to constitute a contingent interest in land for the municipal authorities:

1. *City of Halifax v Vaughan Construction Company Limited:* The City of Halifax owned land on which it "wished to see erected a modern tax producing building". The City sold the land to Maritime Telegraph and Telephone Company Land ("Maritime Telegraph") in 1951 on certain conditions, including that a first class office building be constructed on the property as soon as practicable. If the owner decided not to proceed with construction, it was required to reconvey the land back to the City of Halifax. In 1954, the land was purchased and the building covenants were assumed by Vaughan Construction Company Limited ("Vaughan"). In 1955, the land was expropriated by the Province of Nova Scotia and a dispute arose as to whether Vaughan or the City of Halifax was entitled to the compensation that had been paid by the province. The Supreme Court of Canada held that both Vaughan and the City of Halifax had an interest in the land. Vaughan held the fee simple and the City held an equitable

16 *ClubLink ONCA*, *supra* note 2 at para 33.

17 *Ibid*.

18 *Ibid* at para 35.

interest—the right to enforce a reconveyance if the building covenant was not satisfied. The reconveyance right did not offend the rule against perpetuities because the City's right would vest if the construction did not proceed as soon as practicable, or within a reasonable time. The Court did not explicitly say so, but a necessary implication of holding that the rule against perpetuities did not apply is that a delay of 21 years before commencing construction would never have been reasonable. The Court apportioned the compensation equally between Vaughan and the City of Halifax, after deducting the purchase price that had originally been paid by Maritime Telegraph to the City.[19]

2. *Weinblatt v Kitchener (City)*: The City of Kitchener sold a parcel of land to Hart in 1960 subject to an agreement that Hart commence construction on a building substantially in compliance with the architectural plan that had been submitted (which called for a seven-story building) within one year or else it had to reconvey the land to the City. The land was subsequently conveyed by Hart to Noy Construction in 1960 and to Weinblatt in 1961. The purchasers had full knowledge of the building covenant. Noy Construction and Weinblatt each applied for building permits for a building that was not in compliance with the original plan (one called for only a two-story building), which were rejected by the City. By the end of 1962, Weinblatt had not commenced construction and the City brought an application seeking a reconveyance. The Supreme Court of Canada held that the reconveyance right was a contingent interest in land which did not offend the rule against perpetuities because the interest could not vest outside the life-in-being plus 21 year period—it either vested, or not, within one year.[20]

3. *Jain v Nepean (City)*: The City of Nepean sold a parcel of land to Jain in 1986 subject to a covenant that construction of a building of a stipulated minimum size would start within 12 months and be completed within 24 months, failing which the City could require Jain to reconvey the property back to the City for the original purchase price less 20%. Jain obtained a mortgage from Standard Trust, which had full knowledge of the building covenant. Jain failed to even commence construction within 24 months and the City brought an application seeking a reconveyance. The

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19 *City of Halifax v Vaughan Construction Company Limited*, [1961] SCR 715, 30 DLR (2d) 234.

20 *Weinblatt v Kitchener (City)*, [1969] SCR 157, 1 DLR (3d) 241.

> Court of Appeal for Ontario held that the City was entitled to the reconveyance free and clear of the Standard Trust mortgage.[21]

The Court of Appeal noted in *ClubLink* that in each of the above cases, the parties did not expect the conveyance to materialize—they expected that the owners would build on the property—and the municipal authorities did not have control over whether the owners in fact built on the property or not.

The Court of Appeal held that the contractual provisions in ClubLink's case were indistinguishable in substance and effect from these other "use it as intended or lose it" covenants. The Court of Appeal noted that the following indicated the parties intended to create an interest in land:

1. the 1981 Agreement used clear conveyance language;

2. the 1981 Agreement required that the agreement be registered on title to the property; and

3. the 1988 Agreement provided that the 1981 Agreement would run with and bind the lands.[22]

The Court of Appeal also noted that the provisions fell squarely within the public policy purpose of the rule against perpetuities: they were an attempt by the City to restrict the use of the golf course lands in perpetuity.[23]

Since the City's right to a conveyance of the land if it ceased to be used as a golf course did not in fact vest within 21 years of being granted, it violated the rule against perpetuities and was now void.[24] ClubLink's right to a re-conveyance of the land if the City did not use it for a golf course was similarly void.[25]

6. *ClubLink* Provides Welcome Clarity

In addition to confirming that the rule against perpetuities continues to apply in Ontario, the decision provides welcome clarity that when determining whether an interest in land has been created and the rule against perpetuities has thus been engaged, the regular contractual

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21 *Jain v. Nepean (City)*, 9 OR (3d) 11, 93 DLR (4th) 641 (CA).

22 *ClubLink ONCA*, *supra* note 2 at para 62.

23 *Ibid* at para 61. By comparison, the three "use it as intended or lose it" covenants from the previous cases noted above did not restrict the use of the land indefinitely, they either were triggered or not within a certain period of time.

24 *Ibid* at para 65.

25 *Ibid*.

interpretation principles enunciated by the Supreme Court of Canada in *Sattva Capital Corp v Creston Moly Corp* apply.[26] Namely, the relevant contract is read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[27] Additional requirements are not superimposed in these circumstances that the Court consider whether the interest in land was likely to materialize or whether the contingent interest holder has any control over whether it materializes.

26 2014 SCC 53.

27 *Ibid* at para 47.