

## Restrictive Covenants

# Why courts don't like to interfere with restrictive covenants

By **Ray Mikkola**



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(December 7, 2018, 9:30 AM EST) -- A restrictive covenant may prohibit the uses to which land may be put or may prohibit any building on land. When properly drafted, the covenant will bind the owner and the owner's successor in title.

But the covenant may be modified or discharged by an order of the court, pursuant to s. 61 of the *Conveyancing and Law of Property Act*, RSO 1990 c. C. 34 (CLPA) which provides as follows: "61(1) Where there is annexed to land a condition or covenant that the land or a specified part of it is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed the land, any such condition or covenant may be modified or discharged by order of the Superior Court of Justice."

In *Icona Hospitality Inc. v. 2748355 Canada Inc. et al.* 2018 ONSC 4239, the Superior Court of Justice gave some direction as to when relief under s. 61 of the CLPA may be available.

Briefly put, the facts in *Icona* are as follows: the applicant was owner of the lands which were subject to a 2005 restrictive covenant prohibiting the use of land for any purpose other than as a hotel. The covenant was for a term of 40 years, but 2748355 Canada Inc. could not unreasonably withhold its consent to a waiver or modification or cancellation of the covenant after April 29, 2025. *Icona Hospitality Inc.* asked the court to discharge the covenant as it planned to develop the property for non-hotel uses, which was contemplated by the zoning bylaw of the municipality.

The court refused to modify or discharge the covenant as it was not satisfied that the covenant was either spent or otherwise of no value such that the continued enforcement of it by 2748355 Canada Inc. would be vexatious. The court reviewed the law generally and held that the circumstances must have significantly changed from those prevailing at the time of the granting of the covenant in order to allow the court to conclude that the purpose of the covenant had been eliminated.

The court also confirmed that determining the value of the continuation of the covenant in terms of money alone was not definitive. Finally, the common law establishing that the court should seldom modify or discharge a covenant unless there is no prejudicial effect to the benefiting party was confirmed.

The decision is based on the circumstances and pleading before the court, so a number of interesting issues were either not addressed or were addressed only in passing. For example:

- A restrictive covenant must be negative in nature. Positive covenants do not run with title. There may be very little difference between a covenant compelling a servient owner to build a hotel, and one which prohibits any development on servient land that is not a hotel. If the covenant had been found by the court to be positive in nature, the court would no doubt have held that the covenant is unenforceable, at least against future owners.

- In addition to s. 61 of the CLPA, section 119 (5) of the *Land Titles Act* (LTA) allows a court to modify a covenant if it is satisfied that the modification “will be beneficial to the persons principally interested” in its enforcement.
- Both s. 119(1) of the LTA and s. 61 of the CLPA permits a covenant to be registered on title to the effect that the land “*is to be* or is not to be used in a particular manner” (emphasis added). The authority to require an apparently positive covenant seems to be inconsistent with the established common law respecting restrictive covenants. However, ss. 119(6) of the LTA confirms that merely registering a covenant does not thereby make the covenant run with land.
- One of the purposes of the restrictive covenant in *Icona* was to prevent the servient tenement landowner from competing with 2748355 Canada Inc. when, at some time in the future, 2748355 Canada Inc. decided to develop its land for residential purposes. *Quare* whether a bona fide use of a restrictive covenant would be to thwart competition, despite public policy and the provisions of the *Competition Act*.

This decision and others before it make it clear that a court should be careful not to interfere with properly crafted restrictive covenants. Such covenants are typically carefully negotiated, may have been the subject of a payment or may have been taken into account in negotiating the purchase price of one or both of the servient and dominant lands. Neither the CLPA nor the LTA authorizes a court to award compensation where a covenant is discharged or modified.

Clear evidence of the fact that the covenant is spent, is of no use or is so unsuitable as to be of no value will be required to modify or discharge a covenant. It may be left to further judicial consideration as to the interplay of the LTA and the CLPA, and the enforceability of a restrictive covenant which may be manifestly anti-competitive in nature.

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