**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Municipal Franchises Act,* R.S.O. 1990, c. M.55, as amended;

**AND IN THE MATTER OF** an application by Enbridge Gas Inc. for an Order approving the terms and conditions upon which, and the period for which, Enbridge Gas Inc. will be given the right to construct and operate works for the distribution, transmission, and storage of natural gas and the right to extend and add to the works in the County of Essex;

**AND IN THE MATTER OF** an Application by Enbridge Gas Inc. for an Order directing and declaring that the assent of the municipal electors of the County of Essex to the franchise agreement is not necessary.

# COMPENDIUM OF THE COUNTY OF ESSEX FOR REFERENCE DURING ORAL ARGUMENT

Dated: February 7, 2023

**DAVID M. SUNDIN**
**LSO # 60296N**
Office of the County Solicitor
360 Fairview Avenue West
Essex, Ontario N8M 1Y6
(T) 519-776-6441 ext. 1345
(F) 519-776-4455
(E) dsundin@countyofessex.ca

LAWYER FOR THE INTERVENOR,
THE CORPORATION OF THE COUNTY OF ESSEX

# INDEX

Compendium of the County of Essex
Filed: 2023-02-07
OEB File No.: EB-2022-0207
Page 3 of 35

Ontario

Français

# Perpetuities Act

R.S.O. 1990, CHAPTER P.9

**Consolidation Period:** From April 30, 2018 to the e-Laws currency date.

Last amendment: 2017, c. 14, Sched. 4, s. 27.

Legislative History: [ + ]

**Definitions**
**1** In this Act,

"court" means the Superior Court of Justice; ("tribunal")

"in being" means living or conceived; ("en existence")

"limitation" includes any provision whereby property or any interest in property, or any right, power or authority over property, is disposed of, created or conferred. ("délimitation") R.S.O. 1990, c. P.9, s. 1; 2006, c. 19, Sched. C, s. 1 (1).

**Section Amendments with date in force (d/m/y)** [ + ]

**Rule against perpetuities to continue; saving**
**2** Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect. R.S.O. 1990, c. P.9, s. 2.

**Possibility of vesting beyond period**
**3** No limitation creating a contingent interest in property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period. R.S.O. 1990, c. P.9, s. 3.

**Presumption of validity and "Wait and See"**
**4** (1) Every contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish,

(a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; or

(b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

**General power of appointment**
(2) A limitation conferring a general power of appointment, which but for this section would have been void on the ground that it might become exercisable beyond the perpetuity period, is presumptively valid until such time, if any, as it becomes established by actual events that the power cannot be exercised within the perpetuity period.

Compendium of the County of Essex
Filed: 2023-02-07
OEB File No.: EB-2022-0207
Page 4 of 35

**Special power of appointment, etc.**

(3) A limitation conferring any power, option or other right, other than a general power of appointment, which but for this section would have been void on the ground that it might be exercised beyond the perpetuity period, is presumptively valid, and shall be declared or treated as void for remoteness only if, and so far as, the right is not fully exercised within the perpetuity period. R.S.O. 1990, c. P.9, s. 4.

**Applications to determine validity**

**5** (1) An executor or a trustee of any property or any person interested under, or on the validity or invalidity of, an interest in such property may at any time apply to the court for a declaration as to the validity or invalidity with respect to the rule against perpetuities of an interest in that property, and the court may on such application make an order as to validity or invalidity of an interest based on the facts existing and the events that have occurred at the time of the application and having regard to sections 8 and 9.

**Interim income**

(2) Pending the treatment or declaration of a presumptively valid interest within the meaning of subsection 4 (1) as valid or invalid, the income arising from such interest and not otherwise disposed of shall be treated as income arising from a valid contingent interest, and any uncertainty whether the limitation will ultimately prove to be void for remoteness shall be disregarded. R.S.O. 1990, c. P.9, s. 5.

**Measurement of perpetuity period**

**6** (1) Except as provided in section 9, subsection 13 (3) and subsections 15 (2) and (3), the perpetuity period shall be measured in the same way as if this Act had not been passed, but, in measuring that period by including a life in being when the interest was created, no life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur.

**Idem**

(2) A life that is a relevant factor in limiting the time for vesting of any part of a gift to a class shall be a relevant life in relation to the entire class.

**Idem**

(3) Where there is no life satisfying the conditions of subsection (1), the perpetuity period is twenty-one years. R.S.O. 1990, c. P.9, s. 6.

**Presumptions and evidence as to future parenthood**

**7** (1) Where, in any proceeding respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then,

(a) it shall be presumed,

(i) that a male is able to have a child at the age of fourteen years or over, but not under that age, and

(ii) that a female is able to have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but

(b) in the case of a living person, evidence may be given to show that he or she will or will not be able to have a child at the time in question.

**Idem**

(2) Subject to subsection (3), where any question is decided in relation to a limitation of interest by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question that arises concerning the rule against perpetuities in relation to the same limitation or interest despite the fact that the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been erroneous.

**Idem**

(3) Where a question is decided by treating a person as unable to have a child at a particular time and such person subsequently has a child or children at that time, the court may make such order as it sees fit to protect the right that such child or children would have had in the property concerned as if such question had not been decided and as if such child or children would, apart from such decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act.

**Idem**

(4) The possibility that a person may at any time have a child by adoption or by means other than by procreating or giving birth to a child shall not be considered in deciding any question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by such means, then subsection (3) applies to such child or children. R.S.O. 1990, c. P.9, s. 7.

**Reduction of age**

**8** (1) Where a limitation creates an interest in property by reference to the attainment by any person or persons of a specified age exceeding twenty-one years, and actual events existing at the time the interest was created or at any subsequent time establish,

(a) that the interest, would, but for this section, be void as incapable of vesting within the perpetuity period; but

(b) that it would not be void if the specified age had been twenty-one years,

the limitation shall be read as if, instead of referring to the age specified, it had referred to the age nearest the age specified that would, if specified instead, have prevented the interest from being so void.

**Exclusion of class members to avoid remoteness**

(2) Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents subsection (1) from operating to save a limitation creating an interest in favour of a class of persons from being void for remoteness, such persons shall be excluded from the class for all purposes of the limitation, and the limitation takes effect accordingly.

**Idem**

(3) Where a limitation creates an interest in favour of a class to which subsection (2) does not apply and actual events at the time of the creation of the interest or at any subsequent time establish that, but for this subsection, the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the limitation to the class to be void for remoteness, such persons shall be excluded from the class for all purposes of the limitation, and the limitation takes effect accordingly.

**Interpretation**

(4) For the purposes of this section, a person shall be treated as a member of a class if in the person's case all the conditions identifying a member of the class are satisfied, and a person shall be treated as a potential member if in the person's case some only of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied. R.S.O. 1990, c. P.9, s. 8.

**Spouses**

**9** (1) Where any disposition is made in favour of any spouse of a person in being at the commencement of the perpetuity period, or where a limitation creates an interest in property by reference to the time of the death of the survivor of a person in being at the commencement of the perpetuity period and any spouse of that person, for the purpose of validating any such disposition or limitation, that but for this section would be void as offending the rule against perpetuities as modified by this Act, the spouse of such person shall be deemed to be a life in being at the commencement of the perpetuity period even though such spouse was not born until after that time. R.S.O. 1990, c. P.9, s. 9 (1); 1999, c. 6, s. 54 (1); 2005, c. 5, s. 57 (1).

**Definition**

(2) For the purposes of subsection (1),

"spouse" means a person,

(a) to whom the person is married, or

(b) with whom the person is living in a conjugal relationship outside marriage, if the two persons,

(i) have cohabited for at least a year,

(ii) are together the parents of a child, or

(iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*. R.S.O. 1990, c. P.9, s. 9 (2); 1999, c. 6, s. 54 (2); 2005, c. 5. s. 57 (2, 3).

**Section Amendments with date in force (d/m/y)** [+]

**Saving**

**10** (1) A limitation that, if it stood alone, would be valid under the rule against perpetuities is not invalidated by reason only that it is preceded by one or more limitations that are invalid under the rule against perpetuities, whether or not such limitation expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent upon, any such invalid limitation.

**Acceleration of expectant interests**

(2) Where a limitation is invalid under the rule against perpetuities, any subsequent interest that, if it stood alone, would be valid shall not be prevented from being accelerated by reason only of the invalidity of the prior interest. R.S.O. 1990, c. P.9, s. 10.

**Powers of appointment**

**11** (1) For the purpose of the rule against perpetuities, a power of appointment shall be treated as a special power unless,

(a) in the instrument creating the power it is expressed to be exercisable by one person only; and

(b) it could, at all times during its currency when that person is of full age and capacity, be exercised by the person so as immediately to transfer to the person the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.

**Idem**

(2) A power that satisfies the conditions of clauses (1) (a) and (b) shall, for the purpose of the rule against perpetuities, be treated as a general power.

**Idem**

(3) For the purpose of determining whether an appointment made under a power of appointment exercisable by will only is void for remoteness, the power shall be treated as a general power where it would have been so treated if exercisable by deed. R.S.O. 1990, c. P.9, s. 11.

**Administrative powers of trustees**

**12** (1) The rule against perpetuities does not invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property, or to do any other act in the administration (as opposed to the distribution) of any property including, where authorized, payment to trustees or other persons of reasonable remuneration for their services.

**Application of subs. (1)**

(2) Subsection (1) applies for the purpose of enabling a power to be exercised at any time after this Act comes into force, despite the fact that the power is conferred by an instrument that took effect before that time. R.S.O. 1990, c. P.9, s. 12.

**Options to acquire reversionary interests**

**13** (1) The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease,

(a) if the option is exercisable only by the lessee or the lessee's successors in title; and

(b) if it ceases to be exercisable at or before the expiration of one year following the determination of the lease.

**Application of subs. (1)**

(2) Subsection (1) applies to an agreement for a lease as it applies to a lease, and "lessee" shall be construed accordingly.

**Other options**

(3) In the case of all other options to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities is twenty-one years, and any such option that according to its terms is exercisable at a date more than twenty-one years from the date of its creation is void on the expiry of twenty-one years from the date of its creation as between the person by whom it was made and the person to whom or in whose favour it was made and all persons claiming through either or both of them, and no remedy lies for giving effect to it or making restitution for its lack of effect.

**Options to renew leases**

(4) The rule against perpetuities does not apply, nor do the provisions of subsection (3) apply, to options to renew a lease. R.S.O. 1990, c. P.9, s. 13.

**Easements, profits à prendre, etc.**

**14** In the case of an easement, *profit à prendre* or other similar interest to which the rule against perpetuities may be applicable, the perpetuity period is forty years from the time of the creation of such easement, *profit à prendre* or other similar interest, and the validity or invalidity of such easement, *profit à prendre* or other similar interest, so far as remoteness is concerned, shall be determined by actual events within such forty-year period, and the easement, *profit à prendre* or other similar interest is void only for remoteness if, and to the extent that, it fails to acquire the characteristics of a present exercisable right in the servient land within the forty-year period. R.S.O. 1990, c. P.9, s. 14.

**Determinable interests**

**15** (1) In the case of,

(a) a possibility of reverter on the determination of a determinable fee simple; or

(b) a possibility of a resulting trust on the determination of any determinable interest in property,

the rule against perpetuities as modified by this Act applies in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise on its breach to a right of re-entry or an equivalent right in the case of personal property, and, where the event that determines the determinable interest does not occur within the perpetuity period, the provision shall be treated as void for remoteness and the determinable interest becomes an absolute interest.

**Idem**

(2) In the case of a possibility of reverter on the determination of a determinable fee simple, or in the case of a possibility of a resulting trust on the determination of any determinable interest in any property, or in the case of a right of re-entry following on a condition subsequent, or in the case of an equivalent right in personal property, the perpetuity period shall be measured as if the event determining the prior interest were a condition to the vesting of the subsequent interest, and failing any life in being at the time the interests were created that limits or is a relevant factor that limits in some way the period within which that event may take place, the perpetuity period is twenty-one years from the time when the interests were created.

**Idem**

(3) Even though some life or lives in being may be relevant in determining the perpetuity period under subsection (2), the perpetuity period for the purposes of this section shall not exceed a period of forty years from the time when the interests were created and shall be the lesser of a period of forty years and a period composed of the relevant life or lives in being and twenty-one years. R.S.O. 1990, c. P.9, s. 15.

Compendium of the County of Essex
Filed: 2023-02-07
OEB File No.: EB-2022-0207
Page 8 of 35

**Specific non-charitable trusts**

**16** (1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or the trustee's successor, within a period of twenty-one years, despite the fact that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

**Idem**

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other recurring period within which the limitation creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons, or the person or person's successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such unexpended income or capital. R.S.O. 1990, c. P.9, s. 16.

**Rule in *Whitby vs. Mitchell* abolished**

**17** (1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to any unborn issue of an unborn person is abolished, but without affecting any other rule relating to perpetuities. R.S.O. 1990, c. P.9, s. 17 (1).

**Definition**

(2) For the purposes of subsection (1),

"issue" means issue of a person, whether born within or outside marriage, subject to sections 217 and 218 of the *Child, Youth and Family Services Act, 2017*. 2017, c. 14, Sched. 4, s. 27.

**Section Amendments with date in force (d/m/y)** [ + ]

**Rules as to perpetuities not applicable to employee-benefit trusts**

**18** (1) The rules of law and statutory enactments relating to perpetuities do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities, or sickness, death or other benefits, to employees or to their surviving spouses, dependants or other beneficiaries. R.S.O. 1990, c. P.9, s. 18; 2005, c. 5, s. 57 (4).

**Rules not applicable to certain trust funds**

(1.1) The rules of law and statutory enactments relating to perpetuities do not apply and are deemed never to have applied to a trust fund required by subsection 9 (1) of the *Nuclear Fuel Waste Act* (Canada). 2009, c. 33, Sched. 16, s. 11.

**Definition**

(2) In this section,

"spouse" means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage. 2005, c. 5, s. 57 (5).

**Section Amendments with date in force (d/m/y)** [ + ]

**Application of Act**

**19** Except as provided in subsection 12 (2) and in section 18, this Act applies only to instruments that take effect on or after the 6th day of September, 1966, and such instruments include an instrument made in the exercise of a general or special power of appointment on or after that date even though the instrument creating the power took effect before that date. R.S.O. 1990, c. P.9, s. 19.

Français

# COURT OF APPEAL FOR ONTARIO

CITATION: Clarke v. Kokic, 2018 ONCA 705
DATE: 20180829
DOCKET: C64649



Lauwers, Miller, and Nordheimer JJ.A.

BETWEEN

Dale Clarke and Lorraine Clarke

Applicants (Respondents)

and

Esad Kokic and Behra Kokic

Respondents (Appellants)

Brian R. Kelly, for the appellants

Trenton Johnson, for the respondents

Heard: August 27, 2018

On appeal from the order of Justice Bloom of the Superior Court of Justice, dated October 30, 2017, with reasons reported at 2017 ONSC 6485.

## REASONS FOR DECISION

[1] The Clarkes own the building at 101 St. Andrew St. W. in Fergus, Ontario. It is attached to the adjacent building at 135 St. David St., which is owned by the Kokics. Under the title deeds, the Clarkes have an easement over part of the Kokics' property, which provides interior access to the upper floors and roof of their own property. When the easement was first granted, the Clarkes'

predecessors in title had no other access to the third floor or roof of 101 St. Andrew except through 135 St. David St., though this is no longer the case.

[2] This dispute arose in the context of the Clarkes' renovations to adapt the property for commercial use on the first two floors and residential use on the third. The renovations include slightly widening the third floor door frame through which the easement passes to make it a fire exit, and replacing the doors on the second and third floor to comply with the relevant building and fire regulations. The Kokics interfered with the right of way, and the Clarkes applied for declaratory and injunctive relief.

[3] The application judge declared the easement valid and ordered the Kokics not to interfere with the Clarkes' rights under the easement, including the right to make the renovations. The Kokics appeal from that decision.

[4] At the conclusion of the hearing, we dismissed the appeal with reasons to follow. In our view, the application judge did not err in finding that the easement permitted the Clarkes to alter the door frames and doors in question in order to use the easement as an emergency exit. Further, the rule against perpetuities has no application to this case.

## A. THE RENOVATIONS

[5] The Kokics argue that the Clarkes' renovations impermissibly change the use of the easement, from providing access to space that has been unused or has been used only for storage, into use as an emergency exit.

[6] The title deeds set out the easement language:

> "AND RESERVING a right-of-way for all persons entitled thereto in common with others having a like right, over, through and along the existing hallways and stairways in the first, second and third storeys of said stone building" (Emphasis added)

[7] The easement is then described in "metes and bounds" format.

[8] We observe that while the Kokics characterize the modest widening of the doorframes on the third floor as increasing the size of the easement, this is inaccurate. The grant is silent on the size of the doorframe and the dimensions of the easement remain the same as before. Neither the widening of the door frames nor the replacement of the doors increases the burden on the servient tenement.

[9] The Kokics rely on *Fallowfield v. Bourgault* (2003), 68 O.R. (3d) 417, [2003] O.J. No. 5206. Speaking for the majority, Feldman J.A. distilled the relevant principles, at para. 11:

> In interpreting the meaning and intent of an express easement, the concept of ancillary rights arises. The grant of an express easement includes such ancillary

> rights as are reasonably necessary to use or enjoy the easement. However, to imply a right ancillary to that which is expressly granted in the easement, the right must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable.

[10] The appellants rely on the word “existing” in the easement language. They argue that the respondents have no ancillary right to make changes to the doors and door frame to facilitate a fire escape, because these changes are not necessary for the use of the easement. They assert that permitting the alteration of the door frames may be convenient, but they are not necessary, largely because the respondents had an alternative, which was to build fire escapes out of the windows.

[11] The application judge found that the use of the easement in the event of a fire was within the scope of the original grant. It contemplated ingress and egress for all purposes, which perforce included escaping a fire. The original grant is broad enough to include the use of the easement as an emergency exit, and the renovations do nothing more than render it usable for that purpose. The renovations are “reasonably necessary”, in the sense used in *Fallowfied*, in that they are necessary for the Clarkes to lawfully use the easement for one of the purposes for which they are entitled to use it. The fact that the Clarkes could fulfill the same purpose by some other means not involving the easement, is irrelevant to the necessity analysis. Because the Clarkes already had the right to use the

Compendium of the County of Essex
Filed: 2023-02-07
OEB File No.: EB-2022-0207
Page 14 of 35

easement for ingress and egress, including as an emergency exit, they did not need to substitute alternative emergency exits as the Kokics suggest.

[12] While the redevelopment of 101 St. Andrew could result in increased use of the right of way, the use of the easement remains of the same general nature. The potentially increased burden on the servient tenement at 135 St. David St. by virtue of more frequent use does not fall outside the scope of the initial grant (*Almel v. Halton Condominium Corp. No. 77*, (1997) 98 O.A.C. 72, [1997] O.J. No. 824, at para 8).

[13] The application judge's decision was reasonable and supported by the evidence. He made no errors in finding that the renovations were reasonably necessary for the exercise and enjoyment of the easement.

## B. THE RULE AGAINST PERPETUITIES

[14] The Kokics argue that the ancillary rights under the easement are void because of the rule against perpetuities. We disagree.

[15] It is not clear that this issue was before the application judge, but in any event, the rule against perpetuities has no application in this case. The rule does not restrict the duration of property interests, but the length of time that may elapse between the creation of a contingent interest and the vesting of that interest (*Sutherland Estate v. Dyer*, (1991) 4 O.R. (3d) 168, [1991] O.J. No. 1457

(Gen. Div.), at para. 18). As stated by the court in *Dyer* at para. 18: "the rule applies only to contingent interests".

[16] An express easement includes the ancillary rights reasonably necessary for the use and enjoyment of the easement. These rights vested at the time of grant and are not contingent interests. Thus, the rule against perpetuities does not apply to them.

**Disposition**

[17] The appeal is dismissed with costs to the respondents, as agreed, in the amount of $10,000 inclusive of disbursements and taxes.

"P. Lauwers J.A."
"B.W. Miller J.A."
"I.V.B. Nordheimer J.A."

# Quercus Algoma Corporation et al. v. Algoma Central Corporation [Indexed as: Quercus Algoma Corp. v. Algoma Central Corp.]

Ontario Reports

Ontario Superior Court of Justice

Vella J.

April 1, 2021

**155 O.R. (3d) 293** | 2021 ONSC 2457



## Case Summary

**Real property — Option to purchase — Perpetuities — Parties entering into mining rights option agreement registered on title in 1997 — Respondent having option to purchase half interest in mining rights with associated profits — Applicants claiming that option had a statutory perpetuity period of 21 years and had expired — Application to declare option void dismissed — Option was product of sophisticated commercial transaction creating an interest similar to incorporeal interests of easements and profits à prendre such that perpetuity period was 40 years and option was still valid — Perpetuities Act, R.S.O. 1990, c. P.9, ss. 13, 14.**

The parties entered into a mining rights option agreement (MROA) with a term of 40 years. Notice of the MROA was registered on title to various properties in 1997. The respondent had an option to purchase an undivided one-half interest in mining rights with associated profits regarding some of those lands. A disagreement arose between the parties as to the validity of the option. The *Perpetuities Act* provided that the rule against perpetuities did not apply to options to acquire reversionary interests, and pursuant to s. 13(3) the perpetuity period for all other options to acquire for valuable consideration any interest in land was 21 years. Under s. 14, the perpetuity period was 40 years in the case of an easement, *profit à prendre*, or other similar interest. According to the applicants, the property interest created by the MROA fell within the scope of "all other options" within the meaning of s. 13(3), and as such the option had expired. The respondent submitted that it fell within "other similar interest" within the meaning of s. 14 and as such was presumptively valid. The applicants sought to declare the option void.

**Held**, the application should be dismissed.

The option created by the MROA was a right exercisable within the meaning of s. 14 such that the vesting period was 40 years and the option was valid. The object of the legislation was to modify the common law rule against perpetuities to reflect the modern reality of commercial transactions. The history of the legislation, and ss. 13 and 14 in particular, demonstrated an intention to create a longer vesting period for the exercise of future rights over incorporeal property interests. The reading of the two sections together led to the conclusion that "other options" related only to options to acquire for valuable consideration an interest in corporeal hereditaments. The reference to a "similar interest" meant interests similar in nature to

easements and *profits à prendre*, being incorporeal interests. Section 14 reflected the commercial reality that transactions involving incorporeal hereditament interests were generally the product of sophisticated commercial transactions and should not be frustrated by the rule against perpetuities. The fact that s. 14 provided a longer vesting period than the common law vesting period of 21 years further supported that view. The MROA did not deter future commercial development of the property since it was the applicants who exercised complete control over when, how and whether to enter into mineral exploration, extraction, and development. The MROA was registered on title and the option was a covenant running with the land and as a charge. The fact that the contingent incorporeal interest was framed within a commercial contract as an "option" did not [page294] transform it into an interest in a corporeal hereditament within the meaning of the *Perpetuities Act*.

*Third Eye Capital Corp. v. Dianor Resources Inc*. (2018), 141 O.R. (3d) 192, [2018] O.J. No. 1381, 2018 ONCA 253, 420 D.L.R. (4th) 657, 8 P.P.S.A.C. (4th) 181, 57 C.B.R. (6th) 171 ; *Bank of Montreal v. Dynex Petroleum Ltd.*, [2002] 1 S.C.R. 146, [2001] S.C.J. No. 70, 2002 SCC 7, 208 D.L.R. (4th) 155, 281 N.R. 113, J.E. 2002-230, 299 A.R. 1, 19 B.L.R. (3d) 159, 30 C.B.R. (4th) 168, 1 R.P.R. (4th) 1, **apld**

**Other cases referred to**

*Ayr Farmers Mutual Insurance Co. v. Wright* (2016), 134 O.R. (3d) 427, [2016] O.J. No. 5556, 2016 ONCA 789, 61 C.C.L.I. (5th) 64, 2 M.V.R. (7th) 31; *Belwood Lake Cottagers Assn. Inc. v. Ontario (Ministry of the Environment)*, [2019] O.J. No. 485, 2019 ONCA 70, 431 D.L.R. (4th) 318, 23 C.E.L.R. (4th) 227, 83 M.P.L.R. (5th) 1; *Montréal (City) v. 2952-1366 Québec Inc*., [2005] 3 S.C.R. 141, [2005] S.C.J. No. 63, 2005 SCC 62, 258 D.L.R. (4th) 595, 340 N.R. 305, 32 Admin. L.R. (4th) 159, 201 C.C.C. (3d) 161, 18 C.E.L.R. (3d) 1, 36 C.R. (6th) 78, 134 C.R.R. (2d) 196, 15 M.P.L.R. (4th) 1, 67 W.C.B. (2d) 397; *R. v. Jarvis*, [2019] 1 S.C.R. 488, [2019] S.C.J. No. 10, 2019 SCC 10, 429 C.R.R. (2d) 175, 433 D.L.R. (4th) 195, 52 C.R. (7th) 62, 375 C.C.C. (3d) 324; *R. v. Perka*, [1984] 2 S.C.R. 232, [1984] S.C.J. No. 40, 13 D.L.R. (4th) 1, 55 N.R. 1, [1984] 6 W.W.R. 289, J.E. 84-1013, 28 B.C.L.R. (2d) 205, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113, EYB 1984-149792; *Reyhani v. Karimov*, [2019] O.J. No. 4759, 2019 ONSC 5290, 49 E.T.R. (4th) 216, 13 R.P.R. (6th) 342 (S.C.J.); *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC para. 210-006; *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, [1971] S.C.J. No. 136, 23 D.L.R. (3d) 573, [1972] 2 W.W.R. 108; *Scurry-Rainbow Oil (Sask) Ltd. v. Taylor*, [2001] S.J. No. 479, 2001 SKCA 85, 203 D.L.R. (4th) 38, [2001] 11 W.W.R. 25, 207 Sask. R. 266

**Statutes referred to**

*Land Titles Act*, R.S.O. 1990, c. L.5, s. 71 [as am.]

*Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64(1)

*Perpetuities Act*, R.S.O. 1990, c. P.9, ss. 2, 5(1), 13, (1), (2), (3), (4), 14

*The Perpetuities Act, 1966*, S.O. 1966, c. 113 [rep.]

**Authorities referred to**

Anger and Honsberger, *Law of Real Property*, 2nd ed. (Aurora, Ont.: Canada Law Book, 1985)

Langan, P. St. J., *Maxwell on the Interpretation of Statutes*, 12th ed. (London, U.K.: Sweet & Maxwell, 1969)

Morris, J.H.C. & W. Barton Leach, *The Rule Against Perpetuities*, 2nd ed. (London, U.K.: Stevens & Sons, 1962)

APPLICATION to declare an option under a mining rights agreement void.

*Jonathan Lancaster* and *Daniel Richer*, for applicants.

*Christopher Matthews*, for respondent.

---

[1] **VELLA J.**: — This is an application seeking declaratory relief regarding the validity or invalidity of an option exercisable by Algoma Central Corporation ("ACC") to purchase an undivided [page295] one-half interest in Mining Rights with associated profits regarding certain lands in eastern Ontario referred to collectively by the parties as the Quercus Algoma Parcels, pursuant to s. 5(1) of the *Perpetuities Act*, R.S.O. 1990, c. P.9.

[2] At issue is whether the option provided for in the Mining Rights Option Agreement ("MROA") is captured under s. 13(3) of the *Perpetuities Act* or, alternatively under s. 14. This is important to the parties because if the option is captured under s. 13(3) and the associated 21-year vesting period, as urged by the applicants, the option has expired and is voided. However, if the option is captured under s. 14, as urged by the respondent, then the 40-year vesting period applies and the option has not yet expired and is presumptively valid.

[3] The parties have advised that they cannot find any reported decision in which the scope and ambit of ss. 13(3) and 14, including, in particular, how the two legislative provisions interrelate. Therefore, this is a case of first impression.

*History of Transactions Relating to the MROA -- The Commercial Contractual Context*

*Underlying umbrella land transaction with MROA*

[4] The conveyance of the Quercus Algoma Parcels originated in a 1997 transaction whereby ACC sold approximately 816,000 acres of timberlands to McDonald Investment Company (the "McDonald transaction"). The purchase price for these lands was $60,189,000 and other valuable consideration. The sale was carried out through two transfers at the direction of

McDonald Investment Company ("McDonald"): one conveyance of lands was to 3011650 Nova Scotia Limited in the amount of $55,420,000, and the second conveyance was to 3011651 Nova Scotia Limited in the amount of $4,769,000. The average price per acre of the timberlands was approximately $74.

[5] The terms of the McDonald transaction were set out in an agreement of purchase and sale dated June 12, 1997, between ACC and McDonald, and then in an amending agreement dated August 15, 1997 (collectively, the "land purchase agreement").

[6] At the direction of McDonald, the transfers/deeds of land named 3011650 Nova Scotia Limited and 3011651 Nova Scotia Limited as transferees.

[7] Section 8.5 of the land purchase agreement requires, as part of the 1997 MacDonald transaction, that MacDonald, as purchaser, enter into a mining rights option agreement with the vendor, ACC. A draft of the MROA is included as Schedule F to the land purchase agreement and in that document the parties [page296] agreed that the term of the MROA was 40 years from the date of this transaction. This term is also reflected in s. 8.5(b) of the land purchase agreement:

> The Vendor shall, from and after closing, be entitled to an option to purchase an undivided 49% interest in the Mining Rights and to share in the proceeds of any Commercial Production therefrom, pursuant to the Mining Rights Option Agreement substantially in the form attached hereto as Schedule F. The Mining Rights Option Agreement shall be registered on title to the Purchased Assets and shall be binding on successors in title of the Purchaser. The Mining Rights Option Agreement shall have a term of forty (40) years.

*Specific land transactions involving the MROA at issue in the application*

[8] As indicated above, by direction of McDonald, ACC conveyed a number of properties to 3011650 Nova Scotia Limited ("301"). These properties are collectively referred to by the parties as the Quercus Algoma Parcels (see Exhibit A to the affidavit of David Stewart for the legal descriptions of these lands).

[9] More specifically, by Transfer Deed of the Land dated November 4, 1997, and registered on title on November 5, 1997, ACC conveyed the Quercus Algoma Parcels together with other adjacent lands in the District of Algoma to 301. As part of this transaction, 301 and ACC entered into the MROA, dated November 4, 1997. Notice of the MROA was registered pursuant to s. 71 of the *Land Titles Act*, R.S.O. 1990, c. L.5, on title to, among other properties, the Quercus Algoma Parcels on November 5, 1997. The MROA reflects the terms of the draft MROA which was attached as Schedule F to the land purchase agreement and continues to be registered on title.

[10] 301, in turn, divided the Quercus Algoma Parcels into two parts. First, by transfer/deed of land dated December 12, 2005, registered on title December 15, 2005, 301 conveyed the Quercus Algoma Parcels, other than what the parties have called the Vibert Lands, to Algoma Timberlakes Corporation ("Timberlakes").

[11] Then, by transfer deed of land dated December 12, 2005, registered on title December 15, 2005, 301 conveyed the Vibert Lands to Vibert Holdings Limited ("Vibert Holdings"), as bare trustee for and on behalf of Timberlakes as beneficial owner.

[12] Thereafter, Timberlakes conveyed the Quercus Algoma Parcels, other than the Vibert Lands, to 0990220 BC Limited which later changed its name to Quercus Algoma Corporation ("QAC"). At about the same time, Vibert Holdings, with the consent of Timberlakes, conveyed the Vibert Lands to 0990221 BC Limited which later changed its name to Quercus Algoma Land Corporation ("QALC"). [page297]

[13] As part of the Timberlakes/Vibert Holdings transactions with QAC and QALC, the parties entered into two earn out agreements each dated January 10, 2014, and notice of which were both registered on title pursuant to s. 71 of the *Land Titles Act* on January 14, 2014 (collectively, the "earn out agreements"). Under the earn out agreements, Timberlakes was granted the exclusive option for a period of ten years to designate a part, or parts, of the Quercus Algoma Parcels for the purpose of permitting Timberlakes, or those proposed by Timberlakes, to conduct or undertake mining exploration, development, and production activities in respect of minerals on those designated lands. Under the earn out agreements, Timberlakes' options will expire on or about January 10, 2024.

[14] Finally, by transfer deed of land dated and registered on title September 9, 2016, QAC conveyed a part of the Quercus Land Parcels, described as part of Raaflaub Township to COR Rural Holdings Inc. This was followed by a conveyance by transfer deed of land, dated and registered on title on October 31, 2016, of QAC's interests in Olsen and Brule Townships in the District of Algoma to Great Lakes Power Transmission Holding Corp.

[15] There is no dispute as to the authenticity of the MROA or its proper registration on title. The dispute focusses on the length of the vesting or perpetuity period of the MROA, which in turn will require a determination of whether the 21-year vesting period under s. 13(3) or the 40-year vesting period under s. 14 of the *Perpetuities Act* applies.

[16] The parties also agree that ACC has yet to exercise the option under the MROA and agree that the interest created by that document is a contingent interest.

*Material Terms of the MROA*

[17] Pursuant to the terms of the MROA, 301 is the Optionor (now the applicants as successors in title) and ACC is the Optionee.

[18] The following excerpts from the MROA are particularly relevant to an analysis of what interest or rights the parties intended to convey under the MROA:

1. DEFINITIONS:

"**Commercial Production**" means active mining or extraction of any Minerals from the Lands which is intended to result in shipment of the Minerals from the Lands for treatment or sale . . .

"**Exploration Activities**"means all work, operations or activities normally associated with prospecting, exploration, development or other mining work such as, but not limited to, geological, geophysical, geotechnical and geochemical surveys and studies, sampling, surface stripping, trenching, drilling, shaft [page298] sinking, raising, cross-cutting and drifting, ramp exploration, dewatering underground workings, beneficiation studies, assays,

metallurgical testing, construction or improvements to access roads, any or all of which are completed to determine the potential Minerals on, under or in the Lands.

"**Minerals**" shall include, without limitation, all naturally occurring metallic and non-metallic ores, mines and minerals, natural gas, petroleum, coal, salt, quarry and aggregate or pit material, industrial stone, gold, silver, all rare and precious metals diamonds, gems and other precious or semi-precious stones.
"**Mining Rights**" means all rights in law to mine or extract Minerals in, on, from or under the Lands.

. . . . .

3. OPTIONOR AND OPTIONEE TO SHARE IN PAYMENTS

*Without limiting the Optionee's rights under section 7 hereof, and for greater certainty only, the parties agree that the Optionor and the Optionee shall share 51% for the Optionor and 49% for the Optionee in all Payments, after deducting the reasonable costs and expenses of the Optionor in connection therewith.*

4. OPTIONOR'S CONTROL

*It is agreed and understood that the Optionor shall have sole discretion and control in deciding whether and which Exploration Activities, if any, shall be commenced and whether and which Commercial Production, if any, shall be undertaken.* Apart from notices as provided herein,*the Optionor shall not be required to consult the Optionee* in undertaking or failing to undertake any Exploration Activities or Commercial Production and the *Optionee shall not exercise any control or discretion* in regard to the Exploration Activities or Commercial Production and agrees that the *Optionor shall be solely entitled to control any Exploration Activities or Commercial Production as it sees fit, in its sole discretion, and may assign or delegate such control to third party.*

5. NOTICE OF DISCOVERY

Each of the Optionor and the Exploration Company shall give written notice to the Optionee of any discovery on the Lands within fifteen (15) days of becoming aware of any Discovery . . .

. . . . .

7. OPTION TO PURCHASE

The Optionor hereby grants to the Optionee the sole, exclusive and immediate right and option to purchase a one-half undivided interest (the Subject Mining Rights) in the Mining Rights. The Optionee shall be entitled, at any time and from time to time, to deliver written notice to the Optionor that it elects to purchase the Subject Mining Rights, at the price of Twenty-Five Dollars ($25) per acre. *The aforesaid option may be exercised for all or any part or parts of the Mining Rights owned by the Optionor in the Lands* from time to time during the term of this agreement and the exercise of the option with respect to any part of the Mining

Rights shall not preclude the subsequent exercise of the option against any other part or parts of the Mining Rights in the Lands from time to time. [page299]

8. CLOSING ARRANGEMENTS

In the event that the Optionee exercises its option to purchase the Subject Mining Rights as aforesaid, the Optionor shall convey good and marketable title to the Subject Mining Rights to the Optionee free and clear of all encumbrances except any Exploration Agreement entered into in compliance with this agreement . . .

9. EXPLORATION AGREEMENTS

(a) The Optionor shall not permit any party (an "Exploration Company") to engage in any Exploration Activities for any Minerals on, in or under the Lands or to mine or extract any Minerals . . . at any time or from time to time, except pursuant to an agreement between the Exploration Company and the Optionor (the "Exploration Agreement") . . . All cash payments . . . royalties . . . or other consideration made (hereinafter referred to as the "Payments") by the Exploration Company for the right to conduct Commercial Production . . . or payable or accruing as a result of the mining or extraction of minerals from the Lands shall be made to or accrued to the Optionor and Optionee subject to Section 3 hereof . . .

(b) the Optionor shall provide to the Optionee copies of all executed Exploration Agreements . . . within fifteen (15) days after receipt or execution thereof by the Optionor.

(c) *Prior to being entitled to receive any Payments, the Optionee shall exercise the option to purchase the Subject Mining Rights pursuant to Section 7 hereof, provided that such option may be exercised at any time prior to, contemporaneously with or after entering into of any Exploration Agreement.*

10. BINDING EFFECT

*This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns, including, without limitation, all successors in title to the Lands. The obligations of the Optionor hereunder shall constitute covenants running with the land and shall be binding upon any mortgagees, chargees or successors in title of the Optionor as fully as if they had executed this agreement.*

. . . . .

12. CHARGE

The Optionor hereby mortgages and charges the Mining Rights to the Optionee as further security for the obligations of the Optionor contained in this agreement.

13. TERM

*This agreement shall have a term of forty (40) years.*

. . . . .

16. GOVERNING LAW
This agreement shall be governed by and construed in accordance with the laws of the Province of Ontario.

(Emphasis added) [page300]

*Statutory Framework*

[18a] The key provisions, ss. 13 and 14 of the *Perpetuities Act*, are as follows:

*Options to acquire reversionary interests*

13(1) The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease,

(*a*) if the option is exercisable only by the lessee or the lessee's successors in title; and

(*b*) if it ceases to be exercisable at or before the expiration of one year following the determination of the lease.

*Application of subs. (1)*

(2) Subsection (1) applies to an agreement for a lease as it applies to a lease, and "lessee" shall be construed accordingly.

*Other options*

(3) In the case of all other options to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities is twenty-one years, and any such option that according to its terms is exercisable at a date more than twenty-one years from the date of its creation is void on the expiry of twenty-one years from the date of its creation as between the person by whom it was made and the person to whom or in whose favour it was made and all persons claiming through either or both of them, and no remedy lies for giving effect to it or making restitution for its lack of effect.

*Options to renew leases*

(4) The rule against perpetuities does not apply, nor do the provisions of subsection (3) apply, to options to renew a lease.

*Easements, profits à prendre, etc.*

14. In the case of an easement, *profit à prendre* or other similar interest to which the rule against perpetuities may be applicable, the perpetuity period is forty years from the time of the creation of such easement, *profit à prendre* or other similar interest, and the validity or invalidity of such easement, *profit à prendre* or other similar interest, so far as remoteness is concerned, shall be determined by actual events within such forty-year period, and the easement, *profit à prendre* or other similar interest is void only for remoteness if, and to the extent that, it fails to acquire the characteristics of a present exercisable right in the servient land within the forty-year period.

[19] The following additional provisions of the *Perpetuities Act* are relevant as providing context within which the interpretation and interrelationship of the above two sections to the present factual scenario must be considered:

*Definitions*

1. In this Act,

"limitation" includes any provision whereby property or any interest in property, or any right, power or authority over property, is disposed of, created or conferred.

*Rule against perpetuities to continue; saving*

2. Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect.

*Possibility of vesting beyond period*

3. No limitation creating a contingent interest in property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.

*Presumption of validity and "Wait and See"*
4(1) Every contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish,

(*a*) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; or

(*b*) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

. . . . .

*Application of Act*

19. Except as provided in subsection 12 (2) and in section 18, this Act applies only to instruments that take effect on or after the 6th day of September, 1966, and such instruments include an instrument made in the exercise of a general or special power of appointment on or after that date even though the instrument creating the power took effect before that date.

*The Rule Against Perpetuities and Relevant Property Concepts*

[20] According to s. 2, the common law rule against perpetuities continues to apply in Ontario, save as specifically modified or changed by the *Perpetuities Act*. Therefore, an understanding of the common law development of this rule is relevant.

[21] The rule against perpetuities is a creation of judge made law going back to the 17th century. The rule, at common law, provides that a contingent interest in land must vest within 21

years from its creation. According to the often cited text, J.H.C. Morris & W. Barton Leach, *The Rule Against Perpetuities*, 2nd ed. (London, U.K.: Stevens & Sons, 1962), at p. 1: "The Rule against Perpetuities is a rule invalidating interests which vest too remotely. Indeed, it is often called the rule against remoteness of vesting". Furthermore, "the rule against perpetuities is a doctrine of the law of property, not contract": Morris & Leach, at p. 219. Further of note, the rule has been held at common law not to apply to options to renew leases, even perpetually: Morris & Leach, at p. 223. [page301]

[22] Historically, the mischief sought to be prevented through this rule was the ability of a few wealthy (landowner) families in the United Kingdom to hold on to land beyond death, thereby tying up the future development of the land. Hence, the focus on "hereditaments" (meaning things that are capable of being inherited, reflecting the roots of this common law rule).

[23] In *Scurry-Rainbow Oil (Sask) Ltd. v. Taylor*, [2001] S.J. No. 479, 2001 SKCA 85, 203 D.L.R. (4th) 38, at paras. 52-53, the Saskatchewan Court of Appeal stated the public policy rationale for the rule as:

> The underlying and fundamental purpose of the rule is founded in the public policy of preventing the fettering of the marketability of property over long periods of time by indirect restraints upon its alienation. The general purpose of the rule is to prevent the tying up of property to the detriment of society in general.
> The exclusion of property from the stream of commercial development for extended periods of time was perceived by the law as a public evil. . . . Since this approach was adopted particularly in relation to devolution of estates, the judge-made rule limited the extent to which the "dead hand" could control contingent devolution.

[24] In *Reyhani v. Karimov*, [2019] O.J. No. 4759, 2019 ONSC 5290 (S.C.J.), at para. 11, our court articulated the policy rationale underlying the common law rule against perpetuities as follows: "to prevent the indefinite sterilization of property by fostering certainty of vesting". In other words, the public policy reflects the benefit of land not being tied up indefinitely thus preventing commercial or other development of property.

[25] At common law, an interest in land must vest within 21 years from the date of its creation or it is void. The rule was applied to immediately void interests where there was a possibility, however remote, that the interest would not vest within the 21-year perpetuity period.

[26] The *Perpetuities Act*, passed in 1966, preserves the common law rule, except to the extent modified by that statute. The *Perpetuities Act* did not codify the common law, but rather modified it, to reflect modern commercial and other realities and to bring clarity to the rule which was considered confusing and antiquated in its application: *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, [1971] S.C.J. No. 136, at p. 722, *per* Laskin J. (dissenting).

[27] Important to this analysis is the understanding of the two types of property with which the rule is engaged: corporeal hereditaments and incorporeal hereditaments. The respective definitions and differences between the two are essential to the characterization of the option at issue under the MROA.

[28] The Court of Appeal in *Third Eye Capital Corp. v. Dianor Resources Inc.* (2018), 141 O.R. (3d) 192, [2018] O.J. No. 1381, [page302] 2018 ONCA 253 ("*Third Eye*"), at para. 31, defined

corporeal and incorporeal hereditaments as follows:

> At common law, rights in relation to land are divided into corporeal and incorporeal hereditaments . . . A corporeal hereditament is an interest in land that is capable of being held in possession, such as a fee simple. An incorporeal hereditament is an interest in land that is non-possessory such as easements, *profits à prendre*, and rent charges. Under each type of incorporeal hereditament, the holder has an interest in land.

[29] Accordingly, the right created by the entitlement to purchase a one-half undivided interest in the Mining Rights and the related share of revenues in the MROA is an incorporeal hereditament.

[30] More specifically, the type of incorporeal hereditament created by the MROA is an option to purchase what in essence is a share in a *profit à prendre*. *Black's Law Dictionary* defines a *profit à prendre* as:

> A right exercised by one person in the soil of another, accompanied with participation in the profits of the soil thereof. A right to take part of the soil or produce of the land. A right to take from the soil, such as by logging, mining, drilling, etc. The taking (profit) is the distinguishing characteristic from an easement.
> Right of "profit à prendre" is a right to make some use of the soil of another, such as a right to mine metals, and it carries with it the right of entry and the right to remove and take from the land the designated products or profit and also includes right to use such of the surface as is necessary and convenient for the exercise of the profit.

[31] A property interest is either vested or contingent. The vesting of a contingent interest is delayed by the occurrence of some future event (*i.e.*, subject to a condition precedent): *Reyhani*, at para. 13. Both parties agree that the interest created in the MROA is a contingent interest because the resulting entitlement to a share of revenues by ACC as Optionee will only vest upon its exercise of the option to purchase the one-half undivided interest in the Mining Rights (and payment by the Optionee of $25 per acre to the Optionor). According to the terms of the MROA, the option is exercisable by ACC at any time within 40 years from the date of the MROA.

[32] The Supreme Court of Canada, in *Bank of Montreal v. Dynex Petroleum Ltd*., [2002] 1 S.C.R. 146, [2001] S.C.J. No. 70, changed the common law with respect to the characterization of royalties in the oil and gas industry as an interest in land.

[33] *Dynex* has particular relevance to the case at bar as it deals with royalties which is an incorporeal hereditament. Royalties are similar in nature to the profit-sharing scheme set out in the MROA.

[34] As noted by the Supreme Court, at para. 8, "At common law, an interest *in land* could issue from a corporeal hereditament but not from an incorporeal hereditament" (emphasis added). [page303]

[35] At para. 10, the Supreme Court quoted with approval, Laskin J.'s dissent from *Saskatchewan Minerals*, at p. 722 S.C.R.,

> The language of "corporeal" and "incorporeal" does not point up the distinction between the legal interest and its subject-matter. On this distinction, all legal interests are "incorporeal", and it is only the unconfronted force of a long history that makes it necessary in this case to examine certain institutions of property in the common law provinces through an antiquated system of classification and an antiquated terminology. The association of rents and royalties has run through the cases . . . but without the necessity hitherto in this Court to test them against the common law classifications of interests in land or to determine whether those classifications are broad enough to embrace a royalty in gross.

[36] The Supreme Court accepted the Alberta Court of Appeal's finding that the longstanding practice of the oil and gas industry is to recognize that the owners of mineral rights can offer royalties as an interest in land to raise financing for ongoing exploration and development of "unproduced minerals": *Dynex*, at paras. 6, 15. The Supreme Court concluded, at paras. 15-21, that there were no compelling policy reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than "fidelity to common law principles", reflecting the commercial reality of the mechanisms used by the industry to fund expensive drilling and exploration projects. Thus, the Supreme Court of Canada held that incorporeal hereditaments, such as royalties on unproduced minerals, *can* give rise to the creation of an interest *in land* providing that was the intention of the parties as determined by the contract giving rise to those rights.

[37] In summary, the Supreme Court of Canada found, at para. 21, that "[a] royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre*, if that is the intention of the parties".

[38] A *profit à prendre*, in the mining context, was recently defined by our Court of Appeal, in *Third Eye*, at para. 34, as "a working interest" and "a right given by the fee owner (often the Crown) to a miner to enter the owner's land and extract minerals or resources from the property". In *Third Eye*, at para. 63, the court also emphasized that to determine whether a grant was intended to convey an interest in land by way of an incorporeal hereditament, the court must examine the parties' intention "from the agreement as a whole, along with the surrounding circumstances".

[39] As will become apparent, it is important to repeat that the change in the common law by the Supreme Court of Canada in *Dynex* declaring that interests in land can now be created by incorporeal hereditaments was made in 2002, after the enactment of the *Perpetuities Act* and after the date of the MROA. Also [page304] important is that the courts in *Dynex* and *Third Eye* were not dealing with the concept of incorporeal hereditaments being interests in land within the context of the rule against perpetuities.

*Statutory Interpretation Principles and Analysis*

[40] To resolve the question posed to the court by the parties, this court must determine the scope and ambit of ss. 13(3) and 14 of the *Perpetuities Act*, respectively. To that point, does the property interest created by the MROA fall within the scope of "all other options" within the meaning of s. 13(3) or is it a "other similar interest" within the meaning of s. 14?

[41] As there is no jurisprudence concerning the interrelationship between s. 13(3) and s. 14, I will now turn to a statutory interpretation analysis.

[42] Both parties urge that the court adopt the "modern approach" to statutory interpretation.

[43] The modern approach "requires a court to consider the words of a statute 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament'": *Belwood Lake Cottagers Assn. Inc. v. Ontario (Ministry of the Environment)*, [2019] O.J. No. 485, 2019 ONCA 70, 431 D.L.R. (4th) 318, at para. 39, citing *Montréal (City) v. 2952-1366 Québec Inc*., [2005] 3 S.C.R. 141, [2005] S.C.J. No. 63, 2005 SCC 62, at paras. 9-12, citing *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21.

[44] In *Belwood*, at paras. 40-41, Strathy C.J.O. states:

> Both parties rely on the leading text by Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014), who summarizes the "ordinary meaning" rule at §3.6:
>
> It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.
>
> Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations, including purpose, related provisions in the same or other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.
>
> In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.
>
> Sullivan notes that ordinary meaning is not the end of the process of statutory interpretation, it is simply the beginning. She refers to the observations of Iacobucci J. *in Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 34, in connection with the interpretation of the *Immigration Act*: [page305]
> The grammatical and ordinary sense of the words employed in s. 70(1)(b) is not determinative, however, as this Court has long rejected a literal approach to statutory interpretation. Instead, s. 70(1)(b) must be read in its entire context. This inquiry involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue.

[45] In *Ayr Farmers Mutual Insurance Co. v. Wright* (2016), 134 O.R. (3d) 427, [2016] O.J. No. 5556, 2016 ONCA 789, at paras. 28-29, the Court of Appeal characterized the modern approach:

> The modern approach to statutory interpretation involves a textual, contextual and purposive analysis of the statute or provision in question.

> Three factors must be examined: "the language of the provision, the context in which the language is used and the purpose of the legislation or statutory scheme in which the language is found": *Blue Star Trailer Rentals Inc. v. 407 ETR Concession Co.*, 2008 ONCA 561, 91 O.R. (3d) 321, at para. 23.

[46] Furthermore, s. 64(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F states that legislation "shall be interpreted as being remedial".

[47] ACC also urges the court to adopt the "original meaning" rule in interpreting ss. 13(3) and 14 of the *Perpetuities Act*. That rule requires that the words of the statute be interpreted as they would have been the day after the statute was passed: P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London, U.K.: Sweet & Maxwell, 1969), at p. 85; *R. v. Jarvis*, [2019] 1 S.C.R. 488, [2019] S.C.J. No. 10, 2019 SCC 10, at para. 96.

[48] In *R. v. Perka*, [1984] 2 S.C.R. 232, [1984] S.C.J. No. 40, at pp. 264-65 S.C.R., the Supreme Court stated,

> The doctrine of *contemporanea expositio* is well established in our law. "The words of a statute must be construed as they would have been the day after the statute was passed . . ." . . . See also Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 163: "Since a statute must be considered in the light of all circumstances existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held"; *Maxwell on the Interpretation of Statutes*, *supra*, at p. 85: "The words of an Act will generally be understood in the sense which they bore when it was passed".
>
> This does not mean, of course, that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted. . . . This kind of interpretive approach is most likely to be taken, however, with legislative language that is broad or "open-textured". It is appropriate . . . to the interpretation of the words in constitutional documents, whose meaning must be capable of growth and development to meet changing circumstances.

[49] Accordingly, I will proceed to review the legislative history of the provisions in issue, their place in the overall scheme of the *Perpetuities Act*, the object of the *Perpetuities Act*, and the legislature's [page306] intent both in enacting the *Perpetuities Act* as a whole and the particular provisions at issue. I will employ a textual, contextual, and purposive analysis of the provisions in question.

[50] In light of the history and object of this Act and the provisions in question, I will also employ an interpretation that is consistent with the original meaning rule.

*Legislative history*

[51] Starting with a review of the legislative history of the statute, both parties have referred to the two reports released by the Ontario Law Reform Commission ("OLRC"). The first report, entitled "Report No. 1", is dated February 1, 1965. The second report is dated March 1, 1966 and called "Report No. 1A". These reports each attached draft legislation: An Act to Modify the Rule against Perpetuities (Bills 96 and 131, respectively). The resulting statute, entitled *The*

*Perpetuities Act, 1966*, S.O. 1966, c. 113, was enacted in 1966 and was heavily informed by the respective OLRC Reports, ultimately mirroring the draft legislation attached as Bill 131 to Report No. 1A.

[52] Of note, there have been very few changes to this legislation, now entitled *Perpetuities Act*, R.S.O. 1990, c. P.9, and none that affects the current analysis.

[53] Report No. 1, at p. 1, sets out the need for a statute that addresses antiquated nature of the rule against perpetuities in the modern commercial context:

> Your Commission believed that the rule against perpetuities was an urgent subject for study and recommendations, with a view to law reform. From its origins in the early part of the seventeenth century this judge-made rule has served a useful social function but in the long course of development has acquired unsatisfactory attributes which can now be removed only by legislation. Reform of the rule is long overdue. As has been said, "it is scarcely credible that in the second half of this twentieth century testamentary dispositions offering no threat to the public interest, and reasonable bargains between business men dealing with each other at arm's length, should continue to be struck down in the name of public policy," yet this is frequently the result of the application of the present form.

[54] The main concern of the OLRC, as reflected in Report No. 1, was that the common law rule was applied to abolish contingent property interests that had the mere possibility of vesting more than 21 years from its creation, even when the interest in fact vested before the expiry of that period. The OLRC proposed overcoming this problem by enacting in the proposed legislation a principle called the "wait and see" principle.

[55] Accordingly, the OLRC recommended that the 21-year vesting or perpetuity period be presumptively valid so long as the [page307] interest in question actually vested within 21 years. This was called the "wait and see" approach.

[56] Reviewing next the history of ss. 13(3) and 14 of the Act, the parties again referred to the OLRC Reports.

[57] Under Report No. 1, there was no recommendation made to address how the rule of perpetuities might affect the validity of contingent incorporeal interests such as *profits à prendre* and easements. As a result, there was no section equivalent to the current s. 14 or any reference whatsoever to *profits à prendre* or easements in the draft legislation annexed to Report No. 1.

[58] There was however a section in the draft legislation dealing with options which became s. 13 in the Act.

[59] The OLRC quoted p. 224 from Morris & Leach, at p. 26 of Report No. 1, that up to 1965, the relationship between options and the rule against perpetuities was "a confused one" and "it would seem eminently desirable to free the law from this inconsistent manner of dealing with options". It was observed that the rule against perpetuities originated in family settlements and family gift transactions and to derive from such a rule a general concept applicable to commercial transactions seemed unnecessary and dangerous. The OLRC concluded at p. 28 of Report No. 1 that to apply the common law rule to options left them susceptible to being struck

down even though they were a product of "bargains negotiated between persons usually of competence and keen commercial ability".

[60] A review of this portion in Report No. 1, at pp. 26-31, reveals that the interests that were being addressed in what became s. 13(3) were known as options to purchase "in gross" and relate to corporeal hereditaments. Section 13(1) and (2) changed the common law by making the rule inapplicable to the purchase of reversionary interests in leases and agreements to lease because to continue to have these corporeal interests subjected to the rule was, in fact, contrary to the purpose of the rule. The OLRC wrote, at p. 29,

> The application of the Rule to options in a lease is particularly obnoxious in that it defeats the basic purpose of the Rule. Here the situation is the exact opposite to that which exists in an option in gross. The option-holder, not the option-giver, is in possession of the land. He is the only person who can develop the land during the continuance of the term. The improvement of the land is stimulated, not retarded, by the existence of the option . . .

[61] The OLRC later repeated this point in Report No. 1A, at p. 6: "subsection 1 of section 13 in Bill 96 [attached to Report No. 1] dealt with options to acquire a reversionary interest expectant on the termination of a lease and subsection 3 of section 13 was intended to deal with options to purchase in gross. There was no [page308] intention of having the provisions of subsection 3 of section 13 apply to options to renew a lease, to which the rule against perpetuities does not now apply." The OLRC then recommended adding s. 13(4) to make this latter point clear.

[62] With respect to the then proposed s. 13(3), the OLRC states at p. 54: "Any other option to acquire an interest in land should be valid for a period of twenty-one years from the time of its creation as against all persons but thereafter it shall be void even a s against the original parties to such option." The proposed draft s. 13(3) is identical to the current s. 13(3).

[63] It seems clear that in s. 13, the OLRC was concerned about options relating to corporeal hereditaments.

[64] Further, while there is no definition offered in the Reports concerning what is meant by "interests in land" as that phrase is used in s. 13(3), under the common law an "interest in land" was, at the time *The Perpetuities Act, 1966* was passed, limited to corporeal hereditaments. Namely, physical land that could be seen and handled and over which ownership or possession could be exercised such as a freehold or leasehold interest.

[65] Therefore, in the draft legislation annexed to each of the OLRC Reports, s. 13(1) dealt with reversionary interests on the term of lease, while s. 13(2) addressed reversionary interests on the term of agreements for a lease. Section 13(3) then addressed "all other options to acquire for valuable consideration any interest in land". The perpetuity or vesting period was 21 years "from the date of its creation as between the person by whom it was made and the person to whom or in whose favour it was made and all persons claiming through either or both of them". In the version of the draft legislation annexed to Report No. 1A, the OLRC, at p. 6, recommended adding s. 13(4) to make is "abundantly clear" that the rule would also not apply to "options to renew a lease".

[66] As stated earlier, this draft provision was enacted in the original legislation and is the same in the current version of s. 13 in the *Perpetuities Act*.

[67] It is not until Report No. 1A, that the OLRC raised the issue of incorporeal hereditaments such as easements, *profits à prendre*, and any "other similar interest" to which the rule against perpetuities may be applicable, and recommended a longer vesting period of 40 years.

[68] At pp. 6-8 of Report No. 1A, the OLRC explained that it had not yet addressed "the problem of easements, *profits à prendre* and other similar interests and the effect, if any, of the rule against perpetuities upon them". The OLRC noted, at p. 6, that the relationship between easements and the common law rule was "shrouded in uncertainty". It recommended that interests, such [page309] as easements and *profits à prendre*, be captured by the new legislation but with a longer vesting period of 40 years, subject to the "wait and see" principle that would be codified in s. 4 of the Act. The OLRC thus recommended that a new s. 14 be added to the proposed legislation which included the longer vesting period of 40 years and that the interest would only be void for remoteness "if, and to the extent that, it fails to acquire the characteristics of a present exercisable right in the servient land within the forty-year period".

[69] The specified property interests in s. 14 of easements and *profits à prendre* are incorporeal hereditaments. The exercisable right in question is one is in the "servient land", meaning the land that is subject to an easement, *profit à prendre* or similar interest.

*Analysis*

[70] In Anger and Honsberger's *Law of Real Property*, 2nd ed. (Aurora, Ont.: Canada Law Book, 1985), at p. 924, the authors state that not all rights relating to land are incorporeal hereditaments but that historically rent charges, easements, and *profits à prendre* have been recognized as such. With respect to *profits à prendre*, the authors state that where the right is held in common with others, including the owner of the land, it is known as a *profit à prendre* in common. Further, at pp. 974-75, a "right exercisable by the owner of it profit a prendre independently of his ownership of any land is a profit a prendre in gross". In this case, while the option provides that ACC can "immediately" purchase a one-half undivided interest in the Mining Rights, the applicants maintain sole discretion and control in deciding whether any exploration or extraction of the subject minerals will take place, without consultation with the ACC (see ss. 7 and 4 of the MROA respectively).

[71] The question seems thus to be whether an option to purchase a one-half undivided interest in the Mining Rights with the associated 49 per cent net share of the revenues through a *profit à prendre* in common falls into the category of interests reflected in s. 13(3) as "all other options" or rather falls into the categories of interest reflected in s. 14 as a "similar interest".

[72] The applicants submit that the wording in s. 13(3) of "all other options to acquire for valuable consideration any interest in land" means options of every type, irrespective of whether the subject of the option is an interest in a corporeal hereditament or an incorporeal hereditament, under a plain language interpretation that places an emphasis on "all other options" and "any interest in land". However, in my view, this interpretation fails to [page310] reflect the history or object of the legislation, as well as the context of ss. 13 and 14 when read together.

[73] The object of the legislation was to modify the common law rule against perpetuities to reflect the modern reality of commercial transactions.

[74] The history of the legislation and these two provisions in particular demonstrates an intention to create a longer vesting period for the exercise of future rights over incorporeal property interests. Further, the options intended to be addressed in s. 13(3) were options in gross.

[75] Section 13 deals with reversionary interests over corporeal hereditaments. The language of "interest in land" within the context of the common law rule against perpetuities, and at the time of the enactment of the legislation, was related to corporeal hereditaments. The specific items referenced in ss. 13(1)-(2) also deal with corporeal hereditaments in an area that was seen to be confusing at common law; namely, whether the rule applies to leases and agreements to lease.

[76] On the other hand, s. 14 deals with incorporeal hereditaments including easements and *profits à prendre* and "similar interests" in relation to rights exercisable in the "servient land".

[77] The reference to "other options" in s. 13(3) when read in harmony with the other subsections of that provision along with s. 14, leads me to the conclusion that "other options" relates only to options to acquire for valuable consideration an interest in corporeal hereditaments -- then characterized as the "interest in land", before the decision in *Dynex*. Similarly, the reference to "similar interests" in s. 14, when read together with s. 13, means interests similar in nature to easements and *profits à prendre*, which are incorporeal interests and, at common law, the subject of which was also one of confusion under the common law rule against perpetuities. An option to acquire a *profit à prendre* is still an incorporeal interest that is an "exercisable right in the servient land" and as such falls within the category of "similar interests" under s. 14.

[78] In my view, this interpretation of the interrelationship between ss. 13 and 14 reflects the intent of the legislature, as reflected in the legislation the day after its enactment, to modify or clarify the common law rule against perpetuities drawn along the lines of treatment of corporeal hereditament interests and incorporeal hereditament interests. In particular, s. 14 reflects the commercial reality that transactions involving incorporeal hereditament interests are generally the product of sophisticated commercial transactions and should not be frustrated by the rule against perpetuities. The fact that s. 14 provides a longer vesting [page311] period (40 years) than the common law vesting period (21 years) further supports this view.

[79] Furthermore, the public policy interest underlying the common law rule of perpetuities, as reflected and modernized in the *Perpetuities Act*, was that property not be unduly burdened by obligations indefinitely in a way that would discourage future commercial development of the property. The MROA does not pose any such deterrence, since it is the applicants who exercise complete control over when, how, and whether to enter into mineral exploration, extraction, and development. Further, the Quercus Algoma Parcels have been sold three times since the creation of this option, with full knowledge of it, as the MROA is registered on title and the option is a covenant running with the land and as a charge.

[80] The MROA was negotiated by sophisticated parties well versed in mining transactions. The MROA expressly provided for a term of 40 years for the exercising by the Optionee of the

right to participate in a *profit à prendre* in common with the owners/Optionor of the Quercus Algoma Parcels. The MROA provided that this option would be registered on title, as it was, and binding on future landowners within the 40-year vesting period. At the time of the entering into of the MROA (and the MacDonald transaction), s. 14 of the *Perpetuities Act* had been in effect for over 30 years. The MROA provided that this option would be a covenant running with the land and a charge over the "Mining Rights" as security for the obligations owned by the owners of the Land.

[81] The fact that the contingent incorporeal interest is framed within a commercial contract as an "option" does not transform it into an interest in a corporeal hereditament within the meaning of the *Perpetuities Act*.

[82] It is reasonable to infer from the terms of the MROA that the intent of the parties to the MacDonald transaction was that the right created by the MROA as an option to purchase a one-half undivided interest in the Mining Rights and the associated share in the profits in relation to a *profit à prendre* in common was intended to be an "exercisable right in the servient land within the forty-year period" consistent with s. 14 of the *Perpetuities Act*, and s. 13 and of the MROA.

*Conclusion*

[83] Accordingly, I find that the option created by the MROA is a right exercisable within the meaning of s. 14 of the *Perpetuities Act*. Therefore, the vesting period applicable to the exercise of the option created by the MROA is 40 years. [page312]

[84] The option was created in 1997 and will not expire until 40 years hence. Therefore, the option is presumptively valid and can be exercised by ACC within the 40-year vesting period.

[85] For these reasons, the application is dismissed.

[86] In the event the parties cannot agree on the issue of costs, the respondent shall deliver its costs outline and written submissions (not to exceed three pages double spaced and only if necessary to supplement the cost outline) by no later than April 16, 2021. The applicants will then deliver its costs outline and written submissions (with the same restrictions) by no later than April 23, 2021. The costs outlines and submissions should be provided to my judicial assistant.

*Application dismissed.*

---

**End of Document**

OEB File No.: EB-2022-0207

**ENBRIDGE GAS INC. v. THE CORPORATION OF THE COUNTY OF ESSEX**

---

**ONTARIO ENERGY BOARD**

# COMPENDIUM OF THE COUNTY OF ESSEX FOR REFERENCE DURING ORAL ARGUMENT


**DAVID M. SUNDIN**
**LSO #60296N**
Office of the County Solicitor
360 Fairview Avenue West
Essex, Ontario N8M 1Y6
(T) 519-776-6441 ext. 1345
(F) 519-776-4455
(E) dsundin@countyofessex.ca

LAWYER FOR THE INTERVENOR,
THE CORPORATION OF THE COUNTY OF ESSEX