

# LEGAL ALERT

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Current Legal Developments Critical to Corporate Management

## IN THIS ISSUE

### COMMERCIAL PROPERTY AND LEASES

*No exceptions to Ontario positive covenants rule*

Page 89

### SECURED AND UNSECURED TRANSACTIONS

*New frontier in regulating retail payments in Canada*

Page 89

### ENVIRONMENT

*Elusive stigma damages in contamination cases*

Page 93

### PENSIONS AND BENEFITS

*CPP: Canadians will soon pay more and get more*

Page 95

### BRIEFLY SPEAKING

*Ground-breaking decisions, statutory amendments, and legislative initiatives*

Page 96

*Laws and institutions, like clocks, must occasionally be cleaned, wound up, and set to true time.*

~ Henry Ward Beecher  
(1813 –1887)

## COMMERCIAL PROPERTY AND LEASES

### No exceptions to Ontario positive covenants rule

Seher Goderya,  
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**The Ontario Court of Appeal has confirmed that positive covenants do not run with freehold land, whether in law or equity.**

In *Black v. Owen* (“Black”), the Ontario Court of Appeal recently confirmed that the positive covenants rule is still good law. That rule — that positive covenants do not run with freehold land, whether in law or in equity — was established in the 2002 case of *Amberwood Investments Ltd. v.*

*Durham Condominium Corp. No. 123* (“Amberwood”).

Positive covenants are obligations that require an affirmative act to be performed with respect to land, e.g., the requirement to make a payment of money. Restrictive covenants are obligations that restrict an act to be performed with respect to land, e.g., a restriction on building fences on the land.

The successor-in-title of lands cannot be forced to perform a positive covenant that he or she has not expressly agreed to assume; however, that successor-in-title can be bound to comply with a restrictive covenant.

*See Commercial Property and Leases, page 90*

## SECURED AND UNSECURED TRANSACTIONS

### New frontier in regulating retail payments in Canada

Tracy Molino,  
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**The Department of Finance Canada released a Consultation Paper providing a new, federal oversight framework for retail payment systems.**

As a result of the rapid pace of retail payments innovation, the Canadian

government has identified a need to establish rules and regulations to ensure the retail payments ecosystem evolves in a manner that prioritizes end-user security while promoting the development of faster, cheaper and more convenient payment methods.

#### Consultation paper

In July 2017, the Department of Finance Canada (the “Department”) released a new, federal oversight framework for retail payment systems for consultation in a paper titled, “A

*See Secured and Unsecured Transactions, page 91*

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# Commercial Property and Leases

*continued from page 89*

Restrictive covenants *can* run with freehold land under Ontario law.

## Facts

In *Black*, the property at issue (the “Property”) is part of a community in Toronto called Wychwood Park (the “Park”). That community is subject to an 1891 Trust Deed (the “Deed”) entered into by the original owners of various properties surrounding the Park.

Unlike the Property, which enjoys access to a municipal road, many of the properties in the Park require access to private roads, which are to be maintained by the Trustees appointed through the Deed, along with other common property.

The Deed — which requires the owners to pay an annual levy for the upkeep of the common property — is registered on title to the Property.

## Non-payment of levy

In 2008, Ivon Owen, the owner of the Property at the time, stopped making the annual levy payments to the Trustees. When he was sued for non-payment, Mr. Owen was found to be liable to make the payments.

The current appellants, Gerald Owen and Katherine Anderson, were living with Mr. Owen at that time. Upon inheriting the property in 2010 they, too, refused to make any of the payments.

When they were likewise sued for non-payment of the levy, they sought to rely on the positive covenants rule: they argued that the payment of the annual levy could not be enforced on them as they were successors-in-title and they had not agreed to assume the payments.

## Benefit and burden

At the Small Claims Court appeal, Justice J. Wilson held that the burden and benefit exception, as well as the conditional grant exception, should each be recognized as valid exceptions to the rule in Ontario.

The English benefit and burden exception allows the court to review the circumstances of the case, the intentions and relationships of the parties, and the nature of the benefit and burdens at issue, to determine whether there is a necessary connection between the benefit and the burden running with the land to allow for the burden or positive covenant to be enforced on the successors-in-title of the land.

## Conditional grant

The conditional grant exception allows the court to determine whether the grant of a benefit running with the land is conditional on assuming the performance of a positive obligation. If so, the positive obligation becomes binding on the land and its successors-in-title.

## Decision overturned

At the Court of Appeal, Justice Cronk strongly rejected Justice Wilson’s decision. Firstly, she found that Justice Wilson had failed to follow binding appellate precedent. The rule as articulated by the majority of the court in *Amberwood* is still good law in Ontario and Justice Wilson was therefore bound to apply it.

Although there are instances where a lower court may depart from binding precedent (if there is a new legal issue or if there are significant developments in law or a change in circumstances), Justice Cronk found that none of these instances were applicable in *Black*.

## Exceptions rejected

Having established that *Amberwood* is binding law, Justice Cronk confirmed that the benefit and burden exception cannot be recognized as good law in Ontario.

In particular, the court in *Amberwood* had already reviewed this area of law in English jurisprudence to find that there were too many uncertainties and frailties associated with it, and

*See Commercial Property and Leases, page 91*

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## Commercial Property and Leases *continued from page 90*

adopting it may have consequences that could not be addressed on a case-by-case basis.

Justice Cronk also held that the conditional grant exception, as discussed in *Amberwood*, cannot be recognized under Ontario law as a separate and distinct exception to the positive covenants rule.

If a grant of a benefit is framed as being conditional, then the grant of that benefit is no longer a positive covenant — rather, it resembles a restrictive covenant in nature and can therefore run with the land.

### Positive covenant

Despite rejecting the exceptions, Justice Cronk proceeded to apply both exceptions to the facts of the case, only to find that the wording in the Deed did not provide a correlation

between the benefit of the use of common property and the burden of making the annual levy payment.

She also found that the grant to use the common property as worded in the Deed was not drafted to be conditional on the payment of the annual levy. The payment of the annual levy as set out in the Deed was indeed a positive covenant and, therefore, unenforceable against the appellants as successors-in-title to the Property.

### Significance

How can future parties seeking to enforce positive covenants on successors-in-title proceed to ensure that their interests are protected? One option available to such parties is to enter into an agreement with each successor-in-title wherein each

successor-in-title agrees to assume and perform such positive covenants.

This approach can ensure that privity of contract is maintained between the parties. Pending such agreements, it appears the only other option, for now, is to await legislative change.

REFERENCES: *Black v. Owen*, 2017 ONCA 397, 2017 CarswellOnt 7390 (Ont. C.A.); *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123*, 2002 CarswellOnt 850, 58 O.R. (3d) 481 (Ont. C.A.), additional reasons 2002 CarswellOnt 1201 (Ont. C.A.), leave to appeal to S.C.C. abandoned *Durham Condominium Corp. 123 v. Amberwood Investments Ltd.*, [2002] S.C.C.A. No. 208 (S.C.C.); and *Austerberry v. Oldham* (1885), 29 Ch. D. 750 (C.A.).

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## Secured and Unsecured Transactions *continued from page 89*

New Retail Payments Oversight Framework” (the “Consultation Paper”).

While the consultation period has now closed, the Consultation Paper warrants additional commentary, given the importance of retail payments to the Canadian economy and the rapid pace of innovation in the industry.

### DLT

Most recent media coverage of the payments industry has focused on block chain and other distributed ledger technologies (“DLT”). While DLT does offer exciting potential for payments systems, the retail payments market is vast, and only a tiny fraction of payments are completed using DLT.

With a view to this reality, the Consultation Paper’s oversight framework focuses on the retail payments issues that impact customers on a daily basis

and excludes “virtual currencies,” including currencies like Bitcoin.

### Oversight framework

The Oversight Framework represents a deliberate shift in regulatory approach from institution-based to function-based regulation.

This change results in both payment functions and payment service providers (“PSP”s) — entities that provide functions related to payments that are not banks or payment card networks — being subject to regulation where they are currently unregulated.

This shift is notable for two reasons. First, it means that less-regulated entities — like card networks and more stringently-regulated entities like banks — will both be subject to the Oversight Framework when they perform certain payment functions.

### PSPs as fund holders

Second, PSPs will be central participants in the new Oversight Framework, and will be permitted to perform a wide variety of payment functions.

As an illustration, one of the functions described by the Oversight Framework is the *Provision and Maintenance of a Payment Account*, which will allow PSPs to hold funds for end users.

Today, this activity is only narrowly permitted by non-deposit-taking institutions. In Canada, this expanded scope of PSP participation in retail payments to include deposit-taking-type responsibilities would be unprecedented.

The Oversight Framework’s use of a functional approach means new entities will be able to participate in the retail payments space in meaningful, independent and innovative ways.

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*See Secured and Unsecured Transactions, page 92*