



**SUPREME COURT OF CANADA**

**CITATION:** Heritage Capital Corp. v. Equitable  
Trust Co., 2016 SCC 19

**APPEAL HEARD:** January 22, 2016  
**JUDGMENT RENDERED:** May 6, 2016  
**DOCKET:** 36301

**BETWEEN:**

**Heritage Capital Corporation**  
Appellant

and

**The Equitable Trust Company (now continued as Equitable Bank),  
Lougheed Block Inc., Neil John Richardson,  
Hugh Daryl Richardson, Heritage Property Corporation,  
604 1st Street S.W. Inc. and Krayzel Corp.**  
Respondents

**CORAM:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner,  
Gascon, Côté and Brown JJ.

**JOINT REASONS FOR JUDGMENT:** Gascon and Côté JJ. (McLachlin C.J. and Abella, Cromwell,  
(paras. 1 to 64) Moldaver, Karakatsanis, Wagner and Brown JJ. concurring)

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HERITAGE CAPITAL CORP. v. EQUITABLE TRUST CO.

**Heritage Capital Corporation**

*Appellant*

v.

**The Equitable Trust Company (now continued as Equitable Bank),  
Lougheed Block Inc.,  
Neil John Richardson, Hugh Daryl Richardson,  
Heritage Property Corporation,  
604 1st Street S.W. Inc. and  
Krayzel Corp.**

*Respondents*

**Indexed as: Heritage Capital Corp. v. Equitable Trust Co.**

**2016 SCC 19**

File No.: 36301.

2016: January 22; 2016: May 6.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner,  
Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Property — Real property — Sale — Right to incentive payments arising  
under Incentive Agreement registered by caveat on title to land — City adopting*

*by-law designating building as municipal historical resource under Historical Resources Act — City entering into agreement with building owner providing for yearly payments over 15 years to compensate for decrease in economic value due to designation and for cost of rehabilitation work, and imposing restrictions on use of building — Agreement registered by caveat on title to land — Building sold in judicial sale — Whether incentive payments constitute positive covenant running with land either by virtue of Historical Resources Act or by virtue of agreement between City and building owner — Whether incentive payments sold as asset in judicial sale — Historical Resources Act, R.S.A. 2000, c. H-9, s. 29.*

*Personal property security — City entering into agreement with building owner providing for incentive payments to compensate for decrease in economic value due to historic resource designation and for cost of rehabilitation work — Building owner assigning right to incentive payments to two successive lenders as security for loans — Building sold in judicial sale — First lender assigning interest in payments to purchaser after closing of sale — Whether priority of interests in payments governed by Personal Property Security Act, R.S.A. 2000, c. P-7.*

Lougheed Block Inc. (“Lougheed”) was the owner of the Lougheed Building, located in downtown Calgary, when it was designated a “Municipal Historical Resource” under the *Historical Resources Act* (“HRA”) in 2004. In order to compensate Lougheed for any decrease in economic value due to the designation and for expenses incurred in carrying out rehabilitation work to the building, the City of

Calgary agreed to pay Lougheed \$3.4 million in 15 annual installments (“Incentive Payments”). The agreement (“Incentive Agreement”) between Lougheed and the City, which also imposed certain restrictions on the owner of the building in respect of its use, was registered by caveat on title to the land.

In November 2006, Lougheed borrowed money from Equitable Trust. The loan was secured by, among other things, the assignment of the Incentive Agreement. In May 2007, Lougheed obtained additional financing from Heritage Capital Corporation and also assigned to it, as security for the loan, its right to the Incentive Payments. In May 2009, Lougheed defaulted on Equitable Trust’s loan. The latter then commenced an action to enforce some of its security. As a consequence, the Lougheed Building was advertised for judicial sale. The parent company of 604 1st Street S.W. Inc. (“604”) presented an offer (“604 Offer”), which was accepted in July 2010.

Shortly before the sale’s closing date, Lougheed applied to a master of the Court of Queen’s Bench for a declaration that the Incentive Payments were not an interest in land and were not included in the assets being sold to 604 in the judicial sale. The master issued the requested declaration. On appeal by 604, a chambers judge of the same court upheld the master’s declaration, finding that s. 29(3) of the *HRA* did not operate such that the Incentive Payments could run with the land as a positive covenant. On further appeal by 604, the majority of the Court of Appeal

allowed the appeal, holding that the *HRA* creates *sui generis* covenants that displace the common law rule that positive covenants do not run with the land.

*Held:* The appeal should be allowed.

Correctness is the appropriate standard for reviewing the chambers judge's interpretation of the common law, as well as of the *HRA* given that statutory interpretation is a question of law. The palpable and overriding error standard applies to the chambers judge's interpretation of the Incentive Agreement and the 604 Offer, since contractual interpretation is a question of mixed fact and law.

Section 29 of the *HRA* does not completely displace the common law rule that positive covenants do not run with the land. Rather, s. 29 limits the positive covenants that may run with the land to those that are in favour of the person or organizations listed at s. 29(1), namely: the Minister; the council of the municipality in which the land is located; the Alberta Historical Resources Foundation; or an historical organization that is approved by the Minister. It does not permit positive covenants in favour of an entity not listed in s. 29(1) to run with the land. An application of the relevant principles of statutory interpretation leads to the conclusion that the exception to the common law rule provided for in s. 29 of the *HRA* should be limited by the precise language of the provision and the underlying purpose of the *HRA*. Had the legislature intended to completely displace the common law rules regarding positive covenants and create *sui generis* covenants and conditions that are enforceable by both the City and the landowner, it would have said

so expressly. Section 29 is intended to permit governments and public interest bodies that have no interest in the land or building to enforce covenants and conditions that are in their favour. The chambers judge properly interpreted the *HRA*.

In the case at bar, the right to the Incentive Payments did not become an interest that runs with the land by virtue of the *HRA*. Although the City falls under the organizations listed in s. 29(1), the covenant to pay the Incentive Payments is not in its favour. Therefore, the Incentive Payments do not run with the land under the *HRA*. Furthermore, the Incentive Agreement itself does not reveal an intention that the Incentive Payments would run with the land. Nothing in the Incentive Agreement indicates that the parties to the agreement intended the payments to go to a future owner; rather, a reasonable interpretation of the agreement is that all the Incentive Payments were intended to go to Lougheed. Therefore, even if the common law rule could be circumvented in the case at bar, 604's claim to the payments would still fail. There is no basis on which to disturb the chambers judge's findings with respect to the contractual interpretation of the Incentive Agreement.

The Incentive Payments were not sold in the judicial sale of the Lougheed Building to 604. The chambers judge's conclusion to that effect is well supported by the evidence, and he did not make a palpable and overriding error in his interpretation of the 604 Offer. There was no indication, express or otherwise, in any of the documents related to the sale that the court intended to sell, or 604 intended to buy, the Incentive Payments.

The Incentive Payments were assigned as security and the order of priorities is therefore governed by the *Personal Property Security Act* (“PPSA”). As set out in s. 3(1)(a), the *PPSA* applies to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral. The Incentive Payments are a chose in action, as the right to the payments is merely contractual and is not an interest that runs with the land or that is ancillary to the real property. Therefore, any interests in the payments are not exempt from the *PPSA*. If the parties disagree about the order of priorities under the *PPSA*, this issue alone should be remitted to a master to be decided.

### Cases Cited

**Referred to:** *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750; *Rhone v. Stephens*, [1994] 2 A.C. 310; *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481; *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, 155 B.C.A.C. 1; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Attorney General of Quebec v.*

*Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18.

### Statutes and Regulations Cited

*Historical Resources Act*, R.S.A. 2000, c. H-9, ss. 1(e) “historic resource”, 2, 26, 28, 29.

*Personal Property Security Act*, R.S.A. 2000, c. P-7, ss. 3(1)(a), 4(f), (g).

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APPEAL from a judgment of the Alberta Court of Appeal (O’Brien, Slatter and Wakeling JJ.A.), 2014 ABCA 427, 588 A.R. 258, 7 Alta. L.R. (6th) 285, 3 P.P.S.A.C. (4th) 69, 49 R.P.R. (5th) 19, 626 W.A.C. 258, [2015] 3 W.W.R. 139, [2014] A.J. No. 1397 (QL), 2014 CarswellAlta 2280 (WL Can.), setting aside a decision of Jeffrey J., 2013 ABQB 209, 550 A.R. 337, 77 Alta. L.R. (5th) 276, 1 P.P.S.A.C. (4th) 38, 31 R.P.R. (5th) 253, [2013] A.J. No. 362 (QL), 2013



CarswellAlta 457 (WL Can.), which affirmed a decision of Master Laycock, 2011 ABQB 269, 512 A.R. 200, 52 Alta. L.R. (5th) 414, [2011] A.J. No. 463 (QL), 2011 CarswellAlta 682 (WL Can.). Appeal allowed.

*Jeffrey E. Sharpe and Paul G. Chiswell*, for the appellant.

No one appeared for the respondent The Equitable Trust Company.

*Toby D. Schultz*, for the respondents the Lougheed Block Inc., Neil John Richardson, Hugh Daryl Richardson and the Heritage Property Corporation.

*Derrick S. Pagenkopf and Peter Morrison*, for the respondent 604 1st Street S.W. Inc.

No one appeared for the respondent Krayzel Corp.

The judgment of the Court was delivered by

GASCON AND CÔTÉ JJ. —

I. Overview

[1] At the centre of this appeal is the Lougheed Building in downtown Calgary, which was designated a “Municipal Historic Resource” under the *Historical Resources Act*, R.S.A. 2000, c. H-9 (“*HRA*”). The owner at the time of the designation, Lougheed Block Inc. (“LBI”), agreed to rehabilitate the building and adhere to certain restrictions on its use in exchange for 15 yearly payments (“Incentive Payments”) from the City of Calgary (“City”) totalling \$3.4 million. The purpose of the Incentive Payments, owed under the “Lougheed Building Rehabilitation Incentive Agreement” (“Incentive Agreement”), was to compensate LBI for the restoration and for any decrease in economic value due to the historic resource designation. That agreement was registered by caveat on title to the land pursuant to the *HRA*.

[2] This appeal involves a dispute between one of LBI’s creditors, Heritage Capital Corporation (“Heritage”), and the present owner of the Lougheed Building, 604 1st Street S.W. Inc. (“604”), both of which claim a right to the Incentive Payments. At issue is whether the Incentive Payments constitute a positive covenant running with the land by virtue of the *HRA*, whether they were sold in the judicial sale of the Lougheed Building, and what the present-day effect is of a number of agreements assigning an interest in the Incentive Payments.

[3] The master in chambers and the chambers judge both found that the Incentive Payments did not run with the land by operation of the *HRA* and that they had not been sold to 604 in the judicial sale. They declined to decide the issue of

priority. The majority of the Court of Appeal disagreed, finding that the *HRA* creates *sui generis* covenants that displace the common law rule that positive covenants do not run with the land. They accordingly held that the Incentive Payments ran with the land. O'Brien J.A., dissenting, would have adopted the chambers judge's interpretation of the *HRA*.

[4] We would allow the appeal. Even though, at s. 29(3), the *HRA* provides that a condition or covenant relating to the preservation or restoration of any land or building that is registered on title under s. 29(2) runs with the land and can be enforced whether it is positive or negative, we conclude that the only covenants that run with the land under the *HRA* are those that are in favour of the person or organizations listed in s. 29(1). In the instant case, although the City falls under the listed organizations, the covenant to pay the Incentive Payments is not in its favour. Therefore, the Incentive Payments do not run with the land under the *HRA*. In any event, the Incentive Agreement between LBI and the City shows no intention for the Incentive Payments to run with the land.

[5] We further conclude that the Incentive Payments were not sold in the judicial sale of the Loughheed Building. There was no indication, express or otherwise, in any of the documents related to the sale that the court intended to sell, or 604 intended to buy, the Incentive Payments. Granting the payments to 604 as the current owner would create an undeserved windfall and would have no commercial rationale. Lastly, we find that the Incentive Payments were assigned as security and that the

order of priorities is therefore governed by the *Personal Property Security Act*, R.S.A. 2000, c. P-7 (“*PPSA*”). To the extent that the parties disagree about the effect of the *PPSA*, we would remit the matter to a master in chambers for determination on the priority issue alone.

## II. Facts

[6] LBI acquired the Lougheed Building in 2003. It owned the building at the time it was designated a “Municipal Historic Resource” under s. 26 of the *HRA* in a bylaw passed by the City in 2004. Following the designation, LBI and the City entered into the Incentive Agreement in 2006. It provided that LBI would carry out rehabilitation work on the building and that, upon completion of the work, the City would begin paying LBI \$3.4 million in Incentive Payments, in 15 annual instalments. The purpose of the Incentive Payments was twofold: to satisfy, pursuant to s. 28 of the *HRA*, all of LBI’s rights to compensation from the City for the loss of economic value sustained as a result of the passage of the designating bylaw and to compensate LBI for expenses incurred in carrying out the rehabilitation work. This work was required to repair the building and restore it to its original appearance of 1912. LBI completed the rehabilitation work in 2007 and started receiving the Incentive Payments shortly thereafter.

[7] The Incentive Agreement also imposed certain restrictions on the owner of the Lougheed Building, namely:

- 8.4 The Building and Land shall be used for commercial purposes and no other purpose until all Yearly Installments have been paid pursuant to this Agreement.
- 8.5 The Owner shall use its best efforts to ensure that performance space is maintained within that portion of the Building that is currently referred to as the Grand Theatre.

[8] As was stipulated in clause 8.3, the Incentive Agreement was registered by caveat on title to the land. The entire agreement was attached to the caveat as a schedule.

[9] In November 2006, LBI borrowed money from The Equitable Trust Company, since continued as the Equitable Bank (“Equitable”). The loan was secured by a mortgage, a general security agreement (“GSA”), and assignments of a range of agreements, including the Incentive Agreement (collectively the “Equitable Assignment”). Equitable filed a financing statement at the Personal Property Registry at that time. In May 2007, LBI obtained additional financing from Heritage, and also assigned its right to the Incentive Payments to Heritage as security for the loan (the “Heritage Assignment”). In May 2009, LBI defaulted on the Equitable loan, and in June 2009, Equitable commenced an action to enforce some of its security. The Lougheed Building was advertised for judicial sale in March 2010. In June 2010, 604’s parent company presented an offer to buy the property (the “604 Offer”), which was accepted in July 2010 by means of an “Order Confirming Sale” issued by the Court of Queen’s Bench.

[10] Towards the end of August 2010, shortly before the sale's closing date, LBI applied to a master in chambers for a declaration that the Incentive Payments were not an interest in land and were not included in the assets being sold to 604. After hearing the parties' submissions, the master adjourned the application without deciding the issue, on the condition that the transaction would close as scheduled on September 1, 2010, without prejudice to the parties' rights on the issue of entitlement to the Incentive Payments. After the closing, Equitable executed a specific assignment of its interest in the Incentive Agreement to 604 (the "604 Assignment"). The Heritage Assignment was only registered at the Personal Property Registry in October 2010. There is no evidence on the record in this Court that the 604 Assignment was registered at the Personal Property Registry before the Heritage Assignment.

[11] It is undisputed that 604, as the owner of the Lougheed Building, is subject to the covenants in favour of the City set out in clauses 8.4 and 8.5 of the Incentive Agreement, which restrict the building's use. In 604's submission, as a result of the registration of the entire Incentive Agreement on title pursuant to s. 29 of the *HRA*, the Incentive Payments also constitute a positive covenant running with the land to which 604 is entitled as the new owner of the Lougheed Building. In the alternative, 604 submits that the Incentive Payments were among the assets sold in the judicial sale.

[12] Heritage is supported by LBI in its argument that the *HRA* does not allow the Incentive Payments to run with the land, that the right to the Incentive Payments is merely contractual and that the parties to the Incentive Agreement never intended these payments to run with the land. It also submits that the Incentive Payments were not sold as an asset in the judicial sale. Therefore, Heritage argues that as a creditor to LBI, it was assigned the Incentive Payments as security, and that it has priority with respect to these payments because its security was registered under the *PPSA* first.

### III. Decisions Below

#### A. *Alberta Court of Queen's Bench, 2011 ABQB 269, 512 A.R. 200*

[13] Master Laycock granted the order sought by LBI, declaring that the Incentive Payments were not an interest in land. In his view, the scheme of the *HRA* required the City to compensate the owner of the property at the time the land or building was designated a historic resource. He concluded that the parties to the Incentive Agreement had intended the Incentive Payments to be a purely contractual benefit that was to be bestowed on LBI. He further declared that the Incentive Payments had not been sold to 604 as an asset in the judicial sale. He found that neither Equitable's statement of claim nor the order for sale of the Lougheed Building nor the judicial sale listing indicated that the court intended to include the payments in the judicial sale.

[14] The master further noted that there was no mention of the Incentive Payments in the 604 Offer or in the court's acceptance of the offer. Equitable's statement of claim referred to its GSA, which included personal property "located at or used in connection with the property", but he was of the view that the Incentive Payments did not fall within that description of the property. With respect to the 604 Assignment, which had been executed after the sale of the Lougheed Building, the master held that because the Incentive Payments were only collateral for the debt and the debt had not been transferred, the transfer of the interest in the Incentive Payments was ineffective.

B. *Alberta Court of Queen's Bench, 2013 ABQB 209, 550 A.R. 337*

[15] The chambers judge, Jeffrey J., dismissed 604's appeal of the master's order, declaring that LBI had been entitled to receive the Incentive Payments as at August 30, 2010. He found that s. 29(3) of the *HRA* did not operate such that the Incentive Payments could run with the land as a positive covenant, given that only covenants in favour of the City can run with the land under that provision. Jeffrey J. agreed with the master's conclusion that the scheme of the *HRA* is to require the City to compensate the owner of property at the time of a designation under s. 26. In his view, the conclusion that the City's covenant to pay did not run with the land was consistent with the apparent intention of the parties to the Incentive Agreement. Regarding the judicial sale, he found that if the right to receive the Incentive Payments were an asset included in the sale, the 604 Offer would have expressly



referred to it. He declined to decide the issue with respect to the *PPSA* priorities, finding that because the 604 Assignment had been executed after August 30, 2010, it was beyond the scope of the issues properly before him.

C. *Alberta Court of Appeal, 2014 ABCA 427, 588 A.R. 258*

(1) Majority (Slatter and Wakeling JJ.A.)

[16] The majority held that the proper standard for reviewing the chambers judge's interpretation of the *HRA*, the Incentive Agreement and the 604 Offer was correctness. They found that the *HRA* creates a *sui generis* historic resource covenant that runs fully with the land. In their view, s. 29 should be read as setting aside all common law restrictions that prohibit positive covenants from running with the land and should not be interpreted as allowing only positive covenants in favour of the City. The majority also found that the Incentive Agreement could not be severed such that the portions of it relating directly to the building could run with the land but the portions relating to the payments could not.

[17] The majority concluded that the omission of a specific reference to the Incentive Agreement in Equitable's statement of claim should not be taken to imply that it had decided to forego a portion of its security. They noted that the receivership order issued by the court on consent included the Incentive Agreement. In their view, 604 had clearly agreed to take on the burdens of the Incentive Agreement — it had taken title subject to the caveat protecting the historic resource covenants — and

nothing in the Incentive Agreement suggested that the payments could or would be separated from the obligations under the agreement. Therefore, the majority found that the payments were clearly conditional on the performance of the obligations in the agreement and, all things considered, it did not make sense to suggest that the burdens of the Incentive Agreement had passed with the sale, but not the benefits.

(2) Dissent (O'Brien J.A.)

[18] O'Brien J.A. held that the chambers judge's interpretation of the *HRA* and common law principles were matters of law for which the appropriate standard was correctness, whereas his application of the legal principles and interpretation of the agreements were matters of mixed fact and law for which the standard was palpable and overriding error, and therefore required deference. O'Brien J.A. was of the view that the objective of the *HRA* is to ensure that covenants made by a landowner in favour of the City, whether positive or negative, run with the land and are enforceable against all subsequent owners, but that the *HRA* does not permit positive covenants in favour of the landowner to run with the land. Further, in his view, the parties to the Incentive Agreement did not intend the Incentive Payments to run with the land.

[19] O'Brien J.A. held that the Incentive Agreement was not included in the 604 Offer. He noted that the 604 Offer did not state expressly that the payments under the Incentive Agreement were among the property and assets included in the sale, and there was no indication of an intention to this effect in the documents related to the sale. Regarding the order of priorities, O'Brien J.A. found that, having regard to the

scope of the original application and to the evidentiary record, the Court of Appeal was not in a position to determine who was entitled to the Incentive Payments at that time.

#### IV. Issues

[20] This appeal raises four issues:

(1) What is the standard of review applicable to the chambers judge's interpretation of the Incentive Agreement and the 604 Offer?

(2) Did the Incentive Payments run with the land? The resolution of this issue depends on the answers to two questions:

(a) Does s. 29 of the *HRA* displace the common law rule that positive covenants do not run with the land?

(b) Does the Incentive Agreement registered on title show that the parties to the agreement intended the Incentive Payments to run with the land?

(3) Were the Incentive Payments sold as an asset in the judicial sale?

(4) Is the priority of interests in the Incentive Payments governed by the *PPSA*?

V. Analysis

A. *What Is the Applicable Standard of Review?*

[21] As Rothstein J. stated in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, “[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix” (para. 50). In this context, deference to fact-finders furthers the goals of limiting the number, length and cost of appeals, and of promoting the autonomy and integrity of trial proceedings. These principles weigh in favour of showing deference to first-instance decision makers on points of contractual interpretation, and treating contractual interpretation as a question of mixed fact and law (*Sattva*, at paras. 50-52).

[22] However, Rothstein J. held that where an extricable question of law can be identified, the standard of correctness applies. Extricable questions of law include “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor” (*Sattva*, at para. 53, quoting

*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 21).

[23] In 604's submission, the chambers judge in the case at bar erred in interpreting the *HRA* and this tainted his interpretation of the Incentive Agreement and the 604 Offer, which means that the applicable standard of review for the latter interpretation is correctness. We disagree. While it is true that correctness is the appropriate standard for reviewing the chambers judge's interpretation of the *HRA* given that statutory interpretation is a question of law (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 33), we do not find that this standard applies to his contractual interpretation of the Incentive Agreement and the 604 Offer. As the chambers judge's interpretation of the *HRA* was correct, it did not taint the interpretation of the agreements.

[24] In our view, O'Brien J.A. was right to conclude that the correctness standard applies to the interpretation of the *HRA* and the common law, but that the palpable and overriding error standard applies to the chambers judge's interpretation of the Incentive Agreement and the 604 Offer.

B. *Did the Incentive Payments Run With the Land?*

- (1) Does Section 29 of the *HRA* Displace the Common Law Rule That Positive Covenants Do Not Run With the Land?

[25] The idea of a payment obligation running with land is by its nature unusual. In fact, it is undisputed that at common law, positive covenants cannot run with the land (*Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750). This rule is founded on the principle that at common law, a person cannot be made liable upon a contract unless he or she was party to it (*Rhone v. Stephens*, [1994] 2 A.C. 310 (H.L.)). The rule against positive covenants running with the land applies even if an agreement contains an express intention to the contrary (*Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481 (C.A.)). As a result, the common law rule is that “[n]o personal or affirmative covenant, requiring the expenditure of money or the doing of some act, can, apart from statute, be made to run with the land” (V. Di Castri, *Registration of Title to Land* (loose-leaf), vol. 1, at p. 10-4 (emphasis added), quoted in *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, 155 B.C.A.C. 1, at para. 16). The issue in the instant case is whether and to what extent s. 29 of the *HRA* displaces the common law rule by permitting positive covenants to run with the land.

[26] In our view, O’Brien J.A. and the chambers judge properly interpreted the *HRA*. We find that s. 29 of the *HRA* limits the positive covenants that may run with the land to those that are in favour of the City or of the other person or organizations listed in s. 29(1) and are enforceable by that entity. The *HRA* does not permit positive covenants in favour of an entity not listed in s. 29(1) to run with the land.

[27] Applying the widely accepted modern approach to statutory interpretation, we find that the words of s. 29 of the *HRA*, when read 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, lead to the following conclusion: only covenants in favour of a “person or organization” listed in s. 29(1), whether negative or positive, will run with the land (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 7; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 26-30; *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3, at para. 18; *Canadian National Railway*, at para. 36). In the case at bar, therefore, the right to the Incentive Payments did not become an interest that runs with the land by virtue of the *HRA*.

[28] There is a presumption of statutory interpretation that the provisions of a statute are meant to work together “as parts of a functioning whole” (Sullivan, at p. 337) and form an internally consistent framework. In other words, “the whole gives meaning to its parts”, and “each legal provision should be considered in relation to other provisions, as parts of a whole” (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 326).

[29] In addition, where the legislature expressly creates a statutory exception to a common law principle, that exception should be narrowly construed, as the legislature is assumed not to have intended to change the common law unless it has

done so clearly and unambiguously. In *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39, Iacobucci J., writing for the majority, stated:

To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that “a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed”. In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that “in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law”.

[30] Professor Sullivan also takes the view that to displace a common law rule, the legislation must show a clear intention to do so. Quoting *Halsbury’s Laws of England* (3rd ed. 1961), vol. 36, at p. 412, para. 625, she writes that, “[e]xcept in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law” (p. 538).

[31] Applying these principles of statutory interpretation, we conclude that the exception to the common law rule provided for in s. 29 of the *HRA* should be limited by the precise language of the provision and the underlying purpose of the *HRA*. Section 29 should not be interpreted more broadly than necessary. The express words of the enactment state that while positive covenants may run with the land, they are enforceable only by the entities listed in s. 29(1) in whose favour they are



entered into. A purposive and contextual analysis of the *HRA*, and particularly of s. 29, shows that the legislation does not have a broader reach by necessary implication.

[32] Section 2 of the *HRA* provides that the Minister is responsible for “(a) the co-ordination of the orderly development, (b) the preservation, (c) the study and interpretation, and (d) the promotion of appreciation of Alberta’s historic resources”. A “historic resource” is defined as “any work of nature or of humans that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or esthetic interest including, but not limited to, a palaeontological, archaeological, prehistoric, historic or natural site, structure or object” (s. 1(e)).

[33] Section 26(2) of the *HRA* provides that a municipality may by bylaw designate any historic resource within the municipality as a “Municipal Historic Resource”. Section 28(1) then provides that if a bylaw under s. 26 decreases the economic value of the building or land designated by the bylaw, the owner of the building or land is entitled to compensation for the decrease:

**28(1)** If a bylaw under section 26 or 27 decreases the economic value of a building, structure or land that is within the area designated by the bylaw, the council shall by bylaw provide the owner of that building, structure or land with compensation for the decrease in economic value.

Section 28 does not specify that the right to compensation is available to a future owner, nor does it refer to s. 29, which supports the chambers judge’s interpretation to the effect that the intended recipient of the compensation under s. 28 is the owner at the time of the designation.

[34] Section 29, which is at the heart of this appeal, reads as follows:

**29(1)** A condition or covenant, relating to the preservation or restoration of any land or building, entered into by the owner of land and

- (a) the Minister,
- (b) the council of the municipality in which the land is located,
- (c) the Foundation, or
- (d) an historical organization that is approved by the Minister,

may be registered with the Registrar of Land Titles.

**(2)** When a condition or covenant under subsection (1) is presented for registration, the Registrar of Land Titles shall endorse a memorandum of the condition or covenant on any certificate of title relating to that land.

**(3)** A condition or covenant registered under subsection (2) runs with the land and the person or organization under subsection (1) that entered into the condition or covenant with the owner may enforce it whether it is positive or negative in nature and notwithstanding that the person or organization does not have an interest in any land that would be accommodated or benefited by the condition or covenant.

**(4)** A condition or covenant registered under subsection (2) may be assigned by the person or organization that entered into it with the owner to any other person or organization mentioned in subsection (1), and the assignee may enforce the condition or covenant as if it were the person or organization that entered into the condition or covenant with the owner.

**(5)** If the Minister considers it in the public interest to do so, the Minister may by order discharge or modify a condition or covenant registered under subsection (2), whether or not the Minister is a party to the condition or covenant.

[35] We agree with the chambers judge's interpretation of the above provision, which O'Brien J.A. accepted. Each subsection of s. 29 is like a piece of a puzzle, and when they are all read together, they form a coherent whole. Section 29(1) provides

that a condition or covenant “relating to the preservation or restoration of any land or building” that is entered into by a landowner and the Minister or one of the organizations enumerated there may be registered. Section 29(3) provides that a condition or covenant registered under s. 29(2) runs with the land and can, whether it is negative or positive, be enforced by the “person or organization” listed in s. 29(1). Subsections (1) and (3) are necessary for the preservation or restoration of Municipal Historic Resources, because without them, the City would not be able to enforce such a covenant or condition at common law, as it would have no interest in the land or building to which the covenant or condition applied.

[36] It is noteworthy that s. 29(3) does not expressly grant a landowner the ability to enforce a condition or covenant against the City. According to 604, express language to this effect is unnecessary, because the landowner can already enforce covenants and conditions, given that he or she has an interest in the land or building. In our view, had the legislature intended to completely displace the common law rules regarding positive covenants and create *sui generis* covenants and conditions that are enforceable by both the City and the landowner, it would have said so expressly.

[37] An additional submission by 604 is that s. 29(2), which does not on its face prevent the owner from registering a covenant or condition on title, shows that the owner can register covenants, and therefore can also enforce them under the *HRA*, despite the fact that there is no express wording to this effect in s. 29(3). We are not convinced by this argument. In our view, s. 29(3) should be read as a whole, and the

word “and” in that provision should be considered to be conjunctive rather than disjunctive. Section 29(3) provides that “[a] condition or covenant registered under subsection (2) runs with the land and the person or organization under subsection (1) that entered into the condition or covenant with the owner may enforce it whether it is positive or negative”. The covenant discussed in s. 29(3) is clearly the same covenant throughout the provision – this subsection sets out by whom the covenant registered under s. 29(2) can be enforced whether it is positive or negative, and that is by a person or organization listed in s. 29(1). Therefore, s. 29(3) does not lend itself to the interpretation that all covenants, whether positive or negative, in favour of the owner can be enforced by the owner and are covered by the exception provided for in that subsection.

[38] The two subsections immediately following s. 29(3) further confirm our interpretation.

[39] Firstly, s. 29(4) provides that a condition or covenant registered under s. 29(2) can be assigned by the “person or organization” to any other “person or organization” mentioned in s. 29(1). Again, there is no mention in s. 29(4) of the landowner being able to assign any “condition or covenant”.

[40] In our view, this is further evidence that s. 29 is intended to permit governments and public interest bodies that have no interest in the land or building to enforce covenants and conditions that are in their favour. There is a presumption that the legislature “avoids superfluous or meaningless words, that it does not pointlessly

repeat itself or speak in vain” (Sullivan, at p. 211, citing *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838). Every provision of a statute should be interpreted as having a meaning and a function, and “courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant” (Sullivan, at p. 211; see also *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28). Section 29(4) ensures that the City can assign a condition or covenant registered under s. 29(2) to any other person or organization mentioned in s. 29(1), such that the assignee may enforce it as if it were the person or organization that entered into the condition or covenant with the owner.

[41] Secondly, s. 29(5) provides that the Minister may at any time discharge or modify a covenant or condition registered under s. 29(2) if it is in the public interest to do so. This provision only makes sense in our view if the covenant referred to in s. 29(3) is one in favour of a “person or organization” mentioned in s. 29(1). Indeed, it would be unjust if the Minister could unilaterally discharge a covenant to pay in favour of a landowner simply because he or she considered it in the public interest to do so.

[42] The common denominator between s. 29(3), s. 29(4) and s. 29(5) is that they all point to the conclusion that the covenants and conditions that may be enforced under s. 29(3) are those that the “person or organization” listed in s. 29(1) can in fact enforce: the covenants and conditions in its favour.

- (2) Does the Incentive Agreement Registered on Title Show That the Parties to the Agreement Intended the Incentive Payments to Run With the Land?

[43] In addition to our conclusion arising out of our interpretation of the *HRA*, we find that the Incentive Agreement itself does not reveal an intention that the Incentive Payments would run with the land. Even if the common law rule could be circumvented in the case at bar, 604's claim to the payments would still fail. We see no basis on which to disturb the chambers judge's findings, which O'Brien J.A. accepted, with respect to the contractual interpretation of the Incentive Agreement.

[44] The provisions of the Incentive Agreement that are primarily at issue are clauses 5.3, 8.3 and 8.8. Clause 5.3 states:

If, at any time, the Owner, The Lougheed Block Inc., and any future owner, has not paid such taxes and levies when they become due, the City may, but is not obligated to, set off the amount owed by the Owner, the Lougheed Block Inc., or any future owner against any amounts owed, or that may be owing in the future, to the Owner by the City pursuant to this Agreement. [Emphasis added.]

[45] The chambers judge concluded that clause 5.3 could not be interpreted to mean that the parties to the Incentive Agreement intended the Incentive Payments to go to a future owner. The clause does not refer to a future owner when describing the recipient of the payments from the City under the agreement. Its only references to future owners relate to the payment to the City of taxes and levies. We find no palpable and overriding error in this interpretation.

[46] The chambers judge also considered clause 8.3, which provides that, “[p]ursuant to and in accordance with Section 29 of the Act, this Agreement shall be registered by caveat on title to the Lands and the conditions and covenants herein shall run with the Lands and shall bind the Owner and subsequent owners and successors in title to the Owner”. He found that this was simply a restatement of what is provided for in s. 29 of the *HRA* (enforcement by the City of a positive or negative covenant in its own favour). Again, we find no palpable and overriding error in this interpretation. The reference to s. 29 does not show that the parties to the agreement intended the Incentive Payments to run with the land.

[47] Finally, clause 8.8 provides that “[e]verything herein contained shall inure to the benefit of and be binding upon the parties hereto, their administrators, successors, and assigns respectively”. According to the master’s interpretation, 604, which was merely a subsequent owner, cannot be considered an administrator, successor or assign of LBI. We agree. The term “successor” should be read to mean a corporate successor, considering that clause 8.3 refers to “successors in title” and “subsequent owners”, of which 604 clearly is one, while clause 8.8 refers to “successors”. “Contracting parties are presumed to intend the legal consequences of their words” (G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at p. 91). Meaning must be given to the choice to use one term in one clause and a different term in a different clause of the same agreement, and in this case, of the same section of an agreement (section 8 — *General provisions*). In our view, as the chambers judge found, the intention of the contracting parties was that LBI alone

would, after completing the rehabilitation work, be entitled to the Incentive Payments, which were to be paid over 15 years.

[48] In 604's submission, it would not make sense to sever the benefits available to the owner under the Incentive Agreement (which they identify as the Incentive Payments) from the burdens imposed on it (i.e. efforts to be expended with respect to the use of the Grand Theatre, and a restriction on the use of the building). In our view, there is nothing unusual about severing the Incentive Payments, a benefit under the Incentive Agreement, from the burdens relating to certain restrictions flowing from the designation of the building as a Municipal Historic Resource.

[49] As we explained above, nothing in clause 5.3 confirms that the parties to the Incentive Agreement intended the payments to go to a future owner. Rather, a reasonable interpretation of the agreement is that all the Incentive Payments were intended to go to LBI. Read in conjunction, the recitals of the Incentive Agreement, together with clauses 3 (*Rehabilitation Work*), 4 (*Payment of Rehabilitation Incentive*) and 5.4, lead to the conclusion that LBI was entitled to receive all of the Incentive Payments.

[50] We further adopt the chambers judge's reasoning to the effect that it is LBI that was the owner at the time of the designation and that completed all of the rehabilitative work 604 now benefits from as the new owner. It is LBI that suffered the loss of value and paid for the rehabilitation. Moreover, 604 could take the designation into consideration when it purchased the Loughheed Building.



Consequently, to conclude now that the intention was for the Incentive Payments to go to a future owner would have no commercial rationale and would, in essence, provide 604 with an undeserved windfall.

C. *Were the Incentive Payments Sold as an Asset in the Judicial Sale?*

[51] Another submission by 604 is that it purchased the right to the Incentive Payments in the judicial sale. Once again, we disagree. The chambers judge's conclusion that the Incentive Payments were not sold in the judicial sale is well supported by the evidence.

[52] In the 604 Offer, the "Property" being purchased is defined using the legal description of the Lougheed Building (the real property) alone. The 604 Offer then lists other, ancillary, property that was to be included in the sale:

**10.** All fixtures, equipment and chattels located on the Property and which are owned by the Vendor shall be included in the Purchase Price. The Purchaser acknowledges that certain of said fixtures, equipment and chattels are the property of the tenants of the Property and are not included in the sale hereunder.

[53] The 604 Offer also states, at para. 6, that "[a]ll leases and contracts that are assignable shall be assigned to the Purchaser as of the Closing Date and the Purchaser shall assume all obligations thereunder". In 604's submission, the Incentive Agreement was an "assignable contract" within the meaning of para. 6 and was therefore sold to 604 in the judicial sale.

[54] The chambers judge accepted that the Incentive Agreement was an “assignable contract”, but concluded that it had not been sold to 604, as para. 6 concerns only contracts that are “ancillary to the Property” (para. 62). He found that para. 6 does not expand the scope of the “Property” being acquired; rather, it merely addresses the process for the transaction. He observed that if 604 had intended to purchase the Incentive Payments, its offer would have expressly mentioned them either in the initial definition of the “Property” or in the list of ancillary property at para. 10.

[55] In our view, the chambers judge did not make a palpable and overriding error in his interpretation of the 604 Offer. He sensibly limited the scope of para. 6 to “assignable contracts” that were ancillary to the real property. As Heritage argues, there may have been other contracts to which LBI was a party — for example, car leases or club memberships — and 604 cannot be said to have purchased all such contracts just because they were “assignable contracts”. Given the substantial value of the Incentive Payments, if 604 had intended to purchase the Incentive Payments, its offer would likely have stated this expressly. Instead, there is no indication, express or otherwise, that 604 intended to purchase the Incentive Payments.

[56] Further, the circumstances of the 604 Offer support the chambers judge’s conclusion. As O’Brien J.A. observed, the statement of claim initiating the sale proceedings did not refer to the Incentive Agreement or to the Incentive Payments. In addition, neither the judicial sale listing nor the marketing brochure published

pursuant to the order for sale indicated that the Incentive Payments were part of the property and assets included in the judicial sale.

D. *Is the Priority of Interests in the Incentive Payments Governed by the PPSA?*

[57] Having found that the Incentive Payments are not an interest that ran with the land and that they were not sold to 604 in the judicial sale, we must now determine whether the assignment of the Incentive Payments is governed by the *PPSA*. As we mentioned above, LBI successively assigned the Incentive Agreement to both Equitable and Heritage before it defaulted on the Equitable loan. The 604 Assignment was executed after the sale of the Lougheed Building. It appears that this assignment was registered at the Personal Property Registry, but not until after the Heritage Assignment had been registered in October 2010.

[58] Master Laycock held that the 604 Assignment was ineffective because no consideration had been paid for it. Jeffrey J. declined to decide this issue or to address the issues of assignments and redemptions. He was of the view that any question related to 604's claim to the Incentive Payments was beyond the scope of the issue before the court. The majority of the Court of Appeal, having determined that the Incentive Payments ran with the land, held that the *PPSA* did not apply. O'Brien J.A. was of the view that, "having regard both to the scope of the original application, and to the evidentiary record", the Court of Appeal was not in a position to determine which party was entitled to the Incentive Payments at that time (para. 93).

[59] In this Court, Heritage argues that the Heritage Assignment was registered before the 604 Assignment and that its interest in the Incentive Payments should therefore have priority under the *PPSA*. As for 604, it replies that the Equitable Assignment was already registered under the *PPSA* at the time of the 604 Assignment. Finally, Heritage maintains that, should this Court decline to decide the *PPSA* issue, it should at least determine whether the Incentive Payments are a chose in action so as to facilitate further proceedings between the parties.

[60] The *PPSA* applies to “every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral” (s. 3(1)(a)). We conclude that the Incentive Payments are a chose in action. The right to the Incentive Payments is merely contractual and is not an interest that runs with the land or that is ancillary to the real property. Therefore, it follows that, contrary to 604’s suggestion, any interests in the payments are not exempt from the *PPSA* pursuant to s. 4(f) or (g) thereof. The *PPSA* governs the priority of interests in the Incentive Payments.

[61] Clause 7 of the Equitable Assignment states that the assignment was given by LBI to secure repayment of its mortgage to Equitable. Jeffrey J. held that the Equitable Assignment was only a security interest. O’Brien J.A. accepted Jeffrey J.’s conclusion, as he was also of the view that “the assignment was for purposes of securing the mortgage debt” and that it “constituted a security interest only” (para. 87).

[62] The right to the Incentive Payments, contrary to land lease payments, for example, arose only upon LBI's completion of the rehabilitation work, and their purpose was to satisfy all rights to compensation from the City that flowed from the historic resource designation and from the restoration. They were offered on a one-time basis to the owner of a newly designated building and were never meant to follow the property. This is confirmed by the fact that the parties agree that if the Incentive Payments had been made on a lump sum basis, 604 would not be entitled to recover part of that sum. We are therefore satisfied that the *PPSA* applies to the Incentive Payments.

[63] This being said, to the extent that the parties disagree about the effect of the assignments and the resulting priorities, we would remit this issue alone to a master in chambers to be decided in accordance with our findings above. However, we note that in light of our conclusion that the Equitable Assignment created a security interest only, the most Equitable could have transferred to 604 was its security interest. In this regard, this Court's reasons in the related appeal, *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18, which are being issued concurrently with the reasons in this appeal, will have to be considered in any further proceedings relating to the Incentive Payments.

## VI. Conclusion

[64] We would allow the appeal and restore the order of the master in chambers, with costs throughout to Heritage and LBI as against 604. The Incentive

Payments arising under the Incentive Agreement are not an interest in land by operation of the *HRA* and are not among the assets sold to 604. If the parties disagree about the order of priorities under the *PPSA* between the Heritage Assignment and the 604 Assignment, we would remit this issue alone to a master in chambers to be decided in accordance with the foregoing findings.

*Appeal allowed with costs.*

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