

# Estopped by a Shared Assumption: The Court of Appeal Clarifies the Doctrine of Estoppel by Convention

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On April 1, 2021, the Ontario Court of Appeal reviewed and clarified the equitable doctrine of estoppel by convention in its decision in *Fram Elgin Mills 90 Inc. v Romandale Farms Limited*, [2021 ONCA 201](#).

A landowner was estopped from resiling from certain assumptions it had shared with two other parties, as the landowner had caused the other parties to enter into a separate settlement agreement based on the shared assumptions.

This decision provides further clarity with respect to the relatively rare form of estoppel that may arise when parties act on the basis of a shared assumption relevant to the parties' dealings.

## Background

This case involved four actions regarding undeveloped lands in Markham, Ontario. Romandale Farms Limited ("Romandale") owned two neighbouring farms, and subsequently sold interests in the farmland to two separate parties through multiple transactions.

In 2003, Romandale sold an undivided 5% interest in the lands to Fram. Romandale and Fram planned to obtain the necessary planning approval in order to develop the lands for residential use. Romandale and Fram entered into a number of agreements related to the lands, including co-owners agreements (the COAs), which provided that, subject to limited exceptions, neither party could dispose of its interest in the lands. The COAs also contained a buy-sell mechanism that was generally available only after secondary planning approval ("Planning Approval") had been obtained for the lands. Planning Approval was specifically required before the lands could be developed.

In 2005, Romandale entered into an agreement with a third party, Kerbel, which involved the sale of Romandale's 95% interest in the lands to Kerbel ("2005 Agreement"). The sale was to be achieved in two steps. In the first step, Romandale sold Kerbel 5% of its interest in the lands. In the second step, Romandale agreed to sell its remaining interest in the lands to Kerbel, conditional on either Fram's consent to the sale, or Romandale's exercise of the buy-sell provisions in the COAs with Fram.

The second step of the sale of the lands was at issue in the appeal. Among other things, Fram alleged that Romandale's sale of its interest to Kerbel was an impermissible disposition of Romandale's interest in the lands under the COAs.

In 2010, the parties attended judicial mediation and exchanged correspondence regarding a potential settlement. Fram and Kerbel later reached a settlement regarding the sale of the lands ("2010 Settlement Agreement"). The 2010 Settlement Agreement between Fram and Kerbel expressly included a statement of the parties' intention that the purchase and sale of Romandale's remaining interest in the lands to Kerbel would take place *after* Planning Approval had been obtained for the lands.

Romandale subsequently sued Kerbel, alleging that Kerbel breached the 2005 Agreement by taking steps to reduce the amount of developable acreage on the lands. Romandale later changed legal counsel and, for the first time, alleged that Kerbel had repudiated the 2005 Agreement. Specifically, Romandale alleged that the statement regarding the timing of the sale that was included in the 2010 Settlement Agreement between Fram and Kerbel constituted a repudiation of Kerbel's 2005 Agreement with Romandale.

At trial, the four actions involving the lands were resolved in favour of Romandale. The trial judge specifically found that Kerbel repudiated the 2005 Agreement with Romandale when it entered into the settlement agreement with Fram in 2010. This was because the settlement agreement specifically stated that the parties intended for the purchase and sale of the remaining interest to take place after obtaining Planning Approval. As a result, the trial judge found that Romandale was excused from performing its remaining obligations under the 2005 Agreement.

Fram and Kerbel appealed the trial judge's decision. The Court of Appeal allowed the appeals, and declared that the 2005 agreement was valid and enforceable. The Court also ordered specific performance of Romandale's obligations under the 2005 Agreement.

### **Estoppel by Convention**

Fram and Kerbel argued that estoppel by representation and estoppel by convention operated to bar Romandale from reversing its position regarding the enforceability of the 2005 Agreement. Specifically, they argued that Romandale consistently took the position that the 2005 Agreement was valid and enforceable, and that the buy-sell in the agreement would be performed *after* Planning Approval had been obtained for the lands.

Although issues of estoppel by representation and estoppel by convention were argued at trial, the trial judge only addressed the issue of estoppel by representation. The trial judge did not accept Fram and Kerbel's arguments in respect of estoppel by representation, and found that that reliance on Romandale's position regarding the enforceability of the 2005 Agreement would have been "totally unreasonable".

On appeal, the Court of Appeal found that estoppel by representation did not apply, as Romandale did not make a representation with the intention that Fram and Kerbel should act on it. However, the Court of Appeal held that Romandale was barred from reversing its position on the 2005 Agreement because of estoppel by convention.

The Court of Appeal referenced the criteria for the doctrine of estoppel by convention, as summarized by the Supreme Court in *Ryan v Moore*, 2005 SCC 38 at para 59.

1. The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence*(impliedly).
2. A party must have acted in reliance on such shared assumption, its actions resulting in a change of its legal position.
3. It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

#### *(1) Shared assumption of fact or law*

With respect to the first criterion, the Court of Appeal stated that it must determine what "state of affairs" the parties accepted, and decide "whether there was sufficient certainty and clarity in the shared assumptions to give rise 'to an enforceable equity'" (para 151).

The Court of Appeal clarified that "a common or shared assumption, as that term is used in estoppel by convention, is not the same thing as a representation". Further, the Court held that "an assumption need not be created or encouraged by the estopped party: it

must simply be shared, in the sense that each party is aware that the assumption is held by the other(s)" (para 154).

The Court of Appeal found that there was no ambiguity or lack of clarity about the shared assumptions of the parties regarding the timing of the buy-sell provision in the 2005 Agreement in relation to the timing of obtaining Planning Approval for the lands. The Court held that the parties made "manifest representations" of their belief in the shared assumptions, and communicated such belief to the other parties in the 2010 Settlement Agreement, drafts leading to the settlement agreement, letters between counsel, the pleadings, and evidence in trial.

### *(2) Reliance on the shared assumption*

The Court of Appeal found that the second criterion had been met, as Fram and Kerbel relied on the shared assumptions in entering into the 2010 Settlement Agreement. As a result of having entered into the 2010 Settlement Agreement, their respective legal positions under the COAs and the 2005 Agreement were altered.

With respect to reliance, the Court of Appeal specifically stated that the test for reliance under the doctrine of estoppel by representation is different from the test for reliance under the doctrine of estoppel by convention. Referencing the Supreme Court's ruling in *Ryan v Moore*, the Court clarified that "[f]or the purpose of estoppel by convention, reliance requires a finding that the party seeking to establish estoppel changed its course of conduct by acting (or abstaining from acting) in reliance on the shared assumption, thereby altering its legal position" (para 173).

### *(3) Detriment*

The Court of Appeal found that the third criterion had been met, as Fram and Kerbel would suffer detriment if Romandale was allowed to resile from the shared assumptions.

In response to Romandale's argument that the shared assumptions were mistaken, the Court of Appeal clarified that detriment under the third criterion "is not about the correctness of the Shared Assumptions or how obviously incorrect they might have been. Detriment is a question of whether it would be unjust or unfair to allow Romandale to resile from the Shared Assumptions – regardless of whether the Shared Assumptions were correct or were patently incorrect" (para 193).

### *No requirement to have entered into a contract for estoppel by convention to apply*

Romandale argued that Fram and Kerbel could not avail themselves of the doctrine of estoppel by convention because there was no contract between the three parties based on the shared assumptions. Specifically, only Fram and Kerbel were parties to the settlement agreement.

In response to this argument, the Court of Appeal clarified that "the applicability of the doctrine of estoppel by convention does not depend on the parties having entered into a contract with one another. Rather, as the Supreme Court states in para. 59 of *Ryan v. Moore*, the question is whether the 'parties' dealings' were based on a shared assumption of fact or law." The Court of Appeal found that although Romandale was not a party to the settlement agreement, it was actively involved in the negotiations leading up to that agreement, and exchanged correspondence with Fram and Kerbel that clearly demonstrated that the parties' dealings were based on the shared assumptions. Therefore, Romandale was estopped from resiling from the shared assumptions.

### **Key Takeaways**

To avoid potential litigation on the basis of estoppel by convention, parties should:

- Be aware of shared assumptions upon which communications are exchanged and decisions are made. An assumption does not need to be created or encouraged by the estopped party. It must simply be shared, in the sense that each party is aware that the assumption is held by the other party;
- Consider whether any other parties have changed their course of conduct by acting (or abstaining from acting) in reliance on the shared assumption;
- Be aware that the correctness of the shared assumptions between the parties is irrelevant. Detriment under the doctrine of estoppel by convention is a question of whether it would be unjust or unfair to allow a party to resile from the shared assumptions, regardless of whether the shared assumptions were correct; and
- Consider the factors set out above in *all* dealings with other parties. The doctrine of estoppel by convention is not limited to circumstances in which parties have entered into a contract with one another.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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