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The Law of Options

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Little attention is devoted to the law of options in major Canadian texts on contract law or in periodical literature. One might, therefore, assume that the law in this area is well settled and that few major cases come before the courts. However, a review of appellate decisions in Canada indicates significant judicial interest in the topic which would challenge those assumptions. In fact, appellate courts in various common law jurisdictions continue to struggle with many doctrinal issues related to this specialized type of contract. This article provides a comprehensive review of the law of options in Canada, and identifies and discusses a number of the current doctrinal debates. In particular, it reviews and challenges certain fundamental doctrinal changes that appear to have been made by the Supreme Court of Canada in Sail Labrador v. The Challenge One. The author suggests an alternative basis on which the Court could have achieved the same result while preserving the commercial certainty requirements which underlie the core of option law.

Au Canada, les textes importants et les revues juridiques mentionnent rarement les options. Par conséquent, on serait porté à croire que le droit dans ce domaine est bien établi et que très peu de cas importants sont présentés à la cour. Cependant, un examen des décisions rendues par les cours d'appels au Canada indique que le judiciaire s'intéresse à ce sujet, ce qui met en doute cette hypothèse. À vrai dire, les cours d'appels dans les juridictions de common law sont aux prises avec un grand nombre de doctrines relativement à ce genre de contrat spécialisé. Cet article examine d'une manière compréhensive le droit des options au Canada; de même, il identifie les diverses questions doctrinales et en soulève la discussion. En particulier, l'article met en question les changements de doctrine effectués par la Cour suprême du Canada relativement à Sail Labrador c. The Challenge One. L'auteur propose un autre moyen qu'aurait pu utiliser la Cour suprême pour arriver au même résultat, tout en préservant les exigences commerciales qui sont à la base du droit des options.

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Existing as a species of contract, options frequently receive little direct attention in major treatises on the subject. Even in periodical literature in Canada, apart from one or two items dealing with very specific aspects of options contracts, the last general review of option law appears to date from 1930.[1] Yet, there are peculiarities in respect of this species which merit separate attention, such that a general review is long overdue.

In addition, while many may think the nature of an option is well settled, there are issues which have yet to be resolved doctrinally. Furthermore, for a specialized private law matter, there have been a significant number of Supreme Court of Canada decisions on the subject over the last century. Many of those decisions have come within the past twenty years — a period during which the court has been perceived to be more preoccupied with public law matters. Some of those decisions have opened the door to renewed discussion of unresolved issues, as have a number of decisions in the United Kingdom. It therefore seems appropriate to undertake a thorough review of the law of contract as it relates to options.

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1. There is an annotation titled "The Law of Options" in [1930] 1 D.L.R. 1.

I. *Nature of Option Transactions*

It can be said that an option is simply an offer supported by consideration.[2] The consequence of consideration having been given for the offer is of course that the offer cannot then be withdrawn by the offeror/optionor for the period during which it is stated to be open for acceptance.[3] Consideration can be separately provided such that the option is a stand alone arrangement, or can arise from other contractual obligations, as in a case where an option to purchase is included in the terms of a lease.[4] As with contracts in general, an option can be valid if granted under seal,[5] or if supported by consideration consisting of mutual promises, or a promise to pay an amount giving rise to a debt obligation.[6] Even nominal consideration is sufficient to support the validity of an option.[7]

While the authorities make it clear that an option may not be revoked by the optionor during its term, it is less clear whether the optionee can reject an option right prior to its expiry, such that the option right then lapses and cannot subsequently be exercised by the optionee even though the original term of the option has not expired.[8] Arguably, since the original term is a contractual provision supported by consideration, it can be amended to shorten the stipulated time during which the optionee is entitled to accept—but as with any contract amendment, that amendment would itself need to be supported by consideration.[9] In the absence of such amendment, a subsequent acceptance by the optionee, even after a purported rejection, would appear possible, although there is early Supreme Court of Canada authority to the effect that an optionee may effectively (and so irreversibly) abandon or waive the option. However, any such abandonment

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2. *Baughman v. Rampart Resources Ltd.* (1995), 124 D.L.R (4th) 252, [1995] 6 W.W.R. 99 (B.C.C.A.) [*Baughman*].

3. *Goldsbrough, Mort & Co. Ltd. v. Quinn* (1910), 10 C.L.R. 674, 17 A.L.R. 42 (H.C.A.) [*Goldsbrough* cited to C.L.R.]; *Mountford v. Scott* (1974), [1975] 1 Ch. 258, [1975] 1 All E.R. 198, [1975] 2 W.L.R. 114 (C.A.).

4. *Daku v. Daku* (1964), 49 W.W.R. 552 (Sask. C.A.); *Sail Labrador v. Challenge One (The)*, [1999] 1 S.C.R. 265, 169 D.L.R. (4th) 1 [*Sail Labrador* cited to S.C.R.].

5. But it must clearly be sealed to have that effect as noted in *Thompson v. Skill* (1909), 13 O.W.R. 887 (C.A.).

6. See the judgement of Idington J. in *Davidson v. Norstrant* (1921), 61 S.C.R. 493, 57 D.L.R. 377.

7. *Mountford v. Scott*, *supra* note 3.

8. The majority American view appears to suggest that an option cannot lapse by mere rejection, although this view is challenged by Michael J. Cozzillio, "The Option Contract: Irrevocable not Irrejectable "(1990) 39 Cath. U. L. Rev. 491. For a brief but interesting comment on whether an option can be accepted a second time, in the event that the agreement arising from the first acceptance was not completed due to breach, see Alan Prichard, "Death of an Option" [1988] Conv. & Prop. Law. 183.

9. See *Trustees, Executors and Agency Co. Ltd. v. Peters* (1960), 102 C.L.R. 537, [1960] A.L.R. 327, 33 A.L.J.R. 528 (H.C.A.) [*Peters*], where the starting base for the rest of the judgement was the due amendment of the option term by deed.

or waiver by the optionee would need to be clear and unequivocal. Patent inconsistency between an earlier option and a subsequent agreement would be such clear evidence. However, the inconsistency must be unequivocal. For example, it has been held that the mere entry into of a new lease which was to commence after the expiry of the term of an initial lease containing an option to purchase showed no inconsistency with the continued validity of that option during the balance of the initial term.[10] The optionee could thus validly exercise the purchase option before that new lease came into force. If, however, rejection is clearly consistent with abandonment of the original option contract, this may be enough to prevent subsequent acceptance.

An offer supported by consideration does not technically constitute a contract due to the absence of acceptance, but it is important here to distinguish between an acceptance by the optionee of the option contract itself (which in all cases should be tacitly present), and acceptance of the underlying object of the option through the exercise of the option conditions. Clearly, the option arrangement itself is a contract, as stated by the Supreme Court of Canada in *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*:

> An option contract is an antecedent contract because it precedes the contract of purchase and sale that will result if the opportunity provided by the option is "seized upon" or exercised. Once an option is exercised, the parties discharge their obligations under the option contract by entering into the contract of purchase and sale. The exercise of the option is the election to buy property on the terms specified in the option agreement...[11]

The more difficult doctrinal issue is the legal nature of the arrangement which is the object of the antecedent option contract, prior to the exercise of the option right. The Supreme Court of Canada appears to take the view that during this time, there is an irrevocable offer, concluding the quotation above by stating "and is the equivalent of accepting the irrevocable offer made in the option."[12] Similarly, in New Zealand, the most commonly accepted theory is that an option comprises an offer to sell coupled with a

10. *Mathewson v. Burns* (1914), 50 S.C.R. 115, 18 D.L.R. 399.
11. [1995] 2 S.C.R. 187 at 201, 123 D.L.R. (4th) 449 [*Mitsui* cited to S.C.R.].
12. Ibid.

contract not to revoke the offer.[13] There are other judicial statements to like effect in Canada[14] and elsewhere.[15]

The alternative view is that during the term of the option contract and prior to exercise, there is already in place a contract in respect of the object of the option, but one that is conditional on the optionee committing to be bound thereon by performance of the option conditions. This debate seemed initially to have exercised the courts in Australia more than in any other location, with a number of judgments or decisions favouring the conditional contract approach,[16] and others favouring the irrevocable offer analysis.[17] More recently, however, legislative changes in the United Kingdom have led to a similar debate among courts there as well.[18]

On many matters, the legal consequences will be the same whichever position is taken. However, the most recent debates have centred on matters concerning the interpretation of statutory provisions which indirectly apply to options.[19] The earlier debates centred on one apparent critical consequence of characterizing an option as a conditional contract: such determination ensured that the burden of the option agreement passed to the representatives of the optionor upon death. As Gibbs J. notes in *Laybutt*,[20] if there is a conditional contract the general rule that contract liabilities pass to the personal representative applies, unless the performance of the contract depends on the deceased's personal skill or judgement, or unless

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13. Although the court leaves open the prospect that it is a conditional contract see Somers J., with whom Bisson J. agreed, in *Alexander v. Tse* (1987), [1988] 1 N.Z.L.R. 318 (C.A.).
14. See *Molnar v. Shockey*, [1949] 4 D.L.R. 302 at 303; the dissenting (on other points) judgement of Martland J., in *Frobisher Ltd. v. Canadian Pipelines & Petroleums Ltd.* (1959), [1960] S.C.R. 126, 21 D.L.R. (2d) 497 [*Frobisher*].
15. See the judgement of Lord Denning M.R. in *United Dominions Trust (Commercial), Ltd. v. Eagle Aircraft Services, Ltd.* (1967), [1968] 1 All E.R. 104, [1968] 1 W.L.R. 74 (C.A.) [*United Dominions* cited to All E.R.]; and that of Lord Watson in *Helby v. Matthews*, [1895] A.C. 471 at 480; 72 L.T. 841 (H.L.); *Restatement (Second) of the Law of Contracts*, ß 25(d) (1981).
16. *Goldsbrough*, *supra* note 3; and the decision of Gibbs J. in *Laybutt v. Amoco Australia Pty. Ltd.* (1974), 132 C.L.R. 57, 4 A.L.R. 482, 48 A.L.J.R. 492 (H.C.A.) [*Laybutt* cited to C.L.R.].
17. *Commissioner of Taxes (Queensland) v. Camphin* (1937), 57 C.L.R. 127, [1937] A.L.R. 401 (H.C.A.) [*Camphin* cited to C.L.R.]; the decision of Isaacs J. in *Carter v. Hyde* (1923), 33 C.L.R. 115, 29 A.L.R. 430 (H.C.A.) [cited to C.L.R.]; and the decision of Williams J. in *Ballas v. Theophilos* (1957), 98 C.L.R. 193, 31 A.L.J. 917 (H.C.A.).
18. Starting with the decision in *Spiro v. Glencrown Properties Ltd.*, [1991] Ch. 537, [1991] 1 All E.R. 600, [1991] 2 W.L.R. 931 [*Spiro* cited to All E.R.].
19. Such as in *Camphin*, *supra* note 17; and *Spiro*, *ibid.*
20. *Supra* note 16 at 71.

the contract shows an intent that it was only enforceable personally.[21] However, as the option itself is a contract subject to the general rule, this analysis, focussing as it does on the underlying obligation, may be misplaced and unnecessary.

In fact, this classification issue may embody a paradox. An option is at the same time both an offer and a conditional contract, and yet neither! Hoffmann J. perhaps says it best in *Spiro v. Glencrown Properties Ltd.*:

> The purchaser's argument requires me to say that 'irrevocable offer' and 'conditional contract' are mutually inconsistent concepts and that I must range myself under one or other banner and declare the other to be heretical. I hope that I have demonstrated this to be a misconception about the nature of legal reasoning. An option is not strictly speaking either an offer or a conditional contract. It does not have *all* the incidents of the standard form of either of these concepts. To that extent it is a relationship *sui generis*. But there are ways in which it resembles each of them. Each analogy is in the proper context a valid way of categorising the situation created by an option.[22]

In the course of his analysis, Hoffmann J. notes that an option cannot be an irrevocable offer because those terms are contradictory: "irrevocable" connotes a obligation on the offeror, while offer connotes no such obligation at all. Yet, this is the best way of explaining the position of the *optionee* between the time of grant of the option and time of exercise, as during that period, the seller is conditionally bound to sell, while the buyer is under no such comparable obligation to buy. From the point of view of the *optionor*, however, the analogy to the conditional contract is more apt. Yet, the analogy is not complete because in a true conditional contract, in the traditional sense, the contingency would not lie within the sole power of one of the parties to the contract. Therefore, it is appropriate for a court to adopt whichever of the analogies is the more appropriate one given the particular question before it, particularly where the matter is, as it was in *Spiro*, a

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21. As noted by Isaacs J. in *Carter v. Hyde*, *supra* note 17 at 124-25, the same situation applies with respect to the ability to assign the benefit of an option by the optionee, and in respect of the exercise thereof by the personal representatives of the optionee upon his/her death. See similar comments to this effect in *Spiro*, *supra* note 18 at 605, and the decision in *Griffith v. Pelton* (1957), [1958] Ch. 205, [1957] 3 All E.R. 75, [1957] 3 W.L.R. 522 (C.A.). It should be noted that in respect of options granted in a will, there is no general rule one way or the other. Instead, according to *Skelton v. Younghouse*, [1942] A.C. 571, [1942] 1 All E.R. 650 (H.L.), whether or not the option is personal to the optionee depends on the intent of the testator, to be determined on true construction of the will in light of the surrounding circumstances.

22. *Supra* note 18 at 605-06.

question of statutory interpretation and an issue of application of the purposive approach to statutory interpretation.[23]

It should be beyond question that an option is a contract, as indicated by the Supreme Court of Canada's statement in *Mitsui*, above. The doctrinal issue here arises only when one needs to link the option contract with its object, namely the right of the optionee to acquire additional legal entitlements and to assume related legal obligations associated with those entitlements through exercise of the conditions. It is only in this context that one needs to consider the issue of whether the link between the option and its object is such that the option constitutes an offer which cannot be withdrawn for the relevant period (such that acceptance of the offer can be said to create a second contract) or is in fact a composite conditional contract (a one contract analysis). Some have gone so far as to suggest that there is a third possibility, that of an option being a unilateral contract,[24] but the unilateral/bilateral categorisation issue is only relevant to the legal characterization of the option contract itself, and not the characterization of the distinct relationship between the option and the underlying object of that option. In a two contract (or offer) analysis, the "unilateralness" issue addresses the question of whether the act or acts required for the optionee to accept the second contract have been performed. In a one contract analysis, the bilateral/unilateral question relates to whether the optionee has satisfied the necessary conditions to make the contract unconditional. Thus, a unilateral contract analysis can apply in both contexts without being itself a third way of characterizing the option contract. The modern debate emerges almost invariably in the statutory interpretation field, where it is possible, as in the *Spiro* case, to use a purposive approach to give credence to both theories without needing to accept either as dispositive. In this context, the *Spiro* approach appears appropriate. However, from the point of view of the established common law attributes of options outside of statutory interpretation cases, the offer theory appears to have the most widespread judicial support.

Regardless of the legal nature of the "object" contract prior to exercise of the option, it is clear that the exercise of the option brings into operative effect a different contractual relationship. Under the offer analysis, this

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23. In *Trustees of Chippenham Golf Club v. North Wiltshire District Council* (1991), 64 P. & C.R. 527, 156 L.G. Rev. 863, [1991] N.P.C. 139 (C.A.), the Court of Appeal clarifies that the approach taken in *Spiro* is in fact one of statutory interpretation, refusing to accept an argument that the Hoffmann analysis in effect made an option to purchase, from its inception, a contract of sale. The Court there emphasised that the comparisons were analogies only.

24. See *e.g.* Paul Jenkins, "Options and Contracts After the Law of Property (Miscellaneous Provisions) Act 1989" [1993] Conv. & Prop. Law. 13.

would be a new, second contract, and under the conditional contract analysis, this would be an unconditional contract.[25] Leaving aside for the moment the issue of whether all options are unilateral in nature, or whether some can be bilateral (which will be discussed below), Diplock L.J. perhaps describes the situation best as follows:

> [an option will give rise to an obligation only] on the occurrence of the event specified in the option, viz., the doing (or refraining from doing) by the promisee of a particular thing... [The option] of itself never gives rise to any obligation on the promisee to do or refrain from doing anything. . . . the promisor's undertaking may be to enter into a synallagmatic contract with the promisee on the occurrence of the event specified in the [option], and in that case the event so specified must be, or at least include, the communication by the promisee to the promisor of the promisee's acceptance of his obligations under the synallagmatic contract. By entering into the subsequent synallagmatic contract on the occurrence of the specified event, the promisor discharges his obligation under the [option] and accepts new obligations under the synallagmatic contract. Any obligations of the promisee arise, not out of the [option], but out of the subsequent synallagmatic contract into which he is not obligated to enter but has chosen to do so.[26]

These words do favour the irrevocable offer (two contract) analysis. However, with very little amendment they can be changed to note that when the condition in the contract is satisfied, the object of the option arrangement becomes fully operational, and hence constitute a good description of the effect of exercise regardless of the categorisation.

II. *Bilateral or Unilateral*

The classic view of the option contract itself has been that it is unilateral in nature—an "if" contract. Lord Diplock is the leading proponent of this view:

> In modern terminology, it [the option] is to be classified as a unilateral or "if" contract. Although it creates from the outset a right on the part of

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25. Although where the option is for such a matter as an extension of a lease, the exercise continues the existing contract for the extended term: *Baker v. Merckel*, [1960] 1 Q.B. 657, [1960] 1 All E.R. 668, [1960] 2 W.L.R. 492 (C.A.) [cited to All E.R.].

26. *United Dominions*, *supra* note 15 at 109. I have changed Diplock L.J.'s references to unilateral contract to references to options in this case to show the effect of an option and of its exercise, as this article will deal later with the issue of whether options are always unilateral or can in some cases be bilateral.

> the lessees, which they will be entitled, but not bound, to exercise against the lessors at a future date, it does not give rise to any legal obligations on the part of either party unless and until the lessees give notice in writing to the lessors, within the stipulated period, of their desire to purchase the freehold reversion to the lease. The giving of such notice, however, converts the "if" contract into a synallagmatic or bilateral contract, which creates mutual legal rights and obligations on the part of both lessors and lessees.[27]

There are consequences to the way in which the obligation is so categorised (some of which are dealt with later in this article). However, two differences are of note in the context of the discussion of proper categorisation of the option obligation, as outlined by Diplock L.J. himself in the course of his judgment in *United Dominions*[28]:

1. If an obligation is bilateral, the law will provide a party not in breach with a remedy for that breach—the nature of the remedy being dependent upon whether the breach is one of condition versus one of warranty.
2. In the initial stage, where there is only a unilateral contract, the only inquiry is whether or not the event or events which will bring the underlying contract into place have occurred (or, for the conditional contract enthusiasts, whether the condition has been met so as to allow the full operative effect to arise). If the events described in terms of what is required to bring that main contract's terms into force have not taken place, that is the end of the matter and there can be no mutual obligations for which either side may have a remedy. The question here (paraphrasing Diplock L.J.) is "what have the parties required to be done"—not "what are the consequences for having failed to do those things."

The view that option contracts are unilateral in nature appears to have been generally accepted[29] until it was challenged by the Supreme Court of

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27. *Sudbrook Trading Estate Ltd. v. Eggleton* (1982), [1983] 1 A.C. 444 at 447, [1982] 3 All E.R. 1, [1982] 3 W.L.R. 315 (H.L.) [*Sudbrook* cited to A.C.]. This statement of course picks up at the House of Lords level the earlier view expressed by Diplock L.J. in *United Dominions*, *ibid.*, quoted above, although as noted there, in the context of the legal debate of unilateral v. bilateral, the references to [option] in the earlier quote need to be read in their original form substituting unilateral contract for my references to options.

28. *Supra* note 15.

29. See *e.g.* Isaacs J. in *Goldsbrough*, *supra* note 3 at 696; *Lake Shore Country Club v. Brand*, 171 N.E. 494, 339 Ill. 504 (Sup. Ct. 1930); *Baughman*, *supra* note 2; *Mitsui*, *supra* note 11 at 201, which refers to the unilateral categorisation passage of Lord Diplock from *Sudbrook*, *supra* note 27.

Canada decision in *Sail Labrador v. Challenge One*.[30] In that case, Sail Labrador chartered the *Challenge One* from the respondent in 1985 on a five year charter. The charter gave the appellant the option to purchase the vessel at the end of the five year term, subject "to full performance of all its obligations in the charterparty, including but not limited to payments being made promptly."[31] The charter required payments of $85,000 per annum, in a series of seven stated instalments each year. Notwithstanding that the charter called for payment in cash or by certified cheque, the respondent accepted a practice of the appellant tendering a series of postdated cheques at the start of each charter year. The main problem arose when the cheque for the first payment due in year five was returned "nsf" by the appellant's bank. In fact, the cheque was so marked due to bank error, not due to lack of funds in the appellant's account.

Once the cheque was returned "nsf," the respondent wrote to the appellant stating that the option was void due to the missed payment, while going on to advise how the missed payment could be remedied. Sail Labrador immediately complied with this direction, paying the missed sum, together with interest on it. Later, Sail Labrador attempted to exercise the purchase option. When this attempt was resisted by the respondent, the appellant took action seeking a declaration to the effect that it was entitled to exercise the option in the charter.

Unfortunately from a doctrinal viewpoint, the main arguments in *Sail Labrador*, summarized below, were largely conducted from outside the box of traditional option reasoning:

1. In correspondence in respect of the missed payment, the respondent stated that the option was void. As a consequence, it seems to have been argued at the Supreme Court level that it was therefore possible for the respondent to rescind the option contract. With respect, this entire train of reasoning is misplaced, for as Lord Diplock notes above, the question is not what is the consequence of the parties having failed to have done something—but rather whether or not what the parties have required to be done to bring the obligation of purchase and sale into existence has in fact occurred. Failure to meet one of the conditions needed to bring the underlying contract provided for in the option into full effect cannot properly be said to rescind the option contract. Instead, the option remains

30. *Supra* note 4.
31. *Ibid.* at 265.

in place, but the underlying contract does not become operative due to the failure to have met the conditions.[32]

2. As a counter to the claim for entitlement to rescission of the option due to noncompliance with the terms of the charter, the appellant claimed it was entitled to rely on its substantial performance of its charterparty obligations. This was the corollary to the misplaced rescission claim, for, as the court noted, rescission is only permitted where the failure of performance by one party substantially deprives the other party of what has been bargained for[33]—there must be a substantial nonperformance which goes to the root of the contract. In contract law, where a breach does not go to the root of the contract, the remedy is a claim in damages.[34] Consideration of the substantial performance argument, however, shows once again that the wrong question is being addressed—namely the issue of consequences of a claimed faulty or deficient performance, instead of the more germane issue of whether the stipulated conditions of option exercise have been met.

It was in the face of these misplaced arguments that the majority decision addressed the issue of whether an option could be a bilateral, rather than a unilateral, contract. The court noted that the issue of the seriousness of the deficient performance could only be relevant in a bilateral context. Bastarache J., speaking for himself and five of the six other judges on the appeal, notes that while an option may take the form of a unilateral contract, not all options are in fact unilateral. It is a matter of construction as to whether an option clause established a single, bilateral contract, or two separate contracts, one bilateral, one unilateral.[35] In the *Sail Labrador*

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32. *Ibid.* at 285, Bastarache J. appears to equate a position of noncompliance with the conditions for exercise of the option with the right of the optionor to rescind the option — a position for which there appears to be no authority in the context of the law of options. As S. M. Waddams notes in *The Law of Contracts*, 4th ed. (Aurora, Ont.: Canada Law Book, 1999) at paras. 630-33, the exact meaning of rescission is unclear, and it would be unfortunate if an unclear legal concept with several possible effects were introduced into a branch of contract law where it is not required.

33. In this case, rescission is being equated with the ability to bring about an end to further obligations of a contract.

34. Waddams, *supra* note 32 at paras. 584-99.

35. To support the claim that an option may be an element of a bilateral contract, Bastarache J. refers to *The Monk Corporation v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779, 80 D.L.R. (4th) 58 (cited to S.C.R.). While cited to support the concept that an option contract can be bilateral in *Sail Labrador*, the case in fact is not an option case. In that case, in order to find jurisdiction in the Federal Court to hear the case, the court found that the contract documentation, some parts of which dealt with sale of goods, and some with maritime law, constituted one contract. The court noted that the consideration flowing between the parties supported only one contract which included a number of different obligations and undertakings (*ibid.* at 796).

situation, Bastarache J. was of the view that the option was bilateral, because the consideration for the option arose from the charter party obligations,[36] the option was expressly made dependent on the performance of the charterparty terms,[37] and the charterparty and the option both involved the same property, the vessel *Challenge One*. These three factors showed that the two matters were intimately connected so that the option was bilateral, a part of the charterparty. As such, the issue of substantial performance of the option conditions was said to apply, such that the failure to have met one payment in 35, a failure that was immediately rectified, did not prevent the option to purchase from becoming operative.

This analysis is wrong. An option contract should not be categorised as bilateral.[38] In the first place, as noted above, the need to so categorise the option obligations as bilateral in *Sail Labrador* arose as a result of the misstated position of the optionor, which was taken up by the court, that the option could, or in fact, needed to be, rescinded. Secondly, also as noted above, the need to so categorise the option arises only if one frames the matter as an issue of determining the consequences which flow from a failure to have performed—clearly the wrong question to ask in this context. The issue is not one of determining the appropriate remedy in light of a failure by one party to perform, but quite simply whether the optionee has done what is necessary to bring the fully-fledged bilateral contract which is the object of the option arrangement into operation. Thirdly, if in some cases it is appropriate to analogise an option with an offer, albeit an irrevocable one, the result of *Sail Labrador* creates a novel bilateral offer!

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36. If the bilateral categorisation is a valid one, the fact that the option terms are in a separate agreement with separately stated consideration may make such an option unilateral. In *Baughman*, *supra* note 2, the court construed the option to acquire shares granted to an employee as being unilateral in nature. There the document stated a consideration of $1 and the option arrangements were set forth in a distinct document, so it may well be that this characterisation is consistent with the decision in *Sail Labrador*.

37. The Court distinguished *Re Kennedy & Beaucage Mines Ltd.* (1959), 18 D.L.R. (2d) 156, [1959] O.R. 625 (H.C.J.) [*Beaucage Mines*], where the court found that an option contained in a lease was nonetheless a separate and independent contract from the lease although contained in the same document, as in that case there was no cross-referenced need for compliance with the other contract terms as a condition for the option.

38. In this regard, the stand alone judgement of Binnie J. in *Sail Labrador*, *supra* note 4, emphasising the unilateral obligations inherent in option arrangements, fits much better with the doctrinal position taken throughout the common law world. Binnie J. held that as the contract itself called for full performance of the charter terms, substantial performance, not being "full" performance, was not sufficient to meet this option condition. He went on to hold, however, that the terms had in fact been fully performed, due to the fact that the payment provision in the option arrangement referenced the annual payments, and not the monthly ones, and that in any event the respondent was estopped from relying on the nonpayment due to the fact that they accepted payment by postdated cheques which carried with it the risk of such a bank error as in fact occurred here.

Fourthly, the act of exercise of the option is a unilateral act[39] of the optionee, and it is this feature which necessitates a unilateral classification. Finally, if correct on this issue, the result of the *Sail Labrador* decision would be that there is one set of rules which apply to unilateral options, and another which apply to bilateral ones. This bifurcated analysis would all but eliminate the certainty often cited as a desired goal in commercial settings.

While a categorisation of an option agreement as being bilateral appears inappropriate, it is true that bilateral concepts can have an impact in option situations in two respects:

1. An option commitment can arise, as it did in *Sail Labrador*, from a bilateral contract the terms of which give the consideration necessary to support the option contract itself. Bastarache J. himself stated the position clearly before going on to misapply it, when he said "an option may be an element of a bilateral contract in which it is contained."[40] Merely being an element of such a contract does not make the option arising from the related bilateral arrangement itself bilateral, although when it arises from a bilateral agreement, the terms of the option will be construed in the context of the agreement as a whole.[41]
2. Particularly where an option arises out of another bilateral contractual arrangement, there may be stipulations relevant to the exercise of the option which impose bilateral obligations on the optionor and optionee. This does not however make the option contract bilateral in nature. Diplock L.J., having established the proposition that the classic option contract is unilateral, in fact corrects himself in *United Dominions* and states "it would be more accurate to speak of synallagmatic and unilateral obligations [rather than contracts], for obligations of these two different kinds are often contained in a single agreement."[42] In the context of that case, for example, Diplock L.J. noted that one of the conditions to exercise of the option — the need for the optionee to ensure that the aircraft was insured during the lease term — might in fact be a bilateral obligation during the term of the lease, and to that extent, a bilateral obligation connected to the exercise of the option.

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39. This is a simple statement made by Hoffmann J. in his decision in *Spiro*, *supra* note 18 at 602, which is taken up by Sellers L.J. in *Baker v. Merckel*, *supra* note 25 at 669, but perhaps more than all the other reasons stated shows most forcefully the basis for the claim that an option is in fact a unilateral contract.
40. *Sail Labrador*, *supra* note 4 at 285.
41. *Hillas & Co. Ltd. v. Arcos Ltd.*, [1932] All E.R. 494, 147 L.T. 503, 38 Com. Cas. 23 (H.L.) [*Hillas*].
42. *United Dominions*, *supra* note 15 at 110.

This is a far cry from full bilateral treatment of an option agreement. While it is argued here that such a categorisation by the majority in *Sail Labrador* is wrong, the ultimate result inherent in the majority position is perhaps more acceptable than the position taken by Binnie J. in his concurring judgment in that case. To the extent that the option clause in *Sail Labrador* required full and timely performance of the instalment payment schedule by the optionee, Binnie J. concluded that by missing one payment, the optionee would have lost its ability to exercise the option. However, he ultimately found for the optionee on the basis that by accepting the postdated cheques, with the inherent risk of such a bank error occurring, the optionor was estopped from using the bank's error as a ground for claiming the option conditions had not been met. Equitable grounds can be used as a means to estop the optionor from denying that the conditions for exercise have been met, but what if only one of the thirty five payments had been missed, not due to bank error in clearing a postdated cheque, but because of the optionee's error in issuing bank instructions for a wire transfer on a particular day? On such a set of revised facts, Binnie J.'s argument would no longer apply such that the right to exercise might well have been lost, even if immediately on discovery of the error, the optionee had rectified the error by making a slightly late payment, with interest. The majority, by contrast, would clearly decide the right to exercise survived on such revised facts—a result which appears much more "just." Can such a result be enshrined in the law without introducing into the jurisprudence a position that some options are bilateral in nature?

This position is in fact possible if the substantial (but not exact) performance concept introduced by *Sail Labrador* is restricted to the kind of option condition which was before the court there. In that case, the court had to consider an option which was subject to the due/full performance of obligations under a related bilateral contract, the five-year long charterparty. In that situation, the degree of performance by the optionee of mutual obligations under that other (charterparty) contract can and should have an impact on the question of whether the event or events which will bring a further agreement into force between them, under an option clause, have in fact occurred. It should only be in the context of deciding whether such a condition of linked performance has been met that the concept of substantial performance of those other obligations should be able to be examined by the courts.

Substantial but not exact compliance with other express conditions should not be enough to create a valid exercise situation. If substantial compliance with any set of conditions were to be valid, each of the following would be a proper exercise:

1. Payment of $99,750 to satisfy an option condition requiring payment of $100,000 in cash to the optionor on the exercise date.
2. Payment of $100,000 to the optionee's lawyers in escrow pending completion, when the option conditions make clear that the payment should be in cash to the optionor.
3. Tender of payment at 3:45 p.m. on the last day allowed for exercise, when the terms clearly state the conditions have to be met by noon on that date.

In each of these circumstances, an argument could be made that the optionee had substantially performed, and that therefore there should be a valid exercise. However, as the cases reviewed throughout this article make clear, in no such case has a court previously been willing to hold that there has been a valid exercise in situations such as these. In fact, to hold that these near performances met the relevant conditions would introduce tremendous uncertainty in respect of when an option has been exercised and when not.

By contrast, where one of the exercise conditions requires due performance of the terms of a complex, many faceted, related, bilateral agreement, allowing substantial performance of those related terms to be sufficient for the option to be exercised is a sensible and logical legal conclusion.[43] The substantial performance rule in this precise situation should apply, unless the express option terms make it crystal clear that exact performance of certain such obligations must be established.[44] To the extent that the Supreme Court decision is so restricted in future, the doctrinal foundations inherent in option law as outlined throughout this article will be preserved.

To date, the more liberal approach adopted by the Supreme Court of Canada in *Sail Labrador* as to the need for strict compliance with option conditions seems to have been resisted by other courts considering option terms. In *Hully Gully Ltd. v. Sunbelt Business Centres (Canada)*,[45] the court made reference to the fact that the option agreement in question incorporated

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43. An alternative approach is that taken in New York. There, the rule of strict compliance with option conditions does not apply to terms in a lease requiring compliance with obligations, such as general repair covenants and commitments to comply with government regulations, where the burden so imposed is not susceptible to precise definition. Substantial compliance is appropriate in such cases. See *Vanguard Diversified v. The Review Co.*, 313 N.Y.S. 2d 269 (Sup. Ct. App. Div. 1970). This approach would not have worked in the *Sail Labrador* context, as the payment requirements were in fact susceptible of precise determination.

44. And, as the majority result makes clear in *Sail Labrador*, *supra* note 4, a requirement that there be full performance of all such related terms is not sufficient to require exact compliance with *all* of them.

45. [2001] O.J. No. 588 (Sup. Ct. J.).

a time of essence provision, and was contained in a separate agreement without any cross reference to the related bilateral agreement or cross default terms. On both grounds the court reached a conclusion enforcing the need to get relevant planning permission within the strict time stipulated for closing, even though the option itself called for the possibility of agreed extensions which the grantor declined to give. And in *Fraresso v. Wanczyk*,[46] both the majority decision and the dissent emphasized the continuing need for strict compliance with the acceptance conditions (which did not include any requirement of compliance with the terms of another contractual arrangement). The dissenting judge, Finch J., who dissented on the basis of a disagreement with the majority as to whether there was acceptance of the option on the facts, went so far as to distinguish *Sail Labrador* on the basis that the put option before the court in *Fraresso* was in fact a clear unilateral contract.

III. *Exercise of option*

Subject to the treatment of conditions tied to a related bilateral agreement, as addressed above, in order for the optionee to enforce the option, the terms of the option as to time and otherwise have to be strictly observed.[47] The grantor of an option to sell (the optionor) incurs no obligation to sell unless the conditions precedent to exercise of the option are fulfilled, or, as a result of the conduct of the optionor, the optionee is on some equitable ground relieved from strict performance.[48] Of course, the optionor is free to accept a nonconforming exercise of the option, either explicitly, or impliedly, in which case the new contract will be operative,[49] or to waive any condition stated. In respect of waiver, the onus is upon the optionee to show that there is a definite, clear and intentional waiver of the condition by the optionor.[50]

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46. 2000 BCCA 311.
47. *Pierce v. Empey*, [1939] S.C.R. 247 at 252, [1939] 4 D.L.R. 672; *Alexander v. Tse*, *supra* note 13; per Lord Denning M.R. in *United Dominions*, *supra* note 15; *Laybutt*, *supra* note 16.
48. *Pierce v. Empey*, *ibid.*; *Antifave v. Tisnic* (1981), 7 Sask. R. 169 (C.A.). This is subject to the caveat that an immediate action in damages lies where the optionor puts the power of performance outside his or her capability, as discussed below in the section on anticipatory breach.
49. See *Gillespie v. Redshaw* (1976), 16 N.R. 418 (S.C.C.); *Goodwin v. Temple* (1956), 180 C.L.R. 68 (H.C.A.). In *Hill v. Hill* (1946), [1947] Ch. 231 at 239, [1947] 1 All E.R. 54, 176 L.T. 216 (C.A.), Morton L.J., seems to accept that the grantor there could have accepted notice of exercise of the extension of lease some days after the time for exercise had passed, creating thereby a valid renewal.
50. *Antifave v. Tisnic*, *supra* note 48. In that case, the Court of Appeal noted that it was not possible for waiver to be made out merely because the grantor of the option refused to accept payment at a place or in a manner otherwise than as provided for in the option terms.

The rationale behind the need for strict compliance with the exercise conditions is a commercial one—the optionor must be able to tell whether or not an option has or has not been exercised so as to allow free alienation of the subject matter of the option. Only through a requirement for strict compliance is the element of certainty achieved.[51]

Exactly what is required to effect the exercise of the option needs to be gathered from the language of the option itself.[52] In some cases, this may be the tender of payment[53]—in others, it may be a notice coupled with availability of cash[54] or simply notice itself.[55] Use of imprecise words in a purported exercise of an option may still be treated as valid exercise if it is clear in the context that exercise was intended.[56]

The time for exercise of the option will also be deduced from the wording used.[57] As a result, where an option in a lease gives the lessee the right to purchase certain property during the first five years of the lease upon 30 days notice, exercise is possible at any time during the five year term. Notice did not need to be given at least thirty days prior to the end of the five year term,[58] where the language used did not specifically so require, as many options do.

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51. *Baughman*, *supra* note 2.

52. Option wording, as in other contract interpretation situations, may displace the normal legal rules otherwise applying to contracts. Hence, in *Holwell Securities Ltd. v. Hughes* (1973), [1974] 1 All E.R. 161, [1974] 1 W.L.R. 155, 26 P. & C.R. 544 (C.A.), the court found that the option wording for "notice to the optionor" required actual communication of the acceptance/exercise of the option, and was sufficient to displace the postal acceptance rule otherwise applicable in contractual settings. See also *Lewes Nominees Pty. Ltd. v. Strang* (1983), 49 A.L.R. 328, 57 A.L.J.R. 823 (H.C.A.).

53. As to whether a cheque is valid tender of the price, see *George v. Cluning* (1979), 28 A.L.R. 57, 53 A.L.J.R. 767 (H.C.A.). It seems a cheque will be valid tender unless objected to at tender, unless of course the option wording makes clear the need for cash or a specific form of tender.

54. *Molnar v. Shockey*, *supra* note 14. By contrast, in *Baughman*, *supra* note 2, tender of payment was one of the requirements for proper exercise of the option to buy shares.

55. *Cockwell v. Romford Sanitary Steam Laundry Ltd.*, [1939] 4 All E.R. 370, 56 T.L.R. 135 (C.A.), wherein the court noted that the language used in the option in question resulted in the relationship of vendor-purchaser being substituted from that of landlord-tenant at the expiry of the 6 month notice period specified in the option.

56. *Ballas v. Theophilos*, *supra* note 17.

57. As for the calculation of time, two of the five judges who addressed this issue in *Lamont v. Heron* (1970), 126 C.L.R. 239, [1971] A.L.R. 328, 45 A.L.J.R. 102 (H.C.A.), held that an option that was open for acceptance for 30 days was able to be accepted at any time within 30 days after the day on which the option was granted — the day calculation in this context did not include the day of the grant, even though the option could have been exercised on that day. To a similar effect, see the decision in *Goldstein v. Grant* (1978), 18 O.R. (2d) 241, 82 D.L.R. (3d) 236 (C.A.), where it was held that a right of first refusal open for consideration for 48 hours (where the contract did not actually anticipate the need for fixing the time of day of receipt of the notice of availability of a third party offer) excluded the day of receipt of the notice. This can be contrasted with the option in *Beer v. Lea* (1913), 14 D.L.R. 236 (Ont. S.C.(A.D.)) which was to be exercised *within* 10 days, where the option expired at midnight on the tenth day.

58. *Canadian Petrofina Ltd. v. Berger*, [1962] S.C.R. 652, 35 D.L.R. (2d) 440.

Where the option terms themselves do not provide a stipulated time for exercise, the option must be exercised within a reasonable time, which is a question of fact in light of all the circumstances.[59] But where an option relates to the extension of a lease term, and there is nothing said about the time during which the option can be exercised, it would appear that the option can only be exercised during either the term of the lease or that longer period during which the relationship of landlord and tenant subsists.[60] The position may be different where the lease provides an option to purchase the property and is silent on the time for exercise. There is a conflict of authority in respect of whether the right to exercise the option to purchase extends beyond the term of the lease into a period when the lease has expired but the relationship of landlord and tenant continues to subsist.[61] Arguably, where a lease for a specified period provides an option to purchase at a fixed price, a court might be reluctant to find that the parties intended to extend the option at the same fixed price merely when the lease term is extended[62] although in the end result this really turns on whether the words used in the extension show a requisite intention as to whether or not the parties intended the option to continue.[63]

The exercise of the option must in effect be an unconditional acceptance of the offer made in the option grant itself.[64] An unconditional acceptance is one by which the person to whom the offer was made declares his intention presently to enter into a contract with the offeror on the terms of the offer.[65] Hence, where the optionee purported to accept an option to buy a farm, but added to his acceptance an acknowledgement to be signed by the

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59. *Ballas v. Theophilos*, *supra* note 17.

60. The relevant law here is summarised in the decision of Menzies J. in *Peters*, *supra* note 9. See also *Hensall District Co-operative v. Oud-Boyes* (1991), 3 O.R. (3d) 455, 18 R.P.R. (2d) 292 (C.A.); *Guardian Realty Co. of Canada v. John Stark & Co.* (1922), 64 S.C.R. 207, 70 D.L.R. 333.

61. This issue was canvassed in *Peters, ibid.*, although in that case the court decided that as the right to purchase extended to property greater than that covered by the lease, and as the specific facts indicated that the option was not tied to the lease (in particular its indefinite extension by deed near the end of the lease term with a right in the optionor to bring the option to an end in a particular way), the option could be exercised even after both the lease had ended and the relationship of landlord and tenant had ceased to exist.

62. See the judgement of Pollock M.R. to this effect in *Sherwood v. Tucker*, [1924] 2 Ch. 440, [1924] All E.R., 354, 136 L.T. 86 (C.A.).

63. See the judgement of Sargeant L.J. in *Sherwood v. Tucker*, *ibid.*, and *Batchelor v. Murphy* (1925), [1926] A.C. 63 (H.L.), although it should be noted that the latter case did not involve a lease extension, but a new lease granted to an assignee of the original tenant, with the new lease being on the same terms and conditions as the original. However, *Hill v. Hill*, *supra* note 49, was such a case, and the Court of Appeal held that the language for renewal in that case was specific enough to include the option to purchase during the renewed lease term.

64. *Mitsui*, *supra* note 11; *Lamont v. Heron*, *supra* note 57.

65. Per Duff J., in *Roots v. Carey* (1914), 49 S.C.R. 211 at 221, 17 D.L.R. 172, as approved in *Mitsui*, *supra* note 11 at 202.

optionor, and a requirement to complete the transaction within 6 days, the court held that there was no valid unconditional acceptance.[66] On the facts of that case, the majority of the Supreme Court of Canada found that the acceptance had incorporated new terms not part of the original option agreement. Likewise, purported acceptance of an option to lease where the lease presented as acceptable to the optionee differed from the terms of the option agreement was held not to be an unconditional acceptance.[67]

Acceptance must have the effect of creating a binding contract[68]—there cannot be any terms left upon exercise which require the agreement of the parties[69]—although in the usual way a court will imply relevant terms.[70] As a corollary to this, it has been held that if the purported exercise of an option (in that case to purchase land) does not result in both sides being bound to complete, the relationship between the parties following the purported exercise continues to be that of optionor and optionee—the court being of the view that an agreement of purchase and sale of the subject property, and consequent vesting of the interest in land, could only arise when both the vendor and purchaser were bound to complete.[71]

Until 1983, where an option arrangement stipulated a machinery for the determination of the value to be paid in the event of exercise, the option holder was in the strange position of not being able to enforce the option if the optionor refused to implement the mechanism for determination of value. This position was changed by the House of Lords in *Sudbrook Trading Estate Ltd. v. Eggleton.*[72] In that case, a lessee had an option to purchase

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66. *Shackleton v. Hayes*, [1954] 4 D.L.R. 81.

67. *Gordon v. Connors*, [1953] 2 S.C.R. 127, [1953] 4 D.L.R. 51. As to the impact of legislated rent controls reducing the rent payable under a renewable lease at a specified annual rent, see *Mauray v. Durley Chine (Investments), Ltd.*, [1953] 2 Q.B. 433, [1953] 2 All E.R. 458, 3 W.L.R. 296 (C.A.).

68. *Mitsui*, *supra* note 11.

69. *Murphy v. McSorley*, [1929] S.C.R. 542, [1929] 4 D.L.R. 247; *Hipkins v. MacKenzie*, [1948] 4 D.L.R. 397 (Ont. C.A.); *Loftus v. Roberts* (1902), 18 T.L.R. 532 (C.A.).

70. *Hillas*, *supra* note 41. In *Shackleton v. Hayes*, *supra* note 66, a majority of the Supreme Court indicated that where an option for the sale of real estate contained all other material terms but did not fix the date for completion, the law would imply a term that the sale be completed within a reasonable time. And in *Molnar v. Shockey*, *supra* note 14, the Supreme Court of Canada drew implications from the language used to find that payment of cash was not needed to exercise the option — in that case all that was required was notice of exercise with the court implying a term that the cash payment would be made against transfer of the property. And, in *United Dominions*, *supra* note 15, the English Court of Appeal implied a term that an option to repurchase aircraft needed to have been exercised within a reasonable time of the underlying lease being terminated.

71. *Politzer v. Metropolitan Homes Ltd.*, [1976] 1 S.C.R. 363, 54 D.L.R. (3d) 376 [*Politzer*]. This position is also borne out in *Helby v. Matthews*, *supra* note 15, where the House of Lords noted that for the period during which a purchaser has a choice as to whether or not to proceed with the purchase, the situation is one of option only, and not one of a contract for sale.

72. *Supra* note 27.

the reversion "at such price not being less than £12,000 as may be agreed upon by two valuers, one to be nominated by the lessor and the other by the lessee and in default of such agreement by an umpire appointed by the said valuers."[73] The optionor in this case declined to appoint its valuer, preventing the option from becoming effective. The House of Lords overturned prior Court of Appeal decisions which had declined to order specific performance of the valuation mechanism through an order that the optionor appoint its valuer, and which did not allow the court to substitute a new machinery or value. While the House of Lords agreed that it was inappropriate to order specific performance of the obligation to appoint a valuer,[74] Lord Fraser noted that in cases such as this, the mechanism for determination of value (which did not name a specified value) was ancillary to the obligation to sell at a fair or reasonable value. As the mechanism was not essential to the option, if the mechanism failed as a result of the fault of one of the parties, there should be nothing to prevent the court from substituting other machinery to achieve the contractual objective. In the end result, the court ordered specific performance of the sale while directing an inquiry as to the fair value to be paid by the purchaser.

IV. *Time of the Essence*

It has generally been the case that time, particularly in respect to the time by which an option has to be exercised (*i.e.* the option period itself), has been viewed as being of the essence in an option situation.[75] This was a departure from the situation which applied to bilateral, or synallagmatic contracts, where time was not generally of the essence unless made so by the express terms of the contract. The rationale for this position in the option context is either that the law will not impose a contractual obligation on persons which they themselves have failed to create by proper and timely exercise of the option,[76] or is likewise the need for commercial certainty, as explained by Lord Fraser:

> There is good reason why time limits should be strictly enforced in relation to an option to purchase or renew a lease, because as long as it remains open the grantor is not free to dispose of his property elsewhere, although

73. *Ibid.* at 444.
74. This was viewed as unsuitable on the basis that if the party so ordered did not obey the order, the sanction of contempt, the only remedy then available, did not seem appropriate.
75. See *e.g. Hare v. Nicoll* (1965), [1966] 2 Q.B. 130, [1966] 1 All E.R. 285, [1966] 2 W.L.R. 441; *Lamont v. Heron*, *supra* note 57.
76. Per Lords Simon and Salmon in *United Scientific Holdings v. Burnley Council* (1977), [1978] A.C. 904, [1977] 2 W.L.R. 806, 33 P. & C.R. 220 [cited to A.C.].

> the grantee is under no obligation to him. Similarly, where a tenant has an option to break his lease, he can break it or not as he chooses, but the landlord is not free to let his property to anyone else until the time for exercising the tenant's option has expired. It is fair and reasonable, and in accordance with what I would take to be the intention of the parties, that the time limit of restriction on the grantor should be strictly enforced.[77]

Sail Labrador appears to cast doubt in Canada on the strength of the position of time being of the essence to option contracts. It does so on two bases: firstly, due to the bilateral categorisation of the option arrangement (as noted above, time is not of the essence in bilateral contracts unless expressly made so), and secondly, by the express comment by Bastarache J., that "I must disagree with the statement that time is always of the essence in option contracts."[78]

While it may now be true that time is not necessarily of the essence in respect of all matters and conditions in an option arrangement, on neither basis is there strong ground for challenge of the need to exercise option conditions strictly within the time expressly stated for exercise (*i.e.* the option period), even though time is not expressly stated to be of the essence in respect of the exercise conditions. In respect of the first basis in *Sail Labrador*, the bilateral treatment of options by the Supreme Court has already been challenged herein, and the *Sail Labrador* bilateral treatment should not be used as a basis for departure from the time of essence rules in respect of the option period itself. If one focuses on the issue of unilateral and bilateral *obligations*, rather than *contracts*, recognizing that certain option conditions might have aspects of bilateral obligation, and on the question of whether the stipulated events which will generate the new contract have taken place within the option language, the option contract remains a unilateral obligation. It is thus clear that to the extent that an option specifies a time by which the events have to occur, time remains of the essence.

In respect of the express statement by Bastarache J. quoted above, it would be wise to remember that these comments were directed to the need for timely payment of the instalments required under the bilateral charterparty, and were not specifically made in the context of the time within which the option conditions themselves had to be met. Furthermore, as made clear in the quotation above, as certainty is key to the need for strict compliance with the option period requirements, Bastarache J. would

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77. *Ibid.* at 962. Lord Diplock expressed a similar rationale at 929.
78. *Supra* note 4 at 297.

unlikely take the same position on the time period within which option conditions have to be satisfied. He himself, earlier in his judgement in *Sail Labrador*, notes that certainty was not an issue on the specific matters raised in that case.[79] By implication, where certainty is important, his comments are not applicable. Therefore, untimely performance of the events needed to exercise the option — even where such performance is only slightly outside the time frame permitted, and hence in substantial compliance — should never result in a court finding that the option has been validly exercised.

V. *Spent Breach*

Where the option rights are contained in another contractual document, such as the right to purchase in the context of a lease of the property, the issue of whether the option may be exercised in the face of a default in a term or terms of the underlying contractual agreement arises. In fact this is the corollary of the issue raised in *Sail Labrador*: default in this context being the other side of the coin from the performance requirement at issue in that case. If the option right is expressly subject to the optionee not being in default in respect of the underlying contractual provisions, and if, at the time of exercise, there is an open and ongoing default, the option cannot be exercised — effectively this is treated as if there is a condition precedent to the option that remains unperformed.[80] In light of *Sail Labrador*, however, it might now be that exercise of the option is foreclosed only where the relevant condition precedent is substantially unperformed.[81] In the event that terms in a related bilateral agreement which have been made part of the exercise conditions in an option have been substantially performed, unless the clause makes it clear that minor nonperformance breaches the condition, the *Sail Labrador* result would appear to dictate a finding that the condition has in fact been met.[82]

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79. *Ibid.* at 285.

80. *Petrillo v. Nelson* (1980), 29 O.R. (2d) 791, 114 D.L.R. (3d) 273 (C.A.); *Fitzgerald v. Barbour* (1908), 17 O.L.R. 254 (C.A.); *Finch v. Underwood* (1876), 2 Ch. D. 310 (C.A.).

81. If this is so, at least in Canada, the Court of Appeal decisions in *Finch v. Underwood*, *ibid.*; *West Country Cleaners (Falmouth), Ltd. v. Saly*, [1966] 3 All E.R. 210, [1966] 1 W.L.R. 1485; *Bairstow Eves (Securities) Ltd. v. Ripley* (1993), 65 P. & C.R. 220 [*Bairstow*], would not apply.

82. In fact, it seems that very clear language will be required, as the position appears to be that differences in the way in which the concept of default is described in exercise conditions have not generally been seen as having any great effect on the rules relating to the issue of spent breach. See the comments to this effect of Kerr L.J. and Nicholls L.J. in *Bass Holdings Ltd. v. Morton Music Ltd.* (1987), [1988] Ch. 493, [1987] All E.R. 1001, [1987] 3 W.L.R. 543 (C.A.) [*Bass Holdings* cited to All E.R.] at 1006 and 1018, respectively.

There is also an interesting Supreme Court of Canada decision from 1909 which holds that where a lessee was given an option to renew a lease "in case the lessees had kept and performed all their covenants and agreements and should give notice"[83] six months before the expiry of the initial term, the lease was held not renewable when the existing and unremedied breach occurred after the giving of the six month notice but before the new term was due to commence. Anglin J., speaking for the court, felt that these words required the observance of the lease provisions up to the time that occupation under the new term was due to begin—not just to the time of notice.

However, if the option terms are silent as to whether a default in the underlying terms of the contract impacts the right of exercise (as in a case where the option simply states it could be exercised at any time during the term of the contract in question), it appears that the option is exercisable even though the optionee is in default under some provision of the agreement.[84] This position should not be different under any interpretation of *Sail Labrador*, as without the cross-reference to the terms of an underlying bilateral arrangement, it would not seem possible to class the option as bilateral in any event. Accordingly, there would be no basis upon which to apply any special bilateral rules of the kind postulated by *Sail Labrador* to this kind of option situation.

That leaves for consideration the issue of an option which ties its exercise to there being no default (or the corollary, due performance) under the terms of a connected bilateral agreement in a case where there has in fact been a clear breach of certain of those obligations, but where the breach has been rectified prior to the purported exercise of the option. This is in fact the issue of a spent breach—the breach having been spent in the sense that it does not give rise to a subsisting cause of action at the time the optionee seeks to exercise the option.[85] The doctrine of spent breach arises out of English authority. It is perhaps best summarised in the decision of *Bass Holdings Ltd. v. Morton Music Ltd.*,[86] and is quite compelling. The

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83. *Loveless v. Fitzgerald* (1909), 42 S.C.R. 254.
84. *Beaucage Mines, supra* note 37. While that case was overruled in *Harris v. Minister of National Revenue*, [1966] S.C.R. 489, 57 D.L.R. (2d) 403 [*Harris*], the decision to overrule related only to that part of the *Beaucage Mines* decision dealing with the issue of whether the option was void for infringement of the rule against perpetuities, and not on the basis of the point in issue here. The position may well be different in Scots law in cases where there is clear mutuality see *McCall's Entertainments (Ayr) Ltd. v. South Ayrshire Council (No. 1)* (1997), [1998] S.L.T. 1403 (O.H.).
85. The doctrine is so described by Bastarache J. in *Sail Labrador, supra* note 4 at 277.
86. *Supra* note 82.

underlying rationale for the result is that to take a position that an option is exercisable only if every single covenant in an underlying lease throughout its term, particularly one with the range of covenants typically found in a full repairing lease, must be strictly met would be virtually impossible of attainment.[87] Given this near impossibility, which would make the option so granted virtually meaningless from the point of view of the optionee, the court took the view that this could not have been the intent of the parties. As a result, it held that the doctrine of spent breach applied, with the result that late but rectified payment obligations, and failure to have obtained the landord's prior consent to two unsuccessful planning applications, did not foreclose the exercise of the option to extend the lease for 125 years.

It is difficult to understand why Bastarache J. did not in fact simply apply this doctrine to the rectified payment obligation in *Sail Labrador*. While he chose not to do so, he in fact cited the doctrine in support of his proposition that time is not of the essence in respect of all matters relating to options.[88] As the doctrine is consistent with the result in *Sail Labrador*, and was cited to support the court's judgment on one of the issues before it in that case, the doctrine should apply in Canada in respect of a breach in performance under a related contract, where the default or breach has been rectified by the time of exercise, such that there remains no substantive cause of action with respect thereto.[89] In fact, in light of the problems associated with the bilateral approach taken by the court in *Sail Labrador*, it might be preferable to characterize that decision as an application of the spent breach rules subject, however, to possible modification in the manner suggested in the opening paragraph to this section to allow substantial performance to be sufficient to constitute a spent breach.

This approach would resolve one of the difficulties with the spent breach rules which has emerged in England. The problem is how to decide when a breach is spent and when it is subsisting. Under the English cases, if it is

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87. *Ibid.* at 1005, Kerr L.J.; *ibid.* at 1013, Nicholls L.J. See also *Birchmont Furniture Ltd. v. Loewen* (1978), 84 D.L.R. (3d) 599, [1978] 2 W.W.R. 483 (Man. C.A.); and *Burlock v. Steeves* (1990), 109 N.B.R. (2d) 442, 13 R.P.R. (2d) 38 (C.A.). In the latter case, the court noted that in accepting late payments the optionor might have preserved her right to refuse to honour the option had she expressly done so at the time she accepted the late payments. This ability is perhaps subject to question in light of the fact that in *Sail Labrador* the optionor immediately indicated that the option was void and thereafter accepted late payment in the manner requested, and this did not result in the option rights being lost.

88. *Supra* note 4 at 297.

89. It is useful to note that the *Bass Holdings* decision, *supra* note 82, indicates that the doctrine applies to all forms of option purchase, lease and break options and to breaches of both positive and negative covenants.

the former, the breach does not prevent the exercise of an option, but if the latter, it does. The rule suggests that a breach is subsisting if it gives rise to a subsisting cause of action at the time of exercise—but even a rectified breach is still a technical breach which could be seen as giving rise to a subsisting cause of action for nominal damages by the non breaching party, provided the relevant limitation period has not yet run. The optionor probably had such a cause of action for nominal damages for the past breaches in *Bass Holdings* itself, but this did not prevent the spent breach ruling in that case.

The problem of differentiating breaches was raised in *Bairstow Eves (Securities) Ltd. v. Ripley*.[90] There, the optionee argued that provided a subsisting breach would not result in other than nominal damages, it should not prevent the exercise of the option. In that case, the lease in question contained a covenant that required the tenant/optionee to paint the premises inside and out during the last twelve months of the initial term. Painting had been done within 20 and 17 months of the end of the term, and the optionee argued that this resulted in a technical but immaterial breach which should not have prevented the exercise of the option to renew, even though the option was only exercisable if the tenant complied with all the lease covenants. The argument was that as only nominal damages would have been available in the event of the landlord having taken action for failure to paint within the relevant timeframe, the breach should be viewed as spent. The court disagreed, and viewed the failure to have painted in the last twelve months of the term as being a subsisting breach preventing the exercise of the renewal option.

However, the judges recognised the problem. Scott L.J. notes:

> Where past breaches of covenant have occurred it may, in some cases, be a matter of difficulty to decide whether they are still 'subsisting' or are to be regarded as 'spent'. Lord Justice Kerr in the passage cited was, in my view, doing no more than to make clear that if breaches are otherwise to be regarded as 'spent', they will not be treated as 'subsisting' breaches merely because a right to claim nominal damages is not yet statute barred.
>
> Although it may not always be clear whether breaches are to be regarded as 'spent' or 'subsisting', there can, in my opinion, be no doubt at all but that the breach . . . in the present case was, on the term date, a subsisting breach.[91]

90. *Supra* note 81.
91. *Ibid.* at 226.

Kerr L.J. (who had delivered the lead judgement in *Bass Holdings*) takes the view that while it was obvious that the breaches in *Bass Holdings* were spent, this was not the case in *Bairstow*. This difference may be due to the spectre of uncertainty, for Kerr L.J. states:

> But it would be quite impractical in cases such as the present to carry out an investigation into the comparative state of the premises, or into other matters, at the end of the lease in order to determine the validity of an option notice according to the degree to which a covenant had been complied with. Here the landlord was entitled to have the premises painted internally and externally within the last 12 months before the end of the term. In fact this was done 20 and 17 months before the end of the term. The [trial] judge found... that there was no material difference. But to determine the validity of an option notice in this way is not a business-like approach, such as this court endeavoured to procure in *Bass*.[92]

While stating that it was clear that there was a subsisting breach in *Bairstow*, none of the judges gave any definitive guidance as to how to decide when there was a subsisting versus a spent breach, when in both cases the remedy might only have been a court case giving the non breaching party a nominal damage award. While Kerr L.J. appears to suggest certainty as a rationale for his approach in *Bairstow*, it appears that one certainty (whether or not an option condition is satisfied) is achieved at the expense of a different uncertainty (what is a spent breach versus a subsisting one).

As the English approach creates uncertainty in one field while trying to prevent it in another, it is suggested that all uncertainty can be minimized by marrying the result achieved by the Supreme Court of Canada in *Sail Labrador* with the doctrine of spent breach. The rule then becomes that where an option is conditional on the performance of a wide range of bilateral obligations in a related contractual arrangement, but where the effect of any breach is immaterial, substantial performance of those terms at the relevant time (so that the optionor has no cause of action other than for nominal damages) is enough to allow the exercise of the option by the optionee. Arguably this is the position in Canada today if *Sail Labrador* is applied in the way suggested herein. This leaves unchanged the need for the optionee to meet strictly all non bilateral exercise conditions, strictly within the time limits set for exercise. In addition, in the event that a particular bilateral obligation is of key significance to the optionor in terms of the exercise right, the law should not preclude the optionor by clear

92. *Ibid.* at 227-28.

language from requiring exact compliance with that requirement—but in light of the case law, optionors would do well to:

1. limit the number of bilateral obligations of such clear importance; and
2. use very clear language dealing with the need for strict compliance and the consequences of any, even minor, noncompliance. This position can be achieved without relying on a questionable bilateral agreement categorisation of option contracts, and eliminates the uncertainties arising from the spent/subsisting breach dichotomy.

VI. *Anticipatory Breach by Optionor*

In the event that the optionor puts the performance of the option beyond her/him before the expiry of the option, by, for example, selling the subject matter of the option contract during the term of the option agreement, this gives the optionee an immediate right to sue for damages. Early cases had suggested that such a breach by the optionor would not excuse the optionee from performance of his or her obligation to exercise before claiming such damages (such as tender of the price), unless the grantor's breach prevented the grantee from performing[93]; but these authorities now appear to be superseded.[94] In the event that the optionee fears the optionor might perform an act which would put performance beyond her/him, the optionee should, as suggested below, also be able to restrain the optionor from so acting.

The position of the optionee where the optionor does not put performance out of reach, but merely intimates that s/he does not intend to honour the option commitment is more difficult, and may now differ depending on whether the option contract is viewed as bilateral or uniliateral in nature. The unilateral position is well stated in the case of *Baughman v. Rampart Resources Ltd.*[95] In that case, the issue was whether an employee was entitled to claim damages in respect of the failure of the company which had employed her to issue her with shares over which she had been granted an option. She had purported to exercise the option, albeit not in the manner required (having failed to have tendered the sum due in payment for the shares). In response to the purported exercise, the company did not raise the non-payment as a problem, but challenged Baughman's right to exercise the option in the first place. The time for valid exercise having

93. Per Duff J. in *Roots v. Carey*, *supra* note 65.
94. *Gold v. Stover* (1920), 60 S.C.R. 623, 57 D.L.R. 64; *Baughman*, *supra* note 2.
95. *Baughman*, *ibid.*

passed, the employee was left to argue that the company's response to her purported, but faulty, exercise of the option showed an anticipatory breach on their part, indicating that even had she complied with the due exercise, the shares would not have been issued—thus entitling her to damages.

The British Columbia Court of Appeal disagreed. Southin J.A., with whom Ryan J.A. agreed, stated that an anticipatory breach, via a purported revocation of an option, does not confer on the optionee all the rights s/he would have had had s/he accepted the offer in the manner prescribed. Instead, the position (again where the offeror has not put performance beyond possibility) is:

1. The optionee is entitled to accept the offer notwithstanding any anticipatory breach. The attempted revocation does not deprive the offeree of the right to accept. As the effect of a valid option is that the offer is held open for the option period, acceptance consummates the contract[96] such that the offeree has all of the rights and obligations under the now valid and breached agreement which the acceptance created. However, to create these rights the offeree must comply with the acceptance conditions, including, where relevant, due tender of the price.
2. The optionee cannot, however, accept the anticipatory breach when it happens and claim damages (except, as noted above, where the breach is an act by which the optionor has made performance an impossibility). If the offeree does not comply with the acceptance conditions, there is no contract and the offeree has no remedy on that contract, although s/he has an action in damages for breach of the promise to keep the offer open—an action where the measure of damages will not be the same as if there had been a proper acceptance.

In reaching this conclusion, the judgement rests on the characterization of the option contract at hand as a unilateral contract. The learned judge notes that where the contract in question is bilateral—and where on the day of completion one party indicates it will not perform—the law does not impose an obligation on the other party to tender performance to preserve their rights. Tender is not required for an anticipatory breach of any bilateral contract—acceptance of the repudiation is enough.[97] The court was of the view that as the principles above were sufficient protection for

96. For an excellent analysis of the legal position here, see the judgement of O'Connor J. in *Goldsbrough*, *supra* note 3.

97. *Canada Egg Products, Ltd. v. Canadian Doughnut Co.*, [1955] S.C.R. 398, [1955] 3 D.L.R. 1.

optionees, there was no need to incorporate the law in respect of anticipatory breach into unilateral option contracts.

If *Sail Labrador* is correct in its holding that some options can be bilateral, the implication is that the law will apply different rules in respect of anticipatory breach, dependant on the nature of the option. This is an unsatisfactory position. In the context of anticipatory breach, the *Baughman* approach is a logical one. Until the optionee exercises the option, including where necessary, tendering the price, there is no contract of sale for which a remedy in damages would be available, even in cases where the optionor has suggested s/he does not intend to comply after due exercise. The law should not award damages where the optionee has not satisfied the conditions necessary to bring the contract into existence. This principle should be true of all options, whether unilateral or bilateral in nature for, without the acceptance in accordance with the stipulated manner of acceptance, there is no contract on which to award damages. It is always the case that the new contract might never in fact come about because the optionee has no obligation to exercise. This might well be a basis for arguing that the discussion in *Sail Labrador* concerning the nature of the obligation is relevant only to the interpretation of an exercise condition requiring performance by the optionee of all of the terms of a related bilateral agreement.[98]

VII. *Rights of First Refusal*

In some cases it is necessary to distinguish between an option and a right of first refusal. An option gives the optionee the unilateral right to exercise the option and to require (where the option is one of sale) the optionor to sell the subject matter of the option on the prearranged terms. By contrast, a right of pre-emption or of first refusal does not give the grantee the power to compel the sale by the grantor. A typical case is a contractual provision which gives to one party the right of first refusal in the event that the other party, the owner of an item, contemplates accepting an offer from a third party to purchase that item. In such cases, only the grantor has the power to bring about the set of circumstances which would vest any rights in the grantee—and it is only when the grantor sets in motion those circumstances

98. If this basis of the true holding in *Sail Labrador* is correct, the need to determine whether the option arrangement is in fact bilateral or unilateral is irrelevant, and the kind of distinction of that case made by Finch J. in *Fraresso v. Wanczyk*, *supra* note 46, is not necessary.

that the grantee is given the right or opportunity to purchase the object of the first refusal right.[99]

Unlike an option, which creates a contingent equitable interest in the subject matter over which the option is given (the contingency being the due exercise of the option), a right of first refusal does not give its holder the right to require in future a conveyance of the thing over which the right is granted—instead it gives only a promise to offer.[100] Such a right does not confer a property right over its subject matter[101] and is accordingly not specifically enforceable, at least until the grantor sets in motion the relevant circumstances, or perhaps earlier when the event which triggers the right of first refusal occurs[102] (such as the receipt of an offer from a third party). As such, the right of first refusal is not subject to the rule against perpetuities, and will not be held to be void for infringing the vesting requirements of that rule.

Instead, such provisions are in the nature of negative covenants under which each party, on the occurrence of a certain event within its own control, gives to the other certain personal rights—namely rights not to substitute a third party as joint owner without permitting the other party the opportunity to acquire full ownership,[103] or a commitment by the grantor to give to the grantee the first chance to purchase should the grantor decide to sell.[104]

However, distinguishing the two is not always easy. In *Mitsui*,[105] Mitsui leased helicopters to a customer under an agreement where the lessee was granted the "option" to purchase the helicopters. In order to do so, the customer had to give written notice to that effect at least 120 days prior to the expiry of the lease term. If the option as phrased was so exercised, the purchase price was to be the reasonable fair market value of the helicopters as established by Mitsui. In the event the customer did not agree with the price so set, it could signify its disagreement within 30 days of the notification of the price, in which event the option was to "cease."

The case involved a contest between Mitsui, as lessor, and the customer's bank, the latter claiming that Mitsui's reservation of title was ineffective

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99. *Mitsui*, *supra* note 11 at 199-200, citing with approval *Irving Industries (Irving Wire Products Division) Ltd. v. Canadian Long Island Petroleums Ltd.* (1974), [1975] 2 S.C.R. 715, 50 D.L.R. (3d) 265 [*Irving Industries*].

100. Per Stephenson L.J. in *Pritchard v. Briggs* (1979), [1980] Ch. 338, [1980] 1 All E.R. 294, [1979] 3 W.L.R. 868 (C.A.).

101. For a detailed analysis of this specific issue, see Paul M. Perell, "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991) 70 Can. Bar Rev. 1.

102. *McFarland v. Hauser*, [1979] 1 S.C.R. 337, 88 D.L.R. (3d) 449.

103. *Irving Industries*, *supra* note 99.

104. *Mitsui*, *supra* note 11.

105. *Ibid.*

against it due to a failure on *Mitsui*'s part to have the agreement registered under the relevant conditional sales legislation in Nova Scotia. This argument was bound to succeed if the provisions in question conferred on the customer an option to purchase the equipment. Mitsui maintained that they had no such effect—essentially arguing that the arrangement was a right of first refusal only, as the key clause did not confer a right in the customer to compel outright the sale by Mitsui. Instead, Mitsui argued that the two step process which required the customer to serve an initial notice effectively created a first refusal right only, until such time as the first notice was in fact served.

The court concluded that there was an option on the basis that the agreement gave the lessee the unilateral right to compel the lessor to sell the helicopters at their reasonable fair market value.[106] Agreement to sell at that value did not leave a material term of the agreement of purchase and sale open for further agreement—as the court noted that the lessor is under a duty to act in good faith in such circumstances to complete the valuation to allow the sale to take place. On this basis, one might conclude that the option would have been validly exercised on the giving by the customer of the initial notice 120 days prior to the expiry of the lease term, subject to the ability in the customer to resile from the agreement to purchase if the price determined by the lessor as the reasonable fair market value was subsequently found by the customer to be too high. However, the reasoning of the court appears to cast a great deal of doubt on this position—as the court in fact suggests that the giving of the intitial notice was not the actual exercise of the option, but instead was one of three conditions precedent to the exercise of the option, namely,

1. the lessee had to be in compliance with the lease obligations;
2. the initial (120 day) notice in writing had to be given;
3. the lessor had to comply with the contractual obligation to determine the reasonable fair market value of the helicopters.

If the third condition must be satisfied, this means that the option is only formally exercised on the failure of the customer to withdraw from the transaction within 30 days of the determination of the value by the lessor—a very problematic approach to the concept of "exercise" of an option—as in this case the act of exercise is the omission or failure of the customer to withdraw from the transaction within 30 days of the notification of the price—a negative option exercise. If the option, as the court suggests in its

106. *Ibid.* at 205.

concluding comments, consisted of the customer's right to compel the sale of the helicopters at their reasonable fair market value, this right is exercised when the first notice is in fact given. It is at that point in time that the customer can compel the sale of the helicopters at the reasonable fair market price, subject to the customer's contractual right to change its mind once the price has been notified. In fact, if the lessor declines to set the price, the purchaser can enlist the aid of a court to intervene to determine the price.[107] While the reasoning is subject to question, the fact remained that the clause did constitute an option, not a right of first refusal, and should have been registered under the then applicable conditional sales legislation.

As is the case with options, a court will construe the language used in rights of first refusal with reason and will imply relevant and necessary terms. Hence, where a right of first refusal to acquire land did not stipulate a time frame within which the right holder was entitled to meet a third party offer, the Supreme Court of Canada was willing to give the holder a reasonable time and opportunity to meet the third party offer.[108]

VIII. *Creation of Equitable Interests on Grant*

An option gives the optionee at the time the option is granted a right in future to compel the conveyance of the subject matter and as such creates an equitable interest in the subject matter which is specifically enforceable. This interest is contingent on the exercise of the option, but as it is an equitable interest from the time of its creation, it is subject to the rule against perpetuities at the time of grant.[109] Therefore, the contingent interest must vest within the period specified by the rule. If it does not, the option will be void and, to the extent the option is contained in a contract dealing with other matters, the rest of the contract will be applied as if the void provision is omitted.[110]

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107. *Sudbrook*, *supra* note 27; *Empress Towers Ltd. v. Bank of Nova Scotia*, 50 B.C.L.R. (2d) 126, 73 D.L.R. (4th) 400 (C.A.).

108. *McFarland v. Hauser*, *supra* note 102.

109. *Irving Industries*, *supra* note 99; *Harris*, *supra* note 84; *Frobisher*, *supra* note 14. See also the decision of Gibbs J. in *Laybutt*, *supra* note 16, and *Camphin*, *supra* note 17. Detailed analysis of the application of the rule against perpetuities to options deals more with the issue of perpetuities than with the concept of the option itself, and therefore is beyond the scope of this Article. Some of the other case law on this issue in the specific context of options includes *Auld v. Scales*, [1947] S.C.R. 543, [1947] 4 D.L.R. 721; *Politzer*, *supra* note 71; *Woodall v. Clifton*, [1905] 2 Ch. 257 (C.A.).

110. *Harris*, *supra* note 84. As noted in that case, if there is a separate personal contract, that personal contract will not be void and will be enforceable between the original contract parties, but where the only interest created is a contingent future interest in land, the rule against perpetuities applies. The *Harris* decision therefore overrules to that extent the decision in *Beaucage Mines*, *supra* note 37. But see *Peters*, *supra* note 9, where the Australian High Court adopts the view apparently espoused in *Beaucage Mines*.

As noted above, the grant of a right of first refusal does not create an equitable interest in the subject matter of the option, although it would seem that as soon as the event which triggers the right of first refusal occurs, an equitable interest then arises.[111]

As an option to purchase land creates an interest in the land, issues of registration of such options may well arise in particular jurisdictions, but this particular issue relates more to real estate matters than it does to the law of contract, and will not be addressed in this article. The issue of registration has, however, thrown up a number of the more recent cases that have been reviewed above, although this article has not touched upon this aspect of those cases. No doubt, however, registration issues will continue to be a source of option law in the future.[112]

IX. *Remedies*

While the normal range of contractual remedies is available in option situations, there are certain peculiarities with respect to the application of remedies in this field. It is therefore appropriate to conclude the review of the law of options with a brief reference to remedies. The wrinkles which arise in the area of anticipatory breach have already been reviewed. The other item which needs to be addressed is when specific performance, both of the option itself, and of its object contract in the event the option is exercised, might be appropriate.

Specific performance is not to be granted in respect of an unexercised option, as in the option stage the only obligation of the grantor possibly capable of enforcement is the promise to keep the offer open for acceptance during the time stipulated. However, if the optionee fears that the grantor will undertake an act which will defeat the optionee's interest, s/he may obtain an injunction to restrain the grantor from taking that action until the date and time at which the option will expire.[113]

In the event that the optionor breaches his/her obligations in respect of an exercised option, the case authorities above clearly indicate that the optionee can claim damages, subject to the relevant contractual rules in

111. *McFarland v. Hauser*, *supra* note 102. See also *Pritchard v. Briggs*, *supra* note 100.

112. See *e.g.* the issue of whether an extension of a prior registered option is a new contract/interest in land which might need to be separately registered in Nigel P. Gravells, "Land Options: Registration Again . . . And Again?" [1994] Conv. & Prop. Law. 483.

113. *Camphin*, *supra* note 17; *Alexander v. Tse*, *supra* note 13.

respect of the appropriate damages recoverable.[114] Likewise, an option, upon exercise, is specifically enforceable,[115] as is a validly exercised right of first refusal,[116] provided of course in both cases that the various requirements for applicability of the remedy of specific performance are satisfied. The specific performance ordered is the enforcement of the object contract, and not of the contract not to withdraw the offer.[117] Specific performance will now even be granted coupled with an order for determination of the price to be paid in cases where the option specifies, or a court implies, that the price is to be a fair or reasonable one, and where the mechanism provided by the parties to determine that price has failed due to the refusal of one of the parties to appoint its valuer.[118]

Conclusion

Relatively recent judicial activity on both sides of the Atlantic has added a significant number of appellate level decisions to the jurisprudence on the law of options. The number of decisions alone has made a general review of the law in the area overdue.

More significantly, the thrust of some of these cases has been to challenge the parameters of what may have been seen as settled common law precepts in the field, but with the exception of the Supreme Court of Canada decision in *Sail Labrador*, that challenge has resulted in small progressions to the established rules, leaving the fundamentals on which the progression is based unchanged. *Sail Labrador*, without an apparent acknowledgement of its effect, represents a significant departure from the established law. While the outcome is correct, the reasoning by which it was achieved is subject to significant doubt. As argued herein, the same outcome could have been achieved in a way which is more consistent with the established common law, both in Canada and the United Kingdom. It is possible that *Sail Labrador* may yet be interpreted in a way which will achieve better consistency with the prior jurisprudence, incrementally extending the law while preserving the certainty required in commercial law settings. As a result, further decisions in the appellate courts shall be anticipated with keen interest.

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114. See *Ontario Asphalt Block v. Montreuil* (1916), 52 S.C.R. 541, 27 D.L.R. 514, which applied a damage limitation rule from the law of property, limiting the damage available where the vendor is unable to make good title to land to the actual expenses incurred by the purchaser (optionee) in the context of an option granted by an optioner who had only a life interest, not title to the property in question.

115. *Politzer*, *supra* note 71; *Niesmann v. Collingridge*, [1921] 29 C.L.R. 177, 27 A.L.R. 209 (H.C.A.); *Pritchard v. Briggs*, *supra* note 100.

116. *Goldstein v. Grant*, *supra* note 57.

117. *Mountford v. Scott*, *supra* note 3.

118. *Sudbrook*, *supra* note 27.