CITATION: 5054545 Ontario Inc. v. Fogolar Furlan Club Windsor, 2026 ONSC 6199
COURT FILE NO.: CV-26-00036670
DATE: 20261102

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
5054545 Ontario Inc.	Applicant	Myron W. Shulgan, for the Applicant
– and –		
Fogolar Furlan Club Windsor	Respondent	Rodney Godard, for the Respondent
		HEARD: September 17, 2026

REASONS FOR DECISION

KALAJDZIC J.:

[1] In 2021, the respondent ("Fogolar") sold ten acres of a 20-acre parcel of land it owned and occupied, and from which it operated its banquet hall, soccer fields and social club. Fogolar sold the land to the applicant ("505 Ontario") to raise capital as a result of COVID-related financial issues. As a result of the sale, Fogolar retained an undivided ten acres of land (the "Retained Land") to the west of the land purchased by 505 Ontario.

[2] During the course of negotiations, Fogolar advised that it might need to raise further capital in the future. If that need arose, Fogolar intended to sever and sell the rear three-acre portion of the ten acres it retained. Fogolar asked 505 Ontario to grant it an easement over the rear portion of the land 505 Ontario was purchasing, to enable a severance of the Retained Land. Once severed, there would be no road access to the rear three acres without the easement. The three-acre parcel (the "Designated Land") was identified in a sketch of a proposed severance plan attached to the agreement of purchase and sale.

[3] 505 Ontario agreed to grant the easement, in exchange for a right of first refusal ("ROFR") to acquire the Designated Land.

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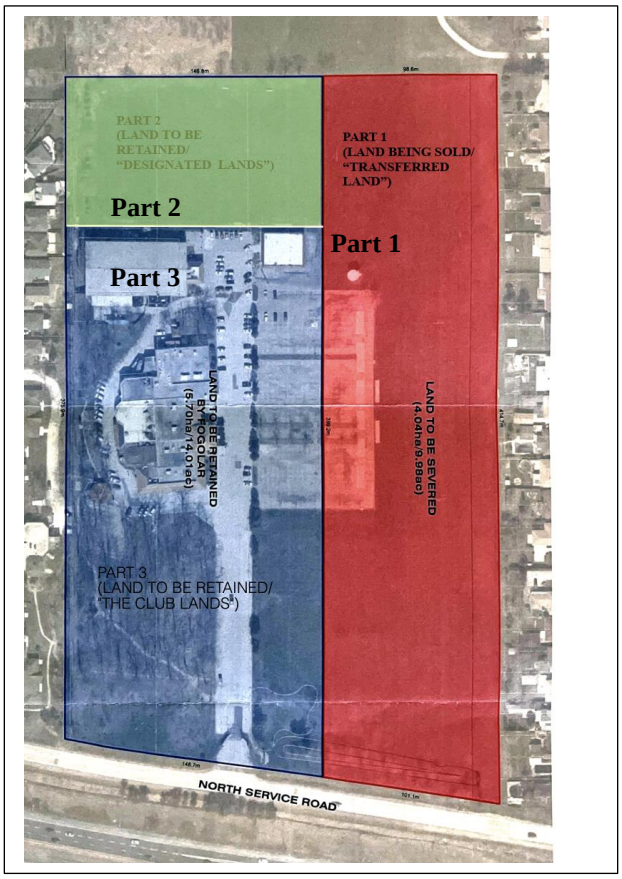
[4] The sketch attached to the agreement identifies the land sold to 505 Ontario as Part 1, the Retained Land as Parts 2 and 3, and the Designated Land, the three-acre parcel within the Retained Land that was the subject of the ROFR, as Part 2:



[5] To be clear, Parts 2 and 3 form one unsubdivided parcel that Fogolar still owns.

[6] In 2025, Fogolar decided it could no longer afford to stay in business. It decided to shut down its operations and sell the Retained Land in its entirety.

[7] The parties now disagree whether the ROFR applies to an eventual sale of the Retained Land. 505 Ontario takes the view that it does in one of two ways: either Fogolar must subdivide the Retained Land in accordance with the proposed severance plan attached to the 2021 agreement of purchase and sale, and then grant 505 Ontario a ROFR over the Designated Land, or Fogolar must give 505 Ontario a ROFR over the entire unsubdivided ten acres. 505 Ontario grounds its argument in a duty of good faith. In contrast, Fogolar submits that the dispute is one of contractual interpretation, and that the ROFR neither compels Fogolar to sever the Retained Land nor grants 505 Ontario any rights vis-à-vis the unsubdivided Retained Land.

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[8] In light of what it calls Fogolar's anticipatory breach, 505 Ontario seeks the following relief:

a. A declaration that the ROFR constitutes a valid and effective right to match an acceptable offer for either the Designated Land or for a parcel that contains the Designated Land;

b. An order directing Fogolar to divide the Retained Land into two parts, one of which includes the three-acre Designated Land; and

c. A certificate of pending litigation against the Retained Land.

[9] For the reasons set out below, I dismiss 505 Ontario's application in its entirety.

Issues

[10] The application raises two issues:

a. Does the ROFR require Fogolar to offer 505 Ontario the right to match an acceptable offer for the unsubdivided Retained Land?

b. Does the ROFR require Fogolar to divide the Retained Land before selling it?

[11] Although pleaded, the certificate of pending litigation was not argued at the hearing of the application or addressed in either factum. In light of my conclusion regarding the interpretation of the ROFR, I need not address this issue.

Law and Analysis

[12] In its factum and its pleading, 505 Ontario's principal argument was that it was entitled to an order directing Fogolar to divide the Retained Land so that 505 Ontario could exercise its ROFR over the Designated Land. Only in the alternative did 505 Ontario submit that the ROFR should be interpreted to include the right to match an acceptable offer for the whole of the Retained Land.

[13] At the hearing of the application, however, 505 Ontario changed its position. Its main submission now is that the ROFR pertains to the Retained Land, and its alternative argument is that Fogolar can only sell the Retained Land after severing the Designated Land.

[14] I will address 505 Ontario's main argument first.

a. Does the ROFR require Fogolar to offer 505 Ontario the right to match an acceptable offer for the Retained Land?

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[15] ROFRs are creatures of contract. Accordingly, the analysis of any claim must begin with the precise language of the agreement that grants the right: *Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*, 2016 BCCA 84, at para. 38.

[16] The ROFR negotiated by 505 Ontario states:

> The seller [Fogolar] covenants and agrees with the buyer [505 Ontario] that the seller will give the buyer five (5) business days to submit an offer upon the same terms and conditions as any bona fide Offer to purchase the property being known as Part 2 "retained lands" [the Designated Land] as per Schedule B in this agreement that the seller has received and is willing to accept.

[17] In interpreting a contract, the court must read it as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47. On a plain reading of the provision, 505 Ontario has the right to match a bona fide offer, that is acceptable to Fogolar, to purchase the Designated Land, identified as Part 2 in the sketch. The provision does not explicitly provide that 505 Ontario has the right to match an acceptable offer for Parts 2 and 3, the Retained Land.

[18] Fogolar argues that a plain reading of the ROFR ends the matter. The contractual conditions for the exercise of the ROFR are not met if Fogolar receives an offer to purchase something other than the Designated Land. Put another way, 505 Ontario did not bargain for rights over all of the Retained Land, and this court cannot give the applicant what it did not bargain for.

[19] 505 Ontario submits that the ROFR must be interpreted to give effect to the intent of the parties, and in keeping with Fogolar's good faith performance obligations.

[20] There is little case law on the interpretation of ROFRs in the context of block or portfolio sales, where the ROFR-encumbered property is being sold along with others in one transaction. Fogolar relied principally on *Budget Car Rentals Toronto Ltd. v. Petro-Canada Inc.* (1989), 69 O.R. (2d) 289 (C.A.).

[21] The property subject to the ROFR in *Budget* was a parcel of land leased by Budget, which Gulf was selling to Petro-Canada as part of its entire portfolio of assets in Canada west of Quebec. The majority held that a ROFR is an option that arises only when its conditions are strictly met, including an offer for the ROFR property at a price referable to that property. An offer for a package of properties at a single price does not satisfy that condition. In interpreting the ROFR, the majority said: "The language is clear and unambiguous that the right of first refusal applied only to a specific offer *with an ascribed price for the particular piece of property that is the subject of the lease*" (emphasis added).

[22] *Budget* has not been overruled or reconsidered, but it has been followed in a handful of cases. For example, in *Southland Canada, Inc. v. Zarcan Equities Ltd.*, 1999 ABQB 831, Southland leased a portion of Block B from the defendant, Zarcan. Block B was not

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subdivided. When Zarcan received an offer to purchase all of Block B, Southland purported to exercise its right of first refusal with respect to the portion it leased. At paras. 77-90, the Alberta Court of Queen's Bench held that an offer to purchase the whole parcel did not trigger a lessee's ROFR with respect to its demised premises for three reasons:

a. The wording of the ROFR clause was unambiguous. It applied only to "the demised premises". The parties could have constructed a ROFR that would be specifically triggered by a package deal, but they did not do so.

b. The terms of any purchase agreement between Southland and Zarcan (arising from the ROFR) could not be established by the proposed purchaser's offer. As in *Budget*, there was no price ascribed to Southland's premises that it could match.

c. Finally, the court found that the ROFR and its application was void for uncertainty until the ROFR property was subdivided. "One cannot imply an undertaking to subdivide based on a mere ROFR. By its nature, a ROFR does not entail an immediate undertaking or obligation to sell nor to subdivide. A ROFR becomes operative only when the preconditions occur": at para. 89.

[23] The court in *Municipal Savings and Loan Corp. v. Oswenda Investments Ltd.* (1989), 69 O.R. (2d) 521 (H.C.), reached a similar result, finding that the holder of the ROFR did not have the right to match the price for a block sale. The ROFR parcel was sold with five other parcels for a single price. The court held that no right to match arose because no price was attributable to the ROFR parcel. The court did, however, order a reference to determine the value of the holder's loss of its ROFR, on the basis that the vendor had entered into an agreement which effectively rendered the ROFR nugatory.[1]

[24] Neither 505 Ontario nor Fogolar addressed *Oswenda*, and 505 Ontario is not seeking damages as an alternative to the exercise of its ROFR. In any event, *Oswenda* is distinguishable because the properties in that case were conveyed by several deeds, and the vendor could have honoured the ROFR by attributing a price to the leased parcel and offering it to the tenant, but bundled it instead. In the case before me, there is no "bundling" of separate properties. Moreover, *Oswenda* does not stand for the proposition that the ROFR-holder has the right to match the block price, which is what 505 Ontario is effectively seeking.

[25] 505 Ontario submits that *Budget* and the cases that follow it must be reconsidered in light of the more recent pronouncement of the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, that parties to a contract are subject to good faith performance obligations.

[26] I do not agree that *Bhasin* assists the applicant on the facts before me.

[1] What was determined at the reference is unknown because there is no subsequent decision reported.

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[27] First, the Supreme Court was careful to distinguish good faith obligations from fiduciary duties. “Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first”: at para. 65. Thus, Fogolar is not obligated to recognize a broader ROFR than was contracted for.

[28] Second, the court declined to adopt an expansive duty of good faith and limited the new common law duty to an obligation of honest performance: at paras. 89, 92-93. Honest performance simply means “that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one’s contractual performance”: at para. 73.

[29] There is no allegation, let alone evidence, of dishonesty on Fogolar’s part. At the time it negotiated the sale to 505 Ontario, it anticipated that a sale of the Designated Land might be required in the future to sustain its operations. In 2025, it made the business decision that its operations were no longer financially sustainable. There is no evidence that Fogolar misled 505 Ontario in 2021, and no evidence that it is being dishonest now in reaching its business decision to wind up operations and sell the Retained Land.

[30] Thus, even if *Budget* must be reconsidered in light of *Bhasin*, I do not find that Fogolar is acting in bad faith by proceeding with the sale of the Retained Land without acknowledging a ROFR over the sale.

[31] Similarly, *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div.), does not stand for the proposition that block sales trigger a ROFR or that an owner must refrain from pursuing a block sale in the face of a ROFR that encumbers part of the block. Rather, the court in *GATX* found that Hawker Siddeley and the third-party buyer purposely structured the transaction in such a way as to avoid the application of the ROFR: at para. 45. The bad faith was patent in *GATX*: Hawker Siddeley sought to defeat the ROFR-holder’s right to purchase Hawker Siddeley’s shares by transferring those shares to a newly created subsidiary, distributing the subsidiary’s shares to Hawker Siddeley’s own shareholders, and leaving the third party to make a take-over bid for them: at para. 46. The court described this conduct as “structuring of the deal in a fashion designed to frustrate the Right of First Refusal”: at para. 156. That is not the case before me.

[32] The presence or absence of bad faith is key. In *Greta Energy Inc. v. Pembina Pipeline Corporation*, 2022 ONCA 783, at paras. 14 and 22-26, the Court of Appeal upheld a finding that a vendor that chose to sell a package of assets, two of which were subject to ROFRs, did not breach its duty of good faith or honest performance. The court distinguished *GATX* as a case in which the ROFR-holder was intentionally precluded from exercising its right: at para. 26.

[33] Finally, 505 Ontario relies on *Alim*. The British Columbia Court of Appeal stated that a ROFR may be triggered by a block sale unless the agreement expressly limits its

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application to the encumbered property and no other. Once the ROFR is triggered, "the holder of the right of first refusal is entitled to require that it be provided with a segregated price for the property subject to the right of first refusal": at para. 42. The court ultimately found that the ROFR-holder did not have the right to purchase the entire block; the proposed block sale to the third party triggered the ROFR, but it did not expand the ROFR to include any parcel beyond the encumbered property: at paras. 45, 48.

[34] The court in *Alim* questioned the correctness of *Budget* and *Southland* to the extent that they hold that a ROFR is not triggered by a package sale unless it specifically provides that it applies when the property is sold with other assets. However, it also distinguished *Southland* as involving the sale of an unsubdivided parcel, part of which was subject to the ROFR: at paras. 40-41. This case is closer to *Southland* than to *Alim*. *Alim* involved two subdivided parcels. Here, the Designated Land is not a separate parcel. It cannot be sold on its own unless a severance is obtained. An offer for the Retained Land, therefore, will contain no price for the Designated Land that 505 Ontario could match.

[35] None of the cases relied upon by the applicant support its submission that it is entitled to match an offer to purchase the Retained Land. The ROFR in the agreement of purchase and sale, and the attached sketch, limit the right to the Designated Land only. The surrounding circumstances known to both parties in 2021 support this reading. During negotiations, Fogolar advised 505 Ontario that it might need to raise further capital and, if so, intended to sever and sell the rear three acres. The easement was sought to make that severance possible, and the ROFR was granted in exchange for it. The ROFR, the easement and the sketch of the proposed severance were all directed to a possible future sale of the three-acre Designated Land on its own. Nothing in those circumstances suggests that the parties intended the ROFR to extend to a sale of the Retained Land as a whole.

[36] In his affidavit, the Fogolar representative, Fausto Volpatti, attested that the parties discussed the ROFR only in the context of a possible future severance of the Designated Land and the applicant did not ask that the ROFR apply to all of the respondent's Retained Land. This factual matrix supports Fogolar's interpretation of the ROFR clause. In any event, surrounding circumstances "must never be allowed to overwhelm the words of that agreement": *Sattva*, at para. 57.

[37] 505 Ontario is not entitled to a declaration that rewrites the parties' agreement. I find that Fogolar is not obligated to offer 505 Ontario the right to match an acceptable offer for the unsubdivided Retained Land.

b. Does the ROFR require Fogolar to divide the Retained Land before selling it?

[38] The applicant's alternative submission is that Fogolar must sell the Retained Land in a manner that would give effect to the ROFR. In practical terms, this means that Fogolar must build a road, apply to sever the Designated Land from the Retained Land, and sell the property in two parcels.

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[39] In 2021, the City of Windsor advised Fogolar that before it could grant a severance, Fogolar would have to construct a road so that there would be proper access to the Designated Land. It was for this reason that the easement was sought from 505 Ontario. If the Retained Land remains unsubdivided, there is existing access to North Service Road, and there is no need for a road to be built.

[40] 505 Ontario submits that Fogolar is acting capriciously and unreasonably by not severing the property. On cross-examination, Mr. Volpatti said he did not know of any reason why Fogolar could not sell the property in two parcels. 505 Ontario relies on this answer in support of its argument that Fogolar's conduct constitutes a breach of the duty of good faith.

[41] As previously stated, I am not satisfied on the evidence that Fogolar is acting dishonestly now or that it misled 505 Ontario in 2021. It is technically true that Fogolar "can" sell the property in two parcels, as Mr. Volpatti testified. However, the duty of good faith does not require that Fogolar incur the expense of building a road, obtain a severance and list two parcels for sale. If, as the court held in *Bhasin*, at para. 73, the duty of good faith does not require a party to give up advantages it derives from the contract, it cannot entitle 505 Ontario to require that Fogolar act to its own disadvantage.

[42] Nor does the duty to exercise contractual discretion in good faith assist 505 Ontario. That duty "does not require a party to confer a benefit on the other party that was not a part of their original agreement, nor does it require a party to subordinate its interests to those of the other party": *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 S.C.R. 32, at para. 113.

[43] To accept 505 Ontario's argument would be to turn a right to match an offer into a promise that Fogolar will only sell in parcels that suit 505 Ontario. The ROFR is not a promise to sever. Reading this obligation into the ROFR produces results that are not consistent with the reasonable expectations of commercial parties. The ROFR was only intended to come into play if Fogolar determined it needed to sell three more acres to continue funding its operations. Now that Fogolar has determined its business is no longer viable, it is unreasonable to expect that it would incur the time and expense of road construction and a severance application in order to sell the Retained Land in pieces. That it could hypothetically pass on those expenses to a third party buyer, as 505 Ontario suggests, is speculative.

[44] The law of implied terms in contracts does not help the applicant. A term may be implied on the basis of the presumed intentions of the parties where it is necessary to give business efficacy to the contract or where it meets the "officious bystander" test. The implied term must have "a certain degree of obviousness to it", and it may not be implied if there is evidence of a contrary intention on the part of either party: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at paras. 27, 29. The term 505 Ontario seeks to imply meets neither test. The ROFR works as written: it operates if Fogolar severs the Designated Land and receives an acceptable offer for it. Nor is the proposed term obvious. It would require Fogolar to build a road and obtain a severance that

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it does not need in order to sell the Retained Land as a whole. Like the court in *Southland*, I conclude that a promise to subdivide cannot be implied from a bare right of first refusal.

[45] Finally, 505 Ontario submits that it is prejudiced because it no longer has protection against the prejudicial use of neighbouring property, protection it negotiated in exchange for the easement. In other words, Fogolar obtained the benefit of the easement without the burden of an operative ROFR.

[46] 505 Ontario did not argue, and I do not find, that the granting of the easement gave it any rights over and above those of an ordinary ROFR-holder. The easement was the consideration 505 Ontario gave for the ROFR, and it received what it bargained for: a right to match an acceptable offer for the Designated Land if Fogolar decided to sell it. By its nature, a ROFR is contingent. Whether it is ever triggered depends on an event within the grantor's control, namely the grantor's decision to sell: *Canadian Long Island Petroleums Ltd. v. Irving Industries (Irving Wire Products Division) Ltd.*, [1975] 2 S.C.R. 715, at p. 735; *Southland*, at para. 89.

[47] It is true that the easement continues to burden 505 Ontario's land. The easement is not conditional on severance taking place, and so the purchaser of the Retained Land will have the ability to construct a road at the back of the applicant's property. When it agreed to the easement, however, 505 Ontario knew the easement would be registered on title even if Fogolar did not sell the Designated Land, and even if 505 Ontario could not match an acceptable offer by a third party. 505 Ontario granted the easement anyway.

[48] The applicant asked for and obtained a ROFR over the Designated Land. That is the bargain negotiated by the parties. 505 Ontario could have asked for a ROFR over the Retained Land to fully protect itself against the prejudicial use of the neighbouring property. It did not do so. This court cannot give the applicant what it did not bargain for.

[49] For these reasons, I conclude that Fogolar is not required to sever the Retained Land and give the applicant a right to match any acceptable offer received in respect of the severed parcel. It follows that Fogolar is not in breach, or in anticipatory breach, of the ROFR.

Conclusion and Costs

[50] The application is dismissed.

[51] Counsel advised at the hearing that they agreed the successful party is entitled to $16,000 in costs for the application. The applicant, therefore, is ordered to pay costs in the amount of $16,000, inclusive of fees, disbursements and HST, within 30 days.

Jasminka Kalajdzic

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Justice

Released: November 2, 2026

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