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Consultation Paper on Restrictive Covenants

Prepared by the Real Property Reform (Phase 2) Project Committee

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Call for Responses

We are interested in your response to this consultation paper. The tentative recommendations are those of the Project Committee and have not yet been formally adopted by the Board of Directors of the British Columbia Law Institute. The tentative recommendations in this consultation paper may be subject to revision following consideration of responses received.

How to Respond

Responses may be sent to us in one of three ways—

by mail: British Columbia Law Institute
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Please forward your response before **1 September 2011**.

Your response will be used in connection with the Real Property Reform Project. It may also be used as part of future law reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name in the final report for the project, unless they expressly advise us to keep their names confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: <http://www.bcli.org/privacy>.

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EXECUTIVE SUMMARY

A covenant running with land is an obligation owed by one landowner to another that is enforceable between successors in title or interest of the original parties. While originating as a contractual obligation, a covenant running with land derives many of its characteristics from property law. A familiar and frequently encountered type of covenant running with land is the *restrictive covenant*. While restrictive covenants have only been recognized since the mid-nineteenth century, the rules surrounding them are firmly established.

A cardinal feature of restrictive covenants is that they must be negative in substance, or in other words impose a prohibition regardless of whether the covenant is worded in positive or negative terms. Apart from statutory exceptions, a covenant that in substance imposes a positive duty to perform some act or make a payment is not enforceable against the successors in title of the covenantor, although the successors in title of the covenantee may be able to enforce it against the original covenantor. The reasons for this asymmetry between positive and negative covenants are historical, rooted in the division between common law and equity. They are explained briefly in Chapter II.

The existing law surrounding covenants running with land greatly limits the ways in which covenants can be used for such useful purposes as maintaining amenities within a neighborhood, enforcing mutual cost-sharing obligations, and maintaining shared facilities in integrated, non-stratified developments where there is no statutory framework for enforcement of cost-sharing. In order to overcome these limitations on the use of covenants, registrable rights of re-entry exerciseable in the event of non-performance of an obligation, or rentcharges that are waived in the event of performance, are sometimes employed in conveyancing documentation. These are poor substitutes for an enforceable covenant, however. They are circuitous and needlessly increase the complexity of contractual arrangements in real estate dealings.

This consultation paper proposes that two kinds of positive covenants be allowed to run with land. The first category would be cost-sharing covenants calling for payment of or contribution towards expenditures for work, provision of materials, or operations on particular land belonging either to the covenantor or covenantee, or on land in which they both hold an interest such as co-owned common facilities. The second category would be covenants requiring work or operations on the land, including maintenance, repair or replacement of anything in whole or in part. "On the land" in this context means in, on, above or under land, in order to cover underground and airspace works and operations as well as those located on the surface.

Apart from the statutory positive covenants that are now enforceable against subsequent owners of the burdened land, such as those contemplated by section 219 of the *Land Title Act*, the change would only apply to positive covenants entered into after the enactment of legislation implementing this proposal. In this way, landowners who do not bear any liability now under positive covenants made in the past by their predecessors in title would not become instantly subject to springing liabilities.

Positive covenants capable of running with land under this proposal should be enforceable only against the holders of certain interests having a substantial and durable connection with the burdened land. The consultation paper tentatively recommends that positive covenants should be binding only upon the following interest holders in addition to the original covenantor: an owner for the time being of the fee simple, an owner of a life estate, a purchaser in possession under a long-term agreement for sale within the meaning of section 16(1) of the *Law and Equity Act*, and a lessee under a ground lease of the entire burdened parcel with a term of 10 years or longer (including any renewal at the lessee's option). If the burdened land is mortgaged, a positive covenant running with land would be enforceable against the mortgagor, but not the mortgagee.

An application for subdivision of land subject to a positive covenant running with the land would need to be accompanied by a proposed allocation of the benefit and burden amongst the subdivided parcels. Either the consent of the registered owner of the benefited land or a court order in accordance with the proposed subdivision plan that cancels or modifies the covenant, or provides for the allocation, would need to accompany the subdivision application.

The consultation paper proposes that the liability for breach of a positive covenant should be joint and several, as the breach will consist of an omission and all interests bound by the covenant are equally obliged to perform what the covenant requires. There would be rights of contribution between the parties liable, so that the burden of meeting a liability owed collectively could be equalized.

Restrictive covenants would continue to bind anyone in occupation of the land having notice of them under the proposals in the consultation paper. Inasmuch as breach of a restrictive covenant consists of doing what the covenant prohibits, the consultation paper takes the position that liability should fall only on someone who actually commits the breach or, being in a position to correct the breach, fails to take reasonable steps to do so.

A curious and rather unjust feature of the law of covenants running with land stems from their hybrid contractual and proprietary nature. The original covenantor remains contractually liable to the covenantee and the covenantee's successors or assignees for any breach of the covenant, even if the breach took place after having divested any interest in the burdened land. This is not true of subsequent owners of the burdened land or other interest holders bound by the covenant, who are liable only for breaches of the covenant that take place while they hold an interest in the land. It is also unlike the case of the grantor of an easement, who has no liability to the owner of the dominant land after divesting all interest in the servient land. The consultation paper contains a tentative recommendation to relieve the original covenantor of liability for a breach of covenant commencing after the covenantor has divested any interest in the burdened land.

The consultation paper proposes that the same array of remedies be available for breach of a covenant running with land, whether positive or negative. These include orders for compliance (whether in the form of an injunction, specific performance, or an order in the exercise of a statutory jurisdiction), damages, an accounting, a lien on the interest of the party in breach for the amount of losses attributable to the breach, or the suspension of benefits under a reciprocal covenant.

The Project Committee believes the reforms covered by the tentative recommendations in this consultation paper are timely and will simplify and rationalize the law of covenants affecting land. Comment on these tentative recommendations is invited from all interested sectors.

I. INTRODUCTION

A. General

When people enter into an agreement that they intend to be legally binding, it is normally binding only on those people and not on others. There are only a few exceptions to this rule. In certain circumstances, covenants affecting land are among the exceptions.

A covenant is a legally binding promise by one person (covenantor) to another (covenantee). Originally, the term "covenant" was applied only to promises made under seal, but nowadays it is not confined to that meaning when used in relation to land and leaseholds.[1] Some covenants concerning the use or occupation of land are said to "run with the land" because they are capable of being enforced by or against the owners for the time being of the lands they are intended to benefit or burden, respectively.

One type of covenant affecting land is the "restrictive covenant." It is a relatively recent development in property law, having been recognized for the first time in the mid-nineteenth century. The rules surrounding restrictive covenants are now well-established, but are quite inflexible. Restrictive covenants are in wide use, despite limitations imposed by the current law.

This consultation paper contains recommendations for reform of the law relating to restrictive covenants in order to allow them to be an even more useful and flexible mechanism for protecting legitimate interests connected with the use and enjoyment of land.

B. The Real Property Reform Project

This is the fifth consultation paper to be issued in connection with Phase 2 of the Real Property Reform Project, a multi-year initiative funded by the Law Foundation

1. Section 16(1) of the *Property Law Act,* R.S.B.C. 1996, c. 377 provides that an instrument charging or otherwise dealing with land need not be executed under seal. In the case of restrictive covenants, with which this consultation paper deals at length, it was established as long ago as the foundational case *Tulk v. Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143 that it is unnecessary for the agreement creating a restrictive covenant to be under seal in order for the covenant to be enforced.

of British Columbia, the Notary Foundation, and the Real Estate Foundation. The Real Property Reform Project examines certain areas of land law in British Columbia that are not currently under review by other bodies and which are in need of reform. The objective is to develop concrete recommendations for legislative reform needed in these areas, based on extensive research and consultation. The final recommendations will appear in published reports that will be provided to provincial Ministries, the Land Title and Survey Authority, and other bodies concerned with the matters in question.

Phase 1 of the Real Property Reform Project was a preliminary scoping study completed in 2007 with the aid of an Advisory Committee. Phase 2, which began in 2008, involves active research, consultation, and development of the law reform recommendations. The members of the Project Committee for Phase 2 are listed at the beginning of this document.

C. Purpose of this Consultation Paper

This paper is issued for the purpose of eliciting comments on the tentative recommendations it contains. The recommendations are referred to as "tentative" because the Board of Directors of the British Columbia Law Institute (BCLI) has not yet formally adopted them and they are subject to change in light of the responses to the consultation paper and further deliberations by the Project Committee and the Board. The final recommendations on the subject of covenants affecting freehold land will be formulated after reviewing all responses to this consultation paper.

II. THE PRESENT LAW OF RESTRICTIVE COVENANTS

A. General Principles Relating to Covenants Affecting Land

Covenants that affect land have both contractual and proprietary aspects. They can be properly understood only by reference to principles of both contract and property law.

One concept in contract law that is basic to understanding how covenants operate is *privity of contract*. This term describes the relationship existing between persons who have formed a contract directly with one another or through agents, and who may enforce the terms of the contract against each other.

Another concept drawn from property law that is central to understanding covenants is *privity of estate*. Privity of estate is a relationship of tenure. In other words, it refers to a relationship in which the estate of one person in land has been derived from the estate of another in the same land, so that the first-mentioned person holds the land from the other. In modern times, the only example of privity of estate that remains other than a direct grant of land from the Crown is the relationship of landlord and tenant.

At common law, three basic principles govern the enforcement of covenants affecting land:

1. If privity of contract exists between the covenantor and covenantee, all covenants between them are enforceable purely as a matter of contract, whether they are positive (requiring a covenantor to do something) or negative (imposing a restriction).[2]

2. If there is privity of estate, but not privity of contract, covenants that "touch and concern" the land are enforceable between the holders of the estates in question at the time they are sought to be enforced.[3] They are said to "run with the land" in this sense. Thus, covenants in leases that touch and concern the land can be enforced by

2. Megarry and Wade, *The Law of Real Property*, 7th ed., (London: Sweet & Maxwell, 2008) at 1329.

3. *Ibid.*, at 1332-1333.

the landlord against an assignee of the original tenant, and vice versa.[4] When there is privity of estate, positive and negative covenants are equally enforceable.

Not all covenants in leases are characterized as "touching and concerning" the land. Leasehold covenants that touch and concern land are principally ones that relate to the land itself and go to the essence of the landlord-tenant relationship. The tenant's covenant to pay rent is one of these.[5] A tenant's covenant to repair is another.[6] The characterization of lease covenants on the basis of whether they touch and concern the land does not follow a thoroughly logical pattern.

As this consultation paper is concerned with covenants originating between owners of land (freehold covenants), little more will be said here about covenants in leases.

3. If there is neither privity of contract nor privity of estate, the *benefit* of a covenant touching and concerning the land can pass with the estate of the covenantee, but not the *burden*, i.e. the obligation to perform the covenant and the liability for its breach.[7]

This is in keeping with the common law principle that only rights and not liabilities can be assigned unilaterally.[8] At common law, therefore, the covenantee or a suc-

4. Originally covenants touching and concerning the land only ran with the lease term and not the reversionary interest of the lessor, so that an assignee of the lease from the lessor could not enforce the lease covenants. This was altered in 1540 by the *Grantees of Reversions Act*, 32 Hen. 8, c. 34 to allow assignees of lessors the full right to enforce the tenant's covenants against the tenant. The running of lease covenants is explained at greater length in the respective reports of the former Law 1Reform Commission of British Columbia and BCLI on the *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57. See Law Reform Commission of British Columbia, *Report on the Commercial Tenancy Act* (LRC 108) (Vancouver: The Commission, 1989) at 42-28 and *Report on Proposals for a New Commercial Tenancy Act* (BCLI Report No. 55) (Vancouver: The Institute, 2009) at 8-9 and 59-60.

5. *Parker v. Webb* (1693), 3 Salk. 5, 91 E.R. 656.

6. *Williams v. Earle* (1868), L.R. 3 Q.B. 739.

7. *Megarry and Wade, supra*, note 2 at 1332-1333.

8. Gray, *Elements of Land Law*, 5th ed. (Oxford: Oxford University Press, 2009) at 246. The classic common law rule that liabilities cannot be assigned without the consent of the party to whom the obligation is owed continues to be recognized in recent cases: see *Peak Real Estate Marketing Ltd. v. 697604 B.C. Ltd.*, 2009 BCSC 634 at para. 18; *Coon v. Port Sidney Development Corp.*, 2007 BCSC 580, at para. 9. Exceptions sometimes referred to as the "conditional benefits" principle and the "pure principle" have been asserted on the basis of *Tito v. Waddell (No. 2)*, [1977] Ch. 106. See *Silver Butte Resources Ltd. v. Esso Resources Canada Limited* (1994), 19 B.L.R. (2d) 299 (B.C.S.C.). The existence of what Megarry, V.C. referred to in *Tito v. Waddell* as the "pure principle of benefit and burden," whereby one supposedly cannot take the benefit of a deed of land without being thereby bound by the obligations it contains, was rejected by the House of Lords in *Rhone v. Ste-*

cessor or assignee holding the same estate or interest as the covenantee can enjoy the benefit of a covenant and enforce it against the original covenantor, whether it is positive or negative.[9] If, however, the covenantor transfers away burdened land (land on which a covenant must be performed), the *burden* of the covenant does not pass at common law to the covenantor's successor in title or interest.

Equitable *restrictive covenants* form the great exception to this principle. As explained later, the benefit and the burden of a restrictive covenant can pass with the benefited and burdened lands to successive owners.

B. Nature of a Restrictive Covenant

Restrictive covenants capable of "running with land" originated with the 1848 case *Tulk v. Moxhay*.[10] The facts were that in 1808 the plaintiff, who owned several houses surrounding Leicester Square and the central vacant area, sold the central portion and extracted a covenant from the purchaser to maintain it in its then state as a "square garden and pleasure ground" without buildings. The central area changed hands several times afterwards and was eventually purchased by the defendant. The conveyance under which the defendant acquired the land did not contain any covenant requiring the defendant to refrain from building on the central

phens, [1994] 2 A.C. 310 (H.L.). The House of Lords was prepared to recognize that the exercise of a right or benefit attaching to property could be made conditional on the performance of an obligation, but the condition "must be relevant to the right." The question of what exceptions exist in the general law of contract is outside the scope of this report.

9. *Smith v. River Douglas Catchment Board*, [1949] 2 K.B. 500 (C.A.). In order for the benefit of the covenant to run with the benefited land, the covenant must be either "annexed" to the land or be the subject of a specific assignment to a purchaser. Whether a covenant is annexed to the covenantee's land or not is a question of whether the covenantor and covenantee intended the covenant to benefit specific land belonging to the covenantee and persons claiming under or through the covenantee, rather than only the covenantee personally. The intention may be drawn from the proper construction of the document creating the covenant, the nature of the covenant, and the surrounding circumstances: *Rogers v. Hosegood*, [1900] 2 Ch. 388 at 396. Wording that the covenant will enure to the benefit of the covenantee, the covenantee's heirs, assigns and persons claiming under them may be sufficient to convey that intent: *ibid.* In England s. 78 of the *Law of Property Act, 1925*, 15 & 15 Geo. 5, c. 20 deems a covenant "relating to land of a covenantee" to be made "with the covenantee and his successors in title and the persons deriving title under him or them." This has been held to result in automatic annexation: *Federated Homes Ltd. v. Mill Lodge Properties Ltd.*, [1980] 1 All E.R. 371 (C.A.). Ontario has a similar provision: see s. 24 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34. British Columbia does not have such a provision. As a result, a form of wording indicating the covenant is obtained not only on the covenantee's own behalf, but also on behalf of the covenantee's successors in title and assignees and those claiming through them, may be necessary for the benefit of a covenant to be capable of running with land without being specifically assigned.

10. *Supra*, note 1.

area of the Square. The defendant knew of the covenant in the original deed from 1808 when he purchased the land, however. The defendant wanted to build on the central area, and the plaintiff applied for an injunction to prevent it.

While the burden of the covenant clearly did not run with the land at common law, the Court of Chancery granted the injunction. The reasons given for granting the injunction had nothing to do with common law doctrine. They were purely equitable: that someone buying land with notice of a restriction imposed for the benefit of other neighbouring land should not be allowed to violate the restriction, as this would reduce the value of the neighbouring land. The court reasoned that if the purchaser could ignore the restriction, no one could sell part of one's land without running the risk that the value of the retained portion could be destroyed. It would also result in an entirely unjust windfall if the purchaser could immediately re-sell the land and take advantage of the greater price that would be obtainable without the restriction that the purchaser had freely accepted.[11]

The court that decided *Tulk v. Moxhay* couched its decision in terms suggesting the result was fully in keeping with an established equitable principle, namely that someone purchasing land with notice of an equity attaching to the property cannot stand in a better situation than the vendor, but later developments treated the decision as giving birth to a new form of equitable interest in land.

Cases subsequent to *Tulk v. Moxhay* in the nineteenth and early twentieth centuries refined the concept of the equitable restrictive covenant capable of running with land and filled in its essential elements.

The British Columbia Court of Appeal has summarized the essential elements of a valid restrictive covenant at the present time as follows:

> (a) The covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement. No personal or affirmative covenant requiring the expenditure of money or the doing of some act can, apart from statute, be made to run with the land.
>
> (b) The covenant must be one that touches and concerns the land; i.e., it must be imposed for the benefit or to enhance the value of the benefited land. Further that land must be capable of being benefited by the covenant at the time it is imposed. …
>
> (c) The benefited as well as the burdened land must be defined with pre-

11. *Ibid.*, at 2 Ph. 777-778, 41 E.R. 1144-1145.

cision in the instrument creating the restrictive covenant….

(d) The conveyance or agreement should state the covenant is imposed on the covenantor's land for the protection of specified land of the covenantee

(e) Unless the contrary is authorized by statute, the titles to both the benefited land and the burdened land are required to be registered….

(f) Apart from statute the covenantee must be a person other than the covenantor.[12]

These elements are discussed separately below.

C. Intention that Covenant Should Run With Land

In order for a covenant to be held to run with land, the document creating it must reflect a clear intention on the part of the original parties that it was intended to bind successive owners of burdened land, not merely the covenantor.[13] A restrictive covenant will often contain a statement that the covenantor is contracting on behalf of the covenantor and his or her successors and assigns, although this language is not determinative and the full intent must be ascertained from the entire terms.

As the general policy of the law is to favour freedom of use and alienation of land, any terms restricting the use of land are strictly interpreted.[14] They must be very clear in order to be upheld. If the court is left in doubt as to the meaning, it will not enforce the covenant.[15]

D. Requirement that a Restrictive Covenant Be Negative

1. General

Despite a few early cases that appeared to enforce positive covenants against successive owners, it was established at a fairly early date that in order to run with

12. *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268 per Ryan, J.A. at para. 16, citing Clearwater, J. in *Canada Safeway Ltd. v. Thompson (City)*, [1996] M.J. No. 393 at para. 8, who in turn quoted DiCastri, *Registration of Title to Land* (Toronto: Carswell, 1987, looseleaf) at 10-3 to 10-5.
13. *Nylar Foods Ltd. v. Roman Catholic Episcopal Corporation of Prince Rupert* (1988), 48 D.L.R. (4th) 175 (B.C.C.A.).
14. *Noble v. Alley*, [1951] S.C.R. 64 at 74-75.
15. *Kirk v. Distacom Inc.* (30 August 1996) Vancouver CA019571/019572 (B.C.C.A.) at para. 23.

land, a restrictive covenant must be negative.[16] In other words, it must be capable of being performed by not doing something.

While the requirement of negativity has always lacked a well-expressed justification, it may be understood as being related to the availability of remedies. Restrictive covenants only existed in equity, and the principal equitable remedy to prevent or stop the violation of a right is an injunction. Injunctions are usually prohibitory. Mandatory injunctions, which compel performance of acts, are much more rare. Courts are traditionally reluctant to issue mandatory injunctions because they are not able to supervise compliance.

Covenants that can only be performed by doing some act are referred to as "positive" and will not bind successive owners of burdened land. For example, a covenant to repair or maintain something on the burdened land or a covenant that requires payment of money is treated as positive and will not be enforced against a successor of the original covenantor.[17]

2. Substance, Not Form Is Determinative

The substance of the covenant, not the form, determines whether the covenant is positive or negative.[18] The covenant in *Tulk v. Moxhay* was actually worded positively: to maintain Leicester Square garden as an open area without buildings. It could be characterized as negative in substance because it was capable of being performed by not building on the burdened land.[19]

Conversely, a covenant that can only be performed by carrying out some activity on particular land is likely to be characterized as positive even if worded as a prohibition. In *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.*, a covenant was expressed in terms prohibiting use of particular land for any purpose other than a golf course. The British Columbia Court of Appeal held this was actually a positive covenant requiring the use of the land for a golf course. As such, the covenant could not be enforced against a successor in title of the original covenantor.[20]

16. *Haywood v. Brunswick Permanent Benefit Society* (1881), 8 Q.B.D. 403; *London County Council v. Allen*, [1914] 3 K.B. 642 (C.A.).

17. *Ibid.*; *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268 at para. 16; *Qureshi v. Gooch*, 2005 BCSC 1584 at para. 20.

18. *Galbraith v. Madawaska Club Ltd.,* [1961] S.C.R. 639 at 651.

19. Megarry and Wade, *supra,* note 2 at 1350.

20. (2009), 88 B.C.L.R. (4th) 348 (C.A.).

Lebeau v. Low, a recent British Columbia decision, illustrates the "negative in substance" requirement.[21] The terms of a building scheme required owners to connect to a water supply and to a sewer system if local government provided one. It also required owners to pay connection fees, water rates, and sewer rates. The requirement for water and sewer connections was upheld as valid restrictive covenant because the court treated it as a prohibition against occupying a lot within the building scheme without utility connections if they were available. The requirement to pay utility rates was considered positive and was therefore unenforceable against subsequent purchasers.

3. Methods of Circumventing the Negativity Requirement

The inability to enforce a positive covenant against subsequent owners, such as one creating an obligation to keep an access route in good repair, can be inconvenient. Some methods exist by which the performance of a covenant by successors in title of the covenantor can sometimes be obtained.

One method would be to maintain privity of contract by a chain of personal covenants and indemnity agreements. Land may be sold subject to a positive covenant accompanied by wording requiring the covenantor to require anyone purchasing from him or her to also perform the covenant and indemnify the covenantor against liability for its breach, and to extract the same terms from any subsequent purchaser. This would tend to ensure performance of the obligation as long as the chain remains intact, but it is is unlikely to last through more than a few transfers of the burdened land. Once the promise to perform and the indemnity have been omitted from the terms of a sale of the burdened land, the chain is broken.[22]

A right of re-entry can be attached to breach of a positive obligation created by covenant, and this will also tend to induce the performance of the obligation by successors in title, despite the fact that it cannot run with the land.[23] A right of re-entry for breach of condition is registrable in British Columbia.[24]

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21. 2002 BCSC 687.

22. Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land* (1989) at 22; Law Commission, *Making Land Work: Easements, Covenants and Profits a Prendre* (Law Com No. 327) (London: TSO, 2011) at 101.

23. *Ibid.* at 22-23.

24. *Property Law Act*, R.S.B.C. 1996, c. 10(4). It is subject to the rule against perpetuities as modified by the *Perpetuity Act*, R.S.B.C. 1996, c. 358, however. If the right of re-entry does not become exercisable within 80 years from the time it was created, it will be void: *Perpetuity Act*, s. 22(1),(2). See also s. 23(1).

The principle that one cannot take the benefit of a deed without performing the burden of trusts attached to the land may also operate to compel successors in title of an original covenantor to perform an obligation relating to the land in the same way as would an enforceable positive covenant. In the English case *Halsell v. Brizell*, owners of lots were entitled by the terms of a trust deed to use private roads and had rights with respect to other amenities of the surrounding lands. Each owner covenanted to pay towards the maintenance of the amenities. Their successors in title were held to be bound by these obligations.[25] This principle has limited application, however.[26] It will only apply as long as the covenantor continues to make use of the benefit of the deed.[27]

Another technique that is in use in contemporary real estate developments is to stipulate in the terms of sale of individual lots or units included in the development that a rentcharge (a periodic payment charged on land) be payable to the vendor and also impose a positive obligation, such as a covenant to maintain and repair the property. The rentcharge can be registered against the purchaser's title and is enforceable against successors in title, as it is a legal interest in the land. The purpose of structuring the arrangement in this manner is not to collect the rentcharge as such, but to induce performance of the obligation linked to it. The rentcharge is not demanded if the obligation is performed. In other cases, the rentcharge may be larger and actually be collected for the upkeep of common elements of the development. The rentcharge then serves the same purpose as a positive cost-sharing obligation would serve if a positive covenant of that kind were capable of binding successive owners of the lot or unit to which it attaches.

These techniques to circumvent the inability to create positive covenants running with freehold land are circuitous and less than fully reliable. They also add to the complexity of real estate dealings.

E. Requirement that a Restrictive Covenant Must "Touch and Concern" the Land

A restrictive covenant must be imposed for the benefit of land belonging to the covenantee or to enhance its value, and not simply be for the benefit of the covenan-

25. *Halsall v. Brizell*, [1957] Ch. 169.

26. There must be a relationship between the benefit and burden, and the successor in title of the original obligor must have had the opportunity to forego the benefit and not assume the burden: *Rhone v. Stephens*, [1994] 2 A.C. 310 (H.L.).

27. *Parkinson v. Reid*, [1966] S.C.R. 162, 56 D.L.R. (2d) 315.

tee personally.[28] It is in this sense that a restrictive covenant is said to "touch and concern" the land, or to be "annexed" to it.

Thus, apart from any authorizing legislation a valid restrictive covenant cannot exist "in gross," meaning without being annexed to any specific benefited parcel. It must affect two distinct parcels of land.[29]

The benefited land must be identifiable from the terms of the document containing the covenant.[30] If the document does not refer to the benefited land, the covenant will be treated as personal only, and will not bind successors in title of the covenantor.[31] Extrinsic evidence is not admissible to identify the benefited land if there is no reference to it in the document.[32]

A recent example in British Columbia involved a sale of land to a municipality below market value, accompanied by a stipulation that the land would be used only for municipal or community purposes and that it should never be sold or used for commercial or industrial purposes. The terms were registered against the title to the land as restrictive covenants. After several decades, the municipality passed a resolution to have the covenants removed. Based on legal advice, the municipality treated the covenants as personal only, and the consent of the corporate successor to the original covenantee was obtained to their release. A society formed by prop-

28. *Rogers v. Hosegood*, *supra*, note 9; *Galbraith v. Madawaska Club Ltd.* [1961] S.C.R. 639 at 652; *Nylar Foods Ltd. v. Roman Catholic Episcopal Corporation of Prince Rupert*; *Westbank Holdings Ltd. v. Westgate shopping Centre Ltd., supra,* note 17 at para. 16. For example, a covenant that merely restricts who can own the burdened land does not touch and concern the benefited land and is personal only: *Noble v. Alley*, *supra*, note 14 at 69-70.

29. *Formby v. Barker*, [1903] 2 Ch. 539 at 552. This is also true of an easement, which must have a dominant and servient tenement. The terms "dominant" and "servient" are sometimes used in relation to lands subject to covenants instead of the more technically correct terms: "benefited" and "burdened" land.

30. *Kirk v. Distacom Ventures Inc.*, *supra*, note 15.

31. *Canadian Construction Co. v. Beaver (Alta.) Lbr. Ltd.*, [1955] S.C.R. 682; *Hi-Way Housing (Sask.) Ltd. v. Mini-Mansion Constr. Co.*, [1980] 5 W.W.R. 367 (Sask. C.A.); *Re Sekretov and City of Toronto* (1973), 33 D.L.R. (3d) 257 at 261 (Ont. C.A.).

32. Canadian authorities hold that extrinsic evidence is not admissible to identify the land to which the covenant is annexed if the instrument does not refer to specific benefited land: *Hi-Way Housing (Sask.) Ltd. v. Mini-Mansion Construction Co., ibid.*; *Re Sekretov and City of Toronto*, *ibid.* In England, extrinsic evidence may be considered: *Marten v. Flight Refuelling Ltd.*, [1962] Ch. 115. The B.C. Court of Appeal has allowed the use of extrinsic evidence for the purpose of clarifying an ambiguous reference to the benefited land in the instrument: *Kirk v. Distacom Ventures Inc.*, *supra*, note 15. Ultimately, however, the benefited land must be ascertainable in order for the covenant to be enforced against the covenantor's successor in title: *ibid.*

erty owners in the municipality sought declarations that the covenants were valid and in effect. One of their arguments was that the covenants benefited all lands within the municipal boundaries or other lands owned by the vendor company in the vicinity at the time. As the terms of the original sale contained no reference at all from which the land which the covenants were to benefit could be identified, extrinsic evidence was not admissible to aid in identifying it. For this reason, the terms of the sale were held not to contain valid restrictive covenants.[33]

There is some authority that there must be an objective basis for determining that the land to which the covenant is annexed is capable of benefiting from it. This may require proximity between the burdened and benefited land.[34]

Section 25 of the *Property Law Act* provides that the benefit of a restrictive covenant about building on land or the use of land that is annexed to other land extends to "the whole and each and every part" of the land to which it is annexed that is capable of benefiting from it, unless the parties to the covenant expressly agreed otherwise.[35] Section 25 helps to avoid the difficulty of having to determine whether a restrictive covenant was intended to apply to all or only part of the benefited land when a portion of the benefited land is sold off and there is no wording in the instrument creating the covenant describing it as being annexed to "the whole and any part" of that land.[36]

F. Registration of Restrictive Covenants

1. General

A restrictive covenant is a registrable interest in land. Section 221 of the *Land Title Act* specifies the requirements for registration, which correspond closely to the requirements of a valid restrictive covenant under the case law*:*

33. *Save the Heritage Simpson Covenant Society v. City of Kelowna*, 2008 BCSC 1084 at paras. 63-68. While the covenants did not run with the land, in the final result the terms attached to the sale were found to create a charitable trust.

34. In a 20th century English case, it was held that land at Clapham could not benefit from covenants burdening land at Hampstead: *Kelly v. Barrett*, [1924] 2 Ch. 379 at 374. This is a distance of approximately 12 kilometres.

35. R.S.B.C. 1996, c. 377.

36. For example, a covenant not to build over a certain height may have been intended to protect a viewscape that is available only from a portion of the covenantee's land. If a portion of the covenantee's land that does not enjoy the viewscape is later transferred away, an issue might arise whether the covenant is annexed to that portion: see *Re Union of London & Smith's Bank Ltd.,'s Conveyance*, [1933] Ch. 611 at 628.

(a) the covenant must be negative or restrictive, in the registrar's opinion;

(b) the benefited and burdened land are described satisfactorily in the instrument containing the covenant;

(c) the title to the affected land is registered.[37]

As well as being registered as a charge on the title to the burdened land, a restrictive covenant is endorsed on the title for the land to which the benefit of the covenant is annexed.[38] Section 182(2) of the Act provides that a transfer of that land passes the the benefit of the covenant without any express mention.

As a practical matter, registration is necessary to ensure the enforceability of a restrictive covenant affecting registered land in British Columbia against the owner for the time being of the burdened land. This is because the *Land Title Act* provides, with few exceptions, that a purchaser who acquires title from a registered owner of the land is not bound by an unregistered interest in the land that the purchaser did not create.[39] Registration of a restrictive covenant is not confirmation that the covenant is valid and enforceable.[40] Registration ensures, however, that anyone dealing with the title to the burdened land cannot assert lack of notice and will take the title subject to the restrictive covenant.[41]

37. R.S.B.C. 1996, c. 250.

38. *Ibid.*, s. 182(1).

39. By s. 29(2) of the *Land Title Act*, a person dealing with the title to land is not bound by notice of an unregistered interest apart from the exceptions stated in the subsection. On its literal wording, s. 29(2) would appear to displace the effect in equity of notice of an unregistered restrictive covenant and would allow a purchaser to take title to burdened land free of the covenant. There are a number of British Columbia cases holding that, despite the wording of s. 29(2), a purchaser who registers a transfer with actual notice of a pre-existing unregistered interest (such as a restrictive covenant) may take the title subject to that interest on the ground that to claim the benefit of registration under those circumstances amounts to fraud. There are also a considerable number of decisions holding otherwise. See the BCLI *Report on Section 29(2) of the Land Title Act and Notice of Unregistered Interests* (No. 58, 2011), which contains recommendations to resolve the conflicting lines of case authority on this point.

40. *Ibid.*, s. 221(2).

41. Registration of a charge gives notice of the interest it covers and the instrument creating it: *ibid.,* s. 27(1).

2. Unregistrable Covenants

Section 222(1) of the *Land Title Act* provides that covenants directly or indirectly restricting the ownership, sale, occupation or use of land on the basis of sex, race, creed, colour, nationality, ancestry or place of origin, regardless of how or when they are created, may not be registered.[42]

G. Building Schemes

Restrictive covenants are often used to achieve a consistent standard in building and the pattern of land use and occupation within a real estate development. The covenants are typically reciprocal in that the restrictions on each lot are imposed for the benefit of the other lots within the development. Reciprocal covenants of this nature within building schemes were recognized at an early point in time as running with land and capable of enforcement between the lot owners on the basis of the community of interest existing between them.[43] The requirements of a non-statutory building scheme were that: the titles derive from a common vendor (i.e., the original developer), restrictions be imposed for the benefit of all the lots within the scheme, and owners or their predecessors in title acquire their properties with knowledge that the restrictions are imposed for the benefit of all the lots in the scheme.[44]

Building schemes now have a statutory foundation. Section 220(1) of the *Land Title Act* enables a registered owner intending to sell or a registered lessee intending to sublease at least two parcels of land to "impose restrictions consistent with a general scheme of development" by registering a Declaration of Creation of Building Scheme as a charge against the lands described in it. This results in the restrictions imposed by the building scheme running with the land and binding purchasers, lessees, sublessees, and their successors in title or interest.[45] The owners for the time being may consent to a modification of the original terms of the building scheme.[46] If the land is subject to a charge other than the statutory building scheme itself, the

42. The registrar may cancel the registration of such a caveat registered before October 31, 1979: ss. 222(2), (3). Even apart from the human rights and public policy issue of discrimination, a covenant that only restricts who can purchase, own, rent, or occupy the burdened land would probably not run with land. Covenants restricting the class to whom property may be sold do not touch and concern the land and therefore do not bind successors in title: *Noble v. Alley*, *supra,* note 14; *Galbraith v. Madawaska Club Ltd.*, *supra*, note 18.

43. *Hemani v. British Pacific Properties Ltd.* (1992), 70 B.C.L.R. (2d) 91 at 125 (S.C.).

44. *Elliston v. Reacher*, [1908] 2 Ch. 374; aff'd [1908] 2 Ch. 665 (C.A.).

45. *Supra*, note 37, s. 220(3).

46. *Ibid*., s. 220(4).

owner of the charge must consent to the registration of the declaration of building scheme or a modification of it.[47]

A statutory building scheme must meet the same requirements for registrability as a restrictive covenant.[48]

H. Statutory Positive Covenants

The requirement that a covenant must be negative and "touch and concern" benefited land has been relaxed by legislation, but only in favour of certain covenantees, principally local governments and other public bodies. Section 219 of the *Land Title Act*[49] permits both positive and negative covenants to run with the land in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority (Translink) or a local trust committee established under the *Islands Trust Act*[50] for various purposes. It is unnecessary for the bodies that hold these covenants to also hold land to which the covenants are annexed. In other words, these statutory covenants running with land may exist "in gross."

The purposes for which section 219 covenants may be held include restrictions on land use, building, subdivision, and the separate sale of parcels of land.[51] They also include restrictions aimed at the preservation, conservation, or restoration of land or specific "amenities" of land, or preservation of land in its natural state.[52]

Covenants under s. 219 in favour of the Nisga'a Nation, the Nisga'a Government, or the Nisga'a Corporation may be registered and enforced against a parcel of Nisga'a land to the same extent as a s. 219 covenant held by the Crown.[53]

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47. *Ibid.*, s. 220(6).

48. *Ibid.*, s. 220(5). See the text under the heading "F. Registration of Restrictive Covenants" in this chapter.

49. *Supra,* note 37.

50. R.S.B.C. 1996, c. 239.

51. *Supra*, note 37, s. 219(2), (4)(a).

52. *Supra*, note 37, ss. 219(3), (4). A covenant of this type may be held by anyone designated by the responsible minister (currently the Minister of Forests and Range): s. 219(3)(c). The minister may delegate the power to designate eligible covenantees under s. 219(3)(c) to the Surveyor General: s. 219(14).

53. *Supra*, note 37, s. 373.63.

Under s. 219, provincial and federal governments, Crown corporations and agents, local governments and a few other entities enjoy wide powers to impose restrictions on land use and stipulate conservancy or restoration measures through covenants with a landowner that will be enforceable also against subsequent owners and occupiers. Section 219 covenants may also be held by an individual or organization designated by the responsible minister under section 219(3)(c).[54]

It is unnecessary under s. 219(1) for the covenantee to own land which the covenant is intended to benefit.

Section 219 covenants are designed to enable the control of land use for purposes of public planning, conservation and heritage or environmental protection without a need for site-specific legislation, bylaws, or regulations, or governmental acquisition of the land itself.[55] Designation of non-governmental organizations to hold covenants under s. 219 relieves public authorities of the regulatory burden of enforcing land use restrictions and of having to take positive steps to conserve and maintain the condition of land.[56] Provisions similar to section 219 may be found in other jurisdictions.

I. Common Ownership of Benefited and Burdened Land

Formerly the owners of the benefited and burdened land had to be separate persons for a restrictive covenant to continue to remain in effect and run with the land. This was because the covenant would be extinguished if ownership of the benefited and burdened land merged in the same person.

Section 18(1) of the *Property Law Act* now provides, however, that common ownership and possession of burdened and benefited land does not extinguish a restrictive

54. A list of organizations designated to hold s. 219 covenants may be found online at http://www.ltsa.ca/surveyor-general/bodies-able-to-hold-covenants.

55. Land Title and Survey Authority, online at http://www.ltsa.ca/surveyor-general/covenants.

56. This point regarding the use of statutory covenants similar to s. 219 of the *Land Title A*ct for the achievement of planning objectives was made by the Victorian Law Reform Commission in a consultation paper issued in 2010. See *Easements and Covenants* (Consultation Paper 9) (Melbourne: The Commission, 2010) at 91. In its subsequent final report, however, the Victorian Law Reform Commission has recommended that "statutory agreements" between a landowner and a public authority entered into for planning purposes that will run with land and impose obligations on subsequent landowners should be entirely separated from the body of law governing covenants between private landowners, and take effect as part of a self-contained legislative scheme. See Victorian Law Reform Commission, *Easements and Covenants* (Final Report 22) (Melbourne: The Commission, 2010) at 76-77.

covenant.[57] This enables the owner of benefited land to acquire burdened land and then sell either the benefited or burdened land or portions of each, with the original covenant remaining in place.

J. Liability for Breach of a Restrictive Covenant

As the burden of a restrictive covenant runs with the burdened land itself, it is capable of affecting interests in the burdened land other than the owner of the fee simple title.

It appears that in addition to the owner, anyone in occupation of burdened land who has notice of the covenant is bound by it.[58] A lessee under a multi-year lease,[59] a tenant under a lease with a yearly term,[60] a sublessee,[61] and even a mere occupier without a contractual or other right to be on the land,[62] have all been held liable for breach of a restrictive covenant.

Apart from the original covenantor, an owner or holder of an interest in burdened land is not liable for a breach that occurred before the title or other interest was acquired, nor of course for one that takes place occurs after divesting the title or interest.

It is a curious feature of the hybrid contractual and proprietary nature of freehold covenants that the original covenantor remains liable to the covenantee or successive holders of the covenantee's estate purely on the basis of contract, even

57. R.S.B.C. 1996, c. 377.

58. In the case of a registered restrictive covenant, registration is notice of the covenant to anyone dealing with the title to the burdened land: *Land Title Act*, supra, note 37, s. 27(1). Entry and occupation under an unregistered lease, sublease, contractual licence or a trespass is not "dealing with the title," however, and may be outside scope of the statutory notice contemplated by s. 27(1). Actual or constructive notice under rules of equity may be necessary in those cases for the covenant to be enforceable against the occupier. English jurisprudence indicates that either actual or constructive notice will suffice to make an occupier liable: *Patman v. Harland* (1881), 17 Ch. D. 353 (lessee liable to covenantee for breach of covenant binding on lessor because of rule that lessee has constructive notice of lessor's title).

59. *Patman v. Harland* (1881), 17 Ch. D. 353.

60. *John Brothers Abergarw Brewery Company v. Holmes*, [1900] 1 Ch. 188.

61. *Re Nisbet and Potts Contract*, [1906] 1 Ch. 386.

62. *Mander v. Falcke*, [1891] 2 Ch. 554 (C.A.). There was some question in this case as to whether the chief defendant was a mere occupier without a licence or the beneficiary of a trust of the term of a sublease, but the court clearly considered that an occupier with notice of a restrictive covenant would be bound by it.

after ceasing to hold any interest in the burdened land.[63] This could operate unfairly, because the original covenantor could be liable for breaches committed by subsequent owners or occupiers when the covenantor no longer has any control over what happens on the land.

K. Remedies for Breach of Restrictive Covenants

As restrictive covenants are an invention of equity, only equitable remedies are available for their breach.[64] The normal remedy for breach of a restrictive covenant is an injunction. In the more common type of case, a prohibitory injunction may be granted to require a defendant to stop doing something in breach of a covenant. In a less common type of case, a mandatory injunction may be granted requiring a defendant to take positive steps to correct a breach.[65] A defendant may be ordered, for example, to remove a house built in violation of a covenant of a type common in residential building schemes that no more than one building may be constructed per lot.

Equitable damages can be awarded for breach of a restrictive covenant in addition to, or instead of, an injunction.[66]

Injunctions and equitable damages are discretionary remedies. The court is not obliged to grant them even where a breach is present if the plaintiff's conduct is adjudged to disentitle him or her to the remedy, or if the breach is trivial and an injunction would result in disproportionate harm to the defendant. The court will consider the degree of harm to the plaintiff caused by the breach and balance the detriment the injunction will impose on the defendant.[67]

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63. *Re Markin; Re Roberts*, [1966] V.R. 494 at 496; Megarry and Wade, *supra*, note 2 at 1348-1349; Victorian Law Reform Commission, *Easements and Covenants* (Consultation Paper 9), *supra*, note 56 at 113.

64. Ontario Law Reform Commission, *supra*, note 22 at 47.

65. In *Lynch v. In Situ Production Consultants Ltd.*, [2000] B.C.J. No. 1377 (S.C.) a mandatory injunction was granted requiring either removal of a garage blocking a water view for other lots in breach of a building scheme covenant, or modification of the garage to fit plans approved by the plaintiff.

66. The *Chancery Amendment Act, 1858*, 21 & 22 Vict., c. 27, s. 2, (*Lord Cairns' Act*) conferred a general statutory jurisdiction to award damages in equity in addition to, or in substitution for, an injunction or specific performance (another equitable remedy functioning much like a mandatory injunction). A plaintiff cannot insist on equitable damages instead of an injunction, however: *Kelly v. Barrett*, [1924] 2 Ch. 379 (C.A.).

67. *Shepherd Homes Ltd. v. Sandham*, [1977] Ch. 340 at 351. See also two British Columbia cases in which mandatory injunctions were refused because the breach of a building restriction was merely technical and there had been a good faith attempt at compliance: *Armitage v. Moretto*,

A prohibitory or mandatory injunction will be granted "as of course" to restrain a breach of a restrictive covenant when the covenant specifies precisely what must be done or not be done to avoid contravening it. A prohibitory injunction simply to restrain a breach will rarely be refused. If the covenant merely prohibits an activity on, or use of, land without the consent of the plaintiff, the court may exercise discretion to refuse a mandatory injunction, e.g. for removal of a structure, on the basis of factors that include the following:

(a) the relative degree of hardship to the plaintiff or defendant if it is granted or denied;

(b) whether the defendant acted in ignorance of the covenant rather than deliberately flouting it;

(c) the interests of other landowners in the area and the general public;

(d) whether damages would be adequate relief;

(e) delay on the part of the plaintiff in seeking enforcement of the covenant;

(f) the interest the covenant was intended to protect.

If an injunction is refused, the court may award damages in lieu. The measure of damages will most probably be the amount that the plaintiff covenantee could reasonably demand in return for relaxing the restriction.[68]

L. Discharge and Release of Covenants

1. Release by Covenantee

A covenant may be released by the covenantee or the covenantee's successors.

2. Judicial Modification or Cancellation

Section 35 of the *Property Law Act* empowers the court to modify or cancel a "restrictive or other covenant burdening land" and a statutory building or leasing scheme on specified grounds, among other kinds of rights and interests concerning the use of land. The grounds are:

[1986] B.C.J. No. 2250 (S.C.); *Jabs v. Good*, [2009] B.C.J. No. 480 (S.C.).

68. *Arbutus Park Estates Ltd. v. Fuller*, [1977] 1 W.W.R. 729 (B.C.S.C.); *Wrotham Park Estate co. Ltd. v. Parkside Homes ltd.*, [1974] 1 W.L.R. 798.

(a) the covenant is obsolete because of changes in the character of the land, the neighbourhood or other circumstances the court considers material;

(b) reasonable use of the land will be impeded, without practical benefit to others, if the covenant is not modified or cancelled;

(c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled;

(d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest; or

(e) the registered instrument containing the covenant is invalid, unenforceable or has expired, and its registration should be cancelled.

The threshold for obtaining modification or cancellation of a restrictive covenant under section 35 is quite high. The courts will not exercise the powers given by section 35 lightly, recognizing that a restrictive covenant is a valuable property right.

The Project Committee has examined section 35 of the *Property Law Act* in the course of the Real Property Reform Project. That review has not led the Project Committee to conclude that any change to section 35 would be required as a result of the tentative recommendations in Chapter III, in particular because the section covers "restrictive *or other*" covenants burdening land.[69] Comment is nevertheless invited from readers on this as with all other matters addressed in this consultation paper.

69. While it would not be essential, a consequential amendment changing "restrictive or other covenants" in s. 35(1) to read simply "covenants burdening land" might be useful from the standpoint of clarity following implementation of the tentative recommendations in Chapter III on positive covenants.

III. REFORM

A. General

Despite their limitations, restrictive covenants remain in wide use. While they may become anachronistic restraints on development or reasonable use of land in some circumstances, they are also capable of enhancing the amenity of land in many ways. Maintaining a uniform architectural theme in a subdivision, controlling density, preserving "green spaces" and other features of the natural landscape are some examples. There is no groundswell of support to abolish them. Indeed, they are employed by real estate developers and conservationists alike to achieve their objectives.

Law reform bodies elsewhere that have examined restrictive covenants in recent years have not urged their abolition.[70] As noted below, they have leaned instead towards liberalizing the essential requirements and limitations of restrictive covenants. They have viewed restrictive covenants as being capable of co-existing with and supplementing public planning, even if conflicts occasionally arise between planning regulations and the effect of particular covenants.[71] Restrictive covenants have been seen as a useful means of protecting valuable interests connected with the

70. One Royal Commission in the U.K. was an exception. The Royal Commission on Legal Services investigating the provision of legal services in England, Wales and Northern Ireland suggested, but did not formally recommend, that the binding effect of covenants affecting land should be confined to the original parties with the possible exception of covenants to secure privacy in a standard form of wording. These comments were made in the context of a compilation of suggestions received by the Royal Commission for the simplification of conveyancing law and procedure: Royal Commission on Legal Services, *Final Report* (Cmnd. 7648) (London: HMSO, 1979), vol. 1 at 283.

71. Law Commission (England and Wales), *Transfer of Land: The Law of Positive and Restrictive Covenants*, Report No. 127 (London: HMSO, 1984) at 6; Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land* (Toronto: Ministry of Attorney General, 1989) at 99; Law Reform Commission of Western Australia, *Report on Restrictive Covenants* (Project No. 91) (Perth: The Commission, 1997) at 60-61; Victorian Law Reform Commission, *Easements and Covenants* (Consultation Paper 9), *supra*, note 56, at 108-109. In its final report on easements and covenants, the Victorian Law Reform Commission did not resile from this view, but proposed that the relationship between public regulation and private covenants be clarified by explicitly enacting that a restrictive covenant is unenforceable to the extent that it conflicts with any existing law: see *Easements and Covenants* (Final Report 22), *supra*, note 56 at 108-109.

use and enjoyment of land at a localized and private level that public planning does not reach.[72]

The Project Committee believes covenants that run with land continue to serve useful purposes and makes no recommendation here for their abolition or for curtailment of the circumstances in which they can be used. Instead, this chapter contains a number of proposals for reform of the law relating to restrictive covenants that would allow greater flexibility in the use of covenants running with land. We consider that these proposed reforms will enhance the utility of covenants and at the same time, simplify the law.

B. Positive Covenants

1. General

From *Tulk v. Moxhay*[73] to the present day, restrictive covenants have always been associated with real estate development. While developments still often take the form of subdivisions consisting of detached buildings, many modern urban real estate developments are more integrated in nature. Condominium developments are governed by the *Strata Property Act*, which imposes obligations of both a positive and negative nature on owners of strata lots, and provides a means of enforcing them through the powers of the strata corporation.[74]

Modern developments can involve a high degree of integration and interdependence between the separate properties comprised in them even if they are not governed by the *Strata Property Act*. Individual lots or units may be serviced by common access elements such as driveways and parking areas, for example.

The legal framework for mutual obligations of freehold owners within the same development, possibly sharing some facilities, could be considerably simplified if positive obligations could be made binding upon successive owners as lots or units change hands over the course of time. The current circuitous and complex methods of securing performance of positive obligations of this kind by rentcharges and re-

72. *Ibid.*

73. *Supra*, note 1.

74. S.B.C. 1998, c. 43. Among the positive obligations imposed by the Act and Schedule of Standard Bylaws on owners of strata lots are the duty to contribute to common expenses (Act, s. 92) and to repair and maintain a strata lot (Standard Bylaws, s. 2(1)). Strata lot owners also have negative obligations, *e.g.* not to use a strata lot in contravention of ss. 3(1), (2) and (4) of the Standard Bylaws. The strata corporation is empowered to enforce these obligations by fine or registration of a lien against the strata lot, enforceable by judicial sale.

entry rights could be abandoned. Cost-sharing and other mutual obligations could be enforced by owners of individual properties against delinquent owners, even in the absence of a management structure analogous to a strata corporation.

Apart from limited statutory inroads in favour of public authorities and publicly designated holders of conservation covenants, the requirement of negativity nevertheless remains well-entrenched. In British Columbia as elsewhere, courts have routinely applied the requirement on the basis of previous authority without attempting to justify it. Judicial reluctance to relax the requirement of negativity has been described as "a phobic response to entering new terrain."[75] Some common law jurisdictions have legislated in recent decades to open the door nevertheless to positive covenants running with freehold land. An examination of the merits of allowing positive covenants to run with land is overdue.

2. Common Law Jurisdictions Allowing Positive Covenants to Run With Land

(a) General

In the United States, positive and negative covenants are capable of running with land both at common law and in equity.[76]

Many jurisdictions have provisions similar to section 219 of the British Columbia *Property Law Act* allowing positive covenants held by public authorities to run with land for various public planning and conservation purposes.

Among Commonwealth jurisdictions, New Zealand,[77] Northern Ireland,[78] and the Northern Territory of Australia[79] all allow positive covenants held by private parties to run with land. Trinidad and Tobago has enacted provisions that contemplate

75. Bruce Ziff, "Positive Covenants Running With Land: A Castaway on Ocean Island" (1989), 27 Alta. L.R. 354 at 369.

76. See *Restatement of the Law of Property 3d: Servitudes* at 26. In American property law, the interest corresponding to the Anglo-Canadian restrictive covenant was until recently called an "equitable servitude." The *Restatement* has expressly abandoned use of this term except in historical explanations, referring instead to both equitable servitudes and covenants capable of running with land at common law (formerly called "real covenants") under the generic term "covenants running with land": *ibid.* at 28.

77. *Property Law Act 2007*, No. 91, ss. 301-303. These provisions were originally enacted in 1986: *Property Law Amendment Act 1986,* No. 106, s. 3.

78. *Property (Northern Ireland) Order 1997*, art. 34.

79. *Law of Property Act* (N.T.), s. 170.

positive covenants running with land.[80] Ireland has recently passed legislation to permit this as well.[81]

(b) New Zealand

New Zealand allows positive as well as negative covenants to be enforced by owners and occupiers of the benefited land against anyone who is or beco mes an owner or an occupier for the time being of the burdened land, subject to a contrary intention in the instrument creating the covenant.[82] An "occupier," for this purpose, is someone who occupies land under a lease or licence with a term of ten years or more or under a renewal of such a lease or licence, a mortgagee in possession, or a receiver appointed by a mortgagee exercising powers to manage the land or receive income from it.[83]

(c) Northern Ireland

Northern Ireland provides for an exhaustive list of specific kinds of covenants (positive or negative) to be enforceable at the instance of the fee simple owner of benefited land against the fee simple owner of burdened land.[84] This list is:

(a) covenants in respect of the maintenance, repair or renewal of party walls or fences or the preservation of boundaries;

(b) covenants to do, or to pay for or contribute to the cost of, works on, or to permit works to be done on, or for access to be had to, or for any activity to be pursued on, the land of the covenantor for the benefit of land of the covenantee or other land;

(c) covenants to do, or to pay for or contribute to the cost of, works on land of the covenantee or other land where the works benefit the land of the covenantor;

(d) covenants to reinstate in the event of damage or destruction;

(e) covenants for the protection of amenities or services or for compliance with a statu-

80. *Land Law and Conveyancing Act 1981*, Act No. 20 of 1981, s. 118. The Act is not in force.

81. *Land and Conveyancing Law Reform Act 2009*, No. 27 of 2009.

82. *Property Law Act 2007*, *supra*, note 77, ss. 301-303. The New Zealand legislation also includes an elaborate scheme to procure compliance with a positive covenant through delivery to the owner or occupier of burdened land of a notice requiring work, with a right of cross-notice in the event of objection: *ibid.*, ss. 308-312.

83. *Ibid.*, s. 4, definition of "occupier," s. 303(1).

84. *Property (Northern Ireland) Order 1997*, s. 34(4).

tory provision (or a requirement under it), including -

(i) covenants (however expressed) not to use the land of the covenantor for specified purposes or otherwise than for the purposes of a private dwelling;

(ii) covenants against causing nuisance, annoyance, damage or inconvenience;

(iii) covenants against interfering with facilities;

(iv) covenants prohibiting, regulating or restricting building works or the erection of any structure, or the planting, cutting or removal of vegetation (including grass, trees and shrubs) or requiring the tending of such vegetation;

(f) covenants in relation to a body corporate formed for the management of land.[85]

It will be noted that this list includes covenants imposing positive obligations calling for the expenditure of money for work or activity on the burdened or benefited land.

(d) Northern Territory, Australia

The Northern Territory of Australia allows both positive and negative covenants to run with land. Rules of common law and equity on how covenants run with land have been supplanted by statutory ones. Covenants may be enforced by anyone having the estate to which the benefit of the covenant attaches.[86] They may be enforced against anyone having an interest in the burdened land that is either the burdened estate (i.e., the estate of the covenantor), the interest of a mortgagee, or that confers a right to possess the land for more than 21 years.[87] Restrictive (i.e., negative) covenants or those relating to access may also be enforced against any occupier deriving a right to occupy from someone bound by the covenant.[88]

(e) Trinidad and Tobago

Section 118(1) of the Trinidad and Tobago *Land Law and Conveyancing Act 1981*[89] would allow negative and positive covenants or agreements affecting land for the benefit of other land to be enforced by the owner or occupier of the benefited land

85. *Ibid.*

86. *Supra*, note 79, s. 170.

87. *Ibid.*, s. 171.

88. *Ibid.*, s. 172.

89. *Supra*, note 80.

land against the owner or occupier for the time being of the burdened land. It would expressly allow for agreements requiring payments towards the cost of works carried out on the benefited land to be enforced against the owner or occupier of the burdened land. The section would apply only to registered covenants.[90] The *Land Law and Conveyancing Act 1981* has not been brought into force, although Trinidad and Tobago was the first Commonwealth jurisdiction to enact legislation abrogating the negative covenant rule.[91]

(f) Ireland

Ireland's *Land and Conveyancing Law Reform Act 2009* abolishes common law and equitable rules concerning covenants affecting land and replaces them with a simple statutory regime in which positive and negative covenants are enforceable against successive owners.[92] The Act provides that a freehold covenant "which imposes in respect of servient (burdened) land an obligation to do or refrain from doing any act or thing" is enforceable by the owner of the dominant (benefited) land for the time being against the owner for the time being of the servient land.[93] The term "servient owner" extends to persons claiming from or under the owner, except tenants for a term of less than five years. Covenants imposing restrictive obligations are binding on anyone in occupation of the servient land, with or without the owner's consent.[94]

3. Law Reform Activity Concerning Positive Covenants

The English Law Commission has recommended that the law be changed to allow the burden of positive obligations to run with land, most recently in a report published in 2011.[95] Law reform agencies in Ontario[96] and Victoria,[97] as well as the New South Wales Land Title Office[98] have done so as well.

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90. *Ibid.*, s. 118(4).

91. *Supra*, note 22 at 82.

92. *Supra*, note 81, s. 49(1). The 2009 Act implemented the substance of recommendations made by the Law Reform Commission of Ireland with some variations. See *Report on Land Law and Conveyancing Law: Positive Covenants Over Freehold Land and Other Proposals* (Report 70) (Dublin: The Commission, 2003) at 15, 18-19 and 78.

93. *Supra*, note 81, s. 49(2).

94. *Ibid.*, s. 48, definition of "servient owner."

95. *Supra*, note 22 at 111-112. Earlier publications of the Law Commission on the subject advocated this position as well, but the introduction of commonhold in English land law caused the Law Commission to re-examine the area of obligations affecting land. Under the scheme recommended by the Law Commission, the term "covenant" would be replaced by "land obligation," denoting a

These agencies have pointed out that development projects in which there is a high level of interdependence between the subdivided parcels of land require mutually enforceable obligations between the owners for the time being, especially regarding expenditure towards maintenance of shared facilities and amenities.[99] Land registration systems have removed much of the force of the objection to covenants running with land that prospective purchasers cannot readily determine their existence.[100]

The law reform agencies also note that the existing means of securing performance from successive owners of a positive obligation assumed by a previous owner, such as use of rentcharges, re-entry rights, and indemnity chains, are cumbersome, unreliable, and unnecessarily complex.[101]

statutory legal interest capable of embracing both negative and positive obligations. A land obligation could be created in the same manner as covenants have been until the present time. The term "land obligation" was also adopted by the Ontario Law Reform Commission, *supra*, note 22.

96. *Supra*, note 22 at 101-102.

97. Law Reform Commission of Victoria, *Easements and Covenants* (DP 15) (Melbourne: The Commission, 1989). The former Commission's successor body, the Victorian Law Reform Commission, rejected the expansion of positive covenants running with land in a report published in 2010, however. The Victorian Law Reform Commission concluded that the imposition of positive obligations on successive owners should be limited to rule-making by "owner corporations" (the Victorian equivalent of a strata corporation) and to obligations specifically imposed by legislation. The Victorian Law Reform Commission saw this as a means of guarding against land becoming subject to positive covenants that are unduly onerous in relation to the benefits they confer. See *supra,* note 56 at 86-88. It may be noted that in Victoria it is possible to form an owner corporation with powers confined to the common property, unlike a strata corporation in British Columbia. See *Owners Corporations Act 2006*, No. 69 of 2006, s. 9. This would allow for common management of shared assets and enforcement of cost-sharing obligations within an integrated cluster of individually owned properties not established as a condominium development.

98. *Review of the Law of Positive Covenants Affecting Freehold Land* (Discussion Paper) (Sydney: NSW Land Title Office, 1994) at 26, para. 6.1.

99. Ontario Law Reform Commission, *supra* note 22 at at 101.

100. Ontario Law Reform Commission, *supra*, note 22 at 100; New South Wales Land Title Office, *supra*, note 98 at 9.

101. Law Commission, *ibid.* at 136-139; Ontario Law Reform Commission, *supra*, note 22 at 102; Victorian Law Reform Commission, Consultation Paper 9, *supra*, note 56 at 90-91.

The argument that positive covenants would interfere with the marketability of land is disputed on the ground that covenants, whether positive or negative, are capable of enhancing land values because they protect the amenity of neighbourhoods.[102]

Agencies favouring the introduction of positive covenants running with land also answer the concern for marketability by saying there is no proof that positive covenants would interfere with marketability of land to any greater degree than negative covenants now do. There is some empirical support for this answer in relation to residential property. In Scottish law, both affirmative (positive) and negative "real burdens" are equally enforceable against successive owners of land to which they attach. Real burdens are functionally equivalent to covenants running with land in Anglo-Canadian law. A survey of 402 owners of residential property subject to real burdens conducted for the Scottish Law Commission in 1999 at seven locations in the country revealed that for a majority, the existence of the real burdens did not influence their decision to purchase.[103]

The law reform agencies emphasize that there is no satisfactory principled justification for distinguishing between positive and negative freehold covenants in terms of their binding effect on successive owners of the burdened land. The Ontario Law Reform Commission expressed its view in these terms:

> We have reached the conclusion that the present law, which prohibits the running of the burden of positive covenants upon a transfer of freehold land, operates to defeat the legitimate expectations of the parties. In our view, there can be no principled rationale for a rule that would preclude neighbours from agreeing, for example, to maintain a boundary fence, or, to keep certain drains clear, such that the covenant would run with the land. Nor is it justifiable, in our view, that, in a property development providing for parks, open spaces, and other amenities, obligations to pay for the maintenance of these amenities cannot be enforced against the successors of the original contracting parties. In addition, to the extent that a variety of methods have been developed to circumvent the undesirable effect of the present law, it has been productive of much uncertainty and confusion. For the foregoing

102. Ontario Law Reform Commission, *supra*, note 22 at 101; New South Wales Land Title Office, *supra*, note 98 at 9.

103. Scottish Law Commission, *Report on Real Burdens* (Report No. 181) (Edinburgh: The Commission, 2000), Appendix C at 467. The survey also found a significant majority of owners had a favourable view of real burdens. Sixty-four per cent of the owners surveyed believed that real burdens were actually beneficial in selling houses. Eighty-one per cent thought that real burdens were helpful in maintaining the residential character of neighbourhoods.

reasons, the Commission recommends that the law should be reformed to permit the burden of affirmative obligations to run upon a transfer of freehold land.[104]

4. SHOULD POSITIVE COVENANTS RUN WITH LAND IN BRITISH COLUMBIA?

(a) General

In British Columbia, the rule that a covenant must be negative in order for the burden to run with freehold land has already been eroded to some extent by section 219 of the *Property Law Act*, although only public authorities and designated organizations benefit from this at the present time.[105] To abolish the rule completely and permit enforcement of positive covenants generally, as some other countries and territorial divisions in the common law world have done, may not be such a large step.

The matter needs to be approached nevertheless with some caution, because positive obligations are often more onerous than negative ones. A covenant not to build more than one dwelling per lot is easily performed, and a purchaser of property subject to the covenant is not exposed to any greater detriment than the vendor who has performed the covenant by not putting a second building on the property. If the covenant is to maintain and repair works or structures on the property, however, a purchaser cannot be certain of what the future cost of compliance will be.[106]

This reality that positive covenants can be more onerous in nature feeds into the concern that expanding the scope of obligations running with land would reduce the marketability of any land affected by them. The American *Restatement (3d) of Property: Servitudes* maintains this concern is misplaced, stating that purchasers pay little regard to obligations attaching to land in relation to other factors such as location, price, and the physical characteristics of the property.[107] The *Restatement* does

104. *Supra*, note 22 at 101-102. Some academic writers have expressed similar views: see Ziff, supra, note 75 at 371-372; N. Gravells, "Enforcement of Positive Covenants Affecting Freehold Lands" (1995), 110 L.Q.R. 346 at 350. The Manitoba Law Reform Commission noted in a report on building schemes that the rule preventing the burden of positive covenants from running with the land was "widely acknowledged as harsh and illogical," but considered that a recommendation for change should come only after extensive study and consideration that would have been beyond the scope of that report: Manitoba Law Reform Commission, *Building Schemes* (Report #113) (Winnipeg: The Commission, 2006) at 13.

105. See Chapter II under the heading "H. Statutory Positive Covenants."

106. Ziff, *supra*, note 75 at 369.

107. American Law Institute, *Restatement (3d) of Property: Servitudes* (St. Paul, ALA Publishers, 2000), ch. 6, Introductory Note..

not cite any supporting study, but the Scottish survey mentioned above suggests that purchasers are not greatly affected by rights similar to covenants running with land.

It has been said in favour of positive covenants that they are equally likely to enhance land values and make land more marketable by preventing destructive use or neglect.[108] Enforceable positive obligations exist under condominium legislation, compelling owners of strata lots to contribute to the expenses of maintaining the common property and to keep individual strata lots in good repair.[109] Condominium property is marketable despite having these features. The concern that positive covenants would interfere unduly with the marketability of land seems exaggerated.

(b) Positive Covenants in Integrated Developments

Where there is some degree of interdependence between two or more non-stratified properties, positive covenants could be useful substitutes for a common management structure like a strata corporation to maintain cost-sharing arrangements and standards of upkeep over successive changes in ownership. For example:

> Common Parking Area in Industrial Park
>
> Companies own individual freehold lots in an industrial park grouped around a central parking area used by their employees and customers. Title to the central parking area is held by the municipality, which charges each owner an annual fee to allow employees and customers to park their vehicles there. A contract between the owners provides for pro rata contributions toward the cost of maintaining the parking lot and access strips. A voluntary owners' association acts as the agent of the owners to maintain the parking area. When a company sells a lot, the owners must try to obtain the purchaser's agreement to join the contractual arrangement. As the obligation to share the expenses of maintaining the parking area does not pass with the lot purchased, and the vendor cannot assign the contractual liability to make contributions when selling the lot, it is open to the purchaser to refuse, while still being eligible to contract with the municipality for a licence to use the parking area.

If the owners had the ability to create mutual covenants for cost-sharing that would run with each individually owned lot, the cost-sharing arrangement could be maintained despite a change in ownership of the lots. Consider also this example:

108. Ontario Law Reform Commission, *supra*, note 22 at 100-101.

109. *Strata Property Act*, S.B.C. 1998, c. 43, s. 99(1); Schedule of Standard Bylaws., s. 2.

Mixed-use Development Involving Stratified and Freehold Parcels[110]

A mixed-use resort development includes a hotel, a condominium complex, a golf course and sports club, and freehold lots with detached, non-stratified villas. The golf course and sports club are common amenities to which the condominium owners and detached villa owners have equal access. The original purchasers of the freehold lots agree to pay golf course and club dues in their agreements of purchase and sale, which also stipulate that this obligation does not merge in the conveyance of the lots. Subsequent purchasers of the strata lots repudiate the obligation to pay dues on the ground it does not run with the freehold lands.

This problem could be addressed indirectly at the inception of the development by several means. Rentcharges could be made applicable to the self-standing freehold lots. Contractual obligations to adhere to a homeowner association's bylaws imposing dues could be imposed in the initial sale of the freehold lots,[111] together with a stipulation that the purchaser must include identical obligations in the terms of any re-sale. As an extreme and probably quite impractical solution, the developer could sell the units as determinable fees that would persist only so long as the dues required for the upkeep of the common use facilities continue to be paid. It would be simpler if the covenant to pay dues ran with the non-stratified freehold lots and the covenant could be registered on the titles.

The advantages of allowing the burden of positive covenants to run with land are not confined to commercial or mixed-use developments. Positive covenants could be well-adapted to arrangements between neighbouring homeowners as well.

The Ontario Law Reform Commission gave the example of a duplex. It would make considerable sense for the owners of each of the two living units to enter into reciprocal covenants for maintenance of common walls, decoration, and landscaping that would be binding on a new owner if one of the units is sold.[112]

110. This example is adapted from a description of problems that actually arose in resort developments in the Caribbean. Evidently the earlier resort developments were structured as condominiums in which legislation provided for the enforcement of common expense obligations, but later mixed-use developments consisted of a mixture of condominium, detached freehold residential property, and freehold commercial property in which there was no single governing legislative regime, giving rise to the type of situation in Example 2. See Owen Foley, "Enforcement Issues Surrounding Positive Covenants in Mixed-Use Resorts" (International Law Office, 2008), online at http://www.internationallawoffice.com/newsletters/detail.aspx?g=43dcfew53-0366-4bcl-a19d-7f14fdd6e2e.

111. *Ibid.*

112. *Supra*, note 22 at 101.

(c) Obligations Attached to Easements

Another worthwhile purpose that positive covenants could serve is to attach obligations to positive easements. Positive easements consist of a right attaching to particular land (dominant tenement) to use or do something on other land (servient tenement).[113] The grant of a positive easement does not impose a duty on the owner of the servient tenement to maintain or repair the subject-matter of the easement to enable its continued enjoyment by the owner of the dominant tenement.[114] The dominant owner usually may maintain and repair it as a right necessarily ancillary to the easement, but is not obliged to do so.[115]

An obligation to maintain and repair could be placed on the servient owner by means of a separate covenant. The advantages to a dominant owner would be obvious, but under some circumstances there could also be advantages for the servient owner. The example below provides an illustration.

> Adjacent Agricultural Operations – Private Utility Easement
>
> Company A and Company B have large adjacent tracts of land in a semi-rural area. A raises seasonal crops. B has a market garden with large greenhouses. A grants B an easement over A's lot to install underground piping for a sprinkler system on B's lot in return for a percentage of B's net profits. A does not want its agricultural operations to be disrupted at B's whim and would prefer to be in control of any works on its land and also of when they are carried out, rather than face the inconvenience of entry by B's contractors during a growing season. For this reason, A is willing to (a) maintain and repair the piping that crosses A's lot, subject to indemnity from B for the cost, and (b) agree not to erect any buildings on the portion of A's lot over which the easement lies.

The mutual benefits could extend beyond the original parties to their respective successors in title if the successors continue in the same or similar operations.

The Project Committee sees considerable value in allowing the burden of positive covenants to run with land, especially but not exclusively in the context of modern

113. Jonathan Gaunt and Paul Morgan, eds. *Gale on Easements*, 17th ed. (London: Sweet & Maxwell, 2002) at 4. By contrast, a negative easement is a right to receive something from the servient tenement without interference, e.g. support, light, air or water: *ibid.*

114. *Jones v. Price*, [1965] 2 Q.B. 618 (C.A.); *Nordin v. Faridi* (1996), 17 B.C.L.R. (3d) 366 (C.A.).

115. Jonathan Gaunt and Paul Morgan, eds., *Gale on Easements*, 17th ed. (London: Sweet & Maxwell, 2002) at 47-49.

developments that involve a high degree of integration of individually owned parcels of land. There still is a valid concern that ownership of land must not become encrusted with onerous obligations that are unconnected with the manner in which land is used. For example, it would be untenable for owners of lots in a residential subdivision to be forced to join and maintain membership in a golf club operated by the developer at a distant location for as long as they remain owners. For this reason, the Project Committee believes that the burden of positive covenants should run with land only if the covenants are for the purpose of enforcing a cost-sharing arrangement or if they require work or operations to be carried out on either the burdened or benefited land.[116] Section 221 of the *Land Title Act*, which currently empowers the registrar only to register restrictive covenants, should be amended to also allow the registration of positive covenants of this kind. Section 182(1), which provides for the endorsement of the covenant as an appurtenant right on the title to the benefited land, should be amended accordingly.

The Project Committee tentatively recommends:

1. (1) Subject to the Land Title Act and to the intent of the parties, a covenant by a fee simple owner that imposes a positive obligation on the covenantor to perform a duty or act should be capable of running with the land and binding the successors in title of the covenantor, if and to the extent that the duty or act consists of any of the following in relation to the land of either the covenantor or covenantee, or to land in which they both have an interest:

(a) payment of, or contribution towards, expenditures for work, provision of materials, or operations in, on, above or under the land, or

(b) carrying out any work or operations, including maintenance, repair or replacement of anything in whole or in part, in, on, above or under the land.

(2) Sections 221 and 182(1) of the Land Title Act should be amended to authorize registration of covenants described in paragraph 1(1) of this tentative recommendation against the title to the burdened land and their endorsement on the title to the benefited land, respectively.

116. See below under the heading "C. Covenants in Gross" where the conclusion is reached that there should be no change in the requirement that a covenant must benefit specific land in order to bind successive owners and others in possession of the burdened land.

5. Subdivision of Land Subject to a Positive Covenant

When land that is either benefited or burdened by a covenant is subdivided, a question may arise as to whether the benefit or burden should extend to all of the subdivided parcels equally as before the subdivision, or whether some other allocation is appropriate.

When land subject to a restrictive covenant is subdivided, the restrictive covenant will appear as a charge against new titles to the resulting subdivided parcels of burdened land. As a restrictive covenant is performed by refraining from doing what it prohibits, this does not create undue hardship under most circumstances. If the owner of a subdivided burdened parcel seriously wishes to use the land in a manner prohibited by the covenant or has another objection to its continuance in relation to that parcel, the owner can seek relief under section 35 of the *Property Law Act*[117] in the form of cancellation of modification of the covenant.

If the benefited land is subdivided, an endorsement regarding the restrictive covenant that appeared on the title to the benefited land before subdivision would appear on new titles for the subdivided parcels of benefited land as well. As noted in Chapter II, section 25 of the *Property Law Act* provides that the benefit of a restrictive covenant extends to the whole and any part of the land to which it is annexed that is capable of benefiting from the covenant, unless the parties agree otherwise. Insofar as restrictive covenants are concerned, this would normally present little difficulty for the owner of the burdened land because a restrictive covenant is performed in the same passive manner regardless of how many parcels, or owners, of benefited land there are.

The question whether the burden of a covenant should extend equally to all the subdivided lands after as it did before subdivision is intrinsically more acute in relation to positive obligations that may include cost-sharing. A positive obligation running with land could become unduly onerous if the subdivision results in a configuration that removes the economic or practical basis for its attachment to one or more of the new parcels. For example:

> A reciprocal cost-sharing covenant is in place amongst several adjoining semi-rural landowners for the maintenance of a private access road running east and west. The lots front along the road on both the north and south sides. It is proposed to subdivide one of the lots on the north side into two new lots: Lot A (south half) and B (north half). The subdividing owner intends to retain

117. *Supra*, note 35.

> Lot A and transfer Lot B to a purchaser. Lot B has no direct access to the road and no need for access because it has different frontage than lot A.

It would be illogical and unfair for the reciprocal cost-sharing obligation to continue to run with Lot B after the transfer either in terms of benefit or burden, because Lot B cannot benefit from the access road. As between Lot A and Lot B, the obligation to contribute under the cost-sharing covenant should be allocated entirely to Lot A when the subdivision takes place. The proposed subdivision should probably not take place otherwise.

The next example involves a different pattern:

> Lot C is situated partly on a slope running downward from Lot D. Lot D is subject to a covenant in favour of Lot C to maintain and repair a retaining wall. The owner of Lot D wishes to subdivide so as to create Lots E, F, and G and transfer each to a different owner. Two-thirds of the retaining wall is on Lot E, one-third is on Lot F. Lot G is not adjacent to Lot C and no part of the retaining wall is located on it.

Lots E and F should remain subject to the covenant with respect to the part of the retaining wall that is located on each lot. If the obligation to maintain the entire retaining wall were to attach to each lot, however, the owners of Lots E and F would theoretically be required to trespass on each other's land to perform the covenant on the adjoining lot. In order to make the proposed subdivision feasible, the burden of the covenant should be allocated between Lots E and F so as to run with each lot only with respect to the portion of the retaining wall physically located on the lot.

It would also make sense for Lot G to be released from the covenant, because the owner of Lot G would be unable to perform it without trespassing. In addition, Lot G presents no hazard to Lot C in terms of failure of lateral support, so that Lot C cannot benefit from the covenant continuing to attach to Lot G. Again, the proposed subdivision should probably not take place without these changes in the applicability of the covenant.

Allocating the burden of the positive covenant between Lots E and F and releasing Lot G from it would require the consent of the owner of Lot C, of course. If the owner of Lot C refused to consent, the subdivision would be blocked in the absence of a process in which the competing interests could be impartially weighed and a just result imposed. In some cases, an application for an order for cancellation or modification of the covenant under section 35 of the *Property Law Act* could afford

such a process.[118] The grounds on which cancellation and modification are allowed under section 35 chiefly relate to changed patterns of land use, however. A dispute like the one between the owners of Lots C and D might be more efficiently resolved through a judicial process focused on the proposed subdivision plan itself and the territorial application of the covenant.

Recent Irish legislation addresses the effect of subdivision on covenants running with land by providing for automatic apportionment of the obligations under a covenant amongst the subdivided parcels "as if those obligations had originally been entered into separately in respect only of each such part."[119] The legislation does not specify the method of apportionment or provide for a default rule subject to variation by agreement. Instead, it states only that the obligations under the covenant "are apportioned, as appropriate to the subdivided parts of the land."[120] The Irish provisions also provide that any dispute regarding the application of the apportionment provision in a particular case may be referred to the court, which may order the apportionment that it thinks fit.[121]

While automatic apportionment by virtue of statute may appear to be an attractively simple solution, the reliance of the Irish provisions on court proceedings to sort out any difficulties flowing from the notional statutory apportionment, coupled with the lack of specificity regarding the basis of apportionment, create too high a level of uncertainty for them to serve as the model that British Columbia should follow.

We prefer to put the onus on the subdivider to specify how the obligations of a positive covenant are to be allocated as a requirement of the subdivision process. An allocation of the benefit or burden of a positive covenant is technically only essential in connection with a subdivision if there is to be a change of ownership concurrent with or following the subdivision. As the purpose of many if not most subdivisions is to facilitate a sale of land immediately or eventually, however, a subdivider applying for approval of a subdivision of land subject to or benefited by a positive covenant running with the land should have to make such an allocation as an integral part of the subdivision application, whether or not any of the subdivided parcels are to be immediately transferred. Particulars of the allocation would have to be endorsed on the new titles generated by the subdivision. In the event that consent to

118. As noted in Chapter II, s. 35 of the Property Law Act refers to "a restrictive *or other* covenant." The powers of cancellation or modification it confers on the court would therefore extend to positive covenants running with land, without the need for consequential amendment.

119. *Land and Conveyancing Law Reform Act 2009*, *supra*, note 81, s. 49(4).

120. *Ibid.*

121. *Ibid.*, s. 49(5).

the proposed allocation is not forthcoming from the owner of the benefited land, the Supreme Court should be empowered, as a matter of judicial discretion, to make an appropriate allocation of the benefit or burden of a covenant. This discretionary jurisdiction should be independent of, but supplementary to, the jurisdiction already existing under section 35 of the Property Law Act to modify or cancel the covenant.

The provisions of the *Land Title Act* dealing with subdivision of land should be amended accordingly.[122]

The Project Committee tentatively recommends:

2. The Land Title Act should be amended to require an application for approval of a subdivision of land affected by a positive covenant of the kind described in Tentative Recommendation 1(1) to be accompanied by

(a) a description of how the burden or benefit of the covenant is to be allocated amongst the subdivided parcels of land; and

(b) either

(i) the written consent of each registered owner of the land benefited by the covenant to the proposed application of the covenant following the subdivision, or

(ii) an order of the court cancelling, modifying, or making an appropriate allocation of the benefit or burden of the covenant in accordance with the proposed subdivision plan.

6. Transition

What effect, if any, should the change in the law contemplated by Tentative Recommendation 1 have on existing covenants that impose positive obligations of a kind fitting with paragraphs (a) and (b) of the tentative recommendation? At the present time covenants of that kind affecting freehold land are valid and enforceable between the original parties, but not against the successors in title of the original

122. Divisions 2-5 of Part 4 of the *Land Title Act* pertain to the subdivision of land. Subject to some exceptions, a proposed subdivision must be approved by an "approving officer," as defined in the Act, before the subdivision may be deposited in the Land Title Office and titles issued for the subdivided parcels: s. 91.

covenantor.[123] Some covenants that are positive in substance, though not in form, may have been registered by error. The mere fact of registration does not make them enforceable, but it does mean that a purchaser of the burdened land cannot assert lack of notice of their existence.

If the change under Tentative Recommendation 1 were applied to registered covenants in existence when it is implemented, the effect would be that covenants meeting the description in the tentative recommendation that were not previously enforceable would suddenly become enforceable against some current and possibly previous owners who were not previously bound by them. This would be an unfair and unjust result. In some cases, this would bring about liability for breaches that occurred before the current owner of burdened land had any control over the land.

Jurisdictions that have made the burden of positive covenants run with freehold land have generally made the change on an expressly prospective basis, so that it applies only to covenants created after the effective date of the change.[124] This avoids the sudden imposition of new liabilities for past acts or omissions on persons not previously bound by positive covenants. The Project Committee believes that this precedent should be followed and legislative provisions implementing Tentative Recommendation 1 should be expressed to operate only prospectively.

The Project Committee tentatively recommends:

3. Legislation implementing Tentative Recommendation 1 should be expressly prospective, so that positive covenants of the kind described in Tentative Recommendation 1 run with the burdened land only if created after the effective date.

C. Covenants in Gross

1. General

Has the time come to abandon or further relax the requirement that a covenant must be annexed to benefited land in order to be enforceable against successive owners of the burdened land? As explained in Chapter II, this requirement has been relaxed

123. See Chapter II under the heading "A. General Principles Relating to Covenants Affecting Land."

124. See *Property Law Act 2007* (N.Z.), *supra*, note 77, s. 303(1); *Land Law and Conveyancing Act 1981* (Trinidad and Tobago), *supra*, note 80, s. 118(1); *Law of Property Act 1985* (N.T.), *supra*,, note 79, s. 170(2); *Land Law and Conveyancing Reform Act 2009* (Ire.), *supra*, note 80, s. 48 (definition of "freehold covenant" as being a covenant attaching to dominant and servient land entered into after commencement of Act).

already by section 219 of the *Land Title Act* in favour of certain public authorities and designated organizations to permit them to hold negative and positive covenants in gross for the purpose of fulfilling public policy goals in connection with land use.

Like the rule that a covenant must be negative in order to be binding on subsequent owners with notice of it, the rule that a covenant must be annexed to specific benefited land is one that has been entrenched largely by virtue of having been repeated frequently, without a great deal of justification being offered. One possible justification for the rule that covenants cannot exist in gross is that the original reason given in *Tulk v. Moxhay* for recognizing restrictive covenants as running with land was to give vendors of land security that the value of any land they retained would be preserved. The requirement that an equitable restrictive covenant must affect two distinct parcels of land was therefore essential to the concept.

A second rationale may flow from the explanation of the the principle behind restrictive covenants as being "either an extension in equity of *Spencer's Case*[125] to another line of cases, or… of the doctrine of negative easements."[126] The analogy made to the law of easements attracts the requirement of a dominant and servient tenement. Yet the requirement that an easement must have a dominant tenement does not rest on any stronger policy rationale. It has been criticized as well for being based on repetition instead of reasoned analysis and policy.[127]

An argument often made against permitting covenants in gross is that it could become difficult for successive owners of burdened land to determine who holds them. The land title system relieves this concern to some extent, because a covenant must be registered against the title to the burdened land in order for a purchaser to be bound by it.[128] This does not remove the concern entirely, however. Registrations of charges against the title may not necessarily reflect the current ownership of the rights created by the charge, as assignees and successors of the chargeholder may not be punctilious in having changes in the interest recorded. If a covenantee dies intestate, for example, the right to enforce a covenant may be fragmented among several widely scattered relatives, who may be hard to identify and track down.

125. (1583), 5 Co. Rep. 16a, 77 E.R. 72. *Spencer's Case* held that the benefit and burden of covenants in leases that "touch and concern the land" are directly enforceable by the landlord against an assignee of the tenant.

126. *London and South Western Railway Co. v. Gomm* (1882), 20 Ch. D. 562 per Jessell, M.R. at 583.

127. A.J. McClean, "The Nature of an Easement" (1966), 5 U.W. Ont. L. Rev. 32 at 38. See also M.F. Sturley, "Easements in Gross" (1980), 96 L.Q.R. 557 at 568.

128. See *supra*, note 39.

While this situation can arise in connection with the ownership of the benefited land as well, it would do so less frequently because purchasers or personal representatives will normally register their ownership promptly.

2. The U.S. Position

American courts formerly reacted inconsistently to the proposition that a valid equitable servitude (equivalent to a restrictive covenant) could run with burdened land, but not be annexed to any land of the covenantee. According to the *Restatement 3d: Property (Servitudes)*,[129] covenants in gross were regularly upheld by U.S. courts in certain contexts, notably covenants relating to non-competition in sales of commercial premises, those in favour of homeowner associations representing landowners within a community building or planning scheme that did not themselves hold any of the subdivided land, and those held by public bodies for planning or conservation purposes.

The position now seems to have solidified in favour of allowing positive and negative covenants to exist in gross. The *Restatement 3d* now states confidently that "The benefit of a servitude may be created to be held in gross, or as an appurtenance to another interest in property…."[130]

3. Divided Opinion Among Law Reform Bodies

Several law reform bodies in the Commonwealth that have examined the area of restrictive covenants are divided on the question of recognizing covenants in gross.

The Ontario Law Reform Commission concluded that situations can arise in which it is desirable for covenants to be held and enforced by an entity that is not an owner of benefited land, such as a homeowner's association under a building scheme. It therefore recommended that covenants in gross should be allowed to run with land.[131] It acknowledged that there could also be situations in which it would be pointless to enforce a covenant in gross if the covenantee could not derive a substantial benefit from it, but that these could be addressed by giving the court the power to modify or discharge a covenant that did not benefit anyone to a sufficient degree to justify its continued existence.[132]

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129. American Law Institute, *Restatement of the Law 3d: Property (Servitudes)* (St. Paul: American Law Institute Publishers, 2000), vol. 1, p. 108.

130. *Ibid.*, p. 102, § 2.6(1).

131. *Supra*, note 22 at 110-111.

132. *Ibid.*

The New South Wales Land Title Office urged in 1994 that the positive covenant it proposed should be capable of existing in gross, but only in favour of a developer-manager within the framework of a strata or community scheme.[133]

By contrast, the English Law Commission has concluded that the existing rules preventing both easements and covenants in gross were justified and proposed that they should be carried forward.[134]

The Victorian Law Reform Commission rejected covenants in gross in a recently issued consultation paper, even in relation to covenants held by public bodies for planning and conservation purposes. It did so because it considered reform in this area should be oriented towards reconceptualizing covenants primarily as rights appurtenant to land rather than as contracts. To allow a freehold covenant to exist in gross would be inconsistent with the concept of a right appurtenant to land.[135]

4. Conclusion

There is reason for caution about opening the door to privately imposed restrictions on land use that are not linked to the use and enjoyment of other land in the vicinity. Apart from the potential for fragmentation of the interest among many potential holders, the legitimacy of a privately created right to enforce a permanent restriction on land use is questionable if the right is not protecting other property that directly benefits from the restriction.

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133. New South Wales Land Title Office, *supra*, note 98 at 30.

134. Law Commission, *supra*, note 22 at 15, 108 and 112. In an earlier consultation paper, the Law Commission focused on easements in discussing the merits of relaxing the rule requiring a dominant tenement. The Law Commission considered that the existence of land benefited by an easement is the rationale for giving the easement the status of a proprietary right rather than a mere licence. It reasoned that the policy behind the relaxation of the requirement of a dominant tenement elsewhere had been to permit public bodies providing services such as water, gas, and electricity lines to hold easements without owning dominant land, and pointed to the existence in the U.K. (as in B.C.) of statutory utility easements exempt from the requirement of a dominant tenement. The Law Commission was also concerned about the possibility that the dominant owner's interest could become fragmented, as in an intestacy: Law Commission, *Easements, Covenants and Profits a Prendre: A Consultation Paper* (No. 186) (London: TSO, 2008) at 17-18. These arguments are applicable to covenants as well.

135. *Supra*, note 56 at 117. In the ensuing final report, the Victorian Law Reform Commission did not change or revisit its earlier rejection of covenants in gross. See Victorian Law Reform Commission, *supra,* note 56. A rentcharge, however, exists in gross and is recognized as a real property right.

The Project Committee is not persuaded that covenants in gross running with land should be expanded beyond the extent now permitted by section 219 of the *Land Title Act*. We invite comment on this position, however.

D. What Interests in the Burdened Land Should Be Bound by Covenants?

1. Restrictive Covenants

As noted in Chapter II, it appears that a restrictive covenant will currently bind anyone in occupation of the burdened land. This can be justified on two grounds. First, a restrictive covenant would be ineffective if someone who is in a position to control activity on the burdened land were able to breach it without liability to the covenantee. Second, compliance with a restrictive covenant is usually not onerous because it is performed by refraining from doing something that the covenant prohibits. As a consequence, it is reasonable for a restrictive covenant to bind anyone in occupation of the burdened land in addition to the owner. This extends to lessees, occupiers having a licence (permission) from the owner to occupy the land, and occupiers without licence. The present law seems satisfactory in this regard.

2. Positive Covenants

(a) General

As already noted, positive covenants are usually more onerous to perform than a restrictive covenant because they require positive acts of some kind, not merely refraining from doing something on the land that is prohibited. If compliance involves expenditure or significant effort, it would be unjust to impose the burden on someone whose connection with the burdened land is insubstantial and transitory. A distinction should be made, therefore, between restrictive and positive covenants in terms of the interests in burdened land that are bound.

The Project Committee considered whether liability for breach of a positive covenant running with land should be restricted to the owner of the freehold title, but concluded that this would not give adequate protection to the covenantee when land is leased for long periods and the owner is much less engaged in the management of the burdened land than the holder of a non-title interest.

Apart from the original covenantor, fairness requires that only those having an interest with a durable connection with the land and who are in a position to exert control over the land should be subject to the obligations of a positive covenant. The principal categories of interest holders are: the owner for the time being of the freehold title, a holder of a life interest (life tenant), a lessee or residential tenant, a li-

censee occupying the land, an occupier without licence, and a mortgagee in possession. Which of these categories of possessory interest holders should be bound by a positive covenant running with land is discussed below.

(b) Owner

Provided that the current owner of the fee simple is the original covenantor or a successor in title, that current owner is logically the principal party against whom the positive covenant should be enforceable. If it were otherwise, the covenant could not be said to "run with land."

The case of land subject to a mortgage requires some special consideration. Uncertainty still persists as to whether a mortgage of registered land in British Columbia operates only as a charge to secure the mortgage debt, or causes the legal title to pass to the mortgagee as it did at common law, leaving the mortgagor as the owner only of an equity of redemption (right to redeem) despite the fact that title to the land remains registered in the name of the mortgagor.[136] Thus the term "owner" is somewhat ambiguous when used in reference to mortgaged land. Depending on the view taken of the effect of a mortgage, it might be understood as equally referable to the mortgagee as owner of the legal title and to the mortgagor holding the equity of redemption.

Whether or not a mortgage of registered land still has the effect it had at common law, it is the mortgagor who is more likely to be in possession of the land rather than the mortgagee. Thus it is usually the mortgagor rather than the mortgagee who is in a better position to control the activity on the land and fulfil obligations attaching to the land. Even if not in actual possession, the owner of an equity of redemption has a degree of direct connection to the land that is virtually equivalent to that of an owner of an absolute fee simple. For this reason, and because of the lingering uncertainty as to whether a mortgage operates to transfer the legal title, an owner of an equity of redemption in mortgaged land should be expressly included in the class of interest holders against whom a covenant may be enforced.

136. Section 231 of the *Land Title Act* now states that a mortgage operates to charge the estate of the mortgagor to secure payment of the mortgage debt, whether or not the mortgage contains words of transfer or charge subject to redemption. Previous to the enactment of this provision by the *Land Title (Amendment) Act 1989*, S.B.C. 1989, c. 69, s. 25, it was generally thought on the basis of the judgment of Galliher, J.A. in *District of North Vancouver v. Carlisle* (1922), 31 B.C.R. 372 (C.A.) that the *Land Title Act* did not change the common law rule that a mortgage operates to pass the legal title to the mortgagee. In *Dhillon v. Jhutree* (1998), 49 B.C.L.R. (3d) 311 (C.A.), the Court of Appeal left open the question of whether the 1989 amendment now reflected in s. 231 had produced any change in the law, because the point had not been argued.

(c) Purchaser in Possession

Land is sometimes sold under an arrangement often referred to as an "agreement for sale" whereby the purchase price is paid in instalments over a period of time and the title is only transferred after the final instalment is paid. Normally the purchaser is in possession of the land pending the actual transfer of title. Section 16(1) of the *Law and Equity Act* makes the rights of redemption and remedies for default between the vendor and purchaser very similar to those between a mortgagor and mortgagee if the agreement for sale has a term for payment longer than six months and the purchaser is entitled to be in possession during that period.[137]

A purchaser in possession for an extended period under an agreement for sale of this kind is in many ways similarly situated to a registered owner who has mortgaged the land. It is clear that a purchaser in possession under an agreement for sale may be concurrently liable with the registered owner for breach of a restrictive covenant.[138] It would be reasonable to treat a purchaser in possession in the same manner as the registered owner in relation to positive covenants running with land as well. As very few agreements for sale have a term less than six months, the prerequisites for the application of section 16(1) of the *Law and Equity Act* provide a rational and workable benchmark for the kind of durable connection with the land and sufficient level of control over it to justify imposing the burden of positive covenants. Accordingly, a purchaser under an agreement for sale to which section 16(1) of the *Law and Equity Act* would apply should be subject to the burden of positive covenants attaching to the land.

(d) Life tenant

A life tenancy is an interest in freehold land carrying the right to enjoyment of the land for the lifetime of the holdemaker. A life tenant may or may not be in actual possession, but in either case has a substantial connection with the land. In addition, life tenants are normally responsible for at least some categories of expenses of associated with the land. It would not be unjust or unreasonable for obligations attaching to the land to be enforceable against a life tenant.

137. R.S.B.C. 1996, c. 253.

138. *Terasen Gas Inc. v. Utzig*, 2010 BCSC 90, at paras. 308-311.

(e) Lessees

The term "lessee" is used here to refer to tenants whose tenancies are subject to the *Commercial Tenancy Act*.[139] The case of residential tenants is discussed separately below.

Lessees may have either a relatively brief connection with the burdened land or a prolonged and extensive one, depending on the term of the lease and the extent of the premises covered by the lease.

The different situations of a long-term and short-term lessee may be considered in relation to a covenant to maintain and repair a drainage easement which an adjoining landowner is seeking to enforce. It is quite possible that a long-term lessee of the burdened land may be responsible under the terms of the lease for many expenses associated with the land and its upkeep. The long-term lessee may also derive considerable benefit from a reciprocal easement and covenant to repair given to the lessor by the adjoining landowner in respect of the drainage works crossing that landowner's property. It would not be unjust for the long-term lessee to be bound by the covenant owed to the adjoining landowner, particularly as the lessor and lessee can agree between themselves on how the financial responsibility for performing obligations attaching to the leased land will be borne and indemnify each other accordingly.

How long the lease term should have to be in order for the lessee to be subject to the obligations of a positive covenant running with land is a question that can only have a somewhat arbitrary answer. The Ontario Law Reform Commission thought the lease term should have to be longer than 21 years.[140] The English Law Commission, initially thought so as well, but its ultimate recommendation was that a lessee should be subject to the obligations of a positive covenant if the lease were longer than seven years.[141] The New Zealand *Property Law Act 2007* sets the bar at a 10-year term or occupation under any renewal of a term of at least 10 years.[142]

139. R.S.B.C. 1996, c. 57.

140. Ontario Law Reform Commission, *supra*, note 22 at 123.

141. *Supra*, note 22 at 141 and 143. The reason for adopting a lease term of seven years or longer as the threshold for liability to perform a positive covenant running with land was that seven years is the minimum length of term required for a lease to be registrable under the English land registration system: *ibid.* at 142.

142. *Supra*, note 77, ss. 4 (definition of "occupier"), 303(1).

The Project Committee considers that in order to justify subjecting a leasehold to a positive covenant of the kind contemplated by Tentative Recommendation 1, the lease should have a term of not less than 10 years, or be renewable at the lessee's option for at least 10 years in total.

The extent of the premises covered by a lease is also a factor to be weighed in considering whether the leasehold should attract the positive obligations running with the land. In order for positive obligations created by the owner to be imposed on a lessee, the lessee should be similarly situated to the owner vis-à-vis those to whom the obligations are owed. A lessee of a floor in a building or even an entire building does not have the same degree of connection with the land as the holder of a lease of the actual land itself (ground lease), and certainly not the same degree of control over activity of the land. A covenantee could not reasonably expect the lessee of a portion of floor space in a building to fulfil all positive obligations attaching to ownership of the entirety of the land.

On the other hand, a lessee under a long-term ground lease of the burdened land has a durable and substantial connection with the land. A covenantee might quite readily look first to the person in actual possession of the burdened land for performance of a covenant. Vis-à-vis the covenantee, a ground lessee is in virtually the same position as an owner. This leads the Project Committee to the view that a lease should have to cover the entire area of the burdened land rather than only a part in order for the leasehold to be bound by positive covenants.

In other words, the lease should be one outside the scope of section 73(1) of the *Land Title Act*, which requires subdivision approval for leases of less than a complete parcel of land.[143] Section 73(1) does not apply to leases of buildings and parts of buildings, but these too should be unaffected by positive covenants for the reasons stated above.

The Project Committee's conclusion is that in order for a leasehold interest to be bound by positive covenants under Tentative Recommendation 1, the lease should

(a) have a term of 10 years or more, or be renewable at the lessee's option for a total length of time of 10 years or more,

143. *Supra*, note 37, s. 73(1)(b). Leases for not more than three years are excepted: *ibid.* Also excepted are leases for buildings or part of a building: *ibid.*, s. 73(3). A "parcel" is defined in the *Land Title Act* as "a lot, block or other area in which land is held or into which land is subdivided": *ibid.*, s. 1(1).

(b) be a ground lease (one not covering only buildings or a part of a building), and

(c) not be subject to section 73(1) of the *Land Title Act*.

(f) Residential tenants

Tenancies governed by the *Residential Tenancy Act* can have a term of up to 20 years.[144] Most are far shorter, however. While commercial lessees often occupy an entire lot or a large area of space, residential tenants typically occupy a rental unit that is only a small portion of the landlord's property. While the rental of detached dwellings may be an exception, most residential tenancies are of the apartment type and the tenant is not normally in possession of enough of the landlord's property to fulfil obligations to third parties that may attach to that property, even if the tenancy is one of long duration.

The Act and the standard terms that must form part of every tenancy agreement subject to the Act impose a general duty on the landlord to repair the residential property. The tenant is responsible only for repairing damage caused by the tenant or someone whom the tenant has brought onto the property. Responsibility for the repair of the residential property is not variable by agreement, as it is in a commercial lease. Thus it is not feasible to make a residential tenant subject to obligations under a positive covenant running with the landlord's land that would involve active operations on the land.

As the tenant enjoys only a right to occupy a rental unit that is a fraction of a single residential property in most cases, and contributes toward the financial obligations of the landlord through payment of rent in any case, it would also be unreasonable to expose residential tenants to liability for financial obligations of the landlord under a positive covenant.

These factors militate against including residential tenants in the class of holders of non-title interests in burdened land that are subject to a positive covenant, regardless of the length of their tenancies. The Project Committee concludes that positive covenants running with land should not be enforceable against residential tenants.

144. *Residential Tenancy Act*, S.B.C. 2002, c. 78, s. 4(i).

(g) Licensees and Other Occupiers

While in some cases occupation under a licence may be similar to occupation under a lease in duration and in other ways, generally licensees have a transitory and tenuous connection with the land that does not justify requiring them to perform positive covenants involving expenditure or active operations. This is even more true of occupants who do not have any formal or informal licence from the owner to be present on the land.

(h) Mortgagees in Possession

A mortgagee in possession of burdened land has both control of the land and the potential to acquire full ownership through foreclosure. For these reasons, a mortgagee in possession, vis-à-vis a covenantee, is in a position similar to that of an owner. The New Zealand *Property Law Act 2007* makes positive covenants that run with land enforceable against mortgagees in possession.[145] The English Law Commission and Ontario Law Reform Commission recommended that this be possible also in their respective jurisdictions.[146]

In British Columbia, the issue of whether a mortgagee in possession should be subject to the burden of positive covenants running with land could arise only if the covenant is registered in priority to the mortgage.[147] In any case, the Project Committee disagrees with the suggestion that mortgagees in possession should be bound by positive covenants running with the mortgaged land. Mortgagees go into possession typically for only a short period and only to realize upon their security. They do not have a sufficiently durable connection with the burdened land to justify the imposition of a duty to perform positive covenants.

The Project Committee therefore tentatively recommends:

145. *Supra*, note 77, ss. 4 (definition of "occupier"), 303(1).

146. Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants* (Report No. 127) (London: HMSO, 1984) at 79. The Law Commission reiterated its recommendation that mortgagees in possession be subject to the burden of positive covenants when it revisited the area in its 2011 report: *supra*, note 22 at 143.

147. Section 28 of the *Land Title Act*, supra, note 37, provides that charges against a title rank in priority according to the order of registration. Accordingly, if a mortgage is registered ahead of a covenant, the mortgagee will be unaffected by it as a matter of priorities, apart from the issue of whether the covenant is substantively capable of binding the mortgagee's interest.

4. A positive covenant running with land should be enforceable only against:

(a) an owner of the following estates or interests, whether or not in possession,

(i) the fee simple, but not including a mortgagee,

(ii) an equity of redemption,

(iii) a life estate,

(b) a purchaser under an agreement for sale within the meaning of section 16(1) of the Law and Equity Act,

(c) a lessee under a lease that

(i) has a term of 10 years or more, including the length of any renewal term if the lease provides for renewal at the option of the lessee,

(ii) is a ground lease (one not covering only buildings or a part of a building), and

(iii) is not subject to section 73(1) of the Land Title Act.

E. Liability for Specific Breaches of a Covenant Running With Land

1. General

The question of who should be liable for a specific breach of a covenant running with land is a separate question from that of the interests which the covenant should bind. This flows in part from the fact that the covenant attaches to the land and the ownership of the land and interests in it, as well as occupancy, changes over time. It also flows in part from differences in how a breach of a positive and a restrictive covenant occurs and the nature of the remedy.

2. Liability for Breach of Restrictive Covenants

Breach of a restrictive covenant occurs through commission of an act, i.e. doing or authorizing what the covenant prohibits. The usual remedy for breach of a restrictive covenant is an injunction to restrain the breach. In order to obtain an injunc-

tion, it is necessary to name defendants and prove that they have contravened it.[148] Even though a restrictive covenant is capable of binding virtually everyone who may occupy the land, an injunction would only be obtainable against someone against whom the commission of a breach could actually be proved.[149] This means in effect that liability should not extend beyond persons bound by the covenant who actually cause the breach or who are in a position to stop the prohibited activity and fail to do so.[150]

For example, if a lessee carries on a business from the land in contravention of a covenant that prohibits that particular use, and the lessor allows the prohibited activity to carry on, both the landlord and the lessee should be liable. If the situations were reversed, and the breach was that of the lessor (say, having erected a second dwelling on a lot restricted by a building scheme to one dwelling) a lessee of one of the dwellings would not be in a position to restrain the lessor, and so only the lessor should then be liable for the breach.

Even though virtually any occupier of the burdened land may be bound by a restrictive covenant, as mentioned in Chapter II, only a person who has actually caused a specific breach or who has acquiesced in it by failing to take steps within that person's power to stop it should be liable for a breach of a restrictive covenant.

3. Liability for Breach of Positive Covenants

A breach of a covenant that requires some positive act, such as making a cost-sharing payment or carrying out active maintenance, occurs through omission to perform the required act. If the covenant is not performed, all those bound by it are in breach. Each interest holder is equally liable for an omission to perform the covenant, and it should be possible to correct the breach or recover a loss resulting from it by proceeding against all or any of them ("joint and several liability").

148. Once an injunction has been granted, anyone having notice of an injunction may be found in contempt of court for disobeying it, whether a party to the proceeding or a non-party: *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048. Normal civil procedure must be followed in order to *obtain* an injunction in the first instance, however. This involves impleading a defendant and proving the allegations against that defendant.

149. Technically, an occupier must have had notice of the restrictive covenant to be bound by it, but as stated *supra*, note 41, s. 27(1) of the *Land Title Act* ensures that virtually no one could claim not to have had notice of a registered restrictive covenant. If the restrictive covenant was not registered, it would likely not bind the current fee simple owner and therefore no one claiming a right of occupation under him or her, unless the fee simple owner was the original covenantor.

150. Law Commission, *Easements, Covenants and Profits à Prendre: A Consultation Paper*, *supra*, note 134 at 184. See also Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre*, *supra*, note 22 at 150.

As between those liable for breach of a positive covenant capable of running with land, the liability should be shared in whatever manner they may agree upon. For example, a long-term lease might provide that the lessee will indemnify the lessor in full for any liability to a third party caused by a failure of the lessee to perform obligations under the covenant, or vice versa.

In the absence of an agreement, the liability should be shared between those liable according to their respective degrees of fault. Sometimes this would simply be a percentage share based on the number of parties liable, but not in every case. For example, if a recent purchaser of a one-fifth interest who has held the interest for only one year satisfies a liability arising from the default of the remaining co-owners in making cost-sharing payments extending over several years, a sharing of liability strictly in proportion to the fractional shares of the co-owners would be unjust.

Each interest holder who has satisfied a liability for breach of a covenant to an extent greater than what would be dictated by the extent of that interest holder's own fault should have a right to recover contribution from the other parties liable.

4. Liability For a Continuing Breach

An owner or holder of another interest in burdened land should not be liable for a breach committed at a time when he or she did not hold an interest in the land or, in the case of a restrictive covenant, occupied it with notice of the covenant. Instead, that person should only be liable for a breach occurring at a time while he or she held the interest that is bound by the covenant or was an occupier.[151] Applying those principles to the case of a breach of a covenant that continues through one or more changes in ownership leads to the conclusion that liability should rest on those who have held interests in the burdened land at any time while the breach persisted, provided they would have been liable for the particular breach in question if it had begun while they held those interests.

The liability of present and past interest holders for a continuing breach should be joint and several. This would allow present interest holders who may be forced to bear the entire cost of correcting the breach, or to meet a monetary liability for damage covering the entire period in which the breach continued, to recover contribution from their predecessors who share the responsibility for it.

151. Ontario Law Reform Commission, *supra*, note 22 at 125.

5. Jurisdiction to Apportion Fault for Breach of Covenants and Award Contribution

If two or more persons are concurrently liable for a breach of either a restrictive or positive covenant running with land and one of them satisfies a monetary liability arising from breach of the covenant to an extent in excess of that person's own share of responsibility, a judicial apportionment of fault may be needed in order to allow rights to contribution to be exercised unless the persons liable agree on how the liability should ultimately be borne amongst them.

Jurisdiction to allocate liability and award contribution between persons concurrently liable for a breach of a restrictive covenant may already exist because of the right of contribution that arises at common law when a shared contractual obligation is satisfied by one of several obligors.[152] This is not completely clear in respect of liable parties other than original co-covenantors, however, because the obligation to perform a restrictive covenant is only strictly contractual as between the original covenantee and covenantor.

As positive covenants capable of running with land as a result of the implementation of Tentative Recommendation 1 would derive their force only from implementing legislation, jurisdiction to apportion fault for their breach and award contribution between the interest holders in the burdened land would probably need to be conferred by legislation as well.

It would be desirable to confer a clear jurisdiction on the Supreme Court of British Columbia to apportion fault on a just and equitable basis for a breach of covenant running with land, quantify the amounts of contribution payable between the interest holders liable for the breach, and award judgment for contribution accordingly.

6. Release of Original Covenantor from Contractual Liability

It is an unjust and anomalous feature of the present law that the original covenantor remains liable to the covenantee and the covenantee's assignees, purely on the basis of contract, for breaches of the covenant occurring after the covenantor has ceased to own the burdened land and is no longer in a position to control its use. This is not the case in relation to an easement. A grantor of an easement is not responsible towards the grantee for anything that occurs in relation to the easement after divesting all interest in the servient land.

152. *Batard v. Hawes* (1853), 2 E. & B. 287, 118 E.R. 775.

In nearly every other respect, covenants running with land have evolved into the rights of property and their contractual character has faded into the background.[153] As in the case of a grantor of an easement, an original covenantor should be released from liability for breaches arising after the covenantor has ceased to hold any interest in the burdened land, though remaining contractually liable for a breach that took place before that point.

The Project Committee tentatively recommends:

5. A person should be liable for a breach of a restrictive covenant if that person

(a) is bound by the restrictive covenant, and

(b) has either

(i) committed or authorized the breach, or

(ii) failed to take steps within the power of that person to correct or stop the breach.

6. A person should be jointly and severally liable for breach of a positive covenant capable of running with land if that person is bound by the positive covenant, and has failed to perform the positive covenant.

7. A person should be jointly and severally liable for a continuing breach of a covenant running with land if that person would have been liable for the breach if the breach had first occurred while that person held an interest in the land or right of occupation, and the breach continued while that person held the interest or right.

8. A person liable for a breach of a covenant running with land who satisfies the liability to an extent greater than that person's own share of fault should have a right to contribution.

153. See Victorian Law Reform Commission, Consultation Paper 9, *supra*, note 56 at 117.

9. The Supreme Court of British Columbia should be empowered to apportion liability for breach of a covenant running with land among the persons liable, to quantify the contribution payable under Tentative Recommendation 8 between those persons, and give judgment accordingly for the amounts of contribution payable .

10. The original covenantor should be automatically released from liability for a future breach of the covenant upon divesting all interest in the burdened land, but should remain liable for a breach of covenant that occurred while the covenantor owned or held an interest in the land.

F. Remedies for Breach of Covenants Affecting Land

1. General

The remedies of injunction and equitable damages appear to be adequate in relation to the breach of a restrictive covenant. Injunctions are well-adapted to stopping conduct that violates a restriction. A breach of a positive covenant, however, requires a remedy compelling performance of the required act. In addition, positive covenants running with land are creatures of statute, not equity. Expanding the availability of positive covenants creates a need for some new thinking in regard to the remedies that may be needed to make them effective.

2. Compliance Orders

Damages will not be a sufficient remedy in all cases because the harm from non-compliance with a positive covenant, such as a covenant to maintain and repair, may require positive remedial steps to be taken quickly. For example, a positive covenant may be registered that requires a retaining wall to be maintained in good repair to protect adjoining land. A landslide damages part of the wall that had been allowed to deteriorate. The weakened wall threatens to give way, causing a much larger landslide that will damage the covenantee's land. The covenantee does not have the right to trespass on the burdened land to do the necessary work. If the owner of the burdened land ignores the situation, the covenantee needs to obtain an order directing the owner of the burdened land to carry out the necessary work. The covenantee should not be restricted to waiting for the loss to occur and claim damages.

If the owner of the burdened land is the original covenantor, the covenantee may be able to obtain a decree of specific performance. Specific performance is a discretionary equitable remedy requiring a contract to be performed according to its

terms that is sometimes granted when damages are inadequate as a remedy. It is only available to enforce a contract, however. If the owner of the burdened land is no longer the original covenantor, the covenantee cannot base the claim in contract and must claim relief on the basis of the covenant running with the land. As a breach of the covenant is occurring, a mandatory injunction might be obtainable, but as noted above this is by no means certain given the highly discretionary nature of the remedy.

Rather than relying on equitable remedies for the enforcement of positive covenants, it would be simpler and more effective to give a new statutory remedy for this new category of statutory right. Positive covenants could be enforced by a compliance order that would serve the same purpose as specific performance or an injunction, but without the technicality surrounding either of the equitable remedies. Positive covenants requiring contribution toward expenses or other payments could be enforced by an order for payment of specific amounts.[154]

The jurisdiction to grant a compliance order would remain discretionary in the sense that the court should remain able to weigh the degree of benefit that the covenantee would obtain from the order against the degree of harm that might be suffered by the owner or lessee of the burdened land.

The statutory jurisdiction to grant compliance orders could be extended to the enforcement of restrictive covenants as well. There would be no need to confine it to positive covenants, nor to make it an exclusive remedy. Damages and injunctions could remain available as alternative remedies for the breach of both restrictive and positive covenants.

3. Damages

Damages should be available to compensate for loss resulting from a breach of a positive covenant, either instead of or in addition to the other remedies outlined here. In the example given above of breach of a covenant to maintain and repair a retaining wall, relief to the covenantee might extend to an order directing that work be done to rebuild the damaged part of the retaining wall on the burdened land and damages be paid for the cost of removal from the plaintiff's land of mud and debris deposited by the slide.

154. The English Law Commission urged that jurisdiction should be conferred to enforce positive "land obligations" simply by ordering payment of a specified amount, as well as by injunction, damages, or an order to comply with the obligation: *supra*, note 22 at 152.

As positive covenants running with land are statutory, unlike the equitable restrictive covenant, damages awarded for their breach would be damages at law rather than in equity. It would simplify the law to make damages available on the same basis for breach of a covenant affecting land whether the covenant is restrictive or positive. The theoretical availability of an injunction should not have to be a prerequisite for damages to be awarded for breach of a covenant, as it is in the case of restrictive covenants at the present time. Equitable damages need not be abolished as a remedy for breach of a restrictive covenant, but should coexist as an alternative to a statutory claim for damages under the reforming legislation.

4. Accounting

Default in the performance of a positive obligation to pay or contribute to shared expenses would mean in some cases that other owners may have to shoulder the burden of cost and try to collect from the defaulting owner later. Sometimes the determination of what is owed may not be a completely straightforward exercise and amounts may be disputed. Owners therefore need access to the remedy of accounting, or in other words the right to apply to have the obligation quantified by the court.

5. Suspension of Benefits Under Reciprocal Covenants

When covenants are reciprocal, as in a building scheme where all lots are benefited and burdened by mutual covenants, a useful means of procuring compliance would be to order suspension of the benefit of a reciprocal covenant until the delinquent owner complies. For example, the right to use of a common amenity such as a parking lot or recreational facility might be withdrawn pending compliance. Suspension of benefits under a system of reciprocal covenants should be available as an additional remedy whether the covenants are positive or negative.

6. Lien

A remedy against the burdened land itself is desirable to procure compliance with covenants in addition to the personal remedies discussed above. If an owner of burdened land is outside the jurisdiction, has no tenant liable for breach concurrently with the owner, and ignores proceedings to enforce the covenant, there may be little effective recourse except to prosecute a claim for damages to judgment and then attempt to execute against the land, a lengthy process in which the right to an execution sale is not absolute.[155]

155. Execution against land is not automatic at the option of the judgment creditor. It requires discretionary authorization by the court: see *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, ss. 96(2). In the case of an absentee judgment debtor in which substituted service has been or-

A lien against the burdened land enforceable by sale should be available for the cost of correcting a breach of covenant and the losses arising from the breach. The *Strata Property Act*[156] affords a model for such a lien. Section 116(1) of the *Strata Property Act* allows imposition of a lien on a strata lot for outstanding amounts due to a strata corporation for fees and special levies. A lien of this kind would be particularly appropriate in the context of an integrated development where there are mutual covenants calling for contribution to shared expenses. A lien remedy can also be justified in a simple case of neighbouring landowners if non-performance of a covenant puts the covenantee to expense.

The lien would be granted by judicial declaration, would be registrable against the title or the interest of the party in breach, and would be enforced by sale.

7. Tentative Recommendation Concerning Remedies

All of the above remedies should be available for breach of a covenant running with land.

The Project Committee tentatively recommends:

11. All of the following remedies should be available for breach of a covenant running with land, whether the covenant is restrictive or positive:

(a) an order to comply with the covenant, whether framed as an exercise of a statutory jurisdiction to order compliance, an injunction, a decree of specific performance, or otherwise;

(b) damages;

(c) accounting;

(d) an order for suspension of benefit under a reciprocal covenant;

(e) a lien on the interest of the party in breach for the losses arising from the breach.

dered, land must be advertised for six months after the order for sale before the sheriff may sell it.

156. *Supra*, note 74.

G. Conclusion

The Project Committee believes the reforms covered by the tentative recommendations in this consultation paper are timely and will simplify and rationalize the law of covenants affecting land. We invite comment on these tentative recommendations from all interested sectors.

LIST OF TENTATIVE RECOMMENDATIONS

1. Subject to the Land Title Act and to the intent of the parties, a covenant by a fee simple owner that imposes a positive obligation on the covenantor to perform a duty or act should be capable of running with the land and binding the successors in title of the covenantor, if and to the extent that the duty or act consists of any of the following in relation to the land of either the covenantor or covenantee, or to land in which they both have an interest:

(a) payment of, or contribution towards, expenditures for work, provision of materials, or operations in, on, above or under the land, or

(b) carrying out any work or operations, including maintenance, repair or replacement of anything in whole or in part, in, on, above or under the land.

(2) Sections 221 and 182(1) of the Land Title Act should be amended to authorize registration of covenants described in paragraph 1 (1) of this tentative recommendation against the title to the burdened land and their endorsement on the title to the benefited land, respectively.

[P. 33]

2. The Land Title Act should be amended to require an application for approval of a subdivision of land affected by a positive covenant of the kind described in Tentative Recommendation 1(1) to be accompanied by

(a) a description of how the burden or benefit of the covenant is to be allocated amongst the subdivided parcels of land; and

(b) either

(i) the written consent of each registered owner of the land benefited by the covenant to the proposed application of the covenant following the subdivision, or

(ii) an order of the court cancelling, modifying, or making an appropriate allocation of the benefit or burden of the covenant in accordance with the proposed subdivision plan.

[P. 37]

3. Legislation implementing Tentative Recommendation 1 should be expressly prospective, so that positive covenants of the kind described in Tentative Recommendation 1 run with the burdened land only if created after the effective date.

[P. 38]

4. A positive covenant running with land should be enforceable only against:

(a) an owner of the following estates or interests, whether or not in possession,

(i) the fee simple, but not including a mortgagee,

(ii) an equity of redemption,

(iii) a life estate,

(b) a purchaser under an agreement for sale within the meaning of section 16(1) of the Law and Equity Act,

(c) a lessee under a lease that

(i) has a term of 10 years or more, including the length of any renewal term if the lease provides for renewal at the option of the lessee,

(ii) is a ground lease (one not covering only buildings or a part of a building), and

(iii) is not subject to section 73(1) of the Land Title Act.

[P. 49]

5. A person should be liable for a breach of a restrictive covenant if that person

(a) is bound by the restrictive covenant, and

(b) has either

(i) committed or authorized the breach, or

(ii) failed to take steps within the power of that person to correct or stop the breach.

[P. 53]

6. A person should be jointly and severally liable for breach of a positive covenant capable of running with land if that person is bound by the positive covenant, and has failed to perform the positive covenant.

[P. 53]

7. A person should be jointly and severally liable for a continuing breach of a covenant running with land if that person would have been liable for the breach if the breach had first occurred while that person held an interest in the land or right of occupation, and the breach continued while that person held the interest or right.

[P. 53]

8. A person liable for a breach of a covenant running with land who satisfies the liability to an extent greater than that person's own share of fault should have a right to contribution.

[P. 53]

9. The Supreme Court of British Columbia should be empowered to apportion liability for breach of a covenant running with land among the persons liable, quantify any contribution payable under Tentative Recommendation 8 between those persons, and give judgment for the amounts of contribution payable .

[P. 54]

10. The original covenantor should be automatically released from liability for a future breach of the covenant upon divesting all interest in the burdened land, but

should remain liable for a breach of covenant that occurred while the covenantor owned or held an interest in the land.

[P. 54]

11. All of the following remedies should be available for breach of a covenant running with land, whether the covenant is restrictive or positive:

(a) an order to comply with the covenant, whether framed as an exercise of a statutory jurisdiction to order compliance, as an injunction, a decree of specific performance, or otherwise;

(b) damages;

(c) accounting;

(d) an order for suspension of benefit under a reciprocal covenant;

(e) a lien on the interest of the party in breach for the losses arising from the breach.

[P. 57]

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