Report on Section 35 of the *Property Law Act*

A Report prepared for the British Columbia Law Institute by the Members of the Real Property Law Reform (Phase 2) Project Committee

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British Columbia Law Institute

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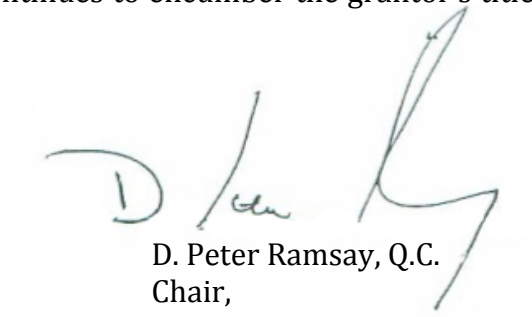
INTRODUCTORY NOTE

Report on Section 35 of the *Property Law Act*

Section 35 of the *Property Law Act* allows the Supreme Court of British Columbia to remove certain kinds of charges from the title to land or modify them. One of the specified grounds is that the charge has become obsolete. Another is that the charge is impeding reasonable use of the land without conferring practical benefit to others. The interests to which this power extends include easements and statutory rights of way, restrictive covenants, statutory building schemes, rights to extract or remove substances from land, and mineral or timber reservations.

This report examines section 35 and its judicial interpretation in depth. It asks whether the section should be expanded to cover a broader category of regulatory land use restrictions. It also considers whether there is a need for additional grounds in section 35 for the cancellation or modification of charges, or reformulation of the existing grounds. In particular, the report considers whether the court should be required to take the public interest into account.

The report concludes that expansion of section 35 to embrace regulatory restrictions or additional grounds is not warranted. It does recommend, however, that the section apply to unregistered interests in the currently listed categories as well as registered ones. This would make relief available under section 35 when the charge in question has not been registered, but continues to encumber the grantor's title in the absence of a change of ownership.



D. Peter Ramsay, Q.C.
Chair,
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January 2012

Real Property Law Reform (Phase 2) Project Committee

The Real Property Reform (Phase 2) Project Committee was formed in August 2008 to make recommendations for the reform of several distinct areas of real property law. The members of the committee are:

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The Institute extends its thanks to all those individuals and organizations who responded to the consultation paper that preceded this report. The comments they provided were of great assistance to the Project Committee in reviewing and refining the recommendations reflected in the report.

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The Institute acknowledges the contribution of the legal staff of the Institute in supporting the work of the Project Committee and the Board of Directors leading to this report, in particular Mr. Greg Blue, Q.C., project manager, Mr. Kevin Zakreski, and Mr. Andrew McIntosh. Other present and former members of the Institute staff who contributed to the project at various times were Mr. Christopher Bettencourt, Ms. Emma Butt, Ms. Heather Campbell, Ms. Kristine Chew, Ms. Setareh Javadi, and Ms. Elizabeth Pinsent.

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EXECUTIVE SUMMARY

Section 35 of the *Property Law Act* empowers the Supreme Court of British Columbia to modify or cancel certain listed categories of incorporeal (non-possessory or non-title) interests in land on specified grounds. These include easements, statutory rights of way, statutory building schemes, restrictive covenants, and some categories of rights to extract or remove substances from the land.

One of the grounds on which this power may be exercised is that the interest in question is obsolete because of changes in the character of the land or the neighbourhood or other circumstances considered material by the court. Non-use or non-enforcement over a long period of time does not in itself render an interest in the listed categories obsolete, though it may support a finding of obsolescence in combination with other factors, such as change in the pattern of use of the surrounding lands.

Other grounds for cancelling or modifying an interest in a listed category are that it impedes the reasonable use of the land it affects without conferring practical benefit to others, that the holder of the interest has agreed to its modification or cancellation, that modification or cancellation will not injure the holder, or that the instrument creating the interest is invalid, unenforceable, or has expired.

Section 35 provides a means of clearing the title to land of charges that have ceased to fulfil their purpose or that no longer have practical value. The section is treated as a complete code regarding judicial extinguishment or modification of the incorporeal interests to which it extends.

The criteria for exercise of the power to cancel or vary interests covered by section 35(1) are not easy to meet. Section 35 does not call for the court to simply balance the interests of a landowner and the holder of an incorporeal interest in the land. The court will not cancel or modify interests covered by section 35(1) unless their continuance would cause very substantial detriment to the landowner without any realistic practical benefit to the holder of the right.

A review of section 35 of the *Property Law Act* was included in the Real Property Reform Project. Expansion of section 35 to embrace a wider spectrum of regulatory land use restrictions was considered at the invitation of some stakeholder sectors. Also considered was the addition of the public interest as a further criterion for the court to weigh in deciding whether to exercise powers of modification or cancellation under the section. The conclusion ultimately reached, however, was that these

changes would represent too deep an encroachment into the area of public land use planning, and neither is recommended in this report.

The review indicated that section 35 is interpreted in a fairly consistent manner according to principles that remain essentially sound. Amendment is not required for the typical reasons of clarification, removing uncertainties, or resolving inconsistent interpretations. As the section currently applies only to registered interests, however, its characterization in case law as a complete code creates doubt as to whether the common law doctrine of implied release (deemed abandonment) still applies to unregistered incorporeal interests that have outlived their purpose but remain in effect in the absence of a change in ownership of the land. If the doctrine of implied release has been completely supplanted, a landowner who originally granted a clearly obsolete easement or restrictive covenant or other interest covered by section 35(1) that remains unregistered could be without a remedy.

Accordingly, this report recommends that section 35(1) of the *Property Law Act* be amended to extend to unregistered rights and interests in the listed categories in addition to those that are registered.

I. INTRODUCTION

A. General

Real property law recognizes certain categories of rights over land owned by another person. These rights include positive easements and statutory rights of way, which allow their holder to use land belonging to someone else in a certain way. They include restrictive covenants and negative easements, which prevent land belonging to another from being used in a particular manner. They also include *profits à prendre*, which confer the right to remove or extract products or materials from the land like timber and minerals. Most of these rights are created by private agreement, and some result from agreements between a private party and a public authority. They are said to be *incorporeal*, meaning that they do not give the right to possession of the land itself.

When incorporeal rights of this kind persist after they have ceased to be used or to fulfil their original purpose and their holders refuse to release them, they can interfere with the development of land in useful ways or with the marketability of land, essentially being "clogs" on the title.

At common law, the doctrine of implied release allowed for easements and covenants to be removed on the ground of deemed abandonment. For the doctrine of implied release to apply, the holder of the easement or covenant had to demonstrate a fixed intention not to assert the right or to attempt to transfer it to anyone else.[1] One of the ways the intention to abandon the right could be demonstrated was by showing that there had been an extended period of non-use. At one time, non-use for 20 years was sometimes considered to raise a rebuttable presumption of abandonment.[2] This is no longer the case, however.[3]

1. *Tehidy Minerals Ltd. v. Norman*, [1971] 2 Q.B. 528 at 553 (C.A.).

2. *Lawrence v. Obee* (1814), 3 Camp. 514, 170 E.R. 1465 (bricking up window for 20 years deemed an abandonment of a negative easement of light); *Hepworth v. Pickles*, [1900] 1 Ch. 108 (restrictive covenant against sale of liquor not enforced for over 24 years running from the time the covenant was created, despite continuous sale of liquor over the period).

3. *Benn v. Hardinge* (1993), 66 P. & C.R. 246 at 262.

In British Columbia, the common law doctrine of implied release has been supplanted by section 35 of the *Property Law Act* with respect to the rights and interests covered by the section.[4] Section 35 empowers the Supreme Court of British Columbia to modify or cancel, on specified grounds, several listed categories of incorporeal rights on application by a person having an interest in the land they affect. This report summarizes the review of section 35 carried out as part of the Real Property Reform Project (Phase 2) and the conclusions reached.

B. The Real Property Reform Project

This report is issued in connection with the Real Property Reform Project, a multi-year initiative funded by the Law Foundation 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. The objective is to develop concrete recommendations for legislative reform where 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 law reform recommendations. The members of the Project Committee for Phase 2 are listed at the beginning of this document.

C. Why Section 35 of the *Property Law Act* was Reviewed in this Project

During Phase 1 of this project, the British Columbia Law Institute (BCLI) was invited to consider whether section 35 should be expanded or replaced with a mechanism for removing regulatory restrictions on land use that have outlived their purpose. A review of section 35 was therefore included in Phase 2 of the project.

D. Structure of this Report

Chapter I is a general introduction. Chapter II analyzes section 35, its origins, and its judicial interpretation. Chapter III discusses whether section 35 requires reform and explains the conclusion of the Project Committee that section 35 is serving its purpose satisfactorily and that only a minor amendment is required.

4. R.S.B.C. 1996, c. 377. The scope of s. 35 is discussed in Chapter II.

II. SECTION 35 OF THE *PROPERTY LAW ACT* AND ITS INTERPRETATION

A. Overview of Section 35

Section 35(1) of the *Property Law Act*[5] allows a person interested in land to apply to the Supreme Court of British Columbia for an order modifying or cancelling

(a) an easement;

(b) a land use contract;[6]

(c) a statutory right of way;[7]

(d) a statutory building or statutory letting scheme;[8]

(e) a restrictive or other covenant burdening the land or the owner;[9]

5. *Supra*, note 4.

6. A land use contract was a means of regulating development of land contemplated by s. 702A of the *Municipal Act*, R.S.B.C. 1960, c. 255, as amended. Land use contracts were registrable against the title to land that they covered. Section 702A was repealed in 1978 by the *Municipal (Amendment) Act*, S.B.C. 1977, c. 57, s. 13(1). Existing land use contracts remained in force despite the repeal, however.

7. Section 218 of the *Land Title Act*, R.S.B.C. 1996, c. 250 provides for statutory rights of way, which are easements not requiring a dominant tenement that may be granted to the Crown, a Crown corporation or agency, a municipality, or certain specified kinds of industrial operators for the benefit of their undertakings.

8. Section 220 of the *Land Title Act, ibid.* allows for registration of a statutory building scheme or letting scheme where more than two parcels of land are being sold or subleased and the registered owner wants to impose restrictions "consistent with a general scheme of development." Once registered, the building scheme is binding on successors in title. The covenants in it may be enforced by the owners of individual lots against other owners of lots within the scheme.

9. The reference in s. 35(1)(e) to a "restrictive *or other* covenant" likely extends to positive statutory covenants entered into under s. 219 of the *Land Title Act*, R.S.B.C. 1996, c. 250 as well as equitable restrictive covenants. Section 219 of the *Land Title Act* allows both negative (restrictive) and positive covenants entered into with the Crown, certain specified public authorities,

(f) a right to take the produce of or part of the soil;

(g) an instrument by which minerals or timber, or minerals and timber, being part of the land are granted, transferred, reserved or excepted.

Section 35(2) sets out the grounds on which this power may be exercised. Section 35(3) authorizes the court to award compensation to someone who incurs damage or loss as a result of an order under the section. Section 35(4) requires the court, before making an order, to direct that notice be given to persons entitled to the benefit of the right sought to be cancelled or modified, and to direct inquiries to a municipality or public authority, as the court deems advisable.

Section 35(5) provides that an order under section 35 is binding on everyone, whether they are parties to the proceeding and whether or not they receive notice of it. This is an unusual provision. Normally an order is binding only on persons before the court, and courts seldom make final orders against persons who have not had notice. In the peculiar context of challenges to obsolete rights, however, it could be difficult to determine who the current holder of the right is in some cases. Section 35(5) operates to prevent the purposes of section 35 from being defeated under those circumstances.

Section 35(6) directs the land titles registrar to amend the register in accordance with an order under section 35(2).

The section is reproduced in its entirety below:

Court may modify or cancel charges

35 (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:

(a) an easement;
(b) a land use contract;
(c) a statutory right of way;
(d) a statutory building or statutory letting scheme;
(e) a restrictive or other covenant burdening the land or the owner;
(f) a right to take the produce of or part of the soil;
(g) an instrument by which minerals or timber or minerals and timber, being part of the land, are granted, transferred, reserved or excepted.

or persons or entities designated by the responsible minister for the purpose of regulating land use, building, or subdivision, to run with land.

(2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that

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

(b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest 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 is invalid, unenforceable or has expired, and its registration should be cancelled.

(3) The court may make the order subject to payment by the applicant of compensation to a person suffering damage in consequence of it but compensation is not payable solely for an advantage accruing by the order to the owner of the land burdened by the registered instrument.

(4) The court must, as it believes advisable and before making an order under subsection (2), direct

(a) inquiries to a municipality or other public authority, and

(b) notices, by way of advertisement or otherwise, to the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled.

(5) An order binds all persons, whether or not parties to the proceedings or served with notice.

(6) The registrar, on application and the production of an order made or a certified copy of it must amend the registrar's records accordingly.

Section 35 was enacted in 1978.[10] It is derived from section 84 of the English *Law of Property Act 1925*,[11] which allows the discharge or modification of restrictions on the use of land, but unlike section 35 does not apply to easements or profits.

10. S.B.C. 1978, c. 16, s. 31.

11. 15 & 15 Geo. 5, c. 20.

B. Judicial Interpretation of Section 35

1. Section Applicable Only to Registered Charges and Interests

Section 35 has been held to apply only to *registered* charges and interests of the kinds listed in section 35(1).[12]

It is unclear whether the doctrine of implied release continues to apply to unregistered rights and interests to which it applied at common law or in equity such as easements, covenants, and *profits à prendre*.

2. Section 35 Treated As Complete Code

Section 35 is interpreted as a complete code, meaning that it completely supplants the common law with respect to the judicial extinguishment or modification of the rights to which it applies. This interpretation, which had been adopted in a few decisions at the trial level, was confirmed by the Court of Appeal in 2010 in its judgment in *Vandenberg v. Olson*.[13]

It is not possible, therefore, for a landowner to remove or secure a variation of a right affecting the land that is covered by section 35(1), otherwise than by agreement with the holder of the right or by making an application under section 35 and succeeding on one of the grounds listed in section 35(2).

Each of the grounds in section 35(2) is treated as alternative to the others, so that only one of the grounds needs to be satisfied in order to justify the court in cancelling or modifying the right or interest in question.[14] Some authorities state that even if the petitioner satisfies one of the grounds in paragraphs (a) to (e) of section 35(2), the court has an overriding discretion to refuse relief.[15] The majority of the cases do not allude to an overriding discretion of this kind, however.

12. *Strata Plan NW 1942 v. Strata Plan NW 2050* (2008), 80 B.C.L.R. (4th) 300 at para. 92 (S.C.).

13. 2010 BCCA 204.

14. *Knight v. Stapleton* (1985), 64 B.C.L.R. 394 (C.A.).

15. *Parmenter v. British Columbia (Minister of Environment, Lands and Parks)* (1993), 30 R.P.R. (2d) 302 (B.C.S.C.); *Murrayfield Developments Ltd. v. Brandon* (1995), 8 B.C.L.R. (3d) 364 at para. 29 (S.C.); *Fleishman v. British Properties Ltd.*, 1997 BCSC 2182 at para. 35; *Dykes v. Nagel*, 2011 BCSC 1549 at para. 46.

The burden of proof under section 35(2) is a high one. It has been said that the purpose of such a provision is not to enable A to expropriate the private rights of B for the purpose of enhancing the value, use and enjoyment of A's property.[16]

In *Winmark Capital v. Galiano Is. Local Trust*, which concerned a restrictive covenant, the court made it clear that its task was not to decide what use of the land is reasonable, but whether the continuance of the covenant was justified in the circumstances:

> I accept that the onus is on the petitioner and that onus is a relatively high one. It is not enough for the court to consider that the restrictive covenant is less than optimal. The court is not in a position of determining reasonable land use *per se*.[17]

3. Prematurity

A threshold test that must be met is that the application must not be *premature*. This is clear from the wording of the main clause of section 35(2), which states that the court may make an order under section 35(1) "on being satisfied that the application is not premature in the circumstances." If the court finds that an application is premature, it will dismiss the application even if it might otherwise appear to succeed in meeting one of the grounds listed in section 35(2).[18]

Thus, in *Lonegren v. Rueben* an application to discharge two easements on the ground that they prevented the subdivision and sale of the servient tenement for purposes fitting the new character of a neighbourhood that had changed substantially was dismissed as premature, because the municipality had not yet slated the two lots concerned for inclusion in a re-zoning and re-plot that would have permitted more intense residential development of the kind that had taken place on the other side of the street.[19]

16. *Re Henderson's Conveyance*, [1940] Ch. 835 at 846 (with reference to s. 84 of the *Law of Property Act 1925*, *supra*, note 11.)

17. 2004 BCSC 1754 at para. 27.

18. *Newco Investments Corporation v. British Columbia Transit* (1987), 14 B.C.L.R. (2d) 212 at 222 (C.A.).

19. (1988), 26 B.C.L.R. (2d) 339 (C.A.).

In *Murrayfield Developments Ltd. v. Brandon*, "premature" in section 35 was held to mean "that anticipated circumstances have not yet materialized or that there are existing reasons to defer the application."[20]

4. Procedure

Prior to *Vandenberg v. Olson*, it had been held that an application to cancel a charge or other interest mentioned in section 35(1) must be brought by petition on notice to all interested parties, and that it could be made in the course of a proceeding to enforce the charge or interest.[21]

In *Vandenberg v. Olson*, however, the owners of the servient land raised a defence and counterclaim based on section 35 in a proceeding for an injunction preventing them from interfering with the dominant owner's use of the easement. The servient owners were allowed to argue the section 35 defences at the trial level. The Court of Appeal also dealt with the section 35 arguments on the ground that the procedure followed had not caused any prejudice to the parties, but mentioned that the preferable procedure is to proceed by petition.[22]

C. The Grounds for Cancellation and Modification: Section 35(2)

1. Obsolescence: Section 35(2)(a)

Section 35(2)(a) states:

> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,

In *Collinson v. Laplante*, the Court of Appeal determined that no technical meaning was to be given to the word "obsolete" in section 35(2)(a).[23] The court relied on the definition of the word in the *Shorter Oxford Dictionary*, 3rd ed.:

> 1. That is no longer practiced or used; discarded; out of date. 2. Worn out; effaced through wearing down, atrophy, or degeneration.

20. *Supra*, note 15 at para. 18.

21. *Alexander v. Luke* (1991), 16 R.P.R. (2d) 23 (B.C.S.C.).

22. *Supra*, note 13 at para. 40.

23. (1992), 73 B.C.L.R. (2d) 257 at 265 (C.A.).

On the basis of this, the court concluded that a right of way that was still being used by the dominant landowner could not be obsolete, despite the availability of other access.[24]

Non-observance of a covenant for a lengthy period has been occasionally treated as a factor contributing to a finding of obsolescence under section 35(2)(a), though not as the sole factor. A covenant restricting the use of land to residential dwellings was cancelled as obsolete when the land had never been used for that purpose and in fact had been used as a marina for more than twenty years.[25] Another that restricted the use of land to agricultural purposes was cancelled when there had been no agricultural use for eighteen years and the land was eminently unsuitable for agriculture.[26]

Other cases under section 35(2)(a) illustrate that lack of use even for very long periods is not determinative of obsolescence, however. In *Gray v. Doyle*[27] the Court of Appeal held the common law doctrine of abandonment (implied release) was inapplicable to registered charges, and that non-use by previous owners of the dominant tenement was only a factor to be considered, but not one that was determinative. The fact that the easement was not necessary because the dominant landowner had alternative access was treated as irrelevant to the issue of obsolescence.[28] In reversing the trial judge's cancellation of the easement for obsolescence, the Court of Appeal stressed the dominant landowner's professed intentions to use and develop the easement and previous refusals to release it.

In *Lonegren v. Rueben*, Lambert, J.A. commented on the proper approach to the question of obsolescence under section 35(2)(a), although concurring in the refusal to cancel the easements in question on the basis that the application was premature. Rejecting the suggestion that the analysis under section 35(2)(a)

24. *Ibid.*

25. *Re Crescent Beach Marina Co. (1967) Ltd.*, [1987] B.C.J. No. 2635 (S.C.).

26. *Broadmead Farms Ltd. v. Gawley*, [1990] B.C.J. No. 938 (S.C.).

27. (1998), 50 B.C.L.R. (3d) 97 (C.A.).

28. See also *Dykes v. Nagel*, 2011 BCSC 1549 at para. 51 regarding the irrelevance of alternative access to the question of whether an easement is obsolete.

involves balancing the interests of the parties, Lambert, J.A. reiterated what he had said in *Chivas v. Mysek*,[29] an earlier unreported decision:

> …the test of whether the easement or restrictive covenant or other charge is obsolete is not a test to be satisfied on the basis of balancing the rights of the parties, but rather by *a consideration of the nature of the charge itself in the circumstances of the use of the relevant property and a determination of whether on those facts the charge or interest is obsolete*.[30]
>
> [Italics added.]

A second test of obsolescence under section 35(2)(a) enunciated in several authorities is whether the original purpose of the right or restriction can no longer be fulfilled.[31] The second test was applied in *Murrayfield Developments Ltd. v. Brandon*.[32] A covenant restricted the number of buildings on the burdened lots to one dwelling house per lot and prohibited any further subdivisions. There had been a great change in the character of the neighbourhood since the covenant was imposed, from semi-rural residential to a general suburban mix of commercial and residential uses. Other owners opposed the cancellation of the covenant on the ground that it would reduce the enjoyment of their property and that large lots were part of the original attraction of the area. The court reasoned that the purpose of the covenant was to control density. The issue of whether the change in the use of the neighbourhood rendered the covenant obsolete had to be considered in light of the original purpose of the covenant. The original purpose of preventing

29. [1986] B.C.J. No. 2547 (C.A.). The suggestion that s. 35(2)(a) involves a balancing of interests was made in *Laurence v. Century Holdings Ltd.*, (1985), 64 B.C.L.R. 33 (S.C.), a decision in which a restrictive covenant was also cancelled on the grounds that a change in the character of the neighbourhood rendered it obsolete, despite the fact that a development permit would be required to achieve the uses contemplated for the burdened property. The rejection by the Court of Appeal in *Lonegren v. Rueben* of the balancing approach and that court's characterization of the application as premature because re-zoning and development permission had not yet occurred call the authority of *Laurence v. Century Holdings Ltd.* into doubt.

30. *Supra*, note 19 at 343.

31. *Re Truman, Hanbury, Buxton & Co.'s Application*, [1956] 1 Q.B. 261 (C.A.) (decided under the *Law of Property Act 1925*, s. 84); *Re Beach Grove Realty Ltd.* (1980), 22 B.C.L.R. 168 (S.C.) at 173; *Kirk v. Distacom Ventures Inc.* (1994), 45 R.P.R. (2d) 313 (B.C.S.C.), rev'd on other grounds (1996), 4 R.P.R. (3d) 240 (B.C.C.A.); *Romspen Investment Corporation v. Chemainus Quay and Marina Complex Ltd.,* 2011 BCSC 768.

32. *Supra*, note 15.

increased density in the area which the lot covered could still be fulfilled, and therefore the covenant was not obsolete.

A registered building scheme was recently struck down as obsolete under section 35(2)(a) in *Bertamini v. Clark*.[33] The building scheme dated from the early 1970's and was aimed at maintaining a uniform appearance for all dwellings in the scheme by prohibiting exterior changes. The specifications of the building scheme were unsuited to the wet climate of coastal British Columbia, however, and resulted in serious water entry and structural damage problems. The houses affected were in urgent need of remediation with up-to-date building materials and techniques. The building scheme had been more honoured in the breach over the years, even by the group of owners that opposed cancellation. It appears that the finding of obsolescence was based chiefly on a pattern of non-adherence to the building scheme rather than on changes in the character of the land or the neighbourhood. The result might be questioned on that basis, but the court also found the building scheme was impeding the reasonable use of the land and could therefore be cancelled under section 35(2)(b).

2. Reasonable Use Impeded Without Practical Benefit to Others: Section 35(2)(b)

> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,

Unlike section 35(2)(a), which addresses the extent of change in the character of the property and its surroundings, section 35(2)(b) requires a determination of the effect of the charge or right in question on the interested parties.[34] The determination is not based on fairness or equity, however. In *Wallster v. Erschbamer*, the Court of Appeal affirmed that section 35(2)(b) means what it

33. (2007), 61 R.P.R. (4th) 111 (B.C.S.C.). The court somewhat surprisingly referred to a balancing of interests being involved, which may be an observation confined to the circumstances of the case. If not, the case is arguably at odds in this respect with the Court of Appeal's decisions in *Chivas v. Mysek*, *supra,* note 29; *Lonegren v. Rueben*, *supra*, note 19; *Wallster v. Erschbamer* (2011), 16 B.C.L.R. (6th) 72 (C.A.); and *676604 B.C. Ltd. v. Nanaimo (City)*, 2011 BCCA 447.

34. Di Castri, *Registration of Title to Land* (Toronto: Carswell, 1987), looseleaf, updated, p. 10-26, para. 349.

says. In order to succeed, the applicant must show the continuation of the charge or interest would bring *no* practical benefit.[35]

If the respondent can point to any practical benefit from the continuation of the charge or right, it is immaterial that the charge or right interferes with the reasonable use of the servient owner's land.[36]

In *Winmark Capital v. Galiano Island Local Trust,*[37] a restrictive covenant prohibiting the harvesting or cutting of evergreen trees was imposed by the local authority as a condition of subdivision approval. The covenant was imposed during an interregnum in which zoning bylaws that restricted residential development and severely restricted forestry activities on the land in question had been struck down by the B.C. Supreme Court and had not yet been upheld on appeal. After the appeal decision restoring the restrictive bylaws, the owner applied to have the covenant cancelled on the ground, *inter alia,* that the purpose of the covenant had disappeared and the restriction was impeding reasonable use of the land without corresponding practical benefit. The court found that there was no significant impediment to the applicant's use of the land because no timber cutting in the immediate area was anticipated for five years. It also found that the residual purpose of the covenant was to maintain a buffer strip between roadways and areas in which timber cutting and other uses would occur. This was held to be a legitimate benefit for the community and it could not be said the covenant held no practical benefit for the respondent, the local authority. The covenant was allowed to remain.

A different result took place in *Parmenter v. British Columbia*, where a covenant confined the use of certain land to agricultural purposes.[38] The land in question was outside the Agricultural Land Reserve. The land was patently unsuited to agriculture, but its value would be markedly greater without the covenant. The owner wished to sell the land and realize that value. The court held that the covenant impeded reasonable use of the land for other purposes and held no practical benefit for the provincial Crown, which had imposed the covenant when the owner purchased the land under an option in an agricultural lease.

35. *Supra*, note 33 at para. 19.

36. *Collinson v. Laplante, supra*, note 23 at paras. 22-23. In *Wallster v. Erschbamer*, *supra*, note 33 at 79, Newbury, J.A., with whom the other members of the court concurred, said at para. 19 that it is possible that "a truly minimal benefit" remaining from the interest or charge might be disregarded under the principle *de minimis non curat lex*.

37. *Supra,* note 17.

38. *Supra*, note 15.

In *Matthews v. Howse*[39] the applicants succeeded in having a covenant that prevented construction of a duplex on their lot cancelled because the zoning would permit it and many duplexes already existed in the neighborhood. The covenant was held to impede reasonable use of the applicants' land without providing practical benefit. The submissions of the respondents that construction of a duplex would deprive them of practical benefit because of increased traffic congestion and reduced safety for children were rejected as being overstated.

3. Consent of Charge Holder or Abandonment: Section 35(2)(c)

> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (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,

In *Zabolotniuk v. Strata Plan NW1527*[40] the holder of an easement had made no use of it for nine years after a retaining wall was constructed on the servient land which effectively prevented use of the easement. The court found there was no evidence of an intention to abandon as the dominant owner had no use for the easement during that time, and midway through the period had expressly refused to surrender it. Similarly, in *Arduini v. Gasparin*[41] the fact of non-use of a right of way for an extended period was held to be inconclusive with respect to an intention on the part of the dominant owner to abandon it.

In both cases, section 31(2)(c) was interpreted as codifying the common law doctrine of implied release. The doctrine is dependent on proof of an intention on the part of the holder of an incorporeal right such as an easement or profit to abandon it permanently. Non-use alone, even for an extended period, is insufficient in itself to demonstrate abandonment, although in some cases decided under the common law a prolonged period of non-use led to an

39. (1994), 41 R.P.R. (2d) 153 (B.C.S.C.).

40. [1990] B.C.J. No. 2434.

41. (1995), 2 B.C.L.R. (3d) 94 at 97 (C.A.). In *Arduini*, s. 35(2)(c) is not specifically referred to, but appears to have been the provision on which the appellant relied in seeking cancellation of a registered easement.

inference of an intention to abandon.[42] B.C. courts applying section 35, however, have generally been reluctant to draw such an inference.

4. Non-injury: Section 35(2)(d)

> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or…

Section 35(2)(d) is usually considered in conjunction with section 35(2)(b). "Injury" may be seen as a loss of the "practical benefit" derived from the charge or right in question.

"Injury" is interpreted broadly. It is not confined to economic loss.[43] In *Collinson v. Laplante* the Court of Appeal held that "injure" under section 35(2)(d) means "to cause harm to."[44] In that case, the harm that would flow from cancellation of an easement would be deprivation of use of a driveway. The availability of alternate access was irrelevant, even if it was preferable to the access conferred by the easement. In *Lonegren v. Rueben*, the loss of "natural beauty and serenity" was considered to be an injury potentially flowing from cancellation for the purpose of section 35.[45] In *Gubbels v. Anderson*, the injury was the risk to loss of privacy and increased likelihood of disturbance that would come from increased density of housing.[46]

5. Invalidity, Unenforceability, or Expiration: Section 35(2)(e)

> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

42. See *Lawrence v. Obee*, *supra*, note 2.

43. *Gubbels v. Anderson* (1995), 8 B.C.L.R. (3d) 193 at 200 (C.A.).

44. *Supra*, note 23 at 266.

45. *Supra*, note 19.

46. *Supra*, note 43 at 199-200.

Under section 35(2)(e) the courts simply apply common law standards of contractual certainty and enforceability to the instruments creating registered charges.[47] An instrument will be examined "in the context of its own factual matrix" and in light of the conditions existing at the time it was created in order to find the meaning. The purpose of the instrument at that time is one of the factors that may provide guidance to the proper meaning.[48]

D. Summary

The Court of Appeal has confirmed that section 35 is a complete code for the cancellation or modification of the rights and interests to which the section applies. These comprise several kinds of incorporeal rights that existed at common law and some arising under statute: easements, covenants, profits, statutory rights of way, statutory building and letting schemes, and land use contracts. It appears that only registered rights and interests can be challenged under section 35.

The criteria for exercise of the power under section 35 of the *Property Law Act* to cancel or vary a right or interest covered by section 35(1) are not easy to meet. It is clear that these rights and interests will not be treated as obsolete only because they are not used or enforced for an extended period. Non-use or non-enforcement over a long period of time may support a finding of obsolescence in combination with other factors such as change in the pattern of use of surrounding lands.

It is also clear that section 35 does not call for a balancing of interests. The court will not disturb a right unless continuance of the right or interest in question would bring about very substantial detriment to the applicant, and no practical benefit to the respondent.

47. See *Gubbels v. Anderson, supra*, note 43 regarding use of conventional principles of construction of contractual documents in applying s. 35(2)(e).

48. *Ibid.*, at 198.

III. Assessment of Section 35 From a Law Reform Standpoint

A. General

The Project Committee considered section 35 in light of a series of issues.

One question in particular that has been explored is whether section 35 can or should be elevated into, or be replaced by, a general power to cancel or modify regulatory restrictions on land use imposed by various levels of government in addition to incorporeal rights created by agreement.

A related question is whether the public interest should be a factor the court should be required to consider in an application under section 35. Other questions considered relate to the desirability of expanding the list of grounds in section 35(2), of raising or lowering the bar these grounds present as a threshold for cancelling or varying a right or interest listed in section 35(1), bringing unregistered rights and interests under section 35, and what effect, if any, our recommendations made elsewhere to allow certain positive covenants to run with land should have on section 35.

B. Should the Scope of Section 35 Be Expanded?

1. General Judicial Power To Cancel and Modify Land Use Restrictions: A concept

There is a body of opinion within the real estate industry and amongst some legal practitioners that restrictions on land use imposed by public and regulatory authorities often remain in place after outliving their purpose. Retention of large volumes of land in agricultural land reserves near expanding urban areas is a commonly cited example. Other examples cited to us concerned streamside restrictions persisting when water flow is insufficient or present only intermittently.

During Phase 1 of this project, BCLI was urged to consider a comprehensive mechanism for challenging the continuation of land use restrictions on grounds of obsolescence or lack of justification for the continuation of the restriction. This would essentially be an overarching general judicial or quasi-judicial power to remove or modify land use restrictions, whether imposed by a public author-

ity or by private agreement, and whether they appear as registrations against the title or not. The jurisdiction that now exists under section 35 would be subsumed into the proposed general power of removal or modification.

It is arguable that section 35 contains the seeds of this idea as it now stands. By including land use contracts, statutory rights of way, and probably also covenants entered into under section 219 of the *Land Title Act*[49] within the purview of section 35(1), the Legislative Assembly has clearly brought public land use planning tools within the scope of the judicial powers of extinguishment and modification. It is difficult to discern where the boundary between public planning law and the private law of real property now is in section 35.

Conferral on the courts of a general jurisdiction to vary and remove land use restrictions imposed for a wide variety of reasons by public authorities, presumably including municipal zoning, would greatly expand the role of the courts in making policy choices in areas which have until this time remained within the purview of government. Until this point the role of courts in matters regarding the imposition or continuance of land use restrictions has been restricted for the most part to judicial review of administrative decisions for procedural fairness rather than deciding the merits of the restrictions themselves. Even the limited moves in this direction represented by the inclusion of statutory rights of way, land use contracts, and probably also section 219 covenants in section 35(1), do not have the effect of allowing the court to decide between competing views on the most reasonable use of land, but only whether a reasonable use is being impeded without an offsetting practical benefit to another.[50] Lifting of regulatory land use restrictions is a matter that may engage competing views of the public interest, and necessitates decision-making involving policy choices as well as a balancing of interests.

While the court now has the ability under section 35(4) to hear and consider the submissions of public authorities and those whose interests are directly affected by the proposed removal or modification of a restriction, the focus under section 35 is a dispute between a landowner and the holder of an incorporeal right in the land, employing the usual processes of civil litigation. The lifting of some environmental restrictions, for example, may affect a large area of land and have implications going far beyond the interests of the parties to an easement or covenant. A civil court may not be the most appropriate forum for an exercise involving the balancing of the many interests that should be heard when re-

49. See note 9, *supra*.

50. *Winmark Capital v. Galiano Island Local Trust*, *supra*, note 17.

moval or relaxation of a restriction has wide implications for environmental regulation.

These considerations militate against expanding section 35 into a mechanism for reviewing land use restrictions imposed by a public authority other than those already covered in sections 35(2)(b) to (e), or replacing it with a much broader provision conferring a general jurisdiction on the court to remove or vary land use restrictions.

2. Expansion of Section 35(1)

The arguments made above against the expansion or conversion of section 35 into a plenary judicial power to cancel and modify land use restrictions largely answer the question whether the list of rights and interests in section 35(1) should be expanded. Section 35(1) already includes the common law and equitable incorporeal interests created by agreement and some land use restrictions originating in statute but operating through the mechanism of agreement. The Project Committee did not see a need to add additional statutory restrictions to that list.

C. Should the Court Be Required to Consider the Public Interest in an Application Under Section 35?

1. General

Section 35 focuses on the positions of the owner of the land subject to the right or interest being challenged, and the holder of the challenged right or interest. The public interest is not a factor the court is expressly required to consider, nor have the courts interpreted the section to require it to be taken into account. The following example may illustrate how the public interest could enter a factual matrix potentially giving rise to a section 35 application:

> A covenant covering an entire neighbourhood restricts use of the lots to single-family detached dwellings. The covenant has been in place for 40 years. The neighbourhood remains residential in character, but has no recreational facilities or other amenities because of the covenant. Some owners complain to the municipal council that they do not receive adequate return in terms of community facilities for the taxes they pay. The municipality has acquired several vacant lots adjacent to one another for use as a playground and public swimming pool. The zoning permits this use, but the municipality cannot proceed to open the playground and build the pool unless the covenant is cancelled with respect to those lots. Developers are interested in acquiring the lots for house-building. Some

> residential owners, a minority, also support continuation of the covenant in its full rigour. They argue that they will be disturbed by the noise from the playground and that it will attract loitering delinquents and lead to vandalism. The municipality applies under section 35 for a variation of the covenant so that it no longer applies to the lots to be used for the playground and swimming pool.

Clearly there have not been any changes in the character of the neighbourhood, and the purpose of the covenant can still be fulfilled. The present tests of obsolescence under section 35(2)(a) would not be met. While one reasonable use (playground facilities) is impeded, it cannot be said that this is entirely without practical benefit to others, since developers are ready to acquire and build upon the lots in compliance with the covenant. Thus, the test under section 35(2)(b) is not met either. There is some basis for saying that at least some owners will be "injured" if the covenant is cancelled or modified to allow the playground, so section 35(2)(d) is not satisfied. Sections 35(2)(c) and (e) do not come into play on the facts. As section 35 now stands, the court likely would have no basis on which to modify the covenant.

It is arguable that the court should be able to take the public interest into account, because a change in the use of land may affect many people and interests in the vicinity beyond the owner of land and the other party to an easement, covenant, or other incorporeal right. The above facts also illustrate, however, that it is not always possible to form a clear view of the public interest.

2. Public Interest As a Ground in Commonwealth Counterparts of Section 35

Section 84 of the English *Law of Property Act 1925* has been amended to allow the discharge or modification of a covenant on the ground that it impedes a reasonable use of land and is contrary to the public interest if any resulting loss or disadvantage can be adequately compensated with money.[51] An applicable planning scheme and any ascertainable pattern of granting or refusing planning permission must be taken into account in applying the public interest ground. The "public interest" ground is interpreted narrowly, however, and evidently applicants rarely resort to it.[52] The fact that planning permission allows the use

51. *Supra*, note 11, s. 84(1A).

52. A search of the Tribunal Service website for Lands Tribunal and Upper Tribunal (Lands Chamber) decisions involving the public interest ground reveals only one case decided on the public interest ground since 2000: *Re Azfar's Application*, LP 10 2000. The Lands Tribunal was formerly the body that decided applications under s. 84 of the *Law of Property Act 1925*. That function is now carried out by the Upper Tribunal (Lands Chamber) as a result of a general reform of quasi-judicial tribunals in the U.K.

that the covenant prohibits, or that the covenant does not fit within the government's preferred use, is not regarded in itself as being sufficient to support a finding that the covenant is contrary to the public interest.[53] This provision has been interpreted fairly consistently to mean that a restriction is not to be discharged or modified as being contrary to the public interest unless discharge or modification would enable land to be used in a manner that is in the public interest and cannot be reasonably accommodated on other land.[54] The English Law Commission has endorsed this approach and provisionally proposed in a recent consultation paper that it be entrenched in the legislation.[55]

Some Australian states allow modification or discharge of easements and covenants on the ground of public interest. Queensland[56] and the Northern Territory,[57] for example, have legislation very similar to section 84(1A) of the *Law of Property Act 1925*. Other Australian states allow public land use planning to override easements and covenants to the extent they are inconsistent with the planning measures.

Tasmania has made a clear choice that private land use restrictions in the form of easements and covenants should give way to public land use planning. Its leg-

53. *Re Davies' Application* (1971), 25 P. & C.R. 115.

54. *Re Mansfield District Council's Application* (1976), 33 P. & C.R. 141; *Re O'Reilly's Application* (1999), 66 P. & C.R. 485; *Re Azfar's Application*, *supra*, note 52. But see *Re Lloyd's and Lloyd's Application* (1993), 66 P. & C.R. 112, where it was found that a "desperate need" for a residential care home justified the discharge of a covenant preventing use of an adapted private residence as one, despite an apparent lack of evidence of the availability of alternate sites. A distinct provision, s. 610(1)(b) of the *Housing Act 1985*, c. 68 authorizes variation of a restrictive or leasehold covenant preventing conversion of premises for multiple dwellings if the character of the neighbourhood has changed or planning permission exists for the conversion. Section 610(1)(b) of the *Housing Act 1985* has been interpreted more broadly, allowing the court to essentially balance the interests represented by the covenant with the weight to be given to housing demand and planning permission for higher densities: see *Lawntown Ltd. v. Camenzuli*, [2008] 1 All E.R. 446 (C.A.).

55. Law Commission, *Consultation Paper on Easements, Covenants and Profits à Prendre* (Consultation Paper No. 186) (London: TSO, 2008) at 242, 244-245. In the ensuing report, however, this provisional recommendation apparently lapsed when the Law Commission decided to recommend no change in the grounds for modifying or discharging restrictive covenants: Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (LC 327) (London: TSO, 2011) at 161-162.

56. *Property Law Act 1974* (Qld), s. 181(1).

57. *Law of Property Act 2000* (N.T.), s. 177(2)(b).

islation provides that such interests may be extinguished or modified if their continued existence would impede a use authorized by a planning scheme.[58]

New South Wales[59] and Victoria[60] have provisions similar to section 84 of the *Law of Property Act 1925* and section 35 of the British Columbia *Property Law Act* that do not mention the public interest as a ground for discharge or modification of incorporeal rights. They also have legislation allowing covenants to be overridden if they are inconsistent with public planning measures, however.

In New South Wales the operation of a restrictive covenant is suspended to the extent that it is inconsistent with an environmental planning instrument issued under the *Environmental Planning and Assessment Act 1979*.[61] Victoria allows the removal or variation of easements and covenants pursuant to the amendment of a planning scheme or by a planning permit, which can be requested by anyone. There are no specific criteria set out in the legislation for consideration when an amendment to a planning scheme is sought, but it has been suggested that the panels hearing the applications have referred to criteria contained in the general Victorian provision for discharge or modification of easements and covenants corresponding to British Columbia's section 35.[62] In the case of an application for variation or discharge of a covenant by planning permit, there are different criteria depending on when the covenant came into being.[63] The Victorian Law Reform Commission has recently recommended that the present provisions for overriding covenants by planning schemes and planning permits be repealed on the ground that they create too much confusion between private land use control and public planning, which in the Commission's view should be kept

58. *Conveyancing and Law of Property Act 1884* (Tas.), s. 84C(1).

59. *Conveyancing Act 1919* (N.S.W.), s. 84.

60. *Property Law Act 1958* (Vic.), s. 84.

61. *Environmental Planning and Assessment Act 1979* (N.S.W.), s. 28. While the term "covenants" in s. 28 appears as an inclusion in the definition of "regulatory instrument," in s. 1 of the Act, it has been held to extend to restrictive covenants created by private agreement: *Wainwright v. Canterbury Municipal Council,* [1992] NSWLEC 96.

62. *Supra*, note 60. See Mark Robert Bender, "Triple Treat: Legal Options For The Removal Or Modification Of Restrictive Covenants On Land In Victoria" (2006) 13 Austl. Prop. L. J. 9.

63. For a covenant created after 25 June 1991, a council must be satisfied before issuing a planning permit overriding it that the owner of land benefited by the covenant will be unlikely to suffer financial loss, loss of amenity, loss arising from change in the character of the neighbourhood, or any other material detriment: *Planning and Environment Act 1987* (Vic.), s. 60(2). If the covenant predates 25 June 1991, the owner of land must not be likely to suffer detriment of any kind: *ibid.,* s. 60(5).

separate.[64] In their place, the Commission recommends simply making it possible for a planning scheme to specify permitted uses that cannot be prevented by restrictive covenants, and to provide that a restrictive covenant be unenforceable to the extent that it is inconsistent with a planning scheme.[65]

3. Conclusion

In the few cases where applications based on public purposes have been made in the United Kingdom, they have rarely been successful. This has led one writer to suggest that the public interest ground "far from being an oppressive threat to property owners, has been only a snare and delusion for applicants…."[66]

One reason for this may be that the public interest is a very difficult concept to define. Another is that it would seldom be possible to show that the public interest could not be met through the use of other land. Another may be a perception that relying on the public interest to justify the extinguishment or variation of private rights tends to change the process called for by section 35 and its counterpart provisions from one of granting relief from allegedly onerous and outdated restrictions or fruitless rights into one of expropriation.

Given the experience with the public interest ground under section 84 of the *Law of Property Act 1925*, and the lack of reported case law under the Australian counterpart provisions recognizing the public interest as a basis for interfering with private proprietary rights, this ground appears to have had very little effect. This leads us to conclude that it would be inadvisable to add the public interest as a distinct ground in section 35(2).

D. Existing Grounds in Section 35(2)

In the Project Committee's view, the present grounds in section 35(2) for cancelling or modifying rights and interests listed in section 35(1) and the manner in which they have been interpreted strike a fair balance between the interests of landowners in clearing their titles and those of the holders of the rights and interests in preserving the benefits they confer. The threshold for cancellation or modification has been set extremely high, but this befits an extraordinary power to extinguish or alter rights created by private agreement.

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64. Victorian Law Reform Commission, *Easements and Covenants* (Final Report 22) (Melbourne: The Commission, 2010) at 109-110.

65. *Ibid.*, at 111.

66. Patrick Polden, "Private Estate Planning and Public Interest" (1986), 49 Mod. L.Rev. 195 at 209.

While the grounds are perhaps not phrased in the simplest of language, the Project Committee was not persuaded that substitution of a set of new or rewritten grounds would be helpful. That would require a new round of interpretation to begin. There is no significant inconsistency in the British Columbia case law interpreting the separate grounds in section 35(2) that would require resolution or clarification through amendments to that subsection.

E. Unregistered Interests

Chapter II mentions that section 35 applies only to registered rights and interests.[67] It also mentions that section 35 has now been authoritatively interpreted as a complete code by the Court of Appeal. These two propositions create uncertainty as to whether the common law doctrine of implied release would still govern unregistered rights and interests of the same kind as those listed in section 35(1) and that continue to be held by the original parties. If section 35 is truly a complete code, it should displace the common law completely.

If an easement has not been used for 20 years, the dominant and servient lands have not changed hands, and the dominant owner has openly disavowed any intention of using the easement again but will not release it, should the servient owner not have a means of freeing the title from the easement? The original instrument creating the easement would likely be in the dominant owner's hands, so the servient owner could not register the easement for the purpose of making an application under section 35 to have it cancelled. If the doctrine of implied release can no longer be invoked, the servient owner is without a remedy.

The original grantor or covenantor who retains the title and whose land is bound by an unregistered easement should not be in a worse position than a subsequent owner who purchases land that is subject to a registered easement or covenant. Section 35 should be amended so as to apply to both registered and unregistered rights and interests listed in section 35(1).

67. See *Strata Plan NW 1942 v. Strata Plan NW 2050*, *supra*, note 12; *Vandenberg v. Olson*, *supra*, note 13.

F. Positive Covenants

In another document issued in connection with this project, the Institute has recommended that positive covenants imposing obligations to pay or contribute towards expenditures for work, provision of materials, or operations on land, or to carry out work or operations on the land, should be capable of running with the land like restrictive covenants.[68]

As section 35(1)(e) refers to "a restrictive *or other* covenant burdening the land…," a consequential amendment to ensure that positive covenants running with land come within the section is unnecessary.

G. Conclusion and Recommendation

The review of section 35 of the *Property Law Act* that the provision is working satisfactorily for the most part, and therefore engendered only one recommended change , namely to extend the scope of section 35 to unregistered interests of the kinds listed in section 35(1). The recent holding by the Court of Appeal that section 35 is a complete code emphasizes the need to implement the sole recommendation of this report in order to treat all landowners fairly.

The Institute recommends:

1. Section 35(1) of the Property Law Act *should be amended so as to expressly apply to the interests listed in paragraphs 35(1)(a) to (g) inclusive, whether or not they are registered.*

68. British Columba Law Institute, *Report on Restrictive Covenants* (Report No. 67) (Vancouver: The Institute, 2012).

PART TWO - DRAFT LEGISLATION

The following draft amendment to section 35 of the *Property Law Act* is intended only to illustrate one means of implementing the foregoing recommendation and does not form part of the recommendation itself.

Property Law Amendment Act, 20__

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. Section 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377 is amended

(a) in subsection (1) by inserting ", or unregistered" **after** "comes into force";

(b) in subsections (2)(a), (2)(b), (2)(c) and (2)(d) by striking out "registered";

(c) by repealing subsection (2)(e) and substituting the following:

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

(d) in subsection (3) by striking out "registered**".**

Comment: Under its current wording, section 35 of the *Property Law Act* has been interpreted to extend only to registered interests. An unregistered interest of the kind listed in section 35(1) is equally capable of becoming obsolete or otherwise ceasing to be of practical benefit as one that is registered, however, and will continue to bind the original grantor if the grantor has remained the owner of the land it affects since its creation. Section 35 has been authoritatively interpreted nevertheless as a complete code regarding the judicial extinguishment or modification of the interests to which it refers. This raises considerable doubt as to whether a remedy is available to the original grantor of an easement or restrictive covenant, for example, that has outlived its purpose if the grantor remains the owner of the servient or burdened land. This report recommends the amendment of section 35 so that it applies to both registered and unregistered interests. The draft amendments above would accomplish this.

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