



# COVENANTS RUNNING WITH THE LAND

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**"RESTRICTIVE COVENANTS, INCLUDING THOSE RUNNING WITH THE LAND, SHOULD BE STRICTLY INTERPRETED; THE COURT WILL CONTAIN RATHER THAN EXPAND UPON THE SCOPE OF THE COVENANT."**

## The scenario

Imagine that a potential purchaser comes to you for an appraisal of a particular shopping centre property in a rapidly expanding residential area that is underserved by retail gas stations. The shopping centre has one retail gas station, but you conclude that the market demand would easily support another gas station situated at the shopping centre, and that this demand would translate into a tenant paying a premium rent for the opportunity to operate a gas station there. However, upon investigating the property, you discover that the lease for the existing gas station contains the following provision:

*The landlord shall not, during the term hereof, enter into or be a party to any lease if its lands would be used for a retail gas station.*

Does the provision act as a complete prohibition against a second retail gas station being operated from the shopping centre? Should this lease provision affect your opinion of value? The answer to these questions depends on whether the provision is a covenant that runs with the land.

## Characteristics of covenants running with the land

Covenants running with the land bear some similarity to easements.<sup>1</sup> Both create a benefit for one parcel of land (dominant tenement) and a corresponding burden for another parcel of land (subservient tenement). Easements are said to run with the land because the owner of

the dominant tenement can enforce the easement against the owner of the subservient tenement, whether or not the owners of each parcel are the original parties who created the easement. Covenants with this element of enforceability are likewise said to run with the land.<sup>2</sup>

Courts will often state that there is a policy "... to favour competition and alienability ..." with the result that restrictive covenants, including those running with the land, should be strictly interpreted; the court will contain rather than expand upon the scope of the covenant.<sup>3</sup>

A covenant will be said to run with the land if the following elements are present:<sup>4</sup>

1. the covenant is negative in substance, creating a burden on the covenantor's land, similar to an easement;
2. the covenant touches and concerns the land in that it benefits or enhances the value of the benefitted land;
3. the benefitted and the burdened land must be precisely defined in the document creating the covenant;
4. the agreement should state the covenant is imposed on the covenantor's land to protect the identified land of the covenantee;
5. except as allowed by statute, title to the benefitted and burdened land must be registered; and
6. except as allowed by statute, the covenantee and the covenantor cannot be the same person.

Only the first and second elements will be reviewed herein.



### Positive and negative covenants

One needs to understand how the law differentiates between positive and negative covenants, because the former cannot create a covenant that runs with the land. The Alberta Court of Queen's Bench described the difference between a negative and a positive covenant in the following words:<sup>5</sup>

*The parties err when they associate 'positive covenants' with things that benefit the land and 'negative covenants' with things which burden the land. A covenant is a positive covenant when the covenantor promises to do something. A covenant is a negative covenant when the covenantor promises to not do something.*

The explanation of the difference seems simple enough, but, in application, the results can be challenging. For example, take the following covenants considered by the British Columbia Court of Appeal:<sup>6</sup>

*... Whitlam hereby covenants and agrees that he will not use the Whitlam land for any purpose other than as a golf course ...*

*Whitlam further covenants with Thousand Trails to maintain the golf course on the Whitlam land in a proper manner in keeping with its use as a golf course and consistent with a state of repair generally considered acceptable for comparable golf courses.*

There was also a clause requiring preferential rates for certain golfers.

At trial, it was found that there were three separate covenants: 1) not to use the land for any purpose other than as a golf course, 2) to maintain the golf course to an acceptable standard, and 3) to provide preferential rates. The learned trial judge held that, while the second and third covenants were positive, the first covenant was negative in substance. The Court of Appeal disagreed, finding that, although the first part of the agreement used negative language, the covenant was positive in substance. The agreement had to be read as a whole; the document evidenced an intention by the parties that

## "COVENANTS RESTRICTING COMMERCIAL COMPETITION ON THE LAND AND MAINTAINING PARKING RIGHTS CAN TOUCH AND CONCERN THE LAND"

the lands be used as a golf course and only as a golf course. Since the covenant was not negative in substance, it could not be enforced against the owner's successors in title.

### Touching and concerning the land

When will a covenant be found to 'touch and concern' the land? The question is often framed in terms of whether the covenant was intended by the parties to benefit or enhance land, or was merely intended as a personal covenant enforceable as a contractual right.

The covenant must affect the nature, quality or value of the land, or the way in which it is used. Consequently, covenants restricting commercial competition on the land and maintaining parking rights can touch and concern the land.<sup>7</sup>

A covenant that commercial strata lots "... shall not be used or occupied at any time for the operation of an undertaking which rents skis, snowboards or related equipment ..." was found to touch and concern the land in question and that the covenant's effect on the land was not merely incidental or collateral.<sup>8</sup>







On the other hand, in the purchase of a shopping centre property, a purchaser agreed to pay certain fees and bonuses. The purchaser also covenanted that it would require a subsequent purchaser to honour these obligations. The purchaser did sell and the original vendor sought to enforce the covenant arguing that the obligation ran with the land. The court struck the claim on the basis that there was no hope of success; the document creating the covenant did not show unambiguously that the parties intended to create an interest in land in favour of one of the parties. Only a personal covenant was created.<sup>9</sup>

A covenant that one party “... will not sell or otherwise dispose of any land within a distance of one-half (1/2) of a mile from [specified location] ... for the purpose of ... using the land as a store for the sale of food ...” was held not to create a covenant running with and was not binding on the lands, but was a personal covenant only.<sup>10</sup>

A situation similar to the shopping centre scenario described in the introductory paragraphs was considered by the British Columbia Court of Appeal. An existing lease prohibited the landlord from entering into a combination convenience store and retail gas bar outlet.<sup>11</sup> The court reviewed the law relating to covenants running with the land and concluded that the provision of the lease prohibiting the specific use was only a personal covenant enforceable between the parties to the lease. The provision was not a covenant running with the land and could not prevent the subsequent purchaser from arranging for another convenience store/gas bar tenant.

### Conclusion

The essential difference between a covenant running with the land and a mere personal covenant is that the former must contain a clear intention to create an interest in land. It is not easy to forecast when a court will find the requisite intention. Some cases show a propensity to rely more heavily on the policy of strict interpretation, thereby limiting the scope for covenants running with the land, whereas other cases show a willingness by the courts to look critically at the whole of a document to ascertain the parties’ intention.

Complicating the situation is the complexity of commercial relations. The cases often address convoluted fact patterns, making it possible for reasonable people to come to different conclusions about the effects of covenants.

As noted by the courts and academics alike, the results in cases dealing with purported covenants running with the land are very difficult to reconcile. The safe course of action is to obtain appropriate legal advice when confronted by provisions an appraiser might think benefits or burdens the land.

### End notes

<sup>1</sup> Kevin Gray and Susan Francis Gray, *Elements of Land Law*, 5th ed., (Oxford: Oxford University Press, 2009), para. 5.1.9

<sup>2</sup> Eileen E. Gillese, *Property Law Cases, Text and Materials*, 2d ed., (Toronto: Emond Montgomery Publications

Limited, 1990), p. 20:2

<sup>3</sup> See for example *NylarFoods Ltd. v. Roman Catholic Episcopal Corp. Prince Rupert* (1988), 48 D.L.R. (4th) 175 (B.C.C.A.)

<sup>4</sup> Victor DiCastrì, *Registration of Title to Land*, (Toronto: Carswell, 1987), pp. 10-3 - 10-5; *Canada Safeway Limited v. Thompson (City)*, 1996 CarswellMan 401 at para. 20, affirmed [1997] 7 W.W.R. 565 (Man. C.A.); *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268 at para. 16; *Equitable Trust Co. v. Loughheed Block Inc.*, 2013 ABQB 209 at para. 38.

<sup>5</sup> *Equitable Trust Co.*, para. 37

<sup>6</sup> *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5

<sup>7</sup> *Canada Safeway Limited*, para. 27, 28

<sup>8</sup> *PMT XII LLC v. Strata Plan VR 2753*, Section 1, 2010 BCSC 1235

<sup>9</sup> *Westbank*, para. 18, 19; See also *Domo Gasoline Corp. v. St. Albert Trail Properties Inc.*, 2003 ABQB 649, *White v. Lauder Developments Ltd.*, 9 O.R. (3d) 363 (Ont. C.A.), p. 6

<sup>10</sup> *Dundee Development Corp. v. Westfair Properties Ltd.*, 2000 SKQB 444

<sup>11</sup> *NylarFoods Ltd.*

**Note:** This article is provided for the purposes of generating discussion. It is not to be taken as legal advice. Any questions relating to the effect of covenants in particular circumstances should be put to qualified legal and appraisal practitioners.