The Boundary Point
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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

In two separate decisions, rendered only 3 months apart, courts in Ontario and British Columbia recently considered applications for orders to remove a restrictive covenant from the title to land. The specific circumstances in each case were different from one another, but the basic problem which prompted the applications was the same.

The courts were petitioned, in both instances, to declare that a restrictive covenant was unenforceable and should therefore be removed from title. Unenforceability was argued in each application based upon the covenant being vague, ambiguous and uncertain. The boundaries of the area to which the restrictive covenant applied was attacked as undefined in one case while in the other case it was argued that the terms and expressions used were subjective and undefined.

In this month's issue we have an excellent opportunity to consider and compare the frameworks of analysis used for a common problem, in different provinces and, ultimately with opposite results.

Clarity of Boundaries and Terms as Essential Elements of Restrictive Covenants

Key Words: *restrictive covenant, ambiguity, uncertainty, building scheme, enforceability*

Unlike a contract between two persons, a special agreement by which the use of land is constrained or restricted can be made to "run with the land" if certain elements are present and satisfied. These are known as "restrictive covenants" and in some respects, are similar to easements and might even be considered as a form of "private zoning".

Elements of what exactly a restrictive covenant is can be found in several sources. For example, the need for the land to be benefitted and burdened to be ascertained and described exactly is

part the test stated in an appeal decision cited by both decisions in Ontario and British Columbia:

> The law of Ontario and of the other common law Provinces plainly require that the dominant land for the benefit of which a restrictive covenant is imposed in a deed from the covenantee to a purchaser of other lands of the covenantee must be ascertainable from the deed itself; otherwise, it is personal and collateral to the conveyance as being for the benefit of the covenantee alone and not enforceable against a successor in title to the purchaser.[1]

A helpful statement of the general problem with restrictive covenants is this illustration from a law reform commission report:

> Most owners … would likely be surprised to learn that, if they agree with their neighbour, for example, that the neighbour and her successors in title will maintain a common boundary fence, or a common driveway, the obligation will not bind subsequent owners of the neighbour's property. Similarly, where the owners in a property development agree that they and their successors in title will pay for the maintenance of the amenities provided in the development, the obligation will not bind subsequent owners.
>
> Moreover, the neighbour, in the first example, and the original owners, in the second, might be even more surprised to learn that they will remain liable for contraventions of the obligation, even after they have disposed of the property. Thus, not only is the obligation not enforceable against someone who should be liable, but it is enforceable against someone who should not.[2]

That restrictive covenants are based in both contract law and property law can be readily appreciated.

Our first decision involved a restrictive covenant created by a co-tenancy agreement registered on the title to all housing units in the complex. In *Chapadeau v. Devlin*,[3] the applicants had renovated a rooftop deck. The co-tenancy agreement provided,

Section 6.2 of the co-tenancy agreement provided:

> Alterations to Exterior. An Owner shall not make any alteration to the exterior of the Unit without the prior written approval of the Co-Tenancy Committee, unless such alteration is minor or cosmetic in nature, in which event such approval shall not be required. The Co-Tenancy Committee shall determine whether an alteration is minor or cosmetic and its

[1] *Re Sekretov and City of Toronto*, 1973 CanLII 712 (ON CA), http://canlii.ca/t/g16hr

[2] *REPORT ON COVENANTS AFFECTING FREEHOLD LAND*, Ontario Law Reform Commission, Toronto, Queen's Printer, 1989, at p. 1

[3] *Chapadeau v. Devlin*, 2018 ONSC 6456 (CanLII), http://canlii.ca/t/hvtcc

> decision shall be final and binding. Such alterations shall be subject to the requirements, if any, of the National Capital Commission.

A general view of the property is available in Figure 1 below and depicts a development with townhomes and close to the Rideau Canal in Ottawa.

Figure 1: King's Landing[4]

An application for approval of changes or alteration was also required from an owner to a "Co-Tenants Committee" which had the delegated authority to decide whether a proposed alteration met with approval or not. This was done by the Applicants, but the Committee had decided to refuse approval, in part.

The basis of a court application can be found in section 61(1) of the *Conveyancing and Law of Property Act*, which states:

> 61 (1) Where there is annexed to land a condition or covenant that the land or a specified part of it is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land, any such condition or covenant may be modified or discharged by order of the Superior Court of Justice.[5]

Readers will note that the power of a court under this section is not only broad, but the section offers no guidance on how a court should exercise its discretion. For this, we must turn to case law and find guidance in this statement:

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[5] *Conveyancing and Law of Property Act*, R.S.O. 1990, Chapter C.34

> …the court's discretion under the Act should be … exercised with the greatest caution, and an order should seldom, if ever be made which will operate to the prejudice of an adjacent landowner who has any real rights. The true function of the statute is to enable the Court to get rid of a condition or restriction which is spent and so unsuitable as to be of no value and under circumstances when its assertion would be clearly vexatious.[6]

The court noted that the test under s. 61(1) requires a moving party to prove that the covenant under consideration is either "spent" or that its discharge or modification would have no negative or detrimental impact on the lands benefitting from the restriction. In continuing its analysis, the court noted that the impugned clause in the co-tenancy agreement was in fact a restrictive covenant within a "building scheme." This was an important consideration; the court explained:

> In support of their position, the applicants rely, in particular, on the Court of Appeal's decision in *Sekretov v. Toronto (City)*, 1973 CanLII 712 (ON CA), [1973] 2 O.R. 161 (C.A.). *Sekretov* deals with a restrictive covenant that was said to run with land conveyed by the municipality to a resident and imposed partly by means of a deed transferring the land and partly by a resolution of the municipal council passed almost a month after the date of the conveyance. On appeal, the Court of Appeal agreed with the trial judge that the restrictive covenant in the deed was ambiguous and therefore invalid. The Court of Appeal also found that the covenant was vague and uncertain and should not be enforced. The uncertainty arose because the covenant in the transfer could be interpreted as providing that the use to which the land might or might not be put must depend upon the "whim of Council" to be expressed in a resolution to be passed at some future date. As the Court of Appeal put it, "I cannot think of anything more uncertain and more indefinite than such a provision if, by the covenant, the municipal corporation purported to reserve to itself the right to dictate and control by resolution the uses which could be made of the subject land" (*Sekretov*, at para. 19).
>
> I distinguish *Sekretov* from the case before me because *Sekretov* did not involve a building scheme. The concept of community interests was not at play.
>
> A restrictive covenant involves a relationship where one property is subject to restrictions for the benefit of another property. As this relationship, by its very nature, interferes with the free use of land, restrictive covenants are strictly interpreted (*Re Girard* (2007), 61 R.P.R. (4th) 288 (Ont. S.C.J.), at para. 34).
>
> By contrast, under a building scheme, all owners share similar burdens and enjoy benefits relating to limitations on property use. In my view, the interpretation of a restrictive

[6] *Chapadeau v. Devlin*, 2018 ONSC 6456 (CanLII), at para. 16, citing *Re Ontario Lime Co.* (1926), 1926 CanLII 362 (ON CA), 59 O.L.R. 646, at p. 651 (cited in *Remicorp Industries Inc. v. Metrolinx*, 2017 ONCA 443 (CanLII), 138 O.R. (3d) 109, at para. 91)

> covenant that is part of a building scheme must take into account the building scheme's community of interests, recognizing the burdens imposed upon and the benefits shared by all owners in the community, and considering the building scheme as a whole (*Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (CanLII), [2015] 2 S.C.R. 633, at paras. 48-49 and 57, and *Paterson*, at para. 22).
>
> I make two additional observations as to the inapplicability of *Sekretov* to this case. First, the ambiguity in *Sekretov* arose as a result of the covenant's failure to identify the dominant and servient land. Under a building scheme, all lots are both dominant and servient. Second, the restrictive covenant at issue in *Sekretov* was aimed at restricting the use of the land completely. By contrast, s. 6.2 does not create an absolute prohibition against any exterior modifications or alterations.[7]

There appeared to be nothing in the decision that would indicate that King's Landing was a condominium. Yet, the word "unit" appears in the reasons for decision, and also formed part of the applicants' position. In that regard, an argument that the restriction in section 6.2 was submitted to apply to the exterior "boundaries of the unit." The court rejected these submissions, holding that:

> Section 6.2 of the co-tenancy agreement requires prior written approval of the co-tenancy committee for alterations to "the exterior of a unit." In interpreting and applying s. 6.2, the co-tenancy committee has considered proposed alterations to the exterior of a home owner's townhome, that is, the building. The applicants submit that another plausible interpretation is that the restriction in s. 6.2 applies to alterations "outside the boundaries of the unit," that is, beyond the private property line. The applicants rely on the description of "the Units" in s. 2.1 of the co-tenancy agreement which states in part: "[t]he Units to which this agreement applies are identified in Schedule 'B'," and the fact that the boundaries of "the Units" are delineated on the reference plan. The applicants also point to the use of the word "building" (as opposed to "unit") in s. 6.6(b) of the co-tenancy agreement (which provides each owner with a right of access).
>
> I am unable to accept the applicants' proposed, alternative interpretation as it would, in my view, render s. 6.2 of the co-tenancy agreement meaningless. The King's Landing building scheme, of which s. 6.2 is a part, is intended to preserve the character of the neighbourhood. Interpreted in this context, s. 6.2 prohibits alterations being made to those elements of the privately owned property which are visible to third parties, including other owners.[8]

The restrictive covenant was upheld as valid.

[7] *Ibid.*, at paras. 30 to 34
[8] *Ibid.*, at paras. 41 and 42

Turning to our second and more recent decision in *Cole v Paterson*,[9] the Supreme Court of British Columbia considered an application for cancelling a restrictive covenant, primarily on the basis that it was ambiguous and thus unenforceable. Alternatively, if the restrictive covenant was not cancelled, the relief included a declaration pursuant to the court's inherent jurisdiction that the applicants' proposed construction was not contrary to the restrictive covenant. The statutory basis for such a court application was found in section 35(2) of the *Property Law Act*,[10] which used a different test from the legislation in Ontario. It included the criteria, or factors to be considered by a court on such an application and these allowed a court to modify or cancel certain charges or interests against land identified in s. 35(1), including restrictive covenants, upon being satisfied that the application is not premature 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.

The wording of the restriction itself was found in the covenant document which provided:

> …NOW THEREFORE in consideration of the sum of ONE DOLLAR and other valuable consideration the Grantor does hereby covenant and agree to and with the Grantee as follows:
>
> 1. That the Grantor shall not erect or construct any buildings or other structure nor allow the growth of any trees which would obstruct the view from Lot 6 on any part of the said Lot 5 other than the area outlined in heavy black ink on the attached plan.
>
> 2. The Grantor shall not erect any structure on the premises without first obtaining the written approval of all plans and specifications by the Grantee.
>
> 3. The Grantor shall not alter the exterior appearance of any structure erected on the premises without the consent of the Grantee first had and obtained.

[9] *Cole v Paterson*, 2019 BCSC 45 (CanLII), http://canlii.ca/t/hx0md

[10] *Property Law Act*, R.S.B.C. 1996, c. 377

> 4. The rights, liberties and easements hereby granted are and shall be of the same force and effect to all intents and purposes as a covenant running with the land, and this Indenture, including all the covenants and conditions herein contained, shall extend to and be binding upon and enure to the benefit of the heirs, executors, administrators, successors and assigns of the parties hereto respectively, and, whenever the singular and masculine is used, it shall be construed as if the plural or feminine or neuter, as the case may be, had been used where the context or the party or parties hereto so require, and the rest of the sentence shall be construed as if the grammatical and terminological change thereby rendered necessary had been made.[11]

The reasons for decision immediately identified the details shown on the "the area outlined in heavy black ink on the attached plan" in paragraph 1:

> The "attached plan" referenced in clause 1 of the Restrictive Covenant is attached to it as Schedule "A". The plan shows Lots 5 and 6. An area within Lot 5 is outlined in black and filled in with black diagonal lines. The markings appear to be done by hand. I will call this the "Marked Area" for ease of reference. There are no measurements in the Restrictive Covenant or on Schedule "A" that delineate the precise size of the Marked Area.[12]

Just to be clear as to what the "view from Lot 6" referred to in clause 1 looked like, an image in Figure 2:

Figure 2: View of Okanagan Lake sought to be protected through the restrictive covenant[13]

The court explained the overarching principles in defining the essential elements of a restrictive covenant:

[11] *Cole v Paterson*, supra, at para. 12

[12] Ibid., at para. 13

[13] From Google® Streetview. All rights reserved.

The general principles that apply to the enforceability of a restrictive covenant were confirmed by the Court of Appeal in *Westback Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268 (CanLII) at paras. 16-17:

> [16] The necessary conditions of covenants which run with land are set out by DeCastri in his text, *Registration of Title to Land* (Carswell 1987*).* They were stated by Clearwater, J. in *Canada Safeway Ltd. v. Thompson (City),* [1996] M.J. No. 393, August 15, 1996, at page 8, 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 precision 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.[14]

The "attached plan" referred to in clause 1 of the restrictive covenant was not attached to the online report of this decision, but the court described it in detail:

> …the Marked Area is vague and imprecise. Schedule A to the Restrictive Covenant contains a plan drawing, but contains no measurements or other indicators of the precise area where a future building may block Lot 6's view. From the hand drawn black lines, it is clear that the Marked Area begins at the roadway and encompasses the full width of Lot 5, but one is left to guess where precisely the Marked Area ends. [The builder] has attempted to identify the end of the Marked Area on the Proposed Design plans, but this is, at best, an educated guess or estimate.[15]

[14] *Cole v Paterson*, supra, at para. 41

[15] *Cole v Paterson*, *supra*, at para. 55

In other words, the plan attached to the Restrictive Covenant was not a plan of survey. The uncertainty or vagueness that resulted was but one of several reasons why the restrictive covenant failed in this application. The court also referred to language found to be vague in the restrictive covenant document:

> The language used in the present case is even less specific than seen in the above authorities. It is simply "which would obstruct the view". This raises many questions. Does it mean obstruct the view of the water of Okanagan Lake? Or does it mean obstruct the view of the water of Okanagan Lake and the hills across the lake? Or does it mean obstruct the view of the water of Okanagan Lake, the hills across the lake and the sky? Does it mean a complete obstruction of one or more of these things? Or does it mean partial obstruction of one or more of these things? If partial obstruction, how much is too much?[16]

The restrictive covenant was found to be unenforceable. There also exist public policy reasons which the courts remind readers of in almost every decision in which a restrictive covenant is attacked.

> It is well established that restrictive covenants are strictly construed. Ambiguity is resolved in favour of non-enforcement. The rationale for this approach would appear to be the principle described by Lord Dunedin in *Anderson v. Dickie* (1915), 84 L.J.P.C. 219 at 227 (H.L.):
>
> > Far earlier than this it had been held that all conditions restricting the use of land must be very clearly expressed, the presumption being always for freedom.
>
> This principle was adopted by the Supreme Court of Canada in *Noble and Wolf v. Alley*, 1950 CanLII 13 (SCC), [1951] S.C.R. 64 at 74.[17]

Despite the similarities in legislation and the application of the same principles, it is not surprising that in one application, the restrictive covenant was upheld as enforceable, while in the other it was not. Their factual matrices were very different.

Editor: Izaak de Rijcke

[16] *Cole v Paterson*, *supra*, at para. 60

[17] *Kirk v. Distacom Ventures Inc.*, 1996 CanLII 1442 (BC CA), 81 BCAC 5; 4 RPR (3d) 240, at para. 23

Cross-references to *Principles of Boundary Law in Canada*

Restrictive covenants are addressed in subsection 7 within *Chapter 5: Boundaries of Easements* which covers the criteria required for a restrictive covenant at common law as well as some of the legislative changes that have taken place in an effort to clarify the law and streamline the process of registration, and as discussed in this issue, the power of courts to resolve uncertainty through a court order.

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[18] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

Sixth Annual Boundary Law Conference

This year's conference theme is: *Easements: Update and Refresher*. Unlike previous years, this event will be held during April and May as a series of eight weekly *lunch & learn* sessions via our interactive virtual meeting room. Each presentation will focus on a scenario as the context for clarifying recent court decisions. The objective is to support the formation of professionally defensible opinions that parallel what the courts do.

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[18] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.