

Subject: **RESTRICTIVE COVENANTS**

BACKGROUND

The development of the restrictive covenant as an interest in land dates back to the mid-nineteenth century (1) when it was used, as it still is, to control the use and development of land. In this sense, a restrictive covenant is similar to a land use by-law except that it results from an agreement between the owners of two or more parcels of land or from a building scheme established by the owner of several parcels of land. The common law developed certain requirements that had to be satisfied in order for a restrictive covenant to be enforced by and against subsequent owners of the parcels of land affected. A summary of these requirements is as follows:

1. There must be a servient tenement, which is subject to the restriction, and a dominant tenement, which benefits from the restriction. This must be ascertainable from the instrument. (2) This is similar to the requirement for easements.
2. The covenant must be restrictive, or negative, in nature so that the court can remedy a breach by granting an injunction restraining an act, which would be in violation of the covenant.
3. The covenant must "touch or concern the land" which means that it must be a restriction that benefits or enhances the value of the dominant tenement.
4. The covenant must be annexed to the land, which can be accomplished through express words or by implication from the provisions of the agreement.

If the common law requirements are not met, the agreement is merely a personal contract that is enforceable by the original parties to the agreement or their assigns.

The Land Titles Act has only altered the common law requirements to the extent of requiring registration in order for the covenant to be binding on persons who subsequently acquire interests in the servient tenement. (3) Since section 48(5) of the Act expressly recognizes that the registration of an instrument purporting to be a restrictive covenant does not in itself create a restrictive covenant and since the determination of compliance with the common law requirements can be a complex issue, it is the policy of the Land Titles Offices to examine such instruments only for the requirements set forth in the Registration Procedure.

REGISTRATION PROCEDURE

1. The agreement must be between the owner(s) of two parcels of land, which are described in the restrictive covenant. An owner may be the owner of a leasehold interest in a parcel of land. (4) There must be a dominant tenement (i.e., a parcel

benefiting from the restriction) and a servient tenement (i.e., a parcel subject to the restriction). The same person may own both the dominant and servient tenements. (5) The parcels do not have to be contiguous.(6)

Often a restrictive covenant agreement is in the nature of a building scheme and is registered against several or all parcels in a development project. In this situation, each parcel is both a servient and a dominant tenement as it is subject to the restrictions and benefits from the restrictions placed against the other parcels.

2. There must be a certificate of title issued for all parcels that benefit from or are subject to the restriction of the restrictive covenant. (7) If the servient tenement is a leasehold estate, a certificate of title must be issued for the leasehold estate. If the dominant tenement is a leasehold estate, a certificate of title must be issued for either the fee simple estate or the leasehold estate. If title has not been issued for all of the parcels, the restrictive covenant may be registered by way of caveat. (8)

3. The agreement must contain at least one negative covenant that imposes a restriction rather than an obligation. It may be expressed positively but still be in effect negative. For example, a covenant that property is only to be used for single-family residential purposes is in effect a covenant that the property is not to be used for any other purpose.

4. Only the signature of the owner of the servient tenement is essential for registration purposes. Attestation requirements must be complied with. (9)

5. Dower requirements must be complied with. (10)

6. The restrictive covenant is endorsed against each of the certificates of title whether the parcel is the dominant or servient tenement, as follows:

"RESTRICTIVE COVENANT".

6.1 If one of the tenements is a leasehold estate, the particulars should include the following:

"BENEFITING THE LEASEHOLD ESTATE"

or

"BURDENING THE LEASEHOLD ESTATE".

7. Registration by way of Caveat - A restrictive covenant may be registered by way of caveat, in which case the registration requirements respecting caveats must be complied with. (11) Only the caveat claim is endorsed "RESC", the caveator and address for service are not to be included in the endorsement. Also, a caveat amending a restrictive covenant should be endorsed in the same manner with the particulars (PF16) of "AMENDING AGREEMENT" included. These caveats cannot be discharged or lapsed in the normal fashion.

A caveat regarding a restrictive covenant pursuant to the Municipal Government Act may be registered (see [CAV-5](#) page 2 of 4). Full caveat particulars such as caveator's name and address for service are to be shown on title in this situation.

8. Restrictive Covenant Amending Agreement - An agreement amending the terms of a restrictive covenant which is executed by all owners of both dominant and servient tenements can be registered. The usual requirements for registration of the restrictive covenant must be complied with (e.g., attestation, dower). The amending agreement must refer to the registration number of the restrictive covenant and be endorsed against all lands subject to the original restrictive covenant. Legal descriptions are not required as ALTA will amend all titles affected by the restrictive covenant. (12)

9. Discharge of Restrictive Covenant

a) A restrictive covenant may be discharged or amended by the registration of a certified copy of a court order. (13) The requirements of section 191 must be complied with on an order discharging a restrictive covenant.

b) A restrictive covenant may be discharged by the registration of a discharge in the prescribed form ([FORM 10.1](#)) executed by the registered owner of the dominant tenement. (14) The original instrument must be checked to verify the dominant tenement(s). Attestation requirements must be complied with. (15)

10. Expiry of Restrictive Covenant - An owner of land affected by a restrictive covenant may request that the Registrar cancel the registration of the instrument where the interest created by the restrictive covenant has expired. The Registrar must be satisfied that the interest has expired through an express provision in the instrument. (16)

The written request signed by a person having a registered interest in the land is registered as a discharge. Attestation requirements do not apply.

11. Withdrawal of a Caveat re Restrictive Covenant - Where the dominant lands can be identified the caveat may be withdrawn:

a) by the registered owner of the dominant tenement, or

b) if the registered owner of the dominant tenement is the caveator and the caveat was signed by an attorney or agent, by the registered owner or the attorney or agent. (17)

Where the dominant lands cannot be determined from the caveat or an attachment to the caveat, the caveat may only be discharged by a court order. A restrictive covenant caveat cannot be lapsed. (18)

Caveats re restrictive covenants pursuant to the Municipal Government Act can only be discharged by the municipality or by an order of a court, and cannot be lapsed (see [CAV-5](#) page 2 of 4).

12. **Covenants and Conditions** - Previously many building scheme restrictive covenants were created by a series of transfers. These were usually endorsed against the certificates of title as "covenants and conditions", or they may have been endorsed against titles as a Restrictive Covenant. These covenants and conditions must be discharged by all those who benefit from the building scheme (i.e., all current owners of the dominant tenements). If the dominant tenement is NOT identifiable; we require a court order, which complies with section 191. A discharge of the covenants and conditions signed by the original transferor is not appropriate. (19)

13. **Fees** - [Tariff item 11\(6\)](#) is charged for the registration of the restrictive covenant and [Tariff item 11\(5\)](#) is charged for the registration of a discharge or expiry. [Tariff item 13](#) is charged for each cancellation or endorsement after the first.

STATUTE AND CASE REFERENCES

Statute references are to the Land Titles Act, R.S.A. 2000, c. L-4, unless otherwise indicated.

1. V. DiCatri, *Thom's Canadian Torrens System*, 2nd ed., p. 373 ff.
2. *Galbraith v. Madawaska Club Ltd.* (1961) SCR 639 (S.C.C.)
3. *Canadian Construction Company v. Beaver (Alberta) Lumber Ltd.*, [1955], S.C.R. 682; *Oluk v. Marahrens and Marahrens* [1976] 4 W.W.R. 94 (Alta. App. Div.)
4. R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, 3rd ed., p. 758
5. s. 68
6. In *International Coal and Coke Co. v. Evans* (1909), 11 W.L.R. 463 (Alta.) Beck, J. commented at p. 464 that the proposition that the land must be adjoining was too restrictive.
7. s. 48(3)
8. s. 48(1)
9. see procedures on Attestation [AFF-1](#), [AFF-2](#) and [COR-1](#)
10. see procedure on Dower [DOW-1](#)
11. see procedure on Caveats [CAV-1](#)
12. s. 129
13. s. 48(4)
14. s. 73
15. see procedures on Attestation [AFF-1](#), [AFF-2](#) and [COR-1](#)
16. s. 73(2)
17. s. 137(2)
18. s. 139
19. see: *Seifeddine v. Governor and Company of Adventurers of England Trading into Hudson's Bay et al.* (1980), 11 Alta. L.R. (2d) 229 (C.A.) at pp. 237-239 for a discussion of building schemes.