Using Conservation Covenants to Preserve Private Land in British Columbia

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[Note: The amendments to statutes recommended in this paper have since been adopted by the B.C. Legislature. See *Leaving a Living Legacy: Using Conservation Covenants in British Columbia*.]

Contents

EXECUTIVE SUMMARY

Land use issues have long occupied a central role in environmental disputes in British Columbia. How land and its resources are managed and whether land will be subject to any human impact at all are questions that frequently generate heated public debate. Increasingly, citizens and conservation organizations are interested in the preservation or conservation of land for a variety of ecological reasons, including

- preserving wilderness areas,
- preserving important plant or wildlife habitat,
- maintaining a particular use of the land, such as agricultural use, and
- conserving green spaces for recreational and aesthetic purposes.

This report recommends that the Province of British Columbia enact legislation permitting the use of conservation covenants for the voluntary protection and preservation of private land in British Columbia. One of the most important features of this tool is that it would be possible for a landowner to grant a conservation covenant to a private conservation organization.

While a variety of tools are available to protect land, there is a growing need in British Columbia to expand the initiatives available to private parties for the protection of private land. In the United States and elsewhere, the conservation easement has enjoyed wide success as a private land protection measure. The conservation covenant recommended in this report is similar to the U.S. conservation easement. It is a tool that is flexible, requires a minimum of government resources, and could take advantage of the expertise of local and regional conservation organizations in land protection.

This report examines and makes recommendations on key issues that need to be addressed in the conservation covenant legislation. A summary of some of the main recommendations is set out below.

- Any incorporated society or not-for-profit corporation whose constitutional purposes include any purpose for which a conservation covenant may be granted should be able to hold a conservation covenant.

- A conservation covenant should not require the approval of government prior to registration.

- The common law and *Property Law Act* rules regarding the discharge of covenants and easements should not apply to conservation covenants.

- It should be possible to modify or discharge a conservation covenant only when it serves the original purposes of the conservation covenant.

- It should be possible to create a conservation covenant for a broad variety of conservation purposes.

- The common law requirement that a covenant must benefit adjacent land should not apply to conservation covenants.
- A conservation covenant should bind successor owners of the land.
- The rules regarding when parties who hold an interest other than title to the land are bound by the terms of a conservation covenant should be set out clearly.
- It should be possible for a conservation covenant to specify that a third party has the right to enforce the covenant.
- It should be possible for the holder of a conservation covenant to assign it to another party who is qualified to hold a conservation covenant.
- Various tax reforms should be implemented to optimize the use of conservation covenants in British Columbia.

There are serious constraints on the ability of government to preserve land in British Columbia. The focus on larger areas and the need for public financial restraint together hamper government's ability to preserve anything other than British Columbia's publicly owned land base. Given the limits to what government can do itself to protect all of the natural areas in British Columbia that warrant protection, there is a pressing need for private methods of protecting land as well. One of the most promising tools for the private protection of land is the conservation covenant. The government of British Columbia should act quickly to make this tool available.

PREFACE

The West Coast Environmental Law Research Foundation (WCELRF) is a non-profit, charitable society devoted to legal research and education aimed at protection of the environment and promotion of public participation in environmental decision-making. It operates in conjunction with the West Coast Environmental Law Association (WCELA), which provides legal services to concerned members of the public for the same two purposes.

This report has been prompted by a growing awareness among conservation groups and landowners in British Columbia that there are serious limits to what government can do to preserve the environment. This report urges law reform in British Columbia to enable the voluntary preservation of privately owned land through a new statutory tool called a conservation covenant, that may be granted to private conservation organizations. There are various methods currently available to protect private land in British Columbia. However, experience elsewhere illustrates that a tool similar to the conservation covenant recommmended in this report would be a valuable addition to the existing tools.

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CHAPTER 1
INTRODUCTION

Concern about the natural environment has increased dramatically in recent years. Many of the most pressing environmental issues in British Columbia are land use issues involving questions about allocation and management of land and resources. [[Footnote: (1) -- 1. For a discussion about a number of the environmental issues connected to land use issues, see British Columbia Round Table on the Environment and the Economy, *Sustainable Land and Water Use* (Victoria: British Columbia Round Table on the Environment and the Economy, 1991).]] There often is intense -- and sometimes acrimonious -- struggle over how land and resources are to be used, if at all. Many parties involved in land use struggles look to one level of government or another for resolution of the conflict. However, in many cases there are limits to what government can do to solve these problems. Therefore, private measures to preserve private land in British Columbia are becoming increasingly important.

This report examines the conservation covenant, a tool that offers maximum flexibility in the use of land while ensuring protection for defined purposes. This report also identifies key areas of law reform aimed at making this tool available to private conservation organizations, thereby creating new opportunities for the voluntary preservation of private land in British Columbia.

1.1 Limits on Government Action

There are serious constraints on the ability of government to preserve land in British Columbia. First, land use planning and protection mechanisms usually operate on a large scale. [[Footnote: (2) -- 2. This is not universally the case. For example, many ecological reserves in British Columbia protect relatively small areas.]] Traditional preservation tools, such as parks, apply to relatively large areas; they encompass valleys, forests or watersheds. Opportunities to protect smaller parcels of land, especially privately-held land, are frequently overlooked.

The second important limit on what government can do is financial. Despite broad public support for land preservation, the financial resources of government available for that purpose are increasingly limited. Moreover, land values in all areas of the province are climbing. For those reasons, government is often unable to purchase privately owned parcels of land for conservation purposes. Publicly funded preservation initiatives are therefore likely to continue to focus on Crown land. Privately held parcels of land are less likely to be preserved even if they are environmentally significant.

The focus on larger areas and the need for public financial restraint together hamper government's ability to preserve anything other than British Columbia's publicly owned land base. This has led many people to pursue private initiatives in land preservation to complement government action. [[Footnote: (3) -- 3. An example of the growing recognition that traditional conservation tools must be supplemented by private sector conservation tools is found in the opinion piece by D. Anderson, "More Than Mountaintops" *The Vancouver Sun* (21 December 1991) B5, where the author argues that there is a need for "an increase in the use of private sector legal tools for environmental protection."]]

1.2 Private Purchase of Land

Private purchase of private land for conservation purposes is a major option. However, the cost of land in British Columbia presents an increasingly serious obstacle to private land preservation through outright acquisition. Land values are an obstacle not only to government intervention, but also seriously limit the ability of private conservation organizations to acquire land for conservation purposes.

Cost is not the only reason private conservation organizations are interested in alternatives to land purchases. Some landowners have no interest in selling their land, in spite of possible tax benefits. For example, a farmer may wish to ensure that her land will continue to be used for agricultural purposes forever. Sale or donation of the land to a private conservation group may not provide sufficient assurance to the farmer that the use of the land will remain unchanged. In other cases, the landowner's desire to retain control may make outright disposition unworkable.

In addition to the purchase of land by a conservation organization, there are other legal tools available in British Columbia that offer opportunities for land preservation by private methods. There are two types of tools, statutory and non-statutory, and they include the following:

- statutory covenants in favour of the Crown;
- statutory rights of way;
- heritage easements or covenants;
- long term leases;
- fee simple transfers, with a lease back to the transferor;
- fee simple transfers, with a life interest back to the transferor;
- trusts;
- options to purchase; and
- profits a prendre.

1.3 The U.S. Conservation Easement

For reasons similar to those discussed above, methods of protecting land, other than through outright purchase, have become popular in the United States. Experience in the United States and elsewhere has shown that one of the most useful tools is what is referred to in the United States as a conservation easement, [[Footnote: (4) -- 4. In this report the term conservation covenant is used to refer to a registrable interest in land created for the purpose of preserving or conserving the land or some feature of the land. This interest is similar to that referred to as a conservation easement in the United States. While some authors draw a distinction between conservation covenants and conservation easements, in this report the terms are used interchangeably to refer to the same type of interest in land.

End of Footnote]] z which can be held by private organizations. It is one of the most popular tools used by land trusts [[Footnote: (5) -- 5. Many United States land preservation groups refer to themselves as land trusts, many of which are not-for-profit corporations. The term land trust is not a technical legal term. It arises from the fact that a land trust holds land, or interests in land, for the public purpose of preservation. Although land trusts may be formed and used in British

Columbia, examination of various practical and legal issues related to land trusts is beyond the scope of this report. End of Footnote]] z and other conservation groups in the United States. A similar method of land preservation is not available in British Columbia to private groups.

Other tools used by private conservation groups in the United States are already available in British Columbia. A detailed discussion of those tools is beyond the scope of this report. However, some require a brief discussion largely to underscore the need for law reform in British Columbia to permit the use of conservation covenants held by private groups.

1.4 Tools Available in British Columbia

The land preservation tools currently available for the protection of private land in British Columbia are both statutory [[Footnote: (6) -- 6. In addition to the statutory instruments discussed in the text, there are other statutory powers which may be useful in the preservation of private land. For example, a local government may co-operate in the designation of privately owned land as an environmentally sensitive area under the development permit area provisions of Part 29 of the *Municipal Act*, R.S.B.C. 1979, c. 290 [the "*Municipal Act*"].]] and non-statutory.

1.4.1 Statutory Tools

If a landowner wishes to involve government in land preservation, the *Land Title Act [[Footnote: (7) -- 7.* R.S.B.C. 1979, c. 219 [the "*Land Title Act*"].]] offers two useful tools.

First, section 215 of that Act permits a landowner to enter into an agreement with the government, by way of a covenant registered on title to the land, to restrict the use of the land in question, including what can or cannot be built on it. The agreement can also require the landowner to do something positive on the land, such as undertake a program of works preserving wetlands.

Recent amendments to the *Land Title Act* allow a covenant of this kind to be granted for environmental purposes. The new provision, section 215(1.1)(e), permits a covenant to be registered for the purpose of protecting, preserving, conserving or keeping land in its natural state according to the terms of the covenant. While a section 215 covenant is enforceable against successors in title and does not need to benefit adjacent land, it can only be granted in favour of a provincial or local government body. It cannot be granted in favour of a private party. This seriously limits its application for the protection of private land.

In this report, the covenant permitted under section 215(1.1)(e) of the *Land Title Act* is referred to as a " section 215 environmental covenant" to distinguish it from the new land preservation tool recommended in this report, referred to as a "conservation covenant". The latter could be held by a private organization, the former cannot.

Second, under section 214 of the *Land Title Act* it is possible for a landowner to give the provincial or a local government a statutory right of way over land. [[Footnote: (8) -- 8. Section 214 of the *Land Title Act* also allows a statutory right of way to be granted to anyone designated

by the Minister of Lands, Parks and Housing -- as the section now reads -- as qualified to receive such rights of way. This could be very useful for conservation groups, if the government were willing to make the necessary designations under section 214.]] This permits the government to use specified parts of the land for purposes necessary to a government undertaking. Some local governments have used this power to secure rural and urban trails.

Another existing statutory tool, similar to a covenant granted under section 215 of the *Land Title Act*, is the heritage conservation covenant or easement under sections 13 and 27 of the *Heritage Conservation Act*. [[Footnote: (9) -- 9. R.S.B.C. 1979, c. 165 [the "*Heritage Conservation Act*"].]] That Act allows a landowner to grant a covenant or easement in favour of the Province, the British Columbia Heritage Trust or a local government for the purpose of protecting or conserving a heritage object or heritage site. A heritage site is defined in section 1 of the *Heritage Conservation Act* as "land, including land covered by water" which has "historic, architectural, archaeological, palaeontological or scenic significance to the Province or a municipality."

It is clear from the language of the *Heritage Conservation Act* that land can have heritage significance apart from the structures located on the land. A heritage covenant or easement could be used, for example, to preserve a landscape of scenic or historic significance.

Further, unlike section 215 of the *Land Title Act*, the *Heritage Conservation Act* expressly contemplates assignment of interests created under it. Section 27(3) of that Act provides that a heritage easement or covenant may be "assigned ... to any person and shall continue to run with the land and may be enforced ... by and in the name of that person." The assignability of such interests offers considerable flexibility. For instance, it would be possible for a local government to act as a facilitator by accepting a covenant or easement and then assigning it to a private conservation organization. However, one significant restriction on the use of heritage covenants or easements is the limited list of heritage purposes for which they can be created. For example, there will be many cases where wildlife habitat which merits preservation is neither scenically nor historically significant to the Province or a local government.

1.4.2 Non-Statutory Tools

There are four main non-statutory preservation techniques available in British Columbia to landowners and private conservation groups or governments, in addition to the option of purchasing the land outright.

First, a landowner may grant a long term lease of land to a conservation group for 99 years or longer. The lease could include a base-line ecological inventory of the land, using written descriptions, data, graphs, photographs and maps, and detailed conditions for the use of the land by the conservation group. Breach of the conditions, such as use of the land for prohibited purposes, might entitle the landowner or his or her heirs to terminate the lease. This would give the landowner ongoing control over land use while giving the conservation group some security of tenure. [[Footnote: (10) -- 10. There may be tax consequences which would limit the utility of this technique.]]

Second, a variation of the long term lease is a "lease-back". In this case a landowner transfers title to the land to a conservation group. As part of the deal the conservation group leases the land back to the owner on a long term lease, subject to conditions designed to ensure preservation of the land or particular aspects of it. Breach of the lease could entitle the conservation group to terminate the lease and take possession of the land.

Third, a landowner could transfer title to the land to a conservation group, but reserve a life interest in the land. This allows the landowner to remain on the land for life undisturbed. However, the landowner has the assurance that the conservation group will assume control of the land upon the landowner's death, without further legal action.

A fourth tool currently available involves carving up property rights and transferring a specific right to a conservation group. One such property right is known as a profit a prendre, a right which entitles its holder to enter the land and carry away or harvest a specified part or produce of the land. For example, if a landowner wished to preserve old growth forest on his or her land, the landowner could grant a conservation organization a profit a prendre entitling the organization to enter the land and cut trees growing on it. By granting such a right to a conservation group, the landowner would prevent future owners of the land from harvesting the trees, since that right has been given away. The profit a prendre itself -- or perhaps a collateral agreement in some cases -- would place conditions on the use of the profit a prendre. If it was the landowner's intention to preserve the old growth forest on the land, the conditions would prohibit cutting old growth trees.

Profits a prendre also can be given with respect to the land's soil, water, and other commonly exploited components. [[Footnote: (11) -- 11. See A.H. Oosterhoff & W.B. Rayner, 2d ed., *Anger & Honsberger: Law of Real Property* (Aurora, Ontario: Canada Law Book, 1985) at 973-977 ["*Anger & Honsberger*"]. In British Columbia, the *Mineral Tenure Act*, R.S.B.C. 1979, c. 263.3 removes the power of almost all landowners in the province over minerals on their land. There are exceptions, such as where the original Crown grant included minerals of certain kinds (which varies from case to case).]]

1.5 Need for Law Reform

While the tools discussed above -- and other statutory and non-statutory tools -- are currently available for preserving private land in British Columbia, each has limits to its application. For example, one serious drawback to using the available statutory tools is that each involves a level of government, thus limiting private conservation organization initiatives.

Experience in the United States suggests that what is referred to in this report as a conservation covenant is the most flexible and widely used private land preservation tool in the various states. Even though in British Columbia it is possible to grant a covenant for conservation purposes under section 215 of the *Land Title Act*, the section 215 environmental covenant, it must be held by a government body. Law reform is needed in British Columbia to allow private organizations to hold conservation covenants.

1.6 Land Title System in British Columbia

It is necessary to discuss briefly the land title system in British Columbia, since the legal effectiveness of conservation covenants -- and the legal tools just outlined -- depends on that regime. The following discussion, intended for the general reader, deals only with those aspects of the British Columbia land title system relevant to this report.

The law conceives of land, which is also known as real property or realty, as a bundle of individual property rights which can be divided into component property rights. A landowner can transfer some or all of these rights to another person, a conservation group or a government. For instance, a landowner can lease land or grant a profit a prendre by carving out specific rights from the overall bundle of property rights and transferring them to someone else.

In earlier times there was no system for keeping track of who had done what with that bundle of property rights. This had serious drawbacks, since it was difficult for anyone dealing with a landowner, such as a prospective purchaser or lender, to know if the landowner really owned all the rights to the land. A basic legal rule is that a purchaser cannot acquire any legal rights which were not the seller's to give. So purchasers were always nervous that someone would claim to have acquired an interest in the land from a previous owner.

The problems resulting from this state of affairs led to legislation in various jurisdictions creating systems for registration of all dealings with land. The current land title system in British Columbia, which is established by the *Land Title Act*, provides certainty as to dealings with land. Subject to certain exceptions, [[Footnote: (12) -- 12. Such as the limits set out in section 23 of the *Land Title Act* regarding municipal taxes.]] the present statutory regime is designed to ensure that anyone who wishes to purchase land can search the title records kept by the Land Title Office and be certain of what they are getting.

This certainty has been achieved by providing in the *Land Title Act* that every owner registered in the Land Title Office has a good and marketable title to the land he or she is shown as owning. [[Footnote: (13) -- 13. *Land Title Act*, s. 23.]] Therefore, if Jane Doe is registered in the Land Title Office as the owner of certain land, that normally settles the matter. Subject to some rarely encountered exceptions, [[Footnote: (14) -- 14. Such as the right of a person to show fraud in which the registered owner has participated. See *Land Title Act*, s. 23(1)(j). End of Footnote]] z her registration under the *Land Title Act* as owner of the land assures everyone that she is the owner of the land.

The system also records lesser interests in land, such as the rights of mortgagees or holders of easements. [[Footnote: (15) -- 15. It should be noted that section 26 of the *Land Title Act* provides that only the fee simple interest is indefeasible; lesser interests such as easements -- or conservation covenants -- are open to challenges to their validity. Although beyond the scope of this report, some consideration should be given to whether conservation covenants should also be indefeasible and immune from challenge.]] For example, if Jane Doe has mortgaged her land, registration of the mortgage in the Land Title Office gives everyone notice of the mortgage company's rights under the mortgage. Everyone who deals with the land -- for example, a second mortgagee -- is subject to the first mortgagee's rights. If anyone buys the land from Jane Doe and the two mortgages are not discharged, the purchaser becomes bound by them.

This has important implications in the land preservation context. If it were possible to register a conservation covenant of the type recommended by this report against title to Jane Doe's land, anyone who later bought the land from Jane Doe, or who was later registered as the holder of a mortgage of the land, would be bound by the covenant and would be required to observe it. Anyone who acquired an interest in the land after the covenant had been registered would be deemed by the *Land Title Act* to have had notice of the obligation and therefore would be bound by it. [[Footnote: (16) -- 16. As always in the law, there are important exceptions to this, some of which are discussed in this report in connection with conservation covenants.]]

Despite some important exceptions to this system, if law reform in British Columbia proceeds as recommended in this report, conservation covenants could very effectively bind parties who later deal with the land. This ability to affect people who later deal with the land would make conservation covenants an effective tool for the voluntary preservation of private land.

1.7 Organization of this Report

The remainder of this report is organized as follows:

- Chapter 2 discusses possible uses for conservation covenants and the environmental benefits that could be achieved.
- Chapter 3 examines why the current legal rules governing covenants and easements make these tools unsuitable for preserving land for environmental reasons.
- Chapter 4 examines initiatives in other jurisdictions which have allowed for the use of conservation covenants or easements as private land preservation tools.
- Chapter 5 proposes, in broad terms, the law reform needed to make conservation covenants a viable land preservation option in British Columbia.
- Chapter 6 considers the income tax and other tax issues affecting the use of conservation covenants.
- Chapter 7 sets out the conclusions.
- Appendix A reproduces the recommendations made in this report.
- Appendix B contains a glossary of a number of terms used in the report. [[Footnote: (17) -- 17. These definitions are intended to provide a discussion framework for this report. The circumstances of a particular case may require a different understanding of what is meant by a specific term.]]

- Appendix C contains a more detailed discussion of the current law on easements and covenants.
- Bibliography lists a selection of useful books, articles, reports and legal cases.

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1.4.1 Statutory Tools

If a landowner wishes to involve government in land preservation, the *Land Title Act [[Footnote: (7) -- 7.* R.S.B.C. 1979, c. 219 [the "*Land Title Act*"].]] offers two useful tools.

First, section 215 of that Act permits a landowner to enter into an agreement with the government, by way of a covenant registered on title to the land, to restrict the use of the land in question, including what can or cannot be built on it. The agreement can also require the landowner to do something positive on the land, such as undertake a program of works preserving wetlands.

Recent amendments to the *Land Title Act* allow a covenant of this kind to be granted for environmental purposes. The new provision, section 215(1.1)(e), permits a covenant to be registered for the purpose of protecting, preserving, conserving or keeping land in its natural state according to the terms of the covenant. While a section 215 covenant is enforceable against successors in title and does not need to benefit adjacent land, it can only be granted in favour of a provincial or local government body. It cannot be granted in favour of a private party. This seriously limits its application for the protection of private land.

In this report, the covenant permitted under section 215(1.1)(e) of the *Land Title Act* is referred to as a " section 215 environmental covenant" to distinguish it from the new land preservation tool recommended in this report, referred to as a "conservation covenant". The latter could be held by a private organization, the former cannot.

Second, under section 214 of the *Land Title Act* it is possible for a landowner to give the provincial or a local government a statutory right of way over land. [[Footnote: (8) -- 8. Section 214 of the *Land Title Act* also allows a statutory right of way to be granted to anyone designated by the Minister of Lands, Parks and Housing -- as the section now reads -- as qualified to receive such rights of way. This could be very useful for conservation groups, if the government were willing to make the necessary designations under section 214.]] This permits the government to use specified parts of the land for purposes necessary to a government undertaking. Some local governments have used this power to secure rural and urban trails.

Another existing statutory tool, similar to a covenant granted under section 215 of the *Land Title Act*, is the heritage conservation covenant or easement under sections 13 and 27 of the *Heritage Conservation Act*. [[Footnote: (9) -- 9. R.S.B.C. 1979, c. 165 [the "*Heritage Conservation Act*"].]] That Act allows a landowner to grant a covenant or easement in favour of the Province, the British Columbia Heritage Trust or a local government for the purpose of protecting or conserving a heritage object or heritage site. A heritage site is defined in section 1 of the *Heritage Conservation Act* as "land, including land covered by water" which has "historic, architectural, archaeological, palaeontological or scenic significance to the Province or a municipality."

It is clear from the language of the *Heritage Conservation Act* that land can have heritage significance apart from the structures located on the land. A heritage covenant or easement could be used, for example, to preserve a landscape of scenic or historic significance.

Further, unlike section 215 of the *Land Title Act*, the *Heritage Conservation Act* expressly contemplates assignment of interests created under it. Section 27(3) of that Act provides that a heritage easement or covenant may be "assigned ... to any person and shall continue to run with the land and may be enforced ... by and in the name of that person." The assignability of such interests offers considerable flexibility. For instance, it would be possible for a local government to act as a facilitator by accepting a covenant or easement and then assigning it to a private conservation organization. However, one significant restriction on the use of heritage covenants or easements is the limited list of heritage purposes for which they can be created. For example, there will be many cases where wildlife habitat which merits preservation is neither scenically nor historically significant to the Province or a local government.

1.4.2 Non-Statutory Tools

There are four main non-statutory preservation techniques available in British Columbia to landowners and private conservation groups or governments, in addition to the option of purchasing the land outright.

First, a landowner may grant a long term lease of land to a conservation group for 99 years or longer. The lease could include a base-line ecological inventory of the land, using written descriptions, data, graphs, photographs and maps, and detailed conditions for the use of the land by the conservation group. Breach of the conditions, such as use of the land for prohibited purposes, might entitle the landowner or his or her heirs to terminate the lease. This would give the landowner ongoing control over land use while giving the conservation group some security of tenure. [[Footnote: (10) -- 10. There may be tax consequences which would limit the utility of this technique.]]

Second, a variation of the long term lease is a "lease-back". In this case a landowner transfers title to the land to a conservation group. As part of the deal the conservation group leases the land back to the owner on a long term lease, subject to conditions designed to ensure preservation of the land or particular aspects of it. Breach of the lease could entitle the conservation group to terminate the lease and take possession of the land.

Third, a landowner could transfer title to the land to a conservation group, but reserve a life interest in the land. This allows the landowner to remain on the land for life undisturbed. However, the landowner has the assurance that the conservation group will assume control of the land upon the landowner's death, without further legal action.

A fourth tool currently available involves carving up property rights and transferring a specific right to a conservation group. One such property right is known as a profit a prendre, a right which entitles its holder to enter the land and carry away or harvest a specified part or produce of the land. For example, if a landowner wished to preserve old growth forest on his or her land, the landowner could grant a conservation organization a profit a prendre entitling the organization to enter the land and cut trees growing on it. By granting such a right to a conservation group, the landowner would prevent future owners of the land from harvesting the trees, since that right has been given away. The profit a prendre itself -- or perhaps a collateral agreement in some cases -- would place conditions on the use of the profit a prendre. If it was the landowner's intention to preserve the old growth forest on the land, the conditions would prohibit cutting old growth trees.

Profits a prendre also can be given with respect to the land's soil, water, and other commonly exploited components. [[Footnote: (11) -- 11. See A.H. Oosterhoff & W.B. Rayner, 2d ed., *Anger & Honsberger: Law of Real Property* (Aurora, Ontario: Canada Law Book, 1985) at 973-977 ["*Anger & Honsberger*"]. In British Columbia, the *Mineral Tenure Act*, R.S.B.C. 1979, c. 263.3 removes the power of almost all landowners in the province over minerals on their land. There are exceptions, such as where the original Crown grant included minerals of certain kinds (which varies from case to case).]]

1.5 Need for Law Reform

While the tools discussed above -- and other statutory and non-statutory tools -- are currently available for preserving private land in British Columbia, each has limits to its application. For example, one serious drawback to using the available statutory tools is that each involves a level of government, thus limiting private conservation organization initiatives.

Experience in the United States suggests that what is referred to in this report as a conservation covenant is the most flexible and widely used private land preservation tool in the various states. Even though in British Columbia it is possible to grant a covenant for conservation purposes under section 215 of the *Land Title Act*, the section 215 environmental covenant, it must be held by a government body. Law reform is needed in British Columbia to allow private organizations to hold conservation covenants.

1.6 Land Title System in British Columbia

It is necessary to discuss briefly the land title system in British Columbia, since the legal effectiveness of conservation covenants -- and the legal tools just outlined -- depends on that regime. The following discussion, intended for the general reader, deals only with those aspects of the British Columbia land title system relevant to this report.

The law conceives of land, which is also known as real property or realty, as a bundle of individual property rights which can be divided into component property rights. A landowner can transfer some or all of these rights to another person, a conservation group or a government. For instance, a landowner can lease land or grant a profit a prendre by carving out specific rights from the overall bundle of property rights and transferring them to someone else.

In earlier times there was no system for keeping track of who had done what with that bundle of property rights. This had serious drawbacks, since it was difficult for anyone dealing with a landowner, such as a prospective purchaser or lender, to know if the landowner really owned all the rights to the land. A basic legal rule is that a purchaser cannot acquire any legal rights which were not the seller's to give. So purchasers were always nervous that someone would claim to have acquired an interest in the land from a previous owner.

The problems resulting from this state of affairs led to legislation in various jurisdictions creating systems for registration of all dealings with land. The current land title system in British Columbia, which is established by the *Land Title Act*, provides certainty as to dealings with land. Subject to certain exceptions, [[Footnote: (12) -- 12. Such as the limits set out in section 23 of the *Land Title Act* regarding municipal taxes.]] the present statutory regime is designed to ensure that anyone who wishes to purchase land can search the title records kept by the Land Title Office and be certain of what they are getting.

This certainty has been achieved by providing in the *Land Title Act* that every owner registered in the Land Title Office has a good and marketable title to the land he or she is shown as owning. [[Footnote: (13) -- 13. *Land Title Act*, s. 23.]] Therefore, if Jane Doe is registered in the Land Title Office as the owner of certain land, that normally settles the matter. Subject to some rarely

encountered exceptions, [[Footnote: (14) -- 14. Such as the right of a person to show fraud in which the registered owner has participated. See *Land Title Act*, s. 23(1)(j). End of Footnote]] z her registration under the *Land Title Act* as owner of the land assures everyone that she is the owner of the land.

The system also records lesser interests in land, such as the rights of mortgagees or holders of easements. [[Footnote: (15) -- 15. It should be noted that section 26 of the *Land Title Act* provides that only the fee simple interest is indefeasible; lesser interests such as easements -- or conservation covenants -- are open to challenges to their validity. Although beyond the scope of this report, some consideration should be given to whether conservation covenants should also be indefeasible and immune from challenge.]] For example, if Jane Doe has mortgaged her land, registration of the mortgage in the Land Title Office gives everyone notice of the mortgage company's rights under the mortgage. Everyone who deals with the land -- for example, a second mortgagee -- is subject to the first mortgagee's rights. If anyone buys the land from Jane Doe and the two mortgages are not discharged, the purchaser becomes bound by them.

This has important implications in the land preservation context. If it were possible to register a conservation covenant of the type recommended by this report against title to Jane Doe's land, anyone who later bought the land from Jane Doe, or who was later registered as the holder of a mortgage of the land, would be bound by the covenant and would be required to observe it. Anyone who acquired an interest in the land after the covenant had been registered would be deemed by the *Land Title Act* to have had notice of the obligation and therefore would be bound by it. [[Footnote: (16) -- 16. As always in the law, there are important exceptions to this, some of which are discussed in this report in connection with conservation covenants.]]

Despite some important exceptions to this system, if law reform in British Columbia proceeds as recommended in this report, conservation covenants could very effectively bind parties who later deal with the land. This ability to affect people who later deal with the land would make conservation covenants an effective tool for the voluntary preservation of private land.

1.7 Organization of this Report

The remainder of this report is organized as follows:

- Chapter 2 discusses possible uses for conservation covenants and the environmental benefits that could be achieved.
- Chapter 3 examines why the current legal rules governing covenants and easements make these tools unsuitable for preserving land for environmental reasons.
- Chapter 4 examines initiatives in other jurisdictions which have allowed for the use of conservation covenants or easements as private land preservation tools.
- Chapter 5 proposes, in broad terms, the law reform needed to make conservation covenants a viable land preservation option in British Columbia.
- Chapter 6 considers the income tax and other tax issues affecting the use of conservation covenants.
- Chapter 7 sets out the conclusions.
- Appendix A reproduces the recommendations made in this report.

- Appendix B contains a glossary of a number of terms used in the report. [[Footnote: (17) -- 17. These definitions are intended to provide a discussion framework for this report. The circumstances of a particular case may require a different understanding of what is meant by a specific term.]]

- Appendix C contains a more detailed discussion of the current law on easements and covenants.
- Bibliography lists a selection of useful books, articles, reports and legal cases.

ACKNOWLEDGEMENTS

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The views expressed are those of the author and the West Coast Environmental Law Research Foundation . Any errors or omissions are, of course, solely the responsibility of the author.

CHAPTER 1
INTRODUCTION

Concern about the natural environment has increased dramatically in recent years. Many of the most pressing environmental issues in British Columbia are land use issues involving questions about allocation and management of land and resources. [[Footnote: (1) -- 1. For a discussion about a number of the environmental issues connected to land use issues, see British Columbia Round Table on the Environment and the Economy, *Sustainable Land and Water Use* (Victoria: British Columbia Round Table on the Environment and the Economy, 1991).]] There often is intense -- and sometimes acrimonious -- struggle over how land and resources are to be used, if at all. Many parties involved in land use struggles look to one level of government or another for resolution of the conflict. However, in many cases there are limits to what government can do to solve these problems. Therefore, private measures to preserve private land in British Columbia are becoming increasingly important.

This report examines the conservation covenant, a tool that offers maximum flexibility in the use of land while ensuring protection for defined purposes. This report also identifies key areas of law reform aimed at making this tool available to private conservation organizations, thereby creating new opportunities for the voluntary preservation of private land in British Columbia.

1.1 Limits on Government Action

There are serious constraints on the ability of government to preserve land in British Columbia. First, land use planning and protection mechanisms usually operate on a large scale. [[Footnote: (2) -- 2. This is not universally the case. For example, many ecological reserves in British Columbia protect relatively small areas.]] Traditional preservation tools, such as parks, apply to relatively large areas; they encompass valleys, forests or watersheds. Opportunities to protect smaller parcels of land, especially privately-held land, are frequently overlooked.

The second important limit on what government can do is financial. Despite broad public support for land preservation, the financial resources of government available for that purpose are increasingly limited. Moreover, land values in all areas of the province are climbing. For those reasons, government is often unable to purchase privately owned parcels of land for conservation purposes. Publicly funded preservation initiatives are therefore likely to continue to focus on Crown land. Privately held parcels of land are less likely to be preserved even if they are environmentally significant.

The focus on larger areas and the need for public financial restraint together hamper government's ability to preserve anything other than British Columbia's publicly owned land base. This has led many people to pursue private initiatives in land preservation to complement government action. [[Footnote: (3) -- 3. An example of the growing recognition that traditional conservation tools must be supplemented by private sector conservation tools is found in the opinion piece by D. Anderson, "More Than Mountaintops" *The Vancouver Sun* (21 December 1991) B5, where the author argues that there is a need for "an increase in the use of private sector legal tools for environmental protection."]]

1.2 Private Purchase of Land

Private purchase of private land for conservation purposes is a major option. However, the cost of land in British Columbia presents an increasingly serious obstacle to private land preservation through outright acquisition. Land values are an obstacle not only to government intervention, but also seriously limit the ability of private conservation organizations to acquire land for conservation purposes.

Cost is not the only reason private conservation organizations are interested in alternatives to land purchases. Some landowners have no interest in selling their land, in spite of possible tax benefits. For example, a farmer may wish to ensure that her land will continue to be used for agricultural purposes forever. Sale or donation of the land to a private conservation group may not provide sufficient assurance to the farmer that the use of the land will remain unchanged. In other cases, the landowner's desire to retain control may make outright disposition unworkable.

In addition to the purchase of land by a conservation organization, there are other legal tools available in British Columbia that offer opportunities for land preservation by private methods. There are two types of tools, statutory and non-statutory, and they include the following:

- statutory covenants in favour of the Crown;
- statutory rights of way;
- heritage easements or covenants;
- long term leases;
- fee simple transfers, with a lease back to the transferor;
- fee simple transfers, with a life interest back to the transferor;
- trusts;
- options to purchase; and
- profits a prendre.

1.3 The U.S. Conservation Easement

For reasons similar to those discussed above, methods of protecting land, other than through outright purchase, have become popular in the United States. Experience in the United States and elsewhere has shown that one of the most useful tools is what is referred to in the United States as a conservation easement, [[Footnote: (4) -- 4. In this report the term conservation covenant is used to refer to a registrable interest in land created for the purpose of preserving or conserving the land or some feature of the land. This interest is similar to that referred to as a conservation easement in the United States. While some authors draw a distinction between conservation covenants and conservation easements, in this report the terms are used interchangeably to refer to the same type of interest in land.

End of Footnote]] z which can be held by private organizations. It is one of the most popular tools used by land trusts [[Footnote: (5) -- 5. Many United States land preservation groups refer to themselves as land trusts, many of which are not-for-profit corporations. The term land trust is not a technical legal term. It arises from the fact that a land trust holds land, or interests in land, for the public purpose of preservation. Although land trusts may be formed and used in British Columbia, examination of various practical and legal issues related to land trusts is beyond the scope of this report. End of Footnote]] z and other conservation groups in the United States. A similar method of land preservation is not available in British Columbia to private groups.

Other tools used by private conservation groups in the United States are already available in British Columbia. A detailed discussion of those tools is beyond the scope of this report. However, some require a brief discussion largely to underscore the need for law reform in British Columbia to permit the use of conservation covenants held by private groups.

1.4 Tools Available in British Columbia

The land preservation tools currently available for the protection of private land in British Columbia are both statutory [[Footnote: (6) -- 6. In addition to the statutory instruments discussed in the text, there are other statutory powers which may be useful in the preservation of private land. For example, a local government may co-operate in the designation of privately

owned land as an environmentally sensitive area under the development permit area provisions of Part 29 of the *Municipal Act*, R.S.B.C. 1979, c. 290 [the "*Municipal Act*"].]] and non-statutory.

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First, section 215 of that Act permits a landowner to enter into an agreement with the government, by way of a covenant registered on title to the land, to restrict the use of the land in question, including what can or cannot be built on it. The agreement can also require the landowner to do something positive on the land, such as undertake a program of works preserving wetlands.

Recent amendments to the *Land Title Act* allow a covenant of this kind to be granted for environmental purposes. The new provision, section 215(1.1)(e), permits a covenant to be registered for the purpose of protecting, preserving, conserving or keeping land in its natural state according to the terms of the covenant. While a section 215 covenant is enforceable against successors in title and does not need to benefit adjacent land, it can only be granted in favour of a provincial or local government body. It cannot be granted in favour of a private party. This seriously limits its application for the protection of private land.

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This has important implications in the land preservation context. If it were possible to register a conservation covenant of the type recommended by this report against title to Jane Doe's land, anyone who later bought the land from Jane Doe, or who was later registered as the holder of a mortgage of the land, would be bound by the covenant and would be required to observe it. Anyone who acquired an interest in the land after the covenant had been registered would be deemed by the *Land Title Act* to have had notice of the obligation and therefore would be bound by it. [[Footnote: (16) -- 16. As always in the law, there are important exceptions to this, some of which are discussed in this report in connection with conservation covenants.]]

Despite some important exceptions to this system, if law reform in British Columbia proceeds as recommended in this report, conservation covenants could very effectively bind parties who later deal with the land. This ability to affect people who later deal with the land would make conservation covenants an effective tool for the voluntary preservation of private land.

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CHAPTER 1
INTRODUCTION

Concern about the natural environment has increased dramatically in recent years. Many of the most pressing environmental issues in British Columbia are land use issues involving questions about allocation and management of land and resources. [[Footnote: (1) -- 1. For a discussion about a number of the environmental issues connected to land use issues, see British Columbia Round Table on the Environment and the Economy, *Sustainable Land and Water Use* (Victoria: British Columbia Round Table on the Environment and the Economy, 1991).]] There often is intense -- and sometimes acrimonious -- struggle over how land and resources are to be used, if at all. Many parties involved in land use struggles look to one level of government or another for resolution of the conflict. However, in many cases there are limits to what government can do to solve these problems. Therefore, private measures to preserve private land in British Columbia are becoming increasingly important.

This report examines the conservation covenant, a tool that offers maximum flexibility in the use of land while ensuring protection for defined purposes. This report also identifies key areas of law reform aimed at making this tool available to private conservation organizations, thereby creating new opportunities for the voluntary preservation of private land in British Columbia.

1.1 Limits on Government Action

There are serious constraints on the ability of government to preserve land in British Columbia. First, land use planning and protection mechanisms usually operate on a large scale. [[Footnote: (2) -- 2. This is not universally the case. For example, many ecological reserves in British Columbia protect relatively small areas.]] Traditional preservation tools, such as parks, apply to relatively large areas; they encompass valleys, forests or watersheds. Opportunities to protect smaller parcels of land, especially privately-held land, are frequently overlooked.

The second important limit on what government can do is financial. Despite broad public support for land preservation, the financial resources of government available for that purpose are increasingly limited. Moreover, land values in all areas of the province are climbing. For those reasons, government is often unable to purchase privately owned parcels of land for conservation purposes. Publicly funded preservation initiatives are therefore likely to continue to focus on Crown land. Privately held parcels of land are less likely to be preserved even if they are environmentally significant.

The focus on larger areas and the need for public financial restraint together hamper government's ability to preserve anything other than British Columbia's publicly owned land base. This has led many people to pursue private initiatives in land preservation to complement government action. [[Footnote: (3) -- 3. An example of the growing recognition that traditional conservation tools must be supplemented by private sector conservation tools is found in the opinion piece by D. Anderson, "More Than Mountaintops" *The Vancouver Sun* (21 December 1991) B5, where the author argues that there is a need for "an increase in the use of private sector legal tools for environmental protection."]]

1.2 Private Purchase of Land

Private purchase of private land for conservation purposes is a major option. However, the cost of land in British Columbia presents an increasingly serious obstacle to private land preservation through outright acquisition. Land values are an obstacle not only to government intervention, but also seriously limit the ability of private conservation organizations to acquire land for conservation purposes.

Cost is not the only reason private conservation organizations are interested in alternatives to land purchases. Some landowners have no interest in selling their land, in spite of possible tax benefits. For example, a farmer may wish to ensure that her land will continue to be used for agricultural purposes forever. Sale or donation of the land to a private conservation group may not provide sufficient assurance to the farmer that the use of the land will remain unchanged. In other cases, the landowner's desire to retain control may make outright disposition unworkable.

In addition to the purchase of land by a conservation organization, there are other legal tools available in British Columbia that offer opportunities for land preservation by private methods. There are two types of tools, statutory and non-statutory, and they include the following:

- statutory covenants in favour of the Crown;
- statutory rights of way;
- heritage easements or covenants;
- long term leases;
- fee simple transfers, with a lease back to the transferor;
- fee simple transfers, with a life interest back to the transferor;
- trusts;
- options to purchase; and
- profits a prendre.

1.3 The U.S. Conservation Easement

For reasons similar to those discussed above, methods of protecting land, other than through outright purchase, have become popular in the United States. Experience in the United States and elsewhere has shown that one of the most useful tools is what is referred to in the United States as a conservation easement, [[Footnote: (4) -- 4. In this report the term conservation covenant is used to refer to a registrable interest in land created for the purpose of preserving or conserving the land or some feature of the land. This interest is similar to that referred to as a conservation easement in the United States. While some authors draw a distinction between conservation covenants and conservation easements, in this report the terms are used interchangeably to refer to the same type of interest in land.

End of Footnote]] z which can be held by private organizations. It is one of the most popular tools used by land trusts [[Footnote: (5) -- 5. Many United States land preservation groups refer to themselves as land trusts, many of which are not-for-profit corporations. The term land trust is not a technical legal term. It arises from the fact that a land trust holds land, or interests in land, for the public purpose of preservation. Although land trusts may be formed and used in British

Columbia, examination of various practical and legal issues related to land trusts is beyond the scope of this report. End of Footnote]] z and other conservation groups in the United States. A similar method of land preservation is not available in British Columbia to private groups.

Other tools used by private conservation groups in the United States are already available in British Columbia. A detailed discussion of those tools is beyond the scope of this report. However, some require a brief discussion largely to underscore the need for law reform in British Columbia to permit the use of conservation covenants held by private groups.

1.4 Tools Available in British Columbia

The land preservation tools currently available for the protection of private land in British Columbia are both statutory [[Footnote: (6) -- 6. In addition to the statutory instruments discussed in the text, there are other statutory powers which may be useful in the preservation of private land. For example, a local government may co-operate in the designation of privately owned land as an environmentally sensitive area under the development permit area provisions of Part 29 of the *Municipal Act*, R.S.B.C. 1979, c. 290 [the "*Municipal Act*"].]] and non-statutory.

1.4.1 Statutory Tools

If a landowner wishes to involve government in land preservation, the *Land Title Act [[Footnote: (7) -- 7.* R.S.B.C. 1979, c. 219 [the "*Land Title Act*"].]] offers two useful tools.

First, section 215 of that Act permits a landowner to enter into an agreement with the government, by way of a covenant registered on title to the land, to restrict the use of the land in question, including what can or cannot be built on it. The agreement can also require the landowner to do something positive on the land, such as undertake a program of works preserving wetlands.

Recent amendments to the *Land Title Act* allow a covenant of this kind to be granted for environmental purposes. The new provision, section 215(1.1)(e), permits a covenant to be registered for the purpose of protecting, preserving, conserving or keeping land in its natural state according to the terms of the covenant. While a section 215 covenant is enforceable against successors in title and does not need to benefit adjacent land, it can only be granted in favour of a provincial or local government body. It cannot be granted in favour of a private party. This seriously limits its application for the protection of private land.

In this report, the covenant permitted under section 215(1.1)(e) of the *Land Title Act* is referred to as a " section 215 environmental covenant" to distinguish it from the new land preservation tool recommended in this report, referred to as a "conservation covenant". The latter could be held by a private organization, the former cannot.

Second, under section 214 of the *Land Title Act* it is possible for a landowner to give the provincial or a local government a statutory right of way over land. [[Footnote: (8) -- 8. Section 214 of the *Land Title Act* also allows a statutory right of way to be granted to anyone designated

by the Minister of Lands, Parks and Housing -- as the section now reads -- as qualified to receive such rights of way. This could be very useful for conservation groups, if the government were willing to make the necessary designations under section 214.]] This permits the government to use specified parts of the land for purposes necessary to a government undertaking. Some local governments have used this power to secure rural and urban trails.

Another existing statutory tool, similar to a covenant granted under section 215 of the *Land Title Act*, is the heritage conservation covenant or easement under sections 13 and 27 of the *Heritage Conservation Act*. [[Footnote: (9) -- 9. R.S.B.C. 1979, c. 165 [the "*Heritage Conservation Act*"].]] That Act allows a landowner to grant a covenant or easement in favour of the Province, the British Columbia Heritage Trust or a local government for the purpose of protecting or conserving a heritage object or heritage site. A heritage site is defined in section 1 of the *Heritage Conservation Act* as "land, including land covered by water" which has "historic, architectural, archaeological, palaeontological or scenic significance to the Province or a municipality."

It is clear from the language of the *Heritage Conservation Act* that land can have heritage significance apart from the structures located on the land. A heritage covenant or easement could be used, for example, to preserve a landscape of scenic or historic significance.

Further, unlike section 215 of the *Land Title Act*, the *Heritage Conservation Act* expressly contemplates assignment of interests created under it. Section 27(3) of that Act provides that a heritage easement or covenant may be "assigned ... to any person and shall continue to run with the land and may be enforced ... by and in the name of that person." The assignability of such interests offers considerable flexibility. For instance, it would be possible for a local government to act as a facilitator by accepting a covenant or easement and then assigning it to a private conservation organization. However, one significant restriction on the use of heritage covenants or easements is the limited list of heritage purposes for which they can be created. For example, there will be many cases where wildlife habitat which merits preservation is neither scenically nor historically significant to the Province or a local government.

1.4.2 Non-Statutory Tools

There are four main non-statutory preservation techniques available in British Columbia to landowners and private conservation groups or governments, in addition to the option of purchasing the land outright.

First, a landowner may grant a long term lease of land to a conservation group for 99 years or longer. The lease could include a base-line ecological inventory of the land, using written descriptions, data, graphs, photographs and maps, and detailed conditions for the use of the land by the conservation group. Breach of the conditions, such as use of the land for prohibited purposes, might entitle the landowner or his or her heirs to terminate the lease. This would give the landowner ongoing control over land use while giving the conservation group some security of tenure. [[Footnote: (10) -- 10. There may be tax consequences which would limit the utility of this technique.]]

Second, a variation of the long term lease is a "lease-back". In this case a landowner transfers title to the land to a conservation group. As part of the deal the conservation group leases the land back to the owner on a long term lease, subject to conditions designed to ensure preservation of the land or particular aspects of it. Breach of the lease could entitle the conservation group to terminate the lease and take possession of the land.

Third, a landowner could transfer title to the land to a conservation group, but reserve a life interest in the land. This allows the landowner to remain on the land for life undisturbed. However, the landowner has the assurance that the conservation group will assume control of the land upon the landowner's death, without further legal action.

A fourth tool currently available involves carving up property rights and transferring a specific right to a conservation group. One such property right is known as a profit a prendre, a right which entitles its holder to enter the land and carry away or harvest a specified part or produce of the land. For example, if a landowner wished to preserve old growth forest on his or her land, the landowner could grant a conservation organization a profit a prendre entitling the organization to enter the land and cut trees growing on it. By granting such a right to a conservation group, the landowner would prevent future owners of the land from harvesting the trees, since that right has been given away. The profit a prendre itself -- or perhaps a collateral agreement in some cases -- would place conditions on the use of the profit a prendre. If it was the landowner's intention to preserve the old growth forest on the land, the conditions would prohibit cutting old growth trees.

Profits a prendre also can be given with respect to the land's soil, water, and other commonly exploited components. [[Footnote: (11) -- 11. See A.H. Oosterhoff & W.B. Rayner, 2d ed., *Anger & Honsberger: Law of Real Property* (Aurora, Ontario: Canada Law Book, 1985) at 973-977 ["*Anger & Honsberger*"]. In British Columbia, the *Mineral Tenure Act*, R.S.B.C. 1979, c. 263.3 removes the power of almost all landowners in the province over minerals on their land. There are exceptions, such as where the original Crown grant included minerals of certain kinds (which varies from case to case).]]

1.5 Need for Law Reform

While the tools discussed above -- and other statutory and non-statutory tools -- are currently available for preserving private land in British Columbia, each has limits to its application. For example, one serious drawback to using the available statutory tools is that each involves a level of government, thus limiting private conservation organization initiatives.

Experience in the United States suggests that what is referred to in this report as a conservation covenant is the most flexible and widely used private land preservation tool in the various states. Even though in British Columbia it is possible to grant a covenant for conservation purposes under section 215 of the *Land Title Act*, the section 215 environmental covenant, it must be held by a government body. Law reform is needed in British Columbia to allow private organizations to hold conservation covenants.

1.6 Land Title System in British Columbia

It is necessary to discuss briefly the land title system in British Columbia, since the legal effectiveness of conservation covenants -- and the legal tools just outlined -- depends on that regime. The following discussion, intended for the general reader, deals only with those aspects of the British Columbia land title system relevant to this report.

The law conceives of land, which is also known as real property or realty, as a bundle of individual property rights which can be divided into component property rights. A landowner can transfer some or all of these rights to another person, a conservation group or a government. For instance, a landowner can lease land or grant a profit a prendre by carving out specific rights from the overall bundle of property rights and transferring them to someone else.

In earlier times there was no system for keeping track of who had done what with that bundle of property rights. This had serious drawbacks, since it was difficult for anyone dealing with a landowner, such as a prospective purchaser or lender, to know if the landowner really owned all the rights to the land. A basic legal rule is that a purchaser cannot acquire any legal rights which were not the seller's to give. So purchasers were always nervous that someone would claim to have acquired an interest in the land from a previous owner.

The problems resulting from this state of affairs led to legislation in various jurisdictions creating systems for registration of all dealings with land. The current land title system in British Columbia, which is established by the *Land Title Act*, provides certainty as to dealings with land. Subject to certain exceptions, [[Footnote: (12) -- 12. Such as the limits set out in section 23 of the *Land Title Act* regarding municipal taxes.]] the present statutory regime is designed to ensure that anyone who wishes to purchase land can search the title records kept by the Land Title Office and be certain of what they are getting.

This certainty has been achieved by providing in the *Land Title Act* that every owner registered in the Land Title Office has a good and marketable title to the land he or she is shown as owning. [[Footnote: (13) -- 13. *Land Title Act*, s. 23.]] Therefore, if Jane Doe is registered in the Land Title Office as the owner of certain land, that normally settles the matter. Subject to some rarely encountered exceptions, [[Footnote: (14) -- 14. Such as the right of a person to show fraud in which the registered owner has participated. See *Land Title Act*, s. 23(1)(j). End of Footnote]] z her registration under the *Land Title Act* as owner of the land assures everyone that she is the owner of the land.

The system also records lesser interests in land, such as the rights of mortgagees or holders of easements. [[Footnote: (15) -- 15. It should be noted that section 26 of the *Land Title Act* provides that only the fee simple interest is indefeasible; lesser interests such as easements -- or conservation covenants -- are open to challenges to their validity. Although beyond the scope of this report, some consideration should be given to whether conservation covenants should also be indefeasible and immune from challenge.]] For example, if Jane Doe has mortgaged her land, registration of the mortgage in the Land Title Office gives everyone notice of the mortgage company's rights under the mortgage. Everyone who deals with the land -- for example, a second mortgagee -- is subject to the first mortgagee's rights. If anyone buys the land from Jane Doe and the two mortgages are not discharged, the purchaser becomes bound by them.

This has important implications in the land preservation context. If it were possible to register a conservation covenant of the type recommended by this report against title to Jane Doe's land, anyone who later bought the land from Jane Doe, or who was later registered as the holder of a mortgage of the land, would be bound by the covenant and would be required to observe it. Anyone who acquired an interest in the land after the covenant had been registered would be deemed by the *Land Title Act* to have had notice of the obligation and therefore would be bound by it. [[Footnote: (16) -- 16. As always in the law, there are important exceptions to this, some of which are discussed in this report in connection with conservation covenants.]]

Despite some important exceptions to this system, if law reform in British Columbia proceeds as recommended in this report, conservation covenants could very effectively bind parties who later deal with the land. This ability to affect people who later deal with the land would make conservation covenants an effective tool for the voluntary preservation of private land.

1.7 Organization of this Report

The remainder of this report is organized as follows:

- Chapter 2 discusses possible uses for conservation covenants and the environmental benefits that could be achieved.
- Chapter 3 examines why the current legal rules governing covenants and easements make these tools unsuitable for preserving land for environmental reasons.
- Chapter 4 examines initiatives in other jurisdictions which have allowed for the use of conservation covenants or easements as private land preservation tools.
- Chapter 5 proposes, in broad terms, the law reform needed to make conservation covenants a viable land preservation option in British Columbia.
- Chapter 6 considers the income tax and other tax issues affecting the use of conservation covenants.
- Chapter 7 sets out the conclusions.
- Appendix A reproduces the recommendations made in this report.
- Appendix B contains a glossary of a number of terms used in the report. [[Footnote: (17) -- 17. These definitions are intended to provide a discussion framework for this report. The circumstances of a particular case may require a different understanding of what is meant by a specific term.]]

- Appendix C contains a more detailed discussion of the current law on easements and covenants.
- Bibliography lists a selection of useful books, articles, reports and legal cases.

CHAPTER 2. CONSERVATION COVENANTS: A NECESSARY TOOL

2.1 Benefits of Conservation Covenants

One author has stated that

[C]onservation easements are valuable tools for the coordinated protection of open space. Easements are consensual land use controls that promote private sector participation and offer public benefits not available from more traditional forms of land use regulation. [[Footnote: (18) -- 18. S. Hoffman, "Open Space Procurement Under Colorado's Scenic Easement Law" (1989) 60 Univ. of Col. L. Rev. 383.]]

Chapter 1 of this report highlighted two of the main reasons that private conservation covenants -- or conservation easements as they are known in the United States [[Footnote: (19) -- 19. In this report the terms conservation covenant and conservation easement refer to the same type of interest in land. See note 4.]] -- are such valuable tools for private sector land protection. First, land use planning and park creation usually are done by government on a scale that is too large to adequately protect specific parcels of land, particularly small parcels. For example, the planning and creation of large Class A provincial parks may not be a feasible means to preserve pothole wetlands. [[Footnote: (20) -- 20. This is not to say government could not make use of conservation covenants; it means only that private groups may have better success with such tools in small scale preservation efforts.]] Second, increased land values mean that even in the more remote regions of British Columbia the cost of acquiring land outright frequently is prohibitive. Many valuable preservation opportunities will be lost in the future due to lack of funds, both public and private.

In addition to these reasons, there are other arguments for expanding the use of conservation covenants as an adjunct to existing land preservation tools. [[Footnote: (21) -- 21. For a useful discussion of some of the factors favouring conservation covenants, see Ron Reid, *Conservation Easements* (Wasaga, Ontario: Ontario Heritage Foundation Conservation Easements Implementation Project, Final Report, 1987) [unpublished].]] While section 215 environmental covenants can be used in British Columbia for conservation purposes at present, their use is restricted by the need for government involvement, as discussed earlier.

2.1.1 Local Government Revenue

One benefit of conservation covenants is that the land would remain within the local government's property tax base. In contrast, when land is purchased by government it is removed from the property tax base, reducing local government revenues.

Although there may be some reduction in tax revenue -- even if no tax reforms are introduced as part of law reform aimed at facilitating the use of conservation covenants -- the cost to the public will be much less than if the land were purchased outright by government. Moreover, there will

be cases where the protected land and nearby parcels increase in value due to conservation covenants.

2.1.2 Management of Land

Another benefit of conservation covenants held by private parties is that in many cases the land would continue to be managed by its owner. The private holder of the covenant could undertake the monitoring while leaving the responsibility for the daily care and improvement of the land to the owner. This would further reduce demands on public finances, since neither management nor monitoring costs would fall directly on taxpayers' shoulders.

2.1.3 Continuity

Conservation covenants could permit long term land use to remain unchanged, subject to obligations contained in the conservation covenant. This means, for example, that a farmer could continue farming in a manner consistent with the terms of a conservation covenant. Land would not be removed from agricultural production and would remain in the care of the person often best suited to care for it. Preservation of land in this way is less disruptive and, therefore, often will be more acceptable to landowners and the surrounding community.

2.2 Possible applications

This report has already referred to other land preservation tools which are presently available in British Columbia. It recommends that an additional voluntary technique, not involving a change in ownership or a change in control over all uses of land, should be available. With appropriate law reform, conservation covenants are likely to be applied widely to preserve private land in British Columbia.

To underscore this point, three fictional illustrations are set out below. Each is designed to identify a different land preservation purpose and demonstrate the inadequacy of the current law to secure those purposes, due to a variety of legal and practical reasons. In each of the three hypothetical cases a private conservation covenant, similar to the conservation easement used in the United States, could have solved the problem identified. Existing legal tools will often be available to meet some of the needs outlined in each case. However, these illustrations demonstrate that in certain situations a combination of factors can render existing regulatory and private legal tools ineffective.

ILLUSTRATION 1

PRESERVING AGRICULTURAL LAND USE

SITUATION:

Caroline Scott owns and operates a small farm near an expanding urban area in British Columbia. She plans to retire soon and wants to let her daughter have the farm. She is adamant,

though, that in the future the land should be used for agricultural purposes and not for residential development.

ANALYSIS:

1. Giving the farm to her daughter now or in her will might not prevent the daughter or the daughter's heirs from developing it for residential purposes at some time in the future.

2. A common law covenant against non-agricultural uses would not be valid, if challenged, because such a covenant has to be attached to a neighbouring piece of land and Caroline does not have the resources to purchase another property.

3. A covenant under section 215 of the Land Title Act could specify that the farm only be used for farming, but the government would hold the covenant and Caroline does not trust the government to enforce it in the future.

CONCLUSION:

A conservation covenant granted to a local conservation group, restricting Caroline and future owners to agricultural uses of the farm land, would suit Caroline's purposes extremely well.

ILLUSTRATION 2

PRESERVING WETLAND HABITAT

SITUATION:

Colin Miller owns a large parcel of land in southwestern British Columbia. The land is not suitable for farming and does not form part of the provincial agricultural land reserve. However, several creeks run through the land, providing extensive wetland habitat and breeding grounds for plants and wildlife. With land values and property taxes increasing annually, Colin is tempted to sell some of his property to developers, but wants to ensure that the wetland habitat is preserved forever.

ANALYSIS:

1. It would be possible to grant a covenant to the local government under section 215 of the Land Title Act, but local government officials are not interested in this option because they lack the staff and expertise to properly maintain and monitor the wetland habitat.

2. Subdividing the land and retaining title to the wetland habitat poses difficulties because the wetland area winds through the property, carving the remaining land into three separate parcels. This arrangement would complicate the subdivision process and make access to two of the remaining areas very difficult.

3. A common law covenant or easement covering the wetland area would need to benefit an adjacent parcel in order for it to bind future owners of the land. There is some uncertainty as to whether a court would view it as actually benefitting an adjacent parcel.

CONCLUSION:

A conservation covenant in favour of a local environmental organization, covering only those portions of Colin's land that require protection, would allow Colin to sell the land to a developer subject to the terms of the conservation covenant. This solution would ensure that the sensitive wetland habitat area is preserved even though the remaining land is developed for residential purposes.

ILLUSTRATION 3

A BUFFER ZONE FOR ABORIGINAL LANDS

SITUATION:

One of British Columbia's First Nations is negotiating a land claim with the federal and provincial governments. They want to receive full title to their territorial land, but also want to ensure that the Crown land which borders their territorial land will not be used for logging, mining or other purposes that might harm the First Nation land.

ANALYSIS:

1. Acquiring title to a buffer zone may not be feasible if the land is outside the traditional First Nation territory.

2. A covenant under section 215 of the Land Title Act, granted by the Crown in favour of another government body, would provide no assurance to the First Nation that the land would remain in its present state, since the First Nation feels it has little reason to trust future governments.

3. The government could grant a conventional covenant to the First Nation to benefit their territorial land. However, there is some doubt that the courts would necessarily conclude that a covenant barring profitable activities is a "benefit" to the First Nation land. Therefore, such a covenant might be invalidated in the future.

CONCLUSION:

A conservation covenant over the Crown land, granted by the government to a non-governmental organization, could include terms to ensure that the Crown land is not used for mining, logging or other specified activities that might lead to harm of the territorial land.

2.3 Need for New Legal Tool

The previous discussion notes that growing numbers of people recognize that existing land preservation tools, while valuable, cannot address all of the land preservation needs in British Columbia. The three illustrations above demonstrate situations where a new land preservation tool, such as the conservation covenant, could play an important role. Discussion with groups and individuals working to preserve or conserve our natural heritage yields numerous other examples of situations where conservation covenants would be very useful.

The conservation covenant is a flexible, low-cost tool which could maximize the freedom of landowners to preserve their land as they choose. It could also provide some financial relief to government, since

- the direct burden of preservation would fall on the private landowner who voluntarily granted a conservation covenant, and
- the conservation organization to which the conservation covenant was granted normally would be responsible for monitoring and enforcing the conservation covenant.

For these and other reasons detailed in this report, it is recommended that the British Columbia government move quickly to enact conservation covenant legislation as described in this report.

CHAPTER 3. EXISTING LAW OF COVENANTS AND EASEMENTS

The current legal rules governing easements and covenants are complex and arcane. [[Footnote: (22) -- 22. In this context it is the common law and equitable rules that are considered. Statutory covenants and easements under the *Land Title Act* and the *Heritage Conservation Act* which expressly change some of these rules are not part of this discussion.]] Many cogent arguments have been made for the need to amend these rules in light of modern social conditions. [[Footnote: (23) -- 23. This need has been recognized by recent work of various law reform bodies calling for changes in the law, especially the law regarding covenants. See, for example, the English Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants*, Law Com. No. 127 (1984) [the "English Report"] and the Ontario Law Reform Commission, *Report On Covenants Affecting Freehold Land* (Toronto: Queen's Printer, 1989) [the "Ontario Report"]. End of Footnote]] z It is also evident that the existing law of covenants and easements seriously restricts their application for environmental protection purposes.

This report recommends law reform to create a new statutory instrument called a conservation covenant. This chapter summarizes the legal rules for covenants and easements [[Footnote: (24) -- 24. A more detailed discussion of the legal principles affecting covenants and easements is set out in Appendix C to this report.]] in British Columbia for two reasons:

- first, to illustrate why they are inadequate for the development of the conservation covenant recommended in this report; and
- second, to highlight some of the current legal rules that should be expressly changed in the recommended legislation.

The law defines covenants and easements differently and applies different legal rules to each. In general, a covenant concerning land is an agreement in which a landowner agrees to do or not to do something in connection with his or her land. A covenant to do something with land is called a positive covenant and a covenant not to do something with land is called a restrictive covenant. An easement is the right granted by a landowner to another landowner to use the grantor's land in a particular way or to prevent the grantor from using his or her land in a particular way.

The legal rules that apply to covenants and easements are derived from both common law and equitable rules. [[Footnote: (25) -- 25. The distinction between common law and equity is historical. It arose from the fact that, in former times, the common law did not provide a remedy in many situations where one was needed. A custom developed of referring matters to the Chancellor, a high Royal official, who did not feel bound to follow the strict rules of the common law and gave relief as he thought the party was entitled according to equity and good conscience. Common law and equity were administered by separate courts until well into the 19th century. For a more detailed discussion about the distinction see, generally, J.H. Baker, *An Introduction to English Legal History*, 2d ed. (London: Butterworths, 1979).]]

3.1 Covenants

3.1.1 Common Law Rules

There are three problems with the common law rules governing the use of covenants. The first concerns the burden of the covenant, that is, the obligation to abide by the covenant. The common law does not allow the burden of a covenant, whether positive or restrictive, to bind subsequent owners of land subjected to the covenant. This rule seriously hampers the use of covenants for conservation purposes. An owner's promise not to use land for specified purposes is of little value for long-term conservation if the owner's successors in title, such as heirs, are not bound by the promise. Nevertheless, that is the result of this common law rule.

The second problem is that the common law only allows the benefit of a covenant to "run with the land", that is, to flow to subsequent owners of the benefitted land, if

(1) the covenant touches and concerns the land,

(2) the person to whom the covenant was originally given was the legal owner of the land benefitted, and

(3) the assignee of the covenantee has the same interest in the land as the covenantee.

This is a problem because conservation covenants very often impose obligations regarding the land burdened by the conservation covenant. The burden or duty of observing them cannot, however, run with the land at common law and the benefit often will not run with the land either.

The third problem is that the common law rule on the running of the benefit of a covenant requires that the recipient of the covenant actually own another parcel of land benefitted by the covenant. This rule means that a conservation organization wishing to hold a conservation covenant on a particular parcel will have to buy another nearby parcel of land so that it can receive the benefit of the covenant. This is an unnecessary obstacle.

Also, in relation to this problem, there is some doubt as to whether a covenant for conservation purposes benefits land in the traditional sense. It is not clear that our courts will depart readily from the traditional view of what constitutes a benefit to land and include environmental preservation as a benefit.

3.1.2 Equitable Rules

In contrast to the common law, equity will allow the burden of a restrictive covenant to bind subsequent owners of the burdened land if

> (1) the covenant is restrictive or negative in nature,
>
> (2) the covenantee is the owner of some land which is benefitted by the covenant,
>
> (3) the covenant "touches and concerns" the land benefitted by it,
>
> (4) the covenant reflects an intention to bind the land and run with it, and
>
> (5) the person against whom the covenant is sought to be enforced is not someone who has purchased the burdened land in good faith without notice of the covenant.

Although these rules of equity are somewhat broader than the common law rules, they still raise many practical difficulties for using covenants for conservation purposes. In addition, equity will only allow the burden of a covenant to run with the land when the covenant is restrictive. The covenant cannot bind subsequent owners of the land if it imposes positive obligations, that is, obligations which entail expenditure of money on the land. This seriously restricts the use of covenants for conservation purposes, since often it is desirable to agree to obligations with financial implications, for example, to ensure that certain habitat is maintained by doing conservation work specified in a covenant.

Equity will allow the benefit of a covenant to flow to subsequent owners of the benefitted land if

> (1) the covenant touches and concerns the benefitted land, and
>
> (2) the subsequent owner can establish entitlement to the benefit on one of the following three grounds:

(a) the benefit of the covenant has been annexed to the land;

(b) the benefit was expressly assigned to the subsequent owner; or

(c) the covenant is part of a development or building scheme.

Therefore, unless a covenant "touches and concerns" land, neither its benefit nor burden bind successor owners. As was noted above in relation to the common law rule on benefitting land, there is some doubt as to whether a conservation covenant "touches and concerns" land in the sense required under the traditional rules. This uncertainty alone inhibits the use of conservation covenants.

3.2 Easements

To be valid in British Columbia an easement must

(1) burden one parcel of land, called the servient tenement,

(2) benefit another nearby parcel of land, called the dominant tenement, and

(3) be capable of forming the subject of a grant by one landowner to another.

A fourth traditional requirement -- that the owners and possessors of the dominant and servient land must be different people -- has been abolished by statute in British Columbia. [[Footnote: (26) -- 26. *Property Law Act*, R.S.B.C. 1979, c. 340, ss 18(7) and (8) [the "*Property Law Act*"].]]

The first two of the three existing requirements cause the same problems as do the rules regarding covenants. The third requirement is a bit obscure. However, the result of the third requirement is that, while the subject matter of what constitutes valid easements can expand from time to time, the courts will proceed cautiously by analogy from past cases in determining the validity of a purported easement. Therefore, it is not certain that the courts would decide that an easement for conservation purposes is valid.

This brief description of the current common law and equitable rules governing covenants and easements illustrates the need for law reform to facilitate the use of conservation covenants for environmental purposes. As mentioned above, the section 215 environmental covenant and the heritage covenant or easement permitted under the *Heritage Conservation Act* do reform the common law and equitable rules discussed in this chapter. However, these instruments must be held by a government body so their application is unnecessarily limited.

CHAPTER 3. EXISTING LAW OF COVENANTS AND EASEMENTS

The current legal rules governing easements and covenants are complex and arcane. [[Footnote: (22) -- 22. In this context it is the common law and equitable rules that are considered. Statutory covenants and easements under the *Land Title Act* and the *Heritage Conservation Act* which expressly change some of these rules are not part of this discussion.]] Many cogent arguments have been made for the need to amend these rules in light of modern social conditions. [[Footnote: (23) -- 23. This need has been recognized by recent work of various law reform bodies calling for changes in the law, especially the law regarding covenants. See, for example, the English Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants*, Law Com. No. 127 (1984) [the "English Report"] and the Ontario Law Reform Commission, *Report On Covenants Affecting Freehold Land* (Toronto: Queen's Printer, 1989) [the "Ontario Report"]. End of Footnote]] z It is also evident that the existing law of covenants and easements seriously restricts their application for environmental protection purposes.

This report recommends law reform to create a new statutory instrument called a conservation covenant. This chapter summarizes the legal rules for covenants and easements [[Footnote: (24) -- 24. A more detailed discussion of the legal principles affecting covenants and easements is set out in Appendix C to this report.]] in British Columbia for two reasons:

- first, to illustrate why they are inadequate for the development of the conservation covenant recommended in this report; and
- second, to highlight some of the current legal rules that should be expressly changed in the recommended legislation.

The law defines covenants and easements differently and applies different legal rules to each. In general, a covenant concerning land is an agreement in which a landowner agrees to do or not to do something in connection with his or her land. A covenant to do something with land is called a positive covenant and a covenant not to do something with land is called a restrictive covenant. An easement is the right granted by a landowner to another landowner to use the grantor's land in a particular way or to prevent the grantor from using his or her land in a particular way.

The legal rules that apply to covenants and easements are derived from both common law and equitable rules. [[Footnote: (25) -- 25. The distinction between common law and equity is historical. It arose from the fact that, in former times, the common law did not provide a remedy in many situations where one was needed. A custom developed of referring matters to the Chancellor, a high Royal official, who did not feel bound to follow the strict rules of the common law and gave relief as he thought the party was entitled according to equity and good conscience. Common law and equity were administered by separate courts until well into the 19th century. For a more detailed discussion about the distinction see, generally, J.H. Baker, *An Introduction to English Legal History*, 2d ed. (London: Butterworths, 1979).]]

3.1 Covenants

3.1.1 Common Law Rules

There are three problems with the common law rules governing the use of covenants. The first concerns the burden of the covenant, that is, the obligation to abide by the covenant. The common law does not allow the burden of a covenant, whether positive or restrictive, to bind subsequent owners of land subjected to the covenant. This rule seriously hampers the use of covenants for conservation purposes. An owner's promise not to use land for specified purposes is of little value for long-term conservation if the owner's successors in title, such as heirs, are not bound by the promise. Nevertheless, that is the result of this common law rule.

The second problem is that the common law only allows the benefit of a covenant to "run with the land", that is, to flow to subsequent owners of the benefitted land, if

> (1) the covenant touches and concerns the land,
>
> (2) the person to whom the covenant was originally given was the legal owner of the land benefitted, and
>
> (3) the assignee of the covenantee has the same interest in the land as the covenantee.

This is a problem because conservation covenants very often impose obligations regarding the land burdened by the conservation covenant. The burden or duty of observing them cannot, however, run with the land at common law and the benefit often will not run with the land either.

The third problem is that the common law rule on the running of the benefit of a covenant requires that the recipient of the covenant actually own another parcel of land benefitted by the covenant. This rule means that a conservation organization wishing to hold a conservation covenant on a particular parcel will have to buy another nearby parcel of land so that it can receive the benefit of the covenant. This is an unnecessary obstacle.

Also, in relation to this problem, there is some doubt as to whether a covenant for conservation purposes benefits land in the traditional sense. It is not clear that our courts will depart readily from the traditional view of what constitutes a benefit to land and include environmental preservation as a benefit.

3.1.2 Equitable Rules

In contrast to the common law, equity will allow the burden of a restrictive covenant to bind subsequent owners of the burdened land if

> (1) the covenant is restrictive or negative in nature,
>
> (2) the covenantee is the owner of some land which is benefitted by the covenant,
>
> (3) the covenant "touches and concerns" the land benefitted by it,

(4) the covenant reflects an intention to bind the land and run with it, and

(5) the person against whom the covenant is sought to be enforced is not someone who has purchased the burdened land in good faith without notice of the covenant.

Although these rules of equity are somewhat broader than the common law rules, they still raise many practical difficulties for using covenants for conservation purposes. In addition, equity will only allow the burden of a covenant to run with the land when the covenant is restrictive. The covenant cannot bind subsequent owners of the land if it imposes positive obligations, that is, obligations which entail expenditure of money on the land. This seriously restricts the use of covenants for conservation purposes, since often it is desirable to agree to obligations with financial implications, for example, to ensure that certain habitat is maintained by doing conservation work specified in a covenant.

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Therefore, unless a covenant "touches and concerns" land, neither its benefit nor burden bind successor owners. As was noted above in relation to the common law rule on benefitting land, there is some doubt as to whether a conservation covenant "touches and concerns" land in the sense required under the traditional rules. This uncertainty alone inhibits the use of conservation covenants.

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This brief description of the current common law and equitable rules governing covenants and easements illustrates the need for law reform to facilitate the use of conservation covenants for environmental purposes. As mentioned above, the section 215 environmental covenant and the heritage covenant or easement permitted under the *Heritage Conservation Act* do reform the common law and equitable rules discussed in this chapter. However, these instruments must be held by a government body so their application is unnecessarily limited.

CHAPTER 4. THE EXPERIENCE ELSEWHERE

4.1 Experience In the United States

4.1.1 History of Conservation Easements

The benefits of conservation easements have long been recognized in the United States. In the 1880s conservation easements were put in place

to protect parkways designed by Frederick Law Olmstead, Sr. in and around the city of Boston, although these were invalidated in the 1920s on the basis of a technicality in their drafting. [[Footnote: (27) -- 27. "A Brief History of the Conservation Easement" (1985) 4:3 Land Trusts' Exchange 11 at 11.]]

The federal and various state governments have been using easements for scenic preservation and habitat preservation purposes since at least the 1930s. [[Footnote: (28) -- 28. Thomas S. Barrett & Putnam Livermore, *The Conservation Easement In California* (Covelo, California: Island Press, 1983) at 4. One example is the acquisition by the National Park Service in the 1930s and 1940s of scenic easements to protect some 1,500 acres along the Blue Ridge Parkway in Virginia and North Carolina. See K. Schwartz, "The Federal Government's Use of Conservation Easements" (1985) 4:3 Land Trusts' Exchange 9. According to A. Dana, "Conservation Easements and the Common Law" (1989) 8 Stanford Env. L.J. 2 at 7, the idea that conservation covenants could be used as a tool for private land preservation efforts has its origin in the article by W. Whyte, "Securing Open Space For America: Conservation Easements" (1959) 36 Urban Land Inst. Tech. Bull. 1.]] The U.S. Fish and Wildlife Service has acquired over 21,000 conservation easements protecting some 1.2 million acres of wetland habitat. [[Footnote: (29) -- 29. Reid, *supra*, note 21 at 14. End of Footnote]] z

Although the validity of common law conservation easements given to government has been affirmed [[Footnote: (30) -- 30. *United States* v. *Albrecht*, 364 F. Supp. 1349 (D.N.D. 1973), aff'd. 496 F. 2d 906 (8th Cir. 1974). See also *North Dakota* v. *United States*, 103 S.Ct. 1095, (1983) at 1104-07 .]] in the United States, statutory reform has been necessary to allow meaningful use of conservation easements by private groups. [[Footnote: (31) -- 31. E. Katz, "Conserving the Nation's Heritage Using the Uniform Conservation Easement Act" (1986) 43 Wash. and Lee L. Rev. 369 at 382-84. According to G. Korngold, "Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements" (1984) 63 Texas L.Rev. 433 at 437, by 1984 at least 37 American jurisdictions had enacted legislation enabling the use of private or governmental conservation covenants. End of Footnote]] z

4.1.2 The Legislative Response

Legislation in the United States has aimed at promoting the benefits of conservation easements while eliminating the existing legal obstacles identified earlier in this report. [[Footnote: (32) -- 32. See Katz, *ibid.* at 383-384. See also the 1969 *Massachusetts Conservation and Preservation Statute*, Mass. Ann. Laws ch. 184, §§31-33 (Michie/Law. Co-op. 1977 & Supp. 1982).]] Of particular importance is the fact that the legislation allows these interests to be held by private

conservation organizations. In some cases the legislation has also amended procedures for registering interests in land, so as to accommodate the special character of conservation interests. [[Footnote: (33) -- 33. For example, Montana has instituted a system of separate recording of conservation easements. See *Montana Code Annotated*, §76-6-207 (1981). This is neither necessary nor desirable in British Columbia. End of Footnote]] z Another important legislative response at both the state and federal level has been to institute tax reform aimed at promoting the use of such interests.

A detailed examination of the various state laws enabling conservation easements is not appropriate or necessary for the purposes of this report, because the salient characteristics of many state laws in the United States originate from a model statute called the Uniform Conservation Easement Act (the "UCEA").

4.1.3 Choice of the Common Law Easement

As part of its mandate to promote uniform state laws throughout the U.S., in 1981 the National Conference of Commissioners on Uniform State Laws issued the UCEA. [[Footnote: (34) -- 34. 12 U.L.A. 51 (Supp. 1984).]] Some states, such as Oregon, adopted the UCEA substantially as issued by the Commissioners. [[Footnote: (35) -- 35. 1983 Or. Laws, vol. 2, ch. 642. See Katz, *supra*, note 31 at 385. End of Footnote]] z Others, such as California, had already enacted their own legislation. [[Footnote: (36) -- 36. For example, the *California Conservation Easements Act of 1979*, Cal. Civ. Code §§815-816. End of Footnote]] z However, even the statutes of independent-minded states such as California have a great deal in common with the UCEA.

The drafters of the UCEA consciously rejected the common law covenant as the model for the UCEA and adopted instead the easement as the prototype for creating an interest in land for conservation purposes. Following below is a synopsis of the reasons given for the choice to use the easement as the model for the UCEA, with brief commentary regarding those reasons.

First, the Commissioners were of the view that the American legal profession is more comfortable with the doctrine regarding easements than the doctrine governing covenants and that the easement concept would more easily be adapted to the conservation context.

This concern was driven by the fact that in the United States the restrictive covenant has received little attention. American lawyers and courts deal much more often with easements and equitable servitudes. The resulting lack of familiarity with restrictive covenants led the Commissioners to prefer the easement concept. [[Footnote: (37) -- 37. Professor Sandra McCallum, of the Faculty of Law, University of Victoria, made this point in consultations with the author.]]

The long history of restrictive covenant law in British Columbia limits the weight of this argument. So long as the amending legislation is clear, there is no reason to think that one concept or another will be more comprehensible to lawyers or conservationists in British Columbia.

Second, according to the Commissioners, the easement is the basic less-than-fee interest at common law.

Even if this is correct, it is not clear why the hierarchical view of the law implicit in this argument should prevail. Again, British Columbia law in this general area has developed differently, thus undercutting the force of this argument.

Third, the Commissioners concluded that any non-possessory interest in land which satisfied the common law rules on covenants would invariably meet the UCEA's less stringent rules for valid conservation easements.

Legislation such as the UCEA changes the law. If the legislation is clear, British Columbia's conservationists and their lawyers will be able to understand and follow the statutory rules.

4.2 Experience In Canada

The existing statutory and non-statutory mechanisms available for private land preservation in British Columbia were discussed in Chapter 1 of this report. Due to the limitations of those types of mechanisms, some other provinces have passed legislation to facilitate the use of tools akin to conservation covenants to be used for particular preservation purposes.

4.2.1 Ontario Heritage Act

In Ontario, the Ontario Heritage Foundation has been active in using covenants under the Ontario *Heritage Act [[Footnote: (38) -- 38.* R.S.O. 1990, c. O.18 [the "*Ontario Heritage Act*"].]] for historic preservation purposes. At least 112 conservation covenants have been entered into under the Ontario *Heritage Act*. [[Footnote: (39) -- 39. Reid, *supra,* note 21 at 9. End of Footnote]] z

Section 10 of the Ontario legislation permits the Ontario Heritage Foundation to enter into "agreements, covenants and easements" for the "conservation, protection and preservation of the heritage of Ontario." Such agreements are comparable to covenants under British Columbia's *Heritage Conservation Act*. While these agreements are often used to protect "built-environment" heritage, their value in preserving natural heritage may be more limited, since not all land preservation covenants necessarily involve provincial "heritage". At the very least, there is some doubt about the matter.

4.2.2 Ontario's Conservation Land Act

Another approach taken in Ontario is to offer property tax rebates in connection with habitat protected under some sort of official designation. The Ontario *Conservation Land Act [[Footnote: (40) -- 40.* R.S.O. 1990, c. C.28 [the "*Conservation Land Act*"].]] permits programs to offer a rebate of property taxes where wetland has been designated for protection by agreement of the landowner.

4.2.3 Other Provinces

Several provinces other than British Columbia and Ontario have legislation comparable to the British Columbia *Heritage Conservation Act* and the Ontario *Heritage Act*. Some legislation,

such as Manitoba's *Heritage Resources Act [[Footnote: (41) -- 41.* S.M. 1985-86, c. 10, C.C.S.M. H39.1 [the "*Manitoba Heritage Resources Act*"].]] or the Prince Edward Island *Natural Areas Protection Act*, [[Footnote: (42) -- 42. S.P.E.I. 1988, c. 46, R.S.P.E.I. 1988, c. N-2 [the "*PEI Natural Areas Protection Act*"]. End of Footnote]] z is much more powerful and flexible than the British Columbia or Ontario legislation.

For example, the Manitoba *Heritage Resources Act* permits either government agencies or interested individuals or groups to acquire heritage covenants. These covenants are intended to provide for the maintenance, preservation or protection of a heritage site by its owner and successors in title. The definition of heritage in section 1 of the Manitoba *Heritage Resources Act* includes "any work or assembly of works of nature ... that is of value for ... natural, scientific or aesthetic features, and may be in the form of sites ...". This definition is probably broad enough to allow covenants to be used in Manitoba for conservation purposes by private parties.

Section 5 of the PEI *Natural Areas Protection Act* permits landowners to grant restrictive covenants over their land to protect values. Under section 3, the government may then designate that land as a protected natural area if certain criteria are met, such as if a private landowner has registered a restrictive covenant affecting the land.

4.3 Other Countries

Elsewhere, legislation has been enacted to permit the use of open-space covenants, as under the New Zealand *Queen Elizabeth the Second National Trust Act 1977*. [[Footnote: (43) -- 43. S.N.Z. 1977, No. 102., sections 20(2) and 22 permit the National Trust to hold open-space covenants.]]

4.4 need for change in british columbia

As this selective summary demonstrates, some other countries and some other Canadian provinces have already enacted legislation permitting private land preservation through agreements with landowners. It is clear that in British Columbia law reform is necessary, since existing legislation does not offer the flexibility achieved through participation of private conservation organizations. The remainder of this report focuses on the specific law reform needed in British Columbia to make the conservation covenant a useful tool for the voluntary preservation of privately owned land.

CHAPTER 5. RECOMMENDATIONS FOR LAW REFORM IN BRITISH COLUMBIA

5.1 New Statutory Tool

The previous chapters have outlined a number of the tools currently available in British Columbia for protecting private land, along with some of the difficulties in using these tools for that purpose. The current options are not adequate to meet today's need to preserve land for conservation purposes. New options are required.

It is recognized that it is already possible in British Columbia to grant a section 215 environmental covenant, that is, a covenant under section 215 of the *Land Title Act* for the purpose of preserving land in its natural state. It is also possible to grant a covenant or easement under the *Heritage Conservation Act*. However, these statutory instruments must be granted in favour of a government body. This seriously restricts their use. The new land preservation tool advocated in this report, a conservation covenant, would have a much broader application.

This chapter outlines the law reform necessary to create a new statutory tool for British Columbia that resembles the conservation easement widely used in the United States. It includes discussion on the following topics:

- whether this new statutory tool should be called a conservation covenant or easement;
- the details of the specific law reform needed; and
- the possible application of the rule against perpetuities.

5.2 Covenant or Easement

There are complex and subtle legal differences between covenants and easements under the common law and equitable rules. However, these differences become largely irrelevant when a statute creates a new legal instrument, as is recommended in this report. For a number of reasons, some arbitrary, this report favours the use of the term "conservation covenant."

In many cases the legal obligations being imposed will resemble a restrictive covenant more than an easement. Frequently, the interest being created will be hybrid, with elements of both easements and restrictive covenants.

As discussed earlier, recent law reform work in other jurisdictions has called for fundamental changes to the law on easements and covenants. [[Footnote: (44) -- 44. See the Ontario Report, *supra*, note 23.]] Some have argued in favour of abolishing the terms easement and covenant and using the term land obligation instead. [[Footnote: (45) -- 45. *Ibid.* at 105. End of Footnote]] z However, even if such sweeping law reform does not occur in British Columbia, change is needed to facilitate land conservation for environmental purposes. Therefore, it is recommended that legislation be passed to create a new form of land obligation, known as a conservation covenant.

Recommendation 1 The British Columbia government should enact legislation enabling private landowners to grant conservation covenants voluntarily in favour of conservation groups qualified as holders of such interests, so that the land subject to the conservation covenant is preserved for purposes permissible under the legislation and as specified in the conservation covenant.

5.3 Details of Legislation

There are a number of issues that need to be addressed in the development of conservation covenant legislation for British Columbia. The discussion below examines and makes recommendations on the following key issues which must be addressed in law reform:

- those parties permitted to hold a conservation covenant;
- the creation, modification and termination of conservation covenants;
- the permissible purposes of a conservation covenant;
- the basic elements of conservation covenants;
- the common law requirement that a covenant must benefit adjacent land;
- the ability to bind subsequent landowners;
- the ability to bind other interest holders;
- those parties liable for a breach of a conservation covenant;
- remedies for a breach of a conservation covenant;
- the ability to appoint a third party enforcer of a conservation covenant;
- assignment of a conservation covenant; and
- the need to provide expressly that certain existing legal rules do not apply to conservation covenants.

5.3.1 Holder of a Conservation Covenant

a. Who qualifies

One of the most important policy decisions to be made is who should be qualified to hold conservation covenants. Allowing private organizations to be holders will make this a much more flexible land preservation tool. However, the issue of who may hold a conservation covenant is particularly sensitive if tax incentives are adopted to encourage their use. Since tax incentives involve public subsidy through foregone tax revenues, the government

> (1) may wish to ensure that the use of conservation covenants is consistent with, or complements, government land preservation initiatives, and
>
> (2) will wish to ensure that tax benefits available to grantors of conservation covenants are not abused.

These policy objectives may be achieved by limiting qualified holders to certain quasi-governmental entities or to well-established conservation organizations. Limiting qualified holders is intended to ensure that only organizations with both a genuine commitment to land conservation and the expertise to carry through with that commitment hold conservation

covenants. It also lessens the likelihood that sham transactions will be effected through organizations set up for that purpose alone.

However, the legislation in British Columbia should not too narrowly restrict who may hold a conservation covenant, and may not need to be as restrictive as some legislation in the United States. Many land conservation initiatives are grassroots efforts. Local citizens who are familiar with regional land conservation needs -- and who are frequently in the best position to act appropriately -- often work together to conserve a particular piece of property. [[Footnote: (46) -- 46. This feature of United States private land conservation efforts is evident from a perusal of the Land Trust Exchange's *1989 National Directory of Conservation Land Trusts* (Alexandria, Virginia: Land Trust Exchange, 1989). Land trusts -- which are usually not-for-profit corporations -- are a common vehicle for holding and enforcing conservation easements in the United States. The 1989 directory indicates that there is a decidedly local flavour to each of the listed trusts, of which there are many. See The Land Trust Alliance, *Starting A Land Trust: A Guide To Forming A Land Conservation Organization* (Alexandria, Virginia: The Land Trust Alliance, 1990) ["*Starting A Land Trust*"] at 1 and at 25-30. The subject of land trusts and their usefulness in British Columbia merits a study of its own, and will be undertaken by the West Coast Environmental Law Research Foundation in the future.]] Restricting qualified holders to larger -- and therefore often national -- organizations risks losing valuable local knowledge. It may also discourage participation of local volunteers, whose services often will be necessary to monitor and enforce a conservation covenant properly.

b. Incorporated Entities

Another related issue is whether it should be possible for an individual, an unincorporated association or a common law charitable trust, that is otherwise a qualified holder, to hold a conservation covenant. While it was argued above that government control in this matter should be minimal, only incorporated entities should be permitted to hold conservation covenants. This would limit holders to societies incorporated under the *Society Act [[Footnote: (47) -- 47.* R.S.B.C. 1979, c. 390 [the "*Society Act*"].]] or registered under that Act as extra-provincially incorporated not-for-profit corporations.

There are good reasons for such a limitation. First, it would give better assurance, if not certainty, that specific minimum standards are adhered to in the operation and government of every conservation covenant holder. There is no comparable statutory regulation of the individual behaviour or the affairs of either an unincorporated association or a common law charitable trust. [[Footnote: (48) -- 48. For example, section 56 of the *Society Act* stipulates that a society must hold a general meeting of its members at least once every year after the first year of its existence. Section 6 provides minimum standards for bylaws which must be observed by every society. Parts 4 and 5 provide detailed financial and auditing requirements.]]

Second, an incorporated society is an entity with an independent perpetual existence and the powers and capacity of a natural person. [[Footnote: (49) -- 49. *Society Act*, s. 4.]] This feature gives it great flexibility in conducting its affairs and insulates its members from personal liability for obligations incurred by the society. Neither a common law charitable trust nor an unincorporated association enjoy these benefits. [[Footnote: (50) -- 50. This statement must be

qualified in the case of charitable trusts. Since such trusts are not subject to the rule against perpetuities, they may have a perpetual existence. Moreover, the doctrine of *cy pres* ensures that where a charitable trust fails, the next closest charitable purpose will be pursued using the assets of the failed trust. For an authoritative discussion of charitable trusts, see D.W.M. Waters, *Law of Trusts In Canada*, 2d ed. (Toronto: Carswell, 1984) at 501 ff. End of Footnote]] z

For these reasons, the UCEA approach should be considered for British Columbia. That approach should be adapted slightly, since there is no need for the conservation covenant legislation itself to deal with income tax consequences. Section 1(2) of the UCEA defines a "holder" as a charity "the purposes or powers of which include" the purposes for which a conservation easement may be granted under the UCEA. [[Footnote: (51) -- 51. See the discussion of those purposes at page 50. See, generally, Katz, *supra*, note 31 at 387-389.]] The British Columbia legislation could follow this approach and provide that a qualified holder must be a not-for-profit entity, one of the constitutional purposes of which is to achieve any of the purposes for which a conservation covenant may be granted.

c. dissolution

The legislation should address the situation where a conservation covenant holder becomes moribund and ceases to exist. Although incorporated societies have a perpetual existence, that existence depends on the diligence of the individuals who run the society. For example, if statutorily required information filings are not made, the society may be dissolved by the government agency responsible for overseeing its compliance with statutory requirements. [[Footnote: (52) -- 52. *Society Act*, s. 71.]]

This problem can be addressed by providing that upon the dissolution of a society or not-for-profit corporation holding a conservation covenant, the conservation covenant is transferred to another incorporated society or not-for-profit corporation eligible to hold a conservation covenant, with the consent of the new holder.

Recommendation 2: The legislation should provide that any incorporated society or other not-for-profit corporation, whose constitution provides that

> (1) its purposes include any purpose for which a conservation covenant may be granted, and
>
> (2) upon dissolution any conservation covenant held by it shall be transferred to another incorporated society or not-for-profit corporation eligible to hold a conservation covenant

is qualified to hold a conservation covenant.

5.3.2 Creation, Modification and Termination

a. Government Approval

Some jurisdictions require government review or approval prior to the creation of a conservation covenant or before any tax benefits may be obtained.

California's *Open-Space Easement Act* of 1974 [[Footnote: (53) -- 53. *California Government Code* §§ 51070-51097.]] is an example of this type of control. Section 51080 of that statute provides that an open-space easement may be created only where the local government has adopted an open-space plan. Sections 51083 to 51085 provide that the local government must review and approve a proposed open-space easement before its grantor becomes eligible for property tax benefits available under the Act.

There is a serious risk that control of this kind will stifle private sector use of conservation covenants. Therefore, it is recommended that this approach not be followed in British Columbia.

Recommendation 3: The conservation covenant legislation should not require that a conservation covenant must be reviewed and approved by a government body before it is valid and may be registered on title to a property.

b. Modification, Extinction and Discharge

I. Common Law and Statutory Rules

Both judge-made and statute law allow several grounds for holding an existing covenant affecting land invalid or unenforceable. If these rules were applied to conservation covenants, they would threaten the usefulness of these tools for land preservation. Therefore, the legislation should provide that the existing rules not apply to conservation covenants. To illustrate the reasons for this, the common law and statutory rules are outlined briefly below.

The relevant common law rules are as follows:

- A covenant will be unenforceable if the land subject to the covenant has been used openly for many years in a manner inconsistent with the terms of the covenant. [[Footnote: (54) -- 54. *Hepworth* v. *Pickles*, [1900] 1 Ch. 108.]]
- If a person entitled to the benefit of the covenant has acquiesced in its breach over the years without complaint [[Footnote: (55) -- 55. *Chatsworth Estates Co.* v. *Fewell*, [1931] 1 Ch. 224.]], or if that person has acquiesced in a change in use of the property burdened by the covenant, [[Footnote: (56) -- 56. *Sayers* v. *Collyer* (1884), 28 Ch. D. 103 (C.A.). End of Footnote]] , the court may hold the covenant is unenforceable.
- If the character of the neighbourhood has changed so that it would not be reasonable to enforce the covenant or if a change in the neighbourhood would render enforcement useless, [[Footnote: (57) -- 57. *Chatsworth Estates Co.* v. *Fewell*, *supra*, note 55. This rule has been adopted statutorily in British Columbia by s. 31 of the *Property Law Act]]*, the court will not enforce it. [[Footnote: (58) -- 58. *Turney* v. *Lubin* (1980), 14 B.C.L.R. 329 (S.C.) and *Ramuz* v. *Leigh-on-Sea Conservative & Unionist Club (Ltd.)* (1915), 31 T.L.R. 174 (Ch.). End of Footnote]]

The third of these rules is probably the most important in relation to conservation covenants.

In some cases the ongoing validity of a covenant is governed by statute. [[Footnote: (59) -- 59. For a very good and thorough discussion of this aspect of conservation covenants, see M. McLelan, "Conservation Easements in British Columbia: Concerns Regarding Extinguishment" (Victoria: Faculty of Law, University of Victoria, 1990) [unpublished]. See also J. Blackie, "Conservation Easements and the Doctrine of Changed Conditions" (1989) 40 Hastings L.J. 1187. Blackie argues that the doctrine of changed conditions should not apply to statutorily authorized conservation covenants, on the basis that the policy underlying the common law doctrine does not apply where land preservation is in issue. The author argues, in the alternative, that if the doctrine is applied, it should be supplemented by an analogue of the *cy pres* doctrine of trust law. This would mean that if the original purpose of the covenants is found to have failed, the court will adapt it to the nearest comparable purpose, rather than destroy it altogether.]] In British Columbia, section 31 of the *Property Law Act* gives the Supreme Court of British Columbia the power to modify or cancel a covenant or easement on being satisfied that the application is not premature in the circumstances, and that

> (1) by reason of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
>
> (2) 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,
>
> (3) 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,
>
> (4) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
>
> (5) the registered instrument is invalid, unenforceable or has expired and its registration should be cancelled.

The *Property Law Act* provides further that the court may order that compensation be paid to anyone suffering damage as a consequence of the order. The court is also required to "direct inquiries to a municipality or other public authority" and to give notice by "advertisement or otherwise" to those who appear entitled to the benefit of the charge.

II. Possible Application of Common Law or Statutory Rules

If these common law and *Property Law Act* rules were to apply to conservation covenants, they would negate the purpose of conservation covenants, particularly when the objective is to preserve a parcel of land forever.

The reasons are as follows:

- First, rules regarding changes in the neighbourhood in both the common law and the *Property Law Act* strike at the very heart of conservation covenants. Changes in the neighbourhood are precisely the reason for creating conservation covenants, so as to preserve land in the face of such change.
- Second, the rule which would permit discharge of a conservation covenant if the "reasonable use of land would be impeded without practical benefit to others" similarly strikes at the core of conservation covenants.
- Third, the remaining rules in section 31 of the *Property Law Act*, as a matter of principle, should have little application to conservation covenants.
- Finally, as a whole these rules simply are not sophisticated enough to deal with the environmental issues that give rise to the need for conservation covenants.

The rules set out in section 31 of the *Property Law Act* reflect the 19th century policy of precluding dead hand control of land. In the 19th century various mortmain statutes were enacted, aimed at preventing enduring control over land by those long dead. At the time, the demand for land placed pressure on government to ensure that large blocks of land could not be removed from human use or development by conveyancers' ingenuity. [[Footnote: (60) -- 60. For a good discussion of this development in the law of England, see R.E. Megarry & H.W.R. Wade, *The Law of Real Property*, 5th ed. (London, U.K.: Stevens & Sons, 1984) at 1027. Korngold, *supra*, note 31, provides a comprehensive survey of the issues involved in dead hand control, specifically in the context of conservation covenants.]]

While there may be a need for controls of this nature in some circumstances, the policy of preservation chosen by a landowner should prevail over the policy promoting free marketability of land. Any concern that large amounts of land will be frozen in time by conservation covenants to which the *Property Law Act* does not apply is probably exaggerated. Given the extent and pace of development in British Columbia, it is plain that only a small amount of land in this province will be subject to preservation or conservation of some sort. Since our green spaces are disappearing rapidly, especially on the urban fringe, there is broad recognition that we must use innovative tools if we are to preserve that land.

For these reasons, the provisions of the *Property Law Act* should not apply to conservation covenants. While this could create tension between long-term protection of conservation covenants and the desire not to freeze land from human use, most of our land base is and will remain open and suited to development of one kind or another. Conservation covenants will be most widely used by private property owners to voluntarily preserve those small but environmentally valuable pieces of privately owned green space which cannot be protected through existing mechanisms.

Recommendation 4 The conservation covenant legislation should provide that the existing common law and *Property Law Act* rules regarding the abandonment, termination, discharge or extinguishment of easements or covenants do not apply to conservation covenants.

III. New Rules for British Columbia

There may be situations, however, in which it is desirable to be able to modify or discharge a conservation covenant in order to achieve the intention of the grantor. For example, a

conservation covenant that is granted for the purpose of protecting a particular rare plant species may need to be modified or substituted if some natural occurrence alters the location where this species is found. However, the ability to modify or discharge a conservation covenant should be based on the original purposes of the conservation covenant and the intention of the grantor, rather than other societal purposes. The state is always able to rely on its powers of expropriation in situations where the land is needed for other purposes.

The California *Society Act* of 1974 provides an interesting example of how another legislature has tried to deal with this issue. Section 51090 of that Act provides that an "open-space easement" may be "terminated only by ... nonrenewal, or ... abandonment." An open-space easement may be abandoned or allowed to lapse only if it is approved by resolution of the "governing body of the county or city" in which the land is located. The statute restricts the ability of the governing body to permit abandonment or lapsing of the open-space easement. Section 51090 of that California statute says that approval may be given only if the governing body finds:

> (1) that no public purpose described ... [elsewhere in the Act] will be served by keeping the land as open-space;
>
> (2) that the abandonment is not inconsistent with the purposes of ... [the Act];
>
> (3) that the abandonment is consistent with the local general plan; and
>
> (4) that the abandonment is necessary to avoid a substantial financial hardship to the landowner due to involuntary factors unique to him.

The California approach is closely linked with regulatory land use planning processes. The Act requires that the matter be referred to the local planning authority, which must hold a public hearing on the matter and then report to the governing body, which must also then hold a public hearing on the issue. Finally, the landowner who wishes to remove the open-space easement must pay an abandonment fee equal to half of the "abandonment valuation" of the property, which is set at one quarter of the market value of the land as if it were free of the open-space easement.

The conservation covenant legislation for British Columbia will need to address modification and discharge since, as discussed earlier, the common law rules and the rules for modification and discharge found in the *Property Law Act* are inappropriate in the context of conservation covenants. The rules set out in the California statute provide a useful model for consideration.

The rules developed for British Columbia should provide that a conservation covenant may be terminated only where it would no longer serve the conservation purposes articulated in the conservation covenant. In addition, modification should be permitted only in circumstances where the modifications are not contrary to the original spirit of the conservation covenant.

The courts should be permitted to modify or discharge a conservation covenant on application by the holder, the owner or any other party that the court considers has a sufficient interest in the

conservation covenant. The conservation covenant holder and other affected parties should have the opportunity to argue against the proposed modification or discharge.

Recommendation 5: The conservation covenant legislation should provide that a court may modify or discharge a conservation covenant upon application by a holder, an owner or any other party the court determines has a sufficient interest, in circumstances where

> (1) the original purposes of the conservation covenant and the intention of the grantor are no longer being achieved, and
>
> (2) the modification or discharge serves the original purposes of the conservation covenant and the intention of the grantor, rather than other societal purposes.

5.3.3 Permissible Purposes

The existing legal rules on what purposes may be fulfilled by easements or covenants present significant obstacles in using these tools to preserve land for environmental purposes. The courts have viewed covenants and easements as instruments designed to accommodate the use of land by humans for human purposes. While it is possible to argue that preservation of land from any human development is a human use of land, if that is what its owner wishes to do, there is reason to be concerned that even today our courts might decide otherwise.

The common law rules on easements and covenants are supported by a judicial policy which permitted title to land to be affected only by restrictions which serve human uses of land. Even the range of human uses which could form the subject of a burden on title is limited. It is not clear that the courts today would favour applying these rules to situations where a landowner wished to place restrictions on private property to prevent human development of the land. This uncertainty is one of the central reasons that conservation covenant law reform is required in British Columbia. The risk that a judge will find a conservation covenant invalid seriously inhibits those who might wish to create such interests under the existing law.

The legislation therefore must clearly state the purposes that may be fulfilled by a conservation covenant. This is the approach taken in the model United States statute, the UCEA. [[Footnote: (61) -- 61. Section 1 of the UCEA defines a conservation easement as "a non-possessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting or maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological or cultural aspects of real property."]] It provides that a conservation easement may be used, among other things, to

> (1) retain or protect natural, scenic or open-space values of real property,
>
> (2) assure the availability of real property for agricultural, forest, recreational, or open-space use,

(3) protect natural resources,

(4) maintain or enhance air or water quality, or

(5) preserve the historical, architectural, archaeological, or cultural aspects of real property.

This list is not exhaustive, since the definition states that the purposes of a conservation easement "include" the ones listed. While the list names many useful conservation purposes, it may not be extensive enough to meet local needs in British Columbia.

Although detailed lists in legislation can create problems of interpretation and application, a carefully drafted non-exhaustive list similar to that in the UCEA would serve as an express guide to users.

Recommendation 6: The legislation should contain a non-exhaustive list of conservation purposes which may be served by a conservation covenant. It should be permissible to create a conservation covenant the purposes of which can include the protection, preservation, conservation, maintenance, enhancement or restoration of

(1) the environment, broadly defined,

(2) any form of plant or animal life or habitat,

(3) aesthetic values,

(4) recreational use of land,

(5) an existing state or use of land, or

(6) heritage values, including the paleontological, archaeological, historical, architectural, scientific or cultural values associated with land.

5.3.4 Basic Elements

a. Made in Writing

The legislation should provide expressly that a landowner may grant a conservation covenant only in writing, consistent with the *Law and Equity Act [[Footnote: (62) -- 62.* R.S.B.C. 1979, c. 224, s. 54 [the "*Law and Equity Act*"].]] requirement that interests in land be in writing.

b. Elements of both Conservation and Easements

The legislation should provide that a conservation covenant is a non-possessory interest in land which may contain

(1) positive or negative obligations respecting the use of land, and

(2) obligations to permit access to or use of land by others,

for any of the purposes in respect of which a conservation covenant may be granted. [[Footnote: (63) -- 63. See recommendation 6 of the Ontario Report, *supra*, note 23 at 156, and the discussion in the Ontario Report at 111-116.]]

This would make it clear that a conservation covenant may have any of the elements now found in positive or restrictive covenants or easements, thus ensuring considerable flexibility in designing obligations appropriate to the preservation needs of each situation.

c. Obligations and Powers

The legislation also should provide that certain ancillary obligations and powers may be included in a conservation covenant which, when they are included in the document, are valid and bind successor owners.

One example is the right of access to the land for monitoring purposes. At least one American model conservation easement includes rights of access and inspection in the easement document. [[Footnote: (64) -- 64. See the model conservation easement in Janet Diehl & Thomas S. Barrett, *The Conservation Easement Handbook* (San Francisco, California: Trust for Public Land, 1988) at 156 ["*The Conservation Easement Handbook*"].]] However, even if these rights were expressly included in the easement document, a recalcitrant successor landowner could argue that the right of access is merely a personal obligation on the part of the landowner who granted the obligation, rather than an obligation that runs with title to the land and binds the successor landowner. Therefore, the legislation should make it clear that this obligation binds successor owners.

Some have argued that the legislation should go even further and provide that certain ancillary obligations are automatically included in every conservation covenant and therefore always bind successor owners. [[Footnote: (65) -- 65. See recommendation 7 of the Ontario Report, *supra*, note 23 and the discussion in the Ontario Report at 113. The English Report, *supra*, note 23, apparently is the source for the Ontario Report's recommendation.]] If the right of access were one such ancillary obligation, every conservation covenant would automatically include the right of access for monitoring. This approach was taken in New York. Section 6 of Title 3 of New York's Environmental Conservation Law [[Footnote: (66) -- 66. *McKinney's Consolidated Laws of New York (Annotated)*, 7 (West Publishing Co.) [the "*New York Act*"]. End of Footnote]], provides that the

> holder of a conservation easement ... may enter and inspect the property burdened by a conservation easement in a reasonable manner and at reasonable times to assure compliance with the restriction.

However, the conservation covenant is attractive largely because it is voluntary and affirms the value and primacy of private property rights. Therefore, if these supplementary obligations are

mandatory, they may inhibit the use of the conservation covenant. Accordingly, the conservation covenant legislation in British Columbia should provide that these supplementary obligations and rights are valid and bind successor owners if created in the covenant, but that they are not required to be in the covenant. This will allow landowners and conservation groups to agree on which ones should be included in any particular case.

The legislation should provide that the following obligations and powers are valid and bind successor owners if created in the covenant:

> (1) the right of access to the land for monitoring purposes;
>
> (2) an obligation on the landowner to supply information or produce documents directly concerning the implementation of the conservation covenant;
>
> (3) an obligation on the landowner to create and maintain a fund out of which specific expenditures may be met by the landowner or the conservation covenant holder;
>
> (4) the ability of the parties to create a charge against title to the land, enforceable by court action or appointment of a receiver of the land, or both, to secure the performance by the landowner of any specified aspect of the conservation covenant; and
>
> (5) the right of the conservation covenant holder to enter the burdened land and perform any obligation the landowner has failed to carry out, at the expense of the owner, but only after giving the landowner the required notice.

d. Duration

The legislation should give parties the option of creating either:

- a perpetual conservation covenant, or
- a covenant for a fixed period of time, that is, less than perpetual.

One of the goals of the legislation is to permit the greatest possible flexibility in preserving private land. If tax benefits are to flow from creation of a conservation covenant, the government may wish to stipulate in taxation legislation a minimum duration for conservation covenants. [[Footnote: (67) -- 67. For example, section 51081 of the *California Open-Space Easement Act of 1974* provides that an "open-space easement" under the Act "shall run for a term of not less than 10 years." Paragraph 6 of section 49-0306 of the *New York Act* requires the government to "promulgate regulations establishing . . . the minimum term for a conservation easement."]] Apart from the need to protect the integrity of any tax incentive regime -- a need which is best met through tax laws and not conservation covenant legislation -- the legislation should allow the greatest possible flexibility regarding the duration of conservation covenants.

Recommendation 7: The legislation should provide that a conservation covenant is a non-possessory interest in land, created in writing, that is either perpetual or of fixed duration and which may contain

(1) positive or negative obligations respecting the use of the land or anything to be done or not to be done on it by its owner or the holder of the conservation covenant,

(2) obligations to permit access to or use of the land by the holder of the conservation covenant, and

(3) obligations and entitlements relevant to achieving any of the purposes for which the conservation covenant has been created.

5.3.5 Benefit to Adjacent Land

Our present law requires that covenants or easements must be shown to benefit land adjacent to the land subject to the covenant or easement before the interest binds subsequent owners of the land subject to the covenant or easement. The current rule is a serious obstacle to the use of conservation covenants in British Columbia. The utility of conservation covenants can be assured only if the requirement that a covenant or easement must benefit adjacent land does not apply to a conservation covenant.

Recommendation 8: The legislation should provide expressly that a conservation covenant may be granted and held whether or not it benefits land other than the land which it burdens.

5.3.6 Binding Subsequent Owners

Rules to govern when subsequent owners are bound by a conservation covenant must be explicit, in part because the existing legal rules governing covenants are so complex. [[Footnote: (68) -- 68. See discussion in Chapter 3 and Appendix C.]]

The common law rules applied by our courts provide that the burden of either a restrictive or positive covenant cannot run with title to the burdened land. In other words, at common law a covenant on land will bind the owner who created the covenant, but will not bind subsequent owners. To serve conservation purposes, the reform legislation must provide expressly that a conservation covenant binds later owners of the land subject to the conservation covenant, whether the conservation covenant imposes positive or negative obligations.

The rules of equity applied by our courts provide that a covenant will bind later owners of the land, but only if

(1) the covenant is restrictive or negative in nature,

(2) the person to whom the covenant is granted owns land benefitted by the covenant,

(3) the covenant touches and concerns the land it supposedly benefits, and

(4) the covenant demonstrates an intention to bind the burdened land and run with it. [[Footnote: (69) -- 69. See the discussion above, at pages 25-26 and Appendix C.]]

Recommendations 7 and 8 eliminate the first three equitable rules governing when subsequent landowners will be bound. The fourth equitable requirement -- that the covenant must demonstrate an intention to bind the burdened land and run with it -- can be dealt with by providing in the legislation that a conservation covenant is conclusively presumed to run with title to the land and to bind successors in title.

Recommendation 9: The legislation should provide that a conservation covenant is presumed to run with title to the land and to bind subsequent owners of the land, whether or not such an intention may be gathered from the instrument.

5.3.7 Binding Other Interest Holders

a. Positive Obligations

While it is relatively uncontroversial to argue that successors to the granting landowner should be bound by the conservation covenant, it is not as clear that the burden of a positive conservation covenant should also bind those with a lesser interest in the burdened land. [[Footnote: (70) -- 70. It is important to note that a conservation covenant will not bind a prior interest holder, such as a prior mortgagee, unless a priority agreement is obtained from the prior interest holder and is registered on title to the land together with the conservation covenant.]] This is an important issue that will affect the popularity of the conservation covenant for land preservation.

The Ontario Report recommends that those with a limited interest in land should be bound only by negative land obligations and not by positive land obligations. [[Footnote: (71) -- 71. See recommendation 25 of the Ontario Report, *supra*, note 23 at 160, and the discussion in the Ontario Report at 122-124.]] The authors of the Ontario Report state that only those persons with "a sufficiently substantial interest in the servient land" should be subject to positive land obligations. [[Footnote: (72) -- 72. *Ibid*. at 123. End of Footnote]] z It is not clear what constitutes a "limited" or "substantial" interest in the view of the authors of the Ontario Report, since they did not define those terms.

In reforming British Columbia law, it will be necessary to set out clearly who will be, and who will not be, bound by positive obligations in a conservation covenant. The following is suggested:

- First, the landowner who granted the conservation covenant, or his or her successors, should be bound by the positive obligations in a conservation covenant, whether or not in possession of the land.
- Second, anyone in possession of the burdened land should be subject to the positive obligations in a conservation covenant, including a mortgagee in possession and any lessee, regardless of the duration of the lease.
- Third, anyone who has an interest in the burdened land, other than the categories listed above, should not be subject to positive obligations in a conservation covenant, since the utility of conservation covenants will not be increased if anyone with any interest in the land, such as a statutory right of way, is subject to them.

b. Negative Obligations

As for negative obligations in a conservation covenant, anyone with an interest of any kind, subsequent to the conservation covenant, or who is in possession of the burdened land should be subject to negative obligations. [[Footnote: (73) -- 73. See recommendation 25 of the Ontario Report, *supra*, note 23 at 160, and the discussion in the Ontario Report at 122-124.]] Such obligations generally do not require the expenditure of money, although they may do so indirectly in some cases. The main thrust of a negative obligation is to require that land not be used in a specified way or that access to land be permitted.

While these types of obligations will often have some impact on the value of land, or its utility to even the holder of an insignificant interest in it, they are generally of a much less onerous nature and should bind everyone with a subsequent interest in the land or in possession of the land.

Recommendation 10: The legislation should provide that positive obligations in a conservation covenant bind

> (1) the grantor of the conservation covenant and the successors in title of the grantor, whether or not in possession of the burdened land, and
>
> (2) anyone in possession of the burdened land.

The legislation should provide that restrictive obligations in a conservation covenant bind

> (1) the grantor of the conservation covenant and the successors in title of the grantor, whether or not in possession of the burdened land,
>
> (2) anyone who has any subsequent interest in the burdened land, and
>
> (3) anyone in possession of the burdened land.

5.3.8 Liability for Breach

a. Owners and Other Interest Holders

Another issue to consider is whether every party that is bound to observe a conservation covenant should be liable at law for breach by another of that obligation. Raising this issue presupposes a distinction between

- whether or not someone is personally bound by a conservation covenant, and
- whether or not someone who is personally bound should be liable for a breach by another party.

This is a distinction accepted in the Ontario Report, [[Footnote: (74) -- 74. *Ibid.* at 124-128.]] but not necessarily accepted in United States conservation easement legislation. [[Footnote: (75) -- 75. For example, section 49-035 of the *New York Act* provides that a conservation easement "is

enforceable against the owner of the burdened property." This does not expressly limit the right of enforcement, but may be interpreted to do so. Similarly, section 3 of Michigan's *Conservation and Historic Preservation Easement Act*, 399.251, Michigan Compiled Laws (Annotated), West Publishing Co. [the *"Michigan Act"*], provides that a conservation easement is "enforceable against the owner of the land or body of water subject to the easement." End of Footnote]] z

Possession of and control over land burdened by a conservation covenant is important to observance of that obligation. A restrictive obligation in a conservation covenant -- for example, not to alter prime grassland habitat in any way -- cannot realistically be observed by anyone other than the possessor of the land. On the other hand, if land is burdened by a positive obligation in a conservation covenant -- for example, to spend money to restore wetland habitat -- possession of the land is not crucial. Anyone who owns an interest which subjects that person to the conservation covenant can perform the obligation. [[Footnote: (76) -- 76. This assumes there is a right of access to the land in favour of those not in possession of it, so they can enter the land and perform the positive obligation if the person in possession fails to do so.]] The question is whether this distinction is sufficiently important to warrant treating liability for breach of restrictive and positive obligation in conservation covenants differently.

It is argued in the Ontario Report that different treatment should be given to positive and restrictive obligations in conservation covenants. [[Footnote: (77) -- 77. Ontario Report, *supra*, note 23 at 124-128. See also the English Report, *supra*, note 23 at 86-89.]] The Ontario Report points out that, since a restrictive obligation requires that something not be done, it is difficult to see why anyone other than the person who actually acted in contravention of that prohibition should be liable. [[Footnote: (78) -- 78. Ontario Report, *ibid.* at 125. End of Footnote]] z

Ordinarily only those who are in possession of the land are in a position to breach a restrictive obligation. However, there are cases where someone other than the possessor of the land, such as a trespasser, has breached a restrictive obligation. To deal with both situations, the rule should be that only someone who personally breached a restrictive obligation -- or allowed it to occur -- should be liable.

A positive obligation requires that something be done and almost always entails the expenditure of money or money's worth on the land. Since possession of the land is not essential, interest holders who are bound by a positive obligation should be liable for its breach, whether or not they are in possession of the burdened land, if they personally breached the obligation. Even if a number of interest holders are jointly bound by a positive obligation, if there is a breach of that obligation, all will be in breach and all should be liable. [[Footnote: (79) -- 79. It will be necessary to consider whether the liability of interest holders for breaches of a positive obligation in a conservation covenant, which requires the expenditure of money, should be joint and several as regards the person who has the right to enforce the conservation covenant. If so, the law of restitution will provide a right of contribution to any interest holder who has made good on the obligation. For a discussion of the relevant restitutionary principles, see P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Toronto: Canada Law Book, 1990) at 187-203.]]

Recommendation 11: The conservation covenant legislation should provide that anyone who is bound by a conservation covenant who breaches or permits a breach of an obligation in a conservation covenant is liable for the breach.

b. Former Owners

Normally, a person who undertakes an obligation by way of an agreement is bound by it until the person to whom the obligation is owed releases that person from liability, unless the parties provide otherwise in the agreement. [[Footnote: (80) -- 80. For example, a lessee who has assigned the leasehold interest or sub-leased the premises remains liable for breaches of the lease unless the lessor has released the lessee from further liability for such breaches. See *Anger & Honsberger*, *supra*, note 11 at 259 ff.]] In current British Columbia legal practice it is not unusual for instruments creating land obligations to provide that the obligor is released from liability as soon as the obligor ceases to own any interest in the land. [[Footnote: (81) -- 81. Author's personal observation. It is also not uncommon for this type of release to operate prospectively only to the extent of the interest disposed of by the obligor landowner. Thus, an owner who sells a one half interest in the fee simple title to a parcel of land will remain liable in respect of the one half interest he or she retains. End of Footnote]] z Moreover, section 215 of the *Land Title Act* contains a similar provision regarding landowner liability for breaches of a covenant granted under that section.

Conservation covenant legislation should provide that a landowner is released from liability under the conservation covenant upon the disposition of his or her interest in the burdened land, to the extent of the interest which has been disposed of by the landowner, subject to an express agreement to the contrary.

The parties should be able to expressly provide in the conservation covenant that the obligor remains liable even if he or she disposes of all interest in the land. This option will permit the parties in effect to arrange for a guarantee of performance of the conservation covenant. This will provide flexibility, especially in situations where the conservation covenant has been purchased and not donated. It will also be useful where the conservation covenant exists for a limited number of years. In such cases, the landowner may be willing to assume the risk of liability for an appropriate payment or for no payment at all. The legislation should allow such arrangements to be made.

Recommendation 12: The legislation should provide that

> (1) a person who is bound by a conservation covenant ceases to be liable after disposition by that person of his or her interest in the burdened land, but only to the extent of the interest disposed of, and
>
> (2) the parties to the conservation covenant may provide that, contrary to the foregoing rule, the person who is bound by the obligation remains liable after disposition by that person of his or her interest in the burdened land.

5.3.9 Remedies for Breach

Easements may be enforced by an injunction or damages. [[Footnote: (82) -- 82. See *Anger & Honsberger*, *supra*, note 11 at 969-970. The law also recognizes a form of self-help. The owner of the dominant tenement may remedy a wrongful interference with an easement by taking steps to abate it. Any action taken to abate a nuisance must be reasonable; certain other conditions apply where it is necessary to enter the servient tenement.]] Since it is equity which allows the burden of a restrictive covenant to bind subsequent owners of the land, only equitable relief is available to remedy its breach. This allows for enforcement by injunction. Damages are a common law remedy and traditionally have not been available. [[Footnote: (83) -- 83. Ontario Report, *supra*, note 23 at 128. End of Footnote]] z

In the interests of both certainty and flexibility, conservation covenant legislation should provide that a conservation covenant may be enforced by action in the Supreme Court of British Columbia and that all equitable and common law remedies are available for its breach or threatened breach.

In the case of positive obligations in a conservation covenant, injunctive relief would involve the court ordering compliance with an obligation to do something. However, our courts traditionally have declined to make an order requiring specific performance of a contractual obligation where it would entail personal service. It could be argued that enforcement of a positive obligation in a conservation covenant -- for example, where the landowner is required to engage someone to do some work on the land -- entails such personal service, perhaps indirectly.

For this reason, the legislation should provide that a court is empowered to order compliance with a positive obligation in a conservation covenant, despite any rule of law or equity to the contrary.

Recommendation 13: The legislation should provide that a conservation covenant is enforceable by action in the Supreme Court of British Columbia and that all of the common law and equitable remedies are available to remedy its breach. The legislation should further provide that a court may order compliance with a positive obligation in a conservation covenant, despite any rule of law or equity to the contrary.

5.3.10 Enforcement by Third Party

The UCEA contains a back-up enforcement mechanism which should be considered in developing British Columbia's legislation. Section 3 of the UCEA provides that "[a]n action affecting a conservation easement may be brought by ... a person having a third-party right of enforcement." Section 1(3) of the UCEA defines a third-party right of enforcement as

a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

Following are some of the arguments in favour of including such a mechanism in the British Columbia legislation and some of the issues that should be considered.

a. Improved Enforcement

Giving a third party the right to enforce a conservation covenant offers greater assurance that the conservation covenant will be enforced. The actual holder of the conservation covenant might not enforce it according to its terms for a number of reasons. For example, lack of expertise, human resources or money, or all three things, may disable a conservation organization, leaving the conservation covenants it holds unenforced. In rare cases there may be collusion between a landowner and the holder of a conservation covenant, leading to inappropriate compromise on enforcement or a complete lack of enforcement.

In addition, where a government agency is the holder, the landowner may wish to have the right to grant a right of enforcement to a non-governmental organization. By doing so, the landowner will have added assurance that political agendas -- for example, relating to land development -- will not affect enforcement of the conservation covenant against his or her successors in title.

b. No Extra Cost

There would be no additional cost to government in creation of third party rights of enforcement. The legislation need only provide that a conservation covenant may include a third party right of enforcement granted to an entity which is qualified to be a holder. The legislation also would have to make it clear that the holder of such a right of enforcement has the standing and all of the rights of the holder as regards enforcement and remedies. Section 27(3) of the *Heritage Conservation Act* is an example of a comparable provision.

c. Voluntary, not Mandatory

Designing a conservation covenant which grants a third party the right of enforcement may lead to management problems or conflicts between the holder and the third party enforcer. Therefore, the decision to include a third party enforcer should be left to the parties, on a case by case basis. It should not be a mandatory requirement that every conservation covenant must include a third party enforcer.

d. Qualified Third Party Enforcers

If a conservation organization qualifies to be a holder, it should be able to hold a third party right of enforcement. Therefore, the criteria applied to determine if an organization qualifies to be a holder of a conservation covenant also should be applied to determine if it qualifies to be a third party enforcer.

e. Dissolution

The legislation should provide that upon the dissolution of a third party enforcer, the right of third party enforcement may be transferred to another incorporated society or not-for-profit corporation eligible to hold a conservation covenant, with the consent of that party.

f. Consent

The legislation should make it clear that the proposed third party enforcer must first consent to creation of the enforcement right. This will ensure that enforcers are self-selected and therefore more likely to be committed to that role.

g. Conflict Between Holder and Third Party Enforcer

There may be cases where the third party enforcer and the actual holder of the conservation covenant cannot agree on the need to enforce the interest. The potential for conflict of this kind would be diminished by providing in the legislation that, despite the terms of any conservation covenant, a third party right of enforcement may be exercised only where the holder of the conservation covenant has failed to take and continue steps to enforce the conservation covenant within 60 days after notice to do so is given by the third party. Consideration also should be given to allowing the third party to enforce the conservation covenant in an emergency without giving notice.

Recommendation 14: The legislation should provide that a conservation covenant may grant a third party right of enforcement to an entity otherwise qualified to be the holder of a conservation covenant.

5.3.11 Assignment

British Columbia law does not permit assignment of the benefit or the burden of an easement. [[Footnote: (84) -- 84. See *Anger and Honsberger*, *supra*, note 11 at 925 ff.]] Although an easement is an interest in land, it cannot exist in gross, that is, it cannot exist unless there is other land which it benefits. Law reform recommended in this report would allow conservation covenants to exist as property interests in gross. Therefore, assignment of conservation covenants could not be dealt with adequately by the common law rules on assignment in British Columbia.

Section 2(a) of the UCEA provides that "a conservation easement may be ... assigned ... in the same manner as other easements." This provision follows from recognition in many states that an easement can exist in gross and therefore can be assigned. [[Footnote: (85) -- 85. See Katz, *supra*, note 31 at 383 and 393.]]

Some other American statutes expressly deal with this issue as well. For example, section 6(2) of the Michigan Act provides that a conservation easement "may be assigned to a governmental or other legal entity." [[Footnote: (86) -- 86. It is interesting that section 6(3) of the Michigan Act is more restrictive in relation to historic preservation easements. That section provides that such an easement "may be assigned to a governmental or other legal entity whose purposes include"

historic preservation purposes.]] Section 3 of the New York Act provides that a conservation easement may "be held only by a public body or not-for-profit conservation organization."

In British Columbia, section 27 of the *Heritage Conservation Act* provides that a heritage conservation covenant may be assigned by the Province, the British Columbia Heritage Trust or a local government "to any person". This provision does not restrict assignment to qualified entities. Despite this domestic precedent, a restriction similar to that in the New York Act is desirable in British Columbia's conservation covenant legislation. To allow unrestricted assignment would be inconsistent with Recommendation 2, which would restrict initial holders to certain qualified entities.

There may be some concern that such a restriction on assignment is an unwarranted intrusion on property rights. It might be argued that a landowner has an interest in allowing free assignment by the initial holder of the conservation covenant. However, restriction of assignees to qualified holders is likely to offer a broad choice of potential assignees. The public interest in ensuring that only qualified entities hold such interests justifies such a minimal incursion on free alienation of property interests. In the Restatement of the Law of Property (Servitudes) it was stated that

the social utility of devoting property to conservation, historic preservation and charitable purposes is strong enough to justify severe restraints on alienation that are reasonably necessary or convenient to assure that the property will be used to carry out the intended purpose. [[Footnote: (87) -- 87. Tentative Draft No. 2 (Philadelphia: American Law Institute, April 5, 1991) at 61. This observation also carries weight regarding what grounds, if any, should be used to vary or discharge a conservation covenant. See the discussion above in this chapter.]]

This passage provides support for the argument that such a statutory restraint is desirable.

Recommendation 15: The legislation should provide that it is permissible for the holder of a conservation covenant to assign it, but only to another entity qualified to hold a conservation covenant.

5.3.12 Excluding Debilitating Legal Rules

The above recommendations would effect the main legal changes necessary to enable conservation covenants to be used in British Columbia. Nonetheless, the legislative reforms also should eliminate as much uncertainty as possible regarding the application of existing legal rules on covenants and easements to conservation covenants. To do so, the legislation should expressly stipulate the particular common law and equitable rules that will not apply to conservation covenants.

Recommendation 16: The legislation should stipulate that the following common law and equitable rules do not apply to conservation covenants, namely any rule that

> (1) land other than the land burdened by the interest must be benefitted, or that the interest must touch and concern or be appurtenant to land other than the land burdened,

(2) the burden of an interest will not run with title to the burdened land, or that it will run with title to that land only if the interest is restrictive or negative in nature,

(3) an interest cannot be enforced unless there is privity of estate or of contract, or

(4) an interest must demonstrate an intention to bind the burdened land and run with title to it.

5.4 The Rule Against Perpetuities

Traditionally, the law has been hostile to any property interest which is not held by someone within a reasonable time after its creation. The law sought to eliminate the possibility that a property right could be created that would only be enjoyed at some remote time in the future, thus being in limbo for a long time. The law encouraged liquidity of property rights, by forcing them to be possessed and enjoyed within a reasonable time after their creation.

A legal rule was developed which invalidates any right or interest which is not vested in, or held by, someone within a specified time. This judge-made rule, known as the modern rule against perpetuities, was very complex. In essence, the rule was that a right or interest was invalid if it might vest in someone only on the happening of a remote contingency. Due to the drastic effect some think this rule could have on conservation covenants, it is necessary to examine it in some detail.

The British Columbia *Perpetuity Act [[Footnote: (88) -- 88.* R.S.B.C. 1979, c. 321 [the *"Perpetuity Act*"].]] was enacted in 1975 to codify and modify the rule against perpetuities. Section 2 of the *Perpetuity Act* provides that the common law rule continues in force. Other sections of the *Perpetuity Act*, however, modify the rule significantly. For example, although the common law version of the rule would invalidate unvested yet long duration interests at the outset, the legislation now adopts a wait-and-see approach. Section 4 provides that a "disposition creating a contingent interest in property" is not "void as violating the rule against perpetuities by reason only of the fact that there is a possibility of the interest vesting beyond the perpetuity period."

Sections 18 and 19 deal specifically with easements and "other similar interests." Section 18, the title of which is "commercial transactions", provides that in

> the case of an option or other contractual right under which an interest in property may be acquired for valuable consideration, the perpetuity period is 80 years from the date of the creation of the option or contractual right ... [emphasis added].

The section goes on to provide that where "an interest in property could arise more than 80 years after the creation of the option or contractual right," the option or right is "void after the expiration of 80 years." Section 18(2) provides that the 80 year validity rule laid down by section 18(1) applies to "future ... easements and restrictive covenants."

Section 19 provides that in "the case of the grant of an easement, profit a prendre or other similar interest" not referred to in section 18, other rules apply. Section 19 further provides that any easement or "other similar disposition" to which the rule against perpetuities "may be applicable" is subject to special rules. First, the perpetuity period is 80 years, as is the case under the Act with other interests. Second, the validity or invalidity of the interest is to "be determined by actual events within the 80 year period." Last, the interest "is only void for remoteness if and to the extent that it fails to acquire the characteristics of a present exercisable right ... within the 80 year period."

The rules in section 19 do not apply to any provision in a will or a trust created other than by will.

Some people may be concerned that conservation covenants will be vulnerable to attack because they are perpetual and therefore violate the rule against perpetuities as modified by the *Perpetuity Act*. This concern is unnecessary so long as a transaction involves the immediate vesting of a conservation covenant. [[Footnote: (89) -- 89. *Anger & Honsberger*, *supra*, note 11 at 488-489.]] In other words, so long as a landowner immediately grants a conservation covenant to a holder, the rule will not apply.

The present grant of a conservation covenant means the interest is vested and is not subject to the rule. As is noted in Anger & Honsberger,

> [s]ince the rule against perpetuities is a rule against remoteness of vesting and has no concern with how long an estate or interest lasts, present interests which are vested in some person are not objectionable on any ground of perpetuity regardless of the fact that they may last for an indefinite time. Consequently, the rule does not apply to vested interests, including easements and profits a prendre, rent charges, and similar interests lasting indefinitely, and restrictive covenants and conditions running with the land, for they are so annexed to the land as to create something in the nature of an interest in the land. [[Footnote: (90) -- 90. *Ibid.* See also the well known case of *London and South Western Ry. Co.* v. *Gomm* (1882), 20 Ch. D. 562 (C.A.) at 583.]]

The situation would differ, of course, if the landowner merely granted the holder an option to acquire a conservation covenant at some future time. In that case the rule against perpetuities would apply, since there would be no conservation covenant until the option was exercised. Similarly, if a document contained a conservation covenant but stipulated that it was to come into being only on the happening of a future event, such as the sale of the land by the owner, the rule would apply. In those situations the conservation covenant would fail if the event did not occur within the 80 year period set out in the Act.

CHAPTER 6. CONSERVATION COVENANTS AND TAXATION

Educational programs and direct contact with landowners can do a great deal to encourage voluntary participation in conservation covenant programs. By educating landowners and the public about the benefits of conservation covenants, conservation organizations and government agencies can increase their use. However, to fully maximize the use of conservation covenants, there almost certainly has to be some tax incentive for landowners to donate this interest for conservation purposes.

The United States experience demonstrates the importance of tax incentives in encouraging the use of conservation covenants. [[Footnote: (91) -- 91. See Barratt & Livermore, *supra*, note 28 at 45 ff.]] Further, the desirability of tax incentives in this area has already been recognized in British Columbia through enactment of the *Property Purchase Tax Amendment Act*, 1991. [[Footnote: (92) -- 92. S.B.C. 1991, c. 16. End of Footnote]] z This Act provides for tax relief where a section 215 environmental covenant, that is, a covenant in favour of the Crown under section 215(1.1)(e) of the *Land Title Act*, is registered with the approval of Cabinet. While this is a welcome signal, further amendments to the *Property Purchase Tax Act [[Footnote: (93) -- 93.* R.S.B.C. 1979, c. 340.5 [the "*Property Purchase Tax Act*"]. The name of the Act is to be changed to the *Property Transfer Tax Act* shortly. End of Footnote]] z will be needed if tax relief under that Act is to apply to the conservation covenant recommended in this report.

There are other tax incentives currently available which may encourage the use of conservation covenants once the necessary legislation is enacted. A number of these are discussed below. Nevertheless, additional tax reforms should be implemented to optimize the use of conservation covenants in British Columbia.

The following discussion about existing tax law is not intended as legal advice and must not be relied upon as such. It is important that readers obtain legal and accounting advice before proceeding with any transaction which may have tax consequences. Those consequences will vary depending on the facts of each situation.

6.1 Federal Taxation

6.1.1 Income Tax

The *Income Tax Act [[Footnote: (94) -- 94.* R.S.C. 1952, c. 148 and amendments [the "*Income Tax Act*"].]] of Canada taxes income and capital gains. It also implements various public policies by allowing certain deductions from amounts which would otherwise be taxed as income and by offering tax credits.

One such policy implemented through the *Income Tax Act* encourages donations to charitable organizations. The *Income Tax Act* offers taxpayers a tax deduction in respect of amounts donated by them to qualified charities, [[Footnote: (95) -- 95. *Income Tax Act*, s. 118.1.]] provided certain rules set out in the Act are observed. [[Footnote: (96) -- 96. A detailed

discussion about the charitable donation tax deduction is beyond the scope of this report. Readers may wish to refer to H. Stikeman, ed., *Canada Tax Service* (Toronto: Carswell, 1992) for a useful source of further information on this topic. End of Footnote]] z

It is clear that the donation need not be in cash. A gift can qualify as a donation so long as it is a gift of valuable property. [[Footnote: (97) -- 97. *Income Tax Act*, s. 118.1(1).]] In the case of a donation other than cash, the amount for which relief may be claimed is the prescribed value of a gift made by a taxpayer to a charitable organization properly registered with Revenue Canada under the *Income Tax Act*. [[Footnote: (98) -- 98. For a more detailed discussion refer to Stikeman, supra, note 96. **End of Footnote]] z** If the donation is some type of property, rather than cash, the gift will be assessed for tax purposes at its fair market value.

It is likely, but not certain, that a donation to a registered charity of a conservation covenant of the type recommended in this report would qualify under the Act as a charitable gift for income tax purposes. If so, the value of that gift would be its fair market value -- which should be determined by deducting the fair market value of the land immediately after the donation of the conservation covenant from the fair market value of the land immediately before the donation. [[Footnote: (99) -- 99. *Income Tax Act*, s. 118.1(1); but see also s. 118.1(6).]]

However, this method of valuation is not the only one that could be applied to determine the fair market value. There are some alternative methods which would be less useful in promoting the use of conservation covenants because they undercut the availability of income tax incentives. For example, Revenue Canada could argue that any tax benefit is to be based on the value of the conservation covenant in the hands of the recipient. If there is no secondary market for conservation covenants, that value would be negligible, resulting in a gift without any value. Such a result would be artificial, since it would ignore any actual decrease in land value in cases where a conservation covenant restricting development is attached to land.

In the majority of cases, registration of a conservation covenant against title to land will result in a reduction in the value of the land because most conservation covenants restrict what a landowner may do with the burdened land. For example, a farmer may donate a conservation covenant which prohibits the use of land for anything other than agricultural purposes. If that land is on the border of a growing urban centre, its value will be reduced.

Many cases will involve a much less dramatic reduction in value. In some cases there may be no decrease in value at all. Indeed, it is possible for a conservation covenant to enhance the fair market value of a parcel of land. However, in situations where the conservation covenant diminishes property value, that decrease should be the value of the gift for tax purposes.

There is some evidence that Revenue Canada will treat donated conservation covenants as charitable gifts for income tax purposes. In Prince Edward Island, the PEI *Natural Areas Protection Act* enables landowners to designate land as a protected area under certain conditions and to enter into restrictive covenants which preserve their land. In a letter dated July 13, 1990, Revenue Canada advised Prince Edward Island's Island Nature Trust that

a donation of a restrictive covenant registered against the land [under the PEI *Natural Areas Protection Act*] ... to a registered charity could be considered a gift for the purposes of ... the *Income Tax Act*.

This statement was based on the assumption that a covenant granted under the PEI *Natural Areas Protection Act* to a charity is, according to the letter, "a mechanism for the legal long term or permanent protection of natural areas, ecological preserves or open spaces by private owners of those sites." The letter listed the restrictions placed on land use by such a covenant and observed that the "restriction of land use normally devalues the property." [[Footnote: (100) -- 100. The focus on present devaluation in property value is consistent with our tax treatment of property generally. Unless there is some present diminution in one's property rights, there has ordinarily been no loss of value. In this context, if there is no loss in value of one's property rights, nothing has been given away to charity. This thinking apparently shaped the debate behind United States income tax reform in this area. Thomas Coughlin comments that "the Treasury's steadfast insistence that a current tax deduction should be denied unless the taxpayers' present enjoyment of the land is significantly affected, shaped the debate on Capitol Hill" over 1980 reforms to the Internal Revenue Code. See Thomas A. Coughlin, "Preservation Easements: Statutory and Tax Planning Issues" (1982) 1 Preservation Law Reporter 2011 at 2012. Amendments in 1986 to the Internal Revenue Code threaten the utility of such tax incentives. See Konrad J. Liegel, "The Impact of the *Tax Reform Act of 1986* On Lifetime Transfers of Appreciated Property For Conservation Purposes" (1989) 74 Cornell Law Rev. 742.]] On that basis, it stated that a

restrictive covenant could therefore be assigned a value equal to the difference between the property's value before the restrictive covenant is registered against the land and the property's value after the restrictive covenant is registered against the land.

This approach might yield significant tax benefits but it also imposes a burden on landowners, since it will be necessary to obtain appraisals of the property and to deal with Revenue Canada in each case. In light of this, conservation organizations may need to assist landowners in obtaining appraisals and in dealing with Revenue Canada, to reduce the burden to landowners.

If a conservation covenant is sold, capital gains consequences may arise. However, if the conservation covenant is a charitable gift which complies with the *Income Tax Act* requirements, capital gains tax may not be assessed. If a gift of valuable property is a gift to a registered charity, any capital gain which would otherwise be taxed under the *Income Tax Act* is immune from taxation. [[Footnote: (101) -- 101. *Income Tax Act*, s. 118.1.]]

The possibility that capital gains consequences will inhibit the sale -- as opposed to the charitable donation -- of conservation covenants is not cause to amend federal income tax law. Despite the importance of a conservation covenant system in private land preservation, if a private landowner is profiting by the sale of a conservation covenant, income tax relief is difficult to support.

6.2 Provincial Taxation

6.2.1 Property Purchase Taxation

The *Property Purchase Tax Act* provides that tax is payable under this Act when property is transferred from one party to another. The Act was amended in 1991 by the *Property Purchase Tax Amendment Act*, 1991 to permit a tax exemption when a section 215 environmental covenant is registered on title to the land at the time of the transfer.

Although a detailed critique of the 1991 amendments to the *Property Purchase Tax Act* is beyond the scope of this report, a description of certain new sections and suggestions for further amendments to the Act are necessary.

The following sections are relevant in relation to a section 215 environmental covenant. These sections use the term "conservation covenant" to refer to the interest that is called a section 215 environmental covenant in this report.

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    - Section 5.2(4) exempts from taxation any taxable transaction "to the extent of the fair market value, determined in the prescribed manner, of the interest being transferred that is subject to the conservation covenant."
- Section 5.2(5) exempts a taxable transaction where the property tax administrator is satisfied that a conservation covenant "is intended to be registered" within 6 months after the transaction occurs.

Section 5.2(6) permits a retroactive exemption if a conservation covenant is registered against title within a year after the taxable transaction is registered.

Sections 5.2(1) and (2) provide that, to qualify for any tax relief, a conservation covenant must

- be in favour of the Crown,

- contain one or more provisions described in section 215(1.1)(e) of the *Land Title Act*,

- provide that it may only be amended or discharged with Cabinet approval,

- contain any other provision prescribed by regulation for inclusion, and

- have its registration approved by Cabinet.

There are several limitations regarding the 1991 changes. First, the exemptions under the Act are available only in respect of section 215 environmental covenants, so would not apply to conservation covenants of the type recommended in this report. This excludes the valuable flexibility and resourcefulness offered by private conservation organizations. [[Footnote: (102) -- 102. The terms of section 215 of the *Land Title Act* similarly ignore participation by private groups. Under that section, covenants may only be granted to the Crown or a local government body.]]

Second, the amendments severely restrict the circumstances under which tax relief is available, by requiring Cabinet to approve the registration of a section 215 environmental covenant prior to permitting tax relief under the Act.

Third, since this tax relief is not available for section 215 environmental covenants granted in favour of a local government, the enormous potential for participation by other levels of government is lost.

Fourth, requiring Cabinet approval of registration, amendment or discharge of such instruments is unnecessarily cumbersome and seriously restricts their use. Therefore, it is recommended that this approach not be followed in British Columbia for the conservation covenant legislation recommended in this report. Consideration also should be given to amending section 5.2 of the *Property Purchase Tax Act* to relax its restrictions on tax relief in the case of section 215 environmental covenants.

The 1991 property purchase tax amendments provided a welcome sign that the Provincial government recognizes the value of permitting tax relief to encourage the protection of private land. Further incentives through property purchase tax relief are desirable and should form part of the conservation covenant legislation.

Recommendation 17 The conservation covenant legislation should amend the *Property Purchase Tax Act* to provide property purchase tax relief where a conservation covenant is granted to a qualified holder for a purpose permitted under the conservation covenant legislation. The tax relief should be commensurate with the fair market value of the transaction after accounting for the conservation covenant. The tax relief should be available where the conservation covenant is registered against title either before the taxable transaction occurs or within a specified time after it occurs. Cabinet approval of a conservation covenant should not be required in order to obtain property purchase tax benefits.

6.2.2 Local Government Property Tax

If the recommended conservation covenant legislation were enacted, some property tax relief would be available without any tax reform, provided the landowner could show that the conservation covenant had reduced the value of the land. However, some law reform in this area is desirable to further encourage the use of conservation covenants and to ensure certainty for all parties.

Under current British Columbia law, real property and improvements are taxed by local governments under the *Municipal Act* and various special Acts. [[Footnote: (103) -- 103. For example, the *Vancouver Charter*, S.B.C. 1953, c. 55.]] The *Assessment Act [[Footnote: (104) -- 104.* R.S.B.C. 1979, c. 21 [the *"Assessment Act*"]. End of Footnote]] z provides the mechanism for assessing values for tax purposes.

Property owners may appeal assessments of value made under the *Assessment Act* on either of two grounds. First, since different classes of property attract different rates of tax, a landowner may claim that the property should be classified differently under the *Assessment Act*. Section

26(8) of the *Assessment Act* enables creation of different classes of property. Section 28(1), for example, creates a farm land class. The assessed value of farm land is determined according to the value prescribed for such land by the assessment commissioner, regardless of its value for other purposes. Similarly, section 29 creates a forest land classification and prescribes values for such land. A landowner who obtains a reclassification will pay a different rate of tax. A new classification for conservation covenants could allow it to be preferentially assessed under this Act.

Second, a landowner may appeal an assessment on the ground the actual value of land or improvements is less than the assessed value. For example, if farm land zoned for residential development were burdened by a conservation covenant prohibiting any development, the fair market value of the land would be affected dramatically. The assessment authority would not necessarily be aware of the conservation covenant and therefore might assess the land as if it were available for development.

If a landowner is successful in appealing an assessment and establishing a reduction in value, the assessed value and the property taxes will be reduced. [[Footnote: (105) -- 105. The amount of any reduction will vary, perhaps considerably, depending on the characteristics of the land in question and the restrictions contained in the conservation covenant. It has been noted that in Massachusetts "conservation restrictions have resulted in downward reassessments ranging from as little as thirteen percent to as much as ninety-five percent of a property's pre-restriction assessed value." See Daniel C. Stockford, "Property Tax Assessment of Conservation Easements" (1990) 17 Envtl. Aff. 823 at 826. This article provides a good discussion of the detailed problems inherent in property tax reform in this area.]] Under section 26(3) of the *Assessment Act*, in determining "actual value" the assessor may consider any "circumstances affecting the value of the land and improvements." A prohibition on residential development of land otherwise zoned for that use would in theory, based on section 26(3), reduce its value, which would otherwise take into account the residential zoning based on the principle of highest and best use.

However, there is a Manitoba Court of Appeal decision which may be used by the British Columbia Assessment Authority in refusing to reduce assessed value in such cases. In Consolidated Shelter Corp. Ltd. v. Rural Municipality of Fort Garry, [[Footnote: (106) -- 106. (1965), 49 D.L.R. (2d) 565 (Man. C.A.). The *Consolidated Shelter* decision was considered in *Assessment Commissioner (B.C.)* v. *Houston*, [1979] 5 W.W.R. 639 (B.C.S.C.).]] the Manitoba Court of Appeal dismissed the landowner's argument that, because its lease from the Crown restricted the uses to which the property could be put, there should be a lower tax assessment.

In that oral judgment, Miller C.J.M. distinguished a B.C. case, C.N.R. et al. v. City of Vancouver, [[Footnote: (107) -- 107. [1950] 4 D.L.R. 807 (B.C.C.A.).]] in which the use of land was restricted to railway uses by agreement of the City of Vancouver, the taxing authority. Miller C.J.M. observed in Consolidated Shelter that, if Fort Garry had joined in the agreement with the Crown to restrict land use, as had the City of Vancouver in the C.N.R. case, there might be some force to the argument that a restriction on use by agreement should affect assessed value. Absent such participation by the municipality, such a voluntary restriction could not affect assessed value. At page 568, the judge characterized the situation as one where

... the landowner tries by a restrictive covenant in an agreement to secure lower assessment than his neighbour for land that should in fairness be assessed at the same value[,] ... that normally, were it not for its restrictive agreement, could be sold and otherwise dealt with in a mercantile market ...".

This approach is problematic for a number of reasons.

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    - A landowner will almost never use a covenant solely as an instrument to secure a lower assessed value, as the passage implies in the case.
- The case ignores economic reality, since land use restrictions do affect value, regardless of whether or not they are voluntarily undertaken.

A landowner is denied a lower assessed value where he or she had voluntarily initiated a down-zoning of property.

A successor landowner might also be barred from relief, on the ground that he or she voluntarily bought a less valuable piece of land.

Equity between neighbouring landowners is irrelevant in taxation matters as between a landowner and the taxing authority.

Finally, the judgment -- which is not binding in British Columbia -- should not apply in the face of the plain language of section 26 of the *Assessment Act*.

To avoid the problems associated with the Consolidated Shelter decision and any other uncertainty as to how the *Assessment Act* should be applied, the *Assessment Act* should be amended so that land subject to a qualified conservation covenant is placed automatically in a separate class of property, one which bears a lower assessment.

The certainty and uniformity this approach offers would create fewer costs than an ad hoc approach under which individual assessments are appealed. This approach has been advocated in the United States, on the ground that its use would promote certainty, fairness and uniformity. [[Footnote: (108) -- 108. See Barratt & Livermore, *supra*, note 28 at 45 ff. See also, generally, R.E. Coughlin et al., "Differential Assessment of Real Property as an Incentive to Open Space Preservation and Farmland Retention" (1978) RSRI Discussion Paper Series, Regional Science Research Institute.**]]** Moreover, it would promote greater use of conservation covenants, a very inexpensive tool for private land preservation.

An alternative approach would be to implement a system of property tax rebates for conservation lands. British Columbia's property tax system already uses rebates to achieve certain public policy objectives, as the homeowner's grant demonstrates. [[Footnote: (109) -- 109. The homeowner's grant is given under the authority of the *Home Owner Grant Act*, R.S.B.C. 1979, c. 171.1.]]

Such a system has been adopted in Ontario, under the *Conservation Land Act*, which authorizes property tax rebates in respect of qualified "conservation land." Section 1 of that Ontario statute defines "conservation land" to include

wetland, areas of natural and scientific interest, land within the Niagara Escarpment Planning Area, conservation authority land and such other land owned by non-profit organizations that through their management contribute to provincial conservation and heritage program objectives.

Also, section 2 of the Ontario statute empowers the Minister of Natural Resources to "establish programs to recognize, encourage and support the stewardship of conservation land." Such a program must, by section 2(2), "provide for the payment of grants in respect of such classes of conservation land as the Minister considers appropriate."

In British Columbia, a similar system of rebates could be extended to land in respect of which a conservation covenant has been granted to a conservation organization or the government. So long as the conservation covenant ensures that the land is preserved for accepted purposes, there is no reason for restricting tax benefits to land owned outright by a conservation group, as is the approach in the Ontario *Conservation Land Act*.

Instituting a system of rebates -- or perhaps tax credits -- to encourage use of conservation covenants would be an alternative to differential classification of property. Rebates or credits would give the government more control, since it would be refunding taxes already paid in one way or another. A rebate system also has the advantage of helping to preserve equity among local governments and their taxpayers, since rebates from the consolidated revenue fund will better spread the cost of conservation covenant protection across the British Columbia property tax base.

There is reason to believe that the effect of conservation covenants on the property tax base in British Columbia will either be small or neutral. A conservation covenant on one parcel of land could increase the value of neighbouring parcels. If a parcel is preserved in a park-like state, the value of adjacent parcels may well benefit from the preservation, thus increasing their value. Similarly, the effect of a conservation covenant on the value of the property subject to the conservation covenant may be to increase it. The protection offered by a particular conservation covenant could actually increase the amenities offered by a property and thereby increase its market value. Therefore, there may be no net loss in tax revenue due to the use of conservation covenants.

Recommendation 18 The conservation covenant legislation should enact amendments to the *Assessment Act* so that any land subject to a conservation covenant is placed in a special class of property to which preferential lower assessments of value apply. In the alternative, the government should consider implementing a system of property tax rebates or grants to encourage the use of conservation covenants.

6.2.3 Tax Revenue Funding For Implementation

Consideration should be given to providing public resources -- from the consolidated revenue fund or from new property tax revenues -- to support private conservation covenant programs during the years immediately following law reform. Despite concern over government spending, including indirect subsidies through foregone tax revenues, the public benefit to be gained through private efforts in land preservation is significant and justifies short term assistance to encourage the use of conservation covenants.

Recommendation 19 The government should consider funding a transition program in the years immediately following enactment of conservation covenant legislation to assist conservation groups in enhancing their expertise in using conservation covenants and to educate landowners about the environmental benefits of granting conservation covenants.

CHAPTER 7. CONCLUSION

This report is intended to emphasize the significant benefits which can be realized by adopting conservation covenant legislation in British Columbia. It does not offer definitive solutions to all of the issues raised by conservation covenant legislation, but instead makes recommendations about the general nature and design of the legislation. Hopefully, this report will generate further discussion with all affected parties and lead to prompt government action.

Our environmental crisis is becoming acute. In British Columbia, as elsewhere in the world, some of the most pressing concerns are over the use and management of land and its resources. Degradation and loss of wildlife and plant habitat and destruction of farmland are but two of the many threats to our natural environment. Given the limits to what government can do itself to protect all of the natural areas in British Columbia that warrant protection, there is a pressing need for private methods of protecting land as well. One of the most promising tools for the private protection of land is the conservation covenant. The government of British Columbia should act quickly to make this tool available.

APPENDIX A. SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1 The British Columbia government should enact legislation enabling private landowners to grant conservation covenants voluntarily in favour of conservation groups qualified as holders of such interests, so that the land subject to the conservation covenant is preserved for purposes permissible under the legislation and as specified in the conservation covenant.

RECOMMENDATION 2 The legislation should provide that any incorporated society or other not-for-profit corporation, whose constitution provides that

- (1) its purposes include any purpose for which a conservation covenant may be granted, and
- (2) upon dissolution any conservation covenant held by it shall be transferred to another incorporated society or not-for-profit corporation eligible to hold a conservation covenant

is qualified to hold a conservation covenant.

RECOMMENDATION 3 The conservation covenant legislation should not require that a conservation covenant must be reviewed and approved by a government body before it is valid and may be registered on title to a property.

RECOMMENDATION 4 The conservation covenant legislation should provide that the existing common law and *Property Law Act* rules regarding the abandonment, termination, discharge or extinguishment of easements or covenants do not apply to conservation covenants.

RECOMMENDATION 5 The conservation covenant legislation should provide that a court may modify or discharge a conservation covenant upon application by a holder, an owner or any other party the court determines has a sufficient interest, in circumstances where

- (1) the original purposes of the conservation covenant and the intention of the grantor are no longer being achieved, and
- (2) the modification or discharge serves the original purposes of the conservation covenant and the intention of the grantor, rather than other societal purposes.

RECOMMENDATION 6 The legislation should contain a non-exhaustive list of conservation purposes which may be served by a conservation covenant. It should be permissible to create a conservation covenant the purposes of which can include the protection, preservation, conservation, maintenance, enhancement or restoration of

- (1) the environment, broadly defined,
- (2) any form of plant or animal life or habitat,
- (3) aesthetic values,
- (4) recreational use of land,
- (5) an existing state or use of land, or
- (6) heritage values, including the paleontological, archaeological, historical, architectural, scientific or cultural values associated with land.

RECOMMENDATION 7 The legislation should provide that a conservation covenant is a non-possessory interest in land, created in writing, that is either perpetual or of fixed duration and which may contain

- (1) positive or negative obligations respecting the use of the land or anything to be done or not to be done on it by its owner or the holder of the conservation covenant,
- (2) obligations to permit access to or use of the land by the holder of the conservation covenant, and
- (3) obligations and entitlements relevant to achieving any of the purposes for which the conservation covenant has been created.

RECOMMENDATION 8 The legislation should provide expressly that a conservation covenant may be granted and held whether or not it benefits land other than the land which it burdens.

RECOMMENDATION 9 The legislation should provide that a conservation covenant is presumed to run with title to the land and to bind subsequent owners of the land, whether or not such an intention may be gathered from the instrument.

RECOMMENDATION 10 The legislation should provide that positive obligations in a conservation covenant bind

- (1) the grantor of the conservation covenant and the successors in title of the grantor, whether or not in possession of the burdened land, and
- (2) anyone in possession of the burdened land.

The legislation should provide that restrictive obligations in a conservation covenant bind

- (1) the grantor of the conservation covenant and the successors in title of the grantor, whether or not in possession of the burdened land,
- (2) anyone who has any subsequent interest in the burdened land, and
- (3) anyone in possession of the burdened land.

RECOMMENDATION 11 The conservation covenant legislation should provide that anyone who is bound by a conservation covenant who breaches or permits a breach of an obligation in a conservation covenant is liable for the breach.

RECOMMENDATION 12 The legislation should provide that

- (1) a person who is bound by a conservation covenant ceases to be liable after disposition by that person of his or her interest in the burdened land, but only to the extent of the interest disposed of, and
- (2) the parties to the conservation covenant may provide that, contrary to the foregoing rule, the person who is bound by the obligation remains liable after disposition by that person of his or her interest in the burdened land.

RECOMMENDATION 13 The legislation should provide that a conservation covenant is enforceable by action in the Supreme Court of British Columbia and that all of the common law

and equitable remedies are available to remedy its breach. The legislation should further provide that a court may order compliance with a positive obligation in a conservation covenant, despite any rule of law or equity to the contrary.

RECOMMENDATION 14 The legislation should provide that a conservation covenant may grant a third party right of enforcement to an entity otherwise qualified to be the holder of a conservation covenant.

RECOMMENDATION 15 The legislation should provide that it is permissible for the holder of a conservation covenant to assign it, but only to another entity qualified to hold a conservation covenant.

RECOMMENDATION 16 The legislation should stipulate that the following common law and equitable rules do not apply to conservation covenants, namely any rule that

- (1) land other than the land burdened by the interest must be benefitted, or that the interest must touch and concern or be appurtenant to land other than the land burdened,
- (2) the burden of an interest will not run with title to the burdened land, or that it will run with title to that land only if the interest is restrictive or negative in nature,
- (3) an interest cannot be enforced unless there is privity of estate or of contract, or
- (4) an interest must demonstrate an intention to bind the burdened land and run with title to it.

RECOMMENDATION 17 The conservation covenant legislation should amend the *Property Purchase Tax Act* to provide property purchase tax relief where a conservation covenant is granted to a qualified holder for a purpose permitted under the conservation covenant legislation. The tax relief should be commensurate with the fair market value of the transaction after accounting for the conservation covenant. The tax relief should be available where the conservation covenant is registered against title either before the taxable transaction occurs or within a specified time after it occurs. Cabinet approval of a conservation covenant should not be required in order to obtain property purchase tax benefits.

RECOMMENDATION 18 The conservation covenant legislation should enact amendments to the *Assessment Act* so that any land subject to a conservation covenant is placed in a special class of property to which preferential lower assessments of value apply. In the alternative, the government should consider implementing a system of property tax rebates or grants to encourage the use of conservation covenants.

RECOMMENDATION 19 The government should consider funding a transition program in the years immediately following enactment of conservation covenant legislation to assist conservation groups in enhancing their expertise in using conservation covenants and to educate landowners about the environmental benefits of granting conservation covenants.

APPENDIX B. GLOSSARY OF TERMS

This appendix defines a number of the concepts and terms used in this report. These definitions are by no means exhaustive or definitive, but are intended to provide a discussion framework for this report. The circumstances of a particular case often will require a different understanding of what is meant by each of the terms.

Conservation: This refers to protection of land, or some aspect or component of it, from a certain kind of development or from development in a specified manner or degree. Conservation contemplates some human use -- including, in some cases, development -- either in the past or the future. Given this context, conservation is a lesser kind of protection than preservation. Indeed, conservation is often the kind of protection envisioned when the object is to conserve in its present state some feature of the land, such as the heritage conservation of buildings.

Conservation Covenant: This is the term used in this report to describe an interest in land created for conservation or preservation purposes. The law reform required to allow this interest to be created in British Columbia is recommended in this report. Throughout this report the term conservation covenant is used to encompass both preservation and conservation of land. Despite the fact that conservation covenants often will be designed to preserve land, in many cases the interest will in fact attach to privately owned land which has already been developed in some way.

Conservation Easement: This is a term widely used in the United States to describe a legal tool for land preservation or conservation. A conservation easement may be defined as a binding promise given in writing by a landowner to a government or to a private organization. The conservation easement is recorded against title to the land and binds subsequent owners of the land.

The objective of a conservation easement is to ensure that land, or some feature of it, is preserved, conserved or kept in a specified state. American conservation easements are usually hybrid tools, with characteristics of both easements and covenants. The easement may include one of the purposes set out below.

- (1) The landowner agrees not to use the land in a certain way, that is, agrees to restrictions on use.
- (2) The landowner agrees to use his or her land in a particular way, that is, agrees to positive obligations regarding the land. [[Footnote: (110) -- 110. See *The Conservation Easement Handbook*, *supra*, note 64.

]]

- (3) The landowner allows access by the interest-holder for performance monitoring purposes. [[Footnote: (111) -- 111. See the model conservation easement in *The Conservation Easement Handbook*, *ibid.* at 156.

]]

- (4) The landowner allows the interest-holder to enter the burdened land for other purposes, for example, to take positive steps to preserve waterfowl habitat.

- (5) The landowner agrees to a prohibition against filling in or otherwise interfering with wetland located on a farm, thus protecting waterfowl habitat. In this case, the rest of the farm may still be used for agricultural purposes or even non-agricultural purposes which would not interfere with the swamp habitat.
- (6) The landowner agrees that development of a parcel of land is prohibited. For example, the owner of a large piece of forest land may agree that no buildings can ever be built on it and that the forest is never to be cut down.

Although in the United States the term conservation easement has been used, one commentator has stated that "conservation servitudes more closely resemble real covenants than easements and hence should not be labeled and treated as easements." [[Footnote: (112) -- 112. Korngold, *supra*, note 31 at 437.]]

Development: This refers to land that is either

- (1) exploited by humans, other than for traditional uses by aboriginal peoples, including by extracting its renewable or non-renewable resources, or
- (2) altered, including by alteration of its soil, water, plant or animal life, in a manner which leaves tangible, but not necessarily permanent, evidence of human alteration of a more than evanescent kind, but excludes temporary alteration which is directly associated with the traditional land uses of aboriginal peoples.

Land: The legal nature of land is a bundle of separate property rights, each of which can be separated from the others and sold or otherwise dealt with by a landowner. In this report, land includes land covered by water. In the non-legal sense, this report refers to land as

- (1) the uppermost layer of the Earth's crust, comprised of bedrock and other rock and the soil which forms part of that layer,
- (2) the totality of all natural physical features of that layer of the Earth's crust,
- (3) the biomass which is supported by and upon that layer of the Earth's crust, including all plant and animal life, and
- (4) water on or in that layer of the Earth's crust.

Preservation: This refers to measures to ensure land is excluded from development permanently. Preservation of land will not preclude traditional uses of the land by aboriginal peoples, prevent use of the land for passage by humans or, in some cases, prevent use for carefully regulated "light-footprint" recreational use, such as canoeing. At the very least, preservation consists of exclusion of land from development, as defined above.

Section 215 Environmental Covenant: This term is used in this report to refer to a covenant of a negative or positive nature, granted in favour of the Crown or other government body under section 215(1.1)(e) of the *Land Title Act*, that includes a provision that land or a specified amenity in relation to it be protected, preserved, conserved or kept in its natural state in accordance with the covenant and to the extent provided by the covenant.

A section 215 environmental covenant binds successors in title and need not be annexed to land owned by the grantee.

APPENDIX C. THE EXISTING LAW ON COVENANTS AND EASEMENTS

C.1 Covenants Affecting Land

A covenant is a binding written promise by which one person agrees to do something or refrain from doing something. [[Footnote: (113) -- 113. A covenant need not concern land. The law of covenant developed before and independent of the law of contract and for a long time fulfilled many of the functions now discharged by the law of contract. As to the law on deeds under seal, that is, the law of covenant in general, see British Columbia Law Reform Commission, *Report on Deeds and Seals* (Vancouver: Ministry of Attorney General, 1989). See also, *Anger & Honsberger, supra*, note 11.]] A covenant is enforceable by the person to whom the promise is made -- that is, the person with whom the promising party stands in a direct relationship under the written covenant can enforce the covenant by court action. [[Footnote: (114) -- 114. This action will in some cases be for an injunction to prevent breach of the covenant, although damages for its breach often will be the remedy, in accordance with well-established legal principles. End of Footnote]] z Although covenants do not necessarily relate to land, they often do concern land. A landowner may grant a covenant to another person, by which the landowner agrees to do, or not to do, something with respect to his or her land. [[Footnote: (115) -- 115. A covenant not to do something with land is commonly called a restrictive covenant or a negative covenant. A covenant to do something with land is known as a positive covenant. The crucial test for distinguishing between the two types of covenants is whether the covenant is in substance negative. The language used is not determinative. See Ontario Report, *supra*, note 23 at 8. A simple test for identifying a positive covenant is to ask whether it requires the landowner to spend money. If it does, it is almost certainly a positive covenant in substance. This test is not, of course, definitive in all cases. End of Footnote]] z

If a landowner covenants with another person to do or not to do something with land identified in a covenant, the person to whom the covenant is given can enforce the covenant. However, if the land is subsequently sold, the important question is whether the person to whom the covenant was given can enforce it against the new owner.

The rule has long been that a covenant will be enforceable if there is a direct contractual link between the plaintiff enforcing the covenant and the defendant. This is a rule of contract law. A covenant also will be enforceable if there is privity of estate between the plaintiff and the defendant, meaning that one of the parties must have derived his or her interest in the land in succession to the interest of the other party. This rule is a rule of the law of property. [[Footnote: (116) -- 116. See Ontario Report, *supra*, note 23 at 6-8. See also the *Law and Equity Act* and the *Property Law Act*.]]

The first rule means that if a landowner covenants with an adjacent landowner regarding use by the first owner of his or her land, the second landowner cannot enforce that covenant against someone who purchases the land owned by the first landowner. There is no direct contractual

relationship or privity of estate between the second landowner and the successor to the first landowner.

The second rule is limited today to the relationship of landlord and tenant, since earlier feudal forms of tenure have been abolished, apart from the relationship between the Crown and all other landowners. It is clear that a covenant in a lease can be enforced by the landlord against the assignee of the original lessee, since by the assignment the assignee becomes the landlord's tenant. This means there is privity of estate. If a tenant sub-leases the property, there is no privity of estate between the landlord and the sub-tenant. In this situation a covenant in the lease cannot be enforced by the landlord against the sub-tenant if the covenant is merely personal and does not run with the land. [[Footnote: (117) -- 117. Of course, the original lessee remains liable to the landlord for any breaches of the covenant, despite any subsequent assignment or sub-lease. See *Anger & Honsberger*, *supra*, note 11 at 453 ff.]]

Complex and arcane rules have evolved which expand the enforceability of covenants outside the two cases just discussed. These rules differ as between the common law and the equitable jurisdictions of our courts. By common law jurisdiction is meant the legal principles and rules administered and developed by the courts of the Sovereign. By equitable jurisdiction is meant the body of law originally developed and applied by the courts of the Lord Chancellor of England. The latter court strived to create law which enforced the dictates of good conscience. In theory, at least, this meant the court of equity was determined to ensure fair play and flexibility. [[Footnote: (118) -- 118. For a good introduction to the history of the common law and equitable jurisdictions, see Baker, *supra*, note 25. The Supreme Court of British Columbia now administers the rules of both equity and the common law. See the *Supreme Court Act*, R.S.B.C. 1979, c. 397.1.]] Accordingly, in the case of covenants affecting land, equity took a much more liberal approach than did the common law.

Nonetheless, the common law and equitable rules in this area are complex and ill-suited to the needs of environmental protection. Some detailed discussion of the common law and equitable rules is necessary in order to understand why conservation covenant law reform is needed in British Columbia.

C.1.1 Common Law Rules Regarding Covenants

The critical common law rule is that the benefit of a covenant runs with the land, but its burden does not. The benefit of a covenant is, in essence, the benefit its performance confers on the landowner whose land is benefitted by the covenant. It is also the right to enforce the covenant. The burden of a covenant is the obligation to perform its terms.

The benefit of a covenant can be enforced by the purchaser of the land benefitted by the covenant if

- (1) the covenant touches and concerns the land,
- (2) the person to whom the covenant was originally given was the legal owner of the land benefitted, and
- (3) the assignee of the covenantee has the same interest in the land as the covenantee.

It is clear that at common law the person giving the covenant need not own land for the covenant to be enforceable against that person. [[Footnote: (119) -- 119. See, for example, *Smith* v. *River Douglas Catchment Board*, [1949] 2 All E.R. 179 (C.A.).]] It is necessary only that the person to whom the covenant is given own land benefitted by that covenant. The purchaser of that benefitted land will be able to enforce the covenant against the person who granted it. That does not mean, however, that the covenant will bind successor owners of any land owned by the person who granted the covenant.

The common law refused to allow the burden of a positive or restrictive covenant to run with the land, apparently because it was feared that it would render land unsaleable. It was assumed that people would not be willing to purchase land encumbered with such burdens. [[Footnote: (120) -- 120. See *Keppell* v. *Bailey* (1834), 39 E.R. 1042. See Ontario Report, *supra*, note 23 at 19-22.]] It might be asked why agreeing to take on such a burden, usually for a price, unreasonably restrains the marketability of land. Assumption of such a burden simply affects the value of the land, meaning that it will be sold for a lower, or possibly a higher, price. Nonetheless, the common law continues to limit freedom of contract by fettering the extent to which landowners may bind future owners of their land. The burden of a positive or restrictive covenant does not run with the land at common law.

Another concern of English judges of the last century was that a prospective purchaser of land would have no way of knowing what covenants might burden the land to be purchased. This concern has not applied for some time in British Columbia because of our statutory land registry and land titles schemes, discussed in the main text of this report. [[Footnote: (121) -- 121. See Ontario Report, *supra*, note 23 at 19-22.]]

C.1.2 Equitable Rules Regarding Covenants

Charles Dickens might have had the equitable rules governing covenants in mind when he caricatured the law of equity in Bleak House. Equity permits both the burden and the benefit of a restrictive -- but not a positive -- covenant to run with title to land. So long as a covenant is restrictive or negative in nature, it can be enforced against the successor in title to the land which is burdened by the covenant. If a covenant is positive in nature, only its benefit runs with the land in equity; its burden does not. This rule applies in British Columbia today.

A. Running of the Burden of Restrictive Covenants in Equity

The apparently simple proposition that equity permits the burden of a restrictive covenant to run with the land in fact breaks down into several components. For the burden of a restrictive covenant to run with title to land in equity, the following criteria must be met:

- (1) the covenant must be restrictive or negative in nature;
- (2) the covenantee must be the owner of some land which is benefitted by the covenant;
- (3) the covenant must touch and concern the land benefitted by it;
- (4) the covenant must reflect an intention to bind the land and run with it; and
- (5) the person against whom the covenant is sought to be enforced must not be someone who has purchased the burdened land in good faith without notice of the covenant. [[Footnote: (122)

-- 122. This last criterion has been supplanted by the statutory land titles regime instituted under the *Land Title Act*. See, generally, the discussion above in Chapter 1 regarding that system.

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It is necessary to examine each of these elements of the equitable rule in some detail.

I. Covenant Must be Restrictive

It is the substance of what a covenant obliges the covenantor to do that is most important. Even if it is cast in negative language, a covenant may be positive. Only if the substance of a covenant is negative -- so that it imposes no positive obligation on the part of the landowner -- will it be negative.

For example, in the classic case of Tulk v. Moxhay [[Footnote: (123) -- 123. (1848), 41 E.R. 1143 (Ch.).]] the owner of the burdened land agreed to keep land as a garden and to allow access to it by adjacent landowners on certain terms. Although the language of the covenant was positive, it was in substance negative, since it required the covenantor to maintain the land free of any buildings. The effect was that the land could not be built on and that a certain use could not be made of the land.

Perhaps the easiest test to determine whether a covenant is positive in nature is to see whether it requires the landowner to spend money. For example, while a covenant not to allow certain structures to fall into disrepair appears negative, it is in fact positive, since it requires the expenditure of money.

II. Covenantee Must Own Land Benefitted

If it cannot be demonstrated that a covenant benefits adjacent land owned by the person enforcing the covenant, the attempt to enforce the covenant will fail. [[Footnote: (124) -- 124. See *Formby* v. *Barker*, [1903] 2 Ch. 539 (C.A.) and see *Re Sekretov and City of Toronto* (1973), 33 D.L.R. (3d) 257 (Ont. C.A.).]] This requirement is often described as the need for a dominant tenement -- meaning land benefitted by the covenant -- and a servient tenement -- meaning land burdened by the covenant. The dominant land need not be contiguous with the burdened land; it need only lie within a reasonable distance from the burdened land. [[Footnote: (125) -- 125. *Kelly* v. *Barrett*, [1924] 2 Ch. 379 (C.A.). In the United States, some states allow a covenant to run with the servient land even if there is no parcel of land benefitted by that covenant. For authority that the burden of an in gross covenant runs with the land even if the benefit is in gross, that is, is not appurtenant to a dominant tenement, see *Van Sant* v. *Rose*, 103 N.E. 194 (1913) at 195-96 and *Neponsit Property Owners' Ass'n* v. *Emigrant Indus. Sav. Bank*, 15 N.E. 2d 793 (1938) at 795-97. See also Korngold, *supra*, note 31. In British Columbia, the only inroad into this well-established rule is section 215 of the *Land Title Act*, which is discussed elsewhere in this report. End of Footnote]] z

The principle that a covenant will only run with the land if the covenantee owns land benefitted by the covenant appears to have been designed to ensure that only covenants which affect land directly can be enforced against those with whom there is no privity of contract or estate. The court of equity originally intervened and allowed the burden of restrictive covenants to run with the land so as to mitigate the harshness of the common law restrictions. The court of equity wished to preserve the value of land benefitted by such covenants. If there is no land benefitted by a covenant, there is perceived to be no need for equitable intervention. [[Footnote: (126) -- 126. See Ontario Report, *supra*, note 23 at 29.]]

As is the case with easements, the requirement that a covenant must benefit adjacent land seriously limits the utility of conservation covenants in British Columbia. Even if other obstacles to their availability are overcome, the need for an adjacent parcel of land benefitted by the covenant is a serious and unnecessary barrier to the use of conservation covenants. Conservation organizations often will not be able to arrange for the creation or purchase of an adjacent anchor parcel. The cost of purchasing an anchor parcel will be prohibitive in many cases. In other cases, creation of a new anchor parcel may be precluded by statutory subdivision controls. It serves no interest to force the use of anchor parcels simply to satisfy this existing requirement of land law.

III. Covenant Must Touch and Concern Land

For the burden of a covenant to bind subsequent owners in equity, it must benefit other land or must "touch and concern that land." As one judge stated, "the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land." [[Footnote: (127) -- 127. *Rogers* v. *Hosegood*, [1900] 2 Ch. 388 at 395, per Farwell J. (Ch.).]] The requirement that a covenant must benefit adjacent land calls into question the availability of common law conservation covenants in British Columbia. If one landowner grants a restrictive covenant over land which prohibits the draining of a marsh on the land, it may not be seen as benefitting adjacent land in the sense articulated above. The covenant may be a benefit to waterfowl or other wildlife, but there may be a question as to whether it touches and concerns the land of another person in the anthropocentric, utilitarian manner laid down by the cases. It is true that the covenant affects the value of the land, but it may not affect the value of any other land in a beneficial way.

A British Columbia court might be willing to reform these principles, but that is far from certain. Since there are other uncertainties in our judge-made law of covenants and easements, statutory reform is the safest option.

IV. Intention to Bind the Burdened Land

Just as a covenant must clearly benefit land, it must burden the land in respect of which it has been granted. There must be evidence that the covenantor meant to bind successors in title. Otherwise the covenant is merely personal and cannot be enforced against subsequent owners of the land. [[Footnote: (128) -- 128. See *Anger & Honsberger*, *supra*, note 11 at 908.]]

V. Notice Of Covenant

The rule of equity was that if land burdened by a covenant was purchased by someone in good faith and that person had no notice of the covenant, title to the land was taken free of the covenant. [[Footnote: (129) -- 129. *Ibid.* at 908.]] In British Columbia this rule has been supplanted by the *Land Title Act*, which provides that registration of such a covenant against title to land is considered to be notice to all the world of the existence of the covenant burdening the land. [[Footnote: (130) -- 130. *Land Title Act*, s. 27. Other provinces have adopted statutory land registry or land title schemes which achieve the same end. See, for example, the Ontario *Land Titles Act*, R.S.O. 1990, c. L.5 and the Alberta *Land Titles Act*, R.S.A. 1980, c. L-5. End of Footnote]] z

b. Running Of The Benefit Of Restrictive Covenants In Equity

The equitable rules regarding the running of the benefit of restrictive covenants are "technical and stringent". [[Footnote: (131) -- 131. Ontario Report, *supra*, note 23 at 33.]] They need not be examined in any great detail here. For the purposes of this report it is enough to outline their main features.

First, for the benefit of a restrictive covenant to run with the land in equity the covenant must touch and concern the land benefitted by it.

Second, any subsequent owner of the benefitted land must establish entitlement to the benefit of the restrictive covenant. This may be shown in any one of the following three ways:

- (1) by the subsequent owner demonstrating that the benefit of the covenant has been annexed to the dominant land; [[Footnote: (132) -- 132. *Rogers* v. *Hosegood*, *supra*, note 128, and *Oluk* v. *Marahens* (1976), 68 D.L.R. (3d) 294 (Alta. S.C., App. Div.). It has been said that this is merely another way of saying that the covenant must touch and concern the dominant land, so that it runs with the land into the hands of the assignee. The question of whether the benefit of a restrictive covenant has been annexed to the dominant land is one of intention. That question will be answered by the court looking at the nature of the covenant, interpreting it and looking at the surrounding circumstances. See the Ontario Report, *supra*, note 23 at 33. In most cases the careful lawyer will have provided expressly in the covenant that its benefit is annexed to the dominant land and that it runs with the dominant land.

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- (2) by the assignee demonstrating that the benefit of the covenant was expressly assigned to the assignee; [[Footnote: (133) -- 133. *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305 (C.A.). This will almost always be the case in an ordinary conveyance, but there may be situations where assignment has not clearly occurred.

]] or

- (3) if the covenant is part of a development or building scheme, the benefit of a restrictive covenant may run with the land. [[Footnote: (134) -- 134. Such a scheme is formed where a

series of related covenants benefitting and burdening several parcels of land are sold by a common vendor. See *Elliston* v. *Reacher*, [1908] 2 Ch. 374 at 384, aff'd [1908] 2 Ch. 665 (C.A.). See also Ontario Report, *supra*, note 23 at 41 ff. For a discussion of this early form of subdivision control -- which is still in use in British Columbia -- see Megarry & Wade, *supra,* note 60 at 793.

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The most important of these rules is the first, that the benefit of a restrictive covenant will run with the dominant land only if the covenant touches and concerns the dominant land. This requirement has already been discussed above in the context of the running of the burden of covenants. The comparable requirement in the law of easements is addressed below.

C.2 Easements

An easement is the right granted by a landowner to another landowner to use the grantor's land in some way or to prevent the grantor from using his or her land in some way. [[Footnote: (135) -- 135. *Anger & Honsberger*, *supra*, note 11 at 925. For a good discussion of the origins of easements, see A.J. McLean, "The Nature of an Easement" (1966) 5 Western L. Rev. 32.]]

Easements have been in use for many years and they are still commonly used today in a broad range of situations in British Columbia. Many easements are granted in favour of public bodies and are, therefore, often granted under special statutory provisions. They frequently play an important role in private land use situations.

There are serious limits on the utility of easements for land preservation or conservation. Law reform is needed to remove impediments which make easements of little use in the environmental context. The reasons for this conclusion follow.

C.2.1 British Columbia Law on Easements

In legal terms, an easement may be described as follows:

An easement is a privilege without profit annexed to land to utilize the land of a different owner (which does not involve the removal of any part of the soil or the natural produce of the land) or to prevent the other owner from utilizing his land in a particular manner[,] for the advantage of the dominant owner. [[Footnote: (136) -- 136. *Anger & Honsberger*, *ibid.* at 925.]]

British Columbia law stipulates [[Footnote: (137) -- 137. *Dukart* v. *District of Surrey*, [1978] 2 S.C.R. 1039, citing *Re Ellenborough Park*, [1955] 3 All E.R. 667 (C.A.).]] that to be valid an easement must

- (1) burden one parcel of land, traditionally called the servient tenement,
- (2) benefit another nearby parcel of land, traditionally called the dominant tenement, and
- (3) be capable of forming the subject of a grant by one landowner to another.

A fourth traditional requirement, that the owners and possessors of the dominant and servient land must be different people, has been abolished by statute in British Columbia. [[Footnote: (138) -- 138. *Property Law Act*, s. 18(7).]]

The traditional characteristics of an easement pose problems in relation to preserving land for environmental purposes. It is necessary to examine each of the traditional requirements for easements in some detail to understand why they pose problems. The third requirement will be considered first.

I. Must Be Capable of Forming the Subject of a Grant

In the leading modern English case on easements it was held that for an easement to be valid, it must be "capable of forming the subject-matter of a grant." [[Footnote: (139) -- 139. *Re Ellenborough Park*, *supra*, note 137 at 673-674, per Lord Evershed, M.R.]]

As has been pointed out by others, [[Footnote: (140) -- 140. *Anger & Honsberger*, *supra*, note 11 at 928-929.]] this criterion requires an easement to originate

from an express, implied or presumed grant, or by statute. This requires a capable grantor, a capable grantee ... and a right that is reasonably definite. [[Footnote: (141) -- 141. *Ibid.* at 928.]]

This requirement ensures that the right being asserted is framed with certainty. This is sensible, since easements run with the land and affect the rights and obligations of successor owners.

While the right must be reasonably definite, it is not entirely clear what types of rights can form the subject-matter of a grant. The categories of recognized, valid easements are not closed. [[Footnote: (142) -- 142. *Simpson* v. *Mayor of Godmanchester*, [1896] 1 Ch. 214 (C.A.), aff'd [1897] A.C. 696 (H.L.).]] In determining if a right can form the subject-matter of a grant, a court is almost certain to approach this issue through extension by analogy, a process which invites circularity. If the court concludes that a particular right can constitute a valid easement, it will be found to be capable of forming the subject-matter of a grant.

The courts apply this rule by examining the range of easements which have been recognized in the past and deciding whether the right in question should be accorded the status of an easement. This is necessary to ensure the law remains reasonably in touch with changing social and economic conditions. It is not clear that a British Columbia court would extend the category of easements and recognize a conservation covenant which amounts to an easement as being valid. Given this uncertainty, law reform is needed.

II. Must Burden One Parcel and Benefit Adjacent Parcel of Land

It has been stated that to be valid an easement must

be both appurtenant to the dominant tenement and connected with the normal enjoyment of the dominant tenement[,] so as to both accommodate and serve the dominant tenement. [[Footnote: (143) -- 143. *Anger & Honsberger*, *supra*, note 11 at 927.]]

The meaning of this requirement is open to debate. [[Footnote: (144) -- 144. *Ibid.* at 927 and McLean, *supra*, note 135 at 44.]] At the very least it means an easement will only be valid if it accommodates use of the dominant land by its owner. In other words, the requirement is anthropocentric in that it is designed to accommodate human uses of land for human ends. An easement must benefit the dominant land in that sense.

This rule very likely excludes conservation purposes from the class of valid common law easements. [[Footnote: (145) -- 145. D. Loukidelis, "Habitat Preservation Through Conservation Easements", in C. Sandborn, ed., *Law Reform For Sustainable Development In British Columbia* (Vancouver: Canadian Bar Association, 1990) 108 at 109.]] It is possible that British Columbia courts would recognize conservation purposes as valid subjects of easements against land. However, the experience in the United States, and the traditionally anthropocentric perspective of our courts in land use matters generally, leaves this open to doubt.

Further, the requirement that there must be a piece of land which is burdened by the easement and another piece of land benefitted by it severely limits the usefulness of easements for the preservation of private land. This rule requires the purchase of an anchor parcel near the land to be burdened by the easement. Apart from the cost of doing this, it is often difficult to find sufficiently small and appropriately situated anchor parcels.

The third requirement set out above, that an easement must benefit the adjacent dominant land, is also troublesome. It would be risky to rely on a court to amend the common law as needed to uphold an easement granted for environmental purposes.

Given the serious concerns expressed in this report, statutory reform is by far the better course. As one author has stated, "[t]he difficulty of enforcing conservation servitudes at common law highlights the need for specific legislative intervention." [[Footnote: (146) -- 146. Dana, *supra*, note 28.]]

APPENDIX B. GLOSSARY OF TERMS

This appendix defines a number of the concepts and terms used in this report. These definitions are by no means exhaustive or definitive, but are intended to provide a discussion framework for this report. The circumstances of a particular case often will require a different understanding of what is meant by each of the terms.

Conservation: This refers to protection of land, or some aspect or component of it, from a certain kind of development or from development in a specified manner or degree. Conservation contemplates some human use -- including, in some cases, development -- either in the past or the future. Given this context, conservation is a lesser kind of protection than preservation. Indeed, conservation is often the kind of protection envisioned when the object is to conserve in its present state some feature of the land, such as the heritage conservation of buildings.

Conservation Covenant: This is the term used in this report to describe an interest in land created for conservation or preservation purposes. The law reform required to allow this interest to be created in British Columbia is recommended in this report. Throughout this report the term conservation covenant is used to encompass both preservation and conservation of land. Despite the fact that conservation covenants often will be designed to preserve land, in many cases the interest will in fact attach to privately owned land which has already been developed in some way.

Conservation Easement: This is a term widely used in the United States to describe a legal tool for land preservation or conservation. A conservation easement may be defined as a binding promise given in writing by a landowner to a government or to a private organization. The conservation easement is recorded against title to the land and binds subsequent owners of the land.

The objective of a conservation easement is to ensure that land, or some feature of it, is preserved, conserved or kept in a specified state. American conservation easements are usually hybrid tools, with characteristics of both easements and covenants. The easement may include one of the purposes set out below.

- (1) The landowner agrees not to use the land in a certain way, that is, agrees to restrictions on use.
- (2) The landowner agrees to use his or her land in a particular way, that is, agrees to positive obligations regarding the land. [[Footnote: (110) -- 110. See *The Conservation Easement Handbook*, *supra*, note 64.

]]

- (3) The landowner allows access by the interest-holder for performance monitoring purposes. [[Footnote: (111) -- 111. See the model conservation easement in *The Conservation Easement Handbook*, *ibid.* at 156.

]]

- (4) The landowner allows the interest-holder to enter the burdened land for other purposes, for example, to take positive steps to preserve waterfowl habitat.
- (5) The landowner agrees to a prohibition against filling in or otherwise interfering with wetland located on a farm, thus protecting waterfowl habitat. In this case, the rest of the farm may still be used for agricultural purposes or even non-agricultural purposes which would not interfere with the swamp habitat.
- (6) The landowner agrees that development of a parcel of land is prohibited. For example, the owner of a large piece of forest land may agree that no buildings can ever be built on it and that the forest is never to be cut down.

Although in the United States the term conservation easement has been used, one commentator has stated that "conservation servitudes more closely resemble real covenants than easements and hence should not be labeled and treated as easements." [[Footnote: (112) -- 112. Korngold, *supra*, note 31 at 437.]]

Development: This refers to land that is either

- (1) exploited by humans, other than for traditional uses by aboriginal peoples, including by extracting its renewable or non-renewable resources, or
- (2) altered, including by alteration of its soil, water, plant or animal life, in a manner which leaves tangible, but not necessarily permanent, evidence of human alteration of a more than evanescent kind, but excludes temporary alteration which is directly associated with the traditional land uses of aboriginal peoples.

Land: The legal nature of land is a bundle of separate property rights, each of which can be separated from the others and sold or otherwise dealt with by a landowner. In this report, land includes land covered by water. In the non-legal sense, this report refers to land as

- (1) the uppermost layer of the Earth's crust, comprised of bedrock and other rock and the soil which forms part of that layer,
- (2) the totality of all natural physical features of that layer of the Earth's crust,
- (3) the biomass which is supported by and upon that layer of the Earth's crust, including all plant and animal life, and
- (4) water on or in that layer of the Earth's crust.

Preservation: This refers to measures to ensure land is excluded from development permanently. Preservation of land will not preclude traditional uses of the land by aboriginal peoples, prevent use of the land for passage by humans or, in some cases, prevent use for carefully regulated "light-footprint" recreational use, such as canoeing. At the very least, preservation consists of exclusion of land from development, as defined above.

Section 215 Environmental Covenant: This term is used in this report to refer to a covenant of a negative or positive nature, granted in favour of the Crown or other government body under section 215(1.1)(e) of the *Land Title Act*, that includes a provision that land or a specified amenity in relation to it be protected, preserved, conserved or kept in its natural state in accordance with the covenant and to the extent provided by the covenant.

A section 215 environmental covenant binds successors in title and need not be annexed to land owned by the grantee.

APPENDIX C. THE EXISTING LAW ON COVENANTS AND EASEMENTS

C.1 Covenants Affecting Land

A covenant is a binding written promise by which one person agrees to do something or refrain from doing something. [[Footnote: (113) -- 113. A covenant need not concern land. The law of covenant developed before and independent of the law of contract and for a long time fulfilled many of the functions now discharged by the law of contract. As to the law on deeds under seal, that is, the law of covenant in general, see British Columbia Law Reform Commission, *Report on Deeds and Seals* (Vancouver: Ministry of Attorney General, 1989). See also, *Anger & Honsberger*, *supra*, note 11.]] A covenant is enforceable by the person to whom the promise is made -- that is, the person with whom the promising party stands in a direct relationship under the written covenant can enforce the covenant by court action. [[Footnote: (114) -- 114. This action will in some cases be for an injunction to prevent breach of the covenant, although damages for its breach often will be the remedy, in accordance with well-established legal principles. End of Footnote]] z Although covenants do not necessarily relate to land, they often do concern land. A landowner may grant a covenant to another person, by which the landowner agrees to do, or not to do, something with respect to his or her land. [[Footnote: (115) -- 115. A covenant not to do something with land is commonly called a restrictive covenant or a negative covenant. A covenant to do something with land is known as a positive covenant. The crucial test for distinguishing between the two types of covenants is whether the covenant is in substance negative. The language used is not determinative. See Ontario Report, *supra*, note 23 at 8. A simple test for identifying a positive covenant is to ask whether it requires the landowner to spend money. If it does, it is almost certainly a positive covenant in substance. This test is not, of course, definitive in all cases. End of Footnote]] z

If a landowner covenants with another person to do or not to do something with land identified in a covenant, the person to whom the covenant is given can enforce the covenant. However, if the land is subsequently sold, the important question is whether the person to whom the covenant was given can enforce it against the new owner.

The rule has long been that a covenant will be enforceable if there is a direct contractual link between the plaintiff enforcing the covenant and the defendant. This is a rule of contract law. A covenant also will be enforceable if there is privity of estate between the plaintiff and the defendant, meaning that one of the parties must have derived his or her interest in the land in succession to the interest of the other party. This rule is a rule of the law of property. [[Footnote: (116) -- 116. See Ontario Report, *supra*, note 23 at 6-8. See also the *Law and Equity Act* and the *Property Law Act*.]]

The first rule means that if a landowner covenants with an adjacent landowner regarding use by the first owner of his or her land, the second landowner cannot enforce that covenant against someone who purchases the land owned by the first landowner. There is no direct contractual relationship or privity of estate between the second landowner and the successor to the first landowner.

The second rule is limited today to the relationship of landlord and tenant, since earlier feudal forms of tenure have been abolished, apart from the relationship between the Crown and all other landowners. It is clear that a covenant in a lease can be enforced by the landlord against the assignee of the original lessee, since by the assignment the assignee becomes the landlord's tenant. This means there is privity of estate. If a tenant sub-leases the property, there is no privity of estate between the landlord and the sub-tenant. In this situation a covenant in the lease cannot be enforced by the landlord against the sub-tenant if the covenant is merely personal and does not run with the land. [[Footnote: (117) -- 117. Of course, the original lessee remains liable to the landlord for any breaches of the covenant, despite any subsequent assignment or sub-lease. See *Anger & Honsberger*, *supra*, note 11 at 453 ff.]]

Complex and arcane rules have evolved which expand the enforceability of covenants outside the two cases just discussed. These rules differ as between the common law and the equitable jurisdictions of our courts. By common law jurisdiction is meant the legal principles and rules administered and developed by the courts of the Sovereign. By equitable jurisdiction is meant the body of law originally developed and applied by the courts of the Lord Chancellor of England. The latter court strived to create law which enforced the dictates of good conscience. In theory, at least, this meant the court of equity was determined to ensure fair play and flexibility. [[Footnote: (118) -- 118. For a good introduction to the history of the common law and equitable jurisdictions, see Baker, *supra*, note 25. The Supreme Court of British Columbia now administers the rules of both equity and the common law. See the *Supreme Court Act*, R.S.B.C. 1979, c. 397.1.]] Accordingly, in the case of covenants affecting land, equity took a much more liberal approach than did the common law.

Nonetheless, the common law and equitable rules in this area are complex and ill-suited to the needs of environmental protection. Some detailed discussion of the common law and equitable rules is necessary in order to understand why conservation covenant law reform is needed in British Columbia.

C.1.1 Common Law Rules Regarding Covenants

The critical common law rule is that the benefit of a covenant runs with the land, but its burden does not. The benefit of a covenant is, in essence, the benefit its performance confers on the landowner whose land is benefitted by the covenant. It is also the right to enforce the covenant. The burden of a covenant is the obligation to perform its terms.

The benefit of a covenant can be enforced by the purchaser of the land benefitted by the covenant if

- (1) the covenant touches and concerns the land,

- (2) the person to whom the covenant was originally given was the legal owner of the land benefitted, and
- (3) the assignee of the covenantee has the same interest in the land as the covenantee.

It is clear that at common law the person giving the covenant need not own land for the covenant to be enforceable against that person. [[Footnote: (119) -- 119. See, for example, *Smith* v. *River Douglas Catchment Board*, [1949] 2 All E.R. 179 (C.A.).]] It is necessary only that the person to whom the covenant is given own land benefitted by that covenant. The purchaser of that benefitted land will be able to enforce the covenant against the person who granted it. That does not mean, however, that the covenant will bind successor owners of any land owned by the person who granted the covenant.

The common law refused to allow the burden of a positive or restrictive covenant to run with the land, apparently because it was feared that it would render land unsaleable. It was assumed that people would not be willing to purchase land encumbered with such burdens. [[Footnote: (120) -- 120. See *Keppell* v. *Bailey* (1834), 39 E.R. 1042. See Ontario Report, *supra*, note 23 at 19-22.]] It might be asked why agreeing to take on such a burden, usually for a price, unreasonably restrains the marketability of land. Assumption of such a burden simply affects the value of the land, meaning that it will be sold for a lower, or possibly a higher, price. Nonetheless, the common law continues to limit freedom of contract by fettering the extent to which landowners may bind future owners of their land. The burden of a positive or restrictive covenant does not run with the land at common law.

Another concern of English judges of the last century was that a prospective purchaser of land would have no way of knowing what covenants might burden the land to be purchased. This concern has not applied for some time in British Columbia because of our statutory land registry and land titles schemes, discussed in the main text of this report. [[Footnote: (121) -- 121. See Ontario Report, *supra*, note 23 at 19-22.]]

C.1.2 Equitable Rules Regarding Covenants

Charles Dickens might have had the equitable rules governing covenants in mind when he caricatured the law of equity in Bleak House. Equity permits both the burden and the benefit of a restrictive -- but not a positive -- covenant to run with title to land. So long as a covenant is restrictive or negative in nature, it can be enforced against the successor in title to the land which is burdened by the covenant. If a covenant is positive in nature, only its benefit runs with the land in equity; its burden does not. This rule applies in British Columbia today.

A. Running of the Burden of Restrictive Covenants in Equity

The apparently simple proposition that equity permits the burden of a restrictive covenant to run with the land in fact breaks down into several components. For the burden of a restrictive covenant to run with title to land in equity, the following criteria must be met:

- (1) the covenant must be restrictive or negative in nature;
- (2) the covenantee must be the owner of some land which is benefitted by the covenant;

- (3) the covenant must touch and concern the land benefitted by it;
- (4) the covenant must reflect an intention to bind the land and run with it; and
- (5) the person against whom the covenant is sought to be enforced must not be someone who has purchased the burdened land in good faith without notice of the covenant. [[Footnote: (122) -- 122. This last criterion has been supplanted by the statutory land titles regime instituted under the *Land Title Act*. See, generally, the discussion above in Chapter 1 regarding that system.

]]

It is necessary to examine each of these elements of the equitable rule in some detail.

I. Covenant Must be Restrictive

It is the substance of what a covenant obliges the covenantor to do that is most important. Even if it is cast in negative language, a covenant may be positive. Only if the substance of a covenant is negative -- so that it imposes no positive obligation on the part of the landowner -- will it be negative.

For example, in the classic case of Tulk v. Moxhay [[Footnote: (123) -- 123. (1848), 41 E.R. 1143 (Ch.).]] the owner of the burdened land agreed to keep land as a garden and to allow access to it by adjacent landowners on certain terms. Although the language of the covenant was positive, it was in substance negative, since it required the covenantor to maintain the land free of any buildings. The effect was that the land could not be built on and that a certain use could not be made of the land.

Perhaps the easiest test to determine whether a covenant is positive in nature is to see whether it requires the landowner to spend money. For example, while a covenant not to allow certain structures to fall into disrepair appears negative, it is in fact positive, since it requires the expenditure of money.

II. Covenantee Must Own Land Benefitted

If it cannot be demonstrated that a covenant benefits adjacent land owned by the person enforcing the covenant, the attempt to enforce the covenant will fail. [[Footnote: (124) -- 124. See *Formby* v. *Barker*, [1903] 2 Ch. 539 (C.A.) and see *Re Sekretov and City of Toronto* (1973), 33 D.L.R. (3d) 257 (Ont. C.A.).]] This requirement is often described as the need for a dominant tenement -- meaning land benefitted by the covenant -- and a servient tenement -- meaning land burdened by the covenant. The dominant land need not be contiguous with the burdened land; it need only lie within a reasonable distance from the burdened land. [[Footnote: (125) -- 125. *Kelly* v. *Barrett*, [1924] 2 Ch. 379 (C.A.). In the United States, some states allow a covenant to run with the servient land even if there is no parcel of land benefitted by that covenant. For authority that the burden of an in gross covenant runs with the land even if the benefit is in gross, that is, is not appurtenant to a dominant tenement, see *Van Sant* v. *Rose*, 103 N.E. 194 (1913) at 195-96 and *Neponsit Property Owners' Ass'n* v. *Emigrant Indus. Sav. Bank*, 15 N.E. 2d 793 (1938) at 795-97. See also Korngold, *supra*, note 31. In British Columbia, the only inroad into

this well-established rule is section 215 of the *Land Title Act*, which is discussed elsewhere in this report. End of Footnote]] z

The principle that a covenant will only run with the land if the covenantee owns land benefitted by the covenant appears to have been designed to ensure that only covenants which affect land directly can be enforced against those with whom there is no privity of contract or estate. The court of equity originally intervened and allowed the burden of restrictive covenants to run with the land so as to mitigate the harshness of the common law restrictions. The court of equity wished to preserve the value of land benefitted by such covenants. If there is no land benefitted by a covenant, there is perceived to be no need for equitable intervention. [[Footnote: (126) -- 126. See Ontario Report, *supra*, note 23 at 29.]]

As is the case with easements, the requirement that a covenant must benefit adjacent land seriously limits the utility of conservation covenants in British Columbia. Even if other obstacles to their availability are overcome, the need for an adjacent parcel of land benefitted by the covenant is a serious and unnecessary barrier to the use of conservation covenants. Conservation organizations often will not be able to arrange for the creation or purchase of an adjacent anchor parcel. The cost of purchasing an anchor parcel will be prohibitive in many cases. In other cases, creation of a new anchor parcel may be precluded by statutory subdivision controls. It serves no interest to force the use of anchor parcels simply to satisfy this existing requirement of land law.

III. Covenant Must Touch and Concern Land

For the burden of a covenant to bind subsequent owners in equity, it must benefit other land or must "touch and concern that land." As one judge stated, "the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land." [[Footnote: (127) -- 127. *Rogers* v. *Hosegood*, [1900] 2 Ch. 388 at 395, per Farwell J. (Ch.).]] The requirement that a covenant must benefit adjacent land calls into question the availability of common law conservation covenants in British Columbia. If one landowner grants a restrictive covenant over land which prohibits the draining of a marsh on the land, it may not be seen as benefitting adjacent land in the sense articulated above. The covenant may be a benefit to waterfowl or other wildlife, but there may be a question as to whether it touches and concerns the land of another person in the anthropocentric, utilitarian manner laid down by the cases. It is true that the covenant affects the value of the land, but it may not affect the value of any other land in a beneficial way.

A British Columbia court might be willing to reform these principles, but that is far from certain. Since there are other uncertainties in our judge-made law of covenants and easements, statutory reform is the safest option.

IV. Intention to Bind the Burdened Land

Just as a covenant must clearly benefit land, it must burden the land in respect of which it has been granted. There must be evidence that the covenantor meant to bind successors in title. Otherwise the covenant is merely personal and cannot be enforced against subsequent owners of the land. [[Footnote: (128) -- 128. See *Anger & Honsberger*, *supra*, note 11 at 908.]]

V. Notice Of Covenant

The rule of equity was that if land burdened by a covenant was purchased by someone in good faith and that person had no notice of the covenant, title to the land was taken free of the covenant. [[Footnote: (129) -- 129. *Ibid.* at 908.]] In British Columbia this rule has been supplanted by the *Land Title Act*, which provides that registration of such a covenant against title to land is considered to be notice to all the world of the existence of the covenant burdening the land. [[Footnote: (130) -- 130. *Land Title Act*, s. 27. Other provinces have adopted statutory land registry or land title schemes which achieve the same end. See, for example, the Ontario *Land Titles Act*, R.S.O. 1990, c. L.5 and the Alberta *Land Titles Act*, R.S.A. 1980, c. L-5. End of Footnote]] z

b. Running Of The Benefit Of Restrictive Covenants In Equity

The equitable rules regarding the running of the benefit of restrictive covenants are "technical and stringent". [[Footnote: (131) -- 131. Ontario Report, *supra*, note 23 at 33.]] They need not be examined in any great detail here. For the purposes of this report it is enough to outline their main features.

First, for the benefit of a restrictive covenant to run with the land in equity the covenant must touch and concern the land benefitted by it.

Second, any subsequent owner of the benefitted land must establish entitlement to the benefit of the restrictive covenant. This may be shown in any one of the following three ways:

- (1) by the subsequent owner demonstrating that the benefit of the covenant has been annexed to the dominant land; [[Footnote: (132) -- 132. *Rogers* v. *Hosegood*, *supra*, note 128, and *Oluk* v. *Marahens* (1976), 68 D.L.R. (3d) 294 (Alta. S.C., App. Div.). It has been said that this is merely another way of saying that the covenant must touch and concern the dominant land, so that it runs with the land into the hands of the assignee. The question of whether the benefit of a restrictive covenant has been annexed to the dominant land is one of intention. That question will be answered by the court looking at the nature of the covenant, interpreting it and looking at the surrounding circumstances. See the Ontario Report, *supra*, note 23 at 33. In most cases the careful lawyer will have provided expressly in the covenant that its benefit is annexed to the dominant land and that it runs with the dominant land.

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- (2) by the assignee demonstrating that the benefit of the covenant was expressly assigned to the assignee; [[Footnote: (133) -- 133. *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305 (C.A.). This will almost always be the case in an ordinary conveyance, but there may be situations where assignment has not clearly occurred.

]] or

- (3) if the covenant is part of a development or building scheme, the benefit of a restrictive covenant may run with the land. [[Footnote: (134) -- 134. Such a scheme is formed where a

series of related covenants benefitting and burdening several parcels of land are sold by a common vendor. See *Elliston* v. *Reacher*, [1908] 2 Ch. 374 at 384, aff'd [1908] 2 Ch. 665 (C.A.). See also Ontario Report, *supra*, note 23 at 41 ff. For a discussion of this early form of subdivision control -- which is still in use in British Columbia -- see Megarry & Wade, *supra,* note 60 at 793.

]]

The most important of these rules is the first, that the benefit of a restrictive covenant will run with the dominant land only if the covenant touches and concerns the dominant land. This requirement has already been discussed above in the context of the running of the burden of covenants. The comparable requirement in the law of easements is addressed below.

C.2 Easements

An easement is the right granted by a landowner to another landowner to use the grantor's land in some way or to prevent the grantor from using his or her land in some way. [[Footnote: (135) -- 135. *Anger & Honsberger*, *supra*, note 11 at 925. For a good discussion of the origins of easements, see A.J. McLean, "The Nature of an Easement" (1966) 5 Western L. Rev. 32.]]

Easements have been in use for many years and they are still commonly used today in a broad range of situations in British Columbia. Many easements are granted in favour of public bodies and are, therefore, often granted under special statutory provisions. They frequently play an important role in private land use situations.

There are serious limits on the utility of easements for land preservation or conservation. Law reform is needed to remove impediments which make easements of little use in the environmental context. The reasons for this conclusion follow.

C.2.1 British Columbia Law on Easements

In legal terms, an easement may be described as follows:

An easement is a privilege without profit annexed to land to utilize the land of a different owner (which does not involve the removal of any part of the soil or the natural produce of the land) or to prevent the other owner from utilizing his land in a particular manner[,] for the advantage of the dominant owner. [[Footnote: (136) -- 136. *Anger & Honsberger*, *ibid.* at 925.]]

British Columbia law stipulates [[Footnote: (137) -- 137. *Dukart* v. *District of Surrey*, [1978] 2 S.C.R. 1039, citing *Re Ellenborough Park*, [1955] 3 All E.R. 667 (C.A.).]] that to be valid an easement must

- (1) burden one parcel of land, traditionally called the servient tenement,
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- (3) be capable of forming the subject of a grant by one landowner to another.

A fourth traditional requirement, that the owners and possessors of the dominant and servient land must be different people, has been abolished by statute in British Columbia. [[Footnote: (138) -- 138. *Property Law Act*, s. 18(7).]]

The traditional characteristics of an easement pose problems in relation to preserving land for environmental purposes. It is necessary to examine each of the traditional requirements for easements in some detail to understand why they pose problems. The third requirement will be considered first.

I. Must Be Capable of Forming the Subject of a Grant

In the leading modern English case on easements it was held that for an easement to be valid, it must be "capable of forming the subject-matter of a grant." [[Footnote: (139) -- 139. *Re Ellenborough Park*, *supra*, note 137 at 673-674, per Lord Evershed, M.R.]]

As has been pointed out by others, [[Footnote: (140) -- 140. *Anger & Honsberger*, *supra*, note 11 at 928-929.]] this criterion requires an easement to originate

from an express, implied or presumed grant, or by statute. This requires a capable grantor, a capable grantee ... and a right that is reasonably definite. [[Footnote: (141) -- 141. *Ibid.* at 928.]]

This requirement ensures that the right being asserted is framed with certainty. This is sensible, since easements run with the land and affect the rights and obligations of successor owners.

While the right must be reasonably definite, it is not entirely clear what types of rights can form the subject-matter of a grant. The categories of recognized, valid easements are not closed. [[Footnote: (142) -- 142. *Simpson* v. *Mayor of Godmanchester*, [1896] 1 Ch. 214 (C.A.), aff'd [1897] A.C. 696 (H.L.).]] In determining if a right can form the subject-matter of a grant, a court is almost certain to approach this issue through extension by analogy, a process which invites circularity. If the court concludes that a particular right can constitute a valid easement, it will be found to be capable of forming the subject-matter of a grant.

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It has been stated that to be valid an easement must

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The third requirement set out above, that an easement must benefit the adjacent dominant land, is also troublesome. It would be risky to rely on a court to amend the common law as needed to uphold an easement granted for environmental purposes.

Given the serious concerns expressed in this report, statutory reform is by far the better course. As one author has stated, "[t]he difficulty of enforcing conservation servitudes at common law highlights the need for specific legislative intervention." [[Footnote: (146) -- 146. Dana, *supra*, note 28.]]

APPENDIX C. THE EXISTING LAW ON COVENANTS AND EASEMENTS

C.1 Covenants Affecting Land

A covenant is a binding written promise by which one person agrees to do something or refrain from doing something. [[Footnote: (113) -- 113. A covenant need not concern land. The law of covenant developed before and independent of the law of contract and for a long time fulfilled many of the functions now discharged by the law of contract. As to the law on deeds under seal, that is, the law of covenant in general, see British Columbia Law Reform Commission, *Report on Deeds and Seals* (Vancouver: Ministry of Attorney General, 1989). See also, *Anger & Honsberger, supra*, note 11.]] A covenant is enforceable by the person to whom the promise is made -- that is, the person with whom the promising party stands in a direct relationship under the written covenant can enforce the covenant by court action. [[Footnote: (114) -- 114. This action will in some cases be for an injunction to prevent breach of the covenant, although damages for its breach often will be the remedy, in accordance with well-established legal principles. End of Footnote]] z Although covenants do not necessarily relate to land, they often do concern land. A landowner may grant a covenant to another person, by which the landowner agrees to do, or not to do, something with respect to his or her land. [[Footnote: (115) -- 115. A covenant not to do something with land is commonly called a restrictive covenant or a negative covenant. A covenant to do something with land is known as a positive covenant. The crucial test for distinguishing between the two types of covenants is whether the covenant is in substance negative. The language used is not determinative. See Ontario Report, *supra*, note 23 at 8. A simple test for identifying a positive covenant is to ask whether it requires the landowner to spend money. If it does, it is almost certainly a positive covenant in substance. This test is not, of course, definitive in all cases. End of Footnote]] z

If a landowner covenants with another person to do or not to do something with land identified in a covenant, the person to whom the covenant is given can enforce the covenant. However, if the land is subsequently sold, the important question is whether the person to whom the covenant was given can enforce it against the new owner.

The rule has long been that a covenant will be enforceable if there is a direct contractual link between the plaintiff enforcing the covenant and the defendant. This is a rule of contract law. A covenant also will be enforceable if there is privity of estate between the plaintiff and the defendant, meaning that one of the parties must have derived his or her interest in the land in succession to the interest of the other party. This rule is a rule of the law of property. [[Footnote: (116) -- 116. See Ontario Report, *supra*, note 23 at 6-8. See also the *Law and Equity Act* and the *Property Law Act*.]]

The first rule means that if a landowner covenants with an adjacent landowner regarding use by the first owner of his or her land, the second landowner cannot enforce that covenant against someone who purchases the land owned by the first landowner. There is no direct contractual relationship or privity of estate between the second landowner and the successor to the first landowner.

The second rule is limited today to the relationship of landlord and tenant, since earlier feudal forms of tenure have been abolished, apart from the relationship between the Crown and all other landowners. It is clear that a covenant in a lease can be enforced by the landlord against the assignee of the original lessee, since by the assignment the assignee becomes the landlord's tenant. This means there is privity of estate. If a tenant sub-leases the property, there is no privity of estate between the landlord and the sub-tenant. In this situation a covenant in the lease cannot be enforced by the landlord against the sub-tenant if the covenant is merely personal and does not run with the land. [[Footnote: (117) -- 117. Of course, the original lessee remains liable to the landlord for any breaches of the covenant, despite any subsequent assignment or sub-lease. See *Anger & Honsberger*, *supra*, note 11 at 453 ff.]]

Complex and arcane rules have evolved which expand the enforceability of covenants outside the two cases just discussed. These rules differ as between the common law and the equitable jurisdictions of our courts. By common law jurisdiction is meant the legal principles and rules administered and developed by the courts of the Sovereign. By equitable jurisdiction is meant the body of law originally developed and applied by the courts of the Lord Chancellor of England. The latter court strived to create law which enforced the dictates of good conscience. In theory, at least, this meant the court of equity was determined to ensure fair play and flexibility. [[Footnote: (118) -- 118. For a good introduction to the history of the common law and equitable jurisdictions, see Baker, *supra*, note 25. The Supreme Court of British Columbia now administers the rules of both equity and the common law. See the *Supreme Court Act*, R.S.B.C. 1979, c. 397.1.]] Accordingly, in the case of covenants affecting land, equity took a much more liberal approach than did the common law.

Nonetheless, the common law and equitable rules in this area are complex and ill-suited to the needs of environmental protection. Some detailed discussion of the common law and equitable rules is necessary in order to understand why conservation covenant law reform is needed in British Columbia.

C.1.1 Common Law Rules Regarding Covenants

The critical common law rule is that the benefit of a covenant runs with the land, but its burden does not. The benefit of a covenant is, in essence, the benefit its performance confers on the landowner whose land is benefitted by the covenant. It is also the right to enforce the covenant. The burden of a covenant is the obligation to perform its terms.

The benefit of a covenant can be enforced by the purchaser of the land benefitted by the covenant if

- (1) the covenant touches and concerns the land,
- (2) the person to whom the covenant was originally given was the legal owner of the land benefitted, and
- (3) the assignee of the covenantee has the same interest in the land as the covenantee.

It is clear that at common law the person giving the covenant need not own land for the covenant to be enforceable against that person. [[Footnote: (119) -- 119. See, for example, *Smith* v. *River*

Douglas Catchment Board, [1949] 2 All E.R. 179 (C.A.).]] It is necessary only that the person to whom the covenant is given own land benefitted by that covenant. The purchaser of that benefitted land will be able to enforce the covenant against the person who granted it. That does not mean, however, that the covenant will bind successor owners of any land owned by the person who granted the covenant.

The common law refused to allow the burden of a positive or restrictive covenant to run with the land, apparently because it was feared that it would render land unsaleable. It was assumed that people would not be willing to purchase land encumbered with such burdens. [[Footnote: (120) -- 120. See *Keppell* v. *Bailey* (1834), 39 E.R. 1042. See Ontario Report, *supra*, note 23 at 19-22.]] It might be asked why agreeing to take on such a burden, usually for a price, unreasonably restrains the marketability of land. Assumption of such a burden simply affects the value of the land, meaning that it will be sold for a lower, or possibly a higher, price. Nonetheless, the common law continues to limit freedom of contract by fettering the extent to which landowners may bind future owners of their land. The burden of a positive or restrictive covenant does not run with the land at common law.

Another concern of English judges of the last century was that a prospective purchaser of land would have no way of knowing what covenants might burden the land to be purchased. This concern has not applied for some time in British Columbia because of our statutory land registry and land titles schemes, discussed in the main text of this report. [[Footnote: (121) -- 121. See Ontario Report, *supra*, note 23 at 19-22.]]

C.1.2 Equitable Rules Regarding Covenants

Charles Dickens might have had the equitable rules governing covenants in mind when he caricatured the law of equity in Bleak House. Equity permits both the burden and the benefit of a restrictive -- but not a positive -- covenant to run with title to land. So long as a covenant is restrictive or negative in nature, it can be enforced against the successor in title to the land which is burdened by the covenant. If a covenant is positive in nature, only its benefit runs with the land in equity; its burden does not. This rule applies in British Columbia today.

A. Running of the Burden of Restrictive Covenants in Equity

The apparently simple proposition that equity permits the burden of a restrictive covenant to run with the land in fact breaks down into several components. For the burden of a restrictive covenant to run with title to land in equity, the following criteria must be met:

- (1) the covenant must be restrictive or negative in nature;
- (2) the covenantee must be the owner of some land which is benefitted by the covenant;
- (3) the covenant must touch and concern the land benefitted by it;
- (4) the covenant must reflect an intention to bind the land and run with it; and
- (5) the person against whom the covenant is sought to be enforced must not be someone who has purchased the burdened land in good faith without notice of the covenant. [[Footnote: (122) -- 122. This last criterion has been supplanted by the statutory land titles regime instituted

under the *Land Title Act*. See, generally, the discussion above in Chapter 1 regarding that system.

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It is necessary to examine each of these elements of the equitable rule in some detail.

I. Covenant Must be Restrictive

It is the substance of what a covenant obliges the covenantor to do that is most important. Even if it is cast in negative language, a covenant may be positive. Only if the substance of a covenant is negative -- so that it imposes no positive obligation on the part of the landowner -- will it be negative.

For example, in the classic case of Tulk v. Moxhay [[Footnote: (123) -- 123. (1848), 41 E.R. 1143 (Ch.).]] the owner of the burdened land agreed to keep land as a garden and to allow access to it by adjacent landowners on certain terms. Although the language of the covenant was positive, it was in substance negative, since it required the covenantor to maintain the land free of any buildings. The effect was that the land could not be built on and that a certain use could not be made of the land.

Perhaps the easiest test to determine whether a covenant is positive in nature is to see whether it requires the landowner to spend money. For example, while a covenant not to allow certain structures to fall into disrepair appears negative, it is in fact positive, since it requires the expenditure of money.

II. Covenantee Must Own Land Benefitted

If it cannot be demonstrated that a covenant benefits adjacent land owned by the person enforcing the covenant, the attempt to enforce the covenant will fail. [[Footnote: (124) -- 124. See *Formby* v. *Barker*, [1903] 2 Ch. 539 (C.A.) and see *Re Sekretov and City of Toronto* (1973), 33 D.L.R. (3d) 257 (Ont. C.A.).]] This requirement is often described as the need for a dominant tenement -- meaning land benefitted by the covenant -- and a servient tenement -- meaning land burdened by the covenant. The dominant land need not be contiguous with the burdened land; it need only lie within a reasonable distance from the burdened land. [[Footnote: (125) -- 125. *Kelly* v. *Barrett*, [1924] 2 Ch. 379 (C.A.). In the United States, some states allow a covenant to run with the servient land even if there is no parcel of land benefitted by that covenant. For authority that the burden of an in gross covenant runs with the land even if the benefit is in gross, that is, is not appurtenant to a dominant tenement, see *Van Sant* v. *Rose*, 103 N.E. 194 (1913) at 195-96 and *Neponsit Property Owners' Ass'n* v. *Emigrant Indus. Sav. Bank*, 15 N.E. 2d 793 (1938) at 795-97. See also Korngold, *supra*, note 31. In British Columbia, the only inroad into this well-established rule is section 215 of the *Land Title Act*, which is discussed elsewhere in this report. End of Footnote]] z

The principle that a covenant will only run with the land if the covenantee owns land benefitted by the covenant appears to have been designed to ensure that only covenants which affect land

directly can be enforced against those with whom there is no privity of contract or estate. The court of equity originally intervened and allowed the burden of restrictive covenants to run with the land so as to mitigate the harshness of the common law restrictions. The court of equity wished to preserve the value of land benefitted by such covenants. If there is no land benefitted by a covenant, there is perceived to be no need for equitable intervention. [[Footnote: (126) -- 126. See Ontario Report, *supra*, note 23 at 29.]]

As is the case with easements, the requirement that a covenant must benefit adjacent land seriously limits the utility of conservation covenants in British Columbia. Even if other obstacles to their availability are overcome, the need for an adjacent parcel of land benefitted by the covenant is a serious and unnecessary barrier to the use of conservation covenants. Conservation organizations often will not be able to arrange for the creation or purchase of an adjacent anchor parcel. The cost of purchasing an anchor parcel will be prohibitive in many cases. In other cases, creation of a new anchor parcel may be precluded by statutory subdivision controls. It serves no interest to force the use of anchor parcels simply to satisfy this existing requirement of land law.

III. Covenant Must Touch and Concern Land

For the burden of a covenant to bind subsequent owners in equity, it must benefit other land or must "touch and concern that land." As one judge stated, "the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land." [[Footnote: (127) -- 127. *Rogers* v. *Hosegood*, [1900] 2 Ch. 388 at 395, per Farwell J. (Ch.).]] The requirement that a covenant must benefit adjacent land calls into question the availability of common law conservation covenants in British Columbia. If one landowner grants a restrictive covenant over land which prohibits the draining of a marsh on the land, it may not be seen as benefitting adjacent land in the sense articulated above. The covenant may be a benefit to waterfowl or other wildlife, but there may be a question as to whether it touches and concerns the land of another person in the anthropocentric, utilitarian manner laid down by the cases. It is true that the covenant affects the value of the land, but it may not affect the value of any other land in a beneficial way.

A British Columbia court might be willing to reform these principles, but that is far from certain. Since there are other uncertainties in our judge-made law of covenants and easements, statutory reform is the safest option.

IV. Intention to Bind the Burdened Land

Just as a covenant must clearly benefit land, it must burden the land in respect of which it has been granted. There must be evidence that the covenantor meant to bind successors in title. Otherwise the covenant is merely personal and cannot be enforced against subsequent owners of the land. [[Footnote: (128) -- 128. See *Anger & Honsberger*, *supra*, note 11 at 908.]]

V. Notice Of Covenant

The rule of equity was that if land burdened by a covenant was purchased by someone in good faith and that person had no notice of the covenant, title to the land was taken free of the

covenant. [[Footnote: (129) -- 129. *Ibid.* at 908.]] In British Columbia this rule has been supplanted by the *Land Title Act*, which provides that registration of such a covenant against title to land is considered to be notice to all the world of the existence of the covenant burdening the land. [[Footnote: (130) -- 130. *Land Title Act*, s. 27. Other provinces have adopted statutory land registry or land title schemes which achieve the same end. See, for example, the Ontario *Land Titles Act*, R.S.O. 1990, c. L.5 and the Alberta *Land Titles Act*, R.S.A. 1980, c. L-5. End of Footnote]] z

b. Running Of The Benefit Of Restrictive Covenants In Equity

The equitable rules regarding the running of the benefit of restrictive covenants are "technical and stringent". [[Footnote: (131) -- 131. Ontario Report, *supra*, note 23 at 33.]] They need not be examined in any great detail here. For the purposes of this report it is enough to outline their main features.

First, for the benefit of a restrictive covenant to run with the land in equity the covenant must touch and concern the land benefitted by it.

Second, any subsequent owner of the benefitted land must establish entitlement to the benefit of the restrictive covenant. This may be shown in any one of the following three ways:

- (1) by the subsequent owner demonstrating that the benefit of the covenant has been annexed to the dominant land; [[Footnote: (132) -- 132. *Rogers* v. *Hosegood*, *supra*, note 128, and *Oluk* v. *Marahens* (1976), 68 D.L.R. (3d) 294 (Alta. S.C., App. Div.). It has been said that this is merely another way of saying that the covenant must touch and concern the dominant land, so that it runs with the land into the hands of the assignee. The question of whether the benefit of a restrictive covenant has been annexed to the dominant land is one of intention. That question will be answered by the court looking at the nature of the covenant, interpreting it and looking at the surrounding circumstances. See the Ontario Report, *supra*, note 23 at 33. In most cases the careful lawyer will have provided expressly in the covenant that its benefit is annexed to the dominant land and that it runs with the dominant land.

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- (2) by the assignee demonstrating that the benefit of the covenant was expressly assigned to the assignee; [[Footnote: (133) -- 133. *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305 (C.A.). This will almost always be the case in an ordinary conveyance, but there may be situations where assignment has not clearly occurred.

]] or

- (3) if the covenant is part of a development or building scheme, the benefit of a restrictive covenant may run with the land. [[Footnote: (134) -- 134. Such a scheme is formed where a series of related covenants benefitting and burdening several parcels of land are sold by a common vendor. See *Elliston* v. *Reacher*, [1908] 2 Ch. 374 at 384, aff'd [1908] 2 Ch. 665 (C.A.). See also Ontario Report, *supra*, note 23 at 41 ff. For a discussion of this early form of subdivision control -- which is still in use in British Columbia -- see Megarry & Wade, *supra,* note 60 at 793.

]]

The most important of these rules is the first, that the benefit of a restrictive covenant will run with the dominant land only if the covenant touches and concerns the dominant land. This requirement has already been discussed above in the context of the running of the burden of covenants. The comparable requirement in the law of easements is addressed below.

C.2 Easements

An easement is the right granted by a landowner to another landowner to use the grantor's land in some way or to prevent the grantor from using his or her land in some way. [[Footnote: (135) -- 135. *Anger & Honsberger*, *supra*, note 11 at 925. For a good discussion of the origins of easements, see A.J. McLean, "The Nature of an Easement" (1966) 5 Western L. Rev. 32.]]

Easements have been in use for many years and they are still commonly used today in a broad range of situations in British Columbia. Many easements are granted in favour of public bodies and are, therefore, often granted under special statutory provisions. They frequently play an important role in private land use situations.

There are serious limits on the utility of easements for land preservation or conservation. Law reform is needed to remove impediments which make easements of little use in the environmental context. The reasons for this conclusion follow.

C.2.1 British Columbia Law on Easements

In legal terms, an easement may be described as follows:

An easement is a privilege without profit annexed to land to utilize the land of a different owner (which does not involve the removal of any part of the soil or the natural produce of the land) or to prevent the other owner from utilizing his land in a particular manner[,] for the advantage of the dominant owner. [[Footnote: (136) -- 136. *Anger & Honsberger*, *ibid.* at 925.]]

British Columbia law stipulates [[Footnote: (137) -- 137. *Dukart* v. *District of Surrey*, [1978] 2 S.C.R. 1039, citing *Re Ellenborough Park*, [1955] 3 All E.R. 667 (C.A.).]] that to be valid an easement must

- (1) burden one parcel of land, traditionally called the servient tenement,
- (2) benefit another nearby parcel of land, traditionally called the dominant tenement, and
- (3) be capable of forming the subject of a grant by one landowner to another.

A fourth traditional requirement, that the owners and possessors of the dominant and servient land must be different people, has been abolished by statute in British Columbia. [[Footnote: (138) -- 138. *Property Law Act*, s. 18(7).]]

The traditional characteristics of an easement pose problems in relation to preserving land for environmental purposes. It is necessary to examine each of the traditional requirements for

easements in some detail to understand why they pose problems. The third requirement will be considered first.

I. Must Be Capable of Forming the Subject of a Grant

In the leading modern English case on easements it was held that for an easement to be valid, it must be "capable of forming the subject-matter of a grant." [[Footnote: (139) -- 139. *Re Ellenborough Park*, *supra*, note 137 at 673-674, per Lord Evershed, M.R.]]

As has been pointed out by others, [[Footnote: (140) -- 140. *Anger & Honsberger*, *supra*, note 11 at 928-929.]] this criterion requires an easement to originate

from an express, implied or presumed grant, or by statute. This requires a capable grantor, a capable grantee ... and a right that is reasonably definite. [[Footnote: (141) -- 141. *Ibid.* at 928.]]

This requirement ensures that the right being asserted is framed with certainty. This is sensible, since easements run with the land and affect the rights and obligations of successor owners.

While the right must be reasonably definite, it is not entirely clear what types of rights can form the subject-matter of a grant. The categories of recognized, valid easements are not closed. [[Footnote: (142) -- 142. *Simpson* v. *Mayor of Godmanchester*, [1896] 1 Ch. 214 (C.A.), aff'd [1897] A.C. 696 (H.L.).]] In determining if a right can form the subject-matter of a grant, a court is almost certain to approach this issue through extension by analogy, a process which invites circularity. If the court concludes that a particular right can constitute a valid easement, it will be found to be capable of forming the subject-matter of a grant.

The courts apply this rule by examining the range of easements which have been recognized in the past and deciding whether the right in question should be accorded the status of an easement. This is necessary to ensure the law remains reasonably in touch with changing social and economic conditions. It is not clear that a British Columbia court would extend the category of easements and recognize a conservation covenant which amounts to an easement as being valid. Given this uncertainty, law reform is needed.

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