NATURAL LEGACIES:

Your Educational Guide to Conservation in BC

Land Trust Alliance
BRITISH COLUMBIA

Conservation Covenants in British Columbia

The law on the implementation and enforcement of conservation covenants, and their impact on other types of interests in property, is constantly evolving. The purpose of this project is to provide an overview of the relevant law in British Columbia, and to canvas challenges to conservation covenants in the province. The author reviewed the statutory regime and conducted case law searches on conservation covenants in British Columbia relating to tree covenants, watercourse covenants, farming covenants, no subdivision covenants and no build covenants.

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Brief Overview

WHAT IS A CONSERVATION COVENANT AND WHAT IS IT USED FOR?

A conservation covenant is a voluntary legal agreement between a landowner and an approved covenant holder (usually a land trust organization or government body) that is intended to protect the "natural, historical, heritage, cultural, scientific, architectural, or environmental" value of a specified piece of land. [1]

Conservation covenants "run with the land". This means that they continue to be binding on future owners even though the subsequent owners did not enter into the original agreement. This is considered an important benefit of covenants as they allow owners to retain possession and use of their property while ensuring its long-term protection without having to sell or donate the land to a conservation or land trust organization.[2]

HOW ARE CONSERVATION COVENANTS CREATED?

While there are various ways to create covenants, those that we are concerned with, conservation covenants are created under section 219 of the *Land Title Act* (*LTA*) and registered with the Land

[1] *Land Title* Act R.S.B.C. 1996, c 250, s.219(5).
[2] *Greening Your Title: A Guide to Best Practices for Conservation Covenants*: 2nd ed, Hilyer & Atkins, West Coast Environmental Law 2005 at page 1.
<http://wcel.org/sites/default/files/publications/Greening%20Your%20Title.pdf>.

Title Office against the title of the property identified in the agreement.

Requirements

Previously, conservation covenants could only be "restrictive" in nature (i.e. require landowners to refrain from certain activities) and had to be made between separate landowners with a property that was "burdened" and property that was "benefitted" by the covenant. The BC Legislature amended the *LTA* in 1994 to allow both positive and negative covenant conditions.

Today, a covenant may be "negative" (prohibiting certain activities or actions) or "positive" (requiring certain actions) and there is no longer a requirement of benefitted and burdened land.[3] Rather, section 219 of the *LTA* is very broad and gives landowners considerable freedom in stipulating how the covenant property is to be protected. However, while the requirements of negotiating the agreement with an eligible covenant-holder and registering it with the Land Title Office are enough to create the covenant, they are not necessarily sufficient to ensure it is valid.[4] Some of the implicit requirements for creating a valid and enforceable conservation covenant may be gleaned from the overview of the case law that follows but landowners should seek out publications like *Greening Your Title: A Guide to Best Practices for Conservation Covenants* or consult an organization with expertise in conservation covenants for suggestions on how to create a valid and enduring agreement. [5]

Interpretation of Covenants

Strict Interpretation

Courts have a preference for the free use of land, something which covenants typically restrict. Because of this, courts have responded to covenants by strictly interpreting them.[6] This means that although the purpose of covenants and the intention of the parties when entering into them may help provide context in resolving ambiguity in the written covenant document, courts are unwilling to presume any intent or purpose to amplify or extend a covenant more broadly.[7]

For example, in *Willow Ridge Family Farm*,[8] the plaintiff property owner held a restrictive covenant to prevent the westerly view of their property from being obstructed. To achieve this, the covenant prohibited buildings, structures or plants taller than eight meters. Their neighbor planted and maintained a hedge at a height lower than eight meters but the covenant-holders argued that the hedge nevertheless breached the covenant because it still obstructed the view. The court refused to extend the covenant in this way and although they found that it was the indeed the intention of the parties to preserve the view in question. The hedge did not constitute a breach because it did not offend the clear objective standard set out in the agreement.

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[3] *Land Title* Act R.S.B.C. 1996, c 250, s.219(4).
[4] *Land Title* Act R.S.B.C. 1996, c 250, s.219(10).
[5] *Greening Your Title: A Guide to Best Practices for Conservation Covenants*: 2nd ed, Hilyer & Atkins, West Coast Environmental Law 2005. <
http://wcel.org/sites/default/files/publications/Greening%20Your%20Title.pdf>.
[6] *West Shore Laylum Management Ltd. (Re),* [2013] BCSC 2080.
<http://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc2080/2013bcsc2080.html>.
[7] *Nylar Foods Ltd. v. Roman Catholic Episcopal Corp. of Prince Rupert*, [1988] B.C.J. no. 307 (C.A.).
<http://www.canlii.org/en/bc/bcca/doc/1988/1988canlii3355/1988canlii3355.html>.
[8] *Willow Ridge Family Farm Corp. v. Arber*, [2006] BCSC 600.
<http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc600/2006bcsc600.html>.

Plain and Ordinary Meaning

Another approach taken in interpreting covenants is reading the words of the covenant according to their plain and ordinary meaning, unless there is some justification for treating them as special or technical terms. Courts have often referred to dictionaries to assign plain meaning in the context of covenants.[9]

One situation where a special or technical meaning may be justified is where adherence to the plain and ordinary meaning would create an absurdity. In such cases, if there are two possibilities, one rational and one absurd, the former should be observed.[10]

Ambiguity

If a covenant is ambiguous, "[t]he restriction is to be interpreted as a contractual term in the context of its factual matrix with guidance being taken from what can be said to have been its object or purpose at the time the scheme was created".[11] Covenant ambiguities most dealt with in the case law have tended to be regarding the physical or geographic areas subject to a covenant or with the extent of the obligations or restrictions the covenant places on landowners.

An example of geographic ambiguity occurred in *Mt. Matheson Conservation Society*[12] where a covenant prohibiting logging activities or the removal of vegetation in "the watershed" was found to be unenforceable because "the watershed" was too vague to determine the specific area being referred to. The Court first used the plain meaning approach and looked to dictionary definitions of the term "watershed" but found this insufficient to narrow the area down because there were several spaces on the property that fit the definition. Although this covenant was subject to the more strict pre-1994 requirements under the *LTA*, there were also two covenants created under section 219 of the amended *LTA* that the court found enforceable because they clearly defined the watershed areas to which they were intended to apply.

An example of ambiguity regarding the extent of a covenant restriction occurred in *Goodwin.*[13] Here, several lots had a restrictive covenant registered against them that prohibited the building of anything other than "a dwelling house" for residential purposes. Later, the lots were subdivided and a purchaser wanted to build a home on their empty lot. A neighbor argued that the covenant allowed for only one "dwelling home" on each of the original lots and so the purchaser would breach the covenant if allowed to build. The Court disagreed and found that the covenant was ambiguous in terms of how many houses could be built. They noted that the covenant did not prohibit subdivision, which suggests that the covenant was more concerned with preventing commercial use rather than limiting residential growth.

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[9] For example, "obsolete" in *Collinson v. Laplante;"*watershed" in *Mt. Matheson Conservation Society;* "farming" in *Willow Ridge Family Farm.*

[10] *Nylar Foods Ltd. v. Roman Catholic Episcopal Corp. of Prince Rupert*, [1988] B.C.J. no. 307 (C.A.). <http://www.canlii.org/en/bc/bcca/doc/1988/1988canlii3355/1988canlii3355.html>.

[11] *Gubbels v. Anderson*, [1995] 8 B.C.L.R. (3d) 193) at para 15 (C.A.). <http://www.canlii.org/en/bc/bcca/doc/1995/1995canlii1377/1995canlii1377.html>.

[12] *Mt. Matheson Conservation Society v. 573132 B.C. Ltd.*, [2002] BCSC 1254. <http://www.canlii.org/en/bc/bcsc/doc/2002/2002bcsc1254/2002bcsc1254.html>.

[13] *Goodwin v. Ridley*, [2006] BCCA 581. <http://www.canlii.org/en/bc/bcca/doc/2006/2006bcca581/2006bcca581.html>.

Summary

Overall, interpretation of a conservation covenant is likely to be crucial in cases determining whether a covenant is enforceable or not.[14] Although it is worth emphasizing that much of the case law on the interpretation of covenants has been in the context of older restrictive covenants rather than s.219 *LTA* statutory covenants, courts may nonetheless apply some of the same principles of interpretation in future cases dealing with conservation covenants. Courts will strictly interpret covenants according to their plain meaning (in most cases) and if there is still ambiguity, they will look to contextual factors (such as intent and purpose) to resolve the matter. If these same principles are applied in the conservation context, clarity and precision in drafting will be essential to ensure validity.

Monitoring and Enforcement of Covenants

Monitoring land subject to a conservation covenant to confirm compliance is important for several reasons. First of all, monitoring may help deter deliberate breaches and catch breaches, accidental or otherwise soon after they occur. This is especially significant in the conservation context because many of the values being protected (e.g. environmental, heritage, cultural) may be impossible, difficult, timely and/or costly to replace. Therefore, monitoring can serve as a preventative action against this type of harm. For example, in *Nanaimo v. Buck,*[15] the Court granted an injunction against a landowner from cutting down trees contrary to a conservation covenant registered against the land. They noted that while the trees in question could be replaced, it would take 40-50 years for them to grow back and that their environmental and community value rendered damages an insufficient remedy.

Second, covenants are treated as contracts between the landowner and covenant-holder, despite the fact they are registered against title and run with the land. This means that only parties to the covenant may bring an action and they are not enforceable by third parties.[16] The fact that the covenant holder is likely the only party who will try to enforce a breached covenant makes monitoring imperative to being able to detect when enforcement is necessary.

Finally, as will be discussed below, there are circumstances where a court may agree to cancel or modify a covenant because of explicit or implied agreement from the covenant holder to do so.[17] It has not been discussed in case law how much of a role monitoring will play in this decision but it seems likely that active monitoring of covenanted land could function as evidence of lack of intention to abandon a covenant. Failure to monitor on the other hand is likely to weigh in favour of a petitioner seeking cancellation or modification though the case law does not as of yet indicate how much weight it would be given. There is general agreement in the conservation community that annual monitoring will assist in proving the continued necessity of a covenant.[18]

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[14] *Greening Your Title: A Guide to Best Practices for Conservation Covenants*: 2nd ed, Hilyer & Atkins, West Coast Environmental Law 2005. <http://wcel.org/sites/default/files/publications/Greening%20Your%20Title.pdf >.

[15] *Nanaimo (Regional District) v. Buck*, [2012] BCSC 572. <http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc572/2012bcsc572.html>.

[16] *Nancy Green's Olympic Lodge Ltd. v. Blackcomb Development Ltd*, [1986] B.C.J. no. 1479 (S.C.).

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

[18] *Greening Your Title: A Guide to Best Practices for Conservation Covenants*: 2nd ed, Hilyer & Atkins, West Coast Environmental Law 2005. <http://wcel.org/sites/default/files/publications/Greening%20Your%20Title.pdf>.

Modification and Cancellation of Covenants

Section 35(2) of the *Property Law Act* (*PLA*) allows a court to cancel or modify charges or interests against land, including conservation covenants.[19] The provision outlines the conditions under which a modification or cancellation may be appropriate:

> The court may make an order sought under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (a) 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;
>
> (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled;
>
> (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled;
>
> (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest; or;
>
> (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

A party challenging a covenant need only show that one of these conditions is satisfied.[20] However, the onus of demonstrating that one of these conditions is met is relatively high. It is not enough for the covenant to be less than optimal or more onerous than expected.[21] Covenants are commonly enforced despite the fact they may affect property value,[22] or may be costly to comply with after breached.[23]

Discretion of the Court

It is also important to note than a court has discretion to deny modification or cancellation even if any subsection of 35(2) could be made out. They may do so for example because of failure to act in

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[19] *Property Law Act*, R.S.B.C. 1996, c. 377.
[20] *PMT XII LLC v. Strata Plan VR 2753*, [2010] BCSC 1235. <http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1235/2010bcsc1235.html>.
[21] *Winmark Capital Inc. v. Galiano Island Local Trust Committee*, [2004] BCSC 1754. <http://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc1754/2004bcsc1754.html>.
[22] For example, see *Berrettoni Estate v. Belzberg*, [2006] BCSC 225. <http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc225/2006bcsc225.html>.
[23] For example, see *Burnaby (City) v. Racanelli*, [1998] B.C.J. no. 545 (S.C.) <http://www.canlii.org/en/bc/bcsc/doc/1998/1998canlii3833/1998canlii3833.html?searchUrlHash=AAAAAQAJcmFjYW5lbGxpAAAAAAE>.

a timely manner or, [24] as stated in the *PLA,* because the application is premature.[25] The guiding principles of this discretion appear to be that each individual case will be decided on its merits,[26] and that agreements freely entered into should not be lightly cancelled.[27]

A court is likely to find an application premature where material considerations (i.e. those that would allow a court to cancel or modify a covenant according to section 35(2) of the *PLA*) "have not yet materialized…or, for other reasons it would be better to defer to a later date".[28]

This was the case in *Winmark Capital* where a landowner purchased a parcel of land to develop it for residential use. [29] The land was also subject to a restrictive covenant that prohibited forestry activities except in pursuit of residential development. Shortly after the sale, the land was rezoned so that it no longer allowed residential uses and only permitted forestry activities. The owner sought cancellation of the restrictive covenant so that it could use the land according to the new zoning but the court deemed the application premature because the trees at issue were not mature enough to allow for forestry planning or investment at that time.

The Charge or Interest is Obsolete (s.35(2)(a) *PLA)*

In determining whether a covenant is obsolete, the court must consider "the nature of the charge itself in the circumstances of the use of the relevant property".[30] This does not involve a balancing of rights between the parties concerned. Furthermore, the word obsolete in this context has no technical meaning. Rather, it is an "ordinary" word meaning "no longer practised or used; discarded; out of date…[w]orn out; effaced through wearing down, atrophy or degeneration".[31] Put another way, "a covenant becomes obsolete when its original purpose can no longer be served".[32]

As stated in section 35(2)(a) of the *PLA*, changes in neighbourhood character may in some cases make a covenant obsolete. However, the threshold for this appears to be relatively high. In one case a court refused to deem a restrictive covenant prohibiting anything but single family dwellings obsolete even though there had been commercial development in the area, including on a lot that used to be subject to the same restrictive covenant. The court said the neighbourhood at issue

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[24] *Berrettoni Estate v. Belzberg*, [2006] BCSC 225.
<http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc225/2006bcsc225.html>.
[25] *Winmark Capital Inc. v. Galiano Island Local Trust Committee*, [2004] BCSC 1754.
<http://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc1754/2004bcsc1754.html>.
[26] *Fleischman v. British Pacific Properties Ltd.*, [1997] B.C.J. no. 2838 (C.A).
<http://www.canlii.org/en/bc/bcsc/doc/1997/1997canlii2182/1997canlii2182.html>.
[27] *PMT XII LLC v. Strata Plan VR 2753*, [2010] BCSC 1235.
<http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1235/2010bcsc1235.html>.
[28] *Newco Investments Corp. v. British Columbia Transit*, [1987] B.C.J. no 1266 (C.A.).
<http://www.canlii.org/en/bc/bcca/doc/1987/1987canlii2662/1987canlii2662.html?searchUrlHash=AAAAAQAIbmV3Y28gaW4AAAAAAQ>.
[29] *Winmark Capital Inc. v. Galiano Island Local Trust Committee*, [2004] BCSC 1754.
<http://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc1754/2004bcsc1754.html>.
[30] *Chivas v. Mysek*, [1986] B.C.J. No. 2547 (C.A).
[31] *Collinson v. Laplante*, [1992] B.C.J. No. 2560 at para 19 (C.A.).
<http://www.canlii.org/en/bc/bcca/doc/1992/1992canlii685/1992canlii685.html>.
[32] *Murrayfield Developments Ltd. v. Brandon*, [1995] B.C.J. no. 1491 (S.C.) at para 35.
<http://www.canlii.org/en/bc/bcsc/doc/1995/1995canlii1589/1995canlii1589.html>.

remained single family despite the surrounding changes.[33]

This case contrasts to *Laurence v. Century Holdings* where a similar restrictive covenant was found to be obsolete because of radical changes to the neighbourhood. [34] Specifically, the adjoining property had a restaurant and motel built on it, a tavern had been erected across the street and there were plans for a hotel to be built nearby.

Reasonable Use of the Land Impeded Without Practical Benefit to Others (s.35(2)(b) *PLA)*

To satisfy s.35(2)(b) of the *PLA* it is not enough to argue that a covenant is onerous. Rather, the applicant must demonstrate both elements of the provision: that their reasonable use of the land is impeded by the covenant and that the continuance of the covenant does not provide practical benefit to others.[35]

Courts in BC previously left it open that an application under this section may involve a balancing of the parties' rights and that the petitioner must show a substantial balance in their favour for a covenant to be cancelled.[36] However, more recently this 'balancing' exercise has been largely rejected for the approach of looking at the purpose of the covenant at the time it was created to determine the benefits protected by it. If a practical benefit still exists the covenant will stand.[37] Courts have broadly interpreted what constitutes a practical benefit and consider both objective (e.g. financial) and subjective (e.g. aesthetic) factors.[38] For example, property value and privacy, neighbourhood character and enjoyment of natural aesthetic or views have all been accepted as practical benefits.[39]

The court does retain discretion to find a practical benefit "truly minimal". If this is the case, then the benefit may be disregarded and a covenant cancelled. In *Wallster* the covenant at issue placed a height restriction on homes built on a certain lot in order to preserve the view from an adjoining property. [40] The petitioner wanted to cancel or modify the covenant to allow her to build 16 inches over the restriction but the court refused because the view was a practical benefit that would be at least partially removed if the covenant were disregarded. However, they did say that if it were a case of 1 inch above the restriction then the exception of "truly minimal" would be met.

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[33] *West Shore Laylum Management Ltd. (Re),* [2013] BCSC 2080.
<http://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc2080/2013bcsc2080.html>.
[34] *Laurence v. Century Holdings*, [1985] B.C.J. no. 2798 (S.C.).
<http://www.canlii.org/en/bc/bcsc/doc/1985/1985canlii489/1985canlii489.html>.
[35] *Wallster v. Erschbamer*, [2011] BCCA 27.
<http://www.canlii.org/en/bc/bcca/doc/2011/2011bcca27/2011bcca27.html>.
[36] *Winmark Capital Inc. v. Galiano Island Local Trust Committee*, [2004] BCSC 1754.
<http://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc1754/2004bcsc1754.html>.
[37] *Tri-X Timber Corp. v. Rutherford*, [2010] BCSC 1001.
<http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1001/2010bcsc1001.html?searchUrlHash=AAAAAQAFdHJpIHgAAAAAAQ>.
[38] *Gubbels v. Anderson*, [1995] 8 B.C.L.R. (3d) 193) (C.A.).
<http://www.canlii.org/en/bc/bcca/doc/1995/1995canlii1377/1995canlii1377.html>.
[39] *Berrettoni Estate v. Belzberg*, [2006] BCSC 225; *Fleischman v. British Pacific Properties Ltd.*, [1997] B.C.J. no. 2838 (C.A); *Winmark Capital Inc. v. Galiano Island Local Trust Committee*, [2004] BCSC 1754.
[40] *Wallster v. Erschbamer*, [2011] BCCA 27.
<http://www.canlii.org/en/bc/bcca/doc/2011/2011bcca27/2011bcca27.html>.

Much of the case law has dealt with restrictive covenants where the practical benefit is intended for the covenant holder. In the context of conservation covenants, it is likely that the community at large is intended to benefit rather than the organization or body holding the covenant. It appears from *Winmark Capital* that a benefit intended for the community satisfies clause (b) and is a legitimate purpose of a covenant. [41]

Express or Implied Agreement to Modification or Cancellation (s.35(2)(c) *PLA*)

This section has been interpreted as an expression of the doctrine of implied release (from an obligation) and therefore requires the petitioner to demonstrate intention of the covenant holder to abandon a covenant.[42] This has played out in the case law as quite a high threshold of proof to meet.

One event that may factor in to finding an implied release is a covenant holder's acquiescence to an infringement. However, courts have said that acquiescence is a question of degree and so allowing a minor breach or infringement of the terms of the covenant does not prevent future enforcement against larger breaches.[43]

In the context of covenants, the choice to make exception or release a certain lot from a restrictive or negative covenant is not usually sufficient to show express or implied agreement to modify a covenant generally. This was demonstrated in *West Shore Laylum Management* where the court upheld a covenant only allowing single family homes even though the covenant-holder had agreed to make an earlier exception for a swimming facility to be built on one of the lots subject to the restriction. [44]

It is unclear what role monitoring, or lack thereof, of conservation covenants may play in arguments made pursuant to this section. However, if intention to abandon is necessary to an action it seems as though monitoring may be relatively strong evidence to the contrary.

Modification or Cancellation Will not Injure the Person Entitled to the Benefits (s.35(2)(d) *PLA*)

The Supreme Court of BC in *Fleischman* stated that ss.35(2)(b) & (d) are flip sides of the same coin.[45] In another case, the court when so far as to say that s. 35(2)(d) is now largely redundant because of (b).[46] This view is taken because the removal of a practical benefit has been deemed an "injury" pursuant to clause (d) and so in most cases the analyses under these sections will mirror

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[41] *Winmark Capital Inc. v. Galiano Island Local Trust Committee*, [2004] BCSC 1754. <http://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc1754/2004bcsc1754.html>.
[42] *Arduini v. Gasparin*, [1993] B.C.J. no. 2792 (S.C.). <http://www.canlii.org/en/bc/bcsc/doc/1993/1993canlii704/1993canlii704.html?searchUrlHash=AAAAAQAJYXJkdWluaSB2AAAAAAE>.
[43] *Putt v. Kunetsky*, [2010] BCSC 394. <http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc394/2010bcsc394.html>.
[44] *West Shore Laylum Management Ltd. (Re),* [2013] BCSC 2080. <http://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc2080/2013bcsc2080.html>.
[45] *Fleischman v. British Pacific Properties Ltd.*, [1997] B.C.J. no. 2838 (C.A). <http://www.canlii.org/en/bc/bcsc/doc/1997/1997canlii2182/1997canlii2182.html>.
[46] *Granfield v. Cowichan Valley (Regional District)*, [1996] B.C.J. no.261 (C.A.). <http://www.canlii.org/en/bc/bcca/doc/1996/1996canlii356/1996canlii356.html>.

each other.[47]

Injury is defined as "to cause harm to" and like "practical benefit" in clause (b), [48] has been interpreted quite broadly and is not limited to pecuniary harm.[49] For example, loss of privacy increasing the risk of disturbance has been deemed an injury.[50]

One limitation that may arise under some circumstance, similar to the "truly minimal" exception under clause (b), is that the injury must be relatively likely. This was demonstrated in *Maple Ridge Projects* where the court agreed to cancel a covenant that prohibited a developer from building on a certain piece of land without the Minister of Transport and Highway's consent. [51] The court considered the context in which the covenant was made and found that it had been intended to allow for a highway project that was later abandoned and that any future plans involving the land were so preliminary and conceptual that no reasonable possibility of injury existed.

Covenant is invalid, Unenforceable or Expired (s.35(2)(e) *PLA*)

This clause is used when a petitioner is seeking to have a covenant declared void for vagueness or uncertainty. As discussed above (under Enforcement of Covenants), courts apply contractual rules of interpretation to ambiguous covenants. If a covenant is deemed ambiguous then it may not be enforced.[52]

Another scenario where courts have cancelled covenants under this clause has been where the covenant at issue is deemed to be temporal in nature rather than intended to continue forever.[53] Covenants in such cases seem to fit the description of being "expired".

Common Categories of Covenants & Illustrative Cases

TREE COVENANTS

Nanaimo (Regional District) v. Buck [BCSC 2012][54]

This case involved a conservation agreement known as the "Shady Mile" covenant and was

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[47] *Tri-X Timber Corp. v. Rutherford*, [2010] BCSC 1001. <http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1001/2010bcsc1001.html?searchUrlHash=AAAAAQAFdHJpIHgAAAAAAQ>.
[48] *Berrettoni Estate v. Belzberg*, [2006] BCSC 225. <http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc225/2006bcsc225.html>.
[49] *Gubbels v. Anderson*, [1995] 8 B.C.L.R. (3d) 193) (C.A.). <http://www.canlii.org/en/bc/bcca/doc/1995/1995canlii1377/1995canlii1377.html>.
[50] *Fleischman v. British Pacific Properties Ltd.*, [1997] B.C.J. no. 2838 (C.A). <http://www.canlii.org/en/bc/bcsc/doc/1997/1997canlii2182/1997canlii2182.html>.
[51] *Maple Ridge Projects v. British Columbia*, [1997] B.C.J. No. 2000 (S.C.). <http://www.canlii.org/en/bc/bcsc/doc/1997/1997canlii3643/1997canlii3643.html>.
[52] *Newco Investments Corp. v. British Columbia Transit*, [1987] B.C.J. no 1266 (C.A.). <http://www.canlii.org/en/bc/bcca/doc/1987/1987canlii2662/1987canlii2662.html?searchUrlHash=AAAAAQAIbmV3Y28gaW4AAAAAAQ>.
[53] For example *Maple Ridge Projects v. British Columbia*, [1997] B.C.J. No. 2000 (S.C.); *Windset Greenhouses (Ladner) Ltd. v. Delta (Corp.)*, [2001] BCSC 462.
[54] *Nanaimo (Regional District) v. Buck*, [2012] BCSC 572. <http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc572/2012bcsc572.html>.

registered pursuant to s.219 of the *LTA* in favour of the Regional District of Nanaimo against the title of land purchased by Buck. The covenant prohibited "removal of vegetation" from a certain strip of the property but Buck logged 60-80% of the area anyway. The Regional District of Nanaimo sought an injunction to prevent further logging and argued damages were insufficient for the harm already done.

Buck made several arguments against the covenant's validity and in the alternative claimed that the Regional District of Nanaimo was estopped from enforcing the covenant.

The Court decided in favour of the Regional District of Nanaimo. They found that the harm to the trees was irreparable, making damages inadequate and an injunction necessary to prevent more irreparable harm. The Court conceded that the trees could in theory be grown back but the fact that it would take 40-50 years to do so and the fact that the trees had environmental and community value made the harm more serious.

Note: this case is also outlined below as applicable in the farming context.

Winmark Capital Inc. v. Galiano Island Local Trust Committee [BCSC 2004][55]

A conservation covenant in favour of the Galiano Island Local Trust Committee on land owned by Winmark prohibited the logging of "evergreen trees" on the covenanted land except in certain circumstances related to infrastructure for residential development, which Winmark planned to pursue. The land was later rezoned so that it allowed for forestry uses but not residential development. Windmark sought cancellation of the covenant pursuant to s.35(2) of the *PLA*.

The purpose of the covenant was to:

a) enhance and preserve the forest environment and remaining tree coverage;

b) protect the stand of second-growth trees in the vicinity of the Northwest end of Bodega Ridge; and

c) create a development that would be attractive to residents of the Island.

The Court held that these were legitimate benefits for the community and a valid purpose for a restrictive covenant. They upheld the covenant saying that it was not unenforceable due to vagueness ("evergreen trees" is sufficiently precise), nor had its purpose expired because of the rezoning. Furthermore, the application was premature because although Windmark claimed they wanted to use the land for forestry, such use was not viable at the time of the application because the trees were not mature enough to log anyway.

WATERCOURSE COVENANTS

Mt. Matheson Conservation Society v. 573132 BC Ltd. [BCSC 2002][56]

The Mt. Matheson Conservation Society held a restrictive covenant that prohibited logging or the removal/disturbance of plant life in "the watershed" area. The purpose of the covenant was to

[55] *Winmark Capital Inc. v. Galiano Island Local Trust Committee*, [2004] BCSC 1754. <http://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc1754/2004bcsc1754.html>.
[56] *Mt. Matheson Conservation Society v. 573132 B.C. Ltd.*, [2002] BCSC 1254. <http://www.canlii.org/en/bc/bcsc/doc/2002/2002bcsc1254/2002bcsc1254.html>.

preserve the integrity of the community water supply that representatives of the Society argued the defendant company breached with their construction activities. The company argued that "watershed" was too ambiguous a term and rendered the covenant unenforceable.

The court referred to several definitions of watershed and determined that the term refers to a drainage basin or catchment area. However, they also found that there were many areas on the covenanted land that fit this definition and concluded that this made the covenant invalid because it was impossible to ascertain to which of these places the covenant referred.

The Court noted that two "new" covenants (created pursuant to s.219 of the *LTA*) did sufficiently define the watershed areas they applied to and so in contrast were not ambiguous.

FARMING COVENANTS

Willow Ridge Family Farm v. Arber [BCSC 2006][57]

Part of a restrictive covenant prohibited any commercial greenhouse or operations other than farming on Arber's property. Arber however began operating a commercial nursery/greenhouse business that she characterized as farming rather than horticultural. Willow Ridge argued that this constituted a commercial greenhouse of the type prohibited under the covenant.

In determining what farming entailed, the Court looked to dictionary definitions and found that farming is characteristically associated with the cultivation of food products. Arber's business was in cultivating ornamental plants for gardens. The court concluded that the business was horticultural and as such not a farming endeavour and was a breach of the covenant.

Note: the farming clause was only one issue dealt with in this case. There were several other clauses regarding allowable construction on the properties for which both parties were found to have breached on several occasions.

Parmenter v. British Columbia (Minister of Environment, Lands and Parks) [BCSC 1993][58]

Parmenter approached the Province of B.C. with the intention to purchase a specific tract of land for agricultural purposes. The Province of B.C. eventually granted him a lease to purchase agreement that required Parmenter to make certain improvements to the land. He complied and paid the purchase price for the land. At this time he was informed for the first time that the land would be subject to a restrictive covenant prohibiting anything except agricultural use. Parmenter agreed to the covenant because of the amount of time and money he had invested in the property already.

Parmenter pursued an agricultural venture but it was not successful because the land was not suitable for such purposes. By this time there had also been residential and recreational development in the area so Parmenter sought cancellation of the covenant to pursue those uses instead.

The Court found that s.31(2) of the *PLA* [now s.35(2)] was satisfied. First of all, the fact that the land was unsuitable for agriculture and that it was not a part of an Agricultural Land Reserve (ALR) are

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[57] *Willow Ridge Family Farm Corp. v. Arber*, [2006] BCSC 600. <http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc600/2006bcsc600.html>.
[58] *Parmenter v. British Columbia (Minister of Environment, Lands and Parks)*, [1993] B.C.J. no. 220 (S.C.). <http://www.canlii.org/en/bc/bcsc/doc/1993/1993canlii1351/1993canlii1351.html>.

material circumstances that render the covenant obsolete. Second, practical benefit provided by the continuance of the covenant was not demonstrated by the Province of B.C. and expecting agricultural uses to continue in these circumstances was unreasonable. Finally, it would not injure the province to remove the covenant.

Nanaimo (Regional District) v. Buck [BCSC 2012][59]

In this case, the Regional District of Nanaimo held a covenant that prohibited the removal of any vegetation from a particular strip of land. Buck purchased the land with knowledge of the covenant and went on to log many trees in the covenant area anyway. Nanaimo sought an injunction to stop further logging while Buck argued that the covenant was invalid because it did not comply with the *Agricultural Land Commission Act*. This act requires the Agricultural Land Commission to approve any covenant that affects land that is part of the ALR. Buck argued that because the Commission never approved this covenant and it prohibited farming, it was invalid. Furthermore, Buck argued the covenant did not comply with the *Farm Practices Protection (Right to Farm) Act*, which prohibits a farmer from being prevented from carrying out farming operations on land included in the ALR. Buck claimed he was a farmer and was logging the area in order to conduct farming operations.

The Court rejected these arguments and upheld the covenant. They found that the Commission by implication had decided that the covenant did not require their approval because it did not prohibit the use of the land for farming purposes. Furthermore, the evidence did not support Buck's contention that he was a farmer and was carrying out farming operations. Rather, he had applied to the ALR to have the property subdivided because it was not suitable for farming. The court granted an injunction preventing further logging.

SUBDIVISION COVENANTS

Parker v. Kamloops (City) [BCSC 2012][60]

The Parkers agreed to a restrictive covenant prohibiting further subdivision in return for being allowed to subdivide their current lot with one of the lots being smaller than zoning bylaws allowed. Nineteen years later they sought the covenant's cancellation saying the process was unfair, that Kamloops had no authority to require the covenant and that it is obsolete.

The Court rejected all of these arguments and noted that even if one of the claims had been made out, there was a failure to act in a timely manner. For 19 years the Parkers had enjoyed the benefits of being allowed to make the initial subdivision. The City's Council did have authority to request a covenant and the purpose of this particular one was to address community water capacity concerns. The court said that this purpose still persisted at the time of the application (and if anything, was more pressing than before) and so the covenant was not obsolete.

Fleischman v. British Pacific Properties [BCSC 1997][61]

A restrictive covenant held by British Pacific Properties prohibited the subdivision of any lots

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[59] *Nanaimo (Regional District) v. Buck*, [2012] BCSC 572.
<http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc572/2012bcsc572.html>.
[60] *Parker v. Kamloops (City)*, [2012] BCSC 61.
<http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc61/2012bcsc61.html>.
[61] *Fleischman v. British Pacific Properties Ltd.*, [1997] B.C.J. no. 2838 (C.A).
<http://www.canlii.org/en/bc/bcsc/doc/1997/1997canlii2182/1997canlii2182.html>.

within its neighbourhood boundaries unless an applicant submitted a plan to which they consented. Fleischman submitted a subdivision plan and then sought to challenge the enforceability of the covenant on the basis of obsolescence and lack of practical benefit after British Pacific Properties rejected it.

The Court found that the purpose of the covenant was to create and maintain a unique neighbourhood characterized by large lots, low density and high privacy. This objective was said to still stand and so the covenant was not obsolete. Furthermore, there was a practical benefit provided to the other residents including higher property values and greater privacy. Finally, the discretion of British Pacific Properties to accept or reject subdivision applications was legitimate and did not affect the binding nature of the covenant.

NO BUILD COVENANTS

West Shore Laylum Management Ltd. (Re) [BCSC 2013][62]

West Shore purchased several lots that were subject to a restrictive covenant prohibiting the building of anything other than one single family dwelling on each property. West Shore wanted to build a residential care home for seniors and applied to have the covenant modified or cancelled. They argued that because of changes in the character of the neighbourhood towards commercial development, the covenant was obsolete. In the alternative, they said it did not provide a practical benefit and that an earlier decision to allow a swimming facility to be built on a lot subject to the restrictive covenant constituted implied or explicit agreement to modify the covenant.

The Court dismissed all arguments. The commercial development, although close, did not change the single family nature of the neighbourhood itself and this character constituted a practical benefit for residents of the neighbourhood. Furthermore, the earlier to decision to allow a swimming pool did not reach the threshold of implied or explicit agreement. That decision was likely made because it was expected to provide a benefit to the community.

Berrettoni Estate v. Belzberg [BCSC 2006][63]

Belzberg held a restrictive covenant registered against Berrettoni's lot prohibiting the building of any house, garage, or other outbuildings except for within specified boundaries on the eastern side of the property where a house currently stood in order to protect Belzberg's privacy and quiet enjoyment of her land.

Berrettoni wanted to build a new home that would encroach on the prohibited areas but Belzberg had begun planning and constructing her "dream home" which included a deck that maximized the view to be had over the area in which Berrettoni now wanted to build. Berrettoni challenged the covenant claiming that trends towards larger and more expensive homes in the neighbourhood made the covenant obsolete or in the alternative, that the covenant was restricting the reasonable use of the lot and provided no practical benefit to others.

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[62] *West Shore Laylum Management Ltd. (Re),* [2013] BCSC 2080. <http://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc2080/2013bcsc2080.html>.
[63] *Berrettoni Estate v. Belzberg*, [2006] BCSC 225. <http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc225/2006bcsc225.html>.

The Court noted that although many of the surrounding lots had had larger homes built on them, they were not subject to the same restrictive covenant. The covenant in this case was not obsolete because its purpose was still relevant to Belzberg and its cancellation would remove practical benefits to her (including view, privacy and property value).

The Court also noted that even if one of these arguments had been made out, it was unlikely they would have granted the petition. The Berrettonis had known of Belzberg's plan to build a new home 2 years in advance but did not approach her with their wishes to have the covenant removed or modified until days before construction began. This failure to act in a timely manner would make it very unfair to Belzberg as had they approached her earlier, she may have accommodated their wishes by designing a house that did not focus on the area where they wished to build.

Burnaby (City) v. Racanelli [BCSC 1998][64]

Racanelli wished to build a larger home than what zoning bylaws allowed. The City of Burnaby agreed that they might rezone the property if Racanelli submitted a building plan and granted them a covenant. He submitted a plan and agreed to register a covenant in the City's favour that required the construction of any buildings and retaining walls on his property to comply with his building plan and city bylaws.

As a result, the city rezoned the property to allow Racanelli to build a larger home but he built one that was not only larger than what he proposed in his building plan, but larger than newly applicable bylaw allowed . Furthermore, he built a retaining wall in a location not identified in the building plan. Burnaby sought to enforce the covenant while Racanelli challenged the covenant's validity and the City's authority to require the restrictive covenant for rezoning.

The Court held that the City was entitled to require and hold the restrictive covenant for these purposes and that the covenant itself was valid. They also expressed that the cost of compliance is not a valid consideration when deciding whether or not a covenant is enforceable. In this case it would be very costly for Rancanelli to reduce the size of the house and rebuild the retaining wall in the proper area but he entered into the agreement freely without complaint as to the process and submitted the building plan himself and so should be held to it.

[64] *Burnaby (City) v. Racanelli*, [1998] B.C.J. no. 545 (S.C.). <http://www.canlii.org/en/bc/bcsc/doc/1998/1998canlii3833/1998canlii3833.html?searchUrlHash=AAAAAQAJcmFjYW5lbGxpAAAAAAE>.

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