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Positive Covenants: Enforceability and Registration

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1. On March 27, 2014, Madam Justice Donegan set aside the Expropriation Notice filed by the Regional District of Kootenay Boundary ("RDKB") against lands owned by the petitioner, Atco Lumber Ltd. The basis of her decision (for this, we can start at p. 21 of the decision) was that the Statutory Right of Ways (SRWs) that the RDKB had attempted to acquire through expropriation contained a number of positive covenants which were incapable of forming an interest in land. As a result, it was beyond the RDKB's powers of expropriation.

   Atco Lumber Ltd. v. Kootenay Boundary (Regional District), 2014 BCSC 524

2. This story begins as a spat between a landowner and employees of the unincorporated community of Fruitvale. The owner was upset that the workers were crossing his property to get to Fruitvale's water treatment plant and, in the process, would leave his gate open thus allowing others onto his property. The owner wanted the workers to go through the gate, stop, get out, close and lock the gate, and then (and only then) carry on to the water treatment plant. The workers complained that the gate was heavy and difficult to operate and that it would be unsafe for them to work behind a locked gate in the event of an accident.

3. After many to's and fro's, the RDKB sought to end the debate by expropriating a statutory right of way across Atco's property which expressly provided that Atco:

   > [S]hall not … maintain any … gate … or permit the existence of any obstruction on the Right of Way Areas;

4. At the hearing of the petition, Atco argued that the proposed SRWs contained this and other positive covenants. The others being:

   a. clause 4(c) purported to extract a promise by Atco to indemnify and save the RDKB harmless;
   b. the combined effect of the RDKB's right to use Atco's road and the lack of any obligation on the RDKB to maintain or repair the road placed a positive obligation

on Atco to repair wear and tear to the road done by the RDKB in order to exercise its own right to use the road;

c. clause 6(b) allowed the RDKB to perform acts and then demand repayment of its costs from Atco and, if not paid, add that amount to the taxes payable by Atco;

d. clause 6(c) has Atco acknowledging the RDKB's entitlement to certain remedies in order to enforce its rights under the right of way;

e. clause 6(f) purported to bind Atco to personal covenants as long as it held an interest in the Land; and

f. clause 6(h) required Atco to accept a different version of the right of ways in the event that some portion of the instrument is found to be unenforceable.

5. The question for the court's consideration was whether the *Local Government Act* empowered the RDKB to expropriate the SRWs in the format used. Section 309 of the *Local Government Act* provides that

> For the purposes of exercising or performing its powers, duties and functions, a regional district may expropriate real property or works or an interest in them….

6. Atco argued that it was trite law that a right of way must concern rights which are capable of forming the substance of a grant of an interest in land. Positive covenants, such as the obligation to spend money, do not and cannot run with the land and do not create an interest in land. Although it was not relied upon in *Atco*, we offer this quote from a 2002 decision by the Ontario Court of Appeal:

> The rule that positive covenants do not run with the land has been a settled principle of the English common law for well over a century and it is indisputable that it has clearly been adopted in Canada: Parkinson v. Reid, [1966] S.C.R. 162, 56 D.L.R. (2d) 315.
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> *Durham Condominium Corporation No. 123 v. Amberwood Investments Limited,* [2002] OJ No. 1023 at para 17

7. *Durham* also contains an historic explanation for the rule that negative covenants run with the land but positive covenants do not, including this passage from the English House of Lords decision in Rhone v. Stephens, [1994] 2 All ER 65 .

> My Lords, equity supplements but does not contradict the common law. When freehold land is conveyed without restriction, the conveyance confers on the purchaser the right to do with the land as he pleases provided that he does not interfere with the rights of others or infringe

statutory restrictions. The conveyance may however impose restrictions which, in favour of the covenantee, deprive the purchaser of some of the rights inherent in the ownership of unrestricted land. In Tulk v. Moxhay (1848), 2 Ph 774, [1843-60] All ER Rep 9 a purchaser of land covenanted that no buildings would be erected on Leicester Square. A subsequent purchaser of Leicester Square was restrained from building. The conveyance to the original purchaser deprived him and every subsequent purchaser taking with notice of the covenant of the right, otherwise part and parcel of the freehold, to develop the square by the construction of buildings. Equity does not contradict the common law by enforcing a restrictive covenant against a successor in title of the convenantor but prevents the successor from exercising a right which he never acquired. Equity did not allow the owner of Leicester Square to build because the owner never acquired the right to build without the consent of the persons (if any) from time to time entitled to the benefit of the covenant against building. In Tulk v. Moxhay, 2 Ph 774 at 777-778, [1843-60] All ER Rep 9 at 11 the judgment of Lord Cottenham LC contained the following passage:

> It is said, that the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.

Equity can thus prevent or punish the breach of a negative covenant which restricts the user of land or the exercise of other rights in connection with land. Restrictive covenants deprive an owner of a right which he could otherwise exercise. Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he was a party to it. Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property.

8. On a closer reading, the decision in *Tulk v. Moxhay* can be interpreted to allow for positive covenants to run with the land as well. However, the door on that interpretation was firmly closed by the English Court of Appeal in *Haywood v. Brunswick Building Society,* (1881), 8 Q.B.D. 403. There, the Court of Appeal held that in the absence of privity of contract, a covenant compelling a person to spend money or do some positive act would not be enforceable, i.e., it did not run with the land.

9. When thinking about negative covenants, the basic notion is this: if I have a piece of property that is encumbered with a negative covenant, then I am *restricted* from doing

something that I would otherwise be able to do. However, I can always satisfy the covenant by doing *nothing*. For example, if the restrictive covenant says that I cannot build higher than 100 feet, I can always satisfy that covenant by not building anything at all.

10. You will sometimes hear a negative covenant being referred to as a positive covenant. This happens where the covenant is not targeted at preventing the servient tenement from doing something, but instead at allowing the dominant tenement to do something that would otherwise constitute a nuisance. A good example of this is the covenants that the smelter in Trail, BC placed on properties near the smelter before selling the land. The covenant requires the owner to put up with the smells and dust associated with a smelter and thus allow the smelter to cause what would otherwise constitute a nuisance. Such a covenant is a truly negative covenant and runs with the land.

11. In its argument, Atco relied on *Cloutier v. Ball*, [1995] BCJ No. 1301 in which the plaintiffs attempted to enforce a covenant that required trees to be kept to a maximum height of 20 feet. The plaintiffs wanted the defendants to trim four trees that were between 60 – 70 feet tall. The plaintiffs' motive was their view. The court found that compliance with the covenant would require the defendants to spend money (although the plaintiffs had offered to pick up the bill). The court found that because the covenant required the expenditure of money, it was a positive covenant which could not run with the land so as to bind subsequent owners such as the defendants.

12. Atco also relied on the Court of Appeal's decision in *Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd. et al.*, 2009 BCCA 5. There, Aquadel sought to cancel a charge against its property that provided that a third of it had to be used as a golf course. Aquadel was losing money on the golf course and wanted to redevelop the property or sell to someone who would. There were three covenants at issue:

    a. not to use the land for any purpose but a golf course;
    b. to maintain the golf course to a certain standard; and
    c. to offer certain persons preferential rates at the golf course.

13. The BC Supreme Court held that the first of these covenants was a valid prohibition against using the land for anything but a golf course. The Supreme Court decision was

overturned on appeal. The Court of Appeal found that, although the words used in the covenant were negative, the covenant was positive in substance in light of the other provisions. The Court concluded that, as the covenant was not negative in substance, it could not be enforced against successors in title and ordered the cancellation of the agreement as a charge on the land.

14. The fact that the Courts will look to the *substance* of the covenant is important, because there is always a certain temptation to use negative language to describe a positive obligation, so that the covenant appears to be negative. This is a risky practice at the best of times, but especially so when used in an expropriation context - as we can see from the decision in *Atco*.

15. In *Atco*, Madam Justice Donegan preferred to rest her decision on *Nordin v. Faridi*, [1996] BCJ No. 61 (BCCA) from which she quoted extensively at paragraph 105 of her reasons. In the end, *Nordin v. Faridi* stands for the same principle of law: the nature of an easement "is always negative, the obligation on him being either to suffer or not to do something."

16. Madam Justice Donegan also supported her decision by highlighting the difference between a s. 218 covenant (which is the section that was being used by the RDKB), and the language of s. 219, which specifically allows for the creation of a positive covenant without a dominant tenement and permits such positive covenants to run with the land. Since s. 219 deals specifically with positive covenants, general principles of statutory interpretation say that s. 218 should not be read to allow positive covenants as well, as that would make s. 219 unnecessary.

17. In ruling in Atco's favour, Justice Donegan found that clauses 4(a), 4(c), 4(d) (Atco did not argue that 4(d) was a positive covenant), 6(a), 6(b), and 6(f) on their own or in combination with other clauses were positive and personal in nature. The imposition of positive and personal covenants by way of expropriation was impermissible.

18. This result should not surprise or worry anyone.

19. First, the result only applies in the context of an expropriation. Where the acquisition is by means other than an expropriation, there is no concern that the entire SRW will be set

aside, because there would be a voluntary contract between the parties that could contain both positive and negative covenants.

20. Second, in those cases where there has been an acquisition by way of expropriation, the time limit for challenging the expropriation is brutally short (from the owner's perspective). Pursuant to s. 51 of the *Act,* once the land "vests" under s. 23 of the *Act*, no court challenge can be mounted. In *Atco*, the owner had to make a very novel and complex argument to avoid the application of that section and only succeeded due to a very unique set of circumstances.

21. Third, the time limit imposed by s. 51 of the *Act* might not protect a SRW if it were truly void, rather than just voidable. In an effort to avoid s. 51, Atco argued that the expropriation was void, but on that point, Atco lost. Apparently, only s. 4 of the *Act* creates a condition precedent to a valid expropriation. Any other deficiency merely makes the expropriation voidable and is therefore protected by s. 51 of the *Act*.

22. Fourth, if and to the extent a right of way instrument contains positive covenants, that simply means that once the original owner no longer owns the property, those covenants are no longer enforceable. This should not come as any shock or surprise to governments or public utility companies.

23. Fifth, the standard form of an SRW used by utility companies for decades does not contain any positive covenants as was the case in *Atco*. To illustrate this by example, a 47 year old BC Hydro SRW and an 18 year old BC Tel SRW are appended to this paper.

24. However, in light of the decision in *Atco,* expropriating authorities looking to expropriate an SRW should take a good look at their SRW Agreement templates before proceeding with the expropriation. For example, the "further assurances" clause found at paragraph 4(d) is found in many "standard" SRW Agreements. Not being able to rely on that clause puts additional pressure on the expropriating authority to make sure they "get it right" the first time, because they won't be able to compel the landowner to sign any correcting or modifying documents later on. Instead, the authority will have to turn to the court for permission to make the necessary changes and to order the registration of the corrected instrument.

25. As an aside, we think an SRW acquired under s. 3 of the *Expropriation Act* would be safe (i.e. it could contain positive covenants that would bind the existing landowners), but using a s. 3 agreement presents an interesting problem from a compensation perspective. The grantor's right to compensation is defined and limited by the *Expropriation Act* – so while the SRW agreement could contain positive and personal covenants, the grantor may not be able to obtain compensation for those covenants under one of the established heads of damages set out in the *Expropriation Act*. How would you claim compensation for agreeing to a positive obligation? Does it decrease the market value of what is being taken? Is it injurious affection because of its effect on the landowner? What about under the rubric of disturbance damages? It might not affect the value of the land because a positive covenant would not bind any purchaser; however, a seller may be willing to sell for a lower price to get out from under the positive obligations, which may be a factor in determining market value.

26. The result in *Atco* serves as an important reminder to everyone involved in the expropriation process that expropriation powers are not unlimited – they can be used to take away property rights, but they cannot be used to impose positive obligations on affected landowners without their consent (except perhaps in the case of an instrument authorized under s. 219 of the *Land Title Act*).

27. *Atco* highlights another practical issue that expropriating authorities should try to avoid – though what I am about to say is much easier said than done. In *Atco*, the RDKB believed that its goals could be achieved by expropriating a right of way, rather than a fee-simple taking or a combination of the two. Expropriating a right of way secures the necessary access rights, but when you look at the result, you have to wonder whether the RDKB would have been better off conducting a full taking. Or perhaps the RDKB should have considered agreeing to a locked gate as long as keys were provided. If all else failed, RDKB could have found or built a different route.

28. Alternatively, the RDKB could have taken the rather bold step of entering the property under s. 310 of the *Local Government Act* to "break up" or "alter" the locked gate. The same power is afforded to a municipality under s. 32 of the *Community Charter*. This power is limited to situations where the authority is providing a "service", but the term "service" has a broad meaning in both the *Community Charter* and the *Local Government Act*.

29. As of today, RDKB has been engaged in this process for 2 years, and as a result of the Court's decision, they really don't have very much to show for it. Though we are getting there….

30. Hindsight is always 20/20, but we would suggest that there might have been an opportunity at some point in the process for someone within RDKB – someone with a good knowledge of the property itself – to look at the situation, recognize that there was a pre-existing locked gate, look at the covenants in the SRW Agreement, and start asking questions about whether the RDKB could really achieve their desired result (removal of the locked gate) by simply expropriating a right of way.

31. As long as we are speaking in terms of a right of way (as opposed to a public road), one should not lose sight of the fact that the right to exclude others (i.e., the public) is a fundamental component of the bundle of rights that make up a fee simple interest in land. A right of way, to some extent, impairs an owner's right to exclude others; but an owner retains the right to exclude those who are not entitled to the benefit of the easement. A demand that an easement be clear of any gate imposes a potentially unenforceable burden on an owner to allow anyone and everyone to use the easement. That type of excessive use was/is the focus of a legal battle between UBC (Kelowna Campus) and its neighbours. Last summer, the Supreme Court cautioned UBC that if it could not restrict the use of the easement to those who were entitled to use it, UBC risked having the easement cancelled. After setting out a solution to the excessive use of the easement, the Court wrote:

> It seems to me that if the use of the easement is limited in the fashion set out above, the number of pedestrians and cyclists using it should decline and decline markedly. If the number of users does not decline, it may be that the solution I have fashioned is impractical. Should that be the result, it may be that the easement must be terminated.
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> *Lafontaine v. The University of British Columbia,* 2013 BCSC 1517

32. We wish to end this presentation by stating that positive covenants do indeed run with the land and do so in this province on a regular basis. Not only is this permissible, it is necessary. No, we are not now reversing everything that we just proposed. The difference is whether the positive obligation falls on the servient or on the dominant tenement. We

realize that there is no dominant tenement in an SRW but the point stands just the same. It is common and acceptable that positive obligations are placed on the benefiting party. Such obligations may concern:

a. duties to repair;
b. duties to take steps to prevent unauthorized access;
c. duties to insure;
d. duties to indemnify; and
e. duties to compensate.

33. The reason that these positive obligations are not offensive is two-fold. First, it is a principle of law that a party accepting the benefit of deed must also accept the burdens that come with it. By definition, there is no benefit to the servient tenement. Second, the dominant tenement is free to abandon its rights over the servient tenement and thus end its positive obligations that come with it. Conversely, a servient tenement has no authority to disavow its obligations under the easement (short of court intervention).

We thank you for your time and thank the BCEA for the invitation to present at this year's conference.

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