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Borrowing U.S. Law on Conservation Covenants

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Using American Cases to Dispel Some of the Uncertainty Surrounding Canadian Conservation Covenants

Introduction

Conservation covenants are an increasingly popular instrument for the conservation of private, and occasionally public, land in B.C.[1] The Land Trust Alliance of B.C. estimates that its members, which includes most of the land trusts in the province, hold at least 92 conservation covenants, covering nearly 2000 hectares of land.[2] By all accounts, the use of conservation covenants in North America is booming.[3]

The legal interpretation of conservation covenants lags this boom. To date, there are no Canadian reported cases discussing the validity or enforcement of conservation covenants.[4] This creates massive areas of uncertainty for land trusts and other holders of conservation covenants. In particular, drafters of conservation covenants struggle to unequivocally ensure that each covenant will attain its goals. For example, it is very difficult for land trusts to anticipate how courts will interpret specific clauses. There is no case law to guide land trusts on the best techniques for surveying and monitoring covenanted land. Moreover, there is no successful enforcement case to help dispel the myth that landowners can use their land as they please.

In contrast, the United States does have a small body of case law discussing conservation covenants. This paper examines that body of law, with the goal of dispelling some of this uncertainty. Overall, the U.S. jurisprudence is probably still too young to answer many of these questions. Nevertheless,

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[1] This paper assumes that the reader has a basic understanding of conservation covenants. For a refresher please see A. Hillyer & J. Atkins, *Greening your Title: A Guide to Best Practices for Conservation Covenants* (Vancouver: West Coast Environmental Law, 2000). Online: http://www.wcel.org/wcelpub/2000/13247.pdf <Last accessed 26 July 2003>.

[2] Land Trust Alliance of B.C., "B.C. Lands in Trust" online: http://www.landtrustalliance.bc.ca/registry/code/index.php?template=stats <Last accessed: 25 July 2003>.

[3] See, for example, Land Trust Alliance, "Summary Data from the National Land Trust Census" (2001) at http://www.lta.org/newsroom/census_summary_data.htm <Last accessed: 26 July 2003>.

[4] The closest Canadian case is *Mt. Matheson Conservation Society v. 573132 B.C. Ltd.*, [2002] B.C.J. No. 1950 (S.C.). This case involves a restrictive covenant purporting to prohibit logging in a watershed. However, the case involves a traditional covenant, with a dominant and restrictive tenement, rather than a "conservation covenant" under s. 219 of the *Land Title Act*, R.S.B.C. 1996, c. 250. The court held that the covenant was void for uncertainty because the covenant only applied to the "watershed" and this was too ambiguous in the context.

it does support a generally optimistic attitude, as well as provide some helpful insights, particularly with respect to the interpretation of covenants.

Brief Answer

The American cases provide several interesting insights for Canadian land trusts, although they certainly do not remove all the troubling uncertainties. Perhaps most importantly, the cases indicate that conservation covenants are generally enforceable. The cases did not reveal any overt judicial attitude against the enforcement of conservation covenants. In the general area of enforcement, several U.S. courts flatly rejected the argument that a land trust could not enforce a certain violation because it had failed to enforce a similar violation on a different covenant.

The U.S. courts interpreted conservation covenants much like any other contract, beginning with the ordinary meaning, then moving to external evidence in the event of ambiguity. A few cases explicitly applied the common law interpretive presumption in favour of the free use of land. This is a concern for land trusts seeking to enforce the inherently ambiguous language of certain covenants. The implicit assumption that the free use of land is an overriding value is probably not appropriate in the context of conservation covenants.

The most successful argument by landowners seeking to pursue a questionable activity, was that the activity was necessarily incidental to a use that the covenant explicitly reserved for the landowner. The cases also underscore the concern that covenant drafters should probably pay careful attention to closely related statutes, as these can guide judicial interpretation. Finally, the cases support the general presumption that the legal costs of enforcement are recoverable, but drafters must pay attention to the recovery clauses in the easement.

Discussion

In the United States, conservation covenants are commonly known as conservation easements. However, they are also called conservation servitudes, conservation restrictions, preservation restrictions, conservation rights, conservation agreements, scenic easements and so forth.[5] The cases in this paper result from an exhaustive search for these terms across all U.S. jurisdictions. The following research also builds on a survey done by M.K. Thompson and J.E. Jay, in their article examining U.S. cases on conservation easements from an American perspective.[6]

For the purposes of this paper, a "conservation covenant" is a burden on the land, intended to run with the land, and aimed at benefiting the wider public, rather than just adjacent landowners.[7] In most of the judgments, the wider public purpose was part of an explicit legislative scheme, but this was not always discernible from the judgment. In addition, in most of the cases the covenant holder does not hold adjacent land (i.e. there is no "dominant tenement"), but again this was not always readily discernible from the judgment.

Overall, I located 20 relevant judicial opinions.[8] Almost all of these cases are from eastern states, probably because these states have a longer history of using conservation easements.[9] Seventeen of

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[5] See, for example, T.D. Mayo, "A Holistic Examination of the Law of Conservation Easements" in J.A. Gustankski & R.H. Squires, eds., *Protecting the Land: Conservation Easements Past, Present and Future* (Washington, D.C.: Island Press, 2000) at 26.

[6] M.K. Thompson & J.E. Jay, "An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and other Conservation and Preservation Tools: Themes and Approaches to Date" (2001) 78 Denv. U. L. Rev. 373.

[7] The distinction between traditional covenants and conservation covenants was sometimes difficult. For example, should a case discussing a traditional servitude preventing subdivision in an effort to preserve property values and residential character be included in this review? Generally, I did not include covenants that were based entirely in the common law, and involved a dominant and servient tenement. However, the blurriness of this line likely indicates that there is probably more case law directly relevant to "conservation covenants" than is first apparent. This may be an area for future research.

[8] *United States v.* ***Albrecht*** 496 F.2d 906 (8th Cir. 1974). *Foundation for the Preservation of Historic Georgetown v.* ***Arnold*** 651 A.2d 794 (D.C. Cir. 1994). ***Bagley*** *v. Foundation for the Preservation of Historic Georgetown* 647 A.2d 1110 (D.C. Cir. 1994). ***Bennett*** *v. Commissioner of Food and Agriculture* 576 N.E.2d 1365 (Mass. 1991). ***Chatham*** *Conservation Foundation v. Farber* 779 N.E.2d 134 (Mass. App.Ct. 2002). ***Conrad*** *v. Mattis* 2000 WL 33115395 (Conn. Super.). ***Harris*** *v. Peace* 66 A.2d 590 (Conn. Sup. Ct. of Errors 1949). ***Goldmuntz*** *v. Town of Chilmark* 651 N.E.2d 864 (Mass. App.Ct. 1995). ***Island Venture*** *Associates v. New Jersey Dep't of Environmental Protection* 820 A.2d 88 (N.J. App. Div. 2003). ***Madden*** *v. The Nature Conservancy* 823 F.Supp. 815 (D. Mont. 1992). ***Maryland*** *Environmental Trust v. Gaynor* 803 A.2d 512 (Md. C.A. 2002). ***Natale*** *v. Schwartz* 151 F. Supp. 2d 562 (D. Pa. 2001). *United States v.* ***Ponte*** 246 F.Supp.2d 74 (D. Me. 2003). *Racine v. United States* 858 F.2d 506 (9th Cir. 1998). ***Rattee*** *v. Commissioner, New Hampshire Dep't of Agriculture, Markets and Food* 761 A.2d 1076 (N.H. Sup. Ct. 2000). ***Redwood*** *Construction Corp. v. Doornbosch* 670 N.Y.S.2d 560 (N.Y. App. Div. 1998). ***Sagalyn*** *v. Foundation for the Preservation of Historic Georgetown* 691 A.2d 107 (D.C. Cir. 1997). *Friends of the* ***Shawangunks***,

the twenty cases, or 85%, involve successive landowners. In other words, there are only three cases where the conflict appears to involve the original landowner.[10] This supports the hypothesis that as new owners purchase covenanted land in Canada, violations are more likely to occur. It may also support the argument that one of the best ways for easement holders to avoid the costs of legal action is to build and maintain positive relationships with successive landowners.

If rough statistics are an indicator of success, Canadian land trusts should be cautiously optimistic. In 13 of the 20 cases, the easement holder "won", in that they either successfully defended their easement, or obtained the remedy they were seeking in the context of the easement.[11] This is a 65% "success rate." Of the seven cases where the easement holder "lost", only one case held that the conservation easement was completely invalid.[12]

For several reasons, this paper does not focus on issues relating to the validity of conservation covenants. First, there were very few cases focusing on validity.[13] Second, validity is often strongly dependent on the statutory scheme of the jurisdiction.[14] Third, the University of Victoria Environmental Law Centre recently completed a report examining potential challenges to the validity of conservation covenants, drawing on B.C. cases discussing traditional covenants.[15] The few American cases discussing validity add little to this report. Therefore, the following analysis focuses on insights more closely related to the enforcement of covenants, rather than their defense.

These insights fall into four general themes. First, this paper examines enforcement in general, in particular the merit of the "selective enforcement" defence. Second, this paper examines several topics relevant to the interpretation of conservation covenants. Third, the paper looks at issues relating to the legal costs of enforcement. Finally, the paper concludes by considering the judicial attitude regarding conservation covenants.

Inc. v. Clark 754 F.2d 446 (2d Cir. 1985). ***Southbury*** *Land Trust, Inc. v. Andricovich* 757 A.2d 1263 (Conn. App. Ct. 2000). *Town of* ***Woodside*** *v. Gava* 261 CalRptr. 730 (C.A. 1989). Hereinafter the cases are referred to by the word in bold type.

[9] Thompson & Jay, *supra* note 6 at 374.

[10] These cases are *Bagley*, *Maryland* and *Shawangunks*. *Supra* note 8.

[11] The "losing" cases were *Arnold*, *Chatham*, *Conrad*, *Island Venture*, *Racine*, *Redwood,* and *Southbury*. *Supra* note 8.

[12] *Island Venture*, *supra* note 8. The invalidity arose because the easement holder failed to register the easement.

[13] The following cases focussed on validity: *Harris*, *Island Venture*, *Madden* and *Rattee*.

[14] For a very thorough review of the conservation easement statutes across the United States see J.A. Gustankski & R.H. Squires, eds., *Protecting the Land: Conservation Easements Past, Present and Future* (Washington, D.C.: Island Press, 2000).

[15] K. Hawkins & J. Nelson, *Conservation Covenants: An Environmental Law Centre Report* (2001?). Available in the Habitat Acquisition Trust library, or alternatively in the University of Victoria Environmental Law Centre's library.

A. Enforcement in General

Certain covenants require the land trust to proceed "reasonably" when seeking to enforce the covenant. For example, the conservation covenant in *Bagley* v. *Foundation for the Preservation of Historic Georgetown* ("*Bagley*") contained a provision requiring the Foundation to "exercise reasonable judgment and care in performing its obligations and exercising its rights under the terms of this easement."[16] Bagley, the landowner, argued that the land trust violated this provision by demanding he demolish certain violating structures rather than negotiating an alternate remedy. The District of Columbia Court of Appeals dismissed this argument, commenting that "[t]he Foundation's exercise of a right unambiguously authorized by the agreement was reasonable as a matter of law."[17] The court also noted that the Foundation's request was not the harshest remedy at their disposal, as the covenant also allowed the Foundation to enter upon Bagley's land and correct the violation.

While it is clearly difficult to draw inferences from only one case, land trusts should probably be aware of the potential for an explicit or implicit duty to behave reasonably, or in good faith, when enforcing the terms of the covenant. Nevertheless, a court would probably not find that pursuing remedies explicitly set out in the covenant is unreasonable.

A relatively common argument by landowners was that the court should preclude the covenant holder from enforcing this violation because the covenant holder had permitted similar violations on its other covenants. However, in every U.S. case where the landowner made this argument, it was summarily reject by the court. For example, the court in *Bagley* emphatically rejected this defence, commenting:

> Bagley has cited no constitutional, legislative, or common law authority – and we know of none – under which one who has breached a contract with a private actor may escape the consequences of his breach upon the ground that the party seeking to enforce the agreement has acted more leniently *vis-à-vis* persons who have failed to comply with separate agreements with the enforcing party.[18]

[16] *Bagley*, *supra* note 8 at 1113.
[17] *Ibid.*
[18] *Ibid* at 1114.

Similarly, the United States Court of Appeals, Eight Circuit, rejected the landowner's selective enforcement argument in *United States* v. *Albrecht.* The court commented:

> The claimed discrimination does not affect the plaintiff's easement and is not defense to the plaintiff's right to have the easement observed and respected by the dominant fee owner.[19]

Finally, in *United States* v. *Ponte* the United States District Court dismissed an argument of selective enforcement as irrelevant.[20]

A successful selective enforcement argument would likely also be difficult in Canada. In the Canadian case of *Bartholomew* v. *Clippingdale,* the holder of a traditional restrictive covenant sought to prevent landowners from subdividing their land.[21] The landowners argued that the covenant holder could not enforce this violation because he held covenants over the entire development, and had allowed nearby landowners to subdivide. The B.C. Court of Appeal found for the covenant holder, but was not as dismissive of the argument as in the American cases. The court reasoned that a covenant holder might be estopped from objecting to a violation because it had acquiesced to many previous breaches. The court referred to a test set out in the U.K. case of *Chatsworth Estates Co.* v. *Fewell*,[22] asking "Have the plaintiffs by their acts and omissions represented to the defendant that the covenants are no longer enforceable…?"[23] The court found that the previous subdivisions were consistent with the overall scheme, such that the covenant holder could still prevent this particular subdivision.

Overall, a selective enforcement argument might succeed in Canada, but only in exceptional cases. It would likely require the landowner to show that the land trust, by agreeing to other violations, had effectively told the landowner that they would tolerate this particular violation. This would probably require actual knowledge of the land trust's acquiescence, and a great deal of similarity between the tolerated violations and the one in question. The United States cases support the inference that the standard for a successful "selective enforcement" argument would probably be relatively high.

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[19] *Albrecht*, *supra* note 8 at 909.
[20] *Ponte*, *supra* note 8 at 77, footnote 6.
[21] *Bartholomew v. Clippingdale*, [1981] B.C.J. No. 107 (S.C.). ["*Bartholomew*"]
[22] *Chatsworth Estates Company v. Fewell*, [1931] 1 Ch. 224 (Ch. Div.).
[23] *Bartholomew*, *supra* note 21 at para. 83.

B. Interpretation

Issues regarding interpretation of the covenant were very common throughout all the cases. Four main themes emerged. First, the general interpretation scheme is very similar in both jurisdictions. Second, there is a common law presumption regarding the interpretation of burdens on land that may make enforcement difficult. Third, probably the most common method for a landowner to "escape" the terms of the covenant is to slide a questionable activity in as an included aspect of a reserved use. Fourth, drafters of covenants should be aware that incorporated and closely related statutes can be highly persuasive interpretational aids.

i. The general interpretation scheme

In *Foundation for the Preservation of Historic Georgetown* v. *Arnold* ("*Arnold*") the District of Columbia Court of Appeals set out the following basic scheme for interpreting covenants:

> Deeds, like contracts, are "construed in accordance with the intention of the parties insofar as it can be discerned from the text of the instrument"… If a deed is unambiguous, the court's role is limited to applying the meaning of the words…but if it is ambiguous, the parties' intention is to be ascertained by examining the document in light of the circumstances surrounding its execution…[24]

This basic scheme, of starting with the plain language and only looking to external evidence in the event of ambiguity, was set out in most of the U.S. cases.

Canadian courts follow a roughly similar scheme when interpreting traditional covenants. For example, in *Kirk v. Distacom Ventures Inc.* the B.C. Court of Appeal commented:

> The starting point of inquiry is, of course, a careful examination of the wording of the covenant and the whole of the document which contains it. The court will also, however frequently consider evidence of the surrounding circumstances at the time a covenant was entered into and other extrinsic evidence in order to resolve ambiguities in the text.[25]

As with all types of contract interpretation, several common issues arise in applying this broad method. In particular, what is an ambiguity, and what external evidence is acceptable? Interestingly,

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[24] *Arnold*, *supra* note 8 at 796.
[25] *Kirk v. Distacom Ventures Inc.* (1996), 81 B.C.A.C. 5 at para 21.

in *Arnold*, the District of Columbia Court of Appeals rejected the land trust's offer of the appraisal as evidence of external circumstances. The court held that since the land trust commissioned the appraisal, it was too one-sided to be evidence of the intent of both parties.[26] In contrast, courts might be relatively willing to reference statutory sources as interpretational aids (see below). Finally, the scheme leaves considerable room for judicial discretion, thus raising a serious concern about the prevailing judicial attitude towards covenants and land trusts (see below).

In summary, Canadian courts likely follow roughly the same interpretational scheme as American courts. As a result, many of the following insights are more easily transferable.

ii. The common law interpretive presumption

In *Arnold*, the District of Columbia Court of Appeals added a third step to its interpretational scheme. In the event of unresolved ambiguity, the court held that it could apply common law rules of construction.[27] Land trusts should be particularly concerned about the common law rule requiring that ambiguities in a covenant must be resolved in favour of the free use of land.

In *Arnold*, the Foundation held a "Deed of Scenic, Open Space, and Architectural Façade Easement" on Arnold's property. The purpose of the easement was to preserve a picturesque historical house. Arnold erected a seasonal awning on the rear patio, and enclosed the space between two dormer windows. The issue was whether these additions violated the section of the easement that prohibited "extension of the existing structure or erection of additional structures."[28] The District of Columbia Court of Appeals found the term "extension" ambiguous, because it could include increasing the density of the house, as Arnold had done, or could be limited to expanding the outer frame or "envelope" of the house.

The court found that there was no acceptable external evidence for resolving this ambiguity. As a result, the court looked to the common law interpretive rules. The Court of Appeal applied the rule in favour of the free use of land, and the rule requiring the resolution of ambiguities in favour of the

[26] *Arnold*, *supra* note 8 at 797.
[27] *Ibid* at 796.
[28] *Ibid.*

drafter, and limited "extension" to permanent structures that expanded the "envelope" of the building.[29] Therefore, the court found that Arnold was not in violation of the easement.

The Appellate Court of Connecticut applied a roughly similar common law rule in *Southbury Land Trust* v. *Andricovich* ("*Southbury*"). In this case, the court noted that restrictive covenants must be narrowly construed, and ought not to be extended by implication.[30] This rule, among other factors discussed below, led the court to find that building a second detached home did not violate a conservation easement which allowed "an additional dwelling unit for one family in a dwelling or another building." In doing so, the court rejected the land trust's argument that covenant required the dwelling unit to be attached to the existing home.

This presumption in favour of strict construction also exists in Canada. In the classic case of *Noble* v. *Alley,* the Supreme Court of Canada found that a restrictive covenant claiming to exclude all persons of non-Caucasian blood from owning, occupying or using the land, was void for uncertainty.[31] At page 330, Estey J. quoted Lord Dunedin in *Anderson v. Dickie* as stating:

> Far earlier than this it has been held that all conditions restricting the use of land must be very clearly expressed, the presumption being always for freedom.[32]

The B.C. Court of Appeal recently quoted the same passage in *Kirk v. Distacom Ventures Inc.*, explaining that ambiguities in covenants should always be resolved in favour of non-enforcement.[33] Finally, the B.C. Supreme Court recently applied this reasoning in *Mt. Matheson Conservation Society v. 573132 B.C. Ltd.*[34] In this case, the court considered a traditional restrictive covenant that purported to restrict logging within a watershed. The court held that the restrictive covenant was unenforceable because, in this context, "watershed" was too ambiguous.

The application of this presumption raises serious concerns for the holders of conservation covenants, because much of the language in covenants is inherently ambiguous. In response, trusts should clearly try, as far as possible, to avoid ambiguities in their covenants. However, land trusts

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[29] *Ibid* at 797.
[30] *Southbury*, *supra* note 8 at 790.
[31] *Noble v. Alley*, [1951] 1 D.L.R. 321 (S.C.C.).
[32] *Anderson v. Dickie* (1915), 84 L.J.P.C. 219 at 227.
[33] *Kirk v. Distacom Ventures Inc*, *supra* note 25 at para. 23.
[34] *Mt. Matheson Conservation Society v. 573132 B.C. Ltd.*, *supra* note 4 at para. 33.

seeking enforcement must also argue that it is not appropriate or correct to apply this common law presumption to conservation covenants.

The courts in *Arnold* and *Southbury* did not even consider whether the common law presumption was an appropriate tool for interpreting conservation covenants. Canadian land trusts could argue that, in contrast to standard restrictive covenants, conservation covenants benefit the public at large. As a result, it is not automatically obvious that the free use of land will bring society a larger benefit than the particular public policy advocated by the covenant. Given the purposes served by conservation covenants, it would probably be more appropriate to interpret them liberally, in support of their explicitly stated purposes, rather than strictly in favour of the free use of land.

While this argument would be difficult, as it faces the longstanding common law respect for the free ownership of property, several U.S. cases at least imply that courts might be receptive to such an argument. In particular, in *Bennett v. Commissioner of Food and Agriculture* ("*Bennett*") the Supreme Judicial Court of Massachusetts made the following comments, in obiter, regarding conservation restrictions:

> Where the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force. In such a case, the appropriate question is whether the bargain contravened public policy when it was made and whether its enforcement is consistent with public policy and is reasonable.[35]

The Supreme Judicial Court added, in a footnote:

> …What we decide here does not, of course, endorse the enforcement of all easements in gross. It does, however, prompt us to observe that certain common law rules concerning the creation, validity, and enforcement of servitudes may no longer be sound and that we are willing to reconsider them in appropriate cases.[36]

In *Bennett*, the court was referring in particular to common law rules regarding the validity of covenants and easements. However, the logic, that such rules are inappropriate for the analysis of

[35] *Bennett, supra* note 8 at 1367.
[36] *Ibid* at 1368.

restrictions in favour of public policy, is easily transferable to the common law interpretive presumption.[37]

Support for a more liberal, purposive method also arose in *Goldmuntz* v. *Town of Chilmark*. In this case, the Town held a conservation restriction on Goldmuntz's land, where he wanted to build an in-ground swimming pool. The restriction prohibited "construction or placing of buildings…or other structures on or above the ground."[38] Goldmuntz argued, among other things, that the in ground pool was not a prohibited structure. The Appeals Court of Massachusetts found that the pool was a violation of the covenant. Rather than discuss the interpretive presumption, the court commented as follows:

> In addition to its social benefits, a conservation restriction yields an economic benefit to the grantor of the restriction and successor owners of the property… In return for that benefit to the owner, it is reasonable that the conservation restriction be protected against expedient exemptions which defeat the purpose of preserving land in its natural state.[39]

Finally, of all the cases reviewed, very few cases explicitly applied this presumption. In contrast, the cases presented numerous opportunities for judges to simply cite the presumption and bar enforcement. The relative rareness of such reasoning is a strong ground for optimism.

In summary, there is a common law interpretive presumption, probably alive in the U.S. and Canada, requiring that ambiguities in covenants be resolved in favour of the free use of land. Two American cases applied this presumption to conservation covenants, without questioning the appropriateness of transferring the common law rule. However, the presumption appeared rarely, and two other cases at least implied a willingness to reconsider the common law rules and perhaps take a more purposive approach.

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[37] However, the Supreme Judicial Court has not yet followed up on its 1990 offer to reconsider the common law rules. Indeed, in *Garland* v. *Rosenshein* ("*Garland*") the court indicates some conservatism in applying its proposed approach. In *Garland*, the same court considered a more traditional covenant, which purported to prevent development. The court prevented the grantor of the covenant from enforcing it because he no longer held any benefited land, a requirement under common law and under Massachusetts statute. The court noted that while it had expressed a willingness to reconsider the common law rules, this was not a case where the old common law rules ceased to apply.

[38] *Goldmuntz*, *supra* note 8 at 865.

[39] *Ibid* at 866.

iii. The "problem" of reserved uses

Most conservation covenants explicitly reserve certain uses for the landowner. In several of the U.S. cases, the landowners successfully argued that an alleged violation was actually a permitted aspect of a reserved use.

For example, in *Chatham Conservation Foundation Inc.* v. *Farber* ("*Chatham*") the trial judge prohibited the landowners from building an elevated walkway through the covenanted salt marsh. The covenant stated, among other things, that "no building or other structure…will be erected or placed on the premises" and "no roads will be constructed on the premises."[40] However, the Appeals Court of Massachusetts sent the matter back for a rehearing, on the basis that the landowners could probably build the walkway as part of their expressly reserved right to "pass and repass."[41]

There was an existing walkway across the marsh. The Appeals Court held that the right to make reasonable repairs to the passageway was incidental to the right to pass and repass.[42] The court sent the matter back to determine if the new walkway would constitute "reasonable repairs", but made its opinion on the matter clear. The court noted that the proposed walkway seemed safer, had received the approval of four different government regulatory bodies, and appeared to improve the environmental and scenic values of the property.

Similarly, in *Conrad* v. *Mattis* the Superior Court of Connecticut upheld the landowner's construction and maintenance of a vegetable garden as part of a reserved use. The purpose of the easement was "to perpetually retain the Easement area predominantly in its natural, scenic and open condition."[43] It prohibited the landowner from "the dumping or placing of soil", "the clear-cutting of live trees" and "the use of motorized recreational vehicles."[44] However, the easement also stated:

> The Grantor reserves the right…to continue to use the Easement Area for any uses…which do not interfere with the purpose for which the easement is granted, including, but not limited to:

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[40] *Chatham*, *supra* note 8 at 136, 137.
[41] *Ibid* at 137.
[42] *Ibid* at 139.
[43] *Conrad*, *supra* note 8 at 2.
[44] *Ibid.*

> (a) farming, the grazing of farm animals, gardening and outdoor recreational activities…[45]

To create the garden, the landowner had cleared 12% of the Easement Area and spread topsoil over the land. The maintenance of the garden required the use of motorized vehicles. Nevertheless, the Superior Court found that selective clearing over such a small area did not amount to "clear-cutting." The court stated that the removal of trees was permissible where, as here, it is "necessary to effectuate any of the uses specifically authorized in the Easement."[46] The court also added that the garden area still retained its woodland character, and did not detract from the natural and scenic condition of the land.

These cases indicate that land trusts should be cautious when creating explicitly reserved uses. In particular, the land trust should consider what incidental or necessary activities might attach to these reserved uses. Note also that in *Conrad*, where the easement holder lost, the court still discussed whether the use was compatible with the purpose of the easement. Explicitly stating that reserved uses must stay within the covenant's purpose would probably stop very serious violations from "piggy-backing" on reserved uses.

Goldmuntz illustrates the limits to the "reserved uses" reasoning. As noted above, Goldmuntz wanted to build an in-ground swimming pool despite a covenant prohibiting "construction or placing of buildings…or other structures on or above the ground." The covenant also reserved certain uses for the landowner, including the following:

> …I reserve the right to conduct and perform the following activities…
>
> e. Fishing, shellfishing, boating, walking, horseback riding, bicycling bird watching, nature observation and other similar recreational uses and the repair, maintenance, improvement and building of accessory structures appropriate to said uses;[47]

Among other things, Goldmuntz argued that the pool was acceptable as an accessory structure for swimming, a reserved recreational use. The Appeals Court of Massachusetts agreed that swimming could be within the list of reserved uses. However, the court did not agree that a pool could be an accessory structure. The court commented:

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[45] *Ibid.*
[46] *Ibid* at 4.
[47] *Goldmuntz*, *supra* note 8 at 867.

> …the plaintiff tortures the language and plain meaning…by arguing that a swimming pool is somehow incidental and accessory to swimming in much the same way one might try to argue that a tennis court is incidental and accessory to tennis. The structure cannot be accessory as the activity is not possible without the structure.[48]

As noted above, the court prohibited Goldmuntz from building the pool.

In summary, several of the American cases confirm the somewhat obvious point that land trusts need to be cautious when reserving uses for the landowner. Trusts should try to anticipate any uses that are arguably necessary or incidental to the reserved use. Explicitly prohibiting reserved uses from violating the purpose of the covenant should prevent serious violations.

iii. Statutes as Interpretational Aids

In several cases, the court referred to a statutory provision to aid in interpreting the covenant. This arose in several different contexts, but was often highly persuasive.

For example, in *Racine* v. *United States* ("*Racine*"), the drafters directly incorporated provisions from the enabling statute into the covenant. While some reference to the enabling statute is clearly wise, and often required, in this case it was confusing. In *Racine*, the easement stated that, "with reference to 36 C.F.R. 292.16(g)(1) [a statutory section] it is agreed that only one residence and one tenant dwelling are authorized…"[49] The statute referred to in the covenant enabled the government to hold the easement, and that specific section stated that landowners would be able to build structures "necessary for…dude ranching."[50]

Racine proposed to build a ranch house, four barns, a riding stable, parking and recreational support facilities, all for the purposes of dude ranching. The easement holder protested because the property already contained a log cabin, bunkhouse and barn. The United States Court of Appeal found that the only consistent interpretation of the easement was that it permitted dude ranching

[48] *Ibid* at 866.
[49] *Racine, supra* note 8 at 507.
[50] *Ibid.*

facilities, in *addition to* one residence and one tenant dwelling.[51] Essentially, the enabling statute prevailed over the other terms of the covenant.

Similar problems may arise when the covenant borrows wording from closely related statutory provisions. For example, in *Southbury* the town agreed to amend their zoning regulations to facilitate a development, provided the developer agreed to certain terms, including placing easements on the property.[52] The town lifted language for the easements directly from the amended zoning regulations. Recall that the easement permitted "an additional dwelling unit," which the landowner argued allowed an entirely new house, while the easement holder argued it only permitted an attached unit. The Appellate Court of Connecticut referred to the definition of "dwelling unit" in the town code, which included "a building or a part of a building."[53] Noting that the town code included the amended regulations, from which the covenant borrowed language, the court applied the code's definition of unit to the easement. While this is an unusual situation, it nevertheless indicates that conservation covenant holders should be cautious about incorporating statutory language into the covenant.

Finally, a court may refer to a statute, even though is not incorporated into the easement. In *Sagalyn* v. *Foundation for the Preservation of Historic Georgetown*, the landowners formally consolidated their two lots. The land trust argued this violated the covenant's prohibition against subdivision. The District of Columbia Court of Appeals held that "subdivision" was a term of art, and the parties' understanding of the term could be inferred from its statutory use at the time of drafting.[54] The court referred to the municipal planning regulation, which defined "subdivision" as "the division or assembly of land." On this basis, the court found that the parties either knew, or had reason to know, that subdivision included consolidation.[55] Based on this and other factors, the court found that the Sagalyns had violated the covenant.

In summary, land trusts should use caution when incorporating statutory provisions into their covenants, as a court will naturally be inclined to interpret the covenant so that it agrees with the

[51] *Ibid* at 509.
[52] *Southbury, supra* note 8 at 1264.
[53] *Ibid* at 1265.
[54] *Sagalyn, supra* note 8 at 112.
[55] *Ibid.*

statute. Land trusts should be particularly cautious when there are statutes that closely relate to the subject matter or circumstances of the covenant. More generally, land trusts should probably be aware of the statutory definitions of certain terms, particularly terms defined in local planning and building regulations.

C. Legal Costs

The potential legal costs of enforcement are an overriding concern for all land trusts. Fortunately, according to J.E. Jay, a survey by the U.S. Land Trust Alliance found that 77% of known covenant violations were resolved using only a minor amount of land trust resources.[56] However, the same survey also found that 11% of violations led to litigation, or at least the threat of litigation. There remains a serious concern that a land trust may have to abandon or severely compromise a covenant if the trust does not have enough money to mount a legal challenge.

There are roughly two main concerns about the legal costs of enforcement. First, are these costs recoverable? In the United States, the typical default rule is that neither party recovers costs from the other party.[57] In contrast, the default rule in Canada is for the winning party to recover, from the losing party, roughly half of their legal costs.[58] However, in most conservation easements the landowner promises to pay the costs of enforcing any violation, including legal costs. Such provisions probably make the situation more similar between the two countries.

Second, how large are these costs likely to be? Even if the trust can fully recover all their legal costs, which is unlikely, the trust will generally have to spend these costs up front. As these cases illustrate, it can be difficult to predict if the trust will succeed. In certain circumstances, the trust might even be liable for the other party's costs. As a result, a realistic estimate of the potential costs of legal enforcement could be very useful.

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[56] J.E. Jay, "Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions" (2000) 6 Envtl. Law. 441 at 458.
[57] See C. Tollefson, "When the 'Public Interest' Loses: the Liability of Public Interest Litigants for Adverse Costs Awards" (1995) U.B.C.L.Rev. 303 at para. 2.
[58] *Ibid.*

i. Recovery of legal costs

Several cases confirmed that courts will likely uphold clauses requiring the repayment of legal costs. For example, in *Bagley* the conservation covenant stated that "in the event [Bagley is] found to have violated any of [his] obligations, [he] shall reimburse [the Foundation] for any costs or expenses incurred in connection therewith, including court costs and attorneys fees."[59] The District of Columbia Court of Appeals upheld this provision. The court also noted that there is an implied requirement that these legal costs be reasonable.

Similarly, in *Sagalyn* the same court upheld a provision requiring the landowner to pay the legal costs involved in remedying a violation.[60] In this case, the land trust sought legal costs incurred in response to the Sagalyns' "subdivision" of their property, their application for a building permit, and their plan to build an addition to their house. However, the Sagalyns had agreed not to build anything without the Foundation's consent. The court held that the Sagalyns owed the Foundation the costs of responding to the subdivision issue, because this was an actual violation. However, the court found that neither the application for the building permit nor the intent to build were violations. Therefore, the court held that the Foundation was not entitled to recover legal costs spent in anticipation of these matters.[61]

In addition to upholding explicit cost recovery clauses, even in the United States, a court may require landowners to pay the trust's legal costs when the landowner's defence was frivolous or patently implausible. For example, in *Town of Woodside* v. *Gava* the judgment does not discuss a specific provision requiring the repayment of legal costs. However, the California Court of Appeal found that the defendants had launched an appeal with "a complete lack of merit."[62] The Gavas had appealed the trial court's order requiring them to remove the improvements they had constructed in violation of a scenic easement. The court held that the Gavas had appealed merely to delay obeying the order and required the Gavas to reimburse the Foundation's legal costs *and* the costs to the taxpayers of processing a civil appeal.[63]

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[59] *Bagley, supra* note 8 at 1115.
[60] *Sagalyn, supra* note 8 at 114.
[61] *Ibid* at 115.
[62] *Woodside, supra* note 8 at 733.
[63] *Ibid* at 734, 735.

In summary, courts will probably uphold provisions requiring reimbursement of legal costs spent to remedy violations. However, land trusts should be cautious when making legal expenditures *in anticipation* of violations, as these may not be recoverable. For example, depending on the phrasing of the covenant, the costs of court actions to clarify the nature of the covenant may not be recoverable.

On the other hand, the default cost rule in Canada allows land trusts to generally recover a portion of their legal costs whenever they are the successful party. Moreover, in *Rowan and Eaton (Re)* the B.C. Supreme Court commented as follows, regarding the costs of defending a traditional covenant:

> …the owner who desires to be freed from restrictions which are legally binding upon him ought not to subject those who, in good faith, insist upon their rights, to any expense whatever.[64]

ii. Magnitude of Legal Costs

The legal costs of enforcement appear to be quite high, although there was some variation. For an example on the higher end, in *Bagley* the award was for $78,304.85 (U.S.), for a matter that never even went to full trial.[65] In evaluating the reasonableness of the award, the Court of Appeals noted that while the award was unusually large, Bagley had largely brought it on himself. The court commented as follows:

> Bagley "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response"…
>
> Approximately two-thirds of the Foundation's billable hours were addressed to discovery and litigation regarding Bagley's altogether implausible defense theories and counterclaims.[66]

As a result, the Court of Appeals held that "the Foundation's basic calculation of the 'lodestar' was sound."[67]

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[64] *Rowan and Eaton (Re)* (1926), 59 O.L.R. 379 (S.C.) at para. 20, aff'd (1927), 60 O.L.R. 145 (S.C., A.D.).
[65] *Bagley, supra* note 8 at 1113.
[66] *Ibid* at 1114, 1115.
[67] *Ibid* at 1115.

The remaining awards were not as large. For example, in *Sagalyn* even including the unrecoverable costs, the original award was for $33,994.65.[68] In *Woodside*, the compensation to the covenant holder for the costs of the appeal was only $5,370.[69] Nevertheless, each of these estimates represent money that the easement holder had to spend up front, with no guarantee of reimbursement.

One case never discusses legal costs, but necessarily implies a frightening amount. In *Natale* v. *Schwartz*, the conservation covenant was quite short, apparently stating only that:

> The use of the premises hereby conveyed shall be restricted to farming or for use as a wildlife sanctuary or nature conservation area and for the study of natural history. No building shall be placed thereon other than small buildings accessory to such uses.[70]

The landowners built a 4,900 square foot house on the covenanted land, and the land trust began their lawsuit to enforce the covenant around 1990. The litigation was lengthy and complex, and is unfortunately largely unreported. Initially, the Pennsylvania Court of Common Pleas found that there was no violation. However, in 1993, the Superior Court reversed this decision and ordered the plaintiffs to remove the house. In 1996, the lower court found the plaintiffs in contempt for failing to remove the house. Finally, in 1998, the land trust received a permit authorizing them to demolish the house. The United States District Court[71] commented on the subsequent demolition as follows:

> This permit authorized demolition of the plaintiffs' house without securing the plaintiffs' presence or giving them notice…
>
> On November 23, 1998 crews from PECO energy disconnected electrical service to the property… A demolition contractor then entered plaintiffs' land and demolished plaintiffs' house, its contents, and their well.[72]

The landowners continued to battle in court, and in a reported 2001 decision, the United States District Court, upheld the destruction of the house. While the court never explicitly discusses costs, the land trust likely had to cover over a decade of legal costs, in addition to the costs of demolishing

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[68] *Sagalyn, supra* note 8 at 114.
[69] *Woodside, supra* note 8 at 734.
[70] *Natale, supra* note 8 at 563.
[71] The case went to this court because the landowners allege that the demolition had violated their due process rights. The court held the landowners had received sufficient due process through the lengthy litigation regarding the house and "any claim to the contrary is ludicrous" (568) FIX.
[72] *Natale, supra* note 8 at 564.

the house. While some of these expenses are hopefully recoverable from the landowners (in particular the demolition), such an endeavour would probably bankrupt most land trusts.

Overall, the cases do not provide a reliable estimate of the legal costs of enforcement. However, a few cases indicate that these costs may run quite high.

D. Judicial Attitude towards Conservation Covenants

There are a few opportunities where enforcement of covenants involves a high degree of judicial discretion. In particular, judges must decide whether there is ambiguity in a covenant, and how that ambiguity should be resolved. As a result, judicial acceptance of conservation covenants could be important to their successful enforcement. Overall, the American cases indicate a relatively positive judicial attitude. None of the reported judgments included express statements against conservation covenants, and several judgments made positive comments about their goals. Nevertheless, there is an implied attitude in a few of the cases that may be concerning.

In particular, there are several cases where the judge implicitly favours the free use of land, rather than the explicit purposes of the covenant. For example, in *Redwood Construction Corp.* v. *Doornbosch* a landowner refused to grant an access and utility easement over the property, on the ground that it violated a conservation easement.[73] The easement prohibited any improvements or changes that would affect the natural, open and scenic nature of the property or cause damage to the flood plain. The New York Supreme Court, Appellate Division allowed the access easement, commenting that the covenant did not expressly prohibit such easements.[74] This reasoning, that a use is permitted because it is not explicitly prohibited, assumes that the overriding value is the free use of land, rather than the explicit purposes set out in the contract.[75]

[73] *Redwood*, *supra* note 8 at 561.
[74] *Ibid* at 562.
[75] This is not to say that the access easement might not have been fully compatible with the covenant; simply that the court could have focussed on the impacts of the access easement relative to the purpose of the covenant, rather than on what the covenant expressly prohibited.

Similarly, recall that in *Southbury* the Appellate Court of Connecticut considered the meaning of "a dwelling unit." In addition to several other factors, the court commented on the lack of express language. The court commented:

> If the drafters had intended to restrict new construction such that any new dwelling unit would have to be built as part of an already existing structure, they easily could have accomplished this by adding certain language to the restriction.[76]

While such logic may be sensible for regular covenants, it arguably disregards the larger public purpose of conservation covenants. These courts approached the free use of land as the default situation, rather than analyzing the covenant from the perspective of its explicit purposes.

Fortunately, the lack of explicit language was probably not decisive in either case. However, in *Witter* v. *Taggart*[77] the New York Court of Appeals stated, in the context of analyzing the validity of a more traditional scenic easement, that "[i]t goes almost without repeating that definiteness, alienability and unencumbered use are highly desirable objectives of property law."[78] Given the long history of these principles, it will be difficult to replace the assumption that the free use of land is the penultimate goal.

On the other hand, most cases indicate a judicial attitude that seems supportive, or at least not dismissive, of the goals of land trusts. For example, courts showed no sympathy for landowners who defended obvious violations, or sought to strike down plainly valid covenants. For example, recall that in *Goldmuntz* the Appeals Court of Massachusetts noted that conservation covenants brought benefits to society and to the landowner, such that they should "be protected against expedient exemptions which defeat the purpose of preserving land in its natural state."[79] In addition, various courts made the following comments regarding certain arguments by the landowner:

> In the present case, a clear violation of the easement agreement was brought to Bagley's attention at an early date. It was or should have been readily apparent that Bagley had no viable defense…[80]

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[76] *Southbury*, *supra* note 8 at 1266.
[77] *Witter* v. *Taggart*, 573 N.Y.S.2d 146 (N.Y. Ct. App. 1991).
[78] *Ibid* at 149.
[79] *Goldmuntz*, *supra* note 8 at 866.
[80] *Bagley*, *supra* note 8 at 1115.

> The pattern revealed by the facts…and the complete lack of merit of the appeal supports the inference that the only motive for this appeal was delay.[81]

> The procedural history of this case shows that the plaintiffs have clearly had due process and any claim to the contrary is ludicrous.[82]

> [The landowners] have been obstructionist and have interfered with the orderly and efficient progress of the case, brazenly ignoring court orders and…delaying finality. [83]

In addition, there are several cases where the judge seems receptive towards the goals of conservation covenants. Recall that in *Bennett* the Supreme Judicial Court of Massachusetts explicitly stated that conservation restrictions benefit the public, and as such should be subject to a different mode of analysis.[84] Several judgments also indicate a positive attitude towards the protected land. For example, consider the following sample quotes:

> The Shawangunk range…is noted for spectacular rock formations, sheer cliffs, windswept ledges with pine barrens, fast-flowing mountain streams and scenic waterfalls, as well as a series of five mountain lakes, the "Sky Lakes." Of these, Lake Minnewaska is one, with extremely steep banks and many magnificent cliffs…[85]

> The [traditional conservation covenant] acts…to mitigate the effects of suburban sprawl, some which might be seen as inevitable, and in securing a more rural flavor.[86]

In summary, land trusts should probably be cautiously optimistic about the likely judicial attitude towards conservation covenants. Nevertheless, land trusts should be aware of a pervasive preference towards the free use of land.

Conclusion

Overall, the American jurisprudence on conservation covenants likely raises more questions than it answers. Nevertheless, it introduces certain issues that could assist Canadian land trusts in the future. In particular, land trusts should be aware that while they should avoid blatant "selective enforcement", such arguments by a landowner will probably only succeed in exceptional

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[81] *Woodside, supra* note 8 at 733.
[82] *Natale, supra* note 8 at 568.
[83] *Ponte, supra* note 8 at 81.
[84] *Bennett, supra* note 8 at 1367.
[85] *Shawangunks, supra* note 8 at 447, 448.
[86] *Connaughton* v. *Payne* 779 N.E.2d 683 (Mass. App. Ct 2002) at 687.

circumstances. Second, land trusts should be aware that there is an interpretive presumption in favour of the free use of land. In addition to striving to avoid ambiguity in their covenants, land trusts might also argue that it is inappropriate to apply this presumption to the interpretation of conservation covenants.[87]

There are several other areas where covenant drafters should be particularly cautious. First, several of the American cases confirm the somewhat obvious point that land trusts should be cautious when reserving uses for the landowner, as these uses might extend to include unanticipated activities. Second, drafters should be extremely cautious when directly incorporating statutory provisions or statutory language into the covenant. Third, drafters should probably be aware of the statutory definitions for certain common terms. Finally, drafters should carefully craft provisions dealing with the recovery of legal costs, to ensure all relevant expenses are covered.

Overall, the cases support a cautious optimism, because the easement holder succeeded in most cases. Moreover, there were very few cases where the judge completely undermined the covenant. The judicial attitude towards conservation covenants is generally positive, and indicates limited support for landowners who bring frivolous claims with respect to their covenant.

Hopefully, Canada's first cases regarding conservation covenants will be strong and positive. This would provide land trusts with a strong bargaining position, and could save enormous costs into the future. Continuing to monitor the U.S. cases should be helpful in this respect.

[87] The expansion of this argument would be an interesting area for further research.