

CHAPTER 12

ENFORCEMENT PRACTICES

NEED FOR ENFORCEMENT

Generally, parties to a covenant are committed to the protection of the land involved and to the fulfillment of their obligations under the covenant. The need for enforcement therefore does not arise. It is preferable to prevent breaches of a covenant than to enforce its terms. Regular monitoring and a well-designed program of landowner contact will go a long way to preventing breaches of the covenant. They will promote a good relationship between the covenant holder and subsequent owners of the land. However, in some circumstances, it may be necessary for the covenant holder to enforce compliance with the terms of the covenant to protect the ecological values incorporated in the covenant.

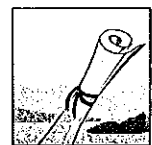
Furthermore, if the covenant holder does not enforce compliance with the covenant when breaches occur, it may lose the right to a remedy from the courts in the future. Courts have the jurisdiction to refuse to grant remedies such as an order for specific performance or an injunction on a number of discretionary grounds.⁹⁰ For example, if the covenant holder delays an unreasonable length of time in taking steps to enforce the covenant and the delay would make giving the remedy unjust, the court may refuse to grant relief. Similarly, if the covenant holder, by its actions, seems to be representing to the landowner that it does not intend to enforce the covenant and, as a consequence, enforcement would become unjust, the court may refuse relief.

In addition, as previously noted, section 35 of the *Property Law Act*⁹¹ provides that anyone with an interest in land may apply to the court for an order to modify or cancel charges or interests against the land. This includes conservation covenants. One of the circumstances under which the court may order modification or cancellation of a covenant is if the holder of the covenant has expressly or impliedly agreed to it being modified or cancelled. A landowner could argue that if a covenant holder does not enforce the covenant, the covenant holder has impliedly agreed to the modification or cancellation of the covenant.

Covenants generally include a provision stating that failure by the covenant holder to enforce a particular breach does not operate as a waiver of any other breach or affect the covenant holder's right to enforce in the future. However, given section 35 of the *Property Law Act* and the jurisdiction of the court in this area, it would not be a good practice for a covenant holder to shirk its monitoring and enforcement responsibilities and attempt to rely on this kind of provision.

⁹⁰ Courts have the jurisdiction to refuse to grant relief on a number of equitable grounds such as laches (unreasonable delay), acquiescence and waiver. An exhaustive discussion of these is beyond the scope of this guide.

⁹¹ R.S.B.C. 1996, c. 377.



It is important that covenants provide a variety of enforcement mechanisms and that covenant holders take recourse to these mechanisms when they become aware of breaches, either through monitoring or some other process.

FILE MANAGEMENT

It is a good practice for all parties to the covenant to keep detailed and accurate records of all interactions. As mentioned in Chapter 3, if a provision of a conservation covenant is determined to be ambiguous, a court might look beyond the document itself to determine the intent of the parties at the time the instrument was drafted.

Covenant holders and, where applicable, landowners therefore should take the following steps:

- Keep an organized file for each covenant.
- Document the specific reasons for entering into the conservation covenant.
- Retain all drafts of the covenant and all correspondence through negotiation process.

These records should be retained permanently because this record will be the “only voice left” indicating the intent of the parties.

In addition, each party should:

- Ensure that all notices, approvals, waivers and consents are in writing. All parties should retain the original or a copy as appropriate.
- Retain copies of all correspondence after the covenant is finalized.
- Retain all monitoring reports.

TYPES OF ENFORCEMENT MECHANISMS

Conservation covenants contain a variety of enforcement mechanisms. Most, if not all, of the following kinds of provisions should be included in a covenant.

ENFORCEMENT REMEDY

Covenants should include a mechanism to initiate and carry out enforcement. A typical provision will

- require the covenant holder to serve the landowner with written notice of any suspected breach of the terms of the covenant and the maximum cost to remedy the breach,⁹²

⁹² The covenant should also include a separate provision setting out how and to whom notice is to be given.

- require the landowner to remedy the breach within 60 days of receiving the notice; and
- if the landowner does not remedy the breach, permit the covenant holder to do so at the landowner's expense.

If the covenant holder remedies the breach and the landowner refuses to pay, the cost of remedying the breach generally is recoverable as a debt.

If there is a dispute about the breach or the cost to remedy it, it may be necessary for the covenant holder to resort to the dispute resolution provisions to recover the cost of remedying the breach.

RENT CHARGE

Conservation covenants commonly include a rent charge, another type of enforcement mechanism.⁹³ A rent charge secures payment of a specific amount by the landowner to the covenant holder for each breach by the landowner of the terms of the covenant. The amount of the rent charge is specified in the covenant and may differ from covenant to covenant, depending on factors such as the size of the covenant area and the sensitivity of the land. In addition, the amount is generally indexed for inflation since the covenant is intended to last indefinitely. Commonly, where the breach involves the removal of flora or fauna from the land, the rent charge is increased by the market value of the material removed plus an additional percentage of the value.

A rent charge is registered against title to the land. The covenant will provide that the rent charge ranks ahead of all other financial charges so that the amount of security will not be affected by enforcement proceedings by the holders of other financial charges.⁹⁴ The rent charge binds all future owners of the land.

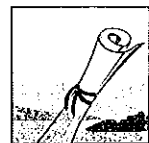
A rent charge is enforceable if the landowner is in breach of the covenant and either has not cured the breach or is not taking steps to do so. Generally, the covenant holder may enforce the rent charge in several ways,⁹⁵ including by a court action against the landowner for the rent charge amount, appointment of a receiver or an order for sale of the land. The covenant holder could apply to the court to have the landowner's interest in the land sold to provide funds to pay the rent charge.

The covenant holder need prove only that the landowner has violated the terms of the covenant in order to collect the basic rent charge amount. It is not necessary to prove that any particular harm resulted from the violation. The covenant holder can also recover the reasonable costs of enforcing the rent charge. This would include legal fees.

⁹³ The granting of a rent charge is permitted under s. 219 of the *Land Title Act* and at common law.

⁹⁴ See Chapter 8 Charges on Title. If there are other financial charges such as a mortgage or lien on title before the covenant and rent charge are registered, it will be necessary to obtain a priority agreement from the chargeholder to give the rent charge priority. As explained in Chapter 8, the prior chargeholder may not agree to give the rent charge priority.

⁹⁵ See clause 12 in the annotated covenant, Appendix 1.



All of these features make the rent charge a more powerful enforcement tool than simply bringing a court action for damages for breach of the covenant.

REQUIRING THE OWNER TO ENFORCE

Another provision frequently included in conservation covenants requires the owner to take all reasonable steps to identify and prosecute those who damage the land by trespass or vandalism and to seek financial restitution for any damage caused to the land (see Annotated Conservation Covenant, section 9.5).

POSTING SECURITY

Another option to ensure compliance is a requirement in the covenant that the landowner post a bond, letter of credit or cash as security for the performance of the covenant. While this is a common requirement in commercial contracts, it is not usually found in a covenant. A covenant is intended to last indefinitely and bind successive owners of the land. Security in this form would need to be reposted periodically, and certainly by a new owner. In addition, it would be expensive to maintain such security indefinitely.

DISPUTE RESOLUTION

A conservation covenant generally contains mechanisms for resolving disputes. Dispute resolution will be discussed in greater detail in the next chapter. However, it is important to note at this point that covenants contain these types of provisions to which the parties can or must take recourse if a dispute arises. The dispute might be about whether there has been a breach of the covenant, the meaning of the terms of the covenant or the appropriateness of any enforcement action taken. Depending on the circumstances, dispute resolution may be used in conjunction with the enforcement options described above.

It is advisable for covenants to contain a provision allowing mediation in the event of a dispute before seeking a remedy from the courts. The parties may also want to include a provision requiring that they look to an arbitrator rather than the courts to resolve disputes.

GOING TO COURT

As mentioned, the covenant holder may be required to go to court to enforce a rent charge or obtain a judgment for any amounts spent to remedy a breach.

The covenant holder could also seek an injunction, a form of court order, to stop an anticipated or ongoing violation. An injunction is available at the discretion of the court where a violation results or will likely result in irreparable harm to the land that cannot be compensated by money.

Finally, the covenant holder could seek an order for specific performance. An order for specific performance would require the landowner to comply with the terms of the covenant.

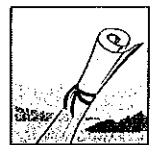
If the landowner were to disobey either an injunction or an order for specific performance, the covenant holder could bring contempt of court proceedings against the landowner.

Although sometimes necessary, court actions are very expensive and the outcome is uncertain. Furthermore, court proceedings are adversarial, resulting in a "winner" and a "loser", often creating discord between the parties. The discord could poison the ongoing relationship between the landowner and covenant holder. Beginning a court action should therefore be the last resort in enforcing the terms of a covenant.

ENFORCEMENT STEPS IN CASE OF A BREACH

The most effective enforcement is prevention of violations through ongoing contact with the landowner and diligent monitoring programs. However, violations do occur. More often than not, violations will be accidental or inadvertent. In some cases, a landowner will knowingly violate the terms of a covenant, for example, by logging a protected area. Depending on the circumstances of the violation, the covenant holder should take the following steps:

- Ensure that the suspected violation really is a violation. Does the covenant prohibit the behaviour? Is the covenant too vague? Has the covenant created a situation that is impossible to comply with or enforce? Address these questions before deciding how to proceed.
- Do not ignore violations of the covenant.
- Contact the landowner informally to notify the landowner of the violation, request that the violation stop if it is ongoing and discuss measures to remedy the situation. A face to face meeting is the best choice.
- Negotiate an acceptable solution to the problem with the landowner. In many cases this will end the matter. This first step is vital in the case of minor infractions and offers a way to deal with them in a cost effective manner. Make detailed notes of all discussions with the landowner and all actions taken. Confirm any action taken in a letter to the landowner. Advise the landowner in writing that the covenant holder is reserving the right to take further steps if the violation continues or recurs. Keep copies of all correspondence, including e-mail correspondence. If the landowner does not cooperate and continues the violation or refuses to remedy the situation or does both, give formal notice of the violation under the enforcement remedy provision of the covenant. The landowner will have a certain time period within which to remedy the breach at the landowner's cost.
- If the landowner disputes that there is a violation or interprets the covenant differently, consider using the dispute resolution provisions of the covenant and seeking mediation of the dispute if necessary. This may resolve the matter or, at least, clarify the issues that need to be resolved.



- If the landowner continues to be uncooperative even in response to formal notice, the covenant holder can take all necessary steps to remedy the breach under the enforcement remedy provisions and, if necessary, sue the landowner to recover the cost of doing so. The covenant holder can also recover at least some portion of the costs of the proceedings. In this circumstance, the covenant holder would obtain a monetary judgment against the landowner. If the landowner did not pay, the judgment could be registered against title to the property and enforced in the same way as any other judgment.
- If the landowner does not stop the violation and remedy any damage that has occurred, the covenant holder could also enforce the rent charge. There will be a number of steps the covenant holder can take to enforce the rent charge. Some of these steps will involve starting a court action. The covenant holder should consider enforcing the rent charge if the landowner has removed flora, fauna or soil from the protected area contrary to the terms of the covenant.
- If the violation is one which will cause or is causing irreparable damage to the land, the covenant holder should consider seeking an injunction as soon as possible requiring the landowner to stop the conduct that is in breach of the covenant.
- If the violation is still not remedied adequately, the covenant holder could then seek other remedies through the courts such as an order for specific performance.⁹⁶

While most breaches will be remedied at an early stage, in some cases where a breach has occurred, the party enforcing the covenant may need to employ most, if not all, of the enforcement mechanisms available in the covenant to ensure compliance with the covenant or obtain recovery of costs.

At every step, the party enforcing the covenant should make careful and detailed notes of all discussions with the party in breach. In addition, the enforcing party should keep a record of all actions taken as well as retain copies of all correspondence and documents. This information may be required as evidence in any arbitration or court proceedings.

⁹⁶ Or binding arbitration if required by the covenant.