REPORT ON COVENANTS AFFECTING FREEHOLD LAND by the Ontario Law Reform Commission, (Ontario: Ministry of the Attorney General, 1989) pp. 171.

The law pertaining to convenants running with land has received its fair share of criticism. Indeed, while many an unkind word has been written about various aspects of property law, some of the more acerbic remarks have been reserved for those principles governing restrictive covenants. So, for instance, it has been said that the law is an "unspeakable quagmire"; "both simple and devastating"; and an area in which "rigid categories, silly distinctions and unreconciled conflicts over basic values have often led to unhappy results for landowners".[1] The concepts are recondite, making mastery of the rudiments a difficult task. In this endeavour common sense appears to be an uncertain guide.

This state of affairs has not escaped notice, as the experience in recent years bears out. English law reformers have studied aspects of this area on four different occasions in the last twenty-five years;[2] there have also been recent studies in Australia[3] and New Zealand;[4] and a reformulation of the covenants section of the American Law Institute Restatement of Property is also under way. The latest contribution to the process of reform is the Ontario Law Commission's *Report on Covenants Affecting Freehold Land*.[5] This *Report* adopts the essence of the English Law Commission's 1984 proposals, but it does so in a careful and discriminating way. It offers a revision of basic principles of covenant law which is rational, and given what has been said above, this is an accomplishment not to be underrated.

The Ontario *Report* addresses the law governing positive and negative covenants affecting land. It does not contain a more general analysis of the body of law sometimes described as servitudes (which would embrace interests such as easements and profits). Neither is it principally concerned with leaseholds, although the proposals advanced would apply to both freehold and leasehold transfers.[6] The central focus is the use of covenants by nearby landowners to control land use in the neighbourhood, or as part of larger development schemes. The Commissioners accept that within these contexts covenants running with land serve a function of enduring value, but that the current law, with its manifest complexity and limiting doctrines, does not do its duty as well as it could. Moreover, they reject incremental adjustment as an approach to reform in favour of a complete overhaul.

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1. For references to these and other statements, see S.F. French, "Towards a Modern Law of Servitudes: Reweaving Ancient Strands" (1982) 55 S. Cal. L. Rev. 1261, at n. 1.
2. Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants*, Law Com. 127 (1984); United Kingdom, *Report of the Committee on Positive Covenants Affecting Land* (Cmnd., 1965) [the Wilberforce Report]; Law Commission, *Transfer of Land: Report of Restrictive Covenants*, Law Com. 11 (1967); Law Commission, *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971).
3. Law Commission of Victoria, *Easements and Covenants*, Discussion Paper No. 15 (1989).
4. New Zealand, Property Law and Equity Reform Committee, *Report on Positve Covenants Affecting Land* (1985).
5. Hereinafter cited as the "*Report*".
6. See *Report*, *ibid.* at 148.

The *Report* contains a succinct overview of Ontario law, a review of reform proposals from New Zealand and England, a description of recent changes introduced in Trinidad and Tobago[7], and an outline of the American approach to this area, which is a highly stylized form of its English counterpart. If the *Report* had done no more than this, it could deservedly be described as a useful addition to the literature (to borrow from the argot of a thousand book reviews). There is so little effective scholarship covering Canadian property law that this exposition, which is clear, concise, and as far as I can ascertain, accurate, should prove helpful to students, law teachers, practitioners and judges.

But of course the *Report* does much more: it recommends profound change to the law of covenants. While it would be impossible to summarize the many proposals advanced by the Ontario commissioners, some core concepts may be briefly described. At the heart of the proposal is the introduction of a new real property concept, to be called a 'land obligation'. That interest could accommodate both positive and negative obligations;[8] it could exist in gross, or appurtenant to a dominant tenement; and it would be capable of existing at law or in equity. The land obligation could be imposed both on an interstitial basis as between neighbours, or in development schemes. In addition to advancing these broad ideas, the *Report* also pays attention to detail, considering the specifics of formality, registration, removal and variation, and so forth. Of course, given that the bare bones summary of the proposals occupies a pithy 14 pages, any hope of the law being rendered significantly simpler may be lost. That will be especially so once jurisprudential barnacles begin to encrust the hull of any reforming legislation.

The most significant proposed changes are those affecting the transmissibility of the burden of positive covenants and the enforcement of benefits in gross. The debate concerning positive covenants has been considered in an earlier issue of this Review[9] and need not be rehearsed. Suffice it to say that whatever benefits may be enjoyed by utilising positive covenants, there are several practical problems attracted by permitting such covenants to run with burdened land. One relates to the perceived absence of adequate remedies.[10] This the *Report* seeks to overcome by the fashioning of an arsenal of statutory remedies. A second problem concerns the imposition of significant positive obligations on persons holding limited interests in land. While the Commissioners would permit negative obligations to be imposed on all occupiers of servient land, this is not the case for positive covenants. Here, for example, the covenant would not normally bind leaseholders for a period of less than 21 years.[11] A further issue is whether a landowner should be saddled with an entire unitary positive burden accruing due, in part, before he acquired his interest in land, and, if so, whether there should be a right of indemnity. The

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7. *Land Law Conveyancing Act, 1981*, Stats. Trin. & Tob. 1981.
8. In all, there would be five different types of land obligations: (1) restrictive; (2) positive; (3) reciprocal payment; (4) positive user; and (5) access: see *Report, supra*, note 5 at 111-2.
9. See B. Ziff, "Positive Covenants Running With Land: A Castaway on Ocean Island?" (1989) XXVII Alta. L. Rev. 354.
10. See S. Gardiner, "The Proprietary Effect of Contractual Obligations Under *Tulk* v. *Moxhay* and *De Mattos* v. *Gibson*" (1982) 98 L.Q.R. 279.
11. Unless the obligation was originally undertaken by a lessee: see *Report, supra*, note 5 at 123.

matter of contributions as between servient owners is considered, but it is not clear (to me) whether a prior owner must contribute where the unitary burden did not fully ripen (i.e. was not yet enforceable) during that person's tenure on the land. The celebrated *Ocean Island* case[12] illustrates how such a situation can arise, and demonstrates that this is not a purely quodlibetic concern.

Allowing benefits to exist in gross seems to be inconsistent with the underlying function of covenants law — to enhance the property rights of some landowners. The law allows Peter to be robbed but only to pay Paul. In other words, a restriction on lot A is tolerated if it benefits lot B. Removing this requirement actually draws the law back to *Tulk* v. *Moxhay*,[13] for it should be recalled that the need for a dominant tenement was not part of that seminal holding, but was added years later.[14] Permitting the transfer of benefits in gross would enable covenants to be enforced by building scheme managers, or residential associations. In response to the concern that covenants in gross might confer no appreciable or true benefit on the person entitled to seek enforcement, the Commission has recommended that this be dealt with by creating a judicial power of discharge and variation. This more flexible approach would replace the 'touch and concern' requirement as the prime mechanism to control the ambit of covenant obligations.

Although the Ontario *Report* has not really blazed some new trail, it has moved our understanding of issues relevant to reform along the learning curve. The result is a proposal which others might find attractive, in Canada and elsewhere. Despite this, there is something about the nature of the inquiry, as manifested in the *Report*, which appears impoverished. For one thing, there is no suggestion that efforts were made to determine in a systematic way the practical use of or need for covenants, and the types of problems which actually arise in their implementation. Additionally, there is no engagement of some of the more interesting writing on servitudes which has emerged in recent years.[15] The case for reform is based largely on a doctrinal analysis, which effectively exposes flaws and inadequacies in the current law, and from which is generated a sensible plan for amelioration and improvement. Perhaps a broader form of inquiry would add little to the substance of what has been recommended. Still, one cannot help wondering whether what is revealed is a somewhat narrow vision about the proper approach to law reform.

Finally, the *Report* evidences little sensitivity to at least one contemporary concern. Improving the law of covenants might be seen as a worthwhile project only to developers or wealthy landowners, and perhaps they would be the primary beneficiaries of the changes suggested for Ontario. However, to accept

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12. *Sub nom. Tito* v. *Waddell (No. 2)*, [1977] Ch. 106 at 308.
13. (1848), 2 Ph. 774, 41 E.R. 1143 (Ch).
14. This issue was settled in *L.C.C.* v. *Allen*, [1914] 3 K.B. 642.
15. See generally *Symposium Issue: A Unified Concept of Servitudes* (1982) 55 S. Cal. L. Rev. 1177-1447. See also L. Berger, "Integration of the Law of Easements, Real Covenants and Equitable Servitudes" (1986) 43 Wash & Lee L. Rev. 337; L. Berger, "A Policy Analysis of Promises Respecting the Use of Land" (1970) 55 Minn. L. Rev. 167; S.E. Sterk, "Freedom from Freedom to Contract" (1985) 70 Iowa L. Rev. 615; G.S. Alexander, "Freedom Coercion and the Law of Servitudes" (1988) 73 Cornell L. Rev. 883; J.E. Stake, "Toward an Economic Understanding of Touch and Concern" (1988) Duke L.J. 925.

this blindly is to understate the role which covenants can play in modern times, that is, in a world in which environmental concerns vie forcefully for political attention. A remarkable feature of *Tulk* v. *Moxhay* is that it was decided at a time when industrialization in Britain was ascending to its zenith. Yet the doctrine most clearly has a sterlizing effect. It creates a check on development. The very lands which were regulated by the covenant in *Tulk*, located in the centre of London, appear to have resisted full development to this day.[16] The Ontario *Report* may provide the type of sharpened tools to allow this type of action. Shrewdly used, the covenant in gross might be a very handy device for those interested in historic or natural preservation, and here various American initiatives can lead the way.[17] It is a pity that the Ontario *Report on Covenants Affecting Freehold Land* treats this aspect only in passing in fashioning its reform proposals, instead of addressing squarely whether the regime which is recommended should, and can, fully serve conservationist goals.[18]

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16. See *R.* v. *Westminster City Council*, Unreported, (19 April 1989), (Q.B.) unpublished.

17. See generally E.E. Katz, "Conserving the Nation's Heritage Using the Uniform Conservation Easement Act" (1986) 43 Wash & Lee L. Rev. 369 and the copious references cited therein.

18. *Quaere* whether a restrictive covenant which is too restrictive can constitute an invalid restraint on alienation: see *Fuji Builders* v. *Tresdoor* (1984), 33 R.P.R. 78 (Man. Q.B.).