IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Save the Heritage Simpson Covenant Society v. City of Kelowna,*** 2008 BCSC 1084

Date: 20080813
Docket: No. S75886
Registry: Kelowna

Between:

Save the Heritage Simpson Covenant Society

Petitioner

And

The City of Kelowna

Respondent

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Petitioner	T.W. Smithwick, Q.C.
Counsel for the Respondent	B.S. Williamson
Date and Place of Trial/Hearing:	June 25 and 26, 2008 Kelowna, B.C.

Introduction

[1] The Save the Heritage Simpson Covenant Society (the "Society") applies by way of petition for certain orders and declarations arising out of a dispute with the City of Kelowna (the "City") concerning the enforceability of what has become known as the Simpson Covenants. The Society represents persons who are registered owners of property in Kelowna, including members of the Simpson family. At the outset of these proceedings the City agreed that the Society had standing to bring this application under the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241, for the relief claimed except insofar as it sought a declaration that the Simpson Covenants, if found to be personal covenants, were enforceable by Mr. Simpson's heirs.

[2] The Simpson Covenants affect two large parcels of land in the downtown area of Kelowna which were purchased by the City in 1946 from the Kelowna Sawmill Co. Ltd. for $55,000. One parcel, consisting of 4.2 acres, is located on the lake shore (the "Lakeshore parcel"). The other parcel, consisting of 7.56 acres, is located between Water Street and Ellis Street (the "Old Mill Site").

[3] In 1946 the Kelowna Sawmill Co. Ltd. was a family business controlled and operated by Stanley Simpson who owned 99% of its shares. The City was looking for land on which to build a new city hall and a civic centre and approached Mr. Simpson with a view to purchasing these two parcels of land for this purpose.

[4] Mr. Simpson's agreement to sell the two parcels of land to the City was subject to three conditions, two of which are material to this petition:

1. That the City will use the property for municipal purposes and that the buildings erected thereon shall be of an attractive design and that the grounds surrounding the same shall be suitably landscaped in keeping with the type and character of the buildings so erected; and

2. That the City will not, at any time, sell the property or use it for commercial or industrial purposes.

[5] These conditions, known as the Simpson Covenants, were included in the deeds of transfer signed by both parties and registered against the titles to the property held in the Land Registry Office as restrictive covenants under numbers 47392E and 43884E. It is the validity in law and the enforceability of these covenants that is in dispute in this petition.

[6] On November 25, 2004, the City obtained the written consent of the corporate successor to the Kelowna Sawmill Co. Ltd., alleged to be Crown Forest Industries Limited, to the release of the Simpson Covenants. On April 30, 2007 the City passed Resolution No. R467/07/04/30 which purported to remove the Simpson Covenants from the affected lands. Although the City attempted to negotiate a resolution of this dispute with Ms. Simpson, the granddaughter of Stanley Simpson, these efforts were not successful.

Issues in Dispute

[7] There are several issues in dispute based upon the alternative arguments presented by the Society in support of the enforceability of the Simpson Covenants.

The Society argues the Simpson Covenants are enforceable as (1) valid and subsisting restrictive covenants, or (2) as personal covenants binding the City and Stanley Simpson's heirs, or (3) as imposing a trust binding on the City for the benefit of the citizens of Kelowna.

[8] The issues in dispute under each argument are as follows:

A. Restrictive Covenant

1. Do the Simpson Covenants meet the legal requirements for a valid and enforceable restrictive covenant, and in particular, is there an identifiable dominant tenement and were the covenants intended to run with the land in equity?

2. Is the fact of registration of the Simpson Covenants as restrictive covenants pursuant to the ***Land Registration Act***, R.S.B.C. 1936, c. 140, conclusive evidence of their validity and enforceability?

3. Is the City estopped by its conduct or representations from relying upon its strict legal rights regardless of whether the Simpson Covenants are valid and enforceable restrictive covenants?

4. If the Simpson Covenants do not meet the requirements for a valid and enforceable restrictive covenant based upon the strict application of the legal test, does equity require a broader and less restrictive test be applied to ensure the mutual intention of the parties is adhered to, because of the charitable purpose underlying

the Simpson Covenants, and due to the public duties reposed in the City?

B. Creation of a Trust

1. Do the purposes described in the Simpson Covenants fall within the legal definition of a public purpose or charitable trust that may exist in perpetuity?

2. Did the parties intend to create a trust as evidenced by the language used in the deed and the surrounding circumstances?

3. Did the legislation in force at the time of the transfer permit the City to hold land in a trust in the terms required by the Simpson Covenants?

4. If the parties intended to create a trust, who are the beneficiaries and what are the City's obligations to those beneficiaries?

C. Personal Covenant

1. If the Simpson Covenants are found to be personal covenants, who is entitled to consent to their discharge?

2. Is the City obliged to obtain the consent of Crown Forest Industries Limited, as the corporate successor to Kelowna Sawmill Co. Ltd., to discharge the covenants?

3. Is the City required to obtain the consent of Mr. Simpson's heirs to discharge the covenants based upon an exercise of the court's discretion to lift the corporate veil and conclude that Mr. Simpson contracted with the city in his personal capacity and utilized Kelowna Sawmills Co. Ltd. solely as an agent to facilitate the transfer?

4. If the Simpson Covenants are found to be personal covenants, does the Society have standing to enforce them?

[9] In addition to these substantive issues, the parties have raised issues in respect of the admissibility of certain evidence filed in affidavit form. These issues are as follows:

1. Whether an appraisal prepared by Mr. Parkhill was served in compliance with Rule 40A and, if not, whether the court should exercise its discretion to admit the opinion;

2. Whether the affidavit of Mr. Smithwick, Q.C. and the affidavits attached thereto are admissible hearsay statements; and

3. What portions, if any, of Ms. Simpson's affidavit are inadmissible as hearsay, argument, or without factual foundation?

Material Facts

[10] Stanley Simpson was a very important businessman and philanthropist who lived and worked in Kelowna from the early 1920's until the 1950's when he died. He was the owner and operator of the Kelowna Sawmill Co. Ltd. and he operated a number of other mills in and about the city. In October 1944 the company's sawmill located on Water Street burnt down and Mr. Simpson decided not to rebuild on this site. Instead, he planned to "establish an up to date retail business for the purpose of providing an adequate service for the growing community."

[11] These plans were put on hold when the City asked Mr. Simpson to consider selling the old sawmill site for its new city hall and civic centre. The City Council had struck a committee to study the possibility of acquiring land suitable for centralizing its municipal offices and public buildings which at that time were spread throughout the city creating inefficiencies and a lack of focus from a city planning perspective.

[12] This committee approached Mr. Simpson in November 1944 and asked him to consider giving the city an option to purchase two parcels of land that were being considered for the city hall and civic centre. As a result of this request, Mr. Simpson, as President of Kelowna Sawmill Co. Ltd, wrote to the Mayor and the City Council on November 25, 1944 describing the option to purchase he had agreed to extend to the City of Kelowna. The option was to be open for a period of four months and included the following parcels of land and their respective prices:

1. Lakeshore (the old sawmill site) known as Lot #1, Plan 2208 containing approximately 4.2 acres. Price with existing buildings; less stock, machinery and equipment: $25,000 (Lakeshore parcel).

2. Planing mill site situated between Ellis and Water Streets being that part of the Registered Plan B3550, lying south of the north boundary of Doyle Avenue, thence east to the north boundary of Doyle Avenue 666 ft., thence south along west boundary of the lane north of Mill Avenue 666 ft. to the point of commencement, containing 7.56 acres. Price with existing buildings; less stock, machinery, boiler and setting and all equipment to be removed by the company: $30,000 (Old Mill Site).

[13] While the committee had considered other sites for a new city hall and civic centre, its members believed that Mr. Simpson's properties were the best choice. The committee's recommendations, contained in a report completed in September 1945, clearly indicate that the Old Mill Site was the most suitable property for this purpose:

> While this site is not perfect in all respects it best fulfills the various requirements and affords many advantages. …
>
> It is in close proximity to the main commercial and shopping centre of the city yet it is sufficiently removed so that it will not interfere with commercial development – especially with its logical future development. Furthermore, although it will not be immediately adjacent to the lake shore, an uninterrupted view of the water and mountains will be afforded. And reciprocally, the building group will be seen from the water and the hills across the lake. The area is readily accessible to important streets and should not interfere with the future improvement and extension of local traffic ways.

[14] Mr. Simpson's agreement to extend to the City an option to purchase these properties came with conditions that the committee and the City Council of the day readily accepted. These conditions became known as the Simpson Covenants. The option agreement was also subject to a condition that the company have two years to vacate the lands and additional time, if necessary, to enable the company to re-establish its business elsewhere. The company required this time to clean up the

fire damage on the lands, at its own cost, which was part of the arrangement with the City. Lastly, Mr. Simpson asked the City to decide the matter quickly because his plans to develop the properties, should the option not be taken up, would have to be held in abeyance while the option remained open.

[15] Immediately thereafter began a public debate over whether the City should exercise the option to purchase offered by Mr. Simpson. At first the debate centred on the Old Mill Site and not the Lakeshore parcel. Local newspaper accounts of the debate commencing in November 1944 indicate that the City Council approved the recommendation of the committee that the Old Mill Site be purchased for the civic centre. In addition, the newspapers reported that the price of $30,000 was arrived at by the committee and Mr. Simpson and that this price was considered to be "considerably less than the actual value of the property." Once the property was surveyed the committee was to draft a bylaw and the entire issue was to be discussed at a public meeting. If the bylaw was approved the City would then put the purchase to a vote of the electorate. The Simpson Covenants were also described by the newspaper articles as conditions of the purchase.

[16] Later the City Council's discussions about the option broadened to include the Lakeshore parcel; however, there was a concern that some ratepayers felt the City was acquiring more property than it required for the new civic centre. As a consequence, Mr. Simpson agreed that, if the bylaw and plebiscite for the purchase passed and it was decided that not all the land was required, he would sell the City only that portion of the parcels actually required for the civic centre and the city hall.

[17] Again, in the spring of 1945, the local newspapers carried stories about the upcoming meetings and referenda concerning the purchase of Mr. Simpson's properties. The newspapers contained comments such as: "The price, real estate men agree, is considerably below the value of the property should it be sold for commercial purposes." Further, the newspapers reported that should the ratepayers reject the purchase, "the property will then be sold for commercial purposes by M. S. Simpson." They also reported that:

> This means the last available site for a group of civic buildings in the city would disappear. If this property is not purchased, any civic buildings that may be erected in the future must be scattered all over the city, an inconvenient and inefficient situation …

[18] Public meetings were held in the spring of 1945 and bylaws were eventually approved for the purchase of both parcels of land. The bylaws stipulated that the purchase of both parcels would be subject to a referendum of the ratepayers. Although the option to purchase had expired long before this time, Mr. Simpson had agreed to extend the option without insisting on any new terms. In May 1945 the ratepayers voted on the purchase of both parcels and the vote was overwhelmingly in favour. The City adopted the referendum vote on May 21st and purchased the Old Mill Site. The option on the Lakeshore parcel was postponed pending receipt of the committee's final report. This property was not actually purchased until December 1945 after another overwhelmingly favourable referendum.

[19] In May 1945, before the sale of the properties completed, the entire 11.8 acre site owned by the Kelowna Sawmill Co. Ltd was subdivided into two lots; 4.24 acres north of the Old Mill Site was retained by the company and the balance of the parcel,

7.56 acres, was sold to the City pursuant to the option to purchase agreement. From the 7.56 acres, 1.01 acres was used for Doyle Avenue which ran between the two lots in an east/west direction.

[20] The transfer documents for the properties were eventually registered in the Land Registry Office in or about January 1946 and these documents reflect the identical terms and conditions contained in the option to purchase, including the Simpson Covenants. The Simpson Covenants were also recorded and registered as Restrictive Covenants against the two subject properties.

[21] Also in accordance with the committee's recommendations, the City Council passed bylaws to acquire land located to the south of the Old Mill Site by purchasing a number of adjacent lots on Mill Avenue for a total price of $60,700. The committee recommended that these lots be purchased because:

> Not only is this enlargement needed to accommodate the buildings and their accessories, such as lawns and parking spaces, but otherwise, the whole effect of the building group would be irretrievably lost if this development did not front upon Mill Avenue. Nothing could be more undesirable than a fine stately group of buildings abutting a narrow city lane which traverses the rear row of heterogeneous buildings ranging from old dwellings to a laundry and a broadcasting station.

[22] The bylaws passed for the purpose of acquiring the Mill Avenue lots were also subject to a public referendum. The City received the assent of the ratepayers to purchase these properties in December 1945. The total acreage covered by the Mill Avenue lots was between 1.4 and 1.65 acres. The committee's report described the lots on Mill Avenue as having an assessed value of $33,190. The old buildings

and business located on the Mill Avenue lots were to be torn down. The salvage value of the buildings was estimated to be about $9,000.

[23] In December 1949, the City passed a bylaw authorizing the transfer of a portion of the Lakeshore parcel to the Provincial Government for the purpose of building a courthouse and government buildings and it received other lands owned by the Province in exchange. The transfer was made subject to the Simpson Covenants and approval of the sale was obtained from the Kelowna Sawmill Co. Ltd. After some negotiations between the City and Mr. Simpson, the company agreed to release the City from the prohibition against the sale of the lands to allow the transfer to the Province because the construction of the courthouse was seen to be for a municipal purpose. The newspaper reports of the day said that the project also involved the construction of a double ferry slip at the end of Mill Avenue and a seawall with accommodation for the Kelowna Yacht Club. When this portion of the Lakeshore parcel was re-acquired by the City in 1966, it remained subject to the Simpson Covenants and was used to create a park on the waterfront.

[24] In 1955, Mr. Simpson wrote to his son criticising the City's plan to option a portion of the property governed by the Simpson Covenants to a private party who intended to build a hotel. Mr. Simpson referred to the original sale of the lands and said: "The price received [for the two Kelowna sawmill parcels] was much less than could have been realized if held as an investment and sold in blocks or in lots." He also stated: "The City agreed to use these lots for community or park purposes." Mr. Simpson ultimately objected to the City's plans and the hotel development did not proceed.

[25] In 1972, a dispute arose between the City and the Kelowna Yacht Club concerning the terms of their lease which covered a portion of the Lakeshore parcel. The City had entered into the lease in February 1951 and the 1972 dispute concerning the terms of the lease gave rise to a discussion about the original intention behind the Simpson Covenants. Affidavits signed by Horace Simpson, Mr. Simpson's son, W.B. Hughes-Games, the Mayor of Kelowna in 1951, and R.F. Parkinson, who was an alderman in 1951, were submitted to the 1972 City Council in connection with the dispute. While the subject of the affidavits is not relevant to these proceedings, there are statements contained therein that touch and concern the issues in dispute. In this regard, Horace Simpson's affidavit says:

> 1. That the said property was transferred to the City of Kelowna at a greatly reduced price so that my father's intentions with regard to the said property would be fulfilled.
>
> 2. That my father intended that this property should be for the benefit of the citizens of the City of Kelowna for all time in the form of a Civic Centre and that the said property was not to be used by the City of Kelowna as a commercial venture.

Mr. Hughes-Games' affidavit says:

> 1. That I was Mayor of Kelowna at the time of the signing of the Yacht Club lease in February of 1951.
>
> 2. That I am familiar with the circumstances and intentions of the parties concerned in the transfer of the property from S.M. Simpson to the City of Kelowna as well as the Yacht Club lease signed in February 1951.
>
> 3. That I spoke with Mr. S.M. Simpson regarding the transfer of the old mill property from Ellis Street to the Okanagan Lake to the City of Kelowna for a nominal amount with the intention that the said property be used for the purposes expressed by Mr. S.M. Simpson.

4. That Mr. S.M. Simpson intended that the property should be used for the benefit of the citizens of Kelowna for all time …

5. That it was agreed between Mr. S.M. Simpson and the City Council that this property be transferred to the name of the City of Kelowna and that the said particular piece of property be used for the benefit of the Yacht Club.

6. That it was agreed that the total of this property was to be used for the benefit of the citizens of Kelowna and was never to be used for a commercial venture.

Mr. Parkinson's affidavit says:

1. That I was an alderman at the time of the signing of the Yacht Club lease in February 1951 and that I had a discussion with Mr. S.M. Simpson and various other people involved in the transfer of the property of Mr. S.M. Simpson to the City of Kelowna in 1946.

2. That I am familiar with the circumstances and intentions of the people involved in the transfer of the said property and the signing of the said lease.

3. That Mr. S.M. Simpson transferred the property at the old Kelowna sawmill to the City of Kelowna at a greatly reduced price so that a Civic Centre could be established and so that his various intentions could be fulfilled.

[26] Further evidence of the state of mind among those persons involved in the transfer of the properties to the City can be found in a speech given by the Mayor of Kelowna, Mr. J.J. Ladd, in April 1957 when he bestowed the "Freedom of the City" award on Mr. Simpson because of his tremendous contributions to the development of Kelowna. In this speech Mayor Ladd said:

> We are also very grateful to S.M. for selling "The Kelowna Sawmill Property" to the City, at a very nominal price, enabling us to plan and build the most modern Civic Centre in British Columbia. The citizens will always be very grateful for that thoughtful and kindly act. I should mention here, Ladies and Gentlemen, that S.M. has always been a wonderful citizen – very keen for the betterment of Kelowna, particularly in town planning.

[27] In April 2004, the City entered into a letter of intent with Westcorp Holyrood Inc. for the purchase of certain property, a portion of which was bound by the Simpson Covenants. The letter of intent stipulates that the City must obtain the approval of the "Simpson Family" to amend the covenants to allow for the proposed development. Further, the letter of intent is to be null and void if the family's approval cannot be secured. The Westcorp proposal was not approved by the Simpson family and the deal collapsed for the time being.

[28] Mr. Shipclark, the City's Director of Corporate Services, was responsible for negotiating the letter of intent with Westcorp. In his affidavit he deposes that at the time no staff member had obtained a legal opinion concerning the validity of the Simpson Covenants. Further, Mr. Shipclark deposes that without having investigated the subsequent corporate history of the Kelowna Sawmill Co. Ltd., the City's staff assumed that the shares were retained by Mr. Simpson's heirs.

[29] In October 2004 the City obtained a legal opinion from their solicitors that the Simpson Covenants were personal covenants between the City and the Kelowna Sawmill Co. Ltd and, as a consequence, only the permission of the successor to this company was required to secure their release. The City obtained a release of the Simpson Covenants on November 25, 2004 from a corporation known as Crown Forest Products Industries Limited which has its registered offices in the Yukon. The City alleges that this company is the successor to the Kelowna Sawmill Co. Ltd.

[30] Mr. Simpson owned all of the shares in the Kelowna Sawmill Co. Ltd. except for two shares held by other family members and two shares held by long term

employees. When he died in 1959, the controlling shares remained within the Simpson family but the company was eventually sold to Crown Zellerbach Canada Ltd. in 1965. Crown Zellerbach sold the company to Fletcher Challenge New Zealand in 1982 and the operating company became known as Crown Forest Industries. In 1988 Crown Forest Industries merged with BC Forest Products and changed its name to Fletcher Challenge Canada Ltd. In 1993 Fletcher Challenge Canada Ltd. sold 51% of its shares to TimberWest and the remaining 49% was sold to NorskeCanada. In 1994 Riverside Forest Products purchased Fletcher Challenge's interior BC sawmills and in 2004 Tolko Industries bought all the shares of Riverside Forest Products.

[31] Notwithstanding it had received the consent of Crown Forest Industries to release the Simpson Covenants, the City sought the approval of the Simpson family again throughout 2005 to 2007 as part of its plan to pass a resolution for the removal of the covenants. Their protracted negotiations failed to achieve a satisfactory settlement of the dispute. When the resolution to remove the Simpson Covenants passed, the Society obtained a certificate of pending litigation and commenced this action. Mr. Shipclark's affidavit says the City preferred to attempt to obtain a consensual release of the covenants by negotiating with the Simpson family rather than litigate the dispute.

[32] The market value of the Lakeshore parcel and the Old Mill Site in 1946 is in dispute. The affidavit of Mr. Fleming, deputy clerk for the City, attaches several public records that the City argues has a bearing on land values during the relevant period. While the property assessments for the land within the City for the years

1940 to 1950 have been lost, the aggregate value of all lands and improvements for taxation purposes was found in the City's financial statements. Both the total value of the lands and improvements increased over the decade; however, the aggregate value of the improvements consistently exceeded the value of the land. Mr. Fleming also obtained the corporate financial statements for the Kelowna Sawmill Co. Ltd. for the years 1932 to 1946. The value of the Old Mill Site and the Lakeshore parcel in 1933 was declared as $35,836.92; and this figure remains the same up until the annual report for 1939. In the 1941 annual report the company's real estate was valued at $37,172.67, in 1943 the total value was stated as $36,412.67, in 1945 the total value was recorded as $41,912.67, and in 1946 the Old Mill Site and the Lakeshore parcel were stated to be valued at $50,836.92.

[33] The City obtained an appraisal of the Old Mill Site and the Lakeshore parcel from Mr. Parkhill which is dated November 15, 2007. Mr. Parkhill's appraisal purports to establish the fair market value of the properties between November 1944 and December 1945 when the purchases were completed. In his opinion, the $55,000 paid for the two parcels of land was the fair market value for the properties in 1945.

[34] Mr. Parkhill excludes from his calculation 1.01 acres of the Old Mill Site which formed the dedication to the City for Doyle Avenue along the north side of the parcel. No reasons are given for this deduction even though presumably the City could not have expropriated it without cost simply because it was required for a road dedication. While Mr. Simpson's option agreement with the City indicates the Lakeshore parcel was 4.2 acres, Mr. Parkhill says the lot size on the survey plan is

3.5 acres and this was further reduced by .04 acres by court order. He uses the smaller figure when coming to his opinion.

[35] Mr. Parkhill compared this purchase with other historical purchases based on the price per square foot. By his calculations, the Old Mill Site was purchased for 10.5 cents per square foot and the Lakeshore parcel was purchased for 16.6 cents per square foot.

[36] The Lakeshore parcel and the Old Mill Site were zoned Industrial and Light Industrial in 1945. Light Industrial zoning included uses permitted in the Retail zone as well as bus and truck terminals, bakeries, clothes cleaners, machine shops, blacksmiths, and the like. Retail zones could have any shop, store or hotel, banks, apartment houses and schools. The principal uses within the Industrial zone were wholesale trade and storage, retail builders' supplies, coal and wood, garages, motor service stations, parking, laundry, bus and truck haulage, apartments and apartment houses, churches and schools.

[37] Mr. Parkhill's report reviews thirty-three property sales between September 1944 and February 1946. The City sold twenty-two of these lots to private purchasers. A significant quantity of commercial, industrial and residential property reverted to the City during the Depression years because of unpaid taxes. Thus at the end of WWII the City offered these parcels for sale. The price per square foot varied considerably. The parcels zoned for light industry made up the majority of the sales and these lots were sold at a low of 6.92 cents per square foot to a high of 15 cents per square foot. There were two sales involving larger parcels of land zoned

Livestock and Industrial which were located farther from the City's core. One 12,000 square foot property was sold by the City to W.A.C. Bennett to build a hotel and the price was 34.17 cents per square foot.

[38] The balance of the thirty-three sales involved the City as purchaser. Seven purchases included the lots along Mill Avenue for which the City paid a total of $60,700. The price per square foot ranged from 11.11 cents to 281.67 cents, with an average of $1.69 per square foot. Mr. Parkhill concluded that because the City paid much more for some lots than others, the price difference was due to the presence of improvements on the lots. As a consequence, Mr. Parkhill estimated the value of the 36,000 square feet of land to be $6,000 and the improvements to be worth $54,700. After quoting the committee's description of the Mill Avenue properties Mr. Parkhill says at p. 43 of his report:

> Considering the foregoing statement and a number of newspaper articles which reported the salvage value of the buildings located on the north side of Mill Avenue at about $9,000, it is concluded that Indices 24 to 28, inclusive, transacting between $7,800 and $20,000 per property, were substantially improved at the date of sale. Indices 24-28, inclusive, comprise an aggregate area of 36,000 square feet. Based on the 16.67 cents per square foot rate reflected by Index 23, the indicated land value attributable to Indices 24-28 is: 36,000 square feet x 16.67 = $6,001 rounded to $6,000. The contributory value of the improvements, with respect to the $60,700 purchase price is, therefore, estimated at: $60,000 - $6,000 = $54,700.

[39] The other four purchases by the City involved residential lots ranging from 9.83 cents per square foot to 4.17 cents per square foot. These lots were located to the north, south, and east of the subject properties.

[40] Mr. Parkhill concluded that notwithstanding the price per square foot of the subject properties was somewhat higher than the mean values paid for Light Industrial and Industrial land during the same time period, this could have been due to their "eminent small lot subdivision potential". Mr. Parkhill's report at p. 47 indicates that the Lakeshore parcel could have been subdivided into about 13 lots and the Old Mill Site, excluding the Doyle Avenue dedication, could have been subdivided into 32 lots.

Argument and Discussion

A. Evidentiary Issues

[41] The Society argues that Mr. Parkhill's appraisal is inadmissible because, although it had notice of the report itself, it was not tendered in the form of an affidavit within the time limits specified in Rule 40A of the ***Supreme Court Rules***, B.C. Reg. 221/90. Assuming that Rule 40A requires the expert report to be delivered in affidavit form within the sixty-day time limit, I find there was no prejudice to the Society in the circumstances of this case. The Society had ample opportunity to peruse the appraisal and make a decision as to whether it would be necessary to present evidence in response to it. The court has a discretion to waive the requirements for delivery of the expert's statement of opinion pursuant to Rule 40A(15) and the lack of any prejudice is a proper ground upon which to exercise that discretion: Rule 40A(16)(b). Thus I waive the requirement for delivery of the opinion in affidavit form and find that the appraisal is admissible.

[42] The City objects to the admissibility of three affidavits sworn in 1972 by Mr. Simpson's son, the mayor of Kelowna in 1951, and a Kelowna alderman in 1951. All of the statements contained in these affidavits are hearsay. Nevertheless, I find they are admissible under the principled approach to the admission of hearsay evidence. First, it is common ground that all of the deponents are deceased and unavailable to testify at trial. Thus the criterion of necessity is easily satisfied. Second, the statements sought to be admitted are clothed with indicia of reliability. The statements are contained in sworn affidavits; the statements concerning the price paid for the subject properties and Mr. Simpson's intention to benefit the citizens of Kelowna by the sale of the properties were not in dispute at the time the affidavits were sworn; and the deponents were either closely related to the original parties, as in the case of Horace Simpson, or directly communicated with the original parties, as in the case of Mayor Hughes-Games and Alderman Parkinson. I am also satisfied that the statements by the mayor and the alderman can be regarded as declarations against interest by a party to this proceeding and thus admissible as an exception to the hearsay rule. The City must be taken to be bound by the statements of its officials, and the predecessors of those officials.

[43] The City also argues that certain portions of Ms. Simpson's affidavits are inadmissible because they do not properly identify the source of her information and belief and are more in the nature of argument and opinion. To the extent that Ms. Simpson's affidavit is in the nature of argument and opinion, it is not relevant and it is inadmissible. Where Ms. Simpson has no direct knowledge of the facts deposed to, and fails to state the source of her knowledge and belief, I agree the evidence is

inadmissible. It is, however, appropriate for the court to have regard to all the material attached to her affidavits, as these are a matter of public record or business records, to determine the admissibility and relevance of Ms. Simpson's affidavit material as well as the affidavits filed by the City. While the City has raised concerns with respect to the admissibility of many specific parts of Ms. Simpson's affidavit, I have considered the evidence as a whole in accordance with these general propositions. I have not relied on any evidence that is inconsistent with the principles I have set out here.

B. Are the Simpson Covenants Valid and Enforceable Restrictive Covenants?

[44] The Society argues the Simpson Covenants are enforceable as valid and legally binding restrictive covenants for several reasons. First, when the Simpson Covenants were registered as restrictive covenants in 1946, the governing legislation did not contain the equivalent of s. 222 of the ***Land Title Act***, R.S.B.C. 1996, c. 250, which declares that registration of a restrictive covenant is not a determination by the Registrar that it is enforceable. Instead, the Society argues that the provisions of the ***Land Registration Act***, R.S.B.C. 1936, c. 140, and in particular ss. 36 and 37 of the Act, combine to deem every registered charge as binding in law and equity. The Society argues that when the registrar accepted the Simpson Covenants for registration, and recorded them on title as restrictive covenants, there was implicitly a determination of their enforceability.

[45] Second, the Society argues that while the Court has jurisdiction to review the validity of these covenants, it must do so in the context of the law in 1946 and the

understanding and expectations of the parties to the purchase. The Society maintains that when the Simpson Covenants were registered the relevant parties understood them to be valid restrictive covenants running with the land. Moreover, up until April 2004 the City had dealt with the land on the basis that the Simpson Covenants were valid and binding restrictive covenants running with the land. In this regard, the Society maintains the City is now estopped by its conduct from asserting its strict legal rights in regard to the Simpson Covenants: ***Crabb v. Arun District Council***, [1976] 1 Ch. 179 (C.A.) at 187 to 188; ***Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.,*** [1981] 3 All ER 577 (H.L.); ***Zelmer v. Victor Projects Ltd.*** (1997) 34 B.C.L.R. (3d) 125 (C.A.); and ***Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.*** (2003), 12 B.C.L.R. (4th) 46 (C.A.).

[46] Applying the principles of estoppel to this case, the Society argues that Mr. Simpson acted to his detriment by selling his land to the City at less than market value because of the City's agreement to use the land in perpetuity for municipal purposes. As a consequence, the Society maintains the court should not allow the City to insist on its strict legal rights to the detriment of Mr. Simpson whose rights have passed either to the citizens of Kelowna, as the beneficiaries of the covenants, or to the Simpson family as Mr. Simpson's heirs.

[47] Third, the Society argues the formal validity of the Simpson Covenants should not be determined according to a strict test and, instead, should be based upon the actual intention of the parties. Using the building scheme as an analogy, the Society argues the same principles of relaxed interpretation should apply here: ***Gubbels v.***

Anderson (1994), 91 B.C.L.R. (2d) 379 (S.C.), aff'd (1995), 8 B.C.L.R. (3d) 193 (C.A.). The Society maintains that restrictive covenants that are charitable in nature and are meant for the benefit of the citizens within a municipality should not be narrowly construed. The Simpson Covenants, argues the Society, warrant different treatment because they were created as a result of the philanthropic intentions of the grantor, benefit all citizens of Kelowna and were endorsed by a vote of the electorate, serve a public purpose, and create a moral obligation on the City.

[48] Fourth, the Society argues that if the strict test of formalities is applied to the Simpson Covenants, the surrounding circumstances provide the required evidence of the intended dominant tenement or benefiting lands. In this regard, the Society says the benefiting lands were all property within the municipal boundaries of Kelowna. While this argument was rejected in ***Thierman v. Itaska Beach (Summer Village)*** (2002), 316 A.R. 102 (Q.B.), the Society argues that case was wrongly decided.

[49] The Society says that for practical reasons it was not possible for the parties to define the benefiting lands within the registered documents; both the volume of the individual lands and the changing boundaries of the municipality would make it impractical to define the dominant tenement in the deed itself. The Society also maintains the fact the parties believed the covenants were valid and binding in 1945 should be the governing factor; the court should not retrospectively allow now apparent deficiencies to frustrate the parties' intentions.

[50] Lastly, if the benefiting lands must be defined more specifically to ensure the formal validity of the covenants, the Society argues that the benefiting lands must be regarded as those lands owned by the Kelowna Sawmill Co. Ltd. at the time, which included 350 Doyle Avenue, 460 Doyle Avenue, 1380 Ellis Street, 820 Guy Street, and all the lower bench of Knox Mountain.

[51] The City argues the Simpson Covenants do not meet the formal requirements for enforceable restrictive covenants for three reasons: (1) the conditions do not touch or concern land that would conceivably benefit from the limitations; (2) the deed of transfer does not identify the benefiting lands and clearly does not describe such lands with precision; and (3) the deed of transfer fails to state that the covenants are imposed on the burdened land for the benefit of the lands held by the grantor. The City argues that covenants having the same defects were declared invalid in ***Galbraith v. Madawaska Club Ltd.***, [1961] S.C.R. 639, where the court held that the benefiting lands must be identified in the deed to make it easily ascertainable.

[52] The City maintains the benefiting lands cannot be defined by extrinsic evidence except where the deed is ambiguous in its reference to the dominant tenement. If there is no reference to the benefiting lands in the deed, extrinsic evidence cannot be used to define the benefiting lands where the instrument does not do so: ***Kirk v. Distacom Ventures Inc.***, [1996] B.C.J. No. 1879 (C.A.) (QL) and ***Galbraith*** at p. 9. Regardless of the intentions of the parties, the City maintains the deed must contain some reference to the benefiting lands to be valid and enforceable based upon extrinsic evidence.

[53] In regard to the Society's argument that the benefiting lands were those within the municipal boundaries, the City says that ***Thierman*** was correctly decided against this point. In particular, the City underlines the reliance of the court in ***Thierman*** on ***Guaranty Trust Co. of Canada v. Campbelltown Shopping Centre Ltd.*** (1986), 72 A.R. 55 (C.A.), a decision cited with approval by our Court of Appeal in ***Distacom***.

[54] Addressing the Society's argument in regard to the registration of the Simpson Covenants, the City says that, if accepted, the argument would nullify the operation of s.35 of the ***Property Law Act*** which allows the Court to order the modification or cancellation of various charges against land, including restrictive covenants, on grounds that include invalidity, expiration, and unenforceability: s. 35(2)(e) of the Act. Moreover, the City argues that the court in ***Distacom*** applied the equivalent to s. 221(2) of the ***Land Title Act*** to a restrictive covenant created in 1936 without regard for the legislation in effect at that time.

[55] The City argues that s. 36 and s. 37 of the ***Land Registration Act*** of 1936 do not constitute conclusive evidence that a registered charge is valid. While the certificate of title may provide conclusive evidence of a registered charge, it does not provide conclusive evidence of the interest passed under a registered charge. Section 36 says that the instrument shall pass the estate covered by the instrument which implies that the nature of the interest capable of being transferred is still subject to judicial determination. The City maintains that s. 40 and s. 41 of the 1936 ***Land Registration Act***, which governed registered charges, only provided a

subsequent purchaser with notice of the registered charge; it did not provide conclusive evidence of the charge's underlying validity: see ***Gubbels*** (C.A.).

[56] The City maintains that the actions of its predecessors cannot be used to infer the validity of the Simpson Covenants because there was no investigation into their enforceability until late in 2004. In addition, relying on ***Distacom***, the City says the longevity of a covenant is not a reason to conclude it is valid despite obvious defects.

[57] The City argues that the Society's estoppel submission must fail because the detriment must be suffered by the grantor which in this case was the Kelowna Sawmill Co. Ltd. and not Mr. Simpson in his personal capacity. The fact that the successor to the Kelowna Sawmill Co. Ltd has now signed a release of the Simpson Covenants is conclusive evidence that it suffered no detriment. In addition, the City argues there is no evidence Mr. Simpson acted to his detriment based on the representations by the City that it would honour the covenants because the land was sold for fair market value and the sale gave Mr. Simpson the opportunity to consolidate his operations in one location: Parkhill Appraisal and the Fleming Affidavit at p. 165. The City also argues that during Mr. Simpson's lifetime he did benefit from the covenants because they precluded the municipality from selling the properties to a competitor. The City argues the Society's position that Mr. Simpson's rights under a claim of proprietary estoppel should pass to the residents of Kelowna or the Simpson heirs is not supported by any authority and does not fit within any proper interpretation of this doctrine.

[58] Lastly, the City argues there are no compelling public policy reasons for applying a relaxed interpretation to the Simpson Covenants. First, the City says that building schemes are a different class altogether and cannot be compared to the covenants in this case: ***Gubbels*** at ¶16 to 20. Second, the City argues the lands were sold for fair market value and precluded any competitive business; thus it is not clear that Mr. Simpson acted out of philanthropic motives. Third, the City maintains "municipal purposes" does not support a finding of a charitable purpose: Waters, *Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005). Fourth, while the assent of the electorate was believed to be a necessary precondition to the purchase, ss. 59(17)(a), (21), (41), (175), and (181) of the ***Municipal Act***, R.S.B.C. 1936, c. 199, authorized purchases of land for municipal buildings without permission of the ratepayers. Moreover, the option to purchase does not incorporate electoral assent as a precondition to any changes in the covenants or to the transfer itself unlike the case of ***Armstrong v. Langley (City)*** (1992), 69 B.C.L.R. (2d) 191 (C.A.). Lastly, the City argues that the Simpson Covenants are subject to the changing legislative framework and today there is nothing in the ***Municipal Charter*** that requires the City to put the release of the Simpson Covenants to a vote of the electorate.

[59] To establish a valid and enforceable restrictive covenant that runs with the land, there are certain preconditions that must be satisfied. These are defined by our Court of Appeal in ***Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.***, 2001 BCCA 268, at ¶16:

> (a) the covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement. No personal or affirmative covenant requiring the expenditure of

> money or the doing of some act can, apart from statute, be made to run with the land.
>
> (b) The covenant must be one that touches and concerns the land; i.e., it must be imposed for the benefit, or to enhance the value of the benefited land. Further, that land must be capable of being benefited by the covenant at the time it is imposed …
>
> (c) The benefitted as well as the burdened land must be defined with precision in the instrument creating the restrictive covenant …
>
> (d) The conveyance or agreement should state the covenant is imposed on the covenantor's land for the protection of specified land of the covenantee …
>
> (e) Unless the contrary is authorized by statute, the titles to both the benefited land and the burdened land are required to be registered …
>
> (f) Apart from statute the covenantee must be a person other than the covenantor.

[60] Apart from the issue of whether any benefiting lands may be identified in relation to the Simpson Covenants, at least one of the covenants cannot be regarded as touching and concerning such lands. It is apparent that the condition that prohibits the City from selling the property is not one that touches and concerns the land but is personal to the covenantee. The condition gives the Kelowna Sawmill Co. Ltd. the right to determine who will own the land which has nothing to do with how the servient tenement will be used to the benefit of the dominant tenement. In ***Noble v. Alley***, [1951] S.C.R. 64, the court concluded that a covenant that precluded alienation to certain classes of persons was not a condition that touched and concerned the land. The same result occurred in ***Galbraith*** where the court

held that a covenant inserted into a deed by a golf club restricting who could occupy the servient land did not run with the land. As Judson J. said at ¶21:

> The covenant in question here gives the Club the right to choose the persons who shall occupy the servient land, if the owner wishes to go outside the club membership. This has nothing to do with the use to which the land may be put, but relates only to the kind of person who may be given occupation. It is imposed by the vendor for its own benefit as a club. It does not touch or concern the land, as being imposed for the benefit of or to enhance the value of land retained by the club. It calls into being the exercise of an unfettered personal discretion by the club management and its plain purpose is to preserve the amenities of the club.

[61] Moreover, in 1946 a prohibition in respect of the sale of the land would have violated the Rule against Perpetuities unless it came within one the recognized exceptions to the Rule which included a charitable purpose trust. As Cheshire's *Modern Law of Real Property*, 11th ed. (London, Butterworths: 1972) says at p. 260:

> The consistent policy of the law has been to prevent land from being unnecessarily tied up and so removed from commerce. There are two ways in which a settlor may offend this policy, viz. either by imposing a restraint upon its future alienation, or by creating a succession of future interests and so postponing to a remote period the time when the land will vest in somebody for an absolute interest. The law has attacked the first evil by invalidating most conditions against alienation, and it has restrained the power of creating future interests by providing in the rule against perpetuities that such interests must arise within certain limits.

[62] The fact the land cannot be transferred or disposed of also leads one to doubt whether the other conditions were intended to run with the land as restrictive covenants. Restrictive covenants are intended to continue to benefit the dominant tenement and burden the servient tenement as each is transferred or sold over time.

Where the servient tenement cannot be sold, there is no symmetry of benefit and burden passing with the transfer of the lands contemplated by the legal and equitable principles governing restrictive covenants.

[63] It is also apparent from the discussion above that to be enforceable a restrictive covenant must benefit lands retained by the vendor at the time the servient lands are transferred. The instrument of transfer must annex the benefit of the covenants to land retained by the vendor as otherwise the covenants are only personal to the parties to the agreement or their respective heirs, successors, or assigns. In this case there is nothing in the option to purchase or the deed of transfer that annexes the benefit of the Simpson Covenants to any other lands owned by the Kelowna Sawmill Co. Ltd. or Mr. Simpson in his personal capacity.

[64] The Society argues that the circumstances surrounding the sale of the properties can be used to infer an intention that the dominant tenement was either all lands within the municipal boundaries or lands owned by the company adjacent to the properties sold to the City. In regard to the issue of when extrinsic evidence may be examined to identify or determine the existence of benefiting lands, Judson J.'s conclusions at ¶24 in ***Galbraith*** appear to suggest that where the agreement or the deed omits any reference to the dominant tenement, the intention of the parties cannot be inferred from extrinsic evidence:

> The majority of the Court [in *Canadian Construction Limited v. Beaver Lumber Limited*, [1951] S.C.R. 682] did not find it necessary to consider the extent of the admissibility of evidence of surrounding circumstances, for the purpose of indicating the existence or situation of other land of the covenantee intended to be benefited. However, the plain implication in the judgment of this Court in affirming the trial

> judgment was that a restrictive covenant contained in an agreement which omits all reference to any dominant land, although it sets out the restrictions placed upon the servient land, is unenforceable by the covenantee against a successor in title of the covenantor, since such an agreement expresses no intention that any other lands should be benefited by the covenant. A covenant running with the land cannot be created in this manner and in the absence of any attempted annexation of the benefit to some particular land of the covenantee, the covenant is personal and collateral to the conveyance as being for the benefit of the covenantee alone.

[65] In 1996 our Court of Appeal applied and explained the ***Galbraith*** requirements in ***Distacom***. In that case the original owner of certain Crescent Beach lands (1.5 acres) subdivided that property into seven lots and, retaining two of them, sold the other five to a company that, in turn, sold the lots to Distacom. When Distacom began to develop the lots, Kirk opposed the development on the ground that there was a restrictive covenant contained in the original 1936 deed transferring the 1.5 acres that only permitted one building to be constructed on the entire parcel. Distacom petitioned under s. 31 of the ***Property Law Act,*** R.S.B.C. 1979, c. 340, to cancel or modify the restrictive covenant. The issue before the Court of Appeal was whether the trial judge erred in concluding the restrictive covenant sufficiently identified the dominant tenement so as to make it enforceable against Distacom. After considering the authorities, Williams J. A. came to the following conclusions about the use of extrinsic evidence to identify the dominant tenement at ¶32:

> Taken together, *Guarantee Trust* and *Sawlor v. Naugle* interpret *Galbraith v. Madawaska Club* as requiring that dominant land be identified in the instrument creating the covenant to a high degree of specificity. While I have no reason to doubt that these cases were correctly decided on their facts, I am uncomfortable with the level of description that they seem to require of the instrument. *Galbraith* is clear authority for the proposition that extrinsic evidence cannot be

> adduced to identify dominant lands where an instrument does not purport to do so. However, where an instrument does contain a term purporting to identify dominant lands, extrinsic evidence may be used to explain that term or to identify its subject matter: *Canadian Construction* at p. 693 per Locke J.

[66] These authorities are binding on this court and they preclude the use of surrounding circumstances to identify the benefiting lands where there is no reference at all to such lands in the deed of transfer or the purchase and sale agreement. This is precisely the case at hand. There is no reference to the dominant lands in the Simpson Covenants, the deed of transfer, or the option to purchase agreement.

[67] The Society argues that this strict test should not be applied to the Simpson Covenants because to insist on these technical requirements defeats the philanthropic intentions of Mr. Simpson and the corresponding obligations willingly assumed by the municipal government of the day and sanctioned by the electorate. The Society points to the relaxation of the strict requirements for restrictive covenants in the case of a building scheme as a recognition by the courts that special cases require a different test to preserve the obvious intentions of the parties.

[68] While I agree there are circumstances in which the application of the strict rules surrounding restrictive covenants create an obvious injustice and defeat the plain intention of the original contracting parties, identification of the dominant lands cannot be regarded as a mere technicality. There must be no doubt about the

identification of the dominant lands because otherwise it is impossible to determine who can enforce the covenants: see ***Distacom*** at ¶21.

[69] The Society uses the analogy of the building scheme; however, such schemes are a distinct class of restrictive covenant where the rules in regard to the identification of the dominant tenement must be relaxed because the scheme itself contemplates that all the lots within it will be sold and that each will take the benefit of the covenants as well as the burden. In ***Gubbels*** (S.C.) at ¶16 to 21, Dorgan J. had occasion to compare a building scheme to a standard restrictive covenant:

> A restrictive covenant involves a relationship where one property is subject to restrictions for the benefit of another property. This relationship, by its nature, interferes with the free use of land and is the reason why such agreements are strictly interpreted.
>
> A building scheme, however, involves a community of interests. Under a building scheme all landowners share similar burdens and enjoy benefits relating to these limitations on property use.
>
> …
>
> In considering the different nature of building schemes and the fact that they are given effect through restrictive covenants, it is my view that the general purpose of building schemes is an important factor in "the surrounding circumstances" and one which I am permitted to consider when interpreting arguably ambiguously worded restrictive covenants.
>
> The sound approach to the interpretation of the restrictive covenant in this case, is to consider the intent of the parties at the time the restrictions were made. This intent is derived from the words of the document in light of the surrounding circumstances. If, after such a consideration, the restrictive covenant remains ambiguous then its interpretation ought to be resolved in favour of the free use of property.

[70] In my view there is no clear analogy between land sold as part of a building scheme and the agreement in this case which involves a private party selling land to

the City on certain conditions. Mr. Simpson or the Kelowna Sawmill Co. Ltd. did not sell land to the City that was to be subdivided with each lot encumbered by the covenants to the mutual advantage of each and for the benefit of the community as a whole. Further, the restrictions placed on the City in regard to the development of the property appear to benefit the residents of Kelowna rather than any land that they may own within municipal limits. The underlying intent of a restrictive covenant is that it benefits the dominant tenement in a material sense rather than providing some collateral benefit to its owner. Retaining this prime real estate for municipal purposes does not enhance the value of the lands owned by Kelowna residents as much as it makes Kelowna a more desirable place for the residents to live.

[71] Even if the court applied a less restrictive test to determine the intention of the parties and, for this purpose, examined all of the surrounding circumstances, I remain concerned that the covenants are still ambiguous. In the case of a building scheme, the parties who are entitled to enforce the covenants are clearly identified as the owners of the lots defined as within the scheme. In the case at hand, it is not such an easy task to identify who can enforce the Simpson Covenants. The fact that the Society offers several alternatives is a clear indication that the underlying intention of the contracting parties remains ambiguous. Did the parties intend that the successors to Mr. Simpson's lands adjacent to or contiguous with the properties sold to the City be able to enforce the covenants? Or did the parties intend that the successor to property owned by the Kelowna Sawmill Co. Ltd., in and about the city of Kelowna, be entitled to enforce the covenants? Or did the parties intend that anyone who owned property within the municipal limits could enforce the covenants?

Or did the parties intend that only the electorate, in a vote by a majority, could enforce the covenants? Any one of these alternatives seems as likely as the other based upon the rather limited evidence available to the court concerning the circumstances surrounding the sale of the lands to the City.

[72] The Society's argument in favour of a less restrictive interpretation of the Simpson Covenants requires the court to consider the decision of the Alberta Court of Queen's Bench in ***Thierman***. In that case, the court addressed the status of covenants registered against certain park lands in 1958 pursuant to the terms of a conveyance between the owners of the property and the Village Council who purchased the lands. By these covenants the Village Council agreed that it would not dispose of the lands and would dedicate them for the purpose of a park to which residents of the Village as well as any other members of the public could have access. When the Village Council proposed a sale of some of the parkland in 2001, the plaintiff, an adjacent property owner, brought an action to prevent the sale. Moen J. considered the plaintiff's argument that the covenants were to benefit all the lands within the boundaries of the Village and that these lands could be interpreted as the dominant tenement despite any reference to such lands in the agreement or the deed. Applying the ***Galbraith*** test, Moen J. rejected the plaintiff's argument at ¶23 to 25:

> One might interpret the reference to the "residents of Itaska" as benefiting all residential lots in the Village. While these lands could be ascertained from plans on file at the Land Title Office, the extent of the dominant tenement would still be in doubt just as was the case in *Guaranty Trust*. The agreement clearly expresses an intention to benefit other cottage owners and all members of the public in addition

> to the residents of Itaska, yet there is no possible way of ascertaining the corresponding land which is benefited under the agreement. …
>
> There is no parcel of land or parcels of land to be benefited. It is people that are to benefit. Those people are not necessarily owners of property in Itaska.
>
> Applying the *Galbraith* test to the 1958 Agreement, it becomes evident that the description of the dominant lands is not sufficient to create a restrictive covenant capable of running with the land. There is nothing in the agreement which attempts to annex the benefit of the covenant to any parcel of land.

[73] I find no flaw in the reasoning of Madam Justice Moen. A covenant that is intended to benefit persons without reference to any land owned by those persons does not come within the purposes of a restrictive covenant. In the case at hand, the covenants are even less capable of defining the dominant tenement because there is no express reference to the land owned by residents of Kelowna as the beneficiaries of the burden placed on the servient tenement. The court is left to imply that the parties intended that land owned by the residents of Kelowna would constitute the dominant tenement. However, this is not the only reasonable interpretation of the parties' intention as I have outlined above.

[74] The Society argues that if the record does not clearly identify all lands within the boundaries of the municipality as the dominant tenement, the alternative is that the lands owned by Mr. Simpson or the Kelowna Sawmill Co. Ltd. adjacent to the subject property were intended to be the beneficiaries of the covenants. If this was the intention of the parties, however, there is no reason why the strict approach to restrictive covenants should not govern. The nature of the relationship created by

the covenants would be no different from any other sale of land apart from the fact that the City was the purchaser.

[75] The Society also argues that the City is estopped by its representations and its conduct since 1945 from insisting on its strict legal rights in regard to the Simpson Covenants. The Society maintains that Mr. Simpson acted to his detriment in reliance upon the City's representations that it would retain the property for municipal purposes. Had the City failed to agree to the covenants, Mr. Simpson would not have sold the land for less than fair market value. Instead, he would have subdivided it and sold it for an enhanced profit or used it for his own retail development. The right to take action in response to the City's recent decision to have the covenants discharged, argues the Society, belongs to Mr. Simpson's heirs. Alternatively, the Society maintains the citizens of Kelowna may enforce the Simpson Covenants by estoppel because the City Council obtained their consent to the purchase by representing to them as a community that the property would always be used for municipal purposes. Unless the City puts to a vote the decision to discharge the covenants, the Society says the City is estopped from claiming any right to do so.

[76] There is no doubt that in 1945 the City agreed to purchase land belonging to the Kelowna Sawmill Co. Ltd. subject to the Simpson Covenants. Further, at the time of the purchase the City Council and Mr. Simpson believed that the price paid for the land was well below market value. It is also apparent that Mr. Simpson was planning to use the land for his own retail stores and that he contemplated subdividing the land thereby enhancing its resale value. Thus it may be inferred

from the evidence that the City Council of the day induced Mr. Simpson by their representations to sell the property and that, had it not agreed to Mr. Simpson's conditions, it is unlikely he would have sold the land to the City for $55,000. The purchase of the properties, expressly subject to the Simpson Covenants, was also put to a public referendum in which the ratepayers of Kelowna voted in favour of the bylaws authorizing the purchase. Thus it may be said that the consent of the electorate was obtained by the inducement of the Simpson Covenants.

[77] Since 1945 there have been a number of incidents where the City has sought permission from Mr. Simpson, and more recently from the Simpson family, when it wanted to use the subject properties for a purpose other than those permitted by the Simpson Covenants. Up until 2004 the City appeared to act as if it were bound by the covenants and in the belief that it was the Simpson family who must give their consent for any derogation of the terms in the original deed. This practice was discontinued when the City for the first time obtained a legal opinion that concluded the Simpson Covenants were not enforceable as restrictive covenants.

[78] I think there can be no doubt that Mr. Simpson, as the president and principal shareholder of Kelowna Sawmill Co. Ltd., and the City Council of 1945 proceeded to carry out their transaction on the basis of an underlying assumption that the Simpson Covenants were valid and enforceable. Moreover, after the property transfer, and during Mr. Simpson's lifetime, the City Council sought his permission whenever it needed an exemption from the covenants. When Mr. Simpson died, the City Council continued to seek the permission of the Simpson family for any necessary exemption.

[79] The question is whether any form of estoppel may be established on these facts and, if so, who may enforce it? It is my intention to begin by discussing who may enforce any rights acquired by the equitable doctrine of estoppel because this will also clarify whether the elements of the doctrine are present in any of the alternative scenarios argued by the Society.

[80] The Society argues that the citizens of Kelowna may enforce the right of estoppel against the City because they were induced into sanctioning the purchase of the land by the City's representations that the Simpson Covenants would forever govern the use of the land. A representation sufficient to establish rights by estoppel can be made to the public at large and, by voting in favour of the purchase, the ratepayers of Kelowna in 1945 may well be regarded as acting to their detriment by committing their tax dollars to the purchase based upon the representations made by the City. In my view, regardless of whether the City was by law required to seek the consent of the electorate, it did so and must therefore be bound if an estoppel by representation is thereby created. The difficulty with this analysis, however, is twofold.

[81] First, there is no evidence that any of the ratepayers who voted in the 1945 plebiscite are still alive to oppose the City's actions. While they may be survived by heirs, it is not clear that the right to enforce an estoppel, absent a contractual relationship, passes with a deceased's estate. If it does, only the executor of the ratepayer's estate would have the right to enforce his or her rights: G. H. Bower, *"The Law Relating to Estoppel by Representation*", 4th ed. (Haywards Heath, Eng.: Tottel Publishing, 2003) at p. 139. Clearly, the present day residents of Kelowna

have an interest in this dispute; however, they have no standing individually, through the Society, or as a whole to enforce rights acquired by the ratepayers of 1945.

[82] Second, and more significantly, the City is governed by a Council whose members were elected by eligible Kelowna residents to represent their interests. When the City makes decisions that affect the community it does so as their elected representatives presumably for the collective benefit of the residents. For those who object to the City's actions, their remedy is to vote them out in the next election. Over time the needs of a community change. In 1945 the City Council believed it was in the best interests of the community to purchase the properties subject to the Simpson Covenants. In 2004 the City decided that these covenants no longer served the best interests of the community. To permit the current residents of the City to enforce rights acquired through estoppel by long-dead residents undermines the democratic process that forms the basis of our municipal government system and thus should not be sanctioned by the court.

[83] The Society also argues that the Simpson family may enforce the rights acquired by estoppel. The only estoppel directly enforceable by the Simpson family is one based upon the City's conduct since the death of Mr. Simpson. As set out above, until late 2004 the City routinely sought the family's permission to any proposed derogation of the Simpson Covenants. While it is acknowledged by the Court of Appeal in ***Zelmer*** and ***Trethewey-Edge Dyking District*** that a cause of action may be founded upon proprietary estoppel even where there is no contractual relationship between the parties, I am not satisfied that the prerequisites to such an action can be proven by the Simpson family. There is no evidence that the Simpson

family have acted to their detriment based on the City's conduct or representations such that it would make it unconscionable for the City to now seek to enforce their strict legal rights. What prejudice has the family suffered as a result of the City's conduct? The Society has not identified any steps the family could have taken at an earlier date to preserve their legal rights in regard to the Simpson Covenants and there is no evidence that the family expended monies on the faith of the City's representations or otherwise committed themselves to a prejudicial course of action.

[84] It is also apparent that the City was unaware of its legal rights in respect of the Simpson Covenants until late 2004 when it sought a legal opinion concerning their validity as restrictive covenants. Knowledge of the existence of one's rights appears to be an essential element of proprietary estoppel. In ***Trethewey-Edge Dyking District***, a majority of the Court of Appeal relied upon the five part test for proprietary estoppel found in the judgment of Fry J. in ***Willmott v. Barber*** (1880), 15 Ch. D. 96 (Eng. Ch. Div.) which was also approved of in ***Zelmer***. A key element of proprietary estoppel according to these authorities is that the possessor of the legal right must be aware of his rights before it would be inequitable for him to insist upon them against the interests of the plaintiff.

[85] The Society also argues that the Simpson family may assert the rights acquired by Mr. Simpson through an estoppel created by the City's representations and conduct at the time of the purchase. The parties to the contract of purchase and sale and the deed of transfer were the City of Kelowna and the Kelowna Sawmill Co. Ltd. Mr. Simpson did not enter into the contract with the City in his personal capacity. Moreover, the land was owned by the company and not Mr. Simpson

personally. For the reasons set out below, I am satisfied that this is not a case where it would be appropriate to pierce the corporate veil. Because the Simpson family no longer owns the Kelowna Sawmill Co. Ltd., they have no right to enforce the contract or assert any rights acquired by way of estoppel that may arise from the contract as the successor to the company.

[86] While the City may have made representations to Mr. Simpson in his personal capacity concerning the enforcement of the covenants such that it would now be unconscionable for the City to insist upon its strict legal rights, there is no evidence to support this claim. Further, the court cannot infer from the fact that the City sought Mr. Simpson's permission when it required an exemption from the covenants that they approached him in his personal capacity because he continued to be the president of the Kelowna Sawmill Co. Ltd. until his death. Nor does the City's conduct in this regard constitute a representation about the enforceability of the Simpson Covenants as restrictive covenants. Mr. Simpson's consent, on behalf of the company, would have been required even if these were personal covenants.

[87] If the facts of this case establish a cause of action based upon proprietary estoppel, it is only the successor to the Kelowna Sawmill Co. Ltd. that may seek to enforce this claim. The Society does not purport to represent the corporate successor and thus has no standing to make a claim on its behalf.

[88] The Society's final argument under this heading is that the registration of the Simpson Covenants as restrictive covenants constitutes conclusive evidence of their validity in law and in equity. The Society argues that because the legislation in force

in 1946 did not contain a provision similar to the current s. 221(2) of the ***Land Title Act***, acceptance by the registrar of a restrictive covenant was a determination of its essential nature and enforceability. Further, the Society maintains that this argument is supported by s. 36 and s. 37 of the ***Land Registration Act*** of 1936 which together create the fundamental assumptions of the Torrens system of land registration that, once registered on title, a charge is binding in both law and equity.

[89] Assuming that the court must look to legislation in force at the time of registration to determine the enforceability of the Simpson Covenants as restrictive covenants, I am not satisfied that the provisions of the ***Land Registration Act*** have the effect argued by the Society. Section 36 of the Act does not say that registration of a charge is conclusive evidence of its underlying validity. This provision simply says that whatever the interest created by the charge, it will pass in law or in equity as of the date of registration. Section 37 is the statutory provision that gives effect to the fundamental principle of the Torrens land registration system that once registered a certificate of title is conclusive evidence that the person on title is seized of an estate in fee simple subject to any charges endorsed thereon. While this provision is intended to protect a third party who is entitled to rely on the certificate of title as a guarantee of ownership, it does not preclude a challenge to title based upon a legal or equitable claim. Section 37 says that the certificate of indefeasible title is conclusive evidence of title in law and in equity, “so long as it remains in force and uncancelled”.

[90] Section 38 of the ***Land Registration Act*** describes specific cases in which a certificate of indefeasible title could be challenged. By s. 38(g), the Act

contemplated challenges to title based upon the "rights arising under any of the clauses of section 37". Section 37(1)(h) refers to the certificate of title being subject to "any condition, exception, reservation, charge, lien or interest noted or endorsed thereon." Thus a certificate of indefeasible title was subject to challenge based upon rights acquired pursuant to a registered charge, including a restrictive covenant.

[91] Further, while s. 37 provides that a certificate of indefeasible title is subject to any registered charge, the principle of conclusive evidence of title does not apply to registered encumbrances. Instead, ss. 40 and 41 of the ***Land Registration Act*** govern registered charges:

> 40 The registered owner of a charge shall be deemed to be entitled to the estate or interest in respect of which he is registered, subject only to such exceptions and registered charges as appear existing on the register.
>
> 41 The registration of a charge shall give notice, from and after the time the application for the registration thereof was received by the Registrar, to every person dealing with the land against which the charge has been registered of the estate or interest in respect of which the charge has been registered, and of the contents of the instrument creating the charge so far as relates to the estate or interest in respect of which the charge has been registered, but not further or otherwise.

[92] Sections 40 and 41 of this Act provide protection to a third party by giving them notice of a charge that is registered against lands and the nature of the interest or estate claimed by the charge holder. While s. 40 deems the estate to be that as registered, there is no indication that registration is conclusive proof of the underlying validity of the charge. The legislature must use clear and unequivocal language to oust the court's jurisdiction to review the legal rights acquired by

registration of a restrictive covenant. In my view, the language of this provision does not clearly preclude a challenge to the enforcement of any registered charge.

[93] The judgment of Lambert J.A. in ***Gubbels*** (C.A.) supports my conclusion that registration of a charge does not guarantee its underlying validity. In response to an argument that a lay person should be entitled to go to the Land Title Office and immediately know the effect of a registered charge, Lambert J. A. says at ¶15:

> The nature of the system is to provide notice of any matters that affect title. The restrictive covenant is referred to and the restrictive covenant must be given the interpretation it requires as a contractual document and not an interpretation that would be given to it by a layman coming into the Land Titles Office.

[94] I am also not satisfied that that the enactment of s. 221(2) of the ***Land Title Act*** leads to an inference that before its existence a restrictive covenant was conclusively valid once registered. Section 221(1) of the Act, and its predecessors, placed an obligation upon the Registrar to ensure the restrictive covenant met certain prerequisites before proceeding to register it. Section 221(2), which says that registration is not a determination by the Registrar of the covenant's essential nature or enforceability, was necessary to preserve the right to challenge the validity of a registered covenant or to foreclose an argument that this right had been curtailed by s. 221(1).

[95] In 1946 there was no similar obligation placed on the Registrar by statute and, accordingly, no need for the legislature to expressly preserve a right to challenge the enforceability of a restrictive covenant. By s. 163 of the ***Land***

Registration Act the Registrar was obliged to ascertain whether an applicant seeking to register a charge had "a good, safe-holding and marketable title to the charge" before registering it. This provision constitutes an obligation to inquire into whether the applicant was a *bona fide* charge holder rather than imposing a duty to determine the essential nature of the charge and whether it was enforceable in law or in equity. Moreover, by s. 148 of the ***Land Registration Act***, where a grantee sought to register a land transfer that was subject to a restrictive covenant in favour of lands retained by the grantor, the charge would be registered against the dominant tenement without a separate application under s. 163 of the Act. I note parenthetically that it is difficult to accept that the Simpson Covenants were valid restrictive covenants under the land registry system in force in 1946 because no other lands retained by the grantor that were to benefit from the covenants were registered as a memorandum on title pursuant to s. 149 of the ***Land Registration Act*** which provided as follows:

> 149 Where any restrictive covenant … has been entered into or is created for the purpose of being annexed to or used and enjoyed, together with other land for which a certificate of indefeasible title has been issued, the Registrar shall make a memorandum of the covenant … and the instrument creating the same, upon the folio of the register which constitutes the existing certificate of title of the land to or with which such covenant … is so annexed, used or enjoyed … and every transfer of the land covered by a certificate of title upon which such memorandum has been made shall transfer the benefits of such covenant … without any express mention of the same.

[96] Lastly, it is not entirely clear that it is the legislation of 1936 that must govern my determination of the validity of the Simpson Covenants as restrictive covenants.

Although the parties do not appear to have argued the point, Williams J.A. in ***Distacom*** considered the validity of a restrictive covenant registered on title in 1936 in accordance with the legislation in force at the date of the challenge (at ¶73 where Williams J. A. considers s. 217(1) of the ***Land Title Act,*** R.S.B.C. 1979, c. 219 which is the predecessor to s. 221(1) of the current ***Land Title Act***.)

[97] I find that to insulate a charge registered against land from changes in the law is contrary to public policy. Amendments to the law often reflect changes in society's collective views about particular conventions, morality, and notions of fairness and equity. For example, restrictive covenants should not be insulated from review in 2008 solely on the ground that they were registered in 1946 at a time when the law may have sanctioned discriminatory limitations on the use of private property. Thus even if I am wrong in my conclusion that the ***Land Registration Act*** of 1936 accorded a registered charge conclusive validity in law and in equity, I am satisfied that its underlying validity should be reviewed in accordance with the legislation in effect at the date of the application.

C. Do the Simpson Covenants Create a Trust Binding upon the City to Use the Subject Properties only for Municipal Purposes?

[98] The Society argues that the parties to the transfer intended to create a trust obligation binding upon the City that it would never sell the property and would use it only for municipal purposes. In support of this argument, the Society relies upon ***Save Our Waterfront Parks Society v. Vancouver (City)*** (2004), 28 B.C.L.R. (4th) 142 (S.C.). The Society argues that this judgment mandates a two-step process for determining whether an instrument creates a valid trust. First, the court looks to the

document to determine the intention of the parties. Second, the court examines the surrounding circumstances that led to the transfer.

[99] The Society argues that by both tests the intention of the parties is clear in the case at hand. The deed says the transfer is subject to covenants that require the City to use the lands only for municipal purposes and not for any commercial or industrial purpose. Further, the deed stipulates that the City may not sell the land. There is no ambiguity in the language used by the parties and it is clear that both parties agreed to these conditions of sale.

[100] The Society also argues that the surrounding circumstances evidence an intention to create a trust obligation on the City in respect to its use and disposition of the land. The Society points to the extensive public debate about the purchase of the properties for the city hall and civic arena, and that the purchase was made subject to the approval of the electorate. While the City paid for the land, the Society argues that financial consideration in exchange for land does not defeat a public purpose trust: ***Save the Waterfront Parks Society*** at ¶33. The Society argues that the $55,000 paid for the properties was acknowledged by all concerned as well below market value and thus the charitable purpose behind Mr. Simpson's actions is clearly evident. The Society also argues that because Mr. Simpson had to clean up the fire damage on the property out of his own pocket, the price he received was obviously a nominal sum. In this regard, the Society maintains Mr. Parkhill's appraisal cannot possibly be an accurate assessment of the value of the land in 1945. When one considers the City paid over $60,000 for less than two acres of

land adjacent to the almost eleven acres purchased from Mr. Simpson, the Society says it is clear the $55,000 was far less than market value.

[101] The Society argues that it is an implied term of the trust that the City cannot rid itself of the trust obligations without seeking the consent of the beneficiaries who are the residents of Kelowna. Without a referendum vote, the City cannot divest itself of trust obligations.

[102] The City argues the statutory provisions governing the acquisition of land at the time of transfer are central to the question of whether the properties were purchased subject to a trust: ***Armstrong v. Langley***. The ***Municipal Act***, R.S.B.C. 1936, c. 199, which governed the transfer in this case, contains no provision that specifically empowers a municipality to purchase lands subject to a trust. Section 503 of the Act only refers to "accept and receive any real or personal property devised or bequeathed to the municipality, subject the trusts (if any) upon which the same is devised or bequeathed." The legislature uses language such as "purchase and acquire" in other sections granting general powers to the City to buy and sell land for consideration. This distinct language, argues the City, is the difference between contract and trust: Petit, *Equity and the Law of Trusts*, 9th ed. (London: Butterworths, 2001) at p. 27.

[103] On the facts of this case, the City says the properties were not devised or bequeathed to the City such that the transfer would be consistent with the power to hold property subject to a trust in s. 503 of the ***Municipal Act***. Nor were the properties gifted to the City as was the case in ***Armstrong***.

[104] The City also argues that the common law requirements for a charitable trust are not met on the facts of this case. Relying on the tests set out in ***O'Neill Community Ratepayers Assn. v. Oshawa*** (1995), 22 O.R. (3d) 648 (Gen. Div.) and ***Save Our Waterfront Parks Society***, the City maintains both the deed and the surrounding circumstances show that it was not the intention of the parties to create a trust. First, "municipal purposes" is not a recognized charitable purpose: Waters, *Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005). The condition that the properties not be used for commercial or industrial purposes could just as likely be for the benefit of Mr. Simpson's businesses as for a charitable purpose. Second, the deed and the option to purchase make no mention of a trust. Third, the fact the covenants were registered as restrictive covenants in the Land Title Office indicates a contrary intention: ***Swarchuk v. Kawano***, [1993] B.C.J. No. 1229 (S.C.) (QL) at ¶36. Fourth, the consideration for the purchase was more than nominal and reflected fair market value: Parkhill Appraisal at p. 3. There is no evidence that the cost of cleaning up the property was close to the $30,000 claimed by the Society and likely Mr. Simpson's insurance covered the cost. The City also argues that the clean-up was necessary to put the land on an equal footing with bare land ready for building.

[105] The City argues that the fact the electorate was asked to vote on the purchase does not support the existence of a trust because a public referendum was felt necessary due to s. 59(21) of the ***Municipal Act*** which required the electorate's consent for any land purchase greater than $2,000. In any event, argues the City, land purchased for municipal buildings did not require the assent of the ratepayers:

Municipal Act s. 59(17)(a), s. 59(21), s. 59(41), s. 59(175), and s. 59(182). The City argues that the fact the agreement does not stipulate that the purchase was subject to a vote of the electorate distinguishes this case from the facts in ***Anderson***.

[106] It appears from the authorities cited by the parties, as well as the leading academic texts in the area of trust law, that a public trust for a charitable purpose may be established either at common law or by statute. Unlike the circumstances present in ***Anderson***, there are no statutory provisions applicable to the facts of this case that expressly impose a trust binding upon the City in respect of the purchase of land. The 1936 ***Municipal Act*** authorized the municipal council to purchase or accept land for municipal purposes. Section 59(17)(a) of the Act also authorized a municipal council to enter into agreements with persons for the purchase of land on "conditions"; however, the specific provisions in the Act addressing the holding of property subject to a trust were limited to devises or bequeaths generally and, specifically, to park land and land designated for hospitals and schools.

[107] The City is now governed by the ***Community Charter*****,** S.B.C. 2003, c. 26. This Act provides that a municipality is a corporation of its residents governed by a council and that the municipality has all the powers of a natural person. Consequently, the City has the authority to hold land subject to a trust. The ***Community Charter*** does not, however, contain a specific provision obligating the City to operate or maintain any land received subject to a trust in accordance with the purposes of the trust. It was a provision of this nature that led the Court of Appeal in ***Anderson*** to conclude that covenants contained in a deed gifting land to

the City of Langley were binding upon it as a trust. Section 684 of the ***Municipal Act,*** R.S.B.C. 1979, c. 290, provided as follows:

> 684 The Council of a municipality to which is granted or conveyed a public park or other place for the use and enjoyment of the public shall operate and maintain it subject to any trusts on which it is granted or given.

[108] This provision, while continued in a broader form in s. 314 of the ***Local Government Act***, R.S.B.C. 1996, c. 323, only applies to a regional district and not a municipality or its council.

[109] Thus if the deed in this case created a public trust binding upon the City, it must be pursuant to the common law. To be valid at common law a trust must comply with the three certainties rule: (1) the language of the transferor must be imperative with certainty of intention; (2) the subject matter or trust property must be certain; and (3) the objects or the beneficiaries of the trust must be certain such that the trust obligations may be carried out properly and enforced: ***Swarchuk*** at ¶39.

[110] The City and the Society agree that to determine the underlying intention of the parties to the transfer, the court may have regard to both the deed of transfer and the surrounding circumstances. This proposition is supported by ***Save Our Waterfront Parks Society*** and ***O'Neill Community Ratepayers Assn***.

[111] In addition to the three certainties rule, a common law trust with the object of carrying out a purpose must be for a recognized charitable purpose. At common law a trust that is not for the benefit of persons but for "purposes" is void because a

trustee could not be compelled to discharge his duties by a "purpose". The exception to this general rule is the charitable purpose trust: Waters at p. 163. Moreover, the purposes of a charitable trust need not be set out with the same degree of certainty as a private trust for persons. "Provided the purpose, whatever the range of possible activities, comes within the scope of charitable activities as the law defines that term, the trust will be said to have certainty of object": Waters at p. 163.

[112] The law with regard to what may be classified as a "charitable purpose" is often difficult to apply primarily because it has not completely shed its historical roots and has developed by way of analogy upon analogy from decided cases. In ***Vancouver Society of Immigrant & Visible Minority Women v. Canada (Ministry of National Revenue***, [1999] 1 S.C.R. 10, Iacobucci J., speaking for the majority, described the historical origins of the legal definition of charitable purpose at ¶144 to 146:

> The starting point for the determination of whether a purpose is charitable has, for more than a century, been Lord Macnaghten's classification, set out in *Pemsel*, supra, of the purposes the common law had come to recognize as charitable:
>
> > "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.
>
> …
>
> This classification is generally understood to refer to the preamble of the *Charitable Uses Act*, 1601, 43 Eliz. 1, c. 4, commonly referred to as the *Statute of Elizabeth*, which listed various activities thought to be charitable. …

> The preamble lists many charitable purposes and is most commonly referred to in its modern English rendition, as it was described by Slade J. in *McGovern v. Attorney-General*, [1982] Ch. 321, at p. 332, and adopted on several occasions by the Federal Court of Appeal:
>
> > . . . the relief of aged, impotent and poor people[;] maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities[;] repair of bridges, ports, havens, causeways, churches, seabanks and highways[;] education and preferment of orphans[;] relief, stock or maintenance for houses of correction[;] marriages of poor maids[;] supportation, aid and help of young tradesmen, handicraftsmen and persons decayed[;] relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.
>
> … [T]he preamble proved to be a rich source of examples and the law of charities has proceeded by way of analogy to the purposes enumerated in the preamble.

[113] The Supreme Court of Canada adopted the ***Income Tax Commissioners v. Pemsel***, [1891] A.C. 531, classification and added an additional requirement that the purpose must also be "[f]or the benefit of the community or of an appreciably important class of the community". As Iacobucci J. explains in ***Vancouver Society of Immigrant & Visible Minority Women*** at ¶147-148:

> … [T]this other notion of public benefit is different and reflects the general concern that "[t]he essential attribute of a charitable activity is that it seeks the welfare of the public; it is not concerned with the conferment of private advantage": Waters, supra, at p. 550. This public character is a requirement that attaches to all the heads of charity, although sometimes the requirement is attenuated under the head of poverty. It is this public quality that I also take Rand J. to be referring to in *Sunny Brae*, supra, at p. 88, when, after outlining the four classifications of charitable purposes, he stated that "the attributes attaching to all are their voluntariness and, directly or indirectly, their reflex on public welfare".

> The difference between the *Pemsel* classification and this additional notion of being "for the benefit of the community" is perhaps best understood in the following terms. The requirement of being "for the benefit of the community" is a necessary, but not a sufficient, condition for a finding of charity at common law. If it is not present, then the purpose cannot be charitable. However, even if it is present the court must still ask whether the purpose in question has what Professor Waters calls, at p. 550, the "generic character" of charity. This character is discerned by perceiving an analogy with those purposes already found to be charitable at common law, and which are classified for convenience in *Pemsel*. The difference is also often one of focus: the four heads of charity concern what is being provided while the "for the benefit of the community" requirement more often centers on who is the recipient.

[114] The ***Pemsel*** approach is difficult to apply and many jurists have commented that the test should be replaced with one that more readily reflects the standards and values of modern Canadian society. The Supreme Court of Canada has not chosen to embark upon what it regards as the task of legislative reform and, instead, has mandated the continued use of the analogy method to determine whether a particular purpose meets the definition of “charitable” with the added caveat that some incremental modernization is permissible: Iacobucci J. at ¶150.

[115] Within the framework of the ***Pemsel*** categories, the facts of this case can only fall under the fourth heading: “certain other purposes beneficial to the community, not falling under any of the other heads”. In ***Vancouver Society of Immigrant & Visible Minority Women***, the majority held that under the fourth heading, the purposes of the organization must be of (a) "public benefit" or "beneficial to the community" and (b) "in a way the law regards as charitable" (at ¶176). To add some clarity to this approach, at ¶177 Iacobucci J. adopted the

following test from ***D'Aguiar v. Guyana Commissioner of Inland Revenue***, [1970] T.R. 31 (P.C.) at 33:

> [The Court] must first consider the trend of those decisions which have established certain objects as charitable under this heading, and ask whether, by reasonable extension or analogy, the instant case may be considered to be in line with these. Secondly, it must examine certain accepted anomalies to see whether they fairly cover the objects under consideration. Thirdly -- and this is really a cross-check upon the others -- it must ask whether, consistently with the objects declared, the income and property in question can be applied for purposes clearly falling outside the scope of charity; if so, the argument for charity must fail.

[116] Finally, at ¶177 Iacobucci J. noted the added requirement that the purpose benefit the community:

> To this I would add the general requirement, outlined in *Verge v. Somerville, supra*, at p. 499, that the purpose must also be "for the benefit of the community or of an appreciably important class of the community" rather than for private advantage.

[117] The authorities cited by the parties addressing whether a specific purpose comes within the fourth ***Pemsel*** heading are ***Save Our Waterfront Parks Society***, ***O'Neill Community Ratepayers Assn.***, ***Swarchuk***, and ***Brisbane City Council v. Attorney-General for Queensland***, [1978] 3 All E.R. 30, a decision of the Privy Council on appeal from the Supreme Court of Queensland. All of the Canadian authorities concerned park land and ***Brisbane City Council*** involved land to be used for a "showground, park and recreational purposes." In Canada, a trust requiring land to be operated as a park is well recognized as a charitable purpose and thus there is very little analysis in these authorities. In ***Brisbane City Council***

"showground" was held to be a charitable purpose because there were probably agricultural shows put on at such places and this would likely promote agriculture and horticulture in the region. A key factor was that a commercial purpose was only ancillary to this primary one: at p. 34 per Lord Wilberforce.

[118] In this case the purpose of the alleged trust upon which the land is to be held is for "municipal purposes" and "not for commercial or industrial purposes". I have no difficulty concluding that this language connotes a purpose that is beneficial to the community just as a trust with respect to park land might be so interpreted. The extrinsic evidence is also consistent with an intention to provide a benefit to the community. The City acquired the land to build a new city hall and a civic centre for the benefit of and to be used by the residents of Kelowna. Moreover, by confining the City's use of the land to municipal purposes, to the exclusion of commercial and industrial uses, the language of the condition focuses on the City's mandate to provide public services to the electorate rather than on its entrepreneurial mandate to develop commercial and revenue producing opportunities for Kelowna. The former being more easily classified as charitable in nature.

[119] The fact the parties described the nature of the buildings and landscaping to be erected or developed on the property in the conditions of the transfer implies that they were concerned the lands be used for a special purpose. "Buildings of an attractive design and grounds … suitably landscaped in keeping with the character of the type and character of the buildings erected thereon" would not have been used to describe land to be used for some ancillary outbuildings or waterworks. I also note that the City was so concerned with the character of the neighbourhood

where the new city hall and civic centre were to be constructed that they purchased several adjacent lots on Mill Avenue because they housed a collection of old buildings that would not be in keeping with the stately new and centralized municipal buildings.

[120] By its ordinary meaning “municipal purposes” connotes the use of property for such things as a public library, a police station, a city hall, an arena, a convention centre, and a public museum or art gallery. All of these purposes, in my view, could be considered as charitable in nature. Any of these facilities promotes the welfare and wellbeing of the community as much as park land or a show ground. In the British text, *Tudor on Charities*, 6th ed. (London: Sweet & Maxwell, 1967) at pp. 85 to 87, the authors note that trusts for achieving objects of general public utility such as museums, libraries, public halls, reading rooms and an observatory, to which the general public have access as of right, have all been held to be charitable purposes. In my view, if characterizing the Simpson Covenants as describing a charitable purpose is regarded as a development of the law defining charitable purpose, I find it is only a permissible, incremental change and not a large step requiring legislative approval.

[121] Thus for the foregoing reasons I am satisfied that the purposes defined in the Simpson Covenants are charitable in nature.

[122] Turning to the three certainties rule, the second and third certainties are easily satisfied on the facts of this case. The subject matter of the trust is the two parcels of land that I have been referring to as the Old Mill Site and the Lakeshore

parcel. These properties are clearly defined and described in the deed of transfer which also expressly makes the City's ownership of these properties subject to the Simpson Covenants. The beneficiaries of the trust may be inferred from the nature of the conditions imposed by the Simpson Covenants. By ensuring that the City could not sell the properties and could only use them for "municipal purposes" and not for "commercial and industrial purposes" it is apparent that the object of the trust was to create a benefit for the residents of Kelowna. The extrinsic evidence also supports this conclusion. The properties were acquired for the purpose of centralizing the municipal buildings in one preferred location and, specifically, for the new city hall and civic centre. The City held public meetings to discuss the advisability of the purchase and the bylaws authorizing its acquisition at the negotiated price, and subject to the Simpson Covenants, were put to a referendum vote of the ratepayers of Kelowna. An intention to benefit the residents of Kelowna is also found in the statements of Mayor Hughes-Games in his affidavit dated July 6, 1972 and by Mayor J.J. Ladd in his speech delivered in April 1957.

[123] The real question is whether there is certainty in the parties' intention to create a trust. The approach to this question utilized by Morrison J. in ***Save Our Waterfront Parks Society*** is to first look to the deed alone to determine the parties' intention and then consider the parties' intention having regard to all of the relevant circumstances. Morrison J. adopted this approach from the decision of the Ontario Court of Justice in ***O'Neill Community Ratepayers Assn.*** at ¶26.

[124] In this case the deed itself does not contain any express words of trust; however, a trust may be created with other words that convey the same intention:

Save Our Waterfront Parks Society at ¶27. Moreover, this common law proposition was recognized in s. 147 of the ***Land Registration Act*** of 1936. By the terms of this provision, where an interest in land vested in a trustee, the terms of the trust were to be noted in a memorandum that was attached to the duplicate certificate of title stipulating "in trust" or "upon conditions" or "other apt words". In this case, the deed stipulates that the transfer is subject to conditions.

[125] Similar to the circumstances in ***Save Our Waterfront Parks Society***, in the case at hand the deed of transfer is expressly made subject to conditions that both parties agreed to be bound by. This is quite different from the facts in ***O'Neill Community Ratepayers Assn.*** where no intention to create a trust was found in the deed because only the description of the lands referred to its use as a park. In the case at hand, the deed itself says that the transfer is subject to the parties' agreement that the City would use the lands for municipal purposes and not for industrial or commercial purposes. The effect of this language, in light of the City's statutory mandate, is that there were no permissible uses other than for municipal purposes. In addition, the character of the City as a public body is more indicative of the creation of a trust than if the grantee was a private person.

[126] Further, the parties agreed that the City could not sell the properties which implies that it would be bound by these conditions in perpetuity. Because the City could not divest itself of title to the lands, it would always be subject to the Simpson Covenants. Even if the City chose to transfer less than a fee simple interest in the lands, it would still be governed by the covenants as the registered owner. An intention to create a permanent benefit for the residents of Kelowna is corroborated

by the statements contained in the affidavit of Horace Simpson dated July 10, 1972, where he deposes:

> That my father intended that this property should be for the benefit of the citizens of the City of Kelowna for all time in the form of a Civic Centre and that the said property was not to be used by the City of Kelowna as a commercial venture.

[127] Where the deed is interpreted as imposing an obligation on the grantee in perpetuity, it tends to support the existence of an intention to create a trust. In ***O'Neill Community Ratepayers Assn.*** at ¶14. Ferguson J. cites as authority for this proposition the judgment of the Court of Appeal in ***Powell v. Vancouver (City)*** (1912), 8 D.L.R. 24, 3 W.W.R. 161 (B.C.C.A.).

[128] In ***Powell*** the property was transferred to the City of Vancouver subject to its agreement "to build the city hall and offices and maintain the same for City purposes". Absent words to the effect that the land would be used for a city hall and offices "for all time" the court concluded a resulting trust had not been intended: per Irving J.A. at ¶8.

[129] Had the parties in the case at hand been more specific about the use to which the lands could be put and, for example, stipulated that the properties would be used only for a city hall and a civic centre, I may have come to the same conclusion. However, because the parties chose to describe the permissible uses of the properties with the more flexible and generic phrase "municipal purposes", the City has the ability to change the use of the properties over time; this tends to support an intention that the condition would govern the City in perpetuity.

[130] It is also a consideration that the properties were not gifted to the City. The parties negotiated a price of $55,000. While the fact that the land is purchased for some financial consideration does not necessarily defeat an intention to create a trust, charitable purposes are normally associated with gifts or bequeaths.

[131] The City argues that the price paid for the properties was its fair market value based upon Mr. Parkhill's appraisal, the financial statements of the Kelowna Sawmill Co. Ltd. which provide a value for its lands during the 1930's and up to 1945, and the aggregate tax assessments for the properties within the municipal boundaries of Kelowna during the relevant period. I find this evidence falls short of establishing that $55,000 was the fair market value for the subject properties.

[132] Mr. Parkhill's appraisal is based entirely on hindsight and fails to consider some important factors. Mr. Parkhill examined comparative sales of land in and around the subject properties during the same time frame (1945); however, in every case the City was the vendor and the sales involved properties that had been acquired during the Depression as a result of non-payment of taxes. Mr. Parkhill failed to consider the possible impact of these factors on the price paid for the properties. Nor did he take into consideration the fact that there were likely social factors prevailing just after the Second World War ended that may have influenced the price the City was willing to accept for land sold to members of its community. In addition, Mr. Parkhill assumed that where the price paid for the land was greater than the norm it was due to the presence of improvements. This conclusion, however, is only conjecture without some evidence of what was actually on the land at the time of the sales.

[133] I am also concerned about Mr. Parkhill's conclusion that the lots purchased by the City on Mill Avenue for in excess of $60,000 warranted this price because of the improvements and not the land. The only description of the improvements on these properties is contained in the committee's report addressing possible sites for the city hall and civic centre. This minimal description is quite negative and suggests that the structures were unsightly and run down. Indeed, that was one of the reasons for the purchase; that is, to ensure the city hall was not surrounded by warehouses and other old buildings. The committee's report also indicated that the assessed value of the lots on Mill Avenue was approximately $30,000, less than half of what the City paid for them. Lastly, while the salvage value of the improvements on the Mill Avenue lots was estimated to be $9,000, Mr. Parkhill's opinion is that the improvements represented $54,700 of the total sale price.

[134] In my view, the most appropriate comparators in terms of land purchases are the lots on Mill Avenue. They are adjacent to the subject lands and the City was the purchaser in both cases. In addition, these lots were purchased in the same time frame and for the same purpose. Even if one accepts Mr. Parkhill's figures on the size of the subject properties, which excludes the land dedicated for Doyle Avenue, the City appears to have paid the Kelowna Sawmill Co. Ltd. $55,000 for over 10 acres of land and to other private citizens $60,700 for 1.4 to 1.6 acres. While there were improvements on the Mill Avenue lots, they had a nominal salvage value of $9,000 and the City planned to demolish whatever was there in any event.

[135] While the financial statements of the Kelowna Sawmill Co. Ltd provide some evidence of the book value of the properties disclosed for income tax purposes,

these amounts cannot be equated with fair market value. Lastly, the aggregate property assessments for Kelowna do not advance the City's case except insofar as they indicate that at this time the value of improvements in general was increasing far more than the value of the land.

[136] Against this evidence I must weigh the opinions and beliefs of the persons involved in the transaction at the time. The newspaper accounts of the public debate over the purchase indicate that the City Council of the day and the committee who negotiated with Mr. Simpson believed that the price was considerably below fair market value. The newspapers also reported that real estate men agreed that the price was well below what Mr. Simpson could get for the land if it was subdivided or sold for commercial purposes. In addition, in an unrelated dispute that occurred in 1972, which involved a lease to the yacht club, the mayor of Kelowna in 1951 and a council member from the same year, deposed that they believed the price was "nominal" and "greatly reduced" to enable the municipality to carry out its plan to centralize the city buildings and offices. Further, in April 1957, when Mr. Simpson was given the "Freedom of the City of Kelowna" award, then Mayor Ladd said in his speech addressed to a meeting attended by citizens, the municipal council members, and members of the board of trade:

> We are so very grateful to S.M. for selling "The Kelowna Sawmill Property" to the City, at a very nominal price, enabling us to plan and build the most modern Civic Centre in British Columbia. The Citizens will always be very grateful for that thoughtful and kindly act.

[137] In my view the intention of the parties should be governed by what they believed and acted upon at the time rather than by an appraisal carried out some sixty years after the fact. Based on the evidence before me, the Kelowna municipal council of 1945 would have been very surprised to learn that Mr. Simpson did not have philanthropic intentions when he agreed to sell the subject properties. They were satisfied that the price was well below market value and made representations to the Kelowna residents in that regard. Moreover, Mr. Simpson was extremely accommodating in regard to the sale of the subject properties. He put his plans for developing the lands on hold well after the period specified in the option to purchase and, in spite of the express terms of the option, he agreed to sell to the City only that portion of the properties that was actually required for the city hall and the civic centre should this be the will of the people of Kelowna.

[138] Accordingly, I am satisfied that although the City paid a sum of money for the subject properties, the price paid does not displace a charitable intention. The parties believed that Mr. Simpson was being philanthropic at the time and the price paid for the Mill Avenue lots is some evidence that they were correct in this belief.

[139] Turning to the other surrounding circumstances, the fact the City put the purchase bylaws to a referendum vote is not indicative of an intention to create a trust. It is apparent that on one reading of the ***Municipal Act*** of 1936, all land purchases, and agreements for the purchase of land with a value of over $2,000, had to be put to a vote of the electorate. Moreover, even if it was not necessary by statute, a public vote does not imply an intention to create a trust. The Kelowna residents were being asked to approve more than just the purchase of two

properties. The referendum was preceded by a public meeting to discuss the purpose for buying the lands which was to centralize all the municipal buildings, including the city hall and civic centre. The residents were asked to approve the entire concept in the referendum vote. Moreover, the City Council also put the purchase of the Mill Avenue lots to a public referendum where there was no question of any trust relationship.

[140] There are no minutes of any City Council meetings where the purchase was discussed and no records of the public meetings in evidence. While the bylaws authorizing the purchases do not contain any express reference to a trust, they clearly identify the Simpson Covenants as the conditions upon which the purchase was premised. Those words, as I have concluded, imply an intention to create a trust.

[141] Finally, there is the registration of the Simpson Covenants as restrictive covenants in the Land Registry Office. The City argues this is clear evidence that the parties did not intend to create a trust. While there is no evidence of the circumstances surrounding the registration of the Simpson Covenants as restrictive covenants, s. 163 of the ***Land Registration Act*** of 1936 required an application to the Registrar for the registration of any charge which was defined as any estate less than fee simple and included any encumbrance upon land (s. 2(1) of the Act). Thus it is unlikely the Registrar acted on his own motion to register the Simpson Covenants as a charge on the title to the subject properties.

[142] Whether or not the Simpson Covenants were valid restrictive covenants at law or in equity, the fact the parties sought and obtained their registration as such is some evidence that they did not contemplate a trust being created. In ***Swarchuk*** Drossos J. addressed whether there had been an intention to create a trust in circumstances where the deed stipulated that the transfer was conditional upon the land being used for a park. The title was registered as a determinable fee subject to a possible right of reverter to the settlor if the land was no longer used for a park. Drossos J. concluded at ¶36 that in these circumstances there had to be clear evidence that a trust qualified the determinable fee and the right of reverter. Of significance was the inconsistency between a right of reverter and a trust created for the benefit of third parties. In this regard, Drossos J. says at ¶39:

> Of the three certainties only the second is present in this case. It is clear that the settlor intended that the Winfield Irrigation District use the subject land for park purposes and/or waterworks system purposes, and no other, but far from clear in the face of the registered possibility of reverter that it intended to create or impose a trust on the District for other parties. To the contrary, if the District failed to use the property for the purposes expressed, the transfer document clearly indicates that the subject land reverts to the settlor.

[143] There are clear distinctions in law between a trust for charitable purposes where the intended beneficiaries are persons and a restrictive covenant where the restrictions on the use of one parcel of land are designed to benefit another parcel of land. What distinguishes the case at hand from ***Swarchuk***, however, is the presence of other factors supporting the existence of an intention to create a trust and the failure of the Simpson Covenants to have any validity in law or equity as restrictive covenants. As outlined above, the parties failed entirely to define a

dominant tenement as the intended beneficiary of the covenants and agreed that the lands would not be sold by the City; this is clearly not a condition that "touches and concerns the land".

[144] It is also apparent that the City was aware that a dominant tenement was a necessary precondition to the creation of a valid restrictive covenant. In 1949, only three years after the Simpson Covenants were registered, the City passed a bylaw authorizing a transfer of part of the lands affected by the Simpson Covenants to the Provincial Government for the purpose of building a courthouse and a new ferry landing. In this bylaw, and the subsequent agreement with the Province, the City stipulated that the benefit of the covenants was to adhere to it as the owner of the balance of the lands subject to the Simpson Covenants:

> That the conveyance from the said Corporation to His Majesty the King in Right of the Province of British Columbia of the said land to be conveyed under the authority of this By-Law will be subject to a restriction in favour of the said Corporation as the owner of Lot Two (2), Map Three Thousand one hundred and seventy-two (3172), in the said City of Kelowna, …

[145] In my view what makes the Simpson Covenants clearly deficient as restrictive covenants tends to support the creation of a charitable trust. The prohibition against the sale of the land is an indication that the City was to be bound by the conditions in perpetuity and the failure to define a dominant tenement underlines the parties' intention that the covenants would benefit other persons rather than other lands.

[146] Accordingly, on balance, I am satisfied that the parties' underlying intention was to create a trust reposed in the City in perpetuity to use the subject properties

for municipal purposes for the benefit of the residents of Kelowna. While the registration of the Simpson Covenants in the Land Registry Office as restrictive covenants is a factor weighing against such a finding, it is not conclusive. All the relevant circumstances must be considered. On the facts of this case the Simpson Covenants can be considered restrictive covenants in name only; they had no validity as such in either law or in equity.

D. Are the Simpson Covenants Personal Covenants and, If So, Who May Enforce Them?

[147] Because I have concluded that the Simpson Covenants constitute a valid charitable trust, the following discussion and analysis is necessarily *obiter*. However, I am satisfied that it is important to address all of the issues raised by the parties where practicable. Thus if I am wrong, and the Simpson Covenants do not constitute a charitable trust obligation reposed in the City, it is apparent that these covenants are personal and enforceable only by the parties and "their respective successors and assignees."

[148] The Society agrees that if the Simpson Covenants are not valid restrictive covenants and the court concludes no charitable trust was created, the covenants must be personal as between the relevant parties. The Society also acknowledges that on a strictly technical basis the City could discharge the personal covenants by obtaining the consent of the corporate successor to the Kelowna Sawmill Co. Ltd. However, the Society maintains the circumstances of this case warrant the piercing of the corporate veil to reach a conclusion that the contract parties were in reality Mr.

Simpson and the City. As a consequence, the Society argues the City would require the consent of the heirs to Mr. Simpson's estate to discharge the covenants.

[149] The Society argues that the corporate successor to the Kelowna Sawmill Co. Ltd. has no real connection to or interest in the lands bound by the Simpson Covenants. The successor company is based in the Yukon and its current manifestation is at least five mergers and sales removed from the original company owned by the Simpson family.

[150] The Society also argues that while Mr. Simpson signed the contract as the President of the Kelowna Sawmill Co. Ltd., the interested parties and the Kelowna residents understood that the deal was between the City and Mr. Simpson personally. The Society says that Mr. Simpson owned all but four of the shares in the company and was the directing will and mind of the company at all times.

[151] In support of lifting the corporate veil in this case the Society cites ***White v. E.B.F. Manufacturing Ltd.,*** 2005 NSCA 167, 239 N.S.R. (2d) 270 at ¶51 and 52. In that case, three situations warranting the lifting of the corporate veil were identified: (1) where failure to do so leads to a result flagrantly opposed to justice; (2) where the company acts with a fraudulent or illegal purpose to facilitate an act that would be unlawful if carried out by an individual personally; and (3) where the corporation merely acts as the controlling shareholder's agent or *alter ego*.

[152] The Society argues that the Kelowna Sawmill Co. Ltd. was the *alter ego* of Mr. Simpson and was merely his agent in the sale of the lands to the City. Further, the Society argues that to permit the distant corporate successor to discharge the

Simpson Covenants will result in a flagrant injustice after the City has acted for 60 years on the assumption that control over the Simpson Covenants passed to his heirs.

[153] The City argues this is not an appropriate case to lift the corporate veil; that the Society lacks standing to assert personal rights acquired by the Simpson heirs; and that there is no evidence Mr. Simpson's personal rights under the contract would devolve to his grandchildren or any other heir in particular.

[154] The City argues that the ***White*** case is distinguishable from the facts here because it involved two corporate entities that were inextricably linked. It was not a case where the court pierced the corporate veil as between a company and a principal said to be its directing mind. In addition, the City argues the ***White*** decision is inconsistent with BC authorities. In ***B.G. Preeco 1 (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.*** (1989), 37 B.C.L.R. (2d) 258 (C.A.), the City says the court rejected the so called "deep rock doctrine" that permits the corporate veil to be lifted whenever the failure to do so creates an injustice and showed a general reluctance to do so in any case. Also in support of this proposition the City cites ***Rohani v. Rohani,*** 2004 BCCA 605, ***Actton Petroleum Sales Ltd. v. British Columbia (Minister of Transportation and Highways***) (1998), 50 B.C.L.R. (3d) 187 (C.A.), and ***Kosmopoulos v. Constitution Insurance Co. of Canada***, [1987] 1 S.C.R. 2. In the latter case the City says the Supreme Court of Canada approved of the principle that only where a third party must be protected should the corporate veil be lifted.

[155] The City also argues there is no separate rule concerning the piercing of the corporate veil in the case of one-man companies: ***Clarkson Co. Ltd. v. Zhelka***, [1967] 2 O.R. 565 (H. Ct. Jus.).

[156] The City maintains the court's authority to lift the corporate veil was never intended to provide a remedy for the person who is the directing will and mind of the company or his heirs. It is only the innocent third party that can claim this relief: ***Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*** (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. No. 3754 (C.A.).

[157] After reviewing the authorities relied upon by the parties, I am satisfied that this is not an appropriate case in which to lift the corporate veil and make a finding that it was Mr. Simpson, rather than the Kelowna Sawmill Co. Ltd., who contracted with the City. Of the three situations in which the courts have lifted the corporate veil (as described in ***White*** at ¶51), only the first and third are potentially involved on the facts of this case. The first situation is "where a failure to do so would be unfair and lead to a result flagrantly opposed to justice". While the Nova Scotia Court of Appeal appears to have accepted that this type of situation warrants lifting the corporate veil, our Court of Appeal has been more reluctant to broaden the types of cases in which the principles of company law are ignored. In ***B.G. Preeco***, Seaton J.A. says at ¶37:

> I do not subscribe to the "Deep Rock doctrine" that permits the corporate veil to be lifted whenever to do otherwise is not fair. … That doctrine and the doctrine laid down in *Salomon v. Salomon & Co.,* [1897] A.C. 22 (H.L.), cannot coexist. If it were possible to ignore the principles of corporate entity when a judge thought it unfair not to do

> so, Salomon's case would have afforded a good example for the application of that approach.

[158] Moreover, the underlying purpose of the court's discretion to lift the corporate veil where to do otherwise would cause an injustice is to protect innocent third parties rather than the principal shareholder and *alter ego* of the company. This principle is aptly illustrated by the Supreme Court's reasoning in ***Kosmopoulos***. In that case, a company and its sole shareholder claimed a loss in a fire. The company held the assets damaged in the fire but the policy was issued in the shareholder's name. The majority declined to lift the corporate veil between the shareholder and the company to permit Mr. Kosmopoulos' action on this ground. Wilson J. (writing for the majority), says at ¶13:

> There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice". Mr. Kosmopoulos was advised by a competent solicitor to incorporate his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to "blow hot and cold" at the same time.
>
> [citations omitted]

[159] Similarly, Mr. Simpson chose to conduct his business as an incorporated company. The land sold to the City was owned by that corporate entity. Mr. Simpson, as the major shareholder, is not a third party who would otherwise suffer an injustice if the court failed to exercise its discretion to lift the corporate veil.

[160] The third situation in which the courts have lifted the corporate veil is when a company essentially acts as the controlling shareholder's agent. However, even in the case of a "one person company", the sole shareholder is not routinely regarded as the agent of the company or vice versa. The company remains a separate legal entity from its sole shareholder. This principle comes from ***Salomon*** where Lord Macnaghten says:

> The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.

[161] It is because of this fundamental principle of company law that before the corporate veil will be lifted, the evidence must show an agency arrangement independent of the relationship between a controlling shareholder and an incorporated entity. In this case, there is no evidence that Mr. Simpson negotiated with the City for the purchase of the subject properties in his personal capacity and merely utilized the corporate entity to carry out the transaction. To the contrary, Mr. Simpson signed the letter setting out the terms of the option to purchase the subject properties as president of the Kelowna Sawmill Co. Ltd. Moreover, the Kelowna Sawmill Co. Ltd. was the registered owner of the lands; Mr. Simpson did not own them in his personal capacity. Thus the fact that the company entered into the agreement and was the "grantor" in the deed was not simply a formality.

[162] The Society argues that to the general public and the members of the City Council, it was Mr. Simpson, and not the company, who was selling the properties to the City. While I have no doubt this is true, these assumptions do not lead to a conclusion that the corporate veil should be lifted. These assumptions do not give rise to evidence that the company was simply acting as Mr. Simpson's agent. Nor do they create the type of injustice that might lead to a lifting of the corporate veil. No third party requires this remedy because of the actions of the Kelowna Sawmill Co. Ltd. or Mr. Simpson. In short, Mr. Simpson took the benefits of incorporation and must therefore accept the burdens of it.

[163] Because of my conclusions in regard to the corporate veil argument, it is unnecessary to address whether the Society has standing to raise the question of enforcing the personal covenant.

[164] The City has obtained the written consent of Crown Forest Products to the discharge of the Simpson Covenants based upon its understanding that this is the corporate successor to the Kelowna Sawmill Co. Ltd. If the court had concluded that the Simpson Covenants were personal covenants, it is apparent that the corporate successor to the Kelowna Sawmill Co. Ltd. could authorize such a discharge. However, the evidence before me concerning this issue is insufficient to meet the onus resting with the City to prove that Crown Forest Products is the corporate successor.

Remedy

[165] The Society is entitled to a declaration that the Simpson Covenants are a valid and subsisting charitable trust that requires the City to use the subject properties for municipal purposes and not for commercial or industrial purposes, and which prohibits the City from selling the properties.

[166] The Society is entitled to a declaration that the City's Resolution R467/07/04/30 passed on April 30, 2004 purporting to discharge the Simpson Covenants constitutes a breach of the charitable trust created by the covenants.

[167] The Society is entitled to an order quashing the said Resolution on the ground that it is in breach of the trust upon which the City acquired the subject properties. I note here that the City does not take issue with the Society's standing to seek such a remedy despite the contrary view expressed in ***Armstrong*** by Rowles J.A. and Southin J.A.

[168] The Society also applies for a declaration that the trust conditions cannot be changed or removed without a plebiscite among the Kelowna residents. I am not satisfied that the parties' submissions have fully addressed this issue. What remedies, if any, the City may have if they believe the Simpson Covenants, as trust obligations, no longer serve the interests of the community was not fully canvassed by the parties during their submissions on the substantive issues. Accordingly, I am satisfied that it is not appropriate to make any orders in this regard until such time as the parties have been afforded this opportunity. Counsel may advise the registry whether they wish to make further submissions on this matter and a date for oral

submissions will be scheduled. In the event both counsel agree to written submissions, the time frame for these should be discussed and agreed upon as well. Failing agreement of counsel, the court will dictate the time frame for submissions.

[169] The Society is entitled to file a certificate of pending litigation against the subject properties until the court has made a decision with respect to the remedies available to the City.

[170] The Society shall have their costs in these proceedings.

[171] I remain seized of the outstanding issues in this matter.

"Bruce J."