

**IMPLIED COVENANTS ARISING OUT OF THE TRANSFER OF LAND
AND THE NEGATING OF SUCH COVENANTS**

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Section 77 of the Manitoba Real Property Act (the "MRPA") provides, in effect, that where title to land which is subject to a "mortgage" or an "encumbrance" is transferred, the transferee is deemed to covenant to the holder of the "mortgage" or "encumbrance" that the transferee will pay and perform all obligations contained in the "mortgage" or "encumbrance", and, that the transferee will additionally be deemed to covenant to the transferor that the transferee will so pay and perform and will indemnify the transferor from liabilities sustained by the transferor by virtue of the transferee's failure to so pay/perform in favour of the holder of the "mortgage" or the "encumbrance". Additionally, Section 77 specifies that "one or more (or all) of these "deemed covenants" may be negatived (i.e., eliminated) by the simple unilateral act of the transferor including a negating statement or declaration within the transfer instrument. These provisions raise the following questions:

- (a) it doesn't seem reasonable that the transferor can by its own act, eliminate the deemed covenant which would otherwise have to be undertaken by the transferee in favour of the holder of the "mortgage" or the "encumbrance", and that the transferor could no doubt do this without the mortgagee or holder of the encumbrance even knowing about this.
- (b) "mortgage" is defined in Section 1 of the MRPA to be "a charge on land created for securing a debt, existing, future or contingent, or a loan, and includes an hypothecation of the charge". Given that Section 77 limits itself to titled real estate, it is reasonable to assume that in the overwhelming majority of cases, "mortgage" will mean a real property mortgage in the form prescribed under the MRPA. "Encumbrance" is also defined in Section 1 of the MRPA to be "a charge or lien on land other than a mortgage, and includes an hypothecation of the charge or lien". Does this latter definition include:
 - (i) a builders lien or a judgment lien? - probably "yes";
 - (ii) an easement, a negative covenant or a building scheme? - probably "no";
 - (iii) the portion or those portions of a municipal subdivision agreement, zoning agreement or development agreement which obligate the property owner and its successors in title to pay certain amounts of money, in particular, where the agreement includes wording to the effect that the obligation to pay such money is "charged" against the ownership of the land? - uncertain; and
 - (iv) those portions of a lease which obligate the lessee to pay certain monies (whether expressed as rental or otherwise)? - probably "no".

The writer would like to thank his legal colleague Len Weinberg, Q.C. for suggesting this topic is one which merits consideration.

It would be useful if the government would clarify all this.

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