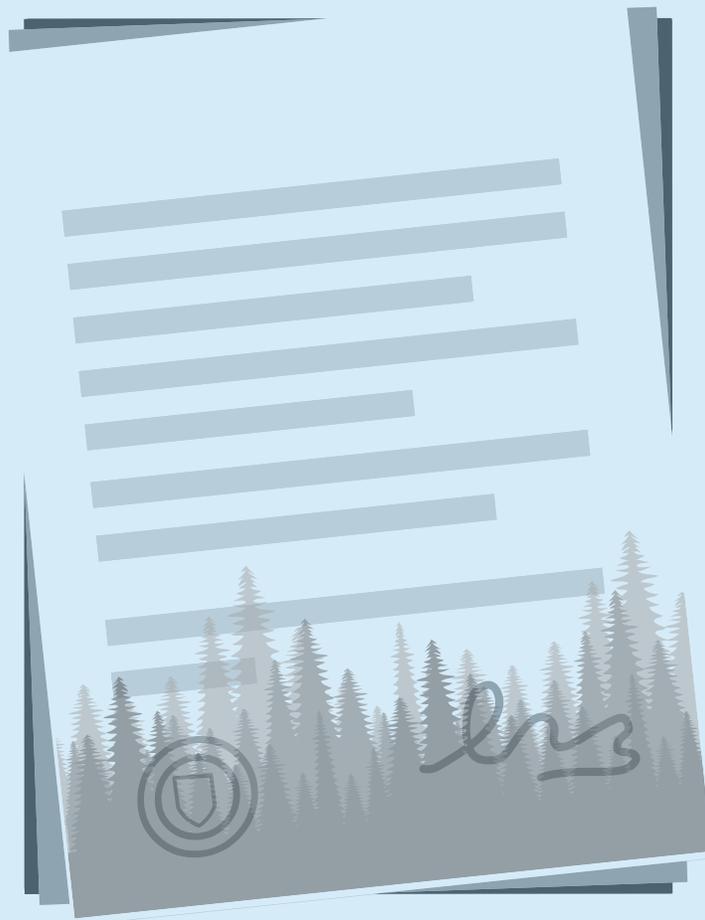


# BC Conservation Covenant Handbook

A Guide to Best Practices for Conservation  
Covenants in British Columbia

WEST COAST ENVIRONMENTAL LAW  
LAND TRUST ALLIANCE OF BRITISH COLUMBIA



FOURTH REVISED AND UPDATED EDITION 2023

(Originally published as *Greening Your Title*)



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**Land Trust Conservation Fund**



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# PREFACE

This publication, originally published in 2000 and periodically updated and revised, is a guide to the best practices associated with the use of “conservation covenants”. The primary focus of the *Handbook* is on using conservation covenants for the protection of ecologically significant private land. However, conservation covenants can be used to protect other special attributes of land such as cultural and heritage values.

This *Handbook* is published by West Coast Environmental Law Research Foundation and The Land Trust Alliance of British Columbia. WCELRF is a non-profit charitable society devoted to legal research, education and action for environmental protection. LTABC is a non-profit charitable organization dedicated to promoting private land conservation in BC through education, research, programs and services. In supporting BC’s 40 community land trusts, LTABC aims to increase capacity and knowledge in the sector.

This *Handbook* canvasses many of the laws, regulations, policies and practices that apply when a landowner grants a conservation covenant to a conservation organization that agrees to protect the land in perpetuity. It provides information about the issues that should be addressed by landowners, conservation organizations and other parties involved in protecting private land when they use conservation covenants to protect ecologically significant spaces or environmentally important features of land.

This *Handbook* is one of a number of publications of WCELRF and LTABC related to the legal protection of ecologically significant private land in British Columbia.

Readers are reminded that this *Handbook* is educational only and does not constitute legal or tax advice. All parties involved in the legal protection of a specific parcel of land are strongly urged to seek legal and tax advice at their earliest opportunity.

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The fourth edition of *BC Conservation Covenant Handbook* (formerly *Greening Your Title*) was coordinated and funded by the Land Trust Alliance of British Columbia. It was funded by The Notary Foundation of BC, Province of BC Gaming Branch and Environment & Climate Change Canada (Funding assistance does not imply endorsement of any statements or information contained in this *Handbook*.)

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## Chapter 1

# INTRODUCTION

Providing legal protection for special areas of privately owned land has become increasingly important in British Columbia during the past number of years. While private land makes up only about five percent of the land base in the province, much is concentrated in scarce and heavily-altered ecological zones such as Coastal Douglas-fir along Georgia Strait and the grasslands of the Okanagan Valley. This attribute amplifies the importance of ecological, cultural, heritage, aesthetic and recreational values of private land, making conservation very significant to individuals, communities and the entire province.

In all parts of the province, settlers were drawn to valley bottoms, estuaries and other scenic areas with high environmental values. Many of these areas are now privately owned. As the human impact on these critically important areas grows, concerned citizens and conservation organizations are increasing their efforts to provide permanent protection for these areas.

However, BC is home to numerous Indigenous peoples with distinct legal orders, languages and associated cultural identities. It is significant that colonization, settlement and private ownership of land has involved dispossession and displacement of indigenous peoples. Conservation of land by exclusion of others is different from how many indigenous societies understand relationships between individuals, communities and the land as a whole.<sup>1</sup> The inherent and constitutionally protected title, rights and jurisdiction of Indigenous peoples must be recognized and upheld whenever management or disposition of land is considered, particularly if that involves provincial public lands<sup>2</sup> or government grants for acquisition of private lands. This subject is discussed further in Chapter 2.

Several options are available to a landowner who wants to protect ecologically special property or land with other significant values. One option is for a landowner to make a gift of the land itself to a conservation organization or to the government. Alternatively, the landowner might sell the land to a conservation

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<sup>1</sup> For a detailed analysis, see L. Innes, I. Attridge and S. Lawson, 2019. *Respect and Responsibility: Integrating Indigenous Rights and Private Conservation in Canada – A guide for Land Trusts and Other Non-Governmental Organizations*, at [https://static1.squarespace.com/static/5d3f1e8262d8ed00013cdf1/t/6189508ca43e595b66116d7d/1636389010629/FINAL\\_Land+Trust+Consultation+Obligations\\_November+2021.pdf](https://static1.squarespace.com/static/5d3f1e8262d8ed00013cdf1/t/6189508ca43e595b66116d7d/1636389010629/FINAL_Land+Trust+Consultation+Obligations_November+2021.pdf).

<sup>2</sup> Provincial public lands, also referred to as Crown lands, are lands that are managed by the Province of B.C. on behalf of the public, subject to unextinguished aboriginal title.

organization. Both of these options require the landowner to part with the land. Another effective way to protect land is for the landowner to grant a conservation covenant to a conservation organization or government agency. A conservation covenant is a long-term commitment to stewardship of the land by the landowner and the conservation organization or government agency. It facilitates the permanent protection of the important values of the land according to the terms of the covenant while allowing the landowner to retain possession and carry out compatible uses of the land.

Particularly in light of the high purchase price of most private land, conservation covenants offer a cost effective alternative to purchasing land for protection of important features. They allow communities and conservation organizations to play an important role in the protection of ecologically significant land in the province.

Landowners can receive significant tax benefits from granting conservation covenants over ecologically significant land. This *Handbook* provides some information on the tax implications of conservation covenants.

While this *Handbook* focuses primarily on protecting natural values of land, the protection strategies and issues discussed in the *Handbook* are relevant to other protection objectives as well, such as preserving the heritage and cultural values of land.

The original title of this publication "Greening Your Title" has been changed, to reflect the fact that this publication is not directed primarily at landowners/ titleholders. A basic overview of principles regarding covenants can be found elsewhere.<sup>3</sup> This *Handbook* is directed to those organizations that want to hold conservation covenants on land owned by others, and to associated professionals – lawyers, realtors, planners and financial advisors. Therefore, it concerns the technicalities of negotiating and drafting conservation covenants. Nevertheless, landowners who contemplate entering into a covenant are likely to benefit from reviewing an example, such as the annotated covenant in Appendix 1. Landowners can also access a more general description of conservation covenants at the Land Trust Alliance of BC.<sup>4</sup>

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<sup>3</sup> Such information is available in the Land Trust Alliance of BC's *Natural Legacies Toolkit* at <https://ltabc.ca/resources/natural-legacies-toolkit/information-for-landowners/>.

<sup>4</sup> *Conservation Covenants – A Guide for Developers and Planning Departments*, The Land Trust Alliance of BC, 2009, available at [https://ltabc.ca/wp-content/uploads/2012/02/covenants\\_for\\_developers\\_planners.pdf](https://ltabc.ca/wp-content/uploads/2012/02/covenants_for_developers_planners.pdf). Although directed at local governments, this short publication provides a basic overview.

## OVERVIEW OF CONSERVATION COVENANTS

A conservation covenant is a voluntary, written agreement between a landowner and one or more covenant holders. It can cover all or part of a parcel of property and can apply year-round or only to specific periods in the year. In the agreement, the landowner promises to protect the land or features on the land in ways that are specified in the covenant. For instance, the landowner might agree to provide specific protection for important habitat or not to subdivide the land. The covenant holder holds the conservation covenant and can enforce it if the owner does not abide by its terms. The conservation covenant is registered against title to the property in the British Columbia Land Title Register under section 219 of the *Land Title Act*.<sup>5</sup> This ensures that it binds future owners of the land, not just the current landowner, since the conservation covenant is intended to last permanently.

### EXAMPLES OF APPLICATIONS

Conservation covenants can be used in a variety of ways to protect private land including:

- to protect ecologically valuable features of land;
- to secure appropriate management of various types of ecosystems and critical habitat;
- to provide buffer zones next to parks, wetlands or other environmentally sensitive areas;
- to protect sensitive areas in newly subdivided developments;
- to protect land for farming or forestry, or to protect ecologically sensitive areas on agricultural and forest land;
- to limit forestry activity on private land to ecologically sustainable, i.e. ecosystem-based forestry;
- to create trail systems and greenways through a number of parcels of adjoining land;
- to protect riparian habitat from logging, clearing or other development;

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<sup>5</sup> R.S.B.C. 1996, c. 250.

- to protect important heritage and cultural sites; and
- to ensure proper and permanent stewardship of ecologically sensitive land.

## NEED TO CONSIDER BEST PRACTICES

“Best practices” are nothing more than the most effective or useful practices that have evolved over time from the use of conservation covenants to protect private land – practices that have proven to be successful in achieving the objectives of the parties in protecting the land or the important features of the land. They are based on the present state of the law related to protecting private land in British Columbia with conservation covenants.

“Best practices” also incorporate some of the practical experience in the province that has occurred since 1994 when the *Land Title Act* was amended to allow conservation covenants to be held by non-government organizations. There has been an explosion of interest in the use of conservation covenants since those *Land Title Act* amendments. Every year, more organizations become involved in protecting ecologically significant pieces of private land. The number of conservation covenants held by non-government conservation organizations is growing. The range of applications for conservation covenants is also growing. As our experience in using conservation covenants in British Columbia expands, the practices related to their use continue to evolve and improve. And as the number of conservation organizations grows, the need, and the opportunity, to share experiences become greater than ever.

In many cases, conservation covenants significantly restrict what landowners can do with and on their land. These restrictions will apply to future owners of the land who did not choose to restrict the use of the land. In addition, placing a conservation covenant on land frequently will reduce the value of land because of the restrictions on land use. In identifying best practices, it should be assumed, therefore, that every conservation covenant will be challenged at some time in the future.

Hence, this *Handbook* contains information about some of the best practices that have evolved to date, particularly in relation to the legal aspects of using conservation covenants. Our objectives in compiling this *Handbook* to best practices are to

- ensure the highest possible standards are employed whenever conservation covenants are used;

- provide possible solutions to potential problems;
- ensure that conservation covenants are enforceable in perpetuity; and
- minimize, to the greatest extent possible, any difficulties related to their use.

Not all of the practices discussed in this *Handbook* will be the best in every situation. Often, more than one approach will yield a successful outcome. And since conservation covenants can be – and should be – tailored to meet the needs of both the land being protected and the parties involved in the protection of the land, the best practices in one situation may differ from the best practices in another.

Not all of the issues covered in this *Handbook* will apply to every situation. The complexity of each conservation covenant will depend on the values it is designed to protect and the wishes of the parties. Some covenants are very complex and involve sophisticated obligations while others are designed to simply protect the land in its natural state or prevent subdivision. As a result, it is important for landowners and conservation organizations to be aware of a wide range of issues and to turn their minds to whether or not the issues are relevant to the specific situation or piece of land with which they are involved.

The term “best practices” of course applies to many aspects of conservation beyond covenants, such as data storage, operation of conservation organizations and so on. This *Handbook* is restricted to best practices around negotiating and drafting conservation covenants. For best practices in relation to other aspects of operations such as fundraising and storage of records, readers should go to the Land Trust Alliance of BC’s *Best Practices Overview*.<sup>6</sup>

Best practices in relation to the use of conservation covenants will continue to evolve as will the need to share up-to-date information, communicate about successes and failures, and encourage the highest standards for achieving the permanent protection of those special spaces in the province that are privately owned.

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<sup>6</sup> Go to <https://best-practices.ltabc.ca>.

## **DISTINGUISHING CONSERVATION COVENANTS FROM OTHER MEASURES TO PROTECT PRIVATE LAND**

A conservation covenant is one of a number of legal tools available to protect private land for ecological or other purposes. In many circumstances, it is the best tool available. However, there may be situations where a different legal tool is necessary or desirable as an alternative to using a conservation covenant. In some cases, another legal tool can be used together with a conservation covenant to achieve a high level of long term legal protection. For instance, a landowner may wish to donate land to a conservation organization but, prior to the donation, grant a conservation covenant on that land to another conservation organization. This will ensure that there are two conservation organizations directly responsible for the protection of the land in the long term.

In other cases, the landowner may wish to grant a conservation covenant to a conservation organization to ensure the stewardship of the land in perpetuity, but also want to retain the right to live on the land for the length of the landowner's life or the lifetime of a relative of the landowner. In that case, the landowner can make the gift of the land to the conservation organization but retain the right to continue to live the rest of his or her life on the land. This is known as a life estate. When the party entitled to the life estate dies, the life estate will no longer be a charge registered against title to the land. The land then will be owned by the conservation organization entitled to the residual interest in the land. Although the land will continue to be subject to the conservation covenant, it will no longer be subject to the life estate.

In some circumstances, a landowner may be concerned about protecting a special attribute of his or her land but be uncertain about whether or not to enter into an arrangement for permanent and irrevocable protection. In those cases, it may be appropriate for the landowner to enter into a stewardship agreement. Such an agreement is not registered against title to the property. The stewardship agreement would be for a fixed term and could be with a conservation organization willing to participate in the protection of the particular parcel of land. These types of stewardship arrangements can build a relationship of trust and confidence that leads to the parties agreeing to place a conservation covenant on the land in the future.

Another option for protecting significant ecological values of private property, such as wildlife habitat, is for a landowner to become involved in measures to restore, preserve and enhance wildlife habitat in either an urban or rural

landscape. The Stewardship Centre for BC has a guide, “Stewardship Options for Private Landowners in British Columbia”<sup>7</sup> for landowners who voluntarily want to protect and maintain wildlife habitat on their property. Over time, a landowner may become interested in providing permanent legal protection for the land as part of practicing good stewardship.

## THE PURPOSE OF THIS *HANDBOOK*

This *Handbook* is intended to provide conservation organizations and other potential covenant holders, and real estate, legal and other professionals, with information about the best practices associated with the protection of ecologically significant private land through the use of conservation covenants. It addresses matters such as

- what a conservation covenant is;
- who can hold conservation covenants;
- how an organization can be designated to hold conservation covenants and statutory rights of way by the Surveyor General<sup>8</sup> of the Land Title and Survey Authority of BC;
- the need for all parties to a covenant to obtain professional advice;
- negotiating and drafting conservation covenants;
- many of the laws and regulations that apply when a landowner grants a conservation covenant;
- the types of costs associated with granting and maintaining a conservation covenant;
- the steps that must be taken when the land is within an agricultural land reserve designated under the *Agricultural Land Commission Act*;<sup>9</sup>
- the use and content of management agreements;
- the collection of baseline information;

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<sup>7</sup> *Stewardship Options for Private Landowners in British Columbia* (2012) at: <https://stewardshipcentrebc.ca/portfolio/stewardship-options>.

<sup>8</sup> The minister responsible for the *Land Title Act* has delegated to the Surveyor General the authority to designate bodies that can hold covenants.

<sup>9</sup> S.B.C. 2002, c. 36.

- monitoring covenants;
- enforcement practices;
- dispute resolution mechanisms;
- how to protect against liability; and
- a model conservation covenant and management agreement.

Chapter 2 (About Covenants) and the model conservation covenant in Appendix 1 can stimulate landowners who contemplate entering into a covenant to consider the seriousness of a covenant and ask questions of themselves and their lawyer.

## **GETTING PROFESSIONAL ADVICE**

This *Handbook* provides educational information only. It does not constitute legal, tax or other professional advice in connection with specific properties or specific transactions. It is intended to alert readers to issues related to using conservation covenants effectively. It is essential that landowners considering legal measures to protect their private land, and potential covenant holders considering accepting conservation covenants, consult with legal and tax advisers at the earliest opportunity.

## Chapter 2

# ABOUT COVENANTS

This *Handbook* is about the best practices associated with the protection of ecologically significant private land through the use of conservation covenants. A more detailed explanation of covenants, and conservation covenants in particular, is therefore in order.

## COVENANTS GENERALLY

A covenant is a promise. In property law, a common law covenant is a promise by one landowner to another to do, or not do, something in relation to his or her land. Such promises take the form of voluntary, written agreements.

At common law, there are a number of limitations to covenants. Such covenants must be restrictive or negative; they cannot create positive obligations. In addition, there must be two pieces of property involved, one that benefits from the covenant and one that is burdened by the covenant. These pieces of property must be very near each other. A common law restrictive covenant meeting these requirements and registered against title to land in the Land Title Register “runs with the land” or continues to bind the land even if the land is sold.

Restrictive covenants have a number of uses; for example, to restrict subdivision or development of property or to prevent a landowner from cutting down trees on his or her property. However, because of the common law limitations, they are not a flexible tool.

Under section 219 of the *Land Title Act*,<sup>10</sup> a landowner has long been able to grant a covenant in favour of the government. A section 219 or statutory covenant is similar to a common law restrictive covenant in being a promise, in a voluntary written agreement, by a landowner relating to the landowner’s land. However, there is no need to have two neighbouring properties. In addition, a statutory covenant can create positive obligations (things the landowner must do), not only negative obligations (things the landowner cannot do).

Statutory covenants have been used for a variety of purposes, including conservation purposes such as requirements or restrictions on use, building or

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<sup>10</sup> *Land Title Act*, R.S.B.C. 1996, c. 250.

subdivision of land, or requiring two or more properties not to be sold unless sold together. However, one particular type of statutory covenant is particularly well suited to conservation purposes – a “conservation covenant”.<sup>11</sup>

## DESCRIPTION OF CONSERVATION COVENANTS

A conservation covenant is a particular kind of statutory covenant, one designed for conservation purposes. It is a short-form way of referring to the intent to provide for “conservation” using the statutory authority to restrict use, building or subdivision, or by linking parcels. It refers to the use of the *Land Title Act*'s authority under section 219(4)(b), which provides: “that land or a specified amenity in relation to it be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant”. That legislation provides for not only conservation, but also enhancement, restoration and other protections. Thus, covenants can protect a broad range of ecological, cultural, heritage and other values.

The *Land Title Act* was amended in 1994 to allow a conservation covenant to be held by any person designated by what was then the Minister of Environment, Lands and Parks; previously, only the provincial or local governments or a government corporation or agency could hold them.<sup>12</sup> In practice, this means that a conservation covenant can be held by a non-governmental conservation organization such as a local conservancy or land trust or a large provincial or national conservancy group. A conservation covenant also can be held jointly by two or more organizations, one of which can be a provincial or local government agency. Conservation covenants have become a popular and effective tool to protect ecologically important private land in British Columbia.

As mentioned, a conservation covenant is a voluntary, written agreement between a landowner and a covenant holder covering all or part of a parcel of property.<sup>13</sup> In the agreement, the landowner promises to protect the land as provided in the

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<sup>11</sup> Strictly, there is no such thing as a “conservation” covenant. Section 219 of the *Land Title Act* refers to “a covenant described in subsection (4)”. Nevertheless, the term is commonly used to refer to a covenant that provides that “land or a specified amenity in relation to it be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state” under subsection 219(4).

<sup>12</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(3)(c). Currently the Surveyor General has been delegated the authority for designating organizations to hold conservation covenants.

<sup>13</sup> There are cases in which a local government may require a landowner to place a section 219 covenant on property at the time of some change in use of the property. However, when this *Guide* refers to a conservation covenant, in general, the reference is to a voluntary agreement between a landowner and a conservation organization or government body.

covenant. The covenant holder can enforce the covenant if the owner does not abide by its terms. The covenant is registered against title to the property in the Land Title Register under section 219 of the *Land Title Act*. Registration ensures that the existence of the covenant is known to future purchasers of the land. The effect is that the covenant binds future owners of the land, not just the current landowner, since the conservation covenant is intended to last indefinitely.

Unless indicated otherwise, the terms “covenant” and “conservation covenant” will be used interchangeably throughout this *Handbook* to refer to section 219 covenants that are created for conservation purposes.

## A GOOD TOOL TO PROTECT PRIVATE LAND

The language in the legislation allows conservation covenants to be used in a wide range of circumstances. Conservation covenants can be used to prohibit cutting down a single tree or to protect many hectares of land. In addition, since a conservation covenant is a written agreement between the parties to the covenant, it is flexible, suited to numerous provisions designed specifically to address the particular needs of the land and the parties involved. A conservation covenant is an effective tool because

- it can be individually tailored to address the particular ecological features or other assets or amenities of the land against which it is registered and the specific conservation objectives of the parties;
- a landowner can grant a conservation covenant covering only those areas of the landowner’s property with special significance or only specific time periods, allowing use of the remainder of the property without restriction;
- conservation covenants can be held by non-governmental conservation organizations that focus their time, energy and expertise on protecting ecologically important parcels of land, which allows these organizations to harness the local interest in protecting special spaces in the community and relieves some of the burden on government to protect land; and
- conservation covenants can be modified by the parties in the future to accommodate necessary changes.

## KINDS OF PROVISIONS

Section 219 of the *Land Title Act* sets out the kinds of provisions that can be included in a conservation covenant. Provisions can be either positive or negative; that is, covenant provisions can require the parties to do something or not to do something.

Under the *Land Title Act*, the following kinds of provisions can be included in a covenant:<sup>14</sup>

- provisions about the use of land or the use of a building on land;
- requirements that land must be built on in accordance with the covenant, cannot be built on except in accordance with the covenant, or cannot be built on at all;
- prohibitions against subdividing land or only in accordance with the covenant;
- where the covenant applies to more than one parcel of land, provisions that parcels of land designated in the covenant shall not be sold separately; and
- provisions that the land or a specified amenity be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant.<sup>15</sup>

“Amenity” includes any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land subject to the covenant.<sup>16</sup>

The Act does not set out an exhaustive list of the kinds of provisions that can be included in a conservation covenant. Conservation covenants can therefore be tailored to meet the conservation needs of the land and the wishes of the parties, so a variety of other types of provisions may be found in many conservation covenants in addition to those listed in the statute. The provisions need not be complex, particularly when the conservation objectives are simple and straightforward such as protecting the land in its natural state.

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<sup>14</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(2).

<sup>15</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(4).

<sup>16</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(5).

## INTENDED TO LAST

Although conservation covenants can include “sunset” clauses to expire after a specified period or event, they are intended to protect land indefinitely. Covenants are registered against title to the land under section 219 of the *Land Title Act* and are binding on the present and all future owners of the land. They are said to “run with the land.” In granting a covenant, the landowner permanently transfers the rights described in the covenant document to the covenant holder. As a result, the landowner cannot subsequently transfer those rights to the next owner of the land. Considerable care therefore must be taken in drafting a covenant, including avoiding language that could result in early expiry or cessation of the covenant.

The covenant is binding on a landowner only while the landowner continues to own the land. When a landowner sells or otherwise disposes of land subject to a covenant, the obligation to comply with the covenant passes to the new owner and the landowner who placed the covenant on the land is no longer bound by it.<sup>17</sup> This attribute is important for covenant holders. If covenanted land is going to be sold, the covenant holder should do an inspection to make sure the current landowner has not contravened the covenant, because as soon as the land is sold, that landowner can no longer be held responsible. Likewise, the new landowner will probably want to know that, when the land was bought, there were no covenant contraventions by the previous owner for which the new owner may be liable.

## ENGAGING FIRST NATIONS

Western approaches to land protection have a long and damaging legacy. Whether the lands were designated as parks or acquired and managed as private conservation areas, the outcome has usually been dispossession of indigenous peoples from the lands and interference with their access to medicine, food, water, important spiritual areas and other important aspects of Indigenous title and culture.

Most of the province still does not have treaties but, with passage of the *Declaration on the Rights of Indigenous Peoples Act*<sup>18</sup> in 2019, BC affirmed the application of the United Nations Declaration on the Rights of Indigenous Peoples (“UN Declaration”)<sup>19</sup> to the laws of BC. Those rights are applicable to conservation of

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<sup>17</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(8).

<sup>18</sup> S.B.C. 2019, c. 44.

<sup>19</sup> A/RES/61/295, available at <https://en.unesco.org/indigenous-peoples/undrip>.

natural areas. For example, the UN Declaration states that indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by traditional ownership, occupation or use. They therefore have the right to participate in decision-making in matters which would affect those rights.

Consultation with First Nations is a government to government requirement; there is no current Canadian legal requirement for conservation organizations engaged in conservation on fee simple lands to consult with Indigenous peoples (although there may well be within the relevant Indigenous legal order). Furthermore, Canadian legal requirements are a minimum; they do not encompass the relationship necessary for such organizations to function effectively within traditional territories. Regardless of whether local First Nations<sup>20</sup> are directly involved in conservation covenants, they should be kept informed so that they are aware of such plans. There are practical benefits to providing such information. For example, if any maintenance work is anticipated (e.g., digging holes to maintain fencing), there is a chance that such work may reveal heritage objects or a heritage site — personal property or land that has heritage value to an aboriginal people.<sup>21</sup> If encountered, all disturbance must stop unless a permit is granted to allow continuation. Local First Nations may be able to forewarn of the possible presence of such archeological features.

More generally, respecting Indigenous laws and knowledge with respect to covenanted lands is foundational to maintaining good relations. Indigenous uses of the land and water should be recognized in a conservation covenant and relevant management plans in cooperation with the relevant First Nation(s). To address the potential for future disagreements about whether the covenant is compatible with the exercise of Indigenous rights in the area, specific dispute resolution processes could be included in the covenant, such as agreeing to resolve such a dispute in a manner that reflects and incorporates the dispute resolution traditions and protocols of the affected Indigenous community.

It can also be the case that indigenous uses are the primary objective of a conservation area. That is the case with Indigenous Protected and Conserved Areas, lands and waters where indigenous governments have the primary role in protecting, conserving and managing ecosystems through indigenous laws, governance and knowledge systems. While IPCAs may be co-designated as

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<sup>20</sup> The province has a map service to find initial contact information for the First Nations that have identified geographic areas for consultation purposes at <https://www2.gov.bc.ca/gov/content/data/geographic-data-services/land-use/contacts-for-first-nation-consultation-areas>.

<sup>21</sup> *Heritage Conservation Act*, RSBC 1966, c. 187.

protected areas by other jurisdictions, BC currently lacks legislative mechanisms for fully recognizing Indigenous governance of IPCAs; a situation that needs to change for IPCAs to reach their full potential for conservation and Indigenous rights recognition. With respect to private lands, the question of whether and how conservation covenants could contribute to the "land back" movement or implementation of IPCAs remains to be explored. At a minimum, conservation covenants may prevent harmful development of private land while questions related to aboriginal title are resolved<sup>22</sup>.

## LONG TERM IMPLICATIONS FOR COVENANT HOLDERS AND LANDOWNERS

Because conservation covenants are intended to protect land indefinitely and bind future owners of the land, it is important that the parties to a covenant carefully consider the long term implications of the covenant.

In particular, covenants create long term obligations for both the covenant holder and landowner. There will be costs attached to some of these obligations and these costs may recur each year indefinitely.<sup>23</sup> The obligations and costs might be assumed by future owners of the land, including heirs of the landowner. In addition, placing a covenant on land may lower its value because a covenant generally restricts some uses of the land; for example, by preventing the landowner from subdividing or further developing the land.

Covenants also create a long term relationship between the landowner (and future landowners) and the covenant holder. Maintaining this relationship in good working order is important to the successful stewardship of the land protected by the covenant.

Parties to a conservation covenant must understand and accept these long term implications prior to entering into the covenant.

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<sup>22</sup> A number of legal cases before the courts may shed further light on the relationship between fee simple title and aboriginal title, including the implications of a declaration of aboriginal title on fee simple property. See e.g.,: *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311.

<sup>23</sup> For example, monitoring and insurance costs. These are discussed in Chapters 11 and 16.

## STEPS IN GRANTING AND HOLDING A CONSERVATION COVENANT

There are a number of common elements in the process of placing a conservation covenant on a parcel of land. Not all of them will be necessary in every situation, but landowners and conservation organizations should at least consider whether each of the steps is required. Some complex situations may involve additional steps.<sup>24</sup> Also, the timing of each of these steps will vary according to the specific circumstances. However, some steps, such as getting tax advice, should occur early in the process to avoid unexpected surprises after both landowners and conservation organizations have invested a great deal of time and energy in the process.

The landowner and the covenant holder should consider the following steps in placing a conservation covenant on land:

- identify the land to be protected;
- identify the characteristics of the land that are in need of permanent protection, such as the special natural features, the important habitat values, or the heritage or cultural values;
- determine the kinds of conservation practices that will best protect those characteristics;
- choose one or more conservation organizations to hold the conservation covenant, taking into consideration whether the organization
  - is designated to hold conservation covenants and statutory rights of way;<sup>25</sup>
  - has conservation objectives that fit well with the features of the land that are to be protected by the conservation covenant;
  - is an appropriate size and has adequate human and financial resources to undertake the covenant obligations and its long-term monitoring and enforcement; and

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<sup>24</sup> See Appendix 3 for a table setting out the steps involved. The table is intended to assist landowners and covenant holders to understand the process and to estimate the time and costs involved in placing a conservation covenant on land.

<sup>25</sup> Statutory rights of way under section 218 of the *Land Title Act* give the covenant holder access to the land. They are discussed in greater detail in Chapter 15.

- will be able to work well with the landowner;
- obtain legal advice;
- obtain tax advice;
- conduct an environmental assessment of the property to ensure it fits within the conservation objectives of the conservation organization and to disclose any outstanding liabilities connected with the land that must be addressed, such as environmental contamination;
- collect baseline information;
- negotiate the terms and conditions of the conservation covenant;
- if the land is in the agricultural land reserve, obtain the approval of the Provincial Agricultural Land Commission;
- have an appraisal completed;<sup>26</sup>
- prepare the conservation covenant document;
- prepare a management plan and management agreement for the land where appropriate;
- obtain a survey of the land, if necessary;
- execute the conservation covenant;
- register the conservation covenant at the appropriate Land Title and Survey Authority office;<sup>27</sup> and
- monitor the land as agreed in the conservation covenant and the management agreement.

**Example:** Morgan and Kim live on a beautiful waterfront parcel on one of the Gulf Islands. The land boasts majestic Douglas-fir, patches of exquisite wildflowers and a number of rare plants. A fish-bearing stream dissects the northwest corner of the land. Fortunately, the house, the original homestead and something of a local historic landmark, was built at the edge of the property. The property has

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<sup>26</sup> For helpful information about assessment of conservation lands, see *Property Assessments of Conservation Lands, A Guide for Land Owners, Land Trusts and Covenant Holders - Case Studies and Resources*, (2021) available at <https://ltabc.ca/wp-content/uploads/2021/04/property-assessments-2021-final.pdf>.

<sup>27</sup> The Land Title and Survey Authority of British Columbia (LTSA) is a statutory corporation responsible for operating BC's land title and survey systems on behalf of the province. The LTSA maintains the Land Title Register, BC's official legal record of private property ownership.

been in Kim's family for three generations and has remained virtually unchanged from the time it was first settled.

Morgan and Kim are getting older. They want to protect the land. However, they fear that other members of their family, to whom they expect to leave the land, may not understand the precious qualities that would be lost forever if the land were subdivided or developed and may not be inclined to keep the parcel intact in the future. Although they have considered trying to make the land a park, they are reluctant to do so because the land is all they have to pass on to their family members.

Kim and Morgan want to make sure they have done all they can to "green" their title to the land before passing the land on to someone else. After talking with the local land trust, as well as their lawyer and accountant, Morgan and Kim have decided to give the land trust a conservation covenant covering all the property except the area on which the house is located. The conservation covenant will describe all the things Morgan and Kim agree to do to protect the land. It also will prohibit any activities on the land, including subdivision of the land, which will disturb the important natural features of the land. Because the covenant will be registered against title to the land in the Land Title Register, it will apply to all future owners of the land, both Morgan's and Kim's heirs and strangers.

## **COSTS ASSOCIATED WITH CONSERVATION COVENANTS**

Two types of costs are likely to be associated with conservation covenants.

In the short term, each step in negotiating, drafting and finalizing a conservation covenant may have associated costs. The parties to a covenant should be aware of the kinds of costs that might be incurred at the beginning of the process and determine who will pay for what. Depending on the circumstances, costs might be incurred for the following:

- conducting an environmental assessment of the land to ensure it fits the conservation objectives of the organization and disclose any outstanding liabilities connected with the land, such as environmental contamination;

- appraising the value of the land and the value of the conservation covenant;
- surveying the area of the conservation covenant;
- preparing a baseline report;
- obtaining legal advice relating to negotiating, preparing and reviewing the conservation covenant;
- additional insurance;
- obtaining tax and accounting advice;
- purchasing the covenant, if it is not being donated; and
- fees for registering the covenant, statutory right of way, priority agreements, survey plans, and any other documents registered in the Land Title Register.

The costs listed above arise during the planning and granting of a covenant. Since a conservation covenant is intended to protect the land indefinitely and is a very serious commitment to the land on the part of both the owner and the covenant holder, it is essential that each step is undertaken carefully, using appropriate expertise where required. The range and amount of actual costs in agreeing to and finalizing a conservation covenant may be significant.

There will also be long-term ongoing costs such as monitoring, document preparation, invasive weed removal, maintenance of amenities and enforcement. These costs should not be underestimated since covenants are normally intended to remain in place indefinitely. The parties should address how these ongoing costs will be met to ensure that the land is protected in the way the parties intended.

A powerful way to deal with these long-term costs is to create an endowment as part of the covenant, whereby funds are invested with a foundation which pays out the interest earned annually. This creates an important and regular source of income to support future monitoring and maintenance. Discussions about endowments should occur early in the covenant negotiation process so that they can be integrated into the decision-making process for both the landowner and the covenant holders. Landowners may well be resistant to providing an endowment in addition to their donation of the covenant itself, so it is important to emphasize the importance of an endowment in allowing future and perpetual protection of the property. For example, there may be very significant costs if a future landowner chooses to challenge or extinguish a covenant in court. An endowment

could build up a defence fund, providing funds that would otherwise be beyond the capacity of a local conservation organization.

Many landowners will not be able to afford contributing to an endowment as a single donation, but there are many options.<sup>28</sup> Smaller donations can be contributed over time, or endowment contribution can be a part of their estate planning. The landowner, or the estate, will receive tax receipts for all donations.

## LAND WITHIN THE AGRICULTURAL LAND RESERVE

Conservation covenants can be used to protect land for farming or to protect environmentally sensitive areas on agricultural land. However, a conservation covenant that restricts or prohibits the use of land in the Agricultural Land Reserve (ALR) for farm purposes has no effect unless it is approved by the Provincial Agricultural Land Commission.<sup>29</sup>

Land within the ALR normally will have a legal notation to that effect on the title which is lodged in the Land Title Register. If a potential covenant holder is unsure of the status of the property, the conservation organization can contact the appropriate local government, either the regional district or the municipality, or the Provincial Agricultural Land Commission to determine if the land is located in the ALR.

In the past, the Agricultural Land Commission has been quite cautious about conservation covenants, interpreting some clauses as potentially prohibiting or restricting agricultural uses. That may not be a problem if the purpose of the covenant is not in direct conflict with agricultural uses. In such a situation, the Commission can formally acknowledge that. For example, a covenant that only prevents commercial logging might be acceptable.

Another option may be having the landowner apply to the Commission for a change of use to “non-farm”. The process is cumbersome<sup>30</sup> and quite expensive. If approved, that would allow a covenant on ALR lands even if that covenant may limit some agricultural uses. An example could be a covenant that prohibits just

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<sup>28</sup> A range of options for gifting, including endowments, is described in *Green Legacies: A Donor's Guide for B.C.* (2016) with detailed information about almost two dozen planned giving options for nature, including gifts of land or covenants. Available at [http://www.stewardshipcentrebc.ca/PDF\\_docs/GreenLegaciesGuide2016supp.pdf](http://www.stewardshipcentrebc.ca/PDF_docs/GreenLegaciesGuide2016supp.pdf).

<sup>29</sup> *Agricultural Land Commission Act*, S.B.C. 2002, c. 36, s. 22(2).

<sup>30</sup> For details, go to <https://www.alc.gov.bc.ca/application-and-notice-process/applications/making-an-application/>. The application fee was \$1,500 at time of writing.

some forms of agriculture, such as commercial removal of vegetation, which allows other agricultural uses like livestock farming to continue.

Overall, covenant registration on ALR lands has been difficult in the past. That may change<sup>31</sup> but, in the interim, a landowner who wishes to grant a covenant on land in the ALR should be advised of the potential difficulties and that covenant completion timelines may need to be significantly extended. One potential option to satisfy the Commission may be to simply include a clause in a covenant for ALR lands to say:

“Nothing in this covenant shall prohibit use of the Land for farm purposes.”

(Specifically in regard to preventing subdivision, there is no need for such a restriction in a covenant on ALR land because the Commission has its own barrier to such land use.)

The Commission requires covenant holders to be designated by the Surveyor General to hold covenants before referring a covenant to the Commission.<sup>32</sup> The Commission recommends early referral so that information gaps may be identified and contentious issues resolved well in advance of registration in the Land Title Register. Conservation covenants on land in the ALR cannot be registered without the approval of the Commission.

If the Commission withholds approval, there may be alternative interests in land, such as a profit à prendre, that could effect the desired conservation with no requirement for Commission approval. A profit à prendre<sup>33</sup> gives the holder the right to take specified natural resources on the land. A landowner can grant a profit à prendre to a conservation organization which could, for example, give the organization the right to harvest trees. The organization can then choose not to cut the trees. Because the conservation organization has acquired the right to that timber, no one else can acquire the right to cut them.<sup>34</sup>

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<sup>31</sup> For example, the ALC did not support a developer’s effort to remove a “no vegetation removal” covenant in a court case - *Regional District of Nanaimo v. Buck*, 2012 BCSC 572 (CanLII), <<https://canlii.ca/t/fr1gv>>, retrieved on 2022-10-26.

<sup>32</sup> See the discussion of designation in Chapter 5.

<sup>33</sup> More information on profits à prendre can be found in LTABC’s Natural Legacies summary *Protecting Nature on Private Land - Profits à Prendre* at <https://ltabc.ca/wp-content/uploads/2017/UP/Natural%20Legacies-%20Conservation%20Covenants%20in%20BC%20-%20Protecting%20Nature%20on%20Private%20Land%20-%20Profits%20a%20Prendre.pdf>.

<sup>34</sup> This type of interest has an 80-year time limit under the *Perpetuity Act*, RSBC 1996, c. 358, s. 7.

## PRIVATE MANAGED FOREST LAND

Owners of forested land can have it classified as “managed forest land” for property tax purposes under the *Assessment Act*.<sup>35</sup> About 5% (or 4.5 million hectares) of BC is privately owned and of that, about 2% is private forest land. About half of that, in turn, is managed forest land.<sup>36</sup>

There is no requirement to obtain consent from any third party prior to registration of a conservation covenant on private managed forest land, but the landowner will normally want to retain managed forest land classification, which requires approval by a Private Managed Forest Land Council under the *Private Managed Forest Land Act*.<sup>37</sup> Retention of managed forest land status requires formal management commitment to the Council to use the land for the production and harvesting of timber,<sup>38</sup> so a conservation covenant cannot completely prohibit timber harvesting on managed forest land.

Those contemplating putting a conservation covenant on managed forest land should consult their advisors about the possible property tax implications before proceeding. Conservation organizations should be cautious about taking on working forest covenants unless they have specific in-house expertise to support the management of such land. Managed forestry, including ecoforestry,<sup>39</sup> is a complex matter and requires substantial administration to be effective, especially when working within the constraints of a conservation covenant.

## WORKING LANDSCAPE COVENANTS

A typical conservation covenant will either protect an entire parcel of land or protect or conserve just a part of a parcel of land while allowing unconstrained use of the rest of the parcel by the landowner. However, landowners and conservation organizations can also agree to use conservation covenants to both protect the conservation area and permit compatible uses of the covenant area for other activities such as ranching and farming. A similar situation arises when maintenance activities are required to conserve amenities, such as endangered plant communities. In contrast to covenants to simply conserve specific amenities,

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<sup>35</sup> R.S.B.C. 1996, c. 20.

<sup>36</sup> Go to <https://alpha.gov.bc.ca/gov/content/industry/forestry/forest-tenures/private-managed-forest-land>.

<sup>37</sup> S.B.C. 2003, c. 80.

<sup>38</sup> *Private Managed Forest Land Council Regulation*, B.C. Reg. 182/2007, s. 9(1)(b).

<sup>39</sup> Ecoforestry or ecological forestry applies forest management that maintains or restores the natural ecosystem and provides for ecologically appropriate levels of harvest within a working forest. Harvesting is designed to create or maintain structural composition and biodiversity.

such “working landscape covenants” set out agreed management practices, ensuring that the land use or maintenance practices are compatible with conservation of specific amenities.

Covenants are a flexible, adaptable tool that can be tailored to meet a wide variety of purposes including complex land management, but they are not the right tool in every circumstance. The first step in creating a working landscape conservation covenant is to determine whether a covenant is the best land use management tool in the circumstances. In making this determination, the parties should consider that working landscape covenants present particular drafting challenges. Extra caution must be exercised when developing covenants that will contain detailed and elaborate land management provisions intended to stand the test of time. Drafting considerations are discussed in Chapter 4.

In addition, working landscape covenants likely will require more resources to monitor and administer over the long term and covenant holders must be able to support the ongoing administration costs. Covenant holder resources are discussed in Chapter 17. Finally, the landowner and covenant holders must be able to agree on the management approach to be taken in the covenant. Chapter 9 includes a more detailed discussion of this point.

## **DEVELOPMENT COVENANTS**

Local governments can implement a land use policy that allows developers to exceed the “allowable floor area ratio” in parts of a development in exchange for amenities such as parks or housing needed by the community in one or more parcels while increasing, by the same number, subdivision potential in one or more other parcels. They typically require dedication of greenspace on part of the property in exchange for increased residential density (“density bonus”) on other parts.

The developer, homeowners and the public can all benefit. For new residential developments, incorporating green space into the design will tend to speed government approvals, increase property values and expedite sale of the new homes. The developer reduces costs for infrastructure to service the residential area – roads, storm drains, sewer lines and distribution of water and power. The future homeowners and, potentially, the public, may get access to paths and trails in conserved greenspace. Conservation covenants are a flexible tool to formalize and conserve green spaces in and around new subdivisions. Chapter 4 has more detail on development covenants.

## LAND WITHIN REGIONAL AND PROVINCIAL PARKS

Conservation organizations sometimes acquire property from a private owner and then transfer it to a local or provincial government for long-term management as parkland, retaining a conservation covenant over that land. This achieves conservation objectives while relieving the organization of ongoing management costs.

Some of the elements found in most conservation covenants are not included in covenants in parks because a current government is often unwilling to constrain the decision-making powers of future elected governments. Thus, government will usually not agree to a penalty such as a rent charge. Because the land is to be park land, public access is usually assumed, so no statutory right of way over private property is required. Many other elements are either unnecessary or straightforward. Fewer terms need definition. The purpose is usually obvious – that the land will remain as a park, so the list of restricted uses is usually quite short. The government needs to reserve no rights and need incur no specific obligations other than using the land like any other park. Enforcement may be unnecessary. In addition, many of the standard “boilerplate” clauses are unnecessary in the case of an elected government landowner. The result is typically a much shorter covenant document.

## Chapter 3

# CONSERVATION COVENANTS IN THE COURTS

Conservation covenants generally are intended to last forever. Because they restrict land use and frequently lower the value of the land subject to the covenant, it is a good practice to assume that every covenant will be challenged some day. Such challenges can incur considerable expense and time. When a property owner wanted an exemption for subdivision of a portion of conservation covenanted land on Cortes Island, the dispute took seven years to go through negotiation, mediation, arbitration and finally court proceedings.<sup>40</sup>

A conservation covenant can be modified or cancelled by a court under the *Property Law Act*.<sup>41</sup> Section 35 provides:

35 (1) A person ... may apply to the Supreme Court for an order to modify or cancel:

- (a) an easement;
  - (b) a land use contract;
  - (c) a statutory right of way;...
  
  - (e) a restrictive or other covenant...
- (2) The court may make an order... on being satisfied that ...
- (a) because of changes in the character of the land... the interest is obsolete,
  - (b) the reasonable use of the land will be impeded, without practical benefit to others...,
  - (c) the persons who (have) the benefit of the ... interest have ... agreed to it being modified or cancelled,
  - (d) modification or cancellation will not injure the person entitled to the benefit of the ... interest, or
  - (e) the registered instrument is invalid (or) unenforceable...

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<sup>40</sup> *The New Forest Woodland Inc. v. The Nature Trust of British Columbia*, 2015 BCSC 111 (CanLII), <<https://canlii.ca/t/gg358>>, retrieved on 2022-08-14. The subdivision prohibition was upheld, although this decision concerned the *Arbitration Act*, not the enforceability of the covenant.

<sup>41</sup> R.S.B.C. 1996, c. 377, s. 35.

Thus, a property owner may ask a court to extinguish a covenant because changes of surrounding land uses over time have eliminated the conservation values on the covenanted property. A property owner could argue that her controversial use of the land is reasonable. However, the threshold here is difficult; the owner must show not only that the reasonable use of the land is being impeded, but also that there is no practical benefit to the covenant holder.<sup>42</sup> Alternatively, a landowner could argue that a covenant is invalid due to vagueness. Yet another possibility is alleging that a covenant is unenforceable, for example because a dispute resolution process set out in a covenant reached an incorrect result.

Of course, rather than asking a court to extinguish a covenant, a landowner may simply ignore the covenant's restrictions, unilaterally doing something on the land that the covenant does not permit. Any such challenge may well end up in court.

## CONSERVATION COVENANT CASES

There is still relatively little case law about interpreting and enforcing statutory instruments like conservation covenants or "conservation easements"<sup>43</sup>, but those decisions provide some guidance for drafting effective and enduring documents.

The following examples show some ways in which the Canadian courts have dealt with conservation covenants.

Example #1: The plaintiff asked the court to declare a conservation covenant to be obsolete because development of the neighbourhood surrounding the property would frustrate the purpose of the covenant.<sup>44</sup>

The covenant generally preserved the property "as is" so that it could be used as a bird and wildlife sanctuary. The landowner later changed his will to give the property to his niece. She wanted to be able to sell it without the covenant, as she believed the property would sell for more without the covenant. The land trust refused to remove the covenant, so the landowner asked the court to declare the covenant to be obsolete.

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<sup>42</sup> *Thornton v The Owners, Strata Plan VIS7092*, 2021 BCSC 2553 (CanLII), <<https://canlii.ca/t/jlqdz>>, retrieved on 2022-09-05.

<sup>43</sup> Conservation easements are similar to conservation covenants discussed in this Guide. Although they are not technically "easements", the term "conservation easement" is commonly used throughout the United States and some parts of Canada.

<sup>44</sup> *Vida (Re)*, 2021 BCSC 1444 (CanLII), <<https://canlii.ca/t/jh583>>, retrieved on 2022-08-01.

The court accepted that there may come a time when the character of the neighbourhood changed such that the property was no longer an effective bird and wildlife sanctuary. However, the property was still in essentially the same state it was when the covenant was granted. A variety of bird species continued to frequent the property to visit the bird feeders and to build nests in the forest. The forest still offered sanctuary and nourishment to small mammals and amphibians. The court concluded that the property was still an important refuge from the pressures of urbanization, and thus rejected the application to extinguish the covenant.

Example #2: The defendant had cut trees, without permission, on an area where a conservation covenant prohibited cutting trees without approval of the covenant holder. The defendant asked the court to declare the covenant invalid because the land was within the Agricultural Land Reserve and the Commission had not approved it.<sup>45</sup>

It was true that, under the *Agricultural Land Reserve Act*, the Commission has to approve any covenant that prohibits the use of agricultural land for farm purposes. In this case, there had been no approval. However, the court said that it was up to the Commission to determine whether land was suitable for farming and also whether the covenant actually restricted or prohibited the use of agricultural land for farm purposes. Here, the Commission had carefully considered the matter and decided that the covenant did not prohibit the use of the defendant's land for farm purposes, and thus also decided that its approval was not required.

Example #3: The defendant owned property within an industrial area but the property had a conservation covenant requiring plant life to remain as a visual screen of undisturbed natural vegetation. The

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<sup>45</sup> *Regional District of Nanaimo v. Buck*, 2012 BCSC 572 (CanLII), <<https://canlii.ca/t/fr1gv>>, retrieved on 2022-08-07.

defendant had deposited fill and had not maintained the required buffer.<sup>46</sup> The covenant holder wanted all of the fill removed and the area replanted to create the conditions that approximated undisturbed vegetation.

The court noted that it was impossible for there to be “undisturbed” vegetation in some parts of the covenant area. There was also no provision in the covenant giving a right to compel remediation. The court then looked to the purpose of the covenant, which was to guarantee a buffer and not necessarily to maintain “undisturbed natural vegetation”. Past industrial use had left sparse natural vegetation, with invasive plant species apparent throughout, so remediation was inappropriate. Instead, the court ordered the defendant to landscape the disturbed area as determined by the covenant holder.

**Example #4:** A conservation organization owned a large cattle ranch, which it leased out for cattle grazing.<sup>47</sup> The defendant, an experienced bison rancher, bought the ranch. He planned to place wild bison on the ranch, which was dedicated to the restoration and conservation of the wild bison species and to the restoration of the natural habitat in which, historically, those bison thrived.

The conservation organization wanted to ensure that wildlife could continue to migrate across the ranch. Before selling the ranch, it registered a conservation easement to ensure that fencing would not impede future wildlife migrations.

Immediately after his purchase, the rancher began to replace the barbed wire fences around the perimeter of the ranch with new smooth wire fencing, with a higher lower strand (to facilitate wildlife passage) but also with electrical current. He believed such fencing would be more effective at restraining his bison, yet still permit wildlife to migrate through the property. The conservation organization disagreed, maintaining that the new

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<sup>46</sup> *North Cowichan (District) v. Fokkema Enterprises Ltd.*, 2014 BCSC 886 (CanLII), <<https://canlii.ca/t/g6x8f>>, retrieved on 2022-08-07.

<sup>47</sup> *Nature Conservancy of Canada v Waterton Land Trust Ltd*, 2014 ABQB 303 (CanLII), <<https://canlii.ca/t/g6x7k>>, retrieved on 2022-08-28.

fence would impede migrating wildlife, contrary to the conservation easement.

Significantly, the court examined the actions of the parties in relation to the overall purpose of the easement. The rangeland had long been in poor condition due to overgrazing, but the conservation organization had done nothing to reduce grazing pressure during the two years that it had owned the property. In contrast, range quality had improved under the defendant's care; he had voluntarily delayed grazing, allowing some recovery. The organization had apparently been more concerned with public relations than range management, whereas the defendant had been focused on safe ranching that allowed wildlife to pass. The court found that the new fence did not contravene the general purpose of the conservation easement, as it did not impede wildlife.

## RESTRICTIVE COVENANT CASES

There is also some guidance from principles and approaches applied by courts in interpreting common law restrictive covenants. A brief review of some of the principles identified by our courts indicates the kinds of approaches that are likely to apply in interpreting and enforcing statutorily based conservation covenants.

The interpretation of the language of a covenant is central to a determination of whether or not a restrictive covenant will be enforceable. Covenants tend to be strictly interpreted. The terms must be clearly and succinctly stated "so that present and future owners may know with precision what obligations are imposed upon them".<sup>48</sup> Therefore, if a covenant's wording is ambiguous, an application to enforce its terms may well be dismissed. BC's highest court confirmed that "It is well established that restrictive covenants are strictly construed. Ambiguity is resolved in favour of nonenforcement."<sup>49</sup>

In general, the courts will first look to the "plain words" of the document itself. If needed, the court can choose to look beyond the 'four corners' of the document and consider other evidence to determine the intent of the parties.

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<sup>48</sup> *Newco Investments Corporation v. British Columbia Transit*, 1988 CanLII 2845 (BC CA), <<https://canlii.ca/t/20xhm>>, retrieved on 2022-09-05.

<sup>49</sup> *Kirk v. Distacom Ventures Inc.*, 1996 CanLII 1442 (BC CA), <<https://canlii.ca/t/1f08p>>, retrieved on 2022-08-05 at para 23.

The examples below are offered as case studies of how the courts have looked at selected restrictive covenants. This is not an exhaustive review of the cases in this area. While in many of these examples the covenant was upheld, some were found to be unenforceable. These “negative” examples are included to show the kind of caution and care that must be taken in drafting conservation covenants to ensure that they are enforceable in perpetuity.

The examples show, among other things, the importance of precision and clarity in drafting and of drafting to meet the specific conservation objectives of the parties. The lessons learned from these cases have been incorporated in the discussion about drafting conservation covenants in the next chapter.

Example #1: The plaintiff sought a permanent injunction alleging that the neighboring landowner had breached an environmental setback restrictive covenant.<sup>50</sup> The covenant stated the following:

The Covenant Area shall not be built upon nor shall any buildings, structures, equipment, chattels, furniture or improvements be placed or erected on the Covenant Area. Any landscaping or vegetation within the Covenant Area between the environmental setback line and the property line for each strata lot comprising of the Lands shall be maintained with a “naturalistic character”.

The defendants, purchasers of land burdened by the covenant, constructed a hot tub and planted trees that the plaintiff neighbour alleged violated the terms of the covenant.

The court noted that the covenant holder was the municipal government, not the plaintiff. “Notwithstanding that they are registered against title, restrictive covenants are contracts that cover the relationship between the owner of land and the other party, in this case, the Resort Municipality of Whistler. As such, they are not enforceable by third parties such as the plaintiff.”

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<sup>50</sup> *Suomalainen v. Jernigan et al.*, 2004 BCSC 465 (CanLII), <<https://canlii.ca/t/1gw30>>, retrieved on 2022-09-04.

Example #2: The plaintiff sought a permanent injunction alleging the defendants had breached a restrictive covenant.<sup>51</sup> The covenant stated the following:

Hereafter, no logging shall be carried out and no vegetation or plant life shall be disturbed or removed or interfered with on... the watershed for the community water utility presently known as Wilderness Mountain Water Corporation.

The defendants, purchasers of land burdened by the covenant, carried out logging, blasting and excavation to construct a driveway. The plaintiff said that violated the terms of the covenant.

The court found that the restrictive covenant was not enforceable because the definition of “watershed” was ambiguous. There were ten different watersheds on the land and it was not possible to determine which watershed the restrictive covenant protected.

The court compared the restrictive covenant with more recent conservation covenants that had been placed on the land and noted that “in marked contrast to the vague wording of [the restrictive covenant, the conservation covenants] identified the watersheds ... on a Reference Plan.” Moreover the new conservation covenants expressly referred to the need to protect specific watershed areas that had been surveyed. An accompanying plan left no doubt as to the exact location of the watersheds to be protected by the conservation covenants.

Example #3: A local government had concerns about public safety due to potential landslides triggered by disturbance to upslope soil and vegetation, so the landowner was bound by a restrictive covenant that specified that there would be “no vegetation or soil removal for driveway construction or building development without a plan(s) ... certifying that the works to be completed will not adversely or injuriously affect persons and/or property”.<sup>52</sup> The

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<sup>51</sup> *Mt. Matheson Conservation Society v. 573132 B.C. Ltd.*, 2002 BCSC 1254 (CanLII), <<https://canlii.ca/t/5jrs>>, retrieved on 2022-09-04.

<sup>52</sup> *Chilliwack (District of) v. Weihs*, 1994 CanLII 3226 (BC SC), <<https://canlii.ca/t/1dnt8>>, retrieved on 2022-12-08.

landowner had placed, and then cleared, debris from the road, mainly treetops from his logging operation. The issue was whether that debris constituted “vegetation or soil”. The court stated:

The purpose of the Restrictive Covenant was to ensure that no further construction that might increase the risk of slides from this steeply sloped property occurred. I find that “vegetation” refers to living material that, while in place, would help to stabilize the soil. The removal of the debris from the road was not removal of “vegetation”. I find that because the road was already constructed the removal did not amount to “driveway construction” within the context of the Restrictive Covenant.

Note that the court first considered the purpose of the covenant and then interpreted the wording in the context of that purpose.

**Example #4:** A restrictive covenant between two neighbours along Cowichan Lake that stated “No act of commerce or industry shall be carried on any lot” was upheld.<sup>53</sup> The court stated:

In this case, it is clear to me the purpose of the relevant restrictive covenant was the preservation of the lands so as to exclude commercial or industrial ventures, and maintain the aesthetic character and amenities of lakeside property... One of the restrictions imposed is using the lands for commercial or industrial purposes. So long as the Court is able to identify commercial and industrial uses of land then, in my view, the language of the covenant is clearly expressed and capable of enforcement.

The court found that a campground and trailer park on the land were commercial ventures that were in breach of the restrictive covenant.

Nevertheless, the court declined to enforce the covenant because other properties that were subject to the covenant had already been commercialized (neighbours had built a marina and motel)

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<sup>53</sup> *Turney v. Lubin*, 1979 CanLII 3117 (BC SC), <<https://canlii.ca/t/gbz5r>>, retrieved on 2022-12-08.

but the plaintiff had done nothing to enforce the restrictive covenant against those commercial developments. The court noted that, by acquiescing in breaches of a covenant, a party may lose its right to have it enforced.

Example #5: A restrictive covenant stated that the owners of the land and their transferees “shall not use the lands herein for any other purpose than that provided by resolution of [the municipal] Council.”<sup>54</sup> The court found this covenant to be far too uncertain to be enforceable:

The covenant as expressed in the transfer is thus susceptible of the interpretation that the use to which the land may or may not be put must depend upon the whim of Council... I cannot think of anything more uncertain and more indefinite than such a provision if, by the covenant, the municipal corporation purported to reserve to itself the right to dictate and control by resolution the uses which could be made of the subject land.

Example #6: A homeowner wanted to build a new house that was slightly higher than what was allowed under a restrictive covenant and applied to have the covenant cancelled.<sup>55</sup>

The court refused to do so. The court accepted that erecting a new house was a reasonable use and that it would be impeded by the covenant. However, the landowner also had to prove that the covenant did not provide practical benefit to others. This did not involve a balancing of interests between the covenantor and covenantees; instead, the landowner had to prove that the covenant provided no practical benefit. In this case, preserving the neighbours’ views was a practical benefit.

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<sup>54</sup> *Re Sekretov and City of Toronto*, 1973 CanLII 712 (ON CA), <<https://canlii.ca/t/g16hr>>, retrieved on 2022-09-08.

<sup>55</sup> *Wallster v. Erschbamer*, 2011 BCCA 27 (CanLII), <<https://canlii.ca/t/2fh7l>>, retrieved on 2022-09-05.

Example #7: A landowner applied for cancellation of a restrictive covenant registered against 20 parcels of land on Galiano Island.<sup>56</sup> The land had previously been down-zoned to prohibit residential use and allow only forestry use. It had also set a minimum lot size of 65 hectares. This down-zoning was challenged in the court and struck down, so the former zoning which allowed smaller lots and residential use was revived.

The landowner began to develop the land. As part of development approval, a restrictive covenant was placed on the land. It prohibited cutting of evergreen trees on portions of the lots bordering the road to preserve a treed corridor in a proposed residential development.

Meanwhile, the court decision that had struck down the down-zoning was successfully appealed, so the more restrictive zoning was reinstated. As a result, the landowner held 8 hectare lots that again could be used only for forestry purposes. Given that the land could now be used only for forestry, the circumstances that existed when the covenant was granted no longer applied. Therefore, the landowner argued that the restrictive covenant was no longer needed. In addition, the landowner argued that words such as “building site” and “curtilage” were unacceptably vague and that a phrase such as “evergreen trees” was insufficiently precise for use in a restrictive covenant.

The court rejected both arguments. It found that changed circumstances had not made the covenant obsolete; it still met some of its original purposes. As for vagueness, the court stated:

While there may some debate as to whether the particular activities are allowed or prohibited – for example, whether the construction of a logging road is included in the term “driveway,” – that does not serve to make the covenant unenforceable. The covenant is not unusual in its wording, and the courts are able to assist the parties in its interpretation should that become necessary.

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<sup>56</sup> *Winmark Capital v. Galiano Island Local Trust*, 2004 BCSC 1754 (CanLII), <<https://canlii.ca/t/1jlf1>>, retrieved on 2022-09-05.

While, as is virtually always the case, greater precision might be helpful, I consider the wording of the restrictive covenant (even in the context of the current zoning) to be enforceable.

## Chapter 4

# NEGOTIATING AND DRAFTING CONSERVATION COVENANTS

A conservation covenant is a kind of contract as well as creating a legal interest in land. Like all contracts, the terms of a conservation covenant must be negotiated between the parties. Once negotiations are complete, a final written document is prepared containing the terms on which the parties have agreed. This chapter looks at the negotiation process and draws on the case studies in the last chapter, among other things, to set out principles for effective drafting.

## NEGOTIATING CONSERVATION COVENANTS

The negotiation process can take a significant amount of time. However, the process of reaching agreement about the terms of a covenant provides an opportunity for the landowner and covenant holder to develop an effective working relationship.

A number of steps are involved in developing and finalizing the terms of a covenant. Generally, covenant holders will use a form of conservation covenant, such as the annotated covenant in Appendix 1. A “form of covenant” is intended to contain the terms that are essential to make the covenant effective and enforceable. However, each form is simply that, a form. It is not a document where the parties can simply “fill in the blanks”. Each conservation covenant will have its own factual matrix and a form of covenant cannot address every possibility. Because entering into a conservation covenant is a significant commitment, the parties must review and analyze each term in a form of conservation covenant. Existing terms must be adapted and new terms created as necessary to address the specific circumstances.

Some local governments or other government agencies may require parties to use a particular form of covenant, for example as a condition of development or subdivision approval or eligibility for property tax relief. The Natural Area Protection Tax Exemption Program of the Islands Trust is a property tax incentive

program specific to a number of Gulf Islands that is designed to encourage landowners to protect the natural features of their land by providing a 65% exemption on property taxes for the protected portion of a property. That program is one example of a program requiring landowners to enter into a particular form of covenant.<sup>57</sup>

Where a form of covenant is required by legislation, there may be little opportunity to alter its terms. In these circumstances, both the landowner and covenant holder must decide whether the required terms accomplish their goals. If the required terms are not sufficient for their purposes, the parties will need to ask the government agency whether the form of covenant can be altered. If the answer is “no”, the parties may find it impossible to reach agreement on the terms of the covenant.

Regardless of the circumstances, all parties should obtain professional advice during the negotiation stage about the legal impact of the covenant and the tax and other financial implications.

#### TYPICAL STEPS IN NEGOTIATING A COVENANT

Conservation covenant negotiations can begin in a number of ways. For example, a landowner with ecologically significant land may know about conservation covenants and want to protect the land in perpetuity. The landowner could contact a conservation organization to begin discussions about putting a conservation covenant on her land. Alternatively, a conservation organization, through its landowner contact program, might contact a landowner or hold a public information meeting about conservation covenants. In still other circumstances, a landowner might choose to grant a conservation covenant on his land to qualify for property tax relief or as a condition of subdivision approval.

Depending on the circumstances and the values to be conserved, the following steps will form part of conservation covenant negotiations:

- determining the values to be protected;
- determining the ways in which the values will be protected, that is, the potential restrictions on land use;
- determining the rights that are to be retained by the landowner;

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<sup>57</sup> For information about NAPTEP, go to the Islands Trust website at <https://islandstrust.bc.ca/programs/natural-area-protection-tax-exemption-program/>.

- preparing and agreeing on a baseline report, which may include mapping, aerial photography, sampling and testing;
- deciding how to allocate costs, liabilities and obligations relating to drafting, registering and implementing the covenant;
- obtaining legal and tax advice; and
- finding out about, and dealing with, prior charges on the land such as mortgages, easements and rights of way.

The parties to a conservation covenant generally will conduct much of these discussions themselves. In some circumstances, however, they may need legal representation. This often will be the case when finalizing the terms of the covenant document.

It is also during the negotiation stage that the parties will obtain surveys, appraisals, certificates of ecological sensitivity in the case of ecological gifts, contaminated site assessments, local government and Agricultural Land Commission approvals, and so on. Each of these steps will provide information that may affect covenant negotiations and the kinds of terms that will be included in the covenant.

The final step in negotiating a conservation covenant is drafting the covenant document itself. The covenant likely will be revised a number of times before it is acceptable to all parties. Drafting often begins before all information has been obtained and terms may need to be revised to address information as it is received. It is not unusual for the negotiation process to take many months.

## **DRAFTING CONSERVATION COVENANTS**

Conservation covenants, which are frequently complex documents, are intended to last indefinitely. As the examples in the last chapter show, conservation covenants must be drafted in a way that clearly sets out the rights and obligations of the parties. They must stand the test of time and be as meaningful 150 years from now as they are today. They should be drafted with the assumption that they will be challenged at some time in the future.

### **SOME GENERAL PRINCIPLES**

The discussion of case law above and general drafting principles offer some guidance for drafting conservation covenants. The principles and suggestions set out below are derived from these sources. It is good practice for any organization

developing a form of conservation covenant to adhere to basic drafting principles. These principles should also be applied when drafting the actual terms of specific covenants.

1. Conservation covenants are creatures of statute so they must comply with the statutory provisions authorizing their use. In British Columbia, the relevant statutory provision is section 219 of the *Land Title Act*. In addition, section 218 authorizes the granting of statutory rights of way to designated organizations.<sup>58</sup> Anyone involved in drafting conservation covenants must be familiar with sections 218 and 219 and the law related to the following:
  - who can hold a conservation covenant or statutory right of way and what steps must be taken to enable an organization to hold covenants and rights of way;
  - purposes for which a conservation covenant can be granted;
  - what kinds of restrictions and obligations a conservation covenant can impose;
  - what kinds of enforcement remedies are permitted; and
  - how a conservation covenant can be modified, assigned or discharged.
2. Do not use precedents and forms of covenants without giving a great deal of thought and care to ensure that the finished product meets all the needs of the parties in the specific circumstances.
3. Check with the Land Title and Survey Authority for the requirements for registering the conservation covenant in the Land Title Register. Registration is necessary to ensure the covenant runs with land and binds future owners. Will it be necessary for the covenant document to include terms about registration? What can be registered in the Land Title Register? Basically, anything that can be scanned electronically and clearly depicted, including maps, can be registered — the covenant document, baseline studies, schedules and such. There is no limit to the number of pages that can be registered. However, the Land Title and Survey Authority cannot register photographs or videos, which cannot

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<sup>58</sup> A statutory right of way gives the covenant holder access to the covenanted land for monitoring and enforcement purposes. See the discussion about access in Chapter 15 and about designation of covenant holders in Chapter 5.

be scanned. How will material that cannot be registered but is essential to the covenant be dealt with in the document?

4. A court will generally look at the entire document when interpreting a provision, so covenant drafters must therefore do the same. Look at the entire document during the drafting process. Throughout the process, review the document to ensure it fits together well. Eliminate internal inconsistencies and contradictory sections. Be vigilant throughout the drafting process because inconsistencies and contradictions are likely to develop over several drafts.
5. Clear, precise, accurate drafting will help avoid disputes and, if a dispute occurs and goes to court, will help ensure the document is interpreted according to the parties' intentions when it was drafted. As much as possible, avoid drafting documents containing vaguely worded clauses and clauses whose meaning is uncertain. Avoid using colloquialisms, abbreviations, terms of art or technical terms in conservation covenants. If they must be used, define the terms so that a "reasonable person" or a lay person will understand the terms, precisely as intended.
6. Avoid including provisions that cannot be monitored or enforced and also those that the covenant holder does not intend to monitor and enforce. Avoid any temptation to micromanage land using a conservation covenant; the attempt may backfire.
7. Proof-read the document again and again and proof-read it carefully. Avoid typographical errors, inconsistencies and sloppy mistakes which tend to colour the entire document. Remember that the covenant may need to be enforced a hundred years from now.
8. Obtain legal advice. If lawyers are not involved throughout the drafting process, each party must obtain independent legal advice before finalizing the covenant. Lawyers can assist in answering the questions raised in the discussion below about specific clauses.

## PARTICULAR KINDS OF CLAUSES

A typical conservation covenant will contain many provisions. This section examines a few typical provisions that will form part of most conservation covenants and offers some drafting guidance.<sup>59</sup>

### **Interpretation and definitions**

See Annotated Conservation Covenant, article 1.

Every covenant should include an interpretation section. The interpretation section generally will include definitions (Annotated Conservation Covenant, section 1.1) and principles of interpretation that must be applied when interpreting the meaning of the covenant terms (Annotated Conservation Covenant, sections 1.2 –1.5). The interpretation section is vital to ensuring that the meaning of the terms of the covenant remains clear over time.

Covenant drafters must decide what words should be defined and whether it may be preferable, under some circumstances, to leave some words undefined. Don't define terms if the dictionary definitions capture what is meant. For example, decide whether it is necessary to define terms like "agriculture", "ecosystem-based forestry" and "organic gardening". Defining words clearly freezes their meaning as of the time the covenant is drafted but makes it more likely that the words will be given the meaning the parties intended.

Ensure that all terms that need to be defined are defined and that those definitions are as clear and precise as possible.

Defined terms are generally capitalized throughout the covenant to indicate that they are defined terms. They must be used consistently throughout the document; use the same term for the same thing. Make sure all capitalized terms are defined. If the document includes a definition section, include all of the defined terms in that section; avoid defining terms elsewhere in the document.

Consider how much information to include in the definition of a term. It may be preferable to include significant content in other sections of the covenant and refer to specific sections in the definitions (see, for example, the definition of "Rent Charge" in section 1.1 of the Annotated Conservation Covenant).

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<sup>59</sup> For additional guidance, see the annotations in the Annotated Conservation Covenant in Appendix 1 for suggestions about drafting.

## **Intent and purpose section**

See Annotated Conservation Covenant, article 3.

The intent and purpose section is also vital to the interpretation of a conservation covenant because it is the lens through which anyone interpreting the covenant must look. It explains why the parties entered into the covenant. The intent and purpose section can include more than one purpose. As discussed in Chapter 6, including more than one purpose can help reduce the risk of a successful application to have the covenant terminated.

An agreement can have both primary and secondary purposes. It is useful to identify the purposes as primary and secondary if that is the case. If there is ever any need to establish a hierarchy of purposes in interpreting other provisions in the conservation covenant, identifying the purposes as primary and secondary will assist in this exercise.

As a general rule, the parties should only include purposes that are important and central to why the covenant was granted. Ancillary purposes that are not central to the conservation objectives should not be included, especially if there is no real intention or possibility of enforcing them. Including ancillary purposes may muddy the waters and have the effect of diluting the importance of the main purposes of the covenant.

Think about the intent and purpose section carefully in the context of the circumstances relating to each covenant. Avoid simply borrowing the intent and purpose section from another covenant without considering whether it is appropriate for the covenant being drafted.

The intent and purpose section often contains the following kind of statement:

This Agreement shall be perpetual to reflect the public interest in the protection, preservation, and conservation of the natural state of the Land and the Amenities for ecological and environmental reasons.

The intent and purpose section may need to anticipate ecological changes as vegetation communities evolve through succession<sup>60</sup> or respond to climate change. For example, if the stated purpose is to protect a salt marsh, but that marsh is likely to be slowly altered by sea level rise, the covenanted land may need to be

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<sup>60</sup> "Ecological succession" is the process by which plant communities replace one another over time. Each community creates conditions that subsequently favour different plant communities. Succession stops when a climax community forms, which remains until a disturbance such as fire or logging restarts the succession process.

shifted upslope over time. Is adaptive management anticipated, or should the covenant be discharged in that eventuality?

Whether it forms part of the intent and purpose section or is included elsewhere in the covenant document, such a statement is important to help ensure that the covenant will endure, even in the face of challenges based on assertions such as changes in the character of the neighbourhood.

### **Restrictions on land use**

See Annotated Conservation Covenant, article 4.

Every covenant will contain a section restricting some uses of the land. This section forms the heart of the covenant because it sets out the measures that are intended to achieve the conservation objectives. The restriction may be as simple as a prohibition on subdivision or may involve complex provisions permitting some activities while prohibiting others or restricting activities during specific times of the year.

This section will be unique to each covenant and careful attention must be given to drafting it in accordance with the principles set out in this chapter. As a general rule, include only restrictions that can be enforced and that will be enforced. Including restrictions that either are not enforceable or will not be enforced by the covenant holder can weaken a covenant and make it vulnerable to challenge.

It is generally preferable to include all restrictions in the main body of the covenant rather than in a schedule to the covenant, even if they are lengthy. The restrictions are central to the covenant and will be easier to find and less likely to become separated from the rest of the covenant document if they are included in the main body of the document.

Do not restrict land uses that would be required to protect the landowner's property. For example, climate change is altering forest lands, producing dead trees and shrubs that increase fuel accumulation and adding "ladder fuels" that exacerbate the spread of ground fires up into the forest canopy. Thus, the risk of wildfire and its consequences are an increasing concern to conservation covenant holders. If strict terms in a conservation covenant agreement have the effect of preventing a landowner from undertaking reasonable wildfire risk mitigation activities, the conservation organization could well be liable. Covenant agreements therefore should allow landowners to undertake mitigative activities if they choose to do so.

The land use restrictions section must be drafted in the context of the entire document. Ensure that the land use restrictions section is consistent with all other provisions; for example, the owner's reserved rights section (Annotated Conservation Covenant, article 8). Do not say one thing in one provision and contradict it in another without creating exceptions. Potential inconsistencies must be addressed in the covenant by using words such as "despite section \*\*\*\*" or "subject to section \*\*\*\*".

Because the land use restrictions section is unique to each covenant, it is particularly vulnerable to the development of inconsistencies and errors over several drafts of the covenant. Great care must be taken throughout the drafting process to ensure that this section remains consistent and clear through to the final product.

### **Incorporating material by reference**

See Annotated Conservation Covenant, section 1.1, definition of "Report" for an example of incorporating a baseline report by reference.

It is a good practice to include everything in the covenant document itself that is necessary to achieve the objectives of the covenant. In this way, the entire covenant will be registered in the Land Title Register, all parties and the public will have access to the full covenant, and it will be clear what forms part of the covenant.

However, in some circumstances, not all material necessary to a conservation covenant can be included in the covenant. Land Title and Survey Authority practice, which changes from time to time, may preclude registration of some material such as photographs or videotapes which form part of a baseline report.<sup>61</sup> In some circumstances, the parties intend material such as standards or bylaws developed by third parties to form part of the covenant. As long as such material can be electronically scanned, there should be no barrier to registering such material along with the covenant.

If material cannot be registered, it could be incorporated by reference in registered documents. However, that may create uncertainty which may render the covenant, or portions of it, vulnerable to challenge. It raises such questions as: Exactly what material is incorporated? Do all parties have access to it? Has it changed since the date it was incorporated and, if so, are the changes incorporated

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<sup>61</sup> It is a good practice to check with the local Land Title and Survey Authority office from time to time about the policy relating to what can form part of a registered covenant document.

as well? If the material has changed, is it possible to find the original material that was incorporated?

Where it is necessary to incorporate material external to the covenant by referring to it in the covenant, the following questions and practices may reduce uncertainty and help ensure that all important parts of the covenant will continue to be a charge on the land in perpetuity.

- Determine the date as of which the material will be incorporated and state this date clearly in the covenant. Attempting to incorporate periodic changes made to incorporated material without an amendment to the covenant may render the covenant vulnerable to attack.
- If the incorporated material will change over time, determine whether the changes will be incorporated as well and how this will be done. Ideally, the covenant should be amended if new material will be incorporated.
- Ensure that the covenant states that a copy of incorporated material is on file with each of the parties. All parties should sign and date enough copies of incorporated material so that each party has an originally signed version. Covenant holders must ensure that new landowners receive a copy of any material incorporated by reference, including the baseline documentation report.<sup>62</sup>

### **“Boilerplate”**

Boilerplate is standard language that is identical or very similar and has the same meaning in documents of a similar nature. Articles 18–21 and 24–29 in the Annotated Conservation Covenant are examples of what is often called boilerplate. Although they change little or not at all from covenant to covenant, boilerplate clauses serve an important purpose and must not be changed or removed without legal advice. In most cases, each clause should be included in a covenant. However, in some circumstances, some of the boilerplate clauses will not be necessary. Landowners and covenant holders should obtain legal advice about the meaning of, and necessity of including, boilerplate clauses.

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<sup>62</sup> For more information on changing landowners, see the discussion in Chapter 14 about change in ownership. Baseline documentation reports are explained in Chapter 10.

## DRAFTING WORKING LANDSCAPE COVENANTS

Working landscape covenants (see the discussion in Chapter 2) are more complex than covenants that are intended to protect land in its natural state, so they present additional drafting challenges.

Although conservation covenants can be used successfully to create working landscapes, the land use management provisions must be carefully drafted to meet the specific needs of the parties in each circumstance. Professional advice is essential to ensure that such a covenant will accomplish the conservation goals of the parties and be enforceable in perpetuity.

All of the drafting considerations discussed above apply to drafting working landscape covenants. The following points should also be considered:

- Ensure definitions (such as “ecosystem-based forestry”, “organic farming”) are clear and will stand the test of time. Include or refer to standards, such as standards developed by the Forest Stewardship Council or other organizations, if necessary.
- Include working landscape purposes either in the intent and purposes section or elsewhere if more appropriate and state them clearly. Decide on the priority of the working landscape purposes in relation to the other purposes of the covenant.
- Consider whether to include principles or objectives of land management or performance goals.
- Decide on the management approach to be taken. This will depend on the needs of the parties and the negotiated approach to management. One or a combination of the following might be used:
  - Will management be on the basis of a management plan? If so, how will land management provisions be divided between the management plan and the covenant itself? What guidance will be given in the covenant for plan preparation?
    - What kind of review and approval process will be required? Who must approve?
    - Will professional advice be required in plan preparation or approval?

- Will the management approach be based on specified standards? If so, will the standards be attached to the covenant or a management plan or incorporated by reference, or will a combination of these approaches be used?
- Will management be on the basis of specific restrictions included in the covenant itself? If so, take particular care to ensure that restrictions are measurable and monitorable, based on scientific principles and related to the covenant purposes.
- Take particular care when drafting the owner’s reserved rights to avoid inconsistencies and incompatible uses.
- As with other conservation covenants, do not include provisions that will not be enforced or that cannot be enforced. There is a particular danger with complex documents that inconsistencies between provisions will develop over several drafts.

## DRAFTING DEVELOPMENT COVENANTS

Development covenants, also called residential or subdivision covenants (see the discussion in Chapter 2) can be created in exchange for a density bonus or clustering of density (i.e., allowing higher density in some parts of the complex with lower density or no construction on other parts).

Development covenants are done in cooperation with a landowner who plans to divide property while using a covenant to protect special areas. Such division can occur in two ways: subdivision or strata title. “Subdivision” simply involves dividing a parcel of land into a number of individually-owned lots. “Strata title” also involves dividing a parcel of land into a number of individually-owned lots, but each owner also owns a share of a strata corporation that owns common areas of the site, called “common property”. Bare land stratas can look like simple subdivision because they often involve the building of single detached homes. However, like a regular strata subdivision that resembles units in an apartment building, an owner securing title to a strata unit or lot also owns part of the common property.

The covenant should be over the portion of the land that has the highest ecological value – a covenant over a bit of wasteland requiring substantial management would have little value. Therefore, a potential covenant holder should require an ecological assessment before designation of the “up-zoned” area proposed for development and the “down-zoned” area proposed for covenant protection.

Development covenants have distinct attributes making them more complex than covenants that are intended to protect land in its natural state. This means that the designation of small protected areas as covenants on individual lots or parcels should normally be avoided because that can be administratively very cumbersome. If, for example, a strata subdivision has 50 units and a covenanted common area, each unit owner also owns part of the common area. Therefore, every time a single unit changes ownership, the conservation organization would have to meet with the new owner to explain the covenant restrictions and begin to develop a relationship. That will require many meetings, indefinitely.

Given that subdivision will entail many other development costs and that a covenant on part of the area will increase the value of the entire subdivision, the developers should expect to pay for the full costs of developing, negotiating and registering such covenants. In particular, developers should be encouraged to provide an endowment to cover future monitoring and enforcement costs.

An alternative approach is for a conservation organization to purchase the land and then work with both the landowner and local government to grant a density bonus to the landowner for increased density on one or more lots, or on another property altogether. The landowner would retain the right to develop or sell the developable land at a future date.<sup>63</sup> Such a process can allow the conservation organization to raise necessary funds to complete a project.

In the case of subdivision development, landowner relations are again important. The developer should be encouraged to produce and provide information packages about the covenant so that each of the purchasers of the new properties are aware of, and appreciate the purposes of, the covenant.

Professional advice is essential to ensure that a development covenant will accomplish the conservation goals of the parties and be enforceable in perpetuity. All of the drafting considerations discussed above apply to drafting development covenants. The following points should also be considered:

- Include a map of the property clearly showing the covenanted area and ecologically sensitive areas, as well as connectivity to biodiversity corridors on and adjacent to the site.

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<sup>63</sup> The Salt Spring Island Conservancy successfully carried out such a procedure to acquire a 130-hectare nature reserve in 2011.

- Ensure definitions (such as “sight lines”, “alteration plans”) are clear and will stand the test of time. Include or refer to standards, such as subdivision standards developed by the health authorities or local governments, if necessary.
- Include covenant purposes either in the intent and purposes section or elsewhere if more appropriate and state them clearly. Decide on the priority of the residential purposes in relation to the other purposes of the covenant.
- Consider whether to include objectives for use by residents of the development and/or the public.
- Decide on the land use approach to be taken. This will depend on the needs of the parties and be negotiated. One or a combination of the following might be used:
  - Will use be allowed at all? If so, how will use, whether by residents of the development or the general public, be managed? What guidance is to be given in the covenant for plan preparation?
    - Should there be a review and approval process for different uses? Who must approve?
    - Who will manage use of the area? A management plan is typically used to set out the details – prepared by the covenant holder and approved by the original landowner.
  - Will use be on the basis of specific restrictions included in the covenant itself? If so, take particular care to ensure that restrictions are measurable and monitorable, based on scientific principles and related to the covenant purposes.
- Provide for flexibility to deal with potential future proposals by residents of the development for alterations to the covenant area such as cutting, moving, harvesting, removing, thinning, topping, trimming or pruning of vegetation for the purpose of creating or improving sight lines, for example by requiring written approval of the covenant holder after providing a written request and an alteration plan.
- Provide for minimization of building encroachments, roads, paths and trails into and across the covenant area, perhaps including compensatory measures to be applied elsewhere in the development area whenever encroachment is approved.

- Take particular care when drafting the owner's reserved rights to avoid inconsistencies and incompatible uses.
- As with other conservation covenants, do not include provisions that will not be enforced or that cannot be enforced. There is a particular danger with complex documents that inconsistencies between provisions will develop over several drafts.

# HOLDERS OF CONSERVATION COVENANTS

## SOME PRACTICAL CONSIDERATIONS

It is important for landowners to give serious consideration to who will hold a conservation covenant on their property. The organization that becomes the covenant holder should have conservation objectives that fit well with the values the landowner wants to protect. For instance, if a landowner has a piece of property containing an ecologically sensitive marsh, the landowner will want to find a conservation organization that has the interest and expertise necessary to provide appropriate protection for the marsh itself and the flora and fauna dependent on the marsh. If the landowner were interested in protecting the heritage values of his or her property, an organization with experience in heritage conservation would be more appropriate.

In some circumstances, government programs or conditions require a specific covenant holder. For example, the Natural Area Protection Tax Exemption Program of the Islands Trust requires that one of the covenant holders be the Trust Fund Board. There may also be a co-covenant holder such as a local conservancy. Generally, the landowner may choose a second covenant holder as well.

When deciding on an appropriate covenant holder, landowners should also consider the organization's capacity to meet its obligations under a covenant.<sup>64</sup> In addition, landowners may want to inquire whether the organization has adopted standards and practices to guide its conduct and to review these standards and practices. Standards and practices are discussed later in this chapter.

The landowner and the conservation covenant holder will have an important ongoing relationship and, depending on the nature of the land and the conservation covenant, may have substantial contact. There will probably be a significant amount of contact during the process of negotiating and granting the conservation covenant. After the covenant is registered, the parties will continue to have periodic contact when monitoring of the covenant provisions occurs. Therefore, it is important for a landowner to choose an organization that he or she

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<sup>64</sup> See Chapter 17 for a discussion of the kinds of resources covenant holders need.

will feel comfortable dealing with for as long as the landowner continues to own the property.

Some landowners feel most comfortable dealing with a local organization which might include neighbours or other members of the community known to the landowner. Others prefer a more arm's length or businesslike relationship with the covenant holder and might choose a national or provincial organization with less of a local presence. In some cases, landowners do not want to deal with government agencies and will only consider non-government organizations as candidates for holding a conservation covenant. Yet other landowners want to ensure there is no danger of the conservation covenant holder ceasing to exist and need the security of knowing that a government agency is likely a permanent body.

## LEGAL OPTIONS

Conservation covenants can be held by a variety of parties. The *Land Title Act* provides that a conservation covenant can be held by

- the Crown or a Crown corporation or agency,
- a municipality, regional district or local trust committee under the *Islands Trust Act*, or
- any person designated by the Surveyor General<sup>65</sup> on terms and conditions he or she thinks proper.

While many conservation covenants continue to be held by government bodies such as the Islands Trust Conservancy, there are an increasing number of covenants that are held by non-government conservation organizations such as land trusts.

## DESIGNATION

Any individual or organization wishing to hold a conservation covenant must apply to the Surveyor General to be designated before receiving and registering the covenant.<sup>66</sup> Generally, a conservation covenant will also incorporate a statutory right of way granted under section 218 of the *Land Title Act*. A statutory right of

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<sup>65</sup> Sections 218 (1)(d) and 219(3)(c) allow the minister responsible for the Act to designate a person able to hold conservation covenants and rights of way. This authority was delegated to the Surveyor General.

<sup>66</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(3)(c).

way allows the covenant holder access to the covenanted land for monitoring and enforcement purposes.<sup>67</sup> Organizations must be designated to be allowed to hold statutory rights of way as well. Conservation covenants and statutory rights of way may be assigned or transferred to another party, but any receiving party also must be designated prior to receiving and registering the assignment.

Application for designation is made to the Surveyor General Division of the Land Title and Survey Authority of British Columbia and should be sent to:

Surveyor General Division  
Land Title and Survey Authority of British Columbia  
Suite 200 – 1321 Blanshard Street  
Victoria, B.C. V8W 9J3  
Email: [surveyor.general@ltsa.ca](mailto:surveyor.general@ltsa.ca)

The Surveyor General Division formerly provided a list of organizations that have been designated as able to hold statutory rights of way or conservation covenants, but it no longer does so. This is because designated bodies can based on specific terms and conditions for specific and often limited purposes, designations and lands; the previously published broad lists did not entail those details.

The Surveyor General reviews the information provided with the application and, when the designation is made, issues an order. The order must be filed with the appropriate Land Title and Survey Authority office prior to or at the same time that a conservation covenant or statutory right of way in favour of the designated party is registered against title to the land.

## TYPES OF DESIGNATION

Designation may be on a general or individual basis. Registered non-profit organizations or societies can apply for general designation so they may enter into conservation covenants or statutory rights of way without requiring designation or approval of assignment for each covenant or right of way. In some circumstances, a conservation organization may be given a general designation that is limited to a specific geographic area, such as one island in the province.

Persons or organizations that are not of a non-profit nature may apply for individual designations in order to protect specific parcels of private land.

The designate must obtain the written consent of the Provincial Agricultural Land Commission prior to registering a covenant affecting title to lands that lie within

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<sup>67</sup> See Chapter 15 for a discussion of statutory rights of way.

the Agricultural Land Reserve as designated under the *Agricultural Land Commission Act*. If lands to be encumbered by a covenant lie within the Agricultural Land Reserve, this must be verified and attested to by the designate.<sup>68</sup>

## **MORE THAN ONE HOLDER**

Ongoing administration of a conservation covenant program requires financial and human resources and expertise. Joint covenant holders can share the responsibilities and obligations imposed by a covenant ensuring that, in the future, if one organization is not able to manage its responsibilities effectively, the other organization can carry on (see the discussion below about Protecting Against the Dissolution of a Covenant Holder). However, having more than one covenant holder may not be necessary; such an arrangement can incur a great deal of staff time. If the objective is simply to protect against the possibility that the holder of the conservation covenant might dissolve or cease to exist in the future, that is better achieved by providing that, in such an event, the covenant holder will transfer the covenant to another like-minded organization (see following section).

Nevertheless, it is sometimes convenient, or required by a landowner, to have more than one covenant holder.

There may be long-term tactical advantages in having co-covenant holders. For example, assume that a local government has a municipal park. The current elected officials may be in favour of continued protection of such parkland, but a future government may someday prefer development of that land – and one such government could degrade the conservation options on that land forever after. If the local government lets a conservation organization hold a covenant on that park, long-term conservation is much better secured.

Another advantage in such a partnership is speed in decision-making. Where fast action is needed, as in response to a serious breach of a covenant, a small organization can likely make decisions and act much faster than the local government, which would be slowed by organizational rules and a series of required approvals.

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<sup>68</sup> See the discussion in Chapter 2 about the requirements related to land within an agricultural land reserve.

Landowners may want to consider a number of options when choosing appropriate parties to hold the covenant on their land. Some examples include:

- two non-government conservation organizations, such as one national or provincial organization with a broad range of experience and one local organization with significant local knowledge;
- a local government body with an interest in preserving particular types of ecosystems, such as the Garry oak ecosystem, and a conservation organization with specific expertise in protection of that type of ecosystem; and
- a non-government conservation organization that operates in a particular geographic area and a provincial government body that has conservation objectives in that area.

It is important that joint covenant holders both be clear about, and agree on, the restrictions on land use. A future landowner may ask permission of the covenant holders to undertake a restricted activity, and things can get complicated if one covenant holder is willing to grant approval but the other is not. It is therefore a good practice for joint covenant holders to enter into a private memorandum of understanding with each other allocating responsibility for covenant obligations such as monitoring and enforcement and allocating costs associated with these obligations.<sup>69</sup> There is no need to incorporate such a memorandum into the covenant itself, but agreement dividing responsibilities will avoid duplication of effort at the outset and may eliminate conflict or uncertainty at a later date.

**Example:** A developer proposed a strata development on two adjoining lots in an urban area. Part of the lots consisted of a rocky area containing mature Garry oaks, a portion of a larger grove of Garry oaks crossing a number of properties in the neighbourhood. Both the developer and the neighbours were committed to conserving the trees and the development was designed to preserve the grove of trees as part of the common property of the strata development. In addition, the developer placed a conservation covenant on the common property to protect the trees. The covenant is held jointly by a land conservancy organization and the local government. The development design and the conservation covenant both promise to encourage better stewardship of the entire grove of Garry oaks

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<sup>69</sup> This is recommended in Standard 11 of the *Canadian Land Trust Standards and Practices*; see footnote 75.

and may result in conservation covenants being placed on adjacent properties comprising the Garry oak grove.

A memorandum of understanding between co-holders should include the following:

- a. an indication of which co-holder will be the primary covenant holder, usually the one responsible for monitoring and regular contact and discussions with the landowner.
- b. allocation of costs, such as covenant registration, surveys, baseline report and, if needed, an appraisal. Usually, each co-holder is responsible for its own legal and staff costs.
- c. assignment of responsibility for completing the baseline report(s).<sup>70</sup>
- d. allocation or assignment of future monitoring, and details of the monitoring – frequency, a monitoring protocol, content of monitoring reports, who will pay for monitoring and specifics on the notification process if monitoring detects a potential breach of the covenant. This can all be decided in a separate agreement once the covenant has been registered, but if that is so, the memorandum should refer to such future agreement.
- e. allocation of enforcement responsibilities. While each co-holder usually retains the right to enforce the terms of the covenant, additional details, such as which will enforce/correct minor problems and which will enforce major contraventions, can be included.
- f. responsibility for documents and records. Ideally, each party, including the landowner, should receive copies of all documentation related to the covenant, but co-holders may prefer to minimize duplication by assigning one as the keeper of the records.
- g. a timeline for anticipated completion of the covenant.
- h. administration of any endowment, including whether an endowment will be split among the co-holders and, if so, how it is to be allocated.
- i. assignment of the application process with the Agricultural Land Commission, if that is required.

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<sup>70</sup> There can be two types of baseline reports: Baseline Inventory Reports are directed at management planning, whereas Baseline Condition Reports are for use during monitoring. These are described in Chapters 9 and 10.

- j. assignment of application under the Ecological Gifts Program, if the landowner is to be assisted in that process.
- k. identification of approvals required internally by the co-holders, if any.

The memorandum should be consistent with the proposed covenant, although the terms of the covenant, once registered, will take precedence. If the anticipated terms of the covenant are still unclear, the co-holders can make two separate memoranda, one for the period before covenant registration and another once the registration is complete.

## PROTECTING AGAINST THE DISSOLUTION OF A HOLDER

Landowners need to consider ways to protect against the possibility that the holder of the conservation covenant might dissolve or cease to exist in the future.

The *Land Title Act*<sup>71</sup> provides that, upon the dissolution or death of the holder of a conservation covenant designated by the Surveyor General, the conservation covenant ceases to be enforceable by anyone, including the government, other than another conservation covenant holder named in the conservation covenant document, or an assignee of the conservation covenant holder (if such assignment has received the written approval of the Surveyor General).

One way for a landowner to protect against the possibility that a conservation covenant may become unenforceable due to the dissolution of the holder is to name another holder in the conservation covenant document, one that agrees in advance to have the conservation covenant assigned to it in the event the original holder is dissolved or ceases to exist.<sup>72</sup> Another form of protection is to include a clause in the covenant whereby the parties agree that, if the covenant holder ceases to exist, the covenant can only be transferred to another conservation organization with similar objectives. A third form is having two parties hold the conservation covenant from the outset. Some of the combinations of parties who might jointly hold a conservation covenant are noted above.

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<sup>71</sup> R.S.B.C. 1996, c. 250, s. 219(11).

<sup>72</sup> See article 14 of the annotated covenant in Appendix 1 for wording to set out a procedure for assigning the covenant to another holder.

If the holder of a conservation covenant is a corporation or a society, and it has been dissolved and then restored into existence under British Columbia legislation, the conservation covenant continues to be enforceable by the restored corporation or society from the date it is restored.<sup>73</sup> For instance, if the holder of a conservation covenant is a society that does not meet the statutory requirements for filing information with the Registrar of Societies, it could be dissolved. It would need to be restored before being able to enforce the conservation covenant it holds.

## STRATEGIC OBJECTIVES OF HOLDERS OF CONSERVATION COVENANTS

Negotiating, developing, monitoring and, when necessary, enforcing conservation covenants demand both human and financial resources.<sup>74</sup> Organizations interested in holding covenants must evaluate their capacity to carry out all the obligations associated with entering into and holding covenants. These obligations must be met for as long as the covenant is in place – in most cases, forever.

Covenant holders will need resources to obtain legal and tax advice. In addition, monitoring covenants to ensure that landowners comply with covenant provisions will take money, time, expertise and frequently equipment. Enforcement can be a very expensive step. Each of these aspects of holding a covenant is discussed in later chapters. Covenant holders should assess their capacity to fulfil their obligations before deciding to hold a covenant.

Since conservation organizations often have limited financial and human resources, it is desirable for each organization to identify clearly where to direct its resources to best achieve the conservation objectives of the organization.<sup>75</sup> This will ensure that the organization makes the most of its resources and is effective in reaching its goals. Each conservation organization needs to establish a clear set of strategic objectives. From those objectives, it can then identify priorities and specific criteria for land it wants to protect or assist in protecting. These objectives, priorities and criteria should be set out in writing and be readily available for potential members, landowners and donors.

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<sup>73</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(12).

<sup>74</sup> See Chapter 17 for a more in depth discussion of the resources needed by covenant holders.

<sup>75</sup> For guidance on developing a conservation plan that sets out conservation objectives, see the Land Trust Alliance of BC's *Developing a Conservation Plan – A Basic Guide for Land Trusts*, available at [https://ltabc.ca/wp-content/uploads/2020/05/developing-a-conservation-plan-2020\\_final.pdf](https://ltabc.ca/wp-content/uploads/2020/05/developing-a-conservation-plan-2020_final.pdf).

The objectives of a conservation organization might be as simple as protecting one piece of property. Indeed, this may be the very reason the organization was formed in the first place. Other conservation organizations will be interested in protecting as much land as possible within a defined set of criteria, such as a particular type of ecosystem or ecologically significant land within a particular geographic area.

A clear set of strategic objectives provides the basis for the conservation organization to identify parcels of land it would like to protect and then focus its resources to accomplish this. It also provides the basis for an organization to decline a conservation covenant where the land does not fit within its priorities or meet its specific conservation criteria. This ensures that the resources of the organization will be available for priority sites and not directed towards sites that do not fit within its objectives.

## STANDARDS AND PRACTICES

It is a good practice for conservation organizations to develop standards and practices to guide their operations. Adhering to carefully drafted standards and practices will help ensure operational consistency, integrity and accountability and avoid conflicts of interest.<sup>76</sup>

The Canadian Land Trust Alliance developed *Canadian Land Trust Standards and Practices*<sup>77</sup> which are guidelines for the responsible operation of a land trust that is run legally, ethically, and in the public interest, and which conducts a sound program of land transactions and stewardship.

The *Canadian Land Trust Standards and Practices* includes standards relating to matters such as the purpose, goals and objectives of the land trust; board accountability; conflict of interest; basic legal requirements for the organization; fundraising; financial and asset management; staff, consultants and volunteers; selecting projects; choosing the best conservation method; ensuring sound transactions; tax benefits; board approval of transactions; and stewardship of conservation covenants and land.

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<sup>76</sup> For discussion about the importance of standards and practices, see the Nature Trust of Canada's *Land Trusts: Measuring the Effectiveness of Conservation Easement Programs* available at <https://1library.net/document/y8g4p37r-best-practices-performance-measures-bppm-conservation-easement-programs.html>.

<sup>77</sup> Available from the Centre for Land Conservation at [https://centreforlandconservation.org/\\_uploads/62fea097c084a.pdf](https://centreforlandconservation.org/_uploads/62fea097c084a.pdf).

Conservation organizations should adopt these standards and practices or develop their own to ensure that they act ethically, responsibly and consistently in all their transactions. Adoption of clear, transparent standards and practices will also provide assurance to potential funders.

## Chapter 6

# MODIFICATION OR TERMINATION OF COVENANTS

Conservation covenants are not intended to be changed or cancelled except in very unusual circumstances. Modification should be avoided whenever possible because a great deal of negotiation will typically be required. Nevertheless, sometimes the terms of a covenant need to be amended or the parties may agree that the covenant should be terminated altogether. For example, discharge of a covenant might be done for housekeeping purposes or to provide a better level of protection, such as to improve the covenant.

Modification or termination can happen in one of a number of ways:

1. A covenant can be modified by written agreement between the covenant holder and the current landowner.<sup>78</sup>
2. The covenant holder can discharge the covenant unilaterally.<sup>79</sup>
3. Certain circumstances such as expropriation may result in termination of a conservation covenant.
4. Someone with a legal interest in the land can ask a court to have the covenant modified or cancelled, but must convince the court that specific circumstances exist, such as that the covenant has become obsolete.<sup>80</sup>

If a covenant is to be discharged, for example to remove the covenant from portions of the property, the parties should have agreed guidelines on the process, including which party can instigate it.

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<sup>78</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(9).

<sup>79</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(9).

<sup>80</sup> *Property Law Act*, R.S.B.C. 1996, c. 377, s. 35(2).

## MODIFICATION OR TERMINATION BY THE PARTIES

Allowing amendments to covenants after registration should be a rare occurrence. They should only be allowed if the amendment is consistent with the goals or purposes of the covenant and there is no other way to achieve the amendment's purpose. In addition, covenants that qualified as ecological gifts will be subject to tax penalties if they are amended in any way that negatively affects the conservation values of the covenant.

Nevertheless, it may sometimes be necessary to amend a conservation covenant for a variety of reasons. For example, an amendment may be necessary to update or correct baseline information or standards incorporated into the covenant. In some circumstances, the parties may agree to amend a covenant to allow an unanticipated land use that is consistent with the conservation objectives. In other cases, the parties may find, after living with the covenant for a period of time, that some of its terms are vague or do not accomplish the conservation objectives.

Regardless of the circumstances, all parties must agree to the amendments. Amendments to a conservation covenant must be in writing and must comply with all relevant statutory provisions. For example, amendments must meet the requirements of section 219 in the same way that the covenant itself must meet the requirements. An agreement amending a covenant must be registered in the same way as the original covenant. Any charges registered on title to the property after the conservation covenant and before the amending agreement will have priority over an agreement amending a conservation covenant. In that case, the parties will need to consider whether to request a priority agreement from every intervening charge holder.

Other issues may also arise. Is anyone who is not a party to the covenant, such as a mortgage holder or a third party with a right to enforce the covenant, required to approve covenant amendments? If the covenant was a charitable gift and the landowner received a donation receipt for making the gift, will the amendment affect the value of the gift and therefore the donor's tax return? If the donation was an ecological gift, will the amendment constitute a change of use and require the consent of the federal Minister of Environment and Climate Change or, if that consent is not obtained, trigger the penalty tax?<sup>81</sup>

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<sup>81</sup> Although written for Alberta landowners, *Conservation Easements for Landowners* provides current information about the tax implications of donating conservation covenants; go to <https://www.legacylandtrustsociety.ca/wp-content/uploads/2021/05/Conservation-Easements-for-Landowners-2021.pdf>.

Requests to amend a conservation covenant may arise in a number of circumstances. The parties to a covenant or a prospective purchaser may determine that certain covenant provisions are unclear or do not have the desired effect. A landowner may wish to amend a covenant to make the land more attractive to prospective purchasers. A new owner of the land may ask for amendments to allow activities prohibited by an existing covenant.

Covenant holders should develop a policy to assist in resolving issues relating to covenant amendments.<sup>82</sup> For example, such a policy could provide that land or covenants can be declared “inalienable”, meaning they cannot be sold and may only be transferred with the approval of the membership. (The legal effect of such a declaration was considered in a 2015 court case<sup>83</sup> which confirmed that the court can order the sale of an inalienable property, but should do so only when such an override is appropriate, fair and reasonable.)

At a minimum, the policy should raise and, where possible, address the following questions:

- In what circumstances will the covenant holder consent to an amendment?
- What kinds of amendments will be acceptable generally?
- Do the purposes of the covenant holder allow the kind of amendment being contemplated?
- Does section 218 or 219 affect the kind of amendment being considered?
- Are any other legislative provisions relevant to the proposed amendment?
- Do any covenant provisions relate to amendments?
- What procedures are in place for approving covenant amendments?
- Who must approve amendments?

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<sup>82</sup> Some additional detail is provided in Standard 11 of the *Canadian Land Trust Standards and Practices*; see footnote 75.

<sup>83</sup> *TLC The Land Conservancy of British Columbia (Re)*, 2015 BCSC 1890 (CanLII), <<https://canlii.ca/t/glmzw>>, retrieved on 2022-09-18.

- Was the covenant the subject of an ecological gift? If so, the covenant holder will need to obtain the approval of Environment and Climate Change Canada for the amendment if the amendment allows a change of use.
- Should the covenant holder use the landowner's request for an amendment as an opportunity to update or improve other provisions in the covenant?

The policy could provide additional protection by requiring a board to go to its membership to discharge covenants or other landholdings, such as a requirement that the board requires approval of its membership to discharge land and interests in land outside of any existing policy about disposal of land.<sup>84</sup> Having a co-covenant holder will also reduce the risk of a board amending or discharging a covenant for questionable reasons.

## **MODIFICATION OR CANCELLATION BY OPERATION OF LAW**

Expropriation can result in the cancellation of a conservation covenant. In an expropriation inquiry, the covenant holder generally will have an opportunity to argue in favour of land preservation. If an expropriation is approved, the expropriating authority is entitled to take the land free of any charges such as a covenant. However, the covenant holder may be entitled to compensation for the loss of its interest.

## **MODIFICATION OR CANCELLATION BY THE COURT**

A person who has a legal interest in land protected by a conservation covenant can apply to the court to have the covenant modified or cancelled under the *Property Law Act*. A landowner has an interest; so does someone leasing the property.

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<sup>84</sup> For example, see the Islands Trust Conservancy Board's *Disposition of Land Policy* at <https://islandstrust.bc.ca/wp-content/uploads/2020/05/27-disposition-of-land-poli.pdf>.

Upon an application by an interested party, the court has discretion as to whether or not to modify or cancel the covenant. The court may modify or cancel a covenant if:

- the covenant is obsolete because of changes in the character of the land, the neighbourhood or other circumstances the court considers material;
- reasonable use of the land will be impeded, without practical benefit to others, if the covenant is not modified or cancelled;
- the covenant holder has expressly or impliedly agreed to the modification or cancellation;
- modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest; and
- the covenant is invalid, unenforceable or has expired.<sup>85</sup>

It is good practice to address these issues in the covenant itself. For example, the covenant could include a provision stating that the covenant is intended to preserve the land and is not to be considered obsolete even if the neighbourhood around the land ceases to be used for agricultural (or other) purposes.

Alternatively, the covenant could include a term, such as section 3.2 in the Annotated Conservation Covenant in Appendix 1, stating that the covenant is perpetual to reflect the public interest in conservation of the land for ecological and environmental reasons.

Another way to protect against cancellation of the covenant on the basis of obsolescence is to include a number of purposes in the intent and purposes section of the covenant (article 3 of the Annotated Conservation Covenant in Appendix 1). Although it is not a good practice to include purposes that are irrelevant, including all relevant purposes for entering into the covenant will help protect against cancellation by court order. The content of the intent and purpose section is discussed in greater detail in Chapter 4.

Although the court will not be bound by the provisions of the covenant, it may be less likely to modify or cancel the covenant on the application of one party if the covenant contains such a provision.

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<sup>85</sup> *Property Law Act*, R.S.B.C. 1996, c. 377, s. 35(2).

**Example:** A landowner applied under section 35 of the *Property Law Act* for cancellation of a restrictive covenant registered against 20 parcels of land on Galiano Island.<sup>86</sup> The land had previously been down-zoned to prohibit residential use and allow only forestry use, setting a minimum lot size of 65 hectares. This down-zoning had been challenged in court and was initially struck down. That resurrected the former zoning, which allowed smaller lots and residential use, so the landowner began to develop the land. As part of development approval, a restrictive covenant was placed on the land, which prohibited cutting of evergreen trees on portions of the lots bordering the road to preserve a treed corridor.

Then, the earlier decision of the court was successfully appealed so that the more restrictive zoning was reinstated. As a result, the landowner held 8-hectare lots that could be used only for forestry purposes. The landowner asked the court for an order removing the covenant under section 35. The court rejected the landowner's application despite the change in circumstances from the time the covenant was granted, specifically that residential development could no longer take place. The court pointed out that the burden is on the landowner to satisfy the court that the covenant should be removed and that the burden is a relatively high one. The court commented that the original and current function of the covenant appeared to be to maintain a buffer of trees along the road and that this purpose was neither substantially altered by the change in zoning nor obsolete.

Finally, the court concluded that the covenant would not impede the reasonable use of the land, particularly since the landowner did not anticipate cutting evergreen trees on the land for at least five years. The court stated that a landowner would have to show a very substantial balance in favour of its own position before a covenant would be cancelled.

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<sup>86</sup> *Winmark Capital v. Galiano Island Local Trust*, 2004 BCSC 1754 (CanLII), <<https://canlii.ca/t/1jlf1>>, retrieved on 2022-09-20.

## Chapter 7

# PROFESSIONAL ADVICE

Both the granting and receiving of a conservation covenant are serious decisions with legal and financial consequences. It is critical that landowners and covenant holders each seek independent professional advice as early as possible in the process of considering whether to enter into a covenant to protect land.<sup>87</sup>

A conservation covenant is an arrangement that is legally binding on all the parties to the covenant and on future owners of the property. It creates rights and obligations that are intended to be permanent. The parties to the covenant must understand what they are able to do and what they are required to do to comply with the terms of the covenant, effectively protect the property and avoid liability.

There may be income tax and property tax benefits and liabilities involved in placing a conservation covenant on land. In addition, there may be other financial considerations. Parties to a covenant should discuss these matters with their tax advisers before finalizing the covenant.

Each party to a covenant must obtain its own legal and financial advice. While all parties clearly have a common interest in protecting ecological values of the land on which the covenant will be placed, there are different legal and tax considerations for landowners and for covenant holders. In some circumstances, there could be a conflict between their respective interests, so independent professional advice for each party is essential.

## LEGAL ADVICE

BC's laws (statutes and regulations), such as the *Land Title Act*, and those of Canada, such as the *Income Tax Act*, are available on line.<sup>88</sup>

Landowners considering a covenant should seek legal advice at the earliest opportunity. A lawyer will explain the effect of granting a covenant and the kinds of obligations and restrictions it might impose on the landowner. This advice will

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<sup>87</sup> This is strongly recommended in Standard 9 of the *Canadian Land Trust Standards and Practices*; see footnote 75.

<sup>88</sup> For BC laws, go to <https://www.bclaws.gov.bc.ca/civix/content/complete/?xsl=/templates/browse.xsl>. For federal laws, go to <https://laws-lois.justice.gc.ca/eng/acts/>.

assist the landowner in deciding whether to proceed with the covenant. It will also familiarize the landowner with the kinds of terms to negotiate.

Potential covenant holders should obtain similar advice from their own legal advisers. However, it may not be necessary for covenant holders to seek legal advice as early as landowners, since many organizations will already be familiar with conservation covenants and their effect.

Covenant holders should avoid the pitfall of advising landowners about the landowner's obligations under the covenant. Although it will often be useful (and unavoidable) for covenant holders to provide landowners with information, they should urge landowners to obtain independent legal advice as soon as possible. Covenant holders also should not give tax advice to landowners. Typically, conservation covenants will include a term stating that the landowner has obtained independent legal advice and has not obtained legal advice from the covenant holders' legal advisers.

Legal advisers will also be involved in drafting the covenant document as well as any ancillary documents such as a management agreement. In some situations, the parties' lawyers will negotiate the terms of the documents. Generally, the lawyer for one of the parties to a covenant will draft the written documents for review, comment and ongoing negotiation by the other parties. Each party, often through its legal adviser, will have an opportunity for input into the terms of the documents. Frequently, a number of drafts of each document will be generated before the terms are finalized.

Once the documents are in final form and signed by all parties, the covenant will be registered in the Land Title Register. This registration is generally arranged by the lawyer for one of the parties. Registration is necessary to bind future owners of the land.

## **TAX AND FINANCIAL ADVICE – WHAT AND WHEN**

Granting a covenant generally will have tax and other financial implications for the landowner and covenant holder.<sup>89</sup>

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<sup>89</sup> More detail is in Standard 10 of the *Canadian Land Trust Standards and Practices*; see footnote 75. Also, see "*Green Legacies: A Donor's Guide for BC*", 2017, particularly the chapter on "Gifts of Land or Covenants: Tax and Legal Implications", for a guide to the tax implications of gifts of covenants. It is available at <https://ltabc.ca/wp-content/uploads/2021/09/green-legacies-guide-2016-with-supplement-october-2017.pdf>.

## INCOME TAX

When a landowner grants a covenant to a conservation organization, the grant is considered to be a “disposition” under the *Income Tax Act*. It is considered a disposition whether or not the landowner receives any money or other consideration in return. The landowner is considered to have received proceeds of the disposition even if the landowner makes a gift of the covenant. In order to determine the amount of the proceeds of the disposition, the property should be appraised by a qualified appraiser to determine its fair market value.<sup>90</sup>

If the value of the covenanted property has increased since the landowner purchased it, a portion of the gain in the value may need to be included in the landowner’s income for the year. Generally, unless the property on which the covenant is placed is inventory in the landowner’s business (for example, if the landowner is a developer), the property will be capital property and the gain will be treated as a capital gain. Unless an exemption, such as the principal residence or qualifying farm property exemption, is available, one half of the gain must be included in the landowner’s income for the year.

If the landowner has made a gift of the covenant to the covenant holder and received a tax receipt, the landowner will be able to claim a tax credit which will reduce income tax payable. Alternatively, a landowner may find it more advantageous to use “split receipting”. That involves the landowner selling a covenant or a property to a conservation organization for part of its value and receiving a charitable receipt from the organization for the gift of the remaining value. To do this, the landowner’s gift must be at least 20 percent of the property’s total appraised value. There are also income tax implications for covenant holders. Some of these tax implications may have an impact on the covenant holder’s charitable status.

This is only a brief summary of some of the possible income tax implications. Tax provisions are detailed and vary over time, so tax advice is essential at an early stage.

## ECOLOGICAL GIFTS

Environment and Climate Change Canada’s Ecological Gifts Program (often called “Ecogifts”) provides tax benefits to landowners who donate ecologically sensitive land or a conservation covenant on such land. Made possible by the federal *Income*

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<sup>90</sup> It is good practice to obtain an appraisal of the value of the covenant in every case, even where the covenant holders pay for the covenant. The fair market value must be reported to the Canada Revenue Agency.

*Tax Act*, it offers significant tax benefits to taxpayers if they make a gift of a covenant on land certified as ecologically sensitive, and if the gift is made to a level of government (including some indigenous organizations) or a registered charity designated as an eligible recipient.<sup>91</sup>

The value of the covenant is used to create a non-refundable tax credit for individuals, which can be used to offset up to 100% of the donor's income. Corporations simply deduct the value of the donation from their taxable income. Individuals can use the full value of the charitable credit in one year, or carry an unused portion forward for up to ten years. Any taxable capital gain triggered by the donation is eliminated.

To qualify as an ecological gift, the gift must be of land, or an interest in land such as a conservation covenant; it must be certified as ecologically sensitive; and the recipient must be qualified to receive ecological gifts. The program's handbook (see footnote below) includes criteria for "ecological sensitivity", and the program's regional coordinators can help interpret how these criteria might apply to a particular property.

The fair market value of the land or interest in land must be appraised, and the appraisal is reviewed by the program. To address some of the difficulties in valuing covenants, the *Income Tax Act* expressly authorizes the use of a "before and after" appraisal method for valuing a covenant that qualifies as an ecological gift. The value is deemed to be the greater of its fair market value and the amount by which the value of the land is reduced as a result of making the gift of the covenant.

Once the covenant is registered and proof of registration is received by the program, they issue a "statement of fair market value". At that point, the covenant holder can issue a tax receipt to the donor for the value of the covenant. From the application to the statement, the process generally takes several months.

Benefit recipients are responsible for the long-term management and conservation of ecological gifts. To ensure the properties remain protected, charitable and municipal recipients must obtain written permission from Environment and Climate Change Canada to change the use or dispose (transfer) the ecogift. Otherwise, these recipients (including a charitable conservation organization) can be subject to a tax equal to 50% of the current fair market value of the land or

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<sup>91</sup> A detailed discussion of ecological gifts is beyond the scope of this *Guide*. For more information, see the Ecological Gifts Program website at [www.canada.ca/ecological-gifts](http://www.canada.ca/ecological-gifts). A handbook answers most questions about the program: [https://publications.gc.ca/collections/collection\\_2021/eccc/cw66/CW66-157-2021-eng.pdf](https://publications.gc.ca/collections/collection_2021/eccc/cw66/CW66-157-2021-eng.pdf) (continue past the "Continue to Publish" button.)

covenant.<sup>92</sup> Conservation organizations should be aware of this potential tax liability, and ensure they are prepared to conserve the covenanted land for the long term.

More detailed information on the tax benefits of the Ecological Gifts Program can be found in the program's Ecological Gifts Program Handbook and the Donation and Income Tax Scenarios factsheet.<sup>93</sup>

## ESTATE PLANNING

Consulting legal and financial advisers at an early stage will also help landowners plan how to dispose of assets most effectively during their lifetime.<sup>94</sup> Granting a covenant may form part of a lifetime plan to dispose of property in a way that will minimize tax and meet the landowner's other needs such as protecting the ecological values of his or her land and providing for dependents.

Professional advisers can assist landowners with exploring options and formulating a comprehensive plan.

## APPRAISALS

As mentioned above, the parties should agree as early as possible on obtaining an appraisal of the fair market value of the covenant.<sup>95</sup> This value, usually the difference between the value of the land without the covenant and its (usually lower) value with the covenant, will form the basis for the calculation of any tax consequences of entering into the covenant.

The parties must negotiate arrangements for the appraisal. One party may arrange and pay for it or the parties may agree to share the cost. In some circumstances,

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<sup>92</sup> Section 207.31 of the *Income Tax Act*. See also the factsheet "Disposition or change in use of ecological gifts: what recipients need to know," available at <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/ecological-gifts-program/publications/disposition-change-need-to-know.html>.

<sup>93</sup> This handbook is available at <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/ecological-gifts-program/publications/program-handbook.html>; for the scenarios factsheet, go to <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/ecological-gifts-program/publications/donation-income-tax-scenarios.html>.

<sup>94</sup> See *Green Legacies: A Donor's Guide for B.C.* (Stewardship Series) available at <https://stewardshipcentrebc.ca/programs/strengthening-stewardship/legacies/green-legacies-guide/> for a more in depth discussion of estate planning.

<sup>95</sup> For a discussion of engaging an appraiser and the valuation of covenants, see *Property Assessments of Conservation Lands, A Guide for Land Owners, Land Trusts and Covenant Holders - Case Studies and Resources*, The Land Trust Alliance of BC, rev. 2020, available at <https://ltabc.ca/publications-a-research/property-assessments-on-conservation-lands-updated-2020/>.

each party may obtain its own appraisal, although one appraisal will normally be sufficient.

Because there may not be a wide market on which to base a valuation of a covenant, it is important to retain a qualified appraiser and one that has some familiarity with valuing conservation covenants. If the parties obtain only one appraisal, it is important that they agree on the appraiser since each party must have confidence in the result.

When an appraiser has been selected, it is important to prepare a letter outlining the appraisal assignment and setting out the terms under which the appraiser is being engaged. This will avoid any confusion about the assignment and may save valuable time and resources in having the work completed.

The value of a conservation covenant that is the subject of an ecological gift must be appraised in accordance with the requirements of the Ecological Gifts Program. That program includes an appraisal review and determination process at the end of which the Minister of the Environment and Climate Change issues a Statement of Fair Market Value of an Ecological Gift. This document must be included with the donor's tax return for the year.<sup>96</sup>

The Ecological Gifts Program has developed *Guidelines for Appraisals* to assist appraisers in the preparation of appraisals of ecological gifts. The *Guidelines for Appraisals* include, among other things:

- general requirements for valuation of all ecological gifts;
- a number of considerations that should be applied to different categories of gifts;
- mandatory format requirements for appraisals;
- information about the timing of appraisals;
- acceptable qualifications for appraisers of ecological gifts;
- details about certificates that must be completed for appraisals; and

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<sup>96</sup> For information about the appraisal and other requirements for ecological gifts, see the Ecological Gifts Program website at <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/ecological-gifts-program.html>. In particular, refer to *Ecological Gifts: Application for Appraisal and Fair Market Value* at <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/ecological-gifts-program/publications/application-appraisal-fair-market-value.html>.

- contact information for program coordinators across Canada.<sup>97</sup>

To address some of the difficulties in valuing covenants, the *Income Tax Act* expressly authorizes the use of a “before and after” appraisal method for valuing a covenant that qualifies as an ecological gift.<sup>98</sup>

## SURVEYING

If a covenant is being registered over only a part of a property, or if the covenant requires different management or conditions for some parts of the covenanted area, the services of a surveyor will be required to obtain a legal description and, in most cases, a map or plan of the covenant area or portions of the covenant area. The legal description will be used in the covenant document itself and the plan (called a “reference plan”) will be filed in the Land Title Register along with the covenant and should be included as a schedule to the covenant. The survey therefore must be completed before the documents are finalized. Even if a survey is not required by the Land Title and Survey Authority office, it is generally a good idea to obtain one in the circumstances described above. A survey provides the best evidence of the boundaries of the covenant area.

Depending on the practice of the local Land Title and Survey Authority office and the complexity of the description of the covenant area, one of the following must be deposited in the Land Title and Survey Authority office in order to create the covenant areas:<sup>99</sup>

- a metes and bounds description or an abbreviated description (a description of the area in words) of the covenant areas;
- an explanatory plan (a plan based on existing records in the Land Title Register, not on a survey);
- a reference plan (a plan based on a survey); or
- a combination of a description and a plan.

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<sup>97</sup> The 2019 version of the *Guidelines for Appraisals* can be found at [https://publications.gc.ca/collections/collection\\_2019/eccc/CW66-392-2019-eng.pdf](https://publications.gc.ca/collections/collection_2019/eccc/CW66-392-2019-eng.pdf). (Continue past the “Continue to Publish” button.)

<sup>98</sup> *Income Tax Act*, R.S.C. 1985 (5<sup>th</sup> Supp.), c. 1, s. 118.1(12).

<sup>99</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 99.

The Land Title and Survey Authority has discretion on what to accept and will almost never accept a metes and bounds description. Similarly, an explanatory plan is only acceptable in limited circumstances such as where the land has been surveyed recently and a plan filed in the Land Title Register.

Generally, therefore, a survey will be required if the covenant covers only part of the land or creates areas with different restrictions. As with an appraisal, the parties should negotiate responsibility for obtaining a survey. One party may agree to assume the burden or the parties may agree to share the cost. Whoever arranges for the survey should check with the local Land Title and Survey Authority office to ascertain what kind of description or plan will be required to create the covenant. This is necessary because each piece of property is different and also because practice may differ from one Land Title and Survey Authority office to another or change from time to time.

## Chapter 8

# CHARGES ON TITLE

“Fee simple” is the interest held by most landowners. It is an unconditional interest, unlimited in duration, and entitles the owner to the entire property. It gives the owner the unconditional power to dispose of the interest. A “charge” is an estate or interest in land that is less than the fee simple.<sup>100</sup> Restrictive covenants, easements, rights of way and financial encumbrances such as mortgages and liens are all charges. A conservation covenant is also a charge.

Under the land title and registration system in British Columbia, fee simple title to land and all charges on the land are registered in the Land Title Register in the area in which the land is located. Registration of a charge gives notice to the world, including subsequent purchasers of the land, that the owner of the charge is entitled to the interest represented by the charge. Generally, unless charges are registered in the Land Title Register, subsequent owners are not bound by the charges.

Those contemplating entering into a covenant should obtain a copy of the title to the land which includes all registered charges as early as possible in the process. Financial charges such as mortgages could pose certain difficulties in relation to conservation covenants. In addition, pre-existing easements, covenants and rights of way could interfere with the conservation objectives of a covenant.

## PRIORITY OF CHARGES

If two or more charges are registered against title to a parcel of property, the charges have priority according to the date and time the applications for registration of the charges were received by the Land Title and Survey Authority office. Note that priority does not depend on the dates of execution of the documents.<sup>101</sup> For example, if a landowner has mortgaged land and grants a conservation covenant after the mortgage is registered, the mortgage has priority over the covenant. Similarly, all pre-existing easements, covenants and rights of way will have priority over the new covenant. As explained below, pre-existing

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<sup>100</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 1, definition of “charge”.

<sup>101</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 28.

charges can threaten the conservation objectives of a conservation covenant so they should be examined in detail with appropriate professional advisors.

## **MORTGAGES**

A pre-existing mortgage can pose a serious threat to a conservation covenant. If a landowner (the borrower) does not repay a mortgage loan as required, the lender has a number of remedies. The lender can

- sue the borrower to enforce the promise to pay the debt;
- seek a court-ordered sale of the property; or
- commence foreclosure proceedings.

If a lender is successful in obtaining an order of foreclosure, title to the property will be vested in the lender and charges, including covenants, registered against title after the mortgage may be foreclosed or dropped from title. However, the order of priority of charges can be altered by a “priority agreement” between the holders of the charges. Priority agreements are discussed below.

In some circumstances, the parties to a covenant might include a term in the covenant prohibiting the landowner from mortgaging the property. The effect of such a term would be to prohibit both the current landowner and future purchasers from ever mortgaging the property, which limits the possibility of selling the property. Landowners who are not conservation organizations or government agencies may wish to explore the consequences of this kind of term carefully before including a prohibition against mortgaging the property in a covenant.

It is important to review the terms of mortgages already on the property to ensure that there are no restrictions in a mortgage against placing a covenant on the property. The mortgage may prohibit this or require the lender’s prior consent.

## **EASEMENTS AND RIGHTS OF WAY**

Pre-existing easements, restrictive covenants, conservation covenants and rights of way must be reviewed carefully to determine their effect before a conservation covenant is finalized for at least two reasons. First, in a conservation covenant, a landowner can give the covenant holder only rights that have not already been given away. Second, pre-existing easements, covenants and rights of way may

authorize their holders to do things that are contrary to the conservation objectives of the parties to the new conservation covenant.

For example, a landowner decides to place a conservation covenant on the landowner's property that prohibits subdivision and the removal of any indigenous flora and fauna. A pre-existing easement in favour of a neighbouring property allows the owner of the neighbouring property to build a driveway across the landowner's property. The driveway has not yet been constructed but will involve removal of all flora in a 10 metre wide strip through the middle of the protected property. Such an action would clearly be contrary to the objectives of the conservation covenant. However, the landowner (perhaps a previous owner) has already given away the right to build the driveway.

In such a circumstance, the parties can try to persuade the owner of the neighbouring property to enter into a priority agreement (discussed below) giving the conservation covenant priority over the easement. Reaching such an agreement is highly unlikely if the easement is necessary for access. Alternatively, the parties can attempt to persuade the easement holder to agree to change the location of the easement if a different location would be better. If no solution is possible, the parties to the conservation covenant must decide whether construction of the driveway would render the conservation covenant useless or whether protection of important ecological values is still possible.

## **MINERAL RIGHTS**

As a general rule, mineral rights in British Columbia are reserved to the government, even on private land. This means that landowners do not have the right to extract minerals from their land. It also means that, with some restrictions, the government can give others the right to explore for and extract minerals from land. In the rare circumstances where individuals or corporations own the mineral rights, those individuals or corporations have the right to extract minerals.

Practically speaking, a conservation covenant cannot restrict or remove the government's right to minerals; nor can the parties expect a conservation covenant to be granted priority over mineral rights. In parts of the province where mineral exploration is a possibility, the parties to a covenant must assess the risk that mineral exploration will occur and make an informed decision about entering into a covenant agreement. Although a covenant cannot protect land against the threat of mineral exploration and extraction, it can still protect against other threats to the preservation of important ecological values.

## PRIORITY AGREEMENTS

Because foreclosure could have the effect of removing a covenant registered after a mortgage, it is important that landowners and covenant holders contact the lender to attempt to obtain the lender's agreement to give the covenant priority over the mortgage. Without a priority agreement, the covenant could be removed from title to the land if a foreclosure order is granted.

A typical covenant provision reads:

The Owner agrees to do everything necessary at the Owner's expense to register this Agreement against title to the Land, with priority over all financial charges, liens and encumbrances.

However, a lender is under no obligation to enter into a priority agreement. Furthermore, the lender may be reluctant to do so, particularly where placing a covenant on property reduces its value and, consequently, the value of the lender's security for the loan. Parties to a covenant therefore may have to present a convincing case to the lender for giving the covenant priority. The parties should be prepared to explain the purpose and effect of the covenant and highlight any points that would persuade the lender to give the covenant priority. For example, the lender may be more agreeable if the amount of the mortgage loan is small compared to the value of the land. Even better, it may be possible to make the case that the covenant protects the lender's interest, by stopping logging or other activities that would devalue the land.

Where there are financial charges registered against title to the land before the landowner grants a covenant, the landowner should seek legal advice about the wording of any provision in the covenant (such as the provision above) by which the landowner promises to give priority to the covenant and other charges it creates. The landowner cannot promise to do something that is not solely within his or her power. If the landowner makes such a promise and the lender or other financial charge holder does not agree, the landowner may be in breach of the covenant.

There may be more than one financial charge on the land. The parties should attempt to obtain priority agreements from everyone holding a financial charge registered against title to the land before the covenant is registered.

As explained above, non-financial charges can also have a significant impact on a conservation covenant registered later in time. The parties must evaluate the impact of non-financial charges, obtain a priority agreement if possible, or decide

whether a pre-existing charge will reduce the benefits of a conservation covenant to an acceptable degree or render it useless.

## **PRIORITY AND RENT CHARGES**

Current or subsequent landowners may wish to mortgage property after a covenant containing a “rent charge”<sup>102</sup> has been registered against it. As discussed more fully in Chapter 12, in the context of conservation covenants, rent charges are financial charges agreed to in the conservation covenant that are payable by the landowner to the covenant holder if the landowner breaches the terms of the covenant. (The effect is similar to a penalty for a breach.)

Lenders may insist that the mortgage take priority over the rent charge. If a landowner might want the option of having a mortgage take priority over the rent charge in the future, the parties should consider including a clause in the covenant allowing this to happen while still protecting the covenant holder’s security. Such a clause might require the covenant holder to give a first mortgage priority over the rent charge as long as the mortgage was not for an amount exceeding a certain percentage, for example, 75% of the value of the property.<sup>103</sup> The clause should also require that the mortgage contain provisions requiring the lender to take steps to ensure that the covenant holder is entitled to be a party to any legal proceedings if the landowner breaches the terms of the mortgage.

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<sup>102</sup> See Chapter 12 for an explanation of rent charges.

<sup>103</sup> See, for example, section 30.3 of the Annotated Conservation Covenant in Appendix 1.

# MANAGEMENT PLANS AND AGREEMENTS

## MANAGEMENT OF THE LAND

When a landowner and a conservation organization agree to protect land by registering a conservation covenant on the title to the land, they will need to consider how the land will be managed over time. What is involved in managing the land will depend on a number of factors, including:

- the type of land being protected,
- the specific values to be protected by the conservation covenant,
- the conservation objectives in the conservation covenant,
- the existing condition of the land and the degree of disturbance that has occurred,
- the permitted use of the land, and
- the level of access to the land contemplated by the conservation covenant.

It is essential that the landowner and the conservation organization assess the management needs of the property; if necessary, agree on a management plan for the land including who will undertake the management activities; and secure the resources for carrying out the long term management of the land. It is preferable for this to be done by the time the conservation covenant is executed and registered against title to the land. If management arrangements are not completed at this point, they should be addressed as quickly as possible after the conservation covenant is in place.

## DIFFERENT LEVELS OF MANAGEMENT

For simple covenants, there usually will be no need for management activities; for example, where a covenant merely restricts or prevents development or subdivision. In other cases, land management activities may consist of little more than preventing human disturbance and monitoring the land to ensure it is

protected from disturbance and allowed to evolve in its natural state. In those cases, the land management provisions can be included in the conservation covenant and form part of the document that is registered against title to the property.

If management arrangements are not included in the conservation covenant then, at minimum, the conservation covenant should address the need for a management plan for the land and identify who is responsible for preparing it. Management plans should be used cautiously, because they add an extra level of complexity.

When the management requirements are complex, it generally will be preferable to have a management agreement as well as a management plan. A management agreement is a separate contract between the owner and the covenant holder. If a third party is involved in the actual management of the property, it too should be a party to the management agreement.

## MANAGEMENT ACTIVITIES

Specific types of management activities that should be addressed in both the management plan and the management agreement include:

- collecting and assembling baseline inventory information about the property that details the existing condition of the property, provides an inventory of the flora and fauna and any unique characteristics of the property, and identifies any features or areas that are degraded and will be the focus of restoration;
- possibly restoring ecological features that have suffered degradation and can be enhanced through proper management;
- ongoing maintenance of the land and its amenities to ensure protection of the ecological and other land values;
- regular monitoring of the land to ensure compliance with the provisions of the conservation covenant; and
- providing access to ensure that baseline information can be collected and monitoring done on a regular basis.

## MANAGEMENT PLANS

A management plan is a document in which the parties agree to the long-term management of the interest in the land represented by the covenant.<sup>104</sup> It will often provide background about the property as well as the parties involved in its protection. This provides important context for defining and describing the specific management needs created in relation to the rights and obligations in the covenant. A management plan should be updated periodically, such as every ten years.

Management plans generally include some or all of the following types of information:

- the background of the conservation organization;
- a history and general description of the property, including a statement identifying the value of the land to the community in which it is located;
- the purpose of protecting the land, the management objectives and the parties that will be involved (this may be as general as stating that management will be undertaken by local organizations that will be approved by the parties);
- a description of the cultural features and background, including information about the historical values and permitted land use arising from community planning (official community plan, zoning and surrounding land uses);
- management issues particular to the property (steep cliffs, access, trails and viewpoints, falling trees, invasive plant species, exotic grasses, existing debris and fire potential);
- objectives and management strategies or recommendations for management measures;
- how and when the management plan will be revised in the future; and
- an agreement to enter into a management agreement if management activities are to be apportioned among the parties.

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<sup>104</sup> See the sample Management Plan outline included in Appendix 2 as a schedule to the Management Agreement.

## BASELINE INVENTORY REPORT

There will normally be a baseline inventory report<sup>105</sup> which describes the existing state of the land, its flora, fauna and natural and cultural features at the time the conservation covenant is placed on the land. It should be a site description (climate, physiography, geology and soils, hydrology, vegetation and landscape classification, flora and fauna, ecological processes, key environmental and ecological factors, and scenic and aesthetic qualities).

A baseline inventory report describes the ecological values that the covenant intends to protect and any other values explicitly referenced in the covenant's statement of intent. These could be social (e.g., low-impact outdoor recreation), historic, cultural, or other. This report describes the physical and ecological attributes (referred to as the "Amenities" of the covenanted area) in detail. This tends to be somewhat subjective, and thus not amenable to being strictly and precisely interpreted in a court during an enforcement proceeding.

Because the term "amenities" is often left quite vague in the definitions section of the covenant (on purpose and for good reason), this is the place to provide more detailed descriptions without being overly prescriptive such that future interpretation of this section is inappropriately narrow. One strategy is to start with a description of which biogeoclimatic zone, subzones and variants are included on the land and any particular conservation values associated with them. If natural areas that are characteristic of a given biogeoclimatic zone, subzone or variant are important amenities, these should be explicitly referenced as being amenities. This approach could then lead to a description of ecological communities (plant associations) at risk which are known to occur or are potentially occurring on the land and/or sensitive ecosystems. These too should be referenced as amenities. Wildlife habitats might be described next, perhaps using examples without unduly limiting the scope.

Any known wildlife species at risk on the property or in the area could also be referenced. However, it is important to remember that the ranking of species changes regularly, and wildlife populations are dynamic over time and space. If ecological goods and services (ecological assets, natural capital, etc.) are referenced as important parts of the statement of intent, include information about those. Likewise, if carbon sequestration, climate adaptation or mitigation are referenced in your statement of intent, include information about those. The same principle

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<sup>105</sup> There is also a "baseline documentation report" which is directed at monitoring and enforcement; that report is explained in the next chapter.

holds true for all values referenced in the statement of intent, linking back to the amenities wherever possible without unduly limiting these concepts by omission.

A typical provision will also acknowledge that the features and ecological values of the land will change naturally over time and that these natural changes will be taken into account and incorporated into the baseline inventory report.

## **WHEN TO COLLECT BASELINE INVENTORY**

The collection of baseline information should begin as a survey and report of what is present on the land at the time the covenant is first being considered. Once the decision has been made to place a covenant on the property, additional information will be collected. Because baseline information must be collected when the ecological features to be protected can best be observed, baseline studies may have to be done at different times of the year to identify and record seasonal changes.

## **SOURCES FOR BASELINE INVENTORY INFORMATION**

Baseline information can be obtained from a variety of sources. Often the landowner is a rich source of information about the land. In addition to the information gathered during the initial site visit to obtain baseline information, critically important information about the significant ecological and cultural features of a parcel of land may be available through organizations such as the Conservation Data Centre<sup>106</sup>, local government, the provincial ministries responsible for forests and lands, and the Agricultural Land Commission.

Other sources of information might include the Land Title and Survey Authority office, local First Nations' centres, universities and colleges, and neighbours. Information might also be gathered from habitat atlases and maps, groundwater maps, and other environmental mapping, species accounts, sensitive area inventories and the records or members of organizations such as local naturalist clubs, rod and gun clubs or land trusts.

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<sup>106</sup> The BC Conservation Data Centre systematically collects and disseminates information on plants, animals and ecosystems (ecological communities) at risk in British Columbia; go to <https://www2.gov.bc.ca/gov/content/environment/plants-animals-ecosystems/conservation-data-centre>. For information on specific species and ecosystems, go to the "BC Species and Ecosystem Explorer" at <https://www2.gov.bc.ca/gov/content/environment/plants-animals-ecosystems/conservation-data-centre/explore-cdc-data/species-and-ecosystems-explorer>.

## MANAGEMENT AGREEMENTS

As noted above, there will be circumstances in which the parties also may enter into a management agreement.<sup>107</sup> A management agreement addresses who will carry out management activities and sets out the kind of management activities that will be conducted. In general, the conservation organization holding the conservation covenant is responsible for management of the covenant and the rights and obligations granted by the covenant while the landowner is responsible for all other aspects of land management.

In some cases, the landowner and covenant holder might enter into a management agreement dividing land management responsibilities in a more detailed way than the covenant. In other cases, the landowner will enter into an agreement with another party to actually carry out the management responsibilities. If a third party is involved, it should be a party agreeable to the covenant holder. All parties should sign the management agreement.

Management agreements generally include the following types of provisions:

- a contractual licence for the party managing the property to enter onto the land and carry out management functions (necessary where the managing party is not the holder of a statutory right of way giving it the right to enter onto the property);
- an agreement to manage the property according to the terms of the agreement or an existing management plan which is attached to the management agreement as an exhibit;
- the term of the agreement;
- requirements if the agreement is to be terminated;
- how and when the management agreement will be revised in the future;
- general and specific rules for management;
- monitoring requirements (these must match the monitoring provisions in the conservation covenant);
- the ability to suspend the management agreement if the manager does not manage according to the rules of the agreement;

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<sup>107</sup> See the sample Management Agreement in Appendix 2.

- an arrangement regarding allocation of management costs;
- indemnification, by the party managing the property, of the parties not involved in management (the landowner and the conservation covenant holder);
- insurance requirements;
- a prohibition against assigning the contract to another manager without the consent of the owner and the conservation covenant holder;
- notice requirements; and
- other requirements describing the legal relationship among the parties.

## **UPDATING BASELINE INVENTORY INFORMATION**

Baseline inventory information may become outdated where land or amenities have changed significantly over time. For example, a natural catastrophe or certain types of human intervention may alter the land to the degree that the original baseline information report is no longer useful. It may be necessary either to update the report or prepare a new one.

## Chapter 10

# COLLECTING BASELINE DOCUMENTATION INFORMATION

### BASELINE DOCUMENTATION REPORT

A baseline documentation report<sup>108</sup> is primarily to assist in monitoring and enforcement of the covenant itself. It is a companion document that ideally is filed with, or is a schedule to, the covenant. The purpose of this report is to describe attributes of the natural state of the land and the amenities to establish an objective information baseline against which future monitoring will assess compliance with the agreement.

The baseline documentation report contains the primary evidence of the state of the land at the time the parties enter into the covenant. This evidence will be crucial in any enforcement action relating to the covenant. Therefore, collecting the baseline information and preparing the baseline documentation report are essential parts of covenant preparation. The same care must be taken as is taken in drafting the covenant document itself.

Each individual restriction should be copied from the covenant and pasted precisely as it is written into the baseline documentation report in the order that they appear, and with the relevant section and sub-section headings preserved. The report authors will need to give careful thought as to how they will effectively assess the land with each specific restriction in mind, in order to thoroughly describe the baseline condition of the land in relation to each individual restriction at the time of covenant registration. The assessment method used to describe the current status of the land in relation to that specific restriction should be described under a data collection method subheading.

Equally important is each right that is reserved to the landowner. Again, the report authors will need to give careful thought as to how they will effectively

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<sup>108</sup> Not to be confused with the “baseline inventory report” that subjectively describes the “amenities” of the covenanted area as explained in the preceding chapter. LTABC has an annotated baseline documentation report template available at <https://ltabc.ca/resources/published-research>.

assess the activities which are reserved to ensure that such activities match each individual reservation at the time of covenant registration.

Careful consideration should be given to the feasibility of covenant monitoring methods over time. If the baseline data collection method applied is too onerous or expensive to be regularly repeatable or usable by a covenant monitor, it may not be appropriate as a baseline data collection method. As a general rule, the data collection method for most covenant restrictions will likely include visually assessing all areas of the land with ground-based searches for evidence of the restricted activity having taken place, but there are many potential exceptions. Therefore, a single standardized data collection method for baseline documentation reports cannot realistically be adopted because the variability in covenant restrictions can be tremendous.

## **WHO SHOULD COMPILE BASELINE DOCUMENTATION**

The covenant holder is generally responsible for gathering baseline documentation information and updating it periodically. Baseline information will be collected by either professionals or trained lay people depending on the ecological features of the land to be protected. In some circumstances, collecting the information will require the technical or professional expertise of such individuals as biologists, foresters or landscape planners.

## **AGREEING ON CONTENT AND FORMAT**

It is good practice for the landowner and covenant holder to cooperate in gathering baseline information. Even though it generally will be the covenant holder's responsibility to prepare baseline reports, the covenant holder should work with the landowner to determine the content and format of the reports.

The landowner also should be invited to participate in the gathering of the baseline information and preparation of the reports. The landowner may be the person most familiar with the land and the ecological values to be protected. Even if the landowner is not very familiar with the land, participating in gathering the baseline information will educate the landowner about the land and may contribute to the landowner's commitment to its protection. Working together on the baseline inventory and reports will help establish a good working relationship between the landowner and covenant holder from the outset.

## WHERE TO KEEP BASELINE DOCUMENTATION

If the length and format of the baseline documentation report permit, it can be included as a schedule to the covenant. For example, if the baseline documentation report and all attachments are in a format that can be reproduced on paper, it would be appropriate to include it in the covenant. Lengthy reports and those accompanied by information in other than written format, such as photographs and audio or video tapes, generally will be stand-alone documents.

Typically, a covenant will define the baseline documentation report as follows:

“Report” means the baseline documentation report that describes the Land and the Amenities in the form of text, maps, and other records of the Land and the Amenities as of the date of registration of this Agreement, a copy of which is attached to this Agreement as Schedule B.

If the full baseline documentation report is not included as part of the covenant, it is a good practice to include a summary or overview of the report so that the core information is readily available as part of the covenant. If only an overview of the baseline documentation report is attached, the definition might read:

“Report” means the baseline documentation report that describes the Land and the Amenities in the form of text, maps, and other records of the Land and the Amenities as of the date of registration of this Agreement, a copy of which is on file with each of the Parties at the addresses set out in section \*\*\*, an overview of which is attached to this Agreement as Schedule B.

Whether or not the full baseline documentation report is attached to the covenant, the covenant should refer to it and describe its purpose. A typical provision in a covenant might state:

The Parties agree that the Land and the Amenities are described in the Report. This Report will serve as an objective information baseline to enable the parties to monitor compliance with the terms of this Agreement.<sup>109</sup>

A baseline documentation report, providing it can be electronically scanned, will be registered in the Land Title Register as part of the covenant or as a stand-alone

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<sup>109</sup> In this example, “Report” will be a defined term in the covenant document. See the Annotated Conservation Covenant in Appendix 1.

document. Anyone requesting a copy of the covenant from the Land Title and Survey Authority will receive a copy of the report if it is part of the covenant.

Each party to the covenant must have a copy of the full baseline documentation report, whether it forms part of the covenant or stands alone. All parties should execute enough dated copies of the baseline documentation report that each party can have an originally executed version. The landowner and each covenant holder should keep a copy in a safe place to which they have ready access. Since the baseline information is essential to monitoring and enforcing the covenant, covenant holders should also keep a copy of the full baseline documentation report with monitoring records. It is a good practice to make at least one copy of the baseline documentation report to use as a working copy. This will preserve the original intact.

The covenant holder should provide each new landowner with a copy of the full baseline documentation report, particularly if the full report is not attached to the conservation covenant. This will ensure that all parties have complete information and also provide a good opportunity for landowner contact.

## **UPDATING BASELINE DOCUMENTATION INFORMATION**

As is the case for baseline inventory, baseline documentation information may become outdated where a natural catastrophe or human intervention significantly alters the parameters that are to be used to monitor and enforce the covenant. If it is necessary to modify the baseline documentation report, this should be accomplished by way of an amendment to the covenant to ensure that updated baseline documentation information is fully incorporated into the covenant. All of the information in this chapter, in Chapter 6 about modifying covenants and in Chapter 4 about drafting covenants applies to updating baseline documentation reports.

## Chapter 11

# MONITORING AND LANDOWNER CONTACT

Monitoring is essential to ensure that the objectives of a conservation covenant are met and to provide information to assist with management of the land. Monitoring involves a site visit to the property and revisiting the sites and any photo points indicated in the baseline documentation report. However, regardless of what is highlighted in the baseline documentation report, monitoring also involves general observation of the property, particularly to ensure that there have been no violations of the covenant.<sup>110</sup> Monitoring provides information that may be used as evidence if enforcement of the covenant is necessary. The extent of monitoring necessary to determine compliance with the terms of the covenant will vary from covenant to covenant. For example, a covenant that simply prohibits subdivision of the land will require only minimal monitoring. Annual monitoring is the practice for more complex situations.

Most covenants include a right of access by the covenant holder for monitoring purposes. Covenants often incorporate a registrable statutory right of way<sup>111</sup> permitting access. It is wise to include such a statutory right of way to ensure that future landowners will permit access for monitoring. As explained in Chapter 5, the covenant holder must be designated as being eligible to hold a statutory right of way as well as a conservation covenant. Access is discussed in greater detail in Chapter 15.

## ROLE OF MONITORS

In accordance with the terms of the covenant, monitors will

- conduct and document regular inspections of the land comparing the current state of the land to the baseline documentation information;

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<sup>110</sup> See *On the Ground: A Volunteers' Guide to Monitoring Stewardship Agreements*, Land Trust Alliance of BC, 2001, a publication in the Stewardship Series, available through <https://ltabc.ca/publications-a-research/on-the-ground-a-volunteers-guide-to-monitoring-stewardship-agreements/>, for a more in-depth discussion of monitoring a variety of stewardship agreements, including conservation covenants.

<sup>111</sup> Under section 218 of the *Land Title Act*.

- document any changes to the land, including flora and fauna; and
- in some cases act as a liaison between the covenant holder and the landowner.

## RELATIONS BETWEEN LANDOWNERS AND COVENANT HOLDERS

A well-designed program of landowner contact in conjunction with the monitoring program is essential to the success of the covenant. It is much more effective to prevent violations of the covenant through monitoring and landowner contact than to enforce compliance and seek a remedy once a violation has occurred. It is therefore important for covenant holders to maintain regular contact with landowners and advise them of monitoring visits.

The terms of the covenant may require prior agreement on monitoring dates. Landowners should be contacted prior to each monitoring visit, preferably in writing with a follow-up call. The letter or email should describe the monitoring process and indicate the proposed date and time. Even if the terms of the covenant or management agreement do not require prior agreement or notice, relations between landowners and covenant holders likely will be strengthened by such contact.

The covenant holder should put in place a general program for maintaining contact with landowners in addition to monitoring visits.<sup>112</sup> This could include providing landowners with regular updates of the covenant holder's conservation activities as well as regularly scheduled specific contact with the landowner.

Covenant holders should develop policies regarding contact with landowners and keep monitors informed of those policies. For example, the organization's policy might involve a volunteer monitor contacting the landowner to arrange a visit and an interview time, if necessary, once a staff representative has made initial contact. When arranging monitoring visits, it is a good idea to check with the landowner about any specific circumstances to be careful of, such as the presence of fierce pets or other animals.

Covenant holder staff should brief monitors about appropriate questions to ask landowners as well as questions to expect from landowners. Careful preparation

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<sup>112</sup> See Theresa Duynstee, *Landowner Contact Guide for British Columbia*, 1997, at [http://stewardshipcentrebc.ca/PDF\\_docs/StewardshipSeries/contact.pdf](http://stewardshipcentrebc.ca/PDF_docs/StewardshipSeries/contact.pdf).

and prior contact with the landowner will help prevent any conflict or unpleasant surprises.

## SELECTING AND TRAINING MONITORS

Covenant holders should establish a training program for monitors tailored to the monitoring requirements for the specific property. Depending on the conservation values protected in the covenant and the nature of the monitoring required, it may be necessary to recruit monitors with technical expertise such as drone operation.<sup>113</sup> Otherwise, lay volunteers generally will carry out monitoring duties. While monitoring may be conducted by staff of the covenant holder, it often is done by volunteers.

Training programs should teach techniques that will be required in the particular circumstances. These could include videotaping, photography, and the use of other equipment such as water sampling equipment and GPS units.<sup>114</sup> All monitors should be proficient in accurate and detailed note-taking. A complete training and orientation program will also include safety instruction.

## DETERMINING WHAT, HOW AND HOW OFTEN TO MONITOR

The covenant or management agreement may set out a monitoring plan and schedule. In the absence of such a plan and schedule, the nature, extent and frequency of monitoring will depend on the ecological values to be monitored. The baseline information, conservation objectives and site specific requirements will determine the specifics of monitoring: the kinds of observations to be made, whether of natural features, flora or fauna; the monitoring techniques required; and the frequency of monitoring.

The primary reason for monitoring is to determine compliance with the terms of the covenant. The emphasis of this aspect of monitoring will be on whether the landowner has met his or her obligations in the covenant. This may require

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<sup>113</sup> A drone is an aircraft with a ground-based controller. A controller must follow the rules in the *Canadian Aviation Regulations* (SOR/96-433), especially the requirement that “No person shall operate a remotely piloted aircraft system in such a reckless or negligent manner as to endanger or be likely to endanger aviation safety or the safety of any person.” Those regulations exempt anyone flying a micro drone (one that weighs less than 250 grams) from many requirements.

<sup>114</sup> The Global Positioning System (GPS) provides location and time information where there is an unobstructed line of sight to four or more GPS satellites. It is freely accessible to anyone with a GPS receiver (e.g., mobile phones).

seasonal monitoring, annual or periodic (e.g., once every 3-5 years) monitoring.<sup>115</sup> It may require extensive documentation or completion of a simple form. Detailed mapping may be necessary in some circumstances. In others, a short walk through the protected area and a short interview with the landowner may suffice. In many cases, viewing the protected area periodically on Google Earth<sup>116</sup> or through a subscription to a company<sup>117</sup> that aggregates satellite, aerial and environmental data may provide the information required. Remote monitoring options will presumably continue to improve.

No matter how frequently monitoring is done, it is a good practice to monitor at regular intervals and as close to the same time each year as possible. This helps evaluate any changes observed on the monitoring visit. It also provides consistency, an important factor should it be necessary to bring proceedings to enforce the covenant.

Monitoring should also occur just before covenanted land is sold because once the land is sold, the former owner is no longer liable under the covenant and no longer subject to any costs or remedial penalties specified in the covenant. It is therefore good practice to include a requirement that the owner notify the covenant holders of sale. Notification of sale will also allow the covenant holders to identify and contact the new owners to set up a meeting to explain the covenant and thereby continue the essential landowner contact process. If the monitoring visit has confirmed that all is well, the new owner could be offered an “estoppel certificate” confirming that the covenant had been complied with at the time of sale so that the new owner knows that he or she is not taking on liabilities of the previous owner. The covenant holder typically will charge a fee, plus expenses, for such a visit.

## TYPES OF DOCUMENTATION

As with frequency of monitoring, the type of documentation of monitoring visits will depend on the ecological values to be monitored, the baseline information and

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<sup>115</sup> Generally, at least annual monitoring is recommended in Standard 11 of the *Canadian Land Trust Standards and Practices* (see footnote 75). However, that can be an unnecessary and expensive drain on resources, so frequency should reflect the specific risk of contravention on each covenanted area.

<sup>116</sup> Google Earth renders a three-dimensional representation of Earth based on satellite imagery. Users can see landscapes from various angles.

<sup>117</sup> Some companies specialize in high-resolution imagery for annual compliance monitoring requirements, including generating monitoring reports that follow Land Trust Standards and Practices; an example is at <https://www.upstream.tech/use-cases/lens-for-land-conservation>.

site specific requirements. Monitoring should focus on recording the state of important natural features as well as flora and fauna. Monitors should be particularly alert to indications of disturbance by people or domestic animals.

Collecting consistent information year to year is an important part of covenant monitoring. Monitoring data should also be comparable with information provided in the baseline documentation report. Generally, covenant holders should provide monitors with a monitoring form to complete for each monitoring visit. The form may be adapted, as necessary, for each specific site. In addition, covenant holders should be flexible about amending the form in response to feedback from monitors and other input that indicates ways in which the form could be improved.

Another important source of monitoring information, of course, is the landowner. In particular, the landowner is best placed to identify impacts on the covenanted area due to the activities of neighbours or even trespassers. Monitoring should therefore involve a short questionnaire to be completed with the landowner to record landowner observations.

Depending on the circumstances, monitors may also document the state of the protected area and any changes by

- collecting and recording samples (provided collecting samples does not result in damage to flora or fauna),
- still or video photography,
- making audio tapes,
- mapping of landforms, vegetation or other significant features, or
- preparing surveys of the land, flora, fauna or surrounding community.

## **CREATING RECORDS THAT MEET EVIDENTIARY STANDARDS**

Where violations of the covenant occur, they will be noted on the monitoring report. If the contravention is minor, simply informing the landowner of the problem and asking that it be rectified will usually be adequate. More major violations, however, may require enforcement proceedings. These proceedings could take the form of mediation, arbitration or court action. It may be necessary for monitors and staff of the covenant holder to give evidence in these proceedings. It is important, therefore, that the monitoring program and

monitoring records are credible. Monitoring must be accurate, consistent and repeated at regular intervals. Preferably, the same individual or team will monitor on each occasion. If this is not possible, overlap between monitors is advisable to ensure continuity. Monitoring techniques also should be consistent from one monitoring visit to the next. This will help ensure that any changes in the land observed and recorded will not be attributed to a change in monitors or a variation in monitoring technique.

In particular, the documentation of monitoring visits must be as thorough, clear, precise and consistent as possible. Detailed, legible note-taking is important. A complete monitoring form will ensure that all necessary information is gathered. The monitoring documentation itself could be introduced as evidence in proceedings. In addition, it likely will form the basis for the monitor's oral testimony in proceedings.

# ENFORCEMENT PRACTICES

## NEED FOR ENFORCEMENT

It is best to prevent breaches of a covenant rather than to enforce its terms after damage has occurred. Regular monitoring and a well-designed program of landowner contact will go a long way to preventing breaches of the covenant. They will promote a good relationship between the covenant holder and subsequent owners of the land. The original parties to a covenant are usually committed to the protection of the land involved and to the fulfillment of their obligations under the covenant, so the need for enforcement at that stage often does not arise. Unfortunately, a subsequent owner of the covenanted lands may not share the original owner's commitment to protection and may wish to use the land in ways that begin to frustrate the purposes of the covenant.<sup>118</sup>

Thus, in some circumstances, it will be necessary for the covenant holder to enforce compliance with the terms of the covenant to protect the ecological values incorporated in the covenant. Such enforcement need not involve a protracted proceeding; minor breaches of a covenant can often be rectified simply by reporting the problem to the landowner in a letter or email and asking that the contravention be corrected.

Nevertheless, situations do arise where formal enforcement is necessary. If the covenant holder does not take some action to enforce compliance with the covenant when breaches occur, it may lose the right to a remedy from the courts in the future. Courts have the jurisdiction to refuse to grant remedies such as an order for specific performance or an injunction on a number of discretionary grounds.<sup>119</sup> For example, if the covenant holder delays an unreasonable length of time in taking steps to enforce the covenant and the delay would make giving the remedy unjust, the court may refuse to grant relief. Similarly, if the covenant holder, by its actions, seems to be indicating to the landowner that it does not

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<sup>118</sup> There is still too little experience with conservation covenants to be certain, but it seems as if the further a covenant moves through subsequent property owners, the greater the chance that the new owners will disregard the restrictions of the covenant.

<sup>119</sup> Courts have the jurisdiction to refuse to grant relief on a number of grounds such as laches (unreasonable delay), acquiescence and waiver. An exhaustive discussion of that jurisdiction is beyond the scope of this *Guide*, but an example is the court's refusal to enforce a covenant in *Turney v. Lubin* (see footnote 52) due to the plaintiff's failure to enforce previous similar contraventions.

intend to enforce the covenant and, as a consequence, enforcement would become unjust, the court may refuse relief.

In addition, as previously noted, section 35 of the *Property Law Act*<sup>120</sup> provides that anyone with an interest in land may apply to the court for an order to modify or cancel charges or interests against the land. This includes conservation covenants.

One of the circumstances under which the court may order modification or cancellation of a covenant is if the holder of the covenant has expressly or impliedly agreed to it being modified or cancelled. A landowner could argue that if a covenant holder does not enforce the covenant, the covenant holder has impliedly agreed to the modification or cancellation of the covenant. Covenants generally include a provision stating that failure by the covenant holder to enforce a particular breach does not operate as a waiver of any other breach or affect the covenant holder's right to enforce in the future.

However, given section 35 of the *Property Law Act* and the jurisdiction of the court in this area, it is risky practice for a covenant holder to minimize its monitoring and enforcement and attempt to rely on this kind of provision. It is therefore important that covenants provide a variety of enforcement mechanisms and that covenant holders apply these mechanisms when they become aware of breaches, either through monitoring or some other process.

That said, there will be situations where conservation covenants are not enforced because of lack of funds or person-power. A conservation organization, with the best of intentions at the time of the acquisition, may have to allow minor violations, and then allow more serious violations, since a pattern of non-enforcement has been set. As a result, mandatory terms of a covenant become discretionary. This is why an organization should not take on a conservation covenant unless there is assurance that it will have the funds to monitor and enforce.

The need for enforcement can be reduced if a covenant's terms are flexible because rigid, inflexible terms are more likely to be violated. Dispute resolution mechanisms will help, but covenant requirements should be just strict enough to protect environmental values — a tricky balance.

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<sup>120</sup> R.S.B.C. 1996, c. 377.

## FILE MANAGEMENT

It is a good practice for all parties to the covenant to keep detailed and accurate records of all interactions. As mentioned in Chapter 3, if a provision of a conservation covenant is ambiguous, a court might look beyond the document itself to clarify the intent of the parties at the time the instrument was drafted. Covenant holders and, where applicable, landowners therefore should take the following steps:

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

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

In addition, each party should:

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

## TYPES OF ENFORCEMENT MECHANISMS

Conservation covenants contain a variety of enforcement mechanisms. However, breaches of a covenant will often be minor and easily corrected, so initiating a formal enforcement process may not be necessary. Good landowner relations can be maintained if the landowner is notified of such breaches in a letter or email and asked to correct the problem before the next monitoring visit. Nevertheless, serious breaches can and do occur. In such cases, it is important that most, if not all, of the following kinds of provisions be included in a covenant.

## ENFORCEMENT REMEDY

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

- require the covenant holder to serve the landowner with written notice of any suspected breach of the terms of the covenant, specifying the legal description of the property, the clause in the covenant that has been breached, the enforcement provisions in the covenant (enforcement remedies, rent charge, dispute resolution), the nature of the breach, when the breach was discovered, the actions needed to remedy the breach and the maximum cost to remedy the breach;<sup>121</sup>
- require the landowner to remedy the breach within a period, such as 60 days of receiving the notice; and
- if the landowner does not remedy the breach, permit the covenant holder to do so at the landowner's expense.

If the covenant holder remedies the breach and the landowner refuses to pay, the cost of remedying the breach generally is recoverable in court as a debt. If there is a dispute about the breach or the cost to remedy it, it may be necessary for the covenant holder to resort to dispute resolution provisions in the covenant to recover the cost of remedying the breach.

Given the importance of maintaining good landowner relations, the letter giving notice of the breach should include an offer to meet with the landowner to discuss the breach and potential remedies.

## RENT CHARGE

Conservation covenants commonly include a rent charge, another type of enforcement mechanism.<sup>122</sup> A rent charge secures payment of a specific amount by the landowner to the covenant holder for each breach by the landowner of the terms of the covenant. The amount of the rent charge is specified in the covenant and may differ from covenant to covenant, depending on factors such as the size of the covenant area and the sensitivity of the land. In addition, the amount is generally indexed for inflation since the covenant is intended to last indefinitely.

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<sup>121</sup> The covenant should include a separate provision setting out how and to whom notice is to be given.

<sup>122</sup> The granting of a rent charge is permitted under ss. 219(6) of the *Land Title Act* and at common law.

Commonly, where the breach involves the removal of flora or fauna from the land, the rent charge is increased by the market value of the material removed plus an additional percentage of the value.

A rent charge is registered against title to the land. The covenant should provide that the rent charge ranks ahead of all other financial charges so that the amount of security will not be affected by enforcement proceedings by the holders of other financial charges.<sup>123</sup> The rent charge binds all future owners of the land.

A rent charge is enforceable if the landowner is in breach of the covenant and either has not cured the breach, is not taking steps to do so, or if the damage cannot be remediated. After giving the landowner formal notice of enforcement of the rent charge, the covenant holder may enforce the rent charge in several ways,<sup>124</sup> including by a court action against the landowner for the rent charge amount, appointment of a receiver or an order for sale of the land. The covenant holder could apply to the court to have the landowner's interest in the land sold to provide funds to pay the rent charge.

Another option is for the parties to negotiate a remediation agreement that suspends the rent charge. A remediation agreement specifies the actions that the landowner will carry out to remedy the breach, a timeframe to complete the remediation and any financial penalty that the landowners must pay for having breached the covenant. The remediation agreement also specifies that, if the terms of the agreement are not met, the covenant owner retains the right to enforce the rent charge provisions of the covenant. (Note that additional monitoring visits will likely be required before, during and after the remedial work is carried out.)

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

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

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<sup>123</sup> See Chapter 8 Charges on Title. If there are other financial charges such as a mortgage or lien on title before the covenant and rent charge are registered, it will be necessary to obtain a priority agreement from the charge holder to give the rent charge priority. As explained in Chapter 8, the prior charge holder can refuse to give the rent charge priority.

<sup>124</sup> See article 12 in the Annotated Conservation Covenant, Appendix 1.

## REQUIRING THE OWNER TO ENFORCE

Another provision frequently included in conservation covenants requires the owner to take all reasonable steps to identify and prosecute those who damage the land by trespass or vandalism and to seek financial restitution for any damage caused to the land (see Annotated Conservation Covenant, section 9.6).

## POSTING SECURITY

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

## DISPUTE RESOLUTION

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

It is advisable for covenants to contain a provision allowing mediation in the event of a dispute before seeking a remedy from the courts. The parties may also want to include a provision requiring that they look to an arbitrator rather than the courts to resolve disputes.<sup>125</sup>

## GOING TO COURT

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

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<sup>125</sup> "Mediation" involves a neutral third party facilitating resolution discussions. "Arbitration", in contrast, involves referring the dispute to an arbitrator who will decide the matter.

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

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

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

Although sometimes necessary, court actions are very expensive and slow, and the outcome is uncertain. Furthermore, court proceedings are adversarial, producing a “winner” and a “loser”, usually worsening relations between the parties. The discord could poison the ongoing relationship between the landowner and covenant holder. Beginning a court action should therefore be the last resort in enforcing the terms of a covenant.

## **ENFORCEMENT STEPS IN CASE OF A BREACH**

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

- Ensure that the suspected violation really is a violation. Does the covenant actually prohibit the behaviour? Is the covenant too vague? Has the covenant created a situation that is impossible to comply with or enforce? Address these questions before deciding how to proceed.
- Do not ignore violations of the covenant.
- Contact the landowner informally to notify the landowner of the violation, request that the violation stop if it is ongoing and discuss measures to remedy the situation. A face to face meeting is the best choice.

- Negotiate an acceptable solution to the problem with the landowner. In many cases this will end the matter. This first step is vital in the case of minor infractions and offers a way to deal with them in a cost effective manner. Make detailed notes of all discussions with the landowner and all actions taken. Confirm any action taken in a letter to the landowner. Advise the landowner in writing that the covenant holder is reserving the right to take further steps if the violation continues or recurs.
- Keep copies of all correspondence, including e-mail correspondence. If the landowner does not cooperate and continues the violation or refuses to remedy the situation or does both, give formal notice of the violation under the enforcement remedy provision of the covenant. The landowner will then have a certain time period within which to remedy the breach at the landowner's cost.
- If the landowner disputes that there is a violation or interprets the covenant differently, consider using the dispute resolution provisions of the covenant and seeking mediation of the dispute if necessary. This may resolve the matter or at least clarify the issues that need to be resolved.
- If the landowner continues to be uncooperative even in response to formal notice, the covenant holder can take all necessary steps to remedy the breach under the enforcement remedy provisions and, if necessary, sue the landowner to recover the cost of doing so. The covenant holder can also recover at least some portion of the costs of the proceedings. In this circumstance, the covenant holder would obtain a monetary judgment against the landowner. If the landowner did not pay, the judgment could be registered against title to the property and enforced in the same way as any other judgment.
- If the violation is one which will cause or is causing irreparable damage to the land or amenities on the land, the covenant holder should consider seeking an injunction as soon as possible requiring the landowner to stop the conduct that is in breach of the covenant.
- If the violation is still not remedied adequately, the covenant holder could then seek other remedies through the courts such as an order for specific performance.<sup>126</sup>

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<sup>126</sup> Or binding arbitration if that is required by the covenant.

- If the landowner does not, or cannot, remedy any damage that has occurred, the covenant holder could enforce the rent charge. There will be a number of steps the covenant holder can take to enforce the rent charge. Some of these steps will involve starting a court action.

If the damage is significant and cannot be repaired, enforcing the rent charge may be the only way for the covenant holder to be compensated; that compensation could then be used to enhance the attributes or amenities on another covenant area (no net loss). The covenant could specify that the rent charge is doubled in the event of a breach that cannot be remedied.

While most breaches will be remedied at an early stage, in some cases the party enforcing the covenant may need to employ most, if not all, of the enforcement mechanisms available in the covenant to ensure compliance, obtain recovery of costs or obtain compensation for irreparable damage.

At every step, the party enforcing the covenant should make careful and detailed notes of all discussions with the party in breach. In addition, the enforcing party should keep a record of all actions taken as well as retain copies of all correspondence and documents. This information may be required as evidence in any arbitration or court proceedings. Notes and records made at the time are considered more reliable than notes and records based on recollection made well after the fact.

## Chapter 13

# DISPUTE RESOLUTION

Even with careful drafting of covenant documents, disputes related to conservation covenants can arise between landowners and covenant holders. A dispute might occur if there were:

- a difference in interpretation of a specific provision in a conservation covenant,
- an honest mistake on the part of a landowner about what types of activities were permitted on the land or where certain activities could take place, or
- a deliberate violation of a provision in a conservation covenant, particularly if the violation were repeated.

To address these possibilities, it is useful for landowners and conservation organizations to consider what types of dispute resolution mechanisms they want included in the covenant document. It is always useful to include alternatives to the parties having to go to court to resolve their differences.

## PROVISIONS TO INCLUDE IN COVENANTS

A range of dispute resolution mechanisms is available including negotiation, mediation and arbitration. Given the time and cost required in using the courts to resolve disputes, one or more of these mechanisms are normally included in covenants. Nevertheless, there are costs associated with all dispute resolution processes and the covenant should set out how these costs will be allocated among the parties. Generally, parties will share the cost of dispute resolution. A brief description of several of these mechanisms follows.

### NEGOTIATION

Negotiation involves direct dealing between the parties in an attempt to resolve the dispute. Most covenants include a provision permitting the parties to attempt to resolve disputes directly with each other. Such a provision could also be mandatory, requiring the parties to attempt to negotiate a solution before moving on to other dispute resolution mechanisms.

In many cases, the parties will be successful in negotiating a resolution of the dispute.

## MEDIATION

Covenants often provide that, if attempts by the parties to resolve their dispute are not successful, the parties may appoint a mediator. A mediator is a mutually acceptable, neutral third party who is skilled at assisting the parties to resolve the dispute themselves. Mediation encourages direct participation by the parties. A mediator does not impose a resolution to the problem but helps the parties find one themselves.

The majority of disputes will be resolved by either direct dealings between the parties or mediation.

## ARBITRATION

With arbitration, the parties select a neutral third party to actually decide the matter in dispute. After hearing the parties and any witnesses, the arbitrator makes an award in favour of one or the other. Arbitration may or may not be binding, depending on the provisions included in the covenant and the terms of reference given to the arbitrator.

With binding arbitration, the parties agree to use arbitration instead of the courts to resolve disputes. Binding arbitration generally ends the matter, saving the time and money of taking further steps to resolve the dispute. Arbitration is generally faster and less expensive than court proceedings and can be tailored by the parties to meet their needs.

While conservation covenants generally do not include arbitration as a dispute resolution option, it may be useful for the parties to consider this option in appropriate circumstances. If the parties decide to use arbitration to resolve disputes, they should include provisions in the covenant setting out acceptable qualifications for the arbitrator, how the arbitrator will be appointed, the arbitration process and the allocation of arbitration costs.

It is important to remember that arbitration will generally be the last recourse before court, so the parties must be satisfied with the arbitrator and the arbitration process.

## CULTURAL PROTOCOLS

If indigenous cultural use of covenanted land is generally compatible with protection of the land and amenities, conflict may nevertheless arise about specific uses of the property. In such a situation, the parties may want to resolve the matter in a manner that reflects dispute resolution mechanisms of the indigenous community. The covenant could be drafted to include dispute resolution mechanisms that reflect and incorporate the legal traditions and protocols of the indigenous community involved in the dispute.

## POSSIBLE TRADE-OFFS TO RESOLVE DISPUTES

It is almost always in the best interests of the landowner, the covenant holder and the protection of the land to avoid disputes through the use of best practices and, where disputes are unavoidable, to attempt to settle them as early as possible. Often the landowner and covenant holder will be able to find a solution to problems that arise. Sometimes mediation will assist the parties to find a resolution.

Workable solutions may involve trade-offs that will meet the land stewardship objectives of the covenant. Consider this hypothetical dispute: a landowner constructs a small guest cottage within the covenant area contrary to the terms of the covenant. After some negotiation between the landowner and covenant holder, the landowner agrees to grant a covenant on a separate wetland area on the property in exchange for modifying the boundary of the original covenant to exclude the guest cottage. This solution is acceptable to both the landowner and covenant holder and further enforcement measures are not necessary.

## Chapter 14

# CHANGE IN OWNERSHIP

Conservation covenants are intended to protect land indefinitely. They are registered against title to the land and bind future owners of the land. Because they last indefinitely, changes in ownership of the land will certainly occur during the life of the covenant. A change of ownership will take place if the landowner transfers the land during the landowner's life or disposes of it by will on death. Covenant holders therefore must be prepared to deal with change in ownership to ensure that the covenant requirements are met and the land continues to be adequately protected after the change.

## NOTICE TO NEW LANDOWNER

Prospective new landowners will receive notice of the existence of the conservation covenant through conducting a search of the title to the property in the Land Title Register. A title search will reveal all charges, including covenants, registered on title. Copies of the covenant and any other documents filed in the Land Title Register can be obtained from the Land Title and Survey Authority office.

## TRACKING CHANGES IN OWNERSHIP

Covenant holders generally will not receive notice of a change of ownership. A covenant could include a term requiring the owner to notify the covenant holder of a change in ownership but such a term would not guarantee that covenant holders will be kept up to date. Covenant holders therefore should establish a system to check for changes in ownership of land on which they hold a covenant. Regular landowner contact programs will reveal such changes. In addition, it is a good practice for covenant holders to conduct Land Title Register searches on a periodic basis of all land on which they hold covenants to determine whether there have been changes of ownership. A title search will also reveal any changes in the other charges registered against title to the land.

## ESTABLISHING CONTACT AND ONGOING RELATIONS

A good landowner contact program is even more important with subsequent landowners than with landowners who are the original party to the covenant. Subsequent owners, even the heirs of the owner that is a party to the covenant, may not be as committed to conservation of the land as the original owner. Subsequent landowners may wish to use the land in ways that the original owner wanted to limit and seek to modify the covenant provisions. An effective landowner contact program will go a long way toward ensuring that new landowners understand and respect the intent of the covenant.

The covenant agreement could require regular contact. For example, a clause can require that the landowner agree to meet annually or biennially, at the request of the covenant holder, to discuss the results of monitoring or any other items relating to the land which the covenant holder wants to bring forward.

It is good practice for landowners to advise the covenant holder of an impending sale or transfer of the property even in the absence of a requirement in the covenant to do so. A covenant holder can pay for a “parcel activity notifier”<sup>127</sup> whereby the Land Title and Survey Authority electronically notifies it, for up to 180 days, of activity on the title of the covenanted land, but this can be an expensive option.<sup>128</sup> (Note that, if a covenant has qualified as an ecogift, the federal government will maintain its own parcel activity notifier on the ecogifted property.)

It is also good practice for the covenant holder to notify the new owner of the covenant and explain how the covenant is intended to protect certain features of the land. This notification provides the basis for establishing initial contact with the new owner. As part of the landowner contact program, new owners should be provided with a copy of the conservation covenant and baseline reports as well as any information produced by the covenant holder about its work in general. The covenant holder should give the new owner access to all monitoring reports and any other information available about the protected area and the property in general.

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<sup>127</sup> With a parcel activity notifier subscription, a covenant holder will be notified for a period of up to 180 days whenever an activity affects a specific parcel of land. Pending activities such as a transfer of land, mortgage, claim of builder's lien, or a judgment will all generate a notice.

<sup>128</sup> At time of writing, it costs almost \$6 for a six-month subscription service for automated alerts related to each specific parcel. If a subscription is purchased for each covenanted property twice per year indefinitely, those costs will mount up over time.

Covenant holders should take the same care in maintaining contact with each subsequent landowner as was taken with the landowner that granted the covenant. Regular contact and consultation with successive landowners will contribute significantly to a good relationship. In addition, the owner is usually in the best position to report on changes in the protected area. The new landowner should be introduced to the monitoring program and invited to participate where appropriate.

## Chapter 15

# ACCESS

It is necessary to provide for access to the area protected in a covenant. Certainly, the covenant holder must have access in order to monitor and enforce compliance with the covenant. In some circumstances, it may also be appropriate to provide for public access to the protected area.

## WHEN PUBLIC ACCESS IS APPROPRIATE

Many protected areas are ecologically very sensitive and are protected in large part to prevent unnecessary human access that is potentially damaging. In addition, in many instances, the landowner will not want the public to have access to the protected area. This often is the case if the landowner lives on the property.

However, there are cases in which the public may be invited onto the protected area for educational or recreational purposes. This might occur where the land, although privately owned, is a place where the public has enjoyed access in the past for recreational purposes or where the purpose of the covenant is to permit construction of a hiking or cycling trail. In other circumstances, the exercise of traditional indigenous land uses, culture and education may well be compatible with conservation objectives and would require access. It may also be in the best interests of the covenant holder, and acceptable to the landowner, to invite the public to a protected area to view wildlife, vegetation or ecosystems generally where this serves to educate the public and garner support for the conservation objectives. This is more likely to be the case where public access can be accomplished with minimal impact.

## HOW TO ACHIEVE A RIGHT OF ACCESS

Every covenant should incorporate a statutory right of way in favour of the covenant holder and its employees, workers and invitees. Section 218 of the *Land Title Act* authorizes the landowner to grant the covenant holder a right of way “for any purpose necessary for the operation and maintenance of the grantee’s

undertaking". Conservation organizations must be designated by the Surveyor General to be granted a statutory right of way.<sup>129</sup>

The statutory right of way should state to whom the right of way is being given and for what purpose. Typical statutory right of way provisions will allow access to enter, rehabilitate and restore the land, to monitor by inspecting the land, taking samples and photographs, to survey the land, and so on. Where a covenant charges only a portion of a parcel of land, the statutory right of way should permit access over the uncovenanted portion of the land to get to the covenant area where necessary.

Unless the public is to have access to the covenant area, the covenant should include a provision stating that the statutory right of way does not give a right of public access. Alternatively, if the public or a particular group is to have access, this should be stated clearly along with the allowable purpose of the access.

Even though the statutory right of way is generally included in the covenant itself, it should be registered separately against title to the land. It will show as a separate charge.

## **ACCESS RELATIONS WITH LANDOWNER**

Typical right of way provisions require the landowner and covenant holder to agree on regular dates of access to the land. They also require notice to the landowner of visits to the land in some circumstances.

Covenant holders should make a practice of giving as much notice to the landowner as possible of visits to the land. Alternatively, the parties might agree on a regular access schedule for monitoring and inspection purposes. If this is the case, the covenant holder should make careful note in writing of the schedule.

Even with a prior agreement, the covenant holder should notify the landowner of an upcoming visit to the land. This will prevent surprise and inconvenience to the landowner and contribute to a positive relationship.

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<sup>129</sup> See the discussion in Chapter 5 about designation.

## Chapter 16

# HOW TO PROTECT AGAINST LIABILITY

Both the landowner and the covenant holder are potentially liable to third parties. Liability could arise in relation to individuals who enter on the land subject to the covenant. There is also potential liability in nuisance to neighbouring landowners.

The landowner (and the occupier of land) has exposure to this liability even without a covenant. However, the existence of a covenant may add to the landowner or occupier's liability, largely because the number of people permitted or likely to enter the land may increase. Depending on the terms of the covenant, the covenant holder is also potentially liable as an occupier of land.

The risk of liability is much lower where the person entering on property willingly assumes the risk of doing so. This affords both landowners and covenant holders an opportunity to take steps to minimize liability or avoid it altogether. In addition, adequate liability insurance helps protect against adverse economic consequences should liability be found.

This section will describe circumstances that could give rise to liability and address ways in which landowners and covenant holders can minimize liability and protect against the potentially adverse consequences of liability.

## OCCUPIERS LIABILITY ACT

The *Occupiers Liability Act*<sup>130</sup> provides that "occupiers" (anyone who is in physical possession of property, or has the responsibility for and control over the condition of the property, the activities conducted on the property and the persons allowed to enter the property) must take reasonable care so that individuals entering on the property will be reasonably safe in using the property.<sup>131</sup> This duty is referred to as a duty of care. What is considered reasonable care will depend on the circumstances. This duty does not require that occupiers ensure that visitors are

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<sup>130</sup> R.S.B.C. 1996, c. 337.

<sup>131</sup> *Occupiers Liability Act*, s. 3.

absolutely safe. However, an occupier could be held liable for inadvertently or accidentally endangering someone.

The duty of care applies to the condition of the property (land and structures), activities conducted on the property and the conduct of others on the property. In other words, the occupier must ensure that the property is maintained in a reasonably safe condition and that activities conducted on the property do not cause harm to others.

Depending on the circumstances, the occupier could be the landowner, a tenant of the property or a covenant holder. There can be more than one occupier of a piece of property. The owner of property subject to a covenant will be an occupier if the owner lives on the property or has the responsibility for and control over the property. Clearly this will be the case in most circumstances. A landowner (or tenant) owes this duty of care whether or not there is a covenant on the property.

The covenant holder may also have responsibility for and control over at least part of the property depending on the terms of the covenant and any rights of way granted by the landowner in favour of the covenant holder. For example, the covenant holder may have responsibility for and control over a trail located on the covenant area. Both the landowner (and, perhaps, a tenant) and the covenant holder therefore could be occupiers within the meaning of the *Act* and potentially liable if someone were injured on or adjacent to the trail.

Where someone is harmed because an occupier of property has not taken reasonable care to ensure that person's safety, the occupier may be required to pay the person monetary damages.

A conservation covenant on property might increase the property owner's risk of liability where, under the terms of the covenant, more people are authorized or invited to enter onto the property than if the covenant did not exist. For example, a covenant or an ancillary management agreement will generally authorize the covenant holder to monitor compliance with the terms of the covenant. In addition, the covenant may permit access by the public or specified groups to the covenant area for recreational, educational or cultural purposes. An associated right of way or easement contained in the covenant document itself or prepared separately may authorize such access. The increased number of people permitted to enter on property increases the risk of harm to someone for which the landowner or covenant holder may be found liable.

If a person entering property willingly assumes the risks of entering the property, the owner or occupier owes a lesser duty to that person. In these circumstances, the occupier has a duty not to create a dangerous situation with the intent of

harming that person or their property and not to act with reckless disregard to that person's safety. Because this duty requires either intention or reckless disregard on the part of the occupier, it is a much lower duty than the general duty owed to people entering on property.

Whether someone entering property "willingly" assumes the risks of entering the property will depend on the circumstances of the particular situation. For example, if property is marked as hazardous or dangerous by the posting of clearly visible signs, those who enter the property may be considered to have done so at their own risk (although some may not be able to read a sign). Protective measures are discussed in greater detail below.

In a number of situations, however, a person who enters on property is deemed under the *Act* to have willingly assumed the risk of entering the property regardless of the circumstances. These situations are:

- where the person is trespassing while committing or intending to commit a criminal act;
- where the person is trespassing in any circumstances or is entering for a recreational activity<sup>132</sup> and the property falls within certain categories such as
  - property primarily used for agricultural purposes;
  - rural property that is
    - used for forestry or range purposes,
    - vacant or undeveloped property,
    - forested or wilderness property, or
    - a private road reasonably marked as a private road; or
  - a recreational trail reasonably marked as such.

In many circumstances, property subject to a conservation covenant will fall within one or more of these categories, so the occupier of the property will owe trespassers and recreationalists the lesser duty of care — not creating a situation with the intent to harm anyone entering the property or acting with reckless disregard to their safety.

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<sup>132</sup> If the occupier provides the person with living accommodation or receives payment for the entry or recreational activity, other than payment from a government agency or non-profit association, the higher duty will be owed.

However, occupiers of property that is not in one of these categories — for example, property located in a municipality that is not primarily used for agricultural purposes or is not a recreational trail will owe those coming onto the property the higher duty of care; that is, to ensure that they will be reasonably safe in using the property.

No matter which duty of care is owed in the circumstances, landowners and covenant holders can and should take effective steps to protect against liability. These steps are discussed below.

## **NUISANCE**

Both landowners and covenant holders must take care not to do anything on property that will unreasonably interfere with a neighbouring parcel of land. Doing so could result in a nuisance. Nuisance is the unreasonable, unwarranted or unlawful use by a person of his or her own property resulting in interference with the reasonable use and enjoyment of another person's property or by the public of a public area. Smoke, odours, noise, vibration, obstructing private easements, interfering with support of land or structures and interference with public rights of passage and enjoyment could all constitute nuisances, depending on the circumstances.

Landowners and covenant holders that have responsibilities under covenants must carry out activities in such a way that they will not interfere with neighbouring properties. For example, care must be taken in trail building or any other construction or restoration activities to ensure that neighbouring property does not flood or subside. In addition, where property adjoins a public area, it is important to ensure that public access to and enjoyment of the area is not hampered by any structures or activities on the property.

## **ENVIRONMENTAL LIABILITY**

Environmental contamination is another possible source of liability. The potential for environmental contamination must be addressed before any acquisition of land. Forestry, agriculture, mining and waste disposal can all result in significant environmental contamination, so those concerns must be addressed early. Even if

the source of contamination was created by a previous owner, the new owner or covenant holder may be found responsible for cleanup costs.<sup>133</sup>

In circumstances where the covenant holder, after completing a site inspection and a review of the history of the property, is concerned that contamination may be a problem, the covenant holder may want to retain professional assistance to complete an environmental audit of the property. An audit will identify the nature and extent of contamination of the land or water included in the covenant area and the remediation measures necessary to clean up the contamination.

Whether or not the land is contaminated, it is advisable for conservation covenants to include a term allocating responsibility for contamination. Generally, covenants provide that the owner is responsible for any contamination on the land and that the owner will indemnify the covenant holder for any costs or liabilities that arise from contamination on the property.<sup>134</sup>

## ARCHAEOLOGICAL MATERIALS

The *Heritage Conservation Act*<sup>135</sup> protects archaeological sites whether on public or private land. Archaeological sites are automatically protected by being of particular historic or archaeological value and may not be altered without a permit. There is a provincial heritage register for known sites, but regardless of whether a site is already known or not, it is an offence, among others, to “damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of human habitation or use before 1846”.<sup>136</sup> Penalties can be significant, so it is prudent to make efforts to determine whether there are or may be archaeological objects on the property. The landowner and local First Nations would be good sources of such information.

In addition, the Ministry of Forests’ Archaeology Branch has RAAD<sup>137</sup>, a GIS application that lets authorized users view and download data about B.C.’s archaeological sites. Authorized users include local government resource and land use planning agencies, but it is not available to the general public. Individuals who

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<sup>133</sup> *Environmental Management Act*, S.B.C. 2003, c. 53, s. 45.

<sup>134</sup> See section 9.5 of the Annotated Conservation Covenant in Appendix 1.

<sup>135</sup> R.S.B.C. 1996, c. 187.

<sup>136</sup> S. 12.1(2)(d).

<sup>137</sup> Information about Remote Access to Archaeological Data (RAAD) is at <https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/archaeology/systems/raad>.

require archaeological information but who are ineligible for access can submit a request form to the Archaeology Branch of the Ministry of Forests.

## MISCELLANEOUS LIABILITY ISSUES

Covenant holders will not generally be held liable to third parties for non-enforcement of the terms of a covenant. While the holder of a covenant has the right to enforce the terms of the covenant, it does not have an obligation to do so. Members of the public who are of the view that a covenant holder is not adequately enforcing compliance with the covenant generally will not have a legal remedy against the holder.<sup>138</sup>

Covenant holders may owe landowners a duty not to cause reasonably foreseeable harm to the landowner or the property.<sup>139</sup> It is common, however, for the parties to a covenant to include a clause excluding this liability. Where it is not excluded, this duty is in addition to any obligations that the holder may have under the terms of the covenant. Covenant holders must ensure that they act with reasonable care when carrying out monitoring and maintenance obligations so that they do not cause damage to the property.

Landowners and, especially, staff and volunteers working with covenant holders should be aware of the boundaries of the land subject to the covenant in order to avoid trespassing on neighbouring properties while carrying out monitoring or maintenance duties.

## PROTECTING AGAINST LIABILITY

Landowners and covenant holders can take a number of measures to protect against liability. Depending on the circumstances, some or all of these measures should be implemented as a matter of course for each property subject to a covenant.

### SIGNAGE

Landowners and covenant holders should give primary consideration to posting signs on property. There are three kinds of signs that serve a purpose in protecting

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<sup>138</sup> In *Suomalainen v. Jernigan et al.*, 2004 BCSC 465 (CanLII), <<https://canlii.ca/t/1gw30>>, retrieved on 2022-09-04, the court confirmed that a restrictive covenant was just between the landowner and a municipality and was not enforceable by third parties such as the plaintiff.

<sup>139</sup> This is a duty which, if breached, gives rise to tort liability.

against liability: signs warning of danger or particular hazards, signs marking roads or trails, and “no trespassing” signs.

As explained above, where someone willingly assumes the risk of entering property, the occupier has a much lesser duty to ensure that person’s safety. Where a property is dangerous or contains hazardous areas, signs warning of the danger or hazards serve to inform those who might enter on the property.<sup>140</sup> It is more likely that individuals who have been informed of a risk in such a way that they can recognize and avoid danger will be found to have assumed the risk willingly.

Similarly, because under some circumstances individuals are deemed to have assumed the risk of entering property, clearly visible signs should be posted identifying private roads in a rural area or recreational trails.

One of the situations in which an occupier owes a lesser duty of care is if the individual entering on certain kinds of land is trespassing. Anyone entering without consent on land that is fenced, enclosed by a natural boundary or posted with no trespassing signs is a trespasser.<sup>141</sup> Therefore, on those properties to which the public does not have access under the terms of the covenant, such as highly sensitive ecological areas, signs should be erected prohibiting trespass. In order to be effective, signs prohibiting trespass must be posted at each ordinary access to the land in such a way as to be clearly visible and readable in daylight and under normal conditions.

## MAINTENANCE AND MONITORING

As explained previously, landowners and covenant holders have a duty to take all reasonable steps to ensure that individuals are reasonably safe when using the land. Putting good maintenance and monitoring procedures in place is an important measure in taking all reasonable steps to ensure safety. These procedures will assist in identifying hazards and might include cutting down hazardous trees, maintaining trails or bridges, and dealing with flooding. This is particularly true for properties to which the public has access.

Those charged with the obligation to maintain property, including the covenant area, must maintain the property in a safe way. This includes general, systematic maintenance appropriate in the circumstances. It also involves being aware of unusual conditions and taking steps to ensure the risk of danger is not increased

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<sup>140</sup> However, written signs will only warn those who can read; small children may remain unwarned by signage.

<sup>141</sup> *Trespass Act*, S.B.C. 2018, c. 3, s. 2.

as a result. For example, where there is a recreational trail, the trail should not be opened prematurely if there is a risk of flooding, avalanche, slides or trail washouts because of weather conditions. The public should be warned through clearly visible and readable signs of the risks involved in entering the land and, if necessary in the circumstances, warned to keep off the trail.

When carrying out monitoring or maintenance duties, staff and volunteers should keep detailed records of conditions they observe on the land, including conditions that could result in a hazardous situation, and of maintenance and any preventive measures taken. Should a problem arise, these records can provide evidence that all reasonable steps were taken to ensure that the property was safe.

## **INSURANCE**

The landowner and the covenant holder should address the issue of liability insurance either in the covenant or an ancillary management agreement. If liability does arise, insurance is the only effective way to guard against the economic consequences. It is very important, therefore, that the parties consider maintaining liability insurance on land. Where the public has access to the covenant area, it is even more important that the parties address insurance, as the risk of liability increases significantly with public access.

While landowners generally insure their own property, it is open to the parties to a covenant to agree that the covenant holder will obtain and pay for insurance. Depending on the circumstances, covenant agreements should provide that the other party to the agreement is an additional named insured.

## **ALLOCATING RESPONSIBILITY**

Responsibility for taxes, penalties, charges and other expenses and for maintenance of the property as well as for dealing with hazards specific to the property should be allocated between the landowner and covenant holder in the conservation covenant or management agreement or both. The covenant or management agreement also should address who is responsible for signage, particularly when signage is necessary for safety reasons.

The landowner and covenant holder generally will agree about their liability to each other. It is common, for example, for the landowner and covenant holder to

exclude liability for torts such as negligence and limit their liability to each other to liability for breach of the terms of the covenant itself.<sup>142</sup>

It is not possible, however, to exclude or limit liability to third parties. The covenant document therefore should address who will be responsible if liability to a third party should arise. For example, covenants commonly include an indemnification clause in which one party agrees to indemnify or protect the other from particular kinds of claims. An indemnity serves to shift liability from one party to another. The party who agrees to indemnify should have insurance to support this promise in the event a successful claim is made.<sup>143</sup>

**Example:**<sup>144</sup> Conservancy West holds a covenant on a piece of property located in a municipality. Over 80% of the property is comprised of a sensitive wetland. There is one particularly treacherous swampy area on the property. There is also one small cabin located on the property where the landowner spends several weeks a year. The property is fenced but there are a number of access points through the fence. At one of these access points, Conservancy West has erected a plaque and a sign explaining the sensitive nature of the property. The public is requested to keep out of the area because it is so sensitive but there are no signs warning of the swamp hazard. There are no marked trails through the property. Although Conservancy West monitors the landowner's compliance with the terms of the covenant, it does no maintenance on the property.

One spring day, Jan, a new resident with a particular interest in dragonflies, ventured onto the property in spite of the sign. She was injured when she fell in the swamp and sued both the landowner and Conservancy West. The judge found that both the landowner and Conservancy West were liable and awarded Jan damages of \$50,000. The judge found that they had a duty to take all reasonable steps to ensure that those going onto the property were reasonably safe and that they had not done so. The judge found it significant that there was no sign warning of the danger on the property even though both the landowner and Conservancy West were fully aware of the hazard. A sign at each

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<sup>142</sup> See article 18 of the Annotated Conservation Covenant in Appendix 1.

<sup>143</sup> See article 9 in the Annotated Conservation Covenant in Appendix 1 for an example of some indemnification provisions.

<sup>144</sup> These are fictitious examples. Readers should obtain their own advice about how to best protect against liability in their particular circumstances.

access point warning of the hazard and stating that those who entered the property did so at their own risk might well have provided the landowner and Conservancy West with a defence to Jan's claim.

**Example:** Sasha owns 20 hectares of forested rural property but does not live on the property. Sasha granted a covenant in favour of Conservancy West to protect 4 hectares of bog on the property. Under the terms of the covenant, Conservancy West engaged in restoration of the bog area, removing plants and trees such as hemlocks not naturally occurring in the bog.

Conservancy West posted a sign at the edge of Sasha's property explaining the project and describing its involvement. There were also signs posted at each access point to the property asking the public to keep out because it was private property, contained sensitive bog area and was likely to be hazardous.

Mohan and Jocelyn entered the property without authorization in late March to look at the bog and the progress of the restoration work. They were injured when they lost their footing in an unstable area of the property and slid down an embankment. Mohan and Jocelyn sued Conservancy West and Sasha for damages.

The judge dismissed the action against both Conservancy West and Sasha. The judge found that Mohan and Jocelyn had accepted the risk of entering the property. They entered the property without consent and therefore were trespassers. The property is forested property. There were signs asking the public to keep out of the property. In addition, the public was warned of hazards on the property.

# RESOURCES OF COVENANT HOLDERS

## NON-GOVERNMENT ORGANIZATIONS

The change in the *Land Title Act* in 1994 opened up opportunities for conservation organizations to play a central role in protecting many of the significant spaces in the province. The number of conservation organizations and the level of activity of those groups have increased steadily over the past years. The results are impressive – natural areas, wetlands, scenic vistas, ranch and farm land are being protected on a continuous and routine basis.

## TYPES OF RESOURCES NEEDED

The success of this work requires substantial resources, both human and financial, on the part of the conservation community generally as well as within individual organizations. The resources needed to acquire conservation covenants normally will be significantly less than the resources to acquire land outright (as will the risk of liability to third parties, as described in the previous chapter). Even if the conservation covenant is purchased rather than received as a donation, the purchase price will be considerably less than the price of the land itself.

However, there will be acquisition costs even if the conservation covenant is donated to the conservation organization.<sup>145</sup> These costs could include:

- conducting an environmental assessment of the land to ensure it fits the conservation objectives of the organization and discloses any outstanding liabilities connected with the land, such as environmental contamination;
- appraising the value of the land and the conservation covenant;
- surveying the area of the conservation covenant;
- collecting and documenting baseline information;

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<sup>145</sup> See Appendix 3: Steps in Acquisition of Covenant.

- legal fees for negotiating, preparing and reviewing the conservation covenant;
- professional fees for tax and accounting services; and
- fees for registering the covenant, statutory right of way, rent charge, priority agreements, survey plans and any other documents that are to be registered in the Land Title Register.

In addition to these initial costs, there will be ongoing costs associated with monitoring compliance with the provisions of the conservation covenant, managing the land according to the terms of the management plan, maintaining appropriate signage on the property and maintaining appropriate insurance for the conservation organization and its holdings. If there are problems with compliance, there will be costs associated with enforcing the terms of the covenant.

A conservation organization should carefully consider the human and financial resources it will need to acquire and protect every parcel of land for which it might hold a conservation covenant. The organization also needs to assess its present capacity to hold conservation covenants to determine how many it will be able to hold and maintain effectively and to identify where and how it might wish to expand its own resources. Landowners should carry out the same kind of assessment when choosing a covenant holder, keeping in mind that the covenant is intended to protect the land in perpetuity.

Many of the resources required of conservation organizations may be available through volunteers who are willing to work for these organizations in exchange for the satisfaction of protecting land important for its ecological, cultural and community values. Some professionals are willing to do this work on a *pro bono* or reduced fee basis. In addition, conservation organizations often will assist each other in sharing needed expertise or referrals to appropriate experts. Nevertheless, outside assistance will sometimes be required on a fee for service basis.

Every conservation organization should identify the various types of expertise required to meet its conservation objectives and strategize about how to fill those needs. In some situations it may be possible to attract members with the desired skills.

## WORKING LANDSCAPE COVENANTS

Potential holders of working landscape conservation covenants (see the discussion in Chapter 2) must evaluate their ability to fulfil the additional obligations and

responsibilities imposed by such a covenant. Depending on the nature of the conservation covenant, a covenant holder should have experience in managing forest, ranch or farm land so that it can develop a good working landscape covenant program generally and respond to specific management questions and concerns effectively and efficiently.

Ongoing administration and monitoring for working landscape covenants often will also require more outside resources and expertise. In addition to the professional assistance required in relation to all conservation covenants (see Chapter 7), ongoing administration of a working landscape covenant will require the covenant holder to have access to the services of other professionals such as foresters, agrologists or biologists. The covenant holder must have the resources to be able to support the professional review of management plans during the plan approval process and professional assistance in monitoring land use activities and responding to suspected violations.

To address these concerns, small conservation organizations interested in holding a working landscape covenant should consider holding it jointly with a larger organization with greater resources and experience. Co-holding covenants was discussed in greater detail in Chapter 5.

## **FOCUSING SCARCE RESOURCES**

Initially, it may be tempting for an organization to be opportunistic rather than strategic, accepting every chance to protect environmentally-significant land with conservation covenants. However, there is a real risk of overextension. In advance of every land and conservation agreement transaction, the conservation organization must carefully evaluate and select its conservation projects. Each organization has to determine its conservation objectives, set priorities, establish specific criteria concerning the type of land it wants to protect and accept only covenants that fit within this framework.<sup>146</sup> This will ensure that the organization gets the maximum benefit from the resources at its disposal and will enable it to attract new resources in the form of donors and volunteers more easily. It will also prevent the organization from expending all of its resources on protecting land that happens to come to its attention earlier than other more significant parcels, land which may not be of the highest priority to the organization or of lesser priority generally.

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<sup>146</sup> This is explained in more detail in Standard 11 of the *Canadian Land Trust Standards and Practices*; see footnote 76.

As discussed in Chapter 5, where there is more than one covenant holder, the covenant holders can enter into an agreement dividing covenant responsibilities and associated costs. This will help minimize the burden on individual covenant holders.

## FUNDRAISING

Conservation organizations are developing sophisticated fundraising expertise and raising impressive sums to protect land with significant ecological and cultural values. Often this work requires monumental efforts at raising public awareness and considerable media savvy, in addition to financial skill. If these talents are not available within the organization, it may wish to consider retaining the assistance of outside professionals. Fortunately, many conservation organizations include members with many of these critical talents.

Although a detailed discussion about fundraising for conservation purposes is outside the scope of this *Handbook*, there are excellent resources available on the internet.<sup>147</sup>

## ENDOWMENTS

One technique for raising funds is to request an endowment from the landowner with the grant of a conservation covenant. An endowment will help offset some of the costs associated with entering into a conservation covenant and may provide initial funding for ongoing monitoring costs. Assuming the covenant holder is a registered charity, the endowment would constitute a gift that would result in tax benefits for the landowner.

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<sup>147</sup> See, for example, Orr, Shannon, 2015. *Fundraising Challenges for Land Trust Organizations: A National Survey*, at [https://www.researchgate.net/publication/298072108\\_Fundraising\\_Challenges\\_for\\_Land\\_Trust\\_Organizations\\_A\\_National\\_Survey](https://www.researchgate.net/publication/298072108_Fundraising_Challenges_for_Land_Trust_Organizations_A_National_Survey).

## Appendix 1

# ANNOTATED CONSERVATION COVENANT

This Appendix consists of an annotated conservation covenant. This annotated conservation covenant is also available as a downloadable file from West Coast Environmental Law Association’s website, [www.wcel.org](http://www.wcel.org). The terms of the covenant are contained in the left column while comments about the meaning and use of the terms are contained in the right column.<sup>148</sup> “Article” refers to an entire numbered article, such as “article 3”; “section” refers to a section in an article, such as “section 3.1”; “clause” refers to a subsection, such as “clause 3.1 (a)”.

**This is a mixed example of a conservation covenant. It is a guide, not a template, and cannot be used “as is”; it therefore must be applied with caution.** Some clauses are suited to conservation covenants that simply conserve land, others to covenants that allow a covenant area to be worked and still others to covenants that conserve areas in residential subdivisions. Therefore, while some of the kinds of provisions included in this covenant are necessary in every conservation covenant, many provisions in this covenant will not apply in particular situations. The wording will not necessarily be same in every document. This annotated covenant does not contain wording relating to specific conservation objectives and land restrictions. Those sections must be written specifically for each covenant.

It is important for landowners, covenant holders and real estate, legal and other professionals to be aware of the broad range of terms that can be included and to turn their minds to the kinds of terms that are appropriate to the specific situation. Some conservation organizations have example covenants, including annotations, on their websites as well.<sup>149</sup>

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<sup>148</sup> See Chapter 4 for additional information about drafting conservation covenants.

<sup>149</sup> For example, the Islands Trust Fund has an annotated covenant geared to its Natural Area Protection Tax Exemption program at <https://islandstrust.bc.ca/document/naptep-annotated-conservation-covenant/>.

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**TERMS OF INSTRUMENT – PART 2**

**EXPLANATORY NOTES**

**Section 219 Conservation Covenant**

→ Section 219 of the *Land Title Act* authorizes, among others, a provincially designated body to hold a registered interest in land for the purposes of conservation.

**And**

**Section 218 Statutory Right of Way**

→ Section 218 of the *Land Title Act* allows an owner to give another person the right to enter onto the owner's land, in the case of a covenant, to ensure the covenant is being complied with.

This Agreement dated for reference [*insert date*], is

→ This reference date allows the parties to refer to and identify the agreement<sup>150</sup> by its date.

BETWEEN:

→ Or AMONG if there are more than two parties. If there is only one covenant holder, the agreement must reflect that.

Name, address and occupation of the owner.

AND:

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<sup>150</sup> The conservation covenant is contained within this agreement. The agreement also incorporates, among other things, a statutory right of way and rent charge. Generally these annotations will refer to this annotated document as "the agreement" because the agreement contains more than the conservation covenant. Occasionally, however, the term "covenant" will be used to refer to the agreement as a whole.

Name, status ["a society..." or "a corporation..."] and address of the covenant holder

AND:

Name, status ["a society..." or "a corporation..."] and address of each additional covenant holder

(collectively, the "Parties")

**BECAUSE:**

- A. The Owner is the registered owner of the Land;
- B. The Land contains significant amenities including flora, fauna and natural features of great importance to the Owner, the Covenant Holders and the public;
- C. The Owner wishes to grant the Covenant Holders a covenant pursuant to section 219 of the *Land Title Act* (British Columbia), to restrict the use of the Land;
- D. The Owner intends to obtain federal government certification of the Land as ecologically sensitive and to grant the covenant and statutory right of way in this Agreement as an ecological gift under the *Income Tax Act* (Canada).  
  
or The Land has been certified as

→ This part of the agreement is known as the "recitals" and is composed of statements explaining what has led to the agreement and why the parties have entered into it.

The recitals will often state what is special about the land that is to be protected by the covenant contained in the agreement.

→ Add this kind of clause if the covenant will be an ecological gift under the *Income Tax Act*. This will alert future owners to the fact that the original grant of covenant was or may have been an ecological gift and that alteration of the land could result in tax consequences.

ecologically sensitive under the provisions of the *Income Tax Act* (Canada).

- E. A statutory right of way in favour of the Covenant Holders is necessary for the operation and maintenance of the undertakings of the Covenant Holders; and
- F. [Name of Covenant Holder] has been designated by the minister as a person authorized to accept covenants under section 219 of the *Land Title Act* and as a person authorized to accept a statutory right of way under section 218 of the *Land Title Act*.

**NOW THEREFORE** in consideration of the payment of \$2.00 by each of the Covenant Holders to the Owner, the receipt and sufficiency of which is acknowledged by the Owner, and in consideration of the promises exchanged below, the parties agree as follows, in accordance with sections 218 and 219 of the *Land Title Act*:

## 1. INTERPRETATION

### 1.1 In this Agreement:

- (a) "Administration Fee" means a fee charged by the Covenant Holders to be applied to administration costs of providing approvals or special inspections at the request of the Owner. The amount is to

→ A statutory right of way gives the covenant holder the right to enter on the land to, among other things, monitor the covenant.

→ Non-government organizations must be designated before they can hold conservation covenants.

Repeat this paragraph for each covenant holder.

→ The agreement containing the conservation covenant is a contract. Every contract must have some kind of payment or "consideration" to be valid. The consideration in this covenant is \$2.00 and the mutual promises, but would be the actual purchase price and promises if the covenant was bought by the covenant holder.

→ This article includes definitions and general principles of interpretation that the parties agree to apply in interpreting the agreement.

→ Any term that has a specific interpretation or meaning in the

- be determined by adjusting the amount set out in this Covenant by any increase in the CPI which has occurred since the date of registration of this Covenant;
- (b) "Amenities" includes any natural, scientific, environmental, wildlife, plant life or cultural value relating to the Land [*or* Covenant Area];
- (c) "Baseline Condition" is defined as the state of the land as described in the Report;
- (d) "Business Day" means any day other than a Saturday, Sunday or British Columbia statutory holiday;
- (e) "Certificate" means a certificate issued by the Covenant Holder certifying that there were no violations of this Agreement noted before the transfer to the Owner of that interest at the date of issue;
- (f) "Covenant Area" means that part of the Land which is indicated by a heavy black line and the words "Covenant Area" on the Plan;
- (g) "Covenant Holder" means, unless the context otherwise requires, [*name of Covenant Holder*
- agreement is defined in this section and capitalized in the text of the agreement. All defined terms should be included in this section. Terms that are not used in the agreement should not be included; nor should terms that are to have their ordinary dictionary meanings.
- It may be necessary to include definitions other than the ones included in this sample covenant, depending on the terms of the covenant.
- It is prudent, whenever a new owner acquires the covenanted land, for that owner to get confirmation that there are no contraventions of the covenant at the time of acquisition.
- In cases where the covenant does not cover the entire property, the covenanted portion is called the "Covenant Area" and an additional definition must be added. The agreement must then be drafted to include references to the covenant area rather than the land, where appropriate.
- Each covenant holder should be defined.

# 1] or [*name of Covenant Holder #2, etc.*], singularly;

- “Name of Covenant Holder #1” [*or short name of covenant holder*] means, unless the context otherwise requires, [*full name and status of covenant holder*] and includes its permitted successors and assigns;
- “Name of Covenant Holder #2” [*or short name of covenant holder*] means, unless the context otherwise requires, [*full name and status of covenant holder*] and includes its permitted successors and assigns;

- (h) “Covenant Holders” means, unless the context otherwise requires, [*include names of each covenant holder*], collectively;
- (i) “CPI” means the All-Items Consumer Price Index published by Statistics Canada, or its successor in function, for Vancouver, British Columbia, where [*insert year*] equals 100;
- (j) “Detail Plan” means a report which sets out the existing nature, including the Amenities, of the Covenant Area and illustrates proposed alterations (including but not limited to the legal designation of public roads and the siting of buildings,

→ Include this definition if there is more than one covenant holder.

→ The consumer price index provides a benchmark for calculating increases in the rent charge and fees to account for inflation.

→ This sort of definition is useful if subdivision development is anticipated. The covenant would include provisions requiring the landowner to have a plan that sets out proposed developments in detail and demonstrates that

fences, gates, driveways and pathways) of the Covenant Area by the Owner, and which takes into consideration the impact that the proposed alterations may have on the vegetation, soils, drainage, wildlife and other Amenities, and identifies all remedial actions that the Owner will take to lessen or eliminate any impacts identified;

(k) "Ecosystem-based Forestry" means forest practices undertaken in accordance with the Forest Stewardship Council Regional Certification Standards for British Columbia;

(l) "Land" means the parcel of land legally described as [*insert legal description of the land*];

(m) "Management Plan" means the management plan for the Land [or Covenant Area] created in accordance with section 5.1;

(n) "Natural State" is defined as the historic range of variability in natural ecosystem conditions in the last 2,000 years prior to the influence of European settlers, such as seral stage distribution, patch size distribution, stand

impacts on the covenant amenities have been assessed and minimized. The plan could also provide for compensation, perhaps by conservation elsewhere on the property. The plan would require approval by the covenant holder before development could occur.

→ A definition for ecosystem-based forestry is provided here as an example, for use where this is allowed as a term of the covenant.

This sort of definition might apply if the covenanted area is to be a working landscape covenant rather than simply protected; in this example covenant, ecologically-sensitive timber production is to be allowed.

→ Include this definition if the agreement provides for a management plan.

structure and disturbance regimes (i.e., frequency, intensity, spatial extent and heterogeneity of disturbances) and includes elements resulting from First Nations' prehistoric management systems (e.g., burning) as an integral element;

(o) "Notice of Enforcement" means a notice of enforcement given under section 11.1;

(p) "Owner" means [*name and address of the current owner of the Land*] and includes any Successor of the Owner;

(q) "Plan" means the Reference Plan [*describe plan*] certified correct by [*name of surveyor*], B.C.L.S., dated [*date of plan*], and deposited in the \_\_\_\_\_ Land Title Register under number VIP \_\_\_\_\_, a reduced copy of which is attached to this Agreement as Schedule A;

(r) "Rent Charge" means the rent charge granted by the Owner under article 12;

(s) "Rent Charge Amount" means the amount set out in article 12, the payment of which is secured by the Rent Charge;

(t) "Report" means the baseline documentation report that describes the Land [or Covenant Area] and the Amenities in the form of text, maps, and other records of the Land [or Covenant Area] and the Amenities as of the

→ This definition should be included if a plan is attached to the agreement. (There is no such attachment in this example covenant.) A plan might be attached to define a covenant area or show a subdivision.

→ A rent charge is a specified amount that is made payable to the covenant holder if the landowner breaks the covenant. It is a penalty intended to ensure that the landowner complies with the terms of the covenant.

→ The baseline documentation report is used for monitoring and enforcement of the covenant, so it should, if possible, be attached as a schedule. Use this definition if the full baseline documentation report is attached to the

date of registration of this Agreement, a copy of which is attached as Schedule B; *or*

“Report” means the baseline documentation report that describes the Land [or Covenant Area] and the Amenities in the form of text, maps, and other records of the Land [or Covenant Area] and the Amenities as of the date of registration of this Agreement, a copy of which is on file with each of the Parties at the addresses set out in section 15.5, an overview of which is attached to this Agreement as Schedule B; and

(u) “Successor” means a person who, at any time after registration of this Agreement, becomes an owner of the Land or any part of the Land by any means, and includes both registered and beneficial owners.

covenant. (There is no such attachment in this example covenant.)

(A baseline inventory report may also have been completed to describe the amenities more subjectively. However, as it is not geared to enforcement, it need not be referred to here.)

1.2 Where this Agreement says something is in the “sole discretion” of a party, that thing is within the sole, absolute and unfettered discretion of that party.

→ This section is intended to give a party, generally the covenant holder, as much authority as possible to make unilateral decisions.

1.3 This Agreement shall be interpreted in accordance with the laws of British Columbia and the laws of Canada applicable in British Columbia and the Parties agree that the courts of British Columbia have exclusive

→ “Attorn” is a fancy term meaning to consent to a transfer of a right, such as accepting the jurisdiction of a court which

jurisdiction over any proceeding concerning this Agreement and to attorn to the jurisdiction of such courts.

would not otherwise have any authority over that person.

1.4 This Agreement is comprised of the recitation of the Parties, the recitals to this Agreement, the Schedules to this Agreement and Part 1 of the *Land Title Act* Form C to which this Agreement is attached.

1.5 In this Agreement:

- (a) reference to the singular includes a reference to the plural, and vice versa, unless the context otherwise requires;
- (b) where a word or expression is defined in this Agreement, other parts of speech and grammatical forms of the same word or expression have corresponding meanings;
- (c) reference to a particular numbered article or section, or to a particular lettered clause or Schedule is a reference to the correspondingly numbered or lettered article, section, clause or Schedule of this Agreement;
- (d) article headings have been inserted for ease of reference only and are not to be used in interpreting this Agreement;
- (e) reference to an enactment is to an enactment of the Province of

→ These general clauses assist in understanding and interpreting the agreement.

British Columbia except where otherwise provided;

- (f) the word “enactment” has the meaning given to it in the *Interpretation Act* on the reference date of this Agreement;
- (g) reference to any enactment is a reference to that enactment as consolidated, revised, amended or re-enacted or replaced, unless otherwise expressly provided;
- (h) reference to a “party” or the “parties” is a reference to a party or the parties to this Agreement and their respective successors, assigns, trustees, administrators and receivers; and
- (i) reference to a “day”, “month” or “year” is a reference to a calendar day, calendar month, or calendar year, as the case may be, unless otherwise expressly provided.

## 2. REPRESENTATIONS AND WARRANTIES

2.1 The Owner warrants that the facts set out in Recitals A, C and D are true as of the date of this Agreement.

→ This article will help avoid disputes in the future about the truth of the facts stated in the recitals.

2.2 The Covenant Holder warrants that the facts set out in Recitals E and F are true as of the date of this Agreement.

Add a similar section for each covenant holder. Change the recital letters as necessary. Ensure that each party only

2.3 The Parties warrant that the facts set out in Recital B is true as of the date of this Agreement.

warrants the truth of the facts that each party can know.

### 3. INTENT OF AGREEMENT

3.1 The Parties each agree that the intent of this Agreement is:

- (a) to protect, preserve, conserve, and maintain the Land [*or* Covenant Area] consistent with the Baseline Condition, and to the extent practicable restore ecosystem conditions to their Natural State, with particular interest in maintaining and where necessary restoring characteristics of the coastal Douglas-fir ecosystem,
- (b) to restrict permanent residential development on the Covenant Area and thereby control urban expansion and conserve critical connective wildlife corridors in the Covenant Area, and
- (c) to ensure that forest operations and land management on the Covenant Area are conducted in a manner consistent with Ecosystem-based Forestry that encourages continual crops of forest of varying age classes, on a landscape level basis, subject to the tree species' ecological suitability for the site and in consideration of the natural forest

→ Article 3 gives the context in which the agreement must be interpreted by any potential reader, including a court. This example concerns a working landscape covenant. The intent could also be something like “to protect, preserve, conserve and maintain portions of the Land and the amenities consistent with the baseline condition, and to the extent practical restore... while maintaining a viable working agricultural use”.

→ For a residential development covenant, perhaps “to limit building and land development to preserve a substantial portion of the Land in the Baseline Condition as forest, wetland or otherwise”.

health incidence over the long term;

and the Parties agree that this Agreement is to be interpreted, performed and applied accordingly.

- 3.2 This Agreement shall be perpetual to reflect the public interest in the protection, preservation, conservation, maintenance, restoration and enhancement of the Land [or Covenant Area] and Amenities for ecological and environmental reasons.

→ This section is important to help ensure that the covenant will last in perpetuity and that perpetual protection is in the public interest.

#### 4. SECTION 219 COVENANT (RESTRICTIONS ON LAND USE)

- 4.1 Except as expressly permitted in this Agreement [or, in the Management Plan], the Owner shall not do anything, omit to do anything, allow anything to be done, or allow the omission of anything, that does or could reasonably be expected to destroy, impair, diminish, negatively affect, or alter the Land [or Covenant Area] or the Amenities from the Baseline Condition.

→ Article 4 sets out restrictions on the owner's use of the land – either the entire parcel or just of the portion of the land that is subject to the covenant.

→ The sample restrictions set out in this covenant will not all apply in most situations and should not be included unless they do apply.

- 4.2 Without restricting the generality of section 4.1, the Owner shall not, except with the prior written approval of the Covenant Holders, in the sole discretion of each of them:

Depending on the circumstances, there may be other specific restrictions that will be included, such as restrictions related to access; vehicle use; agricultural, forestry, hunting or fishing

- (a) use or permit the use of the Land [or Covenant Area] for an activity or use which:
  - (i) causes or allows silts, leachates, fills or other deleterious substances to be released into any watercourse on the Land [or Covenant Area];
  - (ii) causes the erosion of the Land [or Covenant Area] to occur;
  - (iii) causes or facilitates the loss of soil on the Land [or Covenant Area];
  - (iv) alters or interferes with the hydrology of the Land [or Covenant Area], including diversion of natural drainage or flow of water in, on or through the Land in a manner which may impact the Land [or Covenant Area];
  - (v) causes or allows fill, rubbish, ashes, garbage, waste or other material foreign to the Land to be deposited in or on the Land [or Covenant Area];
  - (vi) causes or allows any component of the Land, including soil, gravel or rock, to be disturbed, explored for, moved, removed from or deposited in or on the Land [or Covenant Area];
  - (vii) causes or allows pesticides, including but not limited to herbicides, insecticides or

uses; subdivision, buildings and other improvements; camping, paths, trails and other recreational uses; commercial activities; heritage sites; leases, mortgages, re-zoning or other encumbrances; native or non-native flora and fauna; pesticides; signage; soil, gravel or minerals and water.

More than any other section, this will change from covenant to covenant. Careful thought must be given to each clause in this section to ensure that it expresses the intention of the parties.

Some restrictions and land management provisions will be complex, particularly in working landscape covenants. These will be unique to each covenant and must be drafted specifically for each covenant keeping in mind the objectives of the parties.

It is not a good practice to include restrictions that are unenforceable or that will not be enforced.

fungicides, to be applied to or introduced onto the Land [*or* Covenant Area]; or

- (viii) causes or allows any indigenous flora on the Land [*or* Covenant Area] to be cut down, removed, defoliated or tampered with in any way; → This clause requires that plants that are native to the area must be left in a natural state.
- (b) use or permit the use of the Land [*or* Covenant Area] for fishing or hunting, or for the gathering and grazing of domestic animals;
- (c) have the Land removed from the Agricultural Land Reserve; → Covenants on land within the Agricultural Land Reserve must be approved by the Provincial Agricultural Land Commission.
- (d) construct, build, affix or place on the Land [*or* Covenant Area] any buildings, structures, fixtures, habitation sites or improvements of any kind, except for a period of not more than 30 days and as necessary for use in supervised educational programs and scientific research;
- (e) lay out or construct any new roads or paths on the Land [*or* Covenant Area];
- (f) lease or licence the Land [*or* Covenant Area] or any part thereof unless the lease or licence is expressly made subject to the provisions of this Agreement and expressly entitles the Owner to terminate the lease or licence if the tenant or licensee breaches any of the provisions of this Agreement; → A lease gives someone possession and rights to use the property for a fixed period. A licence gives permission for someone to use specified material on the property. In either case, a lessee or licensee should be made aware of covenant restrictions.

- (g) after all financial encumbrances have been removed from the Land, place any new financial encumbrance on the Land;
- (h) use or permit the use of heavy equipment on the Land [*or* Covenant Area], except as required to carry out activities permitted in the Management Plan, other than emergency vehicle use;
- (i) remove any snags and fallen trees from the Land [*or* Covenant Area], including all size classes and decay classes, for firewood or other wood product purposes;
- (j) remove more than 5% of the dominant and co-dominant trees in any one cut from the Land [*or* Covenant Area], and not more than 15% of the dominant and co-dominant trees in any 50-year period;
- (k) allow tree cutting on the Land [*or* Covenant Area] that leaves more than a one-tree opening in any 15 year period, with trees removed being representative of the species mixture in the stand;
- (l) remove any parts of cut trees from bucking, limbing, and topping from the forest floor where the tree was cut;
- (m) cut trees whose age dates from prior to the year 1900;

→ This type of clause is useful if the covenant is to be a working landscape covenant, one that will continue to be used for agriculture or, as in this example, sensitive forestry.

- (n) construct new skid trails with an area of more than 1.0% of the Land [*or* Covenant Area];
- (o) construct any dwelling houses, accessory buildings or any other structures within the Land [*or* Covenant Area];
- (p) disturb, explore, move or remove for commercial purposes any component of the Land [*or* Covenant Area], including soil, gravel or rock; and
- (q) subdivide the Land [*or* Covenant Area] by any means.

4.3 The Owner agrees that the Covenant Holder may charge the Owner an Administration Fee of \$200.00 for each and every request by the Owner to a Covenant Holder to review, approve or assess any action of the Owner, or for a site visit for mortgage priority in section 30.5, prior to such review, visit or assessment and irrespective of whether or not the Covenant Holder grants the requested approval.

→ This administration fee helps to defray the covenant holders' costs of responding to landowner's requests. It is usually waived by the covenant holders for minor approval requests, but having the option of charging a fee can discourage frequent requests by landowners for approval for activities that are likely to contravene the restricted uses.

(The Surveyor General has on occasion rejected an administration fee in a conservation covenant. In that event, a similar result could be achieved by providing that the landowner will indemnify the covenant holder for such costs; see section 9.3 below. Use one section or the other, not both.)

## 5. MANAGEMENT PLAN

→ The parties can provide in the agreement for the creation and

5.1 The Owner shall create, review and revise at intervals agreed to by the Covenant Holders [*or specified intervals such as five years*], a Management Plan for the Land [*or Covenant Area*] and submit the Management Plan to each Covenant Holder for approval. Each Covenant Holder shall, within 25 Business Days of receipt of the proposed Management Plan, notify the Owner in writing whether or not that Covenant Holder, acting reasonably, approves the proposed Management Plan.

5.2 If a Covenant Holder does not approve the proposed Management Plan, the Covenant Holder will, in its notification to the Owner, provide written reasons for not approving the Management Plan and a description of changes to the Management Plan that are necessary for the Covenant Holder to approve the Management Plan.

## 6. BASELINE DOCUMENTATION REPORT

6.1 The Parties agree that the Land [*or Covenant Area*], the location of current land uses and the Amenities are described in the Report.

revision of a management plan for the land. In some circumstances the covenant holder will be responsible for creating the plan. The parties may wish to provide for specific revision times in the agreement itself.

This article may be omitted if there will be no management plan or if the covenant holder will enter into a management agreement, including a management plan, with a third party.

→ A baseline documentation report is prepared for each covenant.

It provides protection for the parties by documenting the conditions on the land at the

6.2 The Parties agree that the Report is intended to serve as an objective information baseline for monitoring compliance with the terms of this Agreement and the Parties each agree that the Report provides an accurate description of the Land [or Covenant Area] and the Amenities as of the date of this Agreement.

time of the agreement. The baseline documentation report is important for enforcement purposes because it allows documentation of change, damage and loss on the land.

6.3 The Parties each acknowledge that the flora and fauna on the Land [or Covenant Area] will evolve through natural succession over time and, unless otherwise expressly stated, references to the Report in this Agreement are intended to take into account the natural succession of the flora and fauna over time, without human intervention other than as expressly permitted by this Agreement.

→ As time passes, the features and values will change naturally. For monitoring or rehabilitation purposes, those natural changes will be taken into account. For example, if a breach of the agreement occurs 50 years from now, the parties would take into account a 50 year change from the baseline information when initiating rehabilitation or considering enforcement.

## 7. DISPUTE RESOLUTION

7.1 If a breach of this Agreement occurs or is threatened, or if there is disagreement as to the meaning of this Agreement, either Covenant Holder or the Owner may give notice to the other parties requiring a meeting of all Parties within 15 Business Days of receipt of the notice.

→ This article establishes a mechanism to resolve disputes that might arise between the parties as an alternative to the potentially slow and expensive court litigation process. It is important to include a dispute resolution mechanism because the agreement is intended to last indefinitely and disputes are likely to occur at some point.

7.2 All activities giving rise to a breach or threatening a breach of this

Agreement, or giving rise to a disagreement as to the meaning of this Agreement, must immediately cease upon receipt of notice.

7.3 The Parties must attempt to resolve the matter, acting reasonably and in good faith, within 20 Business Days of receipt of the notice.

→ The number of days for responding may be changed if a longer or shorter time would be more appropriate for the parties.

7.4 Where a matter in dispute is related to an indigenous cultural use, the parties agree to resolve the matter in a manner that reflects and incorporates the traditions and protocols of the indigenous community whose cultural use gave rise to the dispute.

→ If indigenous cultural use of covenanted land is incorporated, the parties may want to include dispute resolution mechanisms of the indigenous community.

7.5 If the Parties are not able to resolve the matter within the time specified in section 7.3, the Parties may appoint a mutually acceptable person to mediate the matter, with the costs to be borne equally between the Parties. If the Parties are unable to agree to the appointment of a mediator within 15 days after the mediation process is invoked, any party may apply to Mediate BC, or its successor, or such other organization or person agreed to by the Parties in writing, for appointment of a mediator. The Parties must act reasonably and in good faith and cooperate with the mediator and with each other in an attempt to

→ This section permits the parties to have disputes mediated. The parties could consider making mediation mandatory by stating that the parties must appoint a mediator. If the agreement includes an arbitration clause such as section 7.6, the first steps in the dispute resolution process should be mandatory.

This example clause provides that all costs of mediation be shared equally by all of the parties. However, it could simplify mediation by specifying, for example, that mediation costs will not include

resolve the matter within 60 days after the mediator is appointed.

the costs incurred by any party to have a lawyer at the mediation.

7.6 If the Parties are not able to resolve the matter within that time with the assistance of a mediator, the Parties agree to submit the matter to a single arbitrator under the *Commercial Arbitration Act* appointed jointly by them.

→ The next four sections should be included only if the parties decide to use binding arbitration as an alternative to court action to resolve disputes if mediation is not successful or instead of mediation.

7.7 If the Parties cannot agree on a single arbitrator, then the Covenant Holders shall present to the Owner a list of three arbitrators and the Owner must choose one arbitrator from the list.

A section requiring the arbitrator to have expertise in the subject matter of the arbitration as well as in the arbitration process could also be included.

7.8 The decision of the arbitrator is final and binding.

7.9 The cost of the arbitration will be borne equally between the Parties.

## 8. OWNER'S RESERVED RIGHTS

8.1 Subject to article 4, the Owner reserves all of its rights as owner of the Land, including the right to use, occupy and maintain the Land in any way that is not expressly restricted or prohibited by this Agreement, so long as the use, occupation or maintenance are consistent with the intent of this Agreement.

→ This article sets out rights that the owner wants to retain. Although the owner automatically retains all rights of ownership that are not given away under the agreement, listing them allows the owner to specify particular rights to avoid future disputes and confusion about the ways in which the owner can use the land.

8.2 The Covenant Holder acknowledges that the Owner intends to subdivide the Land, including the Covenant Area. Any dedicated public road required by government agencies through the Covenant Area to or toward the easterly boundary of the Land should be discouraged. Should no alternatives exist, the Covenant Holder will agree to remove the portion of the Land from the Covenant Area required for such access on the condition that the Owner:

→ Sections relating to subdivision and residential use can get quite complicated. This example concerns minimizing, or compensating for, road allowances in the covenanted portion of a subdivision. Other clauses may be required for getting agreement on work around maintaining viewsapes or construction of fences, driveways, paths or gates. The covenant may have to anticipate requests to construct buildings that will encroach on the covenant area.

- (a) provides a Detail Plan including all relevant governmental requirements and a description of the efforts made by the Owner to seek alternative access to the Covenant Holder;
- (b) applies under section 76 of the *Land Title Act* for relief

from normal requirements for provision of such dedicated roads; and

- (c) negotiates with the Ministry of Transportation and Infrastructure for the provision of reasonable amounts of pathway, parkland or other Amenities in return for an appropriate reduction in the number of such road dedications required.

8.3 Without limiting the generality of section 8.1, and subject to article 4, the following rights are expressly reserved to the Owner:

- (a) to subdivide the Land [*or* Covenant Area] in accordance with applicable statutes, regulations, plans and by-laws;
- (b) to cluster or exchange density of development for increased or decreased density in other lands owned by the Owner;
- (c) to occupy the Land in accordance with applicable statutes, regulations, plans and by-laws;
- (d) to maintain, restore or replace existing buildings and other improvements on the Land [*or* Covenant Area], the location of which are indicated in the Report,

→ Section 8.3 includes examples of some rights that might be specifically reserved. There are many others, which will vary with the circumstances. The parties may wish to include specific reserved rights in the context of the restrictions in article 4. Care must be taken to ensure that the provisions are not contradictory or inconsistent.

If the exact location of buildings or any other structure or improvement on the land is central to the objectives of the parties, it would be a good practice to arrange for a survey

- as of the date of registration of this Agreement;
- (e) to lease the ranching operation or other assets or improvements to a tenant;
  - (f) to farm the Land [*or* Covenant Area] and to do all acts necessary to maintain and operate the Land [*or* Covenant Area] as a working farm;
  - (g) to carry out forest resource and land management activities in a manner consistent with the principles herein and with applicable private forest land regulations and applicable legislation of the current day;
  - (h) to maintain, replace or restore the existing waste disposal and water supply system, the location of which is indicated in the Report;
  - (i) to maintain, replace or restore the utility lines running through the Covenant Area, the location of which is indicated in the Report;
  - (j) to build, maintain, improve, replace or restore a driveway, the location of which is indicated in the Report;
  - (k) to allow public access to the Land [*or* Covenant Area];
  - (l) to remove non-indigenous, invasive flora that pose a threat to the indigenous flora and fauna of the Covenant Area;
  - (m) to maintain the existing foot-trails delineated in the Report, at a
- to show areas in which buildings or structures can be located. A survey affords the best evidence.
- These clauses could be included if the land is to be a working landscape covenant – in these examples, to continue to be farmed or operated for forestry.
- In many cases, the parties may wish to restrict rather than allow public access.

maximum width of one metre (3 feet);

- (n) to install, maintain, restore or replace signs for the purposes of public safety or informing the public about the Land [*or* Covenant Area] and the Amenities; and
- (o) To install, maintain, restore or replace equipment for the generation and storage of electrical power for use on the Land.

8.4 Subject to section 8.5, nothing in this Agreement restricts or affects the right of the Owner or any other party to do anything reasonably necessary to:

- (a) prevent potential injury or death to any individual; or
- (b) prevent, abate or mitigate any damage or loss to any real or personal property.

8.5 If the Owner or any other party intends to do anything described in section 8.3 or 8.4, the Owner shall give at least 30 days' prior written notice to each Covenant Holder, describing in reasonable detail the intended action, the reason for it, and its likely effect on the Land [*or* Covenant Area] or the Amenities. Despite the rest of this Agreement, the Owner shall permit each Covenant Holder to enter upon and

→ Sections 8.4 and 8.5 clarify that the owner may take action to prevent damage to persons or property provided the owner gives the appropriate notice to the covenant holder.

The landowner retains the right to do anything "necessary to...prevent or mitigate any damage or loss". This would include reasonable actions to mitigate wildfire risk due to climate change, for example. The right prevails over everything else in the agreement because the clause includes the powerful phrase "nothing in this Agreement restricts" this right.

inspect the Land [or Covenant Area] if any action is proposed under section 8.3. The Covenant Holders may comment on the proposed action and the Owner and any other party must take those comments into consideration before doing anything under that section.

8.6 Despite section 8.5, in an emergency situation, such as fire or threat to human safety, the Owner may do anything reasonably necessary to prevent potential injury or death without the consent of the Covenant Holders, but the Owner shall notify the Covenant Holders of the circumstances of such action within 30 days, including the actual or likely effect on the Land [or Covenant Area] or the Amenities.

→ Insert this kind of section if the parties want the owner to be able to act in an emergency situation without prior notice to the covenant holder. This section could also be more restrictive by listing specific activities that can be done in an emergency, such as only cutting down or trimming live or dead trees sufficient to control the emergency.

## 9. OWNER'S OBLIGATIONS

9.1 The Owner retains all responsibilities and bears all costs and liabilities related to the ownership, use, occupation and maintenance of the Land, including any improvements expressly authorized by this Agreement.

→ Despite the covenant, the owner retains responsibility for the costs and potential liabilities of ownership. This article protects the covenant holder from having to pay costs such as property taxes and from liability for damages.

9.2 The Owner shall indemnify the Covenant Holders, their directors, officers, employees, agents and

→ If the covenant holder is found liable by a court for any damage in relation to the land caused by

contractors, from and against any and all liabilities, damages, losses, personal injury or death, causes of action, actions, claims, and demands by or on behalf of any person, arising out of any act or omission, negligent, or otherwise, in the use, occupation and maintenance of the Land or the Amenities by the Owner.

the owner, the owner agrees in this section to protect the covenant holder from the financial consequences of the owner's liability.

9.3 The Owner further covenants and agrees to indemnify the Covenant Holder in the amount of \$200.00 for each and every request by the Owner to a Covenant Holder to review, approve or assess any action of the Owner, or for a site visit for mortgage priority in section 30.5, prior to such review, visit or assessment and irrespective of whether or not the Covenant Holder grants the requested approval.

→ If an administration fee under section 4.3 above is not feasible, a similar result could be achieved by this section which provides that the landowner will indemnify the covenant holder. (Use one section or the other, but not both.)

9.4 The Owner is liable for any and all breaches of this Agreement, but the Owner is not liable for:

→ The owner is only liable for breaches that occur when he or she is the registered owner of the land. This section is necessary since the agreement is intended to bind all future owners.

(a) breaches of this Agreement which occur while the Owner is not the registered owner of any interest in the Land, provided that the Owner has received a Certificate under section 13.2;

Prospective purchasers of the land should request that the covenant holder inspect the land before purchase to confirm the condition of the land.

(b) injury or alteration to the Land [or Covenant Area] or the Amenities resulting from natural causes, or

→ The owner will not be liable for injury to the land caused by natural causes or causes beyond

causes beyond the Owner's reasonable control, including accidental fire, flood, storm, pest or fungal infestation, vandalism, trespass and earth shifting or movement, but excluding injury or alteration resulting from actions of the Owner or any other person with the actual or constructive knowledge of the Owner;

- (c) any prudent action taken by the Owner under emergency conditions to prevent, abate, or mitigate significant injury to the Land or Amenities resulting from natural causes, including accidental fire, flood, storm and earth movement; or
- (d) injury or alteration to the Land [*or* Covenant Area] caused by the Covenant Holders exercising their rights under this Agreement.

9.5 Without limiting the generality of sections 9.1, 9.2 and 9.4, the Owner:

- (a) is solely responsible and liable for any loss or damage, or liability of any kind (whether civil, criminal or regulatory), in any way connected with the existence in, on, from, to or under the Land (whether through spill, emission, migration, deposit, storage or otherwise) of any pollutant, contaminant, waste, special waste, or any matter that impairs the environment; and

his or her control such as vandalism.

- The owner is not liable for breaches that occur when the owner attempts to protect against a natural disaster in an emergency situation.
- The owner is not liable for damage caused by the covenant holders.
- Covenant holders are not responsible for the clean-up of any contamination on the land, such as toxic waste.

(b) shall indemnify each Covenant Holder from and against any loss, damage, liability, cause of action, action, penal proceeding, regulatory action, order, directive, notice or requirement, including those of any government agency, incurred, suffered, brought against or instituted against the Covenant Holders, jointly or severally, in any way associated with anything described in clause 9.5(a).

9.6 Where, as provided under clause 9.4(b), the Owner is not responsible for damage or theft due to trespass or vandalism, the Owner will take all reasonable steps to identify and prosecute the persons responsible and to seek financial restitution for the damage or theft.

9.7 The Owner shall pay when due all taxes, assessments, levies, fees and charges of whatever description which may be levied on or assessed against the Land and shall pay any arrears, penalties and interest in respect thereof.

9.8 The Owner shall indemnify each Covenant Holder from and against any fee, tax, or other charge which may be assessed or levied against the Owner or the Covenant Holder pursuant to any enactment, including

→ Only the owner has the right to prosecute trespassers or vandals or seek restitution. Section 9.6 prevents owners turning a blind eye to such violations.

→ In some circumstances a tax receipt is issued in relation to the donation of a covenant. If the covenant holder releases the covenant, there could be significant penalties against both

the *Income Tax Act* (Canada) with respect to the Land or with respect to this Agreement, including any fee, tax or other charge which may be assessed or levied against the Owner or Covenant Holder as a result of the amendment or termination of this Agreement [,provided that the Owner shall not indemnify either Covenant Holder from and against a tax assessed against either Covenant Holder under the *Income Tax Act* (Canada) as a result of the Covenant Holder's non-compliance with the provisions of the *Income Tax Act* (Canada), the revocation of that Covenant Holder's registration as a charity or of that Covenant Holder's disposing or changing the use, without authorization or permission, of the interest in the Land granted to that Covenant Holder under this Agreement].

the owner and covenant holder; for example, in the case of ecological gifts. In this section, the owner agrees to pay any penalties that arise.

→ This section should be removed or modified as shown in square brackets if the owner is not prepared to give such an indemnity.

9.9 Any debts or other amounts due from the Owner to the Covenant Holders under this Agreement, if not paid within 30 days after notice, will bear interest at the annual interest rate that is 1 per cent greater than the prime rate of interest. For the purposes of this section, the "prime rate of interest" is the annual rate of interest charged from time to time by the Bank of Montreal, at its main branch in Vancouver, British Columbia, for demand Canadian dollar commercial loans made by its most creditworthy commercial

→ The parties can choose another rate of interest or define the prime rate with reference to another financial institution.

customers and designated from time to time by the Bank of Montreal as its prime rate.

9.10 For clarity, the indemnities granted by the Owner to the Covenant Holders under sections 9.2, 9.3, 9.5 and 9.8 are indemnities granted as an integral part of the section 219 *Land Title* covenant created by this Agreement.

9.11 The Owner shall provide to the Covenant Holders, within two months after the anniversary of the date of this Agreement, an annual written report setting out any changes to the Land [*or* Covenant Area] and the Amenities in comparison with the Report.

9.12 The Owner agrees that, annually and at the request of a Covenant Holder with at least 10 Business Days notice, the Owner will meet with the requesting Covenant Holder, in person or by telephone at the Covenant Holder's sole discretion, to discuss the results of monitoring and any other items relating to the Land [*or* Covenant Area] which the Covenant Holder wishes to bring forward.

→ Not all covenants will include this section because not all owners will undertake this kind of monitoring obligation. In many cases, the covenant holder will do all the monitoring.

→ This is an alternative to the owner having to file an annual report, suitable for when the covenant holder does the monitoring. It creates regular landowner contact, where the owner and one or more covenant holders simply meet once a year and discuss how the covenant is working out.

**10. STATUTORY RIGHT OF WAY  
(FOR MONITORING AND  
ENFORCEMENT)**

10.1 The Owner grants to each Covenant Holder a licence, and a statutory right of way pursuant to section 218 of the *Land Title Act*, permitting each Covenant Holder to do the following:

(a) to enter upon and inspect the Land [*or* Covenant Area],

(i) at least once each calendar year, with the date for each inspection to be agreed on by the Parties before August 31 each year, but if the Parties cannot agree on those days by August 31 each year, the Covenant Holders are entitled to enter upon and inspect the Land [*or* Covenant Area] in accordance with clause 10.1(a)(ii); and

(ii) at all reasonable times upon prior written notice by a Covenant Holder to the Owner of at least 24 hours, unless, in the opinion of a Covenant Holder, there is an emergency or other circumstance which makes giving such notice not

→ A statutory right of way is a charge or encumbrance on the land in addition to the covenant. It allows the covenant holders to enter on the land to monitor and inspect the land at regular intervals to ensure that the owner is complying with the terms of the covenant.

Conservation organizations must be designated to be able to hold a statutory right of way.

→ The parties could agree to more frequent or less frequent inspections if the circumstances of the covenant warrant it.

practicable, in the sole discretion of the Covenant Holder;

(b) as part of inspection of the Land [or Covenant Area], to take soil, water or other samples, visual and sound recordings as may be necessary to monitor compliance with and enforce the terms of this Agreement;

(c) to enter upon and protect, preserve conserve, maintain, enhance, rehabilitate or restore, in the Covenant Holder's sole discretion and at the Covenant Holder's expense, the Land [or Covenant Area] or the Amenities to as near the condition described in the Report as is practicable, if an act of nature or of any person other than as described in clause 10.1(d) destroys, impairs, diminishes or negatively affects or alters the Land [or Covenant Area] or the Amenities from the condition described in the Report;

(d) in accordance with article 11, to enter upon and protect, preserve, conserve, maintain, enhance, rehabilitate or restore, in the Covenant Holder's sole discretion and at the Owner's expense, the Land [or Covenant Area] or the Amenities to as near the condition described in the Report as is practicable, if an action of the Owner or any other person acting with the actual or constructive knowledge of the

→ This statutory right of way clause also permits the covenant holder to enter on the land for the purpose of restoration or repairs. Generally, the covenant holder must pay for the restoration.

→ Where the restoration or repairs are required as a result of a breach of the agreement by the owner, the owner must pay for the work.

Owner destroys, impairs, diminishes, negatively affects or alters the Land [*or* Covenant Area] or the Amenities from the conditions described in the Report, or contravenes any term of this Agreement;

- (e) to carry out or evaluate, or both, any program agreed upon between the Parties for the protection, preservation, conservation, maintenance, restoration or enhancement of all or any portion of the Land [*or* Covenant Area] or the Amenities; and
- (f) to place survey pegs or other markings on the Land [*or* Covenant Area], or to increase the visibility of existing survey pegs or other markings.

10.2 The Covenant Holders may bring workers, vehicles, equipment and other personal property onto the Land when exercising their rights under this Agreement.

→ In some cases, it might be contrary to the conservation objectives to permit vehicles and other large equipment on the land.

## **11. ENFORCEMENT REMEDIES OF THE COVENANT HOLDERS**

11.1 If either Covenant Holder, in its sole discretion, believes that the Owner has neglected or refused to perform any of the obligations set out in this Agreement or is in breach of any

→ This article gives the covenant holder the power to ensure that the owner complies with the terms of the covenant and to

term of this Agreement, that Covenant Holder may serve on the Owner and the other Covenant Holder a Notice of Enforcement setting out particulars of the breach, actions required to remedy the breach and of the Covenant Holder's estimated maximum costs of remedying the breach.

remedy any breaches at the owner's expense.

11.2 On receipt of a notice given under section 11.1, the Owner must immediately cease all activities giving rise to the breach pending resolution of the matter.

→ The landowner must stop the potential breaching activities immediately, and is then provided an opportunity to remedy the results of a contravention.

11.3 The Owner has 60 days from receipt of the notice given under section 11.1, or from the conclusion of a dispute resolution process under article 7 if it is invoked, to remedy the breach or make arrangements satisfactory to the Covenant Holder for remedying the breach, including with respect to the time within which the breach must be remedied.

11.4 If the Owner does not remedy a breach described in section 11.1 within the time acceptable to the Covenant Holder under section 11.3, either Covenant Holder may enter upon the Land [or Covenant Area] and remedy the breach or carry out the arrangements referred to in section 11.3 and the Owner shall reimburse that Covenant Holder for

→ If the landowner fails to remedy the damage resulting from a contravention, the covenant holders will have an opportunity to do so, and be reimbursed for the cost of doing so.

any expenses incurred in doing so, up to the estimated maximum costs of remedying the breach as set out in the notice given under section 11.1.

11.5 If the Owner cannot remedy a breach described in section 11.1 within the time acceptable to the Covenant Holder under section 11.3, either Covenant Holder may enforce the Rent Charge under article 12.

11.6 Expenses incurred by the Covenant Holder under this article, until paid, are a debt owed by the Owner to the Covenant Holder.

11.7 By this section, each Covenant Holder appoints the other its agent for the purpose of recovering any debt owed by the Owner to the Covenant Holder who incurred expenses under this section, including through legal proceedings, and the Covenant Holder who recovers the debt shall hold it, less reasonable legal fees and disbursements and other reasonable expenses of recovery, as agent for the Covenant Holder that incurred the expenses.

→ It may be necessary for the covenant holder to bring a legal action against the owner to recover the cost of remedying a breach by the owner. This section sets out rights of the covenant holders in regard to each other when there is more than one covenant holder. This section is not necessary if there is only one covenant holder.

## **12. RENT CHARGE AND ITS ENFORCEMENT**

→ This is a penalty article. The rent charge is similar to a fine and is a charge registered against the land. The rent charge amount is payable by the owner if the

12.1 As security for the performance of the Owner's obligations under this Agreement, the Owner grants to the Covenant Holders a perpetual rent charge against the Land, ranking prior to all other financial charges and encumbrances registered against the Land, including options to purchase and rights of first refusal. The Rent Charge is granted both under section 219 of the *Land Title Act* as an integral part of the statutory covenant created by this Agreement and as a fee simple rent charge at common law.

owner violates the covenant. The rent charge is only enforced if the owner violates the covenant and is intended to deter the owner from such violations and to provide compensation for irreparable damage due to violation of a covenant.

This section provides that the rent charge is intended to have priority over other charges on the land. However, in the case of other charges registered against the land before the covenant and rent charge are registered, it would be necessary for each of those other charge holders to sign a priority agreement giving the rent charge priority. Therefore, the parties may need to change this section to accommodate pre-existing charges where a priority agreement will not be entered into.

12.2 The Rent Charge secures payment to the Covenant Holders by the Owner of the sum of \$20,000 per year, subject to adjustment under section 12.3, for each violation occurring within that year. For clarity, only one Rent Charge Amount is payable by the Owner for each violation and not one to each Covenant Holder.

→ The amount of the rent charge can be any amount agreed to by the parties, but should be sufficient to act as a deterrent. It is a fine paid for any significant violation in any given year, and only for the year within which each violation occurs. (Thus, if the rent charge were \$20,000 and the owner violates one term of the covenant in 2025 and continues to violate the same

term in 2026 along with a violation of a second term in 2026 and then corrects both violations, the penalty would be \$20,000 for 2025 plus \$40,000 for 2026 and no rent charge thereafter.)

12.3 The Rent Charge Amount is to be adjusted on January 1 of each year by increasing or decreasing, as the case may be, the Rent Charge Amount by the amount determined by multiplying the Rent Charge Amount on December 31 immediately preceding by the percentage increase or decrease, as the case may be, in the CPI between the previous January 1 and that December 31, and adding the amount so determined to the Rent Charge Amount as it stands on that December 31. If Statistics Canada, or its successor in function, ceases to publish a CPI or comparable indicator as determined by the Covenant Holder in its sole discretion, the Parties agree that the factor to be used in determining the Rent Charge Amount for each year shall be an increase of 3%.

→ The rent charge amount should be adjusted for inflation. This section is important because the covenant is intended to last indefinitely. Even a significant rent charge amount today may be of little value decades from now without an adjustment for inflation.

An alternative method is to set the rent charge as a percentage (e.g. – 25%) of the fair market value of the land at the time of a contravention. Presumably, the value of the land will reflect inflation and can be determined simply, by a standard property appraisal.

12.4 The Rent Charge Amount shall be increased by a sum equal to 110% of the market value, at the date of any breach of this Agreement, of any flora or fauna, soil, rock, gravel or minerals, which have been altered,

→ Increasing the amount of the penalty by more than the value of substances removed from the land prevents the owner from profiting from a violation of the covenant.

damaged, destroyed, moved, harvested or removed.

12.5 The Rent Charge Amount shall be doubled if, in the sole opinion of the Covenant Holders, the damage resulting from a breach of this covenant cannot be repaired or remediated.

→ If the damage resulting from the contravention simply cannot be remedied, a fine in the form of double the rent charge is imposed. The proceeds can be used to provide compensatory funds to perhaps purchase another covenant elsewhere or to enhance the conservation values on another covenant area.

12.6 The Covenant Holders shall be entitled to recover from the Owner all reasonable expenses incurred as a result of enforcement of the Rent Charge.

12.7 The Rent Charge is suspended unless and until the Owner is in breach of any provision of this Agreement and has not cured the breach, cannot cure the breach or is not diligently proceeding to cure the breach in accordance with article 11 of this Agreement.

12.8 The Covenant Holders may enforce the Rent Charge by any of the following:

- (a) an action against the Owner for the Rent Charge Amount;
- (b) distraint against the Land to the extent of the Rent Charge Amount;

→ The covenant holder has a number of options for enforcing the rent charge. This section concerns court-ordered options that further strengthen the deterrent effect of the rent charge.

“Distraint” is the seizure of someone’s property in order to

- (c) an action for appointment of a receiver in respect of the Land ;  
or
- (d) an order for sale of the Land.

obtain payment of rent or other money owed.

12.9 If either of the Covenant Holders wishes to enforce the Rent Charge, it shall provide notice to that effect to the Owner and the other Covenant Holder. This notice may be given at any time after notice is given under section 11.1.

12.10 Within 10 Business Days of receipt of a notice given under section 12.9, the Owner must pay the full Rent Charge Amount to the Covenant Holder giving the notice.

12.11 The Covenant Holder receiving notice given under section 12.9 has 30 days from receiving it to send notice to the notifying Covenant Holder that it wishes to enforce the Rent Charge jointly and, if it does not do so, it is deemed to have elected not to enforce the Rent Charge.

→ The remaining sections in article 12 address enforcement of the rent charge where there is more than one covenant holder and set out the rights of the covenant holders in regard to each other. These paragraphs are not necessary where there is only one covenant holder.

12.12 If the Rent Charge is enforced jointly:

- (a) reasonable expenses incurred as a result of the enforcement of the Rent Charge shall be shared

equally between the Covenant Holders; and

- (b) the net proceeds obtained as a result of the enforcement of the Rent Charge shall be shared equally between the Covenant Holders,

unless otherwise agreed in writing between the Covenant Holders.

12.13 If the Covenant Holder receiving notice given under section 12.9 does not wish to enforce the Rent Charge jointly, that Covenant Holder shall have no entitlement to the Rent Charge unless otherwise agreed in writing between the Covenant Holders.

12.14 A Covenant Holder who declines to enforce the Rent Charge jointly shall execute all documents which may be necessary for the enforcement and collection of the Rent Charge by the notifying Covenant Holder.

### 13. SUCCESSORS OF THE OWNER

13.1 This Agreement shall enure to the benefit of and be binding on the Owner and the Owner's Successors.

13.2 The Owner may request the Covenant Holders to visit the Land [or Covenant Area] and issue a

→ The covenant is intended to bind the current owner and any subsequent owners, including beneficial owners, of the land. A sale or other transfer of the land will not release or otherwise affect the covenant.

→ It is prudent for the landowner to request an estoppel certificate

Certificate indicating whether or not there are any violations of this Agreement. The Covenant Holders may charge an Administrative Fee plus expenses for such a visit and Certificate.

confirming compliance before the new owner or lessee/licencee begins activities on the land.

13.3 The Owner will notify the Covenant Holders of any activity in regard to charges on the title to the Land as registered with the Land Title and Survey Authority.

Although the covenant holders can pay for a “parcel activity notifier” to be informed by the Land Title and Survey Authority of activity on the title of the covenanted land, it is simpler to require the landowner to notify the covenant holders directly of any such activity. Requiring written approval will encourage such notification.

#### **14. ASSIGNMENT OF AGREEMENT OR DISSOLUTION OF THE COVENANT HOLDERS**

→ Because the covenant is intended to last indefinitely, provision must be made for possible changes in the status and existence of covenant holders, as well as owners. This section permits covenant holders to assign their interest in the covenant to another qualified party. If a covenant holder dissolves or changes its purposes, its rights and responsibilities can be assigned to another entity that is able to hold covenants.

14.1 This Agreement shall be transferable by a Covenant Holder, but the Covenant Holder may only assign its rights and obligations under this Agreement to a person or entity authorized to hold statutory rights of way under section 218 of the *Land Title Act* and covenants under section 219 of the *Land Title Act*.

14.2 The Covenant Holders agree that, before either of them assigns its rights and obligations under this article, it shall consult with the Owner, and consider the Owner's comments, with respect to the proposed assignee. The Covenant Holder must give notice to the Owner of the proposed assignment, setting out in reasonable detail the identity of the proposed assignee and the qualifications and experience of the proposed assignee relevant to performance by the assignee of the rights and obligations of the Covenant Holders under this Agreement. If the Owner does not provide comments to the Covenant Holder regarding the proposed assignee within 10 Business Days after receipt from the Covenant Holder to the Owner under this section, the Owner is conclusively deemed to have declined to comment on the proposed assignee and to have consented to the assignment. For clarity, the Owner agrees that the Covenant Holder is only required to consult the Owner and that the Covenant Holder is entitled to assign its rights and obligations so long as it has consulted the Owner.

→ This section requires a covenant holder that wants to assign its interest under the agreement to another qualified covenant holder to consult with the owner before doing so. While the owner's comments are not binding on the covenant holder, the covenant holder must take the comments into account.

14.3 In the event of the winding-up or dissolution of a Covenant Holder, the Covenant Holder shall use its best efforts to assign and transfer all of its interest under this Agreement to a person or entity authorized to accept

→ If a covenant holder winds up, it must use its best efforts to transfer its rights to another qualified covenant holder. If that cannot be accomplished then the covenant will be transferred

covenants under section 219 of the *Land Title Act*. If the Covenant Holder does not assign and transfer all of its interest under this Agreement as set out in this section, it shall be deemed to have assigned and transferred all of its interest under this Agreement to the other Covenant Holder to hold until another qualified and suitable covenant holder can be found or, if the other Covenant Holder is not available, to His Majesty the King in Right of the Province of British Columbia. For clarity, the consultation process set out in section 14.2 does not apply to this section.

temporarily to the other covenant holder or to the provincial government. Although the government is named in this example, it is important to be aware that even if the government were to take assignment of the covenant upon the dissolution of the covenant holder, the government is under no obligation to ensure that the covenant is monitored and enforced. Finding a conservation organization willing to take assignment of the covenant is therefore vital to the long term protection of the land.

The parties may wish to include an additional clause in which the covenant holder agrees not to assign its interest in the agreement for a specified period.

In the case of the death or dissolution of a covenant holder, the Surveyor General must approve an assignment to a covenant holder not named in the covenant. To avoid this requirement, the parties may wish to name another covenant holder in this section.

## 15. NOTICE TO PARTIES

15.1 Any notice or other communication (collectively, notice) required or

→ A number of provisions require or contemplate notice. The

permitted under this Agreement must be in writing and shall be:

- (a) delivered in person or by courier;
- (b) sent by electronic means to the Parties at their respective numbers set out in section 15.5, followed by a copy sent by ordinary mail; or
- (c) sent by pre-paid registered mail addressed to the Parties at their respective addresses set out in section 15.5.

parties should consider the reliability of methods of giving notice, and consider, for example, whether they want to allow notice by electronic means. Notice is very important and, with some methods of giving notice, it can be difficult to prove that the notice has actually been delivered.

15.2 If notice is delivered in person or by courier, the party receiving the notice shall forthwith acknowledge, in writing or by electronic means, receipt of same, and the notice shall be deemed to have been received on the earlier of the date of the acknowledgement and the date that is 5 Business Days after the notice is delivered.

15.3 If notice is sent by electronic means, it shall be deemed to have been received on the date of the transmission of the notice.

15.4 If notice is sent by pre-paid registered mail, it shall be deemed to have been received on the fourth Business Day following the day on which the notice was sent.

15.5 The addresses of the Parties for notice are as follows:

The Owner:

[ADDRESS OF THE OWNER]

[Facsimile or email address of the Owner]

Covenant Holders [list separately]:

[ADDRESS OF THE COVENANT HOLDER]

[Facsimile or email address of the Covenant Holder]

15.6 Each party agrees to give notice immediately to the other parties of any change in its address or contact information from those set out in section 15.5.

15.7 If a party refuses to sign an acknowledgement of receipt of notice, the person delivering the notice may swear an affidavit of service and the notice shall be deemed to have been received on the date of service set out in the affidavit.

## 16. ACCESS

16.1 No right of access by the general public to any portion of the Land is

→ Although the covenant does not carry with it a right of public access, a section such as this could be included for greater

conveyed or created by this Agreement.

[16.1] The Land [or Covenant Area] is accessible to the public, subject to such regulation by the Owner as to time, place and amount of access as is required for safety purposes and to maintain the Land [or Covenant Area] in its Natural State.

clarity, particularly if public access is a concern to the owner.

→ Some covenants, however, may include a right of public access such as the one included here (although, to be a formal and permanent right of access, there would need to be a statutory right-of-way under section 218 of the *Land Title Act* to that effect). Where a covenant permits public access, the parties to the agreement must carry adequate liability insurance.

## 17. PUBLICIZATION OF COVENANT

17.1 The Owner agrees to allow the Covenant Holders to publicize the existence of this Agreement.

17.2 Without restricting the generality of the foregoing, the Owner agrees to allow the Covenant Holders to erect a plaque or other sign on the Land, at the expense of the Covenant Holders, indicating that they hold a covenant on the Land [or Covenant Area]. The size, style and location of the plaque or sign must be approved by the Owner prior to its placement, such approval not to be unreasonably withheld.

→ The text of covenants is available to the general public from the Land Title and Survey Authority office. This article allows the covenant holders to publicize the covenant, for example, in newsletters, displays, and requests for funding, and to erect a sign on the land.

If an owner objects to having a sign posted on the land, omit this section.

## 18. NO LIABILITY IN TORT

18.1 The Parties agree that this Agreement creates only contractual obligations and obligations arising out of the nature of this Agreement as a covenant under seal. Without limiting the generality of the foregoing, the Parties agree that no tort or fiduciary obligations or liabilities of any kind are created or exist between the Parties in respect of this Agreement, and nothing in this Agreement creates any duty of care or other duty on any of the Parties to anyone else. For clarity, the intent of this section is to, among other things, exclude tort liability of any kind and to limit the Parties to their rights and remedies under the law of contract and the law pertaining to covenants under seal.

→ This section clarifies that the liability of the parties is limited to the terms of the agreement and that the agreement does not create any additional duties that would be actionable in tort. For example, the owner could not sue the covenant holder in negligence, as negligence is a tort claim, but they could sue for breach of contract.

## 19. WAIVER

19.1 An alleged waiver of any breach of this Agreement is effective only if it is an express written waiver signed by each of the Covenant Holders, and is only effective to the extent of that express waiver and does not operate as a waiver of any other breach.

→ If the covenant holder does not enforce the terms of the covenant in one circumstance, the owner cannot argue that the covenant holder is prevented from doing so in the future.

While this kind of provision expresses the intent of the

19.2 The failure of either or both Covenant Holders to require performance by the Owner at any time of any obligation under this Agreement does not affect either Covenant Holder's right to subsequently enforce that obligation.

parties, it may not be binding on a court, depending on the circumstances. Covenant holders should not ignore breaches of the covenant. Breaches should be addressed as discussed elsewhere in this Handbook.

## **20. JOINT AND SEVERAL OBLIGATIONS**

20.1 Where there is more than one party comprising the Owner in this Agreement, the obligations of those parties are joint and several.

→ Where more than one person owns the land, each person is both jointly with the other owners and individually responsible for all of the obligations under the covenant.

## **21. REMEDIES NOT EXHAUSTIVE**

21.1 Exercise or enforcement by a party of any remedy or right under or in respect of this Agreement does not limit or affect any other remedy or right that party may have against the other parties in respect of or under this Agreement or its performance or breach.

## **22. COVENANT RUNS WITH THE LAND**

22.1 Unless it is otherwise expressly provided in this Agreement, every obligation and covenant of the Owner in this Agreement constitutes

→ The covenant is intended to charge the land and stay on title to the land in perpetuity even if

a personal covenant and also a covenant granted under section 219 of the *Land Title Act* and a statutory right of way granted under section 218 of the *Land Title Act* in respect of the Land [or Covenant Area]. This Agreement burdens the Land and runs with it and binds the Successors in title to the Land. This Agreement burdens and charges all of the Land [or Covenant Area] and any parcel into which it is subdivided by any means and any parcel into which it is consolidated.

the land is sold, subdivided or consolidated into a larger parcel.

## 23. REGISTRATION

23.1 The Owner agrees to do everything necessary at the Owner's expense to ensure that this Agreement, and the interests it creates, are registered against title to the Land.

→ Registration of the agreement is essential to ensure that the covenant, statutory right of way and rent charge are formally recorded on the title to the land. Once registered in the Land Title Register, the covenant will bind all successive owners.

This section should be changed if the covenant holder will pay the registration expenses.

23.2 The Owner agrees to do everything necessary and possible, at the Owner's expense, to ensure that this Agreement, and the interests it creates, are registered with priority over all financial charges, liens and encumbrances, including options to purchase and rights of first refusal, registered or pending registration in the Land Title Register at the time of

→ The parties intend that the covenant, right of way and rent charge will have priority over other charges against the land. While the owner cannot be sure of obtaining the necessary priority agreements from holders of existing charges, the owner agrees to try to do so.

application for registration of this Agreement.

If there are pre-existing charges and a priority agreement is not possible, it would be prudent from the owner's point of view to list these charges here and make an exception for them.

## 24. SEVERANCE

24.1 If any part of this Agreement is held by a court [or arbitrator] to be invalid, illegal or unenforceable, that part is to be considered to have been severed from the rest of this Agreement and the rest of this Agreement is to remain in force unaffected by that holding or by the severance of that part as if the part was never part of this Agreement.

→ One invalid term will not make the whole covenant unenforceable. The invalid term will be severed from the agreement and the rest of the agreement will remain in force.

## 25. NO OTHER AGREEMENTS

25.1 This Agreement is the entire agreement between the Parties and it terminates and supersedes all other agreements and arrangements regarding its subject.

→ It is important that the parties include everything in the agreement since side verbal and other informal agreements generally will not be effective.

## 26. INDEPENDENT ADVICE

26.1 The Owner acknowledges and agrees that the Owner has sought and obtained, to the Owner's satisfaction,

→ It is crucial that owners seek independent tax advice before placing a covenant on their land.

independent advice from an accountant or other income tax expert with respect to the tax implications of this Agreement and acknowledges that it does not rely, and has not relied, on either Covenant Holder for advice in this regard and that the Covenant Holders have given no representation or warranty in that regard.

Granting a covenant can have significant tax implications. Owners should not rely only on information provided by the covenant holder.

26.2 The Owner acknowledges and agrees that the Owner has been advised by the Covenant Holders that the Owner should seek independent legal advice as to the meaning and effect of this Agreement, and the Owner further acknowledges and agrees that no legal advisor of either of the Covenant Holders has advised the Owner on the meaning or effect of this Agreement or in connection with this Agreement.

→ Independent legal advice is also important, to ensure that the agreement will be enforceable. Covenant holders should not give legal advice on the implications of the covenant and should insist that the owner obtain independent legal advice.

## 27. AMENDMENTS

27.1 This Agreement may only be changed by a written instrument signed by all the parties.

## 28. DEED AND CONTRACT

28.1 By executing and delivering this Agreement, each of the parties

→ The contract under seal is the oldest method of creating an enforceable promise. A promise

intends to create both a contract and a deed and covenant executed and delivered under seal.

made under seal is enforceable even if there is nothing given in return for the promise.

## **29. RIGHTS OF COVENANT HOLDERS**

29.1 A Covenant Holder may exercise its rights under this Agreement through its directors, officers, employees, agents or contractors.

## **30. MORTGAGES**

30.1 If the Owner charges the Land with a mortgage and wishes the mortgage to have priority over the Rent Charge, the mortgage must include provisions obligating the mortgage lender to notify the Covenant Holders in the event of any default in compliance with any of the terms of the mortgage and each Covenant Holder shall be entitled to status as a party in any legal proceedings as a consequence of any default under the terms of the mortgage and shall have the right to redeem the mortgage in any such proceedings.

→ A lender may insist that a mortgage registered after the covenant and rent charge be given priority over the rent charge. The effect of priority is that, if the owner defaults on mortgage payments, the lender is entitled to enforce its remedies against the owner and the land before the covenant holders are entitled to enforce the rent charge. This section should only be included if the owner and covenant holder agree that the covenant holder will give priority to a mortgage over the rent charge.

This section gives the covenant holder the right to participate in foreclosure or other legal proceedings and to pay off the mortgage. This allows the covenant holder to ensure that the land is preserved.

30.2 In this article, "approve" and "approval" mean approval by the Covenant Holders of a first mortgage intended to be registered against the Land or any portion of the Land.

30.3 If the Owner is not in breach of this Agreement, the Covenant Holders shall approve a first mortgage if:

- (a) the mortgage does not exceed 75% of the fair market value of the Land at the date of the approval, as determined by a qualified appraiser; and
- (b) the mortgage is an arms-length transaction with a mortgage lender.

30.4 Upon approval of a first mortgage, the Covenant Holders must execute a priority agreement granting priority to the first mortgage over the Rent Charge to a maximum of the outstanding balance of the first mortgage plus penalties.

30.5 Either Covenant Holder may, in its sole discretion, inspect the Land [or Covenant Area] to determine if the Owner is in breach of any of the terms of this Agreement before

→ A lender is more likely to approve a mortgage if the mortgage is given priority over the rent charge, and these terms allow that. In this example, the covenant holder or holders only agree to approve a mortgage if the amount of the mortgage is 75% or less of the market value of the property and if the lender is at arm's length, or independent, from the owner.

This helps minimize the risk of foreclosure proceedings, which could result in the removal of the rent charge from title to the land.

→ In order for a mortgage registered after the covenant to have priority over the rent charge, the covenant holder must sign an agreement giving the mortgage priority. If the mortgage meets the requirements set out in the covenant agreement, the covenant holder must sign the priority agreement, but may charge an administration fee for

granting approval and may withhold approval if there is any breach.

an associated inspection – see section 4.3.

30.6 The Owner shall reimburse and indemnify each Covenant Holder for all reasonable expenses incurred by the Covenant Holder as a result of a site visit to inspect the Land [or Covenant Area] pursuant to this article.

### **31. GENERAL**

31.1 As evidence of their agreement to be bound by the above terms, the parties each have executed and delivered this Agreement under seal by executing Part 1 of the Land Title Act Form C to which this agreement is attached and which forms part of this Agreement.

31.2 The schedules referred to throughout the document are attached after this page.

**END OF DOCUMENT**

## Appendix 2

# MANAGEMENT AGREEMENT AND PLAN

This Appendix includes a sample management agreement. It also includes an outline for a management plan which is attached as a schedule to the management agreement. **As with the Annotated Conservation Covenant in Appendix 1, the management agreement in this Appendix is a guide, not a template, so it must be used with caution.** This example of a management agreement contemplates delegation of management responsibilities by the landowner to a manager. The landowner, covenant holders and manager are all parties to this sample agreement. In some cases, there may not be a third party manager. While some of the provisions included in the management agreement are necessary in every management agreement, not all the provisions in this agreement will apply in every situation.

Management plans must be specifically tailored to the needs of the parties and the protected area to be managed. As a result, only an outline of a management plan is provided here, to show the structure of a management plan and the kinds of information included.

If the covenant area does not cover all of the land, the management agreement must state clearly that it covers the same area as the conservation covenant. In some cases, such as those in which the conservation covenant is granted only to prevent the subdivision of land, a management agreement and management plan may not be required at all.

It is important for landowners, covenant holders and real estate, legal and other professionals to be aware of the range of terms that can be included and to turn their minds to the kinds of terms that are appropriate to the specific situation.

## MANAGEMENT AGREEMENT

THIS AGREEMENT dated for reference [*insert date*] is

BETWEEN:

Name and address of landowner

AND:

Name and address of manager

AND:

Name and address of the covenant holder

AND:

Name and address of covenant holder [*if more than one*]

(collectively, the "parties")

BECAUSE:

- A. The Owner is the registered owner in fee simple of the Land;
- B. [*a description of the importance of reason for protecting the land*];
- C. The proper management and use of the Land will protect and preserve the Land and Amenities;
- E. The Owner has granted the Covenant Holders a covenant pursuant to s. 219 of the Land Title Act, respecting the use of, subdivision of and building on the Land, and in respect of the conservation, protection, preservation, maintenance, enhancement and restoration of the Land and the Amenities and a statutory right of way pursuant to s. 218 of the Land Title Act;
- F. The parties want the Manager to manage the Land in accordance with the terms of the Covenant and this Agreement;

[*add if the covenant requires this*] [The Covenant requires the parties to enter into a written management agreement for the management of the Land];

NOW THEREFORE in consideration of the payment of \$1.00 by the Manager and each of the Covenant Holders to the Owner, the receipt and sufficiency of which is acknowledged by the Owner, and in consideration of the promises exchanged below, the Owner, the Manager and the Covenant Holders agree as follows:

1. Definitions

In this Agreement:

[*Insert as many defined terms as necessary to accomplish the objectives of the management agreement. Some of the more common terms are included below.*]

- (a) "Amenities" includes any natural, scientific, environmental, natural heritage, wildlife, plant life, and Biodiversity values relating to the Land;
- (b) "Baseline Report" means the baseline inventory documentation report that describes and illustrates the state of the Land and the Amenities at the time of execution of the Covenant, a copy of which is attached to this Agreement as Schedule "\*\*\*\*";
- (c) "Biodiversity" means the variety of life and its processes and encompasses genetic, species, assemblage, ecosystem and landscape levels of biological organization and their structural, compositional and functional components;
- (d) "Covenant" means the covenant agreement between the Owner and *[insert name of each covenant holder]*; a copy of which is attached to this Agreement as Schedule "\*\*\*\*".
- (e) ["Covenant Area A" means those areas marked "Covenant Area" on the Covenant Plan;] *[use if there are separate covenant areas]*
- (f) "Covenant Holders" means *[insert names of each covenant holder; each covenant holder should be defined separately]* collectively and each singly is a Covenant Holder;
- (g) "Covenant Plan" means *[insert description if there is a covenant plan]*, a reduced copy of which is attached to this Agreement as Schedule "\*\*\*\*";
- (h) "Covenant Purposes" means the purposes set out in Section \*\*\* of the Covenant;
- (i) "Guidelines" means *[define any guidelines that will be applied in management of the land]*, a copy of which is attached to this Agreement as Schedule "\*\*\*\*";
- (j) "Land" means *[insert legal description of land]*;
- (k) ["Management Plan" means the management plan prepared in accordance with section \*\*\* of the Covenant [or section 5 of this Agreement, depending on which agreement requires preparation of a management plan] attached to this Agreement as Schedule "\*\*\*\*";] *[insert if a management plan will be prepared]*
- (l) "Manager" means *[insert name and address of manager]*;
- (m) "Owner" means *[insert name and address of owner]*.

## 2. Grant of Licence

The Owner grants to the Manager the contractual licence to enter and be on, and the right to manage, the Land. The Manager agrees that this section does not grant to it any property right or interest in the Land and that the non-exclusive contractual licence created by this section is only for the purpose of enabling the Manager to perform its rights and obligations under this Agreement.

## 3. Management and Use of the Land

The Manager must manage the Land:

- (a) according to the terms of the Covenant;
- (b) according to the terms of this Agreement;
- (c) *[according to the terms of the Management Plan, if a management plan is included]*;
- (d) only for the Covenant Purposes, and

(e) subject to all applicable laws, statutes, bylaws, regulations, orders and directives.

4. Term of This Agreement

This Agreement starts on the reference date noted above and terminates on *[specify date]*.

5. Management Plan

*[Include if the covenant does not provide for creation of a management plan and if a management plan is desired.]*

- (a) The Manager must create, review and revise at five year intervals, a Management Plan for the Land and submit the Management Plan to the Owner and each Covenant Holder. The Owner and each Covenant Holder must, within 25 Business days of receipt of the proposed Management Plan, notify the Manager in writing whether or not the Owner and that Covenant Holder, acting reasonably, approves the proposed Management Plan.
- (b) If the Owner or a Covenant Holder does not approve the proposed Management Plan, the Owner or Covenant Holder will, in its notification to the Manager, provide written reasons for not approving the Management Plan and a description of changes to the Management Plan that are necessary for the Owner or Covenant Holder to approve the Management Plan.

6. Rules for Management and Use of the Land

*[Do not use this kind of provision if there is a management plan.]*

Subject to section 3 the Manager must manage the Land according to the following rules: *[Insert specific rules if desired. Any rules must be consistent with the terms of the covenant.]*

7. Termination of Agreement

Despite section 4, this Agreement may be terminated

- (a) by the Owner or either Covenant Holder, if
  - (i) the Manager breaches this Agreement and fails to cure that breach within 15 days after the Owner or either Covenant Holder gives notice to the Manager to do so,
  - (ii) the Manager is wound up, dissolved, or otherwise ceases to exist, or
  - (iii) the Owner gives the Manager at least 90 days notice of termination, or
- (b) by the Manager, by giving, the Owner and the Covenant Holders at least 90 days notice of termination.

8. Temporary Suspension of Management

Without affecting section 7, the Owner may give written notice to the Manager immediately suspending the Manager's contractual licence to enter and be on the Land and the Manager's right to manage the Land for up to 90 days if the Owner considers that any act proposed or undertaken by the Manager would be, or is, contrary to this Agreement.

9. Management Costs

Except to the extent the Owner and the Manager may agree in writing, the Owner is not obliged to remunerate Manager, or provide financial or other assistance, in connection with management of the Land by the Manager. For clarity, the Manager is solely responsible to pay the costs connected with its performance of this Agreement. [*Or set out other specific cost-sharing arrangements.*]

10. Indemnification

The Manager

- (a) irrevocably releases the Owner and the Covenant Holders from, and waives, any claim, right, remedy, action, cause of action, loss, damage, expense or liability which the Manager may have against the Owner and Covenant Holders in respect of this Agreement or its performance or breach, and
- (b) must indemnify and hold harmless the Owner and the Covenant Holders from and against any claim, right, remedy, action, cause of action, loss, damage, expense or liability incurred or suffered by the Owner or Covenant Holders,

in connection with performance of this Agreement by the Manager, or its breach by the Manager, or connected with any negligence or other legal wrong of the Manager. Among other things, the release and indemnity under this section includes occupier's liability and builder's lien matters. For the purposes of the Occupier's Liability Act, all other enactments, and the common law, the Manager is, as between the Owner and the Manager, the sole occupier of the land.

11. Insurance

The Owner agrees to obtain, and maintain in effect throughout the term of this Agreement, public liability insurance under which the Manager is named as an insured against liability to anyone for personal injury, death, property loss and property damage, and any of them. The insurance must be underwritten by an insurance company licenced to carry on business in British Columbia.

12. Assignment

The Manager may not assign this Agreement or sub-contract any of its rights or obligations under this Agreement except with the written consent of the Owner and Covenant Holders.

13. Notice

- (a) Any notice, request for approval or consent under this Agreement must be in writing and may be given by any of the following means:
  - (i) delivered in person; or
  - (ii) sent by pre-paid registered mail addressed to the parties at their respective addresses set out in Section 13(c).
- (b) A notice sent by pre-paid registered mail is deemed to have been received on the seventh business day following mailing.
- (c) The addresses of the parties for notice are as follows:

The Owner:

The Manager

Covenant Holder 1

Covenant Holder 2

- (d) Each party agrees to immediately give written notice to the others of any change in its address from that set out in Section 14(c).

14. No Liability in Tort

This Agreement creates only contractual obligations. No tort obligations or liabilities of any kind exist between the parties in connection with the performance of, or any default under or in respect of, this Agreement. The intent of this section is to exclude tort liability of any kind in connection with this Agreement and to limit the parties to their rights and remedies under the law of contract.

15. Waiver

An alleged waiver of any breach of this Agreement is effective only if it is an express waiver in writing of the breach in respect of which the waiver is asserted. A waiver of a breach of this Agreement does not operate as a waiver of any other breach of this Agreement.

16. Interpretation

- (a) This Agreement is comprised of the recitation of the parties, the recitals to this Agreement, and the Schedules to this Agreement.
- (b) Where this Agreement says something is in the "sole discretion" of a party, that thing is within the sole, absolute and unfettered discretion of that party.
- (c) In this Agreement:
  - (i) wherever the singular or masculine is used the same shall be construed as meaning the plural or the feminine or the body corporate or politic where the context or the parties hereto so require;
  - (ii) every reference to a party is deemed to include heirs, executors, administrators, successors, assigns, officers and employees of such parties wherever the context so requires or allows; and
  - (iii) the headings are inserted for reference and convenience only and must not be used to construe or interpret the provisions hereof.

17. Amendment

No amendment to this Agreement is valid unless it is in writing and executed by the parties.

18. Severance

If any part of this Agreement is held to be invalid, illegal or unenforceable by a court having the jurisdiction to do so, that part is to be considered to have been severed from the rest of this Agreement and the rest of this Agreement remains in force unaffected by that holding, or by the severance of that part.

19. No Other Agreements

This Agreement is the entire agreement between the parties regarding its subject.

20. Enurement

This Agreement binds the parties to it and their respective successors, heirs, executors and administrators.

As evidence of their agreement to be bound by the above terms, the parties each have executed and delivered this Agreement.

**SCHEDULE \*\*\*  
MANAGEMENT PLAN**

**A. INTRODUCTION**

- A.1 Covenant Purposes
- A.2 Background Summary
  - Project history
  - General visual description
  - Value to the community

**B. PROJECT DESCRIPTION**

- B.1 Purpose
- B.2 Management Objectives
- B.3 Project Partners
- B.4 Limitations

**C. PHYSICAL AND NATURAL FEATURES DESCRIPTION**

- C.1 Location
  - C.1.1 Legal Description
  - C.1.2 Map Location
  - C.1.3 Directions to Site
- C.2 Site Description
  - C.2.1 Climate
  - C.2.2 Physiography
  - C.2.3 Geology and Soils
  - C.2.4 Hydrology

- C.2.5 Vegetation and Landscape Classification
- C.2.6 Flora
- C.2.7 Fauna
- C.2.8 Ecological History and Processes
- C.2.9 High Visibility and Sensitive Resources
- C.2.10 Key Environmental and Ecological Factors
- C.2.11 Studies/Inventories
- C.3 Special Features
  - C.3.1 Rare/Endangered/Threatened Species
  - C.3.2 Biodiversity
  - C.3.3 Scenic/Aesthetic
  - C.3.4 Historical/Archaeological
  - C.3.5 Cultural and Recreational

**D. LAND STATUS AND USE**

- D.1 Land Tenure and History
- D.2 Past and Present Land Use
- D.3 Community Plan Policies
- D.4 Zoning, Registered and Unregistered Encumbrances
- D.5 Water Management/Licences
- D.6 Surrounding Land Uses

**E. NATURAL RESOURCE MANAGEMENT ISSUES**

- Fire risk
- Falling trees
- Steep slopes
- Physical access to property
- Noise pollution
- Invasive plant species

Existing debris  
Ocean-borne pollutants  
Watershed pollutants  
Watershed integrity/recharge  
Squatters/vandalism  
Midden/berm protection  
Interference with ground nesting birds  
Traffic  
Camping  
Beach access  
Garbage  
Tourism  
Trespassing on adjacent lands

## **F. OBJECTIVES AND MANAGEMENT STRATEGIES**

- F.1 Objectives
- F.2 Management Strategies
  - F.2.1 Short-Term Strategies
  - F.2.2 Mid-Term Strategies
  - F.2.3 Long-Term Strategies

## **G. INSURANCE**

## **H. MANAGEMENT AGREEMENT**

### **BIBLIOGRAPHY**

### **MAPS AND APPENDICES**

Appendix 3

# STEPS IN ACQUISITION OF COVENANT

The table below sets out steps in the granting of a conservation covenant. Not all transactions will require each step listed below. Some steps will be carried out by or at the request of the landowner, and some by or at the request of the covenant holder.

All costs will not be incurred on every transaction. In each instance, the landowner and conservation organization will negotiate who is responsible for each transaction cost. Every conservation covenant will involve ongoing costs as well as transaction costs. Ongoing costs include ongoing property insurance, property taxes, maintenance, restoration and improvement, management, monitoring and enforcement. These costs are not included in the table below.

<b>Transaction step</b>	<b>Responsible Party</b>	<b>Cost and Who Pays</b>	<b>Time to Complete</b>
Obtain designation to hold conservation covenant and statutory right of way			
Fundraising campaign			
Tax advice			
Legal advice			
Title search including agent's fees			
Title insurance			

<b>Transaction step</b>	<b>Responsible Party</b>	<b>Cost and Who Pays</b>	<b>Time to Complete</b>
Obtaining copies of charges against title			
Survey of entire property			
Survey of covenant area			
Legal opinion as to title			
Correction of title defects or other remedial action			
Preparing baseline report including mapping, aerial photography, sampling, testing			
Conservancy travel and other expenses			
Contaminated site environmental assessment/audit			
Municipal, Provincial Agricultural Land Commission and other approvals			
Certification as ecologically sensitive land			
Appraisal			

<b>Transaction step</b>	<b>Responsible Party</b>	<b>Cost and Who Pays</b>	<b>Time to Complete</b>
Ecological Gifts Program appraisal review and determination process			
Legal work—negotiating and preparing covenant documents, priority agreements, etc.			
Land title registration of covenant and related documents including agent’s fees			
Property transfer tax			
Property insurance			
Publicity and promotional material – thanking donor, publicizing conservation			

# GLOSSARY

**Appraisal.** An estimate of the value of a property made by a qualified appraiser, sometimes referred to as a valuer.

**Arbitration.** The referring of a dispute to an impartial third person chosen by the parties to a dispute who agree in advance to abide by the arbitrator's award issued at a hearing at which both parties have an opportunity to be heard. (*Black's Law Dictionary*)

**Baseline inventory information.** Information describing the existing state of the land, its flora, fauna and natural and cultural features at the time the conservation covenant is placed on the land.

**Baseline documentation information.** Information describing the state of the land, its flora, fauna and natural and cultural features as an objective information baseline against which monitoring will assess compliance with the covenant or management agreement.

**Charge on land.** In the *Land Title Act*, an estate or interest in land less than the fee simple. Includes encumbrances such as judgments, mortgages, and liens. Charges may be registered against title to land in the Land Title Register.

**Conservation covenant.** A voluntary, written agreement registrable against title to land under section 219 of the *Land Title Act* made between a landowner and a covenant holder covering all or part of a parcel of property in which the landowner promises to protect the land as provided in the covenant.

**Covenant.** In real property law, a promise made by a landowner, the covenantor, to another, the covenantee, to do, or not do, something in relation to his or her land. Such promises take the form of voluntary, written agreements. See also "restrictive covenant".

**Covenant holder.** Also covenantee. A person for the benefit of whom a covenant is made.

**Crown.** Also "Crown in Right of British Columbia" or "Crown in Right of Canada", meaning the constitutional head of the provincial and

Canadian governments and whose powers are carried out by the provincial and federal governments.

**Crown land.** Land managed by the federal or provincial government on behalf of the public.

**Designation.** Authorization delegated by the minister to the Surveyor General, of an individual or organization to hold a conservation covenant. Designation may be general designation or individual.

**Dominant tenement.** Land which receives the benefit of a covenant or easement over a neighbouring property called the servient tenement.

**Easement.** A right of use attached to land over nearby or adjacent property of another. The land having the right of use attached is known as the dominant tenement and the land subject to the easement is known as the servient tenement. Often used to provide access to one parcel of land over another.

**Ecological gift.** A gift of land or a covenant or easement on land that is certified as ecologically sensitive by the federal Minister of the Environment and Climate Change or his designate in accordance with the provisions of the federal *Income Tax Act* and otherwise meets the requirements of the *Income Tax Act* and that gives rise to special tax benefits.

**Enforcement.** The act of putting the terms of a conservation covenant into effect.

**Estate.** (1) An interest in land. (2) All the property of which a person had the power to dispose by will.

**Fee simple.** The estate in fee simple is the largest estate or interest in land known in law and is the most absolute in terms of the rights which it confers. The largest possible bundle of ownership rights in a piece of land including the right to exclusive possession of the land, the right to use the land, and the right to dispose of the land.

**Indemnify.** To restore the victim of a loss; to secure against loss or damage; to make good, compensate or make reimbursement to a person for a loss already incurred.

**Injunction.** An order of the court forbidding a person to do some act which he or she is threatening to do or is doing or commanding a person to do some act that he or she is required to do.

**Interest in land.** A right to have the advantage from something. One or more of the ownership rights of land. A conservation covenant or an easement is an interest in land. See also “estate”.

**Management agreement.** A written agreement addressing who will carry out management activities in relation to a conservation covenant.

**Management plan.** A document in which the parties agree to the long-term management of the interest in the land represented by the covenant.

**Mediation.** Intervention by a neutral third party in a dispute between two other parties with a view to persuading them to settle their dispute.

**Monitoring.** Actions carried out to measure and record change on land on which a covenant has been placed, determine the effectiveness of the covenant to protect the land and ensure compliance with the terms of the covenant. Change on the land is often assessed based on a baseline inventory report.

**Nuisance.** An unreasonable interference with the use and enjoyment of land that is owned or occupied by another person. For example, depending on the circumstance, the creation of smoke, odours, noise or vibration, obstructing easements, interfering with support of land or structures, diminution of water quality or flow, and soil erosion could all constitute nuisances.

**Private land.** Land owned by private individuals or corporations, rather than the government.

**Real property.** Land or an interest in land such as an easement or covenant.

**Relief.** The redress of a wrong or the benefit that a person seeks from the court. See also “remedy”.

**Remedy.** “The means by which a right is enforced or the violation or a right is prevented, redressed or compensated.” (*Black’s Law Dictionary*)

**Rent charge.** A charge, registered against title to land, securing payment of a specific amount by the landowner to the covenant holder for each breach by the landowner of the terms of the covenant.

**Restrictive covenant.** An agreement between two landowners restricting the use of one property for the benefit of the other.

**Security.** A pledge, lien, bond, mortgage or other promise given by a person to assure the payment of a debt or the performance, to be forfeited in case of default.

**Servient tenement.** Land over which a burden such as an easement or covenant has been granted in favour of another parcel of land called the dominant tenement.

**Statutory right of way.** An easement without a designated dominant tenement registrable against title to land under section 218 of the *Land Title Act*.

**Title.** The legal right to the possession of property, especially real property, or the evidence of the right such as title deeds.

**Tort.** Breach of duty, other than under a contract, leading to liability for damages resulting from the breach. A legal wrong.

**Note:** The authors relied extensively on *Black's Law Dictionary* (West Publishing Co.) in compiling this glossary.

## Appendix 5

# Conservation Organizations Designated to Hold Covenants in BC

(Compiled in 2023 by the Land Trust Alliance of BC. It does not include all agencies, organizations and persons designated.)

American Friends of Canadian Land Trusts\*  
Bowen Island Conservancy  
Central Okanagan Land Trust  
Comox Valley Land Trust  
Cowichan Community Land Trust  
Denman Conservancy Association  
Ducks Unlimited British Columbia\*  
Elk Valley Regional Land Trust Society  
Fraser Valley Conservancy  
Gabriola Land & Trails Trust  
Galiano Conservancy Association  
Gambier Island Conservancy  
Garry Oak Meadow Preservation Society  
Habitat Acquisition Trust\*  
Islands Trust Conservancy  
Malaspina Land Conservancy Society  
Mayne Island Conservancy  
Nanaimo & Area Land Trust Society  
Nature Conservancy of Canada\*  
Nature Conservancy of the North Okanagan Society  
Nature Trust of British Columbia\*  
Pender Islands Conservancy Association  
Quadra Island Conservancy and Stewardship Society  
Salt Spring Island Conservancy  
Savary Island Land Trust Society  
Sunshine Coast Conservation Association  
TLC The Land Conservancy\*  
Thetis Island Nature Conservancy Society

\* Denotes Province-wide designation.

## WEBSITES OF INTEREST

These websites contain a great deal of information of interest to those involved in land conservation. Individual websites include a variety of publications not listed in the publications section below.

Alliance of Canadian Land Trusts at <https://aclt-acoc.ca/>

Appraisal Institute of Canada at <http://www.aicanada.ca/>

BC Conservation Data Centre (BC Species and Ecosystems Explorer) at <https://www2.gov.bc.ca/gov/content/environment/plants-animals-ecosystems/conservation-data-centre>

BC Laws at

<https://www.bclaws.gov.bc.ca/civix/content/complete/?xsl=/templates/browse.xsl>

Canada Revenue Agency at <https://www.canada.ca/en/revenue-agency.html>

Canadian Laws at <https://laws-lois.justice.gc.ca/eng/acts/>

Ecological Gifts Program at <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/ecological-gifts-program.html>

Land Trust Alliance (US) at <https://landtrustalliance.org/>

Land Trust Alliance of BC at <https://ltabc.ca/>

Ontario Land Trust Alliance at <https://olta.ca/>

Provincial (BC) Agricultural Land Commission at <https://www.alc.gov.bc.ca/>

Réseau de milieux naturels protégés à <https://rmnat.org/>

Species at Risk (Canada) Public Registry at <https://www.sararegistry.gc.ca/default.asp?lang=en>

Stewardship Centre for British Columbia at <https://stewardshipcentrebc.ca/>

Surveyor General of British Columbia at <https://ltsa.ca/professionals/surveyor-general/>

Trust for Public Land (US) at <https://www.tpl.org/>

West Coast Environmental Law Association at <https://wcel.org/>

Wildlife Habitat Canada at <https://whc.org/>

# PEOPLE PROTECTING PLACES



**The Land Trust Alliance of BC is a registered charity and accepts donations to support its work in**

- Education – programs for land owners, students, land trusts, professionals and the public
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- Standards & Practices – program that guides the work of land trusts
- Programs – community outreach, conferences, social media and others designed to further conservation across BC

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[ltabc.ca/donate](http://ltabc.ca/donate)



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Amount Enclosed: \$ \_\_\_\_\_

Please mail to:  
**201 – 569 Johnson Street, Victoria BC Canada V8W 1M2**



The Land Trust Alliance of British Columbia provides Programs and Services to the province's 40 land trusts and British Columbians.

From training programs for Boards, volunteers and staff to research and publications, communications and outreach, capacity building and services such as an extensive insurance program, the Alliance salutes its members who have conserved more than 1600 properties totalling 556,000 acres.

To find out how to support your local land trust by donating, volunteering or conserving your property please visit our member directory at: [ltabc.ca/land-trusts/directory](http://ltabc.ca/land-trusts/directory)



*View from Pender Islands*

PHOTO: Kristine Mayes | COURTESY: Islands Trust Conservancy