WEST COAST ENVIRONMENTAL LAW

Greening Your Title

A Guide to Best Practices for Conservation Covenants

THIRD REVISED AND UPDATED EDITION 2013

West Coast Environmental Law is dedicated to safeguarding the environment through law. Since 1974 our staff lawyers have successfully worked with communities, non-governmental organizations, the private sector and all levels of governments, including First Nations governments, to develop proactive legal solutions to protect and sustain the environment. Through our Environmental Dispute Resolution Fund, we have granted over $5,000,000 to hundreds of citizens' groups across BC to help them solve environmental problems in their communities.

West Coast
Environmental Law
200 – 2006 West 10th
Avenue
Vancouver, BC V6J 2B3
Canada

phone (604) 684-7378
fax (604) 684-1312
toll-free in BC 1 800 330-WCEL
admin@wcel.org
www.wcel.org

West Coast Environmental Law would like to thank the Land Trust Alliance of British Columbia for its generous support for the third revised and updated edition of this publication in 2013. West Coast would also like to thank the Real Estate Foundation of British Columbia, the Islands Trust Fund, the Canadian Wildlife Service of Environment Canada, the Endswell Foundation, Wildlife Habitat Canada, the BC Ministry of Environment, Lands and Parks and the Law Foundation of British Columbia for support and funding that enabled West Coast to complete the first and second editions.

Canadian Cataloguing in Publication Data available on request.

ISBN: 978-0-919365-33-9

The Land Trust Alliance of British Columbia LTABC would like to thank West Coast Environmental Law for partnering with them in support of this revised edition. The Alliance also recognizes the exceptional time commitment provided by Board member Ben Van Drimmelen, editor of this edition. LTABC would like to acknowledge the following donors for their generous support for the third revised and updated edition of this publication in 2013:

"We acknowledge the financial assistance of the Province of British Columbia"

Environment Canada Environnement Canada

BRITISH COLUMBIA
The Best Place on Earth

THE NOTARY FOUNDATION
INC. 1986
Building better communities, one grant at a time.

Land Trust Alliance
BRITISH COLUMBIA

201-569 Johnson Street
Victoria BC V8W 1M2
250-590-1921 T
info@ltabc.ca
www.ltabc.ca

As with all WCELRF publications, this *Guide* is available electronically on the West Coast Environmental Law website at www.wcel.org as well as on the Land Trust Alliance of British Columbia website at www.ltabc.ca

PREFACE

This publication is a guide to the best practices associated with the use of conservation covenants. The primary focus of the *Guide* 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 *Guide* is published by West Coast Environmental Law Research Foundation (WCELRF) a non-profit charitable society devoted to legal research and education aimed at protection of the environment and promotion of public participation in environmental decision making. It operates in conjunction with West Coast Environmental Law Association (WCELA) which provides legal services to concerned members of the public for the same two purposes.

This *Guide* 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 *Guide* is one of a number of publications of WCELRF related to the legal protection of ecologically significant private land in British Columbia. WCELRF has published legal materials and provided legal education for many years to assist landowners, conservation organizations, citizens and other professionals with an interest in protecting private land. Previously published materials include *Using Conservation Covenants to Preserve Private Land in British Columbia* (1992); *Here Today, Here Tomorrow: Legal Tools for the Voluntary Protection of Private Land in British Columbia* (1994); *Leaving a Living Legacy* (1996); and *Giving it Away: Tax Implications of Gifts to Protect Private Land* (2004).

Readers are reminded that this *Guide* 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.

ACKNOWLEDGMENTS

The editor of the third revised and updated edition, Ben van Drimmelen and West Coast Environmental Law Research Foundation would like to thank everyone who made contributions of their time and knowledge in the preparation of this and previous editions of *Greening Your Title*. Many individuals, too numerous to mention by name, shared their experiences in using conservation covenants, both the successes and the challenges, and provided helpful suggestions about updating this *Guide*. We thank each of you for your thoughtful comments, your candid assessment of the problems sometimes encountered and your optimism about protecting ecologically important land. We are also indebted to the many landowners in British Columbia willing to grant conservation covenants to protect their land, making our communities ecologically richer places for all species.

Special thanks to Dave Morris of the Provincial Capital Commission for ideas which led to the original title of this *Guide* and to all the individuals that assisted in the original and revised editions of the *Greening Your Title,* as well as the authors of those editions, Ann Hillyer and Judy Atkins. A number of people also provided input and practical suggestions to the third edition; thanks in particular to Katie Blake and Wendy Innes (Nature Conservancy of Canada), Lui Carvello (Carvello Law Corporation), Dave Cunnington (Environment Canada), Deborah Curran (Environmental Law Centre, University of Victoria), Kate Emmings (Islands Trust Fund), Anne Kerr (Nanaimo and Area Land Trust), Margaret Sasges (Clay & Company), Wendy Tyrrell (Habitat Acquisition Trust), Patti Willis (Denman Conservancy Association), Kathleen Sheppard, Iain Murray, Paul McNair and Fiona McLeod (Land Trust Alliance of BC) and Deborah Carlson (West Coast Environmental Law).

The third edition of *Greening Your Title* was coordinated and funded by the Land Trust Alliance of British Columbia. The third edition was funded by a major grant from the Notary Foundation of British Columbia and funding from Environment Canada and the Province of British Columbia. The second edition was funded by Environment Canada, Canadian Wildlife Service, the Real Estate Foundation of British Columbia, the Islands Trust Fund and with core funding from the Law Foundation of British Columbia. The original edition of the *Guide* was funded by the Real Estate Foundation of British

Columbia, the Habitat Conservation Trust Fund, the Endswell Foundation, Wildlife Habitat Canada and the Ministry of Environment, Lands and Parks. Funding assistance does not imply endorsement of any statements or information contained in this *Guide*.

The views expressed in the third revised and updated edition are those of the editor of the third edition, Ben van Drimmelen and the West Coast Environmental Law Research Foundation. Any errors and omissions are their responsibility.

CONTENTS

Chapter 1

INTRODUCTION

Providing legal protection for special areas of privately owned land has become increasingly important in British Columbia over the past number of years. The vast majority of land in the province is owned by the Crown. 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 addition, in all parts of the province, humans were drawn to settle in 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.

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 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 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 the purpose of protecting its 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 *Guide* provides some information on the tax implications of conservation covenants, but readers may also want to consult the companion publication *Giving it Away, Tax Implications of Gifts to Protect Private Land.*

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

Despite the title's reference to greening "your" (i.e. – the landowner's) title, this *Guide* is not directed primarily at landowners. It is not a basic overview to inform landowners about the general principles of such covenants. This *Guide* 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. In addition, a more general description of conservation covenants is available.[1]

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*.[2] This ensures that it binds future owners of the land, not just the

[1] – *Conservation Covenants – A Guide for Developers and Planning Departments*, The Land Trust Alliance of BC, 2009, available at http://ltabc.ca/images/covenants_for_developers_planners.pdf. Although directed at local governments, this short publication provides a basic overview.

[2] R.S.B.C. 1996, c. 250.

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;
- 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 these *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 *Guide* 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 *Guide* 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 any difficulties related to their use to the greatest extent possible.

Not all of the practices discussed in this *Guide* 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 *Guide* 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 land trusts and so on. This *Guide* is restricted to best practices around negotiating and drafting conservation covenants. For best practices in relation to other aspects of land trust operations such as storage and retrieval of records, readers should go to the Land Trust Alliance of BC's *Standards and Practices Assessment Tool*.[3]

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.

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,

[3] Go to http://best-practices.ltabc.ca.

grant a conservation covenant on the 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 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 may wish to grant a conservation covenant to a conservation organization to ensure the stewardship of the land in perpetuity. The landowner also can make a gift of the land to another conservation organization while retaining 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 the special attributes 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 that 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. In some cases, these types of stewardship arrangements may lead 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. For example, the Naturescape British Columbia program[4] promotes caring for wildlife habitat at home and is designed for those who want to become good stewards of the spaces in which they live, such as backyards and neighbourhood commons. Over time, a landowner may become interested in providing permanent legal protection for the land as part of practicing good stewardship.

---

[4] Habitat Conservation Trust Fund. *Naturescape British Columbia: Caring for Wildlife Habitat at Home*, 2003.

For a more complete discussion about legal tools available to protect private land, see *Here Today, Here Tomorrow: Legal Tools for the Voluntary Protection of Private Land in British Columbia*, another publication of West Coast Environmental Law Research Foundation.

THE PURPOSE OF THIS *GUIDE*

This *Guide* 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[5] 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 (ALR) designated under the *Agricultural Land Commission Act*;[6]
- the use and content of management agreements;

---

[5] The minister responsible for the *Land Title Act* has delegated to the Surveyor General his authority to designate bodies that can hold covenants.

[6] S.B.C. 2002, c. 36.

- the collection of baseline information;
- 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 *Guide* 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.

WEST COAST ENVIRONMENTAL LAW RESEARCH FOUNDATION

This *Guide* is one of a number of publications of WCELRF related to the legal protection of ecologically significant private land in British Columbia. WCELRF has provided legal materials and legal education for many years to assist landowners, conservation organizations, citizens and other professionals with an interest in protection of private land. Previously published materials include *Using Conservation Covenants to Preserve Private Land in British Columbia*; *Here Today, Here Tomorrow: Legal Tools for the Voluntary Protection of Private Land in British Columbia; Leaving a Living Legacy;* and *Giving It Away: Tax Implications of Gifts to Protect Private Land*.

This *Guide* and other materials related to legal tools to protect private land in British Columbia are available in an electronic format on the web site of West Coast Environmental Law at www.wcel.org. To the extent resources are available, this *Guide* will be updated periodically when significant changes are made to relevant legislation or government policy.

Chapter 2

ABOUT COVENANTS

This *Guide* 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, therefore is 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*,[7] a landowner has long been able to grant a covenant in favour of the Crown or a local government body. 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.

---

[7] *Land Title Act*, R.S.B.C. 1996, c. 250.

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

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 the Minister of Environment, Lands and Parks; previously, only the provincial or local governments or a Crown corporation or agency could hold them.[8] 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.[9] In the agreement, the landowner promises to protect the land as provided in the

---

[8] *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.

[9] 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 *Guide* 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 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 throughout the province, 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:[10]

- 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 to 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.[11]

"Amenity" includes any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land subject to the covenant.[12]

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

[10] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(2).

[11] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(4).

[12] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(5).

complex, particularly when the conservation objectives are simple and straightforward such as protecting the land in its natural state.

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.[13] 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.

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.

[13] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(8).

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.[14] 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 the use 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.[15]

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

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.[16] 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;

---

[14] For example, insurance and monitoring costs. These are discussed later in *Greening Your Title*.

[15] For helpful information about landowner contact programs, see *On the Ground: A Volunteers' Guide to Monitoring Stewardship Agreements*, The Land Trust Alliance of BC, 2001, a publication in the Stewardship Series, available at http://ltabc.ca/2011-11-10-09-15-27/ltabc-publications.

[16] 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.

- 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;[17]
    - 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
    - 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[18];

[17] 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.

- 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[19]; 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 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

---

[18] 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*, The Land Trust Alliance of BC, 2010, available at http://ltabc.ca/2011-11-10-09-15-27/ltabc-publications.

[19] 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.

someone else. After talking with the local conservancy organization, as well as their lawyer and accountant, Morgan and Kim have decided to give the organization 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 the baseline documentation 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 can 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. Many landowners will not be able to afford contributing to endowment as a single donation, but there are options. 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.[20]

---

[20] A range of options for gifting, including endowments, is described in *Green Legacies: A Donor's Guide for B.C.* with detailed information about 22 planned giving options for nature, including gifts of land or covenants. Available through http://www.givegreencanada.ca/publications.

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.[21]

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 very cautious about covenants, interpreting some clauses as potentially prohibiting or restricting agricultural uses. As a result, covenant registration on ALR lands has been difficult. That may change[22] 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.

When a potential covenant holder wishes to hold a conservation covenant on land within an agricultural land reserve, it must refer the covenant to the Agricultural Land Commission for written approval. The Commission has developed guidelines to assist landowners, conservation groups and government agencies developing conservation covenants that include ALR lands and to facilitate

---

[21] *Agricultural Land Commission Act*, S.B.C. 2002, c. 36, s. 22(2).

[22] For example, in a recent court case, the ALC did not support a developer's effort to remove a "no vegetation removal" covenant (*Regional District of Nanaimo v. Buck* (2012), BCSC 572, at http://www.courts.gov.bc.ca/jdb-txt/SC/12/05/2012BCSC0572.htm)

Commission review of proposed conservation covenants.[23] The Commission states in its guidelines:

> The Commission has and will continue to agree to restrictions on agriculture where there are important, demonstrated environmental values that can be reasonably balanced with agricultural values.

There is no formal application form. The referral to the Commission should contain the information set out in the guidelines including:

- a map showing the general location of property and noting the Municipality or Regional District;
- the size of the property (specify hectares or acres) and number of parcels affected;
- the name of the landowner and covenant holder and contact information for each;
- a statement of ecological values – Is the covenant in support of recovery of a federally-listed species at risk, a rare element occurrence (known locations of rare plants, animals and plant communities) or a red listed (endangered or threatened) species listed by the BC Conservation Data Centre? What other support is available to show that the area is important for wildlife (letters, technical report references)?
- a statement of agricultural values, with a map showing existing or proposed areas where agriculture would be permitted under the covenant; and
- the rationale for the proposed covenant, including how impacts on agriculture will be minimized.

The Agricultural Land Commission has established a number of guiding principles to assist conservation organizations when developing covenants that are intended to apply to lands in the ALR. For instance, proposals for covenants should be substantiated by an appropriate level of scientific information to help

[23] Go to http://www.alc.gov.bc.ca/legislation/policies/Guidelines_convenants_Aug11.pdf.

the Commission gauge the relative importance of the environmental values (examples are wildlife habitat and plant community inventory ratings, technical reports, mapping and inventories).

These principles, together with guidelines for drafting covenants intended to apply to land in the ALR and an outline of the referral procedure, are all set out in the Commission's guidelines referred to above.

The Commission requires covenant holders to be designated by the Surveyor General to hold covenants before referring a covenant to the Commission.[24] 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. The Commission states that eighty percent of referrals will receive a response within 90 days. Conservation covenants on land in the ALR cannot be registered without the approval of the Commission.

PRIVATE MANAGED FOREST LAND

Owners of forested land can have it classified as "managed forest land" for property tax purposes under the *Assessment Act*.[25] More than a quarter of the three million hectares of forested private land in BC has that classification.[26] In order to obtain and retain managed forest land status, landowners must submit a management commitment under the *Private Managed Forest Land Act*[27] to use the land for the production and harvesting of timber.[28] 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 so those contemplating putting a conservation covenant on managed forest land should consult their advisors about the possible property taxes implications before proceeding.

---

[24] See the discussion of designation in Chapter 5.

[25] R.S.B.C. 1996, c. 20.

[26] Go to http://www.pfla.bc.ca/private-forest-land.

[27] S.B.C. 2003, c. 80.

[28] *Private Managed Forest Land Council Regulation,* s. 9(1)(b).

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 use of the covenant area for other activities such as ecologically sensitive forestry, ranching and farming. A similar situation arises when maintenance activities are required to conserve the amenities, such as endangered plant communities. In contrast to covenants to simply conserve specific amenities, 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 4 includes a more detailed discussion of this point.

DEVELOPMENT COVENANTS

For new residential developments, incorporating green space into the design will tend to speed government approvals, increase property values and speed sale of the new homes. The developer, homeowners and the public can all benefit. The future homeowners and, potentially, the public, may get access to paths and trails in conserved greenspace. Local government may require dedication of greenspace

as a condition of change of zoning to allow subdivision. The developer can offer greenspace on part of the property in exchange for increased residential density ("density bonus"), thus reducing costs for infrastructure to service the residential area – infrastructure such as roads, storm drains, sewer lines and distribution of water and power. 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 place covenants in regional or even provincial parks. Often, the organization has acquired the land and wishes to place a covenant on it before it is transferred to government to be used indefinitely as parkland.

Some of the elements found in most conservation covenants are not included in covenants in parks because the current government should not 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. Few terms need definition. The purpose is usually obvious – that the land use 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.

NOTES

CHAPTER 3

CONSERVATION COVENANTS IN THE COURTS

Conservation covenants generally are intended to last in perpetuity. Covenants restrict land use and frequently lower the value of the land subject to the covenant. It therefore is a good practice to assume every covenant will be challenged some day. Questions of the enforceability of a covenant may arise in a number of ways. For example, a landowner, particularly a subsequent landowner, may want to do something on the land that the covenant does not permit. Alternatively, a covenant holder might attempt to enforce the terms of a covenant against a landowner who has allegedly breached the covenant.

There is relatively little case law about interpreting and enforcing instruments like conservation covenants. However, a brief review of some of the principles identified by courts in Canada and the United States indicates the kind of approach that Canadian courts may take in interpreting and enforcing statutorily based "conservation easements"[29] and provides some guidance for drafting effective and enduring documents.[30]

Canadian courts have rarely been called upon to interpret or enforce conservation covenants. While there is considerable jurisprudence relating to common law easements, restrictive covenants and other kinds of section 219 covenants, much of this jurisprudence is not relevant to conservation covenants. However, some of the principles and approaches to be applied in interpreting other restrictive covenants may well be relevant to conservation covenants although the extent of that relevance has not yet been determined.

As one court has stated about common law restrictive covenants:

> The starting point of inquiry is, of course, a careful examination of the wording of the covenant and the whole of the document which

---

[29] The term "conservation easement" is commonly used throughout the United States and other parts of Canada. Conservation easements are similar to conservation covenants discussed in this *Guide*.

[30] This discussion is based in part on Part 6 of Judy Atkins, Ann Hillyer and Arlene Kwasniak, *Conservation Easements, Covenants and Servitudes in Canada: A Legal Review*, Ottawa, North American Wetlands Conservation Council (Canada), 2004, Report No. 04-01.

> contains it. The court will also, however, frequently consider evidence of surrounding circumstances at the time a covenant was entered into and other extrinsic evidence in order to resolve ambiguities in the text…[31]

In the United States, as in Canada, the cases that do exist indicate that the interpretation of the language of the covenant is central to a determination of whether or not the covenant will be enforceable. As one American commentator has explained:

> In general, when called upon to interpret the meaning of conservation easements in the face of allegations of easement violation, the courts will first look to the "plain words" of the easement document itself. "Deeds, like contracts, are construed in accordance with the intention of the parties insofar as it can be discerned from the text of the instrument…. If a deed is unambiguous, the court's role is limited to applying the meaning of the words…."
>
> Courts assume that the express language of conservation easements determines the intentions of the parties. In analyzing the language used in conservation easements, words are "given their ordinary and usual meaning" as judged by a "reasonable person." … If the written words are clear, these terms will govern the rights and liabilities of the parties…. [Citations omitted.] [32]

Only if a term in a conservation easement is found to be ambiguous will the courts look beyond the 'four corners' of the conservation easement document to consider other evidence in an attempt to determine the intent of the parties. This principle is generally applied in Canada as well as in the United States.

It has been held by one court in the United States that to determine the intent of the parties,

> the court should look at the words of the instrument and the circumstances contemporaneous to the transaction…. The

[31] *Kirk v. Distacom* (1996), (B.C.C.A.); at http://www.courts.gov.bc.ca/jdb-txt/ca/96/05/c96-0517.txt..

[32] Andrew Dana, "The Silent Partner in Conservation Easements: Drafting for the Courts," in *The Back Forty,* January/February 1999, Issue, Vol. 8, No. 1.

> circumstances may include the state of the thing conveyed, the object to be obtained and the practical construction given by the parties through their conduct.[33]

Where ambiguities cannot be resolved by an examination of the document itself and the intent of the parties cannot be easily ascertained, courts will apply principles of interpretation to determine the meaning of covenant or easement terms.

The courts in Canada apply a number of principles of interpretation to restrictive covenants. One principle is as follows:

> It is well established that restrictive covenants are strictly construed. Ambiguity is resolved in favour of nonenforcement.[34]

Canadian courts have refused to enforce restrictive covenants where the meaning of the language used in the covenant was uncertain. How this principle will be applied to statutorily based conservation covenants is uncertain.

North American courts have not yet settled the question of the extent to which courts will apply common law rules for interpreting restrictive covenants (for example, that they should be construed strictly against the drafter) to interpreting statutory easements and covenants. In some United States cases, the courts apply these restrictive principles asserting, for example, that "restrictions on land should be construed in favour of the free use of land and against the party seeking enforcement".[35] In applying these principles, the court, on occasion, has rejected arguments that these principles should be applied only to restrictive covenants and not to conservation instruments.[36]

In other cases, the courts apply principles of interpretation that are more likely to recognize the different purpose of statutorily based conservation restrictions.[37] In some cases, the courts have acknowledged the public interest purposes of

---

[33] *Smith* v. *Jack Nicklaus Dev. Corp.,* 225 Ill. App. 3d 384 (Ill.App. 1992), at 391.

[34] *Kirk* v. *Distacom* (1996) *, (B.C.C.A.); see Note 31 above*.

[35] For example, *Foundation for the Preservation of Historic Georgetown* v. *Arnold*, 651 A.2d 794 (D.C.Cir. 1994). See also the *Southbury* case discussed below.

[36] See, for example, *Foundation for the Preservation of Historic Georgetown* v. *Arnold*.

[37] *Chatham Conservation Foundation* v. *Farber*, 56 Mass. App. Ct. 584 (2002). In this case, second generation landowners sought to construct an elevated walkway on their land. The Foundation's position was that this was prohibited by the terms of a conservation restriction on the property. The Foundations was successful at the trial level. However, the Appeals Court sent the case back to the original trial court for resolution of the issue.

conservation restrictions and have approached interpretation and enforcement of the restrictions from that perspective.[38]

EXAMPLES OF COVENANT CASES

The examples below are offered as case studies of how the courts have looked at selected restrictive covenants and conservation easements. This is not an exhaustive review of the cases in this area. While many restrictive covenants and conservation easements have been upheld, in a number of the examples that follow, the covenant under consideration was 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.

CANADIAN CASES

The following examples show some ways in which the Canadian courts have dealt with restrictive covenants:

Example: The plaintiff sought a permanent injunction alleging the defendants had breached an environmental setback restrictive covenant.[39] 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

[38] *Goldmuntz* v. *Town of Chilmark*, 38 Mass. App. Ct. 696; *Bennett* v. *Commissioner of Food and Agriculture*, 576 N.E.2d 1365 (Mass. 1991). In this case, the court enforced an agricultural preservation restriction on common law principles against the grantor's successors in title even though it arguably did not fall within the precise statutory definition of an agricultural preservation restriction.

[39] *Suomalainen* v. *Jernigan* (2004), B.C.S.C. 465; at http://www.courts.gov.bc.ca/jdb-txt/sc/04/04/2004bcsc0465.htm.

> for each strata lot comprising of the Lands shall be maintained with a "naturalistic character".

The defendants, purchasers of land burdened by the covenant, carried out activities on the land that the plaintiff, the neighboring landowner, alleged violated the terms of the covenant. The plaintiff sought an injunction to prevent the activities.

The court noted that the covenantee 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."

Example: The plaintiff sought a permanent injunction alleging the defendants had breached a restrictive covenant.[40] 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 activities on the land that the plaintiff alleged violated the terms of the covenant. The plaintiff sought an injunction to prevent the activities which it alleged would be harmful to the watershed.

The court found that the restrictive covenant was not enforceable because the definition of "watershed" was ambiguous. The court found on the evidence that there were ten different watersheds

[40] *Mt. Matheson Conservation Society* v. *573132 B.C. Ltd.* (2002), (B.C.S.C.); at http://www.courts.gov.bc.ca/jdb-txt/sc/02/12/2002bcsc1254.htm.

on the land and that it was not possible to determine which watershed the restrictive covenant protected.

The court compared the restrictive covenant with new statutorily based conservation covenants that had been placed on the land and noted that "in marked contrast to the vague wording of [the first restrictive covenant, the newer covenants] identified the watersheds … on a Reference Plan."[41] Moreover the new conservation covenants expressly referred to the need to protect specific watershed areas that had been surveyed. The court pointed out that the accompanying plan left no doubt as to the exact location of the watersheds to be protected by the conservation covenant.

Example: 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 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".[42] The landowner had placed, and then cleared, debris from the road, mainly treetops from his logging operation. The issue was whether that debris contituted "vegetation or soil". The court stated:

> 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".

A site inspection and more careful drafting could have led to a more ecologically appropriate interpretation of "vegetation".

[41] *Mt. Matheson Conservation Society* v. *573132 B.C. Ltd.*, para. 48.

[42] *Chilliwack (District of)* v. *Weihs* (1994), (B.C.S.C.); at http://www.courts.gov.bc.ca/jdb-txt/sc/94/19/s94-1914.htm.

Example: A restrictive covenant that stated "No act of commerce or industry shall be carried on any lot" was upheld.[43] 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.[44]

The court found that a campground and trailer park on the land were commercial ventures that were in breach of the restrictive covenant. Despite this finding, however, 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) 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 by injunction.[45]

Example: 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."[46] 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 to

---

[43] *Turney* v. *Lubin* (1979), [1980] 1 W.W.R. 35; (1979) 14 B.C.L.R. 329; (1979) 10 R.P.R. 89 (B.C.S.C.).

[44] *Turney* v. *Lubin,* para. 13.

[45] *Turney v. Lubin,* para. 20.

[46] *Re Sekretov and City of Toronto* (1973), [1973] 2 O.R. 161 (Ont. C.A.).

> be expressed in a resolution or resolutions to be passed at some future time or times as occasion may require. 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: 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.[47] The land had previously been down-zoned to prohibit residential use and allow only forestry use and to set the minimum lot size at 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, with the following term:

> Hereafter, there shall be no cutting, falling or removal of evergreen trees within the Covenant Area WITH THE EXCEPTION that nothing herein contained shall restrict or prohibit the cutting, falling or removal of evergreen trees for the purposes of constructing, installing and maintaining wells, waterlines, driveways, pipes and poles for the purposes of transmission, distribution of electric energy, communication and television, a public trail network, clearing building sites and the curtilege [sic] appurtenant thereto and sewage disposal fields.

In effect, the covenant 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 struck down the down-zoning was successfully appealed and the more restrictive zoning

[47] *Winmark Capital Inc.* v. *Galiano Island Local Trust Committee* (2004), (B.C.S.C.), at http://www.courts.gov.bc.ca/jdb-txt/sc/04/17/2004bcsc1754.htm. Section 35 of the *Property Law Act* is discussed in greater detail in Chapter 6.

reinstated. As a result, the landowner held 8 hectare lots that could be used only for forestry purposes. Given that the land could now be used only for forestry purposes, 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.
>
> 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.

UNITED STATES CASES

The following examples show how the courts in the United States approach conservation easement cases. All but the last example involve interpretation of the terms of the conservation easement. The last example shows how a collateral attack on a conservation easement can threaten its enforceability. It is a cautionary tale for conservation organizations about how they conduct their negotiations.

Example: Construction of a swimming pool prohibited[48]

A restriction in a conservation easement stated that the owner of the property would not, among other things, construct or place buildings or other structures on or above the ground. The landowner, who lived on the property, wanted to build a swimming pool and argued that the pool fell under one of the exemptions in the restriction which allowed "fishing, shellfishing, boating…and other similar recreational uses [on the property] and the repair, maintenance, improvement and building of accessory structures appropriate to said uses." The swimming pool was simply an accessory structure to be used for the recreational use of swimming.

The landowner also argued that the pool fell within an exception in the restriction that allowed for the "improvement of the existing dwelling" and that the Commission had previously allowed him to build decks attached to the dwelling under this exception. The landowner argued that a pool was a similar improvement.

The court rejected these arguments. First, the court found that building a pool was not "accessory" to the recreation: "the structure cannot be 'accessory' as the activity is not possible without the structure." The court found that the exemption allowed for the construction of buildings that were accessory to a pre-existing passive recreational use of the property. For example, the exemption would allow a change room to be constructed next to a swimming pond on the property. Second, the court found that building a pool was not an improvement of the existing building because even if it was flush with the dwelling it was still "an entirely separate structure…"

Example: Construction of an addition prohibited[49]

An easement prohibited the landowner "from building any structure on his property, encroaching on any presently open

[48] *Goldmuntz* v. *Town of Chilmark,* 38 Mass. App. Ct. 696.

[49] *Bagley* v. *Foundation for Historic Georgetown*, 647 A.2d 1110 (D.C.App. 1994).

space, or obstructing a view of the building façade from the street, without first obtaining the written consent of the Foundation [for the Preservation of Historic Georgetown]." The landowner wanted to construct a two-story addition on the back of his house to provide support for new air conditioning units and argued that the terms of the easement were ambiguous. He also argued, based on other easements held by the Foundation, that the easement only prevented him from altering the front of the house.

The court rejected all of the landowner's arguments and held that the easement was clear and unambiguous on its face.

Example: Construction of second dwelling allowed[50]

In this example, the court's determination of the drafters' intent, its application of common law principles relevant to restrictive covenants and its interpretation of the easement worked against the land trust.

An easement on a nine acre farm restricted the land "to its agricultural and open space use…." and provided that the land, buildings and other structures were to be used only for specified purposes including:

(a) Farms, truck gardens, forestry and keeping of livestock and poultry.

(b) A single detached dwelling for one (1) family and not more than (1) such dwelling per lot, except as provided in subparagraph c below.

(c) An additional dwelling unit for one family in a dwelling or another building, provided that the same is used only as a residence for one or more members of the family of persons directly employed in the operation of the uses in subparagraph a above…"

[50] *Southbury Land Trust, Inc.* v. *Andricovich,* 59 Conn. App. 785 (Conn.App. 2000).

New owners of the property wished to construct a detached single family home to be occupied by one landowner's son and his family. The land trust brought an action claiming that the construction of this home would violate the terms of the easement. The land trust attempted to argue that the "dwelling unit" permitted by (c) had to be attached to or constructed within the existing farm house or another existing farm building.

In rejecting this argument, the court relied on a principle that has historically been applied in the interpretation of restrictive covenants:

> Recognizing that "[a] restrictive covenant must be narrowly construed and ought not to be extended by implication"…we decline to adopt the plaintiff's narrow definition of "dwelling unit". Applying the definition found in the very code from which the language in the conservation easement derived, we conclude that the term "dwelling unit" applies to a detached stand alone building, such as a single-family home.[51]

The court commented that if the drafters had intended that new dwellings could not be built, they could have used explicit language to express this, for example, by requiring that any additional dwelling unit be part of an existing dwelling or another existing building. The court had this to say about the drafters' intent:

> Clearly, the drafters wanted to preserve the pastoral aspects of [the land] and sought to stave off future development of the land. The drafters recognized, however, that future generations farming [the land] might want to have their sons or daughters live with them on the farm, but in a separate dwelling unit. The drafters thus allowed for the construction of one more home on the land, but only on the condition that the inhabitants of that home be relatives of those working the farm. The drafters likely rationalized that by restricting

[51] *Southbury Land Trust, Inc.* v. *Andricovich,* at 790.

> ownership of any new home on [the land] to relatives of those farming the land the new inhabitants would have a greater connection to the land and would be more likely to take pains to preserve the pastoral setting of the land…. If the drafters had intended to control the physical design of any new structures on the land, they easily could have done so.

Example: Collateral attack on an easement[52]

A landowner sought to donate conservation easements to a land trust. He was told that the trust normally accepted easements on property consisting of 50 acres or more. The landowner contacted several neighbours about simultaneously donating easements so that the aggregate acreage would qualify for a donation to the trust. As part of the negotiations between the landowners and the trust, the board of the trust decided that it would like a "no subdivision" clause in the easement, but that it would accept the easements without this provision, if necessary.

The letter from the trust to the landowner describing the trust's position on subdivision stated that the board requested that the landowners "consider" adding a "no subdivision" clause. The representative from the trust never specifically told the landowner that the board would accept the easements without the subdivision restriction.

The landowner assumed that the "no subdivision" restriction was non-negotiable and, as a result, his easement included such a restriction. However, his neighbours interpreted the letter as simply an offer and they negotiated their easements without such a restriction. Several years later, the landowner discovered that he was the only landowner with a "no subdivision" restriction. He sued the trust for fraud.

Two lower courts decided that the trust's failure to fully explain its negotiating position was fraudulent and, as a result, the

[52] *Maryland Environmental Trust* v. *Gaynor,* 140 Md. App. 433.

easement was invalidated. An argument by the Land Trust Alliance that "rescinding a conservation easement on the evidence brought forth at trial may do irreparable harm to land conservation in Maryland" did not sway the court.

An appeal was made to the Maryland Court of Appeals and it allowed the appeal.[53] In allowing the appeal the court stated:

> Failure to state more explicitly that [the trust] would accept the conservation easement without a subdivision restriction was not sufficient, by itself, to constitute fraud, as [the trust] had no duty to do so. There was no fiduciary or confidential relationship existing between respondents and [the trust] that would have required such a disclosure in order to avoid any breach of trust…The letter from [the trust] to respondents truthfully and accurately conveyed the decision made by the Board of Trustees at the meeting and concealed nothing from respondents ….

[53] 370 Md. 89; 803 A.2d 512; (2002).

Chapter 4

NEGOTIATING AND DRAFTING CONSERVATION COVENANTS

A conservation covenant is a kind of contract as well as creating an 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". One form of covenant cannot meet the needs of all parties in every circumstance. Each conservation covenant will have its own factual matrix and a form of covenant cannot be expected to 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.[54]

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 explore with the government agency in question the possibility of altering the form of covenant. If the form of covenant is not acceptable and cannot be changed, 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 negotiating 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 land conservation organization to begin discussions about putting a conservation covenant on her land. Alternatively, a land 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 restrictions on land use;
- determining the rights that are reserved to the landowner;

[54] Information about NAPTEP can be found on the Islands Trust website at http://www.islandstrust.bc.ca/.

- preparing and agreeing on a baseline report, which may include mapping, aerial photography, sampling and testing;
- deciding how to allocate costs, liability 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 in 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 document 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 must 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 and that will withstand challenges in the future. 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*. Section 218 authorizes the granting of statutory rights of way to designated organizations.[55] 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;
    - for what purposes 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 ensuring the finished product meets 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

[55] 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.

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

4. Look at the entire document during the drafting process. A court will generally look at the entire document when interpreting a provision. Covenant drafters must therefore engage in the same exercise. Throughout the drafting 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 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 or 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.[56]

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 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 necessary terms are defined and that 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.

[56] See also the annotations in the Annotated Conservation Covenant in Appendix 1 for suggestions about drafting.

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).

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.

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 changes in the character of the neighbourhood, and so on.

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 <u>can</u> be enforced and that <u>will</u> be enforced. Avoid including restrictions that either are not enforceable or will not be enforced by the covenant holder. Both 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.

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.[57] 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 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 the

[57] 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.

uncertainty and help ensure all important parts of the covenant will continue to charge 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 report.[58]

"Boilerplate"

Boilerplate is standard language that is essentially 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.

[58] For more information, see the discussion in Chapter 14 about change in ownership.

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 and 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 (also called residential or subdivision) covenants (see the discussion in Chapter 2) have distinct attributes making them more complex than covenants that are intended to protect land in its natural state.

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 designation of small protected areas as covenants on individual lots or parcels should be avoided because that is administratively cumbersome. If the subdivision is strata titled, the covenanted areas could apply over one or two common

property parcels. Alternatively, a covenant could be placed on one or two undeveloped lots within a subdivision complex.

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.[59] Such a process can allow the conservation organization to raise necessary funds to complete a project.

A covenant can be created in exchange for a density bonus or clustering of density (allowing higher density in some parts of the complex with lower density (or no construction) on other parts). 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.

Again, landowner relations are important. In the case of subdivision development, 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.

[59] 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 users? 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, such as 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 areas, 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.

CHAPTER 5

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 also should consider the organization's capacity to meet its obligations under a covenant.[60] 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 below.

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. Therefore, it is important for a landowner to choose an organization that he or she will feel comfortable dealing with for as long as the landowner continues to own the property. There may be a significant amount of contact during the process of negotiating and granting the

[60] See Chapter 17, Resources of Covenant Holders, for a discussion of the kinds of resources covenant holders need.

conservation covenant. After the covenant is registered, the parties will have periodic contact when monitoring of the covenant provisions occurs.

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. Again, other landowners want to ensure there is no danger of the conservation covenant holder ceasing to exist and enjoy 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. As noted previously, the *Land Title Act* was amended in 1994 to allow non-government organizations to hold conservation covenants, significantly expanding the potential for their use in British Columbia.

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 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 Fund Board, there are an increasing number of covenants held by non-government conservation organizations such as land trusts.

DESIGNATION

Any individual or organization that wishes to hold a conservation covenant must apply to the Surveyor General to be designated before receiving and registering the covenant.[61] 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 way allows the covenant holder access to the covenanted land for monitoring and enforcement purposes.[62] Organizations must be designated to hold statutory rights of way as well. The Surveyor General designates covenant and statutory rights of way holders. Conservation covenants and statutory rights of way may be assigned or transferred to another party. Any party receiving a conservation covenant or statutory right of way by way of an assignment also must be designated prior to receiving and registering the assignment of the conservation covenant or statutory right of way.

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

The Surveyor General Division provides the following guidance about the information an applicant needs to include with an application for designation to hold conservation covenants:[63]

- a statement of whether the applicant is an individual, organization or society; if applying on behalf of a corporation or society, the applicant should indicate the date of incorporation, the incorporation

[61] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(3)(c).

[62] See Chapter 15 for a discussion of statutory rights of way.

[63] See Surveyor General Division website at http://www.ltsa.ca/cms/applications-to-surveyor-general for important information about the designation process, including application forms, as well as a list of the organizations that have been designated to hold conservation covenants and statutory rights of way in British Columbia.

registration number of record (available from the Registrar of Companies), and whether the corporation or society is non-profit in nature;

- a description of the applicant's business and how it relates to holding conservation covenants;
- detailed reasons for requesting designation or assignment;
- a description of the nature of the covenant or covenants which the applicant wishes to hold;
- the legal description of the lands that are the subject of the conservation covenant, unless the application is for a general designation; and
- a statement of whether or not any of the lands to be subject to the conservation covenant lie within an agricultural land reserve (ALR) designated under the *Agricultural Land Reserve Act*.[64]

For designation to hold a statutory right of way, the Surveyor General requires the following information:

- full legal name and incorporation number of the agency to be designated;
- for designation with respect to a particular piece of land:
  - legal description of the land;
  - a copy of the registered title;
  - copies of all pertinent registered or unregistered survey plans; and
- for province or general area designations (see below), the function and range of locations in which the applicant will work.

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

[64] R.S.B.C. 1996, c. 10.

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 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.[65]

MORE THAN ONE HOLDER

It is generally a good practice to have more than one covenant holder, and there are many examples of conservation covenants that are held by more than one covenant holder. 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

[65] See the discussion in Chapter 2 about the requirements related to land within an agricultural land reserve.

- a non-government conservation organization that operates in a particular geographic area and a provincial government body that has conservation objectives in that area.

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).

In some situations, there may be long-term tactical advantages in 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 be in favour of development of that land – and one such government could degrade the conservation options on that land forever after. If the local government lets a land trust hold a covenant on that park, long-term conservation is much better secured. Another advantage in such a local government/land trust partnership is speed in decision-making. Where fast action is needed, as in response to a serious breach of a covenant, a small land trust 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.

It is a good practice for joint covenant holders to enter into a memorandum of understanding with each other allocating responsibility for covenant obligations such as monitoring and enforcement and allocating costs associated with these obligations. Agreement dividing responsibilities at the outset 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 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.

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 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 agreement 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 be 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.

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 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.

Another approach is for the covenant to contain separate terms and responsibilities for each co-holder. This may be necessary to encourage a local government to be a co-holder where the government wants limited involvement as a "back-up plan", or just as an administrator and enforcer of last resort. In this situation, much of what would be in a memorandum of understanding is drafted directly into the covenant.

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*[66] 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 Crown, other than another conservation covenant holder named in the conservation covenant

[66] R.S.B.C. 1996, c. 250, s. 219(11).

document, or an assignee of the conservation covenant holder if the 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.[67] Another form of protection is to have 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.

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.[68] 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 and 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.[69] 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, in perpetuity.

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 an expensive step. Each of these aspects of holding a covenant is discussed in later

---

[67] See article 14 of the annotated covenant in Appendix 1 for wording to set out a procedure for assigning the covenant to another holder.

[68] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(12).

[69] See Chapter 17 for a more in depth discussion of the resources needed by covenant holders.

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. 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.

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.[70]

[70] For one discussion about the importance of standards and practices, see Katie Paris, *Land Trusts: Measuring the Effectiveness of Conservation Easement Programs*, prepared for the Nature Conservancy of Canada, 2004.

The Land Trust Alliance of British Columbia has developed *Land Trust Standards and Practices*[71] 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 *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.

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.

[71] Available on the Land Trust Alliance of British Columbia website at http://best-practices.ltabc.ca/.

NOTES

Chapter 6

MODIFICATION OR TERMINATION OF COVENANTS

Conservation covenants are not intended to be changed or cancelled except in very unusual circumstances. However, circumstances sometimes require that the terms of a covenant be amended or that the covenant 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.[72]
2. The covenant holder can discharge the covenant unilaterally.[73]
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.[74]

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

[72] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(9).

[73] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(9).

[74] *Property Law Act*, R.S.B.C. 1996, c. 377, s. 35(2).

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 the Environment or, if that consent is not obtained, trigger the penalty tax?[75]

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

[75] For more information about the tax implications of donating conservation covenants, see Ann Hillyer and Judy Atkins, *Giving it Away: Tax Implications of Gifts to Protect Private Land,* Vancouver, B.C. West Coast Environmental Law Research Foundation, 2004.

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. 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. 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?
- Was the covenant the subject of an ecological gift? If so, the covenant holder will need to obtain the approval of Environment 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 its "disposal of land policy".[76] 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. 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*.[77] A landowner has an interest; so does someone leasing the property.

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;

[76] For example, see the Islands Trust Fund's "Disposition of Land Policy" at http://www.islandstrustfund.bc.ca/media/47799/03001_disposition_of_land_policy_-_revised_nov_2011.pdf.

[77] R.S.B.C. 1996, c. 377, s. 35.

- 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.[78]

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.

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.[79] The land had previously been down-zoned to prohibit residential use and allow only forestry use and to set the minimum lot size at 65 hectares. This down-zoning was challenged in the court and was initially struck down, which meant that the former zoning, which allowed smaller lots and residential use, was revived. At this time, the landowner began to develop the land. As part of development approval, a restrictive covenant was placed on the land, which prohibited

[78] *Property Law Act*, R.S.B.C. 1996, c. 377, s. 35(2).

[79] *Winmark Capital Inc.* v. *Galiano Island Local Trust Committee* (2004), (B.C.S.C.), at http://www.courts.gov.bc.ca/jdb-txt/sc/04/17/2004bcsc1754.htm.

cutting of evergreen trees on portions of the lots bordering the road to preserve a treed corridor in a proposed residential development. Then, the earlier decision of the court was successfully appealed. That meant 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 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.

Chapter 7

PROFESSIONAL ADVICE

Granting and receiving a grant of a conservation covenant are both 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.

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

The laws (statutes and regulations) of BC, such as the *Land Title Act*, are available at: http://www.bclaws.ca/EPLibraries/bclaws_new/content?xsl=/templates/toc.xsl/group=A/lastsearch=/. The laws of Canada, such as the *Income Tax Act*, are available at: http://laws-lois.justice.gc.ca/eng/.

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

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 should not give legal advice or 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 holder's 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.[80]

[80] See Ann Hillyer and Judy Atkins, *Giving it Away: Tax Implications of Gifts to Protect Private Land*, Vancouver, B.C.: West Coast Environmental Law Research Foundation, 2004 for a detailed guide to the tax implications of gifts of covenants.

INCOME TAX

When a landowner grants a covenant to a conservation organization, the grant is considered 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.[81]

If the value of the covenant has increased since the landowner purchased the property, 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 land trust for part of its value and receiving a charitable receipt from the land trust 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 Canada's EcoGifts program provides tax advantages to landowners who donate ecologically sensitive land or a conservation easement on the land to a

[81] 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.

land trust. It operates through the *Income Tax Act*, which offers significant tax advantages to taxpayers if a taxpayer makes a gift of a covenant on land certified as ecologically sensitive and if the gift is made to a government agency or registered charity designated by the federal Minister of the Environment as authorized to receive an ecological gift.[82]

If a covenant qualifies as an ecological gift, none (rather than one half) of any deemed capital gain resulting from the gift has to be included in the landowner's income for the year. In addition, the donor receives a charitable donation tax credit for the value of the covenant, which can be used to offset up to 100% of the donor's income. Corporations can 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 five years.

To qualify as an ecological gift, the gift must be of land (or an interest in land) certified as ecologically sensitive and the gift must be to a recipient qualified to receive ecological gifts. The fair market value of the land or interest in land must be certified by the federal Minister of the Environment after an appraisal review process. The review process includes requirements about appraising the fair market value of the ecological gift.

When an appraisal is complete, copies of the appraisal and an application for appraisal review are submitted to the federal Canadian Wildlife Service. Once reviewed and approved, the property is visited to confirm ecological sensitivity. The federal government has developed a definition of "ecologically sensitive" to guide the certification process and has authorized several agencies to certify land as ecologically sensitive.

Once the covenant is registered and proof of registration is received by the Canadian Wildlife Service, the Service issues 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. The entire process generally takes more than six months.

[82] A detailed discussion of ecological gifts is beyond the scope of this *Guide*. For more information on ecological gifts, see the Ecological Gifts Program website at http://www.ec.gc.ca/pde-egp/default.asp?lang=En&n=FCD2A728-1.

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.[83] 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 dependants.

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.[84] 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 could agree to share the cost. In some circumstances, 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

---

[83] See Ann Hillyer and Judy Atkins, *Giving it Away: Tax Implications of Gifts to Protect Private Land*, Vancouver, B.C.: West Coast Environmental Law Research Foundation, 2004 and *Green Legacies: A Donor's Guide for B.C.* (Stewardship Series) available through http://www.givegreencanada.ca/publications for a more in depth discussion of estate planning.

[84] For a discussion of 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, 2006, rev. 2010, available at http://ltabc.ca/2011-11-10-09-15-27/ltabc-publications; Ann Hillyer and Judy Atkins, *Giving it Away: Tax Implications of Gifts to Protect Private Land*, Vancouver, B.C.: West Coast Environmental Law Research Foundation, 2004; and Ann Hillyer, Judy Atkins and John B. Miller; *Appraising Easements, Covenants and Servitudes: Guidelines for Valuation*, 2006, under revision 2012.

being engaged. This will avoid any confusion about the assignment and may save valuable time and resources in having the work completed.[85]

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. The Ecological Gifts Program includes an Appraisal Review and Determination Process at the end of which the Minister of the Environment 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.[86]

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
- contact information for program coordinators across Canada.[87]

To address some of the difficulties in valuing covenants, the *Income Tax Act* expressly authorizes the use of the "before and after" appraisal method for valuing a covenant that qualifies as an ecological gift. The value of the covenant is deemed to be the greater of its fair market value otherwise determined and the

---

[85] For additional information about engaging an appraiser, 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, 2006, rev. 2010, available at http://ltabc.ca/2011-11-10-09-15-27/ltabc-publications; and the Ecological Gifts Program website at http://www.ec.gc.ca/pde-egp/default.asp?lang=En&n=FCD2A728-1.

[86] For information about the appraisal and other requirements for ecological gifts, see the Ecological Gifts Program website at http://www.ec.gc.ca/pde-egp/default.asp?lang=En&n=FCD2A728-1. In particular, refer to *Ecological Gifts Program Application Guide: Information and Procedures for Donors and Recipients*.

[87] The current version of the *Guidelines for Appraisals* can be found on the Ecological Gifts Program website at http://www.ec.gc.ca/pde-egp/default.asp?lang=En&n=FCD2A728-1.

amount by which the value of the land on which the covenant is placed is reduced as a result of making the gift of the covenant.[88]

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:[89]

- a metes and bounds description or an abbreviated description (a description of the area in words) of the covenant area;
- 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.

The Land Title and Survey Authority 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.

---

[88] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 118.1(12).

[89] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 99.

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 because practice may differ from one Land Title and Survey Authority office to another or change from time to time.

NOTES

Chapter 8

CHARGES ON TITLE

The 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 less than the fee simple.[90] Covenants, easements, rights of way, and financial encumbrances such as mortgages and liens are all charges. A conservation covenant is also a charge.

Those contemplating entering into a covenant should obtain a copy of the title to the land and of all charges registered against title to the land 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, covenant and rights of way could interfere with the conservation objectives of a covenant.

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.

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, not according to the dates of execution of the documents.[91] 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, pre-existing easements, covenants and rights of way will have priority over the covenant. As explained below, pre-existing charges can threaten the conservation

[90] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 1, definition of "charge".

[91] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 28.

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. 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 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 the 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 not already 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 construction will entail 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 Crown, 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 Crown 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 Crown'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 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 the 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[92] 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. Lenders may insist that the mortgage take priority over the rent charge. If a landowner might want a mortgage to have 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.[93] 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 resulting from the landowner's being in breach of the mortgage.

[92] See Chapter 12 – Enforcement for an explanation of rent charges.

[93] See, for example, section 30.3 of the Annotated Conservation Covenant in Appendix 1.

NOTES

Chapter 9

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 information about the property that details the history and 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 ongoing 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.[94] 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 physical and natural features of the land, including:
    - the location (the legal description, the map location and directions to the site);
    - 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);

[94] See the sample Management Plan outline included in Appendix 2 as a schedule to the Management Agreement.

- 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.

MANAGEMENT AGREEMENTS

As noted above, there will be circumstances in which the parties also may enter into a management agreement.[95] 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 license for the party managing the property to enter onto the land and carry out management functions (necessary where the

[95] See the sample Management Agreement in Appendix 2.

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;
- 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.

NOTES

Chapter 10

COLLECTING BASELINE INFORMATION

Baseline information 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. Depending on the particular circumstances, it is generally prepared in the form of a detailed written report accompanied by a combination of surveys, photos, videotapes and maps. It is sometimes referred to as a baseline inventory or baseline documentation report.[96]

Baseline information also helps the parties identify conservation objectives and draft the covenant itself. It provides the benchmark against which to measure changes in the land and its features. It is essential to the monitoring process. Baseline information makes it easier for both present and future landowners to comply with the terms of the covenant.

The baseline inventory 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. For this and the other reasons explained above, collecting the baseline information and preparing the baseline inventory report are essential parts of covenant preparation. The same care must be taken as is taken in drafting the covenant document itself.

WHEN TO COLLECT IT

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

[96] See *LTABC Guide to Baseline Inventories* The Land Trust Alliance of BC, 2006, available at http://ltabc.ca/2011-11-10-09-15-27/ltabc-publications/61-ltabc-guide-to-baseline-inventories, for a more in-depth description of a baseline inventory. In addition, some conservation organizations have prepared their own baseline report protocols; for example, the Nature Conservancy of Canada (BC Region) and TLC The Land Conservancy have baseline inventory protocols and report templates.

may have to be done at different times of the year to identify and record seasonal changes.

TYPES OF INFORMATION

The baseline documentation report should include a detailed written report accompanied, as appropriate, by maps, sketches, charts, plans, photographs, audio tapes or videotapes. In addition, depending on the circumstances, sampling may be required.

Again, depending on the circumstances, the following kinds of information should be included:

- the location, legal description and size of the property and of the proposed covenant area;a description of other covenants, easements, rights-of-way, leases or licenses relating to the land, including water rights and grazing rights;
- the landowner's name, address, telephone number, e-mail address, and fax number;
- the covenant holder's name, address, e-mail address, telephone and fax number, and a contact name;
- a statement about the significance of the land and the conservation or management goals;
- a history of the site;
- a description of the right of access, if any, to the land;
- a list of buildings, improvements and other structures (e.g. - roads, trails) and their locations on the land;
- a description of natural features – ecosystems, flora and fauna - on the land;
- the aquatic and terrestrial physical features of the land (climate, physiography, geology and soils, hydrology);
- a description of cultural features;

- activities, land use and zoning on and around the land;
- identification of disturbances on the land and potential impact of the disturbances;
- historical photographs and information collected from previous surveys or maps;
- maps, sketches, charts, plans showing location of land and ecological features;
- air and ground photographs and videotapes (with locations[97] and directions), audio tapes;
- results of sampling; and
- any other information, either historic or current, that completes the picture of the land at the time the covenant is granted.

The information in the baseline documentation report forms the basis for monitoring. In order to measure changes most effectively, monitors should be able to record information, take photos or do sampling in the same places and at the same times of year as was done to gather the baseline information.

WHERE TO GET IT

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[98], 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.

---

[97] Use precise locations, such as latitude and longitude or Universal Transverse Mercator (UTM) coordinates.

[98] The British Columbia Conservation Data Centre systematically collects and disseminates information on plants, animals and ecosystems (ecological communities) at risk in British Columbia; go to http://www.env.gov.bc.ca/atrisk/toolintro.html.

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.

WHO SHOULD COMPILE IT

The covenant holder is generally responsible for gathering baseline 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 the baseline documentation report, the covenant holder should work with the landowner to determine the content and format of the report.[99]

The landowner also should be invited to participate in the gathering of the baseline information and preparation of the report. 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 report will help establish a good working relationship between the landowner and covenant holder from the outset.

[99] See, for example, the sample baseline inventory form in *On the Ground: A Volunteers' Guide to Monitoring Stewardship Agreements*, The Land Trust Alliance of BC, 2001, a publication in the Stewardship Series, available at http://ltabc.ca/2011-11-10-09-15-27/ltabc-publications/65-on-the-ground-a-volunteers-guide-to-monitoring-stewardship-agreements.

WHERE TO KEEP IT

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 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 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. [100]

[100] In this example, "Report" will be a defined term in the covenant document. See the Annotated Conservation Covenant in Appendix 1.

The 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 report.

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 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 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 INFORMATION

Baseline 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 report is no longer useful. It may be necessary either to update the baseline documentation report or prepare a new report. Ideally, this would be accomplished by way of an amendment to the covenant to ensure that updated baseline 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.

NOTES

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 report. However, regardless of what is highlighted in the baseline report, monitoring also involves general observation of the property, particularly to ensure that there have been no violations of the covenant.[101] 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[102] 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 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 information;

[101] See *On the Ground: A Volunteers' Guide to Monitoring Stewardship Agreements*, The Land Trust Alliance of BC, 2001, a publication in the Stewardship Series, available at http://ltabc.ca/2011-11-10-09-15-27/ltabc-publications, for a more in-depth discussion of monitoring a variety of stewardship agreements, including conservation covenants. In addition, some conservation organizations, such as Nature Conservancy of Canada (BC Region) and TLC The Land Conservancy have prepared their own monitoring protocols.

[102] 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 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.[103] 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 these 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 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

[103] See Theresa Duynstee, *Landowner Contact Guide for British Columbia*, 1997; at 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. 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.[104] 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.

One 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 seasonal monitoring or only annual monitoring. It may require extensive

[104] The Global Positioning System (GPS) is a space-based satellite navigation system that provides location and time information in all weather, anywhere on or near the earth, where there is an unobstructed line of sight to four or more GPS satellites. It is freely accessible to anyone with a GPS receiver, including many mobile phones.

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 still others, viewing the protected area periodically on Google Earth[105] may provide the information required.

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 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 report. Generally, covenant holders should provide

[105] Google Earth is a virtual globe, map and geographical information program that maps the earth by the superimposition of images obtained from satellite imagery, aerial photography and GIS 3D globe.

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 addition, the documentation of monitoring visits must be as thorough, clear, precise and consistent as possible. Detailed and legible note-taking are 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.

Chapter 12

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. 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 therefore does not arise.

However, in some circumstances, it may be necessary for the covenant holder to enforce compliance with the terms of the covenant to protect the ecological values incorporated in the covenant. 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 and asking that the contravention be corrected. Nevertheless, situations do arise where formal enforcement is necessary. For example, 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.

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

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

In addition, as previously noted, section 35 of the *Property Law Act*[107] 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.

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 determine the intent of the parties at the time the instrument was drafted.

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

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

[107] R.S.B.C. 1996, c. 377.

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 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 should be included in a covenant.

ENFORCEMENT REMEDY

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

- require the covenant holder to serve the landowner with written notice of any suspected breach of the terms of the covenant, 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;[108]
- require the landowner to remedy the breach within a period such as 60 days of receiving the notice; and

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

- 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 be accompanied by a letter offering 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.[109] A rent charge secures payment of a specific amount by the landowner to the covenant holder for each breach by the landowner of the terms of the covenant. The amount of the rent charge is specified in the covenant and may differ from covenant to covenant, depending on factors such as the size of the covenant area and the sensitivity of the land. In addition, the amount is generally indexed for inflation since the covenant is intended to last indefinitely. Commonly, where the breach involves the removal of flora or fauna from the land, the rent charge is increased by the market value of the material removed plus an additional percentage of the value.

A rent charge is registered against title to the land. The covenant 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. [110] 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

---

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

[110] See Chapter 8 Charges on Title. If there are other financial charges such as a mortgage or lien on title before the covenant and rent charge are registered, it will be necessary to obtain a priority agreement from the chargeholder to give the rent charge priority. As explained in Chapter 8, the prior chargeholder may refuse to give the rent charge priority.

ways,[111] 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 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 simply bringing a court action for damages for breach of the covenant.

REQUIRING THE OWNER TO ENFORCE

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

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

[111] See article 12 in the Annotated Conservation Covenant, Appendix 1.

bind successive owners of the land. 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.[112]

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.

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, 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.

---

[112] "Mediation" involves a neutral third party facilitating resolution discussions. "Arbitration", in contrast, involves referring the dispute to an arbitrator who will decide the matter..

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

- Ensure that the suspected violation really is a violation. Does the covenant 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 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.[113]

- 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

[113] Or binding arbitration if required by the covenant.

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 where a breach has occurred, the party enforcing the covenant may need to employ most, if not all, of the enforcement mechanisms available in the covenant to ensure compliance with the covenant, 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 made well after the fact based on recollection.

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 each 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 the 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 decide the matter in dispute for them. 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. However, binding arbitration generally ends the matter, saving the time and money of taking further steps to resolve the dispute.

With binding arbitration, the parties agree to use arbitration instead of the courts to resolve disputes. 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 and the parties must be satisfied with the arbitrator and the arbitration process.

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 to the dispute.

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 almost 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 of ownership.

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 may 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. However, 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 changes in ownership. In addition, it is a good practice for covenant holders to conduct Land Title Register searches on a periodic basis of 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.

It is possible for the covenant agreement to 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 an "activity advisory" whereby the Land Title and Survey Authority electronically notifies it. for up to 60 weeks, of activity on the title of the covenanted land.[114] Similarly, 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 documentation report 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.

---

[114] With an activity advisory, a covenant holder will be notified for a period of up to 60 weeks 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 generate a notice.

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 the landowner 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 the 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, 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.[115]

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, taking 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 is to have access, this should be stated clearly.

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.

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 also 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.

[115] 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 in the absence of 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 the adverse economic consequences of liability 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*[116] 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 to see that individuals entering on the property will be reasonably safe in using the property.[117] 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

[116] R.S.B.C. 1996, c. 337.

[117] *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 the property.

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 to the covenant area for recreational or educational 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.

Where 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 his or her 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. 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. 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 the entry is for the purpose of a recreational activity[118] 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.

[118] 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.

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.

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 and should be addressed prior to finalizing the terms of the covenant.[119] Contamination can occur as a result of a variety of agricultural, commercial and industrial activities. 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.[120]

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.

Covenant holders may owe landowners a duty not to cause reasonably foreseeable harm to the landowner or the property.[121] 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

---

[119] For additional information in the context of land transfers, see pages 28-30 of Paul Peterson, "Securement Process," in Part 3 of Ontario Nature Trust Alliance, *Land Securement Manual* (1999, revised September 2003); at http://www.olta.ca/OLTA/docs/Publications/Land%20Securement%20Manual/Part%203%20-%20Securement%20Process.pdf.

[120] See section 9.5 of the Annotated Conservation Covenant in Appendix 1.

[121] This is a duty which, if breached, gives rise to tort liability.

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 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.[122] 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 areas 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

[122] However, signs will only warn those who can read; small children may remain unwarned by signage.

with no trespassing signs is a trespasser.[123] 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 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 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.

[123] *Trespass Act*, R.S.B.C. 1996, c. 462.

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.[124]

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

[124] See article 18 of the Annotated Conservation Covenant in Appendix 1.

party to another. The party who agrees to indemnify should have insurance to support this promise in the event a successful claim is made.[125]

Example:[126] Conservancy West holds a covenant on a piece of property located in a municipality. Over 80% of the property is comprised of a sensitive wetlands area. 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 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 wetlands, 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 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.

---

[125] See article 9 in the Annotated Conservation Covenant in Appendix 1 for an example of some indemnification provisions.

[126] These are fictitious examples. Readers should obtain their own advice about how to best protect against liability in their particular circumstances.

Example: Sasha owns 50 acres of forested rural property but does not live on the property. Sasha granted a covenant in favour of Conservancy West to protect 10 acres 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.

Chapter 17

RESOURCES OF COVENANT HOLDERS

NON-GOVERNMENT ORGANIZATIONS

The change in the *Land Title Act* in 1994 in British Columbia 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. Even if the conservation covenant is purchased rather than received as a donation, the purchase price will be considerably less than the purchase price of the land itself.

However, there will be acquisition costs even if the conservation covenant is donated to the conservation organization.[127] These costs could include:

- 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 conservation covenant;
- surveying the area of the conservation covenant;
- collecting and documenting baseline information;

[127] See Appendix 3: Steps in Aquisition 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 registered in the Land Title Register.

In addition to these initial costs, there will be ongoing costs associated with monitoring 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 with the conservation covenant, 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. At times outside assistance will be required on a fee for service basis. 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.

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.

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 is discussed in greater detail in Chapter 5.

FOCUSING SCARCE RESOURCES

It may be tempting for an organization to accept every opportunity that comes its way to protect environmentally-significant land with conservation covenants. However, 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. 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 but which may not be of the highest priority to the organization or may be land of lesser priority generally.

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 *Guide*, there are excellent resources available on the Internet.

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.

NOTES

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. 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.[128] "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. Nor will the wording necessarily be same in every document. This annotated covenant does not contain wording relating to specific conservation objectives and land restrictions. These 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.[129]

[128] See Chapter 4 for additional information about drafting conservation covenants.

[129] For example, the Islands Trust Fund has an annotated covenant geared to the natural area protection tax exemption program at http://www.islandstrustfund.bc.ca/media/16996/itfnaptepannotatedcovenant.pdf.

TERMS OF INSTRUMENT – PART 2	EXPLANATORY NOTES
Section 219 Conservation Covenant **And**	→ 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.
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[130] by its date.
BETWEEN:	→ Or AMONG if there are more than two parties. If there is only one covenant holder, the

[130] 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.

agreement must reflect that.

Name, address and occupation of the owner.

AND:

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*

→ 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.

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

→ 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.

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

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

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*.

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

Repeat this paragraph for each covenant holder.

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

→ 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,

accordance with sections 218 and 219 of the *Land Title Act* (British Columbia):

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 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) "Amenity" 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

but would be the 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 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.

It may be necessary to include definitions other than the ones included in this sample covenant, depending on the terms of the covenant. A definition for "ecosystem-based forestry" is provided here as an example, for use where this is allowed as a term of the covenant.

certifying that there were no violations of this Agreement noted before the transfer to the Owner of that interest at the date of issue;

→ 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.

(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;

→ 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 reference to the Covenant Area rather than the Land, where appropriate.

(g) "Covenant Holder" means, unless the context otherwise requires, [*name of Covenant Holder # 1*] or [*name of Covenant Holder #2, etc.*], singularly;

→ Each covenant holder should be defined.

(h) "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;

(i) "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;

(j) "Covenant Holders" means, unless the context otherwise requires, [*include names of each covenant holder*], collectively;

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

(k) "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;

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

(l) "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, fences, gates, driveways, 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;

→ 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 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.

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

→ 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

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

(o) "Management Plan" means the management plan for the Land created in accordance with section 5.1;

(p) "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 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;

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

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

(s) "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

timber production is to be allowed.

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

→ 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

attached to this Agreement as Schedule A;

area or show a subdivision.

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

→ 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.

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

(u) "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 as Schedule B; and

→ Use this definition if the full baseline documentation report is attached to the covenant. (There is no such attachment in this example covenant.)

or

"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 15.5, an overview of which is attached to this Agreement as Schedule B; and

→ Use this definition if an overview of the baseline documentation report is attached to the covenant. (Again, there is no such attachment in this example covenant.)

(v) "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;

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

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

→ These general clauses assist in understanding and interpreting the agreement.

(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 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 warrants the truth of the facts that each party can know.

2.3 The Parties warrant that the facts set out in Recital B is true as of the date of this Agreement.

3. INTENT OF AGREEMENT

→ Article 3 gives the context in which the agreement must be interpreted by any potential reader, including the court.

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

This example concerns a working landscape covenant.

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 health incidence over the long term;

and the Parties agree that this Agreement is to be interpreted, performed and applied accordingly.

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".

3.2 This Agreement shall be perpetual to reflect the public interest in the protection, preservation, conservation, maintenance,

→ This section is important to help ensure that the covenant will last in perpetuity and that perpetual protection is in the public

restoration and enhancement of the Land [*or* Covenant Area] and Amenities for ecological and environmental reasons.

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 the Amenities from the Baseline Condition.

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:

(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;

interest.

→ 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.

Although the covenant holders can pay for an "activity advisory" to be notified 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 ensure such notification.

The sample restrictions set out in this covenant will not all apply in most situations and should not be included unless they do apply. 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 uses;

(ii) causes the erosion of the Land to occur;

(iii) causes or facilitates the loss of soil on the Land;

(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;

(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;

(vii) causes or allows pesticides, including but not limited to herbicides, insecticides or fungicides, to be applied to or introduced onto the Land [*or* Covenant Area]; or

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. TLC The Land Conservancy is a good potential source of sample clauses to deal with specific amenities and resources.[131]

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

[131] TLC The Land Conservancy, *Conservation Covenant Clauses – Including Definition of Terms, Covenant Intent, Covenant Restrictions and Reserved Rights*, Victoria, BC, June 2009.

enforced.

(viii) causes or allows any indigenous flora on the 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 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 Covenant Area;

(f) lease or license the Land [*or* Covenant Area] or any part thereof unless the lease or license is expressly made subject to the provisions of this Agreement and expressly entitles the Owner to terminate the lease or license if the tenant or licensee breaches any of the provisions of this

→ A lease gives someone possession and rights to use the property for a fixed period. A license 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.

Agreement;

(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 Covenant Area, except as required to carry out activities permitted in the Management Plan, other than emergency vehicle use;

(i) allow any commercial activity on the Land except where it is related to Ecosystem-based Forestry that ensures continual crops of forest of varying age classes, on a landscape basis, subject to the tree species' ecological suitability for the site and in consideration of natural forest health over the long term; and;

→ 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.

(j) subdivide the Land 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

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.

→ The parties can provide in the agreement for the creation and 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.

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

→ A baseline report is prepared for each covenant. The report provides a brief history of the land and describes its current state. It also includes a list of the special features and values on the land including known or documented plants, animals, and cultural features.

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.

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 and the Amenities as of the date of this Agreement.

The baseline report provides protection for the parties by documenting the conditions on the land at the time of the agreement. The baseline 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

→ 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

account the natural succession of the flora and fauna over time, without human intervention other than as expressly permitted by this Agreement.

now, the parties would take into account a 50 year change from the baseline information when initiating rehabilitation or considering enforcement.

7. DISPUTE RESOLUTION

→ 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 may occur at some point.

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.

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 If the Parties are not able to resolve the matter within that time, the Parties may appoint a mutually

→ This section permits the parties to have disputes mediated. The parties could consider making

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 resolve the matter within 60 days after the mediator is appointed.

mediation mandatory by stating that the parties must appoint a mediator. If the agreement includes an arbitration clause such as section 7.5, 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 the costs incurred by any party to have a lawyer at the mediation.

7.5 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.

7.6 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.

7.7 The decision of the arbitrator is final and binding.

7.8 The cost of the arbitration will be borne equally between the Parties.

8. OWNER'S RESERVED RIGHTS

→ 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.

8.1 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.

→ 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 viewscapes or construction of fences, driveways, paths or gates. The covenant may have to anticipate requests to construct buildings

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:

(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 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.

that will encroach on the covenant area.

8.3 Without limiting the generality of section 8.1, and subject to article 5, 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;

→ 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

(b) to cluster or exchange density of development for increased or decreased density in other lands owned by the Owner;

ensure that the provisions are not contradictory or inconsistent.

(c) to occupy the Land in accordance with applicable statutes, regulations, plans and by-laws;

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 to show areas in which buildings or structures can be located. A survey affords the best evidence.

(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, 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;

→ 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.

(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 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

→ In many cases, the parties may wish to restrict rather than allow public access.

(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

→ Sections 8.4 and 8.5 clarify that

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, 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 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

the owner may take action to prevent damage to persons or property provided the owner gives the appropriate notice to the covenant holder.

→ Insert this kind of section if the parties want the owner to be able to act in an emergency situation without notice to the covenant holder. This section could also be more restrictive by

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.

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 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.

→ If the covenant holder is found liable by a court for any damage in relation to the Land caused by 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

→ If an administration fee under section 4.3 above is not feasible,

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.

a similar result could be achieved 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

(a) breaches of this Agreement which occur while the Owner in not the registered owner of any interest in the Land, provided that the Owner has received a Certificate under section 13.2;

→ 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. 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 causes beyond the Owner's reasonable control, including accidental fire, flood, storm, pest or fungal infestation, vandalism, trespass and earth shifting or

→ The owner will not be liable for injury to the land caused by natural causes or causes beyond his or her control such as vandalism.

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

→ The Owner is not liable for breaches that occur when the owner attempts to protect against a natural disaster in an emergency situation.

(d) injury or alteration to the Land [*or* Covenant Area] caused by the Covenant Holders exercising their rights under this Agreement.

→ The Owner is not liable for damage caused by the covenant holders.

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

→ 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.

→ 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.

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 the *Income Tax Act* (Canada) with

→ 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 owner and covenant holder;

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].

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

→ The parties can choose another rate of interest or define the prime rate with reference to another financial institution.

dollar commercial loans made by its most creditworthy commercial 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.

→ 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.

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 which the Covenant Holder wishes

→ 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.

to bring forward.

10. STATUTORY RIGHT OF WAY (FOR MONITORING AND ENFORCEMENT)

→ 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.

10.1 The Owner grants to each Covenant Holder a license, 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

→ The parties could agree to more frequent inspections if the circumstances of the covenant warrant it.

(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 practicable, in the sole discretion of the Covenant Holder; and

(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;

→ 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.

(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

→ 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.

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 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

→ This article gives the covenant holder the power to ensure that the owner complies with the terms of the covenant and to remedy any breaches at the

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 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.

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 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.

→ 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.

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

→ 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

reasonable legal fees and disbursements and other reasonable expenses of recovery, as agent for the Covenant Holder that incurred the expenses.	section is not necessary if there is only one covenant holder.

12. RENT CHARGE AND ITS ENFORCEMENT

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.

→ 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 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

→ 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

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.

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 2016 and continues to violate the same term in 2017 along with a violation of a second term in 2017 and then corrects both violations, the penalty would be $20,000 for 2016 plus $40,000 for 2017 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

→ 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.

shall be an increase of 3%.

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, damaged, destroyed, moved, harvested or removed.

→ 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.

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;

(c) an action for appointment of a receiver in respect of the Land ; or

(d) an order for sale of the Land.

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.

→ 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 obtain payment of rent or other money owed.

12.10 Within ten 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.

12.11 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.

12.12 If the Covenant Holder receiving notice given under section 12.9 does

→ 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.

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.

12.13 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

→ 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.

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 and issue a 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.

→ It is prudent for the landowner to request an estoppel certificate confirming compliance before the new owner or lessee/licensee begins activities on the land.

14. ASSIGNMENT OF AGREEMENT OR DISSOLUTION OF THE

→ Because the covenant is intended to last indefinitely, provision must be made for possible

COVENANT HOLDERS

14.1 This Agreement shall be transferable by a Covenant Holder, but the Covenant Holder may assign its rights and obligations under this Agreement only to a person or entity qualified by law at the time of transfer to hold covenants under section 219 of the *Land Title Act* (or any successor provision then applicable) and any applicable regulations.

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.

14.2 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

→ 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.

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.

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 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 Her Majesty the Queen 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.

→ 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 temporarily to the other covenant holder or to the provincial Crown. Although the Crown is named in this example, it is important to be aware that even if the Crown were to take assignment of the covenant upon the dissolution of the covenant holder, the Crown 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

→ A number of provisions require or contemplate notice. The parties should consider the reliability of methods of giving notice, and consider, for example, whether they want to allow notice by facsimile or other 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.

15.1 Any notice or other communication (collectively, notice) required or 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 facsimile 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.

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 number of the Owner*]

Covenant Holders [list separately]:

[*Address of the Covenant Holder*]

[*Facsimile number 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 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.

→ Although the covenant does not carry with it a right of public access, a section such as this could be included for greater 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

→ 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.

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. 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.

If an owner objects to having a sign posted on the land, omit this section.

18. NO LIABILITY IN TORT

→ 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

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.

breach of contract.

19. WAIVER

→ 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.

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.

While this kind of provision expresses the intent of the 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 *Guide.*

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.

20. JOINT AND SEVERAL

→ Where more than one person owns the land, each person is

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.

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

→ The covenant is intended to charge the land and stay on title to the land in perpetuity even if the land is sold, subdivided or consolidated into a larger parcel.

22.1 Unless it is otherwise expressly provided in this Agreement, every obligation and covenant of the Owner in this Agreement constitutes 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. 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 and any parcel into which it is subdivided by any means and any parcel into which it is consolidated.

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 application for registration of this Agreement.

→ 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 priority agreements from holders of existing charges, the owner agrees to try to do so.

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, independent advice from an

→ It is crucial that owners seek independent tax advice before placing a covenant on their land. Granting a covenant can have

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.

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

→ The contract under seal is the

28.1 By executing and delivering this Agreement, each of the parties intends to create both a contract and a deed and covenant executed and delivered under seal.

oldest method of creating an enforceable promise. A promise 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.

→ 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.

30.4 Upon approval of a first mortgage, the Covenant Holders must execute a priority agreement granting priority

→ In order for a mortgage registered after the covenant to have priority over the rent

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 to determine if the Owner is in breach of any of the terms of this Agreement before granting approval and may withhold approval if there is any breach.

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 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

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 an associated inspection – see section 4.3..

NOTES

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 each 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 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 License

The Owner grants to the Manager the contractual license 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 license 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 license 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 licensed 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/Licenses

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.

Nor will all costs 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.

Transaction step	Responsible Party	Cost and Who Pays	Time to Complete
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			

Obtaining copies of charges against title			
Survey of entire property			
Survey of covenant area			
Legal opinion as to title			
Transaction step	**Responsible Party**	**Cost and Who Pays**	**Time to Complete**
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			

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			

Appendix 4

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 information. Also called baseline inventory. 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.

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. Crown in Right of British Columbia or 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 owned by the Crown , also known as public land. Crown land may be held by either the federal or provincial government.

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 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.

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 Crown.

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.

NOTES

Appendix 5

CONSERVATION ORGANIZATIONS DESIGNATED TO HOLD CONSERVATION COVENANTS IN BRITISH COLUMBIA

(Taken in April, 2012 from the Surveyor General's website at http://www.ltsa.ca/cms/bodies-able-to-hold-covenants. It does not include all agencies, organizations and persons designated.)

Conservation Organizations Designated to Hold Covenants Under Section 219 of the *Land Title Act*, Including Conservation Covenants

Abbotsford Land Trust Society

Bowen Island Conservancy

Bowen Island Heritage Preservation Association

C.H.I. – Association for Conservancy Hornby Island

Central Okanagan Land Trust Society

Comox Valley Land Trust

Comox Valley Project Watershed Society

Cortes Land Conservancy Society

Cowichan Community Land Trust Society

Delta Farmland and Wildlife Trust

Denman Conservancy Association

Discovery Coast Greenways Land Trust

Ducks Unlimited Canada

Eco-Care Conservancy of the Powell River Region

Gabriola Land and Trails Trust

Galiano Conservancy Association

Gambier Island Conservancy

Kootenay Land Trust Society

Lasqueti Island Land Conservancy

Mayne Island Conservancy Society

Mt. Matheson Conservation Society

Nanaimo and Area Land Stewards Society

North Okanagan Parks and Natural Area Trust

Pacific Salmon Foundation

Pender Islands Conservancy Association

Quadra Island Conservancy and Stewardship Society

Saltspring Island Conservancy

Saltspring Island Waterbird Watch Collective

Sunshine Coast Conservation Association

Sunshine Coast Natural History Society

The Garry Oak Meadow Preservation Society

The Heartlands Conservancy Society

* The Nature Conservancy of Canada

The Nature Trust of British Columbia

The Real Estate Foundation of British Columbia

The Society for the Preservation of Ayam Creek

TLC The Land Conservancy of British Columbia

TLC The Land Conservancy & Kootenay Land Trust Society

Quadra Island Conservancy and Stewardship Society

* Turtle Island Earth Stewards Society

VNHS Habitat Acquisition Trust Foundation

WBT Wild Bird Trust of British Columbia

* Denotes Province-wide designation.

NOTES

BIBLIOGRAPHY AND REFERENCES

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.

Appraisal Institute of Canada at http://www.aicanada.ca/

BC Laws at http://www.bclaws.ca/EPLibraries/bclaws_new/content?xsl=/templates/toc.xsl/group=A/lastsearch=/

Canada Revenue Agency at http://www.cra-arc.gc.ca/

Canadian Land Trust Alliance at http://www.clta.ca/en/

Conservation Data Centre (BC Species and Ecosystems Explorer) at http://a100.gov.bc.ca/pub/eswp/

Department of Justice Justice Laws at http://laws-lois.justice.gc.ca/eng/

Ducks Unlimited Canada (Institute for Wetland and Waterfowl Research) at http://www.ducks.ca/our-science/our-research/

Ecological Gifts Program at http://www.cws-scf.ec.gc.ca/ecogifts/

Land Trust Alliance (US) at http://www.lta.org/

LTA The Land Trust Alliance of British Columbia at http://www.landtrustalliance.bc.ca/

The Land Centre (Real Estate Foundation of British Columbia) at http://www.landcentre.ca/foundation/

Nature Conservancy (US) at http://nature.org/

Nature Conservancy of Canada at http://www.natureconservancy.ca/en/?gclid=CJWbx7bJ7LECFecWMgodYHsASw

Nature Trust of British Columbia at http://www.naturetrust.bc.ca/

Ontario Land Trust Alliance at http://www.olta.ca/

Provincial (BC) Agricultural Land Commission at http://www.alc.gov.bc.ca/

Species at Risk (Canada) Public Registry at http://laws-lois.justice.gc.ca/eng/regulations/

Stewardship Canada at http://www.stewardshipcanada.ca/sc_national/main/index.asp?sProv=ca

Stewardship Centre for British Columbia at http://www.stewardshipcentre.bc.ca/

Surveyor General of British Columbia at http://www.ltsa.ca/cms/

TLC The Land Conservancy at http://blog.conservancy.bc.ca/

Trust for Public Land (US) at http://www.tpl.org/

West Coast Environmental Law Association at http://www.wcel.org/

Wildlife Habitat Canada at http://www.whc.org/

PUBLICATIONS OF INTEREST

An internet search will provide various websites with up to date lists of relevant publications; for example, see Give Green Canada at http://www.givegreencanada.ca/publications and Environment Canada at http://www.ec.gc.ca/pde-egp/default.asp?lang=En&n=4704013D-1#_3.

The following list includes some of what is available:

Atkins, Judy and Ann Hillyer. *Land Conservation Transactions: Tax Implications of Gifts of Land and Interests in Land*. Ottawa: North American Wetlands Conservation Council (Canada), 2005. Report No. 05-1.

Atkins, Judy, Ann Hillyer and Arlene Kwasniak. *Conservation Easements, Covenants and Servitudes in Canada: A Legal Review*. Ottawa: North American Wetlands Conservation Council (Canada), 2004. Report No. 04-1. Available online at http://www.terreshumidescanada.org/canseasecov.04-1.pdf.

Ecological Gifts Program. *Donation and Income Tax Scenarios,* March 2004.

Habitat Conservation Trust Fund. *Naturescape British Columbia: Caring for Wildlife Habitat at Home*. 1995. Available online at http://www.hctf.ca/naturescape/Provincial_Guide_2003.pdf.

Hillyer, Ann, Judy Atkins and John B. Miller. *Appraising Easements, Covenants and Servitudes: Guidelines for Valuation*. Forthcoming publication.

Hillyer, Ann and Judy Atkins. *Giving it Away: Tax Implications of Gifts to Protect Private Land*. Vancouver, B.C. West Coast Environmental Law Research Foundation, 2004. Available on line at http://www.wcel.org/wcelpub/2000/13020.pdf>.

LTA Land Trust Alliance of British Columbia. *Land Trust Standards and Practices.* Available at http://www.landtrustalliance.bc.ca/docs/Standards.pdf.

Land Trust Alliance. *Land Trust Standards and Practices.* Revised 2004. Available at http://www.lta.org/sp/index.html.

Lind, Brenda. *Working Forest Conservation Easements: A Process Guide for Land Trusts, Landowners, and Public Agencies*. Washington, DC: Land Trust Alliance, 2001.

On the Ground: A Volunteers' Guide to Monitoring Stewardship Agreements. Salt Spring Island, BC: The LTA Land Trust Alliance of BC, 2001. A publication in the Stewardship Series. Available online at www.stewardshipcanada.ca/sc_bc/stew_series/bc_stewseries.asp.

Paris, Katie. *Land Trusts: Measuring the Effectiveness of Conservation Easement Programs*. Prepared for the Nature Conservancy of Canada, 2004.

Surveyor General of British Columbia Website. The website for the Surveyor General has important information about the designation process as well as a list of the organizations that have been designated by the Minister to hold conservation covenants in British Columbia. The website can be accessed through the Crown Land Registry Service Website located at http://www.elp.gov.bc.ca/clrs/.

Thompson, Melissa and Jessica Jay, "An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date," (2001) 78 Denver Univ. Law Rev. 3