

Leaving a Living Legacy:
Using Conservation Covenants in BC

by
William J. Andrews
and
David Loukidelis



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[West Coast Environmental Law Research Foundation](#) 1001 - 207 West Hastings Street
Vancouver, BC, Canada, V6B 1H7



phone: (604) 684-7378
fax: (604) 684-1312
email: admin@wcel.org
<http://www.wcel.org>

The [West Coast Environmental Law Research Foundation](#) is a non-profit charitable society which supports and conducts legal research to develop standards and objectives that will ensure the maintenance of environmental quality.



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Preface

The [West Coast Environmental Law Research Foundation](#) (WCELRF) is 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 the West Coast Environmental Law Association (WCELA), which provides legal services to concerned members of the public for the same two purposes.

This guide is about conservation covenants, a new legal tool that allows the voluntary preservation of privately owned land in British Columbia. A conservation covenant may be granted by a landowner to a non-governmental conservation organization. The guide provides information and encouragement to landowners and conservation organizations that may be interested in placing conservation covenants on privately owned land to protect ecological and other important values of that land. It also provides information to other parties who may be interested in the voluntary protection of private land — local government, lawyers and real estate professionals.

This guide is educational and does not constitute legal advice. Readers concerned about specific land preservation issues in a particular situation, or readers wishing to place a conservation covenant on a specific parcel of land, are strongly urged to seek legal advice from a lawyer.

WJA

Vancouver, December 1995

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The views expressed in this guide are those of the authors and WCELRF. Any errors or omissions are also the responsibility of the authors.

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Chapter 1

Introduction

Protecting private land

Conventionally, people in British Columbia look to government to protect environmentally important areas by creating a park or ecological reserve. Parks and reserves are still vitally important. However, most of these areas are located in the 95% of British Columbia that is owned by the Crown, the publicly owned lands. This is largely because government is increasingly unable to afford to purchase privately owned land.

Unfortunately, much of the most ecologically valuable land in British Columbia is in estuaries and valley bottoms that are mostly privately owned. In addition, government control does not necessarily ensure conservation of the land in the long term. As well, certain conservation objectives can be achieved most cheaply and practically by limiting use of the land without eliminating all use of the land.



As a result, private landowners and conservation groups are turning to voluntary stewardship and to an array of legal tools tailored to safeguard specific land permanently.

Photo: *Scott Covenant, Salt Spring Island, BC*

A new legal tool

In July 1994, British Columbia enacted Bill 28, the *Land Title Amendment Act, 1994*. This legislation allows landowners to grant a conservation covenant to any person designated by the Minister of Environment, Lands & Parks. Technically, this includes individuals as well as non-governmental organizations. However, in this guide, we will focus exclusively on conservation covenants that are held by conservation organizations.

A conservation covenant is a voluntary, written agreement between a landowner and a conservation organization in which the owner of the land promises to protect the land in specified ways. The conservation organization holds the covenant and can enforce it, if necessary, against the owner. The covenant is filed in the BC Land Title Office. The conservation covenant is intended to last forever, and binds future owners of the land, not just the current landowner. The covenant can cover all or just a portion of the landowner's property.

History of conservation covenants

Conservation covenants — known in the US as conservation easements — were first used to protect parkways around Boston in the 1880s. Since the 1930s, the US federal government and some state governments have used easements for habitat preservation and scenic preservation purposes. In 1981, a model statute called the *Uniform Conservation Easement Act* was adopted. By 1984, at least 37 states had enacted legislation to enable use of private or governmental conservation instruments, in many cases following the model act. By 1987, the US Fish and Wildlife Service had acquired over 21,000 conservation easements, protecting some 1.2 million acres of wetland habitat.

In Canada, a number of provinces have enacted conservation covenant legislation in one form or another. The Ontario *Heritage Act* and the Manitoba *Heritage Resources Act* are two examples.

Many uses

Conservation covenants held by conservation organizations are useful in a wide variety of situations:

- protecting ecologically valuable features of the land,
- providing a buffer zone adjoining a park or other protected area,
- requiring agricultural land to be used for farming without damaging important waterfowl habitat,
- limiting private forest land to ecologically sustainable forestry,
- requiring specific management or development practices that protect a variety of values relating to the land, including natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life values,
- providing a buffer zone to protect riparian habitat from logging on private land, and
- protecting a rails-to-trails or other linear conservation project.

Naturally, these are just examples. While there are many types of important values that may be protected by the use of conservation covenants, this guide focuses on protecting the *ecological* values of the land.

What is in this guide

This guide is intended to be used by anyone involved with conservation covenants held by conservation organizations: landowners, conservation organizations, lawyers, real estate professionals, planners, and people in local and provincial governments.

The chapters of this guide address:

- important features of conservation covenants ([Chapter 2](#)),
- what the parties need to do to get started ([Chapter 3](#)),
- establishing objectives and plans ([Chapter 4](#)),

- enforcing a conservation covenant ([Chapter 5](#)),
- tax issues to consider ([Chapter 6](#)),
- aspects of legal liability ([Chapter 7](#)), and
- tips for participants ([Chapter 8](#)).

Appendices address the following:

- example covenants, with comments ([Appendix A](#)),
- frequently asked questions ([Appendix B](#)),
- glossary ([Appendix b](#)),
- a list of organizations ([Appendix D](#)),
- a bibliography ([Appendix E](#)),
- excerpts from statutes ([Appendix F](#)),
- a sample letter requesting designation ([Appendix G](#)),
- a form of priority agreement ([Appendix H](#)),
- example covenants, with photographs ([Appendix I](#)), and
- a form of land management agreement ([Appendix J](#)).

Not legal advice

This guide is educational and does not constitute legal advice. Readers concerned about specific land preservation issues in a particular situation, or readers wishing to place a conservation covenant on a specific parcel of land, are strongly urged to seek legal advice from a lawyer.

Chapter 2

About conservation covenants

This chapter provides some detail about important aspects of conservation covenants held by conservation organizations:

- the kinds of provisions which can be included in conservation covenants,
- the types of promises that may be included,
- how conservation covenants bind future owners,
- what happens when the owner sells or gives away the land,
- circumstances in which conservation covenants may be modified or terminated,
- designation of conservation organizations,
- compliance issues, and
- the need for a legal survey.

Kinds of provisions

The *Land Title Act* (section 215) sets out what kinds of provisions can be in a conservation covenant:

- provisions in respect of the use of the land, or the use of a building on or to be erected on the land,
- requirements that the land is to be built on in accordance with the covenant, or that the land is *not* to be built on except in accordance with the covenant, or that the land is not to be built on at all,
- requirements that the land is not to be subdivided except in accordance with the covenant, or is not to be subdivided at all,
- provisions that parcels of land designated in the covenant and registered under one or more titles are not to be sold or otherwise transferred separately, where the covenant applies to land that is covered by more than one certificate of title, and
- provisions that the 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.

The Act defines "amenity" broadly, to include "any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant."

Positive or negative promises

A conservation covenant consists of promises by the landowner, the covenantor, to do or not to do certain things specified in the covenant. The fact that a covenant can include both positive

obligations (to *do* something) and negative obligations (*not* do something) is very important. In the past, common law rules made it difficult to enforce positive obligations in covenants.

Binding on successors in title



What makes a conservation covenant more than just a contract between the landowner and the conservation group is that the covenant is a *deed* which is registered on title to the land and binds any *future* owners of the land. The legal expression is that the covenant "runs with the land." In effect, the landowner has permanently given up certain property rights regarding the land to the conservation organization. Since the landowner no longer owns these rights, the landowner cannot sell or give them to the next

owner of the land. The rights set out in the covenant remain with the conservation organization that holds the conservation covenant.

Photo: *Tsolum River, Vancouver Island, BC*

Personal release

When a landowner who has entered a conservation covenant later sells or gives away his or her interest in the land, the obligation to comply with the covenant passes to the new owner. The original landowner is no longer liable for a breach of the covenant. This is another aspect of fact that the covenant "runs with the land." It binds the person who is the owner *only* while that person continues to be the owner.

Modification or termination

Conservation covenants are not intended to be changed except in unusual circumstances. This is why it is so important to draft it carefully. However, there are three ways in which a conservation covenant can be changed:

- a conservation covenant can be modified by a formal written agreement between the landowner and the conservation organization holding the covenant,
- someone with a legal interest in the land can apply to the Court to have the covenant varied or discharged in certain limited circumstances, which are discussed in more detail below, or
- the conservation organization holding the covenant can, if it chooses, discharge the covenant.

Modification or discharge by a court

In drafting a conservation covenant, it is useful to bear in mind two of the circumstances (and there are others) in which a court can modify or extinguish a covenant (*Property Law Act*, section 31):

- "where by reason of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete," and
- "where the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled."

If there is any indication that in the future someone may argue that either of these circumstances applies, then it would be wise to address the subject in the covenant itself. For example, the covenant could include a provision such as:

This covenant is intended to preserve this land in its present state and is not to be considered obsolete even if the neighbourhood surrounding the land ceases to be used for agricultural purposes.

However, even such specific statements of intent will not *guarantee* that the court will not modify or discharge the conservation covenant.

Designation

The *Land Title Act* requires that a conservation organization be "designated by the Minister of Environment, Lands and Parks on terms and conditions he or she thinks proper" before it is allowed to hold a conservation covenant. In practice, this designation is issued by the Surveyor General of BC. Normally, groups receive a general designation to hold one or more covenants. Alternatively, an organization could receive a specific designation, which applies to only one particular covenant. Designations in BC all state that they are subject to the approval of the Agricultural Land Commission for sites within the Agricultural Land Reserve. See *Appendix G* for a sample letter requesting designation.

Dissolution of the organization holding the covenant

An incorporated organization can be dissolved for any of a number of reasons. Most commonly, an organization can be dissolved because it has failed to file its annual statements with the government.

The Act provides three possible outcomes if an organization that is dissolved is the holder of a conservation covenant:

- If the covenant is also held by another organization, then the other organization can continue to enforce the covenant.
- If before it is dissolved the organization holding the covenant assigns or transfers the covenant to another organization and if the assignment has been approved in writing by

the BC Minister of Environment, Lands and Parks, then the new holder of the covenant can enforce it. Obviously, this option is possible only where the organization knows in advance that it is going to be dissolved.

- If the group holding the covenant is first dissolved but later becomes reinstated, then the group can continue to enforce the covenant. This option would be relevant where the group was dissolved due to an accidental failure to file annual returns.

If the organization holding the conservation covenant dissolves and none of these options applies, then the covenant simply ceases to be enforceable by anyone, including the Crown.

Non-compliance with the covenant

Obviously, the landowner is required to comply with the terms of the conservation covenant. If the landowner or any future owner of the land *fails* to comply with the covenant, then the conservation organization holding the covenant has three options:

- The conservation organization can discuss the problem with the landowner and try to negotiate an acceptable solution. If there is an agreement, it should be put in writing. The conservation organization should be careful to specify in the agreement that it is not condoning the non-compliance and that it reserves the right to take legal steps to enforce the covenant if non-compliance continues or recurs.
- The conservation organization can rely on whatever remedies are set out in the covenant itself. For example, some covenants provide that the owner will pay a certain amount of money if the owner contravenes the covenant.
- The conservation organization can apply to the court to enforce the covenant. If the conservation organization is successful, it could obtain an injunction ordering the owner to do or not to do whatever is required by the covenant.

Regarding compliance, the conservation organization should remember that it is preferable to *prevent* non-compliance than to have to enforce the terms of a conservation covenant. American conservation organizations with the most experience in this area report that a well-designed program of regular landowner contact is the most effective way to ensure compliance.

A legal survey

A legal survey is a map prepared by a surveyor. Ideally, every conservation covenant would be accompanied by a legal survey identifying particular natural features and areas. A legal survey can be expensive, however, so the question arises as to whether a legal survey is required.

There are really two parts to the question. First, is a legal survey required in order to ensure that the covenant will be enforceable? There is no 'yes or no' answer to this question. It requires a 'judgment call' by the parties and their lawyer(s). Many experts feel strongly that a legal survey is highly desirable.

Second, does the Land Title Office require a legal survey before it will register the covenant? If the covenant is to be registered against the whole parcel of land, then the Land Title Office will not normally require a legal survey.

However, if the covenant is to be registered against only a portion of the parcel, then the Land Title Office will require a reference plan, or, in some cases, an explanatory plan. These are plans prepared by a qualified surveyor in accordance with the *Land Title Act* and other statutory requirements. An explanatory plan does not require an actual survey of the land. A reference plan does, so it is more expensive. A reference plan or an explanatory plan is registered in the Land Title Office, and is given a plan number. This number is referred to in the conservation covenant itself, to allow the affected part of the land to be identified easily. The Land Title Office may consider an explanatory plan acceptable where, for example, a subdivision has recently occurred and the parcel has therefore been surveyed already. In very rare cases, the Land Title Office may allow a conservation covenant to be registered against only part of a parcel of land where that part is described by words in the covenant.



If a conservation organization proposes to take a conservation covenant against only part of a legal parcel of land, it should consult with a BC land surveyor, a lawyer, or the appropriate Land Title Office, to determine whether a reference plan or an explanatory plan will be necessary. The cost of preparing any plan should be considered before the conservation organization agrees to take the covenant.

Photo: *Farm Near Dawson Creek, BC*

Chapter 3

Getting started

Is a conservation covenant required?

A conservation covenant is appropriate where

- the owner of the land is willing to cooperate,
- there is a conservation organization willing to take responsibility for the covenant,
- the owner does not want to transfer complete title (the "fee simple") to the land to the conservation organization, for whatever reason,
- the conservation objectives are capable of being defined in terms of specific things that are to be done or not to be done, and
- the conservation objectives are long-term.

However, a conservation covenant is *not* appropriate in every instance. Another legal tool may be a better choice. See [Here Today, Here Tomorrow: Legal Tools for Protection of Private Land in British Columbia](#) (listed in [Appendix E](#)) for a description of other legal tools which could be considered.



The landowner

In some cases, there is only one landowner who is a potential candidate for giving the conservation covenant.

Photo: *Cunningham Covenant, Salt Sping Island, BC*

In other cases, however, a landowner may be considering involving neighbouring landowners in the conservation project. Or, a conservation group may be considering contacting landowners about the possibility of a conservation covenant. In these cases, whoever is pursuing the possibility of conservation covenants must consider whether to approach all of the landowners at the same time or to contact them one by one. The simultaneous approach facilitates a sense of community spirit toward the conservation project. The one by one approach is more cautious. It allows those involved to work through the details of one covenant, which can then be used as a proposed model for other landowners.

Having identified the landowner(s) who may be involved, an important practical step is to identify correctly who owns the land. For example, even though a conservation group has had contact with only one person regarding a piece of land, it is possible that two people own the

property in joint tenancy. Obtaining a copy of the certificate of title from the Land Title Office is essential. Naturally, everyone with an ownership interest in the land must agree to the covenant.

If there is a mortgage on the property, the parties to the covenant should make every effort to obtain a priority agreement from the mortgage holder. This would give the conservation covenant higher priority on the title to the property than the mortgage. If this is not done, in the event of a foreclosure proceeding on the mortgage, the conservation covenant could be discharged from the title.

The conservation organization

Which non-governmental organization is going to hold the covenant? The simplest and often the best approach is to have the covenant held by a local conservation association. This facilitates land stewardship: local people retain control over the land. The main downside is that the longevity of the local group may be uncertain. Remember, a conservation covenant is meant to remain in place for hundreds of years.

To deal with this problem, another approach is to have the covenant held by a provincially-based or nationally-based conservation organization, which is more likely to continue to exist indefinitely. The downside of this approach is that a large organization may be located a long distance from the land, making it less able to monitor compliance with the covenant. Another possible problem is that large conservation organizations often have to safeguard their scarce resources by limiting themselves to land that meets certain ecological criteria, which may not happen to include the land in question.

There are hybrid approaches intended to provide both local stewardship and longevity. One is to have two conservation organizations hold the covenant, one local and one large. The covenant itself specifies the roles of the two groups, the local group usually doing routine monitoring and the large group responsible for enforcement, if necessary.

Another hybrid approach is to have the local group manage the land under a management contract with the owner, while a large organization holds a conservation covenant. In this model, the large organization ensures that broad conservation objectives are met, while the local group plays a 'hands on' role. One example of this approach involves a property on Denman Island owned by the Islands Trust Fund Board. The Denman Conservancy Association manages the land under a management contract with the Board. The Nature Conservancy of Canada holds a conservation covenant regarding the property. This protects the Board's current conservation objectives over the long term.

Yet another approach is to have a conservation organization and another entity able to hold a conservation covenant hold the covenant jointly. The *Land Title Act* permits a covenant to be held by the province, a municipality, regional district or local trust committee under the *Islands Trust Act*. In appropriate circumstances, any one of these bodies could hold a covenant along with a conservation organization. The covenant itself would describe the responsibilities of each holder.

It is important that an organization that will hold a covenant has the experience and resources - including human resources - to monitor and enforce the covenant effectively. There is not much use creating a conservation covenant if its provisions are not followed. Conservation organizations must not blindly accept every covenant that is offered to them. Limited volunteer resources should be focused on land that meets the group's objectives and has the highest ecological values.

Chapter 4

Objectives and plans

Ecological values and conservation objectives

Before drafting a covenant, it is critically important that the conservation organization and the owner identify

- (a) the ecological values of the land, and
- (b) specific conservation objectives in relation to the land.

By "ecological values of the land" we mean the aspects of the land that are ecologically valuable. Land will usually have many different ecological values. For example, the land may provide habitat for a certain species, serve as a groundwater recharge area, provide a good example of a particular bio-geoclimatic type, or provide seasonal forage for a migratory species.

By "conservation objectives" we mean feasible, anticipated outcomes in relation to the land. It is important to distinguish between ecological values and conservation objectives, because not all ecological values will necessarily be protected by the conservation objectives contained in the conservation covenant. Why not? Some ecological values will be of a higher priority than others. Indeed, protecting *all* ecological values may not even be possible. Some may actually be mutually inconsistent. Promoting migratory bird forage by repairing dikes on a foreshore area, for example, may be inconsistent with promoting fish habitat by allowing the dikes to disintegrate.

Identifying ecological values and conservation objectives may be difficult. People who are very close to a piece of land often simply love it. Their reasons for valuing the land may be totally personal. At first, they may be hard pressed to define specific conservation objectives beyond wanting to leave the land in its natural state. In some cases it may be useful to get assistance from local experts, universities or the BC Conservation Data Centre. However it is done, this is an important step. Identifying ecological values clearly will motivate all concerned to put special effort into the particular conservation project. It will also help define conservation objectives. Identifying conservation objectives will help define specific requirements in the covenant. It will also help people understand the particular challenges addressed by the conservation project.

Specific requirements

After specifying the conservation objectives, the next step is to identify particular things that the landowner must do or must not do to achieve the objectives. Remember, this includes future landowners who may not know how to achieve the objectives without direction from the

covenant. Indeed, a future owner may not even *want* to achieve the conservation objectives. So, the requirements must be carefully worded to ensure that they can be enforced, if necessary.

Recording the baseline



Baseline information regarding the current state of the land will help the parties identify the conservation objectives. Also, a written baseline report will make it easier for the present and future owners to comply with the covenant. For example, if the covenant requires all or part of the land to be left in its natural state, then, obviously, it's important for everyone to be as clear as possible about what constitutes the natural state of the land.

The baseline study should include narrative descriptions and inventories of representative land features, ecosystems and species. Maps and charts also can be very useful. These can be supplemented by photographs and even videotapes, with representative images being selected from specified observation points. Later, monitoring can be recorded by taking photos or videos from the same vantage points.

Photo: *Enchanted Forest, South Pender Island, BC*

It may be helpful for the landowner and conservation organization to spend time together on the area to be protected by the conservation covenant and to agree on the state of the land and the information to be included in the baseline study. This approach can also be used for subsequent inspections of the land done for monitoring purposes.

There are two options regarding filing the baseline report in the Land Title Office:

- If the report is not very long, it can be included in the covenant, or attached as an appendix to the covenant and filed with the covenant in the Land Title Office.
- Alternatively, if the study is too bulky to be attached to the covenant, the Land Title Office may accept the report as a document with a document filing number. The covenant is registered separately against the title to the affected property, and the existence of the separately filed document is noted on the title as part of the description of the covenant. Also, the covenant itself will refer to the document filing number of the baseline study. This way, future owners and others will be alerted to the existence of the separately filed baseline study, and will be able to have access to it.

If the baseline report is *not* filed in the Land Title Office, then the covenant should refer to the report and a copy should be kept by each party. Presumably, the conservation group holding the covenant would store the baseline report along with its monitoring records.

Management plans

In addition to the covenant itself, the parties often establish some form of land management plan, to ensure that the covenant's conservation objectives are met. Essentially, a land management plan specifies *who* will do *what*, *when*, in relation to the plan. It may also address *why*, to motivate and educate future users of the plan. The amount of detail will depend on the complexity involved. Remember, managing the land is the responsibility of the landowner, not the group holding the covenant.

There are three basic types of management plans:

- plans that are attached to the covenant,
- plans that are a separate legal contract, and
- plans that are a voluntary agreement.

Management plans attached to the covenant

The covenant may specify that an attached management plan is *mandatory*, that is, it must be complied with. It binds the landowner and may also impose requirements, such as for monitoring, on the conservation organization holding the covenant. Typically, the covenant will say that the management plan can be changed only with the mutual consent of the landowner and the conservation organization.

Management plans in a separate legal contract

The second type of management plan is also mandatory, but for a different reason. It is in or referred to in a *contract* separate from the conservation covenant. For example, it may be part of a land management agreement (contract) between the landowner and a local conservation group that may or may not hold the covenant. Here, the obligation would be on the group to manage the land in accordance with the management plan, which, presumably, would ensure compliance with all or part of the conservation covenant. Being a contractual relationship, this sort of management plan does not 'run with the land,' so it would not bind a future owner of the land although the conservation covenant itself would.

A management plan in a separate legal contract is especially useful where the landowner does not live on or near the land. To foster local stewardship of the land, a local group would take responsibility for managing the land. Whether or not this local group also holds the conservation covenant is a separate question. Sometimes, the local group does not want to hold the covenant, because it does not have the resources to enforce the covenant if that should become necessary, or because the group does not anticipate continuing to exist beyond the lifetimes of its current members. In this case, the conservation covenant would be held by a provincial or national conservation organization. This conservation organization would not have a presence on the land on a daily basis, but it would be available for enforcement purposes if necessary. Alternatively, a local group can hold the covenant, either on its own or jointly with a larger conservation organization. The joint approach combines the resources and longevity of the larger organization with the knowledge and commitment of the local group.

Denman Island Example

An interesting example of a management plan in both the covenant and a separate contract is the Inner Island Nature Reserve on Denman Island. The land is owned by the Islands Trust Fund Board. The Board has a *Reserve Management Agreement*, a land management contract, with the Denman Conservancy Association, a local conservation organization. This Agreement requires the Denman Conservancy to manage the land in accordance with a Management Plan, which is attached to the Agreement.

The Islands Trust Fund Board also granted a conservation covenant to the Nature Conservancy of Canada. The covenant requires the Board to comply with the Agreement and the Plan. It also requires the Board to ensure that any other land management agreements it enters regarding this land are consistent with the Plan. However, the covenant does allow the Board to amend the Plan, as long as it gives the Nature Conservancy an opportunity to provide comments. Thus, the Plan binds the Denman Conservancy Association because of the land management contract and it binds the Board because of the covenant. As a result, the Denman Conservancy Association provides on-site stewardship of the land and the Nature Conservancy provides a hands-off monitoring and potential enforcement role.

Management plans in a voluntary arrangement

A third type of management plan is voluntary. The document provides guidance rather than rules. Plans of this type can be made by the conservation group or the landowner. They can focus on how the group will monitor the covenant and/or how the landowner will manage the land. A voluntary plan of this type is not part of the covenant. Thus, it cannot grant any rights or impose any obligations on the landowner that are not in the covenant itself. But, a voluntary plan usually will be more detailed than the covenant and can be changed as necessary.

Monitoring

It is very important for a conservation organization holding a conservation covenant to plan how it will monitor compliance with the covenant. Monitoring has three purposes. First, it lets the conservation organization know whether the covenant is being complied with. Second, in the event that enforcement of the covenant becomes necessary, information from past monitoring may be needed as evidence. Third, information from monitoring will help with land management.



Photo: *Monitoring marsh levels, Scott Covenant, Salt Spring Island, BC*

The plan for monitoring could be included in the covenant itself, in a land management plan (which could be attached to the covenant or separate, see above), or in the conservation organization's administrative procedures.

In any event, the covenant should include a provision that allows the conservation organization access to the property in order to carry out monitoring. Specifying access rights in a conservation covenant held by a conservation organization involves legal issues which are discussed below, in [Chapter 8, under Tips for Lawyers](#).

Chapter 5

Enforcement

Court remedies

It is possible for a conservation organization holding a conservation covenant to *sue* a landowner who is in breach of the covenant. The suit would be for either damages or specific performance or both. Specific performance is a court order that the landowner do or refrain from doing whatever is required by the covenant. If the landowner were to disobey this order, the conservation organization could bring contempt of court proceedings against the owner. However, there are legal issues regarding whether and when damages or specific performance is available. They are discussed in *Chapter 8*, under Tips for Lawyers.



Since court remedies can be expensive and the outcome uncertain, many landowners and conservation groups choose to set out specific additional enforcement options in the covenant itself. Options to consider include alternative dispute resolution, self help, a rent charge, and bonding or letters of credit. It is up to the parties to the covenant whether or not to choose any of these options.

Photo: *Peace River Valley, Taylor, BC*

Alternative dispute resolution

Alternative dispute resolution (ADR) refers to a provision in the covenant that requires the parties, both the landowner and the conservation organization, to participate in a problem-solving process in the event of a dispute. There are various ADR processes that can be selected.

Typically, ADR processes require the parties to select a neutral third party who helps the parties to clarify their respective interests and to identify a solution that will be mutually satisfactory. In the arbitration model, the neutral party who is referred to as the arbitrator can impose a solution if the parties cannot agree. In the mediation model, the mediator can only make a non-binding recommendation if the parties do not agree.

Self help

Another enforcement option is a clause allowing the conservation organization to enter the land and to correct any breach by the landowner and then to bill the owner for the cost. If the owner

refuses to pay, the conservation organization would have to bring a lawsuit in court to recover its costs of correcting the breach. This self help clause is commonly used in statutory rights of way and easements.

Rent charge

An enforcement option which may be most suitable where the conservation organization has *paid* the landowner for the conservation covenant is a "rent charge" under section 215 of the *Land Title Act*. In this case, the landowner agrees to pay up to a specific amount of money to the conservation organization if the owner breaches the covenant. In addition, the landowner secures this potential debt with a financial charge on the property, roughly similar to a mortgage. If the landowner breaches the covenant and refuses to pay, the covenant holder can bring an action in court to have the land sold to recover the penalty. This would apply to a new owner of the property, who is bound by the conservation covenant.

In addition, the covenant can specify that the conservation organization can use a remedy called "distrain," in which the conservation organization can simply seize certain assets of the owner. Note that a conservation organization might not want to rely on a rent charge if the landowner has already filed other financial charges against the property, such as mortgages, since these would be higher in priority.

Bonding and letters of credit

In some cases, the parties may decide that the landowner should post a bond, a letter of credit, or cash as security for the owner's performance of the covenant. This is unlikely to be a commonly used option, however. Conservation covenants are usually intended to be long-term arrangements. Providing security in this form would be expensive and would be an administrative inconvenience because of the need to refresh the security periodically.

Chapter 6

Tax issues

Income tax

Placing a conservation covenant in favour of a conservation organization on a property can have income tax implications for the landowner. But, before we say more, here are three important points to consider:

- The income tax implications of a covenant vary greatly depending on the particular income tax situation of the landowner.
- Income tax rules in this area are both complicated and changing, so consult a professional for assistance regarding any specific questions about an actual situation.
- The tax implications of a conservation covenant should be considered as one component of the larger process of "estate planning" by the landowner. This refers to planning for the financial aspects of the landowner's old age and transfer of assets upon death or beforehand.

The income tax implications of conservation covenants stem from the fact that when a landowner grants a conservation covenant to a conservation organization the financial value of the subject land is usually reduced. For example, if the existence of a covenant prevents residential or commercial development of the property, then the financial value of the land to a prospective purchaser would likely be reduced by the covenant. The amount of the reduction in the value of the property is considered to be the value of the covenant.

Note that this value has been *given* from the landowner to the conservation organization holding the covenant. There are two important income tax consequences for the landowner. (They apply to the *landowner* rather than the conservation organization, which does not usually have to worry about income tax.)

Charitable donation

First, if the conservation organization is registered as a charitable organization under the *Income Tax Act*, then the making of the covenant is a donation to a charity. Naturally, this is good news for the landowner/taxpayer.

Recently, there has been more good news. In its March 1995 budget, the federal government announced changes to the *Income Tax Act* that will make it easier for a landowner donating a conservation covenant to a charitable organization to use the charitable credit to the fullest extent possible. Normally, a charitable credit can reduce a taxpayer's income by no more than 20% in one year. Under the new rules, charitable donations of ecologically sensitive land will *not* be subject to the usual limit of 20% of the taxpayer's annual income. In order to qualify, the donated land must be certified by the federal minister of environment to be ecologically sensitive land,

"the conservation and protection of which is, in the opinion of that Minister, important to the preservation of Canada's environmental heritage." (*Ways and Means Motion to Amend the Income Tax Act, etc.*, tabled December 12, 1995, section 20(1)) In addition, one of the main purposes of the conservation group receiving the gift of the covenant must be the conservation and protection of Canada's environmental heritage, and the group must be approved by the minister regarding the gift in question. Although the legislation refers to the minister making these decisions, in practice it will be civil servants who make the decisions. To make it run more smoothly, the federal government has offered to let the provinces make these designations, although federal-provincial agreements for this have not yet been approved. The new rules will be in effect for the 1995 tax year. Legislation implementing the changes was introduced in Parliament in December 1995 and is expected to be approved.

Capital gain

Second, and this is the bad news, by giving away part of the value of the property the landowner/taxpayer is deemed under the *Income Tax Act* to have disposed of it, triggering capital gain. This applies only to the conservation covenant's portion of the value of the property, but it can still be significant. For example, suppose a landowner bought property in 1960 for \$1,000 and it is now worth \$100,000 without the covenant and \$80,000 with the covenant. The covenant is valued at \$20,000. This represents 20% of the current value of the property. Taking 20% of the original purchase price comes to \$200, so the value of this portion of the property went from \$200 to \$20,000, which is a capital gain of \$19,800. Triggering the capital gain means that the gain of \$19,900 is deemed to be income whether or not the landowner/taxpayer actually received any cash.

Here are two additional points regarding capital gains:

- Not all capital gains are taxable, most notably any capital gain regarding the taxpayer's principal residence. However, for large properties "principal residence" includes only the house and a defined amount of surrounding acreage, not the entire property.
- Eventually, the death of the landowner will trigger a capital gain on the whole property. So, if there is going to be income tax payable on the capital gain, then it will eventually be paid by the landowner's estate even if the landowner chooses not to grant the conservation covenant. This illustrates why the covenant should be considered as part of overall estate planning.

In light of all of this, it is essential that the landowner get advice from a tax expert before placing a conservation covenant on his or her land.

Photo: *Headquarters Creek, Vancouver Island, BC*



Property tax

Property taxes are based on the "assessed value" of the property in question. The BC Assessment Authority determines the assessed value based on what is referred in the *Assessment Act* to as the "actual value," which is roughly equivalent to the market value. Thus, to the extent that granting a conservation covenant regarding property changes its market value, the assessed value of property should change, and taxes will change accordingly. Significantly, the 1994 legislative changes authorizing non-governmental organizations to hold conservation covenants also amended the *Assessment Act* to specify that, in determining actual value, the assessor shall give consideration to any terms or conditions contained in a conservation covenant.

From the landowner's point of view, the critical question is whether and how much the Assessment Authority will reduce the assessed value of the land due to the granting of a covenant. There appears to be only one example in which a property has been reassessed following the granting of a conservation covenant. In that case, the assessor concluded that the covenant caused no change in the assessed value. Until there are more examples, however, it will be difficult to predict exactly how much property tax relief, if any, a landowner could expect from the granting of a covenant.

Property transfer tax

The BC property transfer tax does not apply to the granting of a conservation covenant in favour of a conservation organization.

In addition, where a conservation covenant is placed on a property and (a) the covenant is in favour of the Crown and (b) the property itself is also sold, there is an exemption from property transfer tax on the sale of the property. Also, note that a land transfer is exempt from the tax where the recipient is a charitable organization and the land is to be used for a charitable purpose (*Property Transfer Tax Act*, section 5(2)(1)).

Chapter 7

Liability

The landowner

To understand the effect of a conservation covenant in favour of a conservation organization on the potential liability of the landowner, one must remember that the landowner already has certain liabilities even in the absence of a covenant. In particular, any occupier of land has a duty of care to avoid situations that could reasonably be expected to cause harm to others, under the *Occupiers Liability Act*. In addition, an occupier of land has a duty not to cause a legal nuisance, or to unreasonably interfere with his or her neighbours' enjoyment of their land.

There are two key ways in which a conservation covenant might *add* to a landowner's risk of liability. The first is where a member of the



conservation organization holding the covenant is injured while on the land monitoring the covenant. The second is where a member of the public is injured while on the land for recreational purposes which are allowed or promoted by the covenant.

Photo: *Enchanted Forest, South Pender Island, BC*

There is no perfect solution to the liability issue. The owner and the conservation organization should take steps to minimize hazards, post warning signs, and maintain adequate liability insurance. It may be most common for the *landowner* to obtain and pay for liability insurance on the land. However, it is open to the parties to the conservation covenant to agree that the *conservation organization* will obtain and pay for the insurance as part of the overall arrangements for dealing with the land. Insurance is a subject which could be addressed in a management plan.

The conservation organization

Non-enforcement

The most obvious liability question regarding a conservation organization holding a conservation covenant is whether the conservation organization can be held liable for failing to enforce the covenant if the owner violates the covenant. Generally speaking, the answer is no. The conservation organization has the *right* to enforce the covenant, but it does not have an *obligation* to do so.

Liability as an occupier

A second liability question is whether a conservation organization holding a conservation covenant is an "occupier" of the land under the *Occupiers Liability Act*. If so, then the conservation organization, like the landowner, has a duty of care to third parties. According to the *Act*, a conservation organization would be an occupier if it has responsibility for and control over the condition of, or the activities on, the land or structures on it. Whether this applies to any specific case would depend on the terms of the covenant. For example, if the covenant allows the conservation organization to open or close a recreational trail across the land, and the conservation organization opens the trail when it is unsafe to do so, then the conservation organization may be liable for an injury suffered in consequence by a member of the public using the trail.

A related liability question is whether a conservation organization holding a conservation covenant would be liable for damage it caused to neighbouring landowners. Presumably, it would, but only to the same extent that anyone with an interest in land has responsibilities to neighbours. For example, if the conservation organization protects a wetland on the property by constructing a dike in such a way as to cause flooding on a neighbour's property, then the conservation organization might be liable for damages in nuisance or trespass.

Liability to the owner

A different liability question is whether a conservation organization holding a conservation covenant owes a duty of care to the owner of the land. Presumably, it does. Thus, the conservation organization, in its actions regarding the covenant, must not negligently cause foreseeable damage to the owner or the owner's land.

Chapter 8

Tips for participants

This section lists a number of important issues that should be considered when the terms of a conservation covenant are being negotiated and when the covenant is being drafted and registered. The issues are set out in relation to a number of different parties who may be interested in encouraging the use of conservation covenants to protect private land.

Tips for landowners

- It may seem surprising, but in some cases you will have to *persuade* a conservation organization to accept a covenant over your property. If the ecological values of your property do not coincide with the priorities of a conservation organization, then the organization may be reluctant to take on a covenant regarding the land because of the expense of monitoring the covenant. You may have to use your powers of persuasion and approach a variety of conservation organizations to identify an appropriate holder of the covenant.
- Make your consideration of the possibility of a conservation covenant part of your estate planning. Get tax advice.
- Make sure you understand and agree with any proposed conservation covenant, since the covenant will contain your promises.
- It is important to remember that the conservation organization is not obligated to accept the proposed covenant if it does not want to, and that both you *and* the conservation organization must be satisfied with the contents of the covenant.
- Get independent legal advice before you sign a covenant, preferably before the covenant is written. This means advice from a lawyer who is not acting for the conservation organization or any other party involved.

Tips for lawyers

- A conservation covenant should specify that the landowner is granting a *licence* to the conservation organization to allow it to enter the land for monitoring and enforcement and that the covenant creates this licence coupled with the grant of the conservation covenant. Alternatively, a conservation organization that is designated to hold a statutory right of way under section 214 of the *Land Title Act* could use this type of right of way in conjunction with a conservation covenant.
- A self-help clause must be drafted carefully, so that the courts will uphold it as a covenant running with the land, as opposed to characterizing it as a mere personal covenant that does not bind successors in title.
- In drafting a conservation covenant, bear in mind that the covenant holder may have difficulty proving a claim for damages for breach unless the covenant gives the holder rights to enter, to document the damages and to remedy the breach. Without these rights

there may be a problem showing that the holder suffered compensable loss by showing the changes (damages) over time. (See the 1994 decision of the Court of Appeal for England in *Bredero Homes Ltd. v. Surrey County*, [1993] 3 All ER 705.) In any event, the enforceability of the covenant will be enhanced by stipulating that specific relief, specific performance or an injunction is the preferred remedy, as opposed to damages. Of course, this is no guarantee the court will grant this relief, since specific relief is an equitable remedy within the discretion of the court.

- If the conservation organization that will hold a covenant is incorporated outside of BC (for example, a federally incorporated body), be sure that it is registered under the *Society Act*, Part 8, to carry on business in BC. The *Society Act*, section 81, prohibits an unregistered extraprovincial society from holding an interest in land (e.g. a conservation covenant) in BC.
- Check that the purposes specified in the constitution of a conservation organization are broad enough to include holding an interest in land.
- Since a conservation covenant is an interest in land, the rules about acting for more than one party in a real estate transaction must be followed. The landowner must get independent legal advice.
- The *Land Title Act*, section 215(2), allows the landowner and the conservation group the option of including in a conservation covenant a promise by the landowner to indemnify the conservation group regarding liability that the conservation group might acquire in relation to the covenant in connection with any matters agreed to by the parties.
- Where there is more than one owner of the land there may be disputes in the future about which one is responsible for complying with particular aspects of the covenant, especially if out of pocket expenses are involved. The *Land Title Act*, section 215(2), states that a conservation covenant may include a provision for the "just and equitable apportionment (division) of the obligations under the covenant as between the owners of the land affected."

Photo: *Scott Covenant, Salt Spring Island, BC*



- In order to help enforce the requirements of a conservation covenant, the *Land Title Act*, section 215(2), allows the option of including in the covenant "a rent charge charging the land affected and payable by the covenantor and his successors in title." This is not rent in the usual sense of money paid by a tenant to a landlord, but refers to an amount of money that the landowner must pay to the conservation organization if the landowner violates a requirement of the covenant. If the money is not paid, the group could apply to the Court to have the landowner's interest in the land sold in order to provide funds to pay the rent charge. A rent charge is merely an option and is not required, so the landowner may not want to agree to including one in the covenant.

Tips for provincial or national conservation groups

- Organize your conservation covenant holdings systematically, as you have done with your property holdings.
- Prepare for many offers of conservation covenants, especially if the tax consequences of conservation covenants turn out to be positive for the landowner.
- Consider working with local conservation organizations, either holding a conservation covenant jointly or having the local group manage the property under a contract with the landowner while your group holds a covenant.

Tips for local conservation groups

- Assess your resources realistically. Holding a conservation covenant is a long-term responsibility. Consider holding the covenant jointly with a provincial or national organization that has a good chance of being around indefinitely.
- Choose properties carefully. Pick land with strong ecological values. Among other benefits, this will help motivate volunteers to monitor the covenant.
- Make a management plan. Assign responsibilities for monitoring, landowner contact, and other similar issues to individuals and require periodic reporting back.

Tips for real estate professionals

- Consider using conservation covenants as a method of ensuring public amenities within land development projects.
- Work with established conservation organizations to ensure that the holder of the covenant is not seen as unduly influenced by the developer.
- When encountering properties with conservation covenants on the market, take care to explain to potential purchasers both the obligations and intrinsic benefits that come with the covenant.

Tips for local government

- Consider working with a conservation organization and holding a conservation covenant jointly with such a group.
- Consider conservation covenants in favour of conservation organizations as a potential tool to support land stewardship programs.
- Where the municipality *owns* land for purposes that include conservation, consider granting a conservation covenant regarding the land to a local conservation organization, a provincial or national conservation organization or to both jointly. The Islands Trust Fund Board, for example, is taking this approach, to insulate the conservation objectives from possible future political pressures.

Appendix A

Covenant, with comments

Purpose

The purpose of this Appendix is to set out the subjects that either *must* or *can* be included in a conservation covenant, and to offer some suggested wording. Naturally, this is for educational purposes only. A specific covenant must be customized to address the particular circumstances involved.

A modular covenant

Comments

Form C

TERMS OF INSTRUMENT - PART 2

CONSERVATION COVENANT

or

SECTION 215 CONSERVATION COVENANT

or

CONSERVATION COVENANT AND STATUTORY RIGHTS OF WAY

=> *Rather than having the signatures of the parties located at the end of the covenant document, the signatures are located on a Land Title Act form called a Form C, Part 1. The covenant document is called Part 2 and is attached to Part 1.*

=> *The reference to Part 2 links this document to Part 1, which includes the signatures.*

=> *If the document includes statutory rights of way, easements or other instruments, then these should be included in the title.*

Reference date

This Agreement dated for reference June 1, 1995
is

=> *This date does not have to be the same as the dates of the signatures, which are specified separately in Part 1.*

BETWEEN:

TRUST FUND BOARD, a corporation
under the *Islands Trust Act* (British
Columbia), 2nd Floor, 1627 Fort Street,
Victoria, BC, V8W 3E1

=> *Use "AMONG" where there are three or more parties, rather than "BETWEEN."*

("Covenantor")

AND:

THE NATURE CONSERVANCY OF CANADA, a corporation incorporated under the *Companies Act* (Canada) and extra-provincially registered in British Columbia, 2nd Floor, 827 West Pender Street, Vancouver, BC, V6C 3G8

("Covenantee")

GIVEN THAT:

A. The Covenantor is the registered owner of the land legally described in this Agreement;

B. The Covenantor wishes to grant the Covenantee a covenant under s. 215 of the *Land Title Act* (British Columbia) in order to protect and conserve that land, and

C. The Covenantee has been designated by the Minister of Environment, Lands and Parks under s. 215(1.2)(c) of the *Land Title Act* as a person authorized to accept covenants under s. 215 of the *Land Title Act*.

This Agreement is evidence that in consideration of the payment of \$2.00 by the Covenantee to the Covenantor (the receipt and sufficiency of which is acknowledged by the Covenantor), and in consideration of the promises exchanged below, the Covenantor covenants and agrees as follows with the Covenantee in accordance with s. 215 of the *Land Title Act* (British Columbia):

Definitions

1. In this Agreement

(a) "Covenantee" means The Nature Conservancy of Canada;

=> Instead of referring to the parties as "Covenantor" and "Covenantee," a more easily understandable approach is to refer to them as "Landowner" and "Conservancy." Whichever terms are used they should be used consistently throughout the document.

=> The Preamble states the legal status of the parties, specifies the landowner's general intention, and sets the stage for the rest of the document.

=> The recital regarding designation is mandatory and without it the covenant will be rejected by the Land Title Office.

=> This clause is essential since, without this consideration clause, the contractual aspects of the covenant may be unenforceable.

=> It is common to repeat the short-form names of the parties here as well as stating them first in the Parties section.

(b) "Covenantor" means Trust Fund Board, a corporation under the *Islands Trust Act* (British Columbia), and its successors;

(c) "enactment" has the meaning given in the *Interpretation Act* (British Columbia) on the reference date of this Agreement;

(d) "Land" means the land on Denman Island, BC, legally described as

PID: 018-012-256
Lot A, Section 21
Denman Island, Nanaimo District
Plan VIP55499;

or

(e) "Management Agreement" means the agreement regarding management of the Land, between the Covenantor and Denman Island Conservancy Association, a copy of which forms Schedule A to this Agreement; and

(f) "Management Plan" means the document entitled "Management Plan for the Inner Island Nature Reserve and Adjacent Crown Lands, Denman Island", approved by the Trust Fund Board in February, 1994, by resolution TFB 94/12, a copy of which forms Schedule B to this Agreement.

or

(g) "Riparian zone" means the creek running through the southwest corner of the Land and the land extending 10 metres back from the top of the embankment of the creek.

(h) "Remainder" means that part of the Land outside the Riparian zone

or

=> This is a good place to set out the legal description of the land in question. If it is defined as the "Land," that term can be used throughout the document.

=> It is also possible to use this section to define any relevant areas within the Land, for example, the "Pond," the "Cliff," the "Creek," or the "Habitat Area." However, there is a need for a reasonable degree of certainty since this will affect enforcement of the covenant and perhaps the ability to register the covenant. If the relevant area is the area covered by the covenant, it will normally be necessary to have a reference plan or an explanatory plan showing the area of the covenant.

(i) "Map" means the timber cruise map prepared by Acme Consultants a copy of which is attached to the Agreement as Schedule A.

or

(j) "Conservation objectives" means to maintain or enhance the productivity of the Land as forage for migratory waterfowl.

=> This also is a good place to define Conservation Objectives or similar terms that are used in the document. The examples listed in this covenant are fairly narrow and you may want to choose broader objectives. However, make sure the objectives are within the scope of the objectives permitted in the Land Title Act, section 215.

or

(j) "Conservation objectives" means to preserve the Land in its natural state as of the reference date of this Agreement.

or

(j) "Conservation objectives" means to protect the Riparian zone from damage due to logging.

or

(j) "Conservation objectives" means to protect the Garry Oak stand on the Land in its natural state as of the reference date of this Agreement, and to provide public access to the Garry Oak stand for educational and recreational purposes defined further in this Agreement.

Intention

The Covenantor and the Covenantee agree that:

=> This section guides any reader, including a court, about how to interpret the document.

(a) the intent of this Agreement is to ensure that

- (i) the Land is protected and kept in its natural state as of the reference date of this Agreement, as generally described in the Management Plan and in accordance with the Management Agreement, and
- (ii) trees on the Land are dealt with only as expressly permitted by this Agreement,

and the Covenantor and the Covenantee agree that this Agreement is to be interpreted, performed and applied accordingly, and

(b) this Agreement is intended to be perpetual in order to protect the Land, as set out in this Agreement, in view of the public interest in protecting the Land forever for ecological and environmental reasons.

Covenants

3. Subject to sections 6 and 7, the Covenantor covenants and agrees with the Covenantee that the Land must be protected, preserved and conserved, including by strictly adhering to the following non-exhaustive conditions:

(a) no component of the land within the Land, including soil, gravel or rock, may be disturbed, explored for minerals, moved, or removed from the Land;

(b) subject to section 6, no living or dead tree, which in this section includes bushes and shrubs, or other plant life on the Land, may be trimmed, pruned, cut down, damaged destroyed, moved, harvested or removed from the Land;

(c) no herbicides, insecticides or pesticides may be applied or introduced on or to the Land;

(d) there may be no alteration or interference with the hydrology of the land, unless the Covenantor receives the prior written consent of the Covenantee;

(e) the Land must not be polluted or contaminated by any matter;

(f) there may be no interference with, or alteration of, any wetland or body of water in the

=> Specifying that the agreement is to be perpetual and reciting the public interest in protecting the land is done in case there is an attempt in the future to have a court modify or discharge the covenant on the basis that it is obsolete.

=> This section contains the promises regarding the land.

=> Make sure that each commitment is realistic. For example, stating that the endangered species must be kept alive may not be possible even with the best of intentions. It would be more realistic to state that the endangered species or its habitat must not be harmed.

=> Make sure that each commitment can be clearly understood by anyone reading the covenant including people who were not original parties to the covenant such as subsequent landowners or anyone involved in enforcing the covenant.

=> Where possible, word the commitments as prohibitions, or things that cannot be done, as opposed to positive obligations, or things that must be done. It is usually easier to tell if there has been compliance or non-compliance with a prohibition than with a positive obligation.

Land;

(g) no fixtures or improvements, including buildings or other structures, may be built, affixed or placed on the Land;

(h) no road or trail, other than any road existing on the Land on the reference date of this Agreement, may be laid out or constructed on the Land, unless the Covenantor has received the prior written consent of the Covenantee, not to be withheld unreasonably;

(i) without limiting section 3(e), no fill, soil, rock, rubbish, ashes, garbage, waste or other material foreign to the Land may be deposited in or on the Land;

(j) no hunting, fishing, commercial gathering or grazing of domesticated animals may be carried out on the Land; and

(k) no other acts may be carried out on or in respect of the Land which, in the opinion of the Covenantee, acting reasonably, may have a detrimental impact on the Land.

Mandatory land management plan (optional)

=> Referring to the management plan in the covenant this way makes the plan mandatory.

4. The Covenantor and the Covenantee agree that without limiting the generality of section 3,

(a) any management activities undertaken with respect to the Land must be designed and implemented in accordance with the Management Plan and the Management Agreement, and any other management agreement for the Land between the Covenantor and any other party,

(b) any act undertaken by the Covenantor on or in respect of the Land must be designed and implemented in accordance with, and must be consistent with, the Management Plan, and

(c) that any management agreement other than

the Management Agreement must be consistent with the Management Plan, the Covenantee agreeing that the Management Agreement is consistent with the Management Plan for the purposes of this Agreement.

5. The Covenantor may review, and revise, the Management Plan from time to time, in its sole discretion, and the Covenantee agrees that any revision to the Management Plan becomes the Management Plan for the purposes of this Agreement. The Covenantor must give notice to, and consult with, the Covenantee as soon as is practicable each time the Management Plan is reviewed by the Covenantor and the Covenantor must consider any comments of the Covenantee, which the Covenantee must make within 30 days after notice is given to the Covenantee under this section.

Conservation enhancement (optional)

6. Despite section 3,

(a) but subject to section 5, the Covenantee agrees that activity necessary for fish or wildlife habitat protection, preservation, conservation, restoration or enhancement may be undertaken on the Land, but only with the prior written consent of the Covenantee, not to be withheld unreasonably, and

(b) nothing in this Agreement prohibits or affects the right of the Covenantor or any other party to undertake such activities on the Land as are necessary to

(i) maintain, repair, improve, alter or replace anything described in section 3(h) existing on the Land on the reference date of this Agreement, or

(ii) prevent or mitigate any damage or loss to any real or personal property or any person, including through flooding.

=> This version gives the landowner the right to amend the management plan after giving notice to the covenant holder and considering any comments it may have.

=> We strongly recommend including a section of this type, because even if the intention of the parties is to manage the land so as not to interfere with natural processes, there could be situations in the future where it is necessary to take some action in order to carry out the conservation objectives. For example, if an exotic species, such as purple loosestrife, a fast growing plant that chokes out native vegetation in wetlands, took hold, the landowner should probably at least have the option to act.

Exception for risk to humans or property

7. Despite the rest of this Agreement,

(a) if any living or dead tree on the land poses a threat to the safety of those on or immediately adjacent to the Land by its falling or fire, that tree may be cut down or trimmed with the prior written consent of the Covenantee, not to be unreasonably withheld, so as to remove the risk, but the Covenantor and the Covenantee agree that unless it would constitute a fire hazard, the cut tree or trimmings must be left on the Land so that natural processes can occur, and

(b) any living or dead tree on the Land may be cut down or trimmed without the consent of the Covenantee in an emergency situation, such as fire or threat to human safety.

Rent charge (optional)

8. As security for the performance of the Covenantor's obligations under this Agreement, by this section the Covenantor grants to the Covenantee a perpetual rent charge against the Land, ranking prior to all other financial charges and encumbrances registered against the Land. This rent charge secures payment to the Covenantee by the Covenantor of \$25,000.00. The Covenantee may enforce this rent charge only if the Covenantor is in breach of any provision of this Agreement and has not cured the breach, or is not diligently and effectively proceeding to cure the breach, within 10 days after notice to do so is given to the Covenantor by the Covenantee. If the breach is not cured within 30 days after the notice to cure was given by the Covenantee, the Covenantee may enforce this rent charge. The Covenantee may enforce this rent charge by any combination, or all, of:

(a) an action against the Covenantor for the money secured by the rent charge,

=> This is another highly recommended section. Without it, one or both parties might have to go to court to modify the covenant in order to avoid a liability problem.

=> Since the covenant is intended to last indefinitely, consider building into the rent charge a margin for inflation.

(b) distraint against the Land to the extent of the money secured by the rent charge,

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

(d) an order for its sale.

This rent charge is created both under section 215(2)(b) of the *Land Title Act* (British Columbia) as an integral part of the statutory covenant created by this Agreement and as a fee simple rent charge at common law. Enforcement of this rent charge by the Covenantor does not limit, or prevent the Covenantor from enforcing any other remedy or the right the Covenantee may have against the Covenantor.

Limitation on covenantor's obligations

8. The Covenantor is only liable for breaches of this Agreement caused or contributed to by the Covenantor or which the Covenantor permits or allows. The Covenantor is not liable for the consequences of the requirements of any enactment or law or any order, directive, ruling or government action thereunder. The Covenantor is liable only for breaches of this Agreement which occur while the Covenantor is the registered owner of any interest in the Land and then only to the extent of that interest.

No liability in tort

9. The parties agree that this Agreement creates only contractual obligations and obligations arising out of the nature of this document as a deed. The parties agree that 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 and to limit the parties to their rights and remedies under the law of contract and the law pertaining to deeds under

=> It is important to include this clause, even if it could be argued that the Land Title Act already provides it. This is a critically important aspect of the covenant, so there is no point in leaving any doubt about the intention of the parties. However, it is also important to note that not all types of promises the parties wish to make fall within the enabling language of section 215 of the Land Title Act. Anything that does not will not run with the land and will not bind future owners.

=> It could be argued that these limitations are part of the law anyway, but for the sake of clarity it makes sense to include them.

=> This section is intended to limit the liability of the landowner and the conservation organization to the terms of the covenant itself and to prevent a court from adding any additional duties and corresponding liabilities using legal concepts such as negligence. Whether a court would honour this intention if one party sued the other at some time in the future cannot be guaranteed.

=> This section relates only to tort

seal.

liability between the parties to the covenant. It does not, and could not, limit the liability of either party to some third party who is not a party to the covenant.

Covenant runs with the land

10. Unless it is otherwise expressly provided in this Agreement, every obligation and covenant of the Covenantor in this Agreement constitutes a personal covenant and also a covenant granted under s. 215 of the *Land Title Act* (British Columbia) 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 the Land is consolidated.

=> This, of course, is what makes the conservation covenant more useful than a mere contract.

Registration

11. The Covenantor agrees to do everything necessary at the Covenantor's expense to ensure that this Agreement is registered against title to the Land with priority over all financial charges, liens and encumbrances registered or pending registration in the Land Title Office at the time of application for registration of this Agreement.

=> Registration of the covenant is essential. Also, the parties should make every effort to obtain and register a priority agreement from any other party holding a registered interest on the land, such as a mortgage holder, to ensure the covenant is not discharged if there is a foreclosure action. See Appendix H for an example of a form of priority agreement.

Waiver

12. An alleged waiver of any breach of this Agreement is effective only if it is an express waiver in writing of the breach. A waiver of a breach of this Agreement does not operate as a waiver of any other breach of this Agreement.

=> The intention of this section is to prevent the landowner from arguing at some time in the future that the covenant is no longer enforceable because the holder of the covenant failed to enforce it even though the breach of the covenant had been occurring for a long time. Even so, a court might not enforce a covenant if the holder allowed a breach to occur for a long period without taking action. Therefore, timely enforcement of any breach is essential.

Severance

13. 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.

=> This makes it clear that one invalid or unenforceable term does not make the whole covenant fail.

No other agreements

14. This Agreement is the entire agreement between the parties regarding its subject and it terminates and supersedes all other agreements and arrangements regarding its subject.

=> The covenant must contain all of the promises between the parties. If either party has any expectations about what will happen regarding the land, then those expectations must be stated in the covenant or else they will not be enforceable. Each party should remember that while they may have a cooperative relationship with the other party at the present time, the relationship could change if there is a dispute about the covenant. Also, new parties may become involved in the future, such as a new landowner or a new board of directors of the conservation organization.

Binding of successors

15. This Agreement binds the parties to it and their respective successors, heirs, executors and administrators.

=> This clause states the intention of the parties that the covenant will bind their successors.

Deed and contract

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

=> The purpose of this clause is to attempt to protect the deed components of the covenant if for some reason the contract portion should be held to be invalid.

Execution using Form C

As evidence of their agreement to be bound by the above terms, the parties each have executed

=> This section specifies that, as stated above, the signatures go on the Part 1 form, not at the end.

and delivered this Agreement under seal by executing Part I of the *Land Title Act* Form C to which this Agreement is attached and which forms part of this Agreement.

Schedules

=> *Details, such as maps, belong in schedules. Make sure to refer to them at least once in the body of the covenant.*

Appendix B

Frequently asked questions

Can a company grant a conservation covenant? Yes. Any person who owns land or persons who own land jointly can grant a conservation covenant. Legally, a person includes a company, a society incorporated provincially or federally, and any other body which is legally entitled to own land, as well as a natural person.

Who can hold a conservation covenant? Any legal person, that is, an individual, a society or a company, can apply for designation to be eligible to hold a conservation covenant. Probably the most common type of "person" to hold a conservation covenant will be a society incorporated under the BC *Society Act* or a federally incorporated society that is registered extra-provincially in British Columbia. While it is technically possible for an individual to hold a conservation covenant, this poses problems since natural life expectancy will normally be shorter than the intended duration of a conservation covenant. It would also be unusual for a *company* to be designated, since the purposes of most companies would not include protection of land.

Does a conservation organization have to be a registered charity in order to hold a conservation covenant? No. A conservation organization only has to be incorporated in BC or registered extra-provincially in BC to be eligible to apply for designation to hold conservation covenants. Naturally, it would likely be an advantage for the conservation organization also to be registered as a charitable organization under the federal *Income Tax Act*. Registration as a charitable organization gives the organization the right to issue tax receipts for donations. But, obtaining charitable status is not a prerequisite to holding a conservation covenant.

If a landowner grants a conservation covenant regarding a piece of land, can the landowner still sell the property? Yes. But, remember that the covenant will bind the new owner. Thus, the purchase price might be different than if there were no covenant on the property.

What if a conservation organization that holds a covenant ceases to exist? If there is another conservation organization jointly holding the covenant, the other organization continues to be able to hold and enforce the covenant. Likewise, if a local government jointly held the covenant, it would continue to hold be able to enforce the covenant. If the conservation organization assigned the conservation covenant to another organization before it ceased to exist, after obtaining the permission of the BC Minister of Environment, Lands and Parks, then this new holder of the conservation covenant can enforce the covenant. If the conservation organization that ceased to exist is later reinstated, the covenant would continue to be enforceable by that organization from the date of its reinstatement. If none of these apply, then the covenant ceases to be enforceable by anybody.

What if a landowner is unable to find a conservation organization willing to receive a conservation covenant for the landowner's property? If no conservation organization or local

government body is willing to hold a conservation covenant, then it will not be possible to place a conservation covenant on the property. There are a number of organizations listed in *Appendix D* which may be able to provide information about organizations that might be willing to hold a conservation covenant.

Is it necessary to obtain a legal survey of the property in order to register a conservation covenant? If the conservation covenant is to be registered against the entire parcel, then a legal survey is not usually required by the Land Title Office (although a legal survey is highly desirable in order to improve the enforceability of the covenant). However, if the conservation covenant is to be registered against only a part of the parcel of land, then a reference plan (includes a legal survey) or, sometimes, an explanatory plan (doesn't include a legal survey) will need to be prepared and registered in the Land Title Office with the conservation covenant. It is highly recommended that the parties consult the Land Title Office early in the process to determine what requirements that office has in connection with a legal survey or plan of the property. This will let the parties take into account the cost of the preparation of the plan and the time required to have the work done.

If a conservation organization is considering receiving a conservation covenant, are there liabilities to be aware of? Yes. See *Chapter 7*, "Liability."

Are there tax advantages to a landowner who places a conservation covenant in favour of a conservation organization on the landowners property? There may be tax advantages and other tax considerations. See *Chapter 6*, "Tax Issues." It is essential to obtain specific tax advice early in the consideration of placing a conservation covenant on a piece of land.

Do landowners and conservation organizations need to get government approval before agreeing to and registering conservation covenants? Government approval is required only in that a conservation organization must receive designation under the *Land Title Act* to hold a conservation covenant. In addition, the designation will specify that if the land in question is within the Agricultural Land Reserve, then the approval of the Agricultural Land Commission must be obtained. It is also necessary that the conservation covenant meet the requirements for registration under the *Land Title Act* so that the Land Title Office will file the conservation covenant for registration. Other than that, government approval is not required.

Can a conservation organization that has received a conservation covenant later transfer the covenant? A covenant can be assigned to another party if the assignment has been approved in writing by the Minister of Environment, Lands and Parks. The party receiving the covenant would have to be designated by the Minister of Environment, Lands and Parks, unless it was the Crown or a municipality.

Can the landowner be sued if someone from the conservation organization holding the conservation covenant is hurt on the land while monitoring the covenant? Possibly. See *Chapter 7*, "Liability."

What is a "land trust" and how it is connected to a conservation covenant held by a conservation organization? The term "land trust" is sometimes used to refer to an organization

whose purpose is to own land or interests in land for conservation purposes. It is not a term with particular legal significance. At other times, the term "land trust" is used to refer an actual legal trust. There are a number of types of legal trusts and any one intending to hold land in trust should obtain legal advice to ensure all of the legal requirements are met.

Is a landowner who owns property subject to a conservation covenant required to comply with the covenant after the landowner sells the land? No. The new owner is bound by the covenant and the previous owner is no longer bound.

Can the conservation covenant impose obligations on the holder, that is, the conservation organization? Yes. Technically, a conservation covenant is both a contract and a deed. As a contract, a covenant can include obligations on the conservation covenant holder. Normally, the covenant operates as a deed, largely containing promises by the landowner to do or not to do specific things in relation to the land.

Can a conservation covenant in favour of a conservation organization be placed on a property even if there is a mortgage on the property? Yes. But the mortgage would have priority if it were registered first. In a mortgage foreclosure, the conservation covenant would be discharged from title to the property. Therefore, a conservation organization and landowner should attempt to obtain a priority agreement from the mortgage holder before registering the conservation covenant on title to the property.

Will a conservation covenant protect the land against mineral exploration by someone other than the landowner? No. Except in rare cases, the landowner does not own the rights to the minerals under the surface of the land. Thus, the landowner cannot give the rights to these minerals to the conservation organization. So, if a prospector stakes a claim on the land under the *Mineral Tenure Act*, then the rights and obligations that go with the claim will apply even if there is a conservation covenant registered on the title to the land. However, the conservation covenant could contain provisions that would prevent the *landowner* from staking or developing a claim on the land.

Will a conservation covenant guarantee that the land will not be expropriated? No. The landowner's rights to the land are subject to the power of the government and various designated agencies to expropriate land or an interest in land, such as a right of way. A conservation covenant between the landowner and a conservation organization does not change this. If the government chooses to expropriate part of the land to build a highway or for some other purpose, then the existence of a conservation covenant is no legal protection. However, a conservation covenant may provide the basis for a good argument that an alternative route should be chosen.

Does placing a conservation covenant on land mean that the public has the right to go on the land? No, not unless the covenant specifically says so.

Appendix C

Glossary

The following is a list of the meanings of some of the terms used in this guide.

Buffer zone: an area of land between an area that requires special protection and other, surrounding land.

Compliance: acting in accordance with the provisions of a covenant, or refraining from doing anything prohibited by a covenant.

Conservation covenant: a voluntary, written agreement between the owner of land and a conservation organization in which the landowner agrees to protect the land in certain ways. (This guide focuses on covenants held by non-governmental organizations, but readers should be aware that the term "conservation covenant" is also used elsewhere to refer to a similar covenant held by a municipal government.)

Conservation easement: another term for a "conservation covenant."

Conservation organization: an incorporated non-profit group whose purposes include owning land or interests in land, such as a conservation covenant.

Court: the Supreme Court of British Columbia.

Covenant: an agreement or promise, relating to a parcel of land and set out in a legal document, containing promises by the landowner in respect of uses of the land, limiting or prescribing the uses to which the land will be put.

Covenantee: the holder of the covenant (the conservation organization).

Covenantor: the landowner or landowners who made the covenant.

Deed: a written document which transfers an interest in land.

Designation: approval of an organization allowing it to hold a conservation covenant by the BC Minister of Environment, Lands & Parks (in practice, given by the Surveyor General).

Discharge: cancel.

Easement: an interest in land, less than ownership of title, which gives the holder of the easement certain rights, such as access to the land or specific uses of the land.

Enforce: take steps to require a landowner to comply with the terms of a conservation covenant, such as by exercising an enforcement option within the covenant or by going to court.

Estate planning: making financial and legal arrangements for one or more persons to provide for retirement and for passing assets to their heirs.

Extinguish: discharge or cancel.

Hold a covenant: to possess the interest in land referred to as a conservation covenant.

Indemnity: a promise or a contract to reimburse someone if they are held legally liable for something.

Land Title Office: the provincial government office which holds the centralized daily registry of changes in the title to individual pieces of property. There are offices in several locations throughout the province.

Monitor: observe and record aspects of the land protected by a conservation covenant.

Rails-to-trails: conversion of a closed-down railway line into a recreational trail.

Reciting: stating something in a legal document.

Riparian: having to do with the edge of a stream, river, shore or other body of water.

Run with the land: a phrase used to describe an interest in land where the interest is owned by someone other than the owner of the land and the interest continues to be owned by that person even if the owner of the land sells or otherwise transfers ownership of the land.

Appendix D

Organizations

The following is a list of national, provincial and regional organizations that may be able to provide assistance, plus some WWW sites that provide useful information.

National

Nature Conservancy of Canada

contact: Kirk Davis, Regional Director
phone and fax: 604-656-6286

Ducks Unlimited Canada

contact: Tom Slater, Provincial Manager
phone: 604-374-8307
fax: 604-374-6287

Provincial

Nature Trust of BC

contact: Ron Erickson, Executive Director
phone: 604-925-1128
fax: 604-926-3482

BC Conservation Foundation

contact: Deborah Gibson
phone: 604-576-1433
fax: 604-576-1482

Regional

Coast Islands Conservancy

contact: Ron Pither, Chair
phone: 604-539-5024
fax: 604-539-2000

Comox Valley Project Watershed Society

contact: Chris Hilliar
phone: 604-339-1361
fax: 604-339-4612

Denman Island Conservancy

contact: Juan Barker
phone and fax: 604-335-2401

Greenways Committee of the Provincial Capital Commission

contact: Trevor Matthews, Chair
phone: 604-386-1356

Islands Trust Fund Board

contact: Trust Fund Coordinator
phone: 604-387-4000
fax: 604-387-4047

Pender Island Conservancy

contact: Jan Kirkby
phone: 604-629-3381
fax: 604-629-6299

Quadra Island Conservancy

contact: Michael Mascall
phone and fax: 604-285-2331

Salt Spring Conservancy

contact: Maureen Milburn
phone: 604-285-2331

Silva Forest Foundation

contact: Susan Hammond
phone: 604-226-7222
fax: 604-226-7446

Turtle Island Earth Stewards

contact: Deen Selwood
phone and fax: 604-224-7490

WWW Sites

[Land for Nature: Federation of B.C. Naturalists](#)

[U.S. Land Trusts](#)

[McDowell Sonoran Land Trust](#)

[Jefferson Land Trust](#)

[The Trust for Public Lands](#)

[Bodega Land Trust](#)

[Wicken Fen](#)

Appendix E

Bibliography

The following is a short list of helpful publications:

Adirondack Land Trust, *Developing a Land Conservation Strategy: A Handbook for Land Trusts*, (Elizabethtown, NY: Adirondack Land Trust, 1989).

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Diehl, Janet & Thomas Barret, *The Conservation Easement Handbook: Managing Land Conservation and Historic Preservation Easement Programs*, (Alexandria, VA: The Trust for Public Land & Land Trust Exchange, 1988).

findlay, barbara & Ann Hillyer, [Here Today, Here Tomorrow: Legal Tools for the Voluntary Protection of Private Land in British Columbia](http://freenet.vancouver.bc.ca/local/wcel/wcelpub/5110/5110.html), (Vancouver, BC: West Coast Environmental Law Research Foundation, 1994,
<http://freenet.vancouver.bc.ca/local/wcel/wcelpub/5110/5110.html>).

Hilts, Stewart & Ron Reid, *Creative Conservation: A Handbook for Ontario Land Trusts*, (Toronto, ON: Federation of Ontario Naturalists, 1993).

Land Trust Alliance, *Appraising Easements: Guidelines for Valuation of Historic Preservation and Land Conservation Easements*, (Washington, DC: Land Trust Alliance, 1990).

-----, *Starting a Land Trust: A Guide to Forming a Land Conservation Organization*, (Washington, DC: Land Trust Alliance, 1990).

Layard, Nora & Lorelee Delbrouck, editors, *Stewardship '94: Revisiting the Land Ethic, Caring for Our Land -- Proceedings of the Symposium*, (Victoria, BC: BC Ministry of Environment, Lands and Parks, 1994).

Lind, Brenda, *The Conservation Easement Stewardship Guide: Designing, Monitoring and Enforcing Easements*, (Washington, DC: Land Trust Alliance, 1991).

Loukidelis, David, "Preserving Greenspace: Conservation Covenants & Others," in *Environmental Law Update*, (Vancouver, BC: Continuing Legal Education Society of British Columbia, April, 1995)

Loukidelis, David, *Using Conservation Covenants to Preserve Private Land in British Columbia*, Ann Hillyer, editor, (Vancouver, BC: West Coast Environmental Law Research Foundation, 1992).

Meyers, Phyllis, *Lessons from the States: Strengthening Conservation Programs through Grants to Nonprofit Land Trusts*, (Washington, DC: Land Trust Alliance, 1992).

Montana Land Reliance and Land Trust Exchange, *Private Options: Tools and Concepts for Land Conservation*, (Covelo, CA: Island Press, 1982).

Appendix F

Excerpts from statutes

Disclaimers

Please bear in mind certain disclaimers regarding the following excerpts from statutes. First, they are current to June, 1995. You will have to check if they have been amended. Second, these excerpts are unofficial. Consult the statutes published by the Queen's Printer of British Columbia for the official versions. Third, the precise meaning of any excerpt can be determined only in the context of the full statute, other statutes and any court decisions bearing on the subject.

Land Title Act, section 215

The following is the text of section 215 of the BC Land Title Act, RSBC 1979, c.219, as amended by Bill 28, Land Title Amendment Act, 1994, SBC 1994, c.44.

Registration of covenant as to use and alienation

215. (1) A covenant described in subsection (1.1) in favour of the Crown, a Crown corporation or agency, a municipality, a regional district or a local trust committee under the *Islands Trust Act*, as covenantee, may be registered against the title to the land subject to the covenant and is enforceable against the covenantor and the successors in title of the covenantor even if the covenant is not annexed to land owned by the covenantee.

(1.1) A covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:

- (a) provisions in respect of
 - (i) the use of land, or
 - (ii) the use of a building on or to be erected on land;
- (b) that land
 - (i) is to be built on in accordance with the covenant,
 - (ii) is not to be built on except in accordance with the covenant, or
 - (iii) is not to be built on;
- (c) that land

(i) is not to be subdivided except in accordance with the covenant, or

(ii) is not to be subdivided;

(d) that parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately;

(e) Repealed

(1.2) A covenant described in subsection (1.3) in favour of

(a) the Crown or a Crown corporation or agency,

(b) a municipality, regional district or local trust committee under the Islands Trust Act, or

(c) any person designated by the Minister of Environment, Lands and Parks on terms and conditions he or she thinks proper,

as covenantee, may be registered against the title to the land subject to the covenant and, subject to subsections (7) and (8), is enforceable against the covenantor and the successors in title of the covenantor even if the covenant is not annexed to land owned by the covenantee.

(1.3) A covenant registrable under subsection (1.2) may be of a negative or positive nature and may include one or more of the following provisions:

(a) any of the provisions under subsection (1.1);

(b) 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.

(1.4) For the purpose of subsection (1.3) (b), "amenity" includes any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant. ,

(2) A covenant registrable under this section may include, as an integral part,

(a) an indemnity of the covenantee against any matter agreed to by the covenantor and covenantee and provision for the just and equitable apportionment of the obligations under the covenant as between the owners of the land affected; and

(b) a rent charge charging the land affected and payable by the covenantor and his successors in title.

(3) Where an instrument contains a covenant registrable under this section, the covenant is binding on the covenantor and his successors in title, notwithstanding that the instrument or other disposition has not been signed by the covenantee.

(4) No person who enters into a covenant under this section is liable for a breach of the covenant occurring after he has ceased to be the owner of the land.

(5) A covenant registrable under this section may be

(a) modified by the holder of the charge and the owner of the land charged; or

(b) discharged by the holder of the charge

by an agreement or instrument in writing the execution of which is witnessed or proved in accordance with this Act.

(6) The registration of a covenant under this section is not a determination by the registrar of its enforceability.

(7) On the death or dissolution of an owner of a covenant registrable under subsection (1.2) (c), the covenant ceases to be enforceable by any person, including the Crown, other than

(a) another covenantee named in the instrument creating the covenant, or

(b) an assignee of a covenantee if the assignment has been approved in writing by the Minister of Environment, Lands and Parks.

(8) If a covenantee or assignee referred to in subsection (7) is a corporation that has been dissolved and subsequently restored into existence under an enactment of British Columbia, the covenant continues to be enforceable by the restored corporation from the date of its restoration.

(9) A recital in a covenant that a person "has been designated by the Minister of Environment, Lands and Parks under section 215(1.2)(c) of the *Land Title Act*," or a statement to that effect in the application to register the covenant, is sufficient proof to a registrar of that fact.

Property Transfer Tax Act, section 5.2

The following is the text of section 5.2 of the BC *Property Transfer Tax Act*, RSBC 1979, c.15, as amended by Bill 28, *Land Title Amendment Act*, 1994, SBC 1994, c.44.

Exemption for land subject to conservation covenant

5.2 (1) In this section "conservation covenant" means a covenant in favour of the Crown that

(a) is registered under subsection (2), and

(b) includes

(i) one or more provisions described in section 215 (1.3) (b) of the Land Title Act,

(ii) provisions that the covenant will not be amended or discharged without the approval of the Lieutenant Governor in Council, and

(iii) any other provision prescribed by regulation for inclusion.

(2) A covenant referred to in subsection (1) may be registered against the title to land in the same manner as a covenant under section 215 (1) of the Land Title Act if the Lieutenant Governor in Council approves the registration and, on registration, it is deemed to be a covenant under that section.

(3) A taxable transaction is exempt from the payment of tax to the extent provided in subsection (4) if, at the time of registration of the taxable transaction, a conservation covenant is registered against the title to the land to which the taxable transaction relates.

(4) A taxable transaction to which subsection (3) applies is exempt to the extent of the fair market value, determined in the prescribed manner, of the interest being transferred that is subject to the conservation covenant.

(5) The administrator may, by certificate attached to the return filed under section 2, postpone for up to 6 months the time at which tax would otherwise be payable, if satisfied that a conservation covenant is intended to be registered within that time against the title to the land to which the taxable transaction relates.

(6) If, within one year after a taxable transaction is registered, a conservation covenant is registered against the title to the land to which the taxable transaction relates, the transferee may apply to the administrator within that same period for a refund under subsection (7).

(7) On receiving an application under subsection (6) and on being satisfied that the taxable transaction would have been exempt from tax had the conservation covenant been registered at the time of the taxable transaction, the administrator shall

(a) pay out of the consolidated revenue fund a refund of the tax paid equivalent to the amount of exemption to which the transferee would have been entitled had the conservation covenant been registered at the time of the taxable transaction, or

(b) send a letter to the transferee stating the reasons for the refusal, and the letter is deemed to be a notice of assessment for the purposes of allowing the transferee to file a notice of objection under section 8.

(8) If a conservation covenant is discharged after a taxable transaction has been exempt from taxation by reason of this section or after a transferee has received a refund under this section, the person registered in the land title office at the time of discharge as owner of the fee simple interest in the land against which the covenant was registered shall, at the time of discharge,

(a) file a return referred to in section 2 (1), and

(b) pay to the government, as tax payable under this Act, an amount equal to the tax that would be payable at that time were the title to the land being transferred to that person as transferee in a taxable transaction referred to in paragraph (a) (i) of the definition of taxable transaction.

(9) A registrar may, without a hearing, refuse to accept an application for discharge of a conservation covenant where there are reasonable grounds to believe

(a) that the Lieutenant Governor in Council has not approved the discharge,

(b) that the return required by subsection (8) has not been filed, or

(c) that the tax imposed by subsection (8) has not been paid.

(10) As a matter of transition, if a conservation covenant is registered by a transferee before May 22, 1992 against the title to land to which a taxable transaction registered in the land title office before May 22, 1991 relates, that transferee may apply to the administrator before May 22, 1992 for a refund under subsection (11).

(11) On receiving an application under subsection (10), the administrator shall

(a) pay out of the consolidated revenue fund a refund of the tax paid under this Act by the transferee in relation to the taxable transaction referred to in subsection (10) equivalent to the amount of exemption to which the transferee would have been entitled had the taxable transaction been registered after May 22, 1991 and had the conservation covenant been registered at the time of the transaction, or

(b) send a letter to the transferee stating the reasons for the refusal, and the letter is deemed to be a notice of assessment for the purposes of allowing the transferee to file a notice of objection under section 8.

Assessment Act, section 26(3.5)

The following is the text of subsection 26 (3.5) of the BC *Assessment Act*, RSBC 1979, c.21, as amended by Bill 28, *Land Title Amendment Act, 1994*, SBC 1994, c.44.

26 (3.5) In determining actual value, the assessor shall give consideration to any terms or conditions contained in a covenant registered under section 215 of the *Land Title Act*.

Property Law Act, section 31

Court may modify or cancel charges

31. (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel a charge or interest against the land, registered either before or after this section comes into force, and being an easement, a land use contract, a statutory right of way, a statutory building or statutory letting scheme, a restrictive or other covenant burdening the land or the owner, a right to take the produce of or part of the soil, or an instrument by which minerals or timber or minerals and timber, being part of the land, are granted, transferred, reserved or excepted.

(2) The court may make an order sought under subsection (1) on being satisfied that the application is not premature in the circumstances, and that

(a) by reason of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete;

(b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled;

(c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled;

(d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest; or

(e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

(3) The court may make the order subject to payment by the applicant of compensation to a person suffering damage in consequence of it; but no compensation is payable solely for an advantage accruing by the order to the owner of the land burdened by the registered instrument.

(4) The court shall, as it believes advisable and before making an order under subsection (2), direct

(a) inquiries to a municipality or other public authority; and

(b) notices, by way of advertisement or otherwise, to the persons who appear entitled to the benefit of the charge or interest to be modified or canceled.

(5) An order binds all persons, whether or not parties to the proceedings or served with notice.

(6) The registrar, on application and the production of an order made or a certified copy of it shall amend his records accordingly.

Appendix G

Letter requesting designation

Letterhead or author's address

Date

Deputy Surveyor General
Ministry of Environment, Lands and Parks
Parliament Buildings
Victoria, BC, V8V 1X4

Dear Surveyor General:

Re: Application for Designation

This is an application by the Acme Creek Watershed Society (the "Society") for designation of entitlement to hold a conservation covenant under the *Land Title Act*.

The Society was incorporated as a non-profit society under the *Society Act of BC* on February 13, 1993, with registration number S-56789.

The purpose of the Society is to promote community stewardship of the Acme Creek watershed through education, information and action.

The Society requests designation to allow the Society to hold conservation covenants regarding privately-owned land in the Acme Creek watershed. These covenants will enable the Society to protect important ecological aspects of this watershed.

The Society understands that a general designation order will require the Society to obtain the consent of the Agricultural Land Commission prior to registering a covenant affecting lands that lie within the Agricultural Land Reserve.

If you require any additional information, please do not hesitate to contact us. We look forward to your response.

Yours truly,

ACME CREEK WATERSHED SOCIETY

Name

President

Appendix H

Priority agreement

Please note, the following form is for educational purposes only.

CONSENT AND PRIORITY AGREEMENT

GIVEN THAT ("Chargeholder") is the holder of a mortgage registered against title to the lands legally described in the section 215 covenant between _____ and the _____ dated for reference _____, 199__ to which this priority agreement is attached ("Covenant") under mortgage(s) number ____ ("Charge"),

THIS CONSENT AND PRIORITY AGREEMENT IS EVIDENCE THAT in consideration of payment of \$2.00 by the transferee described in item 6 of the *Land Title Act* Form C attached hereto ("Transferee"), and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged,

1. The Chargeholder hereby consents to the granting and registration of the Covenant and the Chargeholder hereby agrees that the Covenant is binding upon its interest in and to the lands described in the Covenant.

2. The Chargeholder hereby grants to the Transferee priority for the Covenant over the Chargeholder's right, title and interest in and to the lands described in the Covenant, and the Chargeholder does hereby postpone the Charge and all of its right, title and interest thereunder to the Covenant as if the Covenant had been executed, delivered and registered prior to the execution, delivery and registration of the Charge and prior to the advance of any money pursuant to the Charge.

IN WITNESS WHEREOF the Chargeholder has duly executed this Consent and Priority Agreement by signing on the Form C above on the date set out therein.

Appendix I

Example covenants

Sadler/Medicine Beach Covenant



This small (0.135 hectare) covenant is located on North Pender Island. The covenant was granted in 1996.

The Pender Islands Conservancy Association and the Islands Fund Board purchased the Medicine Beach marsh and surrounding forest and bluff (not visible in photos).

The covenant applies to a narrow strip of additional land containing a tidal creek - the inflow-outflow channel which is essential to the ecological health of the marsh. The owner of the channel was already conservation-minded but granted the covenant to the Conservancy to ensure long term protection of the marsh.



Inner Island Nature Reserve



This 9.4 hectare covenant on Denman Island was granted in early 1995. The property is owned for conservation purposes by the Trust Fund Board and the covenant is registered to the Nature Conservancy of Canada. Forested uplands and a small beaver-dammed wetland surround a large shallow marsh. The Trust Fund Board granted the covenant in order to provide an extra measure of legal protection for this environmentally important area.

Cunningham Conservation Covenant

This 10 hectare site lies at the south end of Salt Spring Island. The five owners granted the covenant to the Trust Fund Board in 1993.

The owners were developing a five-lot subdivision and wanted to protect and preserve the lots in their natural state.



The site has a fair range of biodiversity, including Douglas Fir and Arbutus forest and isolated rock outcroppings with Garry Oak.



In 1994, the Islands Trust Fund received title to 4 hectares abutting this property, to the north.

Scott Covenant

This one hectare covenant on Salt Spring Island was granted to the Islands Trust Fund in 1992, before the owners sold the property, to ensure that the marsh they had stewarded for many years would be preserved in perpetuity. The covenant includes a dense scrub buffer around the marsh.



Enchanted Forest

This 4.2 hectare covenant is located on South Pender Island.

The covenant was granted in 1992 to the Capital Regional District as a condition of approval of a Plan of Subdivision of Land to ensure that the covenanted lands will be used for park purposes only. A subsequent covenant was granted to the Islands Trust Fund in 1993 as an extra layer of

protection.

This site is managed by the Capital Regional District. Hand-crafted interpretive signs, benches and walkways have been installed, in keeping with the natural beauty and eco-sensitivity of this land.

The Enchanted Forest is known for its uncommon plants, wetland species diversity, water storage capabilities, and general tranquillity.



Appendix J

Management agreement

Please note, the following form is for educational purposes only.

RESERVE MANAGEMENT AGREEMENT

THIS AGREEMENT is

BETWEEN:

Landowner,

("Landowner")

AND:

The person identified in Schedule A to

this Agreement as the Manager.

("Manager")

GIVEN THAT:

A. Landowner is the registered owner of the land legally described in Schedule A ("Reserve"),

B. The Reserve is held by Landowner for the purposes set out in Schedule B ("Reserve Purposes") and is generally known by the name contained in Schedule A, if any, and

C. The Manager wishes to manage the Reserve according to this Agreement and the Reserve Purposes, and also in a manner consistent with the policy of Landowner,

This Agreement is evidence that in consideration of payment of \$2.00 by Landowner to the Manager (the receipt of which is acknowledged by the Manager), and in consideration of the promises exchanged below, Landowner and the Manager agree with each other as follows:

Grant of Licence

1. Landowner grants to the Manager the contractual licence to enter and be on, and the right to manage, the Reserve. The Manager agrees that this section does not grant to it any property right or interest in the Reserve and that the non-exclusive contractual licence created by this section is only for the purpose of enabling the Manager to perform this Agreement.

Management According to Management Plan

2. The Manager must manage the Reserve

- a) according to the management plan that forms Schedule C ("Management Plan"),
- b) in a manner that is consistent with the policy statement of Landowner,
- c) only for the Reserve Purposes, and
- d) subject to all applicable laws, statutes, bylaws, regulations, orders and directives, including under the *Workers Compensation Act* and the *Occupiers Liability Act*.

Term of this Agreement

3. This Agreement starts on the start date ("Start Date") set out in Schedule A and terminates on the termination date set out in Schedule A.

Revision of Management Plan

4. Before the 10th anniversary of the Start Date, the Manager must give Landowner a revised plan for management of the Reserve for the next 10 years. The revised plan must be consistent with the Reserve Purposes and may include changes to the Management Plan the Manager considers necessary or desirable to manage the Reserve according to the Reserve Purposes. Landowner must comment on the revised plan within 90 days after it is given to Landowner. Landowner may approve the revised plan as it was initially submitted to Landowner or require any changes Landowner considers necessary or desirable. The Manager must incorporate any changes to the revised plan required by Landowner and return it to Landowner for final approval no more than 30 days after it is returned to the Manager by Landowner. Once approved by Landowner, the revised plan becomes the Management Plan for the next 10 years. This section applies, with the necessary changes, to revision of the Management Plan after its first revision under this section.

Rules for Management

5. The Manager

- a) without affecting section 2(d), must comply with all laws, statutes, bylaws, regulations, orders and directives applicable to the Reserve,
- b) may not construct or install any permanent or temporary improvements, including, but not limited to, buildings or structures, on the Reserve unless
 - i) the Management Plan expressly authorizes the works and the location and the extent of the works, or Landowner gives its prior written consent, and

ii) written notices have been placed in at least two conspicuous places on the Reserve, before work begins and remaining until after work is completed, clearly stating that Landowner is not responsible for the improvements or the cost of services or materials for the improvements, and

c) must not permit any nuisance to exist on or come from the Reserve.

Termination of Agreement

6. Despite section 3, this Agreement may be terminated

a) by Landowner, if

i) the Manager breaches this Agreement and fails to cure that breach within 15 days after Landowner gives notice to the Manager to do so,

ii) the Manager is wound up, dissolved, or otherwise ceases to exist, or

iii) Landowner gives the Manager at least 45 days' notice of termination, or

b) by the Manager, if,

i) the Manager requests permission to construct or install a permanent or temporary improvement, including a building, structure, trail or sign on the Reserve in order to enable the Manager to comply with applicable laws, statutes, bylaws, regulations, orders or directives including the *Occupiers Liability Act* and Landowner fails to provide the consent within 15 days after the Manager requests Landowner's consent; or,

ii) the Manager gives Landowner at least 45 days' notice of termination.

Temporary Suspension of Management

7. Without affecting section 6, Landowner may give verbal or written notice to the Manager immediately suspending the Manager's contractual licence to enter and be on the Reserve and the Manager's right to manage the Reserve for up to 60 days if Landowner considers that any act proposed or undertaken by the Manager would be, or is, contrary to sections 2 or 5, or both.

Management Costs

8. Landowner is not obliged to remunerate the Manager, or provide financial or other assistance, in connection with management of the Reserve by the Manager. For clarity, the Manager is solely responsible to pay the costs connected with its performance of this Agreement.

Indemnity

9. The Manager must indemnify and hold harmless Landowner, its elected and appointed officials, employees and agents from and against any claim, right, remedy, action, cause of action, loss, damage, expense or liability incurred, suffered or asserted by any of them or anyone else, 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 Manager and Landowner, the sole occupier of the Land.

Landowner must indemnify and hold harmless the Manger, its elected and appointed officials, employees and agents from and against any claim, right, remedy, action, cause of action, loss, damage, expense or liability incurred, suffered, or asserted by any of them or anyone else, in connection with breach of this Agreement by Landowner, or connected with any negligence or other legal wrong of Landowner, or its officers, employees or agents.

Assignment

10. The Manager may not assign or sub-contract this Agreement.

Notice

11. Unless expressly provided otherwise in this Agreement, any notice, waiver or other communication which may be, or is required to be, given under this Agreement must be in writing and be delivered or sent by facsimile transmission addressed to the other party at the address or facsimile number for that party set out on page 1 of this Agreement, or to such other address or facsimile number of which notice has been given as provided in this section.

Any notice, waiver or other communication that is delivered is to be considered to have been given on the next business day after it is dispatched for delivery. Any notice, waiver or other communication that is sent by fax transmission is to be considered to have been given on the day it is sent, if that day is a business day, and if that day is not a business day, it is to be considered to have been given on the next business day after the date it is sent. If a party changes its address or facsimile number, or both, it must promptly give notice of its new address or facsimile number, or both, to the other party as provided in this section.

No Liability in Tort

12. The parties agree that this Agreement creates only contractual obligations. The parties agree that 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 and to limit the parties to their rights and remedies under the law of contract.

No Obligations on Board

13. The rights given to Landowner by this Agreement are permissive only and nothing in this Agreement imposes any duty of any kind on Landowner to anyone, or obliges Landowner to enforce this Agreement, to perform any act or to incur any expense for, any of the purposes set out in this Agreement. Where Landowner is required or permitted by this Agreement to form an opinion, exercise a discretion, make a determination or give its consent, the Manager agrees that Landowner is under no public law duty of fairness or natural justice in that regard and agrees that Landowner may do any of those things in the same manner as if it were a private party and not a public body.

No Effect On Laws or Powers

14. This Agreement does not affect or limit the discretion, rights, duties or powers of Landowner or the Manager under any enactment or at common law, or relieve the Manager from complying with any enactment, including in relation to the use of the Reserve.

Waiver

15. 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.

Severance

16. 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.

No Other Agreements

17. This Agreement is the entire agreement between the parties regarding its subject.

Enurement

18. 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.

The Corporate Seal of LANDOWNER was)
affixed in the presence of:)
)

Authorized Signatory)) C/S
)
)

