

# **A MODEL ANNOTATED SAMPLE CONSERVATION EASEMENT AGREEMENT**

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## **Introduction**

Several Ontario statutes provide specific legislative authority for conservation easements. (See section 5.1.2 of this guide for more detailed information.) The *Ontario Heritage Act* provides authority for conservation easements for a variety of purposes, including the protection of property of “historical, architectural, archaeological, recreational, aesthetic and scenic interest.” Conservation easements created in favour of the Ontario Heritage Foundation under that statute can be assigned to other conservation organizations. This process of creation and assignment may be helpful where the purpose of the conservation easement is the protection of the kind of resources specifically recognized by the *Ontario Heritage Act*.

The Ontario *Conservation Land Act* allows government organizations, conservation authorities, charitable corporations and certain other specified bodies to hold and enforce conservation easements for the conservation, maintenance, restoration or enhancement of land or the wildlife on the land. (See the excerpt of the *Conservation Land Act* reproduced in Appendix D of this guide.) Since this statute allows a wide variety of government and non-government organizations to hold conservation easements, this sample agreement was prepared within the context of the *Conservation Land Act*, and all references in the sample agreement to the “Act” are references to that statute.

This sample agreement, which is annotated, is intended as an example only, to provide readers with an introduction to the provisions that might typically be included in a conservation easement agreement. Actual conservation easements should be individually prepared, paying particular regard to the parties, the property and the circumstances, in consultation with lawyers, accountants, land surveyors and others whose professional advice may be relevant to the particular situation.

**ANNOTATED SAMPLE CONSERVATION EASEMENT AGREEMENT**

DATED this        day of                    , 20XX.

B E T W E E N:

**[Insert name of Owner]  
(the “Owner”)**

OF THE FIRST PART

– and –

**[Insert name of easement holder]  
(the “Conservation Body”)**

OF THE SECOND PART

*The “Owner” may be referred to instead as the “Grantor,” or by name. Section 3 of the Act provides that (only) the owner of land may grant an easement or enter into a covenant with a conservation body. The owner is defined in the Act as the “person registered on title in the proper land registry office as the owner of the land.”*

*The reference in this sample Agreement to “Conservation Body” could be replaced with “Holder,” “Land Trust,” “Municipality,” “Grantee” or a short-form version of the name of the Conservation Body involved, whichever best describes the easement holder. See the annotation that follows article 1.1(c) of this sample Agreement for the types of organizations that are qualified to hold and enforce conservation easements.*

In consideration of the sum of two dollars (\$2.00) now paid by the Conservation Body to the Owner and in consideration of the covenants, terms, conditions and restrictions contained herein, and pursuant to the *Conservation Land Act*, RSO 1990, c. C.28, as amended, the Owner and the Conservation Body hereby agree to the covenants, restrictions and easements as set out in this Agreement, which shall run with the Lands for the Term.

*If the conservation easement is a gift, and especially if it is a gift for charitable purposes, the Agreement could simply state: “In consideration of the covenants, terms, conditions and restrictions contained herein and pursuant to the Conservation Land Act, RSO 1990, c. C.28, as amended, the Owner and the Conservation Body hereby agree to the covenants, restrictions and easements as set out in this Agreement, which shall run with the Lands for the Term.”*

## Article 1

### Definitions

1.1 For the purposes of this Agreement, the following words and phrases shall have the following meanings:

- (a) “Act” means the *Conservation Land Act*, RSO 1990, c. C.28, as amended, and any statute that may be enacted to modify or replace the same.

*As noted in the introduction to this appendix, this sample conservation easement Agreement is pursuant to Ontario’s Conservation Land Act, which authorizes a wide range of government and non-government organizations to hold such easement agreements. However, conservation easements are also authorized by other Ontario statutes, including the Ontario Heritage Act and the Agricultural Research Institute of Ontario Act. (See section 5.1.2 of this guide for details.)*

- (b) “Agreement” or “this Agreement” means this Agreement and the schedules attached hereto as at the date hereof and as amended from time to time.
- (c) “Conservation Body” means a conservation body as defined in the Act.

*Under the Conservation Land Act, only a qualified conservation body is capable of holding and enforcing a conservation easement. “Conservation body” is defined in section 3(1) of the Act to include various government organizations, Indian bands, municipal councils, conservation authorities, non-government corporations that are “a charity registered under the Income Tax Act (Canada)” and “any person or body prescribed by the regulations.” (See the excerpt of section 3(1) of the Act in Appendix D of this guide for the complete definition of “conservation body.” See also the first*

*annotation in this sample Agreement, under “Conservation Body.”)*

- (d) “Covenants” mean the covenants set out in article 4 [and in any schedule listing covenants that may be attached to the Agreement] as the same may be waived, varied or released by the Conservation Body in accordance with this Agreement.

*The Covenants are the obligations and restrictions on the parties that are intended to run with the Lands and bind future owners. The other principal operative part of the conservation easement agreement is the right of access under article 5, “Easement.”*

- (e) “Lands” means the lands and premises of the Owner situate in the Province of Ontario and more particularly described in Schedule “A” attached hereto, and includes any buildings, structures and improvements now existing or constructed during the Term.

*The legal description of the Lands will normally refer to all of the contiguous lands owned by the Owner. Where only part of the Lands are affected by the conservation easement or where the Owner owns abutting lands, the Conservation Body should seek professional advice on compliance with the severance provisions of Ontario’s Planning Act. (See also section 7.2 of this guide.)*

- (f) “Management Plan” means the Management Plan for the Lands, attached hereto as Schedule “B,” and including all of the restrictions, obligations and rights included therein.

*The parties may establish a plan for management of the property, dealing, for example, with habitat enhancement or timber harvesting. However, the provision of a management plan is completely optional. A valid easement agreement may also be executed by the parties and registered simply with restrictions on future use, and without any detailed prescription for management. (See also section 6.4.1 of this guide.)*

*A Baseline Documentation Report, if any (see article 1.1(i) of this sample Agreement), would also be part of Schedule “B.”*

- (g) “Owner” means the above-named party of the First Part and any person who at any time after registration of this Agreement becomes the registered owner of the Lands or any part thereof or any ownership interest therein, including being a trustee for any beneficial owner of the Lands.
- (h) “Protected Area” means that part of the Lands including [insert feature name or description, such as “the estuary” or “the wetland”] that is identified as Part

[insert number] on Reference Plan [insert number].

*This definition anticipates that some parts of the Lands may be subject to a greater level of protection and to greater restrictions on use than others. It is very common in conservation easements applied to rural properties, for example, to allow the maintenance and replacement of existing buildings on the part of the property where they currently exist, while restricting or prohibiting the erection of new buildings on the protected part of the property. It is essential to the future enforceability of the Agreement that the Protected Area be very clearly defined or described. Where a clearly defined boundary is not easily identified, a reference plan prepared by an Ontario land surveyor may provide the necessary clarity and precision.*

- (i) “Report” means the Baseline Documentation Report describing the Lands and documenting the natural values and features and current uses of the Lands, attached or referred to in Schedule “B” hereto.

*A Baseline Documentation Report that documents the existing condition of the Lands and the heritage resource may be invaluable in enforcing the conservation easement in the future. Restrictions on tree cutting, for example, may be valid, but they are likely to be much more effective and enforceable if the prior composition and condition of the forest is documented. While often helpful, this definition and the provision for a Baseline Documentation Report may be deleted if no such report is being prepared. (See also Jason Thorne, Baseline Reporting for Natural Heritage Easements in Ontario, Toronto: Ontario Heritage Foundation, 1997.)*

- (j) “Term” means the term of this Agreement, being from and including the date of this Agreement to the nine hundred and ninety-ninth anniversary of the date of this Agreement or the date the Covenants or Easement cease to have effect in accordance with this Agreement, whichever date shall first occur.

*A defined Term may alleviate potential difficulties at the land registry and land titles offices that could affect the enforcement of covenants without a defined term. The actual definition of the time-limited Term is discretionary. In rare cases, a short term of 10 or 20 years may be considered. However, caution is advised in applying a short term to a conservation easement that is being valued and treated as an “ecological gift” under the Income Tax Act (Canada). Problems could arise both with respect to the valuation for purposes of the charitable receipt and with Income Tax Act provisions intended to secure the long-term public benefits of ecological gifts. See in particular section 207.31 of the Income Tax Act, under which a tax could be imposed if unauthorized changes in land use are made in the future. (See also sections 7.5 and 9.2.3 of this guide.)*

## Article 2

### Representations and Warranties

- 2.1 The Owner covenants and warrants that the Owner is the legal, beneficial and registered owner of the Lands with good title thereto, subject only to the following encumbrances:

[Insert brief descriptions of each encumbrance, such as a mortgage or an existing utility easement, with its date and instrument registration number.]

*It is critical that the Conservation Body conduct a title search and obtain property surveys as soon as possible in the process of preparing the easement agreement. Ownership and title issues may need to be dealt with before the easement can be finalized. For example, if there are mortgages on title, the Conservation Body will want to have the interests of the mortgagee “postponed” to the conservation easement. Without such a postponement, a pre-existing mortgagee could come into possession and control of the property as the result of a mortgage default and may not be bound by the conservation easement. (See also section 7.3 of this guide.)*

- 2.2 The parties represent and warrant to each other that the Report accurately describes the Lands, including the current use and the significant natural features of the Lands, and is intended to serve as an objective information base for monitoring compliance with this Agreement.

*See the definition of “Report” in article 1.1(i) of this sample Agreement.*

- 2.3 The Lands include significant natural features which are described in the Report and which the Owner and the Conservation Body have agreed to protect and enhance.
- 2.4 The Conservation Body covenants and warrants that it is a corporation incorporated under [Part III of the Ontario *Corporations Act* or Part II of the *Canada Corporations Act*], that it is a charity registered under the *Income Tax Act* (Canada) and that it is a Conservation Body within the meaning of the Act.

### Article 3

#### Intention

- 3.1 It is the intention of the parties that this conservation easement Agreement will ensure the protection, maintenance, restoration and enhancement of the natural features on the Lands and will prevent any use of the Lands that will damage or destroy those natural features or prevent their restoration and enhancement. More specifically, it is intended that the use of Lands will be restricted to [agricultural/forestry/wildlife management/other] uses that are consistent with the primary intention of the parties.

*Article 3.1, which sets out the intention of the parties in broad terms, will be a useful reference in interpreting the detailed covenants and rights under the Agreement in the future. It may also provide guidance for those situations and disputes that were not or could not be anticipated when the Agreement was prepared.*

### Article 4

#### Covenants

- 4.1 The Owner shall not use the Lands or permit any use of the Lands that will damage or destroy the natural features of the Lands or prevent their restoration and enhancement. Without limiting the generality of the foregoing, the Owner expressly covenants and agrees that, except with the prior written approval of the Conservation Body, it shall not:

*The restrictions or “Covenants” to be listed here (examples follow this annotation) are a key operative part of the Agreement. Careful attention and negotiation are required to determine the exact nature of the restrictions and obligations to be imposed on any particular property. The final wording should recognize the nature of the resource to be protected and the management objectives of both the Conservation Body and the Owner.*

*The opportunity to tailor the restrictions and obligations to each particular property is one of the major advantages of the conservation easement as a tool for land protection. Examples of both restrictions (negative covenants) and obligations (positive covenants) are provided in this sample Agreement, but they are examples only. Whether to permit or prohibit peat harvesting, timber harvesting, agricultural activities, public recreational use, hunting or fishing are decisions that must be made in each case to reflect the objectives of the parties and the requirements of sound resource management.*

*Conservation Bodies should resist the temptation to restrict too many activities; rather, they should focus on those restrictions that are important to*

*resource protection and that justify the time required to monitor and enforce compliance. Restrictions on an established use of a property, such as hunting or snowmobiling, for example, may be not be critical to the protection of a mature forest and may only result in conflict with the local community.*

*Since the restrictions or covenants are typically the most variable part of the conservation easement agreement and the focus of most of the negotiation effort, some conservation bodies have adopted the practice of using a relatively standard agreement and attaching the restrictions or covenants as a schedule to the agreement. As with the Baseline Documentation Report, the schedule of land use restrictions can be individually prepared and inserted in the agreement for each property. In that case, the second sentence of article 4.1 of this sample Agreement could simply state: “Without limiting the generality of the foregoing, the Owner shall not use or permit the use of the Lands except in compliance with the Covenants as set out in Schedule ‘X’ attached hereto.”*

- (a) Other Easements  
Grant any easement in, over, on, under or through the Lands;
- (b) Subdivision  
Sever or subdivide the Lands;
- (c) Buildings and Structures  
Construct, erect, maintain or allow the construction, erection or maintenance of any building or structure or transmission tower or lines on the Protected Area/Lands;
- (d) Roads, Parking Areas, Footpaths  
Construct, improve or allow the construction or improvement of any road, parking lot, dock, aircraft landing strip or other such facility, except for the maintenance of existing foot trails, fire lanes or other accesses;
- (e) Motorized Vehicles  
Operate or allow the operation of dune buggies, snowmobiles, all-terrain vehicles, motorcycles, motorboats, personal watercraft or any other types of motorized vehicles on the Protected Area;
- (f) Mobile Homes  
Use or allow the Lands to be used as a trailer or mobile home park, parking or storage area;
- (g) Dumping  
Dump or allow the dumping of soil, rubbish, ashes, garbage, waste or other unsightly or offensive materials of any type or description;



- (h) Pesticides  
Use or allow the use of pesticides, insecticides, herbicides, chemicals or other toxic materials of any type or description;
- (i) Grading, Topography  
Change or allow any changes in the general appearance or topography of the Lands, including and without limiting the generality of the foregoing, the construction of drainage ditches, tile drains, retaining walls, dams or ponds or any similar undertakings, as well as the dumping, excavation, dredging or removal of loam, gravel, soil, rock, sand or other materials;
- (j) Vegetation  
Remove, destroy or cut or allow the removal, destruction or cutting of trees, shrubs or other vegetation except as may be necessary for (i) the maintenance of existing foot trails, fire lanes or other accesses, or (ii) the prevention or treatment of disease;
- (k) Planting  
Plant or allow the planting or other introduction of non-native plant or animal species within the Protected Area;
- (l) Hunting, Fishing, Trapping  
Use or allow the Lands to be used for commercial or sport hunting, fishing or trapping;
- (m) Firearms  
Use or discharge or allow the use or discharge of firearms on the Lands.

*Several approaches to the structure of this part of the Agreement are possible. For example, an easement agreement could remove all of the potential development rights and uses from a property, subject only to specific exceptions identifying those uses and activities that would still be permitted. While that approach could make for a strong, clear legal position, it could also make it more difficult to negotiate an agreement with a donor.*

*The approach taken in this sample Agreement is more common in practice. The specific restrictions and obligations are listed (in article 4.1) and other rights are reserved to the "Owner" (see article 9.1).*

*In determining the most appropriate and effective approach for the particular circumstances, consideration could be given to whether the easement is being donated or purchased and whether a minimal or a very high level of protection is required.*

#### 4.2 Livestock and Fences

The Owner further covenants and agrees that the Owner will not permit agricultural

livestock to enter onto or to use the Lands and that the Owner will maintain the fencing along the boundaries of the property in a condition that will prevent agricultural livestock from entering onto the Lands.

*This obligation to maintain livestock fences is an example of a positive covenant, in contrast to the restrictions or negative covenants set out in article 4.1 of this sample Agreement.*

## **Article 5**

### **Easement**

5.1 The Owner hereby grants to the Conservation Body an easement to permit the Conservation Body and the employees, agents, servants, workers, contractors, officers and directors of the Conservation Body and their supplies, equipment, materials, machinery and vehicles to enter onto and have access to the Lands at reasonable times, subject to the notice requirements specified below and for the following purposes:

- (a) to conduct an inspection in order to determine compliance with this Agreement and to determine those measures necessary to ensure compliance with this Agreement;

*Section 3(2)(b) of the Act provides in effect that an owner may grant an easement for access to the land for the purposes of conservation, maintenance, restoration or enhancement of all or a portion of the land or the wildlife on the land. In this sample Agreement, an access easement is provided to allow compliance inspections, management and enhancement activities that may be identified in the Agreement or to remedy a default by the Owner.*

*Caution: In establishing and setting out the extent of the easement, it is important to ensure that the subdivision control provisions of section 50 of Ontario's Planning Act are complied with. In simple terms, that section of the Planning Act prohibits any agreement granting the use of land or right in land unless it affects the entire parcel of land and all abutting lands owned by the same landowner. Exceptions to the prohibition are made for conveyances by governments and for land described by a plan of subdivision.*

*An application for a Planning Act consent could be required, for example, to permit an easement affecting just part of the property. It is common practice to apply the access easement within a conservation easement to the entire property to ensure compliance with the Planning Act. Note, however, that only the landowner can authorize an application for consent to apply the access easement to just part of the property. (See also section 7.2 of this guide.)*

- (b) to carry out any construction, demolition, maintenance, alteration, repair,

improvements, installation or work or any restoration of the natural features reasonably required in the opinion of the Conservation Body, pursuant to the Management Plan or to remedy any default of the Owner as described in article 7 of this Agreement; and

*These access provisions may be necessary where the Conservation Body has significant management responsibilities or where major restoration or enhancement of natural features is proposed. In addition, access rights will normally be required to allow enforcement of the Agreement and to remedy any “default” (breach of obligations) on the part of the Owner.*

(c) for all purposes reasonably necessary or incidental to the exercise of the rights hereby created or related to any of the foregoing purposes.

5.2 Prior to entry or access to the lands for the purposes identified in article 5.1, the Conservation Body shall provide written notice to the Owner as follows, unless in the opinion of the Conservation Body there is an emergency or other circumstance that does not make it feasible to give notice of the intent of the Conservation Organization to enter onto the Lands:

(a) for the purposes specified in article 5.1(a), at least twenty-four (24) hours’ written notice; and

*Although not required by the Act, these provisions requiring the Conservation Body to provide notice before entering onto the Lands are suggested as a courtesy to the existing and future landowners. Notice can be shorter where the purpose of access is for compliance inspection, and longer where more intrusive and expensive works are proposed.*

(b) for the purposes specified in articles 5.1(b) and 5.1(c), at least 10 days’ written notice. The notice under this article 5.2(b) shall describe the nature, scope, design, location, timetable and any other material aspect of the activity proposed.

5.3 The rights described in articles 5.1 and 5.2 are collectively referred to as the “Easement.”

5.4 No right of access by the general public to any portion of the Lands is conveyed by this Agreement.

*In many cases, public access to the natural features located on the Lands may not be necessary or desirable. In addition, landowners may be more willing to grant a conservation easement knowing that rights of public access are not attached. In cases where the parties agree that rights of public access are to be included, the Conservation Body should seek professional advice on the mechanisms for*

*ensuring that rights of recreational access will be enforceable.*

## Article 6

### Owner's Obligations and Indemnity

- 6.1 The Owner shall, at the expense of the Owner, continue to care for and operate the Lands as would a careful and prudent owner. In particular, and without limiting the generality of the foregoing, the Owner shall:
- (a) maintain the Lands and keep the improvements thereon in a good and sound state of repair, and keep the Lands free of construction liens;
  - (b) carry and maintain at all times adequate comprehensive general liability insurance with an inclusive limit of not less than two million dollars (\$2,000,000.00) per occurrence for property damage, bodily damage and personal injury, with the Conservation Body being identified as an additional insured thereunder, and including the following policy endorsements:
    - (i) cross-liability;
    - (ii) waiver of subrogation; and
    - (iii) 30-day notice of cancellation;and provide the Conservation Body with evidence of such coverage not less than annually; and
  - (c) pay as they become due municipal and provincial taxes, rates and fees charged or levied against the Lands, including any that may be charged or levied against the Conservation Body by reason of this Agreement and the rights transferred hereunder, and all charges for utilities, public or otherwise, and provide the Conservation Body with evidence of such payments on its reasonable request.
- 6.2 The Owner shall and does hereby indemnify and save harmless the Conservation Body, its directors, officers, employees, agents and contractors from and against any and all actions, causes of action, suits, claims, demands by or on behalf of any person arising out of or occasioned by any act or omission, negligent or otherwise, in the use and maintenance of the Lands by the Owner, any licensee or lessee thereof or anyone for whom the owner is in law responsible, including any liability arising from any existing or future environmental matters or conditions affecting the Lands. The Owner shall and does hereby further indemnify the Conservation Body from and against any penalty or tax imposed under the *Income Tax Act* (Canada) arising from any change in the use of the Lands or any part of the Lands certified as ecologically sensitive land under the *Income Tax Act* (Canada), which penalty or tax shall be paid by the Owner to the Conservation Body or as the Conservation Body shall direct.

*With respect to the second sentence above, section 207.31 of the Income Tax Act (Canada) imposes a tax on charities or municipalities that dispose of or change the use of an ecological gift property without the authorization of the Minister of the*

*Environment. The tax can amount to 50% of the value of the property. (See also section 9.2.3 of this guide.)*

*Such a penalty may be appropriate against a charity or municipality where the charity or municipality is the owner in control of the property. However, in the case of conservation easements and covenants, conservation bodies that are the holders of the easement but not the owners in control of the property may wish to negotiate for the type of indemnity outlined in the second sentence of article 6.2 of this sample Agreement. This sentence may be deleted if the Lands are not certified as “ecologically sensitive” under the Income Tax Act.*

- 6.3 No less than ten (10) days in advance of a transfer of the fee simple title to or a possessory interest in the whole or any part of the Property, the Owner shall pay to the Conservation Body two (2) percent of the sale price or make alternative arrangements for such payment to the satisfaction of the Conservation Body. Any failure to make such payment shall be a debt with interest at the rate of five (5) percentage points above the prime rate of interest from time to time charged by the Bank of Canada and shall be a charge upon the whole Lands enforceable in the same manner as a mortgage, and shall be recoverable by the Conservation Body in a court of law.

*If agreed to by the owner and conservation body, transfer fees as currently applied in the US and Canada have been in the magnitude of 2% to 10% of the sale price. The latter (10%) has been used on public land that is being transferred to the private sector. The usefulness of the “transfer fee” provision is manifold:*

- (a) It enables the conservation body to assume easements on properties where an endowment is not possible, thus enabling them to meet their mission, expand their portfolio while ensuring the property does not create a long term burden on the organisation;*
- (b) It provides a degree of comfort to landowners who may question how the recipient organisation is going to have the funds for stewardship in perpetuity;*
- (c) It ensures that the conservation easement holder is made aware of property ownership transfers and provides immediate funds for a landowner contact meeting to discuss the terms of the easement and to prepare and have signed off a new baseline report.*
- (d) Transfer fees act as an automatic inflation hedge since they are tied to the underlying real estate value. They may burden people to a nominal degree, but the people they burden are those that benefit from the resource that is protected and stewarded. Ultimately the fees can generate major dollars with very little pain that has the potential to build up a considerable endowment for each property or at least significant operating revenues for stewardship.*

## **Article 7**

## Default

- 7.1 In the event of breach or default in the obligations and covenants of the Owner under this Agreement, the Conservation Body may take any action available to it at law, in equity, by statute or under this Agreement provided that the Conservation Body shall first give to the Owner written notice of the default, which notice shall specify the nature of the non-compliance and the measures necessary to secure compliance with the terms of this Agreement. If notice of default is given, the Owner shall have sixty (60) days following receipt of the notice of default to complete the required measures and to rectify the non-compliance or default.
- 7.2 In the event that the Owner has failed to provide compliance within the sixty-day period allowed, the Conservation Body shall be entitled to enter onto the Lands and to complete those works and measures necessary to provide compliance and to remedy the default at the expense of the Owner.
- 7.3 If the Conservation Body in its sole discretion determines that circumstances require immediate action to prevent or mitigate damage to the natural features of the Lands, the Conservation Body may pursue its remedies under this article 7 without prior notice to the Owner or without waiting for the expiry of the sixty-day notice period as otherwise required under article 7.1.
- 7.4 The parties recognize that damages based on market value may not be adequate or effective to compensate for destruction of or restoration of the natural features of the Lands as they existed prior to default or breach of the Agreement. Accordingly, the parties agree that:
- (a) compensation to the Conservation Body in the event of default or breach of the Agreement may be based on market value or restoration or replacement costs, whichever, in the opinion of the court, shall better compensate the Conservation Body; and
  - (b) in addition and without limiting the scope of the other enforcement rights available to the Conservation Body under this Agreement, the Conservation Body may bring an action or an application for injunctive relief to prohibit or prevent default or the continuance of default under this Agreement.

*Traditionally, a court would look to the market value of a property before and after breach of an agreement to determine the appropriate amount of compensation. However, market value may not be an adequate basis for determining damages when the ecological integrity of a natural feature is at issue. For example, the destruction and drainage of a wetland could actually enhance the development potential and market value of the Lands. Article 7 is specifically drafted to provide compensation that would allow restoration or replacement of the damaged natural feature.*

*In addition, since restoration or replacement of a mature natural feature or ecosystem may not be possible, the agreement should specifically provide for injunctive relief, as in article 7.4 (b) above, to prevent damage to the natural features in the first place.*

- 7.5 All reasonable costs incurred by the Conservation Body in enforcing the terms of this Agreement, including without limitation legal costs and expenses, and any costs of restoration required to remedy any violation of the terms of this Agreement by the Owner shall be paid by the Owner to the Conservation Body. Until paid by the Owner to the Conservation Body, such costs of remedy incurred by the Conservation Body shall be a debt owed by the Owner to the Conservation Body and shall be a charge upon the Lands enforceable in the same manner as a mortgage and recoverable by the Conservation Body in a court of law.

## **Article 8**

### **Notice**

- 8.1 Any notice (which term in this article includes any request or waiver) provided or given hereunder shall be sufficiently given by either party if in writing and delivered by hand, sent by facsimile or other means of electronic communication or mailed by prepaid registered post, if to the Conservation Body as follows:

Address:

Fax Number:

and if to the Owner as follows:

Address:

Fax Number:

Any notice so delivered or any notice so forwarded by facsimile or other means of communication shall be deemed to have been given on the next business day following the day of delivery or forwarding and any notice so mailed shall be deemed to have been given on the fourth business day following the day of mailing. Either party may in any manner aforesaid give notice to the other party of any change in the address or fax number thereof and thereafter the new address or fax number shall be the address of such party for the purpose of giving notice hereunder.

## **Article 9**

### **General Provisions**

- 9.1 Owner's Reserved Rights. The Owner reserves to itself, and to its successors and assigns

and any transferee therefrom, all rights accruing from its ownership of the Lands, including the right to engage in, or permit or invite others to engage in, all uses of the Lands that are not expressly prohibited herein and that are not inconsistent with the purpose and terms of this Agreement.

*It is normal to interpret the Agreement as conveying only those rights and restrictions specifically described in the terms of the Agreement and to assume that the Owner reserves all rights not conveyed. This provision is included to provide the Owner/Grantor with the comfort of having that assumption made explicit.*

- 9.2 The Owner shall give notice to the Conservation Body of any change in the ownership of or any interest in the Lands, and the Conservation Body shall give notice to the Owner of any assignment of the interest of the Conservation Body under article 9.5 of this Agreement. Any such notice shall include the name and address of the new party and shall be given at least ten (10) days prior to the change of interest.
- 9.3 Transfer of Interest. The Owner shall not transfer or permit any mortgagee to transfer any ownership interest in the Lands without requiring the transferee to acknowledge in writing (by acknowledgement addressed and delivered to the Conservation Body) the priority of this Agreement and the interest of the Conservation Body thereunder, and will not lease or licence the Lands or any part thereof without such lease or licence being made expressly subject to this Agreement. The failure of the Owner to perform any act required by this article 9.3 or the preceding article 9.2 shall not impair the validity of this Agreement or limit its enforceability in any way.
- 9.4 [Optional: See annotation below.] No person who is an Owner shall be liable to the Conservation Body for any breach of or default in the obligations owed to the Conservation Body under this Agreement committed after the registration of a transfer by such person of all of the interest thereof in the Lands, provided that the Owner has delivered to the Conservation Body an acknowledgement and assumption executed by the new registered Owner, acknowledging the priority of this Agreement and the interest of the Conservation Body and assuming the obligations of an Owner under this Agreement.

*This optional article is intended to supply the Owner with an incentive to ensure that any purchaser of the Lands provides explicit written acknowledgement and acceptance of the obligations of the Owner under the conservation easement. Such an acknowledgement would give the Conservation Body notice of the change in ownership and an opportunity to begin a co-operative relationship with the new Owner. The Conservation Body may prefer, however, to simply rely on the legal operation of the agreement registered on title, which is intended to “run with the land” and to bind all future landowners.*

- 9.5 Assignment. The Conservation Body may assign all of its interest in this Agreement to any qualified Conservation Body, including the local municipality or the conservation authority, provided that the Conservation Body shall provide the Owner with written



notice of such assignment. The Conservation Body shall not be liable to the Owner for any breach or default in the obligations owed to the Owner under this Agreement committed after notice of the assignment of this Agreement has been given to the Owner.

*Assignment of the Agreement to another Conservation Body is specifically contemplated by section 3(3) of the Act.*

*This provision in the Agreement is directed at relieving the original Conservation Body from any obligations or liability to the Owner after the assignment and notice of assignment.*

*Note that the Act also provides for mandatory assignment of the Agreement to the Minister of Natural Resources in the event that the original “conservation body ceases to be a conservation body.” Such a mandatory assignment may occur if a not-for-profit corporation lost its charitable status under the Income Tax Act (Canada) and could also no longer satisfy the definition of a “conservation body” in the Conservation Land Act. (See also section 8.1.6 of this guide.)*

- 9.6 **Registration.** The Conservation Body shall register this Agreement against title to the Lands and the Owner shall execute any document that may be required to allow such registration.

*Registration on title is, of course, essential to provide notice to any subsequent purchaser, mortgagee or any other person taking an interest in the land of the prior interest of the Conservation Body and of the existence of the conservation easement and the restrictions and obligations attached to the land. Further, sections 3(5) and 3(6) of the Act provide that the conservation easement will only run with the land and be enforceable against subsequent owners if it is registered on title to the land.*

*Read in combination with article 9.11 of this sample Agreement, article 9.6 assigns the costs of registration to the Conservation Body. Of course, other arrangements could be made and the agreement amended to specify that these costs will be the responsibility of the Owner. Alternatively, the Conservation Body could accept a donation from the Owner that would cover the cost of preparing and registering the Agreement.*

- 9.7 **Failure to Exercise or Enforce Rights.** No failure by the Conservation Body to require performance by the Owner of any provision of this Agreement shall affect the right of the Conservation Body thereafter to enforce such obligation, and no failure by the Owner to perform any of its rights or obligations hereunder shall be taken as a waiver of such performance or the performance of any other obligation in the future.
- 9.8 **Acts Beyond Party’s Control.** Neither the Owner nor the Conservation Body shall be liable to the other hereunder for any damage to or change in the Lands resulting from

causes beyond the control of such party, including, without limitation, accidental fire, flood, storm, earth movement, trespass, insect plague or disease.

- 9.9 Time of the Essence. Time shall be of the essence to this Agreement and shall be deemed to remain so notwithstanding any extension of any time limit.
- 9.10 Severability. All provisions of this Agreement, including each of the Covenants, shall be severable and, should any be declared invalid or unenforceable, the validity and enforceability of the remaining provisions shall not be affected thereby.
- 9.11 Costs. Save as provided herein or ordered by any court or tribunal, each party shall be responsible for its own legal fees and related expenses arising from the negotiation and implementation of this Agreement.
- 9.12 Joint and Several. Whenever the Owner should comprise more than one person, the obligations thereof hereunder shall be joint and several.
- 9.13 Enurement. This Agreement, including all of the Easement and the Covenants, shall run with the Lands for the Term or until such time as the Conservation Body, or its successor or assign, authorizes a release or partial release of the terms of this Agreement.

IN WITNESS WHEREOF the Owner and the Conservation Body have executed this Agreement as at the date first above written.

Per: \_\_\_\_\_  
Name:  
Title

Per: \_\_\_\_\_  
Name:  
Title:

Per: \_\_\_\_\_  
Name:  
Title:

## **Schedule “A”**

### **Legal Description of Lands**

[Schedule “A” would be followed by the other schedules – “B,” “C,” etc. – as needed.]