Respect and Responsibility: Integrating Indigenous Rights and Private Land Conservation in Canada

A Guide for Land Trusts and Other Non-Governmental Organizations

Executive Summary

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Overview

In Canada, land trusts, not-for-profit conservation organizations and government agencies have sought to 'conserve private lands' for their ecological, agricultural, recreational, or cultural value through acquiring ownership or other legal interests in land. Often termed 'securement', this process has a long and contentious history.

Despite creating significant public benefits, private land conservation has often occurred without a full appreciation and understanding of the impacts on Indigenous rights and title. Continuing to do so will further perpetuate unreconciled relationships among Indigenous Peoples, non-Indigenous peoples and public governments.

This report provides guidance for private land conservation organizations seeking to adapt their practices and build respectful and appropriate relationships with Indigenous Nations. It is also an important tool for conservation organizations seeking to understand the legal and policy landscape that frames key relationships with Indigenous communities in Canada and abroad.

This report concludes that there is no ethical basis for private land conservation organizations to operate as though Indigenous governments have no role in relation to private lands.

In fact, **the starting point for decisions about the securement or management of private conservation lands is not whether there is a legal duty to consult, but rather, how to meaningfully engage with Indigenous governments and respect Indigenous jurisdiction.** In this way, respectful, equitable and effective conservation outcomes can be advanced.

Each section of this report examines key structures that can inform an approach to private land conservation practice that is respectful of Indigenous rights and title, including: Canadian constitutional law, international law and standards and best practices.

1. Canadian constitutional law, Aboriginal rights and the duty to consult.

In Canada, the duty to consult and accommodate flows from the "Honour of the Crown." This is a series of obligations to uphold the Aboriginal and treaty rights protected under Section 35 of the Canadian Constitution. Crown governments and agencies can delegate procedural aspects of this duty to third parties. However, the Crown ultimately has the responsibility for ensuring that adequate consultation is carried out.

There are three key circumstances where private land conservation is likely to result in Crown consultation obligations or require a private conservation organization to carry out duties to consult. These include:

(1) Purchasing, acquiring or managing conservation land with government funding or through land donations provided through government incentives;

(2) Transferring private land from Non-Governmental Organizations (NGOs) to the Crown; and

(3) Registering certain interests in the land titles system.

To trigger the duty to consult, there must be a **present or future link** between the proposed government activity or decision and **the potential for adverse impacts on existing or asserted Aboriginal and Treaty rights**. The duty to consult does not arise in respect to past actions, however, previous wrongs may give rise to other legal claims.

Currently, NGOs are not legally required to carry out duties to consult in relation to lands they own or intend to acquire. However, they have many social and ethical responsibilities to engage with Indigenous communities, particularly given the legacy of dispossession and denial of Indigenous rights that has resulted from establishing conservation areas in Canada.

2. International law and policy.

In international law, there are obligations under international treaties and agreements for States and their agencies to, at minimum, engage with Indigenous communities and seek their free, prior and informed consent for actions that might affect their lands or rights.

Free, prior and informed consent (FPIC) is enshrined in the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP), the International Labour Organization Convention 169 (, and the Convention on Biological Diversity (CBD), as well as in the national laws of many countries.

In the context of conservation projects, FPIC means that a community has a right to give or withhold its consent to proposed activities with potential impacts on the lands that it uses, occupies, or owns. Discussions must be free from intimidation or other pressures, and the consent (if given) will be context specific.

While law and policy in this area is still under development in Canada, there has been a marked global shift over the past decade beyond merely consulting or partnering with Indigenous Peoples to expressly acknowledging FPIC and deferring to the leadership of Indigenous Peoples in conservation.

This has a direct influence on expectations and practices in Canada for land trusts and conservation practitioners engaging with Indigenous Peoples more generally. With Canada's formal adoption of UNDRIP, domestic legislation can be expected to reflect FPIC and other principles relating to the rights of Indigenous Peoples.

International conservation practices and guidelines concerning Indigenous engagement should be understood to be important sources of guidance to NGOs working on securement projects in Canada.

3. Standards and best practices.

Many land trusts and NGOs in Canada are developing their own requirements to guide their work and relations with Indigenous Peoples. Many of these standards recognize that legal requirements are a minimum and do not encompass the full scope of building and maintaining trust and relationships.

Notable examples of established standards for conservation charities include the 2018 Imagine Canada's Standards Program for Canada's Charities and Non-Profits and the 2019 Canadian Land Trust Standards and Practices.

Within these standards, there is **a basic requirement for organizations to engage with local communities, including Indigenous communities, and to promote and respect equality, diversity and inclusion of racialized and other minority groups.**

While these standards have shifted from community 'outreach' to 'engagement', they have yet to include the international obligation to seek the free, prior and informed consent of Indigenous communities.

To 'engage' effectively, conservation organizations must:

- Acquire cross-cultural knowledge;
- Build relationships and pursue meaningful discussion; and
- Incorporate Indigenous knowledge and related expertise.

Without relationships and engagement, sensitive issues such as questions about an organization's process or access to secured lands could become difficult and public, damaging the group's reputation and support by donors and volunteers.

Information on **best practices** for engagement among Indigenous and Crown governments, agencies and NGOs is also expanding. For example, The Indigenous Circle of Experts emphasized the concepts of "Two-Eyed Seeing" and "Ethical Space":

- **Two-Eyed Seeing: Respecting, valuing and equally applying both Indigenous and non-Indigenous ways of knowing**. In Mi'kmaq Elder Albert Marshall's words, this concept refers to "learning to see from one eye with the strengths of Indigenous knowledges and ways of knowing, and from the other eye with the strengths of western knowledges and ways of knowing – and learning to use both of these eyes together for the benefit of all."

- **Ethical Space: Creating a place for knowledge systems to interact with mutual respect, kindness, generosity** and other basic values and principles. Within Ethical Space, all knowledge systems are considered to have equal standing.

Some additional best practices and lessons learned include, **build trust, be fully transparent, act with mutual respect, engage early, listen and be willing to adapt**.

These lessons can be applied throughout the land securement and management process, such as: understandings and relationships, governance systems, planning, funding and incentives, securement and transfer and stewardship and access.

Beyond Consultation: Recognizing Indigenous Jurisdiction and Governance

Indigenous Peoples and their allies have engaged in decades of political work, resulting in increased recognition of Indigenous rights, including rights to land and self-determination, and a greater awareness of historical and ongoing failures to respect those rights.

The growing acceptance of the need for truth, reconciliation and a renewed relationship between Crown and Indigenous governments has pushed the boundaries of Canadian law beyond consultation and has created new expectations for conservation organizations.

In areas subject to modern treaties and self-government agreements, the Government of Canada has formally acknowledged that Indigenous governments have right to make laws for the governance and use of lands and resources.

Elsewhere, where the recognition of Indigenous jurisdictions is still in process, Crown and Indigenous governments are increasingly engaged as partners and co-managers in conservation. This is evident in the establishment of Indigenous Protected and Conserved Areas (IPCAs) which have emerged as a promising mechanism for achieving Canada's conservation goals.

For private conservation organizations, the growing recognition of Indigenous governance institutions and jurisdictions represents an opportunity to learn from Indigenous Peoples and to support Indigenous leadership and self-determination. This shift will improve conservation outcomes and contribute to meaningful reconciliation.