

# PROJECT BACKGROUND



Environmental  
Law Centre

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## Buying a Better Environment?

### *Property Law: Market-Based Instruments and the Alberta Land Stewardship Act*

Market-based instruments (MBIs) depend on the existence of property. For markets to attract sufficient participation, buyers and sellers need a sense of security which comes from clarity of property rights. Property rights need to be well defined and governed by rules for their creation, enforcement and termination. Unclear or inadequate property rights can discourage investment, and create need for additional legal protections in the form of contracts or regulations.

While MBIs are a potential tool for environmental protection, the authority of governments to regulate property rights means other avenues exist for protection of the environment. In other words, MBIs are not a legal necessity. Limited property rights and the unsuitability of private remedies for protecting public goods necessitate strong regulatory regimes to enable MBIs. Regulations need not be extensive but they must provide clarity of rights and responsibilities. As well, in Canada, the existence of constitutionally protected Indigenous rights on conservation activities and the ability of Indigenous peoples to participate in MBIs may have implications on the design and use of MBIs in some circumstances.



### Property Law issues associated with Market-Based Instruments include:

- Separation of surface and subsurface rights
- Public lands and resources
- Enforcement and remedies
- Indigenous rights

These will be discussed in future backgrounders.

*How are Property Rights related to Market-Based Instruments?*



## What is Property?

Property is notoriously hard to define. Some definitions focus on the legal expectations that flow from holding the land or thing. One of the most accepted definitions of property is as “bundle of rights”.

This bundle might include rights to: own, access, possess, use, enjoy, manage, control, exclude, profit from and alienate (transfer, sell, or dispose of the property). However, not all rights exist in all bundles that we recognize as property. Other definitions focus on the relational nature of property, namely the extent to which rights can be enforced against other persons.

Property law is a system for dealing with these bundles of rights. This system includes the common law made by the courts, as well as, legislation made by the legislature and its delegates. Under the law, property rights can be:

- enforceable or protected; and
- liable to duties, restrictions, prohibitions and takings.

Property rights may also be created by contractual agreement.

## Significance for Market-Based Instruments

The recognition of environmental property rights is still evolving. Generally, environmental property rights are more apt to be created by contracts or legislation as opposed to existing by common law rules. As well, legislation may designate property rights for the specific purpose of MBIs (such as creating tradable units or credits for exchange). Legislation can prevail over the common law; therefore, environmental property rights may not be bound by the conventional rules and forms of property rights.

Environmental property rights are likely to include fewer sticks in the bundle than conventional property rights. Environmental property rights often consist of rights to access land, withdraw resources, and manage the land or resources. However, rights to exclude others or to divest the property may be limited.

Given their relative novelty, the courts can be inconsistent on recognizing environmental property rights and the situations where these rights are affected. These rights are more susceptible to change because the legislation that creates the rights can be changed any time or may provide government with authority to alter the rights. As an example, conservation easements are a form of environmental property which are created through contracts made pursuant to legislation. Depending on the substance of the environmental property right, there may be more or less uncertainty. Where markets for ecosystem services are already well established --for example, timber, crops, petroleum-- one finds the existence of well-established property rights in these components of the environment. Where markets for ecosystem services are less established -- for example, water quality, flood control, wildlife habitat, air quality or scenic views-- one finds greater uncertainty of property rights.

A key element of the use of MBIs for conservation and stewardship purposes is the view that rights come with obligations. Markets for ecosystem services (other than the production of natural resources) demand that some environmental property rights include conservation and stewardship obligations towards land, watersheds and biodiversity.

There are two main types of property: real and personal. Real property is land and interests in land. Public lands are owned by the Crown in right of Alberta and managed under the authority of the provincial government. Private lands are those that have been “deeded” to private parties. In Alberta, the title and interest in private land are registered under the Land Titles Act. The type of real property interest with the greatest bundle of rights is a “fee simple” land title (what most people think of as owning of land). Subject to the law, the holder of fee simple title can use the land, exclude others from the land, transfer the land or grant other people lesser property interests in the land.

Some lesser interests “run with the land” and can bind subsequent landowners, sometimes in perpetuity. Examples include:

- Leases that allow occupation;
- Easements that grant entry;
- Restrictive covenants that restrict uses for the benefit of another landowner; and,
- Conservation easements, voluntary agreements to restrict uses so as to protect land for purposes provided by legislation.

To determine the bundle of rights created by interests other than fee simple land title ownership, one must refer to the form of rights that were granted and ideally the specific grant of rights.



The fact that MBIs may require recognizing new property rights invokes debate about what type of ownership produces better environmental outcomes. Proponents of MBIs often rely on the “tragedy of the commons” as a cautionary tale about lack of private ownership resulting in inadequate land stewardship or resource conservation. Opponents fear a “tragedy of the anti-commons” where privatization or enclosure of public resources creates exclusive access to public goods or environmental inequity based on property rights. Opponents may also feel that public authorities provide the most transparent and accountable managers of public resources.

Some MBIs do not require changing our basic conception of property rights at all. Furthermore, MBIs are a form of regulation designed to pursue the objectives of public policies. They are distinguishable from simply creating private property rights in the environment to be traded on the open market. Regulation creates demand for sellers and protects buyers where property rights are inadequate. Subordinating the market to the policy outcomes sought is likely a factor in the success of MBIs.

## Personal Property

Legal rights in personal property are normally only binding and enforceable on the specific parties to a contract, agreement, or transaction that concerns the personal property. They do not bind subsequent owners of the property after the property has been alienated by the prior owner.

There are some lesser interests in land granted by landowners that do not “run with the land” or bind subsequent landowners. Although associated with land, these interests are more like personal property. Examples include:

- Contracts that create rights and obligations between two or more parties, and
- Licences that create rights to enter onto the property for a purpose.

Property rights can be recognized through the common law or created by legislation. Rights created by legislation are less stable as legislation may be changed or may provide government authority to alter the rights. This is in contrast with other property rights, such as conservation easements, that are often intended to be in perpetuity and bind future landowners once registered on title.

## Registration

Registration of property provides notice to the world of property rights and obligations (i.e. potential liabilities), and is therefore important to providing security to market players. Fee simple ownership and other interests that run with the land are registered on the land title. Some personal property is registered through separate registries.

## Implication for MBIs

MBIs can involve both types of property: real property where conservation and stewardship activities occur, and personal property that can be separated from the land and alienated through the market. Real property interests provide greater security: Fee simple ownership provides the most rights, while other interests that run with the land can be enforceable against future property owners and may last in perpetuity. Personal property rights offer more efficiencies as they are more readily created and extinguished under contracts and legislation. The same pros and cons apply to registration. Registration on land title provides the strongest security. However, a separate registry for tradable personal property would provide more flexibility and efficiency. The different advantages and disadvantages to different types of property suggest some merit for blended models. For example, personal property rights that are created through contracts or legislation but that can be registered on land title.



## Resources on property rights and the environment

Environmental Law Centre, Submissions to the Property Rights Task Force, January 2012.

Alberta Land Institute, A Guide to Property Rights in Alberta

Rowena Maguire and Angela Phillips, The role of property law in environmental management: An examination of environmental markets (2011) 28 EPLJ 215

## How are property rights restricted?

The constitution assigns legal authority over “property and civil rights” to the provinces. Consequently, the main regulators of property in Canada are provincial governments and municipalities that have been delegated authority by the province.

Constitutional protection of property rights is very limited in Canada. Governments may use legislation to expropriate private land and take other private property. Legislation may also regulate or impose restrictions on property rights so as to protect public resources or the public good. These legislative restrictions may injuriously affect property values on the market.

There is no common law right to compensation for the regulation of property. The courts have found that government action must be a practical equivalent to expropriation before a property owner can seek legal protection. They have been unwilling to compensate property rights holders simply for regulatory restrictions.

Legislation can create rights to compensation for impacts on property rights. Compensation is presumed by the courts where legislation authorizes expropriation. The *Alberta Bill of Rights* provides some procedural protection to property owners by requiring due process of law in order to deprive individuals of property. The ALSA creates rights to apply for compensation for the effects of some regional planning decisions (ALSA ss. s. 19.1) although the extent to which this creates new rights to compensation is open to debate. Overall, Alberta law is as generous to property rights holders as that of any province, if not more so.

## Implication for MBIs

Environmental property rights can have much broader impacts on public interests. Consequently, they are likely to be more restricted than conventional property rights. Government authority to regulate means that MBIs and other forms of voluntary private conservation and stewardship are not legally necessary to protect the environment in many situations where MBIs could be used. Conversely, MBIs are appealing where property rights are unlikely to be restricted as a practical matter, for example where environmental harms result from cumulative effects of small activities by numerous rights holders.

## Who can own property?

Property can be owned by private individuals, corporations, public bodies and their delegates.

Private property is owned by individuals or corporations whereas public property is owned by the Crown as represented by federal or provincial governments. Municipal authorities are delegates of the province and can also own property. In Canada, the property rights of government in public lands and resources usually resemble private ownership. Common property is owned by nobody. The best example is air, although even airspace is subject to legal interests.



## Enforcement of Property Rights

Property rights are enforced by the rights holder rather than by a third party authority. It is the rights holders' responsibility to pursue the appropriate disputing channel, whether that is through court, administrative tribunals, or alternative dispute resolution.

The common law remedy for infringements on real property rights is usually "damages" (financial compensation). One exception is nuisance – that is, infringement on the use and enjoyment of property – which be remedied by injunctions to prevent the ongoing activity that causes the nuisance. Legislation that recognizes real property rights trends towards financial compensation as well. Examples include compensation for expropriation or for government ordered access to the surface of the land to access oil and gas.

Damages are the common law remedy for breach of contracts as well. In rare cases, the breach of contracts for the purchase and sale of real estate can be remedied by orders of "specific performance" that force a transfer of the land. This remedy originated in historic times when real property was more apt to have unique value. In the current age, the courts require a plaintiff to show how a property is unique because the modern form of real estate development can mass produce fungible commodities. There are cases where the natural values of a piece of land have had influence on findings that it is unique, but such cases are uncommon.

Property rights in public resources can often be remedied through regulatory processes. Property rights in public resources are created by governmental dispositions. These types of rights provide access to additional processes such as regulatory hearings or administrative appeals. If the government is the rights holder or the dispute resolution body, then this other remedies exist - such as administrative penalties (fines), environmental protection orders, the imposition of environmental standards, the alteration of dispositions or the withholding of requirements such as reclamation certificates.



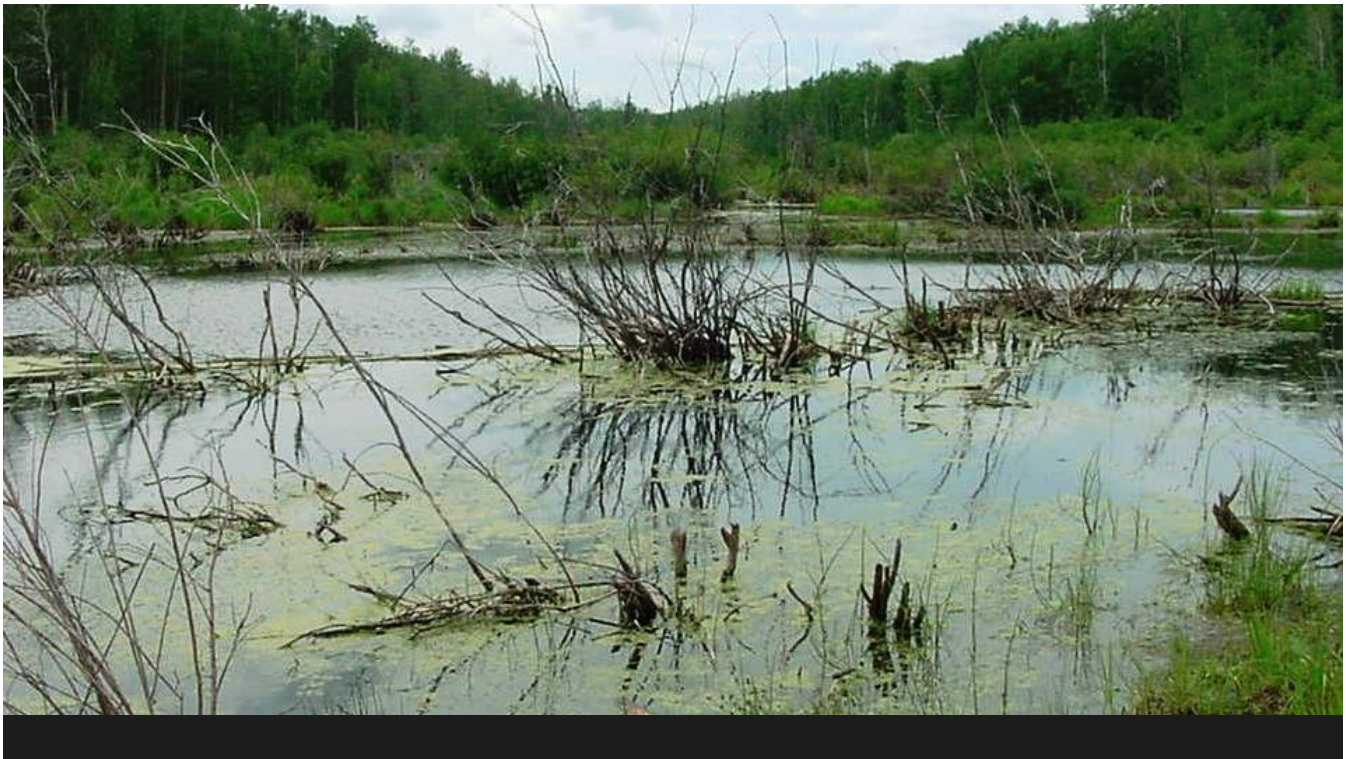
## Implication for MBIs

The nature of enforcement and remedies for violation of property rights creates numerous issues for MBIs as public goods are at stake and money may be inadequate compensation. Issues include:

- who should have enforcement rights and responsibilities and can such rights be delegated or assigned?
- when is compensation due for harm to conservation projects?
- when is compensation due when conservation projects harm other property interests?
- who would be liable to pay damages as between sellers, buyers and public authorities?
- what remedies are available when compensation is inadequate?

## Conservation Easements: A Unique Property Right

The type of conservation easements available in Alberta and Canada more broadly are a type of blended property interest recognized internationally for its potential in MBI schemes. Conservation easements are a real property interest that runs with the land but are created through contracts made pursuant to legislation. However, security is not absolute as easements do not protect land from subsurface property interests, and the legislation allows the Designated Minister to modify conservation easements if in the public interest. MBIs that rely on conservation easements may benefit from land use plans indicating where conservation easements are in the public interest, and regulatory protection for the easements against subsurface interests.



## What does an Environmentally Effective MBI look like?

An environmentally effective MBI will:

- be guided by environmental principles,
- have a sufficient policy and planning context, including clear objectives and directions for use,
- be supported with established programs and administrative structure,
- meet principles for best practice of MBI design; and
- clearly identify and address legal obstacles.

In order to advance the use of MBIs as conservation and stewardship tools in Alberta, our law and policy must meet the above criteria.

## Interested in advancing the use of MBIs in Alberta?

### *The ELC is looking for Project Collaborators*

Throughout 2016, the ELC is looking to:

- review the experiences with “pilot projects” using MBIs in Alberta,
- provide assistance to MBI projects,
- join working groups, core teams or advisory committees focused on legal issues with MBI usage, or
- share findings with municipalities, land trusts, conservation organizations, industry and government agencies.

All activities undertaken with collaborators must meet the ELC’s mandate to:

- act as an independent information service, and
- pursue environmental protection through law and policy.

As well, the collaborator’s work must involve the types of MBIs anticipated by *ALSA*.

## Guiding Environmental Principles for MBI Design

Sustainable development which is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

Precautionary Principle which requires that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

Polluter Pays principle which means the costs of environmental impacts should be borne by the parties creating the impacts.

Other important principles to consider are ensuring sufficient public participation and pollution prevention.

## About the Environmental Law Centre

*The Environmental Law Centre (ELC) is a charity incorporated in 1982 to provide Albertans with information, education and law reform services in the area of environmental law.*

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