

Conservation Easements in Alberta: Practical and Legal Reforms to Facilitate Easement Effectiveness

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(December, 2007)

Introduction

The Environmental Law Centre (ELC) is a charitable organization, incorporated in 1982 to provide an objective source of information on environmental law and policy in Alberta. The ELC provides services in legal information, education, research and law reform to achieve its mission of ensuring that laws, policies and legal processes protect the environment. With this mission in mind the ELC undertook a review of conservation easement law and policy with the aim of assessing and recommending law and policy reforms that may facilitate conservation easements in Alberta. The project was made possible with the financial assistance of Ducks Unlimited Canada and the Alberta Law Foundation.¹

Conservation easements are the primary legal tool through which ecological aspects of private land can be protected. Conservation easements allow private landowners to donate or sell specific land use rights in pursuit of preserving the natural, ecological values of their land in perpetuity.

As a legal tool, conservation easements may be hindered or facilitated by the legal and policy framework in which they operate. This brief provides a review, analysis and recommendations for dealing with legal and practical barriers to the creation, use and maintenance of conservation easements in Alberta. The recommendations reflect both the ELC's mandate of ensuring laws effectively protect the environment and the broader government and public interest in protecting ecologically important areas of private land.

The brief is written in a manner that assumes the reader has an understanding of conservation easement legislation and policy. The recommendations outlined and positions stated in this brief are solely the views of the ELC.

For ease of reference, a summary table of recommendations is set out below and is separated into those law and policy reform initiatives which are viewed as easily attainable and those that require significant work to put into place. Following this summary, Part A provides a general discussion of conservation easements and the value

¹ Special thanks to the staff at Ducks Unlimited Canada and Gordon Garside for providing invaluable review and comments regarding this brief. We would also like to thank and acknowledge all the individual landowners and qualified organizations that participated in the interviews.

they bring to Alberta. Part B describes the process through which issues and gaps regarding conservation easement were identified. Part C lists the issues that have been identified, provides analysis of those issues, and recommends resolution of the issues through legislative or policy reform.

Table 1: Summary of Recommendations

Nature of Recommendations	Recommendation for Policy and Law Reform
<p>Recommendations for immediate implementation Recommendations are: *simple; *require minimal legislative or policy amendment; *low cost; or *have minimal cross departmental issues.</p>	<ul style="list-style-type: none"> ▪ It is recommended that the Ministerial discretion regarding the modification and termination of easements found in section 22(7)(b) of <i>EPEA</i> be repealed (Recommendation #1) ▪ It is recommended that section 24 of <i>EPEA</i> be amended with an additional section indicating that “a conflict between a conservation easement and a land use bylaw or statutory plan will not arise, for the purpose of section 48(4) of the <i>Land Titles Act</i>, where compliance with both the terms of the conservation easement agreement and the land use bylaw or statutory plan can be achieved.” (Recommendation #2) ▪ It is recommended that <i>EPEA</i> be amended to include provisions that will guide adjudicative interpretation, whether judicial or by the Environmental Appeals Board, of conservation easement agreements in a manner that is liberal and purposive, with the guiding principles being found within the legislative purpose of conservation easements under <i>EPEA</i>. (Recommendation #4) ▪ It is recommended that <i>EPEA</i> be amended to include a clause under section 23 indicating “an agreement submitted to the Registrar under this section shall not be considered to effect a subdivision of land for the purpose of section 652 of the <i>Municipal Government Act</i>, R.S.A. 2000, c. M-26, as amended”. (Recommendation #7) ▪ It is recommended that <i>EPEA</i> be amended to include a provision through which any tax liability and any other costs that arise by virtue of exercising the Ministerial discretion under section 22(7)(b) will be paid by the provincial Crown, upon receiving proof of those costs from the qualified organization who held the conservation easement immediately prior to the Ministerial discretion being so exercised. (Recommendation #9) (If recommendation #1 is not adopted). ▪ It is recommended that the province develop a standardized formula for assessing the value to be attributed to conservation easements. (Recommendation #12) ▪ It is recommended that the government repeal section 2 and Form 1 (of the Schedule) of the <i>Conservation Easement Registration Regulation</i>. It is also recommended that section 3 of Form 2 (of the Schedule) be removed. (Recommendation #13)

<p>Recommendations for general implementation Contains recommendations that are:</p> <ul style="list-style-type: none"> *more complex; *have more significant legislative and policy amendment implications; *may have some significant cost to implement; or *have cross departmental issues. 	<ul style="list-style-type: none"> ▪ It is recommended that <i>EPEA</i> be amended to include a provision specifically stating the exercise of Ministerial discretion to terminate a conservation easement to be an act of expropriation as defined in the <i>Expropriation Act</i>², notwithstanding the fact that the Crown is not obtaining the title or an interest in land. This would trigger the ability of the landowner and qualified organization to object to and be compensated for the termination of a conservation easement and would require express provisions that limit the expropriation to the easement itself and not to the land underlying the easement. Legislative guidance surrounding compensation would also be required to include costs of conservation easement production, monitoring, tax impacts and assessment of ecological values attributable to the easement lands. (Alternative recommendation #1a) ▪ It is recommended that <i>EPEA</i> be amended to allow conservation easements to be enforced through legislative mechanisms, by empowering the Environmental Appeals Board (EAB) to hear and adjudicate disputes regarding the meaning and intent of conservation easement agreement terms. A review of the current strength of the privative clause provided in section 102 of <i>EPEA</i> should be undertaken to determine if it needs further enhancement to ensure sufficient deference is given to the EAB. (Recommendation #3) ▪ It is recommended that section 361 of the <i>Municipal Government Act</i> be amended to include conservation easement lands, adding a new subsection (d) stating “lands, or portions of lands, that are covered by a conservation easement pursuant to section 22 of the <i>Environmental Protection and Enhancement Act</i>”. (Recommendation #5) ▪ It is recommended that section 4 of the <i>Matters Relating to Assessment and Taxation Regulation</i> be amended to include a specific tax valuation rate for lands that are the subject of conservation easements, or more generally, for conservation lands, that would be defined to include conservation easement lands. The valuation rate should be equal to or less than the farm valuation to act as an incentive to enter conservation easements or otherwise preserve ecologically valuable lands. (Alternative recommendation #5a) ▪ It is recommended that a policy be introduced whereby landowners with conservation easements on their
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² R.S.A. 2000, c. –13

	<p>lands can, upon providing proof of the conservation easement being registered on their land, apply and receive a rebate from the Government of Alberta covering all or a portion of municipal taxes paid in relation to that land. (Alternative recommendation #5b)</p> <ul style="list-style-type: none"> ▪ It is recommended that the Land Titles Registrars across the province be directed to consistently and clearly apply a notation to the certificate of title indicating that significant limitations on land use may apply to the land to which the conservation easement is attached. This may be accomplished through amendments to section 23 of <i>EPEA</i> requiring that the memorandum of agreement that appears on title must include the notation of “Conservation Easement”, the name of the holder of the easement, and cautionary language such as “Restrictions on land use and subdivision likely to apply”. (Recommendation #6) ▪ It is recommended that section 207.31 of the <i>Income Tax Act</i> be amended, replacing “Any charity or municipality” with “Any charity, municipality or person who has an interest in land classified as an “ecological gift” under this Act”. (Recommendation # 8) ▪ It is recommended that the Government of Alberta adopt a policy to identify and prioritize areas of public land that adjoin or are adjacent to private lands that are under conservation easements and place conservation easements on those public lands that currently or have the potential (through restoration) to benefit the natural and ecological value of the conservation easement lands. (Recommendation #10) ▪ It is recommended that the Government of Alberta adopt a policy to identify and prioritize areas of public land that adjoin or are adjacent to private lands that are under conservation easements and that all departments with administrative roles on those lands adopt special ecologically protective land management policies for those areas. (Alternative recommendation #10a) ▪ It is recommended that the Government of Alberta adopt a policy to identify and prioritize areas where oil and gas activities could be precluded by conservation easements where it is requested by the landowner. (Recommendation # 11) ▪ It is recommended that the province develop criteria that will ensure that the boundary of the easement area is sufficiently described for the purpose of registration at Land Titles. (Recommendation #14)
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Part A: Background on conservation easements in Alberta

Conservation easements have been an option for landowners in Alberta since 1996. As of 2006 Alberta landowners have donated or sold conservation easements covering 29,882 hectares, and donated or sold fee simple title covering 40,928 hectares to conservation organizations.³ 19,110 hectares of these lands qualified as Ecological Gifts and were valued at approximately \$41 million.⁴

As conservation easements continue to be established and properties with conservation easements begin to be bought and sold it is important to analyze both the legal and practical barriers to effective easement creation, monitoring and enforcement.

The ELC considers conservation easements to be one of several important tools to protect ecologically significant aspects of private land. Conservation easements provide flexible legal mechanisms through which society and, more specifically, private landowners can seek to preserve the ecological integrity and biodiversity of a landscape. The value of protecting these landscapes includes protecting important ecological goods and services⁵ and encouraging the protection of biodiversity and the economic and inherent value that biodiversity holds.⁶

The existence of conservation easement legislation in Alberta illustrates the public's support for this legal tool, as does the provincial support for a land trust alliance.⁷ The federal government has also indicated its support for conservation easements by amending the tax provisions applicable to Ecological Gifts, to exempt qualifying gifts from taxes on capital gains.⁸

Part B: Process of Issue Identification

Issues surrounding conservation easement law and policy in Alberta were identified by:

³ Personal communication and unpublished maps, Olaf Jensen, Canadian Wildlife Service, June, 2006.

⁴ *Ibid.*

⁵ See Ducks Unlimited Canada, *Ecological Goods & Services #1-10*, various dates, online: Ducks Unlimited Canada <www.ducks.ca/conserv/wetland_values/conserv.html> and Environics Research Group, *National Survey of Farmers and Ranchers: Ecological Goods and Services* (Ottawa: Wildlife Habitat Canada, 2006) online: Wildlife Habitat Canada <www.whc.org/documents/EN5742landowners1.pdf>. Also see Brandes, O., Ferguson, K., M'Gonigle M, and Sandborn, C., *At a Watershed: Ecological Governance and Sustainable Water Management in Canada* (Victoria: POLIS project on Ecological Governance, 2005) at page 3.

⁶ As recognized in international agreements such as *The Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (1992), online: The Convention on Biological Diversity <<http://www.biodiv.org/default.shtml>>.

⁷ See Government of Alberta, News Release, "Province grants \$300,000 to Alberta's first-ever land trust alliance", (22 November 2006) online: Government of Alberta <<http://www.gov.ab.ca/acn/200611/208511101541D-DE01-A1BF-5487F8AE9FBD5E91.html>>.

⁸ See *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on May 2, 2006*, S.C. 2006, c-1, at s. 52(2), amending the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) as amended, at s. 38(a.2).

- reviewing relevant legislation in Alberta, including the *Environmental Protection and Enhancement Act*⁹ (EPEA), *Land Titles Act*¹⁰ (LTA), and the *Municipal Government Act*¹¹ (MGA);
- reviewing relevant conservation legislation in other Canadian jurisdictions;¹²
- reviewing the federal *Income Tax Act*¹³ in relation to Ecological Gifts;
- reviewing relevant case law, both in and outside of Alberta;¹⁴
- interviewing landowners who have granted conservation easements;
- interviewing qualified organizations;
- participating in and using input obtained from land trusts through the provincial Land Trust Leadership Project;¹⁵ and
- reviewing selected publications on conservation easements.

Further information about specific research that was conducted is outlined below.

Interviews

The interviews with landowners and qualified organizations focused on discovering gaps and barriers in the conservation easement process. For landowners, the interview questions focused on the process of entering into a conservation easement and any past or ongoing concerns that they had in relation to conservation easement agreements. For qualified organizations, the interview questions focused on issues that impacted the current and future implementation of their conservation easement programs. Thirteen landowners and four qualified organizations were interviewed. The results of the interviews were not intended to provide statistically significant results; rather, they were

⁹ R.S.A. 2000, c. E-12.

¹⁰ R.S.A. 2000, c. L-4.

¹¹ R.S.A. 2000, c. M-26.

¹² For reference purposes a thorough description of conservation related legislation in Canada was completed in 2004 by Atkins, Judy, Hillyer, Ann, and Kwasniak, Arlene, *Conservation Easements, Covenants and Servitudes in Canada: A Legal Review*, Report No. 04-1 (Ottawa: North American Wetlands Conservation Council (Canada), 2004).

¹³ R.S.C. 1985, c. I, (5th supp.) as amended at s.38.

¹⁴ There is little jurisprudence regarding conservation easements in Alberta and in Canada generally. A review of all jurisdictions in Canada failed to produce any relevant case law in relation to conservation easements specifically. There are currently some disputes before the courts in Alberta, but no jurisprudence had been reported at the time of the writing of this brief.

¹⁵ The Land Trust Leadership Project was initiated by Alberta Environment in the spring of 2006 and involved meetings and workshops attended by organizations that hold conservation easements and academic and non-government organizations with an interest in conservation easements and land trust initiatives.

conducted to provide insights into barriers and gaps to conservation easements from both the landowners' and qualified organizations' perspectives.

Land Trust Leadership Project

During the course of this project, Alberta Environment initiated a Land Trust Leadership Project (LTLP) to assist in identifying ways to facilitate conservation easements in Alberta. The project culminated in a workshop and resulted in recommendations to the Minister of Environment. These recommendations are attached in Appendix A of this brief.

The LTLP was not focused on regulatory reform but the workshop participants identified various areas that may require legislative and regulatory amendments. This brief identifies deals with several issues raised through the LTLP process that may be addressed through law reform. The recommendations put forward in this brief reflect the position of the ELC alone and should not be construed as reflecting the position of any of the individuals or organizations that attended the workshop.

A note regarding case law from United States

A thorough review of cases regarding private conservation instruments and their efficacy in the United States is beyond the scope of this brief. Nevertheless American jurisprudence, while not necessarily directly applicable in a given Canadian province, may be informative regarding how the legal and practical application of conservation easement validity and enforcement may evolve in Canada. For this reason, reference was made to academic summary documents in relation to how the courts in the United States have treated conservation easements.¹⁶

The primary issue identified in U.S. case law of potential consequence in Canada is the prevalence of enforcement and court action arising as a result of the second generation landowner taking issue with or challenging the terms of the conservation easement agreement.¹⁷ The frequency of legal challenges of conservation easement agreements is anticipated to increase in Alberta (and Canada) as the original grantors of the easements seek to sell their lands.

¹⁶ Specifically the documents used were: Jody Patsch and Paula Ramsay, University of Victoria Environmental Law Centre, *Borrowing U.S. Law on Conservation Covenants* (Victoria: the Environmental Law Centre Society, 2003) (*Borrowing US Law*); Jessica E. Jay, Esq and Melissa K. Thompson "An Examination of Court Opinions on the Enforcement and Defence of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date" (2006), online: Private Landowner Network <<http://www.privatelandownernetwork.org/plnpro/court%20opinions.asp>> (*Court Opinions*); and Thompson, M. K., *et al.*, "An Examination of Court Opinions on the Enforcement and Defence of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date" (2001) 78:3Denv. U.L.Rev. 373.

¹⁷ *Ibid.* See *Borrowing US Law* at page 4 where it notes that 85% of reviewed cases involved successive landowners (with only 3 of 20 being first generation land owners). Similarly of 19 reviewed cases in *Court Opinions*, all but two of the cases involved second generation landowners.

Another issue arising in the American case law involves the ambiguity in the terms of the conservation easement agreements. Notably, the courts in the United States have often applied the common law presumption in favour of the free use of land.¹⁸ This approach to interpretation of conservation easement agreements is relevant to the ELC's recommendations, *infra*.

Part C: Issues and Recommendations

Issues that impact conservation easement effectiveness

The ELC review identified a variety of issues, some of which require legislative and policy reform while others related to building capacity in conservation easement programs. This brief focuses on those issues that are most easily remedied by amendments to law or policy. Issues that were identified but are not easily remedied by law and policy reform are included in Appendix B.

The issues that have an impact on conservation easement effectiveness include:

1. Conservation easement modification and termination uncertainties;
2. Enforcement uncertainty;
3. Inconsistent and detrimental property tax treatment on conservation easements;
4. Clarity on Certificate of Title;
5. Clarity regarding registration of conservation easements;
6. Inappropriate tax implications of enforcement;
7. A lack of tax and related liability where Ministerial discretion under *EPEA* is maintained;
8. A lack of conservation practices on public lands adjoining conservation easements;
9. Limitations on precluding oil and gas activities on high priority lands;
10. A lack of certainty in the conservation easement assessment process;
11. Unnecessary notice provision; and
12. Uncertainty regarding the boundary of easement area and registration.

¹⁸ *Ibid.*, *Borrowing US Law* at page 2.

1. Conservation easement modification and termination uncertainties

In Alberta, the ability to terminate or modify easements relies upon:

- an agreement between the landowner and qualified organization to change or terminate the conservation easement agreement;
- the discretion of the Minister of Environment to terminate the easement if the Minister is of the opinion that it is in the public interest to do so; or
- a court ordering removal or change of the conservation easement under the *Land Titles Act*.

Uncertainty is created where the decision to modify or terminate a conservation easement is very discretionary in nature. The discretionary powers of the Minister and the court can give rise to significant uncertainty in this regard.

i) Ministerial discretion to terminate easements

Subsection 22(7) of *EPEA* indicates that a conservation easement may be terminated or modified “by order of the Minister, whether or not the Minister is a grantor or grantee, if the Minister considers that it is in the public interest to modify or terminate the agreement”. This provision has been subject to criticism since the legislation’s inception for providing a broad, discretionary power to undermine the conservation tool.¹⁹ Non-government organizations have indicated that the Ministerial discretion provision should be removed.²⁰

Interviewees cited the Ministerial discretion as a point of contention. The main concern regarding this section of *EPEA* is that it undermines the certainty regarding conservation easements as a private conservation tool. From the qualified organization’s perspective, the Minister’s discretionary power is of significant concern as large amounts of resources go into conservation easements and their monitoring and this could be undermined by the Minister in a relatively *ad hoc* manner. From the perspective of the landowner, who wishes to see his or her land preserved in perpetuity, the power to terminate conservation easements by exercising broad and unfettered Ministerial discretion may act as a disincentive to enter into the conservation easement agreement.

To date there have been no conservation easement agreements that have been terminated or modified by the Minister. If the Minister were to do so, it would likely result in a freeze in conservation easement activity. Other jurisdictions have not included a

¹⁹ Alberta, Legislative Assembly, *Hansard*, (May 21, 1996) at 1987 (Mr. Collingwood).

²⁰ Canada West Foundation *Yard Work, Exploring Natural Capital Public Policy Issues: Should There Be Certainty? The Elimination of Ministerial Discretion to Terminate Conservation Easements* (Calgary: Canada West Foundation, 2005).

Ministerial discretion provision in their conservation easement legislation, avoiding the vagaries of government discretion.²¹

The exercise of Ministerial discretion also raises issues around tax benefits related to conservation easement lands. In particular, the granting of tax benefits by the federal government for Ecological Gifts may be undermined where the Minister unilaterally terminates an easement. Currently the *Income Tax Act* has enforcement provisions regarding ecological gifts for changes in land use that are caused by the easement holder.²² Changes in land use caused by the Minister are not covered by the *ITA* and the resulting change in land use would result in public funds being wasted, through tax credits or deductions being given notwithstanding the conservation value of the land having been compromised. The question then becomes “who is liable in the instance of provincial intervention and termination?” Should the province not be liable for the amount? Does the qualified organization maintain the tax liability and can they pursue the provincial government for any tax penalties? This issue is dealt with further, *infra*.

Recommendation #1

It is recommended that the Ministerial discretion regarding the modification and termination of easements found in section 22(7)(b) of *EPEA* be repealed.

Alternative Recommendation #1a

Failing adoption of Recommendation #1, it is recommended that *EPEA* be amended to include a provision specifically deeming the exercise of Ministerial discretion to terminate a conservation easement to be an act of expropriation as defined in the *Expropriation Act*,²³ notwithstanding the fact that the Crown is not obtaining the title or an interest in land.

This would trigger the ability of the landowner and qualified organization to object to and be compensated for the termination of a conservation easement and would require express provisions (incorporated into *EPEA*) that limit the expropriation to the easement itself and not to the land underlying the easement. Legislative guidance surrounding compensation would also be required to include costs of conservation easement production, monitoring, tax impacts and assessment of ecological values attributable to the easement lands.

Alternatively, see recommendation #9 at page 16 of this brief.

²¹ Few Canadian jurisdictions that have conservation easement legislation have included discretion within the government to terminate conservation easements in a method similar to Alberta. Ontario, Nova Scotia, New Brunswick, Saskatchewan, Manitoba, and the Yukon have not legislated Ministerial discretion in this manner. Several of these jurisdictions do have a system whereby a landowner can apply to the court to terminate the easement for being “unreasonable” or causing “severe hardship”.

²² *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) at s.207.31.

²³ R.S.A. 2000, c. E –13.

ii) Court ordered change or discharge of easements

Section 48 of the *LTA* provides two instances where the court may decide to modify or discharge a covenant (or conservation easement²⁴), namely, where the court is satisfied:²⁵

- that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant; or
- that the condition or covenant conflicts with the provisions of a land use bylaw or statutory plan.

The second part of this test may give rise to uncertainty as to when a conservation easement agreement might be viewed as conflicting with a specific land use bylaw or statutory plan.

The common law principles applicable to discerning whether a conflict exists between a covenant and a statutory plan or land use bylaw were considered in the Alberta case of *Barker v. Palmer*.²⁶ Citing *Seiffeddine v. Hudsons' Bay Co.*, the Alberta Court of Queen's Bench confirmed that a conflict will only be found where compliance with the covenant requires a violation of the bylaw, that is to say where it is impossible to comply with both the covenant and the bylaw.²⁷ The Alberta Court of Appeal in *Tanti v. Grudenwhere* previously upheld this premise, noting "a restrictive covenant whose terms are more strict than the provisions of the applicable municipal bylaw will nevertheless be enforceable".²⁸

A conservation easement, typically requiring non-use or non-development of land, would rarely (if ever) conflict with a bylaw in this manner. Typically compliance with both the easement and any bylaw standards would be met through non-development. It is submitted that the terms of the *LTA* and the case law in this regard indicate that any challenge of a conservation easement on this basis would therefore fail.

Codifying the common law would bring clarity that the terms of a conservation easement will rarely conflict with a statutory plan or land use bylaw. This in turn will provide a level of certainty to those entering into conservation easements and act as a disincentive to the bringing of unsupported, strategic and costly legal challenges.

²⁴ S. 24(3) of EPEA states that "A conservation easement granted under s. 22 is deemed to be a condition or covenant for the purpose of ss. 48(4) and (6) of the *Land Titles Act*."

²⁵ *LTA*, *supra* note 11 at section 48 (4).

²⁶ 2005 ABQB 815

²⁷ *Ibid.* at para. 29, citing *Seiffeddine v. Hudsons' Bay Co.*, (1980) 11 Alta. L.R. (2d) 229 (Alta. C.A.), [*Seiffeddine*]

²⁸ 1999 ABCA 150, (1999), 74 Alta. L.R. (3d) 110, at paragraph 7, online: CanLII <<http://www.canlii.org/ab/cas/abca/1999/1999abca150.html>>.

Recommendation #2

It is recommended that section 24 of *EPEA* be amended with an additional section indicating that “a conflict between a conservation easement and a land use bylaw or statutory plan will not arise, for the purpose of section 48(4) of the *Land Titles Act*, where compliance with both the terms of the conservation easement agreement and the land use bylaw or statutory plan can be achieved.”

2. Enforcement uncertainty

Reliance on court actions to enforce the terms of the conservation easement agreement can be extremely onerous, adversarial and uncertain. The effectiveness of a conservation easement program is tied closely to the enforceability of the conservation easement agreements.

In interviews, this enforcement uncertainty was cited by the qualified organizations as one of the major issues in relation to implementing conservation easement programs now and into the future. The potential losses if the easements are not upheld are so significant that this uncertain future liability and risk of monetary loss has become a barrier to continued conservation easement facilitation. This is particularly the case for smaller organizations with minimal resources to enforce the terms of a conservation easement in the courts. This concern will continue to grow if, as has been seen in the United States, the number of court challenges increase as land is sold to “second generation” landowners who must then comply with the terms of the conservation easement.²⁹

Minimizing enforcement issues is central to a robust and effective conservation easement program in the province. The ELC recommends that enforcement issues be dealt by encouraging compliance with the terms of the agreements. Means of encouraging compliance will vary depending on the nature of the impugned activity and the intent (or lack thereof) of the landowner. Namely, compliance may involve:

- ensuring clarity in the terms of the conservation easement agreement;
- communication of the terms of the conservation easement agreement to interested parties;
- legal advice being sought by signatories to the agreement; and
- strong legal mechanisms to discourage intentional non-compliance in the first instance.

Where signatories to the agreement intentionally violate the terms of the agreement, promoting compliance will be less effective. The focus must then be on strengthening provincial regulatory guidance around the intent and purposes of the conservation easement legislation.

²⁹ *Supra* note 16.

A variety of tools for better enforcement of conservation easements were canvassed. All options are seen as justifiable mechanisms through which the ongoing use of conservation easements may be facilitated, but the ELC recognizes that some of the proposed mechanisms may be more difficult to put in place. The ELC recommends consideration of the following four options:

- dispute resolution through an administrative body;
- enabling the use of environmental protection orders in instances of violation of conservation easements;
- providing interpretative guidance to the courts; and
- including a reverse onus provision in the *Environmental Protection Enhancement Act*.

It must be noted that the four options outlined should not be applied retroactively. To ensure fairness in the process, retroactive application of enforcement amendments should only apply if the landowner and qualified organization agree to have the new enforcement mechanisms apply.

i) Dispute resolution through an administrative body

An administrative board, such as the Environmental Appeals Board (EAB), could be empowered to consider conservation easement agreements. The nature of the board review would be akin to other administrative boards that adjudicate the relative rights of two parties and the interpretation to be given to an otherwise private agreement. The use of an administrative body for enforcement brings the benefit of more timely decisions and minimization of costs and strategic use of court processes.

Unfortunately, there are few examples of administrative boards taking on a role in conservation easement agreement adjudication. Manitoba has a Conservation Agreement Board with a mandate that includes resolving disputes. However, it appears that the Manitoba Board has not been overly active and lacks governing regulations to guide its activities in this regard.³⁰

To enable the EAB to consider conservation easements, legislative and policy guidance is needed to provide specific direction on the nature of adjudication that would be required in relation to conservation easements. The EAB's current mandate and adjudicative focus may not be well suited to strict interpretation of a conservation easement agreement and finding in favour of one interpretation over another. The EAB typically seeks out compromises or mediation to resolve disputes arising around environmental

³⁰ See the *Conservation Agreement Act*, C.C.S.M. c. C173 and the *Conservation Agreement Board Procedure Regulation*, Man. Reg. 150/98. online: Canadian Legal Information Institute <<http://www.canlii.org/mb/laws/sta/c-173/index.html>>.

authorizations. This focus may not be suitable for most situations of conservation easement interpretation.

To be effective, any board decision regarding the interpretation of conservation easements, whether by the EAB or a new board, would require the protection of a strong privative clause regarding its jurisdiction. Further, implementation of a board's decision would need an enabling mechanism such as an environmental protection order or other order that could be enforced through the courts.

ii) Enabling the use of environmental protection orders

The issuance of environmental protection orders (EPOs) by the Minister or Director in relation to conservation easements is another enforcement alternative. This would add a regulatory response to what is otherwise a private agreement but the regulatory intervention may be justified given the purpose of conservation easements and the preventative intent of environmental protection orders. Alberta Environment's *Compliance Assurance Principles* states that Alberta Environment "will use legislation-based orders to prevent environmental ... problems".³¹ This reflects a preventative approach to environmental protection since no contravention of *EPEA* is required prior to Alberta Environment taking regulatory measures by means of an EPO. Where the environmental quality of conservation easement lands could be under threat an EPO could be used. In particular, the Director or Minister may issue an EPO where activities are occurring on the landscape in a manner that is contrary to the purpose of the agreement as set out in section 22(2) of *EPEA*. In effect, the EPO would be used to uphold the legislative purpose of the conservation easement. The EPO could then be appealed to the EAB, as is currently the case with other EPOs under *EPEA*.

To be effective, the decision to issue an EPO should be accompanied by reasons why the EPO is required and justification why the EPO is necessary to uphold the purpose of the conservation easement as defined by *EPEA*. An EPO could be triggered by way of an application to the Minister or Director supported by a statutory declaration outlining the proof that the purpose of the conservation easement is being undermined. The Minister or Director would then review the facts and determine whether an EPO is justified.

iii) Providing interpretative guidance to courts

EPEA could also be amended to give guidance to the courts in interpreting conservation easement agreements. In particular, the courts should be directed to give conservation easement agreements a liberal, purposive interpretation. This would minimize judicial interpretations that narrowly construe agreements that have impacts on the use of land.³²

iv) Including a reverse onus provision in *EPEA*

³¹ See Alberta Environment, *Compliance Assurance Principles* (Edmonton: Government of Alberta, 2000) online: Alberta Environment <<http://environment.gov.ab.ca/info/library/7433.pdf>>.

³² See *Borrowing US Law*, *supra* note 16 at page 2.

EPEA could be amended to include a reverse onus provision in relation to proof of actions that are contrary to the terms of agreement. The reverse onus provision would operate to allow enforcement through court injunctions to be granted based upon *prima facie* evidence of a violation of the conservation easement agreement. The offending party would be required to rebut this evidence and establish that their actions are not in violation of the terms and purpose of the agreement.

Recommendations

Based on the likelihood of implementation and their potential success of protecting the integrity of the conservation easement system, the ELC favours two of the four options outlined above.

Recommendation #3

It is recommended that *EPEA* be amended to allow conservation easements to be enforced through legislative mechanisms, by empowering the Environmental Appeals Board (EAB) to hear and adjudicate disputes regarding the meaning and intent of conservation easement agreement terms. A review of the current strength of the privative clause provided in section 102 of *EPEA* should be undertaken to determine if it needs further enhancement to ensure sufficient deference is given to the EAB.

Recommendation #4

It is recommended that *EPEA* be amended to include provisions that will guide adjudicative interpretation, whether judicial or by the Environmental Appeals Board, of conservation easement agreements in a manner that is liberal and purposive, with the guiding principles being found within the legislative purpose of conservation easements under *EPEA*.

3. Inconsistent and detrimental property tax treatment on conservation easements

Municipal taxes on conservation easement lands may act as an incentive or disincentive to granting a conservation easement. Currently, there is no consistent policy in place regarding how conservation easement lands will be treated from one municipality to another. This lack of policy or legislative guidance was noted by Arlene Kwasniak in *Conservation Easement Guide for Alberta*.³³ It was also cited as a concern during interviews with qualified organizations and was raised within the LTLP discussions, resulting in the following recommendation to government:³⁴

Modify the municipal approach to conservation easements by providing clearer assessment rules that do not discourage their use and consider providing grants in-lieu of property taxes to municipalities.

³³ (Edmonton: Environmental Law Centre, 1997) at pages 11-12.

³⁴ IMI Strategics, *Land Trust Leadership Project: Report and Recommendations*, for Alberta Environment (3 August 2006) unpublished, at page 6.

The importance of a property tax regime on conservation efforts has also been noted by the National Round Table on the Environment and the Economy where it observed:³⁵

Any unused land - that [*sic*] set aside for conservation assuming a strict conservation interpretation of no agricultural use - will generate no revenue for the farmer but will incur the property tax. A profit-maximizing/cost-minimizing farmer will then set aside land for conservation only if development for agriculture generates net private losses.

These comments were made in support of a municipal property tax credit pilot program in Manitoba that acted as an incentive to set aside land for conservation.³⁶ The principles are applicable to lands set aside under conservation easements. Where a municipal taxation system fails to recognize the value attained through conservation easements and, in fact, taxes the farm or undeveloped property in a manner that indicates that the conservation purpose is not valid, it creates a general perception that conservation of ecological functions of the land is neither valued nor important. Amendments to the municipal tax system in relation to conservation easements are justified to acknowledge the myriad of public and municipal benefits of conservation easements, including providing recreation opportunities, esthetically pleasing areas to attract people to the municipality and ecological goods and services, such as erosion control and water treatment.³⁷ There are also guaranteed savings in relation to conservation easement lands since the costs of providing services for “higher” use developments are avoided.

Some lands are exempt from property taxes under section 361 of the *Municipal Government Act* based on their use while others are subjected to valuations based either on market value or agricultural use value.³⁸ To determine the market value, there is a need to fully understand the restrictions on land use to properly assess the impact these restrictions will have on current and future value. If the restrictions on use, beyond bylaw restrictions, are not properly understood or addressed in the valuation, it is likely that the assessed value may be higher than is appropriate.³⁹

Similarly, using agricultural use value to determine the level of taxation for conservation easement lands may not be appropriate as it fails to recognize the conservation value of

³⁵ See National Roundtable on the Environment and the Economy, *Agricultural Landscapes: Ecological Fiscal Reform Case Study* (Ottawa: National Round Table on the Environment and the Economy, 2002), online: National Round Table on the Environment and the Economy <http://www.nrtee-trnee.ca/eng/programs/Current_Programs/EFR-Energy/Case_Studies/EFR_Case-Studies-Agriculture_E.htm> at s.1.4.2

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ S.4 of the *Matters relating to Assessment and Taxation Regulation*, Alta. Reg. 220/2004.

³⁹ Alberta Municipal Affairs, *Guide to property assessment and taxation in Alberta* (Edmonton: Government of Alberta, undated) online: Alberta Municipal Affairs <http://municipalaffairs.gov.ab.ca/as/pdf/AB_Guide_PtyAsmt.pdf>. at page 9.

keeping some land out of production.⁴⁰ While the reduced taxes of a farmland assessment may act as an incentive to some landowners, a farm land tax assessment may create a misconception regarding conservation easements as being appropriate for cultivation or other farm uses that may be restricted by the terms of the conservation easement agreement. For this reason an assessment and taxation regime specific to conservation easements may be appropriate.

The ELC recognizes that any reduction or perceived reduction in a municipality's tax base is likely to be a source of political contention. It may be argued that the reduction in taxes is more than offset by the benefits provided by conservation easement lands within a municipality. For this reason, the ELC has outlined a variety of mechanisms through which consistent and beneficial tax treatment of conservation easement lands may be achieved.

Recommendation #5

It is recommended that section 361 of the *Municipal Government Act*⁴¹ be amended to include conservation easement lands, adding a new subsection (d) stating "lands, or portions of lands, that are covered by a conservation easement pursuant to section 22 of the *Environmental Protection and Enhancement Act*".

Alternative recommendation #5a

Failing adoption of recommendation #5, it is recommended that section 4 of the *Matters Relating to Assessment and Taxation Regulation* be amended to include a specific tax valuation rate for lands that are subject to conservation easements, or more generally, conservation lands, which would be defined to include conservation easement lands. The valuation rate should be equal to or less than the farm valuation to act as an incentive to enter conservation easements or otherwise preserve ecologically valuable lands.

Alternative recommendation #5b

It is recommended that a policy be introduced whereby landowners with conservation easements on their lands can, upon providing proof of the conservation easement being registered on their land, apply for and receive a rebate from the Government of Alberta covering all or a portion of municipal taxes paid in relation to that land.

4. Clarity on Certificate of Title

Effective preservation of conservation easement lands requires that purchasers of that land and their advisors are well aware of the impact of the conservation easement on the land. A lack of understanding on the part of a purchaser is more likely to result in violations of the terms of the agreement and subsequent court actions.⁴²

⁴⁰ *Supra* note 35 at page 13.

⁴¹ *Supra* note 12.

⁴² *Supra* note 16.

Various types of easements and covenants that may appear on a certificate of title have minimal implications for purchasers of land. However, conservation easements invariably contain more significant restrictions on land use and typically cover larger areas than common easements or covenants. The current practice of the provincial Land Titles office is to place a notation on the certificate of title reading “conservation easement” followed by the qualified organization’s name. To assist in ensuring that landowners and advisors are duly diligent, a heightened notification system is appropriate.⁴³

Recommendation #6

It is recommended that the Land Titles Registrars across the province be directed to consistently and clearly apply a notation to the certificate of title indicating that significant limitations on land use may apply to the land to which the conservation easement is attached. This may be accomplished through amendments to section 23 of *EPEA* requiring that the memorandum of agreement that appears on title must include the notation of “Conservation Easement”, the name of the holder of the easement, and cautionary language such as “Restrictions on land use and subdivision likely to apply”.

5. Clarity regarding registration of conservation easements

The interface between *EPEA* and the *Municipal Government Act (MGA)* may give rise to arguments regarding a potential conflict in the legislation. It has been suggested that placing a conservation easement on a parcel of land may be viewed as having the effect of subdividing the land.⁴⁴ If the Land Titles Registrar shares this view of conservation easement agreements, there are conflicting legislative terms that may arise. Section 23(3) of *EPEA* states that “when an agreement ... is presented for registration, the Registrar shall endorse a memorandum of the agreement on the certificate of title to the land that is subject of the agreement” [emphasis added]. Section 652 of the *MGA* states that “a registrar may not accept for registration an instrument that has the effect or may have the effect of subdividing a parcel of land unless the subdivision has been approved by a subdivision authority.”⁴⁵

If the Registrar views the conservation easement as an instrument that has the “effect of subdividing a parcel” and therefore in need of a subdivision approval it would appear that this view would be in conflict with the mandatory wording of *EPEA*. The ELC views this conflict as primarily theoretical in nature as statutory interpretation would likely give precedence to the mandatory duty under *EPEA*, either because of its mandatory language in relation to the Registrar’s discretion or as an implied exception to the requirement for a

⁴³ It should be noted that most often conservation easement agreements will include a requirement that the landowner notify the qualified organization at the time of sale, but further clarity on the certificate of title remains worthwhile.

⁴⁴ See Shores, William, “Conservation Easements and Subdivision – A Legal Perspective” in (Kwasniak, A., and Tingley D. eds) *A Legacy of Land: Conservation Easements and Land Stewardship, Proceedings of a Conference Held June 18-19, 1998* (Edmonton: Environmental Law Centre, 1999) at page 123.

⁴⁵ *Supra* note 11.

subdivision approval in the *MGA*.⁴⁶ Further, the impact of the potential conflict is minimized once the instrument is registered on the certificate of title by operation of section 36 of the *Land Titles Act*. This section minimizes the instances where an instrument may be voidable notwithstanding the fact that the instrument was registered in a manner contrary to Part 17 of the *MGA*.⁴⁷ Nevertheless the remaining uncertainty around interpretation of this potential conflict unnecessarily invites a court challenge and the accompanying uncertainty and costs. A legislative amendment can easily bring clarity to this issue.

Recommendation #7

It is recommended that *EPEA* be amended to include a clause under section 23 indicating “an agreement submitted to the Registrar under this section shall not be considered to effect a subdivision of land for the purpose of section 652 of the *Municipal Government Act*, R.S.A. 2000, c. M-26, as amended”.

6. Inappropriate tax implications of enforcement

Currently the monitoring and enforcing of a conservation easement agreement is conducted by the qualified organization holding the easement. If the land is compromised by a landowner’s activities, the conservation value of the easement may be reduced or nullified. This reduction in conservation value in turn represents a cost borne by the qualified organization, in the case of a paid easement, or to the taxpayer, in the case of a gift. While the easement remains in existence the value of the land from a conservation perspective is diminished.

If the land is altered such that the ecological gift criteria⁴⁸ are no longer met, it is logical that the tax benefit that has accrued (in favour of the conservation easement) be reversed. The *Income Tax Act* attempts to deal with these tax implications by holding the charity or municipality liable (the qualified organization where conservation easements were the subject of the Ecological Gift) for 50% of the fair market value of the gift.⁴⁹ Section 207.31 of the *Income Tax Act* states:

Any charity or municipality that at any time in a taxation year, without the authorization of the Minister of the Environment or a person designated by that Minister, disposes of or changes the use of a property described in paragraph 110.1(1)(d) or in the definition "total ecological gifts" in subsection 118.1(1) and

⁴⁶ See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Vancouver: Butterworths, 2002). at pages 268-273 where the principles of implied exception (*generalia specialibus non derogant*) and interpreting statutes to establish priority are described.

⁴⁷ S.76 of the LTA states that “if a registration of an instrument or caveat is made in contravention of subsection (1)[registering an instrument or caveat in contravention of Part 17 of the *Municipal Government Act*], that registration ceases to be voidable when any person has in good faith acquired rights for value in the subdivided land.”

⁴⁸ These criteria are assessed by the Canadian Wildlife Service and are enumerated online at <http://www.cws-scf.ec.gc.ca/egp-pde/default.asp?lang=En&n=C6232D19-1>.

⁴⁹ *Supra* note 13 at s.207.31.

given to the charity or municipality after February 27, 1995 shall, in respect of the year, pay a tax under this Part equal to 50% of the amount that would be determined for the purposes of section 110.1 or 118.1, if this Act were read without reference to subsections 110.1(3) and 118.1(6), to be the fair market value of the property if the property were given to the charity or municipality immediately before the disposition or change.

Section 207.31 appears to be focused on gifts of fee simple estates as opposed to conservation easements. In particular the language of section 207.31 fails to recognize that the landowner may be the party that is responsible for changes in use of the property as described.⁵⁰

The potential inequitable implications of this provision are that:

- the charitable organization may be required to pay a tax (punitive in nature) for actions of the landowner; or
- the change in use that is instigated by the landowner fails to result in accompanying tax redress.

In either instance, the *Income Tax Act* may result in an inappropriate penalty being assessed for a change in land use. It is logical that the individual or organization who changes the use on the conservation easement should be the party that must pay for the resulting tax implications, and that this definition should include all forms of easement holders and the easement grantors (landowners) themselves. By changing the *Income Tax Act* relating to Ecological Gifts to include the current landowner, an additional incentive for landowner compliance would be created.

Recommendation # 8

It is recommended that section 207.31 of the *Income Tax Act* be amended, replacing “Any charity or municipality” with “Any charity, municipality or person who has an interest in land classified as an “ecological gift” under this Act”.

7. Lack of tax and related liability if Ministerial discretion under EPEA is maintained

A need to address a federal tax loss may be triggered where the provincial Minister of Environment exercises his or her discretion under section 22(7)(b) of *EPEA* and modifies or terminates an easement. In instances where this occurs, it is only logical and equitable that the provincial Crown be held to account for undermining the original tax benefit. This tax liability would be a reasonable and effective check on the exercise of Ministerial discretion. Other costs incurred by the qualified organization should also be recoverable in instances where a conservation easement is modified or terminated under section 22(7)(b) of *EPEA*.

⁵⁰ *Ibid.*

Recommendation #9

It is recommended that *EPEA* be amended to include a provision through which any tax liability and any other costs that arise by virtue of exercising the Ministerial discretion under section 22(7)(b) will be paid by the provincial Crown, upon receiving proof of those costs from the qualified organization that held the conservation easement immediately prior to the Ministerial discretion being so exercised.

This recommendation is a further alternative to Recommendation #1a at page 6 of this brief.

8. Lack of conservation practices on public lands adjoining conservation easements

The public in Alberta benefits from the ecological and esthetic values sustained by conservation easements. These benefits arise from the decisions of private landowners to treat their land in a specific manner in perpetuity. Public land adjoining conservation easements may similarly benefit the public if the land is managed in a manner that protects the natural, ecological and esthetic values. In this vein, the LTLP recommended that the Alberta Government:⁵¹

Promote better coordination and management of conservation easements with surrounding land uses, in recognition of an integrated approach to land conservation. This may include better integration of conservation easements with surface access and disturbance issues related to oil and gas development or protecting adjacent public lands to ensure ecological integrity and viability.

The department of Sustainable Resource Development administers and manages the public lands in Alberta and there is a need to assess and manage public lands adjoining conservation easements in a manner that preserves and promotes the natural values of that land. The use of conservation easements on public lands or the use of protective management practices that accentuate private conservation efforts should be adopted as part of the future Government of Alberta land use framework.

Conservation easement agreements on Crown land may be pursued as a Crown “disposition” within the meaning of the *Public Lands Act*.⁵² The agreement would not be the same as a conservation easement agreement under *EPEA* as the Minister could unilaterally cancel it. To remove this power would require additional amendments to the *Public Lands Act*.

Recommendation #10

It is recommended that the Government of Alberta adopt a policy to identify and prioritize areas of public land that adjoin or are adjacent to private lands that are under conservation easements and place conservation easements on those public lands that

⁵¹ *Supra* note 31, at page 6.

⁵² R.S.A. 2000, c. P-40.

currently or have the potential (through restoration) to benefit the natural and ecological value of the conservation easement lands.

Alternative recommendation #10a

Failing the adoption of recommendation #10, it is recommended that the Government of Alberta adopt a policy to identify and prioritize areas of public land that adjoin or are adjacent to private lands that are under conservation easements and that all departments with administrative roles on those lands adopt special, ecologically protective land management policies for those areas.

9. Limitations on precluding oil and gas activities on high priority lands

Currently, conservation easements do not preclude oil and gas activities from occurring on conservation easement lands. These activities can pose a significant threat to the purpose of the conservation easement and the ecological integrity of the land. Some landowners may wish to retain the option of allowing oil and gas activities on easement lands (and the revenues it provides) while others would like to see their conservation easement preclude all oil and gas activity on those lands. A qualified organization also indicated that surface access and related disturbance should be subject to conservation easement restrictions.

The ELC recommends that allowing conservation easements to preclude oil and gas activities in certain priority areas would be an important tool to preserve the ecological integrity of privately owned lands. This initiative may fit well into the Government of Alberta's initial phase of developing a land use framework.

To be effective, the assessment and targeting of priority areas for conservation must take place prior to the disposition of mineral rights or following the lapsing of rights in particular areas. Mineral rights could then be withheld in those areas pursuant to an application by the landowner who has entered into a conservation easement in relation to those lands.

Recommendation # 11

It is recommended that the Government of Alberta adopt a policy to identify and prioritize areas where oil and gas activities could be precluded by conservation easements where it is requested by the landowner.

10. Lack of certainty in the conservation easement assessment process

Some landowners indicated that the assessment process for conservation easements created some unease and frustration due to the fact that the assessment values for conservation easements had not been formalized. Standardizing assessments for conservation easements may prove difficult but more clarity in this area would assist in promoting the conservation easement tool.

Recommendation #12

It is recommended that the province develop a standardized formula for assessing the value to be attributed to conservation easements.

11. Unnecessary notice provision

The *Conservation Easement Registration Regulation* requires that notice be given to the local authority prior to the registration of the agreement with the Land Titles Office.⁵³ This requirement does nothing but raise the possibility of delaying the registration of the conservation easement agreement and should be removed. If a municipality requires knowledge of where a conservation easement is located it can be notified through the Land Titles Office.

Recommendation #13

It is recommended that the government repeal section 2 and Form 1 (of the Schedule) of the *Conservation Easement Registration Regulation*. It is also recommended that section 3 of Form 2 (of the Schedule) be removed.

12. Uncertainty regarding the boundary of easement area and registration

Currently *EPEA* indicates that the Registrar “shall” register a memorandum of the agreement on title when it is received.⁵⁴ Section 3 of the *Conservation Easement Registration Regulation* indicates that the “boundaries of the conservation easement must be described to the satisfaction of the Registrar”. Currently, those wishing to register the conservation easement agreement have two options for delineating the conservation easement area; they can either survey the area or provide a descriptive plan. A survey can require that the easement holder or landowner incur significant cost while a descriptive plan may not be viewed as sufficient by the registrar. Both of these results may cause delays or otherwise discourage landowners from entering into conservation easements. It is in the best interest of all parties involved that the conservation easement area boundary is properly and adequately ascertained, as this will be very relevant to enforcement of the terms of conservation easement. The Government of Alberta should pursue criteria to guide the setting of boundaries for conservation easements that provide the requisite certainty, efficiency and minimization of cost that will best serve conservation easement creation and enforcement. One suggestion in this regard is conservation easement mapping through GPS delineation following specific GPS protocols.

Recommendation #14

It is recommended that the province develop criteria that will ensure that the boundary of the easement area is sufficiently described for the purpose of registration.

⁵³ *Conservation Easement Registration Regulation*, Alta. Reg. 215/96 at section 2.

⁵⁴ See *EPEA*, *supra* note 10 at s.23 (3).

Conclusion

The legislative and policy framework of conservation easements in Alberta has shown significant success in facilitating and encouraging landowners and qualified organizations to enter into conservation easement agreements. The majority of the ELC's recommendations involve relatively minor amendments to various pieces of legislation that will provide further efficiency in the process and address outstanding issues pertaining to the enforcement of the terms of the conservation easement agreements. Ensuring that there is certainty around the enforceability and purpose of conservation easements is particularly relevant to curb problems that have the potential to arise in the future, as conservation easement lands are sold to new landowners.

Appendix A

The Land Trust Leadership Project recommendations

6.0 Recommendations

6.1 Immediate actions

1. Secure funding for a provincial land trust alliance and facilitate its creation, which may include defining a framework, recruiting and announcing a board, developing a web site, and launching the initiative.
2. Support a province-wide conference for land trusts, as a starting point for a land trust alliance and including the education and promotion of conservation easements.
3. Create a strategy to achieve significant, long-term endowment funding to support the work of land trusts and specifically provide the capability to purchase or subsidize the purchase of conservation easements or land for conservation purposes.
4. Create an On-going Stewardship Grant Program to provide funding to land trusts to assist with the monitoring and maintenance of conservation easements, based on a percentage of market value per acre or a set amount, for example, \$25 per acre.
5. Create an assistance program to fund transaction costs for the donation or purchase of title of conservation easements involving ecologically significant lands. Eligible costs could include appraisal, survey, legal, and environmental assessment costs.
6. Create a strategy for increasing and improving the use of conservation easements, including planning and prioritization.
7. Partner with the Minister and staff of Alberta Environment to develop awareness and internal capacity with respect to land trusts and conservation easements so they can support and promote them.
8. Link conservation easements with other environmental priorities like the Land Use Framework and Water for Life Strategy, including providing a seat at the Land Trust Framework table for land trusts and those interested in conservation easements.

6.2 Longer term and/or cross-ministry actions

1. Modify the municipal approach to conservation easements by providing clearer assessment rules that do not discourage their use and consider providing grants in-lieu of property taxes to municipalities.
2. Ensure access to important GIS information to help land trusts plan and coordinate their activities, including the securement and management of conservation easements.
3. Develop and launch an awareness campaign to inform the public about land trusts and conservation easements, supported by a more targeted education and marketing campaign for practitioners and professionals who would benefit from more knowledge about conservation easements.

4. Investigate the use of innovative new approaches like transferable development credits to assist land conservation by providing better incentives to landowners.
5. Investigate the use of water trusts as a conservation tool and, if appropriate, modify the Water Act to allow in-stream water rights to be transferred to conservation organizations.
6. Promote better coordination and management of conservation easements with surrounding land uses, in recognition of an integrated approach to land conservation. This may include better integration of conservation easements with surface access and disturbance issues related to oil and gas development or protecting adjacent public lands to ensure ecological integrity and viability.
7. Provide awards and recognition for projects that conserve land, particularly the use of conservation easements.

IMI Strategics, *Land Trust Leadership Project: Report and Recommendations*, for Alberta Environment (3 August 2006) unpublished.

Appendix B

Additional Conservation Easement Issues Identified

Interviews with Landowners

Landowners were generally comfortable with entering into the conservation easement agreements and had few ongoing concerns. The majority of landowners obtained advice from several sources but a significant reliance was placed on the qualified organization. Some landowners indicated that while independent legal advice was obtained they felt that legal advisors were often not familiar with conservation easements and the implications for current and future land use and value. Other landowners felt that the agreements were straight forward enough and they did not use additional legal counsel or indicated they would not use legal counsel again if they entered into another conservation easement. Some landowners had concerns about the apparent or perceived uncertainty around the appraisal process and felt that more consistently applied appraisals would be worthwhile. Landowners were generally happy with the process and felt the flexibility in the agreements was important in their decision.

Other issues raised by landowners included:

- the effectiveness of conservation easements at precluding oil and gas activity;
- the ability to sell easement lands;
- a lack of understanding among staff in the municipality;
- the questions of whether the agreements truly exist in perpetuity; and
- ability to find knowledgeable advisors apart from qualified organization staff.

Interviews with Qualified Organizations

In addition to some of the issues identified in the brief, qualified organizations cited the following concerns that arise in relation to conservation easements:

- the high time commitment involved in securing lands by conservation easements when compared with other tools;
- the need for ongoing resources for monitoring of conservation easements;
- the need for capacity to fully address concerns of parties over the nature of conservation easements being held in perpetuity;
- difficulties in regional coordination of conservation efforts;

- the lack of a standardized and accessible system for the determination of potential tax incentives;
- ensuring sufficient landowner knowledge regarding conservation easements;
- ensuring staff knowledge is sufficient to address objections raised in the field by landowners and their advisors;
- the compromising of and damage to biological systems resulting from the surface impacts of resource extraction activities; and
- dealing with and forecasting future landowner concerns and the need for future contingencies to be worked into the terms of the conservation easement agreement.

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