GIVING NATURE ITS DUE

TAX TREATMENT OF ENVIRONMENTAL PHILANTHROPY: RECENT IMPROVEMENTS, REMAINING BARRIERS AND CURRENT OPPORTUNITIES

SUSTAINING wetlands

ISSUES PAPER, No. 2003-1

PUBLISHED IN PARTNERSHIP WITH:

EVERGREEN COMMON GROUNDS Bring Nature Back to Your City

NATURE CONSERVANCY CANADA

North American Wetlands Conservation Council (Canada)

Printed 2003
Ottawa, Ontario
ISBN: CW69-10/2003-1E
Cat. No. 0-662-35715-9

The *Sustaining Wetlands Issues Paper Series* is published by the Secretariat to the North American Wetlands Conservation Council (Canada). The Series is devoted to the publication of reports concerning wetland management, policy and science issues of national interest in Canada. The objective of the Series is to make Canadians more aware of the importance of the wise use and conservation of wetland ecosystems and their natural resource values.

This paper was produced through the cooperation and funding of the:
- Evergreen Common Grounds
- North American Wetlands Conservation Council (Canada)
- The Nature Conservancy of Canada
- Donner Canadian Foundation
- Richard Ivey Foundation
- J.W. McConnell Family Foundation

Copies of this report are available from the:
Secretariat
North American Wetlands Conservation Council (Canada)
Suite 200, 1750 Courtwood Crescent
Ottawa, Ontario K2C 2B5

Cover: Evans Woods (near Verona, Ontario), Conservation Easement donated to the Nature Conservancy of Canada by Monte Hummel in 1996.

Photo: James Duncan

Également disponible en français.

Cover printed on recycled paper (50% recycled fibre, 10% post-consumer fibre)
Interior pages printed on 100% recycled paper

Over 50% recycled
paper including 10%
post-consumer fibre.
M – an official mark of Environment Canada

GIVING NATURE ITS DUE

TAX TREATMENT OF ENVIRONMENTAL PHILANTHROPY: RECENT IMPROVEMENTS, REMAINING BARRIERS AND CURRENT OPPORTUNITIES

by

Marc Denhez

SUSTAINING wetlands

Issues Paper, No. 2003 - 1

North American Wetlands Conservation Council (Canada)

Table of Contents

Executive Summary

It is useful to take stock of the progress of the past twelve years: Parliament adopted clear environmental objectives; the Government of Canada initiated a strategy to engage private property-owners; it initiated a tax process to address the above; provinces, for their part, amplified legislation for protective agreements across the country; and the public has responded, particularly with the growth of land trusts.

This paper is a follow-up to *You Can't Give It Away: Tax Aspects of Ecologically Sensitive Lands* by this writer (published by the North American Wetlands Conservation Council, 1992). It documents some remarkable progress. However, when a system is developed incrementally, there is always a risk of gaps. The Canadian environmental community has alerted the Government to certain persistent barriers to conservation and stewardship, notably

- ongoing capital gains liability;
- confusing tax treatment of easements, covenants and servitudes;
- functional exclusion of inventory lands from environmental philanthropy; and
- property tax liability.

It is hoped that this paper will provide an opportunity to systematize the subject more thoroughly, make the overall approach more coherent, and improve the linkages between stated public policy and the tax system. The active engagement of private property owners is central to the objective of "stewardship" which, in turn, is growing in importance as a component of national policy.

The most obvious benefits of such improvements would be in lands that are ecologically significant, which remain the environmental community's top priority. There could and should also be important benefits for other categories of lands, such as urban open spaces and cultural landscapes, both of which are also of interest.

Ongoing capital gains liability: Progressive reduction of that liability over the last decade was welcomed by the environmental community; but that community had always challenged both the propriety and the technical rationale of that liability in the first place.

As of 1971, altruistic Canadians who donated lands for conservation started incurring capital gains liability – unlike the capital gains systems in the United States or the United Kingdom, and (shortly afterwards) unlike Canadian donors of Cultural Gifts. In 1994, the *Task Force on Economic Instruments and Disincentives to Sound Environmental Practices* recommended that Canada "*exempt* from capital gains all donations of ecologically sensitive land." This would also reverse the notion of "deemed capital gains" on donations of land, which charged the donor income tax – even when the donor derived neither gains nor income *in real life*.

That Task Force recommendation has not yet been fully implemented, but was recently re-endorsed by the Standing Committee on Finance (November 2002). When that idea is finally instituted, it will not only make the tax system more realistic and logically consistent, but also (and more importantly from an environmental perspective):

- greatly assist the stated national goal of protecting 12% of the Canadian landmass on a biodiverse basis; and
- engage private owners more intensely in that process.

Gifts of inventory land: Developers who donate their land ("inventory land") face a substantially higher tax liability than other donors. The tax improvements of the last decade omitted these taxpayers – even though they (a) hold much of the property under the most immediate threat, and (b) they face the strongest tax disincentives for land donations of anybody in the country. Correction of that situation might provide a direct lever to help defuse some of the most controversial environmental disputes in Canada.

Covenants, easements and servitudes: As of 1990, the position of the Government of Canada appeared to offer relative clarity, with a tax situation that favoured philanthropy along lines similar to those that had been used effectively in the United States; if the donation of an easement reduced the appraisal of the property, this reduction was receiptable. However, events in the following decade then split these agreements into two categories:

- those that were "ecological" were linked to ecogifts, and subjected to the same procedural requirements; and the federal government then codified the capital gains liability which would partly offset the value of the receipt;
- meanwhile, easements that were not strictly "ecological" (e.g. in the case of urban open space or cultural landscapes) actually regressed from a tax standpoint, as the federal government appeared to repudiate the position it had expressed in 1990 (the position which also underlies U.S. tax treatment of such agreements).

So when the Federal Government assimilated the tax treatment of easements to ecogifts, the barriers it hoped to remove were replaced by others. This is an area where there are opportunities for improvement, and where simplification would be immensely helpful.

Property tax liability: While the above areas are under federal jurisdiction, the provinces also have an important role to play. Most have already made a significant contribution, by facilitating conservation easements with the help of new legislation. Several are also making important strides in property taxes, e.g. via outright exemption. In other provinces, however, lands owned and protected by environmental charities are in an inferior tax position to other land uses – even when they do not draw on municipal services as much as those other uses do. Exemptions – or at least parity with other favoured land uses – would have an important beneficial effect on environmental philanthropy.

It is in Canada's interest to analyze these barriers pragmatically. Parliamentary bodies such as the Task Force on Urban Issues and the Standing Committee on Finance have done so, and their findings have merit.

It is hoped that such work will lead to further improvements in the tax treatment of environmental stewardship and, with those improvements, to broader participation by individual Canadians in the protection of our natural heritage.

Acknowledgements

The writer wishes to express particular thanks to Thea Silver of the Nature Conservancy of Canada, and Barbara Heidenreich of Evergreen Common Grounds. Their advice and support for this project were indispensable. Among the many others who contributed generously of their time, particular thanks go to Ian Attridge, Robert Barnett, John Billington, Mark Boreskie, Paul Caverhill, Larry Collins, Ken Cox, Kevin Dingwell, James Duncan, Randy Duplak, Allison Grose, Joanne Loyer, Fiona Mackay, Sam Mersereau, Elaine Mitchell, John Peebles and Susan Thomson. Any errors are, however, the exclusive responsibility of the writer.

This issues paper was generously funded by the Donner Canadian Foundation through a grant to the Nature Conservancy of Canada. In-kind research support was provided by Evergreen, made possible through support from the Richard Ivey Foundation and the J.W. McConnell Family Foundation.

About the Writer

Marc Denhez is a lawyer and author on planning processes for natural and cultural heritage. He has had some 300 works published in seven countries. His career has included advising Heritage Canada, Parks Canada, UNESCO, the Federation of Canadian Municipalities, the governments of all ten provinces and several national environmental organizations. He has lectured at almost every university in Canada, and taught planning at McGill University, Université de Montréal, the Technical University of Nova Scotia and the Academia Istropolitana in Europe.

He has been recognized by the International Association of Business Communicators and has received Parks Canada's National Heritage Award in honour of his "work in enhancing public appreciation of Canada's natural environment and cultural heritage."

About the Nature Conservancy of Canada

The Nature Conservancy of Canada (NCC) is a non-profit, non-advocacy organization that takes a quiet, business-like approach to land conservation and the preservation of biological diversity. Its plan of action involves partnership-building and entering into creative conservation solutions with any individual, corporation, community group, conservation organization or government body that shares its passion. Since 1962, NCC and its supporters have protected more than 1.7 million acres of ecologically significant land nationwide and over 1,200 properties nationwide.

About Evergreen

Evergreen is a national environmental organization with over a decade of experience in fulfilling its mandate to help individuals and agencies bring nature back to Canadian cities. Its Common Grounds Program acts as a land trust providing creative solutions for the preservation, restoration and stewardship of open spaces and natural heritage in urban areas.

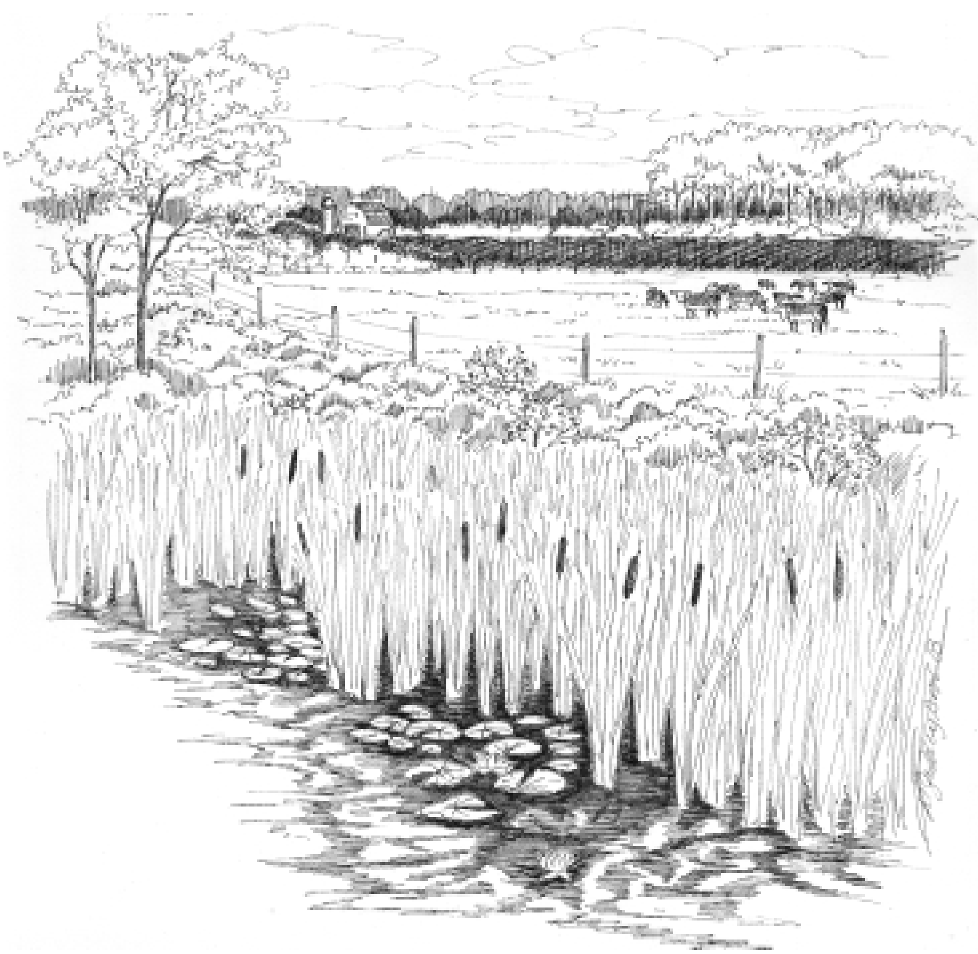
About the North American Wetlands Conservation Council (Canada)

The North American Wetlands Conservation Council (Canada) was formed in 1990 and acts as the senior administrative authority in the delivery of the North American Waterfowl Management Plan. It also acts as a facilitator in the development of wetland policies and programs across Canada. As part of the North American Bird Conservation Initiative Council (Canada), the NAWCC (Canada) in its two series of publications, documents and fosters changes to policies and other conservation endeavours.

Chapter One

Introduction

Importance of land conservation; purpose of the Paper; scope of properties of potential interest; changes in the last decade; establishment of the Ecogift Program; Provincial conservation easement legislation; growth of land trust movement; overview of current status; remaining barriers for ecologically sensitive land; barriers to other forms of land conservation (e.g., urban open space and cultural landscape); approaches in other jurisdictions



1.0 Introduction

1.1 Land Conservation: The Challenge

Canada is home to 144,000 of the world's species, 25% of its wetlands, 15% of its forests and 10% of its renewable freshwater resources.

The question of how to add to Canada's inventory of conservation lands is not new, nor is the question of the role of the private sector in that process. Canada, like other countries, has pursued a two-track policy:

- one track involves setting aside lands in public ownership (e.g., the October 2002 announcement of ten new national parks); and
- the other involves fostering private stewardship.

Canada has long and distinguished experience with the former: Banff, for example, is the world's third oldest national park. Until the 1990s, however, strategies to engage the private sector in conservation were not well developed. Unlike countries such as Britain, where protected parkland is in predominantly private ownership, Canada had few mechanisms to encourage owners to either donate their land for protection, or to protect their land in other ways (e.g., by contract, such as easements and covenants, described later in this paper).

This gap elicited concerns which grew to a chorus in the 1980s. "It has become increasingly clear," said prominent environmental writer Ron Reid (1988), "that public acquisition of a relatively small number of key areas is not enough."[1] "Open space," the Canadian Parks/Recreation Association urged, "is not the sole responsibility of government."[2] As conservationist Kenneth Cox predicted (1989), "Canadian geography dictates that private stewardship must become a continuing program in natural landscape and wildlife habitat securement and management."[3] More recently, John Lounds, President of the Nature Conservancy of Canada, has said that, "Over the next few decades, if we are going to conserve priority lands (alone), Canadians probably need to invest $2 billion."[4]

Governments responded at all levels. Provincial governments enacted legislation to facilitate conservation agreements with property owners; and in the case of several provinces, important changes were introduced to the property tax system, to favour conservation and the encouragement of "stewardship." At the national level, the Government of Canada also responded. It embarked on the long, but essential process of reviewing its options and introducing a more inclusive approach to conservation, involving both the public and the private sectors. Over the past dozen years, Canada has been making positive strides toward engaging Canadians in private land stewardship. In the words of the Federal Environment Minister,

> Donations by private individuals and corporate landowners of ecologically sensitive land are emerging as important tools in conserving sensitive ecosystems and biodiversity across Canada. Species at risk like the burrowing owl and loggerhead shrike have a stronger chance of recovery thanks to the donations of ecologically sensitive lands.[5]

But there is still work to do and opportunities to grasp.

1.2 Scope of this Paper

So what is the state of tax measures for land conservation today? What barriers still remain? What additional opportunities exist? This paper is intended to update that analysis. Many of the initiatives have been national in scope, affecting all provinces and territories; others have been more limited. In this paper the geographic scope will focus on lands within the ten provinces, because the percentage of privately-owned lands north of 60° is currently very low; but the topic of private lands in the territories will be a worthwhile subject of exploration too, at some point in the future.

The properties that interest the environmental community can be categorized in several ways. One way is by ownership; and from that perspective, there are two kinds of property which are of foremost interest, and which are the primary focus of this paper. These are:

- lands owned and managed by environmental charities (i.e., conservation organizations with registered charitable status); and
- lands owned by individuals, which are subject to a special conservation agreement (an "easement, restrictive covenant or servitude," as described later in this paper) to protect the land's characteristics and values.

The properties can also be categorized according to their realm of significance. In the 1990s, "ecologically sensitive lands" were the focus of government policy in this field, and the foremost priority of the conservation community. That situation has *not* changed; however, the range of targeted property has broadened. Although "ecologically sensitive land" remains *the* top priority, there is no suggestion that it is the *only* form of natural heritage of interest.

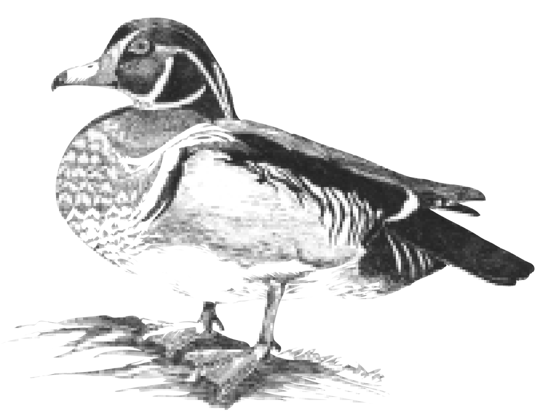
Other notable examples include:

Urban Greenspace can have more ecological potential than was first assumed, once one puts aside the "misconception that urban areas do not contribute significantly to wildlife habitat."[6] This explains the growing governmental interest in the "trend to renaturalize urban landscapes,"[7] and Wildlife Habitat Canada's call for "restoration programs at the local level (to) help improve and create wildlife habitats within or around cities."[8]

The reference to "restoration programs" also raises the question of a second category of greenspace (in cities, but also elsewhere), whose current ecological significance is low – for now. Properties may be redeemable, and the Ecogift Program defines "ecologically sensitive lands" as "areas or sites that currently *or could, at some point in the future*, contribute significantly to the conservation of Canada's biodiversity and environmental heritage."[9]

This subject is also linked to the larger issue of tax and urban sustainability. The National Round Table on the Environment and the Economy (NRTEE) argues that "There is increasing recognition that fiscal measures significantly affect urban environmental sustainability."[10] This has led the NRTEE to study what it calls "Ecological Fiscal Reform" specifically in this urban context;[11] and the NRTEE says that the Government of Canada and other organizations are doing likewise.[12]

Cultural Landscapes are an intertwining of natural and cultural heritage. Although the term is not in common parlance, "geographers had, however, worked with the idea since the turn of the (twentieth) century."[13] "The defining quality of cultural landscapes is their interactive relationship of culture and nature, and the interchange of their cultural activities with the natural environment."[14] Canada is a Party to a 1970s treaty, the *World Heritage Convention,*[15] whose *Operational Guidelines*,[16] specify three main categories:



1. "Defined landscape designed and created intentionally" (e.g., garden and parkland landscapes), like the Halifax Public Gardens.[17]

2. "Organically evolved landscape,"[18] in two "sub-categories":
   - "a relict or fossil landscape" (where "an evolutionary process came to an end at some time in the past"), like the Chilkoot Trail in British Columbia, or
   - a "continuing landscape" with "an active social role in contemporary society closely associated with the traditional way of life,"[19] like the Rideau Canal in Ontario.

3. "Associative cultural landscape... by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence, which may be insignificant or even absent."[20] Canadian examples include Grizzly Bear Mountain and Scented Grass Hills in the Northwest Territories.

The above approach is endorsed by the international community, notably the governments of the United States[21] and Canada.[22] Other examples of cultural landscapes include:

- Western prairie with grain elevators;
- Atlantic seashore, with red barn and lighthouse.

In fact, "cultural landscapes" can usually be equated with "good candidates for a postcard."

Other Lands: There are some properties that altruistic Canadians wish to donate, and which fall short of the "ecological" category – but which the donee (notably a charity or municipality) may still wish to receive, in order to convert it to cash, or to swap it for other land. Such properties are called **"trade lands**."

Brownfields: What about urban open spaces that are supposedly "beyond restoration?" The most extreme examples are polluted lands, often called "brownfields." These are a source of considerable governmental and public concern in their own right, though for different reasons.

But let there be no mistake: ecologically-sensitive lands remain the highest priority of the environmental community, and are not about to be displaced by urban open lands (including "brownfields") or cultural landscapes. Nonetheless, there is a widespread belief that the environmental file in Canada has now reached the point that it can include the latter topics as well.

1.3 A Decade of Progress

In a crucial declaration of national policy, the Government of Canada's 1990 *Green Plan*[23] announced a national objective of bringing protected acreage in Canada to 12% of the total.[24] This was supported by a Resolution of the House of Commons, and can be considered a turning point in this field. However, it begged the question: where would the money come from?

When compared to the United States, Canadian tax treatment of land donations and easements was a disincentive.

According to the Nature Conservancy of Canada, it would cost a billion dollars just to meet the target of conserving 12% of Alberta's grassland and parkland alone.[25] Not only was new money unavailable: in 1989, Cox predicted that "*fewer* dollars will be available from public treasuries for expansion of such a [park] system."[26] During the 1990s, that prediction came true.

Furthermore, the notion that the private sector would help "take up the slack" was falling short. Canadians were reluctant to donate lands to "land trusts," or to conserve it contractually (via easements and covenants): while land trusts in the United States were being created at the rate of one a day, Canada considered itself fortunate to have a couple of new land trusts per year.

The reason for the discrepancy between the two countries was straightforward. When compared to the United States, Canadian tax treatment of land donations and easements was a disincentive. In the case of donations,

(a) appreciation in the value of gifted recreational, farm and forestry lands was treated as taxable capital gains in Canada (unlike the United States – or, for that matter, unlike gifts of cultural property in Canada); and
(b) The usable tax receipts for the donation were subject to mathematical limits. These placed a modest restriction in the case of gifts to the Crown — but a much more serious restriction (a low ceiling of 20% of income) on usable receipts for gifts to charities or municipalities.

As a direct result of these two factors, the tax *liability* triggered by a donation of land could easily exceed the usable receipts, and the donor might have to pay tax in order to give the property away.

There was also a third residual issue, i.e., the complexity of the entire tax approach to philanthropy. One altruistic director of a land trust, who also decided to donate collectibles to an institution, reported that it cost $20,000 in professional fees to determine how to make a donation of the collectibles alone.

These three factors were the backdrop for this writer's publication *You Can't Give It Away*.[27] At the same time as that report was being written, a Parliamentary Committee proposed (December 1991)[28]:
"That the income tax system should be streamlined in order to

(a) simplify the treatment of gifts of property,
(b) to assure that Canadians are not penalized for such gifts and
(c) to create a favourable climate for philanthropy."[29]

After an uncertain start,[30] these proposals were revisited after the 1993 election when the Minister of Finance commissioned a Task Force[31] to study environmental dimensions of the tax system. That Task Force's unanimous recommendations (1994) included the following two points:

- The government should amend the *Income Tax Act* to exempt from capital gains tax all donations of ecologically sensitive land made in perpetuity to all levels of government and charitable institutions.
- The government should amend the *Income Tax Act* to equalize the treatment of donations of ecologically sensitive land to charitable institutions and municipalities with similar donations to the Crown. This would involve removing the 20 percent (of net income) cap on the deductibility of such donations.[32]

But the idea of following the American model and exempting gifts from "deemed capital gains" was not accepted by Finance officials at the time.[33] The preference was to maintain the principle of capital gains liability on such donations,[34] notwithstanding the precedents in e.g., the United States or among other important gifts in Canada (notably "cultural gifts"). But although officials would not *waive* tax liability on such philanthropy, they were open to a two-step process in which (a) taxes would first be *imposed*, then taken *off* again, via a new tax treatment:

- in the 1995 Budget, Finance Canada foresaw a new category of donation, namely "Ecological Gifts" ("Ecogifts") which would enjoy new mathematical rules for the usability of tax receipts (described in Chapter Two);
- in the 1996 Budget, Finance Canada foresaw that for the *rest* of such donations (i.e., gifts other than "ecological"), there would be new mathematical rules for receipts (Chapter Two). These donations were not treated quite as favourably as the first category, but the situation was distinctly preferable to the *status quo ante*;
- in neither case was the principle of liability for "capital gains" abolished.

In other words, it became possible to claim credit for gifts with more latitude than previously; but in each case, the first part of those deductions would still need to offset the tax liability for deemed capital gains. Mathematically, the end result was that

- Finance Canada totally eliminated the possibility of a donor having to pay tax in order to give property away;
- but Finance Canada maintained the principle that donors could not use the full fair market value (FMV) of their gift as a net tax receipt: instead, a part of the tax receipt had to be used to offset the tax liability, and the donor benefited from the *balance*.

It was still an immeasurable improvement over the previous treatment.

In making the above changes, Finance Canada introduced a series of new categorizations and calculations to the already complex subject of philanthropy law. These new rules took effect in several stages, described in the next chapter. At the same time, tax officials were addressing the tax treatment not only of gifts of lands, but also of other protective arrangements, like easements, covenants and servitudes.

Easements, covenants and servitudes are variations on a special kind of contract that can define what activities can or cannot occur on a property. They are described in greater detail in Chapter Three, and have been recognized by law for centuries. Traditional examples include rights of way; in fact, the most common use of these contracts is in utility corridors. In a conservation context, the typical format of these agreements is for the property owner to sign over a part of his/her development rights (among other rights) to an institution, government or charity. An owner might agree, for example, to renounce the right to backfill a wetland for all time, by stating that no such initiative could ever proceed without the consent of a specified conservation organization. This contract with the organization would then be signed and registered at the Land Titles Office, and be binding on future owners as well.

As a conservation tool, these contracts looked so promising that virtually every province passed new legislation in the 1990s to help facilitate them.

New Provincial Laws on Conservation Agreements

British Columbia	1995 amendments to the *Land Title Act*
Alberta	1995 amendments to the *Environmental Protection and Enhancement Act*
Saskatchewan	*Conservation Easement Act* (1996)
Manitoba	*Conservation Agreement Act* (1997)
Ontario	The *Ontario Heritage Act* already addressed the subject, but the *Conservation Land Act* was amended (1995) to further facilitate conservation
Québec	*Private Reserves Act*
New Brunswick	*Conservation Easement Act* (1998)
Nova Scotia	*Conservation Easement Act* (2001)
Prince Edward Island	The new *Wildlife Conservation Act* (1998) assists the old *Natural Areas Protection Act*
Newfoundland and Labrador	[not significantly changed]

In 1990, Revenue Canada (as it was then called) had also clarified the valuation of these agreements for charitable receipt purposes. The question had never been *whether* there were tax consequences, but *how much*. The reason was straightforward: when an owner relinquished a part of his/her development rights in one of these agreements, both Civil and Common Law recognized that the owner had relinquished part of his/her "property." Legal authors opined that when such an agreement was signed with an institution or charity, it was tantamount to a *donation* of part of the owner's property rights, and should be eligible for a tax receipt on that basis. That view was accepted by the U.S. Government in the 1960s, and by Revenue Canada in 1990. According to the U.S. precedent,

- one appraises the property *before* the agreement,
- then *after* it;
- if the relinquishment of development rights has reduced the appraised value, then *that reduction* is the value to attribute to the receipt.

Various authors called this the "Before-and-After Test." This is exactly how easements for utility corridors in Canada had been appraised for over a century (and what was written into the real estate assessment legislation of several provinces, as described in Chapter Three). This is what Revenue Canada approved in writing in 1990.

As Chapter Three will describe, all that changed in the mid-1990s, when federal tax officials distanced themselves from the Before-and-After Test. In its place, they proposed the following scenario (which they called the "Fair Market Value" test):

- In the marketplace for the purchase of easements, how much were easement-buyers paying these days, and how much were easement-sellers collecting?
- If one cannot *find* owners who are marketing easements to institutions for cash, then that is construed to mean that there is no market; and
- if there is no market, there is no market value; and if there is no market value, then the value for receipt purposes should be "nominal."

By that reasoning, an owner could formally relinquish one million dollars of appraised development potential on a property – and get a tax receipt of one dollar.

In a related move in 1997, Finance Canada announced that as part of this new view, it would introduce a "new" tax incentive for these agreements: it would allow the Before-and-After Test to be used on *condition* that the transaction went through the *ecogift* procedure (i.e., that the property was certifiably ecologically sensitive, the recipient had been certified under the same legislation, etc.). This meant that any easements, covenants and servitudes that were *not* strictly "ecological" (e.g., cultural landscapes or urban open space) were excluded.

At the same time, Finance Canada codified *capital gains liability* for donors of easements.

Finally, in 2000, there was a further mathematical adjustment to reduce capital gains liability on donations of ecogifts by half.

In 2002, Finance Canada addressed another issue. The conservation community had pointed out that there are many altruistic owners who were ready to relinquish most, but not all, of the value of their land, (i.e., who needed *some* cash proceeds, but not the full market value of the property). In the United States, the amount by which the sale is *undervalued* (i.e., the extent of the "favour" being granted to the charity) is eligible for a tax receipt. In December 2002, federal tax authorities announced a comparable approach for Canadian "bargain sales" (as well as a more favourable position on the donation of mortgaged property), as further described in Chapter Two.

This is the situation that prevails today. During the course of the past few years, Canada has witnessed unmistakable signs of governmental willingness to facilitate conservation – with conditions. As in the case of any system that arose *incrementally*, the remaining question is this: now that the resulting system can finally be viewed as a whole, does it do everything that it was intended to do? On review, are there still gaps? This topic will be analyzed further in this paper.

Finally, the Federal Government was not the only government that was active in this field. The ten provinces have property tax arrangements which affect conservation lands; and notable progress has occurred over the last decade. New Brunswick, Prince Edward Island and Québec all introduced outright exemptions for various conservation lands in their respective property tax systems. At the time of writing, possible legislative initiatives along similar lines are under discussion in Alberta and Ontario (where a number of properties have enjoyed favourable treatment since 1988). Other initiatives, like British Columbia's pilot project in the Gulf Islands or Manitoba's Riparian Tax Credit, while less sweeping, nevertheless suggest a broad trend toward more favourable property tax treatment.

1.4 Growth of the Land Trust Movement

A closely related question is this: as the tax treatment of environmental philanthropy improves, is Canada's environmental community in a position to *respond?* Does that community have both the interest and the capacity to avail itself of the new opportunities at hand, and to engage private owners in land stewardship? In other words, is Canada positioned to put these tax measures to the use for which they were intended?

The answer is yes, thanks to significant strides over the past decade and beyond. The emergence of land trusts in the 1990s, as a force for conservation, was described by environmentalist Paul Peterson:

> The first land trusts in Canada were established during the1960s… In the past decade there has been a surge in the development of local and regional land trusts throughout Canada, and now some 180 land trusts are active across the country in every province. Collectively, these organizations comprise a powerful group in the conservation sector that is committed to the preservation of important landscape features.[35] Provincial networking organizations exist in British Columbia (Land Trust Alliance of British Columbia) and Ontario (Ontario Nature Trust Alliance)… (Land trusts) have the ability to enlist volunteers, stewards, professionals, funders, government agencies and more. NGOs bring staff dedicated to a project that enable it to take on tasks that are beyond the scope of public authorities (managing volunteers, fund-raising, ongoing community education and outreach programs etc.) Registered charitable NGOs… can raise funds from sources not available to public agencies such as individuals, corporations, foundations, etc. This closes the gap on seemingly unattainable public land acquisition initiatives. NGO's charitable status enables them to issue tax receipts that provide a financial incentive to donate…[36]

As in the case of any system that arose incrementally, the remaining question is this: now that the resulting system can finally be viewed as a whole, does it do everything that it was intended to do? On review, are there still gaps?

In 2000, the Federal Minister of the Environment described these groups in the following terms:

> Canada is fortunate to have many dedicated conservation groups working at the local level. They have the experience, they have the knowledge, and they are willing to go into the field and work hard to protect Canadian wildlife. What they need is more land to be set aside for habitat.[37]

The land trust movement is also proud of its record. "We conserve at well below the cost of traditional (government-owned) parks. Most of our land is donated by generous landowners. We acquire land with volunteer resources. We raise money in our communities. We steward the land without traditional parks employees." [38]

As to the future, the importance of the movement was recently reiterated when the Prime Minister's Caucus Task Force on Urban Issues (2002) called on the Government to

> support the acquisition of critical urban green space by assisting community partnerships such as land trusts and conservation organizations and provide incentives to allow land donations for conservation purposes.[39]

1.5 Remaining Barriers

The foregoing description of trends, over the past number of years, demonstrates that Canada has come an enormous distance – but there are still barriers remaining for both ecologically sensitive land and other forms of land conservation (e.g., urban open space and cultural landscape).

In the case of ecogifts,

- the usable tax receipt is still eroded by the remaining "deemed capital gains," as described in the next chapter;
- this means that the tax treatment of ecogifts is still inferior to some other kinds of transactions, notably cultural gifts (where there are no "deemed capital gains");
- and the tax treatment of Canadian ecogifts is still inferior to that of its American counterparts, for exactly the same reason.
- Furthermore, far from "streamlining" the system (as proposed by the Parliamentary Committee in 1991), the rules and calculations have become highly complex (which is a source of expense in its own right).

Canada has come an enormous distance – but there are still barriers remaining for both ecologically sensitive land and other forms of land conservation (e.g., urban open space and cultural landscape).

This is the case for both donations of fee simple, and also covenants, easements and servitudes. Additionally, in the case of the latter, Chapter Three will outline how

- the level of tax complexity remains extremely high; and
- in the case of non-ecological lands (notably cultural landscapes and urban open space) the tax treatment is actually less advantageous now than in 1990.

Meanwhile, other topics have yet to be addressed. For example, the initiatives of the 1990s did not include donations of lands held by developers or speculators (so-called "inventory lands") regardless of their ecological significance; these are further described in Chapter Two.

1.6 International Comparisons

The American tax experience has already been mentioned. The value of a donation of land to a charity is fully usable, thanks to the absence of any "deemed capital gains."

On the subject of easements, the Internal Revenue Service had announced as early as the 1960s that it was using the Before-and-After method of recognizing donations, and this was later confirmed in legislation. This is described further in Chapter Three.

The situation in the United Kingdom is comparable. Environmental philanthropy has had a long history in the United Kingdom: for years, many owners of country estates would donate or bequeath private parkland (and the family manor) to organizations like the National Trust in order (among other things) to avoid punitive succession duties. Like the United States, (but unlike Canada), gifts of all assets (including land) to United Kingdom charities are exempt from Capital Gains Tax.[40] The asset passes from the donor to the charity on a no gain/no loss basis.[41] Gifts of real property (land and/or buildings) to United Kingdom charities produce additional benefits for individuals (for Income Tax purposes) and companies (for Corporation Tax purposes).[42]

For example, if an individual acquired land for £50,000 and then decided to donate the land to a charity 10 years later when the value of the land had appreciated to £400,000,

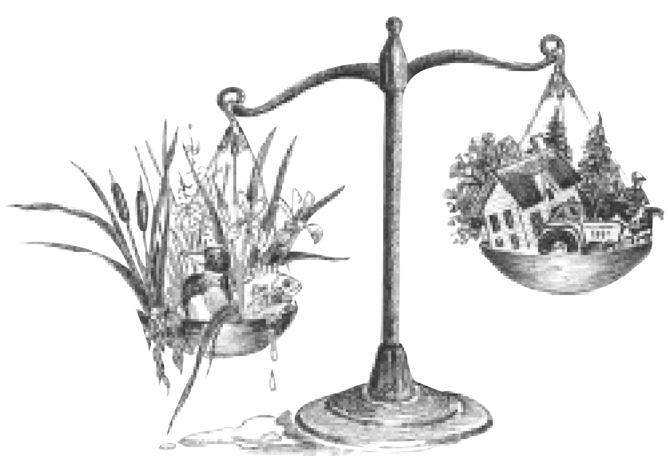
- For capital gains tax purposes the donor would be regarded as disposing of the land at cost (£50,000), so no gain arises on disposal by gift to the charity.
- Under a separate provision, charitable gifts of freehold or leasehold property entitle the donor to deduct the full £400,000 current market value from his/her income for income tax purposes.[43]

1.7 Conclusion to Chapter One

Canada has come a long way over the last twelve years. It is now time to take stock. On the positive side, the Parliament of Canada has articulated a set of environmental objectives; it has taken steps to engage private property owners; it has started to address the tax context; legislation for protective agreements has been amplified by provinces across the country; and the country has witnessed some take-up, particularly with the growth of land trusts.

The Canadian environmental community has raised a number of issues – including ongoing capital gains liability, the treatment of easements, covenants and servitudes, inventory lands and others.

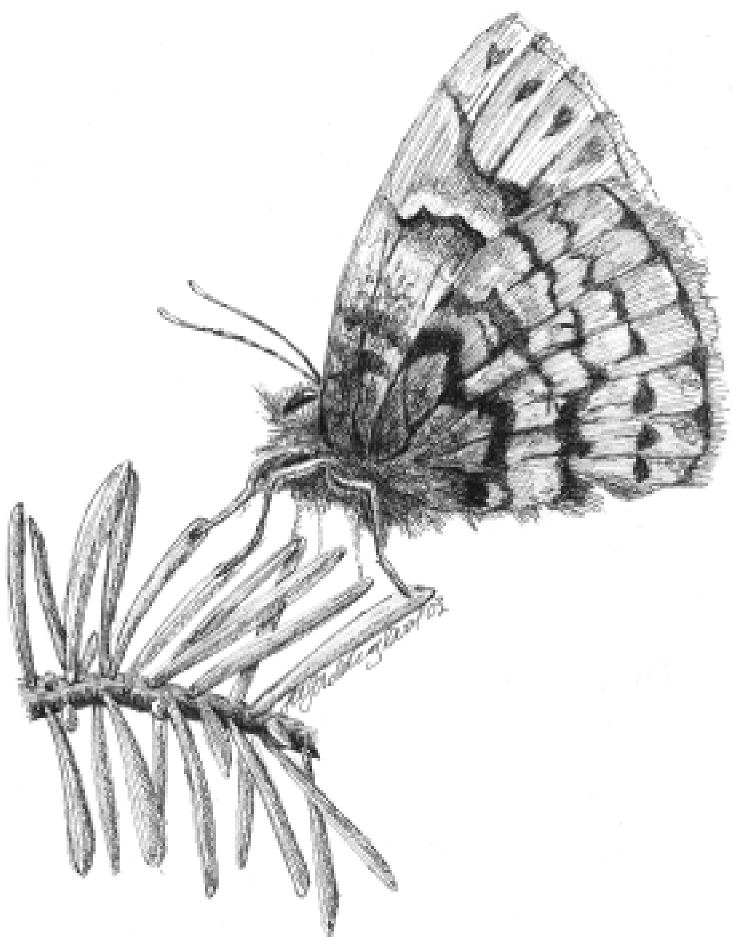
However, when a system is developed incrementally, there is always a risk of gaps. The Canadian environmental community has raised a number of issues — including ongoing capital gains liability, the treatment of easements, covenants and servitudes, inventory lands and others. These issues will be explored further in this paper. It is not unusual for a country to periodically take stock of what has developed over time, and to use the opportunity to systematize the subject more thoroughly; it is hoped that this paper will assist Canada in undertaking that process in this area.



Chapter Two

The National Tax Picture and Ecogifts

Income Tax and GST; Ecological Gifts Program; legislative changes; positive features; comparison with other gifts (e.g. cultural heritage) and with other jurisdictions; analysis and lessons learned; "ecological sensitivity"; donations by developers and speculators; other barriers



2.0 The National Tax Picture and Ecogifts

2.1 The Income Tax Act and Excise Tax Act

The following chapter deals mainly with the *Income Tax Act*, which affects environmental philanthropy in various ways – notably in the case of Ecological Gifts ("Ecogifts"), to which much of this chapter is devoted. Two examples of tax benefits to donors are given in the appendix.

That is not to say that the *Income Tax Act* is the only national tax statute that affects how greenspace is set aside for conservation purposes. The Goods and Services Tax (GST) is governed by the *Excise Tax Act*, which contains important provisions, e.g., rebates to municipalities, charities and certain non-profit corporations for the GST which they incur in pursuit of their public objectives.

Furthermore, let us suppose that a municipality or charity undertook to purchase forested land.

- If the land was "personal-use land," i.e. "real property (other than capital property which was used by the vendor primarily in the course of a taxable commercial activity, or real property which is sold in the course of a business)," then the transaction would be GST-exempt.[1] This exemption extends to "country properties, non-commercial hobby farms and other non-business land."[2]
- But if the land was being bought from a developer, farmer, speculator or lumber company, it would be subject to GST. The municipality or charity would be required to pay that GST; it would then be eligible for a 50% rebate from the Canada Customs and Revenue Agency (CCRA), for the GST that it had paid. (Non-profit corporations which are not registered charities may also be eligible for the 50% CCRA rebate, only if 40% or more of their funding comes from government sources).
- "Conservation authorities" (e.g. those under the *Conservation Authorities Act* in Ontario) are in a different position when they buy land. In order for them to avail themselves of municipal-type GST rebates, they must obtain a federal certification that they perform a municipal service, operate in the public interest, are funded in part from government grants or taxes, are recognized by the provincial government as the local authority, and are governed by elected representatives or government-appointed officers.
- Provincial governments are constitutionally exempt from the GST: they do not need to pay GST on purchases of such lands.

2.2 Income Tax: Historical Background

To understand the complex tax history of Ecogifts, one must begin at the inception of the modern Canadian income tax system.

Although that system was the product of World War II,[3] the underlying thinking was influenced by the Great Depression and the national objective of building a post-war consumer economy,[4] to which the philanthropic sector was an afterthought. Although the Act acknowledged that sector[5] and allowed deductibility of charitable donations, this was subjected to various *mathematical limits* – one set of limits for deductible donations to the Crown, and a more restrictive set of limits for donations to charities and municipalities. The practical effect was that, e.g., the typical Canadian farmer would not be able to donate his/her family farm to a charity on retirement, and expect a usable tax receipt commensurate with the value of the gift: a large part of the receipt would go unused because of the mathematical limits.

Fundamental assumptions were reviewed in the 1960s. Until then, the *Income Tax Act* had been (as its name implied) a tax specifically on *income*, i.e. an individual or corporation's *revenue*; it had nothing to do with their *capital* – or, for that matter, one-time transactions pertaining to that capital. The Act carefully distinguished between "income" and "capital." In the 1960s, however, a Royal Commission called for a tax on profits/gains from the sale of capital property – like real estate – even on one-time transactions which would otherwise not be considered "income." A capital gains tax (loosely modeled on the American version) was therefore introduced in Canada effective 1971. This was integrated into the *Income Tax Act* even though, by the latter's definition, "capital gains" are not synonymous with "income."

Any country with a capital gains tax must, however, include additional measures to counter one obvious method of cheating: what is to stop a taxpayer from artificially reducing his/her "taxable capital gain" on a property by concocting a "gift" or "bargain sale" to a friend or relative? The answer is for the country to pre-empt that possibility by introducing the concept of "*deemed* capital gains": if capital property had appreciated in value and was then disposed of in a "non-arm's length transaction" (*by whatever means, including donation or bargain sale)*, then the capital gain would be *deemed* to accrue (with taxes accordingly) even if the taxpayer posted no actual "gain" on the transaction. "Deemed capital gains" were exceptional because capital gains, unlike normal income, were not historically part of "accrual accounting"[6]: they were

- not computed on the basis of periodic "receivables and payables" (the accrual method of accounting recognized by Generally Accepted Accounting Principles or "GAAP"),
- but were computed only after the capital property was *liquidated.*

This distinction, between the procedures for capital gains as opposed to income tax, explains why historically, *un*liquidated capital gains were not recognized by either GAAP or by the National Accounts. GAAP does not normally require owners to post unliquidated capital gains on their books (or list taxes on those unliquidated gains as a "payable"); nor do the National Accounts post taxes on unliquidated gains as a government "receivable." (If they did, Canada would post virtually no national debt).

Tax liability on unliquidated capital gains was therefore highly exceptional. In the case of non-arm's length transactions, however, there were obvious and important reasons of public policy to introduce it; so this was done.

At first glance, this would appear to have no bearing on philanthropy. Donors who voluntarily dispossess themselves are not making "income"; nor are they deriving a "gain." That explains why in the United States, the Internal Revenue Service had *not* extended deemed capital gains to charitable donations; nor was there any historical or public policy reason to do so.

But Canadian tax officials did.

Henceforth Canada, unlike its neighbour to the South, would be prepared to tax philanthropists for giving their property away. Admittedly, donors could claim a receipt; but because of the mathematical limits on the usable portion of the receipt, the tax write-off could fall well short of the liability for "deemed" capital gains.

In the ensuing controversy, the most high-profile objectors were the benefactors of Canada's art galleries and museums. The response of the Government was to rescind capital gains liability, for donations of "cultural gifts" – a new category of tax treatment invented for that purpose. Canadian donors of art and collectibles were returned to a position similar to pre-1971; and like their American counterparts, there would be no attempt to impute "deemed capital gains" to their donations.

The Government, however, attached conditions to this treatment of cultural gifts:

- a federal process was established to "certify" the institutions that could receive such gifts,
- and a related federal process to "certify" the cultural significance of the gifts themselves.
- Later, a federal panel was established to conduct the appraisals.[7]

The most important condition, however, was that it excluded any gifts other than the "cultural" variety. For the rest, including gifts of ecological significance, the new rule was that the donor was exposed to a tax burden that often exceeded the value of the usable tax receipt. That was the situation until the mid-1990s.

The situation was even more of a disincentive for the very group of private owners who held private land with a high level of development risk, i.e., developers and speculators. For this segment of the private sector, land is part of "inventory," which (in tax law) is different from "capital property." This means that disposition

- does not trigger "capital gains" (which are included in taxable income at a rate of 50% to 75% depending on the year of disposition);
- it triggers "business income" which is 100% taxable.

In other words, if a land donation were to come from a developer or speculator, the tax cost would be even higher than it was for other private donors.

Aside from "land dedications" (where developers are obliged by law to set aside land for recreational purposes as part of a subdivision), there have been few accounts of developers or speculators making donations of inventory land since 1971.

2.3 Legislative Change

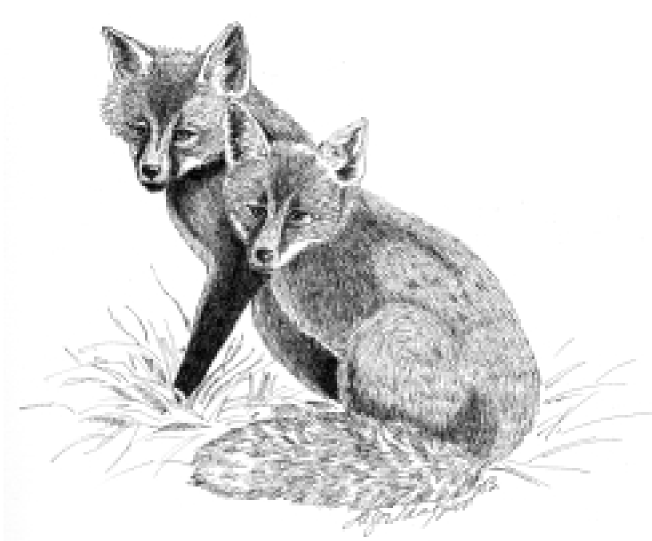
In 1994, the report of the *Task Force on Economic Instruments and Disincentives to Sound Environmental Practices*, established by the federal Ministers of Environment and Finance, contained key recommendations. One was that

> "The government should amend the *Income Tax Act* to exempt from capital gains all donations of ecologically sensitive land made in perpetuity to all levels of the government and charitable institutions."[8]

The Sustaining Wetlands Forum had already made a similar recommendation (1991): "Capital gains regulations and income tax treatment of natural property (land) must be changed to reflect the same advantages given cultural property in Canada."[9] Although that is not what Finance Canada did, it responded by changing the tax treatment of environmental philanthropy – not in one package, but in a series of successive stages.

2.4 Impact

Environment Canada reports that since 1995, "an area approaching the size of Bruce Peninsula National Park" has been donated, including "many habitat types such as tidal wetlands, rocky cliffs, rolling prairie grasslands and boreal woodlands. Over one third of the gifts contain nationally or provincially significant areas, and many contain rare or threatened habitats that are home to species at risk."[15] As of March 31st 2003, there have been 325 completed donations, covering a total land mass of over 24,000 hectares valued in excess of $67 million. "These gifts are helping to preserve the habitats of many species at risk, including the endangered burrowing owl in Prairie Canada and the endangered loggerhead shrike in Ontario."[16] "Almost two thirds of the gifts are donations of land title, the rest are conservation easements and covenants."[17] Important research has been undertaken on the impact in terms of donor motivation.[18]



Chronology of Significant Tax Changes

Year	Status
Pre-1995	A hierarchy of three levels of donation: • Cultural Gifts: *no* capital gains liability; a *limit* on usable receipt equal to *100% of income* for that year. • Donations to the Crown: liability for "deemed" capital gains; a limit on usable receipt equal to 100% of income for that year. • Donations to a *charity* or a *municipality*; liability for "deemed" capital gains; a limit on usable receipt equal to 20% of income for that year.
1995	Introduction of a new (fourth) category, "Ecological Gifts" for gifts of lands that had been federally certified,[10] to donees that had been federally certified.[11] • Similar to donations to the Crown: liability for "deemed" capital gains; a limit on usable receipt equal to 100% of income for that year.
1996	"Tax assistance for charitable donations will be increased"[12] for *all* categories of gift, with three mathematical components: • limit on usable *charitable* donations increased from 20% to 50% of income; • limit for donations in the year of death increased from 20% to 100%; and • the 50% limit "will be further raised by half the amount of taxable capital gains resulting from the donation of capital property that are included in calculating the donor's taxable income." Algebraically, this complex formula indeed "provides a 100% limit on the portion of a donation of appreciated property that must be included in the donor's taxable income,"[13] meaning that • the donation would still produce a deemed capital gain, but • the tax liability could no longer exceed the usable receipt (i.e. no donor would have to pay tax to give property away).
1997	Capital gains liability for donations (of publicly-traded stocks, bonds and related securities) is pegged at *half* the liability that would normally arise on capital gains (the "general inclusion rate"); so if 75% of capital gains were normally taxable (the "general inclusion rate" at the time), then in the case of "deemed capital gains" on donations, 37.5% would be taxable, i.e. half that general inclusion rate.
Feb. 2000	*All* capital gains are subject to a lower "inclusion rate": instead of *three quarters* of the "capital gain" being included in taxable income, *two thirds* would now generally be included; and in the specific case of Ecological Gifts, instead of *two thirds* of that "capital gain" being included in taxable income, *one third* would be included.
Oct. 2000	• The Government changes the general inclusion rates for all capital gains again: instead of *two thirds* of the "capital gain" being included in taxable income, *half* would now generally be included; and in the case of Ecological Gifts, instead of *one third* of that "capital gain" being included in taxable income, *one quarter* would be included. • A federal panel would review all appraisals of ecogifts "to ensure the integrity of donations."[14]

2.5 Ongoing Issues

Notwithstanding the positive public response to the Ecogifts Program, a number of texts have appeared since 1995, proposing that there is room for further improvement. The points raised fall into four main categories, outlined below.

1. **Mathematical Inadequacy:** According to some texts, the mathematical changes are an improvement, but a significant segment of the population is still functionally excluded. Environmentalists cite the example of aging farm couples. "Owners of ecologically significant lands have often stewarded their lands for generations and are of modest financial means. The capital gain arising from the donation of their land—even at a 25% inclusion rate—often results in the donor exceeding the current threshold income amount, above which partial or complete clawback of Old Age Security benefits is triggered."[19]

2. **The Premise of Capital Gains Liability:** Another longstanding argument asks whether there should ever be "deemed capital gains" on such donations in the first place: in real life, donations
   - are not income; and
   - they do not produce "gains."

   According to this view, "if there's *no income*, they shouldn't be in the *Income Tax Act*; and if the person *doesn't gain* from the transaction, it shouldn't be treated as a *gain*."[20] Other countries like the United States and the United Kingdom do not impute "deemed capital gains" to charitable donations; nor does Canada itself, in the case of cultural gifts.

   In response, the proposed *retention* of capital gains liability on gifts was based on three arguments:
   - That cultural gifts are "not an appropriate model for other property"[21] because they are an aberration.[22]
   - That ever since the Government attached capital gains liability to these transactions in 1971, it has derived revenue which tax officials are duty-bound to defend.[23]
   - That the environmentalists' objection (that the attribution of "deemed capital gains" and the collection of *income* tax on donations are both legal fictions), is misconceived: this is no fiction at all. The intent of Parliament, when it approved capital gains tax, was this: as capital property appreciates in Canada, *a proportion of all such appreciation accrues* to the Federal Government.[24] It is like a government receivable; so if the Federal Government were to relinquish that receivable, then this is more than a mere opportunity cost: it is like a waiver of a debt.

That third argument (the most significant) rests on the notion that "unliquidated capital gains" (including those "accruing" from charitable gifts) produce a government *receivable*. However, as pointed out, neither

- Generally Accepted Accounting Principles ("GAAP")[25]
- nor the National Accounts[26]

acknowledge any such government "receivable" from the appreciation of unliquidated capital property *per se.*[27]

What happened in the 1970s, when Canada recognized cultural gifts, was that Parliament acknowledged that these donations should not be among the list of events that are equated with the *liquidation* of the asset. This was not a "waiver of a receivable," because no such receivable had ever existed. It was a simple recognition of reality: such donations, in the real world, trigger neither gain nor income. The question asked by environmentalists is therefore this: was it necessary – and in Canada's public interest – to treat charitable donations of land differently?

3. **The Precondition of "Ecological Sensitivity":** "Each donation of a property or conservation easement must be individually certified as ecologically sensitive before it can be included under this program."[28] The procedural requirements prompted writers to publish detailed checklists.[29] There is some flexibility,[30] but the criteria can also vary from province to province. In the case of Ontario, "not every donated property or conservation easement will qualify as an ecogift – to do so, a property must meet one or more of a set of criteria developed specifically for Ontario. …In Ontario this definition includes 19 specific categories of qualified lands – the 'A' list, and a further 11 general criteria for other lands that may qualify as ecologically sensitive – the 'B' list."[31] The procedural requirements of the current system are said to have corollary effects on appraisals,[32] paper burden and related costs.[33]

   Another concern is that "ecological sensitivity" necessarily excludes other categories, notably urban lands and cultural landscapes.

4. **Exclusion of Donations by Developers and Speculators:** As mentioned earlier, this segment of the private sector often owns land which is under imminent threat of development – and simultaneously has some of the greatest interest because of frequent proximity to cities; yet there are no measures to encourage these owners to donate such "inventory land" to a land trust. As observed by lawyer Paul Peterson,

   > The most significant benefits of the Ecological Gifts Program do not apply to land development companies (or individuals) holding potential conservation lands as the "inventory" of their business. Specifically all of the gains in the value of inventory lands will be included in taxable income (compared to just 25% of the capital gains for qualified ecological gifts). This means that the value of the charitable tax receipt is offset by the inclusion in income and there is little incentive for gifts of inventory land. Despite less favourable tax treatment, lands under development pressure and held as 'inventory' may be exactly the lands that most urgently require conservation protection.[34]

   This was the one prospective group of donors that was not mentioned in the various tax changes of the past decade. This was noted by Environment Canada: "Such gifts are not subject to the same tax benefits as gifts of capital property. All profits derived from the disposition of inventory land must be included in the taxpayer's income for the year."[35]

   Since the Government of Canada still *deems* that there is a fully-taxable "profit" on donating land to charity (equal to the appreciation in the value of the property since acquisition), the tax consequences are severe. The Ontario controversy over the fate of the Oak Ridges Moraine has drawn public attention to the importance of lands held by developers and speculators, and environmental organizations have asked the Government to address donations from this sector.[36]

Another barrier, which existed until December 2002, was problematic for donors who wanted to benefit a charity, but could not make an outright gift of 100% of the value. Suppose an owner has a forested property to convey to a charity; the land is worth $300,000, and it is sold to the charity for $100,000. Under American law, the difference in price ($200,000) can be treated as a receiptable gift. In Canada, this was generally not considered a "gift" at all; for that matter, even a donation of the entire property (without payment) was disqualified for receipt purposes, if there was any mortgage on it.

The exception was in Québec, where Civil Code provisions made the above receiptable[37] – so "the CCRA has been faced with a situation where the rules in Quebec were better for donors than any place else in Canada."[38]

In December 2002, Finance Canada proposed a solution. New legislation (to be enacted) would, as of December 2002, provide a new definition for the "eligible amount," for purposes of a receipt: "New subsection 248(30) generally provides that the 'eligible amount' of the gift is the excess of the fair market value of a property transferred by way of gift over the value of the advantage or benefit, if any, to which the transferor is entitled."[39] In practice, that definition implies

> changes, which take effect for gifts made after Dec. 20, 2002. (This) creates a new concept for Income Tax purposes, the 'eligible gift.' In a nutshell, the proposed rule says that for tax purposes, there will be a gift where the value of the property given exceeds the benefit received by the donor or somebody with whom the donor does not deal with at arm's length. Thus, in the above example of the sale at an undervalue, there would be a gift for tax purposes of $200,000... The new rules will also make it easier to donate property subject to a mortgage which is assumed by a charity…
>
> It can be assumed that the new rules will make life a lot easier for both charities and donors and will pave the way to more gifts that were technically difficult to handle under the old rules.[40]

2.6 Conclusion to Chapter Two

In the various discussions of the tax treatment of environmental philanthropy, the issue that is raised most frequently is that of ongoing capital gains liability.

When the 1994 *Task Force on Economic Instruments and Disincentives to Sound Environmental Practices* recommended that Canada "exempt from capital gains all donations of ecologically sensitive land," it was proposing that Canada return to the position (a) that all charitable donations of land had pre-1971, (b) that Cultural Gifts have had for a generation, and (c) that other countries like the United Kingdom and the United States have. This would have reversed the measure taken a generation ago, when tax officials in Canada (unlike their counterparts elsewhere) introduced the notion of "deemed capital gains" on donations and charged the donor income tax – even when the donor derived neither gains nor income in real life. That recommendation has not yet been implemented.

While the environmental community is clearly grateful for the efforts of the past decade, it is time for Canada to simplify and modernize its approach to environmental philanthropy.

Furthermore, the changes of the last decade *omitted* the very group that (a) held the most property under immediate threat, and (b) had the strongest disincentives for land donations of anybody in the country. These were the people in the development industry, who hold land in "inventory."

While the environmental community is clearly grateful for the efforts of the past decade, it is time for Canada to simplify and modernize its approach to environmental philanthropy.

Chapter Three

Federal Tax Treatment of Covenants, Easements and Servitudes

What these agreements mean; statutory reform; precedents; income tax implications; reversal of positions; current prospects

3.0 Federal Tax Treatment of Covenants, Easements and Servitudes

3.1 What are Covenants, Easements and Servitudes?

Covenants, easements and servitudes are names for a particular kind of *contract* to regulate property. They are an important conservation tool – so much so that they are described as such in the legislation of virtually every province. The classic situation is this: property owners wish to continue owning their property, but are willing to have a conservation organization or institution exercise protective controls (to be registered on title) to protect its natural values for the future. Such conservation agreements have existed for decades in Canada.[1]

Most other agreements are simple contracts: they bind the signatories, but not anyone else – including subsequent owners.[2] Fortunately, certain exceptional contracts (that "run with the land") *do* bind subsequent owners, and are adaptable to the needs of conservation. In Anglo-Canadian Common Law, there were two variations, called "easements" and "restrictive covenants"; in Civil Law, there was a single kind, called "servitudes."[3] Further discussion in this paper will treat them interchangeably. An owner can legally promise to a conservation organization (or government entity) not to cut wood, backfill or pollute wetland, damage an archaeological site, alter or demolish an historic building, etc.

Historically, there were certain disqualifications: such agreements might fail to bind future owners

- if the conservation organization did not own land nearby,
- or if they forced the landowner not only to tolerate something, but also to *do something positive* (e.g. landscaping, maintenance).

This is why various governments, using either the Common Law or Civil Law systems, adopted legislation to facilitate these agreements by validating them regardless of the ancient conditions about having land nearby, or being "positive." This is the thrust of the legislation in Canadian provinces,[4] listed in Chapter One. These agreements are now an international phenomenon. The United States has tens of thousands. Among non-governmental organizations, one of the most eminent bodies of experience in this area belongs to the National Trust in Great Britain. By 1979, it had already acquired protective covenants on 71,000 acres.[5] One author refers to comparable agreements being in place in New Zealand, Switzerland, France, the Netherlands and Sweden.[6]

Since these contractual agreements offer the promise of indefinite protection of land without an actual change of ownership, they have appeared to be an ideal tool for conservation organizations, seeking to foster stewardship among sympathetic property owners who nonetheless wanted to retain title to their property. Unfortunately, this has sometimes led to a simplistic approach to easements and covenants. In one foreign jurisdiction, a major conservation organization lost interest in these agreements because it found them awkward to enforce – which was not surprising, since their three-page agreements were not specific enough. In contrast, the agreements of experienced Canadian institutions like the Ontario Heritage Foundation, (which has been drafting these agreements for decades), are routinely some forty pages long. There is no substitute for professional advice and drafting, particularly in light of two important legal realities: mindfulness of enforcement, and the tax implications. The first has been addressed at length in the proceedings of a conference in 2003[7]; the second is discussed in this chapter.

It should be noted parenthetically that regardless of how carefully an easement or covenant is drafted, there may come a time when the environmental organization must defend it against legal challenges. That can be expensive. Since conservation easements (particularly those donated under the Ecogift Program) are intended for the public and common good, it would appear appropriate for there to be public and/or common resources and funds to defend them. Canada is not yet at that stage. It would be worthwhile to begin considering options now, in parallel with the distinct consideration of tax treatment.

3.2 Tax Implications

The Common Law property system refers to ownership as a "bundle of rights" (what Oliver Cromwell described less charitably as "an ungodly jumble") – in Civil Law, "*un faisceau de droits*." So if part of those rights are removed (e.g., by restrictive covenant, easement or servitude), then one has (by definition) lost part of one's ownership.

This loss can be appraised economically. In routine property tax assessment, assessors take easements into account in computing the municipal tax base, for rights of way for utility companies, etc. Methods of appraisal for these agreements were not only developed, but entrenched in legislation, including both expropriation statutes and assessment laws.

It was long assumed that the same appraisal process would apply to donations of conservation easements. As early as 1974, Professor S. Silverstone predicted in the *Osgoode Hall Law Journal* that "a landowner can donate a conservation easement...to either a conservation organization with charitable status under the Act or the municipality in which the property is located. ...In either situation, the donor is entitled to deduct the value of the gift for income tax purposes."[8] This was consistent with established legal opinion in the United States since the 1960s,[9] where receipts for such donations were not an act of "political will," but merely an acknowledgement of legal realities (as perceived in the U.S.):

> A valuable property right having passed to the United States, it was ruled that the taxpayer was entitled to a deduction…The central premise of the ruling…asked and answered the question of whether a valuable property right had been given. Assuming that, under local law, the rights transferred were a valuable "something," the... questions to be asked, under general principles are (1) Is there a transfer of something of value? (2) Is the transfer a gift with the requisite donative intent? (3) Is the transfer to an organization, contributions to which qualify for the deduction?[10]

If the answer to all three questions was affirmative, the Internal Revenue Service concluded that tax deductibility was the logical consequence. The quantification of the value was based on a professional appraisal of the property before and after the removal of its development potential, under the terms of the easement – commonly called the "Before-and-After" approach. It is the same technique used in Canada for (a) utilities (e.g. when expropriating a utility right-of-way) and (b) property assessment legislation.

In the 1970s, Canadian institutions started to follow suit. The Ontario Heritage Foundation (OHF), which is part of the Government of Ontario, was among the first.[11] The Environmental Law Centre of Alberta reached an identical conclusion in 1986:

> In donating an easement, the taxpayer gives a charity or the Crown a partial interest in his property, while at the same time retaining legal title and the right to use the property subject only to the easement. With such gifts, the major issue becomes the value of the interest of the property donated by the taxpayer. While a gift of less than fee simple would have certain value, it would not have a value equal to the fair market value of the taxpayer's entire interest in the real property.... It would appear that the value of the donation would be the difference between the fair market value of the land unencumbered by the easement and its value subject to the easement. Proper real estate appraisals would be essential to establish such values.[12]

It was not until 1990 that Revenue Canada committed its position to writing, in correspondence with the Island Nature Trust of Prince Edward Island. In its letter of opinion, the Department confirmed not only the deductibility of such receipts for easements, but also the Before-and-After approach as the correct method for appraising these donations:

> A restrictive covenant...is a mechanism for the legal long term or permanent protection of...sites. A private landowner may register a restrictive covenant against his land...The rights forfeited generally include the right to subdivide or to develop the property for any commercial activities... The restriction of land use normally devalues the property. The restrictive covenant could therefore be assigned a value equal to the difference between
>
> - the property's value before the restrictive covenant is registered against the land and
> - the property's value after the restrictive covenant is registered against the land.
>
> Our comments regarding your questions are as follows: Subsection 248(1) of the *Income Tax Act* defines property to include a right of any kind whatever. Since a restrictive covenant registered against land is a right it would be considered a property. Consequently a donation of a restrictive covenant registered against the land to Her Majesty or to a registered charity could be considered a gift for purposes of section 118.1 or 110.1 of the *Income Tax Act*....A registered charity may issue receipts respecting donated restrictive covenants providing the donation qualifies as a gift. For example if the donor were to receive services or any valuable consideration in exchange for the restrictive covenant there would be no gift for purposes of the *Income Tax Act*. The individual would have a disposition equal to the value of the gift. The value must be determined by a person competent and qualified to evaluate the restrictive covenant.[13]

3.3 Subsequent Changes

The above view did not last. A few years later, Environment Canada issued the warning that "by 1996, all (previous) ecological easements were deemed by Revenue Canada to not have used accepted (appraisal) methods."[14]

Instead, federal officials stated that these agreements were essentially worthless ("the value of an easement would be considered nominal" only[15]), on the theory that the Before-and-After approach was not now and never had been the way to appraise conservation easements. It was supposedly irrelevant that the owner had divested himself/herself of a legally-recognized part of their property rights, or that the property had lost value as a result, instead, the appraisal process *should* be based on

- what a purchaser would *pay* for the easement/covenant on the "open market" (the so-called "Fair Market Value" approach);
- and if there is no established "open market" of competing purchasers and sellers vying to buy and sell easements,
- then the receipt should be pegged at a "nominal" value (like $1.00).[16]

"It was the Department's view that only Fair Market Value appraisal techniques would be accepted."[17] This view was reiterated by Finance Canada in the 1997 Budget Plan.

The new theory was in obvious contrast to Revenue Canada's 1990 opinion. Furthermore, if utility corridors had operated on that basis, the utilities would never have had to pay owners for their easements for the last century.

Having repudiated the Before-and-After method and reduced the receipts to "nominal" value, Finance Canada then announced that it would introduce a "new" system "to reinforce (its own previous) measure to encourage donations of ecologically significant land."[18] That "new" system is... the Before-and-After method – but subject to two new conditions:

1) use of this method would be confined to the single category of *ecological gifts*[19]; and
2) part of any receipt would be offset by a capital gains liability (codified in 2001).

This turn of events had three major effects.

1) Donations of easements would henceforth need to go through the same procedures as other ecogifts.
2) Easements *other* than the strictly ecological variety (e.g. over urban open land or cultural landscapes) were treated as essentially having no value for tax purposes.
3) A calculation would need to be done for "deemed capital gains."[20] No formula had ever existed for doing so. Finance Canada therefore created a formula to compute capital gains tax on the donation of easements, and inserted it into the *Income Tax Act* as a "practical method for valuing easements for tax purposes."[21]

In practice, it is said that "it is Revenue Canada's policy to ignore capital gains where the easement or right-of-way covers only *twenty percent of the property* and is valued at twenty percent or less of the total value of the property… Revenue Canada offers no such assistance in determining the cost base of interests in land such as covenants, easements and rights-of-way covering more than twenty percent of the property. Gifts of such interests may well give rise to a capital gain."[22] The calculation of that capital gain, codified by Finance Canada in the recent amendments to the *Income Tax Act*, outline an algebraic "formula for determining the portion of the total (donor cost) that can reasonably[23] be regarded as attributable to the covenant."[24] However, "no such clarification has been proposed for (computing capital gains tax on) covenants or easements that are not certified as ecological gifts."[25]

3.4 Conclusion to Chapter Three

As of 1990, the opinion of Revenue Canada appeared to leave covenants, easements and servitudes in a position of relative clarity, with a tax position that favoured philanthropy along lines similar to those that had been used effectively in the United States.

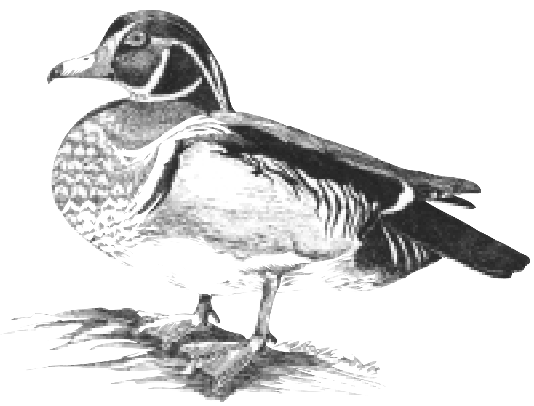
In other words, when the Federal Government assimilated the tax treatment of easements to ecogifts, the barriers it hoped to remove were replaced by others. This is an area where there are opportunities for improvement, and where a process of simplification would be immensely helpful.

Events in the following decade then split these agreements into two categories: those that were linked to ecogifts acquired all the characteristics of the latter (for better or for worse, including similar procedural requirements – and capital gains), while those that were not strictly "ecological" regressed from a tax standpoint.

Covenants, easements and servitudes have a long history of assisting a wide range of public policy objectives, including not only the protection of ecological values, but also other areas including urban open space and cultural landscapes. They are a long-standing instrument of philanthropy, and it is entirely appropriate that e.g., those that serve sound ecological purposes should be treated as ecogifts. There is, however, some lingering uncertainty over whether such treatment has actually conferred any tangible benefit compared to where matters had stood before.

As far as non-ecological covenants, easements and servitudes are concerned, a situation in which owners divest themselves of a legally-recognized component of their property rights, for the benefit of charity, and hence reduce the value of their remaining holdings by a professionally-quantifiable amount, but cannot obtain more than a nominal tax receipt is inconsistent with the way that many other gifts are treated in Canada, the way that easements are treated in the United States, the way that easements have been assessed (under utilities and expropriation law) for a century (as directed by statute), and the way that Revenue Canada said (in 1990) that these transactions *should* be appraised.

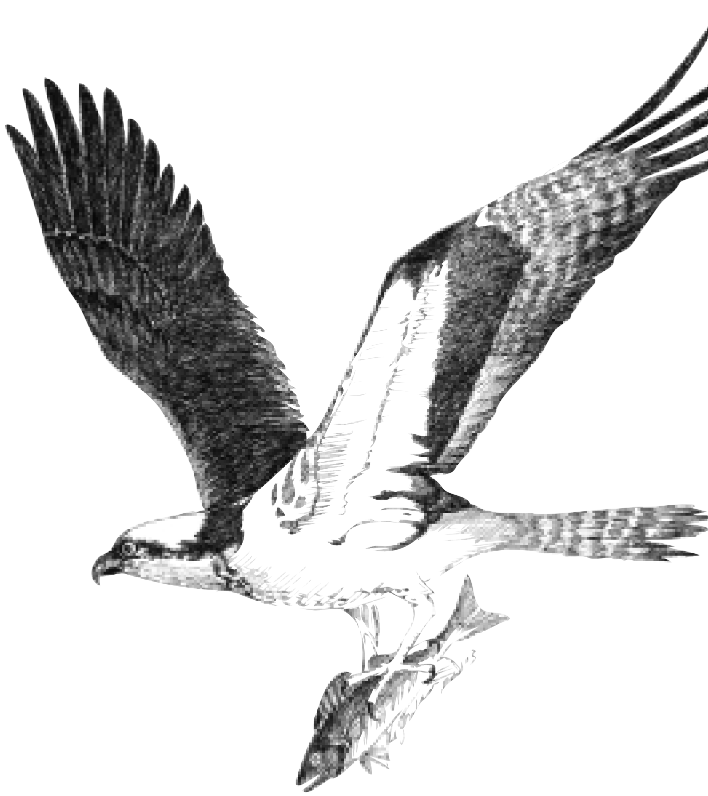
In other words, when the Federal Government assimilated the tax treatment of easements to ecogifts, the barriers it hoped to remove were replaced by others. This is an area where there are opportunities for improvement, and where a process of simplification would be immensely helpful.



Chapter Four

Provincial Tax Issues

Property Tax Mechanisms; Provincial Profiles



4.0 Provincial Tax Issues

4.1 Introduction

Another major area of taxation affecting "open space" is property taxation. Broadly speaking, this is a tax on property value. This is a kind of taxation which, in one form or another, has existed for centuries, and which often shows greater signs of incremental and *ad hoc* development than income taxes. This form of taxation is the primary source of tax revenue for municipal governments in Canada.

Taxes on property take many forms, aside from the well-recognized category which people know as "the property tax." These other forms include business taxes (e.g., a tax on commercial premises, which varies according to property value in some jurisdictions), development charges (a tax on new construction, usually tied to its value), Local Improvement Areas (improvements financed by a charge on neighbouring real estate), etc. However, property taxes *per se* remain the most significant for conservation lands by far; and those taxes will be the focus of the following chapter.

Because the amount of property tax depends on the assessed value of the property, and wilderness areas have traditionally been assessed at fairly low figures (particularly wetlands and other "non-arable" areas, which had often been assessed as "waste lands"), the property tax burden has tended to be modest – with one major exception. That exception has been wilderness which was vulnerable to a "change of use," as part of a real estate or recreational development. The possibility of development could drive the assessment (and hence the tax burden) upward, with tax repercussions for the owner. It is therefore incorrect to assume that the tax burden is invariably low; in fact, there are several land trusts whose annual tax bill is substantial.

Since the fundamental purpose of property taxes is to finance municipal services, some conservation organizations question why wilderness – which does not draw on those services – should be taxable in the first place. Furthermore, there are conservation organizations that challenge the idea that in principle, their tax treatment should be any different from that of a park or government-owned nature preserve:

- In strict principle, the property tax system is linked to *land use* regardless of who is the owner; and identical land *uses* should get identical treatment.
- Although numerous exceptions have been introduced by legislatures over the years, that is the underlying theory.

By that reasoning, conservation lands that have uses identical to a park or game preserve should get tax treatment identical to a park or game preserve. In the words of one group, "It is important that we not pay property taxes when we protect land which the Province should be protecting. Right now, (we are) paying about $3,000 per year and that value will grow dramatically in the next few months as we secure land we've been working on for years. We should be conserving land with our precious donations, not paying taxes."[1] In Canada today, that sometimes happens, and sometimes not. This subject is under provincial (and sometimes municipal) jurisdiction; and although the basic structure of the property tax system is common to all provinces, no two provinces have treated it in the same way.

4.2 Basic Structure

Every provincial system begins with the premise that property taxes should be based on a fixed percentage of fair market value – and then proceeds to introduce a range of exceptions.

A 1992 review by this writer[2] compared how provinces and municipalities treated environmentally significant land for property tax purposes, *as compared* to other lands of similar market value, i.e. whether these environmental lands received equal, preferential or inferior treatment. That analysis indicated that environmental lands were often in a so-called "preferred category" – but *not* as "preferred" as a number of other land uses. This chapter reviews whether that situation still prevails today.

The property tax system is based on two basic steps:

1) an *assessment* of the real estate belonging to a property-owner; and
2) the levy of a tax based on *a percentage* (traditionally called "the mill rate") of that assessment.[3]

4.3 Historical Evolution

As mentioned, virtually every jurisdiction attempted to develop assessments corresponding as closely as possible to *market value* (or a fixed percentage of market value). However, that approach was difficult to apply *verbatim* to ecologically-sensitive lands. Most notably, "waste lands" have traditionally received very low assessments: these lands included wetlands. However, those values could fluctuate if appraisers treated the lands as *"recreational."*

Furthermore, "market value assessment" also witnessed various statutory exemptions. Provincial assessment legislation could, for example,

- exempt charitable organizations from property taxes altogether;
- exempt agricultural lands or reduce their level of assessment;
- exempt "woodlots" or reduce their level of assessment; or
- provide preferential treatment to certain activities (e.g., in several provinces, golf courses enjoy the most favourable tax treatment).

Since the fundamental purpose of property taxes is to finance municipal services, some conservation organizations question why wilderness – which does not draw on those services – should be taxable in the first place.

In some cases, the province's legislation would include penalties for owners who converted their land to a different use, after having enjoyed a preferential tax treatment for several years.[4] In addition, there are longstanding approaches to assessment in the case of easements. Each of these will be described on the following pages.

4.4 Assessments – Normal and Preferential

When governments intervene in the property tax system, they do so either by adjusting the *assessment* process, or by changing the rules for collecting on the *rate* charged. In the first step (assessment), the generally accepted definition of Fair Market Value is the price which would be paid on the open market between a willing seller and a willing buyer.[5]

In daily practice, the projected market value which the typical appraiser will attribute to a property will usually be an amalgam of three figures. These three longstanding "approaches to the process of appraising real estate"[6] are called

1) the "*sales-price theory*" (how much are similar properties selling for?)
2) the "*cost theory*" ("Site value plus depreciated cost of improvement reproduction": what was the property's cost, adjusted for inflation and depreciation?) and
3) the "*income theory*" (what is the capitalized figure for its revenue-generating capacity?).

The sales-price approach includes comparison with other turnovers of property, including those in which there has been a *change of use*; this is overwhelmingly the largest contributor to the figure used for evaluation of wilderness areas. By comparison, figures generated by what the property may have *cost*, or (alternatively) by capitalizing the property's net *income* tend to be very modest for such properties: in practice, if there are no "improvements" to the property, then market value for wilderness land tends to be based on a Direct Comparison Approach with similar properties.

In other words, the usual appraisal techniques on wilderness areas tend to produce relatively low figures for assessment purposes (particularly for wetlands), and hence the property taxes tend to be relatively low *anyway* – *except* when there are real prospects for a change of use (development), in which case the assessment (and the taxes) would be substantially higher.

This has not stopped governments from introducing special forms of tax treatment, particularly as a spillover from taxation practices in related areas, like the treatment of farmland. Since normal appraisal practices theoretically begin with a balancing of all three approaches,[7] it is arguably a departure from the norm for property to be assessed exclusively on the basis of a *single* one (such as the income approach) that would produce a lower figure than the others. Some assessment statutes have nonetheless done so for decades, as an overt preference provided to a given kind of property (which may have high sale value but low income, e.g., farmland in some provinces).

In some other provinces, there is a *modified* version of the sale-price approach: the legislation takes account of comparable sales, but *excludes those associated with conversions to a different use.* This again constitutes a preference, and is sometimes applied to farmland: assessed value is calculated with reference to sales *from one farmer to another*, but not between farmers and developers.

4.5 Tax Calculations – Normal and Preferential

Government can also intervene by adjusting the *rate* of taxation. Traditionally, once the appraisal of property had been done, the mill rate was computed as a certain *percentage* of that assessed figure. However, throughout most of Canada, a practice developed whereby certain classes of properties were taxed at a *different percentage of value* than other classes of property: the mill rate might, for example, be computed on a different percentage when dealing with residential property as opposed to commercial property, with farm property as opposed to non-farm property, etc.

One of the most conspicuous examples was "recreational" property. In some cases, overt preferences were allowed (via low assessments or exemptions) for golf courses[8] or recreational properties operated by service clubs or the like.[9] On the other hand, some government appraisers assumed that when land was used for "recreational" purposes, it warranted a higher assessment than, say, a woodlot used for firewood.[10]

The most common case of a preferential tax calculation was for agricultural land: every province in Canada provides special treatment to its agricultural lands[11] – which sometimes (though not always) extends to wooded lands.

Some provinces will distinguish between several categories of wooded lands. One category may include farm woodlots (up to a certain size); there may be a second category for managed forests, and a third category for open timberland.

In some provinces, governments provide preferential treatment to a given category of properties when they assess them, but do not collect any taxes on them, i.e., there is a tax rate of 0% – a total exemption. In other cases, there is a rate which is more than 0%, but which is still preferential. In still other cases, a government may decide to invoice for the full tax rate – then *rebate* all or part of the taxes to preferred categories of property. In short, a government can follow a variety of widely different avenues to produce an identical monetary result.

Another interesting area is the assessment of lands covered by easements, covenants and servitudes. As mentioned earlier, many provinces adopted legislation pertaining to conservation easements in the 1990s; but long before that time, there were already appraisal practices to deal with easements generally, e.g., for rights of way, utility corridors, etc. Sometimes, the legislation contains a statutory direction for appraisers to adjust the assessed value of land pursuant to easements and covenants. In many cases, however, that statutory direction is unnecessary, because it is already the longstanding and routine practice of appraisers to acknowledge that *if* the market value of a property declines because an easement (of *any* kind) has reduced its development potential, then that decline should be proportionately reflected in the assessment.

For years, there have been other proposals for preferential approaches to ecologically-sensitive lands, including wetlands and other wilderness. Some have been implemented. Their proponents, however, have hoped to avoid a reduction of municipal revenues; the Sustaining Wetlands Forum, for example, had argued (1991) that "Municipalities should be compensated by the province or private sector organizations for losses in their tax base resulting from revisions in assessment procedures related to wetland conservation."[12]

The issue of the loss of tax revenue also affects another component of the tax system of some provinces. Some governments raised the possibility that an owner might enjoy a preferential tax treatment for years, under the guise of reserving a property for a given preferred use – while simply waiting to change that use at the first opportunity. The owner of farmland or of a golf course, for example, might receive substantial property tax incentives; and when the land was sold for suburban development, some governments have claimed that this was the equivalent of "bait-and-switch"; these governments have therefore demanded that the incentives be paid back (sometimes called a "clawback") when the preferred use is changed.

4.6 Review of Options

Are conservation lands in a preferred category for purposes of assessment and tax, or do they take second place (or less) in comparison with other land uses?

- The most favourable tax treatment is **an outright exemption** from taxation. This is the case for the lands of environmental charities in New Brunswick, Prince Edward Island and Québec (and partly in Ontario, for lands acquired pre-1998 by certain charities). It is also the case (for different reasons) in "unorganized territory" (i.e. territory outside municipal boundaries) in Newfoundland and Labrador (although the City of St. John's provides an outright exemption), and in most (though not all) unorganized territory in British Columbia.[13] Possible legislative initiatives along similar lines are under discussion in Alberta and for other lands in Ontario.
- The same result can be achieved if the taxes are subject to a 100% **rebate**, as is sometimes available to, e.g., charities other than environmental charities in Ontario.
- In some locations, conservation lands (lands owned by land trusts, or property under a *bona fide* conservation easement) are exempted as of right; elsewhere, an exemption is available – but must be applied for, and is allowed (for a limited time) only after a government body has approved it on a *discretionary* basis. This is the case in most provinces.
- If the property is not exempted from taxation, the tax burden might nevertheless be reduced, e.g.,
  - if the property is eligible for a **preferential method of assessment**,
  - or a **partial rebate** of taxes (sometimes in the form of a "tax credit"),
  - or is in a **low rate** category.

Almost every province provides such treatment to *some* land uses – but are privately-owned conservation lands among them? The following is a profile of the salient features of each province's legislation. Territorial legislation is not included in this analysis, because the percentage of privately-owned lands north of 60º is currently very low; but that topic too will be a worthwhile subject of exploration at some point in the future.

4.7 Provincial Profiles

British Columbia

The effect of British Columbia's legislation[14] on conservation lands is among the most complex in Canada. There are some places where conservation lands have an outright exemption from property taxes; but elsewhere, the only way that a tax exemption or reduction can be obtained is by requesting it from the municipal council, which can grant or refuse it essentially at its discretion, as described below.

There are two kinds of places where there is a total exemption on lands owned by environmental charities:

(a) First, the *Taxation (Rural Area) Act* provides an absolute exemption on taxation of any charitable non-profit-organization *outside municipal boundaries*,[15] as long as the property has "demonstrable benefit." This requirement of "demonstrable benefit" is the subject of much litigation, but appears to be broad enough to include conservation; nonetheless, it is not entirely impossible for a Regional Assessor to take a conservation organization to court over "demonstrable benefit" when the organization claims the exemption.

(b) On Gambier Island, the Islands Nature Trust has arranged for a 65% exemption on conservation lands, called "Natural Area Protection (Tax Exemptions) Zones," on a "pilot" basis.[16] Although this arrangement is under the authority of legislation specific to the Gulf Islands,[17] there appears to be an expectation that this "pilot" might eventually be extended elsewhere.

The British Columbia Assessment Authority's classification, as applied to properties with conservation easements, refers to them as "Code 89 - Green Legacy Sites."[18] These properties are *not* exempt. There may or may not be a lowering of assessment: like other properties covered by easements, any change in assessment is contingent on a quantifiable decline in actual market value.[19]

A lowering of assessment could be important, because conservation lands are not otherwise in an advantageous tax category within British Columbia municipalities. They are ineligible for the preferential assessment system for farmland,[20] because they produce no farm income. Nor are they eligible for the special treatment reserved for Unmanaged Forest Lands or Managed Forests,[21] if the "highest and best use" of the land is other than "growing and harvesting of trees."

Conservation organizations inside municipal boundaries may therefore wish to obtain an exemption from property taxation, by applying to the local municipal council. Councils are permitted (at their discretion) to exempt association-owned parks and recreational facilities from taxation within municipal boundaries under the *Local Government Act*, or other property of non-profit and charitable organizations.[22] Again, "demonstrable benefit" must be shown, and even where the council gives its approval, it is not impossible for a Regional Assessor to challenge that exemption in court on the ground that the "benefit" was not "demonstrable."[23]

If a property has been enjoying some preferential tax treatment and hence avoids a part of the normal tax burden for a number of years and there is then a change of use (e.g., it is converted into a subdivision), some provinces demand a retroactive payback (or "clawback") of some of those avoided taxes. There is no such system of tax clawback on a change of use in British Columbia.

Alberta

At the time of writing, a legislative proposal is wending its way through the Government of Alberta,[24] with potentially major implications for this subject.[25] Prior to amendments in 1995, conservation lands had been specifically foreseen in Alberta legislation[26] (they were treated similarly to farmland) but since then, their status has been less clear. For example, although the *Municipal Government Act* exempts "environmental reserves,"[27] the Act equates these with "undeveloped property reserved for public utilities" and this category had not been applied to conservation lands. That Act also exempts the property of non-profit organizations which is used for "recreation for the benefit of the general public,"[28] or "a charitable or benevolent purpose that is for the benefit of the general public,"[29] but in both cases, it was determined that an amendment dealing more specifically with conservation lands would be the better course to follow.

Unless conservation lands are included in some new legislative treatment (such as the system currently under legislative discussion), there is no other obvious category into which such property would fall. Conservation lands are ineligible for the exemptions which are available to timber lands held under a forest management agreement or lease. They are similarly ineligible for the preferential assessment for farmland (called "regulated property," with a complex grading system for land productivity, which is then used as the basis of the assessment[30]).

Another possibility is to apply for a municipal exemption. Although environmental charities are ineligible for the automatic exemptions provided to *some* charities (e.g., property in religious use is automatically exempt,[31] but conservation lands are not), a conservation organization that was a charity could apply for an exemption, which would be at the option of the municipal council[32] and a refusal can be appealed.[33]

There is no exceptional treatment for properties covered by a conservation easement. There may or may not be a lowering of assessment: like other properties covered by easements, any change in assessment is contingent on a quantifiable decline in actual market value.

There is no system of tax clawback on a change of use.

Saskatchewan

The legislation[34] in Saskatchewan makes virtually no mention of conservation lands. There is no specific provision for any exemption or preferential assessment, except for a discretionary municipal technique described below.

In practice, Saskatchewan followed the example of some other provinces: wilderness areas like ancient prairie tended to be treated as "waste lands" and were assessed at a low value.

Prior to 1997, the approach was similar to farms, which were assessed on a preferential basis linked to soil productivity (woodlots tended to be assimilated to farms), and "local market conditions" like the prospects for change of use were not included in that assessment. In 1997, the rules changed and "local market conditions" became a factor which increased (or sometimes decreased) the assessment of many lands, including conservation lands, to reflect average local selling prices of agricultural land in local market neighbourhoods. As of 2005, however, Saskatchewan's treatment of such lands will essentially return to the pre-1997 method, namely assessment based on soil productivity with no local sale price adjustments.

There is a tax exemption for some charities like YMCA and YWCA properties, but other relevant charities (including environmental ones) are not specifically referred to. However, a conservation organization, like anyone else, could apply for an exemption: municipal councils have a general discretionary power to exempt lands of almost *any* description for a period of up to five years (renewable).[35]

There is no exceptional treatment for properties covered by a conservation easement. There may or may not be a lowering of assessment: like other properties covered by easements, any change in assessment is contingent on a quantifiable decline in actual market value. With the removal of "local market conditions" in assessing these lands as of 2005, a quantifiable decrease in soil productivity would be required to lower the assessment.

There is no system of tax clawback on a change of use.

Manitoba

Manitoba's legislation[36] provides for a two-tiered assessment system, called "portioned assessment," which establishes (a) a figure for fair market value, and (b) a second figure which is a fixed percentage of the first, and which depends on the land use. It is on the latter that taxes are computed.

There are no exemptions for conservation lands; for that matter, although *some* charitable institutions are exempt from certain school taxes,[37] environmental charities do *not* appear among them, and there is no mechanism for land trusts to apply for an exemption at a municipal council's discretion.

On the other hand, "conservation lands" are specifically foreseen – as long as they are *part of a farm*.[38] They tend to be assessed at relatively low values. The taxes on the entire farm property are also computed preferentially, on 26% of market value. This is not, however, the most preferential rate: golf courses are in a much better position than farmland (or conservation land), because their taxes are computed on 10% of market value.

In addition to the provisions for "conservation lands," Manitoba offers farmers a "Riparian Tax Credit" for "farmers and livestock producers who make a three-year commitment to protect a strip along a waterway on agricultural land"[39] (up to 100 feet).

There is no exceptional treatment for properties covered by a conservation easement. There may or may not be a lowering of assessment: like other properties covered by easements, any change in assessment is contingent on a quantifiable decline in actual market value.

A conversion of farmland can lead to a clawback of taxes covering a five-year period. By implication, this would extend to "conservation lands" which were part of that farmland.

Ontario

Ontario's legislation[40] has been "in transition" since 1997; and at the time of writing, that is its continuing status. Conservation lands had been acknowledged as a special tax category since 1988[41] and had been eligible for rebates; but that system was terminated in 1997 and replaced by a tax exemption system. Since then, the *Assessment Act* has exempted "Land that is conservation land as defined in the regulations."[42] The Government of Ontario indicated an intent to enact those key defining regulations within a year. In the meantime, two results occurred:

- properties that had been recognized as conservation lands *before* 1997 were "grandfathered" and were deemed eligible for the exemption; and
- properties that had not been so recognized before 1997 (e.g., more recent acquisitions by land trusts) were in a different position: their applications for similar treatment would not be considered until the new regulations had been enacted.

As of early 2003, those key implementing regulations are still awaited.

Prior to 1997, eligibility for the "conservation land" exemption had depended on a two-pronged test: the land had to be owned by a charity, *and* meet certain ecological criteria. Those ecological criteria had been relatively open-ended.[43] Subsequent to the 1997 amendments, an attempt was made to define them with greater specificity; and in 2000, the Ministry of Natural Resources circulated a draft list of 21 ecological categories for inclusion in the long-awaited regulations, to synchronize (approximately) with the criteria in the federal Ecogifts Program. In 2002, however, the Government announced that it proposed to retain only seven categories,[44] and to drop the fourteen others (including properties under easement)[45] which would not be considered eligible *per se,* at least not "initially."[46]

The matter is still in abeyance. If the 2002 draft were adopted, it would provide many recently-acquired ecologically-significant properties with an improved tax treatment. On the other hand, some lands protected by Ontario land trusts would be exempt, and others would not, depending on whether they met the new ecological criteria. Since the 2002 version made no mention of further "grandfathering" of previously-recognized conservation lands, it also left open the question of whether property that had been exempt until now might become taxable in the future.

In the meantime, newly-acquired conservation lands have been taxable pending the new Regulations, awaited since 1997. In the functional absence of a "conservation lands" designation, the custodial environmental charities are not in an advantageous position. Although the *Assessment Act* provides an outright exemption to some charities (lands held by e.g., properties used for religious, medical, horticultural or social welfare purposes[47] or even battle sites,[48] roller-coasters and merry-go-rounds[49]), it makes no mention of any such exemption for environmental purposes. Another program under the *Municipal Act,* to provide rebates "for eligible charities for the purposes of giving them relief from taxes" is also inaccessible, because it applies only to property that is "in one of the commercial classes or industrial classes."[50] Nor can a charity apply for relief of "unduly burdensome" taxes under section 365 of the *Municipal Act*, because such applications can be filed only for residential, farm or managed forest (lumber) property.

An environmental charity could always apply for a grant-in-lieu to rebate its taxes, in whole or in part;[51] but this would be at the municipal council's discretion. Other, more indirect techniques may also be available, but are neither straightforward nor obvious.[52]

There is no exceptional treatment for properties covered by a conservation easement. They were in one of the 14 categories of property that had been suggested for exemption under the draft criteria discussed for "Community Conservation Lands" in 2000, but which were dropped in 2002. In the absence of any legislative direction, there may or may not be a lowering of assessment: like other properties covered by easements, any change in assessment is contingent on a quantifiable decline in actual market value.

In other contexts, a conversion of golf courses for example (which enjoy preferential tax treatment) can lead to a clawback of taxes.

Québec

In Québec, legislation[53] from late 2002 creates an organized system for private lands to be conserved, either when owned by a conservation organization, or by a landowner under a conservation servitude or the like. These properties are listed in a Register of "*Réserves naturelles en milieu privé*" ("Nature reserves on private land").

In December 2002, the Province enacted a law[54] "to exempt nature reserves on private land from property taxes."[55] It applies to property on the Register – whether it is owned by an environmental charity or by an individual under a conservation servitude. Although the legislation abolishes property taxes and school taxes *per se* on such lands, it nonetheless leaves the door open to municipal councils to re-introduce charges on such land – not as taxes, but as "fees" for services; such a re-introduction, on a fee-for-service basis, would need to be done by by-law, by the municipal council.[56]

New Brunswick

Legislation[57] in New Brunswick, like Prince Edward Island, foresees two "property taxes" – a provincial one and various municipal ones; since the rules are not always identical at the two levels, any discussion of "property tax" must usually specify which one is being referred to. In the case of lands owned by environmental charities, however, the rules are identical. In New Brunswick, lands owned and protected by an environmental charity enjoy an outright tax exemption unlike any other in Canada: conservation lands are exempted by the Province, under the authority of legislation exempting "real property owned and occupied by institutions and associations formed and operated for the advancement of science."[58]

There is no exceptional treatment for properties covered by a conservation easement, nor would any significant changes in assessment be expected. New Brunswick's treatment of lands covered by easements almost never relies on "highest and best use," and loss of development potential is thus seldom a factor in those assessments.

Conversion of farmland to higher uses can trigger a retroactive tax which would otherwise have been paid over the last decade; but this approach does not extend to conservation lands.[59]

Nova Scotia

According to the legislation,[60] Nova Scotia has a tax specifically designed for non-profit organizations like land trusts. Although the legislation contains no specific reference to the phrase "conservation lands" or the like, it does state that "land in excess of three acres belonging to any non-profit charitable... organizations, excluding any structures, that is used solely for the non-profit purposes of the organization is liable to a recreational property tax."[61] Although this figure is lower than what would be payable by some other land uses, it remains several times higher than the effective tax rate of lumber property;[62] and in contrast, farmland is tax-exempt (the Province also pays a certain amount per hectare per year to the municipality where agricultural land is located).

Otherwise, in the case of properties owned by charitable organizations, *some* organizations and institutions are automatically exempt (e.g., Boy Scouts or Girl Guides), but conservation organizations are not. They can, however, apply for an exemption, which might or might not be granted at the option of the municipal council.[63]

There is no exceptional treatment for properties covered by a conservation easement. There may or may not be a lowering of assessment: like other properties covered by easements, any change in assessment is contingent on a quantifiable decline in actual market value.

In the case of "land in excess of three acres belonging to any non-profit charitable… organizations," a change in use can potentially trigger a one-time tax equal to 50% of the property's value. In other contexts (i.e., agricultural land), a change in use can trigger a one-time tax equal to 20% of the property's value.

Prince Edward Island

Like New Brunswick, legislation[64] in Prince Edward Island has a "property tax" at both the provincial and municipal levels. Conservation lands can be designated as a wildlife management area under the *Fish and Game Protection Act* or the *Natural Areas Protection Act*,[65] whereupon there is a total exemption for both provincial property tax and municipal property tax.[66]

There is no exceptional treatment for properties covered by a conservation easement per se, although such lands could conceivably be designated under the above statutes, whereupon there may or may not be a lowering of assessment: like other properties covered by easements, any change in assessment is contingent on a quantifiable decline in actual market value.

There is no system of tax clawback on a change of use.

Newfoundland and Labrador

In Newfoundland and Labrador, the legislation[67] provides for no assessment (and hence no property tax) *outside municipal boundaries*. Discussion of property tax therefore applies only to lands within municipal boundaries; and even there, many communities have no assessment and no tax. There is, however, a provincial property tax on timber lands; although it exempts large parcels of land which are "managed for purposes not compatible with timber production," it is not clear whether that exemption extends to conservation lands.[68]

Major communities do have property taxes; but in St. John's, which is covered by the *St. John's Assessment Act*, registered charities are exempt from property tax[69] (although any businesses they operate may be subject to business tax).

Elsewhere, the situation is less clear. Although some charities are entitled to an exemption (e.g., property in religious use is automatically exempt[70]), environmental charities are not. A land trust could, like anyone else, apply for an exemption; but this would be at the option of the municipal council.[71]

There is no exceptional treatment for properties covered by a conservation easement. There may or may not be a lowering of assessment: like other properties covered by easements, any change in assessment is contingent on a quantifiable decline in actual market value.

There is no system of tax clawback on a change of use.

4.8 Conclusion to Chapter Four

The research has disclosed certain common themes. The actual monetary amounts at stake tend to be small, because ecologically sensitive lands are often *already* in a low tax category for some other reason. However, there are notable exceptions, particularly in or near urban areas or recreation areas, where there is pressure for change of use.

In a minority of provinces, conservation land is in a "most-favoured" category. Elsewhere, conservation lands may take second place to golf courses, religious properties, farms, lumber forests, etc.

However, by simply putting conservation lands on an equal footing with either (a) game preserves or (b) the most preferred category of property in a given province, each government could use whatever devices it already feels comfortable with.

The monetary stakes involved for governments, in moving conservation lands into the same "most-favoured" category with other land uses, would be relatively modest. They would also be modest for many conservation organizations – again with a number of notable exceptions. That does not change the basic desirability of entrenching a specific tax treatment for conservation lands, because

- this is also a question of basic *principle* ("if the property has the same *use* as a government game preserve, it should have the same treatment"); and
- this may have a positive *psychological* impact upon property owners.

Because of the multiplicity of approaches taken in the various jurisdictions, it is not advisable to recommend a *single* formula for the property tax treatment of ecologically sensitive lands. However, by simply putting conservation lands *on an equal footing* with either (a) game preserves or (b) the most preferred category of property in a given province, each government could use whatever devices it already feels comfortable with.

Several provinces have instituted outright exemptions for conservation lands. Aside from the obvious benefits to the environmental organizations involved, these arrangements have the virtue of simplicity.

Among the various other models available, the notion of provincial rebates has intellectual appeal because it does not "discriminate" against municipalities which have large proportions of wilderness and which might otherwise complain that any tax benefit was causing them a greater hardship than that encountered by other municipalities. That objection does not withstand careful scrutiny, because those municipalities were hardly collecting any taxes on that wilderness in the first place, and hence the "damage" of any wilderness-related initiative would be extremely low; but in politics, "perception is reality." An extension of the provincial rebate system would appear to be an interesting course to follow, among those jurisdictions which already have rebate programs. However, where a jurisdiction already has an alternative set of incentives for other kinds of property, the easier path would appear to be to merely use that other set of incentives.

Another feature which appears interesting is the "clawback" of tax benefits upon conversion of property, as in the case of Ontario golf courses. These retroactive tax increases constitute a disincentive to the eventual destruction of ecologically sensitive lands, once those lands have been subjected to some form of preferential tax treatment. Furthermore, such a clawback provision may possibly render the entire concept of preferential tax treatment more saleable in some political circles. A broadened system of clawbacks could potentially have other implications for the development system, which should be explored further.

…as in the case of Ontario golf courses. These retroactive tax increases constitute a disincentive to the eventual destruction of ecologically sensitive lands…

Chapter Five

Conclusion

5.0 Conclusion

In 1999, the federally-commissioned Panel on the Ecological Integrity of Canada's National Parks reported that "Canadian tax laws continue to impede voluntary participation in local conservation efforts on private lands. The Panel heard this same message from ranchers in Alberta to private woodlot operators in the Maritimes.... Removing these barriers is essential to promoting conservation on lands adjacent to national parks."[1] This led the Panel to issue a formal recommendation[2]: "That the Minister advise the Government of Canada to amend the *Income Tax Act* to exempt ecological gifts from capital gains tax." More recently (2003), the Natural Heritage Task Force of the National Round Table on the Environment and the Economy, in reporting on the "State of the Debate," proposed "removing the remaining capital gains tax on gifts of ecologically sensitive lands and easements; and including donations of ecologically significant lands held by corporations or individuals as part of the inventory of their businesses."[3]

Recent work has also occurred on Parliament Hill itself, including particular reference to the urban context. Although the tax treatment of greenspace can be a complex issue, particularly in an urban setting,[4] two Parliamentary bodies reported on these issues in November 2002. These reports also had particular significance for urban greenspace, cultural landscapes and brownfields. These two parliamentary bodies were the House of Commons Standing Committee on Finance,[5] and the Prime Minister's Caucus Task Force on Urban Issues.[6] One of those two groups (the Standing Committee) also addressed charitable donations of real estate *at large*.

• **Urban Greenspace:** The Standing Committee on Finance stated that "the loss of green space around cities is also a cause for concern."[7] For its part, the Task Force on Urban Issues recommended that the Government of Canada "support the acquisition of critical urban space by assisting community partnerships such as land trusts and conservation organizations and provide incentives to allow donations for conservation purposes."[8]

• **Cultural Landscapes:** "The (Standing) Committee heard that the federal government should fully exempt donations of (certain) lands from capital gains taxation, which implies an inclusion rate of zero, and extend the provision to urban lands that are *socially and historically important* but perhaps not crucial from an environmental perspective."[9] However, instead of confining any recommendations specifically to lands that are "socially and historically important," the Standing Committee's response was more sweeping, and is outlined later in this chapter.

• **Other Lands:** The Standing Committee acknowledged that charities and municipalities also have an interest in other land donations – even when the ecological (or cultural) implications are more modest. Sometimes, the reason is simply that an altruistic property owner wants to benefit the charity, and would not object if the charity were to convert the land donation to cash, or swap it for other land. These are called "trade lands." The Committee quoted the Canadian Association of Gift Planners: "Real estate is the most widely held asset in Canada, and yet it is rarely donated to charity. It represents an enormous and important future source of donations to the sector for the benefit of Canadians." [10]

• **Brownfields:** According to the Standing Committee, "the growing concern over the welfare of our urban centres underscores the need to address the problems of contaminated sites, in city centres in particular."[11] In fact, the Committee specifically listed brownfields as a top priority[12] – and for many public policy reasons.[13] This led it to the following formal Recommendation: that

> The federal government meet with stakeholders in order to develop a plan for brownfield redevelopment. Consideration should be given to tax incentives, loans, grants and mortgage guarantees, with such initiatives funded through a reallocation of existing government expenditures.[14]

The Task Force on Urban Issues similarly recommended "that the Government of Canada consider ... appropriate tax incentives for brownfield redevelopment."[15]

The Standing Committee on Finance took note of the concerns in these various categories. However, the Committee chose not to attempt to produce an individualized response for each category, but rather to recommend a simplified approach that would be *common* to donations of

- stocks, bonds and securities;
- ecological lands;
- properties that are "socially and historically important"; and
- *all other real estate.*

The Standing Committee worded its proposals as follows: that the federal government

- amend the *Income Tax Act* to eliminate the capital gains inclusion rate applied to donations of publicly traded securities to charitable organizations, including private foundations;[16] and
- study the feasibility of extending the provisions regarding the capital gains inclusion rate applied to donations of publicly traded securities to donations of real estate and of land. This study should be undertaken with a view to phasing in the application of the change when feasible.[17]

In other words, the proposed "elimination of the capital gains inclusion rate" would apply first to donations of securities; then, said the Committee, "the extension of these provisions to real estate and land has merit. Such a change would likely result in greater levels of donations by Canadians."[18]

"Such a change," the Committee added finally, "would create consistency between Canada and both the United States and the United Kingdom."[19]

It is in Canada's interest to consider such recommendations carefully. The Parliament of Canada, having adopted the goal of protecting 12% of our landmass on a biodiverse basis, has an obvious interest in assuring that this objective is feasible. This simply cannot occur without the active engagement of private owners. While it is not the mandate of the tax system to facilitate this purpose, it is the mandate of the tax system, to avoid being inadvertently counterproductive wherever possible.

The Parliament of Canada, having adopted the goal of protecting 12% of our landmass on a biodiverse basis, has an obvious interest in assuring that this objective is feasible. This simply cannot occur without the active engagement of private owners.

Canada has made major strides in that direction; and both the environmental community and officials at all levels can take rightful pride in the progress of the last several years. There is, however, work that is still left to do. The Standing Committee on Finance has endorsed one major initiative, which is to finally end capital gains liability on environmental philanthropy.

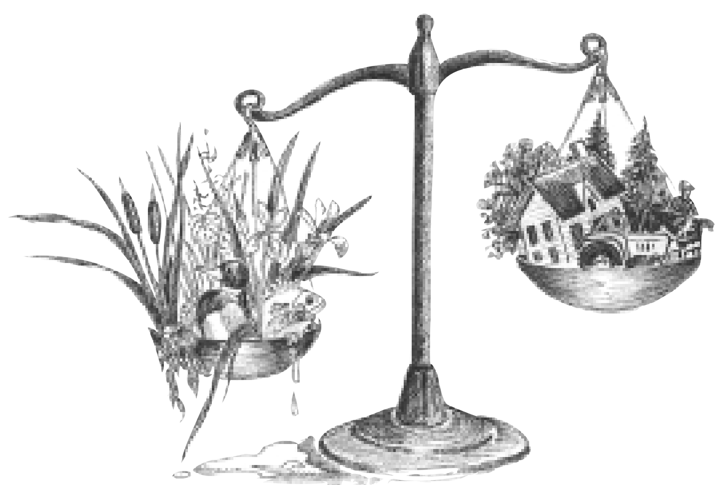
To that objective, the environmental community would add the fair treatment of inventory lands. A better tax treatment for stewardship should not continue to exclude developers: they, too, can have a very positive role to play in the future of environmental philanthropy.

Next, it is in Canada's self-interest to put order in the subject of conservation easements. The Before-and-After method of appraising the value of donated easements (and hence receipts) is the appropriate one – as various statutes declare, and as federal officials correctly deduced in 1990. Subsequent declarations which deviated from that position, complicated it, or which demeaned easements on urban open space or cultural landscapes, were not helpful. This would be an ideal time to get back to basics, and to return to a position that encourages Canadians to capitalize on these useful tools.

Finally, provinces also have an important role to play. Most have already made a significant contribution, by facilitating conservation easements with the help of new legislation. Several are also making important strides in property taxes, e.g. via outright exemption. In other provinces, however, lands owned and protected by environmental charities are in an inferior tax position to other land uses – even when they do not draw on municipal services as much as those other uses do. Exemptions – or at least parity with other favoured land uses – would have an important beneficial effect on environmental philanthropy.

Exemptions – or at least parity with other favoured land uses – would have an important beneficial effect on environmental philanthropy.

It is hoped that such efforts will lead to further improvements in the tax treatment of environmental stewardship – and, with those improvements, to broader participation by individual Canadians in the protection of our natural heritage.



Appendix

Two Scenarios

[Reproduced by permission of Environment Canada, Ontario Region, from Supplement to the Ontario Ecogifts Handbook. The scenarios were prepared by lawyer Paul Peterson, Toronto, Ontario, June 2002.]

Examples of Tax Benefits to Donors

The purpose of these examples is to demonstrate the basic income tax benefits to donors of gifts of land that qualify as ecologically sensitive. Such gifts may also be known as "ecogifts."

Two basic income tax considerations are addressed. The first is that a gift of land to qualified registered charities or government will result in a credit to individuals (and a deduction for corporations). This then reduces the income tax payable.

The second consideration is the treatment of any capital gains. As of October 2000, the general inclusion rate for capital gains is 50 percent and the capital gains inclusion rate for ecogifts is just one half of the general inclusion rate or 25 percent of the total capital gain.

For additional information on these changes see the Canada Customs and Revenue Agency publication *Gifts and Income Tax* issued for the year 2001 available at: *www.ccra-adrc.gc.ca.*

These scenarios and simplified calculations are provided for illustration purposes only and should not be considered as financial or tax advice applicable to any particular individual. The precise calculation of income taxes payable by any individual will vary from these generalized examples. It is essential that donors seek independent professional advice before proceeding with gifts of land

The scenarios demonstrate the two major income tax advantages for the donor arising from a gift of ecologically sensitive land. Firstly, the donor will be entitled to benefit from a non-refundable income tax credit based on the entire value of the gift, without being subject to the "donation limits" which otherwise apply to charitable gifts. Unused tax credits can be carried forward to reduce future income taxes for up to five years after the year of the gift. Secondly, the amount of the capital gain included in taxable income will be reduced from 50 percent to 25 percent.

Scenario A – Gift of Land

About 15 years ago, Mr. Smith bought 20 hectares of waterfront adjacent to his cottage lot in Muskoka for $180,000. This property is located between his cottage lot and a migratory bird sanctuary.

The land is blanketed in mature hemlock forest. The Smiths treasure the tranquillity of this quiet shoreline, and often see deer and other wildlife on their property. As more and more cottages are built on the shores of the lake, they worry that this natural habitat is disappearing.

The Lake Land Trust has been working with cottagers to establish a natural buffer zone of mature forests and undisturbed shorelines around the bird sanctuary. In 2002, to protect their land and to assist with these efforts, the Smiths donated the 20-hectare property to the Trust. The donated property is valued at $600,000.

As a result of this donation, Mr. Smith reduced his income tax by nearly $90,000 in 2002 and carries forward $375,000 of his donation receipt for future years (see calculation).

The Tax Credit Calculation for a Gift of Land 2002

Component	Calculation	Explanation
Fair market value of land	$600,000	Value of donation receipt.
Adjusted cost base of land	$180,000	The adjusted cost base is the purchase price of the land plus allowable expenses.
Capital gain	$420,000	The capital gain is the difference between the fair market value and the adjusted cost base.
Taxable capital gain	$105,000	25 percent of capital gain where the land transfer qualifies as an ecogift.
Income reported for income tax purposes	$225,000	Income ($120,000) plus the taxable portion of the capital gain ($105,000).
Donation limit or amount in year of the gift	$225,000	For certified ecogifts, up to 100 percent of the value of the donation may be used to calculate tax credits and reduce tax payable—to a maximum of the donor's income for the year. Any gift value not used to generate credits in the year of the gift may be carried forward and used for up to five more years.
Amount available for carry forward	$375,000	Subtract the amount used in the year of the gift from the fair market value ($600,000 minus $225,000).
Individual donor's non-refundable federal tax credit	$65,224	Based on 16 percent of the first $200 and 29 percent of the balance of the donation limit or amount in year of the gift.
Provincial tax credit	$24,740	For the purposes of this example, calculated as 6 percent of the first $200 and 11 percent of the balance of the donation limit or amount in year of the gift.
Total federal and provincial tax credit	$89,964	

Scenario B– Conservation Easement

The Smiths could have donated a conservation easement to the Trust instead. The easement would be registered on title and would permanently protect the natural values on the property by restricting subdivision, shoreline disturbance, the cutting of trees, the alteration of other natural features, and the construction of docks or buildings. The land remains in private ownership, subject to the restrictions of the easement. In this example, the value of the land after the conservation easement is put in place is determined to be $200,000, so the value of the conservation easement ($400,000) is the difference in value between the land before ($600,000) and after ($200,000) the conservation easement is put in place.

As a result of this donation, Mr. Smith reduced his income tax by nearly $76,000 in 2002 and carries forward $210,000 of his donation receipt for future years (see calculation).

The value of conservation easements will vary in each case due to the development and resource potential of the land and the restrictions chosen for the property in each easement agreement.

The *Income Tax Act* sets out special rules for determining the fair market value and the capital gains for ecological gifts of conservation easements.

The fair market value of a conservation easement is determined as "the amount by which the fair market value of the land is reduced by the granting of the conservation easement" or the "fair market value otherwise determined" (reference: section 118.1 (12) of the *Income Tax Act*). The reduction in value of the land is because the easement restricts development, land use and resource exploitation which then reduces the fair market value of a property. Since comparable sales or other traditional appraisal methods cannot always establish the fair market value of easements, the *Act* requires that the value of the easement is at least equal to the reduction in private property value. The value of the Smiths' easement is equal to the $400,000 reduction in private property value caused by the granting and registration of the easement on title.

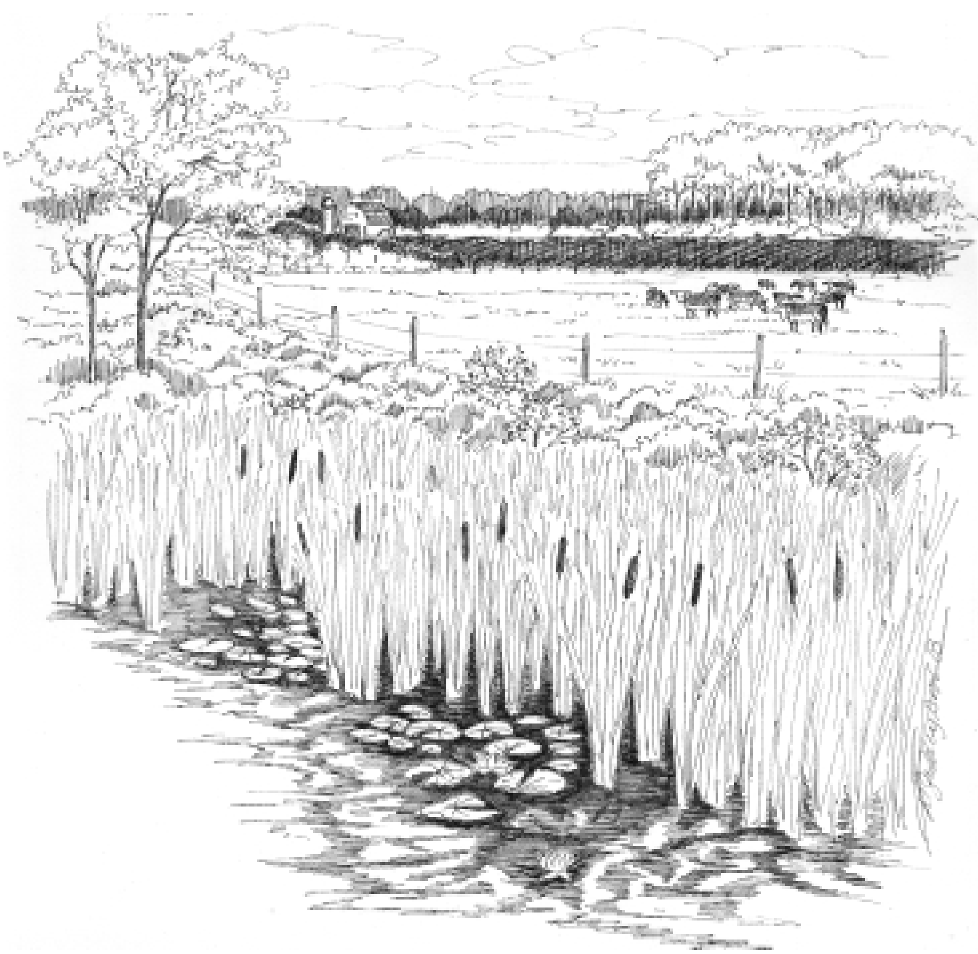
As with a gift of land ownership, 25 percent of the capital gain on a conservation easement for ecologically sensitive land is to be included in taxable income.

The *Income Tax Act* also makes special provision for the allocation of a reasonable share of the cost base to the easement. In the case of the Smiths' gift, the value of the conservation easement ($400,000) is two-thirds of the total land value ($600,000). Accordingly, the cost base of the easement will be calculated as two-thirds of the cost base of the entire property. The specific formula is set out in section 43 of the *Income Tax Act.*

The Tax Credit Calculation for a Conservation Easement 2002

Component	Calculation	Explanation
Fair market value of land (before conservation easement)	$600,000	
Fair market value of land (after conservation easement)	$200,000	
Fair market value of conservation easement	$400,000	Where it cannot be directly appraised, the value of the easement is calculated as the difference between the fair market value of the property before ($600,000) and after ($200,000) the conservation easement is put in place. Value of donation receipt.
Adjusted cost base of entire land	$180,000	The adjusted cost base is the purchase price of the land plus allowable expenses.
Ratio of conservation easement value to entire land value	$400,000 divided by $600,000 = 2/3	The value of the conservation easement divided by the entire land value.
Adjusted cost base of conservation easement	2/3 of $180,000 $120,000	The cost of the conservation easement is 2/3 of the cost of the entire land (same ratio applies).
Capital gain on the conservation easement	$400,000 minus $120,000 $280,000	The capital gain is the difference between the fair market value of the conservation easement and its cost.
Taxable capital gain	$70,000	25 percent of capital gain.
Income reported for income tax purposes	$190,000	Income ($120,000) plus the taxable portion of the capital gain ($70,000).
Donation limit or amount in year of the gift	$190,000	For certified ecogifts, up to 100 percent of the value of the donation may be used to calculate tax credits and reduce tax payable—to a maximum of the donor's income for the year. Any gift value not used to generate credits in the year of the gift may be carried forward and used for up to five more years.
Amount available for carry forward	$210,000	Subtract the amount used in the year of the gift from the fair market value ($400,000 minus $190,000).
Individual donor's non-refundable federal tax credit	$55,074	Based on 16 percent of the first $200 and 29 percent of the balance of the donation limit or amount in year of the gift.
Provincial tax credit	$20,890	For the purposes of this example, calculated as 6 percent of the first $200 and 11 percent of the balance of the donation limit or amount in year of the gift.
Total federal and provincial tax credit	$75,964	

Notes



Chapter One Notes

1. *Bringing Trust to Ontario*, by Ron Reid. Bobolink Enterprises, Washago, 1988, p. 6.
2. *Canadian Parks/Recreation Association National Policy*, Ottawa (undated), p. 1.
3. Kenneth Cox, *Heritage Conservation and Sustainable Development*. J.G. Nelson and S. Woodley, Eds. University of Waterloo, 1989, p. 182.
4. Quoted by David Napier in *Call of the Wild*, http://www.sustainabletimes.ca/ articles/landtrust.htm.
5. Speaking Notes for the Hon. David Anderson, Minister of the Environment at a press conference announcing the establishment of an appraisal review panel for the "Eco-Gifts Program." Ottawa, October 4, 2000.
6. "There is a prevailing misconception among Canadians that urban areas do not contribute significantly to wildlife habitats. While urban landscapes are highly modified from their original ecosystems and remaining habitats are usually fragmented, these areas still provide habitats – nesting habitat, foraging habitat, wintering areas, and staging and movement corridors for native species and less-appreciated introduced species." Wildlife Habitat Canada Web site, 2001.
7. "Over the past 20 years, there has been a trend to renaturalize urban landscapes. Canadian municipalities have responded by incorporating naturalization policies and programs within their official plans and open space strategies." *Urban Naturalization in Canada: a Policy and Program Guidebook*. Evergreen, Toronto, 2002.
8. WHC has also called for the development of "indicators... for the quantity and quality of urban habitats," "programs to encourage individual action in urban areas" and "stronger coordination and collaboration among organizations with current or potential responsibilities for habitat protection in urban areas." See Wildlife Habitat Canada Web site, 2003.
9. *The Canadian Ecological Gifts Program Handbook 2002*, Environment Canada, October 2002.
10. *Urban Sustainability,* National Round Table on the Environment and the Economy, May, 2002.
11. The NRTEE's "Urban Sustainability Program" proposes to address
    - "A continued and expanded role for the federal government in the improvement of environmental quality in Canadian cities;
    - Innovative research (for) the potential application of Ecological Fiscal Reform (EFR) to urban issues; (and)
    - Implementation by the federal government — and, if possible, provincial and municipal governments — (of) a number of specific… fiscal measures that support improvements to urban environmental quality while realizing economic and social benefits." *Urban Sustainability,* National Round Table on the Environment and the Economy, May, 2002.
12. "Recently, the Government of Canada and other organizations have begun studying the impact of fiscal policies on the various aspects of sustainability... The NRTEE hopes that in 2003, the outcome will be 'to recommend a limited set of measures for the federal government to improve the urban environment through changes to federal fiscal policies and operations. Although some measures have already been taken in this regard over the last few years, much more is to be accomplished to maintain and strengthen Canada's leadership in providing its urban citizens with (a) healthy environment in which to grow and prosper.'" *Urban Sustainability, op. cit.*
13. *Background Paper for Meeting on World Heritage and Cultural Landscapes,* Ottawa, 26 January 2001, by Susan Buggey. Environment Canada, 2001.
14. *Ibid.*
15. The full title is the *Convention concerning the Protection of the World Cultural and Natural Heritage*, UNESCO, 1972. Canada adhered to the Convention in 1976. Canadian sites designated under that Convention include areas which are ecological (e.g., the Rocky Mountain National Parks, Nahanni National Park and Wood Buffalo National Park, etc.), areas which are historical (e.g. Vieux-Québec, L'Anse Aux Meadows), and combinations (e.g., Anthony Island). The Convention refers to cultural landscapes as the "combined works of nature and man" (Article 1).
16. Section 36 of the *Operational Guidelines*: "Cultural landscapes represent the 'combined works of nature and of man' designated in Article 1 of the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal…."
    Section 37. "The term 'cultural landscape' embraces a diversity of manifestations of the interaction between humankind and its natural environment."
17. The Canadian examples cited are from Buggey, *op. cit*.
18. "This results from an initial social, economic, administrative, and/or religious imperative and has developed its present form by association with and in response to its natural environment. Such landscapes reflect that process of evolution in their form and component features." Section 39 of the *Operational Guidelines*.
19. "A continuing landscape is one which retains an active social role in contemporary society closely associated with the traditional way of life, and in which the evolutionary process is still in progress. At the same time it exhibits significant material evidence of its evolution over time." Section 39 of the *Operational Guidelines*.
20. Section 39 of the *Operational Guidelines*.
21. In her paper *What Are Cultural Landscapes?*, Alice E. Ingerson of the Harvard University Institute for Cultural Landscape Studies refers to the U.S. Secretary of the Interior's *Guidelines for the Treatment of Cultural Landscapes*, in which these are defined as "a geographic area (including both cultural and natural resources and the wildlife or domestic animals therein), associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values."
22. For example, "Parks Canada applies the World Heritage tripartite typology in evaluating the values and significance of cultural landscapes as National Historic Sites." Buggey, *op. cit.* The Federal Government's very first venture into legislation on cultural heritage was for a cultural landscape (the Plains of Abraham). One of the earliest lawsuits (resolved in favour of the protective designation) was over the heritage designation of an entire "heritage farm" in British Columbia. Most of these statutes also allowed conservation easements on heritage property, decades before some of the provincial statutes for ecological easements.
23. *Canada's Green Plan for a Healthy Environment*, Government of Canada, Ottawa, 1990.
24. *op.cit.,* p. 79.
25. The Nature Conservancy of Canada Alberta regional office estimated that in view of the 65,637 square miles of grassland and parkland, the target (12%) would not be achieved without acquisition of a further 7,001 square miles, at an average price of $225.00 per acre.
26. Cox, *op.cit.,* p. 188.
27. Denhez, Marc, *You Can't Give It Away: Tax Aspects of Ecologically Sensitive Lands*, National Round Table on the Environment and the Economy and the North American Wetlands Conservation Council (Canada). Ottawa, 1992.
28. It was the Parliamentary Committee on Communications and Culture, to which this writer made a presentation on December 2nd.
29. Recommendation #8 in this writer's brief.
30. Initially, the proposals were rejected in their entirety: see Letter of the Hon. Don Mazankowski of June 24, 1993.
31. February 1994.
32. *Economic Instruments and Disincentives to Sound Environmental Practices*, Final Report of the Task Force, November 1994.
33. In a meeting with representatives of the National Round Table on the Environment and the Economy (July 1994), officials opined that although the question of the mathematical ceiling on the deductibility of donations was open to study, the principle of capital gains tax liability on donations was non-negotiable.
34. e.g., Finance Canada, *The Tax Treatment of Donations of Ecologically Sensitive Land*. Elaboration of remarks made by Keith Horner (Department of Finance) to the Senate

Committee on Energy, the Environment and Natural Resources, June 20, 1995. Finance Canada claimed that it would be overly generous to allow donors *both* (a) to use tax receipts to offset taxable income (worth ± 52% of the value of the gift), *and also* (b) to avoid paying to the government its vested rightful share [*sic*] of the appreciated value of the property. [Note: There is no customary practice, under Generally Accepted Accounting Principles, of listing a "payable" for supposed capital gains tax on unliquidated capital property. More importantly, Finance Canada has no practice of listing a "receivable," in the National Accounts, for prospective capital gains tax on all of Canada's unliquidated capital property: if there were, this "deferred income" would dramatically reduce the National Debt.] Finance Canada estimated the Government's receivable at ± 37% of the increase in value of the donated property over the years. If one added (a) and (b) [*sic*], it would mean that under such treatment, the public treasury would supposedly be picking up almost 90% of the cost of the gift. This unusual mathematical approach was also taken by Finance Canada spokesmen, e.g., at the *Stewardship '94* conference in Vancouver.

35. See also Melissa Watkins *The Emergence of Land Trusts as a New Conservation Force in Canada.* Centre for Land and Water Stewardship. University of Guelph, 2001.
36. *Summary/Briefing Notes on Urban Land Trust – Income Tax Issues Re Gifts of Land*, by Paul Peterson. Evergreen, Toronto, May, 2002.
37. Speaking Notes for the Hon. David Anderson, P.C., M.P., Minister of the Environment at a Press Conference Announcing the Establishment of an Appraisal Review Panel for the Eco-Gifts Program, Ottawa, October 4, 2000.
38. Open letter from the Escarpment Biosphere Conservancy to Ontario Ministers of Finance and Natural Resources, April 13, 2002.
39. *The Prime Minister's Caucus Task Force on Urban Issues, Final Report*, November, 2002 (Recommendation no. 49).
40. Section 257, *Taxation of Chargeable Gains Act,* 1992.
41. The charity acquires the asset at the original cost price to the donor. If the charity subsequently sells the asset, any gain is exempt from CGT provided the gain is applicable and applied to charitable purposes (Section 256, *Taxation of Chargeable Gains Act*, 1992).
42. Further information is available on the U.K. Revenue website: www.inlandrevenue.gov.uk by clicking on:
    - 'Charitable and Charitable Giving' (on the left hand side);
    - 'What's New'; and then
    - 'Gifts of Real Property to Charity'.
43. However, the deduction accrues only for the year in which the gift is made, and any "unused relief" cannot be carried forward or back to another tax year.

Chapter Two Notes

1 *A Guide to the Goods and Services Tax*, p. 45.
2. *Ibid.*
3. Although a "Temporary Income Tax" had been introduced in Canada during World War I, it was during World War II that the modern income tax system took shape, under the leadership of the then Deputy Minister of Finance, W.C. Clark. Clark's other interest at the time was urban development (he was also responsible for the drafting of the *National Housing Act* of 1944).
4. The economic thinkers of the day had been traumatized by the Great Depression. In their view, the frugality which families depended on, to survive the depression and wartime, was a threat to building the consumer mentality which they perceived as the *sine qua non* of long-term economic recovery. Every major economic textbook of the day warned against "the Paradox of Thrift." In the national crusade to build that consumer economy, "*conservation*" had absolutely no role to play; and "philanthropy" was not much better. Both notions placed a distant second to the principle of planned obsolescence. In a rare public announcement in 1938, the man who would eventually draft the *Income Tax Act*, W.C. Clark, went to the extent of stating for the record that real estate development should be modeled on "that rugged young interloper, the automobile industry." (Quoted in *The Housing Industry: Perspective and Prospective*, by Clayton Research Associates and Scanada Consultants, CMHC, Ottawa, 1989. Vol. 1, p. 19.) His *Income Tax Act* took a consistent view: buildings were presumed to depreciate at breakneck speed, repairs were marginalized, and (most importantly for the current discussion) charitable donations of real estate were treated as an aberration. For example, the owner of an historic building who donated the property to charity usually received worse tax treatment than if he/she had demolished it in order to redevelop for profit (a situation that prevailed until 1981).
5. Some acknowledgement of the philanthropic sector was required by a line of statutes dating from the reign of Elizabeth I.
6. This means that a Canadian who *earns* income owes a share of those earnings to the Government, even if that Canadian has not *collected* those earnings yet. Canada's income tax system, based on "accrual accounting," says that taxes are computed *not* on the basis of what taxpayers *actually* receive and pay out (that is called "cash accounting"), but rather what they are *scheduled* to receive and pay out. Accordingly, GAAP instructs accountants on how to compute tax on income earned but not yet received; and when Finance Canada does its projection of tax revenues for a given year, the figures that it posts in the line accounts are those based on taxing earnings ("accruals"), not on taxing what taxpayers actually received.
7. A further condition on eligibility, as originally assumed, was that the gift would be of *movable* cultural property only; real estate would be ineligible. That condition became problematic almost immediately. If London Bridge could be considered "movable" (it was transported by a developer to Lake Havasu City, U.S.A.), then other buildings could be too – along with enough land to "seat and serve" them. This is the argument that led to the eligibility of properties like Louis-Joseph Papineau's house in Montreal, or the Steveston Cannery near Vancouver. In the right circumstances, land could indeed become part of a "Cultural Gift."
8. *Economic Instruments and Disincentives to Sound Environmental Practices*, Final Report of the Task Force, November 1994.
9. Explanatory notes to recommendations 1-6,46,60-1; Sustaining Wetlands Forum, Ottawa, April 1991, p. 3.
10. "Certified by the Minister of the Environment to be ecologically sensitive land, the conservation and protection of which is, in the opinion of the Minister, important to the preservation of Canada's environmental heritage": Section 14 (1)(d) of the amendments.
11. The charitable recipient could not be just any charity, but one whose "primary purpose… is, in the opinion of the Minister of the Environment, the conservation and protection of Canada's environmental heritage, and that is approved by that Minister in respect of that gift." Section 14 (4)(b) of the amendments.
12. Finance Canada, *Budget in Brief*, March 6, 1996.
13. Finance Canada, *Budget Plan*, March 6, 1996.
14. *EcoGifts are Good for Nature and for Taxpayers Says Minister Anderson*, Environment Canada Press Release, Ottawa, Oct. 4, 2000.
15. See *Canada's Ecological Gifts Program*, Canadian Wildlife Service Web site.
16. "*EcoGifts are Good for Nature and for Taxpayers Says Minister Anderson*," Environment Canada News Release (posted to the Internet), Ottawa, Oct. 4, 2000.
17. *Canada's Ecological Gifts Program:* Appendix to *EcoGifts are Good for Nature and for Taxpayers Says Minister Anderson, op. cit.*
18. *Survey Report: Donors of Ecologically Sensitive Land in Ontario*, Environment Canada, Ontario Region, Downsview, January 2003.
19. *Realizing the Full Potential of the Ecological Gifts Program*, Excerpt in Our Health, Our Economy, and Our Environment, Recommendations for Budget 2003; An Environmental Reinvestment Strategy: achieving an innovative economy and high quality of life for all Canadians. Presented by the Green Budget Coalition, Oct. 2002.

20. Unless there is an overwhelming policy reason to tax it anyway; but no such policy reason ever existed here.
21. Opinion to the Parliamentary Standing Committee on Communications and Culture (signed by the then Minister of Finance Don Mazankowski), January 24, 1992.
22. *Ibid.* Cultural Gifts are "not an appropriate model" because of "a unique history, tied to the portable nature of such property, and integrally linked to the treatment of such property under the provisions of the *Cultural Property Export and Import Act*." This appears to also be an allusion to the notion that, in the absence of such tax measures for Cultural Gifts, many more items of cultural property might have been sold offshore, and hence that the Government introduced this tax treatment as a pre-emptive measure to keep those items in Canada.
23. The Government of Canada is bombarded daily with requests for additional assistance of one form or another – and usually for purposes that are entirely plausible; if the Government acceded to only a fraction of them, public finances would be in a shambles. It is part of Finance Canada's duty to serve as a watchdog, and to play devil's advocate to any and all such requests.
24. The principle is reputedly similar to income tax: let us suppose that we apply the same principle to capital gains. By that reasoning, the Federal Government earns its share of capital gains tax every time that a capital property increases in value. The proportion of the gain, which would go to capital gains tax if the property were sold, is viewed as accruing to the Federal Government, and continues to "accrue" to the Government as the property appreciates over time.
25. If it were true that a receivable accrued to the Government (and a payable accrued to the owner) every time that capital property appreciated in value, then GAAP would provide for same in the owner's accounts. This is not what is done.
26. If it were true that a receivable accrued to the Government every time that capital property appreciated in value, then the Government's "receivables" from such appreciation would be posted as a line entry in the National Accounts. This is not done either. If the Government of Canada could today post a "receivable" in its assets, for all potential capital gains tax on the appreciation of all capital property in Canada, the figure would be so large as to wipe out much of the National Debt at the stroke of a pen.
27. With only a handful of exceptions (e.g. France, to some extent), countries do *not treat capital gains on a pure accrual system.* They are different from income tax: under the system of most western countries, the receivable/payable is triggered *only when the asset is liquidated*. That explains why the United Kingdom and the United States take the approach that they do. That also explains why, in Canada, Generally Accepted Accounting Principles do not treat capital appreciation as automatically triggering a capital gains tax liability; and it also explains why the National Accounts still say that Canada has a National Debt. The Government of Canada, like other countries, has no receivable (in any accounting sense) in unliquidated capital property.
28. *The Ontario Ecogifts Handbook 2001*, Environment Canada (Ontario Region), Downsview, 2001. The rules for ecogifts include the following, described by Environment Canada: "Each donation of land or a partial interest in land must be certified as ecologically sensitive before it can be included under the Ecological Gifts Program. This certification is carried out by the federal Minister of the Environment or a designated authority… Ecologically sensitive lands are areas or sites that currently or could, at some point in the future, contribute significantly to the conservation of Canada's biodiversity and environmental heritage."
29. "The donor of a property that has been certified as ecologically sensitive must submit an independent appraisal of the fair market value of the donated lands or conservation easement, covenant or servitude to the regional Ecological Gifts Program coordinator, along with a signed *Application for Appraisal Review and Determination*… Although a single appraisal is normally sufficient, a second one may be useful to assist in the review process for gifts that have a high fair market value or that are particularly complex to value. For all gifts estimated at over $25 000 and those of a complex nature, such as partial interests, the appraiser must be an Accredited Appraiser… For straightforward gifts estimated at less than $25 000, the appraiser's only requirement is to establish his or her competence in the field. Ecogift valuation training courses for appraisers have been held across Canada… In provinces that require a licence to establish the fair market value of real property (such as Nova Scotia and New Brunswick), appraisers must have a licence in addition to their approved professional designation. Appraisals must conform to the Canadian Uniform Standards... as well as to all Environment Canada requirements above and beyond these standards. These requirements are outlined in the Ecological Gifts Program's *Guidelines for Appraisals*... All appraisals will be reviewed by one or more members of Environment Canada's Appraisal Review Panel... made up of eight members, including a chair, a senior appraisal specialist from each of the five regions of Environment Canada, a lawyer, and a land-use planner… Three colour copies of the completed appraisal must be submitted to Environment Canada's Ecological Gifts Program regional coordinator, along with a completed *Application for Appraisal Review and Determination* signed and dated by the donor. For appraisals of partial interests in land, a copy of the easement, covenant or servitude must be included in the report... Following the review of the appraisal by one or more members of Environment Canada's Appraisal Review Panel, the donor will receive a *Notice of Determination of Fair Market Value* indicating the fair market value that the federal Minister of the Environment is prepared to certify for the property." *The Canadian Ecological Gifts Program Handbook 2002.* Environment Canada, 2002.
30. For example, it is not necessary for 100% of the property to be "ecologically significant" as long as "a significant part" is: "Where ecologically sensitive land is a significant part of a larger parcel of land, the entire property donated usually qualifies as an ecogift" (*The Canadian Ecological Gifts Program Handbook 2002*, Environment Canada, October 2002). Furthermore, even if the property is of only marginal significance *today,* it may be considered eligible if it is expected to become significant in the *future*, with the right "conservation initiatives." "Ecologically sensitive lands are areas or sites that currently or could, at some point in the future, contribute significantly to the conservation of Canada's biodiversity and environmental heritage… Both the existing environmental values of the land and those that may result from conservation initiatives are included in the consideration of what is ecologically sensitive."
31. "If the property under consideration meets one of the "A" list criteria – for example, if it is within a Provincially Significant Wetland – it will be qualified with minimal discussion. To qualify a property under the more general "B" list criteria, recipient agencies or donors are expected to provide a more detailed rationale for how it meets one or more of the criteria – in essence, to make the case for why it should qualify as ecologically sensitive." *The Ontario Ecogifts Handbook 2001*, Environment Canada (Ontario Region), Downsview, 2001. Environment Canada refers to the "definition of ecologically sensitive lands (in) Ontario (as) the four-step certification process" (not to be confused with "the four-step certification of the value process"). One head of a land trust described a recent donation as follows: "Eco-certification took us four months to receive. I expect another three or four more months to get our review results back…" (Private communication).
32. For example, it is not sufficient to have an appraisal by a professional, duly recognized by the Appraisal Institute of Canada: instead, the Federal Government intervenes directly in the appraisal. This has led to some uncertainties. In the words of the head of one land trust, "One of the barriers to realizing the whole potential of the Ecogifts Program is the bureaucracy involved, particularly the increasing frequency of appraisals being turned back… I am presently awaiting with trepidation the results of an appraisal review being done by the federal Review Panel for a pending ecogift to our land trust.

Several organizations have described battles with the review panel, who choose to second-guess certified appraisers' value estimates." (Private communication).

33. The "time-consuming" aspect of the process was mentioned by several donors, as noted in *Survey Report: Donors of Ecologically Sensitive Land in Ontario*, Environment Canada Ontario Region, Downsview, January 2003. Elsewhere, in the words of the director of one land trust, "As it stands right now, I would not expect (our land trust) to participate in this program in the future. It is essentially an expensive gamble: spend a minimum of $3,000 plus legal fees and staff time to get all the required paperwork done and risk losing that investment (and the land donation) when the Panel rejects the appraisal." (Private communication).
34. *Summary/Briefing Notes on Urban Land Trust – Income Tax Issues Re Gifts of Land*, by Paul Peterson. Evergreen, Toronto, May, 2002.
35. *The Canadian Ecological Gifts Program Handbook*, Environment Canada, January 2003.
36. According to *Realizing the Full Potential of the Ecological Gifts Program*, the Government of Canada should "include donations of ecologically significant lands held by corporations or individuals as inventory of their business under the federal Ecological Gifts Program. The disposition of land held as inventory yields a profit rather than a capital gain (because it is not an "capital asset"), 100% of which is deemed income for income tax purposes. The tax benefits of the Ecological Gifts Program apply only to the capital gain associated with the gift. The Ecogifts Program is intended to offer incentive to preserve significant ecological areas. It should therefore apply to all people and companies owning qualified lands regardless of how these lands are held. This is particularly relevant in areas such as the Oak Ridges Moraine near Toronto, where development companies often own ecologically significant lands, but the ecogift option is not available to conserve land in a cost-effective manner."
37. "The probable reason (for the recent change of position at Finance Canada) lies in the distinction between the Common Law of nine provinces and three territories, and the Civil Code of Quebec. Under Quebec law, where a benefit is received, there is a gift of the excess of the value donated less the benefit." "Charities May Get a Present on Gifts," by Arthur Drache, *Financial Post*, Dec. 24, 2002.
38. Drache, *op. cit.*
39. *Legislative Proposals and Explanatory Notes Relating to Income Tax - December 2002,* Finance Canada.
40. "If you want to donate your home worth $300,000 to a charity provided they assume the mortgage, under the old rule there was no gift. Under the new rule, there would be a gift of the difference between the fair market value of the house and the mortgage assumed by the charity." Drache, *op. cit.* The changes are further described in CCRA's *Income Tax Technical News* No. 26, December 24, 2002, p. 6.

Chapter Three Notes

1. One of the first such agreements in Canada was signed in 1964 by a non-profit heritage organization to protect an eighteenth-century home in Montreal. Subsequently, similar agreements were negotiated by e.g., the Ontario Heritage Foundation, the British Columbia Heritage Trust, and a variety of environmental charities. These properties included sites of environmental, geological or botanical importance, and a variety of architectural and historic landmarks.
2. The basic rule, at Common Law, is that contracts are private agreements which affect only the signatories. This principle is called "privity of contract." So if an owner agrees to protect the property against destruction and later sells it, the agreement would usually *not be binding upon the future owner*. Conservationists would usually find this situation unsatisfactory: they would prefer an agreement that continues to bind all future owners (or, to use the legal expression, "runs with the land").
3. In traditional Anglo-Canadian legal parlance, an "easement" refers to an agreement which requires the owner to allow someone *else* to do something on the owner's own land (e.g. a right-of-way); whereas a "restrictive covenant" restricts the owner's *own* ability to do something on his/her *own* land (e.g. agrees not to backfill a wetland). Conservation agreements are therefore usually "restrictive covenants." In the United States, however, a usage developed whereby protective agreements were lumped together under the name "conservation easements." The Ontario government followed the American example in the 1970s, and in a spate of legislation in the 1990s, other provinces split with some following the American model of calling them all "easements" while others continued to refer to them as "covenants" (and Manitoba, for its part, compromised and called them all "conservation agreements").
4. Typically, the legislation describes formalities of registration, and the fact that the agreement runs with the land whether positive or negative, or whether or not there is neighbouring land benefitted, etc.
5. Nancy Weeks, *Conservation Easements and the Niagara Escarpment*. Sierra Club of Ontario Foundation, Toronto, 1979.
6. *Ibid.*
7. *The Leading Edge: Stewardship and Conservation in Canada,* July 3-6, 2003, University of Victoria, British Columbia.
8. "Open Space Preservation through Conservation Easements," by Samuel Silverstone. *Osgoode Hall Law Journal,* Vol. 12, 1974, particularly at pp. 121-4.
9. The Internal Revenue Service first ruled on the deductibility of an open space easement in gross in Revenue Ruling 64-205 (1964-2 C.B. 62). This state of affairs was ultimately entrenched (with various modifications) in subsequent legislation. This was followed in 1972 by Treas. Reg. 1.170A-7 (b)(ii), which simply restated and interpreted language in the committee report accompanying the *Tax Reform Act* of 1969 to the effect that Congress intended that the limitations on gifts of partial interests in property incorporated in I.R.C. 170 (f) were not intended to apply to gifts of open space easements in gross. Rather, such interests were to be treated as gifts of "an undivided portion of the taxpayer's entire interest in property" allowable under I.R.C. 170 (f)(3)(B)(iii).

   Section 2124(e) of the *Tax Reform Act* of 1976 authorized a charitable contribution deduction for the gift of a "lease on, option to purchase or easement with respect to real property of not less than 30 years' duration granted to an organization described in subsection (b) (1)(A) exclusively for conservation purposes." The phrase conservation purpose was defined to include "the preservation of historically important land areas or structures."

   Because of a drafting error, the 1976 conservation purpose easement authority contained a 1977 expiration date. In Section 309 of the *Tax Reduction and Simplification Act* of 1977, Congress repealed the authority to make tax deductible gifts of easements of less than perpetual duration and imposed a June 14, 1981 expiration date for gifts of easements for conservation purposes.

   Section 6 of the *Tax Treatment Extension Act* of 1980 (P.L. 96-541) revised, codified and made permanent authority for Federal income, estate and gift tax charitable contribution deductions for gifts of preservation easements as "a Qualified Conservation Contribution" under I.R.C. 170 (f)(3)(B)(iii).

   Effective December 17, 1980 only gifts that meet the requirements of Code 170 (f)(3)(B)(iii) and (h) qualify as charitable contributions. Regulations implementing the legislation were promulgated in 1986 at Treas. Reg. 1.170A-14.
10. *Land Saving Action*. R.L. Brenneman and S.M. Bates, eds. Island Press, Covelo, Ca., 1984. p. 166.
11. "Normal (Ontario Heritage) Foundation practice… is to commission an independent appraisal (the cost of which may be shared, depending on circumstances), and to issue a tax receipt based on that appraisal." *Bringing Trust to*

Ontario, by Ron Bobolink, Wasaga, 1988, p.11. Receipts were issued accordingly, after professional appraisals had been done on the Before-and After basis. The Ontario Heritage Foundation issued the receipts for the difference in market value. The receipts were accepted by Revenue Canada.

12. Donna Tingley, F.P. Kirby and R.D. Hupfer, *Conservation Kit: A Legal Guide to Private Conservancy*. Environmental Law Centre, Edmonton, 1986, p. 50. The authors continue: "As an example: assume that the taxpayer's entire interest in the property has a current fair market value of $500,000, and that the value of the property subject to an easement is $200,000. By placing an easement on the property, the taxpayer would have made a gift of $300,000. The deductibility of such a gift for income tax purposes (whether to a registered charity or the Crown) is the same as (donations of land)."
13. Letter of opinion dated July 13th, 1990. [Punctuation added.]
14. *Ecological Gifts: Implementing Provisions of the Income Tax Act*, Environment Canada, 1998.
15. *Ibid.*
16. According to this view, the appraisal process is, was, and always had been based on "what a purchaser would pay for (the restriction) on the open market… (and) as there is no established market for such restrictions, the fair market value… is often minimal." *Op.cit.*, p. 198.
17. *Ibid.*
18. *Budget Plan,* Finance Canada, Ottawa, 1997.
19. *Op.cit.*, p. 224. The Government of Canada amended the *Income Tax Act* at Section 118.1(2):

    The *value* of a gift of servitude, a covenant or an easement to which land is subject is deemed to be the *greater of*
    - its fair market value otherwise determined and
    - the amount by which the fair market *value is reduced as a result of the making of the gift.*
20. In the words of Finance Canada, "Like other capital property, the adjusted cost base (ACB) of a covenant, easement or servitude is also relevant in calculating the capital gain or loss that may arise on disposition." Finance Canada introduced a formula to compute capital gains liability on conservation easements, explaining that the reason was simply "to provide taxpayers (with) greater certainty in making this calculation." *Explanatory Notes Relating to Income Tax*, Finance Canada, March 2001, p. 125.
21. *Canada's Ecological Gifts Program:* Appendix to *EcoGifts are Good for Nature and for Taxpayers Says Minister Anderson, op. cit.*
22. *Giving It Away, op. cit.*
23. The question of "reasonableness" is addressed in *Giving It Away, op. cit.*

    "In recognition of this difficulty (of quantifying the donor's cost of acquisition), the *Income Tax Act* provides that where only part of a capital property is disposed of, the gain or loss on disposition is calculated by attributing as much of the Adjusted Cost Base of the entire property to the part being disposed of as is reasonable. Although Revenue Canada has also addressed the problem in a policy statement, it has provided little guidance as to what is reasonable. Revenue Canada has indicated, however, that the cost of an easement or right-of-way can equal its proceeds of disposition where:

    (a) the portion of the property in respect of which an easement or right-of-way was granted is not more than twenty percent of the area of the whole property; and,

    (b) the proceeds of the compensation received are not more than twenty percent of the amount of the Adjusted Cost Base of the whole property."
24. Excerpt from *Giving It Away, op. cit.*:
    The formula, which will apply to ecological gifts made after February 27, 1995, is:
    - (A × B) divided by C
      where
    - A is the original Adjusted Cost Base of the land before the covenant
    - B is the value of the covenant
    - C is the fair market value of the land immediately before the covenant was granted.

    This cost base would be used to determine whether granting the covenant gives rise to a capital gain or loss. The amendments also provide that, for greater certainty, the donor's cost of the land itself is reduced at the time of the gift by the amount determined to be the cost base of the covenant.

    For example, a donor purchased land in 1985 for $100,000 and granted a covenant in 1998 that qualified as an ecological gift. The fair market value of the covenant was appraised at $30,000. The value of the land immediately before the covenant was granted was determined to be $200,000. Using the new formula the Adjusted Cost Base of the covenant would be $15,000

    $$\frac{100{,}000 \times 30{,}000}{200{,}000} = \$15{,}000$$
25. *Giving It Away, op. cit.*

Chapter Four Notes

1. Private e-mail.
2. *You Can't Give It Away*, *op. cit.*
3. In some provinces, the property is first assessed, then the mill rate is levied, producing a given amount of income which may or may not be adequate for the current budgetary requirements of the municipality and/or school board. In other provinces, the same system operates in reverse: a given budget is agreed upon, then the municipality sets a mill rate which (when applied against the assessed property) is calculated to produce the required (budgeted) income.
4. In other words, if an owner was paying less-than-normal property taxes because his land had a special use, and he then discontinued that use, his property taxes would then return to normal levels *retroactively*. In Ontario, for example, golf courses could have their assessment *frozen* for years, even decades: but if there was a change of use, then up to a decade's worth of back taxes could immediately become payable.
5. At the risk of simplification. There are many different authorities: e.g. Appraisal Institute of Canada, Canadian Uniform Standards of Professional Appraisal Practice, etc. Furthermore, various assessment statutes prescribe definitions for Actual or Market Value for assessment purposes. See *The Appraisal of Real Estate,* 2nd Canadian Edition, the Appraisal Institute of Canada, 2002.
6. *Real Estate Principles* by Henry E. Hoagland. McGraw-Hill, New York, 1955, p. 245. For a more updated set of definitions, see *The Appraisal of Real Estate,* 2nd Canadian Edition, the Appraisal Institute of Canada, 2002. The summarized version is again at the risk of oversimplification. These are three general approaches to value with several specific variations. The role of the appraiser is to determine which market-based approach(es) best reflects the nature of the property and its market.
7. Again, at the risk of oversimplification.
8. In a previous era, it was said that "New Brunswick, Quebec, Ontario and British Columbia have singled out golf courses for special treatment in the form of partial exemption from property taxes over the term of renewable agreements" (*Property Assessment In Canada*, by Frederick H. Finnis, Canadian Tax Foundation, 1979, p. 10). The situation for, e.g. golf courses, has since changed in various respects.
9. "Land held in a municipality for public recreational purposes by associations... could receive special tax concessions at Council's option in Nova Scotia, Ontario, Alberta and British Columbia." Finnis, *op. cit.*
10. There were numerous reported instances in Ontario, for example, where such land was equated with "residential" lands, with a corresponding increase in assessed values.
11. The approaches and mechanisms have traditionally been diverse: some provinces (e.g., Prince Edward Island, New Brunswick, Ontario and British Columbia) issued

instructions which lowered assessments, others (the three Prairie Provinces and the unorganized areas of British Columbia) exempted farm buildings from assessment but not the land, whereas Nova Scotia did the reverse and exempted the farmland (as was the case for municipalities in British Columbia).
12. *Sustaining Wetlands Forum,* Ottawa, April 1991*, op.cit*., p. 9.
13. In British Columbia, each case is reviewed on its merit according to the meaning of s.15(1)(q) of the *Taxation (Rural Area) Act*. The exemption is not automatic.
14. The basic legislation is the *Assessment Act*, the *Local Government Act*, the *Taxation (Rural Area) Act*, the *Vancouver Charter*, the *School Act* and the *Education (Interim) Finance Act*.
15. Under the *Taxation (Rural Area) Act*, Section 15(1)(q) states that a property may be exempted if it is operated by a non-profit organization *and* it is of "demonstrable benefit to all members of the community." In previous years, "demonstrable benefit" was usually equated with public access. However, thanks to a broadening of the interpretation under recent jurisprudence, it is now expected that "exclusive use" by an environmental charity would be deemed a demonstrable benefit.
16. BC Assessment Authority, *File (ARCS): 13535 – 00 Valuation – Restrictions on Title: Ecological Gifts (Green Legacy Program).*
17. *The Islands Trust Natural Area Protection Tax Exemption Regulation*, approved by the Province on March 8, 2002.
18. "This code can be used for any known property with a conservation easement, whether or not it has been approved under the Environment Canada Green Legacies or Islands Trust Natural Area Protection programs." *File (ARCS): 13535 – 00 Valuation*, *op.cit.*
19. "In many rural jurisdictions, appraisers may find the impact of the restriction to be minimal since there may be very limited re-development opportunities… Provided an impact on value can be identified, the remainder of the (normal) steps in investigating the conservation covenant should be followed." *File (ARCS): 13535 – 00 Valuation, op. cit.*
20. According to the *Assessment Act* (section 23), farmland is valued on a complex formula for soil productivity, without regard to its value for other (non-farm) purposes.
21. The assessments themselves are based on forestry use.
22. For example, an exemption is possible under Section 341, subsection (2)(c)c of the *Local Government Act*, which states that "land or improvements not being operated for profit or gain and owned by a charitable or philanthropic organization supported in whole or in part by public funds and used exclusively for charitable or philanthropic purposes" may be exempted. However, this is optional; and some British Columbia municipalities have added additional criteria that made open lands ineligible.
23. Although strictly speaking, the *Local Government Act* does not contain the term "demonstrable benefit": it is only found in the *Taxation (Rural Area) Act*.
24. The proposed amendments were debated in 2001 by the Farm Property Assessment Review Committee; they are currently being debated (in only slightly modified form) by the Standing Policy Committee on Agriculture.
25. ***Proposed Amendments to the Community Organization Property Tax Exemption Regulation Ar 281/98 Consultation Document***, Government of Alberta, 2001. Under the proposal, municipalities could provide tax relief to conservation land on the condition that the land is held by a non-profit organization and managed according to recognized conservation goals. Municipalities would have the discretion to decide if the project is deserving of tax relief. "The policy reflects the (Farm Property Assessment Review) Committee's view that the land should be eligible for tax relief if it is actively managed for conservation purposes by a non-profit organization that has set out clear goals and objectives for the project. It also recognizes that municipalities need to be able to exercise discretion in local taxation matters."The recommended definition of "conservation land" is "a parcel or designated part of a parcel of land held by a qualified conservation non-profit organization where the use of the property is the conservation activity that has been detailed by the holder in a conservation use plan." The recommended definition of a "qualified organization" is "a non-profit organization that actively manages conservation projects in the province through third party agreements and/or ownership of property to achieve the specified program detailed in a conservation use plan for the purpose of species protection (both plant and wildlife), and land preservation through protection and enhancement of natural scenic and esthetic values."
26. At present, the basic statute in Alberta is the *Municipal Government Act*. There are other provisions in the *School Act.*
27. *Municipal Government Act,* s. 361 (c).
28. *Municipal Government Act* s. 362(1)(n)(ii): "Property that is held by a non-profit organization and used solely for community games, sports, athletics or recreation for the benefit of the general public."
29. *Municipal Government Act* s. 362(1)(n)(iii): "Property that is used for a charitable or benevolent purpose that is for the benefit of the general public, and owned by a non-profit organization."
30. *Matters Relating to Assessment and Tax,* Regulation 289/99.
31. Section 362(1)(k) of the *Municipal Government Act*. In that section, property in religious use is in the same category as government property, education buildings, hospitals, or any property exempted by an Act of the Legislature.
32. The *Community Organization Property Tax Exemption Regulation* (Alberta Regulation 281/98) provides property tax relief for non-profit organizations or community associations, whose resources are devoted chiefly to the charitable or benevolent purposes for which the property is used. The property must be used for a purpose that benefits the general public in the community in which the property is located. An application must be made to the municipality in which the property is located.
33. A refusal can be appealed to the Assessment Review Board, and from there to the Municipal Government Board.
34. The relevant legislation in Saskatchewan is *The Cities Act*, *The Urban Municipality Act, The Rural Municipality Act,* and *The Northern Municipalities Act*.
35. *The Cities Act*, section 262, *The Urban Municipality Act, 1984*, section 275, *The Rural Municipality Act, 1989*, section 331, and *The Northern Municipalities Act*, section 226."
36. The basic legislation in Manitoba is in the *Municipal Assessment Act*. There are also relevant provisions in the *Public Schools Act*.
37. *Municipal Assessment Act*, section 21.
38. According to the Act, "conservation land means land that
(a) is Farm Property;
(b) is not used for an agricultural purpose; and
(c) is, during the applicable reference year and the two years preceding the applicable reference year, left in an undeveloped and natural state by the registered owner or occupier of the land for the purpose of preserving or restoring the quality of the land as a natural environment or habitat."
39. Manitoba Finance Riparian Tax Credit Web Site. The Site explains:
    - Former crop land that is no longer cultivated, but that is maintained with native and tame forage, bushes and trees: $2.00 annually for three years, for a total of $6.00 per riparian acre.
    - Former grazing land used only for haying: $5.00 annually for three years, for a total of $15.00 per riparian acre.
    - Former grazing land with no agricultural activity: $7.00 annually for three years, for a total of $21.00 per riparian acre.

    The tax credit is paid only on acreage within the 100-foot strip along the waterway.
    The tax credit's yearly amount cannot exceed the 2002 property taxes on the farm property.
40. The basic legislation in Ontario is found in the *Assessment Act*, the *Provincial Land Tax Act*, the *Forestry Act* and the *Conservation Land Act*.

41. This is a category within the "Conservation Land Tax Incentive Program" (CLTIP). It used to be called the Conservation Land Tax Reduction Program (CLTRP).
42. Section 25.
43. This category, called "other conservation lands," included lands owned by non-profit organizations "that, through management, contribute to provincial conservation and natural heritage program objectives, but do not fit into one of the other four categories of eligible land… (namely) provincially significant wetlands; provincially significant areas of natural and scientific interest; lands designated as escarpment natural in the Niagara Escarpment Plan; and, the habitat of endangered species." *MNR's 2002 and 2000 Proposed Criteria for Community Conservation Lands - CLTIP*, Ontario Ministry of Natural Resources, April 3, 2002.
44. World Heritage Sites; Biosphere Reserves, Ramsar International Wetlands; Escarpment Protection Areas; Oak Ridges Moraine core, corridor, and key hydrological and landform features; and lands adjacent to Ontario's Living Legacy Featured Areas or other protected areas.
45. According to one organization, "we particularly feel that a minimum of six categories should be added to the list. These are:
    1) Natural heritage areas of significance as identified in the Provincial Policy Statement under the *Planning Act* (i.e., area components, including adjacent lands and connectors);
    2) Regionally significant *Areas of Natural and Scientific Interest*;
    3) Areas having species occurrences or ecological communities with an S-Rank designation of 1-3, as identified by MNR's Natural Heritage Information Centre;
    4) Areas contributing to the conservation of natural heritage and biodiversity that are identified within a regional or watershed plan or strategy developed by a recognized conservation organization;
    5) Areas within a municipal official plan or zoning by-law under the *Planning Act* designated as an *environmentally sensitive area, environmentally significant area, environmental protection area, natural heritage system* or other designation intended to conserve biodiversity or protect ecological features or functions, as its primary objective;
    6) Lands eligible under the 'community conservation land' category that are held under a conservation easement by an eligible organization;

    Further, it would help trusts administer land if where a significant portion of a property meets one or more criteria, and the remainder of the property is managed in a compatible manner, the entire property be eligible for tax exemption."

    Open letter from the Escarpment Biosphere Conservancy to Ontario Ministers of Finance and Natural Resources, April 13, 2002.
46. *MNR's 2002 and 2000 Proposed Criteria, op. cit.*
47. The Act exempts e.g., "land that is owned by a church or religious organization... and that is a place of worship and the land used in connection with it" (s. 3), or the Boy Scouts or Girl Guides Associations (s. 10), or the Canadian Red Cross Society (s. 12) or the St. John Ambulance Association (s. 12), or "any charitable, non-profit philanthropic corporation organized for the relief of the poor …(and) supported in part by public funds" (s. 12), agricultural or horticultural societies (s. 14), etc.
48. Section 15.
49. Section 23.
50. *Municipal Act,* s. 361.
51. *Municipal Act,* s. 107.
52. For example, the organization may claim that land of an ecological charity is exempt on the ground of the exemption for "institutions, literary or *scientific*" (*Assessment Act*, s. 14). That argument proved successful in New Brunswick, but Ontario may be another matter. Another approach would be to attempt to have the land declared a "municipal capital facility" (analogous to a park) under s. 110.1 of the *Municipal Act*, under which the municipality could provide an exemption (or other assistance).
53. *Loi sur les réserves naturelles en milieu privé* (*An Act Respecting Nature Reserves on Private Land*).
54. Bill 137 (2002, Chapter 77), an *Act to Amend Various Legislative Provisions Concerning Municipal Affairs.*
55. Explanatory Notes to the *Act to Amend Various Legislative Provisions Concerning Municipal Affairs.* The relevant section of the Act is s. 59.
56. Section 60.
57. The basic legislation in New Brunswick is the *Assessment Act*, the *Real Property Tax Act* and the *Residential Property Tax Relief Act*.
58. *Assessment Act,* s. 4(1)(d)(ii).
59. Retroactive tax repayments apply to farmland where taxes had been deferred under the Farm Land Identification Program (FLIP), but do not apply to conservation lands exempted from taxes under Section 4(1)(d)(ii) of the *Assessment Act*. Should the nature and use of conservation lands change and the lands are not in the conservation mode, the tax exemption can be removed and any previous exempted taxes are not repayable.
60. The basic legislation in Nova Scotia is the *Assessment Act* and the *Municipal Government Act.*
61. Finnis, *op.cit.,* p. 47.
62. i.e., for timberland where the ownership is less than 50,000 acres. Timberlands are exempt from property tax *per se* (*Assessment Act*, s. 40 b), but the owner pays a different tax computed on a rate per hectare for "resource properties" (i.e. where the owner owns less than 50,000 acres) and a higher rate per hectare for "commercial property" over this limit (*Municipal Government Act,* Section 78). There may be an additional charge where a fire protection rate is levied.
63. Section 71. The application for a tax exemption is submitted to the municipality; but municipalities appear to have different standards. Some municipalities require only a letter with a brochure, whereas others require lengthy forms, financial information, property write-ups, etc. Many municipalities appear to require that the application be submitted annually (as opposed to the one-time exemption in some provinces). Finally, the exemption is at the option of the municipal council — several of which have indicated that they do not favour such exemptions for conservation organizations. Others provide a partial exemption.
64. The basic legislation is in the *Real Property Assessment Act* and the *Real Property Tax Act*.
65. Section 3(1) of the *Real Property Tax Act,* subsections (k) and (l).
66. There is no formal application procedure; the Department of Fisheries, Aquaculture and Environment designates the properties and communicates the designation to the Provincial Treasury.
67. The basic legislation in Newfoundland and Labrador is found in the *Assessment Act*, the *Municipalities Act*, the *St. John's Assessment Act* and *the City of St. John's Act*.
68. The *Forest Land (Management and Taxation) Regulations* under the *Forestry Act* refer to that provincial tax, with two components: (a) a certain amount per hectare for fire protection, and (b) a percentage of the cordage rate multiplied by the stumpage rate. They apply whether or not the forest land is within a municipality. However, section 3 of the Regulation exempts "persons holding a parcel of land 120 hectares and greater with at least 75% being actively managed for purposes not compatible with timber production."
69. Section 8(4). Although the wording of the subsection makes it unclear whether City Council has discretion to refuse an exemption to a bona fide registered charity, the law has been interpreted as providing an outright exemption, once the organization proves that it is a registered charity.
70. Section 118 of the *Municipalities Act*. In that section, property in religious use is in the same category as government property, education buildings, hospitals, or any property exempted by an Act of the Legislature.
71. This power is defined in section 111 of the *Municipalities Act*. Council, on a vote of two thirds of the councillors in office, may grant an exemption, remission or deferment of taxes and interest on taxes, either in whole or in part, to anyone who applies for it. Council may set the period of time that the exemption is in effect and the conditions that the applicant must meet to be eligible. An applicant must be able to prove their

need for special consideration. People applying for the exemption or deferment must do so once a year. Council must be satisfied that there is continuing need for this special consideration.

Chapter Five Notes

1. *Report of the Panel on the Ecological Integrity of Canada's National Parks*, p. 9-16.
2. Recommendation 9-12.
3. Publication forthcoming.
4. "Urban land conservation in Canada will involve different issues and require new approaches. The precedents and tools from wilderness protection in Canada and inner cities in the United States cannot simply be adopted without considering the unique challenges of operating in a Canadian urban setting." *Summary Land Trust Issues,* by Paul Peterson. Evergreen, March 6, 2002.
5. *Canada: People, Places and Priorities*. Report of the Standing Committee On Finance, Government of Canada, Ottawa, November 20, 2002.
6. *Canada's Urban Strategy: a Vision for the 21st Century.* Chair: Judy Sgro, MP. Interim Report, April 2002; Final Report, November 2002.
7. *Ibid.*
8. Recommendation 49. *Canada's Urban Strategy. Op. cit.*
9. *Canada: People, Places and Priorities*. *Op. cit.*
10. Quoted in *Canada: People, Places and Priorities*. *Op. cit.*
11. *Canada: People, Places and Priorities*. *Op. cit.*
12. "Among the proposals noted above, at this time we have the most interest in brownfield redevelopment… For example, a focus on brownfield redevelopment would help to address some of the concerns about increased urbanization and the need for revitalization of urban cores; it would also help to minimize the 'donut' effect on cities." *Canada: People, Places and Priorities*. *Op. cit.*
13. For example, "In many instances, these brownfield sites are in the downtown areas of major metropolitan cities. Their development would assist in alleviating the problem of urban sprawl and could reduce greenhouse gas emissions. They would also help urban communities by increasing the taxable base and revitalizing neighbourhoods." *Canada: People, Places and Priorities*. *Op. cit.*
14. Recommendation 30. *Canada: People, Places and Priorities*. *Op. cit.*
15. Recommendation 51. *Canada's Urban Strategy. Op. cit.*
16. Recommendation 34. *Canada: People, Places and Priorities*. *Op. cit.*
17. *Canada: People, Places and Priorities*. *Op. cit.*
18. *Canada: People, Places and Priorities*. *Op. cit.*
19. *Canada: People, Places and Priorities*. *Op. cit.*