YOU CAN'T GIVE IT AWAY

TAX ASPECTS OF ECOLOGICALLY SENSITIVE LANDS

SUSTAINING wetlands

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by

Marc Denhez

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Executive Summary

The focus of this paper is on the *Income Tax Act* (Canada) and on the property tax systems which are in place in each province and territory. How do these tax systems affect the setting aside of ecologically significant lands for conservation purposes?

In the case of wetlands, one of Canada's most threatened habitats on private land, every available institutional instrument to protect them is essential. However, the federal income tax system is not neutral, but negative: a gift of environmentally significant land (to charity or to a government) is seldom accompanied by a usable tax receipt commensurate with the value of the gift. Sometimes the usable receipt is obliterated altogether. That is because the *Income Tax Act* introduces a legal fiction, saying that the donor has received proceeds on the gifts — when he or she has received nothing. The Act thereupon contributes deemed capital gains (and potential capital gains tax) to erode the tax benefits of the receipt; furthermore, artificial numerical limits are imposed upon the usability of the receipt. Due to these legal fictions, gifts of Canada's natural heritage have a substantially worse treatment than gifts of Canada's cultural heritage; in certain key respects, philanthropic expenditure receives worse treatment than business expenditure.

Giving artificially poor treatment to donations of ecologically sensitive lands is no way to foster the public-private sector "partnership" foreseen in the *Green Plan* (Government of Canada 1990a). Furthermore, because budgetary allocations for purchase of environmentally sensitive lands are scarce, failing to encourage donations of such lands runs against a *Green Plan* objective of securing conservation of 12% of the Canadian landmass. While this 12% target may be a laudable goal for public lands protection in Canada, nation-wide conservation of our biodiversity will have to be achieved on a much broader area, much of which is on private land. That is not encouraged under the fiscal status quo. This paper recommends the elimination of the legal fictions which currently roll back the usability of receipts for donations of Canada's natural heritage, on the model of donations of Canada's cultural heritage.

Problems also beset the income tax treatment of conservation covenants and easements. Although Revenue Canada has finally acknowledged that charitable

donations of conservation covenants and easements can give rise to charitable receipts, the possibility of deemed capital gains tax has not been eliminated either. This paper also recommends the elimination of this legal fiction, namely, deemed capital gains on the donations or sale of conservation covenants and easements.

At the property tax level, there is a wide variety of techniques whereby governments provide most-favoured status to certain properties (whether they belong to charities, farmers, or lumbermen, etc.). Some provinces specifically provide advantageous treatment to conservation lands. Elsewhere, these lands tend to be in a low tax category anyway, because of certain established practices. These include appraisals commensurate with income-producing levels (i.e. low), and assessments consistent with farms and wetlands (which also tend to be low). Although there are some notable exceptions, most such properties, including wetlands, are currently subject to a relatively low level of taxation and even elimination of that tax burden would not make a significant monetary impact on municipal treasuries. However, statutory provisions providing advantages to conservation lands would nevertheless have important symbolic value.

Because of the plethora of existing practices (and existing methods of providing most-favoured status), this paper does not recommend any single property tax measure for conservation lands, but instead recommends these lands be put on a par with whatever practices governments already employ to provide most-favoured status to other categories of property.

The paper presents eight specific recommendations in that regard:

Recommendation No. 1: The legal fiction which attributes deemed capital gains (and potential deemed capital gains tax) to donations of ecologically sensitive real estate should be abolished.

Recommendation No. 2: The ceiling on deductible charitable expenditures (20% of income) should be lifted. Business expenditures have no such ceiling; and there is no policy reason why altruistic donations should be treated less favourably than business expenditures. If the Government of Canada insists on retaining a ceiling, then the ceiling should be the same as in the case of donations to senior governments (100% of income).

Recommendation No. 3: The tax treatment of donations of Canada's natural heritage should be no worse than that now enjoyed by donations of Canada's cultural heritage.

Recommendation No. 4: Charitable donations of covenants or easements, for the protection of ecologically sensitive lands, should not be subject to deemed capital gains or a 20% income limitation, any more than donations of other interests in ecologically sensitive lands.

Recommendation No. 5: Purchases of protective covenants and easements by environmental charities may continue to be subject to GST but should not otherwise trigger tax liabilities such as on deemed capital gains.

Recommendation No. 6: All provinces and territories should be encouraged to amend their property tax assessment/collection legislation, to make specific reference to conservation of ecologically sensitive lands.

Recommendation No. 7: Those references should put ecologically sensitive lands on a par with whatever other private or charitable lands enjoy most-favoured status. The exact mechanism in doing so should correspond to the jurisdiction's established practice for other most-favoured properties.

Recommendation No. 8: The legislation should provide for a tax clawback on conversion of the property.

Foreword

Conservationists have an uphill trail to navigate to be able to hang onto existing — and secure additional — lands and waters across this country; lands and waters that protect both our wild vistas and the earth's biodiversity. In the toolbox of institutional arrangements to achieve conservation on private lands, tax legislation and tax regulation have neither been analyzed nor used to the extent they should have been. Such legislation and regulations are often difficult to understand and appreciate, even for an expert in the field. This paper addresses how the *Income Tax Act* (Canada) and the property tax systems in place in each province and territory affect the setting aside of ecologically significant lands for conservation purposes.

The Canadian Wetlands Conservation Task Force (CWCTF) was formed in 1991 as a result of recommendations to the Minister of the Environment following a national policy conference, held in April 1990, entitled the "Sustaining Wetlands Forum". The purpose of this Forum was to stimulate discussion on opportunities to sustain wetlands by providing the broadest possible environmental and economic benefits to Canada. The Sustaining Wetlands Forum (1990) focused on the integration of soil, water and wetland conservation initiatives and how these coordinated approaches might generate benefits for all sectors. Particular emphasis was placed on agricultural, municipal, business, and environmental conservation responses to the North American Waterfowl Management Plan, wetland conservation policies, and the sustainable use of wetlands in Canada.

Through the work of the CWCTF, initiatives and intersectoral thrusts to conserve wetlands initiated by the Forum are being continued. The mandate of the CWCTF is to evaluate and identify appropriate implementation strategies for the 73 Recommendations emanating from the Sustaining Wetlands Forum. One area of concern expressed at the Forum relates to land assessment and taxation laws and procedures in Canada. The following statistics indicate why such concern needs expression and attention.

Canada's most productive lands and its people are concentrated in its southern portions. Ninety percent of Canadians live within 250 km of the Canada-United States border, mostly on private lands. While only 10.8% of Canada's lands are in private ownership, this area encompasses over 920 000 km^2 upon which the vast majority of the population lives. Helping those private owners who wish to retain all or portions of their land for conservation purposes is critical to the retention of biodiversity in these areas. Tax legislation and regulation is one of the institutional arrangements available to accomplish such security and management of ecologically sensitive lands.

The facts and issues concerning tax legislation and regulation in Canada are often misunderstood and confusing to many in the conservation arena. It is the intention of this document to pull the relevant material on this subject together, analyze it and present recommendations which can be helpful to conserving Canada's precious land and water resources. We offer this publication for your information and use to expand and/or improve the tools in our box of institutional arrangements for conservation.

Kenneth W. Cox
Chairman
Canadian Wetlands
Conservation Task Force

Introduction

Conventional Wisdom

The question of how to add to Canada's inventory of protected green space is not new, nor is the question of the rightful role of the private sector in participating in the protection of ecologically sensitive lands for future generations.

Within the public sector, the established wisdom for a century has posited that the protection of ecologically sensitive lands would best be achieved by public ownership. If the protection of lands were considered essential, a way might be found to integrate those lands with the federal, provincial or municipal parks system. With the passage of time, other regulatory methods were introduced. The expansion of the network of protected lands, by implication, was assumed to be the responsibility of the public sector at the taxpayers' total expense: when a given property was considered both vital and endangered, the assumption (among both public and private sector interests) was that its protection would depend upon public acquisition (by purchase or expropriation). A more detailed discussion of this concept is presented in Cox (1989). In later years, there were various governmental attempts to impose environmental controls without, however, being obliged to compensate private sector interests; this often led to a predictable adversarial relationship. At no point in history has there been a true national attempt to develop a partnership (between the private and public sectors extending all the way into tax departments) in the setting aside of wilderness for future generations.

Shortcomings

Within recent years, the traditional approach has come under increasing attack. In the words of Ron Reid, "It has become increasingly clear that public acquisition of a relatively small number of key areas is not enough."[1] Furthermore, as the Canadian Parks/Recreation Association said, "Open space is not the sole responsibility of government."[2] This rethinking of the government's role comes at the same time that conservationists across North America are setting up land trusts and using other mechanisms for charities to set aside ecologically sensitive lands or hold conservation covenants/easements for them. Ron Reid in an estimate of the annual contribution of Canadian non-governmental organizations to the setting aside of environmentally sensitive lands, said "(approximately $50 million) is equivalent to that of all government agencies."[3] Some observers argue that this is inevitable: "Canadian geography dictates that private stewardship must become a continuing program in natural landscape and wildlife habitat securement and man-

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"...private stewardship must become a continuing program in natural landscape and wildlife habitat securement and management."

Cox (1989)

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1. Reid (1988), p. 6.

2. Canadian Parks/Recreation Association *National Policy*, Ottawa (undated), p. 1. A growing number of voices in the conservation community question whether public sector ownership is necessarily a guarantee of protection: could private sector stewardship serve the national interest as effectively? For example,

- The courts have held that parks legislation does not stop the Ontario Government from permitting a cement company to cart away the sand dunes at Sandbanks Provincial Park.
- The fact that open space had been bequeathed in Ottawa for "national park" purposes did not stop the National Capital Commission from attempting to put an American Embassy there.
- Aesthetic property, provided by philanthropists to the public sector at Elora Gorge, was used (some years later) for road and bridge construction.
- When the environmental values of Inverhuron Provincial Park were encroached upon by the Bruce Nuclear Power Station's emissions of hydrogen sulphide, the provincial government's response was not to ban the emissions but to ban camping in the park.

If Canadians were satisfied with the public sector's 100% commitment to the environmental values of lands under its control, we would not be witnessing the current level of public demand for environmental assessment legislation.

3. Reid (1988), p. 6.

agement" (Cox 1989). Furthermore, these charities argue that they are at least as capable of proper stewardship as the public sector. A growing body of opinion posits that the key to conservation is not whether the title-holder to property is from the public or private sector, but what are the standards of stewardship which he or she is committed to bringing to the property?

But demands for greater private sector participation in the setting aside of ecologically sensitive lands have also come from another quarter. They have resulted from Canada's current deficit, and the shortage of public funds at all governmental levels. "Fewer dollars will be available from public treasuries for expansion of such a system" (Cox 1989). Simply put, if Canada wants to increase its network of publicly-held green spaces, there is no public money to do it.

This comes at an extremely awkward moment. Canada's *Green Plan* (Government of Canada 1990a)[4] announced a national objective of bringing the total protected spaces in Canada to 12% of the overall land mass (among national parks alone, total area would purportedly move from 1.8% of the Canadian landmass to about 3.1%). However, even before the *Green Plan* was published, non-governmental organizations (NGOs) immediately saw the problem: if these lands were to be protected via acquisition and supplementary budget allocations, where would the money come from? For example, in order to reach the targeted 12% of Alberta's 17 million ha (42 million acres) of grassland and parkland alone, incremental acquisition costs would be one billion dollars. This would require acquisition of a further 1.8 million ha (4.5 million acres) at an average price of $557/ha ($225/acre).

The traditional concern of NGOs was summarized by John Morgan: "In times of fiscal restraint with continuing severe budget cutbacks to all resource agencies there simply is little or no money for acquisition. Secondly, although acquisition secures a particular piece of land, there is no guarantee that the wildlife habitat upon it will remain in good condition. Those same budget cuts have severed much of the money needed to manage these areas properly. There are many examples of Crown lands across Canada that have suffered... Thirdly, there is the political unsuitability of large scale land purchase."[5]

> *"... the usable receipts for donations of green space are almost never commensurate with the value of the gift, and sometimes are obliterated altogether."*

The NGOs immediately raised the issue with the federal government. In the view of many, the notion of setting aside taxpayers' dollars for a major acquisition program was a political and budgetary impossibility, and would automatically relegate the *Green Plan* to political irrelevance. That belief prompted them to revive a longstanding proposal: could Canada achieve comparable results at lower cost via the tax system?

The Option of Tax Change

There should be no mistake about the fact that tax expenditures cost money. If the tax treatment of a given transaction is "enriched" to the benefit of the taxpayer, that means that the treasury collects less money: it is a "public expenditure" which is every bit as real as a government cheque. The difference, however, is in the amount. If the government acquires a wetland for one million dollars either by purchase or expropriation, it is spending "one-hundred-cent dollars" and subsequently must face all costs associated with property management. On the other

4. See pp. 79-80.
5. Morgan (1987), p. 4.

hand, if the same wetland or other ecologically sensitive area is donated to a charitable organization, the government may achieve the same *Green Plan* objectives (subject to proper control) at a cost to public treasuries of perhaps 40% of the above scenario... with no property management costs in the future. The pros and cons will be discussed further in this paper.

The very expression "tax expenditure", however, is perhaps a misnomer in this case. The preoccupation of NGOs with the tax system is predictable, and will be fully described in this paper. In essence, when a philanthropist makes a charitable donation, he or she usually gets a usable tax receipt commensurate with the value of the gift; but when a person makes a charitable donation of green space, the usable portion of the receipt is (a) reined in and (b) eroded by "deemed capital gains" ['he deemed to receive proceeds of disposition when in fact he has received nothing']. Thanks to these two artifices, the usable receipts for donations of green space are almost never commensurate with the value of the gift, and sometimes are obliterated altogether. The preoccupation of NGOs has therefore focused on the existing policy whereby these receipts are being pushed to artificially low levels. The intent of the NGOs is not to introduce a new "tax incentive", or other artifice, but (on the contrary) to return the tax system to a treatment of donations that corresponds more closely to reality. In short, the focus on tax is prompted not by the desire to introduce a new tax expenditure, but to halt the existing punitive tax fictions affecting environmental philanthropy.

The Concern of NGOs

Over a dozen years ago, John Swaigen in the book entitled *Preserving Natural Areas* published the following view: "Tax relief or other financial incentives should be made available to landowners who want to preserve their land in its natural state, but may be forced to sell to developers or cultivate it to avoid burdensome taxes under present legislation. Ontario and federal legislation provide tax relief, subsidies and other financial incentives to stimulate resource development, assist companies with pollution abatement, and protect farmlands, but not to conserve natural areas for non-economic reasons" (Swaigen 1979).

In 1984, the respected tax expert Wolfe Goodman, in an article in the *Philanthropist*, said that legislation to remove the deterrents from tax treatment of gifts of property "must be given the highest priority"; he emphasized,

"...the focus on tax is prompted not by the desire to introduce a new tax expenditure, but to halt the existing punitive tax fictions affecting environmental philanthropy."

however, that this had not already occurred because "there is serious opposition to this proposal in the senior levels of the federal Department of Finance".

This view acquired more urgency in the lead-up to the *Green Plan*. Unless a better economic deal could be formulated to set aside ecologically sensitive lands (i.e. via the tax system), the national objectives outlined in the *Green Plan* would be expected to fail. This theme was repeated by the NGOs during the lead-up consultations to publication of the *Green Plan*. In August 1990, for example, at the *Green Plan* consultations National Wrap-up Session (including representatives from the oil industry, forestry-mining and agriculture sectors, environmental groups, and business associations) a call was made for "release (of) a Green Paper on economic instruments,

including tax measures." Another group involved in the formal consultations recommended "fiscal measures to encourage behavioural change" (Government of Canada 1990b).

These were not the only views of the business community that have been expressed. Crowe (1991) in an article in *CA Magazine* related that: "incentives designed to encourage environmental protection have not kept pace with the increase in public concern about this issue." Crowe continued: "There will be those who question the merits of the premise... by arguing that tax should not be used to further social policy. While I am sympathetic to this position, it must be acknowledged that it is almost certainly a minority point of view. Once the use of tax policy is accepted, it is inevitable that pressure will build for government to provide extra incentives for individuals and corporations to increase their contribution to the collective effort necessary to solve environmental problems."

The federal government's own environmental officials endorsed a similar view. The Canadian Environmental Advisory Council (CEAC) (1991), in its report entitled *A Protected Areas Vision for Canada*, referred to "partnership" with the private sector and the need for the private sector to participate in the acquisition and protection of lands. CEAC further recommended additional tax credits for donations of lands. In *Federal Economic Instruments and Achievement of Environmental Objectives* (Environment Canada 1989), the federal government itself articulated the view that: "A number of opportunities exist to use tax instruments to influence decisions which affect the environment. These include... modifications to current tax instruments involving the conditions of write-off for investments in conservation..."

The Sustaining Wetlands Forum (1990), which brought together many important environmental NGOs, adopted a formal recommendation: "Use of the tax system to compensate for conservation and protection of wetlands should be explored." The Forum added: "Incentives should be used to encourage wetland conservation; and disincentives should be removed". The Forum's background documentation was even more specific: "Consideration must be given to making federal tax regulations more conservation friendly. Capital gains regulations and income tax treatment of natural property (land) must be changed to reflect the same advantages given cultural property in Canada" (Sustaining Wetlands Forum 1990 – Explanatory Notes).

In the report entitled *Reflections on Sustainable Planning*, The Canadian Institute of Planners (1990) has also insisted that "sustainable planning needs at least six types of fiscal mechanisms." In October 1990, another broad cross-section of NGOs repeated the call to "reduce the inequities e.g. in the tax treatment of donations, particularly the capital gains implications."[6]

In December 1991, the Royal Commission on the Future of the Lake Ontario Waterfront (i.e. the Crombie Commission) issued the following important recommendation: "The federal government should introduce appropriate legislation for amendments to permit significant lands, or interests in lands, to be donated to qualified organizations without triggering capital gains assessments, and to permit the use of a tax credit up to the full value of the donation."[7]

On December 2, 1991 a Parliamentary Committee was also asked to revisit the tax treatment of gifts. This writer made a presentation on this subject to the Parliamentary Committee on Communications and Culture at that time. It was argued: "That the income tax

6. Environment Canada and Communications Canada (1990), p. 54.
7. Supply and Services Canada (1992), Recommendation No. 48, p. 206.

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."

This is the essence of Recommendation No. 8 presented later in this paper. The Committee responded by asking Finance Canada to comment. Finance Canada's answer was issued on January 24, 1992 in the form of a written opinion prepared at Finance Canada for signature by the Minister of Finance. It outlined the concerns which would have to be overcome before Canadians could expect fiscal change in this area. Those challenges, along with the arguments to overcome them, are outlined later in this paper.

Other Tax Levels

In the case of the *Income Tax Act*, the sums in question are very significant. The same cannot be said of other tax levels. The incremental monetary value of property tax incentives for wildlife areas is relatively modest. However, when dealing with taxpayers who are being asked to participate in the protection of ecologically sensitive lands, the perception of the tax system can be as important as the actual monetary values themselves. Even where tax incentives are modest, their very existence may have at least symbolic and psychological value in bringing property-owners "on side".

The Income Tax Act and Ecologically Sensitive Lands

General

The *Income Tax Act* affects every donation of land to government or a charity. It also affects many other transactions that relate to the setting aside of ecologically sensitive lands for posterity. Two areas are of particular significance to this endeavour: the tax treatment of gifts, and the tax treatment of protective measures other than gifts (notably conservation covenants/ easements).

Gifts of Real Estate

Basic Principles

Obviously, a Canadian who is committed to the protection of his or her property is free to donate it to the public sector or to a charity. Donations tend to fall into two main categories. There are donations to the Crown (i.e. the federal or provincial government), and donations to municipalities and registered charitable organizations.[8] These two categories, and the distinction between them, as discussed later in this paper are summarized in Table 1.

In addition, the *Income Tax Act* distinguishes between donations made by individuals, and those made by corporations. Donations by individuals give rise to a tax credit, whereas those by corporations give rise to a deduction from taxable income. The relevant sections of the *Income Tax Act* are ss.110 and 118.1; detailed explanations of these positions can be found in several publications, notably *Canadian Taxation of Charities and Donations*.[9]

The philanthropic tendencies of Canadians (and occasional lack thereof) have been monitored in a number of studies. Although it is not the purpose of this paper to analyze those tendencies, one may nevertheless observe that donations of cultural property (e.g. art or archival material) are substantially more prevalent than donations

8. Only charitable organizations officially registered by Revenue Canada are discussed in this paper under the term "charities".

9. Drache (1990), particularly chapter 12.

of real estate. Part of the reason is that in addition to the sections referred to above, the *Income Tax Act* also provides a distinct tax treatment to donations of "certified cultural property". As explained later, these donations are exempt from capital gains. That feature can be important, particularly in any donation of investment property such as woodlots, farm property, or real estate held for speculative purposes.

Capital Gains on Donated Property

The *Income Tax Act* provides for a legal fiction whereby any donation is considered a disposition at fair market value. In other words, when a person donates a million-dollar wetland complex, he or she is deemed to receive one million dollars in proceeds (Drache 1990). The consequences of this legal fiction can be substantial. This deemed income has no tax consequences so long as the property in question was not investment property. For example, if it was property which was not intended to produce income (i.e. all or part of one's personal residence), then the fictitious proceeds disposition does not normally enter one's taxable income. The situation is different if the donated property was "capital property" (i.e. property used or potentially intended to produce income). This would be the case of farm property or real estate held for speculative purposes. When property held for investment purposes is disposed of, the profit on disposition can be construed as "capital gains". The amount of the capital gain is subject to some complex mathematics, depending upon the improvements that may have been made to the property and other factors.

For example, let us take the case of some wooded land held for speculative purposes since 1971 (the taxation of capital gains came into existence at that time). Let us further suppose that the land was then valued at $100 000, and would today be valued at $1 000 000. Broadly speaking, the donation of this land would trigger a $900 000 deemed capital gain. Since 75% of capital gains are assimilated to normal taxable income, they are taxed as such.

Donee	Gift	Deemed Capital Gain	Capital Gain Exemption		Limit on Usable Receipt against Income	Probability that Capital Gains Tax will eliminate Value of Receipt	Solution if Capital Gains Tax exceeds Value of Receipt
			Individual	Corporate			
To Federal/ Provincial Government	All	Possible	$100 000-$500 000	0	100%	Modest	Legally misrepresented value of gift (downward) to optimize receipt in relation to capital gains tax
To Municipality	All	Possible	$100 000-$500 000	0	20%	Serious	Same as above
To Charity	In Trust for Crown	Possible	$100 000-$500 000	0	100%	Modest	Same as above
	Other Gift	Possible	$100 000-$500 000	0	20%	Serious	Same as above
	Certified Cultural Property	None	Moot	Moot	100%	None	Moot

Table 1: Gifts of Real Estate

At best, "deemed capital gains" encroach upon a taxpayer's normal capital gains exemption. Individuals have a normal capital gains exemption of $100 000 (i.e. the first $100 000 of capital gains is not taxable). In the case of capital gains which occurred on a "qualifying farm property", the relevant exemption is $500 000. This means that if a person makes a gift of capital property to charity, the deemed capital gain may not trigger immediate capital gains tax; on the other hand, for every dollar of deemed capital gain resulting from the gift, there could be a resulting increase in taxable capital gains elsewhere in the philanthropist's estate, if that philanthropist is reasonably wealthy and has significant holdings of stocks and bonds aside from his or her landholdings.

The situation is worse for corporations: they have no capital gains exemptions. It therefore follows that any deemed capital gains invariably produce deemed capital gains tax.

Receipts for Donations

As a *quid pro quo* to a *bona fide* donation to governments or charities, the donor can receive a receipt from the donee, and this receipt can be used to offset taxable income, either in the form of a tax credit (for individuals) or a deduction (for corporations). However, there are ceilings on the extent to which these receipts can be used. In the case of a donation to the Crown (federal or provincial), the usable portion of a receipt cannot exceed the donor's taxable income in any one year; in other words, the donor cannot use his/her receipt to put oneself in a loss position. Any unused portion of the receipt can be carried forward for up to five subsequent years; but in each such year, the usable portion of the receipt is again limited to the taxpayer's taxable income in that year. In other words, a donation to the Crown can be used to offset 100% of the donor's taxable income for a maximum period of six years.

It also follows that if the value of the gift were larger than the donor's income over those six years, the balance would "go to waste". For example, let us envisage a male farmer who was making $50 000 in the year of his retirement and anticipated making $20 000 per year in subsequent years, the following would be the limit of the usable tax receipt in the event that he wished to donate the farm to the Ministry of Agriculture. Leaving aside the capital gains factor for a moment, his usable receipt would cover $50 000 for the year of the donation, and $20 000 for each of the five subsequent years, for a maximum $110 000. If the farm were worth more than $110 000 at the time he made the donation, the extra amount would be unusable for tax receipt purposes.

In the case of donations to charity or to a municipality, the ceilings are substantially lower. In these cases, the donor's receipt cannot offset more than 20% of his/her taxable income in the year of the donation; the unused portion can be carried forward for five subsequent years, but in each subsequent year the usable portion is again limited to 20% of the taxpayer's income in that year. For example, if we were to return to the scenario of the retiring farmer, who earns $50 000 in the year of the donation and $20 000 per year thereafter, his usable tax receipt (leaving aside capital gains) would be limited to $10 000 in the year of the donation, and $4 000 for each of the five subsequent years; in other words, the total usable receipt would be $30 000.

Cumulative Effects

The above scenario illustrates that in the case of investment property, substantial taxes can be triggered by a donation, but there are limits on the extent to which these extra taxes can be offset by the tax receipts involved.

This leads to some unusual scenarios. In the case of property not held for investment purposes, the donor can use his or her tax receipt subject to the applicable ceilings; but for donations of investment property (including most potential donations of significant real estate holdings), the donor could actually find himself or herself with a prospective tax liability (resulting from capital gains) which may actually exceed the receipts claimable. In other words, the taxable capital gains resulting from donations may not only erode the value of the receipts, but may even exceed them. As a result, the philanthropist would be fiscally penalized for the gift.

The *Income Tax Act* has therefore introduced a further legal fiction to mitigate this effect. The donor may "elect" to down-value the gift, so that the deemed proceeds of disposition do not give rise to so high a deemed capital gain.[10] In other words, the Act legalizes the conscious misrepresentation of the value of a gift, in order to assure that the donor will not be penalized for making the donation to the government or to charity. The result is a fairly elaborate accounting process whereby the donor's advisors attempt to determine an optimal figure which will produce the maximum usable receipt in relation to the lowest capital gain. That calculation will also be affected by the extent to which the donor can still use his or her capital gains exemptions, which are usually $100 000 for individuals and $500 000 for farm operations.

In many cases, nonetheless, the donor's prospective tax benefit will not represent a mathematical equivalent or *quid pro quo* for the value of the donation. Predictably, this situation has led to varied attempts to define ways in which donors could get a tax treatment more closely related to the actual value of their donations. Another technique exists at the Heritage Canada Foundation and the Nature Conservancy of Canada. These two organizations have specific contracts with the Government of Canada which entitle them to receive property "in trust for the Crown". It follows that when a gift of real property is made to the Heritage Canada Foundation "in trust for the Crown", this gift can receive the same tax treatment as a gift to the Crown (i.e. a higher ceiling on deductibility), despite the fact that the Heritage Canada Foundation is a non-governmental registered charity.[11] The Nature Conservancy of Canada has a comparable agreement for donations of land abutting national parks. Other organizations have sought to do likewise; however, unless they can produce an actual contract indicating that they can receive property in trust or as an agent of the Crown, this tax treatment will be unavailable. That is what one organization learned when it thought that it had received property in the capacity of agent of the Crown, only to see its anticipated tax treatment disallowed by the courts (on application by Revenue Canada) when it failed to produce documentary evidence of its relationship with the Crown.[12]

"...the Heritage Canada Foundation and the Nature Conservancy of Canada... have specific contracts with the Government of Canada which entitle them to receive property 'in trust for the Crown'."

10. S. 118.1(6) of the Act.

11. The *CCH Canadian Master Tax Guide 1991* notes: "It would appear that a registered charity could be specially empowered to receive gifts in trust for Her Majesty, and such gifts would then be exempt from the 20% limitation. It is understood that this is the case with Heritage Canada Foundation which is a registered charity". See CCH Canadian Ltd. (1991), s. 9185, p. 449.

12. *Murdoch* v. *M.N.R.*, [1979] C.T.C. 2184, 79 D.T.C. 206.

Another tax approach exists via the *Cultural Property Export and Import Act*. That federal statute provides for certain property to be designated as "certified cultural property" by the Cultural Property Export and Import Commission; it also provides for certain institutions in Canada (including registered charities) to be designated as "certified cultural institutions". There are, at present, some 230 such institutions in Canada. When a donor makes a gift of "certified cultural property" to a "certified cultural institution", the *Income Tax Act* not only provides a 100% deductibility ceiling on such gifts (instead of the 20% usually allowed for charities), but also waives the fiction of capital gains.

Naturally, this has led to some speculation as to the kind of real estate which could be treated in this way. Initially, the intent of the *Cultural Property Export and Import Act* was to deal with property that was potentially exportable; but when that reasoning was raised in the context of a proposed donation of a building in Montreal, it was argued that even buildings are potentially exportable stone by stone (like London Bridge, which is in Lake Havasu City) and, hence, should be eligible for this treatment. In fact, there are heritage buildings in three provinces which have been donated to "certified cultural institutions", and whose tax treatment under this heading has been approved first by the Cultural Property Export and Import Commission, then by Revenue Canada.

In the three cases mentioned above, Revenue Canada also allowed the land under the buildings to be assimilated to this tax treatment. The amount of land so treated was the space reasonably required to "seat and serve" the buildings. However, when Revenue Canada was asked to comment on whether pure natural landscape could receive the same tax treatment, the answer was negative.[13] Revenue Canada returned to the original rationale: although buildings could theoretically be exported and reassembled, a natural landscape or habitat could not (at least *in specie*).

Comparison with Other Gifts

The donation of ecologically sensitive lands, whether to government or to a charity, is obviously not on the same footing as a donation of cultural property under the *Cultural Property Export and Import Act*. The question is whether this discrepancy makes sense.

Finance Canada, in a letter signed by the Minister of Finance in 1992, has argued that the tax treatment of gifts of cultural property should necessarily be considered a model for anything. The Minister signed this letter in response to an enquiry from the Parliamentary Committee on Communications and Culture concerning the rationale for the discrepancies among various gifts and the tax fictions attached to them.[14] Six concerns were advanced in the letter, and those concerns would have to be overcome before Finance Canada would consider removing the punitive fictions attached to donations of Canada's natural heritage:

(A) There is no reason why the government should bend over backward for transactions undertaken at the taxpayer's own discretion. The fact that the government provides special treatment to donations of cultural property is an historical aberration.

(B) In any event, gifts must be kept within "reasonable" levels.

(C) If Canada improved the tax treatment for donations of our natural heritage, that would only set off clamouring by other charities (e.g. in social welfare) for comparable treatment, which the government is disinclined to provide.

13. The opinion was sought by the Cultural Property Export and Import Commission in response to a prospective donation. The details of the request for the opinion have not been disclosed.

14. See Footnotes Nos. 6 and 7.

(D) Changing the system would be too administratively difficult.

(E) These tax receipts benefit only a tiny minority of Canadians.

(F) There is no evidence to suggest that a significantly larger number of donations would result.

It is submitted that these concerns can indeed be logically overcome. The rationale is discussed below.

A. Why Should Government Provide Better Treatment?

The first policy hurdle to be overcome is whether there is any reason why the tax system should encourage more philanthropy. Any proposed change in the status quo would first have to address the argument that gifting is the donor's own affair: if he wants to do it, that's fine, but he shouldn't expect Finance Canada or Revenue Canada to feel any obligation to provide any special tax treatment as a reward. The fact that the tax system now rewards such activity (within limits) is in a sense gratuitous: it is a "tax preference" which the government grants exceptionally. Since this is a gratuitous "preference", the government is under no obligation to make those preferences consistent: the fact that government chooses to forego legitimate income in one area is no reason to compel government to forego income in any other area.

Finance Canada has stated that "The tax deduction or credit for charitable donations is unusual in that it is in respect of expenditures made at a taxpayer's discretion. Usually, a credit or deduction is only allowed in respect of expenses incurred to earn income."[15] The scope of this exception is not to be dealt with lightly because, as the Department added, "all tax preferences give rise to a loss of government revenues which must be recouped by other forms of taxation or reduced expenditures."

The answer to this concern is straightforward. Governments around the world (including the Government of Canada) do not "reward" charitable giving merely as a matter of largesse: it is a matter of economic self-interest. Various charities perform functions which would otherwise need to be covered by the public sector; these charities use donations (perhaps 40% of which are offset by tax savings) to do work which would otherwise need to be done with 100% taxpayers' dollars. The tax receipt system is not a gratuitous "preference", but a *quid pro quo* for goods and services actually delivered for the benefit of the public interest.

"Governments around the world (including the Government of Canada) do not 'reward' charitable giving merely as a matter of largesse: it is a matter of economic self-interest."

The expressions "tax benefit" and "tax preference" also have a misleading connotation — the phraseology is reminiscent of disreputable tax incentives like the late Scientific Research Tax Credits (SRTCs), wherein Canadians spent money (allegedly) merely to take advantage of the tax benefits. That concern is misplaced, in the case of charitable donations of ecologically sensitive land. There is simply no evidence that Canadians are lined up to give their property away or that the Government must guard against people encroaching on Revenue Canada's legitimate income by (unethically?) choosing to give too much of their property away.

15. This view is expressed in a letter dated January 24, 1992 by Finance Canada signed by the Hon. Don Mazankowski, to the Standing Committee on Communications and Culture (Finance Canada 1992).

Goodman (1984) already answered that concern: "Our tax system does not permit a person to be better off financially through making a gift to charity. In the ordinary case, a person in a 50% tax bracket who gives $1 000 to charity will be out of pocket $500, just as if he had laid out $1 000 for some expense item which is deductible for income tax purposes. No one would suggest that a taxpayer would be prepared to lay out $1 000 for such an expense item merely because the payment was deductible for tax purposes. Why, then, should anyone think that a taxpayer would make a charitable contribution, merely to take advantage of its deductibility?"

In any event, say some objectors, donations of cultural property cannot be considered a model because they are an historical aberration. "The regime in place for gifts of moveable cultural property is the product of a unique history, is tied to the portable nature of such property, and is integrally linked to the treatment of such property under the provisions of the *Cultural Property Export and Import Act*. This regime is not an appropriate model for other property" (Finance Canada 1992).

However, what is so wrong with the tax treatment of gifts under the *Cultural Property Export and Import Act?* Their treatment is not unfair to Revenue Canada.

Goodman (1984) again explains: "The exception to which I have alluded arises under the *Cultural Property Export and Import Act*, under which the fair market value of gifts of qualified cultural property to a designated institution are fully deductible from income under paragraph 110 (1)(b)(1) of the *Income Tax Act.* If such gifts are capital property whose fair market value exceeds their adjusted cost base, this appreciation in value is not regarded as a capital gain under paragraph 69(1)(b) by reason of the exception in paragraph 39(1)(I.1). If, for example, an individual in a 50% tax bracket purchased a painting for $10 000 in 1972 and if he gives it to a public gallery in 1984, when it is worth $100 000, he receives a tax deduction worth $50 000 to him, which covers his $10 000 cost and gives him a cash profit of $40 000. This is probably as it should be, since it must not be forgotten that he has parted with something that really is worth $100 000. It seems unreasonable to subject him to the full rigours of paragraph 69(1)(b), so that he winds up, at best, with a net tax deduction of only $2 500 after he has made a gift of a $100 000 painting to a charity."

B. The Limits of Reasonableness

The 20% ceiling on tax receipts for donations to charity, says Finance Canada, is required to keep charitable deductions within reason: "The 20 percent limitation serves to restrict the amount of the tax preference for charitable donations to a reasonable level" (Finance Canada 1992). This comment reflects a highly unusual perspective on philanthropy. Finance Canada appears to be the only organization in Canada to suggest that altruism needs to be reined in.

"The 20% ceiling on tax receipts for donations to charity," says Finance Canada, "is required to keep charitable deductions within reason."

One may note, in passing, that there is no commensurate limit on deductible business spending, as there is on charitable spending. Apparently, there is no corresponding urgency for keeping those expenditures within "reasonable levels". The Sustaining Wetlands Forum (1990) presumably alluded to this when it called

for a tax treatment of donations on "the same tax footing (i.e. on a level playing field) that is now available to the corporate sector".[16]

C. Favouritism

Donations to cultural institutions are already on a better footing than, say, donations to the United Way. For example, a person who proposed to donate an office building to the Canadian Cancer Society or a hall to the YMCA would not be in as good a position as the donor of an historic building to the Montreal Museum of Fine Arts. This causes a concern: would assimilating even further donations to the "preferential" category merely compound the potential resentment felt by the charities left out? "It is difficult to justify singling out gifts of certain capital properties to specified organizations as deserving a more preferential tax treatment than gifts to other organizations. Extending preferential treatment to heritage properties over, for example, gifts of cash or land to charitable organizations involved in aiding the homeless or feeding the poor may be unacceptable to many Canadians who may believe that the latter causes are as worthy of assistance as the former" (Finance Canada 1992).

That reasoning starts from the premise that other charities will need to be kept in a disadvantaged position. The counter-argument is simple: if it is unfair for "deemed capital gains" and other features to encroach upon charitable receipts for one kind of donation, it should be equally unfair for them all. There is no *a priori* policy reason why environmental donations should continue being hamstrung, simply because equally worthy donations are also being hamstrung (i.e. misery loves company).

D. Administration

When the Government set up the apparatus to deal with gifts of cultural property under the *Cultural Property Export and Import Act*, it made that apparatus complicated. For example, the donation itself must be approved by the Cultural Property Export and Import Commission; the donee institution must have received an extra "certification" and there are detailed rules applied to the appraisal. One concern is that if the tax system extended comparable treatment to gifts of ecologically sensitive property, "Such proposals would require a cumbersome legislative and administrative regime" (Finance Canada 1992).

Fortunately, that concern may be misplaced, and for a simple reason. The rationale for the complex apparatus related to cultural property was largely that much cultural property is notoriously difficult to appraise (even experts' appraisals of Old Masters, for example, can be millions of dollars apart). This left open the possibility of abuse in the system. Similar discrepancies are not usually found in the appraisal of real estate, and hence the need for highly elaborate safeguards is not comparable.

E. Non-Progressivity

One longstanding concern, respecting any improvement in the tax treatment of gifts, is that such a measure would just help line the pockets of an (already-rich) minority. "Such proposed changes would be of benefit to a restricted number of taxpayers, and would merely serve to enrich an existing tax benefit" (Finance Canada 1992).

That, however, is the nature of philanthropy: significant gifts come only from people who have the resources to give them away. This is a truism, as is the proposition that million-dollar gifts only come from millionaires (i.e. they had to

16. Sustaining Wetlands Forum (1990), p. 15.

own a million dollars' worth of assets before they could give away a million dollars' worth of assets). That hardly means, however, that Canadians who are altruistically inclined toward the environment are plutocrats. Furthermore, the fact remains that these individuals are actually divesting themselves of assets, specifically for the public good. This is not a net "benefit": even with improved tax treatment, they are less rich after the transaction than before. It is, therefore, misconceived to argue that better tax treatment will only "benefit" an already privileged minority. The question is whether the Government is prepared to favour such divestitures or not.

F. No Impact

One of the most familiar concerns of tax officials is whether a given tax change would cause a dramatic outflow of funds from the treasury, without any corresponding benefit elsewhere in society. That concern has also been expressed in the context of gifts of ecologically sensitive property. "There is little empirical evidence to demonstrate that enhancing the tax benefit associated with a particular type of charitable donation will, of itself, result in an increase in that type of donation" (Finance Canada 1992).

Admittedly, there are no Gallup Polls indicating the extent of likely "pickup" on an improved tax treatment for donations of ecologically sensitive land. No one, to this writer's knowledge, has ever commissioned such a poll. But by the same token, there are also no polls suggesting that there would be a failure (in pickup in donations) either.

In view of the lack of "empirical evidence" one way or the other, the issue should be approached on the basis of common sense. At present, any prospective donor who consults his accountant is bound to be told not only about the positive tax features of his prospective gift, but also about the negative tax features... which might even wipe out the positive ones. Can it be seriously argued that such advice never has effects? And even if this results in only a few lost donations per year, aren't those already a few too many?

"It is, therefore, misconceived to argue that better tax treatment will only 'benefit' an already privileged minority. The question is whether the Government is prepared to favour such divestitures or not."

Options under Consideration

Revenue Canada is the silent partner of every Canadian who earns income or sells goods. The Department has a stake in virtually every transaction. Revenue Canada takes its lead from Finance Canada; no two other government agencies have anything close to such a level of intervention in the daily lives of Canadians. Their role, in the pursuit of national goals, must be viewed accordingly.

The Prime Minister, speaking in April 1990, expressed the following view: "Restoring our own habitat has to be everyone's first priority and restoring wetlands is a vital part of it... we need to understand the intolerable cost of neglect. There is no room for anyone on the sidelines. None of us can sit this one out" (Sustaining Wetlands Forum 1990).

An initiative in which the two most influential national bureaucracies are exempt would not be a "national initiative". Furthermore, the Canadian public is unlikely to accept rhetoric delivered to the private sector which is inapplicable to the government itself.

As the Prime Minister continued, "Make no mistake about it; we will be asking Canadians to make sacrifices, Partnership is the key to success of this initiative... For our part we will commit ourselves to managing the government in a manner that makes the public sector a model environmental citizen — and an example to the private sector" (Sustaining Wetlands Forum 1990).

Tax officials, by necessary implication, must be part of that "model environmental citizen" who is prepared to make sacrifices in the name of environmental partnership.

The two fundamental irritants that environmentalists have identified in the system are the following:

- The very notion that an altruistic Canadian who gives away his property for the national good should be saddled with a legal fiction which attributes to him a "deemed capital gain"; and
- The very notion that the tax-deductible value of such a gift needs to be reined in to "reasonable levels". There is no valid policy reason why charitable expenses should be treated less favourably than business expenditures, which face no such limitation.

These are statements of basic principle. Environmentalists have been arguing for over twelve years that a country which is incapable of acknowledging these two fundamental precepts is suffering from basic flaws in its tax system.

In opposition to these statements of principle, various concerns have traditionally been raised in favour of the status quo:

- Government need not reward discretionary spending;
- Charity must be kept "within reason";
- Environmental charities must be hamstrung because other charities are hamstrung;
- Don't complicate the system;
- No giveaways to the rich; and
- It won't work.

Those challenges can all be logically overcome as have been described in this paper. Furthermore, one precedent has been established, namely that of donations of cultural property. Those donations respect the two policy objectives outlined above:

- There is no deemed capital gain to offset the receipt; and
- There is a more reasonable ceiling on the amount which can be deducted (100% of income, rather than 20%).

Notwithstanding the objections outlined in the Finance Canada letter of January 24th, 1992 (Finance Canada 1992), arguing that this tax treatment of cultural donations is an historical aberration (which is a model for nothing), there is no other course that withstands logical scrutiny.

It is always conceivable, of course, that a tax measure could be devised along these lines, adopting a different formulation from that of the gifts of cultural property. However, this writer can see no immediate utility in developing a *sui generis* formula; that would merely complicate the tax system even further. It is submitted that there is virtue in consistency, and that a gift is a gift is a gift. For that reason, this paper recommends that gifts of Canada's natural heritage should be put on a footing identical to gifts of Canada's cultural heritage.

Recommendations

For the reasons outlined above, this paper submits three recommendations:

Recommendation No. 1: The legal fiction which attributes deemed capital gains (and potential capital gains tax) to donations of ecologically sensitive real estate should be abolished.

Recommendation No. 2: The ceiling on deductible charitable expenditures (20% of income) should be lifted. Business expenditures have no such ceiling; and there is no policy reason why altruistic donations should be treated less favourably than business expenditures. If the Government of Canada insists on retaining a ceiling, then the ceiling should be the same as in the case of donations to senior governments (100% of income).

Recommendation No. 3: The tax treatment of donations of Canada's natural heritage should be no worse than that now enjoyed by donations of Canada's cultural heritage.

Conservation Covenants and Easements

Basic Principles

There is a role for private contracts in developing controls on worthwhile landscapes, ecologically sensitive areas, or heritage property. If a proprietor is willing to subject his property to controls on tampering, it is possible to sign a private agreement with him or her to that effect. This contract allows the property owner to commit himself or herself (and his or her heirs and assigns) to the protection of the property without actually relinquishing title to it. Wildlife Habitat Canada has produced a publication that gives an admirable profile of this device (Trombetti and Cox 1990).

Most agreements are simple contracts: they bind the signatories, but they do not bind anyone else.[17] Fortunately, a special form of agreement is possible to deal with that problem. Called an "easement" or "restrictive covenant", it binds future owners as well as the present owner. Restrictive covenants and easements are specific species of contracts in Anglo-Canadian Common Law which have been recognized as distinct from other contracts, ever since the Middle Ages.[18]

In Quebec, the Civil Code has recognized a comparable mechanism called "servitudes". The land which is the subject of the agreement is called the "servient tenement". An easement or covenant can cover a variety of subjects. The best-known example is a right of way, where the owner of land agrees not to interfere with the passage of someone else over his/her land. Similarly, an owner of land can enter into an agreement not to cut wood, backfill or pollute the wetland, etc. This is the kind of agreement that interests conservationists.

As noted above, most agreements do not bind future owners. That is where both easements and restrictive covenants have a crucial characteristic which distinguishes them from other contracts: both can bind future owners. Valid easements and covenants are considered "registrable interests", i.e. contracts that can be registered at the local land titles office. That constitutes public notice and binds future owners. It is this ability that is interesting and which these two kinds of contracts have in common.

17. The basic rule, at Common Law, is that contracts are private agreements which affect only the signatories. This principle is called "privity of contract." Consequently, if an owner agrees to protect his property against destruction and later sells the property, the agreement would usually not be binding upon the future owner, and the property would, hence, be exposed to whatever the new owner had in mind. Conservationists would find this situation unsatisfactory in the majority of situations.

18. Technically, an "easement" refers to an agreement which allows someone else to do something on one's own land (e.g. a right of passage). A "restrictive covenant", on the other hand, is an agreement whereby someone restricts his own ability to do something on his own land (e.g. agrees not to backfill lands). It follows that the agreements contemplated by the proponents of conservation *per se* are primarily "restrictive covenants", at least in Anglo-Canadian law. The term "covenant" is also preferable to the term "easement" when one remembers that to some people, "easement" connotes the right of strangers to cross one's property (as in the case of Ontario Hydro), when that may have nothing to do with the proprietor's wishes. In the United States, however, a usage developed whereby protective agreements were lumped together under the name "conservation easements"; and for reasons which are not entirely clear, the Ontario Government has also taken to calling them easements. This usage in the United States and Ontario has influenced the language of conservationists throughout Canada.

Every Common Law province has introduced specific legislation to clear the way for conservation easements and covenants which would be registrable and binding on future owners for the protection of certain natural and cultural heritage. Quebec's servitudes can do likewise.[19] The literature on "conservation easements" has often discussed the advantages that such agreements have over other arrangements. For example, Reid (1988) summarizes these advantages as follows:

(i) initial costs of acquisition (if applicable) may be less (than retention of fee simple);
(ii) management of the land is provided by the landowner;
(iii) the land remains on the municipal tax roll;
(iv) the land remains in production or use; and
(v) social disruption is minimized.[20]

Conservation covenants and easements have been used unevenly in Canada.[21] Public authorities in the United States have had a longstanding policy of "purchasing easements" and covenants from landowners for various conservation purposes.[22] Among non-governmental organizations, one of the most eminent bodies of experience in this area belongs in the National Trust in Great Britain. By 1979, it had already acquired protective covenants on 71 000 acres (287 300 ha) (Weeks 1979). Enabling legislation for such restrictive covenants and easements is to be found in a variety of statutes.[23] New Zealand's *Reserves Act* also provides for such agreements; and Weeks (1979) refers to comparable agreements being in place in Switzerland, France, the Netherlands, and Sweden.

Receipts for Donations of Covenants/Easements/Servitudes

In Civil Law (e.g. Quebec), ownership is viewed as a whole[24] from which carefully-defined parts can be removed. The Common Law, on the contrary, almost never refers to ownership as a "whole" from which component parts are removed, but rather as a loose (and ill-defined) composite of a spectrum of various rights... or, less charitably, what Oliver Cromwell described as "an ungodly jumble" (Megarry 1975). One may say that the Civil Law looks on ownership as a single forest, but ignores the trees, whereas the Common Law looks on it as a number of trees, but disregards the forest. The significance of calling ownership a "bundle of rights" is simple. If part of those rights are removed (e.g. by restrictive covenant or easement), then one has (by definition) lost part of one's ownership.

19. See Denhez (1978), pp. 605, 670 - 674.

20. Reid (1988), pp. 4,13-14, continues: "Landowners who donate conservation easements tend to share several common characteristics. Typically, they are over 50, comfortably well-off, with an income from a source other than the land in question. "Love for the land" is the primary motivation for donating an easement — 67% of the respondents to the easement survey listed that as the most important factor. Donors are also able to use the tax advantages of their donation, which is listed as the only other significant motivating factor. Donors often are not resident on the land under easement; participation by landowners who depend on their land for their income is very low."

21. In Ontario, the Ontario Heritage Foundation (OHF) has signed over 140 of these agreements under the *Ontario Heritage Act.* Other organizations which were able to circumvent the Common Law hurdles (e.g. by having nearby land, and by phrasing the obligations in the negative) have even been able to use Common Law easements: the Hamilton and Sauble Conservation Authorities acquired right-of-way easements for the Bruce Trail; the Otonabee and Essex Region Conservation Authorities have used easements concerning water levels; and the Bruce Trail Association has purchased land with the intention of reselling same with easements attached. The OHF agreements include "protective provisions (which) are written relatively loosely, requiring OHF approval for, rather than prohibiting outright many activities. These approval provisions are used often, with an average of one to two requests received per week" (Reid 1988, p. 10).

22. The United States Fish and Wildlife Service, for example, has "bought over 21,000 easements covering 1.2 million acres of prairie pothole wetlands." The traditional rationale is that this allows protection of property, at a much lower cost than acquisition or retention of fee simple. However, in areas undergoing some development pressure, United States public authorities had indeed been required to spend considerable amounts of money on these acquisitions. "The National Park Service, for example, found that relatively few landowners along the Appalachian Trail preferred easements to outright acquisition, and that easements averaged 75% of the cost of the fee (simple) (within a range of 25-29%)" (Reid 1988, p. 15). Reid goes on to state that easements over wetlands in the Otonabee Region cost 25% of fee simple; at Hillman Creek Marsh in Essex, they cost 90% of fee simple; trail easements along the Bruce Trail tended to be evaluated at 45% of fee simple in one area, and 15-25% in another. Reid adds, "Cost of (natural) conservation easements in the United States vary widely, but figures in the range of 30-60% are common where public access is not included." (Reid 1988, pp. 20-21).

23. For example, the *Ancient Monuments in Archaeological Areas Act*, United Kingdom (1979 c.46, s.16.).

24. "Ownership is the right of enjoying and disposing of things in the most absolute manner..." (Art. 406 of the Quebec *Civil Code*). Those pre-determined components, which can be hived out of the basic principle called "ownership", are defined in Book Second of the Quebec *Civil Code*. Although attempts have occurred to undermine the rigidity of this system, such as the controversial case of *Matamajaw Salmon Club* v. *Duchaine* [1921] 2 A.C. 426, these have tended to be resisted as an encroachment on the logic of the system.

This loss can be appraised economically. In fact, it is trite to observe that this is done in property tax assessment every day, in every jurisdiction in Canada. Registered easements and restrictive covenants play a role in every province and territory's assessment statute: assessors are indeed directed to take them into account in computing the municipal tax base.[25]

That then gives rise to the following question: if disposal of a part of one's property rights can have a certifiable value for other legal purposes, why can't it receive comparable treatment under the *Income Tax Act*? In other words, if an altruistic individual enters into a registered restrictive covenant or easement with a government or a registered charity, why can't the value of that transaction be professionally appraised, and give rise to a tax receipt accordingly?

Virtually every writer on the subject in Canada has assumed that it would. That opinion is consistent with what the courts have held in other jurisdictions as described below. As early as 1974, Silverstone[26] postulated, with total confidence, 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 (servient tenement) is entitled to deduct the value of the gift for income tax purposes... similarly, the donation can be made to the Crown with even greater deductions permitted on the part of the donor" (Reid 1988). For his part, Reid observed that in the case of donations of property, "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." Reid added that "the procedure for donated easements would be identical".

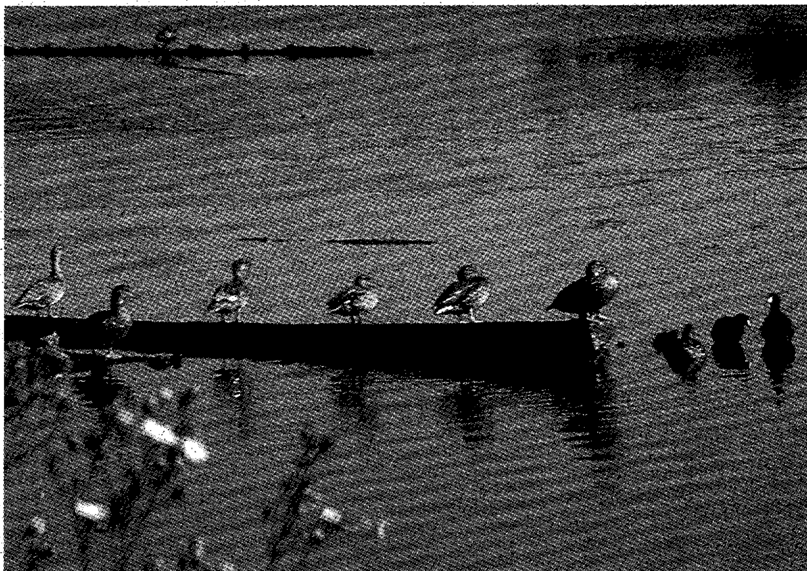

Photo: K. Cox

Wetlands are ecologically sensitive areas for migratory waterfowl across Canada.

The Environmental Law Centre of Alberta issued its own summary (Tingley *et al.* 1986) of the situation: "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. In this case, the initial difficulty for the taxpayer will be determining the value of the gift made and hence the amount of the donation and the proceeds of disposition.

25. For example, the *Assessment Act* of Ontario: "Where an easement is appurtenant to any land, it shall be assessed in connection with and as part of the land at the added value it gives to the land as the dominant tenement, and the assessment of the land that, as the servient tenement, is subject to the easement shall be reduced accordingly (S.8(1)). Furthermore, "a restrictive covenant running with the land shall be deemed to be an easement within the meaning of this section." (S.8(3)). The *Municipal Act*, S.612(3), has similar results. The challenge with this wording, of course, is that it assumes that there is a dominant tenement whose values will increase because of the agreement, and hence counterbalance the decrease affecting the servient tenement.

26. Reid (1988), pp. 121 - 124.

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. Difficulties may be encountered with the Department of (National) Revenue, Taxation over the valuation of a property gift of less than fee simple.[27]

In the United States, the Internal Revenue Service (IRS) first ruled on the deductibility of an open space easement in Revenue Ruling 64-205 (1964-2 C.B. 62). This state of affairs was ultimately entrenched (with various modifications) in subsequent legislation.[28] This long line of enactments was not an act of "political will": it was merely a recognition and interpretation of the Common Law (as perceived in the United States): "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 1984 ruling rested comfortably on familiar foundations. In the case of a charitable contribution, 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?"[29]

If the answer to all three questions was affirmative, the IRS concluded that tax deductibility was unavoidable on legal principle.

Revenue Canada (1990) has now followed suit in its position by writing in correspondence with the Island Nature Trust of Prince Edward Island on July 13th, 1990: "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

27. Tingley *et al.* (1986), p. 50. 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)."

28. 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.

29. Brenneman and Bates (1984), p. 166.

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."

Capital Gains and Covenants

A final question which has yet to be determined is the effect of "deemed capital gains" when a covenant or easement is "donated". If the tax system acknowledges that a portion of one's property rights has been disposed of (for receipt purposes), doesn't it follow that capital gains could accrue on that portion?

In theory, the granting of a covenant or easement would give rise to a deemed capital gain, with accompanying deemed capital gains tax. The problem is in the mathematics: what is the profit margin on a disposition of an easement? In theory, a capital gain is calculated as follows:

(deemed proceeds of disposition) minus (cost base) = capital gain

When donating a "partial interest in property" (e.g. an easement), the owner can calculate his deemed "proceeds of disposition" (i.e. the Fair Market Value of the easement, as attested in the receipt); but how does he or she produce a figure for the "cost", so that one can deduce their "profit"?

The *Income Tax Act* insists that the taxpayer must declare a capital gain... but doesn't say how. Michael Atlas, in *Canadian Taxation of Real Estate* (Atlas 1989), refers to the "granting of easements and other partial dispositions" as a "disposition of a part of a taxpayer's interest in a particular property (which) will require a determination of the... capital cost attributable to the part that was disposed of by the taxpayer... In order to determine the capital gain or loss arising from the disposition. In this regard S.43 specifically contemplates this determination. The section states that it must be 'such portion... of the whole property as may reasonably be regarded as attributable to that part' — and does not offer much meaningful guidance. Further, even Revenue Canada's Interpretation Bulletin on this subject (IT-264R) fails to provide any additional insight on this issue."[30]

Atlas (1989) goes on to conclude that "with the exception of relatively rare situations where there are specific cost elements attributable to the part disposed of, some form of arbitrary, but reasonable allocation will be necessary."

If a qualified appraiser delivered a professional opinion evaluating a conservation covenant/easement at a given value for receipt purposes and Revenue Canada accepted that figure, Revenue Canada would also be expected to take the same figure as the "proceeds of disposition". The "proceeds of disposition", however, are not the deemed capital gain: the deemed capital gain is the proceeds of disposition minus whatever value would be attached to that portion of the "bundle of rights" originally, before the capital gain occurred. The practical problem is simple: it is impossible to define the profit margin on the "disposition" of a covenant/easement because there is no "cost of acquisition" for the easement which the taxpayer can refer back to in computing his "profit". Although it is feasible to appraise the covenant/easement at the time of disposition, it is impossible to appraise what it might have been worth at the time the property was originally acquired (i.e. before the "capital gain" accrued).

However, that has not stopped Revenue Canada. "In the case of amounts received by taxpayers as consideration... for granting an easement, Revenue Canada has adopted an administrative policy aimed at avoiding the difficulty entailed in determining the (original) cost" (Atlas 1989). The Department will

30. Atlas (1989), pp. 5 - 33.

usually accept a "cost" of the easement identical to its "proceeds" (i.e. that the capital gain is zero dollars), provided that:

(a) the area of the portion of the property... in respect of which an easement or right of way was granted is not more than 20% of the area of the total property; and

(b) the (proceeds of the easement) is not more than 20% of the amount of the (cost) of the total property.[31]

That leaves a perplexing situation. On one hand, the property-owner may decide to sign covenants/easements on his or her property, but limit them to 20% of the surface in any single transaction. If the property-owner does so, he or she benefits from the Revenue Canada policy which is to ignore any claim on deemed capital gain on the easement/covenant. However, if the easement/covenant covers more than 20% of the surface of the property, then no such assurances exist. Under S.43 of the Act, capital gains (and capital gains tax) are supposed to apply; but there is almost no physical way of computing them accurately. That leaves open the theoretical possibility of nasty surprises.

This possibility, however, is still theoretical: among the limited number of covenant/easement agreements which have been donated in Canada (currently fewer than 10 are known), there is no reported instance of Revenue Canada invoking a deemed capital gain. It is entirely unclear whether this is a result of: (a) departmental largesse, (b) an unwillingness to tackle the mathematics, (c) an unwillingness to adventure into uncharted areas, or (d) mere oversight.

Options under Consideration

It is arguable that even while disregarding the policy aspects of Revenue Canada's deemed capital gains on easements and covenants, the mechanics are unworkable. So many legal fictions have been layered that the mathematical objectivity of the approach breaks down.

The entire issue would disappear, in the case of donated easements and covenants, if the Government of Canada were to accept this report's recommendations on the subject of gifts generally (see Recommendation Nos. 1, 2 and 3). In short, the computation of deemed capital gains for those easements and covenants would become moot.

"...even while disregarding the policy aspects of Revenue Canada's deemed capital gains on easements and covenants, the mechanics are unworkable. So many legal fictions have been layered that the mathematical objectivity of the approach breaks down."

That would still leave the question of purchased easements and covenants. For example, if a nature trust were to "buy" a restrictive covenant, i.e. pay a farmer in order to secure a registered agreement protecting wetlands on the farm, should Revenue Canada go through the cumbersome exercise which is associated with the legal fiction of attaching deemed capital gains to the transaction?

It is submitted that such an exercise is more trouble than it should be worth to the Treasury. In most cases, existing departmental policy would treat the deemed capital gain at zero already. In the remaining transaction, Revenue Canada already collects its 7% GST from the purchase (as described later in this report); is there any overwhelming policy necessity to collect more? Or would it not be simpler for Revenue Canada to be satisfied with its 7% share, and disregard the balance of the claim (which may cost more in accountancy fees anyway than the claim is worth)?

31. Revenue Canada (1984), paragraph 2.

It is submitted that any Revenue Canada attempt to attribute deemed capital gains to purchased easements and covenants encounters the law of diminishing returns: the nuisance factor of this legal fiction is simply more than the fiction is worth.

Recommendations

For the reasons outlined above, the following recommendations are submitted:

Recommendation No. 4: Charitable donations of covenants or easements, for the protection of ecologically sensitive lands, should not be subject to deemed capital gains or a 20% income limitation, any more than donations of other interests in ecologically sensitive lands.

Recommendation No. 5: Purchases of protective covenants and easements by environmental charities may continue to be subject to GST but should not otherwise trigger tax liabilities such as on deemed capital gains.

Other Federal and Provincial Taxes

The Goods and Services Tax

Other taxes such as the Goods and Services Tax (GST) have an indirect effect upon various philanthropic activities. For example, there are rebates available to municipalities, charities and certain non-profit corporations for the GST which they spend in pursuit of their public purposes.

For example, let us suppose that a municipality or charity undertook to purchase forested land. The transaction would be GST-exempt if the land was "personal-use land". In the publication, *A Guide to the Goods and Services Tax,* this is described as "real property (owned) by individuals or trusts (all of the beneficiaries of which are individuals), 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."[32] This exemption extends to "country properties, non-commercial hobby farms and other non-business land".

Other purchases, such as from a professional speculator or a lumber company, would be subject to GST. "Where an individual sells land that was used in the vendor's business, or sold in the course of a business, tax will apply."[33] The municipality or charity would be required to pay that GST; it would then be eligible for a 50% Revenue Canada rebate for the GST that it had paid. Non-profit corporations which are not registered charities may also be eligible for the 50% Revenue Canada rebate, in the event that 40% of their funding comes from government sources. "Conservation authorities" (e.g. those under the *Conservation Authorities Act* in Ontario) are in a different position. 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."[34] Provincial governments are constitutionally exempt from the GST; they do not need to pay GST on purchases of such lands.

32. *A Guide to the Goods and Services Act*, by Dancey Resendes, Kesler and Puthon. CCH Canadian Ltd., Don Mills, (1991), p. 45.

33. Finance Canada (1989), p. 112.

34. Deloitte and Touche (1990), p. 106.

Provincial Taxes Other Than on Property

Provinces have tax systems other than property tax. The legislation in almost every province and territory provides certain favourable treatment to gasoline taxes paid by farmers or loggers. It is conceivable that this treatment can be extended to those involved with the property management of ecologically sensitive lands. However, the monetary value of such incentives, for the purposes of the latter group, would be small.

Property Tax Treatment

General

The system of property taxation in Canada is pivoted on two basic steps: (1) an assessment of the real estate belonging to a property-owner; and (2) the levy of a tax based upon a specific percentage ("the mill rate") of that property.

In some provinces, the property is first assessed, then the mill rate is levied, producing a given amount 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 precisely the required (budgeted) income.

In virtually every jurisdiction, the basic principle has been to develop assessments which would correspond 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, "wastelands" have traditionally received very low assessments: these lands included wetlands. However, those values could fluctuate if appraisers treated the lands as "recreational".

Furthermore, the system of "market value assessment" also witnessed various statutory exemptions. Provincial assessment legislation could:

- exempt charitable organizations from property taxes altogether;
- exempt farm lands or substantially reduce their level of assessment; or
- exempt "woodlots" or substantially reduce their level of assessment.

In some cases, the provinces' legislation would include a penalty provision for owners who converted their land after having enjoyed a preferential tax treatment for several years. In other words, if an owner was paying less-than-normal property taxes because his or her land had a special use, and he/she then discontinued that use, the property taxes would then return to normal levels retroactively. This is sometimes called a "clawback". 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 might immediately become payable.

In addition, there are standard formulas applicable to covenants and easements. Each of these will be described in turn. A profile of property tax systems for each Canadian jurisdiction is presented in Table 2.

Government	Farmland	Timberland	Golf Courses	Charities	Conservation
British Columbia:					
Municipalities	1a, 2	1b, 2	4, 7b	3d	3c
Outside Municipalities	1a, 2	1b, 2	4, 7b	3a	3a
Alberta	1a, 1b	3c	—	3c	—
Saskatchewan	1a, 2	—	—	3c	—
Manitoba	1a, 1c, 2, 7b	1a	—	3b	1b
Ontario	1a, 1c, 6, 7b	3c, 6, 7b	4, 7b	3b	6, 7b
Quebec	2, 6	2, 6, 7b	7b	3a	—
New Brunswick:					
Provincial	1c, 2, 3a, 7b	5	1c, 7b	6	—
Municipal	1c	—	—	3a	—
Nova Scotia	3a, 7a	2	7a	3c	—
Prince Edward Island	1a, 2	2	—	3b	—
Newfoundland	3a	5	—	3d*	—
Northwest Territories	—	—	—	3c	—
Yukon	—	—	—	3b	—

* St. John's - 3c

Table 2: Profile of Property Tax Systems in Canada

Legend

1. Exceptional Appraisal Methodology
   a. Appraisal based on soil productivity
   b. Appraisal based on farm/woodlot income-generating capacity
   c. Appraisal based on likely sale price to other farmers
2. Differential Assessment (i.e. mill rate computed on a lower percentage of assessed value)
3. Exemption
   a. Outright (i.e. absolute statutory exemption)
   b. Outright, but for some charities only
   c. All charities eligible, but at option of municipal council
   d. Some charities eligible if approved by municipal council
4. Assessment Freeze
5. Taxation on Other than Appraised Value (e.g. flat rate)
6. Rebates and the like
7. Clawback on Conversion
   a. Fixed penalty amount
   b. Taxes paid retroactively

Assessments

Classic Principles of Assessment

The generally accepted definition of Fair Market Value, for assessment purposes, is the price which would be paid on the open market between a willing seller and a willing buyer. It is against that standard that all subsequent devices can be compared.

In daily practice, the projected market value which the typical appraiser will attribute to a property will usually be an amalgam of three sets of figures.[35] These "three approaches to the process of appraising real estate"[36] are called:

- the "sales-price theory" (how much are similar properties selling for?);
- the "cost theory" (what was the property's cost, now adjusted for inflation and depreciation?); and
- 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 turnovers 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.

Preferential Methodologies for Assessment

Because normal appraisal practices incorporate all three approaches, it is a departure from the norm for property to be assessed exclusively on the basis of a single one, such as the income approach. Some assessment statutes have done so for decades, as a self-conscious preference which is provided to a given kind of property that 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. 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.

Preferential Calculations of Tax Payable

Traditionally, once the appraisal of property had been done, the mill rate was computed on a certain percentage of that assessed figure. However, throughout most of Canada a practice developed whereby certain classes of properties were assessed 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. This system of preferences has sometimes been called "differential assessment".

"Recreational" Assessments

Canada's property tax treatment of "recreational lands" has been uneven. In some cases, overt preferences have been allowed for assessments or exemptions from property taxes. For example, "New Brunswick, Quebec, Ontario and British Columbia have singled out golf courses."[37] Furthermore, "land held in a municipality for public recreational purposes by associations... may receive special tax concessions at Council's option in Nova Scotia, Ontario, Alberta, and British Columbia" (Finnis 1979). On the other hand, there are many government appraisers who assume that when land is used for "recreational" purposes it merits a higher assessment, than, say, a woodlot used for firewood. Ionson (1988) report-

35. In some markets, a fourth set of figures is generated on the basis of the tenant's ability to pay (e.g. certain shopping malls etc.). This approach, however, is not necessarily well-adapted to many Canadian situations, particularly in relation to ecological lands.

36. Hoagland (1955), p. 245.

37. Finnis (1979), p. 10

ed numerous instances in Ontario, for example, where such land was equated with "residential" lands, with a corresponding increase in assessed values.

Agricultural Assessments

Every province in Canada provides special treatment to its agricultural lands. The approaches and mechanisms have been diverse, and are outlined later in this report.

Finnis (1979) summarized the situation: "Four of the provinces, Prince Edward Island, New Brunswick, Ontario and British Columbia require farmland to be assessed at its value as a farm provided the owners can meet certain criteria to show they are *bona fide* farmers. Compliance means that in assessing the farmland no consideration will be given to the value of other land in the area that may be increasing in value because of other development..."

Nova Scotia delivers to property owners the same practical effect as an exemption on farmland: the province pays the municipal taxes in his stead.

The provinces have not used a standard approach: instead, there is substantial variety in the techniques which have been used to provide preferential treatment to agricultural lands.

Woodlots and Forests

Like agricultural lands, wooded lands enjoy specific preferential treatment in most assessment statutes. That treatment is sometimes assimilated to agricultural land, and in other cases is distinct. 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. For example, "managed and *bona fide* forest land is exempt in Prince Edward Island and Nova Scotia while all forest land in the prairie provinces is exempt from property taxation" (Finnis 1979).

Assessment of Lands under Easement/Covenant

Assessment legislation will usually issue absolute directions for appraisers to reduce the assessed value of land pursuant to easements and covenants. Ontario's *Assessment Act*, for example, has separate provisions addressing the reduction in value pursuant to both easements and covenants.

The Outcome: Certain Preferential Treatment

The foregoing profile approaches demonstrates that in every jurisdiction in Canada, there are certain properties which enjoy most-favoured status from a property tax standpoint.

The Concern for Municipal Treasuries

Preferential approaches have sometimes been considered for application to ecologically sensitive lands, including wetlands and other wilderness. The proponents, however, have been concerned that this could lead to a reduction in currently-assumed assessment levels, and, hence, to confrontations with municipal treasurers. For example, that is what led the Sustaining Wetlands Forum (1990) to recommend as follows: "The provinces and municipalities should review and, where necessary, revise land assessment and taxation systems to ensure that they do not discourage wetland conservation. For example, tax assessments should be based on existing rather than potential uses." The Forum continued: "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."

Specific Favourable Measures

Distinct Evaluation Procedures

Some governments have distinct legislation which dictates how property is to be appraised. A summary of the basis for assessment in each Canadian jurisdiction is presented in Table 3. For example, property may be appraised at lower than Fair Market Value, for property tax purposes, if the legislation specifies: (a) that it must be appraised according to soil type or productivity; (b) that it must be appraised according to income; or (c) that it must be appraised according to comparable sales between farmers.

Photo: K. Cox

The Habitat Retention Program is an example of landowner stewardship in Alberta.

Government	Farmland	Farm Woodlots	Other Timberland	Wilderness
British Columbia	Soil Productivity	On Capitalized Income	On Timber Productivity	—
Alberta	Soil Productivity and Income	—	—	—
Saskatchewan	Soil Productivity	—	—	—
Manitoba	Income	Soil Productivity	—	Separate (nominal)
Ontario	Value to farmers, soil	20 acres exempt	—	—
Quebec	—	—	—	—
New Brunswick	Provincial tax deferred Municipal tax on value to other farmers	Tax 80 cents/ha	Flat rate	—
Nova Scotia	Exempt	Exempt	Two-tier tax	—
Prince Edward Island	Soil Productivity	—	—	—
Newfoundland	Exempt	Exempt	Special Formula	—
Northwest Territories	—	—	—	—
Yukon	—	—	—	—

Table 3: Basis of Assessment

Exemptions

Over the years various provinces have granted exemptions to a variety of property-owners, aside from those described in the categories of agriculture and timber. A summary of such exemptions is presented in Table 4 for each Canadian jurisdiction. Churches were a typical example. In due course, other kinds of charities were included for property tax exemptions; but the legislation was hit-and-miss. In Ontario, for example, the *Assessment Act* referred to Boy Scout and Girl Guide Camps but not to other protected open space.

Government	All Charities	Some Charities Only
British Columbia	Outside municipalities	Inside municipalities: parks, recreation sites, at option of municipal council
Alberta	At option of municipal council	—
Saskatchewan	At option of municipal council	—
Manitoba	No	YMCA, etc. *not* environmental charities
Ontario	No	YMCA, Scouts, etc. *not* environmental charities
Quebec	Not automatic	• Non-profit organizations approved by Quebec Municipal Commission • Works for protection of wildlife or forests • Non-profit organizations which have an agency agreement with the Crown
New Brunswick	Sliding scale to down value assessment	—
Nova Scotia	At option of municipal council	—
Prince Edward Island	No	Religious/educational, but *not* environmental charities
Newfoundland	At option of municipal council	—
Northwest Territories	*Societies Act* groups, at option of council	—
Yukon	No	Religious use only

Table 4: Property Tax Exemptions

Distinct Rates

As mentioned earlier, some provinces dictate that certain classes of property will be taxed on a figure which is a different percentage of Fair Market Value than other classes of property. The pattern of "differential assessment" for farmland and timberland for each Canadian jurisdiction is presented in Table 5.

Government	Farmland	Managed Timberland	Open Timberland
British Columbia	Lower percentage than non-farm	Lower than open timberland	Lower than residential, commercial, etc.
Alberta	Lower percentage than non-farm	—	—
Saskatchewan	Different rate	—	—
Manitoba	Lower than residential/commercial	—	—
Ontario	—	—	—
Quebec	—	—	—
New Brunswick	Lower than "business"	Flat rate	Flat rate
Nova Scotia	Nil (exempt)	Depends on size	Depends on size
Prince Edward Island	Lower than commercial property	Lower than commercial	Lower than commercial
Newfoundland	Nil	Lower than other timberland	—
Northwest Territories	—	—	—
Yukon	—	—	—

Table 5: Differential Assessment Rates

Offsetting Rebates and Grants

In some provinces, the mechanism used to provide a preference is a rebate of taxes to the property-owner. This is a favourite technique in Ontario. There is a Farm Tax Rebate Program which provides rebates, a Managed Forest Tax Rebate Program which does likewise, and the Conservation Land Tax Reduction Program. For example, the Government of Ontario's Heritage Legislative Project, which addresses the province's natural heritage as well as its cultural heritage, includes among its recommendations that "legislation should specifically provide that municipalities may offer rebates on property taxes to owners of designated property",[38] i.e. property which has been designated of natural, architectural or historic significance to Ontario under the new proposed *Ontario Heritage Act*. A summary of property tax rebate mechanisms for each Canadian jurisdiction is presented in Table 6.

Government	Farmland	Managed Timberland	Open Timberland
British Columbia	—	—	—
Alberta	—	—	—
Saskatchewan	—	—	—
Manitoba	—	—	—
Ontario	75%	50%	75%*
Quebec	70% +	85%**	—
New Brunswick	Deferral	—	—
Nova Scotia	100%***	—	—
Prince Edward Island	—	—	—
Newfoundland	—	—	—
Northwest Territories	—	—	—
Yukon	—	—	—

Table 6: Property Tax Rebate Mechanisms

* Proposed

** Rebate is only triggered by work done on forest management.

*** Strictly speaking, this is not a "rebate" but a provincial payment of the taxes in lieu of the property owner.

38. Ontario Ministry of Culture and Communications (1990), Recommendation 21.2.

Freezes

Some provinces will offer a tax or assessment freeze: during times of escalating property values, this can constitute an important asset for the property-owner. Ontario, Quebec and British Columbia do so with golf courses, while in Newfoundland freezes on golf courses are negotiable.

Penalties on Conversions

Several jurisdictions impose penalty provisions when a preferred use (e.g. agriculture, golf courses, etc.) are eliminated and replaced with more intensive uses such as commercial development. For example, taxes may be charged retroactively. Table 7 provides a summary of tax penalties on land use conversions for each Canadian jurisdiction.

Government	Farmland	Managed Forest	Golf Courses	Conservation Land
British Columbia	—	—	Clawback	—
Alberta	—	—	—	—
Saskatchewan	—	—	—	—
Manitoba	Clawback	—	—	—
Ontario	Clawback	Clawback	Clawback	Clawback
Quebec	—	Clawback	Clawback	—
New Brunswick	Clawback	—	Clawback	—
Nova Scotia	20% Tax	—	20% Tax	—
Prince Edward Island	—	—	—	—
Newfoundland	—	—	—	—
Northwest Territories	—	—	—	—
Yukon	—	—	—	—

Table 7: Tax Penalties on Land Use Conversions

Penalties on Vacant Land

For many years, the "development ethic" was so strong that governments imposed tax penalties on the retention of wilderness. These penalties sometimes evolved into mere surtaxes on vacant urban land held for purely speculative purposes, which would be considered less harmful by the environmental community; but if applied to true wilderness, such penalties would be considered consummately counterproductive today, at least by the environmental community. Such taxes included surtaxes on "vacant land"; alternatively, there were monetary incentives provided for the destruction of wilderness such as the financial aid given by the Government of Ontario to wetlands drainage under the *Tile Drainage Act* or the *Drainage Act*.

Today, the remaining counterproductive provisions in the tax sphere can be summarized as follows:

Quebec: vacant land, which is not used for farm or woodlot purposes, may be hit with a surtax at the municipal council's discretion. In practice, this is usually reserved for serviced land.

Nova Scotia: "recreational" lands of environmental charities are subject to a tax rate which is a fixed rate per acre, rather than one based on assessment. That tax rate tends to be lower than on commercial lands, but higher than on timberlands.

Provincial and Territorial Profiles

British Columbia

The basic legislation is the *Assessment Act*, the *Municipal Act*, the *Taxation (Rural Area) Act*, and the *School Act*. Legislation includes the following specific provisions:

- ***lands held by charities:*** parks and recreational facilities may be exempted from taxation within municipal boundaries under the *Municipal Act* at a municipal council's option, as well as any property of an association used principally as a public park or for public recreation, or other property of non-profit and charitable organizations. Outside municipal boundaries the *Taxation Act* provides an absolute exemption on taxation of charitable non-profit organizations.
- ***lands used for farming:*** farmland is assessed on the basis of "prescribed tables of values per acre based on the capability of the land to grow field crops" (Greenwood and Whybrow 1991). There is also a system of differential assessment.[39]
- ***woodlots:*** lumber areas in British Columbia are classified as Unmanaged Forest Lands or Managed Forest, with a system of differential assessment. Neither category applies, however, if the "highest and best use" of the land is other than the "growing and harvesting of trees". The assessments themselves are based on forestry use.
- ***covenants/easements:*** reduction in assessed value, according to actual impact.

Golf courses can have their assessments frozen. There is a penalty clause for course owners who sell during the life of the freezing agreement.

39. "All property is currently classified into nine classes, based on type or use; on each class, municipalities and (in rural areas) the province may levy different tax rates." Greenwood and Whybrow (1991), p. 15.

Alberta

The basic statute in Alberta is the *Municipal Taxation Act*. There are other provisions in the *School Act*, the *Municipalities Assessment and Equalization Act*, the *Municipal and Provincial Properties Valuation Act*, the *Municipal Tax Exemption Act*, and the *Alberta Property Tax Reduction Act*. Legislation includes the following specific provisions:

- ***lands held by charities:*** non-profit organizations generally can apply to a municipal council for waiver of their taxes. A refusal can be appealed to a Local Authorities Board. The legislation specifies that municipalities may, at their discretion, waive taxation on Crown lands occupied by Ducks Unlimited Canada.
- ***lands used for farming:*** there is a complex grading system for land productivity which is the basis of the assessment. That calculation produces the "fair actual value of the agriculture land". There is also a system of differential assessment. The deregulated percentage is 65% of "fair actual value".
- ***woodlots:*** there are so few privately-held forests in Alberta (as opposed to forests in Crown) that the legislation does not address this issue, except for lands held under a forest management agreement or lease, which are tax-exempt.
- ***covenants/easements:*** reduction in assessed value, according to actual impact.

As a matter of practice, Alberta had been tending towards appraisals of conservation lands which focused on income-generating capacity, as in the case of Farm Land Rates. Since the income was almost nil, the assessment was therefore almost nil.

Saskatchewan

The legislation in Saskatchewan is found in the *Saskatchewan Assessment Management Agency Act*, the *Education Act*, the *Urban Municipality Act*, the *Rural Municipality Act*, and the *Northern Act*. Legislation includes the following specific provisions:

- ***lands held by charities:*** all properties are assessed; 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, municipal councils have a general power to exempt (annually) lands of almost any description.[40]
- ***lands used for farming:*** land is supposed to be assessed according to "present use" which, in terms of current procedures, is related to productivity (adjusted for production and similar farm land values).
- ***woodlots:*** these tend to be assimilated to farms. No provisions are specifically on point.
- ***covenants/easements:*** reduction in assessed value, according to actual impact.

Manitoba

The basic legislation in Manitoba is in the *Municipal Assessment Act*. There are also relevant provisions in the *Public Schools Act*. Legislation includes the following specific provisions:

- ***lands held by charities:*** some charitable institutions are exempt from certain taxes, but environmental charities do not appear among them.
- ***lands used for farming:*** the assessor must assess at "Value" (i.e. market value) but if a farmer applies to bring his land under a special system of

40. For example, the *Rural Municipality Act*, s. 331(3).

assessment called "Farm Property Assessed Value," this property is assessed based on use for farming purposes, i.e. sale value to other farmers and productive capacity of the soil. Furthermore, there is a system of differential assessment (called "Portioned Assessment") which computes tax on a lower percentage figure for farms than residential or commercial properties.

- ***woodlots:*** under the *Municipal Assessment Act* appraisals are based on quality of soil and the value of standing timber. No other incentives are specifically on point.
- ***covenants/easements:*** reduction in assessed value, according to actual impact.

In the case of farm lands, ecologically sensitive portions may be labelled "conservation lands" and assessed at very low values. A conversion of the farmland can lead to a clawback of taxes covering a five-year period. Golf courses have the lowest rate of taxation of all categories of land under the "Portioned Assessment" system.

Ontario

The basic legislation is found in the *Assessment Act*, the *Provincial Land Tax Act*, the *Forestry Act* and the *Conservation Land Act*. Ontario's legislation includes the following specific provisions:

- ***lands held by charities:*** lands held by certain charities are exempt from taxation under the *Assessment Act*, but this exemption appears to extend only to properties used for religious, hospital, university and other related purposes. Battle sites also appear to be included. Properties held by land trusts for ecological purposes are not immediately included in that exemption.
- ***lands used for farming:*** the provincial government offers a 75% rebate on municipal and school taxes. Farmland is appraised exclusively in terms of its farming potential (the appraisal ignores market values associated with alternative uses).
- ***woodlots:*** woodlots of up to eight ha (20 acres) are tax exempt when associated with a farm. The exemption is limited to "one acre used for forestry purpose for every ten acres of farm."[41] Managed forests are currently under consideration for a rebate of up to 50% on municipal taxes. There are elaborate definitions of the criteria required for such "managed forests".
- ***covenants/easements:*** reduction in assessed value, according to actual impact.

Pursuant to the "untaxing nature initiative", Ontario passed the *Conservation Land Act*.[42] The Act specifies a variety of ecologically sensitive lands including wetlands, and other properties; in addition, an Order-in-Council has specified the classes of property which can be considered "conservation lands". "Approximately 372 000 hectares, mostly in southern Ontario, have been identified as conservation land eligible for the tax rebate. Eligible land includes: Provincially Significant (Class 1, 2 and 3) Wetlands; Areas of Natural and Scientific Interest (ANSIs); natural areas within the Niagara Escarpment Planning Area; non-revenue Conservation Authority Lands; and other conservation lands owned by non-profit organizations that through their management contribute to provincial conservation and natural heritage objectives."[43]

Assessment freezes are confined to golf courses, subject to a clawback. Clawbacks also apply on conversion of farmland, conversion of woodlots, and conservation lands.

41. *Assessment Act*, s. 19(3).
42. An *Act to Promote the Conservation of Certain Land*. 1988, S.O. c.41.
43. Federation of Ontario Naturalists (1988), p. 10.

Quebec

The basic legislation is in the *Real Estate Assessment Act*, the *Education Act*, the *Forest Act* and the *Municipal Taxation Act*. The *Municipal Commission Act*, the *Schools Act*, the *Agricultural Lands Protection Act* and the *Department of Agriculture Act* also have a role to play. Quebec's legislation includes the following specific provisions:

- ***lands held by charities:*** non-profit establishments can be exempted from property tax by the municipal commission. Nonetheless, municipalities may charge for services actually received (e.g. utilities), subject to a ceiling.
- ***lands used for farming:*** farmers are eligible for a 70% or greater reimbursement on both municipal and school taxes. There is a sliding scale for rebates depending on whether the land is within an agricultural zone. Farms and woodlots are exempt from the surtaxes, under the *Cities and Towns Act*, on "serviced vacant land". Farms and woodlots are exempt from land transfer taxes.
- ***woodlots:*** farmers who harvest trees are eligible for the same incentives as other farmers. The *Forest Act* allows a rebate of 85% of municipal and school taxes, when work is done on forestry management. Public forests and experimental forests can be exempted.
- ***servitudes:*** (the Civil Law counterpart to covenants/easements): reduction in assessed value, according to actual impact.

Works for the protection of wildlife or forests owned or operated by a public agency are exempt. An exception can extend to a non-profit organization which has signed an agency agreement with the Crown, e.g. La Fondation de la faune du Québec.

There is a surtax on vacant land which municipalities are authorized to apply (at their discrétion) to vacant land; but this surtax does not apply to farms or woodlots. Farms and woodlots are also exempt from land transfer tax. There are special provisions concerning golf courses: their value (above a certain low fixed amount) is tax-exempt; but, as in the case of Ontario, the incremental taxes are applied retroactively in the case of conversion of the property. There is also a clawback provision on the rebate for forest land at conversion.

Major revisions are expected to result from a current review underway under the direction of the Minister of Municipal Affairs. This review, called the Ryan Commission, is expected to report in the autumn of 1993.

New Brunswick

The basic legislation in New Brunswick is in the *Assessment Act*, the *Real Property Tax Act* and the *Residential Property Tax Relief Act*. One of the effects of the combination of these statutes is "almost to double the tax rate on business properties in comparison with residential."[44]

It is, therefore, very important to determine whether a given property has been assimilated to the "business" category or the "residential" category. In New Brunswick, there are two kinds of entries: the province applies its tax rate, and (in several municipalities) a municipality applies its own. All of the provincial rate is then rebated; in the case of principal residence, to owners who live in municipalities. Outside municipal boundaries (i.e. in Local Service Districts), part of the provincial property tax is rebated to owners of principal residences. Legislation includes the following specific provisions:

- ***lands held by charities:*** on application to the provincial government, the property of charitable organiza-

44. Finnis (1979), p. 57.

tions is eligible for a reduction of valuation of 10% to 75% through the Value In Use Program.

- ***lands used for farming:*** the standard provincial real property tax is $1.50 per $100 assessment, but the Farm Land Identification Program (FLIP) allows 100% of the provincial taxes to be deferred. Conversion to other uses triggers a retroactive tax which would otherwise have been paid over the last decade. Farmland is assessed according to its value to other farmers, not its market value to non-farm buyers.
- ***woodlots:*** freehold timberland is assessed at $80/ha. Farm woodlots can be assessed at a value that will realize a total tax of eighty cents per hectare per year. Like "residential property", these woodlots are taxed at a lower rate than other non-residential property.
- ***covenants/easements:*** reduction in assessed value, according to actual impact, if any.

Golf courses are treated in an analogous way to farms: they are assessed in terms of their value to other golf clubs, as opposed to their market value on conversion. There is a clawback of taxes on conversion of farmland.

Nova Scotia

The basic legislation is the *Assessment Act*. Nova Scotia's legislation includes the following specific provisions:

- ***lands held by charities:*** charitable organizations and institutions are tax-exempt from business occupancy taxes, but not normal property taxes. The property of the Boy Scouts or Girl Guides is automatically exempted from property taxes, but other charities are exempted only upon approval of the municipal council.
- ***lands used for farming:*** the province pays a certain amount per acre per year to the municipality where agricultural land is located. The landowner is exempt from paying tax on farmland. A change in use can trigger a tax equal to 20% of the value of the property.
- ***woodlots:*** timberlands are totally exempt from property tax under the *Assessment Act*, s. 47. Instead, the owner pays a certain amount per acre for "resource properties" (i.e. where the owner owns less than 20 235 ha — 50 000 acres) and a higher rate per acre for "commercial property" (over this limit). There may be an additional charge of up to one cent per acre where a fire protection rate is levied. A change in use can again trigger a tax of 20% of the property value (except where the change is to agricultural use).
- ***covenants/easements:*** reduction in assessed value, according to actual impact.
- ***recreational property:*** "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 of $5 per acre" (Finnis 1979). This figure was subsequently adjusted, but remains twenty times the tax rate of lumber "resource" property (i.e. for timberland where the ownership is less than 20 235 ha — 50 000 acres).

Prince Edward Island

The basic legislation in Prince Edward Island is the *Real Property Assessment Act* and the *Real Property Tax Act*. Prince Edward Island provides an initial and fundamental distinction between commercial and non-commercial property: commercial property is taxed at twice

the rate of non-commercial property. Legislation includes the following specific provisions:

- ***lands held by charities:*** the only charities which are listed as being tax-exempt tend to fall into the category of religious or educational institutions. A land trust, for example, is not provided for.
- ***lands used for farming:*** farmland is assessed according to agricultural capability, not market value. The tax rate on farmland and woodlots is half that of "commercial realty". However, since farmland is defined as being "arable", some wilderness (e.g. wetlands) would be disqualified.
- ***woodlots:*** the same low tax rate applies (as in the case of farmlands), although it is possible for assessment to be based on market value instead of soil productivity.
- ***covenants/easements:*** reduction in assessed value, according to actual impact.

In practice, there is some evidence that the Prince Edward Island Department of Finance has not been sending tax bills to environmental charities holding conservation lands.

Newfoundland

In Newfoundland, there is no assessment (and hence no property tax) outside municipal boundaries. Even within municipal boundaries, some 25% of Newfoundland's communities have no assessment and no tax.

The principal legislation in Newfoundland is found in the *Assessment Act*, the *Municipality Act*, and the *St. John's Assessment Act*. Councils of other municipalities can exempt other property. Newfoundland's legislation includes the following specific provisions:

- ***lands held by charities:*** the City of St. John's will exempt real property held or occupied by charitable organizations which are registered under the *Income Tax Act*. In other municipalities, charities can apply for exemption, but this does not appear to apply to environmental charities.
- ***lands used for farming:*** these lands are tax exempt for property tax purposes (but not necessarily for business tax).
- ***woodlots:*** under the *Forest Land (Management and Taxation) Act*, two taxes apply: (1) a certain amount per hectare for fire protection; and (2) a percentage of the cordage rate multiplied by the stumpage rate. There is a significant reduction for "managed lands".
- ***covenants/easements:*** reduction in assessed value, according to actual impact.

Northwest Territories

In the Northwest Territories, the basic statute is the *Property Assessment Taxation Act*. Legislation includes the following provisions:

- ***lands held by charities:*** the council may, at its option, exempt lands of a society under the *Societies Act* from taxation.
- ***lands used for farming:*** no provisions are specifically on point.
- ***woodlots:*** no provisions are specifically on point.
- ***covenants/easements:*** reduction in assessed value, according to actual impact.

Yukon

In the Yukon, the basic statute is the *Assessment and Taxation Act.* Legislation includes the following provisions:

- ***lands held by charities:*** although lands used for religious purposes are absolutely exempt,[45] there is no provision for other charities. However, the Cabinet may, by regulation, exempt further property.
- ***lands used for farming:*** no provisions are specifically on point.
- ***woodlots:*** no provisions are specifically on point.
- ***covenants/easements:*** reduction in assessed value, according to actual impact.

New Measures under Consideration

In view of the plethora of different approaches to preferential tax treatments, the "better mousetraps" that are developed in one jurisdiction are seldom directly applicable to the next jurisdiction. However, there are at least some common themes which can be pursued. Those are described below.

Recommendations

The research has disclosed certain common themes:

(a) The actual monetary amounts at stake tend to be small.

(b) This is because the lands which we would want to cover (as being ecologically sensitive) are often already in a low tax category for some other reason.

(c) That does not change the basic desirability of entrenching a specific tax treatment for conservation lands, because this a question of basic principle, and this may have a positive psychological impact upon property-owners who may be induced to take positive action for conservation.

(d) Because of the relatively low monetary values involved, such an initiative appears unlikely to elicit serious governmental opposition. In fact, several governments have already moved in that direction on an informal basis, whereas others have also moved on the statutory front.

(e) In the case of those governments which have already moved in this direction informally, the governments are acting essentially without the benefit of statutory authority. This does nothing for the comfort level of the officials involved. Furthermore, such initiatives are subject to reversal in the event of a change of policy.

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. The preferable course to follow would be to recommend that each province and territory put the conservation of such lands on an equal footing with its most preferred category of property. That would allow each government to use whatever devices it already feels comfortable with: that would appear, at this time, to be the "path of least resistance".

Among the various models available, the notion of provincial rebates has intellectual appeal because it does not "discriminate" against those municipalities with a large proportion of wetlands 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, of course, because those municipalities were seldom collecting significant taxes on those wetlands in the first place, and, hence, the "damage" of any wetlands-related initiative would be extremely low; but in

45. s. 49 (1)(d).

politics, "perception is reality". An extension of the rebate system, along lines similar to Ontario's Untaxing Nature initiative, would appear to be an appropriate course to follow, among those jurisdictions which already have (or are already considering) rebate programs. However, where a jurisdiction already has an alternative set of incentives for other kinds of property, the easier path would be to merely build upon that other set of incentives.

One feature which appears particularly 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 seems more acceptable from the standpoint of fiscal equity: an owner should not enjoy preferential treatment if he/she intends to undo the work for which the treatment has been provided.

Based upon the above, this paper submits the following recommendations:

Recommendation No. 6: All provinces and territories should be encouraged to amend their property tax assessment/collection legislation, to make specific reference to conservation of ecologically sensitive lands.

Recommendation No. 7: Those references should put ecologically sensitive lands on a par with whatever other private or charitable lands enjoy most-favoured status. The exact mechanism in doing so should correspond to the jurisdiction's established practice for other most-favoured properties.

Recommendation No. 8: The legislation should provide for a tax clawback on conversion of the property.

Summary of Recommendations

Recommendation No. 1: The legal fiction which attributes deemed capital gains (and potential deemed capital gains tax) to donations of ecologically sensitive real estate should be abolished.

Recommendation No. 2: The ceiling on deductible charitable expenditures (20% of income) should be lifted. Business expenditures have no such ceiling; and there is no policy reason why altruistic donations should be treated less favourably than business expenditures. If the Government of Canada insists on retaining a ceiling, then the ceiling should be the same as in the case of donations to senior governments (100% of income).

Recommendation No. 3: The tax treatment of donations of Canada's natural heritage should be no worse than that now enjoyed by donations of Canada's cultural heritage.

Recommendation No. 4: Charitable donations of covenants or easements, for the protection of ecologically sensitive lands, should not be subject to deemed capital gains or a 20% income limitation, any more than donations of other interests in ecologically sensitive lands.

Recommendation No. 5: Purchases of protective covenants and easements by environmental charities may continue to be subject to GST but should not otherwise trigger tax liabilities such as on deemed capital gains.

Recommendation No. 6: All provinces and territories should be encouraged to amend their property tax assessment/collection legislation, to make specific reference to conservation of ecologically sensitive lands.

Recommendation No. 7: Those references should put ecologically sensitive lands on a par with whatever other private or charitable lands enjoy most-favoured status. The exact mechanism in doing so should correspond to the jurisdiction's established practice for other most-favoured properties.

Recommendation No. 8: The legislation should provide for a tax clawback on conversion of the property.

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Photo: K. Cox

Conserving habitat has become a national priority for all Canadians.

Appendices

A. Tax Treatment of Donations of Cultural and Natural Heritage

B. Four Ontario Property Tax Case Studies

Appendix A

Tax Treatment of Donations of Cultural and Natural Heritage [46]

A detailed series of calculations which illustrate the income tax treatment of donations of ecologically sensitive lands as compared with cultural property are summarized below.

Calculation No. 1 explains the tax implications of a single donation of natural heritage by an individual to a registered charity. This individual has a taxable income of approximately $50 000 a year and owns land which if gifted is subject to capital gains tax. The example currently values the property at about $600 000 leaving the owner with a capital gain of approximately $500 000. The total tax payable for this particular individual making $50 000 a year is $144 449. This example illustrates that, in situations where we have a landowner interested in conservation that is land rich and cash poor, their generous contribution to Canada's natural heritage would be rewarded with a tax bill of $144 000; hardly incentive for private landowners to be induced to protect Canada's important natural heritage through donation of conservation easement or fee title to a registered charity.

Calculation No. 2 features the donation of natural heritage by an individual to government. In this example, the landowner has a similar taxable income of $50 000 and, for ease of comparison, the capital gain and value of donation are the same. In this instance, however, where the donation is to government, the landowner pays no tax for the first three years and minimal tax for the fourth year. This indicates to a landowner that if any donation is to be made when comparing it to the tax liability of donating to a registered charity that they should look very seriously at donating natural heritage to the government.

While there is a long list of successful government initiatives to protect Canada's natural heritage, given the rate at which biologically important private lands continue to be transformed, one is reminded of a quote from the President's Council on Environmental Quality as noted in the Stanford *Environmental Law Journal*. It is as follows: "It is neither possible nor desirable that the government own all of the land, or protect all of the nation's natural and environmental diversity. Shifting economic priorities, government deficits, and greater demands for a lessening of the tax burden of the private sector all suggest that the primary reliance upon the public sector to protect and preserve the country's natural resources will no longer be sufficient to the task. We have to rely heavily on private landowners and organizations to play a greater and greater role in protecting these resources".

Calculation No. 3 is the election to select proceeds of disposition on gifting of natural heritage to a registered charity. In this example, the amount of the donation is artificially reduced in value ignoring the current market value of the property so as to minimize the tax implications of such a donation. In this instance, as outlined in point six of the introduction to the four calculations below, the amount of the donation is deemed to be $100 000 which in fact is the same value as the adjusted cost base. This alternative allows a registered charity to mitigate the tax liability for a landowner wishing to donate important natural heritage; however, this does not compare with the far more beneficial tax treatment of land donated directly to the Crown or the more favourable tax treatment received by art.

46. The case studies in Appendix A were computed by tax lawyers in a prominent law firm in Western Canada on behalf of a private client. This writer has been advised in writing that these materials may be reproduced herewith, since the consent of the client has been obtained. However, the law firm has not been given authorization to disclose further information than that which is presented here.

Calculation No. 4 is an example of an equivalent donation of movable cultural property, i.e. art by an individual to a designated institution. One look at this example would readily indicate that art seems to be given far higher priority for conservation than does natural heritage and yet many of our great works of art have been inspired by our natural heritage. To illustrate this point, consider an example wherein the owner of a painting of an endangered species is donating this painting to a designated institution. This donation would be subject to no capital gain tax and would pay no income tax for a minimum of five years. If, however, this landowner were in possession of the last square mile in Canada that was home to this endangered species and wished to donate this section to a registered charity, the charity could in fact bankrupt the landowner in the case of Calculation No. 1 by accepting the donation, or in the case of Calculation No. 3, minimize the tax that they would pay but only make it marginally beneficial.

Income Tax Consequences for Donations of Heritage

Introduction

The four calculations below outline the general tax consequences of a donation of land by an individual. The following facts have been assumed in each of the examples.

1. The land has a present fair market value of $600 000 and an adjusted cost base (tax cost) of $100 000.
2. The individual donor earned other income in the year of the donation of $50 000 and the annual income of the donor will increase by $5 000 in each year after the year in which the donation is made.
3. The donor has no other capital gains and has no other charitable or other deductions or credits in the year of the donation and subsequent years.
4. The donor has utilized his or her lifetime capital gain exemption.
5. The individual is taxable at the maximum federal rate of 29% per annum and this rate will continue during the carry forward period of the donation. Provincial tax has been calculated at the rate of 46.5% of federal tax.
6. Surtax has not been included.

The following calculations are relevant to each of the examples:

Total Taxable Income =
Taxable Capital Gain + Other Taxable Income

Capital Gain =
Fair market value of property disposed adjusted cost base of property

Taxable Capital Gain =
75% of Capital Gain

Federal Tax Donation Credit =
29% of lesser of: (i) the amount of gift (ii) 20% of income earned in any year

Net Federal Tax =
Federal Tax – Federal Tax Donation Credit

Total Tax =
Net Federal Tax + Provincial Tax

Calculation No. 1: Single Donation of Natural Heritage by an Individual to Registered Charity

This calculation outlines the tax consequences of an individual making a single donation of land. Such a donation results in a large increase in income and income tax liability in the vein in which the donation is made, which is significantly greater than the deductions for the donation (because of the 20% income limitation; see 7(ii) below). Under these circumstances, only $43 500 of the $600 000 donation is used as a deduction due to the 20% of income limitation. It should be noted, however, that if income in the years subsequent to the donation was higher than has been assumed, a greater portion of the donation could be claimed as a deduction.

	Year of Donation	Carry Forward Period				
	1990	1991	1992	1993	1994	1995
1. Capital Gain	$500 000	NIL	NIL	NIL	NIL	NIL
2. Taxable Capital Gain	375 000	NIL	NIL	NIL	NIL	NIL
3. Other Taxable Income	50 000	55 000	60 000	65 000	70 000	75 000
4. Total Taxable Income	425 000	55 000	60 000	65 000	70 000	75 000
5. Federal Tax (29%)	123 250	15 950	17 400	18 350	20 300	21 750
6. Amount of Donation	600 000	NIL	NIL	NIL	NIL	NIL
7. Federal Tax Donation Credit 29% x lesser of: (i) gift ($600 000) (ii) (20% of income per year)	(24 650)	(3 190)	(3 480)	(3 770)	(4 060)	(4 350)
8. Net Federal Tax	98 600	12 760	13 920	15 000	16 240	17 400
9. Provincial Tax	45 849	5 933	6 473	7 012	7 552	8 091
10. Total Tax	144 449	18 693	20 393	22 092	23 792	25 491

Table A-1: Calculations for a Single Donation of Land to a Charity

Calculation No. 2: Donation of Natural Heritage by Individual to Government

A second alternative is to make the donation to the Crown, which will have the same general consequences described in Calculation No. 1. However, unlike a donation to a charity, there is no 20% income limitation on the amount of credit which can be claimed in any year. Accordingly, the entire donation can be used as a deduction if there is sufficient income. If it is a gift of qualified property (such as land which is capital property), the donor can select the amount of the proceeds of disposition (within limits), which amount will constitute the amount of the donation (see Calculation No. 3).

	Year of Donation	Carry Forward Period				
	1990	1991	1992	1993	1994	1995
1. Capital Gain	$500 000	NIL	NIL	NIL	NIL	NIL
2. Taxable Capital Gain	375 000	NIL	NIL	NIL	NIL	NIL
3. Other Taxable Income	50 000	55 000	60 000	65 000	70 000	75 000
4. Total Taxable Income	425 000	55 000	60 000	65 000	70 000	75 000
5. Federal Tax (29%)	123 250	15 950	17 400	18 850	20 300	21 750
6. Amount of Donation	600 000	NIL	NIL	NIL	NIL	NIL
7. Federal Tax Donation Credit: 29% of donation to a maximum of income until the entire donation is used	(123 250)	(15 950)	(17 400)	(17 400)	NIL	NIL
8. Net Federal Tax	NIL	NIL	NIL	1 450	20 300	21 750
9. Provincial Tax	NIL	NIL	NIL	674	9 440	10 114
10. Total Tax	NIL	NIL	NIL	2 124	29 740	31 864

Table A-2: Calculations for a Donation to the Government

Calculation No. 3: Election to Select Proceeds of Disposition on Gifting of Natural Heritage to Registered Charity

Under section 118.1 of the *Income Tax Act,* an individual donor can agree with the registered charity as to the proceeds of disposition for a gift of capital property within certain limits. If the proceeds of disposition are chosen to equal the adjusted cost base of the property, no capital gain for the donation will result. The amount selected as the deemed proceeds will also constitute the amount of the donation.

The following example assumed a gift to a registered charity and that the parties elected to have the proceeds of its disposition be $100 000, equalling the adjusted cost base (tax cost) of the property. Accordingly, there is a significant decrease in tax paid in the year of the donation from the previous calculations and a decrease in the amount of deduction available to offset income. Again, due to the 20% income limitation, very little of the donation is utilized as a credit in this example.

	Year of Donation	Carry Forward Period				
	1990	1991	1992	1993	1994	1995
1. Capital Gain	NIL	NIL	NIL	NIL	NIL	NIL
2. Taxable Capital Gain	NIL	NIL	NIL	NIL	NIL	NIL
3. Other Taxable Income	50 000	55 000	60 000	65 000	70 000	75 000
4. Total Taxable Income	50 000	55 000	60 000	65 000	70 000	75 000
5. Federal Tax	14 500	15 950	17 400	18 850	20 300	21 750
6. Amount of Donation	100 000	NIL	NIL	NIL	NIL	NIL
7. Federal Tax Donation Credit 29% x lesser of: (i) gift ($600 000) (ii) (20% of income per year)	(2 900)	(3 190)	(3 480)	(3 770)	(4 050)	(4 350)
8. Net Federal Tax	11 600	12 760	13 920	15 080	16 240	17 400
9. Provincial Tax	5 394	5 933	6 473	7 012	7 552	8 091
10. Total Tax	16 994	18 693	20 393	22 092	23 792	25 491

Table A-3: Calculations for a Donation to a Charity with Election on Proceeds of Disposition

Calculation No. 4: Equivalent Donation of Movable Cultural Heritage by an Individual to a Designated Institution

Under subsections 118.1(1) and (3) of the *Income Tax Act*, a donation of cultural property such as art to a designated institution results in no taxable capital gain to the donation. As well, there is also no restriction in the amount of gift to be used as a credit. Accordingly, while the amount of donation is unaffected, there is no increased income or tax payable as a result of the disposition. This results in significant tax savings for the entire five-year period for the donation.

	Year of Donation	Carry Forward Period				
	1990	1991	1992	1993	1994	1995
1. Capital Gain	NIL	NIL	NIL	NIL	NIL	NIL
2. Taxable Capital Gain	NIL	NIL	NIL	NIL	NIL	NIL
3. Other Taxable Income	50 000	55 000	60 000	65 000	70 000	75 000
4. Total Taxable Income	50 000	55 000	60 000	65 000	70 000	75 000
5. Amount of Donation	600 000	NIL	NIL	NIL	NIL	NIL
6. Federal Tax (29%)	14 500	15 950	17 400	18 850	20 300	21 750
7. Federal Tax Donation Credit	(14 500)	(15 950)	(17 400)	(18 850)	(20 300)	(21 750)
8. Net Federal Tax	NIL	NIL	NIL	NIL	NIL	NIL
9. Provincial Tax	NIL	NIL	NIL	NIL	NIL	NIL
10. Total Tax	NIL	NIL	NIL	NIL	NIL	NIL

Table A-4: Calculations for a Donation to a Designated Institution

Appendix B

Four Ontario Property Tax Case Studies

The following four case studies are reproduced, by permission, from the lucid paper prepared by Ionson (1988). They are not 100% typical; on the contrary, Ionson chose four cases in which the property tax system had gone somewhat astray, in her view. These cases illustrate the need which existed for an initiative such as "untaxing nature", and perhaps today would be treated differently under the Conservation Land Tax Reduction Program.

Case Study No. 1:

This case study involves a forested area not far from Toronto, near Highway 404 and Woodbine Avenue.

The owner of this property wishes to maintain it as a natural area as long as he lives; however, the rising taxes on the land in conjunction with his limited pension income are causing him concern. He has appealed the assessment and written letters to various government officials, including the Premier of the province, all to no avail. He has said that he may soon be forced to sell the property because he cannot afford to pay the increasing taxes. Estate residential development will likely result as much of the surrounding land use is of this type. The present assessed value of the property stands at $36 895. It is assessed as residential land and is billed for garbage pick-up. The increase in taxes over time is outlined in Table B-1.

The owner feels that the tax system is penalizing him for holding vacant, non-productive land, even though this land is a beautiful natural area, supporting many species of plant and animal life. It is doubtful even that the Federation of Ontario Naturalists (FON) could accept a donation of this land, as the annual tax on this land would represent 38% of the total taxes paid on the 13 nature reserves presently owned by the FON. The owner receives the Managed Forest Tax Rebate on the forested portion of his property, but this must be declared as income for income tax purposes and does not provide enough economic incentive for the owner. He feels that regardless of the rebate, the taxes levied on the property are too high for him to maintain it in an undisturbed state. Thus, the recently announced Conservation Lands Rebate Program would not act as an incentive to this natural area owner to maintain his natural area in an undisturbed state.

It appears that in this case the problem lies with the assessment class of the property. There is no doubt that the property is worth over $36 000 as a residential property, given its prime location and size and apparent value of the estate

Year	Taxes ($)*	
1962	60	
1976	175	market value reassessment
1978	1 040	
1979	1 106	
1980	1 186	
1981	1 838	
1982	2 037	decline due to lower mill rate
1983	1 964	
1984	2 102	
1985	2 296	
1986	2 432	

*Information supplied by owner

Table B-1: Taxes Over Time on Case Study No. 1 Land

residential properties in the area. However, it is not yet a residential property, and if the owner had his way, it never would be. If an assessment class existed for significant natural areas, the owner would not likely be forced to sell. If the property could be assessed at its "value in natural area use" versus its fair market value, the FON could likely afford to add it to its roster of nature reserves and make it available to Torontonians wishing to visit a natural area close to home. Farmland in Ontario is assessed at its "value in farming use" in order to allow farmers to continue their business, regardless of how land values and corresponding taxes are rising around them. It has been suggested that natural area owners receive the same consideration.

Case Study No. 2:

The second case study involves a 20 ha (50 acre) parcel in Kent County, Dover Township, Ontario. This property lies to the east of Lake St. Clair, and forms part of the Lake St. Clair marshes complex (this is one of 36 Carolinian Canada sites). It is approximately 20 km southwest of the City of Chatham. This privately owned marshland is surrounded by cash crop agriculture characteristic of Kent County.

The 17 ha (43 acre) marsh (excluding dikes) was created in 1984 with the help of Ducks Unlimited Canada. Before this time, the property was used for agricultural crop production, generally corn. The zoning of the property remained agricultural but the assessment class changed from agricultural to residential when the marsh was created. This was coincidental to market value assessment implementation in the township in 1984. Other marshes which had existed in the area for 35 years as wetlands had their assessment classes changed from agricultural to residential at that time. This is because marshland is considered recreational land which is included in the residential assessment class. The assessed value of the 43 acre marsh rose from $945 to $2 520, an increase of 267%. Some of this increase is due to the fact that the residential class factor is 4.5% and the agricultural class factor is 2.1% (the class factor is multiplied by market value to arrive at the assessed value on which taxes are levied). The change from classification as agricultural to residential would itself result in an increase in assessed value of 214%. The owner appealed his assessment in June of 1985, but was told that because the marsh was man-made and controlled, he must pay the assessed taxes. The owner feels that the provincial government sees his marsh as a private luxury which he should expect to pay higher taxes on. The increase in taxes on the 43 acres as a result of reassessment in 1984 was $436.30 (an 80% increase).

The natural significance of the Lake St. Clair Marshes cannot be overstated. It has been estimated that in Dover Township, only about 10% of the original wetland area remains. The Lake St. Clair Marshes rank second only to the Long Point Marshes of Lake Erie as the most important waterfowl staging areas in Southern Ontario during migration. Marshlands themselves, as a specific wetland type, are generally rare throughout the province. Identification of this area as a Carolinian Canada site indicates significance on a national scale.

The owner of the parcel estimates that the revenue produced on this land is approximately the same, whether it is used as marshland, or as farmland ($175 to $200 per acre). Revenue from the marshland comes from fees charged to hunters during waterfowl hunting season and muskrat pelts. Annual revenues on the parcel thus range from $7 525 to $8 600 (calculated on the 43 acres of marshland). Estimated maintenance costs range from $6 000 to $7 000 per year,

netting the owner approximately $1 500. After property taxes, the owner is left with about $500. The owner says that if he was not as committed to waterfowl production as he is, the logical move would be to return the land to agricultural production. Within two years, a good crop could be produced, with much-reduced taxes and a possible 60% rebate. It is only due to the fact that the owner is a manager of many of the marshes in the area (his full-time occupation) that he is willing to maintain his marshland. The classification of marshland, which is zoned agricultural with no provision for erection of a residence, as residential for assessment purposes is clearly illogical. The need for a different assessment class for natural areas is clearly illustrated in this case.

This case study has explored the situation revealed in the survey where an owner disagreed with the residential assessment class of his/her property because of physical limitations for residential development. In this case, restrictive zoning made the assessment class even more inappropriate.

Case Study No. 3:

The Toronto Field Naturalists' Club owns a 35 ha (87 acre) parcel of forested wetland in Uxbridge Township, Region of Durham, Ontario. It was purchased in the 1970 to 1973 period and has been maintained as a nature reserve. It functions as a wildlife sanctuary, a corridor for migrant species and helps to protect the quality and quantity of water in the Uxbridge Brook.

Naturalists' clubs in Ontario are subject to the same treatment by the tax system as are private individuals. This floodplain property is classed as residential land for assessment purposes, with a market value assessment of $73 000. The 1985 taxes levied on the nature reserve were $1 181.60. The Club has protested the assessment classification of the property because it does not recognize the environmentally sound land use to which the property is being put. Also, they state that, in their opinion, "... existing tax rules are a major cause of the environmental degradation we see daily. Landowners can eventually be forced to damage the environment to pay the taxes (i.e. fill the swamp to form a building site in order to pay the taxes or even a field)."

The Toronto Field Naturalists' Club receives the Managed Forest Tax Rebate (amounting to $659.05 on the 82 acres) but still protests the assessment classification of its nature reserve property. This may be another situation where the Conservation Lands Tax Rebate, if it does apply to this land, may not adequately address the inequity natural area owners feel exists in the assessment system. It seems "unfair" that organizations such as the Boy and Girl Scouts and the Red Cross are property tax exempt while naturalists' clubs are not. By maintaining nature reserves, it can be argued that naturalists' clubs are taking action in the long-term interest of the public but this is not recognized in the tax system. The holding of vacant land, no matter for what purpose or what its natural significance, is penalized by assessment as residential property.

Case Study No. 4:

This case study involves property on the northeast shore of Lake Erie, Ontario and is perhaps the most dramatic of the case studies presented here. The property studied is made up of eight separate parcels, totalling over 90 ha (223 acres). The owner is a retired orthopaedic surgeon who resides in Buffalo, New York, but who spends his summers at his property on Point Abino, Ontario. Point Abino is in the Region of Niagara and the property is within the limits of the town of Fort Erie, Township of Bertie. The devel-

opment in the area is summer resort houses, many of them owned by American citizens.

The property is within the Carolinian Canada site known as the Point Abino Sandland Forest, which is also designated as an Ontario Ministry of Natural Resources (OMNR) Area of Natural Significance (ANSI). This property has been an intensively studied part of the ANSI over the past two decades. In 1969, Shan Walshe of the University of Toronto completed an International Biological Program (IBP) checksheet for UNESCO. In 1970, Gus Yaki of the Toronto Field Naturalists did a floristic survey of the property. In the 1970s, Craig Campbell of the University of Waterloo studied the Hop-Nosed Snake and Fowler's Toad found on the property, living in a cabin as the guest of the owner. In 1976, Ian MacDonald did a vegetative survey as part of the ANSI program for the OMNR.

The north half of the property is wet pastureland and vacant land which had been topsoiled (i.e. the topsoil was removed, leaving bare bedrock) by the previous owner. The south half of the property is composed of an amazingly diverse grouping of vegetative communities. The first community, on the steep, lakeward side of the dune is composed of white cedar, red cedar, common juniper, hoptree, and red oak. This community is under a great deal of stress due to erosion in the area. On top of the dune, a red oak, sugar maple, hemlock community is found. The third community on the flat, moist land to the north of the dune is composed of yellow birch and silver maple. The northern edge of the woods, to the south of the wet pasture land is quite wet and the vegetation there is dominated by silver maple and black ash. In the low depressions in the dune, red oak, silver maple, tulip tree and bladdernut are found. Walshe in his 1969 IBP survey had this to say about the property, "...[it] offers a great diversity of plant communities in a relatively small area... also contains an excellent example of a yellow birch forest (nothing better was seen during a whole summer of searching in Algonquin Park)."

In 1970, the Ontario Department of Lands and Forests (now OMNR) was planning to expropriate the property to be used as a public beach and campground area. The owner and many concerned naturalists opposed the expropriation on the grounds that public use of the sensitive dunes and beach area would cause erosion and sand blow-outs. The owner won the fight against expropriation and today, Tom Beechey, the life science specialist in the Parks Branch of the OMNR says that the owner represents, "...a classic example of private stewardship."

The property is comprised of eight parcels, three of which are zoned hazard land and the remaining five are zoned rural (see Table B-2). Under the municipal zoning by-law, uses allowed in the hazard zone include: agriculture, parks, playgrounds, tennis courts, lawn bowling greens, picnic areas, and boat-launching ramps. New dwellings are not allowed. Uses allowed in the rural zone include: all agricultural uses, a one-family dwelling on one lot, and a few miscellaneous home occupations.

One of the parcels is classed as farmland for assessment purposes and the other seven are classed as recreational or rural development units, which are subclasses of the residential assessment class. The taxes on these parcels of land have increased by 111%, or more than doubled from 1979 to 1986, so that the total taxes in 1986 were $12 592.04. The assessment of these parcels has not changed over that time period.

In 1979, the owner appealed the assessment of all parcels except the farm parcel before the Assessment Review Court. The grounds for appeal on parcel Nos. 1, 2, 4 and 5 was "limited use due to restriction". Parcel Nos. 1, 2, and 4 are zoned hazard land and No. 5 is a small triangular slice of land. Assessment informa-

tion was requested for parcel No. 6 and the grounds for appeal on parcel Nos. 7 and 9 were that the assessment was too high. The owner lost all appeals and the assessment remained unchanged.

The tax per acre is highest on parcel Nos. 2 and 4 (it is also high on parcel No. 1, but an accurate acreage value is not available). Both parcel Nos. 2 and 4 are zoned hazard land by the municipality, thus development of the land is extremely limited. The owner recognizes that the sand dunes and shoreline of these parcels are extremely sensitive to disturbance and wants only to see the area maintained in its present natural state. His argument is not with the hazard zoning of the land, but with the high levels of assessment and taxation of the land which do not take into consideration the restrictions on development of the land, nor its natural significance. The parcel No. 1 lots are barely 9 m (30 feet) deep due to erosion and high water levels, yet, the assessment and taxes on this land are over twice that of the 40 ha (98 acres) of farmland.

It is obvious that because parcel Nos. 1, 2, and 4 are close to the water, they are assessed as being worth more than the parcels further from the water (such as No. 7). The Assessment Program Policy Manual gives the assessor guidance as to what increase in value occurs as property gets closer and closer to a body of water. Because property further to the east, along Point Abino is high-value summer home development, the market value of the waterfront parcels is correspondingly high. However, the owner contends, this does not take into account that the present zoning of these parcels prohibit him from developing them. He feels that in return for maintaining a part of Ontario's natural heritage, which he is willing to share with others, he is penalized by the tax system which does not recognize this.

Parcel	Description	Zoning	Assessment Class	Size (Acres)	1976 Assessment ($)	1979 Taxes ($)	1986 Taxes ($)	1986 Tax/Acre ($)
1.	7 waterlots	11 (hazard)	REC	0	15 700.00	1 643.49	3 469.86	N/A
2.	log cabin	11	RDU	6.09	3 425.00	358.52	756.96	124.30
3.	farm/residence	A1 (rural)	FARM	97.95	7 300.00	764.17	1 613.37	16.47
4.	waterfront	11	REC	6.62	22 650.00	2 371.00	5 005.88	756.18
5.	small slice	A1	REC	2.90	300.00	31.40	66.30	22.86
6.	topsoil removed	A1	REC	38.06	1 900.00	198.90	419.92	11.03
7.	behind waterfront	A1	REC	63.88	5 300.00	544.81	1 171.35	18.34
8.	topsoil removed	A1	REC	8.25	400.00	41.87	88.40	10.72
Total				223.75		5 954.16	12 592.04	

Table B-2: Assessment and Taxation of Case Study No. 4 Property

This case study illustrates the situation which arose in the survey where property has physical limitations for residential use, yet was assessed as residential land. It also illustrates the discrepancy between land classed as farmland by the assessment system, and vacant land classes as residential. It also shows a situation where land is zoned to reflect its "best use" being its natural state, but where the assessment system cannot accommodate this situation.

Discussion

In all four Ontario case studies, the natural area land is classed as residential land for assessment purposes, but no buildings are on the land. (Case Study No. 1 is a vacant woodlot, No. 2 is a marsh, No. 3 is a floodplain, and No. 4 is a sandland forest). A further injustice is perceived by the owner of the marsh in Case Study No. 2. On his marsh, there is physically no possibility of building a house on the property, as long as it is a marsh, and further, the agricultural zoning on the property prohibits residential development. A similar situation exists for the owner in Case Study No. 4, because much of his property which is assessed as residential land is zoned hazard land, with no provision for residential development. The case studies reveal the large extent to which the assessment system encourages the development of unused land, even when the land use planning system is regulating to minimize development.

The actual amount of natural area land which is classed as residential land (approximately 50% in the survey) is a surprising result. All the natural areas surveyed are in urban fringe or rural areas, and it might be expected that a larger proportion of them would be assessed as farm properties are likely rural estate-type properties, but conversely, a large proportion of them (20%) are vacant, recreational land. Any change to the tax system to promote natural area protection should distinguish between the two types of residentially assessed natural area property. This is because the residential assessment of natural area properties that are in residential use may be appropriate, while that of natural area properties which are not in residential use and some of which may never be able to be used residentially may not be appropriate.

An interesting result is the large proportion of owners of farm assessed property who disagree with the farm class of their property (24%). One would think that because of the reduced taxes on farm properties, owners of these properties would be satisfied with the assessment class of their properties. It is interesting that the prime reason for disagreeing with the assessment class of property was similar for both agricultural and residential lands. The reason given most often was that the land is either not suitable for, or has limitations for use as what the assessment class is. Taxpayers do not appear to be satisfied with how market value assessment deals with this situation. It does not appear that the assessor takes into account the difficulty, expense, or even impossibility of developing the land for the assessment class use.

Once again, this is clearly the situation in Case Study Nos. 2 and 4. Not only do these properties have physical limitations for residential development, but the zoning in place prohibits residential development. One could perhaps argue that the possibility exists for rezoning to allow residential use in the future. However, what if this does not happen? What does the owner do to recuperate taxes foregone?

An additional finding regarding rural property assessment is that there appears to be a very low awareness of the farm forestry exemption feature of farm assessment. One would not really expect residential class property owners to be aware

of the exemption. However, the farmland owners also appeared to be ignorant of an exemption which they likely receive. Only 38.5% of the agricultural assessed owners knew about the exemption. Given that all of them own part of a natural area, most of them likely receive the farm forestry exemption. Perhaps this result is not that surprising, given that the exemption does not appear on the tax form. It does seem illogical to give the exemption to promote or make it possible for the farmland owner to maintain 10% of the farm as woodland, and not inform him or her of the exemption. When it is considered that only 38.5% of the farm assessed owners knew of the exemption, it is quite remarkable that 31.5% of the residential assessed owners are aware of it. Perhaps this is because the residential class owners are aware of all the advantages given to farm class properties (value-in use assessment, 60% rebate, and farm forestry exemption). It seems that the intent of the farm forestry exemption, to influence farm owners to maintain a woodlot, cannot be realized, due to its lack of publicity.

Sustaining Wetlands Issues Paper Series

Paper No. 1992-1. *Wetland Evaluation Guide. Final Report of the Wetlands are Not Wastelands Project.* By W.K. Bond, K.W. Cox, T. Heberlein, E.W. Manning, D.R. Witty, and D.A. Young. Published in partnership with Wildlife Habitat Canada and the Canadian Wildlife Service, Environment Canada. 121 p.

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