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# CONSERVATION EASEMENTS, COVENANTS AND SERVITUDES IN CANADA

*A Legal Review*

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AND SERVITUDES IN CANADA**

*A Legal Review*

Judy Atkins  
Ann Hillyer  
Arlene Kwasniak

Report No. 04-1  
North American Wetlands  
Conservation Council (Canada)

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## FOREWORD

There has been a dramatic increase during the last decade in the role of legislative tools to facilitate action by private individual and corporate landowners in Canada. An array of easements, covenants, servitudes and similar tools now exist or are being considered in almost all jurisdictions in our nation. These tools allow the private and corporate landowner to engage in conservation of ecologically sensitive lands and to promote landscape conservation. These efforts are part of the growing support for land stewardship through an array of initiatives based on a national environmental ethic. This ethic is exemplified in *Canada's Stewardship Agenda*, endorsed by federal, provincial and territorial resource ministers in the fall of 2002.

Canadians from all walks of life and sectors of our economy share a common vision of supporting protection of our land, water and air resources. They recognize, when working in their community and contributing through voluntary and incentive-based programs, that their time and personal resources can make a difference. One way to do this is through the use of conservation instruments tied to their ownership and use of private lands in Canada. The growth of national and local non-government organizations and provincial watershed or conservation authorities supports this. They are actively implementing and using these conservation tools in all our provinces and territories.

This publication enhances our national knowledge-base on landscape conservation. Following the first publication on this subject entitled *Land, Law and Wildlife Conservation: The Role and Use of Conservation Easements and Covenants in Canada* (Trombetti and Cox 1990), the North American Wetlands Conservation Council (Canada) published a more comprehensive review entitled *Canadian Legislation for Conservation Covenants, Easements and Servitudes: The Current Situation* (Silver, Attridge, MacRae and Cox 1995). It reviewed the role of partial interests in land to support environmental conservation in each province and territory. At that time, the Governments of Canada and Quebec through their respective income tax acts had only recently introduced tax-based incentives to promote ecological gifts. Much has changed since then. The number of local land trusts has increased greatly. Major new stewardship programs, the federal *Species At Risk Act* and many additional pieces of supporting provincial legislation have been created. Half of the \$70 million in charitable donations in the nine years of Environment Canada's Ecological Gifts Program have been conservation instruments. And we are just getting started!

This past year has seen several national conferences on environmental stewardship and conservation. They focused on watersheds and coastal zones, wetlands and broadly-based stewardship in the public and private sectors. It thus is timely and

appropriate that this fully updated and expanded report entitled *Conservation Easements, Covenants and Servitudes in Canada: A Legal Review* should now be published. The Canadian conservation community will welcome this effort with thanks not only to its authors, Judy Atkins, Ann Hillyer and Arlene Kwasniak, but also to its sponsor, Environment Canada.

Kenneth W. Cox  
Executive Secretary  
Secretariat,  
North American Bird Conservation Initiative and  
North American Wetlands Conservation Council (Canada)

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Special thanks go to Annie Gariépy of the Quebec Environmental Law Centre for reviewing sections related to civil law and Quebec legislation. Readers are encouraged to contact the Centre for further information (Centre québécois du droit de l'environnement/ Quebec Environmental Law Centre, Telephone: (514) 861-7022, [www.cqde.org](http://www.cqde.org)).

We would also like to thank the regional coordinators of the Ecological Gifts Program for reviewing and commenting on portions of the report: Blair Hammond, Ron Bennett, Ron Bazin, Pat Rakowski, Graham Bryan, Lesley Dunn, Paul Chamberland, and Renée Langevin.

We thank the North American Wetlands Conservation Council (Canada) and Environment Canada for their generous support of this project.

The views expressed are those of the authors. Any errors and omissions are, of course, solely the responsibility of the authors.

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## INTRODUCTION

Although not a second edition, one of the purposes of this report is to update *Canadian Legislation for Conservation Covenants, Easements and Servitudes*.<sup>1</sup> The report was published in 1995 and reviewed the state of conservation easement, covenant and servitude legislation at the time. Since its publication there has been an increase in the use of statutorily-based easements and covenants for conservation purposes across Canada. More jurisdictions have introduced legislation enabling the use of such instruments specifically for conservation purposes and more covenants and easements have been placed on private land to conserve and protect open space and important ecological values on the land. During this same time, the federal and provincial governments have improved income tax benefits associated with private land protection.

The land trust movement has matured over this period and national stewardship conferences have created a forum for sharing stewardship experience and ideas, continuing education and developing calls for legislative and policy reform that will enhance the stewardship movement in Canada.

This report attempts to accomplish a number of tasks:

- First and foremost, it updates *Canadian Legislation for Conservation Covenants, Easements and Servitudes* and describes the legal basis for the use of conservation easements, covenants and servitudes in Canadian jurisdictions.
- It briefly examines some of the tax implications of entering into easements, covenants or servitudes.
- Like its predecessor, it addresses some of the challenges associated with drafting covenant or easement legislation. It also includes a section exploring issues related to drafting the easement, covenant or servitude documents themselves.
- It surveys some Canadian and American case law to help identify areas for improvement in both legislation and conservation agreement documents.

The authors owe a great debt to and have relied on *Canadian Legislation for Conservation Covenants, Easements and Servitudes* in preparing this updated report.

The law in this report is current to December 31, 2003.

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<sup>1</sup> Thea M. Silver, Ian C. Attridge, Maria MacRae, Kenneth W. Cox, *Canadian Legislation for Conservation Covenants, Easements and Servitudes: The Current Situation*, Report No. 95-1, Ottawa: North American Wetlands Conservation Council (Canada), 1995.





## **PART 1**

### **WHAT ARE CONSERVATION EASEMENTS, COVENANTS AND SERVITUDES?**

#### **Common law relating to easements, covenants and servitudes**

Easements, covenants and servitudes are instruments by which a landowner grants to another person rights with respect to that landowner's land. In common law jurisdictions in Canada (every province but Quebec), easements and covenants are authorized either by common law or statute. In Quebec, the *Civil Code of Quebec* makes provision for servitudes.<sup>2</sup>

In Canadian common law jurisdictions, private ownership of land means that the owner owns not the land itself but only a certain interest or estate in the land. In Canada, the land itself is owned by the Crown.<sup>3</sup> The concept of estates in land makes possible the fragmentation of ownership among different persons. The interest or estate associated with private ownership is the fee simple estate.

The fee simple estate consists of a "bundle of rights." An owner of the fee simple estate in land has the right to

- sell, mortgage, lease or will the estate;
- use, in accordance with prevailing laws, and occupy the land to the exclusion of others; and
- give away some of the rights that are connected to the fee simple estate, for example, by granting an easement, covenant or servitude.

Under common law, an easement is a right which an owner of land has to use someone else's land in a particular way, most commonly to cross over the neighbour's land to reach his or her own land. A common law easement is attached to the land which benefits from the easement, so it belongs to whoever owns that land.

A common law easement is enforceable by future owners of the land which benefits from the easement if it meets the following requirements:

- There must be two pieces of land, usually neighbouring or in close proximity to each other.

---

<sup>2</sup> *Civil Code of Quebec*, S.Q. 1991, c. 64, Book Four, Title Four, c. III.

<sup>3</sup> Subject to unextinguished aboriginal rights and title.

- The easement must benefit one piece of land and burden the other. The land burdened by the common law easement is called the servient tenement. The land which gets the benefit of the common law easement is called the dominant tenement. Therefore, if one landowner has the right to cross another landowner's property to reach his or her land, the first landowner's property is the dominant tenement and the second landowner's property (which the first landowner is entitled to cross) is the servient tenement.
- Each piece of land must be owned by a different person.

A common law covenant affecting land is a promise made by one landowner to a neighbouring landowner not to do certain things on his or her land, (for example, not to build on a certain part of the land). If a common law covenant meets certain requirements, it is enforceable by future owners of the land benefited by the covenant against future owners of the land burdened by the covenant. These common law requirements are:

- The covenant must be restrictive or negative in nature. It can require a landowner to refrain from some activity concerning the land but it cannot require the owner of the land burdened by the covenant to do something, such as pay money, build on the land or restore the land to its natural state.
- As with easements, there must be two pieces of property, usually neighbouring or in close proximity, owned by different owners, one benefited by the covenant and one burdened with it.
- The covenant must touch and concern the land that receives the benefit of the covenant. Essentially this means that the covenant must benefit the land, not just the owner of the land.
- The covenant must reflect an intention to annex the covenant to the land benefited by the covenant. This can be accomplished by language to that effect in the covenant document itself.
- As with easements, a purchaser of the property burdened by the covenant must have notice of the covenant in order to be bound by it. Provincial land registry systems generally provide a mechanism to give prospective purchasers notice of a covenant. In many jurisdictions, if a covenant is registered against title, a purchaser is deemed to have notice of the covenant, whether or not the purchaser has actual notice.

Non-statutory easements and covenants that meet the above requirements

- are interests in land and constitute real property,

- bind subsequent owners of the land burdened by the easement or covenant, and
- may be enforced by subsequent owners of the land benefited by the easement or covenant.

In the civil law of Quebec, a servitude is a charge or burden on one parcel of land for the benefit of another. It closely corresponds to an easement. The owner of the burdened land is required to tolerate certain acts of use by the owner of the land benefited from the servitude or abstain from exercising certain rights inherent in ownership.<sup>4</sup> There must be two parcels of land, one burdened by the servitude and one benefiting from it, and the parcels must have different owners.

Generally, obligations in a servitude must be negative. With respect to positive obligations, the Civil Code states:

An obligation to perform an act may be attached to a servitude and imposed on the owner of the servient land. The obligation is an accessory to the servitude and can only be stipulated for the service or exploitation of the immovable.<sup>5</sup>

Servitudes meeting all the requirements of the *Civil Code of Quebec*, including the requirements relating to registration of the interest in the appropriate land register, bind future owners of the burdened land and may be enforced by future owners of the land benefited by the servitude.<sup>6</sup>

In most Canadian jurisdictions, some of the restrictions have been removed by statute for covenants or easements entered into under statutory authority, for example, the requirement for two pieces of property owned by different owners, one property benefited by the covenant or easement, and one burdened by it, and the requirement that a covenant be restrictive or negative in nature.

### ***Discharging non-statutory easements, covenants and servitudes***

Under common law, an easement may be extinguished by

- operation of law (if the purpose or term of the easement comes to an end or if the easement and property burdened by the easement come to be owned by the same person),

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<sup>4</sup> *Civil Code of Quebec*, s. 1177.

<sup>5</sup> *Civil Code of Quebec*, s. 1178.

<sup>6</sup> *Civil Code of Quebec*, s. 1182.

- express release (for example, a written document releasing the easement), or
- implied release (such as actions indicating an intention by the owner of the dominant tenement to abandon the easement).

A restrictive covenant may be expressly released by the owner of the dominant tenement. A restrictive covenant will be presumed to have been released if there has been an open enjoyment of the land for many years inconsistent with the covenant. If a person entitled to the benefit of a covenant has acquiesced in a change of use of the land inconsistent with a restrictive covenant, the covenant will cease to be enforceable. In addition, a restrictive covenant may cease to be enforceable

- if the character of the neighbourhood has changed to such a degree to make enforcement useless, or
- if the original object of preserving the property can no longer be obtained.

These are all questions of fact for a court to decide.

A servitude may be extinguished in a number of ways including by both parcels of land affected by the servitude coming to be owned by the same person, by express renunciation of the servitude by the owner of the land benefited by the servitude, by the expiry of any term for which the servitude was established, by redemption and by non-use for ten years.<sup>7</sup>

In addition, jurisdictions generally will have statutory provisions permitting a landowner to apply to court to discharge a non-statutory covenant or easement from his or her land.

For example, the British Columbia *Property Law Act* (section 35) allows a person interested in land to apply to the court for an order to modify or cancel a variety of charges against land including easements, statutory rights of way, and restrictive or other covenants burdening the land. The court may allow an application to modify or cancel a charge if, among other things,

- changes in the character of the land, neighbourhood or other circumstances make the charge obsolete,
- the reasonable use of the land will be impeded, without practical benefit to others, if the charge is not modified or cancelled, or

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<sup>7</sup> *Civil Code of Quebec*, s. 1191.

- modification or cancellation will not injure the person entitled to the benefit of the charge.

### **What is a conservation easement?**

Most jurisdictions in Canada have made legislative provision for easements and covenants to be used for conservation purposes. A conservation easement or a conservation covenant is a particular kind of statutory instrument designed for conservation purposes and given legal authority to protect a range of ecological, cultural, heritage and other values, depending on the legislation.<sup>8</sup> Generally, conservation easements can be granted in favour of a conservancy organization as well as a government agency.

A conservation easement usually takes the form of a voluntary, written agreement between the landowner and an easement holder. It can cover all or part of a privately held parcel of property. In the agreement, the landowner promises to use the land in ways that are specified in the easement. For instance, the landowner might agree to provide specific protection for important habitat or agree not to subdivide the land. The easement holder holds the conservation easement and can enforce it if the owner does not abide by its terms.

The conservation easement is registered against title to the property which ensures that it binds future owners of the land, not just the current owner, since the conservation easement generally is intended to last permanently.

As the survey in this report indicates, some of the common law rules governing restrictive covenants and easements have been eliminated with respect to the conservation easements created under statutes in many jurisdictions. This is also true in Quebec where agreements authorized by the *Natural Heritage Conservation Act* are not subject to the requirements of servitudes. In addition, conservation easement legislation generally clarifies that easements under the legislation may be used for conservation purposes.

Overall, the changes have made these tools more flexible and allow them to be used in a broader range of circumstances. The rule that the owners of the dominant and servient tenements must be different persons generally has been abrogated by statute.<sup>9</sup> Generally, the holder of a statutory right of way, easement or covenant is not required to own any property in addition to the right of way, easement or covenant. Other restrictive rules governing what constitutes an easement or covenant have also

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<sup>8</sup> For ease of reference, the terms “conservation easement” and “easement” are used throughout this report to refer generically to conservation easements and conservation covenants and other statutorily-based conservation agreements, except where the context requires the use of a specific term.

<sup>9</sup> See, for example, the *Property Law Act* (B.C.), s. 18.

been relaxed. Statutorily-based covenants, easements and servitudes generally can include restrictions on land use and impose positive obligations on landowners.

In those jurisdictions in which conservation easement legislation has not been enacted, restrictions may still apply, requiring, for example, two adjacent or nearby pieces of property. A careful examination of the language in the statute is necessary to determine whether or not common law restrictions continue to apply.

### ***Application of conservation easements, covenants and servitudes***

Conservation easements, covenants and servitudes offer a cost effective alternative to purchasing land for the purposes of protecting its important features. This is because the owner of the land gives up some rights to the easement holder without the holder having to purchase the entire parcel of land from the owner. Like the land itself, conservation easements may be donated or sold.

The party that holds the interest created by the conservation easement agreement has the right to require the landowner to comply with the terms of the agreement document. This provides the means to ensure the protection that is described in the document is maintained permanently - or for the duration of the easement if it is not intended to last forever or, as is often said, "in perpetuity."

Depending on the legislative regime, the agreement embodying the conservation easement can be designed to protect or preserve a broad range of values by restricting some uses or activities and requiring other things to be done. These can include:

- preservation of identified conservation values;
- protection of habitat for plant and animal species, including rare and endangered species;
- maintenance of areas that have been restored due to past destructive land practices;
- requirements for protection and maintenance of historic structures;
- protection of scenic corridors or other aesthetic values;
- restrictions on types of industrial activities;
- restrictions on subdivision;
- specifications permitting some uses and prohibiting or limiting other uses;

- requirements for the management of forest land in accordance with specific forestry and conservation standards and practices;
- requirements for sustainable agricultural practices;
- restrictions on the use of pesticides;
- protection for areas adjacent to streams, lakes and other water bodies.

The specific terms and conditions in a conservation easement will depend on the relevant legislative provisions, the type of land, the values to be protected, the intentions of the parties, and the outcome of the negotiations between the parties to the agreement.

### **Benefits**

Generally, conservation easements, covenants and servitudes can be used in a wide range of circumstances. Since a conservation easement is a written agreement between the parties, subject to any applicable legislation, there is considerable

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flexibility in how the terms and conditions in the agreement are written. The easement can contain provisions designed specifically to address the particular needs of the land and the parties involved. A conservation easement is an effective tool because

- it can be individually tailored to address the particular ecological features or other assets or amenities of the land against which it is registered and the specific conservation objectives of the parties,
- a landowner can grant an easement protecting only those areas of the landowner's property with specific significance and can use the remainder of the property without restrictions,
- where easements can be held by non-government conservation organizations, these organizations can harness the considerable interest existing in communities in conserving many of the special spaces in their area, reducing some of the burden on government to conserve land,
- easements usually can be modified by the parties in the future to accommodate necessary changes,

- easements offer a cheaper option for land protection than buying the land outright,
- donations of easements on ecologically sensitive land may qualify as ecological gifts and be eligible for the increased tax benefits associated with ecological gifts.

## **Challenges**

Although the use of conservation easements to conserve and protect land offers a number of benefits, it also poses challenges. These instruments generally are intended to govern the use of land in perpetuity. This raises a number of challenges in drafting documents that will be effective today and in the future. Some of these are addressed in Part 7.

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In addition, it can take considerable financial and other resources to negotiate, complete, monitor, and, where necessary, enforce conservation easements. Easement holders must have the financial and human capacity to carry out these tasks over the long term.

A different set of challenges may arise with second and later generation landowners – landowners who did not willingly enter into the easement agreement but have acquired the land use restrictions when they acquired the land itself. While many second and later generation landowners may welcome the opportunity to participate in conservation of their land, others may be less enthusiastic. Good landowner contact and outreach programs can address these challenges. Again, however, effective contact programs will require financial and human resources.



## PART 2

### CONSERVATION EASEMENT, COVENANT AND SERVITUDE LEGISLATION IN CANADA

This part of the report identifies and describes the primary legislation, if any, in each jurisdiction in Canada that enables conservation easements to be registered against property. It also identifies and describes other legislation which enables easements, covenants or servitudes of some kind which may have an ancillary conservation purpose. In many jurisdictions, this other legislation is intended to preserve heritage sites.

Provincial and territorial legislation contemplates that conservation easements be registered or at least registrable at a land registration facility. In Canada, for all provinces except Quebec and for the

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*Some common law provinces have only deed registry systems, some only Torrens, some hybrid systems, and some are in a transition state from deed registries to Torrens.*

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territories, land registration systems are either deed registry based or Torrens based. Quebec's system is somewhat different because it is based on civil law, in contrast to common law. Some common law provinces have only deed registry systems, some only Torrens, some hybrid systems, and some are in a transition state from deed registries to Torrens. This introduction provides basic information on deed registries and Torrens based registries to help the reader appreciate circumstances regarding registration of a conservation easement in a given province or territory.

Deed registry systems are based on the English common law, as modified by legislation. Under a deed registry system, documents effecting transfers of interest in land are submitted to the registrar of deeds. There may be many deed registry offices in a province. For example, each of Nova Scotia's 18 land districts has its own deed registry. Usually a deed registrar will maintain a document for each parcel of land, sometimes called an "abstract of title," that consists of a list of other documents ("deeds") and events that set out dealings with the land, such as transfers, mortgages, leases, easements, restrictive covenants, and so on, over time.

Documents typically are registered by the name of the person claiming the interest. To ascertain the state of title to a parcel, a person interested in a parcel of land must conduct a search, either in person or through an agent, to gather information on the parcel. This may require examining decades' worth of papers, making additional inquiries, and piecing together how documents and other information relate to each other to establish state of title. Since, depending on legislation, registration of deeds in a province may not be required to maintain an interest in land, even after a title investigation actual state of title may be elusive.

By contrast, a Torrens based registry system is a land titles system. It records ownership and other property interests against a parcel of land, instead of in the name of the interest holder. Robert Torrens was an Australian politician responsible for this land reform system in the mid-1800s. Although western Canadian provinces adopted a Torrens system early on, other jurisdictions only fairly recently are making the transition. Under the Torrens system, there should be no need to search historic records to determine state of title. Subject to certain exceptions as set out in applicable legislation, or as established by case law, any person interested in a parcel can rely on a single title document to determine ownership and outstanding interests in a parcel of land, as well as which interests have priority over others. Copies of encumbrances and other interests noted on title normally may be obtained from the registry office.

A form of land titles system is used in the territories and all provinces from Manitoba west. New Brunswick has recently converted to a land titles system and Nova Scotia and Ontario are in the process of doing so. Prince Edward Island and Newfoundland have only deed registry systems. As stated above, Quebec's registration system is based on its civil law system.

It is beyond the scope of this report to describe in detail the land registry system of any jurisdiction. However, each of the sections below includes some information about how to register a covenant, easement or servitude. Those registering conservation easements must check specific registration requirements in their jurisdiction at the time of registration.

## **BRITISH COLUMBIA**

### ***Land Title Act***

In British Columbia, section 219 of the *Land Title Act* authorizes the granting and registration of covenants for conservation purposes to government agencies and to persons designated by the provincial government. Section 218 of the Act authorizes the granting and registration of a statutory right of way to government agencies and designated persons for any purpose necessary for the operation and maintenance of the grantee's undertaking.

Section 219 specifies that covenants granted under that section run with the land and bind successors in title of the landowner who granted the covenant.<sup>10</sup>

Section 219 sets out the kinds of provisions that can be included in a conservation covenant.<sup>11</sup> These include:

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<sup>10</sup> *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(3).

<sup>11</sup> *Land Title Act*, ss. 219(2) and (4).

- provisions about the use of land or the use of a building on land;
- requirements that land must be built on in accordance with the covenant, cannot be built on except in accordance with the covenant, or cannot be built on at all;
- prohibitions against subdividing land at all or except in accordance with the covenant;
- where the covenant applies to more than one parcel of land, provisions that parcels of land designated in the covenant and registered under one or more titles are not to be transferred separately; and
- provisions that the land or a specified amenity in relation to the land be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant.

“Amenity” includes any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land.<sup>12</sup>

Some of the common law restrictions related to restrictive covenants are eliminated for covenants under section 219. Covenants registered under section 219 may be of a positive or negative nature; that is, they may require the parties to do something with respect to the land, such as maintaining it in accordance with certain objectives, as well as prevent them from doing something, such as building or subdividing.<sup>13</sup> Section 219 also eliminates for section 219 covenants the common law requirement that the covenant holder owns land to which the covenant is annexed.<sup>14</sup>

Section 219 covenants may include as an integral part of the covenant

- an indemnity of the covenant holder by the landowner, and
- a rent charge which is a kind of financial penalty charging the land and payable by the landowner to the covenant holder.<sup>15</sup>

A landowner who enters into a section 219 covenant is not liable for any breaches of the covenant after that landowner has ceased being an owner of the land.

Section 22 of the *Agricultural Land Commission Act*<sup>16</sup> provides that a covenant that prohibits the use of land in the Agricultural Land Reserve for farm purposes has no

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<sup>12</sup> *Land Title Act*, s. 219(5).

<sup>13</sup> *Land Title Act*, s. 219(4).

<sup>14</sup> *Land Title Act*, s. 219(3).

<sup>15</sup> *Land Title Act*, s. 219(6). The Act is silent as to the amount of the rent charge.

<sup>16</sup> *Agricultural Land Commission Act*, S.B.C. 2002, c. 36.

effect until approved by the Agricultural Land Commission. This includes conservation covenants. The Commission has prepared guidelines indicating when it will consider approving the use of conservation covenants in the Agricultural Land Reserve and what it requires to be included in an application for approval.<sup>17</sup>

### ***Who may hold interest***

Under section 219, the following can hold conservation covenants:

- the Crown or a Crown corporation or agency;
- a local government;
- any person designated by the Minister of Sustainable Resource Management.

The last category allows non-government organizations and individuals to hold conservation covenants. Organizations or individuals may apply for either blanket designation to hold covenants or for designation for a specific covenant.

On the death or dissolution of a covenant holder, the covenant ceases to be enforceable by any person, including the Crown, except another covenant holder named in the covenant document or an assignee of the covenant holder. In the latter case, the assignment must be approved in writing by the Minister of Sustainable Resource Management.<sup>18</sup> The Act is silent as to assignments other than where the covenant holder has died or been dissolved.

### ***How registration of interest is effected***

Registration of the interest represented by the section 219 covenant is effected by filing the covenant document in the appropriate Land Title Office. The covenant is then registered against title to the land with priority according to the date and time of registration and any priority agreements relating to the covenant.

Upon registration, the registered owner of the covenant is deemed to be entitled to the interest created by the covenant document subject to certain exceptions. Registration serves as notice of the covenant to every person dealing with the title to the land.

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<sup>17</sup> The guidelines are available at: [http://www.alc.gov.bc.ca/legislation/policies/Guidelines\\_covenants\\_Dec03.pdf](http://www.alc.gov.bc.ca/legislation/policies/Guidelines_covenants_Dec03.pdf)

<sup>18</sup> *Land Title Act*, s. 219(11).

### ***The legislation and transfer of interest***

Section 20 of the *Land Title Act* provides:

Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.

In effect, a covenant entered into under section 219 of the *Land Title Act* will only transfer an interest in land to the covenant holder if it is registered. However, it will be enforceable between the parties regardless of registration.

### ***Termination/modification of interest***

A covenant under section 219 may be modified by a written agreement between the covenant holder and the land owner. Section 219 covenants may be discharged unilaterally by the covenant holder.<sup>19</sup> The modification agreement or discharge must be registered in the appropriate Land Title Office.

In addition, under the *Property Law Act*,<sup>20</sup> “a person interested in land” may apply to the court for an order to modify or cancel a covenant under section 219 of the *Land Title Act*. The court may grant such an order if the court is satisfied that

- (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
- (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
- (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
- (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
- (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

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<sup>19</sup> *Land Title Act*, s. 219(9).

<sup>20</sup> *Property Law Act*, R.S.B.C. 1996, c. 377, s. 35.

## **Agreements on title for conservation purposes under other statutes**

### ***Heritage revitalization agreements***

Heritage revitalization agreements can be registered against land to help conserve heritage property in British Columbia. Although they are not a primary tool for protecting natural landscapes or undeveloped land, they may be useful in some circumstances.

A heritage revitalization agreement is a written voluntary agreement between a property owner and a local government.<sup>21</sup> The *Local Government Act*<sup>22</sup> authorizes a local government, by bylaw, to enter into a heritage revitalization agreement with the owner of heritage property.<sup>23</sup>

The Act includes the following definitions:<sup>24</sup>

“heritage character” means the overall effect produced by traits or features which give property or an area a distinctive quality or appearance;

“heritage property” means property that

(a) in the opinion of a body or person authorized to exercise a power under this Act in relation to the property, has sufficient heritage value or heritage character to justify its conservation, or

(b) is protected heritage property;

“heritage value” means historical, cultural, aesthetic, scientific or educational worth or usefulness of property or an area.

A heritage revitalization agreement may, among other things

- vary or supplement the provisions of a rural land use bylaw including use, density, siting and lot size,
- vary or supplement the provisions of a bylaw which concern land use designation, development cost recovery, subdivision and development requirements,
- vary or supplement a development, or
- vary or supplement a bylaw or heritage alteration permit.

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<sup>21</sup> See *Heritage Conservation: A Community Guide*, available on the website of the Heritage Branch of the Ministry of Community, Aboriginal and Women’s Services at: [http://www.mcaws.gov.bc.ca/heritage\\_branch/conserves/intro.htm](http://www.mcaws.gov.bc.ca/heritage_branch/conserves/intro.htm)

<sup>22</sup> *Local Government Act*, R.S.B.C. 1996, c. 323.

<sup>23</sup> *Local Government Act*, s. 966.

<sup>24</sup> *Local Government Act*, s. 5.

The terms of a heritage revitalization agreement supersede local government zoning regulations, and may vary use, density and siting regulations. If the agreement will change the use or density of property, a public hearing must be held.

With certain exceptions, heritage revitalization agreements must not be used

- to conserve natural landscapes or undeveloped land,
- to restrict a forest management activity relating to timber production or harvesting, or
- to prevent a use of real property that is permitted under the applicable zoning bylaw for the property or to prevent the development of land to the density allowed in respect of that permitted use under the applicable zoning bylaw.<sup>25</sup>

Heritage revitalization agreements can be used to conserve natural landscapes and undeveloped land only in the following circumstances:

- to the extent that the conservation of the natural landscape or undeveloped land is, in the opinion of the local government, necessary for the conservation of adjacent or proximate real property that is protected heritage property,
- with respect to a site that has heritage value or heritage character related to human occupation or use, or
- with respect to individual landmarks and other natural features that have cultural or historical value.<sup>26</sup>

In addition to any other remedies that might be available, a person who alters property in contravention of a heritage revitalization agreement commits an offence and is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than 2 years, or to both, or if the person is a corporation, to a fine of not more than \$1,000,000.<sup>27</sup>

### ***How registration of interest is effected***

Within 30 days after entering into or amending a heritage revitalization agreement, a local government must file a written notice in the land title office with respect to property that is subject to a heritage revitalization agreement and the registrar must

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<sup>25</sup> *Local Government Act*, s. 948.

<sup>26</sup> *Local Government Act*, s. 948.

<sup>27</sup> *Local Government Act*, s. 981.

make a note of the filing on the title of the affected land.<sup>28</sup> If the required notice is filed in the land title office, the heritage revitalization agreement is binding on subsequent owners of the land affected by the agreement.<sup>29</sup>

In addition, the local government must notify the minister responsible for the *Heritage Conservation Act* with respect to heritage property that is subject to a heritage revitalization agreement.<sup>30</sup>

### ***Termination/modification of interest***

A heritage revitalization agreement may only be amended by bylaw with the consent of the owner.<sup>31</sup> The Act does not expressly address termination of a heritage revitalization agreement.

## **ALBERTA**

### ***Environmental Protection and Enhancement Act***

Under the *Environmental Protection and Enhancement Act*<sup>32</sup> a conservation easement may be granted by the registered owner of all or a part of land by way of an agreement for one or more of the following purposes:

- (a) the protection, conservation and enhancement of the environment including, without limitation, the protection, conservation and enhancement of biological diversity;
- (b) the protection, conservation and enhancement of natural scenic or aesthetic values;
- (c) providing for any or all of the following uses of the land that are consistent with purposes set out in clause (a) or (b):
  - (i) recreational use;
  - (ii) open space use;
  - (iii) environmental education use;
  - (iv) use for research and scientific studies of natural ecosystems.<sup>33</sup>

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<sup>28</sup> *Local Government Act*, ss. 976 and 966(9).

<sup>29</sup> *Local Government Act*, s. 966(10).

<sup>30</sup> *Local Government Act*, s. 977.

<sup>31</sup> *Local Government Act*, s. 966(4).

<sup>32</sup> *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

<sup>33</sup> *Environmental Protection and Enhancement Act*, s. 22(2).



A conservation easement may exist for a term, or be granted in perpetuity.

Conservation easements may be enforced by

- the grantee, or
- a qualified organization<sup>34</sup> appointed in writing by the grantor other than the grantee, or by both the grantee and the appointed qualified organization.

The grantee may assign a conservation easement to another qualified organization.

### ***Who may hold interest***

Any qualified organization may hold a conservation easement. A “qualified organization” is

- (a) the provincial government or a provincial government agency,
- (b) a local authority,<sup>35</sup> or
- (c) a body corporate that
  - has as one of its objects the acquisition and holding of interests for the purposes that the legislation defines as the purposes for conservation easements (see preceding section),
  - has in its incorporation (constating) documents a provision that requires its conservation easements interests be transferred to another qualifying organization in the event that the body corporate winds up,
  - is a registered charity in accordance with the *Income Tax Act* (Canada).

### ***How registration of interest is effected***

Conservation easements are registered under the *Land Titles Act*,<sup>36</sup> or the *Métis Settlements Act* (for Métis settlements), although both of those Acts as well as the *Environmental Protection and Enhancement Act* and the *Conservation Easement*

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<sup>34</sup> See below under Who may hold interest.

<sup>35</sup> “Local authority” includes a city, town, village, summer village, municipal district, specialized municipality, or regional services commission, as defined in the *Municipal Government Act* (R.S.A. 2000, c. M-26), a Métis Settlement under the *Métis Settlements Act* (R.S.A. 2000, c. M-14), or a regional health authority under the *Regional Health Authorities Act* (R.S.A. 2000, c. R-10).

<sup>36</sup> *Land Titles Act*, R.S.A. 2000, c. L-4.

*Registration Regulation*<sup>37</sup> are all relevant to registration. The parties should confer with the appropriate Registrar (Land Titles or Métis Settlements) early on in the conservation easement process to ensure that survey or other land descriptions of the conservation easement meet the Registrar's requirements.

Under the *Conservation Easement Regulation*, registration is effected as follows:

- At least 60 days prior to the intended registration date, the grantee must give notice of the proposed conservation easement to the appropriate of the following:
  - the Minister of Municipal Affairs where the land subject to the conservation easement is located in an improvement district (a district appointed by cabinet under the *Municipal Government Act*);
  - the Special Areas Board where the land subject to the conservation easement is in a special area designated under the *Special Areas Act*;<sup>38</sup> or
  - the local authority of the municipality in which the land subject to the conservation easement is located.
- The notice must be in the form set out in the *Conservation Easement Regulation*. Basically, the notice sets out a summary of the terms of the conservation easement agreement, contains contact information, and makes assurances that the conservation easement meets legislative requirements. The giving of notice is advisory only in that the legislation does not give those notified any opportunity to prevent the conservation easement from going ahead. The 60 day period may be waived or shortened by the person entitled to notice.
- Following the 60 day period (or lesser time if shortened) the grantee may register the agreement. At registration the grantee must submit the following:
  - a copy of the conservation easement agreement;
  - a statutory declaration in the form set out in the *Conservation Easement Regulation* in which the grantee swears that notice was properly given, among other matters; and
  - a description of the boundaries of the conservation easement to the satisfaction of the Registrar.

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<sup>37</sup> *Conservation Easement Registration Regulation*, Alta. Reg. 251/2001.

<sup>38</sup> *Special Areas Act*, R.S.A. 2000, c. S-16.

### ***The legislation and transfer of interest***

The effect of registration is that the conservation easement runs with the land and may be enforced.<sup>39</sup> This implies that the transfer of interest occurs at registration.

### ***Termination/modification of interest***

A conservation easement and the underlying conservation easement interest may be modified or terminated as follows:

- by agreement between the grantor and the grantee; or
- by order of the Minister<sup>40</sup> (currently the Minister of Environment), whether or not the Minister is a grantor or grantee, if the Minister considers that it is in the public interest to modify or terminate the agreement.

### **Agreements on title for conservation purposes under other statutes**

#### ***Historical Resources Act***

The *Historical Resources Act*<sup>41</sup> authorizes a landowner to enter into a “condition or covenant” relating to the preservation or restoration of any land or building.<sup>42</sup> Although the Act is not specific, presumably “land or building” would include any land or building that falls under the Act, that is, a historic resource. The definition of “historic resource” is broad enough to cover some lands with conservation values:

“historic resource” means any work of nature or of humans that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest including, but not limited to, a palaeontological, archaeological, prehistoric, historic or natural site, structure or object;<sup>43</sup>

The legislation is silent as to whether a condition or covenant may be for a term or be granted for a term of time or in perpetuity. Nevertheless, perpetual agreements should be possible.

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<sup>39</sup> *Environmental Protection and Enhancement Act*, s. 24.

<sup>40</sup> The Minister is the minister appointed by Cabinet to administer the *Environmental Protection and Enhancement Act*. See *Environmental Protection and Enhancement Act*, s. 1(mm).

<sup>41</sup> *Historical Resources Act*, R.S.A. 2000, c. H-9.

<sup>42</sup> *Historical Resources Act*, s. 29.

<sup>43</sup> *Historical Resources Act*, s. 1(e).

Conditions or covenants under the Act may be enforced whether they are positive or negative in nature, and even though there is no dominant tenement.<sup>44</sup> Thus the legislation specifically overrides the common law requirements that restrictive covenants be negative and easements normally positive. As well, the legislation overrides the common law requirement that valid restrictive covenants and easements require two parcels of land, a dominant tenement and a servient tenement, each owned and occupied by a different person, such that conditions and covenants relating to the servient tenement benefit the dominant tenement.

The legislation also is silent on enforcement, except to say that the holder of a condition or covenant may enforce it. Accordingly, agreements should be enforceable like any contract that grants an interest in land.

A condition or covenant may be assigned to anyone else who may hold an interest (see below).<sup>45</sup>

Historic resources that are registered under the *Historical Resources Act* are given additional protection. The following registered historic resources that could be the subject of a condition or covenant agreement are of the most relevance to conservation lands:

- (a) “Provincial Historic Resource,” a historic resource that the Minister<sup>46</sup> (currently the Minister of Community Development) has declared to be a Provincial Historic Resource;<sup>47</sup>
- (b) “Registered Historic Resource,” a historic resource that the Minister has declared to be a Registered Historic Resource,<sup>48</sup> or other structure that the Minister responsible for administering the Act<sup>49</sup> has declared to be a registered historic site;<sup>50</sup> and
- (c) “Municipal Historic Resource” or “Municipal Historic Area,” a historic resource that the council of a municipality has designated as a Municipal Historic Resource or Area.<sup>51</sup>

In addition to the protection offered by a condition or covenant, the Act provides the following protections for designated historical resources:

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<sup>44</sup> *Historical Resources Act*, s. 29(3).

<sup>45</sup> *Historical Resources Act*, s. 29(4).

<sup>46</sup> The minister for the purposes of the Act is the minister designated by Cabinet to administer the Act. *Historical Resources Act*, s. 1(h).

<sup>47</sup> *Historical Resources Act*, ss. 2(k) and 20.

<sup>48</sup> *Historical Resources Act*, ss. 1(g) and 19.

<sup>49</sup> *Historical Resources Act*, s. 1(g).

<sup>50</sup> *Historical Resources Act*, ss. 2(m) and 17.

<sup>51</sup> *Historical Resources Act*, ss. 26 and 27.

- The Act makes it an offence for anyone to destroy, disturb, or alter any Provincial Historic Resource or Registered Historic Resource without the Minister's written approval.<sup>52</sup>
- Cabinet may restrict and regulate uses in a Provincial Historic Area by regulation.<sup>53</sup>
- The Act makes it an offence for any person to disturb or alter a Municipal Historic Resource without Council's written approval.<sup>54</sup>
- Council may by bylaw restrict uses in a Municipal Historic Area.<sup>55</sup>

### ***Who may hold interest***

Only the following may hold a condition or covenant under the *Historical Resources Act*:

- the Minister;
- the council of the municipality in which the land is located;
- the Alberta Historical Resources Foundation, established under the Act; or
- an historical organization that is approved by the Minister.<sup>56</sup>

### ***How registration of interest is effected***

Conditions or covenants under the *Historical Resources Act* may be registered under the *Land Titles Act* at the Land Titles Office against the title of the property affected.<sup>57</sup> This Act does not contain any explicit instructions for registration of interests under the *Historical Resources Act*. However, the Registrar of Land Titles may require a plan of survey or descriptive plan so that the area that the condition or covenant applies to is readily ascertainable.

### ***The legislation and transfer of interest***

The Act states that a condition or covenant that is registered runs with the land and may be enforced.<sup>58</sup> Accordingly, the transfer of interest presumably occurs at registration.

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<sup>52</sup> *Historical Resources Act*, s. 20.

<sup>53</sup> *Historical Resources Act*, s. 24.

<sup>54</sup> *Historical Resources Act*, s. 26.

<sup>55</sup> *Historical Resources Act*, s. 27.

<sup>56</sup> *Historical Resources Act*, s. 29(1).

<sup>57</sup> *Historical Resources Act*, s. 29(1).

<sup>58</sup> *Historical Resources Act*, s. 29(3).

## **SASKATCHEWAN**

### ***Conservation Easements Act***

The 1996 *Conservation Easements Act*<sup>59</sup> enables conservation easements in Saskatchewan. The Act allows an owner of land, including the provincial or federal government, or a municipality, to grant a conservation easement. The provincial or federal government, or a municipality, may grant a conservation easement to itself, or anyone else eligible to hold a conservation easement.<sup>60</sup> A conservation easement may be granted for any of the following purposes:

- (a) the protection, enhancement or restoration of natural ecosystems, wildlife habitat or habitat of rare, threatened or endangered plant or animal species;
- (b) the retention of significant botanical, zoological, geological, morphological, historical, archaeological or palaeontological features respecting land;
- (c) the conservation of soil, air and water quality;
- (d) any of the purposes prescribed in the regulations.<sup>61</sup>

The Act enables a conservation easement to exist for a term, or be granted in perpetuity.<sup>62</sup>

- Conservation easements may be enforced by
- the holder (grantee),
- the grantor,
- a subsequent owner of the land, or
- in the court's discretion, anyone else who is eligible to be a holder.<sup>63</sup>

The grantee may assign a conservation easement to anyone eligible to be a holder.<sup>64</sup>

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<sup>59</sup> *Conservation Easements Act*, R.S.S. 1996, c. C-27.01. As at the date of writing there were no regulatory provisions adding purposes.

<sup>60</sup> *Conservation Easements Act*, s. 5.

<sup>61</sup> *Conservation Easements Act*, s. 4.

<sup>62</sup> *Conservation Easements Act*, s. 3(2).

<sup>63</sup> *Conservation Easements Act*, s. 11(c).

<sup>64</sup> *Conservation Easements Act*, s. 3(2)(b).

### ***Who may hold interest***

The following persons or entities may hold a conservation easement:

- the provincial Crown;
- the Crown in right of Canada;
- a municipality;
- a corporation within the meaning of *The Non-profit Corporations Act*, 1995<sup>65</sup> that has as one of its primary purposes any of the purposes for which a conservation easement may be held under the *Conservation Easements Act* or regulations (see discussion above under *Conservation Easements Act*); or
- any person, body or group or class of persons, bodies or groups that are eligible to hold an interest in land and that are prescribed in the regulations for the purposes of this section.

At the date of writing no additional holders have been prescribed in regulations.

The Act does not specifically provide for joint holders of conservation easements.

Any conservation easement, or combination of conservation easements, respecting farm land that is at least one quarter section, constitutes a “landholding” under the *Saskatchewan Farm Security Act*.<sup>66</sup> This may prevent or limit non-resident persons in acquiring conservation easement interests in the province. Under the Act a “non-resident” person is someone who is not a Canadian citizen or who has resided in Canada less than 183 days.<sup>67</sup>

### ***How registration of interest is effected***

Conservation easements are registered under the *Land Titles Act*.<sup>68</sup> However, that Act, the *Conservation Easements Act*, and the *Conservation Easements Regulations*<sup>69</sup> are all relevant to registration.

To understand the registration requirements it is necessary to distinguish between

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<sup>65</sup> *Non-profit Corporations Act*, R.S.S. 1997, c. N-4.2.

<sup>66</sup> *Saskatchewan Farm Security Act*, R.S.S. 1988-89, c. S-17.1, s. 76(e)(vii).

<sup>67</sup> *Saskatchewan Farm Security Act*, ss 76(h) and (j).

<sup>68</sup> *Land Titles Act*, S.S. 2001, c. L-5.1, ss. 7-9.

<sup>69</sup> *Conservation Easements Regulations*, Sask. Reg. 24/2002.

- (a) a conservation easement,
- (b) an interest based on a conservation easement,
- (c) a Notice of Intent to file a conservation easement, and
- (d) a conservation easement notice.

**Conservation easement:** The conservation easement itself is the written agreement that sets out terms of the conservation easement. The legislation contemplates that the parties enter into the conservation easement agreement prior to carrying out the other registration steps. The conservation easement must contain the information set out in the *Conservation Easements Regulations*.<sup>70</sup>

**Interest:** The interest based on the conservation easement is the interest in land that runs with title, if the legislative provisions regarding conservation easements are met.

**Notice of Intent:** The *Conservation Easements Act* requires that the holder serve a Notice of Intent to register an interest based on the conservation easement at least 60 days prior to the intended registration date. The required form of the notice may be found in the *Conservation Easements Regulations*. The form requires that the actual conservation easement be attached to the Notice.

This notice must be served on all persons with interests registered against the title respecting the lands proposed to be subject to the conservation easement and on the municipality in which the land subject to the conservation easement is located.

Anyone served with a Notice of Intent has 60 days to apply to the Court of Queen's Bench for an order that the conservation easement not be registered. If satisfied that the proposed conservation easement would adversely affect the interests of the applicant, the Court may order that the "interest based on the conservation easement is not valid." Where the court issues such an order, the conservation easement agreement is of no effect. If no person applies to the court for an order, the proposed holder of the conservation easement may go on to the next registration step.

**Conservation easement notice:** The conservation easement notice must be in the form prescribed in the *Conservation Easements Regulations*. The notice sets out information on the proposed conservation easement. It is by the conservation easement notice that the holder registers the interest based on the conservation easement. In the conservation easement notice that the holder swears and files, the holder gives key information about the conservation easement, states that Notice of Intent was properly given, and states that no one applied to the Court during the 60 day objection period.

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<sup>70</sup> *Conservation Easements Regulations*, s. 5.



Interestingly, neither the regulations nor the Act address what happens if someone makes an application to the court and the court denies the application.

With these distinctions in mind, here are the steps in the registration process:

1. The holder serves the Notice of Intent, including the attached conservation easement, on those who have an interest registered on title and to the municipality in which the land is located.
2. After 60 days, if no one objects to the conservation easement, the holder duly files the conservation easement notice. The legislation is not explicit on what happens if someone has objected but the Court declines to order that the interest based on the conservation easement is not valid. Although logic would dictate that in such circumstances the holder may proceed to the next registration step, given the lack of explicit authorizing legislative language, the holder should seek legal advice and perhaps direction from the court regarding the right to proceed to registration.

At this point even though a conservation easement is registered it does not come into effect. To come into effect two additional steps are necessary<sup>71</sup>:

3. The holder must have paid any required fees associated with registration to the “department,” currently, Saskatchewan Environment.<sup>72</sup>
4. The holder must have filed a copy of the conservation easement with the department.

### ***The legislation and transfer of interest***

Under the Act a conservation easement has no effect until all of the four steps noted in the preceding section have been completed.<sup>73</sup>

### ***Termination/modification of interest***

A conservation easement may be terminated

- (a) by a written agreement between the holder and the registered owner of the title to the land against which the interest based on the conservation easement is registered, or

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<sup>71</sup> *Conservation Easements Act*, s. 7(3).

<sup>72</sup> The conservation easement legislation is administered by the “department” that the “minister” oversees. The “minister” is the minister assigned to administer the *Conservation Easements Act*. See Act, definitions of “department” and “minister” in s. 2.

<sup>73</sup> *Conservation Easements Act*, s. 7(3).

- (b) by the Court of Queen's Bench on application
  - (i) by the holder or registered owner of the title to the land, where the court is of the opinion that continuation of the easement would produce a severe hardship for the applicant, (the legislation does not explain what would constitute a "severe hardship"), or
  - (ii) by any person when the holder ceases to exist (for example where a land trust winds up and de-registers).

Where a holder ceases to exist, any person wishing to make an application pursuant to (b)(ii) must give the provincial Crown 30 days' notice. Within that 30 day period, the Crown may elect to assume the obligations and accept the rights and privileges of the holder.<sup>74</sup>

### **Agreements on title for conservation purposes under other statutes**

#### ***Heritage Property Act***

The *Heritage Property Act* authorizes a landowner to enter into an "easement or covenant" relating to the protection of "heritage property."<sup>75</sup> The Act's definition of "heritage property" is broad enough to cover some lands with conservation values:

"heritage property" means:

- (i) archaeological objects;
- (ii) palaeontological objects;
- (iii) any property that is of interest for its architectural, historical, cultural, environmental, archaeological, palaeontological, aesthetic or scientific value; and
- (iv) any site where any object or property mentioned in subclauses (i), (ii) or (iii) is or may reasonably be expected to be found.<sup>76</sup>

The legislation is silent as to whether an easement or covenant may be for a term or be granted for a term of time or in perpetuity. However, perpetual agreements should be possible.

Easements or covenants under the Act may be enforced whether they are positive or negative in nature, and notwithstanding that there is no dominant tenement.<sup>77</sup> Thus the legislation specifically overrides the common law requirements that restrictive

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<sup>74</sup> *Conservation Easements Act*, s. 10.

<sup>75</sup> *Heritage Property Act*, S.S. 1979-80, c. H-2.2, ss. 3, 28(f) and 59.

<sup>76</sup> *Heritage Property Act*, s. 2(i).

<sup>77</sup> *Heritage Property Act*, s. 59(3).

covenants be negative and easements normally positive. As well, the legislation overrides the common law requirement that valid restrictive covenants and easements require two parcels of land, a dominant tenement and a servient, each owned and occupied by a different person, such that conditions and covenants relating to the servient tenement benefit the dominant tenement.

The legislation otherwise does not address enforcement, except to say that assignees of a municipality, when a municipality holds the condition or covenant, may enforce it as the municipality could have enforced it.<sup>78</sup> Presumably, agreements are enforceable like any contract that grants an interest in land.

A municipality may assign a covenant or easement relating to heritage property to “any person.”<sup>79</sup> “Person” includes any individual or corporation, and accordingly should include any incorporated conservation organization that may carry out conservation activities in Saskatchewan.<sup>80</sup>

A person wishing to further protect a heritage property could seek registration of the property under the Act. Registration is at the discretion of the appointed government authority. As well, the legislation sets forth a detailed designation and registration process. Registered heritage properties that are of the most relevance to conservation lands are the following:

- “Provincial Heritage Property,” a heritage property that the Minister<sup>81</sup> (currently the Minister of Culture, Youth and Recreation) has designated as a Provincial Heritage Property;<sup>82</sup>
- “Municipal Heritage Conservation District,” any real property that is heritage property that is part of a municipality that the municipality designates under the Act;<sup>83</sup> and
- “Municipal Heritage Property,” real property that is heritage property that the council of a municipality has designated as a Municipal Heritage Property.<sup>84</sup>

The Act affords additional protection for registered heritage properties by making it an offence to destroy, disturb, or alter Provincial Heritage Property, Municipal Heritage Property or property within a Municipal Heritage District without the appropriate written consent.<sup>85</sup>

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<sup>78</sup> *Heritage Property Act*, s. 30(1).

<sup>79</sup> *Heritage Property Act*, s. 30(1).

<sup>80</sup> *Interpretation Act*, 1995, S.S. 1995, c. I-11.2., s. 27, definition of “person.”

<sup>81</sup> The minister for the purposes of the Act is the minister designated by Cabinet to administer the Act. *Interpretation Act*, 1995, s. 2(k).

<sup>82</sup> *Heritage Property Act*, ss. 2(n.2), 39(1), 45(1) and 55(1).

<sup>83</sup> *Heritage Property Act*, ss. 2(k.1) and 11(1)(b).

<sup>84</sup> *Heritage Property Act*, ss. 2(k.2) and 11(1)(a).

<sup>85</sup> *Heritage Property Act*, ss. 23(1) and 44(1).

### ***Who may hold interest***

Only the following may hold an easement or covenant under the *Heritage Property Act*:

- the Minister;
- the municipality in which the land is located;<sup>86</sup> or
- an assignee of a municipality (see discussion under *Heritage Property Act* above).

### ***How registration of interest is effected***

Covenants or easements must be registered in the appropriate land titles office.<sup>87</sup> The covenant or easement is to be accompanied by a certificate of the minister or municipality, as the case may be, that the document is for the purpose of protection of a heritage property.<sup>88</sup> The Act states that if the document is accompanied by such certificate “the registrar shall accept the easement or covenant for registration.”<sup>89</sup> The Act does not otherwise address registration.

### ***The legislation and transfer of interest***

The Act states that a covenant or easement that is registered runs with the land and may be enforced.<sup>90</sup> Accordingly, the transfer of interest presumably occurs at registration.

## **MANITOBA**

### ***The Conservation Agreements Act***

In Manitoba, *The Conservation Agreements Act*<sup>91</sup> authorizes the entering into of conservation agreements between landowners and conservation agencies for the protection and enhancement of natural ecosystems, wildlife or fisheries habitat, and plant or animal species.

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<sup>86</sup> *Heritage Property Act*, s. 59(2).

<sup>87</sup> *Heritage Property Act*, s. 59(1).

<sup>88</sup> *Heritage Property Act*, ss. 59(1) and (2).

<sup>89</sup> *Heritage Property Act*, s. 59(2).

<sup>90</sup> *Heritage Property Act*, s. 59(3).

<sup>91</sup> *The Conservation Agreements Act*, C.C.S.M., c. C173.

A conservation agreement is a written agreement between a landowner and a holder that creates a conservation interest in land.<sup>92</sup> A conservation interest is an interest that imposes restrictions on the use of land for the protection and enhancement of natural ecosystems, wildlife or fisheries habitat, or plant and animal species.<sup>93</sup>

As part of a conservation interest, a conservation agreement may grant to the holder rights and privileges relating to a conservation purpose, including a right of access to the land.<sup>94</sup>

A landowner may enter into more than one conservation agreement respecting the same land as long as no conflict exists between the provisions of the agreements.<sup>95</sup>

A conservation agreement remains in force for the term specified in the agreement.<sup>96</sup> Nothing in the Act prevents the creation of a conservation interest in perpetuity.

The Act establishes the Conservation Agreements Board which consists of representatives from conservation agencies, the government of Manitoba, local government and agricultural producers' organizations.<sup>97</sup> The Board performs the following functions:

- (a) provides a forum for discussion for interested parties (landowners, interest holders, municipalities, local government districts and any other parties affected by a conservation agreement) regarding conservation agreements;
- (b) assists interested parties who apply to the Board to consider the implications of a conservation agreement;
- (c) assists in the resolution of disputes between interested parties regarding conservation agreements; and
- (d) fulfils functions prescribed by regulation.<sup>98</sup>

A form of conservation agreement has been prescribed under the *Conservation Agreement Forms Regulation*<sup>99</sup> in accordance with section 10 of the Act. The form

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<sup>92</sup> *The Conservation Agreements Act*, s. 2(1).

<sup>93</sup> *The Conservation Agreements Act*, s. 2(2).

<sup>94</sup> *The Conservation Agreements Act*, s. 3(1).

<sup>95</sup> *The Conservation Agreements Act*, s. 4.

<sup>96</sup> *The Conservation Agreements Act*, s. 2(3).

<sup>97</sup> *The Conservation Agreements Act*, s. 8.

<sup>98</sup> *The Conservation Agreements Act*, s. 8(4).

<sup>99</sup> *Conservation Agreement Forms Regulation*, Reg. 149/98. The form of agreement is in Schedule A.

of agreement contains specified terms such as a description of the conservation interest (including restrictions on land use) and sections governing the grant of the conservation interest, registration of the interest, duration of the agreement, right of access, and termination of the agreement, but allows the terms to be tailored to a particular transaction. There is also a section permitting the inclusion of terms and conditions not specified in the form of agreement.

### ***Who may hold interest***

Eligible conservation agencies can hold conservation interests under a conservation agreement. Eligible conservation agencies include:<sup>100</sup>

- (a) a corporation without share capital that is incorporated under Part XXII of *The Corporations Act*<sup>101</sup> and designated by regulation as being authorized to enter into conservation agreements;
- (b) a not-for-profit corporation that is incorporated under an Act of Parliament and designated by regulation under this Act as being authorized to enter into conservation agreements;
- (c) the Crown in right of Canada;
- (d) the Crown in right of Manitoba;
- (e) a federal or provincial Crown corporation or agency;
- (f) a municipality;
- (g) a local government district;
- (h) a conservation district established under *The Conservation Districts Act*.<sup>102</sup>

Where the land subject to the conservation agreement is farm land, the *Farm Lands Ownership Act*<sup>103</sup> may apply. This Act restricts who can hold an interest in farm land within the meaning of the Act.<sup>104</sup> Depending on the nature of the holder under a conservation agreement, it might be necessary to apply to the Manitoba Farm Lands Ownership Board for an exemption from the provisions of the Act.<sup>105</sup> Holders must review this legislation to determine if they are restricted from holding a conservation agreement and whether an exemption is required.

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<sup>100</sup> *The Conservation Agreements Act*, s. 5.

<sup>101</sup> *The Corporations Act*, C.C.S.M., c. C225.

<sup>102</sup> *The Conservation Districts Act*, C.C.S.M., c. C175.

<sup>103</sup> *Farm Lands Ownership Act*, C.C.S.M., c. F35.

<sup>104</sup> *Farm Lands Ownership Act*, s. 4.

<sup>105</sup> *Farm Lands Ownership Act*, s. 3(3).

### ***How registration of interest is effected***

The holder of the conservation interest under a conservation agreement may give notice of the interest by registration of a caveat.<sup>106</sup> According to the Property Registry website:

Caveats are notices from parties who are not owners of lands that they are claiming some right or interest in the lands. Usually this claim results from some agreement entered into between the owner of the lands and the person who filed the caveat. ... This is particularly useful for providing information to people looking to purchase lands.<sup>107</sup>

The caveat has the effect of requiring that any transfers of the land or any instrument affecting the conservation interest granted under a conservation agreement be subject to the conservation interest.<sup>108</sup>

The holder must give notice of intent to file the caveat, at least 45 days before filing, to various classes of persons all of which may object to the registration of the caveat. These classes of persons include the following:

- those who appear from the certificate of title to have an interest in the land, a registered charge, lien or judgment against the land, or a security interest in the land;
- the municipality or local government district in which the land is located;
- the Minister of Aboriginal and Northern Affairs if the land is in Northern Manitoba;
- the board of the conservation district if the land is in a conservation district.

Anyone receiving notice who wishes to object to registration of the caveat may apply to the Conservation Agreements Board within 30 days after being served with the notice for assistance in resolving the objection. If the objection is not resolved, the person objecting may apply to court within 30 days after the failure to resolve the objection for an order that the caveat not be registered. If the court finds that the conservation agreement would adversely affect the interests of the applicant, it may order that the caveat not be registered or that registration of the caveat be vacated.

If a holder is served with notice of an objection, the holder must not file a caveat until at least 45 days after the holder and anyone objecting to the caveat have failed to resolve the

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<sup>106</sup> *The Conservation Agreements Act*, s. 7.

<sup>107</sup> <http://www.gov.mb.ca/tpr/faq.html#titleinfo>

<sup>108</sup> *The Real Property Act*, C.C.S.M., c. R30, ss. 148(1) and 152.

objection or, if the person objecting has applied to court, until after the application is dismissed or the holder is otherwise permitted to file the caveat.

### ***The legislation and transfer of interest***

A conservation interest created by a conservation agreement is an interest in land and runs with the land, subject to registration of a caveat.<sup>109</sup>

### ***Termination/modification of interest***

A conservation agreement may be terminated by a written agreement between the landowner and holder or by an order of the court.<sup>110</sup> In addition, a landowner may apply to the court to terminate a conservation agreement on the grounds that

- the conservation interest no longer exists,
- the holder no longer exists and no successor to the holder is specified in the conservation agreement,
- the conservation interest is no longer required by the holder for the purposes identified in the conservation agreement, or
- the continued existence of the conservation agreement is an unreasonable hardship for the landowner.<sup>111</sup>

The *Conservation Agreement Forms Regulation* includes a form of conservation agreement. Section 3 of the form of agreement states that, subject to the terms of *The Conservation Agreements Act*, the conservation interest created by the agreement is an interest in land and runs with the land.

Section 4 of the agreement provides that the agreement can continue in force indefinitely (if the parties choose this option) subject to termination provisions in the agreement. Section 6 of the agreement provides that the grantor can terminate the agreement if the holder has failed to comply with the terms of the agreement.

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<sup>109</sup> *The Conservation Agreements Act*, s. 3(2).

<sup>110</sup> *The Conservation Agreements Act*, s. 9(1).

<sup>111</sup> *The Conservation Agreements Act*, ss. 9(2) and (3).



## **Agreements on title for conservation purposes under other statutes**

### ***The Heritage Resources Act***

Under *The Heritage Resources Act*<sup>112</sup> owners of land believed to contain heritage resources or human remains may enter into a heritage agreement. The heritage agreement may contain terms respecting the maintenance, preservation or protection of the site and the heritage resources or human remains by the current owner of the land and all subsequent owners.

Heritage resources include

- (a) a heritage site,
- (b) a heritage object, and
- (c) any work or assembly of works of nature or of human endeavour that is of value for its archaeological, palaeontological, pre-historic, historic, cultural, natural, scientific or aesthetic features.<sup>113</sup>

Heritage resources may be in the form of sites or objects or a combination of both.

The provisions contained in the heritage agreement are covenants running with the land and bind successive owners of the land.

Where a person is in breach of a provision of a registered heritage agreement, the minister responsible for the administration of the Act, whether or not a party to the heritage agreement, may institute an action in a court of competent jurisdiction for an order requiring the person to remedy the breach.

### ***Who may hold interest***

The minister responsible for administration of the Act or a municipality, or any interested person, group, society, organization or agency may enter into a heritage agreement with the owner of a site or municipal site believed to contain heritage resources or human remains.

### ***How registration of interest is effected***

Where the minister is not a party to the heritage agreement, the parties to the heritage agreement must each serve the minister with a copy of the agreement. Whether or

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<sup>112</sup> *The Heritage Resources Act*, C.C.S.M., c. H39.1, s. 21. The provisions respecting heritage agreements are contained in ss. 21(1)-(4) of the Act.

<sup>113</sup> *The Heritage Resources Act*, s. 1.

not the minister is a party to the heritage agreement, the minister must file a notice of the heritage agreement together with a copy of the agreement in the proper land titles or registry office.

### ***The legislation and transfer of interest***

After the filing of the notice and a copy of the heritage agreement, the provisions contained in the agreement are covenants running with the land and binding upon the owner and all subsequent owners of the land.

### ***Termination/modification of interest***

The parties to a heritage agreement may modify or cancel any provision of the original heritage agreement by a further heritage agreement. The minister must then file a notice of the further heritage agreement together with a copy of the agreement in the appropriate land titles or registry office.

In addition, where the minister deems it advisable and the parties are unable to agree to modify or cancel provisions of a heritage agreement, the minister may, by order and whether or not the minister is a party to the heritage agreement, effect the modification or cancellation.

## **ONTARIO**

### ***Conservation Land Act***

The *Conservation Land Act*<sup>114</sup> authorizes an owner of land to grant an easement to or enter into a covenant with a “conservation body,” described below, for the conservation, maintenance, restoration or enhancement of all or a portion of the land or the wildlife on the land, or for access to the land for these purposes.<sup>115</sup>

The legislation is silent as to the length of time for which a condition or covenant may be granted. It is assumed that an interest may be granted for either a term of years or in perpetuity.

The legislation also is silent on enforcement, except to say that the holder of an easement may enforce it. Accordingly, agreements should be enforceable like any contract that grants an interest in land.<sup>116</sup>

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<sup>114</sup> *Conservation Land Act*, R.S.O. 1990, c. C.28.

<sup>115</sup> *Conservation Land Act*, s. 3(2).

<sup>116</sup> *Conservation Land Act*, s. 3(6).

An easement or covenant may be assigned by a conservation body to another conservation body.<sup>117</sup> If a conservation body ceases to be a conservation body, the Act deems all easements and covenants held by the body to be assigned to the Minister of Natural Resources.<sup>118</sup>

As with other legislation, the Act eliminates some common law restrictions and provides:

The easement or covenant is valid whether or not the conservation body or assignee owns appurtenant land or land capable of being accommodated or benefited by the easement or covenant and regardless of whether the easement or covenant is positive or negative in nature.<sup>119</sup>

Although the *Conservation Land Act* authorizes regulations that set out records, information and reporting requirements,<sup>120</sup> to date, no regulation has been passed.

### ***Who may hold interest***

A conservation body may hold an interest. The Act defines “conservation body” to mean:

- (a) the Crown in right of Canada or in right of Ontario,
- (b) an agency, board or commission of the Crown in right of Canada or in right of Ontario that has the power to hold an interest in land,
- (c) a band as defined in the *Indian Act*<sup>121</sup> (Canada),
- (d) the council of a municipality,
- (e) a conservation authority,<sup>122</sup>
- (f) a corporation incorporated under Part III of the *Corporations Act*<sup>123</sup> or Part II of the *Canada Corporations Act*<sup>124</sup> that is a charity registered under the *Income Tax Act* (Canada),<sup>125</sup>

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<sup>117</sup> *Conservation Land Act*, s. 3(3).

<sup>118</sup> *Conservation Land Act*, s. 3(7).

<sup>119</sup> *Conservation Land Act*, s. 3(4).

<sup>120</sup> *Conservation Land Act*, s. 11(b).

<sup>121</sup> *Indian Act*, R.S.C. 1985, c. R-5.

<sup>122</sup> “Conservation authorities” are bodies established under the *Conservation Authorities Act*, R.S.O. 1990, c. 27, s. 6, by the councils of two or more municipalities situated in whole or in part in a watershed to deal with watershed management issues.

<sup>123</sup> *Corporations Act*, R.S.O. 1990, c. C-38.

<sup>124</sup> *Canada Corporations Act*, R.S.C. 1970, c. C-32.

<sup>125</sup> *Income Tax Act* (Canada), R.S.C. 1985, c. 1 (5th Supp.).

- (g) a trustee of a charitable foundation that is a charity registered under the *Income Tax Act* (Canada), or
- (h) any person or body prescribed by the regulations.<sup>126</sup>

Regulations prescribe the following as falling under the definition of “conservation body”:

1. A prescribed donee under the *Income Tax Act* (Canada).<sup>127</sup>
2. A qualified organization, as defined under section 170 (h) of the *Internal Revenue Code* (United States) and Treasury Reg 1.170A-14 (United States).<sup>128</sup>
3. A corporation created by statute that is a registered charity under the *Income Tax Act* (Canada).<sup>129</sup>

### ***How registration of interest is effected***

Ontario has both a deeds registry system and a Torrens based land titles system. The deed registry is governed by the *Registry Act*<sup>130</sup> and the Torrens based land titles system is governed by the *Land Titles Act*.<sup>131</sup>

The government is in the process of

converting entirely to an electronic land titles system. Most lands in the province are under the land titles system.<sup>132</sup> There are 54 land registration offices in the province. A conservation easement or covenant will be registered through the office that deals with the area covered by the easement or covenant. The easement or covenant will be registered under the land titles system if the land that it relates to has been brought under that system and otherwise it will be registered under the deed registry system.

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*The easement or covenant will be registered under the land titles system if the land that it relates to has been brought under that system and otherwise it will be registered under the deed registry system.*

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Conservation easements or covenants are registered like regular easements.<sup>133</sup> Both the *Land Titles Act*<sup>134</sup> and the *Registry Act*<sup>135</sup> authorize their registration. The *Registry*

<sup>126</sup> *Conservation Land Act*, s. 3(1).

<sup>127</sup> *Income Tax Regulations*, s. 3504 provides that, for the purposes of ss. 110.1(3)(a)(ii) and 118.1(6)(b) of the *Income Tax Act*, The Nature Conservancy, a U.S. charity, is a prescribed donee. The effect is to give it specialized tax status in Canada.

<sup>128</sup> This includes some U.S. conservation charities.

<sup>129</sup> *Conservation Bodies Regulation*, Ont. Reg. 293/03, s. 1.

<sup>130</sup> *Registry Act*, R.S.O. 1990, c. R.20.

<sup>131</sup> *Land Titles Act*, R.S.O. 1990, c. L.5.

<sup>132</sup> Telephone communication with Barbara Wilson, Ontario Real Property Registration, June 18, 2003.

<sup>133</sup> Telephone communication with Barbara Wilson, Ontario Real Property Registration, June 18, 2003.

<sup>134</sup> *Land Titles Act*, s. 39.

<sup>135</sup> *Registry Act*, s. 26.

*Act* specifically requires that a “local description of the affected part of the servient tenement is contained in the instrument by which the conveyance is made.”<sup>136</sup> Failure to provide a local description could defeat the interest as against a purchaser who purchases the land subject to the easement in good faith, for valuable consideration, without actual notice.<sup>137</sup>

The *Surveys, Plans, and Descriptions of Lands Regulation*<sup>138</sup> deals with survey or other plan requirements whether the land subject to the easement or covenant is under the deed registry system or under the land titles system. The registrar may request a plan of survey or other descriptive plan for easements in order to correctly identify the area covered by the conservation easement or covenant interest. The holder should contact the registrar well in advance of the intended registration date to ensure that the registrar’s requirements are met. The regulation sets out specific requirements for various plans.

### ***When transfer of interest occurs***

The *Conservation Land Act* states that once an easement or covenant is registered at the proper land registry office, it runs with the land against which it is registered. This suggests that the transfer of interest could occur prior to registration, as against the original parties to the easement or covenant. However, to bind any subsequent owners of the land subject to the easement or covenant the interest must be registered.

### ***Termination/modification of interest***

The following statutory provisions are relevant to termination of an interest:

- The *Land Titles Act* states where no term is fixed for a registered condition, restriction or covenant, the interest is deemed to expire 40 years after registration and the condition, restriction or covenant may be deleted from the register. Ontario lawyers debate whether stating that an easement or covenant is issued “in perpetuity” sufficiently fixes a term to prevent an interest from expiring in 40 years. Some conservation lawyers deal with the uncertainty by stating that a conservation easement is granted in perpetuity meaning at least a term of X (some great number, such as 999) years, or by stating a term of X years, for example, 999 years.<sup>139</sup>

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<sup>136</sup> *Registry Act*, s. 26(2).

<sup>137</sup> *Registry Act*, s. 26(2)

<sup>138</sup> *Surveys, Plans, and Descriptions of Lands Regulation*, O. Reg. 43/96.

<sup>139</sup> Email exchange on June 20, 2003, with Ian Attridge, Barrister and Solicitor, Peterborough, Ontario.

- Under the *Land Titles Act*, the holder of conservation easements or covenants may file a release and discharge of interest.<sup>140</sup>

## Agreements on title for conservation purposes under other statutes

### *Ontario Heritage Act*

The *Ontario Heritage Act*<sup>141</sup> authorizes a landowner to enter into “agreements, covenants, or easements” for the conservation, protection and preservation of heritage of Ontario.<sup>142</sup> The Act does not define “heritage” but the Act states that “heritage attributes” in relation to a property means “the attributes of the property that cause it to have cultural heritage value or interest.”<sup>143</sup> The Act enables Cabinet to define “cultural heritage” by regulation.<sup>144</sup> To date, no such regulations have been passed. However, since the objects of the Act include preserving heritage resources of “historical, architectural, archaeological, recreational, aesthetic and scenic”<sup>145</sup> interest, unless a future regulation states otherwise, “heritage” could cover some lands with conservation values. Indeed numerous conservation easements have been completed under the Act to protect natural heritage areas, including in respect of the Niagara Escarpment, southern Carolinian forest zone sites, and Pelee Island.<sup>146</sup>

Covenants and easements under the Act that are registered at the proper land registry office may be enforced whether they are positive or negative in nature, and even if there is no dominant tenement.<sup>147</sup> Thus the

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*Thus the legislation specifically overrides the common law requirements that restrictive covenants be negative and easements normally positive.*

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legislation specifically overrides the common law requirements that restrictive covenants be negative and easements normally positive. As well, the legislation overrides the common law requirement that valid restrictive covenants and easements require two parcels of land, a dominant tenement and a servient tenement, each owned and occupied by a different person, and that conditions and covenants relating to the servient tenement benefit the dominant tenement. The legislation is silent as to whether an easement or covenant may be granted for a term of time or in perpetuity. Nevertheless, perpetual agreements should be valid.

<sup>140</sup> Telephone communication with Barbara Wilson, Ontario Real Property Registration, June 20, 2003. Ms. Wilson noted that this may be under s. 75 of the *Land Titles Act* which enables “owners of interest” to file changes relating to that interest.

<sup>141</sup> *Ontario Heritage Act*, R.S.O. 1990, c. O.18.

<sup>142</sup> *Ontario Heritage Act*, s. 10(e).

<sup>143</sup> *Ontario Heritage Act*, s. 1.

<sup>144</sup> *Ontario Heritage Act*, s. 70(h).

<sup>145</sup> *Ontario Heritage Act*, s. 7(d).

<sup>146</sup> T. Silver, I. Attridge, M. MacRae, and K. Cox, *Conservation Legislation for Conservation Covenants, Easements and Servitudes*, (North American Wetlands Conservation Council: Ottawa) 1995, at p. 16.

<sup>147</sup> *Ontario Heritage Act*, ss. 22(2) and 37(3).

The legislation does not address enforcement, except to say that assignees of a municipality, when a municipality holds the easement or covenant, may enforce it as the municipality could have enforced it.<sup>148</sup> Presumably, agreements otherwise are enforceable like any contract that grants an interest in land.

A person wishing to further protect a heritage property could seek designation of the property under the Act. Designation is discretionary on the municipality in which the property is located. The legislation sets forth a detailed designation process. However, once designated by bylaw, it is an offence for the owner to alter or permit alteration of the property without council's permission.<sup>149</sup>

### ***Who may hold interest***

Only the following may hold an easement or covenant under the *Ontario Heritage Act*:

- (a) the Ontario Heritage Foundation, which is created under the Act;
- (b) the responsible Minister,<sup>150</sup> currently the Minister of Culture, if the Minister assumes the role of the Ontario Heritage Foundation in relation to an easement or covenant; or
- (c) the municipality in which the land is located.

The Ontario Heritage Foundation, or the Minister if the Minister assumes the role of the Foundation, may hold an easement or covenant for all heritage purposes. Municipalities may hold an easement or covenant for the conservation of cultural heritage value.<sup>151</sup>

Subsequent to the creation of an easement or covenant, an easement or covenant may be assigned to "any person."<sup>152</sup> "Person" includes any individual or corporation, and accordingly should include any incorporated conservation organization that may carry out conservation activities in Ontario.<sup>153</sup>

### ***How registration of interest is effected***

Covenants or easements may be registered at the appropriate land titles office.<sup>154</sup> The Act provides no specific requirements for registration, but the *Land Titles Act*

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<sup>148</sup> *Ontario Heritage Act*, ss. 22(3) and 37(4).

<sup>149</sup> *Ontario Heritage Act*, s. 33.

<sup>150</sup> S. 1 of the *Ontario Heritage Act* defines "Minister" to mean "the member of the Executive Council to whom the administration of this Act is assigned by the Lieutenant Governor in Council."

<sup>151</sup> *Ontario Heritage Act*, ss. 10, 36 and 37.

<sup>152</sup> *Ontario Heritage Act*, ss. 22(3) and 37(4).

<sup>153</sup> *Interpretation Act*, R.S.O. 1990, c. I.11, s. 29, definition of "person."

<sup>154</sup> *Ontario Heritage Act*, ss. 22(1) and 37(2).

specifically enables registration of easements. Registration is in the same manner as registrations regarding ownership of land, “as near as circumstances admit.”<sup>155</sup>

### ***The legislation and transfer of interest***

The Act states that covenants or easements “may” be registered. This suggests that the transfer of interest could occur prior to registration, as against the original parties to the easement or covenant. However, to clearly bind any subsequent owners of the land subject to the easement or covenant, the interest must be registered.<sup>156</sup>

### ***Termination/modification of interest***

The Act does not address termination of a covenant or easement. However, the statutory provisions of the *Land Titles Act* dealing with termination of covenants, noted above under the discussion of conservation easements, likely applies to heritage easements or covenants.

### ***Agricultural Research Institute of Ontario Act***

The *Agricultural Research Institute of Ontario Act*<sup>157</sup> enables the Agricultural Research Institute of Ontario “to enter into agreements, covenants and easements with owners of real property or interests therein, or assign such agreements, covenants and easements, for the conservation, protection or preservation of agricultural lands.”<sup>158</sup> Agricultural lands are those lands defined in regulations under the Act.<sup>159</sup>

Any easement or covenant entered into by the Research Institute may be registered in the appropriate land registry office.<sup>160</sup> A registered easement or covenant runs with the land and, whether positive or negative in nature, may be enforced by the Research Institute against the owner or subsequent owners of the land even if the Research Institute owns no adjacent or nearby land that is accommodated or benefited by the easement or covenant.

An easement or covenant entered into by the Research Institute may be assigned to any person designated by the Director of Research and the assignee may enforce the

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<sup>155</sup> *Land Titles Act*, s. 39.

<sup>156</sup> *Ontario Heritage Act*, ss. 22(1) and 37(3).

<sup>157</sup> *Agricultural Research Institute of Ontario Act*, R.S.O. 1990, c. A.13.

<sup>158</sup> *Agricultural Research Institute of Ontario Act*, s. 3(f).

<sup>159</sup> This legislation has been used rarely, if at all. At present, only land in a Good Tender Fruit Area or a Related Area shown on the five maps titled Niagara Tender Fruit Lands Program of Eligibility Maps dated January, 1995, has been designated as “agricultural lands” by regulation.

<sup>160</sup> *Agricultural Research Institute of Ontario Act*, s. 4.1(1). The provisions respecting easements and covenants are largely contained in s. 4.1.



easement or covenant against the owner or subsequent owners of the property as if it were the Research Institute even if the assignee.

An easement or covenant granted under the Act can be modified or discharged by written agreement between the Director of Research of the Research Institute and the owner or subsequent owners of the property against which the easement or covenant is registered.

## QUEBEC

In Quebec, servitudes governed by the *Civil Code* have been used for conservation purposes.<sup>161</sup> Although statute-based, servitudes are subject to restrictions similar to those affecting common law easements and restrictive covenants – there must be two parcels of land and each parcel must have a different owner. Quebec has recently enacted legislation enabling the registration of conservation agreements against land free of the restrictions attached to servitudes.

### *Natural Heritage Conservation Act*

The Quebec *Natural Heritage Conservation Act*<sup>162</sup> enables the registration against title to land of conservation agreements that run with the land as part of a process of recognizing the land as a nature reserve. A nature reserve is “land under private ownership recognized as a nature reserve because it has significant biological, ecological, wildlife, floristic, geological, geomorphic or landscape features that warrant preservation.”<sup>163</sup>

The object of the Act is to contribute to

safeguarding the character, diversity and integrity of Quebec’s natural heritage through measures to protect its biological diversity and the life-sustaining elements of natural settings.<sup>164</sup>

The Act provides that

any private property having significant biological, ecological, wildlife, floristic, geological, geomorphic or landscape features that warrant preservation may be recognized as a nature reserve on the application of the owner as provided in this Act.<sup>165</sup>

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<sup>161</sup> See the discussion of servitudes in Part 1.

<sup>162</sup> *Natural Heritage Conservation Act*, L.R.Q., c.-61.01; replaced *An Act Respecting Nature Reserves on Private Land*, L.R.Q. c. R-26.2.

<sup>163</sup> *Natural Heritage Conservation Act*, s. 2.

<sup>164</sup> *Natural Heritage Conservation Act*, s. 1.

<sup>165</sup> *Natural Heritage Conservation Act*, s. 54.

The application for recognition as a nature reserve may be made by the landowner alone or jointly with a non-profit conservation organization. The application must be made to the Minister of the Environment and must contain the information specified in the legislation.<sup>166</sup> The Minister may establish and implement financial and technical assistance programs to support the creation, conservation, supervision and management of nature reserves.<sup>167</sup>

For a parcel of land to be recognized as a nature reserve, the Minister must either enter into an agreement with the landowner or approve an agreement between the landowner and a non-profit conservation organization.<sup>168</sup>

The agreement must contain, among other provisions,

- a description of the land,
- the term of the agreement (perpetual or a specified term of at least 25 years),
- the significant features of the property that warrant preservation,
- the management arrangements for the property,
- the conservation measures to be applied, and
- permitted and prohibited activities on the land.<sup>169</sup>

Once land is recognized as a nature reserve, the Minister must publish a notice announcing this recognition in the *Gazette officielle du Québec* and in a newspaper circulated in the territory of the municipal body where the property is situated. The recognition takes effect on the date of the publication of the notice in the *Gazette*.<sup>170</sup> In addition, land recognized as a nature reserve is entered into a register of protected areas maintained by the Minister.<sup>171</sup>

The Act contains provisions authorizing inspection of protected areas by a person authorized and creating offences and penalties for trespass or damage to property contrary to the Act.<sup>172</sup> It authorizes the court to order a person convicted of an offence under the Act to restore damaged land to its original state. It also authorizes the Minister to restore land at the offender's expense if the offender does not comply with the court order.<sup>173</sup>

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<sup>166</sup> *Natural Heritage Conservation Act*, s. 55.

<sup>167</sup> *Natural Heritage Conservation Act*, s. 8.

<sup>168</sup> *Natural Heritage Conservation Act*, s. 57.

<sup>169</sup> *Natural Heritage Conservation Act*, s. 57.

<sup>170</sup> *Natural Heritage Conservation Act*, s. 58.

<sup>171</sup> *Natural Heritage Conservation Act*, s. 5.

<sup>172</sup> *Natural Heritage Conservation Act*, ss. 66-77.

<sup>173</sup> *Natural Heritage Conservation Act*, ss. 75-76.

### ***Who may hold interest***

Either the Minister or a non-profit conservation organization may hold the interest created by an agreement made under the Act. An agreement between a landowner and a non-profit conservation organization must be approved by the Minister.

### ***How registration of interest is effected***

The agreement must be registered in the land register. Once it is registered, the Minister must send a certified statement of registration to the landowner, the conservation organization, where applicable, and the local and regional municipal authorities where the land is located.<sup>174</sup>

In addition, as stated above, land recognized as a nature reserve is entered into a register of protected areas maintained by the Minister.<sup>175</sup> This is to enable the nature reserve to receive legal recognition under the Act.

### ***The legislation and transfer of interest***

The Act is silent about the transfer of an interest in land. Once an agreement under the Act is registered, however, subsequent owners of the land are bound by the terms of the agreement. Every subsequent owner of land recognized as a nature reserve must send a copy of the deed of transfer to the Minister.<sup>176</sup>

### ***Termination/modification of interest***

An agreement under the Act may be amended at any time with the consent of the parties as long as the amendments are not contrary to the purpose for which the land has been recognized as a nature reserve. Where the agreement is between a landowner and a conservation organization, the Minister must approve any amendments.<sup>177</sup> To have effect against third parties, amendments must be registered in the same way as the original agreement.<sup>178</sup>

The Act is silent with respect to termination of an agreement. However, it provides that recognition of land as a nature reserve terminates at the expiry of any term in the agreement or upon the Minister's decision to withdraw recognition because

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<sup>174</sup> *Natural Heritage Conservation Act*, s. 59. Registration is governed in part by the *Civil Code of Quebec*, S.Q. 1991, c. 64, Book Nine, Title One, c. I.

<sup>175</sup> *Natural Heritage Conservation Act*, s. 5.

<sup>176</sup> *Natural Heritage Conservation Act*, s. 59.

<sup>177</sup> *Natural Heritage Conservation Act*, s. 62.

<sup>178</sup> *Natural Heritage Conservation Act*, s. 62.

- the property was recognized on the basis of inaccurate or incomplete information or documents,
- the provisions of the agreement are not being complied with,
- the features of the property no longer warrant preservation, or
- it would be more detrimental to the community to maintain the recognition than to withdraw it.<sup>179</sup>

Within 30 days of notification of the Minister's decision to withdraw recognition, the landowner and, where applicable, a conservation organization that is either a party to the agreement or managing the property can contest the decision before the Administrative Tribunal of Quebec.<sup>180</sup>

If recognition is terminated, the Minister must publish notice to this effect. In addition, registration of the agreement in the land register is cancelled.

However, if the agreement meets all of the requirements of a civil law servitude, the agreement may survive the withdrawal of recognition as a nature reserve and continue to charge the land. This is so because the loss of recognition as a nature reserve is not a reason for extinguishing of a servitude under the *Civil Code*.

## **NEW BRUNSWICK**

### ***Conservation Easements Act***

The *Conservation Easements Act*<sup>181</sup> enables landowners to grant conservation easements in New Brunswick. The Act also specifies that the federal or provincial Crown and municipalities may grant conservation easements to themselves or to anyone eligible to hold conservation easements.

A conservation easement is defined as

a voluntary agreement entered into between the grantor of the conservation easement and the holder of the conservation easement that

- (a) grants rights and privileges to the holder of the conservation easement respecting land that relate to the purposes for which the conservation easement is granted, and

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<sup>179</sup> *Natural Heritage Conservation Act*, s. 63.

<sup>180</sup> *Natural Heritage Conservation Act*, s. 64.

<sup>181</sup> *Conservation Easements Act*, R.S.N.B. 1998, c. C-16.3.

- (b) may impose obligations, either positive or negative, on the holder of the conservation easement, the grantor of the conservation easement or any subsequent owner of the land respecting that land that relate to the purposes for which the conservation easement is granted.<sup>182</sup>

A conservation easement may be for a fixed term or for perpetuity.<sup>183</sup>

The permitted purposes of a conservation easement are:

- (a) the conservation of ecologically sensitive land;
- (b) the protection, enhancement or restoration of natural ecosystems;
- (c) the protection or restoration of wildlife habitat or wildlife;
- (d) the conservation of habitat of rare or endangered plant or animal species;
- (e) the conservation or protection of soil, air, land or water;
- (f) the conservation of significant biological, morphological, geological or palaeontological features;
- (g) the conservation of culturally important, archaeologically important or scenically important places;
- (h) the protection or use of land for outdoor recreation;
- (i) the use of land for public education; and
- (j) any other purpose prescribed by regulation.<sup>184</sup>

The Act eliminates the common law requirement for two parcels of land and authorizes the inclusion of both positive and negative obligations.<sup>185</sup>

Subject to the provisions of the Act, a conservation easement runs with the land for the period set out in the easement and is enforceable by the easement holder against the landowner that granted the easement and against any subsequent owners of the land.<sup>186</sup>

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<sup>182</sup> *Conservation Easements Act*, s. 2(1).

<sup>183</sup> *Conservation Easements Act*, s. 2(2).

<sup>184</sup> *Conservation Easements Act*, s. 3.

<sup>185</sup> *Conservation Easements Act*, s. 4(2).

<sup>186</sup> *Conservation Easements Act*, s. 2(4).

The obligations in a conservation easement may be enforced by court action by the landowner that granted the easement, a subsequent owner of the land or the easement holder.<sup>187</sup>

Regulations set out information that must be included in a conservation easement,<sup>188</sup> including:

- the rights and privileges granted to the easement holder;
- the obligation imposed on the landowner and easement holder;
- the period of time for which the easement is granted;
- a description of the land use practices that are permitted, restricted or prohibited;
- the purposes for which the easement is granted;
- the conservation, restoration or enhancement practices that may be undertaken by the landowner or easement holder;
- terms and conditions, if any, relating to access by the public or the easement holder;
- the allocation of liability between the easement holder and landowner; and
- the responsibility for costs relating to the easement.

### ***Who may hold interest***

Any of the following may hold a conservation easement:<sup>189</sup>

- the Crown or an agency of the Crown in right of the Province or of Canada;
- a municipality or any agency of a municipality;
- a non-profit corporation that has as one of its primary purposes the purposes set out in the Act for which a conservation easement may be granted; and
- any person, body or group or class of persons, bodies or groups eligible to hold an interest in land and prescribed by regulation.

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<sup>187</sup> *Conservation Easements Act*, s. 11.

<sup>188</sup> Regulation 98-58 under the *Conservation Easements Act*, O.C. 98-479.

<sup>189</sup> *Conservation Easements Act*, s. 5.

Subject to the terms of the conservation easement, a holder may assign the easement to another eligible holder. The assignment must be registered in the same manner as the easement itself and has no effect until it is registered.<sup>190</sup>

### ***How registration of interest is effected***

New Brunswick has recently implemented a land titles registration system governed by the *Land Titles Act*. Land will gradually be brought into this system from the deed registry system under the *Registry Act*. Until all land is brought under the *Land Titles Act*, both systems will run concurrently.

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*New Brunswick has recently implemented a land titles registration system governed by the Land Titles Act. Land will gradually be brought into this system from the deed registry system under the Registry Act.*

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The easement holder registers the easement by submitting it for registration in the appropriate land registration office.<sup>191</sup> “Land registration office” means a registry office established under the *Registry Act* (the legislation governing the former deeds registration system) or a land titles office established under the *Land Titles Act*. The easement holder must forward a copy of the conservation easement to the minister responsible for administering the Act within 30 days after registration of the easement.

### ***The legislation and transfer of interest***

A conservation easement has no effect until the conservation easement has been registered in accordance with this Act in the appropriate land registration office.<sup>192</sup> Once the easement is registered it runs with the land and is enforceable against the landowner.

### ***Termination/modification of interest***

A conservation easement may be amended by written agreement between the landowner and easement holder. The amending agreement must be registered in the appropriate land registration office before it has any effect.<sup>193</sup>

A conservation easement may be terminated by

- written agreement between the landowner and easement holder,

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<sup>190</sup> *Conservation Easements Act*, s. 9.

<sup>191</sup> *Conservation Easements Act*, s. 6(1).

<sup>192</sup> *Conservation Easements Act*, s. 6(3).

<sup>193</sup> *Conservation Easements Act*, s. 8.

- order of the court,
- the easement holder or the landowner where the court is of the opinion that continuation of the conservation easement would produce severe hardship for the applicant, or
- any person that the court determines has a sufficient interest where the easement holder has died or ceased to exist.<sup>194</sup>

In the last circumstance, the Crown may elect to assume the role of easement holder.

Registration of the written agreement or court order terminating a conservation easement will discharge the easement from title to the land.

### **Agreements on title for conservation purposes under other statutes**

#### ***Historic Sites Protection Act***

Under the *Historic Sites Protection Act*, the minister responsible for administration of the Act, or any other person if the easement or covenant is approved by the Minister, may enter into an easement or covenant with respect to a historic site with the owner of the land on which the site is located.<sup>195</sup> A historic site is any site, parcel of land, building or structure of historical significance that has been designated by the minister.<sup>196</sup> Easements or covenants under this legislation cannot be entered into respecting sites that are not designated historic sites. A regulation under the Act lists designated historic sites.<sup>197</sup>

An easement or covenant under the Act may be registered against the affected land in the property registry office.<sup>198</sup> Where the easement or covenant is registered, it runs with the land and the holder may enforce the easement or covenant against the landowner who entered into the easement and subsequent landowners.

The easement or covenant may be positive or negative in nature and the common law requirement for two pieces of land is removed.<sup>199</sup> An easement or covenant under the Act may be assigned to any person.<sup>200</sup> The Act does not require the minister to approve the assignment.

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<sup>194</sup> *Conservation Easements Act*, s. 10.

<sup>195</sup> *Historic Sites Protection Act*, R.S.N.B., c. H-6, s. 2.1(1).

<sup>196</sup> *Historic Sites Protection Act*, s. 1.

<sup>197</sup> Regulation 83-196 under the *Historic Sites Protection Act*.

<sup>198</sup> *Historic Sites Protection Act*, s. 2.1(1).

<sup>199</sup> *Historic Sites Protection Act*, s. 2.1(2).

<sup>200</sup> *Historic Sites Protection Act*, s. 2.1(3).



The legislation is silent as to the duration of an easement or covenant entered into under the Act and as to termination and modification of an easement or covenant. There is nothing to indicate that an easement or covenant cannot be entered into in perpetuity.

## **NOVA SCOTIA**

### ***Conservation Easements Act***

The *Conservation Easements Act*<sup>201</sup> of 2001 replaced the 1992 *Conservation Easements Act*.<sup>202</sup> The 2001 Act applies to conservation easements made under the 1992 Act “as if the easement or covenant were a conservation easement within the meaning of [the 2001] Act.”<sup>203</sup>

Under the 2001 Act a conservation easement may be made for the purpose of protecting, restoring or enhancing land that:

- (i) contains natural ecosystems or constitutes the habitat of rare, threatened or endangered plant or animal species,
- (ii) contains outstanding botanical, zoological, geological, morphological or palaeontological features,
- (iii) exhibits exceptional and diversified scenery,
- (iv) provides a haven for concentrations of birds and animals,
- (v) provides opportunities for scientific or educational programs in aspects of the natural environment,
- (vi) is representative of the ecosystems, landforms or landscapes of the Province, or
- (vii) meets any other purpose prescribed by the regulations (no such regulations have been made at the date of writing).<sup>204</sup>

A conservation easement may exist for a term of years or be granted in perpetuity.

A conservation easement may be enforced by an action in the Supreme Court of Nova Scotia by either the holder or the owner of the land subject to the conservation easement.<sup>205</sup>

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<sup>201</sup> *Conservation Easements Act*, S.N.S. 2001, c. 28.

<sup>202</sup> *Conservation Easements Act*, S.N.S. 1992, c. 2.

<sup>203</sup> *Conservation Easements Act* 2001, s. 3(4).

<sup>204</sup> *Conservation Easements Act* 2001, s. 4(c).

<sup>205</sup> *Conservation Easements Act* 2001, s. 15(1).

A conservation easement may be assigned by the holder to any “eligible holder” but only with the written consent of the owner and subject to any relevant terms in the conservation easement.<sup>206</sup>

### ***Who may hold interest***

Any “eligible body” may hold an interest. The *Conservation Easements Act* 2001 defines “eligible body” as:

- (a) the provincial Crown or a provincial government agency;
- (b) the federal Crown or a federal Crown agency;
- (c) a municipality or any agency of a municipality;
- (d) any organization designated as a conservation organization by cabinet under the *Conservation Easements Act* 1992; and
- (e) any other organization designated pursuant to the regulations.<sup>207</sup>

The *Designation of Eligible Bodies Regulations*<sup>208</sup> designates as eligible bodies the Nova Scotia Nature Trust, Nature Conservancy of Canada, Bras d’Or Preservation Foundation, Ducks Unlimited Canada, Federation of Nova Scotia Naturalists, Kingsburg Coastal Conservancy Association, Blomidon Naturalists Society and the Shubenacadie Canal Commission.

### ***How registration of interest is effected***

Nova Scotia’s registry system currently is in transition. The province’s 250-year-old deed registry system is being replaced with a Torrens based electronic land registration system.<sup>209</sup>

The registry system is created and regulated under the *Registry Act*.<sup>210</sup> Under the Act each of Nova Scotia’s 18 districts houses a deed registry. Registration of deeds is not mandatory under the Act.<sup>211</sup> Nova Scotia’s adoption of a

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*Nova Scotia’s 250-year-old deed registry system is being replaced with a Torrens based electronic land registration system.*

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<sup>206</sup> *Conservation Easements Act* 2001, s. 10.

<sup>207</sup> *Conservation Easements Act* 2001, ss. 21(c) and 8.

<sup>208</sup> *Designation of Eligible Bodies Regulation*, N.S. Reg. 12/2002.

<sup>209</sup> See the introduction to Part 2 for a discussion of deed registry systems and Torrens based systems.

<sup>210</sup> *Registry Act*, R.S.N.S. 1989, c. 392.

<sup>211</sup> Although not mandatory under the Act registration is advisable since a person’s unregistered land interest could be determined to be ineffective as against subsequently filed interests.

Torrens based electronic land registration system is through the *Land Registration Act*.<sup>212</sup> The switch to the new system will be gradual, starting with one county.

Landowners and those with existing interests in lands, including conservation easements, are not immediately required to re-register interests under the new legislation. According to a government issued “Questions and Answers” document, conversion to the system under the *Land Registration Act* will not be necessary unless an owner transfers a property for value, mortgages a property, or subdivides it into three or more lots for non-familial reasons. When one of these events occurs, the land is to be brought under the new system.<sup>213</sup>

The registration process itself is as follows:

- The conservation easement holder must submit the conservation easement to the appropriate registry for registration (no time limit is specified in the *Conservation Easements Act*).<sup>214</sup> Where a conservation easement relates to lands that have not been registered under the *Land Registration Act*, the conservation easement is to be registered under the *Registry Act* (deeds registry system) at the Registry of Deeds in the district in which the land is located.
- Where a conservation easement relates to lands that have been registered under the *Land Registration Act*, the conservation easement is to be registered under that Act (Torrens based electronic registry). The conservation easement itself will be deposited at the Land Registration Office.
- The *Conservation Easements Act* sets out what a conservation easement shall contain.<sup>215</sup> In addition to other information, a conservation easement must include a sketch of the lands to which the conservation easement relates, and must describe the land to which it relates by metes and bounds, a plan of survey, and by the unique parcel identification number that is assigned to it by the Service Nova Scotia and Municipal Relations or “other means sufficiently to identify the land.”<sup>216</sup> Both the *Land Registration Act* and the *Registry Act* require that the registered interest be clearly identified.
- For a conservation easement registered under the *Land Registration Act*, a certificate of a qualified solicitor setting out the legal effect of the document will be required.<sup>217</sup>

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<sup>212</sup> *Land Registration Act*, S.N.S. 2001, c. 6.

<sup>213</sup> “Land Registration Questions and Answers” available online at [www.gov.ns.ca/snsmr/property/ROD/faqs.stm](http://www.gov.ns.ca/snsmr/property/ROD/faqs.stm). Also see s. 46 of the *Land Registration Act*.

<sup>214</sup> *Conservation Easements Act* 2001, s. 11(1).

<sup>215</sup> *Conservation Easements Act* 2001, s. 7.

<sup>216</sup> *Conservation Easements Act* 2001, ss. 7(b) and (c).

<sup>217</sup> *Land Registration Act*, s. 18(4).

- The appropriate registrar must forward a copy of a registered conservation easement to the Minister of Natural Resources within 90 days of registration.<sup>218</sup>

### ***The legislation and transfer of interest***

In Nova Scotia the transfer of interest apparently occurs upon execution of a valid conservation easement agreement. Although the Act requires that the conservation easement be registered, it does not set a deadline<sup>219</sup> nor does it state consequences if a conservation easement is not registered. The registry acts, however, do provide that unregistered interests may be rendered ineffective as against subsequently registered interests in certain circumstances and so it is very important that the holder of a conservation easement comply with the registration requirement promptly following execution.<sup>220</sup>

### ***Termination/modification of interest***

A conservation easement may be terminated by a written agreement between the easement holder and the owner. The holder then must register the termination agreement within 90 days and then the appropriate registrar has a further 90 days to file a copy of the agreement with the Minister of Natural Resources.<sup>221</sup>

Where an easement holder ceases to exist, the owner of the land to which the conservation easement applies must notify the Minister of this fact. The Minister then must notify all eligible bodies within 90 days. Any eligible body, with the consent of the owner, may take over as holder of the conservation easement within 90 days. If no eligible body steps forward, the Minister may assume the role as holder within a further 180 days. If neither an eligible body nor the Minister assumes this role, then the conservation easement is terminated and the Minister must file a notice of termination at the appropriate registry and provide a copy to the owner.<sup>222</sup>

The Act specifically provides that a conservation easement does not lapse by reason only of

- (a) non-enforcement,

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<sup>218</sup> *Conservation Easements Act* 2001, s. 11(2).

<sup>219</sup> The Act does, however, require that a written termination agreement between the grantor and grantee be registered. See *Conservation Easements Act* 2001, s. 11(4).

<sup>220</sup> *Registry Act*, s. 18, and *Land Registration Act*, s. 20.

<sup>221</sup> *Conservation Easements Act* 2001, s. 13.

<sup>222</sup> *Conservation Easements Act* 2001, s. 16.

- (b) the use of the land to which the easement relates for a purpose that is inconsistent with the purposes of the easement, or
- (c) a change in the use of land that surrounds or is adjacent to the land to which the easement relates.<sup>223</sup>

A conservation easement may be amended by written agreement between the owner and the easement holder.<sup>224</sup>

## **Agreements on title for conservation purposes under other statutes**

### ***Heritage Property Act***

The *Heritage Property Act*<sup>225</sup> authorizes the Minister<sup>226</sup> to enter into an agreement with an owner of “provincial heritage property,” and a municipal council to enter into an agreement with the owner of “municipal heritage property” in a municipality regarding the use, preservation or protection of the property.<sup>227</sup> The Act’s definition of “heritage property” is narrower than some other provinces’ heritage protection legislation but still is broad enough to cover some lands with conservation values. “Municipal heritage property” means a building, streetscape or area registered in a municipal registry of heritage property and “provincial heritage property” means a building, streetscape or area registered in the Provincial Registry of Heritage Property.<sup>228</sup>

Lands could fall under the definitions if the council or Minister found them to constitute an “area” with sufficient provincial heritage values for protection under the legislation. Registration under either the municipal or provincial system involves considerable process, though a landowner’s willingness to register an area should ease the process.

The legislation is silent as to whether an agreement may be granted for a term of time or in perpetuity. However, perpetual agreements should be possible. The legislation states that agreements run with the land though the Act does not specifically address common law requirements for easements or restrictive covenants.<sup>229</sup>

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<sup>223</sup> *Conservation Easements Act* 2001, s. 12.

<sup>224</sup> *Conservation Easements Act* 2001, s. 9.

<sup>225</sup> *Heritage Property Act*, R.S.N.S. 1989, c. 199.

<sup>226</sup> S. 3(f) of the *Heritage Property Act* defines “Minister” as Cabinet’s appointee from Executive Council to administer the Act, currently the Minister of Tourism and Culture.

<sup>227</sup> *Heritage Property Act*, s. 20.

<sup>228</sup> *Heritage Property Act*, ss. 3(g) and (i).

<sup>229</sup> *Heritage Property Act*, s. 20(3).

Under the Act, the Minister, in respect of a provincial heritage property, or the municipal council, in respect of a municipal heritage property, may enforce the agreement against the owner and subsequent owners.<sup>230</sup>

In addition to the protection afforded by an agreement, a person commits an offence who “substantially alters” the “exterior appearance” of a registered municipal heritage property without council’s approval<sup>231</sup> or of a provincial heritage property without Cabinet’s approval.<sup>232</sup> As well, conservation by-laws and conservation plans may further limit uses of heritage properties. The Minister, or the council, as the case may be, may bring an enforcement action for any violations of the Act or agreements in the Trial Division of the Supreme Court. The Act authorizes the Court, in addition to other remedies, to order an injunction or restoration.<sup>233</sup>

### ***Who may hold interest***

Only the Minister, in respect of a provincial heritage property, or municipal council, in respect of a municipal heritage property, may enter into an agreement under the Act.

### ***How registration of interest is effected***

Agreements must be deposited in the appropriate registry of deeds office.<sup>234</sup>

### ***The legislation and transfer of interest***

The Act is silent with respect to transfer of the interest represented by the agreement. It provides, however, that where an agreement is registered it runs with the land and is enforceable against the owner and subsequent owners.<sup>235</sup>

### ***Termination/modification of interest***

As mentioned earlier, a landowner holding land subject to the agreement may alter the heritage property with prior approval of the holder, the Minister or council. As well,

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<sup>230</sup> *Heritage Property Act*, s. 25(3).

<sup>231</sup> *Heritage Property Act*, ss. 17 and 18.

<sup>232</sup> *Heritage Property Act*, s. 11.

<sup>233</sup> *Heritage Property Act*, s. 25.

<sup>234</sup> *Heritage Property Act*, s. 20(2). The Act does not mention land under the *Land Registration Act*, though presumably transitional provisions relating to the change of title systems have been or will be developed.

<sup>235</sup> *Heritage Property Act*, s. 20(3).

Cabinet may waive or discharge any obligations created by an agreement.<sup>236</sup> An “aggrieved person” may appeal a waiver or discharge to the Nova Scotia Municipal Board. An “aggrieved person” includes persons whose enjoyment of property or property value may be affected by Cabinet’s decision, as well as incorporated organizations whose objects include promoting or protecting features of the area affected by the decision.<sup>237</sup>

## **PRINCE EDWARD ISLAND**

### ***Natural Areas Protection Act***

The *Natural Areas Protection Act*<sup>238</sup> is intended to preserve natural areas in Prince Edward Island.<sup>239</sup> Under the Act, a private landowner may impose a restrictive covenant on his or her land by entering into an agreement with a covenant holder. A restrictive covenant under the Act may be positive or negative in nature and prohibit specific uses of the land. The Act eliminates the requirement for a nearby or adjacent parcel of land that is accommodated or benefited by the covenant.<sup>240</sup>

A restrictive covenant may be enforced by injunction by the parties to the covenant and by successors in title of the landowner.<sup>241</sup> The Act is silent as to any other remedies available for covenant violations.

In more general terms, the Act allows the responsible minister to make an order designating an area of land as a natural area if<sup>242</sup>

- the land is Crown land,
- the minister has entered into an agreement with the landowner to purchase, lease or otherwise acquire the land, or
- a landowner has registered a restrictive covenant affecting the land.<sup>243</sup>

The provincial Cabinet may regulate natural areas by, among other things,

- defining the objectives, purpose and function of a natural area, and
- regulating activities that may take place in a natural area.<sup>244</sup>

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<sup>236</sup> *Heritage Property Act*, s. 20(4).

<sup>237</sup> *Heritage Property Act*, s. 20A.

<sup>238</sup> *Natural Areas Protection Act*, R.S.P.E.I. 1988, c. N-2.

<sup>239</sup> *Natural Areas Protection Act*, s. 2.

<sup>240</sup> *Natural Areas Protection Act*, s. 5.

<sup>241</sup> *Natural Areas Protection Act*, s. 5(2).

<sup>242</sup> *Natural Areas Protection Act*, s. 5.

<sup>243</sup> *Natural Areas Protection Act*, s. 3.

<sup>244</sup> *Natural Areas Protection Act*, s. 7.

A “natural area” is defined as a parcel of land designated as such by the minister charged with responsibility for administering the Act that

- contains natural ecosystems or constitutes the habitat of rare, endangered or uncommon plant or animal species,
- contains unusual botanical, zoological, geological, morphological or palaeontological features,
- exhibits exceptional and diversified scenery,
- provides haven for seasonal concentrations of birds and animals, or
- provides opportunities for scientific and educational programs in aspects of the natural environment.<sup>245</sup>

The Act authorizes Cabinet to make regulations regulating activities in natural areas, creating offences in relation to activities in a natural area and prescribing penalties for the offences. The *Natural Areas Protection Act Regulations* sets out a number of activities that are prohibited in natural areas and establishes an offence and penalties for violating the Regulations.

The Regulations include prohibitions against:

- cutting, destroying or removing trees, shrubs or other vegetation;
- introducing non-native plant or animal species to the area;
- operating motor vehicles;
- building roads or erecting any kind of structure;
- dumping, filling, excavating, mining, drilling or dredging; and
- constructing anything that affects the topography of the land.

However, the minister may authorize anyone responsible for management of a natural area to engage in any of these activities if the minister is satisfied that the activity is necessary for the proper management of the area.<sup>246</sup> The Regulations specifically provide that the restrictions are in addition to restrictions established in restrictive covenants, easements and other documents relating to a natural area.

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<sup>245</sup> *Natural Areas Protection Act*, s. 1.

<sup>246</sup> See *Natural Areas Protection Act Regulations*.



### ***Who may hold interest***

The minister responsible for the administration of the *Natural Areas Protection Act* or any other person may hold a restrictive covenant under the Act.

### ***How registration of interest is effected***

A restrictive covenant under the Act may be registered as a deed under the *Registry Act*.<sup>247</sup> On payment of the appropriate registration fee, the Registrar must register, in the order they are presented for registration, all properly executed documents.<sup>248</sup> Under the *Registry Act*, every document is deemed to have been registered at the time it was received by the Registrar in the appropriate registry office.<sup>249</sup>

### ***The legislation and transfer of interest***

The Act is silent with respect to transfer of an interest in land. It provides, however, that a restrictive covenant registered under the *Registry Act* runs with the land and is binding on successive owners of the land.<sup>250</sup>

### ***Termination/modification of interest***

The Act is silent with respect to termination or modification of the interest created by a restrictive covenant.

### ***Wildlife Conservation Act***

The *Wildlife Conservation Act*<sup>251</sup> replaced the *Fish and Game Protection Act*. Section 18 of the Act enables the minister responsible for administering the Act to enter into an agreement with a private landowner for the purpose of protecting the habitat of wildlife.<sup>252</sup> An agreement under the Act may impose a conservation covenant or easement in respect of the landowner's land.<sup>253</sup>

A conservation covenant or easement may be granted for the following purposes:

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<sup>247</sup> *Registry Act*, R.S.P.E.I. 1988, c. R-10.

<sup>248</sup> *Registry Act*, s. 38.

<sup>249</sup> *Registry Act*, s. 14(2).

<sup>250</sup> *Natural Areas Protection Act*, s. 5(2).

<sup>251</sup> *Wildlife Conservation Act*, R.S.P.E.I. 1988, c. W-4.1.

<sup>252</sup> *Wildlife Conservation Act*, s. 18(1).

<sup>253</sup> *Wildlife Conservation Act*, s. 18(2).

- the protection, enhancement or restoration of natural ecosystems, wildlife habitat or habitat of rare, threatened or endangered plant or animal species;
- the retention of significant botanical, zoological, geological or morphological features of land;
- the conservation of soil, air or water.<sup>254</sup>

The Act eliminates common law requirements associated with restrictive covenants and easements<sup>255</sup> and provides specifically that a conservation covenant or easement granted under the Act

- has effect even in the absence of a second piece of land which benefits from the covenant or easement,
- may be either positive or negative in nature, and
- is enforceable by either party to the covenant or easement or by any conservation agency to which the benefit of the covenant or easement is assigned by the covenant or easement document.

### ***Who may hold interest***

Only the minister responsible for the administration of the *Wildlife Conservation Act* can hold a conservation covenant or easement under the Act.<sup>256</sup> Although it does not address the issue expressly, the Act implies that the minister may assign the benefit of the covenant or easement to a conservation agency.<sup>257</sup>

### ***How registration of interest is effected***

A conservation covenant or easement granted to the minister under the *Wildlife Conservation Act* must be registered as a deed under the *Registry Act*.<sup>258</sup>

### ***The legislation and transfer of interest***

The Act is silent with respect to transfer of an interest in land. However, it provides that a conservation easement or covenant runs with the land and is binding on both

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<sup>254</sup> *Wildlife Conservation Act*, s. 18(3).

<sup>255</sup> *Wildlife Conservation Act*, s. 18(6).

<sup>256</sup> *Wildlife Conservation Act*, s. 18(1).

<sup>257</sup> *Wildlife Conservation Act*, s. 18(4)(d).

<sup>258</sup> *Wildlife Conservation Act*, s. 18(4)(f).

the landowner that granted the covenant or easement and on that landowner's successors in title.<sup>259</sup>

### ***Termination/modification of interest***

Conservation covenants or easements under the *Wildlife Conservation Act* may be either perpetual or for a period of time specified in the covenant or easement document. If the document is silent as to the term of the agreement, it is deemed to be perpetual.<sup>260</sup> The Act is silent with respect to termination or modification of a conservation covenant or easement.

### **Agreements on title for conservation purposes under other statutes**

#### ***Museum Act***

Under the *Museum Act*, the Prince Edward Island Museum and Heritage Foundation may enter into agreements in the form of covenants or easements with landowners who wish to impose limitations or restrictions on the use of the landowner's land or buildings on the land. The covenants or easements must be worded in a way prescribed by the Board of the Governors of the Museum.<sup>261</sup>

The Museum's purpose is to study, collect, preserve, interpret and protect the human and natural heritage of Prince Edward Island for the use, benefit and enjoyment of the province.<sup>262</sup> Although not explicitly stated, it is likely that covenants or easements entered into under the *Museum Act* must fulfil the Museum's statutory purpose - to preserve and protect the human and natural heritage of the province.

Covenants and easements under the *Museum Act* must be registered in the registry of deeds for the county in which the land is located and constitute an encumbrance against the land.<sup>263</sup> A covenant or easement registered against land under this section runs with the land and is enforceable against future owners of the land.<sup>264</sup>

The Act states that obligations under a covenant or easement may be positive or negative in nature and eliminates the requirement for a second piece of property benefited by the covenant or easement.<sup>265</sup>

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<sup>259</sup> *Wildlife Conservation Act*, s. 18(4)(a).

<sup>260</sup> *Wildlife Conservation Act*, s. 18(4)(e).

<sup>261</sup> *Museum Act*, R.S.P.E.I. 1988, c. M-1.4, ss. 11(1)-(3).

<sup>262</sup> *Museum Act*, s. 4.

<sup>263</sup> *Museum Act*, s. 11(4).

<sup>264</sup> *Museum Act*, s. 11(5).

<sup>265</sup> *Museum Act*, s. 11(5).

The Museum may assign any covenant or easement entered into under the Act to a corporate body with objects similar to the Museum. After the assignment, the covenant or easement would continue to run with the land and bind future owners. It would be enforceable by the assignee.<sup>266</sup>

The Museum can unilaterally cancel a covenant or easement entered into under the Act, but only under circumstances prescribed by bylaw made by the Board of Governors of the Museum.<sup>267</sup>

### ***Heritage Places Protection Act***

The *Heritage Places Protection Act* charges the minister responsible for the administration of the Act with the preservation, study and interpretation, and promotion of understanding and appreciation of the province's heritage places.<sup>268</sup> A heritage place is a place which includes or is comprised of a historic resource of an immovable nature. A historic resource is any work of nature or humans that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest.<sup>269</sup>

Under the Act, a conservation or heritage organization approved by the minister may enter into an agreement with the owner of property of heritage significance to acquire an easement or to place a restrictive covenant on the property.<sup>270</sup>

The provisions of the *Museum Act* discussed above apply to easements and restrictive covenants entered into under the *Heritage Places Protection Act*.<sup>271</sup>

- they must be registered in the registry of deeds for the county in which the land is located and constitute an encumbrance against the land;
- a covenant or easement registered against land runs with the land and is enforceable against future owners of the land;
- obligations under a covenant or easement may be positive or negative in nature;
- there is no requirement for a second piece of property benefited by the covenant or easement;

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<sup>266</sup> *Museum Act*, s. 11(6).

<sup>267</sup> *Museum Act*, s. 11(7).

<sup>268</sup> *Heritage Places Protection Act*, R.S.P.E.I. 1988, c. H-3.1.

<sup>269</sup> *Heritage Places Protection Act*, s. 1.

<sup>270</sup> *Heritage Places Protection Act*, s. 10(1).

<sup>271</sup> *Heritage Places Protection Act*, s. 10(2) which provides that ss. 11(3) to (7) of the *Museum Act* apply to an easement or covenant entered into under the *Heritage Places Protection Act*.

- a covenant or easement is assignable to a corporate body presumably with heritage conservation objects;
- after an assignment, the covenant or easement continues to run with the land and bind future owners and is enforceable by the assignee;
- the minister can unilaterally cancel a covenant or easement entered into under the Act.

## **NEWFOUNDLAND AND LABRADOR**

### ***Historic Resources Act***

Newfoundland and Labrador has no specific conservation easement legislation. However, the *Historic Resources Act*<sup>272</sup> authorizes covenants or easements for the protection of historic resources. The Act's definition of "historic resources" is broad enough to cover some lands with conservation values. The Act defines "historic resources" as

a work of nature or of humans that is primarily of value for its archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest, including an archaeological, prehistoric, historic or natural site, structure or object.<sup>273</sup>

The legislation is silent as to whether an easement or covenant may be granted for a term of time or in perpetuity. Presumably easements or covenants may be granted for either.

The legislation also is silent on enforcement, except to say that the holder of an easement may enforce it. Nevertheless, agreements should be enforceable like any contract that grants an interest in land.

Historic resources that are registered under the *Historic Resources Act* are given additional protection. Registered historic resources that are of the most relevance to conservation lands that could be the subject of an easement or covenant agreement are:

- (a) "provincial historic site" meaning a site, area, parcel of land, building, monument or other structure that Cabinet has declared to be a provincial historic site;<sup>274</sup>

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<sup>272</sup> *Historic Resources Act*, R.S.N.L. 1990, c. H-4.

<sup>273</sup> *Historic Resources Act*, s. 2(e).

<sup>274</sup> *Historic Resources Act*, ss. 2(k) and 16.

- (b) “registered historic site” meaning a site, area, parcel of land, building, monument or other structure that the Minister designated to administer the Act<sup>275</sup> (currently the Minister of Tourism, Culture and Recreation) has declared to be a registered historic site;<sup>276</sup> and
- (c) “significant palaeontological site” meaning an area of land that the minister considers to be of palaeontological significance and that Cabinet, on the recommendation of the minister, has declared to be a significant palaeontological site.<sup>277</sup>

The Act provides the following additional protection for registered sites:

- Except with the written permission of the Minister, a commercial or industrial use or development within a significant palaeontological site is prohibited.<sup>278</sup>
- Except with the Minister’s consent no one may damage, deface, or alter a provincial historic site, registered historic site, or significant palaeontological site.

An easement or covenant may be assigned to anyone else who may hold an interest. Where a municipal authority or an approved heritage or historical organization holds an easement and the municipal authority or organization dissolves, the easement or covenant is assigned to the Minister.<sup>279</sup>

### ***Who may hold interest***

Only the following may hold an easement or covenant under the *Historic Resources Act*:

- (a) the Minister;
- (b) a municipal authority in the area in which the property is situated;
- (c) a heritage or historical organization approved by the Minister; or
- (d) the “foundation that has as its purpose the protection of an historic resource or architectural characteristic” which presumably means the Heritage Foundation, established under the Act.<sup>280</sup>

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<sup>275</sup> *Historic Resources Act*, s. 1(g).

<sup>276</sup> *Historic Resources Act*, ss. 2 (m) and 17.

<sup>277</sup> *Historic Resources Act*, ss. 2(p) and 16.1.

<sup>278</sup> *Historic Resources Act*, s. 16(2).

<sup>279</sup> *Historic Resources Act*, ss. 30(3) and (4).

<sup>280</sup> *Historic Resources Act*, ss. 30 and 19-21.

### ***How registration of interest is effected***

Easements or covenants under the *Historic Resources Act* may be registered at the Registry of Deeds against the title of the property affected.<sup>281</sup> Registration will be under the *Registration of Deeds Act*.<sup>282</sup> This Act does not contain any explicit instructions for registration of interests under the *Historic Resources Act* or for easements or covenants. However, the *Registration of Deeds Act* does state that the registrar may refuse to register documents where the sheets exceed 21.5 centimetres wide by 35.5 centimetres long and which do not have a margin of at least 1.25 centimetres on each side of the sheet on which no written or printed material appears.<sup>283</sup>

As well, any documents must, before registration, be proved either by the acknowledgement, under oath, of the parties to the document, or by the oath of a witness to the signing of the document, that the parties to it, from whom an interest passes, executed it in his or her presence.<sup>284</sup> Given the lack of further instruction, it is suggested that the Registrar's other requirements (such as a survey or plan) be sought out in advance.

### ***The legislation and transfer of interest***

An easement or covenant under the *Historic Resources Act* does not run with the land nor does it become explicitly enforceable until it is registered against the property.<sup>285</sup>

### ***Termination/modification of interest***

The Act does not state how an easement or covenant may be terminated. Accordingly, as at common law, termination should be possible by the written agreement of both parties. The parties then should register a release of interest at the Registry of Deeds office.

## **YUKON**

### ***Environment Act***

Sections 76 to 80 of the *Environment Act*<sup>286</sup> authorize the granting of conservation easements in the Yukon.

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<sup>281</sup> *Historic Resources Act*, s. 30(1).

<sup>282</sup> *Registration of Deeds Act*, R.S.N.L. 1990, c. R-10.

<sup>283</sup> *Registration of Deeds Act*, s. 7(2).

<sup>284</sup> *Registration of Deeds Act*, s. 13. There are special provisions for acknowledgements out of province in s. 14.

<sup>285</sup> *Historic Resources Act*, s. 30(2).

<sup>286</sup> *Environment Act*, S.Y. 1991, c. 5.

An owner in fee simple of real property may grant a conservation easement to a holder as defined in the Act in the same manner as any other interest in land.<sup>287</sup> “Conservation easement” is defined as an interest in real property which imposes restrictions or positive obligations for

- (a) retaining or protecting natural, scenic, or open-space values,
- (b) assuring natural resources are available for recreational or open-space uses,
- (c) conserving or enhancing natural resources, the land in its natural state, wildlife habitat, plant habitat, or migratory routes of birds and animals, or
- (d) conserving or enhancing soil, air or water quality.<sup>288</sup>

A conservation easement runs with the land.<sup>289</sup> Conservation easements that meet the requirements of the Act are valid even where they do not benefit another parcel of land.<sup>290</sup>

Actions affecting conservation easements may be brought by either the landowner or the easement holder.<sup>291</sup>

### ***Who may hold interest***

Any government body empowered to hold an interest in real property under the laws of the Yukon or of the Parliament of Canada may hold a conservation easement. In addition, a charitable corporation, charitable association or charitable trust, the purposes or powers of which include any of the purposes listed above can hold a conservation easement.<sup>292</sup> The Act provides that an easement holder may transfer its interest to another holder.<sup>293</sup>

### ***How registration of interest is effected***

Registration of the interest created by a conservation easement takes place under the *Land Titles Act*.<sup>294</sup> The *Land Titles Act* provides that

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<sup>287</sup> *Environment Act*, s. 77(1).

<sup>288</sup> *Environment Act*, s. 76.

<sup>289</sup> *Environment Act*, s. 77(3).

<sup>290</sup> *Environment Act*, s. 79.

<sup>291</sup> *Environment Act*, s. 78.

<sup>292</sup> *Environment Act*, s. 76.

<sup>293</sup> *Environment Act*, s. 77(5).

<sup>294</sup> *Land Titles Act*, S.Y. 1991.



Every instrument other than a grant [of Crown land] shall be deemed to be registered as soon as a memorandum of it has been entered in the register...<sup>295</sup>

### ***The legislation and transfer of interest***

No right or duty arises under a conservation easement until the instrument creating the easement is registered under the *Land Titles Act*.<sup>296</sup>

### ***Termination/modification of interest***

The *Environment Act* is silent about modifying or terminating the interest created by a conservation easement except to state that the conservation easement provisions do not affect the power of the Supreme Court to modify or terminate a conservation easement in accordance with the *Land Titles Act*.<sup>297</sup>

## **NORTHWEST TERRITORIES**

The Northwest Territories has no legislation authorizing conservation easements. However, the *Historical Resources Act*<sup>298</sup> authorizes the Commissioner of the Northwest Territories, out of moneys appropriated for the purpose, to enter into agreements with any person “commemorating historic places under this Act and for the care and preservation of ... any places so marked or commemorated.”<sup>299</sup> As well, the Act authorizes the acquisition, by donation or purchase of things of historic value or importance<sup>300</sup> and contemplates the Commissioner’s acquisition of “places and sites” of prehistoric or historic significance.<sup>301</sup> The Act does not define “historic place” or “historic significance.” The Act does not set out any designation or acquisition process.

## **NUNAVUT**

At present, Nunavut has no legislation authorizing the use of conservation easements. However, the ordinances of the Northwest Territories as of April 1, 1999, and the laws made under them, apply in Nunavut to the extent they can apply in relation to Nunavut, with any modifications that the circumstances require and to the extent they have not

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<sup>295</sup> *Land Titles Act*, s. 37.

<sup>296</sup> *Environment Act*, s. 77(2).

<sup>297</sup> *Environment Act*, s. 80.

<sup>298</sup> *Historical Resources Act*, R.S.N.W.T. 1988, c.H-3.

<sup>299</sup> *Historical Resources Act*, s. 2(1)(c).

<sup>300</sup> *Historical Resources Act*, s. 2(1)(e).

<sup>301</sup> *Historical Resources Act*, s.7. The section requires the Northwest Territories Historical Advisory Board, established under s. 3(1) of the Act, to consider and advise the Commissioner on such acquisition, among other matters.

been changed since the time of adoption.<sup>302</sup> Accordingly, the *Historical Resources Act* discussed above applies in Nunavut as well as in the Northwest Territories.

## **FEDERAL**

According to Canadian constitutional law, the power to make laws respecting privately owned property and public land generally is within provincial jurisdiction. Therefore no federal legislation specifically authorizes the creation of conservation easements or servitudes in relation to privately owned land.

However, the federal Parliament has the power to legislate in relation to land owned by the federal Crown. Under various statutes, the federal Crown is able to and does acquire land for federal purposes such as national parks. Furthermore, the *Federal Real Property and Federal Immovables Act* enables the federal Crown to dispose of or acquire real property or any right or title to or estate or interest in real property, including easements and servitudes.<sup>303</sup> Arguably this authorizes the federal Crown to acquire and hold the interests created by conservation covenants and easements in the provinces. As indicated in the review of provincial legislation, the federal Crown is specifically empowered by many provincial statutes to hold conservation covenants or easements granted under that legislation. However, under the legislation in some provinces the federal Crown arguably may not hold a conservation easement. For example, the Alberta *Environmental Protection and Enhancement Act* authorizes the “Government” to hold a conservation easement, but the Act defines “Government” as the Government of Alberta.<sup>304</sup>

Under section 10.1 of the federal *Species at Risk Act*,<sup>305</sup> the Minister of the Environment may establish a stewardship action plan that creates incentives and other measures to support voluntary stewardship actions taken by any government in Canada. The stewardship action plan must include commitments to provide information respecting programs related to stewardship agreements, land conservation easements and other such agreements.<sup>306</sup>

The *Species at Risk Act* also authorizes conservation agreements between the federal government and any government in Canada, organization or person to benefit a species at risk or enhance its survival in the wild or to provide for conservation of other species.<sup>307</sup> However, the Act does not specifically enable conservation easements to be entered into under the Act.

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<sup>302</sup> *Nunavut Act*, S.C. 1993, c. 28, s. 29.

<sup>303</sup> *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50.

<sup>304</sup> *Environmental Protection and Enhancement Act*, R.S.A. 2000, s. 22(1)(e), definition of “qualified organization,” and s. 1(w), definition of “Government.”

<sup>305</sup> *Species at Risk Act*, S.C. 2002, c. 29.

<sup>306</sup> *Species at Risk Act*, s. 10.2.

<sup>307</sup> *Species at Risk Act*, ss. 11 and 12.

If conservation agreements contemplated by the *Species at Risk Act* take the form of statutory conservation easements, they likely will be entered into under the legislation of a province or territory.



## PART 3

### TAX CONSIDERATIONS

A gift or sale of a conservation easement may have federal and provincial income tax consequences as well as property tax consequences. This section of the report provides a brief overview of some of the potential tax implications.

#### Federal Income Tax Act

Under Canadian income tax legislation, dispositions of real property may give rise to tax consequences.<sup>308</sup> A disposition of real property may be a disposition of land itself, so that title to the land is transferred to the recipient of the gift or disposition of an interest in land such as an easement, covenant or servitude. A disposition of real property may involve a sale for fair market value, a sale at less than fair market value or a transfer for no consideration or advantage at all.

For tax purposes, land is classified as either capital property or inventory. The tax implications of a disposition of land will be different depending on whether the land is capital property or inventory. Inventory lands are lands acquired by a

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taxpayer for the purpose of subsequent sale in the course of a business rather than for the purpose of producing rental, agricultural or other income, or for personal enjoyment. Inventory lands are lands acquired as inventory of a business; for example, lands held by a land developer that the developer intends to sell to others in the course of the developer's business. Generally, all other land is capital property.

In the case of real property that is capital property, if the property has appreciated in value, the landowner disposing of the property will realize a capital gain and will have to include a portion of that gain, currently 50%, in his or her income for the year. Unless an exemption applies, any gain in value of inventory lands is treated

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<sup>308</sup> The following is a very brief discussion of some of the tax considerations of sales or gifts of land and conservation easements. For more information about the tax implications of dispositions of real property see Ann Hillyer and Judy Atkins, *Giving It Away: Tax Implications of Gifts to Protect Private Land*, Vancouver: West Coast Environmental Law Research Foundation, 2004; and Judy Atkins and Ann Hillyer, *Land Conservation Transactions: Tax Implications of Gifts of Land and Interests in Land*, prepared for The Leading Edge: Stewardship and Conservation in Canada, Victoria, 2003.

as profit rather than a capital gain when the land is sold or transferred. The taxpayer must include in his or her yearly income the full profit arising on a disposition of inventory lands.

### ***Charitable gifts of land***

If the disposition of property is a charitable gift within the meaning of the *Income Tax Act*, tax benefits may be available. A gift under the *Income Tax Act* is a voluntary transfer of property without valuable consideration.<sup>309</sup> To qualify as a gift, the transfer must be to a recipient qualified under the *Income Tax Act* to receive charitable gifts and issue donation receipts. These recipients include government agencies and registered charities.

Landowners who make a charitable gift of their land or of a conservation easement on their land are entitled to a tax credit in the case of individuals and to a deduction of the amount shown on the donation receipt in the case of corporations. Tax credits are calculated as 16% of the first \$200 of the amount shown on the donation receipt and 29% of the balance. The charitable gift tax credit is a federal tax credit and reduces the amount of federal tax payable.<sup>310</sup> In most jurisdictions, a similar provincial tax credit for charitable gifts is available. In British Columbia, for example,<sup>311</sup> the combined federal and provincial tax credit for 2003 is 43.7% of donations in excess of \$200.

Any portion of the amount of the donation receipt that a donor does not use as a deduction or to calculate a tax credit may be carried forward for up to five years and used to claim a tax credit or deduction.<sup>312</sup> However, tax credits are non-refundable and may only be used to offset tax liabilities. If a taxpayer cannot or does not use the full value of donations within the time allotted, the taxpayer will lose any remaining benefit. In circumstances where this may occur, proper tax planning may mitigate the effect.

A charitable gift of land or an interest in land that is capital property is considered under the *Income Tax Act* to be a disposition of the property and therefore could give rise to a capital gain. However, the gift also will result in a tax credit or deduction.

Unless the gift qualifies as an ecological gift, the tax credit is calculated as a percentage of the total value of the donation up to a maximum of

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<sup>309</sup> Interpretation Bulletin IT-110R3, Part I, section 3. This is Canada Revenue Agency's administrative position based on the common law interpretation of "gift." Sections 110.1 and 118.1 of the *Income Tax Act* deal with gifts. See the new policy relating to split-receipting discussed below.

<sup>310</sup> Donors should check with their tax advisers about available provincial tax credits.

<sup>311</sup> *Income Tax Act*, R.S.B.C. 1996, c. 215, s. 4.4.

<sup>312</sup> There is no carry forward period for gifts made in the year of death. However, donations made in the year of death may be carried back one year.

75% of the taxpayer's income for the year, plus  
25% of the taxable capital gain, plus  
25% of recaptured capital cost allowance.<sup>313</sup>

As with a sale of capital property, if the property donated has appreciated in value, the donor will realize a capital gain. Unless the gift qualifies for special tax benefits (for example, as an ecological gift), 50% of the gain must be included in the donor's income for the year. However, the tax credit or deduction that the donor will be able to claim generally will more than offset the additional tax resulting from the gain.

The *Income Tax Act* allows a donor of capital property to designate any amount between the adjusted cost base (the original cost of the property with adjustments permitted by the Act) and fair market value of the property as the value of the gift. The designated amount is deemed to be the proceeds of disposition of the property (or the amount the donor is deemed to have received) and the gain is calculated on the basis of this amount. The designated amount is also deemed to be the fair market value of the property and the donation amount.<sup>314</sup> A donor who elects to use the adjusted cost base as the proceeds of disposition will have no gain and a donation amount (and donation receipt) equal to the adjusted cost base.

Gifts of inventory lands do not attract the same tax benefits as gifts of capital property. A donor of inventory lands must include the fair market value of the land donated in its income for the year. The donor may deduct from income the cost of the land and any other costs relevant to the land, such as financing costs, costs related to acquiring the land, ongoing maintenance costs and other allowable costs. In other words, all the profit derived from the disposition of inventory lands (the selling price less the cost of the land and other allowable costs) must be included in the taxpayer's income for the year.

The result is that the tax implications of making a gift of land from inventory are essentially the same as those of making a cash donation. The *Income Tax Act* does not currently offer any tax incentives for businesses to donate inventory property such as land rather than cash.

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<sup>313</sup> *Income Tax Act*, s. 118.1(1), definition of "total gifts." Donors should consult their tax advisor for information about capital cost allowance and the tax treatment of depreciable property.

<sup>314</sup> *Income Tax Act*, ss. 118.1(6) and 110.1(3). Amendments to these sections have been proposed in part to accommodate the changes resulting from the introduction of split-receipting. The amendments will address the fact that only a portion of the value of donated property may be eligible for a donation receipt.

For more information about gifts for the purposes of the *Income Tax Act* see *Gifts and Income Tax*, P113; *Gifts and Official Donation Receipts*, IT-110R3; *Gifts of Capital Properties to a Charity and Others*, IT-288R2; and *Gifts to a Charity of a Residual Interest in Real Property or an Equitable Interest in a Trust*, IT-226R available on the Canada Revenue Agency website at <http://www.cra-adrc.gc.ca/>

### ***Split-receipting***

As explained above, a gift under the *Income Tax Act* is a voluntary transfer of property without valuable consideration. The transfer of property must be made without the expectation of any benefit, advantage, right or privilege in return, unless the benefit or advantage is of nominal value. The benefit or advantage could be in the form of cash, other property or services. However, proposed amendments to the *Income Tax Act* issued December 20, 2002 permit the issue of donation receipts in circumstances where an intention to make a gift is present but consideration is also received by the donor. These proposed amendments permit the practice of “split-receipting” by which, within certain limitations, a donation receipt may be issued for the difference between the fair market value of the property transferred to the recipient and the advantage that the donor receives for it.

Split-receipting arises in a situation where a donor gives a gift to a qualified recipient and receives something of value in return. Under the split-receipting guidelines and proposed amendments, the donor receives a donation receipt for the value of the gift, minus the value of the item or benefit that was given in return.

The donor must have a clear intent to give a gift that will enrich the recipient. Under the proposed legislation and policy, if the value of the advantage or benefit to the donor does not exceed 80% of the market value of the gift, the balance generally will be eligible for a tax credit or deduction. Even where the value of the advantage to the donor exceeds 80% of the fair market value of the transferred property, the gift may still qualify for a tax credit or deduction if the donor can establish to the satisfaction of the federal Minister of National Revenue that the transfer was made with the intention to make a gift.

### ***Ecological gifts***

To encourage the conservation of habitat and biodiversity in Canada, the Government of Canada provides tax incentives to those who donate ecologically sensitive land or easements, covenants or servitudes on ecologically sensitive land to qualified recipients.



As with other charitable gifts, ecological gifts give rise to a tax credit or deduction for donors. However, ecological gifts of capital property benefit from a reduction in the normal taxable capital gain realized on the disposition of the property. In addition, they are not subject to the 75% income limitation that applies to most other kinds of gifts.

To qualify for the tax benefits associated with ecological gifts, the gift must satisfy all the criteria for an ecological gift – it must be a gift of land or an interest in land (an easement, covenant or servitude) that is certified as ecologically sensitive by the Minister of the Environment; the recipient must be qualified to receive ecological gifts; and the fair market value of the land or easement, covenant or servitude must be certified by the Minister of the Environment.

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As with other charitable gifts, corporate donors may deduct the amount of their gift directly from their taxable income and individual donors may claim a non-refundable tax credit. Unlike other charitable gifts, there is no limit to the amount of charitable donations in a year that are eligible for the deduction or credit.

Donors of ecological gifts of land or easements, covenants or servitudes that are capital property receive a reduction in the taxable capital gain realized on the disposition of the property. For most gifts the taxable portion of the capital gain is 50%. In the case of an ecological gift the taxable portion is 25%.

### **Provincial income tax**

Each province has its own income tax legislation. As with the federal government, provinces impose income tax. Provincial rates, which vary from province to province, are calculated either at rates set out in the provincial legislation or as a percentage of the federal tax rate.

Provincial tax credits and deductions are also generally available. For example, provincial legislation may offer tax incentives for ecological gifts that augment the federal incentives. The impact of both tax liabilities and tax benefits generally will be greater when both federal and provincial tax implications are taken into account. In British Columbia, for example, the combined value of the federal and provincial tax credit in 2003 is 43.7% of the amount of a donation in excess of \$200. This is in contrast to a federal tax credit of 29%.

## Property tax

For the purposes of this discussion “municipalities” include cities, towns, villages, municipal districts, municipal regions, counties, etc., depending on authorizing legislation, and the expression includes both urban and rural municipalities. Municipalities are legal entities created under provincial laws. How Canadian municipalities treat land subject to a conservation easement for property tax purposes depends on not only authorizing provincial law, but also on how municipalities have regulated taxation under those laws.

A question often raised is whether placing a conservation easement on lands will affect municipal property taxes. Given the multitude of municipalities in Canada operating under a variety of laws, it is impossible in this report to provide anything approaching a comprehensive answer to the question. However, the issue may be addressed in a general manner by setting out the basics of municipal taxation and examining how the placing of a conservation easement could affect taxation, depending on provincial and local legislation.<sup>315</sup>

There are three potential ways that placing a conservation easement on a property could affect municipal taxation. The first is by changing the assessment class or value of the property; the second is by changing the taxation class and tax rate; and the third is where placing a conservation easement otherwise qualifies a property for special tax treatment.

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### ***Assessment class or value and conservation easements***

Regarding assessment class or value, property tax legislation typically requires assessors to assess the value of every taxable property in the municipality on a regular basis, normally annually. In most provinces assessors value all land and buildings on the basis of their market value. Market value is the price that would be struck by a willing seller and a willing buyer in an open market in an arm’s length transaction. Some provinces’ legislation requires that assessment be based on “fair value,” “actual

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<sup>315</sup> Arlene Kwasniak, “Local Revenue Base and Conservation Lands: a Law and Policy Review,” prepared for the Leading Edge Conference, Victoria, B.C., July 2003. This section of the report borrows extensively from this conference paper. The paper is available online through links to commissioned research at <http://www.stewardship2003.ca>. The paper reviews the property tax legislation for each province and provides information on how U.S. state property tax laws treat conservation interests.

value,” or similar concepts. These concepts sometimes incorporate methods other than, or in addition to, market value methods to ascertain the value of a parcel, including replacement costs, or accounting for features of land or real estate features that add or subtract value. For simplicity sake, this report considers all such approaches of determining value as a market value approach.

Some provinces’ legislation allows for a preferential way of assessing farm property by not basing assessment on market value. In Alberta, for example, farm property that is actually used in farming operations is assessed at “agricultural use value,” sometimes called “productive value.” This means the value of the parcel is exclusively based on its use for farming operations, regardless of its market value. In Alberta, determining agricultural use value, an assessor must follow the procedures set out in the *Alberta Farm Land Assessment Minister’s Guidelines*.<sup>316</sup> Using these Guidelines, assessors rate a parcel of farmland on the basis of its ability to produce an average net income under typical management practices. In doing so the assessor takes the land on an “as is” basis so that unfarmable areas, such as wetlands, forested areas, rocky soil and bush do not add any value (or add little value) to the valuation. This way, assessment for agricultural use value is neutral with respect to preservation of natural features on rural lands. Invariably, at least in Alberta, land assessed at its agricultural use value is significantly less than land assessed at market value, especially for land located at the urban and rural fringe.

The placing of a conservation easement can affect taxation if the easement changes assessment class or assessment value. Here are some ways:

- If a conservation easement relates to land assessed at market value, restrictions on use of property could require a lower assessment, especially if the land is located near an urban area and, without the conservation easement, likely would be developed.
- If a conservation easement relates to land that is assessed for its agricultural use value, then if the assessor must assess land on an “as is” basis (as in Alberta) it is likely that the placement of a conservation easement will not affect assessment value. This is because the agricultural use assessment would have already lowered the assessment for unfarmable areas such as wetlands and forests.
- If a conservation easement prohibits any agricultural uses of land in respect of land that was assessed at agricultural use value, an assessor might well determine to change the agricultural assessment to a market value assessment. In this case municipal assessment likely would rise.
- It is conceivable that in time the presence of natural features on land protected by conservation easement will add to market value.

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<sup>316</sup> *Standards of Assessment Regulation*, s. 2(2). The Minister’s Guidelines may be viewed at the Department of Municipal Affairs, or at most public libraries.

### ***Taxation class and conservation easements***

At the taxation stage, land is classified into one of usually a number of land classes or subclasses. Common classes are residential, commercial and agricultural, though there may be others. At the taxation stage, the municipality, through a bylaw normally passed every year, assigns a taxation rate (often called a “mill rate”) to a class. Sometimes provincial legislation sets out parameters for municipalities in setting tax rates, and sometimes legislation leaves it entirely up to the municipality. After assigning the appropriate class or subclass to a property, someone, normally the assessor, consults the tax rate bylaw. The assessor calculates property tax for every assessed parcel by multiplying the tax rate times the assessment amount for the property. Some provinces’ legislation requires the tax rate to be multiplied by a percentage of the assessment value of the property. In these cases, percentages vary among classes of property.

Placing a conservation easement on a property could affect its tax class, and consequently, property taxes in a number of ways. For example:

- A municipality might have a tax class for conservation lands and placing a conservation easement on property could qualify land for inclusion in this class. In such case taxes probably would go down.
- Placing a conservation easement could require a change of tax class. For example, if a conservation easement prohibits agricultural use of a property then the land would likely not qualify for inclusion in an agricultural class and would be moved into some other class such as recreational or residential. Normally this will result in higher taxes.

### ***Other special tax treatment***

Another way that placing a conservation easement could affect property taxes is through full or partial tax exemptions. Property tax legislation sets out who or what is exempt from property taxation and often gives municipalities the right to allow other exemptions, or at least to have some kind of role in determining exemptions. Sometimes exemptions are total, and sometimes legislation sets partial exemptions or states that municipalities may decide to what degree a property is exempt from property tax. Some provinces’ property taxation legislation provides for full or partial exemptions for land owned by some registered charities. Such legislation could be applicable to land trusts holding conservation easement interests,<sup>317</sup> though in the usual case it would only apply where the land trust owned the entire conservation lands parcel.

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<sup>317</sup> The province of Alberta, for example, currently is considering legislative amendments that would enable municipalities to allow an exemption (full or partial) for lands under conservation easement.

## **Property transfer taxes**

Some jurisdictions in Canada levy taxes on the transfer of land and certain interests in land. Anyone transferring or receiving a conservation easement should check relevant provincial or territorial legislation to determine whether the transfer will attract property transfer tax and, if so, whether any exemptions apply.

In British Columbia, for example, the *Property Transfer Tax Act*<sup>318</sup> offers relief from tax on the transfer of property where a conservation covenant in favour of the Crown is registered with the approval of Cabinet.

Depending on provincial legislation, a transfer tax may be levied only on a transfer for value. Where this is the case, a donation of a conservation easement should not attract the tax.

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<sup>318</sup> *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378.



## **PART 4**

### **CONSERVATION EASEMENT LEGISLATION IN THE UNITED STATES**

A variety of federal and state legislation in the United States enable restrictions to be placed on land for conservation and preservation purposes. These purposes range from scenic, habitat and open space preservation to heritage conservation and agricultural land preservation. Some of this legislation has been in place for many years and creates restrictions for specific purposes.

While a detailed examination of the various state laws enabling conservation restrictions is beyond the scope of this report, many of the existing conservation easement statutes originate, at least in part, from a model act called the *Uniform Conservation Easement Act*.<sup>319</sup>

#### **Uniform Conservation Easement Act**

The *Uniform Conservation Easement Act* (UCEA) is a model act upon which a number of states have based their own enabling laws for the establishment of state conservation easement programs. Some states have adopted UCEA while others have based their conservation easement legislation on UCEA.<sup>320</sup> UCEA was completed, approved and recommended for use by all states in 1981 by the National Conference of Commissioners on Uniform State Laws. The National Conference of Commissioners on Uniform State Laws is a non-governmental body that drafts many forms of uniform laws for use by state and local governments.

UCEA is intended in part to remove the common law restrictions associated with easements and covenants. According to the Commissioners' Prefatory Note to UCEA:

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. Under the conditions spelled out in the Act, restrictions and obligations are immune from certain common law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes. In each instance, if

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<sup>319</sup> 12 U.L.A. 55.

<sup>320</sup> As of the date of writing, 22 states had adopted UCEA while others have incorporated some of its provisions in their own statutes.

the requirements of the Act are satisfied, the restrictions or affirmative duties are binding upon the successors and assigns of the original parties.<sup>321</sup>

In a summary of UCEA, the Uniform Law Commissioners describe the rationale for UCEA:<sup>322</sup>

... there are historical legal impediments to the acquisition of lesser interests, such as easements, restrictions and covenants, and equitable servitudes. These restrictions appear artificial and archaic in light of current policies, and the *Uniform Conservation Easement Act* provides the means to eliminate them in a simple, straightforward fashion.

There are two problems with the common law. The law has always favored easements or restrictions or servitudes appurtenant, or ones that serve a dominant estate or land holding. An example is an easement over a parcel of land A, which provides access to a road for a second parcel of land B. A is the servient estate, and B the dominant estate. The easement will run with the land, that is, the owner of A cannot convey it and extinguish the easement over A in B's favor.

The law has not favored interests "in gross," however. Such an interest does not serve a dominant estate, and although it may be good between the original parties to its conveyance, it is not likely to survive any second transfer, however made. Most interests for historic preservation or conservation protection fall into this "in gross" category.

The second problem concerns affirmative versus negative easements or restrictions or servitudes. An affirmative easement allows others to use a piece of land in a particular way. A right-of-way for public travel is an example. A negative easement restricts the owner from certain uses of his own land. Again, the law favors the continuity and permanence of affirmative easements, but has disfavored, historically, negative easements.

UCEA is intended to address these common law restrictions. Specifically, UCEA provides that a conservation easement is valid even though:

- it does not benefit another piece of property,
- it can be or has been assigned to another holder,

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<sup>321</sup> *Uniform Conservation Easement Act*, Commissioners' Prefatory Note, available, among other places, at <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm>. The Prefatory Note contains an interesting discussion of statutory conservation easements.

<sup>322</sup> From Uniform Law Commissioners website [http://www.nccusl.org/nccusl/uniformact\\_summaries/uniformacts-s-ucea.asp](http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ucea.asp).



- it is not of a character that has been recognized traditionally at common law,
- it imposes a negative burden,
- it imposes affirmative obligations upon the owner of an interest in the property burdened by the easement or upon the holder,
- the benefit does not touch or concern real property, or
- there is no privity of contract (for example, between the easement holder and a subsequent landowner that is not a party to the original easement agreement).<sup>323</sup>

Under UCEA, “conservation easement” is defined as

a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.<sup>324</sup>

UCEA permits two kinds of easement holder – government bodies empowered to hold an interest in real property and charitable organizations whose purposes or powers include the purposes described above for which the conservation easement could have been created in the first place.<sup>325</sup>

An interesting feature of UCEA is the third-party right of enforcement. UCEA enables a conservation easement to empower a charitable organization or governmental body otherwise eligible to be a holder but not a holder to enforce its terms. In other words, one organization may hold the conservation easement but by the terms of the easement delegate enforcement to another.<sup>326</sup> A landowner, easement holder and a person authorized by law are also entitled to enforce conservation easements.

A conservation easement created under UCEA is unlimited in duration unless the easement document specifies otherwise.<sup>327</sup>

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<sup>323</sup> UCEA, s. 4.

<sup>324</sup> UCEA, s. 1, definition of “conservation easement.”

<sup>325</sup> UCEA, s. 1, definition of “holder.”

<sup>326</sup> UCEA, s. 1, definition of “third-party right of enforcement” and s. 3.

<sup>327</sup> UCEA, s. 2(c).



## **PART 5**

### **DRAFTING CONSERVATION EASEMENT LEGISLATION**

The review in Part 2 of conservation easement legislation in Canada shows that a range of legislative approaches have been used to create statutory agreements intended to protect important ecological, heritage and other conservation values of real property. This part examines the kinds of provisions that should be included in conservation easement legislation to ensure that conservation easements are effective and enforceable. It also explores the relationship of conservation easement legislation to other kinds of legislation and to the common law generally.<sup>328</sup>

Each jurisdiction's legislation can be reviewed and evaluated in light of the information included in this section.

#### **Drafting considerations**

Drafters of conservation easement legislation must grapple with a number of issues to ensure that conservation easements will protect the full range of important ecological values and will be fully enforceable. In some cases, important provisions may be contained in related legislation such as land titles legislation. This section looks at some of those issues.

#### ***Permissible purposes***

The legislation must clearly state the purposes for which conservation easements may be granted. At a minimum, easement legislation should enable easements to be granted for general environmental protection including ecosystem protection, protection of biological diversity and habitat and species conservation. Other permissible purposes could include protection of aesthetic and scenic values, historical, cultural, educational, recreational and archaeological values, and existing land uses such as agriculture.

A clear description of purposes is included in the Yukon, British Columbia and New Brunswick legislation and in the *Uniform Conservation Easement Act* in the United States.

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<sup>328</sup> Although the authors have relied generally on Thea M. Silver, Ian Attridge, Maria MacRae, Kenneth W. Cox, *Canadian Legislation for Conservation Covenants, Easements and Servitudes: The Current Situation* in the organization and preparation of this report, they owe a particular debt to that publication in the preparation of this part, particularly in the section about the relationship of conservation covenant legislation to other legislation.

### ***Removal of common law restrictions***

One of the primary purposes of conservation easement legislation is to eliminate restrictive rules governing common law easements and covenants. As described in Part 1, these rules, which have developed over time, greatly limit the usefulness of common law instruments for land conservation.

As the legislative review in Part 2 discloses, most conservation easement legislation eliminates the most significant restrictions, in particular that

- the easement or covenant holder must own land near or adjacent to the land charged by the covenant (the burdened land),
- the burdened land must provide a recognized benefit to the other parcel of land, and
- restrictive covenants cannot impose positive obligations on the landowner, that is, obligations that require landowners to do something or spend money on the burdened land.

In addition, at common law a restrictive covenant will not bind subsequent landowners unless the covenant touches and concerns the land benefited by the covenant and the covenant agreement reflects an intention to bind the land and run with it. Although these restrictions generally have not been expressly removed by conservation easement legislation, most legislation states that the instruments it creates burden the land and bind subsequent landowners. The necessary implication is that if a conservation easement meets the criteria set out in the legislation, it will bind subsequent landowners and that it does not have to meet unspecified criteria. However, prudent drafters of easement documents will include a clause stating that the easement is intended to run with the land.

Generally, conservation easements are contractual arrangements that create an interest in land. To the extent that legislation enabling conservation easements does not eliminate common law rules, conservation easements are governed by the common law of

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contracts and real property. Depending on the circumstances and the common law in a province, a number of anomalies could arise. Ongoing consideration and scrutiny of the relationship between conservation easement legislation and contract and real property law is necessary to ensure that the purposes of conservation easement legislation are not undermined by common law rules.

For example, while the above restrictions have generally been removed in conservation easement legislation, other less obvious problems should also be addressed. For example:

- a covenant may be unenforceable if the burdened land has been used openly for a long period in a manner inconsistent with the terms of the covenant or if the covenant holder has allowed the inconsistent use;
- changes in the character of the land or neighbourhood can make a covenant obsolete and may allow a court to cancel the covenant.

Easement legislation should also ensure that easement holders can assign their interest in easements since assignment of easements may be restricted under common law. Assignment is discussed below. Generally, these principles are codified in legislation (for example the *Property Law Act* in British Columbia).

While the parties can attempt to address these and other potential problems in the easement document itself, common law rules should be identified, examined and eliminated or altered to eliminate uncertainty and ensure that conservation easements are effective indefinitely.

### ***Easement grantors***

Easement legislation must clearly enable private landowners, both individual and corporate, to grant conservation easements. Federal, provincial and local government agencies should also be able to grant easements. For example, a conservation easement granted by a government agency on park land will afford additional protection of that land. Legislation should not limit the number of conservation easements a landowner can grant as long as there is no conflict between the easements that are granted.

### ***Easement holders***

Existing easement legislation provides three approaches to defining who can hold conservation easements:

1. criteria are set out in the legislation and entities meeting the criteria can hold easements (for example, Manitoba *Heritage Resources Act*, Ontario, Yukon, Prince Edward Island);
2. a minister or government agency is given the discretion to designate eligible holders, sometimes according to specified criteria (for example, Manitoba *Conservation Agreements Act*, Nova Scotia, Newfoundland);

3. a combination of the first and second approach in which specific criteria are identified for some holders while others must be designated (for example, Saskatchewan, New Brunswick).

In some circumstances (for example, Prince Edward Island's *Natural Areas Protection Act*), the legislation does not set out criteria governing which organizations can hold easements. Under the Prince Edward Island legislation, any person may hold a restrictive covenant.

Generally, even where legislation uses one of the first two approaches to regulate which non-government organizations can hold easements, it specifies which levels of government and, sometimes, which government agencies, can hold easements (for example, British Columbia, Manitoba *Conservation Agreements Act*).

The first approach or third approach is preferable because it allows organizations to plan to meet the legislative criteria for holding easements and proceed without waiting for government to designate them as a holder.

Regardless of the approach used in the legislation, drafters of conservation easement legislation should consider and, where appropriate, specify criteria related to the following:

- the kind of individuals or organizations that can hold easements - individuals, incorporated entities, trusts;
- levels of government (federal, provincial, municipal, First Nations) and government ministries, departments and agencies that can hold easements;
- whether easements can be held jointly;
- whether easement holding organizations should have a charitable or public purpose;
- whether easement holding organizations should have specified conservation purposes;
- whether organizations should have a provincial or national presence or whether regional and local organizations can qualify as holders;
- whether organizations that are not resident in Canada can hold easements; this would enable landowners to obtain cross-border tax benefits.

With respect to the last point, most, if not all, provinces and territories have foreign ownership of lands legislation which could prohibit or limit conservation easement

holdings of non-residents of Canada. Currently, non-residents must consult a jurisdiction's legislation to determine the effect of any foreign ownership of lands legislation.

Ideally, conservation easement legislation should permit as broad a range of holders as possible while attempting to ensure that only non-government organizations with a commitment to land conservation and the resources and expertise necessary to meet that commitment will hold conservation easements.

At a minimum, government agencies at the federal, provincial and local level should be able to hold easements. In addition, First Nations governments should qualify as easement holders. Legislation should clearly state that all levels of government can hold easements. Valuable land protection opportunities associated with national or local parks, for example, may be lost where provincial legislation does not clearly specify that both the federal government and local governments can hold easements.

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To ensure that non-government organizations are committed to land protection and have the capacity and are accountable for ongoing monitoring and enforcement of conservation easements, enabling legislation should contain criteria governing which organizations can hold easements. While local,

grassroots organizations may struggle with finding resources, restricting holders to provincial or national organizations will eliminate as holders the many local conservation organizations formed to hold easements. Valuable local expertise and energy will be lost. In addition, allowing local holders may increase easement donations as landowners may be more likely to donate easements to local organizations they know and trust.

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By stipulating that non-government organizations have land conservation as one of their purposes (see, for example, New Brunswick, Saskatchewan and the United States *Uniform Conservation Easement Act*), legislation can at least ensure that non-government organizations are committed to land conservation.

Finally, it is important that conservation easements can be held jointly by two or more government agencies, government agencies and non-government holders, or two or more non-government holders. Currently, some jurisdictions may allow, either

explicitly or implicitly, more than one entity to hold a conservation easement. In other jurisdictions, it may not be possible or it is questionable whether easements can be jointly held. Organizations therefore must be careful to ensure joint holding is possible if they propose to jointly hold a conservation easement.

Ideally, enabling legislation will make it clear that easements can be held jointly by two or more entities that are otherwise permitted to hold easements. Having joint easement holders can help address some of the problems associated with a lack of resources for ongoing monitoring and enforcement of easements. For example, one easement holder could be a local conservation organization with local knowledge and expertise while the other easement holder could be a government agency or national conservation organization with more human and financial resources. Similarly, joint holders (for example, a conservation organization with an historical focus and one with a natural conservation focus) could hold an easement with several purposes. Each would bring the expertise to monitor and enforce the easement with respect to the purposes that concern it.

### ***Easement registration***

Conservation easement legislation must address how easements will be registered against title to property to ensure that both current and subsequent owners of the property are bound by the terms of the easement. The issue of registration should be addressed in both conservation easement legislation and, to the extent necessary, legislation governing registration and land titles to ensure that registration requirements are clear and consistent.

The following questions will help focus some of the issues associated with registration:

- Does the legislation expressly state that the conservation easement granted under the legislation binds subsequent owners of the land? There should be no question that a conservation easement runs with the land and binds subsequent owners.
- When does the easement agreement take effect - on signing or on registration? When does it bind the parties - immediately on signing or only once it is registered? When does it bind subsequent owners of the land? One approach is to have the easement agreement be effective between the parties as soon as it is signed and against subsequent owners once it is registered. Assuming a conservation easement is an interest in land, when does the interest in land pass - when the easement agreement is signed or on registration?
- Who is responsible for registering the conservation easement - the landowner, the easement holder or the responsible minister or any of them? If the legislation



is silent, can any party to the easement register the easement? Ideally, either the landowner or easement holder should be able to register a fully executed easement. This maximizes flexibility and allows the parties to negotiate easement responsibilities.

- Should anyone (for example, specified federal, provincial or local government agencies, provincial/national land trusts) be notified and given a copy of the registered easement? Notification could keep appropriate government and other agencies informed of conservation easement activity. Notification also could assist conservation organizations, assessors and appraisers in collecting information.
- How will registration requirements under land titles legislation be reconciled with registration requirements in easement legislation? The best approach might be to mirror the registration requirements for other statutory charges such as utility easements.
- Will the registration process accommodate the registration of full conservation easement documents including the baseline documentation report? Land titles systems should be able to accommodate registration of long documents, maps and photographs so that full easements are readily available to future landowners and other interested parties.

### ***Easement monitoring***

Monitoring conservation easements is a crucial component of ongoing easement administration. Easement legislation (or related legislation) must address the issue of monitoring by permitting easement holders to negotiate access to the property subject to the easement. An automatic right of access could be granted to easement holders in legislation. However, the preferable approach may be for legislation to expressly permit the landowner to grant the easement holder a right of way. Using this approach, common law restrictions related to access easements can be overcome and the nature of the right of access can be negotiated between the landowner and easement holder.

### ***Easement enforcement***

Conservation easement legislation should address enforcement so that easements can be enforced as simply and economically as possible in the event that a party breaches a term of the easement. The following questions should be considered:

- Who can enforce the conservation easement - the holder, the landowner or a third party such as government or another conservation organization? At the very least, the parties to the easement should be able to enforce it and serious

consideration should be given to whether third party enforcement rights could be granted and to whom. For example, the *Uniform Conservation Easement Act* in the United States permits third party enforcement to be included in an easement document.

- If a third party can enforce an easement, under what conditions should it be able to enforce?
- What is the potential for conflicts in enforcement, for example, between the easement holder and a government authority or other entity empowered to enforce the easement? Is there a possibility that more than one party can enforce at the expense of the landowner?
- Should the legislation establish a stewardship and enforcement fund funded by a fee on the transfer of land subject to a conservation easement?
- Should alternative dispute resolution provisions such as mediation and arbitration be included in the legislation or the easement agreement? Ideally, legislation would not be prescriptive about alternative dispute resolution processes but would enable the parties to negotiate the terms that best suited them.
- What remedies are available for breaches of the terms of the easement? Should all the usual contractual and real property remedies be available? Should any special remedies be available? The British Columbia legislation, for example, provides that a covenant agreement may include a rent charge, a kind of fine levied for breach of the covenant. The legislation should be clear about available remedies, particularly if they are unusual as in the case of the rent charge. If the legislation is silent, can it be assumed that the usual remedies (damages, injunction, and so on) are available?
- Before which level of court or other forum of arbitration can an easement be enforced?
- Who should be liable for breach of easement obligations?
- Should a breach of an easement also be an offence?

Allowing third parties to enforce easements or delegating enforcement to a third party can help address capacity problems faced by easement holders in a similar way to permitting joint holders. Enforcement rights can be given or delegated to government or organizations with the financial and human resources to enforce effectively. The criteria applied to determine if an organization qualifies as a covenant holder should also be applied to determine if it qualifies for third party enforcement rights.

### ***Assignment, modification and termination***

It is essential that conservation easement legislation allow the parties to deal with changes over time, either to the organizations that are parties to the conservation easement or to the land itself.

Organizations may not last forever but most conservation easements are intended to. An organization holding a conservation easement may dissolve or develop other priorities. In addition, some jurisdictions allow individuals to hold easements and individuals clearly have a limited life span. There must be a mechanism by which such an organization can assign the easement to another appropriate organization or agency. This can be a matter for negotiation between the original parties to the easement agreement or can be governed by the legislation. At a minimum, however, conservation easement legislation should provide that conservation easements are assignable to any agency or organization qualified to hold an easement in the first instance and should address the death or dissolution of easement holders.

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Possible legislative solutions to the dissolution of an easement holder include:

- allowing the organization a set period of time (six to twelve months) to assign the easement to another qualified holder;
- allowing a time period for restoration of the organization's status before assignment is required;
- allowing the relevant minister to order assignment of the covenant to a qualified organization (possibly only as a back-up option after first giving the holder an opportunity to assign the easement itself);
- requiring all easements to contain a clause designating a back-up organization or individual to assume the agreement if the holder dissolves or dies;
- specifying that the easement automatically transfers to a specified government ministry or agency if the holder dissolves.

Most of these solutions would have to be set out in the enabling legislation.

Alternatively, legislation can provide that a conservation easement is assignable but allow the parties to negotiate the terms relating to assignment, perhaps making provision for one of the above options if the parties fail to do so.

Regardless of the assignment provisions, the consent of the organization to which the easement will be assigned must be obtained before the assignment to ensure that the organization is prepared to take on the obligations associated with holding the easement, including ongoing monitoring and enforcement if necessary.

Legislation should also address modification or termination of the easement agreement. Changes to the land could require modifications to the easement agreement or, in some cases, eliminate the purpose of the easement. In these circumstances, the parties should be able either to modify or terminate a conservation easement. The enabling legislation might also specify the circumstances under which an easement could be modified or terminated.

Legislative drafters should consider whether to provide for fair compensation where a conservation easement is terminated by an external authority such as a court or government authority. Compensation akin to that under expropriation statutes would recognize the investment of easement holders and the commitment of grantors to conservation. In addition, termination under these circumstances could result in adverse tax consequences (for example, the unauthorized change of use or disposition tax for ecological gifts) for the easement holder. A compensation provision could protect holders from these adverse consequences.

Both the original parties and subsequent landowners and assignees of the easement holder should be able to modify an easement agreement. Legislation should provide that easement modifications must be agreed to in writing by the parties to the easement and be registered in the same way as the original easement.

Similarly, legislative provision should be made for terminating conservation easements. Termination can either be done unilaterally by the easement holder (as in British Columbia) or only by agreement of the parties.

The legislation should specify whether an easement can be assigned, modified or terminated by the parties alone or whether government or court approval is required.

### ***Duration***

Conservation easements are generally intended to provide permanent protection for land. Conservation easement legislation therefore must ensure that easements can be granted in perpetuity. This may also be necessary to qualify gifts of conservation easements for tax benefits. For maximum flexibility, legislation should allow easements to be granted for a specified term as well (see New Brunswick legislation).

As in other areas (for example, registration), easement legislation must be reconciled with other related legislation. For example, as indicated in the review of Ontario legislation in Part 2, where no term is fixed in an easement, the interest is deemed to expire 40 years after registration and may be removed from the register. There is some question as to whether stating in an easement document that the easement is granted in perpetuity is fixing a term for the easement. In this case, it should be made clear in the conservation easement legislation that despite anything in the *Land Titles Act*, an easement can be granted in perpetuity and will not be removed from the register unless it is specifically terminated.

### **Relationship to other legislation**

Conservation easement legislation does not operate in a legislative vacuum. Some of the points raised above in relation to drafting easement legislation will be addressed in different legislation such as legislation governing land registration or other real property legislation. In addition, granting a conservation easement may have tax implications.

It is important that conservation easement legislation be consistent with other related legislation or, at least that any inconsistencies are noted and dealt with clearly. This section looks at the relationship

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between easement legislation and selected other legislation. Some of the matters addressed in this section have been raised in other parts of this report.

### ***Tax legislation***

Income tax legislation and property tax legislation has been discussed in detail in Part 3. This section will highlight only a few points of relationship between easement and tax legislation.

### ***Income tax legislation***

Transfers of conservation easements may have income tax implications. A sale of a conservation easement will be treated like a sale of any other real property interest and may give rise to a capital gain or other kind of income. On the other hand, donations of conservation easements may result in significant tax benefits, particularly if the donation qualifies as an ecological gift. It is important, therefore, that provincial

conservation easement legislation is drafted in such a way as to ensure that conservation easements can qualify as ecological gifts.

For example, although the federal *Income Tax Act* contains few specific criteria for what constitutes an ecological gift, the Ecological Gift Program and the Canada Revenue Agency take the position that only

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*The task of reconciling tax and easement legislation might be made simpler if income tax legislation included more specific requirements for ecological gifts.*

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easements granted in perpetuity qualify as ecological gifts. Easement legislation, therefore, should enable conservation easements to be granted in perpetuity. The task of reconciling tax and easement legislation might be made simpler if income tax legislation included more specific requirements for ecological gifts.

There may also be GST consequences arising from the transfer of a conservation easement. This could result in an increase in the amount of money a potential easement holder would need to complete a transaction even if the money is refunded at a later date. Those involved in a conservation easement transaction must obtain tax advice as early as possible to determine the effect of tax legislation on the conservation easement transaction.

The authors of *Canadian Legislation for Conservation Covenants, Easements and Servitudes* suggest that care be taken in integrating taxation issues with basic conservation easement provisions and that it may be better to address taxation issues in different legislation or different parts of one statute.

### ***Property tax and property transfer tax legislation***

As outlined in Part 3, the placing of a conservation easement could have an effect on property taxes by changing either the assessment class or tax class or both. Although removing development potential from a parcel through the placement of an easement often (though not always) lowers property values, it does not always follow that a jurisdiction's legislation will allow property taxes to be reduced. As Part 3 points out, in some provinces a conservation easement that prohibits agricultural activity in order to preserve conservation values could have the effect of substantially raising taxes, by requiring that the land not be given any preferential tax treatment for agricultural lands. Where this limitation does not apply, some property tax relief would be available without tax reform if a landowner showed that a conservation easement reduced the value of the land. However, law reform in this area could further encourage the use of conservation easements.

Measures to provide property tax relief have been discussed in some detail in Part 3. To summarize, the following kinds of provisions could be incorporated in

conservation easement or property tax legislation to offer incentives to landowners to enter into conservation easements:

- a full or partial exemption from property taxes for land subject to a conservation easement;
- a new assessment class for conservation lands;
- a new tax class for conservation lands;
- direction to assessors to take into account the effect on property value of a conservation easement on land (although this may add little to what assessors should already be doing);
- property tax rebates.

Another issue which should be addressed is the impact of a tax sale on property subject to a conservation easement. Provincial legislation generally provides that local governments can sell property within their jurisdiction to recover unpaid property taxes. When property is transferred as a result of a tax sale, many kinds of charges on title to the property are dropped. Consideration should be given to ensuring that tax sale legislation specifies that a conservation easement on property sold in a tax sale is not dropped from title.

As discussed in Part 3, property transfer taxes are assessed in some provinces. Legislators may want to consider implementing an exemption from property transfer tax for land subject to a conservation easement or for land where the transferor or transferee expresses an intention to register a conservation easement within a specific time frame.

### *Implications for municipal treasuries*

If conservation easements decrease the assessed value of land, there could be a reduction of tax revenues to local government. It has been suggested that local governments should be compensated by the province or private sector for losses in their tax base resulting from changes to assessment procedures associated with conservation easement legislation.<sup>329</sup> However, many working in this area have concluded that any property tax ramifications of conservation easements would be small or neutral for a number of reasons:

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<sup>329</sup> Recommendation of the Sustaining Wetlands Forum (1990) cited in Thea M. Silver, Ian Attridge, Maria MacRae, Kenneth W. Cox, *Canadian Legislation for Conservation Covenants, Easements and Servitudes: The Current Situation*, at p. 36.

- in British Columbia, for example, it was calculated that only a small percentage (0.4%) of the land base would likely be considered by non-governmental organizations for establishment of conservation covenants for habitat protection;
- the number of parcels protected by conservation easements which also have development value (and therefore higher assessed values) would likely be small;
- usually the conservation easement would be placed on rural property and be structured in such a way as to allow ongoing use of developed areas of the property for existing purposes;
- even where property might have development or other value relevant to property tax revenues, a conservation easement would not always affect the whole parcel and other uses would still be possible;
- conservation easements may raise property values in some circumstances;
- protecting significant land may provide irreplaceable (or costly to replace) ecological services of greater value;
- improved quality of life from protecting some land may attract related businesses which are taxed at a higher rate;
- conservation easements will often be placed on land that is already assessed at low or no value.

Ongoing work in this area will assist proponents of the use of conservation easements to work with local governments to address concerns about reduced tax revenues and to encourage local governments to implement appropriate property tax incentives for conservation easements.

### ***Title registration and other land-related legislation***

The introduction to Part 2 includes a discussion of the different title registration systems used in Canada. Conservation easement legislation and land titles legislation must address the way in which conservation easements are registered against title to land. To ensure that conservation easements bind future owners of land, legislation should set out a

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*To ensure that conservation easements bind future owners of land, legislation should set out a registration process for conservation easements - either by creating a specific process or specifying that conservation easements will be registered in the same way as other charges on land.*

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registration process for conservation easements – either by creating a specific process or specifying that conservation easements will be registered in the same way as other charges on land.

Registration procedures may include matters such as who is responsible for registration, the steps involved in registering a conservation easement, fees for registration, registration of modifications or terminations of easements. As discussed above (under the heading Duration), easement legislation and legislation governing land titles must be reconciled to ensure that the intent of easement legislation is not undermined.

Other issues arising out of potential conflicts between conservation easement legislation and related legislation generally include:

- reconciling easement legislation with legislation setting out the circumstances under which a landowner can apply to court to have an easement, covenant or other charge removed from title (see discussion under Removal of Common Law Restrictions);
- clarifying who can terminate or modify an easement (see above under Assignment, Modification and Termination);
- the effect of foreclosure on land subject to a conservation easement – whether the easement will be foreclosed from title; as with property tax sales, conservation easement or other relevant legislation should ensure that conservation easements are not removed from title in foreclosure proceedings.

### ***Planning and expropriation***

Although planning and expropriation questions generally have not been considered in conservation easement legislation, some related issues should be addressed. For example, a conservation easement covering only part of a parcel of land may be subject to severance or subdivision approval requirements which may unduly delay covenant transactions. It may therefore be useful for conservation easement or land use legislation to exempt conservation easements from severance and subdivision procedures. Another solution may be to have an easement cover an entire parcel of land but have the land use restrictions apply only to a portion of the parcel. One disadvantage of this approach is that it will likely require a survey which can be costly.

As in foreclosure proceedings and tax sales, when property is expropriated, a conservation easement registered against the property may be removed from title to the property. This would defeat the purpose of the easement and of easement legislation generally. Serious consideration must be given to exempting conservation

easements from this aspect of expropriation legislation. Alternatively, expropriation legislation could require that the expropriation process assesses whether the expropriation serves a more important public purpose than the conservation easement. In any case, expropriation legislation should ensure that if land subject to a conservation easement is expropriated, the easement holder is appropriately compensated, either financially or with an equivalent easement.

### ***Other relationships to consider***

A number of other issues and the extent to which they are addressed in legislation should be considered in drafting conservation easement legislation. These include:

- occupier's liability issues and the common law and legislation governing occupier's liability; occupier's liability should be explored to ensure that easements that provide for public access do not unnecessarily burden the landowner or occupier of the land with liability for accidents;
- reconciling the relationship between conservation easements and legislation governing the use of agricultural and forest land - whether conservation easements can restrict agriculture and timber harvesting;
- how conservation easements relate to aquatic areas and the effect of easements on water rights and responsibilities;
- how conservation easements affect rights to and development of subsurface resources such as minerals and petroleum;
- the granting of conservation easements in wills;
- how conservation easements affect the resolution of aboriginal land claims.

It is important that legislators and government agencies ensure that legislation and policy in these areas complements conservation easement legislation and that the purposes of easement legislation are not thwarted by contradictory objectives.

## PART 6

### CONSERVATION EASEMENTS IN THE COURTS

#### Canada

Canadian courts have not yet been called upon to interpret or enforce legislatively-based conservation easements in Canada and only rarely to consider other kinds of easements such as heritage easements. In an Ontario case,<sup>330</sup> for example, the court found that a heritage easement agreement registered under the *Ontario Heritage Act* prohibited demolition of a church rectory which would otherwise have been permitted under the provisions of the *Building Code Act*. The court found the easement agreement was created as part of a statutory scheme to protect heritage buildings in Ontario and that the *Ontario Heritage Act* gave the easement agreement priority in the event of a conflict with other parts of the legislation. The court stated that easement agreements allow landowners and municipalities to expand the protection for historic buildings beyond that provided elsewhere in the *Ontario Heritage Act*.

While there is considerable jurisprudence relating to common law easements and restrictive covenants, much of this jurisprudence is not relevant to conservation easements and covenants authorized by statute. As has been discussed, legislation has eliminated several of the more significant features of common law easements and covenants. These features – the requirement for two pieces of land, one benefited by and one burdened by the easement or covenant, the requirement that a covenant impose only restrictions and not positive obligations – have given rise to litigation in the past and continue to be the subject of court actions. This jurisprudence does not offer assistance in anticipating the courts' approach to interpreting and enforcing statutory easements.

However, a number of Canadian cases address principles to be applied in interpreting common law restrictive covenants. Some of these principles and approaches may well be relevant to statutorily-based instruments although the extent of that relevance has not yet been determined. The cases that follow are illustrative of the way the courts approach the interpretation of restrictive covenants.

With respect to interpreting common law restrictive covenants, for example, it has been stated:

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<sup>330</sup> *Roman Catholic Episcopal Corp. for the Diocese of Peterborough v. Cobourg (Town)* (1998), 40 O.R. (3d) 187, 46 M.P.L.R. (2d) 195 (Gen. Div.).

The starting point of inquiry is, of course, a careful examination of the wording of the covenant and the whole of the document which contains it. The court will also, however, frequently consider evidence of surrounding circumstances at the time a covenant was entered into and other extrinsic evidence in order to resolve ambiguities in the text...

It is well established that restrictive covenants are strictly construed. Ambiguity is resolved in favour of nonenforcement.<sup>331</sup>

The extent to which these latter two principles will be applied to the interpretation of statutory conservation covenants or easements has yet to be determined. See the discussion below on American case law.

A court may decline to enforce a restrictive covenant if the meaning of the language used in the covenant is uncertain. In a recent British Columbia case,<sup>332</sup> the plaintiff sought a permanent injunction alleging the defendants had breached a restrictive covenant. The covenant stated the following:

Hereafter, no logging shall be carried out and no vegetation or plant life shall be disturbed or removed or interfered with on that part of the Servient Tenement comprised of the watershed for the community water utility presently known as Wilderness Mountain Water Corporation.

The defendants, purchasers of land burdened by the covenant, carried out activities on the land that the plaintiff alleged violated the terms of the covenant. The plaintiff sought an injunction to prevent the activities which it alleged would be harmful to the watershed.

The court held that the restrictive covenant was void for uncertainty and therefore unenforceable. The court reiterated that a restrictive covenant is strictly construed and ambiguity is resolved in favour of non-enforcement. The ambiguity in this restrictive covenant resulted from the definition of "watershed." The court found on the evidence that there were ten different watersheds on the land and held that because it was not possible to determine which watershed the restrictive covenant protected, the court would not enforce it.

The court compared the restrictive covenant with new statutorily-based conservation covenants that had been placed on the land and noted that "in marked contrast to the vague wording of [the first restrictive covenant, the newer covenants] identified the

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<sup>331</sup> *Kirk v. Distacom* (1996), 4 R.P.R. (3d) 240 (B.C.C.A.), paras. 21 and 23.

<sup>332</sup> *Mt. Matheson Conservation Society v. 573132 B.C. Ltd.* (2002), 3 R.P.R. (4th) 146, 48 C.E.L.R. (N.S.) 78 (B.C.S.C.).

watersheds ... on a Reference Plan.”<sup>333</sup> Moreover the new conservation covenants expressly referred to the need to protect specific watershed areas that had been surveyed. The court pointed out that the accompanying plan left no doubt as to the exact location of the watersheds to be protected by the conservation covenant.

In another case,<sup>334</sup> a restrictive covenant that stated “No act of commerce or industry shall be carried on any lot” was upheld. The court stated:

In this case, it is clear to me the purpose of the relevant restrictive covenant was the preservation of the lands so as to exclude commercial or industrial ventures, and maintain the aesthetic character and amenities of lakeside property... One of the restrictions imposed is using the lands for commercial or industrial purposes. So long as the Court is able to identify commercial and industrial uses of land then, in my view, the language of the covenant is clearly expressed and capable of enforcement.<sup>335</sup>

The court found that a campground and trailer park on the land were commercial ventures that were in breach of the restrictive covenant. Despite this finding, however, the court declined to enforce the covenant because other properties that were subject to the covenant had also been commercialized (neighbours had built a marina and motel), but the plaintiff had done nothing to enforce the restrictive covenant against these commercial developments. The court noted that by acquiescing in breaches of a covenant a party may lose its right to have it enforced by injunction.<sup>336</sup>

In an Ontario case,<sup>337</sup> a restrictive covenant stated that the owners of the land and their transferees “shall not use the lands herein for any other purpose than that provided by resolution of [the municipal] Council.” The court found this covenant to be far too uncertain to be enforceable:

The covenant as expressed in the transfer is thus susceptible of the interpretation that the use to which the land may or may not be put must depend upon the whim of Council to be expressed in a resolution or resolutions to be passed at some future time or times as occasion may require. I cannot think of anything more uncertain and more indefinite than such a provision if, by the covenant, the municipal corporation purported to reserve to itself the right to dictate and control by resolution the uses which could be made of the subject land.<sup>338</sup>

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<sup>333</sup> *Mt. Matheson Conservation Society v. 573132 B.C. Ltd.*, para. 48.

<sup>334</sup> *Turney v. Lubin*, [1980] 1 W.W.R. 35; (1979) 14 B.C.L.R. 329; (1979) 10 R.P.R. 89 (B.C.S.C.).

<sup>335</sup> *Turney v. Lubin*, para. 13.

<sup>336</sup> *Turney v. Lubin*, para. 20.

<sup>337</sup> *Re Sekretov and City of Toronto*, [1973] 2 O.R. 161 (Ont. C.A.).

<sup>338</sup> *Re Sekretov and City of Toronto*, [1973] 2 O.R. 161 (Ont. C.A.).

Although there is no body of Canadian case law considering statutory conservation easements, Canadian cases such as those described above, together with the case law from the United States discussed below, indicate the kind of approach that Canadian courts may take in interpreting and enforcing statutorily-based conservation easements and may provide some guidance for drafting effective documents.

## **United States**

Even in the United States, where conservation easements have been used for over 30 years, “conservation easement enforcement law is still virtually nonexistent...”<sup>339</sup> However, the cases that do exist indicate that the interpretation of the language of the covenant is key to a determination of whether or not the covenant will be enforceable. Thus, much of the American case law on the enforceability of conservation easements focuses on principles of statutory interpretation. Although these are American principles, they are similar to Canadian approaches to statutory interpretation and the principles in the American cases, therefore, may be useful to Canadian land trusts and landowners entering into conservation easements.<sup>340</sup>

### ***Some general principles***

As one commentator has explained:<sup>341</sup>

In...enforcement cases, the issues that may be decided by the courts include (a) *issues of law* and (b) *issues of fact*. Issues of law include such fundamental questions as: What are the respective rights of the parties? Is a conservation easement provision ambiguous? And, how should a specific clause in a conservation easement be interpreted? By contrast, issues of fact include such questions as: What did a landowner or land trust actually do on the property? And, what are the specific activities that support the allegations of easement violation?

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<sup>339</sup> Andrew Dana, “The Silent Partner in Conservation Easements: Drafting for the Courts,” in *The Back Forty*, January/February 1999, Issue, Vol. 8, No. 1.

<sup>340</sup> This section does not contain an exhaustive review of conservation easement cases in the United States. Rather it identifies some principles and provides some examples of how American courts are interpreting and enforcing (or not enforcing) conservation restrictions. The authors reviewed Andrew Dana, “The Silent Partner in Conservation Easements: Drafting for the Courts” and Melissa Thompson and Jessica Jay, “An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date,” (2001) 78 *Denver Univ. Law Rev.* 373, as well as a range of enforcement cases from federal and state courts in preparing this section. With some exceptions, the authors did not include in this review cases related to tax consequences of conservation easements.

<sup>341</sup> Andrew Dana, “The Silent Partner in Conservation Easements: Drafting for the Courts.”

In American as well as Canadian case law, conservation easement enforcement cases generally will centre on the meaning and scope of specific terms contained in the conservation easement:

In general, when called upon to interpret the meaning of conservation easements in the face of allegations of easement violation, the courts will first look to the “plain words” of the easement document itself. “Deeds, like contracts, are construed in accordance with the intention of the parties insofar as it can be discerned from the text of the instrument... If a deed is unambiguous, the court’s role is limited to applying the meaning of the words...”

Courts assume that the express language of conservation easements determines the intentions of the parties. In analyzing the language used in conservation easements, words are “given their ordinary and usual meaning” as judged by a “reasonable person.” ... If the written words are clear, these terms will govern the rights and liabilities of the parties.... [Citations omitted.]<sup>342</sup>

As in Canada, the courts in the United States have indicated that only if a term in a conservation easement is found to be ambiguous will they look beyond the “four corners” of the conservation easement document to consider other evidence in an attempt to determine the intent of the parties. A term in a conservation easement will be considered ambiguous if it “is reasonably susceptible of different interpretations.”<sup>343</sup> However, a term is not ambiguous simply because the parties to an action argue that it has different meanings. Whether it is ambiguous is a question of law for the court to decide.<sup>344</sup>

How do the courts determine the intent of the parties? One court has stated:

An instrument creating an easement is construed in accordance with the intentions of the parties.... In determining the parties’ intentions, the court should look at the words of the instrument and the circumstances contemporaneous to the transaction.... The circumstances may include the state of the thing conveyed, the object to be obtained and the practical construction given by the parties through their conduct.<sup>345</sup>

Where ambiguities cannot be resolved by an examination of the document itself and the intent of the parties cannot be easily ascertained, courts will apply principles of

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<sup>342</sup> Andrew Dana, “The Silent Partner in Conservation Easements: Drafting for the Courts.”

<sup>343</sup> For example, *Sagalyn v. Foundation for Historic Georgetown*, 691 A.2d 107, (D.C.App. 1997).

<sup>344</sup> *Bagley v. Foundation for Historic Georgetown*, 647 A.2d 1110 (D.C.App. 1994).

<sup>345</sup> *Smith v. Jack Nicklaus Dev. Corp.*, 225 Ill.App. 3d 384 (Ill.App. 1992), at 391.

interpretation to determine the meaning of covenant or easement terms. American jurisprudence has not yet settled the question of the extent to which courts will apply common law rules for interpreting restrictive covenants (for example, that they should be construed strictly against the drafter) to interpreting statutory easements and covenants. In some cases, the courts apply these restrictive principles asserting, for example, that “restrictions on land should be construed in favour of the free use of land and against the party seeking enforcement.”<sup>346</sup> In applying these principles, the court, on occasion, has rejected arguments that these principles should be applied only to restrictive covenants and not to conservation instruments.<sup>347</sup>

In other cases, the courts apply principles of interpretation that are more likely to recognize the different purpose of statutorily-based conservation restrictions:

A restriction, like a deed, “is to be construed so as to give effect to the intent of the parties as manifested by the words used, interpreted in the light of the material circumstances and pertinent facts known to them at the time it was executed.”... In addition, “the restriction ‘must be construed beneficially, according to the apparent purpose of protection or advantage . . . it was intended to secure or promote.’”<sup>348</sup>

In the following statements, the courts have acknowledged the public interest purposes of conservation restrictions and have approached interpretation and enforcement of the restrictions from that perspective:

In addition to its social benefits, a conservation restriction yields an economic benefit to the grantor of the restriction and successor owners of the property.... In return for that benefit to the owner, it is reasonable that the conservation restriction be protected against expedient exemptions which defeat the purpose of preserving the land in its natural state.<sup>349</sup>

Where the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross [an easement that is not attached to land and usually ends with the death of the easement holder] have no continuing force. In such a case, the appropriate question is whether the

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<sup>346</sup> For example, *Foundation for the Preservation of Historic Georgetown v. Arnold*, 651 A.2d 794 (D.C.Cir. 1994). See also the *Southbury* case discussed below.

<sup>347</sup> See, for example, *Foundation for the Preservation of Historic Georgetown v. Arnold*.

<sup>348</sup> *Chatham Conservation Foundation v. Farber*, 56 Mass. App. Ct. 584 (2002). In this case, second generation landowners sought to construct an elevated walkway on their land. The Foundation’s position was that this was prohibited by the terms of a conservation restriction on the property. The Foundation was successful at the trial level. However, the Appeals Court sent the case back to the original trial court for resolution of the issue.

<sup>349</sup> *Goldmuntz v. Town of Chilmark*, 38 Mass. App. Ct. 696.



bargain contravened public policy when it was made and whether its enforcement is consistent with public policy and is reasonable.<sup>350</sup>

### ***Examples of easement cases***

The following examples show how the courts approach conservation easement cases. They are described in some detail in the hope that they will be helpful to those engaged in drafting easements and in the ongoing monitoring and enforcement of these instruments.

### ***Enforcement cases***

The following cases are examples of cases in which the courts were called on to enforce the terms of a conservation easement or similar instrument. In the first two examples, the court decided in favour of the easement holder. In the next two cases, the court decided in favour of the landowner.

#### ***Construction of a swimming pool prohibited***

In *Goldmuntz v. Town of Chilmark*<sup>351</sup> the court was asked to decide whether a conservation restriction in perpetuity on the plaintiff's land prevented him from installing an in-ground swimming pool on the property. The Appeals Court of Massachusetts found that the restriction did prevent the installation of a pool.

The grantor's purpose in creating the conservation restriction for the town's benefit was "to restrict the use of [the property] and retain it predominantly in its natural, scenic and open condition..." The restriction stated that the owner of the property

will not conduct or perform or permit others to conduct or perform any of the following activities...:

Construction or placing of buildings...or other structures on or above the ground...

The landowner, who lived on the property, argued that the pool fell under one of the exemptions in the restriction which allowed "fishing, shellfishing, boating...and other

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<sup>350</sup> *Bennett v. Commissioner of Food and Agriculture*, 576 N.E.2d 1365 (Mass. 1991). In this case, the court enforced an agricultural preservation restriction on common law principles against the grantor's successors in title even though it arguably did not fall within the precise statutory definition of an agricultural preservation restriction.

<sup>351</sup> 38 Mass.App. Ct. 696.

similar recreational uses [on the property] and the repair, maintenance, improvement and building of accessory structures appropriate to said uses.” The swimming pool was simply an accessory structure to be used for the recreational use of swimming.

The landowner also argued that the pool fell within an exception in the restriction that allowed for the “improvement of the existing dwelling” and that the Commission had previously allowed him to build decks attached to the dwelling under this exception. The landowner argued that a pool was a similar improvement.

The court rejected these arguments. First, the court found that building a pool was not “accessory” to the recreation: “the structure cannot be ‘accessory’ as the activity is not possible without the structure.” The court found that the exemption allowed for the construction of buildings that were accessory to a pre-existing passive recreational use of the property. For example, the exemption would allow a change room to be constructed next to a swimming pond on the property.

Second, the court found that building a pool was not an improvement of the existing building because even if it was flush with the dwelling it was still “an entirely separate structure...”

#### *Construction of an addition prohibited*

In *Bagley v. Foundation for the Preservation of Historic Georgetown*,<sup>352</sup> one of three cases involving the Foundation,<sup>353</sup> the court found that an easement prohibiting the landowner “from building any structure on his property, encroaching on any presently open space, or obstructing a view of the building façade from the street, without first obtaining the written consent of the Foundation” prevented the landowner from constructing a two-storey addition on the back of his house to provide support for new air conditioning units.

The landowner argued that the terms of the easement were ambiguous, presumably because the easement authorized the replacement of air conditioning units. He also argued, based on other easements held by the Foundation, that the easement only prevented him from altering the front of the house.

The court rejected all of the landowner’s arguments and held that the easement was clear and unambiguous on its face. The court also awarded costs to the Foundation in spite of the landowner’s objections to the size of the award. In doing so the court stated:

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<sup>352</sup> *Bagley v. Foundation for the Preservation of Historic Georgetown*, 647 A.2d 1110 (D.C.App. 1994).

<sup>353</sup> See also *Foundation for the Preservation of Historic Georgetown v. Arnold*, 651 A.2d 794 (D.C.Cir. 1994) and *Sagalyn v. Foundation for the Preservation of Historic Georgetown*, 691 A.2d 107 (D.C.Cir. 1997).

Bagley “cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.”

The court commented that approximately two-thirds of the Foundation’s billable hours were spent in addressing the landowner’s “altogether implausible defence theories and counterclaims.”

*Construction of second dwelling allowed*

*Southbury Land Trust, Inc. v. Andricovich*<sup>354</sup> is an example of a case in which the court’s determination of the drafters’ intent, its application of common law principles relevant to restrictive covenants and its interpretation of the easement worked against the land trust.

In this case, an easement on a nine-acre farm restricted the land “to its agricultural and open space use...” and provided that the land, buildings and other structures were to be used only for specified purposes including:

- (a) Farms, truck gardens, forestry and keeping of livestock and poultry.
- (b) A single detached dwelling for one (1) family and not more than (1) such dwelling per lot, except as provided in subparagraph c below.
- (c) An additional dwelling unit for one family in a dwelling or another building, provided that the same is used only as a residence for one or more members of the family of persons directly employed in the operation of the uses in subparagraph a above...

New owners of the property wished to construct a detached single family home to be occupied by one landowner’s son and his family. The land trust brought an action claiming that the construction of this home would violate the terms of the easement. The land trust attempted to argue that the “dwelling unit” permitted by subsection 2(c) had to be attached to or constructed within the existing farm house or another existing farm building.

In rejecting this argument, the court relied on a principle that has historically been applied in the interpretation of restrictive covenants:

Recognizing that “[a] restrictive covenant must be narrowly construed and ought not to be extended by implication”...we decline to adopt the plaintiff’s narrow definition of “dwelling unit.” Applying the definition found in the very code from which the language in the conservation

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<sup>354</sup> *Southbury Land Trust, Inc. v. Andricovich*, 59 Conn.App. 785 (Conn.App. 2000).

easement derived, we conclude that the term “dwelling unit” applies to a detached stand alone building, such as a single-family home.<sup>355</sup>

In determining the intent of the parties, the court looked at the statute from which the words in the easement restrictions were taken. The court also commented that if the drafters had intended that new dwellings could not be built, they could have used explicit language to express this, for example, by requiring that any additional dwelling unit be part of an existing dwelling or another existing building. The court had this to say about the drafters’ intent:

Clearly, the drafters wanted to preserve the pastoral aspects of [the land] and sought to stave off future development of the land. The drafters recognized, however, that future generations farming [the land] might want to have their sons or daughters live with them on the farm, but in a separate dwelling unit. The drafters thus allowed for the construction of one more home on the land, but only on the condition that the inhabitants of that home be relatives of those working the farm. The drafters likely rationalized that by restricting ownership of any new home on [the land] to relatives of those farming the land the new inhabitants would have a greater connection to the land and would be more likely to take pains to preserve the pastoral setting of the land... If the drafters had intended to control the physical design of any new structures on the land, they easily could have done so.

#### *Development of dude ranch allowed*

In *Racine v. United States*<sup>356</sup> a scenic easement granted to the government stated that “with reference to 36 C.F.R. s. 292.16(g)(l) [a legislative provision], it is agreed that only one residence and one tenant dwelling are authorized within the easement area.” The landowner proposed to develop the property for dude ranching which would require constructing buildings in addition to the log cabin, bunkhouse and barn already existing on the property.

The proposal was rejected through all administrative levels as being contrary to the terms of the easement. The landowner took the matter to court. At the first level, the court interpreted the easement as allowing dude ranching structures such as corrals and barns in addition to one residence and one tenant dwelling. The government appealed.

The appeal court affirmed this decision pointing to the legislative provision incorporated by reference into the easement. That provision expressly permitted structures “necessary...for dude ranching.” The court stated:

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<sup>355</sup> *Southbury Land Trust, Inc. v. Andricovich*, at 790.

<sup>356</sup> *Racine v. United States*, 858 F.2d 506 (1988).

Were we to interpret the easement as the Secretary did, we would be forced to ignore the language in section 292.16(g)(l), which permits dude ranching structures which do not impair “scenic, natural, historic, pastoral, and fish and wildlife values...” Under the Secretary’s interpretation of the easement, no dude ranching structures would be allowed. This is contrary to the plain meaning of the language used in the easement. As the district court aptly commented,

It would have been easy for the Government’s drafter to place language in the deed prohibiting all dude ranching buildings otherwise permitted by the regulation...But the Government did not do so. Because of this drafting failure, the Government is now essentially asking this Court to re-write the deed...But the Court does not have the power to re-write the deed.

### ***Other cases***

Two non-enforcement cases illustrate how two courts can look at the same case with different eyes. In the first example, the same court rehears the case. In the second example, two levels of appeal court take a different view of the same matter.

*Parkinson v. Board of Assessors*,<sup>357</sup> a property tax case, is an interesting example of the court’s being persuaded ultimately to take into account the public interest importance of conservation easements. A landowner granted a conservation easement which prohibited, among other things, “the construction or placement of any building...or other temporary or permanent structure on, above or under the Premises” as well as “[a]ny use of the Premises, and activity thereon which, in the reasonable opinion of the grantee is or may become inconsistent with...the preservation of the Premises predominantly in their natural condition...” The easement further provided that the use of “[o]ne single family residence with usual appurtenant outbuildings and structures” would “not be prohibited...or considered inconsistent” with these restrictions. The Secretary of Environmental Affairs approved the easement and it was registered. The landowner retained a life estate in the property.

The landowner attempted to have her property taxes reduced to reflect the reduction in the value of her property as a result of the easement. An appraiser testified on her behalf that the property, with the easement, was worth approximately \$215,000. In making this determination, he calculated that occupation of the single family residence and outbuildings required the use of about seven acres of land.

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<sup>357</sup> *Parkinson v. Board of Assessors*, 395 Mass. 643 [1985].

The local board of assessors, however, refused to discount the value of her property (and, thus, her taxes) because it concluded that the conservation easement was invalid. The Appellate Tax Board upheld the board of assessors' decision, finding that the easement at issue purported to apply not only to land, but also to the residence and buildings, and that the statute did not authorize this. The court that reviewed the Appellate Tax Board's decision, however, did not address this issue. Instead, the court concluded that the easement was invalid, not because it was prohibited by statute, but because its terms were too vague. The court stated:

The board [of assessors] inability to assess the property in light of the conservation easement is symptomatic of the easement's fatal ambiguity. The use of a single family residence, along with the "usual" outbuildings and structures, was excepted from the restrictions set forth in the instrument. According to the decision of the Appellate Tax Board, the appraiser who testified on behalf of [the landowner] stated that such use would require "about" seven acres of land surrounding the house. Therefore, [the landowner] contends that the assessors should have made separate assessments of the seven-acre parcel and of all the remaining land.

There is nothing in the record which supports the apparently arbitrary determination that seven acres of land were required for the use of [the landowner's] house, and thus ought to be excepted from the restrictions set forth in the easement. One-half acre would probably be sufficient for some, while others would doubtless prefer substantially more. In short, the size of the servient estate depends wholly on one's estimate of the amount of property required for the use of the house. Moreover, as the board [of assessors] recognized, the easement would allow the use of one single family residence anywhere on the property. Accordingly, the instrument creates a roving exception to the easement's development restrictions, which, if the current residence were destroyed, could be placed anywhere on [the landowner's] land. Therefore, the easement fails because it inadequately describes not only the size, but also the location, of the land subject to its restrictions.

[The landowner] contends that the legislative scheme anticipates that the grantors of conservation easements may remain in residence on the subject property.... We conclude that in order to do this, grantors are required to identify a parcel of land, separate from the house, which is subject to the development restrictions.

However, this was not the end of the matter. The Attorney General, on behalf of the Secretary of Environmental Affairs, petitioned the same court for a rehearing arguing that conservation restrictions such as the one in issue were consistently recognized as valid and that many other existing conservation arrangements would be affected by

the decision in the case.<sup>358</sup> The Attorney General stressed that the result in the case was important to the cause of environmental conservation. Sixteen charitable corporations also participated in the rehearing.

On the rehearing, the court concluded that the conservation restriction was “valid because it meets all the requirements for a valid conservation restriction [under the statute].” On the issue of vagueness, and being able to identify a parcel of land that is separate from the house and subject to the development restrictions, the court concluded that the section of the Act which made this a requirement did not apply in this case because “the entire locus owned by the taxpayer is subject to the conservation restriction.” However, the court did not address the comments it made in its earlier decision about the vagueness of the easement. It appears that faced with the implications of its decision and the negative effect its decision would have on conservation, the court reversed its earlier decision.

A recent case illustrates how a collateral attack on an easement can threaten the enforceability and even the very existence of the easement. In *Maryland Environmental Trust v. Gaynor*<sup>359</sup> a landowner sought to donate conservation easements to the Maryland Environmental Trust (the “Trust”). He was told that the Trust normally accepts easements on property consisting of 50 acres or more. As a result, the landowner contacted several neighbours about simultaneously donating easements so that the aggregate acreage would qualify for a donation to the Trust. As part of the negotiations between the landowners and the Trust, the Board of the Trust decided that it would like a “no subdivision” clause in the easement, but that the Board would accept the easements without this provision, if necessary.

The letter from the Trust to the landowner describing the Trust’s position on a “no subdivision” stated that the Board requested that the landowners “consider” adding a “no subdivision” clause. The representative from the Trust never specifically told the landowner that the Board would accept the easements without the subdivision restriction.

The landowner assumed that the “no subdivision” restriction was non-negotiable and, as a result, his easement included such a restriction. However, his neighbours interpreted the letter as simply an offer and they negotiated their easements without such a restriction. Several years later, the landowner discovered that he was the only landowner with a “no subdivision” restriction. He sued the Trust for fraud.

The Court of Special Appeals of Maryland upheld a lower court decision that the Trust’s failure to fully explain its negotiating position was fraudulent. As a result of this finding, the easement on the landowner’s property was invalidated. The dissent

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<sup>358</sup> See *Parkinson v. Board of Assessors*, 398 Mass. 112 [1986].

<sup>359</sup> See *Maryland Environmental Trust v. Gaynor*, 140 Md.App. 433.

argued that the letter's plain language made it clear that the Trust did not demand that the landowners include a "no subdivision" clause in their easements.

The Land Trust Alliance intervened in the case to argue that "rescinding a conservation easement on the evidence brought forth at trial may do irreparable harm to land conservation in Maryland." However, this did not sway the court.

Maryland Environmental Trust [MET] appealed the decision and the Maryland Court of Appeals allowed the appeal.<sup>360</sup> In doing so the court stated:

Failure to state more explicitly that MET would accept the conservation easement without a subdivision restriction was not sufficient, by itself, to constitute fraud, as MET had no duty to do so. There was no fiduciary or confidential relationship existing between respondents and MET that would have required such a disclosure in order to avoid any breach of trust... The letter from [MET] to respondents truthfully and accurately conveyed the decision made by the Board of Trustees at the meeting and concealed nothing from respondents...

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<sup>360</sup> 370 Md. 89; 803 A.2d 512; (2002).



## **PART 7**

### **DRAFTING CONSERVATION EASEMENT DOCUMENTS**

Each conservation easement is different. Each will relate to different land with different conservation values. Each will require different restrictions, reservation of rights, and other terms. Different grantees will have different capabilities and interests. Legislation varies from province to province. Accordingly, it is not possible to give information that will be relevant to all conservation easements or that will cover all aspects of all conservation easements. In every case it is important that experts, including legal experts, be involved in drafting conservation easements. That said, and with the understanding that what follows is in no way legal advice, we offer the following general tips for drafting conservation easements.

#### **1. Your easement may be challenged**

Conservation easements are fairly new in Canada and there have not been many court actions affecting easements, but there will be. Although you may think that no one will ever want to challenge your

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*A lawyer knowledgeable in conservation easements, contracts, covenants and land law should be involved in the drafting of your conservation easement.*

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conservation easement, someone, most likely someone who will hold title in the future, might well want to develop the land in a manner inconsistent with the conservation easement. That person will go to a lawyer who will examine your conservation easement and poke holes in it everywhere to see if it will collapse. If the agreement has not been very carefully crafted a court could declare parts of it, or even all of it to be of no effect. Conservation easements should be drafted with this in mind. Each provision should be examined for vulnerability. The whole agreement should be examined for vulnerability. A lawyer knowledgeable in conservation easements, contracts, covenants and land law should be involved in the drafting of your conservation easement.

#### **2. Conservation easements are many-natured: they are statutory, covenants or easements, and contracts**

A regular conservation easement will wear at least three legal coats and the agreement must be tailored to meet the requirements of each. If the agreement does not, the whole arrangement may unravel and the land will be left unprotected. These three are discussed directly below.

### 3. Statutory requirements

First and foremost, conservation easements are statutory creations. This means that they do not exist at common law. If the requirements of the authorizing statute are not precisely met in a conservation easement document, a court could strike down the agreement and declare it to be of no effect. Courts likely will take a strict approach in determining whether a purported conservation easement complies with the authorizing statute so do not take chances. For example, if a statute states the purposes for which a conservation easement may be granted, make sure that the purposes for your conservation easement fall squarely within the statutory purposes. Carry out this exercise for every statutory requirement or characterization and for every easement.

### 4. Covenants or easements

Conservation easement terms will include covenants or easements as well as other terms. Covenants and easements convey obligations relating to the land, in other words that “touch or concern the land” as lawyers say. These terms bind the heirs and successors in title of the original parties to the covenants or easements. Covenants and easements run with the land.

Covenants and easements fall under the legal category of interests called “incorporeal hereditaments.” Under common law incorporeal hereditaments can only be created by grant and grants normally must be under seal,<sup>361</sup> though statutes may alter this common law requirement. Although there may be ways to salvage conservation easements that do not have a seal,<sup>362</sup> always be sure that when a conservation easement is being signed that the parties properly affix a seal wafer if required in the jurisdiction in which it is being signed.

As well, as conservation easements are conveyances of land interests they also must be clearly signed and delivered. Deliverance is best accomplished by actual delivery of the fully signed and sealed document to each party.

Remember that a conservation easement must be signed, sealed and delivered.

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<sup>361</sup> See for example, Megarry, *A Manual of the Law of Property*, 5th ed. by Baker (London: Stevens and Sons, 1975) at p. 399.

<sup>362</sup> If there are no intervening equities, the parties should be able to affix seals after execution of the agreement. If one party balks it may be possible to obtain an order of specific performance requiring affixation. Or, there may be other avenues. Where there is part performance, a court could save the agreement by invoking equitable remedies, or by treating the agreement as an accepted option. See Ballem, *The Oil and Gas Lease in Canada*, 3rd ed. (Toronto: University of Toronto Press, 1999) at pp. 59-64. Ballem discusses seal requirements for an oil and gas lease, which at law normally grants a *profit à prendre* which is an incorporeal hereditament.

## 5. Contract

Conservation easements also are contracts. This means that they must meet all the applicable requirements of contract law to be valid, unless statute has varied that law. So, for example, there must be:

- offer (clear expression of willingness to agree on certain terms);
- acceptance (clear and final expression of acceptance of an offer);
- consideration (money or other valuable consideration) unless the conservation easement is a gift (as many conservation easements will be), in which case it is a deed (deeds must be under seal);
- capacity of parties (for example, normally parties may not be minors, must be of sound mind, if a corporate entity such as a land trust is a party, corporate requirements for binding the entity must be met, and so on);
- formalities complied with (as mentioned earlier, covenants, easements, and deeds, should be signed under seal, and there must be delivery);
- certainty of terms (see discussion below).

The last point, certainty of terms, warrants special attention. A court may declare a contract to be void if the terms are not certain. So if a conservation easement term is vague, meaningless, or otherwise uncertain the whole agreement could be at stake.

A common form of uncertainty is an “agreement to agree.” This is a term where the parties agree to work out something that is meant to bind them or some detail regarding a term in the future. In a conservation easement context it might be the parties agreeing to agree on a

management plan. Such agreements to agree normally are not binding on the parties and a court could strike down such clauses or even the whole conservation easement agreement because of such agreements to agree. So, do not include agreements to agree in your conservation easement. If there are matters that need to be somewhat open-ended for flexibility, make sure that the conservation easement spells out the process by which a definitive, binding result is inevitable. For example, one party may be given the right to determine a matter if no agreement is reached within a certain, reasonable, specific timeframe.

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*So, do not include “agreements to agree” in your conservation easement. If there are matters that need to be somewhat open-ended for flexibility, make sure that the conservation easement spells out the process by which a definitive, binding result is inevitable.*

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Sometimes a court will sever the uncertain term from the rest of the agreement if the uncertain term is not essential. Every conservation easement agreement should contain a severance clause that states that permits severance.

## **6. Relation to other statutes**

When crafting a conservation easement it is critical that the agreements appropriately reflect the provisions of other relevant legislation. Examples include the following:

- The agreement may need to include deeming provisions relating to legislation that permits development on property. For example, title between ownership of minerals (oil, gas, coal, etc.) and title to the surface may be split. This means someone, usually the Crown, owns the mineral interests, and the landowner granting the conservation easement owns the surface interest. In such a case (which will be the usual case in most of Canada), the conservation easement will attach only to the surface interest, unless the agreement also applies to the mineral interest and the owner of the mineral interest executes the agreement. Nevertheless, the agreement should reference legislation relevant to exploration or development of mineral interests to ensure that the grantor has clear obligations regarding any proposed exploration or development. These will include, among others, a requirement to advise the grantee of any activities relevant to the mineral interests and to do what the grantor can do to enable the grantee to participate in any regulatory processes and be entitled to compensation for any interference with the grantee's interest under the conservation easement.
- Other examples of legislation that a conservation easement may need to consider that deal with potential development or other matters relevant to the land are municipal land use legislation, water use legislation, wildlife laws and any other laws that may lead to an alteration or expropriation of a conservation easement interest through development.
- Regarding the last point, note that in all provinces throughout Canada the provincial Crown and not the private land owner may own resources relevant to conservation easements, or at least have primary management responsibility over such resources. For example, the Crown normally owns all water, and the bed and shores of many water bodies or water courses. As well, the Crown normally owns, or at least has primary management authority over wildlife on private land.

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*In all provinces throughout Canada the provincial Crown and not the private land owner may own resources relevant to conservation easements, or at least have primary management responsibility over such resources.*

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Drafters of conservation easements should be aware of the legislation governing Crown ownership or management of such resources to ensure that conservation easement terms are consistent with and appropriately reflect and benefit from the legislation.

- In addition to laws that are relevant to development on land, there are many other laws that must be considered while drafting a conservation easement. For example there may be relevant land titles or land registry legislative provisions. The section on conservation easement legislation in Ontario provides a good example. As noted in that section the Ontario *Land Titles Act* states where no term is fixed for a registered condition, restriction or covenant, the interest is deemed to expire 40 years after registration and the condition, restriction or covenant may be deleted from the register. Accordingly, conservation easements in Ontario must be drafted so that they have a fixed term.
- Other title issues to be considered and appropriately addressed in the conservation easement process concern priority of interests, the effect of foreclosure and the effects of tax recovery processes.
- As well, the drafter should consider the potential effect of a conservation easement on property taxes and review property tax legislation to see if there is anything relevant to drafting a conservation easement that should be considered. For example, the municipal tax legislation of a number of provinces enables beneficial assessment or taxation treatment for lands that are used in agricultural operations. If a conservation easement prohibits all agricultural operations, taxes relating to the parcel could well be substantially increased. Or, municipal tax legislation might authorize special treatment for conservation lands. How a conservation easement is worded could affect whether the lands qualify.<sup>363</sup>

In addition, the drafter must consider the income tax implications, and reference income tax legislation, as appropriate, such as the Ecological Gifts Program.<sup>364</sup>

## **7. Relation to common law**

As noted elsewhere in this publication, conservation easement legislation typically is drafted to overcome common law stumbling blocks and other problems with granting interests in land to protect conservation values. Although this is so, conservation

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<sup>363</sup> See Part 3 of this report and the referenced materials for further information on municipal taxation and conservation easements.

<sup>364</sup> See Part 3 of this report and the referenced materials for further information on federal taxation, including ecological gifts.

easement legislation likely does not entirely modify relevant common law. Drafters of conservation easements must be aware of pertinent common law and address it in the conservation easement document where the authorizing legislation does not unquestionably remove the common law problem.

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## **8. Issues specific to conservation easements**

Conservation easements must contain a number of kinds of clauses. Make sure your conservation easement has such clauses and that they are clear. A non-exhaustive list is:

- a statement of intent of the conservation easement;
- a statement of the purposes and unequivocal evidence that the conservation easement is entered into for the purposes;
- a general clause restricting use in accordance with the purposes of the agreement;
- specific restrictions and specific reservation of grantor's rights regarding use of land;
- references to, attaching as a schedule, or valid incorporation by reference (if permitted by law) of baseline data or report;
- monitoring provisions including rights of entry to monitor;
- crystal clear enforcement provisions;
- effect of waiver of any obligation;
- a clause to address what happens if the grantee (the land trust or other qualified corporate grantee) dissolves; and
- provisions for assignment by grantee (if allowed by legislation).

In addition, a conservation easement agreement should contain general clauses (such as time is of the essence, severance, and so on) as appropriate. Many of these clauses can be found in standard contracts, leases or other land-related documents.

Drafters should be careful that the general clauses they use reflect current best legal practices.

Finally, most conservation easements should incorporate a baseline documentation report describing the state of the land and important features of the land at the time the easement is entered into. A good baseline report is essential for effective ongoing monitoring of the easement and for enforcement in the event of a breach. It also may be useful in establishing that a conservation easement met legislative purposes if the easement is challenged.

## **9. Damages for breach of conservation easement**

Most courts in Canada use a change in market value approach in respect of damages for breach of agreement in relation to property. That is, damages will be assessed on the basis of the difference between the market value of the property before a breach of an agreement and the market value of the property after the breach.

A market value approach will not usually adequately compensate the holder of a conservation easement for breach of agreement. For example, consider a property under conservation easement that prohibits cutting down trees. Suppose that the owner of the land cuts down the trees in violation of the agreement and thereby creates a view property. The market value of the property might well increase on account of the breach. To address this problem, the conservation easement should include an acknowledgement that damages based on market value will not always adequately compensate the grantee for breaches. The parties should agree to some other method or methods, such as restoration costs, to compensate the grantor when a market value approach fails to do so. Although a court might not be bound by such agreement, such a clause should be influential when the court awards damages.

## **10. Do not over draft**

Despite the above, do not over draft. A conservation easement is meant to last for a long time, usually forever. Do not include unnecessary terms. Draft an agreement with an eye towards avoiding problems for future owners. For example, do not include purposes you do not care about. Do not include restrictions that you do not care about. Include purposes that meet statutory requirements that are important to the parties. Similarly, include only restrictions and other obligations that relate to those purposes. If you include purposes and obligations that you do not care about, you make future monitoring and compliance more difficult. As well, you may unnecessarily burden the grantor by making it very difficult to sell or mortgage the property. You also make your conservation easement agreement more susceptible to challenge. So do not add everything you can think of. Add only what is essential and

important. The agreement must be workable over the long term or else there might be resistance to their use in the future. That said, be careful that your conservation easement contains adequate purposes and restrictions so that a court will not be able to find that it was not entered into to protect the conservation values.

### **11. Be realistic when considering the grantee**

As a corollary to point number 10, remember that for every purpose and restriction in a conservation easement there is a responsibility on the easement holder to monitor compliance and to enforce. Easement holder capabilities may be limited in this regard and may change over the years. Do not either directly or indirectly impose obligations that the easement holder cannot handle. Again, protect what is important and do it well.

### **12. Draft for the present and the future; take a trip in a time machine**

Conservation easements are meant to bind owners and occupiers of land for a long time, usually forever. Accordingly, drafters of conservation easements must write not only for the first parties to the agreement, but also for successors in title.

When drafting pretend that the year is 2200 and you are reading the agreement for the first time. In doing so, pretend that you are a lawyer looking to strike down the agreement. Bearing this in mind:

- If there is an interpretive problem in the future, a court will look at the intent of the parties who entered into the agreement. Set out the intent of the agreement in the agreement. Use clear, unequivocal language.
- As a corollary to the last point, remember that a court's determination of the circumstances surrounding the creation of the easement will become more difficult as time passes.<sup>365</sup> Keep copies of correspondence, including email notes, notes to file, and other material that was produced during the development of the conservation easement. These may be critical in the future when a court attempts to find the intent of the parties.
- Do not use terms that may have meaning today, or have meaning only in certain circles, but may lose their meaning over time, unless you clearly define the terms in timeless language. Examples of such terms could be "landscape management approach," "ecosystem needs," "in-stream flow needs," and so on.

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<sup>365</sup> See Andrew Dana, "The Silent Partner in Conservation Easements: Drafting for the Courts," in *The Back Forty*, January/February 1999, Issue, Vol. 8, No. 1.



- Consider that technology will change. For example, if part of the conservation easement background or the agreement itself is a video, computerized, or digital information make sure, as far as possible, that there is hardware around in the future to read or view this data or information. Where data or information is transferred to new technological formats, make sure, as far as possible, that its integrity is preserved so that it will remain admissible in court. Always save the data or information in the original format and keep good records of what was done in transferring into new formats.

### **13. Review, revise, review, revise**

Review and revise the draft until it is as perfect as it can be. Ensure that the entire agreement hangs together. Look for and fix any lack of clarity in purposes, intent or definitions, inconsistent obligations, inconsistent use of terms, using different terms for the same concept, disorganization, ambiguity and typos. Ask does the entire agreement make sense? Does each term make sense? Does the agreement contain terms that make sense in 2004 but may not retain meaning over time? Does the agreement contain clear definitions using language that will stand the test of time? Be sure that the parties to the agreement understand and agree to any revisions.

### **14. Pay attention to court cases**

As mentioned elsewhere in this publication, although there is not much Canadian case law relevant to conservation easements, cases on restrictive covenants and similar interests could be relevant to drafting conservation easements. There has been some litigation in the United States concerning conservation easements. Although our legal systems differ in various ways, it is quite possible that the interpretative and enforcement problems that conservation easements have encountered in the United States may occur in Canada. We may learn from our conservation minded friends south of the 49th by drafting our easements to avoid similar court challenges. Part 6 of this report looks at litigation in Canada and the United States. Drafters of conservation easements should be aware of litigation and should craft their conservation easements to avoid the uncertainties and other problems that gave rise to the litigation.



## PART 8

### FUTURE DIRECTIONS

Since the publication of *Canadian Legislation for Conservation Covenants, Easements and Servitudes* more jurisdictions have introduced conservation easement legislation (for example, Manitoba, Quebec and New Brunswick). The federal government has greatly increased the tax incentives available for donations of conservation easements on ecologically sensitive land. Government agencies, non-government organizations and individuals have gathered in two national stewardship conferences to explore, among many other issues, the issues addressed in this report. In short, the possibilities for voluntary private land conservation have increased significantly.

However, there are still a number of obstacles preventing the full participation of landowners in stewardship of their land. Some of these obstacles are created by existing easement legislation (for example, by legislation providing that only a designated minister or

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*However, there are still a number of obstacles preventing the full participation of landowners in stewardship of their land. Some of these obstacles are created by existing easement legislation and some have not yet been addressed.*

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government agency may hold easements) and some have not yet been addressed. Based on the trends to date, over the next period of time, Canadians may expect to see the following:

- introduction of conservation easement legislation in those jurisdictions that do not yet have such legislation;
- the growth of land trusts and associated provincial organizations as well as movement toward a national coalition of land trusts;
- ongoing discussions about the value and implementation of uniform conservation easement legislation across Canada;
- improvements to existing legislation to address more of the issues raised in this report; these improvements may be sparked by experience in other jurisdictions and may lead to a greater consistency in conservation easement legislation across the country;
- improvements to existing legislation to protect more landscapes or resources, such as provisions to facilitate agricultural easements, water trusts developed on the land trust model and donations of water rights;

- an increased number of partnerships between the public and private sectors designed to protect private land and public parks and other protected public lands; these partnerships will arise out of legislation such as the federal *Species at Risk Act* and are possible as long as conservation easement legislation permits a broad range of easement holders and allows for two or more holders.

Reforms to related legislation may also improve the use of conservation easements as a tool for protecting private land. Examples of legislative reforms that likely would enhance the use of conservation easements include the following:

- introduction of property tax incentives and exemptions from property transfer tax related to conservation easements;
- improvement of income tax incentives such as the elimination of capital gains inclusion in income for gifts of capital property generally, and conservation easements specifically, similar to the tax treatment of gifts of cultural property;
- improvement in valuation techniques and information related to conservation easements;
- exploration of a system for tracking conservation easements to monitor changes of ownership, extent of land protection and so on;
- reconciliation of land registration processes with easement legislation to ensure, for example, that easements can be granted in perpetuity and discharged only in appropriate circumstances;
- coordination of the use of conservation easements with government acquisition strategies and legislation for parks and other protected areas;
- implementation of measures to ensure that conservation easements will not be removed from land in the event of a tax sale, foreclosure or expropriation.

As conservation easements and other land stewardship tools are used with greater frequency in Canada, more lessons will be learned and the shortcomings of existing mechanisms identified. As

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*As it has been to date, the development of conservation easement legislation and the use of conservation easements will continue to be an iterative process.*

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it has been to date, the development of conservation easement legislation and the use of conservation easements will continue to be an iterative process. The use of existing mechanisms will give rise to reforms necessary to improve them and help identify and give rise to tools that have not yet been created or used for protection of private land.

## **SELECTED RESOURCES AND REFERENCES**

### **Useful websites**

The following websites contain statutory information or information about income tax or about protecting private land.

#### ***Canada***

Canada Revenue Agency <http://www.cra-adrc.gc.ca/>

Canadian Wildlife Service <http://www.cws-scf.ec.gc.ca/>

CanLII - Canadian Legal Information Institute [www.canlii.org/](http://www.canlii.org/) (access to authoritative versions of Canadian case law and statutes)

Ducks Unlimited Canada, especially Institute for Wetland and Waterfowl Research <http://www.ducks.ca/research/>

Ecological Gifts Program [www.cws-scf.ec.gc.ca/ecogifts](http://www.cws-scf.ec.gc.ca/ecogifts)

The Land Centre (Real Estate Foundation of British Columbia) <http://www.landcentre.ca/>

TLC - The Land Conservancy of BC <http://www.conservancy.bc.ca/>

Land Trust Alliance of British Columbia <http://www.landtrustalliance.bc.ca/>

Nature Conservancy of Canada <http://natureconservancy.ca/>

North American Wetlands Conservation Council (Canada) <http://wetlandscanada.org>

Ontario Land Trust Alliance <http://www.ontariolandtrustalliance.org/>

Stewardship Canada <http://www.stewardshipcanada.ca/>

West Coast Environmental Law <http://www.wcel.org/>

Wildlife Habitat Canada <http://www.whc.org/>

#### ***United States***

Land Trust Alliance <http://www.lta.org/>

National Trust for Historic Preservation <http://www.nationaltrust.org/>

The Nature Conservancy <http://www.tnc.org/>

Trust for Public Land <http://www.tpl.org/>

### **Useful publications**

Andrews, William J. and David Loukidelis. 1996. *Leaving a Living Legacy: Using Conservation Covenants in BC*. West Coast Environmental Law Research Foundation. Vancouver, British Columbia. Contact West Coast Environmental Law Research, 1001-207 West Hastings Street, Vancouver, BC, V6B 1H7.

Atkins, Judy and Ann Hillyer. 2003. *Land Conservation Transactions: Tax Implications of Gifts of Land and Interests in Land*. Prepared for The Leading Edge: Stewardship and Conservation in Canada, July 3-6, 2003. Victoria, British Columbia. Available from the authors.

Attridge, Ian C. *Conservation Easement Valuation and Taxation in Canada*. 1997. Report No. 97-1. North American Wetlands Conservation Council (Canada). Ottawa, Ontario. Contact the Secretariat, North American Wetlands Conservation Council (Canada), Suite 200, 1750 Courtwood Crescent, Ottawa, ON, K2C 2B5.

Attridge, Ian C. *Ontario Easement Guide*. [Forthcoming]. Toronto: Heritage Foundation. Toronto, Ontario.

Canada Revenue Agency. *Capital Gains*, T4037, available on the Canada Revenue Agency website at <http://www.cra-adrc.gc.ca/>

Canada Revenue Agency. *Gifts and Income Tax*, P113, available on the Canada Revenue Agency website at <http://www.cra-adrc.gc.ca/>

Canada Revenue Agency. *Gifts and Official Donation Receipts*, Interpretation Bulletin IT-110R3, available on the Canada Revenue Agency website at <http://www.cra-adrc.gc.ca/>

Canada Revenue Agency. *Gifts of Capital Properties to a Charity and Others*, Interpretation Bulletin IT-288R2, available on the Canada Revenue Agency website at <http://www.cra-adrc.gc.ca/>

Canada Revenue Agency. *Gifts to a Charity of a Residual Interest in Real Property or an Equitable Interest in a Trust*, Interpretation Bulletin IT-226R, available on the Canada Revenue Agency website at <http://www.cra-adrc.gc.ca/>

- Canada Revenue Agency. *Income Tax Technical News*, no. 26, December 24, 2002 (Proposed Guidelines on Split-Receipting) at <http://www.cra-adrc.gc.ca/E/pub/tp/itnews-26/itnews-26-e.pdf> and [http://www.fin.gc.ca/toce/2002/02-107\\_1e.html](http://www.fin.gc.ca/toce/2002/02-107_1e.html)
- Canada Revenue Agency. *Part Dispositions*, Interpretation Bulletin IT-264R, IT-264SR, available on Canada Revenue Agency website at <http://www.cra-adrc.gc.ca/>
- Canada Revenue Agency. *Registered Charities and the Income Tax Act*, RC4108(E) 1204, available on the Canada Revenue Agency website at <http://www.cra-adrc.gc.ca/>
- Canada Revenue Agency. *Registering a Charity for Income Tax Purposes*, T4063(E) Rev. 01, available on the Canada Revenue Agency website at <http://www.cra-adrc.gc.ca/>
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- Hillyer, Ann and Judy Atkins. 2004. *Giving It Away: Tax Implications of Gifts to Protect Private Land*. West Coast Environmental Law Research Foundation. Vancouver, British Columbia. Contact West Coast Environmental Law Research Foundation, 1001-207 West Hastings Street, Vancouver, BC, V6B 1H7. Also available on website: <http://www.wcel.org>
- Hillyer, Ann and Judy Atkins. 2000. *Greening Your Title: A Guide to Best Practices for Conservation Covenants*. West Coast Environmental Law Research Foundation. Vancouver, British Columbia. Contact West Coast Environmental Law Research Foundation, 1001-207 West Hastings Street, Vancouver, BC, V6B 1H7. Also available on website: <http://www.wcel.org>
- Hillyer, Ann and John Miller. [Forthcoming]. *Appraising Easements*. North American Wetlands Conservation Council (Canada). Ottawa, Ontario.
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- Kwasniak, Arlene. 2001. *Alberta's Wetlands: A Law and Policy Guide*. Environmental Law Centre, for the North American Waterfowl Management Plan. Edmonton, Alberta.
- Kwasniak, Arlene. 2003. "Local Revenue Base and Conservation Lands: a Law and Policy Review," prepared for the Leading Edge Conference, Victoria, BC, July 2003, available online through links to commissioned research at <http://www.stewardship2003.ca>
- Kwasniak, Arlene and Donna Tingley (eds). 1999. *A Legacy of Land: Conservation Easements and Land Stewardship: Conference Proceedings*. Environmental Law Centre. Edmonton, Alberta.
- Ontario Nature Trust Alliance. 1999. *Land Securement Manual*. Contact Ontario Nature Trust Alliance, c/o Federation of Ontario Naturalists, 355 Lesmill Road, Don Mills, ON, M3B 2W8 or Ontario Land Trust Alliance, 1 Jasper Avenue, Smiths Falls, ON K7A 4B5.



Silver, Thea M., Ian Attridge, Maria MacRae and Kenneth W. Cox. 1995. *Canadian Legislation for Conservation Covenants, Easements and Servitudes: The Current Situation*. Report No. 95-1. North American Wetlands Conservation Council (Canada). Ottawa, Ontario. Contact the Secretariat, North American Wetlands Conservation Council (Canada), Suite 200, 1750 Courtwood Crescent, Ottawa, ON, K2C 2B5.

Thompson, Melissa and Jessica Jay. 2001. "An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date." *78 Denver Univ. Law Rev.* 373.

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## APPENDIX 1

### LIST OF CONSERVATION EASEMENT LEGISLATION IN CANADA

This appendix contains a list of the primary statutes or portions of statutes enabling the use of conservation easements, covenants and servitudes in Canada. Other parts of the statutes referred to as well as other legislation may be relevant to the use of conservation easements. Other legislation includes land registration legislation, taxation legislation, and land use and planning legislation. However, this appendix lists only those statutes that specifically enable the use of some form of registrable conservation agreement. Where only a part of a statute authorizes the use of conservation easements, the section numbers are given. However, there may be other relevant sections and reference should be made to text of this report for more information.

Links are provided to websites where the statutory material is available. Because links may change, links are not provided to specific legislation. Specific acts, however, are easily accessed from the links.

#### Conservation Easement Legislation in Canada

Jurisdiction	Name of Act and citation	Kind of registrable instrument	Sections	Where to find it
British Columbia	<i>Land Title Act</i> , R.S.B.C. 1996, c. 250, s. 219	Conservation covenant	s. 219	BC Queen's Printer website at <a href="http://www.qp.gov.bc.ca/statreg/default.htm">http://www.qp.gov.bc.ca/statreg/default.htm</a>
	<i>Land Title Act</i> , R.S.B.C. 1996, c. 250, s. 218	Statutory right of way	s. 218	
	<i>Local Government Act</i> , R.S.B.C. 1996, c. 323	Heritage revitalization agreement	s. 966	
Alberta	<i>Environmental Protection and Enhancement Act</i> , R.S.A. 2000, c. E-12	Conservation easement	ss. 21-24	Alberta Queen's Printer website at <a href="http://www.qp.gov.ab.ca/catalogue/">http://www.qp.gov.ab.ca/catalogue/</a>
	<i>Historical Resources Act</i> , R.S.A. 2000, c. H-9	Condition or covenant	s. 29	CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>
Saskatchewan	<i>Conservation Easements Act</i> , R.S.S. 1996, c. C-27.01	Conservation easement	Entire act	Saskatchewan Queen's Printer website at <a href="http://www.qp.gov.sk.ca/">http://www.qp.gov.sk.ca/</a>
	<i>Heritage Property Act</i> , S.S. 1979-80, c. H-2.2	Easement or covenant protecting heritage property	s. 59	CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>

### Conservation Easement Legislation in Canada cont.

Jurisdiction	Name of Act and citation	Kind of registrable instrument	Sections	Where to find it
Manitoba	<i>The Conservation Agreements Act</i> , C.C.S.M c. C173	Conservation agreement	Entire act	Manitoba Queen's Printer website at <a href="http://www.gov.mb.ca/chc/statpub/">http://www.gov.mb.ca/chc/statpub/</a>
	<i>The Heritage Resources Act</i> , C.C.S.M. c. H39.1	Heritage agreement	s. 21	CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>
Ontario	<i>Conservation Land Act</i> , R.S.O. 1990, c. C.28	Conservation easement or covenant	Entire act	Ontario e-Laws website at <a href="http://www.e-laws.gov.on.ca/home_E.asp">http://www.e-laws.gov.on.ca/home_E.asp</a>
	<i>Ontario Heritage Act</i> , R.S.O. 1990, c. O.18	Heritage easement or covenant	ss.10, 22	CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>
	<i>Agricultural Research Institute of Ontario Act</i> , R.S.O. 1990, c.A.13	Agricultural lands protection easement or covenant	ss. 3, 4.1	
Quebec	<i>Natural Heritage Conservation Act</i> , L.R.Q., c.-61.01	Nature reserve agreement	Various sections throughout act, esp. s. 57	CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>
New Brunswick	<i>Conservation Easements Act</i> , R.S.N.B. 1998 c. C-16.3	Conservation easement	Entire act	New Brunswick Department of Justice website at <a href="http://www.gnb.ca/0062/acts/acts-e.asp">http://www.gnb.ca/0062/acts/acts-e.asp</a>
	<i>Historic Sites Protection Act</i> , R.S.N.B., c. H-6	Historic site easement or covenant	s. 2.1	CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>
Nova Scotia	<i>Conservation Easements Act</i> , S.N.S. 2001, C. 28	Conservation easement	Entire act	Nova Scotia Legislative Counsel website at <a href="http://www.gov.ns.ca/legi/legc/acts.htm">http://www.gov.ns.ca/legi/legc/acts.htm</a>
	<i>Heritage Property Act</i> , R.S.N.S. 1989, c. 199	Heritage agreement		CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>
Prince Edward Island	<i>Natural Areas Protection Act</i> , R.S.P.E.I. 1988, c. N-2	Restrictive covenant	Entire act	PEI Legislative Counsel website at <a href="http://www.gov.pe.ca/law/statutes/index.php3">http://www.gov.pe.ca/law/statutes/index.php3</a>
	<i>Wildlife Conservation Act</i> , R.S.P.E.I. 1988, c. W-4.1, s. 18	Conservation covenant or easement	s. 18	
	<i>Museum Act</i> , R.S.P.E.I. 1988, c. M-1.4, s. 11	Covenant or easement	s. 11	
	<i>Heritage Places Protection Act</i> , R.S.P.E.I. 1988, c. H-3.1	Easement or restrictive covenant	s. 10	

### Conservation Easement Legislation in Canada cont.

<b>Jurisdiction</b>	<b>Name of Act and citation</b>	<b>Kind of registrable instrument</b>	<b>Sections</b>	<b>Where to find it</b>
Newfoundland and Labrador	No conservation easement legislation  <i>Historic Resources Act</i> , R.S.N.L. 1990, c. H-4	Easement or covenant	s. 30	Newfoundland and Labrador House of Assembly website at <a href="http://www.gov.nf.ca/hoa/sr/">http://www.gov.nf.ca/hoa/sr/</a>
Yukon	<i>Environment Act</i> , S.Y. 1991, c. 5	Conservation easement	ss. 76-80	CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>
Northwest Territories	No conservation easement legislation  <i>Historical Resources Act</i> , R.S.N.W.T. 1988, c.H-3	Historic places agreement	Entire act	CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>
Nunavut	No conservation easement legislation  <i>Historical Resources Act</i> , R.S.N.W.T. 1988, c.H-3 (historic places agreements)	Historic places agreement	Entire act	CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>
Federal	No conservation easement legislation  <i>Species at Risk Act</i> , S.C. 2002, c. 29	Conservation agreement	ss. 10-11	Department of Justice website at <a href="http://laws.justice.gc.ca/en/index.html">http://laws.justice.gc.ca/en/index.html</a>  CanLII website at <a href="http://www.canlii.org/">http://www.canlii.org/</a>



## APPENDIX 2

### SUMMARY OF ISSUES TO CONSIDER WHEN DRAFTING CONSERVATION EASEMENT LEGISLATION

This appendix provides a brief overview of issues to consider when drafting conservation easement legislation. See Part 5 for an in-depth discussion of these issues and the kinds of provisions that should be included in conservation easement legislation to ensure that conservation easements are effective and enforceable.

#### Issues to consider when drafting conservation easement legislation

Issue	Factors to consider
Permissible purposes	<ul style="list-style-type: none"><li>• general environmental protection<ul style="list-style-type: none"><li>◦ ecosystem protection</li><li>◦ protection of biological diversity</li><li>◦ habitat and species conservation</li></ul></li><li>• protection of aesthetic and scenic values</li><li>• protection of historical, cultural, educational, recreational and archaeological values</li><li>• protection of existing land uses such as agriculture</li></ul>
Removal of common law restrictions	<ul style="list-style-type: none"><li>• results in significantly more flexible instruments</li><li>• legislation should eliminate restrictive common law requirements (e.g. for separate parcels of land, restricting imposition of positive obligations)</li><li>• ongoing scrutiny of relationship between conservation easement legislation and contract and real property law and legislative amendment where necessary to ensure that the purposes of conservation easement legislation are not undermined by common law rules, (e.g. effect of use of land inconsistent with easement and effect of changes in the character of the land or neighbourhood)</li></ul>
Easement grantors	<ul style="list-style-type: none"><li>• private landowners, both individual and corporate</li><li>• federal, provincial and local government agencies</li><li>• no limit to number of conservation easements a landowner can grant as long as there is no conflict between the easements that are granted</li></ul>

**Issues to consider when drafting conservation easement legislation cont.**

<b>Issue</b>	<b>Factors to consider</b>
Easement holders	<ul style="list-style-type: none"> <li>• the kind of individuals or organizations that can hold easements</li> <li>• levels of government (federal, provincial, municipal, First Nations) and government ministries, departments and agencies that can hold easements</li> <li>• whether easements can be held jointly</li> <li>• whether easement holding organizations should have a charitable or public purpose</li> <li>• whether easement holding organizations should have specified conservation purposes</li> <li>• whether organizations should have a provincial or national presence or whether regional and local organizations can qualify as holders</li> <li>• whether organizations that are not resident in Canada can hold easements with any amendments to other legislation necessary to permit foreign ownership of easements</li> </ul>
Registration of easements	<ul style="list-style-type: none"> <li>• how easements will be registered against title to property so that current and subsequent owners are bound</li> <li>• should be addressed in conservation easement legislation and title registration legislation</li> <li>• when does the easement agreement bind parties, subsequent owners, (e.g. on signing or on registration)</li> <li>• who is responsible for registering the easement - the landowner</li> <li>• who should be notified and given a copy of registered easement</li> <li>• reconciliation of registration requirements under land titles legislation and easement legislation</li> <li>• what can be registered - easement, baseline documentation report, photographs, maps</li> </ul>
Monitoring	<ul style="list-style-type: none"> <li>• statutory right of access to the property subject to the easement</li> </ul>
Enforcement	<ul style="list-style-type: none"> <li>• who can enforce the conservation easement - the holder, the landowner, third party such as government or another conservation organization</li> <li>• delegation of enforcement rights and conditions under which a third party can enforce</li> <li>• potential for conflicts in enforcement</li> <li>• establishment of stewardship/enforcement fund through fee on the transfer of land subject to a conservation easement</li> <li>• alternative dispute resolution provisions</li> <li>• remedies available for breaches of the terms of an easement</li> <li>• level of court or other forum of arbitration that can enforce an easement</li> <li>• who should be liable for breach of easement obligations</li> <li>• should a breach of an easement also be an offence</li> </ul>



### Issues to consider when drafting conservation easement legislation cont.

Issue	Factors to consider
Assignment, modification, termination	<ul style="list-style-type: none"> <li>• assignability of easements by holder and conditions under which easements are assignable</li> <li>• modification of easement agreement – by whom, under what circumstances, how</li> <li>• termination of easement agreement – by whom, under what circumstances, how</li> <li>• compensation for termination of easement</li> </ul>
Duration	<ul style="list-style-type: none"> <li>• in perpetuity for permanent protection or for a specified term</li> <li>• must be reconciled with other legislation (in Ontario land registration legislation, where no term is fixed in an easement, the interest is deemed to expire 40 years after registration and may be removed from the register)</li> </ul>
Relationship to other legislation	<ul style="list-style-type: none"> <li>• income tax legislation</li> <li>• property tax and property transfer tax legislation</li> <li>• land title registration and other land-related legislation</li> <li>• planning legislation</li> <li>• expropriation legislation</li> </ul>
Other relationships	<ul style="list-style-type: none"> <li>• occupier's liability issues</li> <li>• reconciling the relationship between conservation easements and legislation governing the use of agricultural and forest land</li> <li>• how conservation easements relate to aquatic areas and the effect of easements on water rights and responsibilities</li> <li>• how conservation easements affect rights to and development of subsurface resources such as minerals and petroleum</li> <li>• the granting of conservation easements in wills</li> <li>• how conservation easements affect the resolution of aboriginal land claims</li> </ul>

