



## Legal and practical reforms for conservation easements

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## About the ELC

- Incorporated in 1982
- Registered charity
- Mission: To ensure that laws, policies and legal processes protect the environment.
- Ends:
  - People are actively engaged in decisions to protect the environment
  - Laws are effective in protecting the environment and are continuously improved.

## About the ELC

### Public Programs

- Information and referral
- Community outreach
- Law reform



## Conservation Easement law reform initiative

- Inform legal advisors about legal and practical aspects of conservation easements
- Research and review law and policy and recommending reform
- Interviewed easement holders and grantors
- Coincided with Land Trust Leadership Project



Alberta **LAW**  
**FOUNDATION**

## Outline

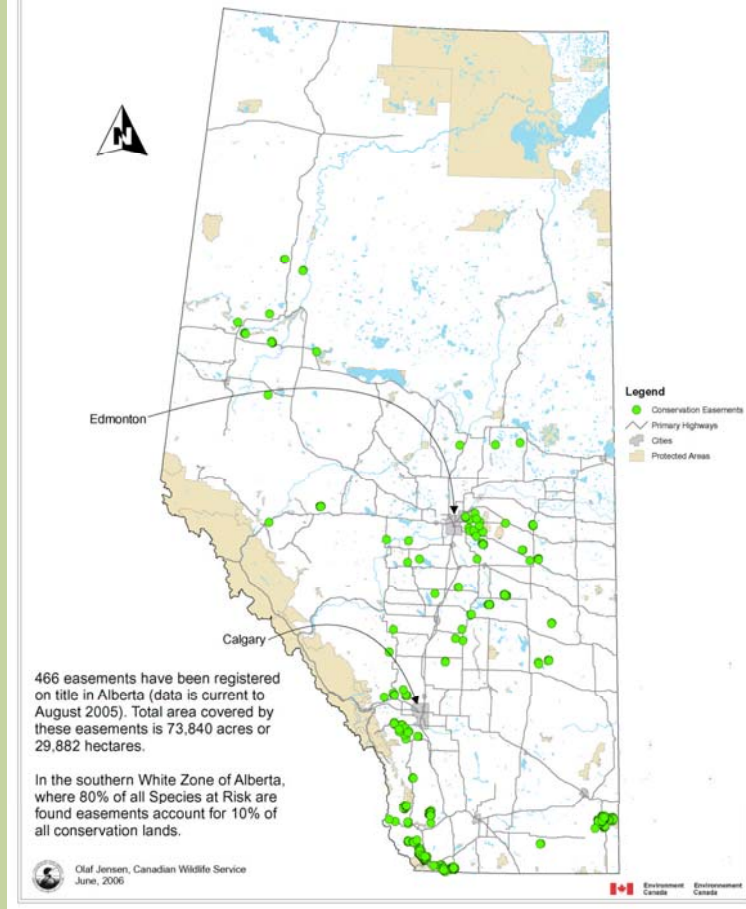
- Context – Conservation easements today and tomorrow
- Law and policy issues and recommendations (select)
  - Enforcement uncertainty
  - Modification and termination uncertainty
  - Property tax treatment
  - Federal tax liability and who bears it
  - Prioritization of lands for greater protection
- Conservation easement reform and land use planning
- Conclusions

## Context - Relevant Legislation

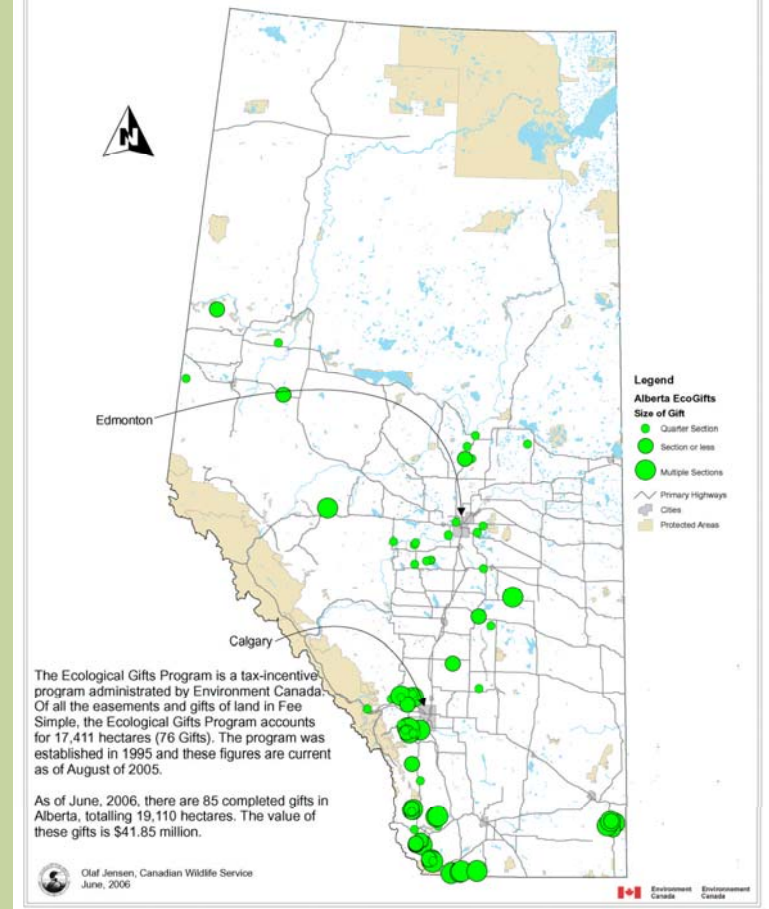
- *Environmental Protection and Enhancement Act (EPEA)*
  - *Conservation Easement Registration Regulation*
- *Municipal Government Act*
- *Land Titles Act*
- *Income Tax Act* (federal)
- *Expropriation Act, Mines and Minerals Act, Exploration Regulation, and Surface Rights Act.*

# The picture in Alberta

## Conservation Easements in Alberta



## Ecological Gifts in Alberta



## Legislation – Purpose (s.22 EPEA)

- Focused on environment, natural scenic or esthetic values
- Recreation, open space, research or educational use of land
  - so long as the use consistent with above conservation purpose
- wetlands, forests, parkland, grasslands (ranchlands), and other natural areas
- Cultivated agricultural land?



## The process in a nutshell

- Landowner or qualified organization wants to preserve land in natural state
- Negotiates agreement to enter into a conservation easement
- Describes/surveys land and natural attributes
- Notifies municipality and sends information to Land Titles for registration
- Conservation easement exists in perpetuity (or for term set out in agreement)

## Conservation easements tomorrow

- Private conservation tool and planning tool
- Needs
  - To be efficiently and effectively enforced
  - Certainty regarding third party/government intervention
  - Subject to consistent tax treatment
  - Facilitated through land use planning



## Enforcement

- The easement holder often retains:
  - the right to access the CE area to monitor compliance (with notice requirements)
  - the right to go to a court for an injunction
  - the right to sue the landowner for damages
- Agreement may provide for arbitration



## Enforcement –current status

- Problems
  - Uncertainty – How will courts decide? How many will agreements be challenged?
  - Costs
  - Timeliness of resolution
- Likely to be an ongoing issue (US scenario)
  - Secondary land owners

## Resolution of enforcement issues

- Certainty in CE agreement terms and descriptions
- Case Precedents (i.e. time and money)
- Options
  - ✓ i) Dispute resolution through an administrative body
  - ii) Enabling the use of environmental protection orders
  - ✓ iii) Providing interpretative guidance to courts
  - iv) Include a reverse onus provision in *EPEA*

## Modification and termination

- Currently
  - Modify through agreement btwn grantor and grantee
  - Minister –where it is in the public interest
  - Court (*LTA*)
    - When modification is in the interest of person seeking to enforce the easement (covenant);
    - Conflicts with statutory plan or land use bylaw;
      - And is in the public interest
- Raises uncertainty
  - Potential to have funds invested in entering and maintaining easement lost

## Resolution of modification and termination

- Ministerial power should be repealed or have qualifications associated with it
  - Why? use of discretion will (unless based on emergency) undermine CE system
  - Amend *EPEA* to require compensation for any costs/market losses and other fees
  - Amend *ITA* to allow federal tax penalties to accrue to province
- Court
  - Case law supports easements being upheld in face of statutory plans and bylaws
  - Amend *EPEA* to provide clarity (reflects case law *Potts v. McCann*, 2002)

## Tax Implications

- Municipal, provincial and federal tax implications
- Municipal Tax
  - CE may lower assessed value of the property as a whole, and thus reduce property tax
- Farm land returned to natural state may result in reclassification and a higher tax rate (from agricultural use value to market value)



## Municipal tax treatment of CE lands

- Currently no provincial regulation or policy –largely ad hoc
- May act as a disincentive in certain instances
- Disadvantages
  - Uncertainty
  - Inconsistency
  - May change at whim of municipality



## Resolution

- Options
  - Exempt CE lands from municipal taxation
  - Define a CE specific rate in the MGA and related regulations.
    - equal or less than farm valuation to create incentive for conservation
  - Rebate system –municipal or provincial rebates upon application and proof of conservation
    - Benefit is that it could apply to non CE lands

## Certificate of Title clarification

- Currently
  - Appears on title as conservation easement and easement holders name
  - Those looking at title may not know what type of easement this is and presume that it is inconsequential
  - Potential liability for lawyers and realtors
  - Increased potential for future challenges
- Strengthening notice provisions of registered CEs

## Federal tax implications and reforms

- Ecological gifts and CEs –no capital gains tax on ecogifts
- Currently under Income Tax Act
  - states that if a municipality or charity “disposes or changes the use of property” they may be subject to penalty
  - Recent guideline published
  - Landowner or Ministerial changes to use of property are not captured
  - Appears to contemplate gifts of fee simple but not conservation easement
- Include others who may change use -landowners and minister to discourage unilateral changes to land use

## Public land and prioritizing conservation

- Public land management
  - Areas adjacent to private land under conservation easement should be subject to special management considerations
    - Notations
    - Conservation easements
    - Regulations
- Prioritization of conservation lands
  - To create incentives
  - To be fully protective, including oil and gas

## Conservation easements as planning tools

- Amendments may facilitate broader planning goals but broader planning is still required
- Tradable Development Credits
  - Implemented through CEs but may need to be amended to cover agricultural land
- Land Use Framework??
  - Can be used to set targets
  - Amend provincial land use policy (municipal statutory plans must comply)
- Other programs examined in recent Canada West Foundation publication *Thinking Outside the Fence: International Land Stewardship Policy Options for the Canadian Agriculture Sector* (2008)

## Other reform considerations re agricultural lands

- Amending the purpose to include open space/agricultural lands
- Create an agricultural reserve area provincially to preserve high value agricultural lands (as done in BC)



## Conclusions

- Conservation easements should be facilitated through law and policy change
  - Reflect both private and public interest in conservation
- Broader planning must accompany this tool
- Agricultural lands (and best management practices) need to be incorporated
- Municipalities may need to justify changes in tax structure

## Resources

- *Legal Aspects of Conservation Easements*
  - Environmental Law Centre  
[www.elc.ab.ca/pdffiles/LegalAspectsOfConservationEasements.pdf](http://www.elc.ab.ca/pdffiles/LegalAspectsOfConservationEasements.pdf)
- *Conservation Easement Guide for Alberta*
  - Environmental Law Centre



For further information contact

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