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Canadian Wildland Resources:

The Role and Management Of Wildlands as a Natural Resource

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LEGAL TOOLS FOR PROTECTING PRIVATELY-OWNED WILDERNESS AREAS

by

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With increasing development pressures on natural areas throughout Ontario, government fiscal restraints, and decreasing reserves of land in its natural state, the need to develop a philosophy and an effective strategy for wilderness preservation is more urgent than ever. The private ownership of much of the wilderness targeted for preservation, particularly land accessible to the large urban population of southern Ontario, just be taken into account when considering the appropriate philosophy and strategy.

Undoubtedly, the most effective way to protect ecologically sensitive lands is to bring them under the control of a body, whether public or private, whose primary purpose is wilderness preservation. Non-governmental public interest groups such as the Nature Conservancy of Canada, the Federation of Ontario Naturalists, local nature clubs, hunters and anglers associations, and the Bruce Trail Association have purchased lands which were in danger of destruction. Provided that public authorities are subject to policies and legislation which restrict their tendency to use such land for schools, hospitals, roads, power plants, and other public works, an effective way to protect private wilderness lands would be to bring them into public ownership by purchase or expropriation.

However, at the present time and for the foreseeable future, acquisition by the public sector or by the few groups devoted to wilderness conservation is not likely to be a sufficient tool to protect all natural areas that should be preserved. Particularly in southern Ontario, where development pressures are extreme, large areas of land are heavily urbanized, and the lands between these sprawling urban/industrial complexities are riddled with transportation and utilities corridors, there is a need for a preservation strategy which does not require acquisition of private lands. As one commentatot has recently noted[1]:

> "We cannot leave the task entirely to governments and their various agents, for they are loaded with commitments far beyond their present revenues. Short term priorities demand more immediate attention in the eyes of elected representatives. Also, increasing unemployment leads to emphasis on labour-intensive expenditures, and land saving is not one of these.
>
> Acquisition is no longer the sole instrument for preserving woodlands and wetlands. They are being overrun too quickly. The price of land is rising beyond the capacity of the public or private purse to cope with the situation."

Because acquisition of all the environmentally sensitive lands that should be preserved is impossible it is necessary to find ways to identify and preserv these lands while they remain in private ownership Ultimately, we appear to have three broad choices: 1) t facilitate and greatly expand public acquisition of thes lands; 2) to develop effective tools to preserve the while they remain in private ownership; or 3) to accep massive environmental deterioration as an inevitabl result of our present land use system. In the meantime there is an immediate need to use the legal tools tha are presently available to prevent, or a least slow down the destruction of the natural areas which are in privat ownerhsip.

In theory, the government has almost unlimited power to control or even freeze the uses of land in privat ownership without acquiring it, provided that proper pro cedural safeguards are followed. However, legal theor and political reality differ greatly. In theory, ever landowner has the right to deal with his property as h sees fit, but this right may be restricted by legisla tion. According to one judge,[2]

> "As urban planning and renewal has assumed greater and greater importance as a matter of social policy, legal restraints on the disposition and use of real property have proliferated. The principle remains - freedom to act - subject to restraints imposed by valid laws."

In theory, these restraints can include legislati which would freeze all uses of land if the legislatu deems this to be in the public interest. The legislatu has the right to pass laws to keep private property in wilderness state if it feels this is necessary. In t United States, a constitutional right to the enjoyment private property has been construed by the courts in su a way that restrictions on the use of private land mig be considered "expropriation without compensation". Ho

ever, this restraint does not exist in Canadian law. The governments of Ontario and Canada may pass laws taking away so-called "development rights" (which have no legal recognition in Canadian jurisprudence) without expropriating the land itself. Removal of such "rights" does not necessarily require compensation.

Despite this theoretical freedom to restrict and even to "sterilize" the use of private lands, freezing private land for conservation purposes has little public acceptance. During hearings on proposed ravine protection policies in the City of Toronto draft official plan in 1973, for example, numerous landowners came forward to make it clear that they would consider prohibitions against development of their ravine lots to be "expropriation without compensation" and an unwarranted infringement of their "rights". Elected bodies consider it politically suicidal to try to use these powers. Politicians know that the exercise of these powers not only will lose them votes, but will almost inevitably embroil public authorities in litigation, as landowners are quick to fight to protect their privileges.

The North American land ownership ethic – that the private owner should be able to do as he likes with his own land – often ensures that attempts to use private lands for public purposes will be met with resistance. The belief of some environmentalists that land should be treated as a common resource like air and water does not reflect contemporary political realities. The Ontario government's policies on zoning of private lands for wilderness are reflected by decisions of the Ontario Municipal Board (OMB). The OMB will not permit a municipality to freeze land use permanently or for an indefinite period of time without making a *bona fide* and reasonable attempt to purchase the land. They have stated that:[3]

> "Privately owned lands are not in the public domain. Until such time as they are required, there is no right of the public to deny an owner the reasonable use of his lands in accordance with planning principles which have been determined and adopted by the duly elected representatives of the people, which action already implies consideration of the rights of the public."

Given these political realities, there are both "carrots" and "sticks" within the present legal framework to encourage landowners to maintain their land in a state of wilderness or to discourage them from destroying trees, filling swamps, stripping topsoil, or otherwise destroying the natural features of the landscape. One approach which has proved very effective in some cases and com-

pletely ineffectual in others is an appeal to the philanthropic motivations of the landowner. The Bruce Trail is an example of successful use of private lands for preservation and recreation purposes. The trail was secured mainly by "handshake" agreements between a private club, the Bruce Trail Association, and private landowners. The permanency or stability of the trail alignment has depended on the generosity of the landowners. As long as the land remains in use as a trail, the landowner may be unable to use it for other purposes, yet he continues to pay taxes on it. There are no financial incentives to the landowner to continue to permit the trail club to use his land. It has, however, been a revelation to urban trail workers to discover that many landowners do not want financial returns but prefer to enjoy the ancient value of making a voluntary, friendly gift to their fellow men.

But the spectacular success of the trail program in using private lands for "public" purposes must be weighed against the utter failure of the private forest reserve program to accomplish similar goals. This program was established in 1919 under the Private Forest Reserves Act by the Ontario government to give philanthropically minded landowners a way to ensure that their natural areas would be preserved in perpetuity. The provisions have been carried over into the present *Forestry Act*. Under these Acts, the Cabinet, with the consent of the owner of any land covered with forest or suitable for reforestation, may declare the land to be a private forest reserve. Once a property is declared a private forest reserve, and the declaration is registered in the local land titles or land registry office, neither the present owner nor any future owner may cut any trees without the Minister's consent. The forest must be preserved forever. As no one took advantage of this opportunity, there is not one private forest reserve in Ontario.

It is interesting to speculate why one program has been so effective and the other so ineffectual. Perhaps this has something to do with the fact that one program was established by a government department devoted primarily to resource exploitation (the Ontario Ministry of Natural Resources) and the other program was developed by a group of volunteers devoted to the concept of nature preservation together with compatible education and recreation opportunities.

A second form of legislated government incentive to preserve private land in its natural state is the management agreement available under the *Forestry Act*, the *Woodlands Improvement Act*, and the *Game and Fish Act*. Under the *Woodlands Improvement Act* and the *Forestry Act*,

The provincial Ministry of Natural Resources will provide free services to plant trees and maintain forests on private land for forestry purposes. In return, the owner must agree not to permit certain destructive activities. Under the Game and Fish Act, the same Ministry will enter into management agreements with private owners for the purposes of management, perpetuation and rehabilitation of wildlife resources. The forestry agreements have been used primarily to promote commercial forestry. There is no legal impediment to the development of similar programs to preserve land for non-commercial conservation purposes, but the government has taken little initiative to do so. In fact, many legal mechanisms which the government uses to preserve land for other purposes, such as the easements over private land available to Ontario Hydro for its power lines, or the tax relief available to to schools and churches, are not available for wilderness preservation. The government could easily use these tools if it wanted to preserve wilderness.

There is other legislation in Ontario that may have some limited effectiveness in preserving wilderness areas in private ownership. It includes planning statutes, licencing laws, anti-pollution laws, public health laws and tax incentives. All of these laws affect the right of the private owner to use his lands as he sees fit. Seldom do they actually take away his right to destroy the land's value as a natural area if he is really determined to do so.

The most important statute affecting use of private land is the Planning Act, which gives a municipality the power to make an official plan stating policies for future development and designating areas of land within its boundaries for certain uses, including open space and recreation. In addition, the municipality can pass zoning by-laws which restrict the use of individual parcels of land in great detail. Through its powers of subdivision control and development control, the municipality can impose conditions whenever a private owner wants to divide or develop his lands. Among the conditions for granting of subdivision approval, for example, is a requirement that the private owner give a percentage of his land to the municipality for parkland. This "levy" can be used by the municipality to protect ecologically-sensitive areas within the proposed subdivision.

The Minister of Housing has zoning and planning powers under the 1973 Ontario Planning and Development Act and under the Planning Act, which are similar to the powers of the municipality.

The provincial government has also given itself similar planning powers over private and public lands in two

specific areas of the province with valuab
environmental amenities by enacting the Parkway Be
Planning and Development Act and the Niagara Escarpme
Planning and Development Act* in 1973.

Under the Environmental Protection Act and the Pi
and Quarries Control Act, the Ministry of the Environme
and the Ministry of Natural Resources respectively ha
some powers to prevent the destruction of natural area
They can refuse to issue licences for waste dispos
sites, gravel pits or sand quarries if they consider t
use of a particular parcel of land for these purposes
be against the public interest.

Potentially, the Endangered Species Act passed in 19
can completely freeze all use of land which provides
habitat for the few endangered species that have be
designated under that Act. In practice, however, the A
is almost a "dead letter" as the Ministry of Natur
Resources, which is responsible for its administratio
has never made any attempt to enforce it.

Finally, the Environmental Assessment Act, passed
1975, but being brought into force only graduall
requires an environmental impact study and a public hea
ing before any one undertakes a major project with si
nificant effects on the environment - provided that t
project is one covered by regulations. As of June, 197
the Act covers some Ontario government projects, no pr
jects undertaken by municipalities or Conservati
Authorities, and only one private project - the propos
by the Reed Paper Company to log 19,000 square miles
northern Ontario timber.

Business interests have expressed a fear that th
statute would bring all development in Ontario to
grinding halt. On the other hand, environmentalists co
sider it a panacea. They hope it will be the cure-a
for every environmental problem. It is too early to te
what effect this Act will have on development of priva
lands. Probably, in most cases, it will not apply to t
small woodlots, ravines, streams and marshes in southe
Ontario that are within reach of the developers' bulldo
ers.

Although detailed examination of the various statut
is beyond the scope of this paper, it is safe to s
that, overall, these statutes do not provide sufficie
incentive to the landowner to preserve his land or suf
cient disincentive from destroying its natural enviro
ment if development pressures are great. If a priva
owner really is intent on turning a potential wildern
park into an industrial park, there is very little in t
present legislative scheme that is capable of preventi
him in the long run.

The main value of all this legislation is its potential use by municipal councils, other public authorities, and citizens groups as a negotiating tool. There is often some provision in the statutes that can be used to delay development or to stimulate some publicity and public awareness of the ecological value of the land involved. The legislation can be used to create some pressure on the owner to negotiate a compromise solution.

For example, a municipality has the right to approve or disapprove applications for rezoning and official plan amendments, to impose development control by-laws and demolition control by-laws, to oppose applications for minor variances, and to refuse to enter into subdivision agreements. The municipal council is therefore in a position to negotiate with a developer for retention of trees and greenspace on part of his lands. The planning process requires on-going discussion between the developer and his representatives and the municipality's departments of planning, engineering, and parks, as well as with the local Conservation Authority and ratepayers associations in some cases. The Planning Board and Council members are also indirectly involved in the negotiating process as the plans must receive consideration, and in the case of council, approval or rejection, from them before going to the Minister of Housing or Ontario Municipal Board for final approval.

The developer, in deciding whether to circumvent the planning process by clearing the land of trees or filling the valued marsh before submitting his draft plan of subdivision or instead to place his buildings on the plan in a position which least interferes with the preservation of existing natural features, will weigh a number of factors which amount to economic considerations. If he decides, upon reviewing the market for housing of certain type, that the presence of trees and associated greenspace on the lots will help sell houses, the develop will plan accordingly. If, on the other hand, he feels that it is necessary to place as many housing units on a site as are allowed by the zoning, the developer is unlikely to sacrifice potential building sites for greenspace preservation. The advantages of building additional units to sell might well outweigh the marginal profits to be gained from selling houses in a more esthetically pleasing setting.

An effective strategy for preserving wilderness and other greenspace in private ownership will require further legislative tools. One mechanism which has been the subject of study and use in other jurisdictions but has received little interest in Canada, is the conservation or open space easement. This is a right to use private land for limited public purposes such as protecting a

view, limiting development, or preserving the natu qualities of undeveloped land. Samuel Silverstone, his article "Open Space Preservation Through Conservat Easements" states that conservation easements are val ble in both private and public efforts for open sp preservation.[5] The area protected, though not in act use, is still of public benefit because it satisfies contemporary public's need for open space.

Silverstone enumerates the advantages of this tech que of protecting open space over other techniques s as purchase or expropriation:

"First, when a municipality purchases or expropriates land for whatever purpose, that land is thereby entirely withdrawn from the tax roll. Instead, by purchasing or expropriating only a conservation easement over the same property, the tax base is only slightly affected since the land remains on the tax roll (minus the easement value). Second, purchase or expropriation of a conservation or development easement is usually much less expensive than acquisition of the fee simple. This factor is very important for municipalities attempting to accomplish a maximum number of goals on fixed budgets. Third, because there is no transfer of ownership, the government or other dominant tenement[6] escapes the maintenance costs of the property. Fourth, conservation easements permit flexibility and can be easily tailored to each particular open space problem. Fifth, the granting of a conservation easement clearly reduces the market value of the servient tenement[6] and consequently reduces the real estate assessment of that property. This possibility of lower property tax may act as an incentive for people to sell or even donate such rights. Finally, the fact that easements are granted for long periods of time and possibly in perpetuity provides a secure medium for open space protection and a control over future unrestricted and unplanned development."

But, Silverstone also warns:

"However, those advocating the use of this device must proceed with caution. Lack of understanding on the part of either landowner or the tax department can shatter the entire scheme and any possibility of its future use. Success of the conservation easement will depend on the ability of its advocates to convey the following two main principles to the public and governments alike:

1) Conservation easements must be used in a complementary fashion with other open space tools. To rely on this device for all open space protection is to invite disaster.

2) Justification of the device must be sought in the fact that it saves land and not money. Savings are obviously an incentive to its use by both private landowners and government. But, to rely too heavily on this element of savings is to mislead potential users into believing that substantial gains are to be had in every situation. Furthermore, too great a stress on the savings aspect may draw a sharp and undesirable reaction from the Tax Department."

In other words, in cases where development means high profits, the small financial advantages of a conservation easement, or indeed almost any other incentive that can be offered the landowner, cannot compete. But where the landowner sincerely wants to preserve his land, but is penalized for doing so by present tax laws, conservation easements may be useful.

Among the reforms which might present legislation effective are the following:

- Public authorities should have a right to enter private lands to make ecological inventories.

- Conservation Authorities, municipalities and other public authorities should be empowered to issue stop work orders when the environment is being destroyed.

- Tax relief should be available to landowners who want to preserve their land in its nature state, but may be forced to sell to developers to avoid burdensome taxes under present legislation.

- Where the common law right of private prosecution has been taken away by statutory provision, the statute should be amended to restore this right.

- Environmental protection legislation should contain provisions allowing any member of the public to seek injunctions against any environmental degradation that is prohibited by the statute.

- Where statutes provide for fines on conviction for damaging the environment, the maximum fine should be raised in many cases, and a minimum fine should be provided for by the statute. The penalties for environmental destruction provided by many Ontario statutes are so low that they provide no deterrent. Some of these penalties have not been reviewed for decades. The maximum fine of $25 for injuring a tree within a municipality provided for in section 457(7) of the Municipal Act, for example, has remained at that level since 1870.

- Provisions should be added to some environmental statutes giving public authorities the right to compel those who destroy ecologically sensitive land to repair the injury or damage or to pay the costs of repair. If a public authority pays for such restoration, it should have a statutory right to add the cost of repairs or restoration to taxes, to impose a lien on the property of the offender, to recover the costs in a legal action, and to enforce its rights in the same manner as a court order is enforced.

Our laws are intended to reflect our society's values. Until the late 1960's, the sanctity of private proerty and the stimulation of economic growth were unquestioned values. In the past, both the common law and statute laws have reflected the perceived need for development by strengthening the rights which promoted development and curtailing the rights which inhibited it. Public interest and the private interest were considered to coincide. Both required the promotion of a more comfortable standard of living through urbanization, industrialization, and more extensive transportation, communications, and other services requiring land development. This synchronicity of goals promoted extensive land development - rapid and under-planned - at the expense of preserving wilderness and other open space.

In the last decade, values reflecting the need for energy conservation, resource conservation, pollution control, recreational space and the preservation of certain esthetic, historical and ecological places have gained broader support. Now that the so-called "public" and "private" interests increasingly come into conflict it is necessary to readjust the balance between these competing interests before it is too late, if wilderness is to be preserved.

FOOTNOTES

1 Kirk, M.D. "Nature Preservation in Woodlands and Wetlands", speech Seminar on Private Land, Public Recreation and the Law, Conservation Council of Ontario, June 16, 1975.

2 Re Teperman and Toronto [1975], 5 O.R. (2d) 507 at 510, Henry J.

3 Re City of Brockville By-Law 44-72 [1974], 2 O.M.B.R. 343 at 345.

4 In the case of the escarpment, the government has delegated some of its statutory powers to a Niagara Escarpment Commission composed of representatives of municipalities and members of the public at large.

5 Silverstone, Samuel. "Open Space Preservation Through Conservation Easements" [1974], 12 Osgoode Law Journal 105.

6 Traditional easements involve two parcels of land - the land which is subject to the easement (the servient tenement) and the land which benefits from the easement (the dominant tenement). In the case of conservation easements, the government or the public at large, rather than an adjoining landowner, may receive the benefits of the easement.

THE WILDERNESS CONTROVERSY IN ONTARIO

by

George Priddle

THE PROBLEM

At the present time, in the province of Ontario tw professional, but diametrically opposed 'voices' are con fronting the matter of wilderness. Two years ago, th Division of Parks of the Ministry of Natural Resource issued for discussion, a series of documents that collec tively composed a revised park classification system fo the province. In fact these documents went much furthe than simply providing a new means of classifying parks These documents stated explicitly the rationale fo establishing and managing a system of parks for the prov ince.[1]

It was at this point that I became official involved. The Ontario Government's Provincial Par Council - of which I am the Chairman - was asked react and to solicit reaction from the public to the do uments. After this process of public involvement t documents were revised and distilled into what is n being considered by the cabinet of the legislature as park policy for the province.

The park system as proposed in this policy would co sist of Nature Reserves, Wilderness Areas, Natural Env ronment Parks, Recreation Areas, Waterways and Historic Parks. No commercial logging would be allowed with some types of parks or within some types of zones with parks. This is the matter that has created the greate concern. Simply stated the nature of the problem is th the forest industry feels that too much land would be s aside as wilderness and the wilderness advocates fe that not enough land would be protected from the fore industry.

The discussion has become polarized with the Ontar Forest Industries Association presenting one point