

## Legal Aspects of Conservation Easements

Jason Unger, Staff Counsel, Environmental Law Centre

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### Introduction

A conservation easement is a legal tool that allows landowners to preserve the natural attributes of their land. Landowners in Alberta have donated or sold conservation easements covering 29,882 hectares, and donated or sold fee simple title covering 40,928 hectares to conservation organizations.<sup>1</sup> Of these lands 19,110 hectares qualified as ecological gifts and were valued at \$41.85 million as of June 2006.<sup>2</sup>

Landowners may seek legal advice in relation to either sale or gifts of conservation easements. These materials provide legal practitioners with information to effectively guide and advise clients in the conservation easement process.

### Conservation easements: value beyond conservation

Landowners can choose to protect the natural aspects of their lands through the conservation easement provisions of the *Environmental Protection and Enhancement Act (EPEA)*<sup>3</sup>. Entering into a conservation easement agreement benefits the local ecology and may provide additional benefits to the landowner including:

- tax benefits by way of reduced capital gains taxes and income tax deduction or credit;
- the ability to retain substantive use of and rights to the land while ensuring future preservation of the land; and
- a potential increase to property value, particularly where there are contiguous adjoining lands with conservation easements.

### **Not all easements are equal**

Conservation easements are statutory tools created by *EPEA* that must be distinguished from a typical easement or covenant. In particular, conservation easements can be registered on title notwithstanding the fact that they fail to meet certain statutory and common law criteria applying to typical easements or covenants.<sup>4</sup> This is a result of *EPEA* exempting conservation easements

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<sup>1</sup> Personal communication and unpublished maps, Olaf Jensen, Canadian Wildlife Service, June 2006.

<sup>2</sup> *Ibid.*

<sup>3</sup> R.S.A. 2000, c. E-12, *as amended*.

<sup>4</sup> *Land Titles Act*, R.S.A. 2000, c. L-4, *as amended*. See in particular s. 48.

from application of portions of section 48 of the *Land Titles Act*.<sup>5</sup> This exemption allows the conservation easement to run with the land and to be enforced whether it is positive or negative in nature.<sup>6</sup> Conservation easements also do not need to be associated with benefits and burdens between dominant and servient tenements; they can exist in “gross”.<sup>7</sup>

## **Conservation easement legislation**

### **Legislative purpose**

Conservation easements may be granted for the following purposes:<sup>8</sup>

- protection, conservation and enhancement of the environment, including biodiversity;
- protection, conservation and enhancement of natural scenic or esthetic values; and
- recreational use, open space use, environmental education, research and scientific study of natural ecosystems, so long as the use is in accordance with the conservation and protection purposes outlined above.

### **The landowner (or grantor)**

The grantor is defined as the person who grants the conservation easement and includes a successor and assignee.<sup>9</sup>

### **The qualified organization (or grantee)**

Only specific bodies can hold conservation easements and they are referred to as “qualified organizations”.<sup>10</sup> *EPEA* defines a “qualified organization” as:<sup>11</sup>

- a body corporate that is a registered charity that has as an object of incorporation, the acquiring and holding of an interest in land for a conservation purpose, and whose bylaws indicate that any interest held will pass to another qualified organization on winding up;
- the government or a government agency; or
- a local authority, which includes municipalities, the Minister responsible for the *Special Areas Act* or an improvement district, and Métis settlements.

Typically conservation easements are donated or sold to a qualified organization with a conservation mandate or to the local municipality.

### **Legal status of the grant**

A conservation easement constitutes an interest in land in the qualified organization as grantee.<sup>12</sup> This is significant as the grantee obtains a recognized interest whereby his or her participation in decisions relating to land will be legally recognized. This is of particular importance in relation the grantee having recognizable rights before administrative bodies such as the Alberta Energy and Utilities Board or the Environmental Appeals Board.

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<sup>5</sup> *Supra* note 3 at s. 24.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*; also see *Land Titles Act*, *supra* note 4, at s. 48.

<sup>8</sup> *Supra* note 3 at s. 22.

<sup>9</sup> *Ibid.* at s. 22(1)(d). An executor, administrator, receiver, receiver-manager, liquidator and trustee of the grantor are also considered a grantor in the definition provided in *EPEA*.

<sup>10</sup> *Ibid.* at s. 22(1).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* at s. 22(8).

Like other covenants, a conservation easement does not constitute an encumbrance on land.<sup>13</sup> The easement typically exists in perpetuity although it can be for a set term as well.

### **Termination and Modification**

A conservation easement may be modified or terminated by:

- agreement between grantor and grantee;
- order of the Minister if the Minister is of the view that to terminate or modify an easement is in the public interest;<sup>14</sup> or
- a court order pursuant to section 48(4) of the *Land Titles Act*.<sup>15</sup>

### **Lapsing easements**

An easement may lapse if it is registered subsequent to a mortgage on title and the property is foreclosed upon.<sup>16</sup> For this reason the conservation easement agreement may indicate that all reasonable efforts are to be pursued to obtain a postponement of any encumbrances such that the easement takes priority over other instruments that are registered on title.

*EPEA* states that conservation easements will not lapse merely because the easement has not been enforced, the use of the land is inconsistent with the purpose of the conservation easement, or the use of surrounding or adjacent lands has changed.<sup>17</sup>

### **Enforcement**

Typically the qualified organization that holds the easement will be responsible for enforcing the easement although the landowner can name another qualified organization to do so, either alone or in conjunction with the grantee qualified organization.<sup>18</sup> Enforcing an easement provision will usually entail the qualified organization seeking injunctive relief against the landowner from the Court of Queen's Bench.

### **Assignability**

The qualified organization can assign a conservation easement to another qualified organization and in doing so must notify the landowner of the assignment forthwith.<sup>19</sup> The landowner may assign an easement although this typically occurs when there is a sale or transfer of the land to which the easement pertains. Easement agreements often have notice requirements when there is a proposed transfer of land or a transfer of property rights.

### **Land Titles Registration**

To be a recognized interest in land, the conservation easement agreement must be registered with the Land Titles Office.<sup>20</sup> Prior to registration occurring, notice of the intent to register the agreement must be given to the local authority (municipality or the Minister of Municipal Affairs

<sup>13</sup> *Land Titles Act*, *supra* note 4 at s. 48(6).

<sup>14</sup> *Supra* note 3 at s. 22(7).

<sup>15</sup> See *infra* at page 6.

<sup>16</sup> See Arlene Kwasniak, *Conservation Easement Guide for Alberta*, (Edmonton: Environmental Law Centre, 1997) at pages 23-24.

<sup>17</sup> *Supra* note 3 at s. 22(9)

<sup>18</sup> *Ibid.* at s. 22(3) and (4).

<sup>19</sup> *Ibid.*, s. 22(5).

<sup>20</sup> For easements on Métis Settlement land the agreement must be registered in accordance with the regulations under the *Métis Settlements Act*, R.S.A. 2000, c. M-14, *as amended*. See the *Métis Settlements Land Registry Regulation*, Alta. Reg. 361/91.

for easements in an improvement district or in the special areas).<sup>21</sup> The form of the notice is provided in the Schedule to the *Conservation Easement Registration Regulation* and must be delivered to the local authority 60 days prior to filing papers with the Registrar.<sup>22</sup> Written confirmation of receipt of the notice from the local authority is required.<sup>23</sup>

The Registrar will endorse a memorandum of the agreement on title when the agreement is submitted.<sup>24</sup> Part of this process includes the signing of a statutory declaration by the qualified organization as provided in the *Conservation Easement Registration Regulation*.<sup>25</sup> It is also important to ensure that the description of the conservation easement land area is acceptable to the Registrar.<sup>26</sup> Similarly, a memorandum will appear on title for any modifications or termination of the agreement.<sup>27</sup>

### **Effect of registration**

Subsection 48(4) of the *Land Titles Act* is applicable to conservation easements and dictates that every transferee of land is deemed to be affected with notice of the easement being on title. The transferee is thereby bound by the terms of the conservation easement agreement. Once the conservation easement is registered, section 54 of the *Land Titles Act* operates to recognize the interest that has been created.<sup>28</sup>

## **Common landowner concerns – the conservation easement agreement, mineral development and termination**

Concerns that may often be raised by landowners about conservation easements include:

- the terms and restrictions in the conservation easement agreement;
- the potential for mineral development on conservation easement lands; and
- the modification or termination of the easement in the future.

### **The easement agreement – allowable land use**

The terms and conditions governing the grantor and grantee are expressed in a negotiated agreement, the “conservation easement agreement”. The terms of the agreement can be quite flexible, constrained only by the need to uphold the purpose of the easement and the objectives of the qualified organization (the grantee). Outlined below are typical issues dealt with in the easement agreement.

Conservation easement agreements may deal with the following rights and responsibilities of the landowner (grantor):

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<sup>21</sup> *Conservation Easement Registration Regulation*, Alta. Reg. 215/96 at s. 2(1).

<sup>22</sup> *Ibid.* at s. 2(1) and Schedule.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Supra* note 3 at s. 23. The language in *EPEA* states that the Registrar “shall” put a memorandum on title. This is interesting in so far as it might create a conflict for the Registrar if the easement is to be considered as effectively subdividing the land, as the *Land Titles Act* prohibits the registration of an instrument that has that impact without the proper approval.

<sup>25</sup> *Supra* note 21, at s. 4.

<sup>26</sup> *Ibid.* at s. 3.

<sup>27</sup> *Supra* note 3 at s. 23.

<sup>28</sup> S. 54 states “So soon as registered every instrument becomes operative according to its tenor and intent, and on registration creates, transfers, surrenders, charges or discharges, as the case may be, the land or the estate or interest in the land or estate mentioned in the instrument.”

- the right to unhindered use and enjoyment of the land to the extent that this is not limited by the terms of the agreement;
- restrictions on interfering with the ecological characteristics that are the focus of the agreement;
- a requirement to give notice to the grantee if any dispositions of rights to land are being contemplated or any damage is done to the land;
- restrictions on building or developing on land that is the target of the easement;
- restrictions on depositing harmful or waste materials;
- restrictions on excavating or removing land or water;
- restrictions on the use of the easement land for agricultural uses (although grazing or haying may be allowed);
- a requirement to maintain insurance on the land covered by the easement;
- a requirement to indemnify the qualified organization for damages to the land arising from landowner activities;
- a requirement to take reasonable steps to stop and repair damage caused by others;
- the right to post signs and to provide access for a given purpose that does not degrade the intent of conservation easement, such as recreational uses; and
- the right to transfer, sell or otherwise assign an interest in property, although there may be a requirement to give notice to the grantee and to the future landowner of the easement.

Conservation easement agreements may give the qualified organization (the grantee) the following rights and responsibilities:

- to create a management plan and administer that plan; usually the agreement will allow the grantee to amend the plan with notice being given to grantor and time for feedback;
- access to the property for the purpose of monitoring and enforcement;
- the right to erect signage;
- a right to a portion of compensation where expropriation occurs or other activities occur affecting the conservation area;
- limited liability of the qualified organization in terms of maintaining ecological nature and integrity of the property; and
- the right to enter property and perform activities for habitat enhancement.

### **Other conservation easement agreement provisions:**

Several other conservation easement agreement provisions of importance include:

- arbitration clauses;
- the term of agreement (typically in perpetuity);<sup>29</sup> and
- requirement to seek independent legal advice.

### **Conservation easements, mineral development and expropriation**

Placing a conservation easement on land does not immunize the lands from mineral development<sup>30</sup> or expropriation.<sup>31</sup> Oil and gas companies continue to enjoy the right to the minerals below the surface and can obtain a right-of-entry order from the Surface Rights Board to access the land and develop those rights. The qualified organization may have the ability to

<sup>29</sup> An easement for a set term may not be eligible for certain federal tax benefits.

<sup>30</sup> See *Mines and Minerals Act*, R.S.A. 2000, c. M-17, *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, and *Surface Rights Act*, R.S.A. 2000, c. S-24.

<sup>31</sup> See *Expropriation Act*, R.S.A. 2000, c. E-16, as amended. Section 3 that allows the expropriation of any interest in land that is required by the expropriating authority.

participate in (and oppose) oil and gas development or expropriation before administrative bodies. The qualified organization may also be entitled to compensation where activities adversely impact the conservation easement area, depending on the terms of the conservation easement agreement.

### **Modification and termination of easements by court order**

The two instances where a covenant or easement may be discharged through operation of section 48(4) of the *Land Titles Act* are:

- where the modification or termination will be beneficial to the persons principally interested in the enforcement of the covenant; or
- where there is a conflict between the easement and a land use bylaw or statutory plan.

The modification or discharge of the easement must also be in the public interest in the view of the court. Section 48(4) will have limited application in modifying or terminating conservation easements for the following reasons:

- A modification or discharge will rarely benefit the persons principally interested in enforcement, namely the qualified organization (grantee). The qualified organization will have the stated objective of acquiring an interest in land for a conservation purpose. Any modification that is detrimental to that conservation purpose or the termination of an easement would not be to the qualified organization's benefit. Where the qualified organization is the government or a municipality (or other local authority) the determination of what is considered "beneficial" to the grantee will likely be interpreted more broadly.
- A conservation easement will rarely be found to be in conflict with land use bylaws or statutory plans. Case law indicates that a conflict will only be found where compliance with the covenant requires a violation of the bylaw, that is to say where it is impossible to comply with both the covenant and the bylaw.<sup>32</sup> A conservation easement, typically a non-use or non-development of land, would rarely conflict with a bylaw in this manner. Typically compliance with both the easement and any bylaw standards would be met through non-development.
- If either of these tests for termination or modification is met, the court must also find that it is in the public interest to modify or terminate the easement. Case law has indicated that the public interest in modifying an easement may be met where the character of a neighbourhood has changed so significantly that the modification of the easement no longer violates the rights of other landowners.<sup>33</sup> Section 22(9) of *EPEA* indicates that a conservation easement will not lapse for reasons merely of non-enforcement or change of land use on lands adjacent to easement lands and this would certainly be considered in a court's determination of whether it was in the public interest to modify or terminate the easement.

### **Landowner liability and costs associated with a conservation easement**

Liabilities related to land ownership persist to varying degrees once a conservation easement has been placed on the land. Description of some of these liabilities follow:

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<sup>32</sup> *Barker v. Palmer*, 2005 ABQB 815 at para. 29, citing *Seiffeddine v. Hudsons' Bay Co.*, (1980) 11 Alta. L.R. (2d) 229 (Alta. C.A.), [*Seiffeddine*]

<sup>33</sup> *Seiffeddine*, *supra* note 33. The Court also noted that this jurisdiction must be exercised cautiously.

### **Occupier's liability – third party liability**

The *Occupier's Liability Act*<sup>34</sup> defines an occupier as someone in physical possession of land or a person who has responsibility for and control over certain aspects of land.<sup>35</sup> The grantor, as the party retaining physical possession, is certainly an occupier for the purpose of the legislation and the grantee may be an occupier depending on the amount of management and control it has over the lands. The *Occupier's Liability Act* states that the occupier must “take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there”.<sup>36</sup>

An occupier's duty of care (along with the negligence standard of care) will therefore be relevant to the contents of the conservation easement agreement. In particular, the conservation easement agreement should deal with whether the landowner wishes to allow or invite access to the easement area, either through recreational trails or in a less structured manner to allow for activities such as hunting, and whether indemnification provisions are necessary. Further considerations must be given to signage and management of lands in a manner that minimizes liability.

### **Other potential costs and liabilities to be considered**

Costs and liabilities associated with taxes, insurance, indemnification and non-compliance should also be considered.

- **Taxes and fees** – the conservation easement lands will continue to have property taxes charged against them and may have other fees associated with them. These charges are usually still payable by the grantor but terms for payment of these costs can be negotiated and should be incorporated into the easement agreement.

Fees may include survey, appraisal and legal fees associated with creating the easement. Payment of these fees may be negotiable.

- **Insurance** – conservation easement agreements will generally require that adequate insurance be maintained for the easement lands. The type and cost of insurance will vary greatly depending on the proposed use of the easement lands.
- **Indemnity** – conservation easement agreements will often have indemnity clauses relating to third party claims. In particular, the qualified organization will seek indemnity against any losses or damages sought by another party that are a result of activities undertaken by the grantor, their employee or agent, in carrying out of their obligations under the agreement. A similar indemnity can be sought in relation to liability arising from the qualified organization's activities.
- **Remedying non-compliance** – enforcement of the conservation easement agreement, if required, may result in costs being payable by the landowner for actions that are required to remedy the non-compliance. Furthermore, the non-compliant landowner may be held liable for court costs that arise through enforcement proceedings.

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<sup>34</sup> R.S.A. 2000, c. O-4.

<sup>35</sup> *Ibid.* at s. 1.

<sup>36</sup> *Ibid.* at s. 5.

## **Tax implications and estate planning**

Tax implications of entering into conservation easements are separated into federal, provincial and municipal tax issues.

### **Federal taxes**

Whenever a piece of property is sold or donated there are likely to be tax implications. Disposition of partial interests in land, such as conservation easements, carry these same tax implications. The complexity of the tax scenarios in a specific circumstance may require further information being sought from tax and estate planning professionals.

The tax implications will differ significantly depending on whether the conservation easement is donated to a charitable grantee or is paid for by the grantee. The tax benefits of giving a gift of an easement on capital property fall under regular gift rules arising under the *Income Tax Act*<sup>37</sup>(*ITA*); however, further tax benefits may be available through the federal ecological gifts (Ecogifts) program.

### **Sale of conservation easements**

The sale of a conservation easement may give rise to a capital gain that is subject to tax at a rate of 50%.<sup>38</sup> The *ITA* outlines the calculation of capital gains related to conservation easements with a formula that roughly equates the amount of the gain to the proportional value of the conservation easement in relation to the fair market value of the land.<sup>39</sup> For example, if a conservation easement is appraised at one-third the property value, then the adjusted cost base for the purpose of the capital gains calculation will be roughly one-third of the normal adjusted cost base.

### **Gifts of conservation easements**

The value of a donation of capital property, including a conservation easement, may give rise to a tax credit where there is a valid receipt produced. A gift, for the purpose of the *ITA*, must transfer the ownership of property to a qualified recipient. This can include a part of a property right such as a conservation easement. The transfer must be voluntary and cannot provide a benefit to the donor or anyone selected by the donor (with the exception of split receipting).

### **Split receipting**

Split receipting rules apply to conservation easements as well as to fee simple donations. The split-receipting rule allows the grantor to obtain compensation for a portion of the easement with a tax receipt being presented for the remainder.<sup>40</sup>

<sup>37</sup> R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.), as amended.

<sup>38</sup> *Ibid.* at s. 38(a).

<sup>39</sup> *Ibid.* S. 43(2) sets out the adjusted cost base formula for easements, namely the adjusted cost base of the property at the time of the easement disposition times the quotient of the value attributed to the easement over the fair market value of the property immediately prior to the disposition.

<sup>40</sup> The amount of the benefit to the donee should not exceed 80% of the amount paid (see *Income Tax Technical News #26*, online: Canadian Revenue Agency <<http://www.cra-arc.gc.ca/E/pub/tp/itnews-26/itnews-26-e.pdf>>. See also Environment Canada, *The Ecological Gifts Program: Confirmation that Ecogifts are Eligible for Split-Receipting*, March 2004, online: Canadian Wildlife Service <[http://www.cws-scf.ec.gc.ca/egp-pde/D85A0090-B668-4FE6-84A8-7064CF36C593/split\\_e.pdf](http://www.cws-scf.ec.gc.ca/egp-pde/D85A0090-B668-4FE6-84A8-7064CF36C593/split_e.pdf)>.

## **Federal Ecological Gifts Program**

The Canadian Wildlife Service of Environment Canada administers the Ecological Gifts or Ecogifts program. An Ecogift can be a fee simple gift of land or the donation of a conservation easement to a qualified recipient. There is also the ability to split receipt donations of Ecogifts to allow for partial payment for conservation easements.

### **Tax benefits of the federal Ecogifts program**

The Ecogifts program gives rise to various income tax benefits including:

- corporations can deduct directly from their taxable income the value of the donated conservation easement;
- individuals get a non-refundable tax credit (16% of first \$200 and 29% for the balance) for the value of the donated conservation easement;
- the donation may also result in reduction of provincial tax; and
- there is no limit on the amount that can be claimed through an Ecogift in a given year, that is to say it can be credited against 100% of income. Any unused portion of the credit can be carried forward up to five years.

### **Taxable capital gain treatment of Ecogifts**

Capital gains realized through a donation that qualifies as an Ecogift were made tax exempt as of May 2006.<sup>41</sup> It is expected that a new tax form will be produced to replace T1170 (05) *Capital Gains on Gifts of Certain Capital Property* to facilitate the tax-exempt gift.<sup>42</sup>

### **Qualifying as an Ecogift**

To qualify for the Ecogift program and related tax treatment requires:

- a donation receipt from the recipient organization;
- the recipient organization to be a “qualified recipient”; and
- certification of the fair market value and the “ecological sensitivity” of the property by the federal Minister of Environment or a designated authority.

### **What is ecologically sensitive?**

The determination of what will be considered “ecologically sensitive” is based on the current and future contribution of an area to biodiversity and environmental heritage in Canada and is outlined by the Canadian Wildlife Service.<sup>43</sup>

### **Who can be given a gift?**

Ecogifts must be given to a qualified recipient and this is most often a registered charity with the Canada Revenue Agency. The organization must have included in its purpose “the conservation and protection of Canada’s environmental heritage” or a statement of similar intent acceptable to the Minister of Environment (or a delegate) and they must apply to Environment Canada to be eligible.

<sup>41</sup> See *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on May 2, 2006*, S.C. 2006, c-4, at s. 52(2), amending the Income Tax Act, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) as amended, at s. 38(a.2).

<sup>42</sup> Online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/E/pbg/tf/t1170/t1170-05b-e.pdf>>.

<sup>43</sup> See the Canadian Wildlife Service Ecological Gifts Program website where the criteria are described. The criteria are available online: Canadian Wildlife Service <<http://www.cws-scf.ec.gc.ca/egp-pde/default.asp?lang=En&n=C6232D19-1>>.

## **Provincial Taxes**

Provincial taxes may also be affected by the sale or donation of a conservation easement. Where taxable income is affected through capital gains realized through the sale or donation of the easement, provincial taxes will be impacted.<sup>44</sup>

## **Municipal property taxes**

There are no consistent rules or guidelines in place for property tax assessments of conservation easement lands. Municipalities may decide to apply property tax at a level commensurate with agricultural land or that of developable land. Where the land was previously taxed as agricultural land, and is then assessed as developable land, an increase in property taxes is likely to occur. How the municipality will characterize the conservation easement land for tax purposes is therefore central to determining whether entering into a conservation easement will be beneficial, detrimental or neutral in relation to property tax assessments.

## **Conservation easements and estate planning**

Conservation easements can be tools to facilitate conservation goals of a testator while bringing tax benefits to the estate. The tax implications of a conservation easement being established through a will can be complex and may require consulting with other tax and estate planning professionals.

When incorporating a conservation easement into a will, it is important to leave specific instructions for the executor in relation to the terms of the conservation easement agreement. The executor will execute the easement agreement on behalf of the estate and if the contents of a will are too vague a court may find them void.<sup>45</sup>

## **Conclusion**

Conservation easements are likely to continue to be used by landowners, qualified organizations and municipalities to protect the naturally and ecologically significant aspects of land in Alberta. The legal, financial and ecological consequences of conservation easements must be understood if proper advice is to be given to clients who may place conservation easements on their land or future purchasers of that land.

*While every effort has been made to ensure the accuracy and timeliness of this information, the information provided is of a general nature and is not a substitute for legal advice. For further information about conservation easements contact the Environmental Law Centre.*

Environmental Law Centre  
 #800, 10025-106th Street  
 Edmonton, Alberta, T5J 1G4  
 Tel: (780) 424-5099  
 Fax: (780) 424-5133  
 Toll Free: 1-800-661-4238  
 E-mail: [elc@elc.ab.ca](mailto:elc@elc.ab.ca)  
 Website: [www.elc.ab.ca](http://www.elc.ab.ca)

<sup>44</sup> *Alberta Personal Income Tax Act*, R.S.A. 2000, c. A-30 at s. 5.

<sup>45</sup> Phillip J. Renaud, "Wills & Estates Planning Issues Surrounding Conservation Easements", in Arlene Kwasniak and Donna Tingley, eds., *Proceeding of a Conference Held June 18-19, 1998* (Edmonton: Environmental Law Centre, 1999) at page 73.