

# The Urgent Need for the Formation and Support of an Alberta Farmland Trust

## Introduction

With the Alberta economy moving in 2018 toward some degree of recovery, most thinking Albertans recognize that there is now an urgent need for an initiative, supported by government policy, designed to protect and preserve Alberta's highest quality and most productive food producing lands. Such a policy would be warmly welcomed not only by the agriculture community but also by those living in the urban centers to whom the implications of urban sprawl, industrialization and country residential development on productive farmland is fully apparent.

## Background of Conservation Easements in Alberta

Conservation easements were first introduced in Alberta through the *Environmental Protection and Enhancement Amendment Act*, 1996, SA 1996, c.17. That legislation, however, provided only for ecological conservation easements for the protection, conservation and enhancement of the environment and of natural scenic or aesthetic values.

In 2008 the Canadian federal Ministry of Agriculture and Agri-food Canada published a paper by Good and Michalsky entitled "*Summary of Canadian Experience with Conservation Easements and their Potential Application to Agri-Environmental Policy*" which includes strong support for the creation of tax and other incentives to give life to the use of conservation easements for the preservation of well managed agricultural landscapes.

In 2009, the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 ("**ALSA**"), created the first legislative foothold in Alberta for the use of conservation easements for the "protection, conservation and enhancement of agricultural land or land for agricultural purposes". Since 2009, however, nothing substantive appears to have been done by government to implement the policy in ALSA that was so warmly received at the time. Consequently, some nine years later, there is no noticeable movement in the Province toward the use in a meaningful way of conservation easements over farmland.

To be clear, many of the ecological conservation easements put in place to date in the Province encompass lands that have an agricultural purpose, namely livestock grazing, and indeed some even include some hayland as well. So as to avoid any misunderstanding arising from that fact, it is emphasized at the outset that the thrust of this paper in support of the use of agricultural conservation easements, is to advocate for farmland conservation easements as distinct from ecological conservation easements that have a secondary function of preserving land that also has an agricultural function from grazing.

In March 2012, the Miistakis Institute and the Environmental Law Centre published a report entitled "*Conservation Easements for Agriculture in Alberta, A Report on a Proposed Policy Direction*" ("**Miistakis**") which is a helpful and comprehensive analysis of the concept of agricultural conservation easements for Alberta. However, there has been governmental policy inertia since that report was issued in 2012.

In the meantime, ecological conservation easements under ALSA as implemented under the Federal/Provincial EcoGift Program, have proven to be a popular and very helpful tool in the protection and preservation of ecologically sensitive lands in Alberta, particularly in the Eastern Slopes region. To date, approximately 165,000 acres have been conserved under the Eco-Gifts Program.

### **Conservation Easement**

A conservation easement as used in Alberta today is an amphibious legal creation. In one respect it is an easement to the extent that the qualified organization (i.e., a charity such as, for example, Nature Conservancy of Canada, Southern Alberta Land Trust or Western Sky Land Trust) has the right to enter the lands from time to time for the purpose of monitoring the landowner's compliance with the provisions of the conservation easement. At the same time, the instrument is a restrictive covenant which imposes certain restrictions and prohibitions applicable to the land in perpetuity.

It is the restrictive covenant aspect of a conservation easement that gives rise to the greatest challenge to its enforceability. In the first place, the restrictions must not be dated and must be practical with a view to being in place and enforceable in perpetuity. But even more important, is the fact that the common law prescribes that a restrictive covenant is to be strictly construed. By that is meant that anything that is not precisely and unambiguously prohibited by the terms of the conservation easement, will not be disallowed.

### **The Essence of an Agricultural Conservation Easement**

Miistakis addresses what it calls the "purpose conundrum". The report advises Government that it needs to articulate a purpose for agricultural conservation easements before full implementation of that tool can be put in place. To that end, Miistakis analyzes whether the purpose should be economic, for food production, to support culture and rural communities, to preserve open spaces, to protect the environment or to implement sustainable production. It is respectfully submitted, however, that any such focus on requiring a new and specific purpose for agricultural conservation easements maybe founded upon misunderstandings that are important to recognize.

The first, is alluded to in the Miistakis Report where reference is made to the experience in the United States over its 100 years of usage of conservation easements. In the US, the perspective is that legal challenges are a question of "when" and not "if". It is submitted that there is no reason why the Alberta perspective with regard to the use of this tool should be any different over the perpetual life of a conservation easement. It would be a mistake to think otherwise.

It is easy to imagine how future owners of conserved land will in many cases resent the restrictions imposed on their property by an unknown predecessor in title. The resentment will stem from the substantially lower value for the property and the inability to utilize the generally applicable laws allowing for changes of use, subdivision, etc. The end result is that future owners of property can reasonably be expected to scrutinize every word of the conservation easement encumbering their land and, together with their solicitors, analyze how strictly each provision of the conservation easement can be construed.

As a matter of good management, qualified organizations holding conservation easements retain an endowment fund or a reserve fund for ongoing stewardship of conserved land. But the budgets for those reserved funds do not allow daily, weekly, monthly or anything much more than an annual monitoring visit. So what is a qualified organization to do if a future landowner starts cutting timber on the land when it was prohibited, selling topsoil when it was prohibited or any one of myriads of other things that angry or destructive landowners might resort to. Of course, if any such destructive steps were to be taken without prior notice to the qualified organization, then the damage would have been done even before the qualified organization has any idea of the threat.

Of equal significance is the fact that qualified organizations are not likely to be able to fund any frequency of hard-fought litigation with disgruntled future owners over the precise meaning of the restrictions contained in individual conservation easements. The danger of that, is that landowners of the future may run roughshod over the conservation easement tool unless it is carefully and thoughtfully established at the outset, without attempts to overreach by including restrictions and purposes that are unrealistic or simply unenforceable. There is a common unrealistic expectation on the part of many commentators about conservation easements with respect to the extent and precision by which legally enforceable restrictions can be imposed in order to achieve overly ambitious and unrealistic purposes.

### **What is the Purpose of an Agricultural Conservation Easement in Alberta?**

It is submitted that enforceability of a conservation easement can best be attained by recognizing that the relatively simple and direct task of protecting, conserving and enhancing of land for agricultural purposes can be achieved:

- (a) by prohibiting any subdivision (ie., reducing the area of a parcel below a quarter section of 160 acres);
- (b) by prohibiting any change in use of the land; and
- (c) possibly also by prescribing what, if any, and what extent of agricultural building will be allowed on the land.

The latter item would be negotiated between the donating landowner and the qualified organization with the expectation that if a clear limitation on agricultural building is breached, the court will have little difficulty with enforcement.

It is the combination of items (a) and (b) above, however, that is the essence of an agricultural conservation easement. Specifically, if a future landowner wants to subdivide he/she will have to go to the subdivision approving authority which will have been fully informed in advance of the existence of the conservation easement. Similarly, if he/she wants to change the use of the land under any future land use planning legislation, he/she would also need to get approval from the appropriate regulatory authority which will also be aware in advance of the conservation easement.

If one recognizes that those two (and perhaps three) essential provisions of an appropriate agricultural conservation easement in Alberta (the “**Essence of an ACE**”) are put in place, then

the protection, conservation and enhancement of agricultural land or land for agricultural purposes can be achieved in a readily enforceable manner regardless of the opposition of any future owners. That is because any future disgruntled landowner could not achieve subdivision or change of use without the authorization of a third party governmental agency such that unilateral breach of the conservation easement would not at all be likely to occur.

Some have argued that the provision of Section 29 of ALSA providing for the use of a conservation easement for the protection, conservation and enhancement of agricultural land or land for agricultural purposes is a land use rather than a purpose. However, that is a distinction without a meaningful difference in this context. It is submitted that all concern about there being an absence of a purpose for agricultural conservation easements in Alberta can be dispensed with if one recognizes that ALSA already expresses the purpose in Section 29 of the Act - “the protection, conservation and enhancement of agricultural land or land for agricultural purposes”.

### **What Lands Should be Agriculturally Conserved in Alberta Today?**

It is recommended that the Alberta Government implement a policy to support the creation of agricultural conservation easements on lands within Alberta’s most highly productive food producing areas. To that end, we attach as Appendix A to this Memorandum a map entitled “*Organic Matter Content of Cultivated Soils of the Agricultural Area of Alberta*” as produced by Alberta Agricultural, Food and Rural Development in conjunction with Norwest Labs. On that map the soils containing a percent of organic matter of 6 and greater (ie., the very dark brown and the dark redish brown areas) be used to delineate Alberta’s most highly productive food producing lands.

Some of those best soils in the Province extend all the way down the Eastern Slopes to the US border. Many parts of those particular lands are already being conserved under the EcoGift Program so that the agricultural conservation easement could be used to slip into place for cultivated lands in that particular area that do not qualify under the EcoGift Program. It is submitted that government policy ought to make clear that agricultural conservation easements apply to parcels which are all or substantially all cultivated land, including forages and tame pasture.

### **Importance of Implementing an Agricultural Conservation Easement Program in Alberta at this Time**

There are a number of farm families in the Province who themselves and their ancestors have farmed high quality Alberta farmland for many years and in some cases, for several generations. A number of them have expressed to both the national and the regional land trusts, a desire to be able to conserve those agricultural lands. However, they are unable to do so because of the risks and costs described herein and because the established land trusts are fully focussed and occupied with gifts under the EcoGift Program.

Not only are there no tax advantages available today, nor any public funding for support of agricultural conservation easements, but also there are substantial legal, accounting, appraisal and land registration costs and challenges to be incurred. All of those costs and challenges need to be incurred and met by the landowner so that he/she can devalue his/her property. The fatal

issue in all of this is the fact that granting an agricultural conservation easement is a disposition of an interest in the land for capital gains tax purposes.

As can be seen from the map which is Appendix A, much of the highest quality and most productive soils in the Province run along the Edmonton / Calgary corridor. Industrialization up and down that corridor is happening at a rapid rate. It is submitted that the people of Alberta, both rural and urban would welcome the implementation of policies to allow at least some of those invaluable food producing lands to be conserved.

The essential question therefore is, what policy initiatives need to be taken to implement a workable agricultural conservation easement program in Alberta?

### **What are the Financial Implications of Granting a Conservation Easement in Alberta Today?**

In face of ongoing habitat loss and degradation, the Government of Canada, with the objective of maintaining biodiversity, has established the EcoGift Program. It provides incentives to landowners to protect their ecologically sensitive lands. Before one addresses what might be done to stimulate the granting of agricultural conservation easements in Alberta, it is useful to understand the financial implications of an ecological conservation easement from the point of view of a donating landowner.

Ownership of fee simple land in Alberta today can be described as comprising many bundles of rights: rights such as the right to cut trees, the right to farm, the right to graze, the right to build structures, the right to apply for subdivision, the right to apply for a change in use, the right to grow any and every crop imaginable that might survive in this climate, etc., etc. When a conservation easement is granted, some of those “bundles of rights” are removed and from a legal standpoint, that is seen as a sale of part of the fee simple interest.

For that reason, the donor and the qualified organization as the donee of a conservation easement must obtain an appraisal of the value of the lands without a conservation easement, and an appraisal of them after the conservation easement is put in place.

As mentioned above, when a conservation easement is granted there is a deemed disposition of a real property interest, equal to the value of the gift (ie., the value attributed by the appraiser to those bundles of rights removed by means of the conservation easement).

Under the EcoGift Program, the capital gains tax on the value of that donation is waived. No such advantage, however, accrues to a donor of an agricultural conservation easement and it is that fact which currently creates the single greatest impediment to the use of conservation easements to protect agricultural land.

The donor of an ecological conservation easement, together with the qualified organization receiving it, enjoy two significant advantages under the EcoGift Program. One is the fact that the Federal Department of Environment certifies that the lands in question are ecologically sensitive. The other is that the value attributed by the appraiser to be the market value of the ecological gift is certified by the Federal Department of Environment as having been reviewed by qualified professionals and approved. The advantage, therefore, is that a donor of an

ecological conservation easement can go forward with the donation with certainty that the value attributed to the gift will not be questioned by the Canada Revenue Agency (“CRA”). Similarly, the qualified organization will be in a position to issue a tax receipt for the value of the gift which the CRA will not question.

Of course, since there is no “AgriGift Program” in place in Canada today, the donor of an agricultural conservation easement cannot have such certainty. In theory, at least, the donor can place faith in the appraiser, and hope that the qualified organization will as well. However, both of them must know that the CRA may at any time over a 4 year period after the year in which the gift is made, challenge the appraiser’s valuation of the land, the assessment of the value of the gift or whether the lands in question meet the objective of the protection, conservation and enhancement of agricultural lands or land for agricultural purposes. In short, the granting of an agricultural conservation easement today is awash with uncertainty including the potential for disputes and the threat of possible litigation with the CRA.

There is yet another significant advantage that accrues under the EcoGift Program where the donor is an individual as opposed to a corporation. An individual receives a tax receipt which can be utilized for the year of the gift plus ten more taxation years against tax actually payable by the individual, as opposed to taxable income which would be the case for a corporate donor. No such advantage accrues to an individual upon the granting of an agricultural conservation easement.

Finally, a major incentive within the EcoGift Program is that the donating landowner can receive part of the value of his gift, not merely as a tax receipt for the donated portion, but also in cash for the portion of the value of the conservation easement that is purchased by the qualified organization. Some of that funding for the qualified organizations comes from the Federal Government and some from the Provincial.

Not many farm owners in Alberta today need a tax receipt. An ideal solution would be for tax receipts that are issued for donations of agricultural conservation easements, to be made transferable so that farm owners might be able to obtain cash for the receipt. Also, receipt of cash, perhaps to the same degree made available under the EcoGift Program, would be highly attractive and a great incentive to cause landowners to move forward to protect Alberta’s most valuable food producing lands.

### **What Should be Done?**

The best solution would involve the creation of an “AgriGift Program” parallel to the EcoGift Program. Such a policy, however, would require cooperation between the federal and provincial governments. It is recommended that efforts in that regard be initiated by the Province of Alberta with the aim of creating a program similar to the EcoGift Program.

The federal government has, of course, heard of this issue before. Attached as Appendix B is a letter dated December 6, 2006, from the Ontario Farmland Trust to the Honourable James Flaherty, who was then the Minister of Finance for Canada. That letter clearly articulates many of the strong arguments in favour of the two levels of government working together to create functional mechanisms for the preservation of farmland in Canada before it is too late.

Back in 2012, Miistakis commented that (under the previous federal Government) there seemed to be a significant appetite for the creation of such a program nationwide. One would hope that the present federal Government, recognizing the constant and rapid decline in the most highly productive food producing lands in the country, may also be supportive of such an initiative.

A number of potential mechanisms for creating and enhancing the tax incentives for the granting of a conservation easement in Canada are discussed in a useful paper by Zweibel and Cooper entitled “*Charitable Gifts of Conservation Easements: Lessons From the U.S. Experience in Enhancing the Tax Incentive*” published in the Canadian Tax Journal (2010) Vol. 58, No. 1, 25-61.

Governments today are concerned about costs. It is submitted, however, that any perceived loss of tax revenue on capital gains from an agricultural donation is theoretical at best and would be overcome by the perpetual future food productivity of the lands. The loss of tax revenue through the issuance of tax receipts, and the availability of cash for at least partial purchase of agricultural conservation easements, could at the outset be capped when a new program is initiated and the very best lands in each Province or region are identified and qualified, so that there would be no unbudgeted expenditures of public funds.

Finally, it is time for the establishment of an Alberta Farmland Trust to be the qualified organization to receive agricultural conservation easements, to press governments for support of the concept and to raise funds for administration and stewardship purposes. Such an organization would be complementary of the land trusts engaged in the EcoGift Program but not competitive with them.

Dated this 2<sup>nd</sup> day of August, 2018.

Stanley Carscallen, Q.C.<sup>1</sup>

---

<sup>1</sup> Mr. Carscallen is a practising lawyer with Carscallen LLP in Calgary and the owner of White Moose Ranch at Millarville, Alberta.