Donated Conservation Easements: New Directions in Land Protection

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Abstract

Tremendous growth in land trusts, better income tax incentives and the relatively recent rise in conservation easement legislation have resulted in a surge in donated conservation easements. In the U.S., donations of statutory easements have long been used to assemble protected areas, especially in privately held, populated landscapes. Conservation easements that restrict development and other rights allow their holders various degrees of protection over natural heritage features. In the Oak Ridges Moraine, strategic donations of conservation easements on lands comprising the Glen Majors Forest, have created a large, viable reserve in a major headwaters and groundwater recharge area. Whether conservation easements can be used to effectively create protected areas must be assessed on the strength of the easement, the capacity of the easement holder and the relationship with the landowner.

Introduction

Traditionally, protected areas have taken the form of parks and wildlife or conservation reserves where title and all associated rights are held by a government. More recently non-governmental organizations with a mandate for conserving natural heritage/biodiversity have also established 'full title' private conservation reserves. In these instances the title holder is the body responsible for management. The title holder sometimes arranges for management and/or stewardship by a third party. These parks and reserves form a public trust for land in a setting of strong government involvement. This approach is changing as individual owners of lands with significant natural values directly transfer land rights, in the form of granting conservation easements, to non-governmental bodies. Various factors, such as better tax incentives, new legislation, and the rise of a Canadian land trust movement have worked synergistically to establish a new arrangement with less direct government involvement, more citizen involvement and a reliance on individual charity.

This new conservation easement approach does not replace the existing "full title" traditional parks and reserves approach – witness the *Ontario Living Legacy* and the recent announcement of ten new national parks – but works in parallel. Through dedicated securement projects, conservation easements have been used to reserve lands that are strategically located and well configured to protect biodiversity and/or landscape features. Whether these lands can be considered 'protected areas' depends on the values protected in an easement, the easement's strength, the easement holder, and long term monitoring and management. In turn, by examining the strengths and weaknesses of conservation easements and their validity in terms of creating protected areas, insight can also be

gained in examining the effectiveness of the traditional park/reserve model for protecting heritage values and biodiversity.

The Traditional Park and Nature Reserve Model

Government-owned and controlled parks and reserves have been the dominant means to create protected areas compatible with IUCN World Commission on Protected Areas (WCPA) protected areas categories I, II, III – Strict protection, National Parks and Natural Monument. In Ontario protected areas such as national and provincial parks are held in fee simple ownership, often combined with legislation, such as the *National Parks Act*, that confer additional powers upon the landholder. The landowner has management control over the land and often through legislation has powers beyond common law and provincial statutes. Non-governmental organizations (NGOs) and private individuals have also held land for conservation purposes, such as the Long Point Company, but probably the first acquisitions of land as strict nature reserves began in the 1960s with the Hamilton Naturalists Club's acquisition of Spooky Hollow in 1961, the start of the Nature Conservancy of Canada (1962) and the Federation of Ontario Naturalists Nature Reserves program (1962). Today there are over 35 land trusts in Ontario (Ontario Land Trust Alliance, 2003; Watkins, 2002). These groups acquire and manage land independently, in much the same manner as government but without the benefit of additional statutory powers. While NGOs, and to a degree governments, have received donations of land, the predominant means to assemble protected areas has been through fee simple purchase, the conversion of crown lands or, in rare cases, expropriation.

The New Model

Various factors have contributed to the rise of donated conservation easements as a tool to set aside lands. Changing government priorities coupled with inflation have constrained the resources available to purchase lands. Furthermore, in southern and eastern Ontario there is a relative lack of remaining crown land with high natural heritage values to convert to parks or reserves. At the same time community advocates and the public in general have looked to models in the United States and formed land trusts - often a direct response to the reality or perception that government could not set aside significant lands for conservation purposes. A developing land trust movement successfully lobbied for better income tax benefits and creation of various provincial easement statutes. In 1994 the *Conservation Land Act* (Government of Ontario, 1994) was amended to allow government and non-government organizations to hold conservation easements. In 1995 the Ecological Gifts income tax incentive program was established, and in 2000 changes to the *Income Tax Act* provided even greater income tax benefits for land donors. *Income Tax Act* changes were essential - previously many donors would see little tax benefit or actually incur a net income tax liability as a result of donations (Denhez, 1992)

The Tool: Conservation Easements

Conservation easement legislation allows an easement holder (other than the Ontario Heritage Foundation, the holder is almost always a non-government conservation body) and a landowner to enter into a legally binding agreement, usually registered on title and binding on all future landowners. The 'conservation easement' as described under the *Conservation Land Act* or *Ontario Heritage Act* (Government of Ontario, 1990) is in reality an agreement that allows for covenants that restrict and/or permit various activities on a property and an easement that allows the holder access to the property for inspection and enforcement purposes. Outside of Ontario such agreements created under provincial statutes may also be known as conservation covenants. The landowner retains title and in effect donates a portion of his or her 'rights' to the land. *The Conservation Land Act* is not specific as to the terms of the agreement other than it must be for 'conservation' purposes; hence most aspects of the agreement, such as specific covenants, are a matter for discussion between holder and landowner. Almost all easements in Ontario are donated, and in 2000 and 2001 90% were certified by the federal government as ecological gifts (Environment Canada, 2003). Easements certified as ecological gifts must qualify as gifts under the *Income Tax Act*, must have their ecological sensitivity and fair market value certified by the Minister of the Environment (Environment Canada), must be made to a recipient qualified by Environment Canada, and must be registered on title for perpetuity. In addition, to avoid potential tax liability, any change in use or disposition of the ecogift easement agreement must be authorized by the Minister.

Conservation easements are used for a variety of reasons. The cost to purchase full title may be prohibitive, the landowner may not be able to afford to donate title or may wish to remain living on the property, the property may have ecologically significant land mixed with agricultural or residential uses inappropriate for ownership by a conservation organization, and it may be easier to share long-term stewardship costs. The dominant method for holders to acquire easements is donation. Very few conservation easements are purchased in Ontario.

Consideration of Eased Lands as Protected Areas

Conservation Easements, Donations and Conservation Biology

As with traditional reserves, the design of the reserve greatly influences the conservation value of lands set aside using conservation easements. Scattered applications of easements with little incorporation of conservation biology principles in reserve design have occurred and usually reflect NGOs reacting opportunistically to donation offers. However, there have been successful efforts to target landowners in specific landscapes in order to create viable reserves.

The Glen Majors Forest is one of the largest single tracts of woodland within the Greater Toronto Area. The Toronto and Region Conservation Authority (TRCA) owns several large blocks of land that comprise much of the core of the forest. To expand the core and link the forest to adjacent woodlands to the east and west, as well as north and south to stream corridors, TRCA identified all surrounding landowners. By mapping properties in

relation to landscape features TRCA was able to identify key securement sites. Working informally with the Oak Ridges Moraine Land Trust, TRCA has either secured, or is in the process of securing over 35 properties covering some 1,400 ha on the Oak Ridges Moraine – almost all of this land has been secured in the Glen Majors area, and all but two properties are conservation easement donations, the remainder being donations of full title. Figures 1, 2 and 3 illustrate the lands secured in an ongoing project. TRCA has filled in gaps in the core of the Glen Majors Forest, secured properties that are gaps within interior forest for possible future restoration, created a buffer of compatible land-use around the core forest and begun to link the forest to north-south stream corridors. In terms of the land conserved, the easements have preserved the status quo – countryside with significant natural values that will allow for some restoration of the original forest, kettle and meadow habitats through active planting and passive regeneration. This project would have been less viable if approached as fee simple purchase to create a park or reserve not only due to cost but the express desires of many residents to preserve countryside and protect natural features without the land becoming a 'park'.

Experience within the Ecological Gifts Program Ontario Region would indicate that lands set aside using conservation easements tend not to be pristine areas but lands with areas of high ecological value located within a matrix of land-uses. While traditional nature reserves tend to be largely or completely comprised of 'natural' lands where other uses are non-existent, or at least ancillary to an overall goal of protection, they can also be established to cater to multiple land uses. For example, national parks in the UK tend to fall within IUCN protected areas categories II and V (Davey, 1998). While both easements and traditional reserves cater to multiple land use, easements also often provide for a greater segmentation within designated lands, allowing significant features greater protection than surrounding areas with other land-uses. For example an easement property may have a distinct 'protection area' designated similar to an IUCN category I Strict Nature Reserve within a working agrarian landscape. Hence, eased lands, through use of a statutory mechanism, can provide a mixture of protection in terms of IUCN categories. The statutory/legal mechanisms used to establish and manage traditional reserves do not usually allow such segmentation - differing levels of protection must be based upon policy.

Strength of Easements

In evaluating eased lands as protected areas the actual legal strength and validity of statutory conservation easement agreements must be considered. This is in contrast to traditional parks and reserves where the legal validity and strength of the underpinning of such areas – fee simple ownership of the land, often backed by enabling legislation- rarely needs to be questioned. To complicate such an evaluation, conservation easements, while created under common statutes, vary in their structure. Furthermore, these partial interests usually are not designed to provide uniform protection across land – the provisions of the easement must be measured against individual landscape features in order to evaluate the protection offered by an easement. Conservation easements can only be evaluated on an individual easement basis. Whether conservation easements are a valid mechanism to create protected areas depends on the values protected in an easement, the easement's strength, the easement holder and long term monitoring and management.

Figure 1. *Glen Majors showing TRCA owned lands and easements – December, 2001.*

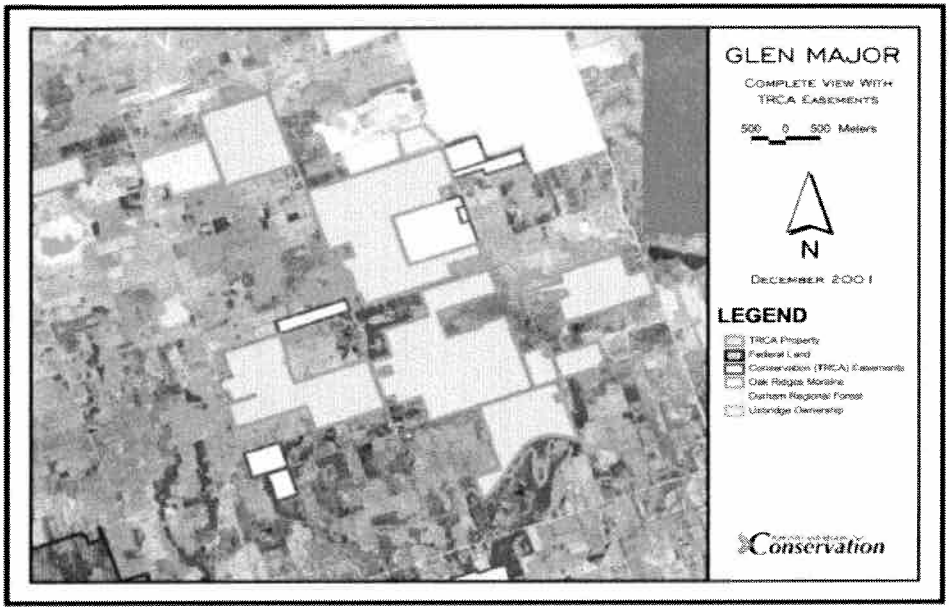


Figure 2. *Glen Majors showing TRCA owned lands and easements – December, 2002.*

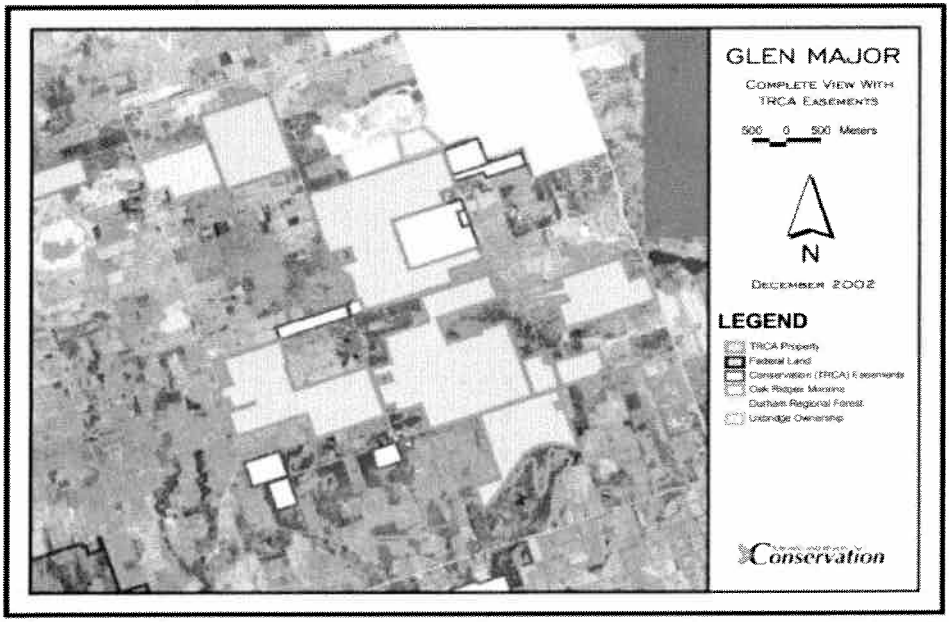
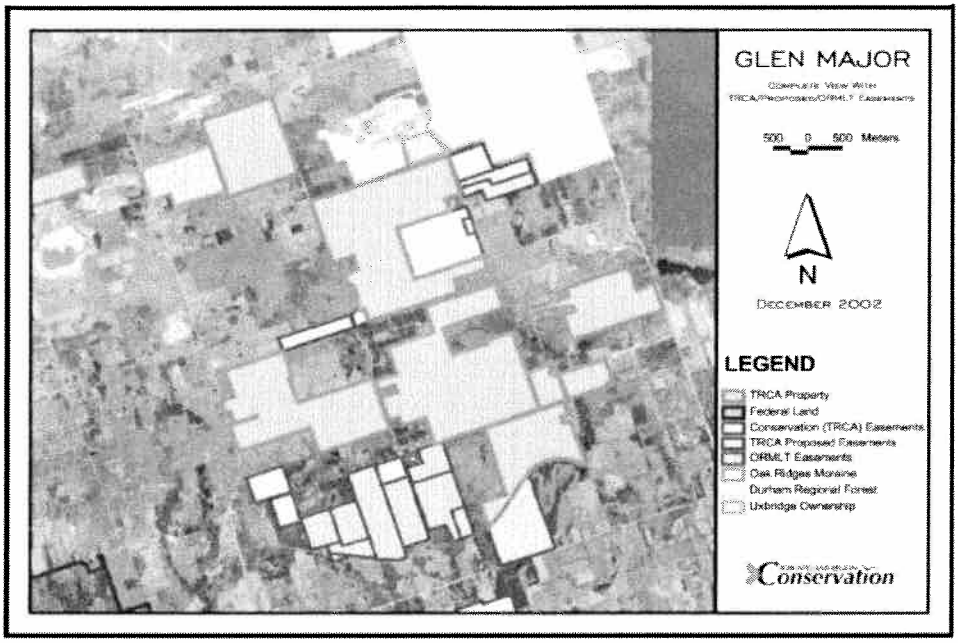


Figure 3. *Glen Majors showing TRCA lands, easements and Oak Ridges Moraine Land Trust easements – December, 2002.*



In Ontario, while statute allows the creation of an easement and covenants on title of a property for 'conservation purposes' there is no further guidance in regard to what ecological values are to be protected. In the case of lands where full title is held by a conservation organization, such as a national or provincial park, the uses allowed are by definition and policy automatically restricted. For example, land set aside under a statute such as the *National Parks Act* has a blanket restriction on land-uses. While there is still debate over what can be allowed in national and provincial parks there is a general acceptance or tendency that human uses, especially proposed new land uses and activities, are by default subservient to conservation (unless a rationale can be made for such activities). Generally, all rights are reserved by the landowner – a conservation organization/agency. Under a conservation easement rights to use the land or perform activities are generally reserved by the landowner. In most cases, depending on the nature of the legal document, the landowner is free to do what he or she could previously do within the limit of law and within the easement covenants. To preserve natural values the conservation easement, especially its covenants, must explicitly address activities/land-uses that would imperil the integrity of natural values present. It is possible that new or unforeseen impacts from incompatible land-uses will not be addressed by the terms of the conservation easement. Moreover, there is an onus to match the appropriate land-use and activity restrictions with key natural features and impacts. For example, one common weakness is found in eased lands containing a significant stream headwaters where covenants restrict the ability of the owner to subdivide the land, yet still allow logging and unrestricted cattle access (Environment Canada, 2001). The key ecological function may not be sufficiently protected if the owner's reserved rights are exercised.

However, a well-crafted easement can protect lands against major threats to specific and overall natural features. Unlike traditional parks and reserves it is rarely used to provide blanket protection across a parcel of land. The conservation easement usually provides some degree of protection across a parcel, but chiefly it is used to target the protection of explicit natural features. It can protect key resource features in a binding and permanent fashion, in effect creating strict nature reserve zones within lands with lesser restrictions. In comparison Parks Canada allows for three levels of protective zoning within national parks (Parks Canada Agency, 2003) but this zoning carries no extra legislative strength. This situation is comparable to the process in other governmental and non-governmental conservation bodies. Technically, easements lack the adaptive aspects and flexibility of zoning that is part of a regularly reviewed management planning process while zoning lacks the permanence and legal stature of restrictions upon title.

An often overlooked factor in assessing how 'protected' eased lands are is the strength of the legal easement document. In Ontario, conservation easements are a relatively new mechanism and most easements are registered on lands still held by the landowners who granted the easements. Therefore, there is little or no case law to gauge legal enforceability. Specific considerations are the ability of conservation easements to withstand legal challenges as to the validity of some or all of the agreement, the extent to which the easement holder can enforce the easement in the event of incompatible land-use and the overall validity of the conservation easements to restrict use. In terms of legal challenges, at least in Ontario, there are no known instances of easement holders having to defend the terms of easements against landowners who wish to see the easements or specific easement terms lifted, nor cases where easement holders have had to go to court to rectify easement violations. And there has been no challenge to the provincial statute that allows conservation easements. Therefore, case law history cannot be used to determine or gauge the relative strength of individual easements. However, in the United States, where easements have been in use for a longer period of time, relatively few easements have been litigated (Ontario Land Trust Alliance, 2003) and very few extinguished in court; *"Information obtained by the Land Trust Alliance [US] from self selecting non-profits indicates few easements have been challenged and fewer have been litigated."*(Thompson and Jay, 2001).Where conservation easements have been partially or fully successfully challenged courts have looked beyond covenants to the overall intent of the document (Thompson and Jay, 2001). The true test of the strength of conservation easements will occur as title to eased lands are transferred from the original sympathetic donor landowner to subsequent landowners.

The lack of case history in Ontario and small case history in the U.S.A can also be viewed as reassuring. Based on anecdotal evidence there appears to be little if any case history elsewhere in Canada. The lack of legal activity to date indicates that easements do not often end up in court. Canadian easements generally follow the U.S.A example that the easement portion of the agreement is often used to establish the relationship between the landowner and holder and that the agreement will often address in detail respective responsibilities, *"An easement establishes a relationship between the landowner and conservation organization to further conservation"* (Jeremy Collins, 2003). Moreover, the agreement will often have built-in mitigation measures in the event of a violation. Essentially, a well-written easement will have its own 'conflict resolution' process built

in. Moreover, while it is inevitable that it will be difficult in all cases to establish a working relationship with subsequent landowners, and that challenges will occur, it should be noted that almost all conservation easements are registered as an encumbrance on title. A potential buyer undertaking a minimum of due diligence will be aware of the easement beforehand and therefore buyers looking for a property that they can develop or otherwise alter will not generally acquire eased properties.

The ability and mandate of the easement holder will be key in using easements to permanently reserve lands as viable protected areas. Even a well-written easement with covenants that protect explicitly defined natural features/landscape features will have little effect if the easement holder does not monitor the lands or is unwilling or unable to react to violations. Unlike lands where full title is held by a conservation body, an easement holder must continually demonstrate their interest in the land through inspection. While not showing an interest does not extinguish the easement, it should be considered mandatory for holders. Should there be a challenge to the easement, regular monitoring clearly demonstrates a continued interest in the values that the easement is designed to protect. Moreover, by not having a presence, any relationship with the landowner is lost - a key element in preventing violations.

Mandate can affect the ability, or will, of an easement holder to maintain an interest in the land. A holder without a primary mandate to conserve lands may have little capacity or interest in monitoring. Mandate can also threaten the integrity of the conservation easement agreement beyond an ability or will to monitor. An easement can be extinguished by mutual consent between landowner and holder. In the case of a body without a mandate focused on land conservation, such as a municipality, an easement entered into by a current council may be extinguished or significantly altered, in agreement with a non-conservation minded future owner. As with traditional parks and reserves, bodies not specifically mandated to conserve natural heritage or biodiversity are less likely to establish and maintain Class I or II IUCN protected areas. However, there are instances where local and political will has resulted in maintaining ecological reserves, such as the City of Windsor's protection of oak savanna at Ojibway Park. It remains to be seen if conservation easements will be used similarly.

Long-term monitoring of easements is key to their success. While not monitoring lands held in full title for conservation purposes can also lead to significant impacts upon natural features, not monitoring conservation easements could result in the landowner exercising, on purpose or inadvertently, reserved and restricted rights resulting in possible land use changes. Contrarily, on eased lands a conscientious landowner may actively steward the land and thereby avoid problems, such as motorized vehicle use on vegetation destruction, that a park or reserve manager/owner may have to endure. The land often has an on-site steward or caretaker in the landowner. However, the holder cannot rely merely upon goodwill and the landowner being completely knowledgeable about restrictions on the land. Having an interest in the land essentially puts the conservation easement holder in partnership with the landowner. When looking to US examples where conservation easement holders defended easements against violations, many violations might have been avoided through more frequent monitoring, better baseline documentation against which to measure monitoring findings and better landowner relations. Likewise, inability to

communicate with, or form a relationship, with second generation and beyond landowners leads to an environment where easement challenges are made by the landowner.

Discussion

As a new tool, conservation easements have been viewed uniformly much as provincial parks, national parks, national wildlife areas are viewed – essentially as classes of protected areas. Conservation easements really need to be viewed on an individual basis. Further, as a new tool, conservation easements are subject to higher scrutiny and skepticism. While warranted, it may be useful to assess the status quo of existing traditional protected areas in a similar fashion.

The validity of conservation easements as a means of establishing protected areas hinges on not only employing principles of conservation biology in reserve design but paying greater care to matching land restrictions to features to be protected. Unlike traditional reserves and parks, validity also hinges on legal considerations in ensuring that a conservation organization's partial interest in the land is both legally enforceable and actively demonstrated. Certainly, holding full title as per traditional parks and reserves removes much uncertainty in terms of long-term protection of natural features, habitats and landscapes. While conservation easements can be used to create and maintain protected areas it is doubtful, nor likely advisable, that easements will provide the same level of security as holding full title.

Probably the most important consideration with conservation easements is the notion that while the conservation body has entered into a binding legal agreement that can be defended in court, the objective is to avoid such an interpretation of the easement. Moreover, easements are largely intended to be used in working landscapes. The conservation easement agreement is a basis for a long-term relationship or partnership to steward the land.

Building relationships with landowners and the capacity of the conservation organization are key to considering the viability of conservation easements. To protect natural features organizations with strong management capacity and internal standards and practices establish active relationships with landowners. The conservation easement as a protection mechanism will rarely stand alone without these active components. The investment in such components is often seen as a resource liability. In contrast, the protection status of parks and other traditional protected areas are accepted as permanent without the need for maintaining a legal interest in the land. This can lead to a tendency to accept benign neglect as a management option and/or allow parks to be 'islands of green'. While easements may be seen as a long-term labour commitment, holding full title with less, or assumed less, labour commitment may not be viable where there are increasing external pressures on the borders of parks or reserves.

Moreover, the conservation challenges faced in southern Ontario, such as protecting species at risk, are ones which take place in rapidly urbanizing bio-regions dominated by private lands. Investment in a relationship with landowners, with a conservation easement

as a basis, may be critical in addressing land-use concerns.

It is worth considering maintaining an interest in the land as not just a legal requirement but a literal commitment for the steward/manager, regardless of ownership of the land. Regardless of status in creating valid protected areas conservation easements will increase in use, especially as the land trust movement grows.

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