# A Role for the Courts in Market-based Conservation

David W. Poulton

A Symposium on
Environment in the Courtroom:
Enforcement Issues in Canadian Wildlife Protection

March 2 & 3, 2018
University of Calgary

Canadian Institute of Resources Law
Institut canadien du droit des ressources

UNIVERSITY OF CALGARY
FACULTY OF LAW

This project was undertaken with the financial support of:
Ce projet a été réalisé avec l'appui financier de :

Environment and Climate Change Canada
Environnement et Changement climatique Canada

The Canadian Institute of Resources Law encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following considerations:

(1) You must acknowledge the source of this work

(2) You may not modify this work, and

(3) You must not make commercial use of this work without the prior written permission of the Institute.

Copyright © 2018

There is an irony in seeking to address economic instruments for environmental protection in a seminar entitled "Environment in the Courtroom" and which is focused upon issues of enforcement. The irony lies in the fact that such instruments are conceived of as an alternative to our focus on enforcement and on the courtroom.

Rather than rely on strict legal sanctions, they attempt to alter human behaviour by appealing to economic self-interest. They attempt to internalize more environmental costs into resource decisions, changing the economic drivers of development and exploitation. In various and diverse forms they create new liabilities for environmental bads, and new rights, sometimes including property rights, in environmental goods. Like the laws of contract and property, when they operate properly their biggest effect comes through broad acceptance and voluntary compliance, with the courts and legal sanctions merely lying in the background for support.

In the traditional legal framework laws for the protection of wildlife and the environment fit awkwardly into the broader legal system. Our doctrines of property and commerce are abundantly focused upon making resources available for human use. Those doctrines underlie an economic system which has enabled social growth for hundreds of years and which forms people's expectations respecting the opportunity to create prosperous and useful lives. The more recent development of laws of environmental protection runs counter to this overall trend. It sets up environmental protection as a barrier to the pursuit of economic self-interest, which is otherwise facilitated by many legal doctrines. This contrary nature of environmental protection sets up to the dichotomy of economy versus environment which dominates so much of our public discourse, including our environmental litigation.

In contrast to this the development of market-based or economic instruments for environmental protection seeks to travel upstream in the flow of economic forces and alter the nature of economic relations in order to assure that interests of the environment are taken into account in the formation of life and business plans, that economics and environment become harmonized, both being necessary and beneficial for human life.

Much of the thinking on economic instruments has originated in academia and then been adopted into policy discussions. This is happening at an increasing rate. A recent report found that almost one hundred jurisdictions worldwide use some form of market-based policy instrument for the protection of biodiversity.[1]

But while policy discussions have been dynamic there has not been the same level of attention paid to such instruments in the promulgation of our statutory law. Individual components and building blocks of market-based programs, such as conservation easements or land use planning authority, may be found in some statutes, but it may not be clear on the face of a statute how they are intended to fit into the larger policy picture. As well, many market-based environmental policies are being promoted through regulatory structures and jurisdiction which were originally conceived of when such intention was unknown. It is in this consideration of new building blocks of market-based programs and in the pairing of traditional statutory jurisdictions with new environmental-economic initiatives that the courts are likely to become involved. In considering these matters the courts may contribute to the harmonization of economic and environmental

[1] Genevieve Bennett, Melissa Gallant & Kerry ten Kate, *State of Biodiversity Mitigation 2017: Markets and Compensation for Global Infrastructure Development* (Washington DC: Forest Trends, 2017), online: <http://forest-trends.org/releases/p/sobm2017>.

incentives, or may frustrate that policy direction, and they may do either without being aware of the implications.

This paper seeks to very briefly review some cases where the courts have added their voice, even if inadvertently, to the policy debate in this area, and touch on some situations where they have – benignly in my view – left the field to policy-makers and regulator decisions-makers. The paper touches on four particular market-based instruments of environmental policy

**Conservation Easements**

A conservation easement is an interest in land created by statute. One significant point of distinction from a common law easement is that a conservation easement does not require a dominant tenement, though it does require a qualified second party to receive the easement and hold the power to enforce it. A conservation easement provides a means by which a private landowner may covenant to undertake or forgo certain activities or developments in order to preserve the natural features and ecosystem functions of his or her land. When registered the covenant runs with the land and is binding on subsequent owners. This is, therefore, an important way of securing environmental benefits for the future, and those secure benefits, while important in themselves, may also underpin other market-based environmental policy tools and programs.

Almost all jurisdictions in Canada have legislation providing for conservation easements, though in some cases they may be referred to by different names such as conservation covenants. In Alberta the legislation is the *Alberta Land Stewardship Act* [*ALSA*],[2] specifically Sections 28 through 35. Section 29 reads, in part:

> 29(1) A registered owner of land may, by agreement, grant to a qualified organization a conservation easement in respect of all or part of the land for one or more of the following purposes:
>
> (a) The protection, conservation and enhancement of the environment;
> (b) The protection, conservation and enhancement of natural scenic or esthetic values;
> (c) The protection, conservation and enhancement of agricultural land or land for agricultural purposes.

The Alberta Court of Queen's Bench had occasion to consider this provision in the case of *The Nature Conservancy of Canada v Waterton Land Trust Ltd*.[3] The defendant operated a bison ranch on land which it owned near Waterton Lakes National Park. It purported to give a conservation easement to the Nature Conservancy of Canada (NCC) to the effect that the landowner would not use "wildlife-proof fences" on the land, as well as some other restrictions. Presumably the purpose of this was to maintain wildlife movement across the land. Unfortunately the form and execution of the easement document was beset by a myriad of errors and points of confusion. The landowner employed fencing that the NCC objected to and the NCC brought suit to enforce the terms of the easement. The defendant brought a countersuit seeking a declaration that the easement was invalid.

---

[2] SA 2009, c A-26.8.
[3] 2014 ABQB 303.

One argument of the defendant landowner was that the easement was *ultra vires* the Alberta statute, based upon the above-quoted wording. It claimed that the plaintiff was required to prove the validity of the easement by calling expert evidence to establish its conservation purpose, and that its failure to do so placed the easement outside the statute. To its credit, in my opinion, the court dispensed with this argument succinctly:

> I disagree with what amounts to a presumption of invalidity. I disagree that *a priori* a conservation easement is unenforceable unless the grantee demonstrates with scientific evidence that the conservation easement, or the specified term of it to be enforced, *accomplishes* at least one of the statutory purposes for the legislators creating conservation easements, now set out in *ALSA.* Section 29 permits conservation easements to exist where the grantor had at least one of the stated purposes for the conservation easement. Proof of accomplishing one of those purposes, or proof of the probability of accomplishing one of those purposes, or proof of potentially or even possibly accomplishing one of those purposes is not required. The prerequisite is that the grantor had one of the purposes in mind. There will be many ways to prove such intent, most notably by inference from the wording of the conservation easement. On the face of a conservation easement it will usually be apparent whether the grantors purposes fell within at least one of the statutory purposes.[4]

In another part of its judgment the Court noted the public interest served by conservation easements:

> By relinquishing such rights of ownership in support of conservation-minded restrictions the landowner is in effect donating them in favour of a conservation purpose. Thus, conservation easements enable private capital from charitable benefactors to be deployed for public interest purposes – such as environmental protection, enhancement and sustainability.[5]

While the particular conservation easement in question in this case was ruled unenforceable on other grounds – the vagueness of term “wildlife-proof fence” – the liberal and purposive interpretation of the statutory provision for conservation easements will help create confidence in that important conservation policy tool.

**Trade of Development Credits**

Trade of Development Credits (“TDC”) schemes are a municipal planning tool that allows for development pressures to be shifted from an area of higher conservation interest to an area of lower conservation interest. Under such a scheme a municipality is called upon to designate areas preferred for development (the "receiving parcel") and those preferred for lower impact and lower density uses, compatible with conservation objectives broadly understood (the "sending parcel). Development rights are allocated to both parcels but those wishing to develop in the receiving parcel may increase the density of development there by buying development rights from the sending parcel. Accordingly, landowners in the sending parcel who wish to conserve their land may receive some compensation for their forsaken development rights.

---

[4] *Ibid* at para 388 [italics in original].
[5] *Ibid* at para 20.

Proponents of such schemes claim that they enable better municipal planning, incent conservation, and fairly distribute the economic benefits of development among the whole community.

In *Keller v. Municipal District of Bighorn No. 8*[6] a landowner challenged the jurisdiction of the municipality to implement a TDC scheme. At the time the MD of Bighorn adopted the TDC scheme at issue there was not specific provision allowing such schemes in Alberta legislation, including the *Municipal Government Act*. However, Madam Justice Hunt Macdonald of the Alberta Court of Queen's Bench had no difficulty reading the jurisdiction into the *Act* using a "broad and purposive approach," saying:

> Under s. 632(a)(ii), an MDP [municipal development plan] must address the manner of future development within the municipality. Under s. 632(b)(iii) and s. 632(3)(b)(vi), it may address environmental matters and the physical, social and economic development of the municipality. Though the legislation does not refer specifically to a TDC scheme, in my view such a scheme clearly falls within the broad powers of regulation and control provided to the municipality under these sections of the *MGA*. Similarly, s. 640(4)(o) very clearly provides authority to the municipality to provide for density in its LUB [land-use bylaw], and s. 633(2)(a) requires a municipality to address issues of land use and population density in any ASP [area structure plan].[7]

The applicant put forward a second argument against the scheme which was based on *ALSA*, which was passed subsequent to the municipal bylaws in question in *Keller*. *ALSA* did explicitly provide for municipalities to adopt TDC schemes (s. 48), but required that any such scheme be approved by the Lieutenant Governor in Council. The applicant argued that that provision should negate the Bighorn by-laws, which had no such cabinet approval. The Court, however, found that *ALSA* had no retroactive impact on the validity of the bylaws passed before it was adopted.[8]

Again, in this case the court adopted a broad and purposive approach and in the process reinforced the validity and viability of an important municipal tool for market-based conservation. Unfortunately, however, we must turn to quite a contrary situation.

**Rights in Environmental Goods**

One of the tools in the market-based toolbox is the creation of property rights in environmental goods and services. This is one way of avoiding the “tragedy of the commons” where the benefits of a person’s environmentally responsible behaviour are dissipated throughout a larger community. Instead it allows the person a means of retaining the benefit for their own use, and thereby incents more responsible actions in the future. The property right might attach to the actual resource conserved or it may attach to the credit for the beneficial action. For example, in

---

[6] 2010 ABQB 362.
[7] *Ibid* at para 26.
[8] *Ibid* at para 54-58.

the United States one may earn a valuable credit for creating a wetland, and retain and use that credit even after passing on the title to the wetland itself.

One case which touched on this question was *Water Conservation Trust of Canada* v. *Environmental Appeals Boards et al.*[9] The Water Conservation Trust of Canada ("WCTC") was a non-profit organization formed for the purpose, among others, of holding water licenses for the purpose of maintaining aquatic ecosystem health.[10] A water license is the right to use a given amount of water (owned by the Crown) in given location. ConocoPhillips Canada held a water license for the stated purpose of industrial use on a particular reach of the Red Deer River in southern Alberta. Through its own water conservation efforts the company came to the conclusion that it no longer needed the water license and attempted to donate and transfer it to the WCTC for conservation purposes. The WCTC intended to hold the license, securing the water instream for the benefit of the aquatic environment. The transfer required a change both in the name of the holder of the license and also the stated purpose, from "industrial" to "habitat enhancement, recreation, fish and wildlife management and water management," both of which required the approval of Alberta Environment and Sustainable Resource Development ("AESRD"), as the department was then known. The Director of AESRD refused the transfer. The WCTC appealed the refusal to the Environmental Appeals Board ("EAB"), which recommended that the refusal stand. That decision was then appealed to the Alberta Court of Queen's Bench, which ruled that the Environmental Appeals Board decision was reasonable and should stand.

The case involved several issues, most of which are not addressed here. My focus is on the position taken by AESRD on whether the WCTC, as private party, had the right to hold a water license for a conservation purpose, and how that position was seen both by the EAB and the Court of Queen's Bench. That turned on the interpretation of the relationship between two parts of Section 51 of Alberta's *Water Act*.[11]

Section 51(1) empowers the Director of AESRD to issue or refuse to issue a water license to any person who may apply:

> 51(1) On application for a license by a person in accordance with this Act, the Director may, subject to subsection (2). . . (and other provisions not relevant here)
>
> (b) a license to that person for
>
> (i) the diversion of water, or
>
> (ii) the operation of a works,
>
> for any purpose specified in the regulations.

The applicable regulation is the *Water (Ministerial) Regulation*.[12] Section 11 lists the permissible purposes for which a water license may be issued, including several apparent conservation purposes:

---

[9] 2015 ABQB 686.
[10] On the nature and role of water trusts generally see Arlene J Kwasniak, "Quenching Instream Thirst: A Role for Water Trusts in the Prairie Provinces" 16:3 JELP 2006.
[11] RSA 2000, c W-3.
[12] Alta Reg 205/1998.

> 11 A license may be issued for any or all of the following purposes:
> . . .
> (h) management of fish;
> (i) management of wildlife;
> (j) implementing a water conservation objective;
> (k) habitat enhancement;
> (l) recreation;
> (m) water management;
> (n) any other purpose specified by the Director.

Recall, however, that the authority to grant a person a license for any of the listed purposes is subject to the *Water Act* subsection 51(2), which reads:

> 51(2) On application by the Government in accordance with this Act, the Director may issue a License to the Government but no other person, or may refuse to issue a license, for
> (a) the diversion of water,
> (b) the operation of a works, or
> (c) providing or maintaining a rate of flow of water or water level requirements
> for the purpose of implementing a water conservation objective.

Implementing a water conservation objective ("WCO") is therefore a purpose which can underlie the issue of a water license to any person under Subsection 51(1), but is reserved only to the Government by Subsection 51(2), which takes priority. "Water conservation objective" is a defined term in the legislation:

> 1(hhh) "water conservation objective" means the amount of quality water established by the Director under Part 2, based on information available to the Director, to be necessary for the
> (i) protection of a natural water body or its aquatic environment, or any part of them,
> (ii) protection of tourism, recreational, transportation or waste assimilation uses of water, or
> (iii) management of fish or wildlife,
> and may include water necessary for the rate of flow or water level requirements.[13]

A WCO was in fact in place at the time that ConocoPhillips sought to transfer its license to the WCTC. One of the key questions before AESRD, the EAB, and the Court of Queen's Bench, was to what extent the reserving of licenses to the government for a WCO under subsection 51(2) occupied the entire field of holding water instream for environmental purposes. Conversely, to what extent could the private parties of ConocoPhillips and the WCTC retain the

[13] *Water Act*, section 1(hhh).

right to the environmental benefit created by ConocoPhillips' efforts to conserve water? The answer which all three levels of authority gave was disappointing.

The position of AESRD was summarized in the EAB decision:

> The Director stated if water is held instream as a rate of flow for a water conservation objective, then the water is not available for other purposes which are generally economic purposes. The Director stated the Government is in the best position to consult with the public and weigh the opportunity costs and broader implications of keeping water instream as opposed to allocating it for other uses. The Director explained creating a water conservation objective requires: (1) balancing social, economic, and environmental factors; (2) looking at changing values of water use and addressing water scarcity; and (3) balancing protection of the aquatic environment with water allocation for consumptive purposes.[14]

In short, conserving water in stream for environmental reasons is a matter for the government alone and cannot be entrusted to private parties. This position was accepted more or less uncritically by both the EAB and the Court of Queen's Bench. The strong suggestion was that the savings generated by ConocoPhillips water conservation measures, motivated by environmental responsibility, were to be reallocated for other industrial uses. Both their interest and the interest of their donee the WCTC was to be negated, the direct opposite of the market-based trend to establish enforceable rights in environmental goods and services.

Further, this conclusion could have been avoided. The WCTC argued that the other purposes listed for private water licenses – management of fish and wildlife, habitat enhancement, recreation, etc. – could characterize the holding of the license by the WCTC. It also drew attention to the threshold wording at the beginning of subsection 51(2), "Upon the application by the Government." No application had been brought by the government, so arguably subsection 51(2) had not been triggered, leaving the full range of subsection 51(1) in play. Both of these arguments were summarily dismissed by both the AEAB and the Court of Queen's Bench.

The WCTC's position in this case is not without its challenges. It is unfortunate, however, that its opportunity to steward the water in question was lost become of a policy position that denied that private parties could be proper stewards and accordingly have enforceable rights. An opportunity to advance thinking in line with market-based conservation was thus lost.

**Conservation Offsets**

Most often the policies respecting market-based conservation are brought to bear on actual decisions and development through the regulatory process. As a result they may come before a court as an issue of the scope of jurisdiction of a regulatory decision-maker. Again, at this juncture a court may facilitate innovation in a market-based direction or inhibit it or even stop it dead in its tracks.

---

[14] *Water Conservation Trust of Canada* v. *Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development* (8 March 2013), Appeal No. 10-056-R (A.E.A.B.) at para 58.

On this point I shall focus on the policy tool of offsetting. Offsetting links the right to develop or use a resource, and to thereby create some environmental loss, to the obligation to create an environmental enhancement equivalent to the loss, with the objective of leaving no net loss to the environmental values in question. Long a tool for carbon emissions, offsetting for habitat and biodiversity is now found in programs in ninety-nine countries worldwide[15] and getting increasing attention from policy-makers across Canada. Perhaps the best known offset program in Canada is the federal program for compensation for serious harm to fish (previously harmful alteration, disturbance or destruction of fish habitat). With respect to another resource, Alberta is among several provinces which use offsetting as a tool of wetland conservation.[16]

Offsetting uses a price mechanism to encourage environmental stewardship. By requiring a development proponent to bear the replacement cost of the environmental components and values it proposes to degrade or destroy. It thus has an incentive to minimize that loss and direct it away from environmental elements of high value.

There are very few provisions in Canadian statutory law, however, that explicitly enable or require offsetting. One notable exception is British Columbia's *Water Sustainability Act*,[17] which includes the following provision:

> 16(2) If the decision maker considers that the [adverse effects] cannot be addressed, or cannot fully be addressed, by mitigation measures proposed by the applicant but can be compensated for by other mitigation measures taken on a different part of the stream or aquifer than the part to which the proposal relates, the decision maker may impose . . . terms and conditions requiring the applicant to take compensatory mitigation measures that meet the prescribed criteria, in place of or supplemental to any mitigation measures proposed by the applicant, on a different part of the stream or aquifer to which the application relates.
>
> (3) With the consent of the applicant, the terms or conditions of an authorization . . . may require that the applicant take compensatory mitigation measures on a different stream or aquifer in respect of which the application is made.[18]

In contrast to this, it is much more common that offsetting requirements are based on the general jurisdiction of a regulator to impose environmental conditions on development or use permitting. Thus, for example, the federal fish habitat compensation has been based upon Section 35 of the *Fisheries Act*, which reads in part:

> 35 (1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.
>
> (2) A person may carry on a work, undertaking or activity without contravening subsection (1) if

---

[15] Bennett et al, *supra* note 1.
[16] For a recent review of federal and provincial wetland compensation programs see David W. Poulton & Anne Bell, *Navigating the Swamp: Lessons on Wetland Offsetting for Ontario* (Toronto: Ontario Nature, 2017), online: <https://www.ontarionature.org/discover/resources/PDFs/reports/wetlands_report_Final_Web.pdf>.
[17] SBC 2014, c 15.
[18] *Ibid*, s 16(2)-(3).

> . . .
> (b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;[19]

No mention is made of offsetting or compensation in this section. Rather it is implicitly seen as within the scope of the discretion of the regulator to impose conditions. In the case of the fisheries regime this has supported an offset program since the late 1980s (though the wording of Section 35 has been amended in ways unrelated to this point).

In a similar vein, Alberta new and developing offset policy for wetland relies upon the following sections of the Province's *Water Act*:[20]

> 36 (1) . . . no person may commence or continue an activity (i.e., altering a water body, including a wetland) except pursuant to an approval . . .
>
> 38 (3) The Director may issue an approval subject to any terms and conditions that the Director considers appropriate.

Again, the discretion to impose conditions is the basis for offset requirements. Similar jurisdiction to impose conditions is found in dozens of resource statues across Canada and depending on the particular wording of each, might form a foundation for many different offset programs.

While jurisprudence ought not to be distilled out of the absence of litigation, the fact that such jurisdiction to impose offsetting has been so little challenged despite years of the operation of offset programs may be taken as an indication of the mainstream acceptability of such programs. Accordingly, the courts ought not to be hasty in seeking to limit them.

**Conclusion**

Increasingly market-based policy instruments are playing a prominent role in environmental and resource planning and protection. These programs may never come before a court for consideration in their entirety, for that is not in the nature of the instruments. Nevertheless, individual building blocks or components may become the objects of litigation, and may come before a court without a clear signal of their significance to the larger environmental program.

This paper has very briefly touches on just a few of the array of market-based environmental instruments. It has reviewed two cases where important conservation components were impugned, and where the courts upheld their validity by taking a broad and purposive approach to interpretation. It has also looked at one case where an unfortunately narrow approach to resource stewardship was accepted. Finally, it touched on the broad scope of jurisdiction of many resource regulators to place conditions on permitting and how that process has provided a window for a whole realm of environmental programs, and done so with little involvement of the courts.

---

[19] RSC 1985, c F-14, s 35.
[20] RSA 2000, c W-3.