# VALUATION OF CONSERVANCY INTERESTS

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What is the value of a tree in the ground in its natural state? There is no doubt that as members of an ecosystem we are benefited in some way by its existence: The tree provides oxygen to the atmosphere, stabilizes the surrounding soil, provides a home or host to countless organisms up the food chain, affects the environment immediately surrounding it, propagates itself and upon its demise provides the elements necessary for continued growth and evolution of the ecosystem. But can we put a specific dollar value on something which is often considered a renewable resource in inexhaustible supply, valuable in the global sense but which provides no quantifiable benefit to any particular person?

Our market systems have in the past, and often still operate on a supply and demand basis presuming the supply of raw material as never-ending and thereby assuming no environmental cost. Certain individuals and organizations believe that to be dangerous folly and are working toward the preservation of natural areas as one small countermeasure to that philosophy. In Alberta, nature conservancies are created by easements or restrictive covenants registered against the titles to those natural areas. By those restrictive covenants an interest holder in lands (the dominant tenement) restricts the use to which all other interest holders (the servient tenements) can put those natural preserves. These people believe those nature conservancies to be invaluable.

What happens then, when a nature conservancy, defined and protected by restrictive covenant, is expropriated?

We all know that we really don't own land but rather we acquire certain rights in regard to it granted to us by the Crown. The Crown therefore can and with the increasing numbers of conservancies being created will, in the future, expropriate land which is the subject of environmental protection by restrictive covenant. When it does so it will be tasked with valuing those natural trees. The approach it likely takes will not be so much philosophical as statutorial.

Any expropriating authority acquiring land under provincial authority will likely do so by virtue of the Expropriation Act (now R.S.A. 2000, Chapter E-13, as amended). Upon expropriation, compensation is restricted to an owner or owners of the land. Section 1(k)(ii) of the Act defines "owner" to include: **"a person who is shown by the records of the land titles office as having a particular estate or an interest in or on land."** One would expect that to mean the dominant tenement. Section 1(k)(iv) also defines "owner" to include: **"any other person who is known by the expropriating authority to have an interest in the land".** Although the restrictive covenant protecting the lands may be intended for all our benefits, conveying to all of us an interest in the outcome of the expropriation, it is doubtful that we all have an ownership interest worthy of compensation under the Act. (Consider, however, what a clever draftsman of a restrictive covenant might achieve having that latter section in mind.)

Section 42(2) limits the compensation due an expropriated "owner" to:

(a) the market value of the land
(b) the damages attributable to disturbance
(c) the value to the owner of any element of special economic advantage to him arising out of or incidental to the owner's occupation of the land to the extent that no other provision is made for its inclusion, and
(d) damages for injurious affection.

Our Courts have determined other sections of the Act to mean the "owner" is not to be "out of pocket" as a result of the expropriation (*Amdue Holdings* v. *The City of Calgary*, (1980) 20 L.C.R. 7). Unfortunately the "owner" of a nature conservancy won't be so concerned to be "out of pocket" as "out of land". The environmental preserve by its very nature may have a low market value. There is likely no specific economic advantage to be claimed by the dominant tenement since that individual's actions are designed as a non economic move to benefit others and injurious affection is likely not a factor.

One would presume the aim of an "owner" of an environmental preserve would be to replace the land if at all possible. That may be difficult if the "owner's" compensation is restricted to market value of the expropriated property and the replacement cost exceeds that market value – a common scenario. Might the difference be made up as disturbance damages? Perhaps, but the recent history of our Land Compensation Board indicates a certain reticence to go in this direction. Other factors which ordinarily come to play in valuation of land such as soil type, access to services, water coverage, acres cultivated, fixtures on the land, etc., may also affect the value of the replacement property while having absolutely no bearing on whether the land is suitable as a replacement reserve.

If disturbance damages are not the answer, there are two other sections of the Act which might assist the "owner".

Quaere if the "owner" is not an individual but a non-profit organization, a charitable institution, whether section 46 of the Act applies. That section allows for replacement of land for "a building or other structure erected on it that was specifically designed for use for the purpose of a school, hospital, municipal institution or religious or charitable institution or for any similar purpose". One would have to argue that trees were "structures" and natural growth equivalent to "erecting". Even if successful at climbing those synonymic mountains one would still be left with the before and after test set out in Section 46(1)(b)(ii). In other words, if improved economically, the "owner" might not receive the full value of the replacement. Once again factors which constitute no value to a non profit "owner" might deny it full compensation.

However, section 44 of the Act provides "… no allowance shall be made on account of the acquisition being compulsory except where unusual circumstances exist for which no provision for compensation is contained in this Act." In the case of *Mannix* v. *The Queen in the Right of the Province of Alberta*, (1983) 27 L.C.R. 13 at page 71, the Chairman of the Land Compensation Board stated:

> "In this case the province took 313 acres more or less from Mannix. It was a compulsory taking. The parcel of land was in a unique setting involving a beautiful valley, heavily treed and with flowing water.

> Because of the very nature of the expropriated land much of it would have been lost to environmental reserve on any application for subdivision. Although I have found that the CEP Plan would have found favor with the City of Calgary, nevertheless, the result is that nearly two-thirds of the land holding would be converted to environmental reserve, which, in my view, is substantial. When a substantial portion of a land holding, because of the very nature of its topography, ends up as reserve and as a result cannot be used for residential housing, the expropriated owner is faced with accepting no award for undevelopable acreage. I think this constitutes "unusual circumstances"."

The Board awarded an extra 10% of the stated market value to the owner because a significant portion of the land was undevelopable and therefore by ordinary standards less valuable. On appeal the award was overturned [(1985) 31 L.C.R. 299] on the basis that the market value provisions (section 41) of the Act as applied by the Board constituted "provision for compensation" thereby precluding the use of section 44 in that instance. The Court objected to Mannix "hav(ing) his cake and eat(ing) it too". Mr. Justice Stevenson did, however, confirm that an arbitrary allowance could be made in unusual circumstances. Surely the circumstance of the expropriation of an environmental reserve where the market value of such reserve is not adequate to allow its replacement is sufficiently unusual to justify consideration under this section.

The valuation of nature conservancies will not be an easy task. The basic assumption made to this point is that the land taken is, in fact, replaceable. One can easily envision circumstances where a preserve is created because the land is unique – irreplaceable. What then?

The Ontario Law Reform Commission prepared a report in 1990 entitled "Damages for Environmental Harm". The report recommended that individuals without a special personal, proprietary, or pecuniary interest in a proceeding should be able to seek a civil damages remedy for the benefit of the Public in the larger interest of protecting the environment. The writers also took the view that courts ought to recognize both "use value" and "intrinsic value" in assessing damages for environmental harm. They defined "use value" as based on the use to which natural resources may be put for practical human ends and "intrinsic value" as a value on the preservation or continuing existence of natural resources. They opined that the true extent of environmental loss was the sum of those two values.

These recommendations have not, to this writer's knowledge, been codified in law and are certainly not a regular part of expropriation valuations by our Land Compensation Board. They might, however, become more relevant if the market value issue is defined not as what a willing seller would sell for and a purchaser would pay for "the land" but rather what willing parties would pay and receive for an "irreplaceable environmental resource". Isn't that the true value?