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The High Price of Habitat Protection

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Under the new *Species At Risk Act*, the federal government would compensate landowners whose property values are reduced by habitat protection orders. This is a very bad idea.

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Shortly after the new session of Parliament began in January 2001, the Liberal government introduced a new endangered species bill to replace the one that died with the fall 2000 federal election.[1] Committee hearings were held through the spring, and it was expected that the bill would be reported back to the House of Commons in early summer and enacted shortly afterward.

Critics have identified many flaws in the proposed *Species at Risk Act* (SARA), but one alarming feature has been largely overlooked: the legislation proposes to compensate landowners if mandatory habitat protection orders reduce the value of their land. Such orders would be issued when private stewardship and economic incentives fail to protect critical wildlife habitat. As the government explained in December 1999:

> If the use of one's land has to be highly restricted by the use of the federal habitat safety net to protect species' habitats, then individuals should be able to apply for compensation.[2]

This proposal is found in section 64 of the current bill, which authorizes the federal Minister of the Environment to "provide compensation to any person for losses suffered as a result of any extraordinary impact of the application" of SARA's critical habitat protection provisions.

Proponents of compensation argue that critical habitat protection measures imposed by the government might drive already beleaguered family farmers and other vulnerable individuals out of business and possibly out of house and home.[3] Clearly nobody wants this result. In addition, proponents argue that American experience shows that enforcement of endangered species legislation without compensation may give landowners a perverse incentive to destroy wildlife habitat before it is discovered by the authorities.[4] This, too, is a result that everyone agrees should be avoided.

Nonetheless, leaping from these extreme cases to a general rule that landowners and possibly holders of timber leases or mineral licenses on federal land are entitled to compensation whenever habitat protection laws cause them business losses or reduce the market value of their land would be unprecedented in Canadian law. Moreover it would be unjustified.

The general rule in Canada is that there must be an actual taking of property by the state or deprivation of its entire reasonable economic value, before a right to compensation is triggered; there is generally no right to compensation for laws or government actions simply because they severely restrict the uses to which property may be put, reduce its market value or limit (or even freeze) its development.[5] A wide range of federal, provincial and municipal laws severely restrict land use, but do not normally give rise to a right to compensation: for example, prohibitions on disturbing fish habitat or archaeological sites, restrictions on logging or farming in riparian buffer zones, regulation of industrial air and water pollution, and municipal zoning by-laws. Under Canadian law, property owners do not have a right to be paid to comply with validly enacted laws that affect the market value of their property.[6]

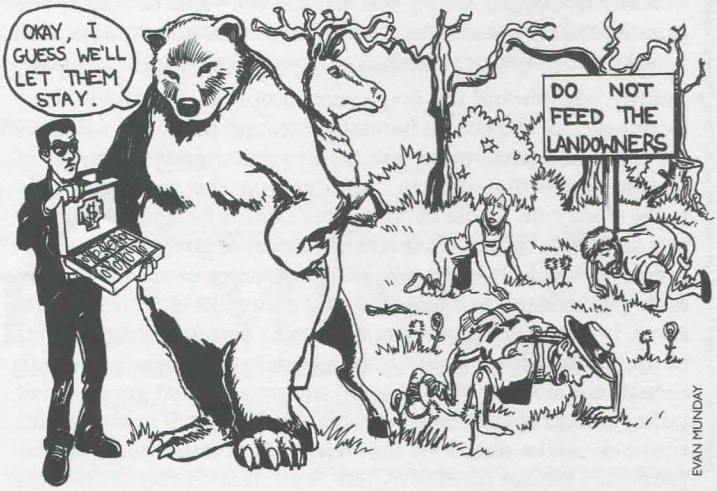
Proponents of the compensation proposal argue that government regulation that reduces property values may amount to a "regulatory taking" of property that must be compensated out of taxpayers' wallets. This argument has been used by property rights advocates and industry groups in the United States to attack a broad range of government measures relating to health, safety, social welfare and environmental protection. Some courts in the United States have used the regulatory takings doctrine to invalidate, or order compensation for, municipal land-use planning decisions and state and federal measures to protect environmentally sensitive areas such as wetlands and endangered species habitat.

Not surprisingly, the regulatory takings movement has generated furious controversy in the United States.[7] If the status of the regulatory takings doctrine is doubtful in a country where private property is constitutionally protected against government takings, it should be even more so in Canada where we have consciously decided against constitutional entrenchment of private property rights. Indeed, the "regulatory taking" argument has been raised infrequently before Canadian courts and has not met with much success.[8]

Even the federal government's own expert consultant expressly recognizes that the compensation proposal is a radical departure from past practice. Noted economist Peter Pearse, in his February 2001 report on compensation, states very clearly that:

> [T]he courts and governments have historically drawn a distinction between expropriation of property, for which compensation is due, and restrictions on the use of property for some public purpose, for which compensation is generally not payable. Restrictions that might be imposed under the *Species at Risk Act* are of this regulatory type, so compensation for them conflicts with long established policy in Canada.[9]

Strangely, very few voices have been raised in opposition to the federal government's compensation proposal. Indeed, some prominent conservation groups have refused to condemn the proposal, possibly because they do not fully appreciate its implica-



If the funds earmarked for compensation were redirected to incentives and assistance, the resulting benefits to endangered species could be substantially enhanced.

tions. Yet the proposal is highly problematic for several reasons.

- First, the proposal is the thin end of a very large wedge. If the government acknowledges an entitlement to compensation for mandatory wildlife habitat protection measures, why not for other government measures that affect property values, such as mining and forestry regulations, municipal down-zoning, or the introduction of controls on agricultural waste such as the manure that contaminated Walkerton's drinking water supply with the *e. coli* bacteria? Governments have not recognized a right to compensation for such injuries in the past. If they now acknowledge a property owner's entitlement to compensation for habitat protection, it will become increasingly difficult to refuse to compensate these other "injuries."
- Second, the proposal to compensate landowners reduces landowners' incentives to agree to co-operative stewardship arrangements with the government. A guarantee of compensation in the event of failure of co-operative arrangements markedly improves the landowner's bargaining position. If the unco-operative landowner is left as well off after a habitat protection order is issued as he or she was before, the incentive to co-operate is reduced and the government will have to offer more incentives to achieve a negotiated resolution. Unless stewardship incentives equal or exceed the anticipated compensation, a rational landowner may well refuse to co-operate. Thus the compensation proposal has the potential to undermine the very goal of the act: protection of endangered species habitat through voluntary stewardship arrangements.
- Third, the proposal reflects the general view that wildlife habitat protection will usually reduce property values. This view is based on a conception of "value" that largely disregards the value of things for which there are no markets, such as habitat and biodiversity. Moreover it ignores the possibility that restrictions on land use may, in fact, *increase* the market value of certain properties. In fact, land use restrictions created by legal tools like covenants and easements often enhance the value and marketability of land by protecting a business from competition, ensuring the performance of services beneficial to property owners, or enhancing the aesthetic appeal of a property. The same can be said of many municipal zoning restrictions: the value of your home is increased by the assurance, provided by zoning bylaws, that a parking lot, factory or big box store will not be built next door.
- Fourth, why should the taxpayers compensate individuals or businesses for the cost of habitat protection measures when we do not compensate other people for similar costs? The role of elected representatives is to make decisions that apply generally to the electorate. These decisions necessarily benefit some interests and harm others. That is the business of government. Governments regularly enact regulations or issue permits that legally authorize industry to release harmful pollutants into the environment, but they do not generally offer to compensate members of the public whose health is thereby harmed or put at risk (although some argue they should; my point is that government policy should at least be consistent in this area). If governments routinely make decisions that harm some individuals for the purported greater good of society, why should property owners whose land is designated for habitat protection be singled out for favourable treatment?
- Finally, even if we accept the argument that landowners should be compensated with taxpayers' money for reductions in property value caused by government action, doesn't it follow that we should send them a bill when government action causes the value of their property to increase? When governments provide infrastructure works like a massive sewer main or highway connecting a semi-rural hinterland to an urban metropolis, property values in the area tend to rise. Governments do not require benefited property owners to compensate the taxpayers for this increase in value.

When a government establishes a park or protected area, should the neighbouring landowners who benefit from the aesthetic beauty of unspoiled nature and the assurance that their gorgeous backyard view will not be turned into a subdivision pay for the resulting increase in their property value? Conversely, when a province dismantles environmental protection regulations in order to signal that it is "open for business," should companies be asked to reimburse the public for the benefits reaped from lower regulatory compliance costs? There is no principled basis on which to compensate owners for the burdens of government action, yet allow them to keep the benefits of government action (or inaction) as a windfall.

So what should be done? We should protect farming families and other vulnerable parties from genuine hardship occasioned by endangered species habitat protection measures without recognizing a legal principle of compensation for reductions in property or business value due to government action. This could be done by offering greater stewardship incentives to landowners severely disadvantaged by habitat protection requirements, along with technical and financial assistance to switch to alternative land uses. If the funds earmarked for compensation were redirected to incentives and assistance, the resulting benefits to endangered species could be substantially enhanced (in part by avoiding the perverse bargaining incentives discussed above). Finally, some funds should be set aside to compensate, on an *ad hoc* basis, landowners and their families who suffer severe hardship. But the operative principle would be avoidance of genuine personal hardship, not compensation for reduced profitability.

It would be best to remove the compensation principle from the act itself, but this may not be possible. Nonetheless, the legislation is drafted in such a way that these restrictions could still be achieved in the design and implementation of a compensation program, and the federal government has hinted that it might be open to such ideas.[10]

It is odd that there has not been more controversy over this issue. Before the federal government puts in place a system to compensate landowners for the effects of critical habitat protection orders, we should consider the serious implications this would have for the whole range of public health, safety, welfare and environmental protection regulation. If we acknowledge a right to compensation in this situation, it will not be long before landowners and industry demand compensation every time governments tighten environmental protection laws or restrict the development of environmentally significant areas. A

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Notes

[1] *Bill C-5*, an act respecting the protection of wildlife species at risk in Canada (first reading February 2, 2001), available online at: <www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-5/C-5_1/C-5_cover-E.html> (accessed April 19, 2001). The federal government has established a Web site devoted to the *Species At Risk Act*, <www.cws-scf.ec.gc.ca/sar/main.htm>.