

# SURVIVING SUSTAINABILITY:

TOWARDS ENDURING PROSPERITY

BY ELIZABETH NICKSON



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October 2015

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ISSN # 1491-78 ©2015

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### ELIZABETH NICKSON

Elizabeth Nickson is a Senior Fellow at the Frontier Centre for Public Policy. She is an accomplished communicator, journalist, author and novelist. She was European Bureau Chief of *Life Magazine* in the late 80's and early 90's. Prior to her appointment at *Life*, she was a reporter at the London bureau of *Time Magazine*. As well, Nickson has written for *The Sunday Times Magazine*, *The Guardian*, *The Observer*, *The Independent*, *The Sunday Telegraph*, *The Spectator (UK)*, *Saturday Night*, *The Globe and Mail*, *The National Post*, and *Harper's Magazine*. Nickson's latest book *Eco-Fascists, How Radical Conservationists are Destroying Our Natural Heritage* (Harper Collins, 2012), chronicles her experience with subdividing her 30-acre forest on Salt Spring Island in half and examines the excesses of the conservation movement. The subdivision is now taught in local colleges and universities as a case study in "good green development". She is also author of the novel *The Monkey Puzzle Tree* (Knopf, Bloomsbury 1994), which dealt with the CIA mind control experiments in Montreal. She has interviewed Nelson Mandela, Margaret Thatcher, the Dalai Lama, and dozens of other leaders, thinkers, scientists, politicians and royalty. Nickson earned an MBA from York University in Toronto.

## EXECUTIVE SUMMARY

The first formal definition of “sustainability” was given by the 1987 Brundtland Report or, properly, the Report of the World Commission on Environment and Development. “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

However, it is impossible to determine or even guess how future generations will meet their needs, because recent history has shown human ingenuity – our ability to manipulate new technologies – has created abundance by an order of magnitude nearly every decade. Rather than scarcity being our future, an embarrassment of riches should be a more likely scenario.

As we have shown in *The Failures of Forest Certification*, the fears expressed by the participants in the 1987 World Commission on the Environment and Development led to the creation of an organizational field funded by civil society and all levels of government that, in fact, threatens enduring prosperity. Billions of repurposed tax dollars have been used to harness and halt all resource-based industries, hampering efforts to create environmentally friendly technologies, and choking prosperity. An environmental aristocracy has sprouted and grown. This aristocracy enjoys grace and favours residences on conserved lands, substantial incomes and easy and favourable access to power brokers and media. The creation of fear by this new elite has twisted the well-founded desire of citizens for a healthy environment toward a hysteria that leads people to demand ever-increasing restrictions on industry and the activities of ordinary businessmen and women. It also

led to a maze of regulations being placed on any resource-based industry, even straightforward farming operations. As shown in the previous Ontario case studies, regulators bent on “saving” the environment are forcing small rural operations out of business.

Governments must perform reviews of the following environmental policies and in some cases undertake a root-and-branch reform of these policies. For the past 20 years, many scholars and writers, recognizing the imbalance, have argued for a society-wide revisioning of environmental regulation. However, despite pleas for incentive-based policies, cost-based analysis, reliance on demonstrated real-world problems rather than hypothetical or modelled problems, environment ministries and conservation bureaucracies have remained sclerotic, confiscatory and obstructive of economic activity.

While many solutions to environmental overregulation have been proposed over the last 30 years, few have been taken seriously enough to prosecute in any meaningful way. This paper looks at the following necessary reforms:

1. Reform of the Species at Risk Act (SARA) and the Endangered Species Act.
2. Halting of private and public land sequestration and sterilization and a return to the highest and best use of public land.
3. Reversion to a property rights/private ownership land-management system. Legal penalties placed on plaintiffs

who sue rural producers and prevent the development of natural resources or rural businesses, when they lose.

4. Introduction of new methods of governance at the local level to deal with environmental issues and to support local residents as equal in law to senior government actors. Federal and provincial regulations must be consistent with local customs, economies and traditions. Entire regions should not be drawn down based on the current thinking in a resource-use bureaucracy.

5. A rethinking of the current planning ethic and a move to a more organic and open form of planning, following human movement rather than prescribing what can and cannot be done before it is even contemplated.

6. Halting rural population decline caused by overregulation, by means of a root-and-branch reform of land-use regulation across all involved ministries.

## INTRODUCTION

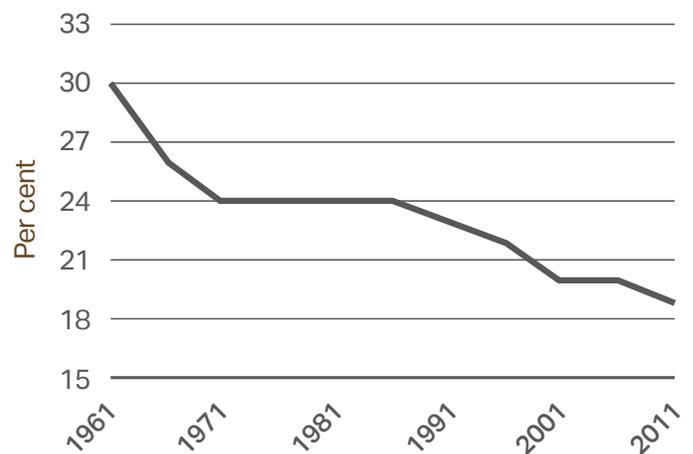
While environmental goods – clean air, open space, parks, protected species, abundant fresh water – are necessary, Canada's environmental movement has manipulated the natural desire of citizens for a pristine environment and a well-cared-for Earth and imposed draconian regulation on all resource- and land-based development. As is made painfully obvious by the work of Pacific Phytometric in the first paper in this series, the funding of environmental activism has made the profession so lucrative that alarmism has been methodically stepped up, reaching hysteria proportions. So much mania surrounds real problems that reasoned debate and effective problem solving are difficult.

The precautionary principle is embedded in regulation – meaning that even small businesses are prevented from growth because they face a maze of restrictions and rules. Hundreds of millions of acres have been set aside or are in the process of being sequestered. In Canada, government still holds much of this land, but rather than Crown land, it has become protected land, protected even from exploration. Canada's shores and shoreline waters are also in the process of being sequestered. Lands and oceans not fully sequestered are increasingly enmeshed in regulations that re-purpose those lands and oceans to serve as buffers for those preserved lands. Sequestration is largely done with public money, since even private land trusts use re-purposed tax money from wealthy citizens and corporations to "save" lands from human use. In fact, 62 per cent of so-called private sector land conservation is effected by the use of public money.<sup>1</sup>

Environmental regulation has become a snarl of impossible demands that has smothered enterprise and initiative in Canada's rural regions. As a result, for the past 50 years, rural Canada has been slowly depopulating. Since 1991 alone, Canada's urban population has grown by 6,000,000, but the rural population has dropped by 60,000. This is, at

least in part, deliberate. City planners and politicians have embraced the idea of increased urban density despite the measured results of increased pollution, crime, noise, heat, traffic and health risks.

**Figure 1: Percentage of Canadians Living in Rural Areas 1961-2011**



Year	Canadian Population	Urban Population	Rural Population
1991	27,296,856	20,906,872	6,389,984
2011	33,476,688	27,147,274	6,329,414
<b>Net Change</b>	<b>6,179,832</b>	<b>6,240,402</b>	<b>-60,570</b>

While centre-right governments tend toward loosening restrictions, at no time has any federal or provincial government looked at environmental regulation as a unified field and sought reform across all involved ministries. Too often, environmental restrictions are traded by both right and left in return for other conservative or liberal policy goals, largely because no independent cost-benefit analysis has been performed on environmental regulation. For instance, in mid-May of 2014, Prime Minister Stephen

Harper announced a National Conservation Plan,<sup>2</sup> in part, no doubt, as a way of deflecting demands for cap and trade or a carbon tax in the run up to the 2015 election.

Despite Harper's good intentions, which were praised by the media, we do not know the negative effects of large-scale land sequestration, because we have absolutely no idea where the next great engine of wealth will be found. Decades ago, no one could predict the success of Fort McMurray. Nor, in 1970, for the sake of argument, could anyone have predicted the evolution of Vancouver from a pretty backwater to one of the most exciting global cities in the world. Saving entire regions from development prevents even the consideration of new civic and industrial centres. It also prevents energy or resource development in those regions. Equally, adding another species to the endangered species list or increasing its protection area by adding another 1,000-hectare habitat is rarely seen as costing anyone anything, or given the declining population of rural Canada, affecting very few. Rural Canadians are typically seen as a disposable voting block with little or no voice or access to the centres of power.

## POLICY RECOMMENDATIONS

### 1. *Endangered-species regulation reform*

Provincial and federal endangered-species Acts are sold to the public using hysteria over species loss which is, at the very least, overstated, if not the stuff of outright fantasy. The example of the Fowler's toad and the Bobolink in Ontario, described in paper 2 of this series, is instructive, as is the Northern Goshawk listing described in paper 3. While the Bobolink and toad are found in Southern Ontario, they are at the northernmost part of their range and, therefore, their very existence is always at risk given ever changing natural systems. However, both are in abundance in many other parts of North America. Despite that, farmers are restricted in their harvesting and planting activities, and children cannot use beaches that were once available to all. The Northern Goshawk is used as a surrogate in order to restrict logging activity, road building and access to valuable resources in Canada's vast boreal regions.

Too much endangered-species regulation is overwrought, sold to the public using hysteria and based on still not fully understood science, desktop mapping and algorithms that too often resemble guesswork. It should and must be subjected to fact-checking by anonymous peer review and subsequent reform.

There is no recognition in the ministries that deal with endangered species of the abundant biodiversity that humans have brought to their counties and regions or that as a rule, outside of heavily developed mega-cities, biodiversity actually increases around human settlements.

A regrettable centralization of endangered-species research has occurred. The origins of SARA mapping are international and sourced from the International Union for the Conservation of Nature and The Nature Conservancy in the United States. In tandem, the two organizations built the current species mapping in use, spending hundreds of millions of dollars over three decades, using foundation and

government funds.<sup>3</sup> The mapping, models and algorithms provided by these two Non-Governmental Organizations (NGOs) are the basis for Canadian regional mapping.

One must understand that the dominant underlying assumption of the bureaucrats, foundation officers and scientists who promote SARA and the provincial endangered-species Acts is that the Earth's biodiversity is not merely declining, but crashing, and climate change requires the depopulation of rural regions so that the countryside will become a "rural air conditioner" and that without humans, "natural" biodiversity will recover.<sup>4</sup>

This thesis, which many have pointed out is more like religion than science, is based on flawed algorithms and models that bear little relation to reality. However, the urgency is deeply felt. One need only listen to a handful of video presentations at the Ontario Species at Risk conference held at the Royal Ontario Museum<sup>5</sup> in the spring of 2013 to recognize the tinge of fanaticism and panic. The advocates claimed that green jobs are being created and green economies are booming because of the land and resource sequestration. However, most green jobs are public jobs that regulate human activity rather than create wealth and with few exceptions those jobs exist only because of public subsidy. At present, green economies – chiefly energy production – only work if supported by public funds.

Further, the biodiversity collapse meme itself is starting to collapse. A recent study by scientists at the University of Vermont, published in *Science* in April of 2014, found no diminution of the number of species. In fact, in 59 of the 100 long-term studies reviewed, biodiversity was found to be increasing slightly.<sup>6</sup> The composition of species is shifting, and perhaps some species that are increasing are less helpful or charismatic than the ones that are declining, but at present, we do not know. The science is simply too new.

For example, currently, in the United States, the sage grouse is in the process of being “protected” in many states. The Center for Biological Diversity and the Wilderness Society, the two protagonists and drivers of the listing, see the protection of the sage grouse as an excellent proxy for limiting oil and gas exploration and extraction as well as ranching and rural businesses.<sup>7</sup> Despite many studies showing that the grouse does well in ranching country, that the presence of large animals protects the grouse from predators,<sup>8</sup> that the droppings of cattle fertilize the range and provide more fodder for the grouse,<sup>9</sup> faulty science commissioned by environmental NGOs is being used to protect the 138 sage grouse found in Alberta and Saskatchewan. There are few sage grouse in Canada, because the birds exist in Canada at the northernmost portion of their range.

In 2012, Ecojustice, formerly the Sierra Legal Defence Fund, teamed with Alberta Wilderness Association, Wilderness Committee, Nature Saskatchewan and Grassland Naturalists to sue the federal government over the threat to the sage grouse. In December of 2013, an Emergency Order was issued and a plan for preserving the sage grouse was put in place.<sup>10</sup>

Alberta’s ranchers have had substantial costs levied against them in order to protect those 138 birds. For instance, they must put points on all fence posts to prevent predators from landing on them, which means tens, if not hundreds of thousands of fence posts were “fixed.” The ranchers experienced a further sequestration of 1,700 square kilometres which were removed from ranching, the placement of power lines, oil and gas extraction and even camping. Speed limits were lowered, and the penalties for threatening the existence of one of these birds now run to \$1,000,000 for a corporation and \$250,000 for an individual.

If the precautionary principle is cited in these cases and we act as if we must prevent the worst-case scenario, we must broaden the principle to include rural economies, traditions and heritage. The removal of cattle from ranges throughout

the American West has shown that those ranges, cleared of cloven-hoofed animals, are degrading and desertifying.<sup>11</sup> Again, endangered-species science is new, much of it is flawed, and untested, and, as it turns out, the unintended consequences are many and worrying.

It is necessary to consider the rejection of the precautionary principle as a tool for regulation making. As pointed out by a Mercatus Center policy brief:

*the precautionary principle is “[G]enerally regarded as an implementation of the ‘better safe than sorry’ doctrine, this principle opens the door to regulation based on subjective and arbitrary political bias. Because there is no standard definition, despite having been adopted as official policy throughout the world, the precautionary principle is prone to application on anything but a principled basis.”<sup>12</sup>*

Lincoln Professor of Emerging Technologies, Law and Ethics at the Sandra Day O’Connor College of Law at Arizona State University, Professor of Life Sciences at ASU and Executive Director of the ASU Center for the Study of Law, Science and Technology, Gary Marchant and his colleagues recommend the adoption of a principle of non-discrimination that would prohibit regulatory discrimination against a product based on the process by which it was produced. Under this framework, regulation would be based solely on the evidence of risk of the individual product or resource and not the technology used to produce it.<sup>13</sup>

Non-discrimination with regard to a product based on the process by which it was produced may (and arguably, rightly) dismay even the casual observer of environmental destruction. But, as will be seen below, a reversion to common law and property rights, including trespass law, riparian law and nuisance law would efficiently prevent the destruction of environmental goods, including water pollution and diminution, noise, smell, air pollution etc., and deal effectively with any “downstream” destruction. Equally, common law in this area has a history of successful case

law upon which to build environmental protection, without the vertiginously expensive legal wrangling which has accompanied current practices.

Cost-benefit analysis applied to regulations that would affect all rural businesses, communities and public wealth must be included in all endangered-species determinations.

Equally, if land is to be withdrawn from use, payment for the lost land, whether private or leased, must be made.

Sections 11 and 12 of the federal SARA state that there must be agreements between government and any person. Property owners must be made aware of these provisions before they enter into negotiation with regulating bureaucrats. Far too often, property owners do not understand their rights and do not realize that the British *North America Act (BNA Act)* protects their property rights.

As well, if habitat is to be created on private lands, payments or tax deductions must be made or put in place for these services.

Government should launch a public education campaign to inform Canadians about the debates within the endangered-species community. Wholesale biodiversity collapse is broadly overstated and is used to frighten schoolchildren. Technological solutions to species decline or even extirpation, which are in the experimental phase all over the world, should be part of the public discussion.<sup>14</sup>

When applying endangered-species regulations, regulatory agencies should consider market-oriented solutions (such as performance standards and economic incentives) first and command-and-control options last.

Voters should know about the costs borne by the public when international NGOs take the government to court over an endangered or threatened species on behalf of local environmental organizations. Canadian courts are overburdened, and the government has spent millions of dollars adjudicating these cases.

Before these disputes reach court, an independent and anonymous peer review of the science used in species listings must take place. In the United States, complaints have often been found to have little or no merit but only after thousands of hours of court time paid for by the public. Further, lawyers and judges are not fully capable of making species determinations.<sup>15</sup>

## 2. Halting of private and public land sequestration and subsequent sterilization and a return to the ethic of the highest and best use of public land

Government land-use planning is subject to fashion, but unlike private owners, administering bureaucrats bear no responsibility for the failures of these new ideas. Largely, by the time the policies these fashions inspired are seen to fail, the bureaucrats have long retired. This does not make for an efficient and prosperous use of valuable resources.

As Alston Chase, the most cogent writer and thinker on environmental issues in North America, points out:

*At the turn of the century, saving big game animals was the rage. Officials fed elk, bred bison and bashed wolves. Today they do the opposite – batter bison, breed wolves and encourage hunters to shoot elk. A generation ago, old growth forests were called 'biological deserts.' Now they are revered for 'biodiversity.' Over the years, the field known as 'restoration ecology' went into, then out of, then back into popularity, without once having been tried. Wildfires were first thought good, then bad, then good and seem to be on their way out again. Ditto the mysterious doctrine, 'sustainable development.'*<sup>16</sup>

In May of 2014, the B.C. legislature was debating reform of the Agricultural Land Reserve (ALR).<sup>17</sup> Debate was heated, because B.C. voters have an emotional attachment to the idea of farmland around cities. However, the ALR was created in the 1970s when the development and population pressures of urban areas, particularly in Vancouver, were minor. This is no longer the case. Further, as agricultural technology advances, more is grown on smaller parcels of land, and for decades, much of B.C.'s food has come from other parts of the world. This is not likely to change. While buy local is currently fashionable, and even desirable, it is not yet practical on a large scale, and, at present, it makes no economic sense.

As well, ALR land is often beautiful, even stunning, as in the Delta wetlands near Vancouver, which are home to tens of thousands of waterfowl. The idea of mega-warehouses and an intermodal yard on these lands is widely unpopular. Despite a reasonable desire to protect that beauty, during the recent extended economic downturn, increasing the competitive ability of Vancouver's port means that trade with Asia will benefit all of B.C.'s citizens, and its public accounts. B.C.'s long-term debt, while not as threatening as that of Ontario or Quebec, still requires that its economy grow, and fast. Some conservation, while desirable is simply not affordable yet.

In addition, because the ALR holds so much land around the city, industrial land in the Greater Vancouver region costs \$1,000,000 per acre, while industrial land in Calgary costs only \$250,000 per acre.<sup>18</sup> The price of entry for any business, therefore, is four times as high – illustrating just one of the liabilities of sequestered lands, particularly those generally known as greenbelts. City dwellers hungering for green open space and nature heavily discount the value of industrial activity. They are unaware of how critical industrial enterprise is in the providing of goods and services. Equally, they do not understand that industry creates prosperity and lifts the marginal out of despair. Mega-cities increase the need of humans for nature while disallowing the experience of nature, thus demonstrating just one of the contradictions inherent in mega-city planning.

### Public Land Reform

This is a fundamental issue with regard to current planning strategies. While planners have been methodically setting aside large tracts of Crown land for decades, private conservers such as the Nature Conservancy of Canada and many other provincial and regional private conservancies

have joined them. Almost all land “saved” from use has been purchased with public money, as corporations and individuals donate, in part, to reduce their tax burden and secondarily, because of the need to be seen as good green citizens.

The highest and best use of public and privately conserved lands must be instituted across Canada. Public lands are “saved” using public money, and private lands are “saved” using repurposed tax money from corporations and individuals seeking tax breaks to a maximum of 62 per cent. Therefore, property rights cannot apply to these lands, which are properly common lands and, therefore, should be available to citizens for the highest and best use. In many cases, the highest and best use is not conservation.

Furthermore, land conservancies can run into real trouble. This is inherent in the structure of “ownership” of land that cannot be used. The Land Conservancy of B.C., for instance, owes its creditors more than \$7.5-million, and it has had difficulties in meeting its payroll, paying interest on those loans, and maintaining their properties. This means that the scores of properties the conservancy owns cannot receive proper care.<sup>19</sup> Legally, these properties cannot be sold to pay off the debt. Further, these properties could be used to create rather than eliminate wealth, which they are presently doing.

The most efficient way to determine highest and best use is a gradual return of property rights.

### 3. *Reversion to a property rights/private ownership land-management system*

In Canada, the most instructive direction forward has been proffered by Elizabeth Brubaker, who argues in *Property Rights in Defence of Nature* that English common law was founded on downstream rights.

*Secure property rights provide both powerful incentives for the preservation of natural resources and effective tools to resolve differences over resource use. Although the Canadian judiciary has traditionally been committed to protecting property rights, few governments, federal or provincial, have acknowledged the importance of such rights or allowed them to thrive. Indeed, successive governments have systematically overridden property rights to the detriment of both the economy and the environment.<sup>20</sup>*

Brubaker points out that for hundreds of years people used common law to protect their air, water and soil from pollution.

*Trespass law has been used when pollutants have constituted direct, tangible invasions. ... In order for an activity to constitute a nuisance, it must create an unreasonable and substantial interference. Furthermore, unlike a trespass, it must cause harm, be it physical damage, financial harm, annoyance, discomfort, or inconvenience.*

*Another factor in determining whether something is a nuisance is the character of the neighbourhood in which it occurs.*

*A third branch of the common law, the law of riparian rights, was traditionally used to protect surface water. Under the common law, the people who own or occupy land beside lakes and rivers have the right to the natural flow of the water. They have the right to water substantially unaltered in quantity or quality.*

This law, says Brubaker, was extrapolated to include the character of a neighbourhood.

These three branches of common law can easily manage almost all of the incursions of industrial activity on land, water and air without the mind-numbing and vertiginously expensive legal wrangling that now accompanies environmental degradation. Brubaker points out that these three branches of common law prevented “sanitary sewage, storm-water runoff, mine discharges, mill wastes, industrial effluents, dams, water diversions, thermal pollution, the discolouration of water, and even the hardening of water.”

Elizabeth Marshall, a director of the Canadian Justice Review Board; director of research, Ontario Landowners Association; and a research fellow, Meighen Institute, introduced new thinking into the position of property rights in Canada’s founding document, the *BNA Act*. She found that, when using the preamble to the *Act*, Crown patent grants, which are the first document in any land title, place the holder of the grant on an equal footing with the Crown after 60 years, with provisions set out only in the original grant. During the founding of Canada, the Crown kept certain rights in original grants, for instance, stands of white pine were kept by the Crown for possible future use in sailing ships.

Crown patent grants allow landowners to refuse regulatory government officials access to their property, and while Ontario’s Ministry of Natural Resources states that Sections 92:13 and 92:16 give it rights over everyone in the province, the lower courts, so far, disagree.<sup>21</sup> The higher courts have yet to test Marshall’s theory.

Property rights, according to Marshall, were enshrined in Canadian law from the first legal document that defined the existence of the country as a protectorate of the British Crown.

She makes the following points, based on her interpretation and study of the relevant Acts.

Provinces can only legislate and regulate lands belonging to them. Equally, municipalities cannot regulate lands they do not own.

*These provisions have been included in all of Ontario's Acts: in the Conservation Authorities Act,<sup>22</sup> the Niagara Escarpment Planning and Development Act, sections 24 and 25, and 28-33. Any planning or replanning, the municipality or province has to acquire it before they develop it and zone it, and then they can sell it. That is in the Planning Act. I can go through all these restrictions in the Municipal Act as well. All these Acts state that all these authorities can only regulate for property that they own. If the provinces had the right to impose comprehensive plans on us, they would have already done it. But they haven't; they have delegated these tasks to our municipalities. No one is reading the legislation in its entirety. Warrantless entry is the first step towards forfeiture. It has nothing to do with coming on to the person's property; it has everything to do with the expropriation process. And that is where all of this is falling down. In the legislation it says 'enter on and expropriate.' That's the whole thing. "Enter on" is everything to do with the expropriation process. It has nothing to do with entering on a person's property and saying "I am here to do an inspection," or "I am here to do an investigation." They still have to have a warrant, and Terry Green [lawyer] is proving that in court with Conservation Authorities.*

*The language hasn't changed. It's the inability of the bureaucrats to understand the language of their own Acts.<sup>23</sup> These Acts restrict the Conservation Authorities; they do not exist to restrict the property owner.*

*Municipal councillors can be sued over warrantless entries, and there have been many wins.<sup>24</sup> The*

*judgments were that by-law officers must know and understand the legal limits of their authority.<sup>25</sup>*

Marshall thinks that bureaucrats may have been acting *ultra vires*, outside of their authority, and cites a phrase from the BNA Act: "It is an evasion of the Act from which the Local Legislature derives its power. The Local Legislature cannot, no more than private individuals, act as it were in fraud of the law, that is, do by indirect means what it cannot effect directly ...."<sup>26</sup>

Marshall also thinks that senior members of the various land-use bureaucracies do understand Crown patents and the immutability of their place in the founding documents. Since Crown patent grants do confer full property rights on the owner within the common law and are the senior law of the land, in order to be able to regulate private land to the benefit of the environment, government bureaucrats have begun to create ways to become partners in land ownership with private owners, thereby giving regulatory agencies the power to regulate.

As Marshall points out:

*In the Food and Farm Protection Act of Ontario, there are three pieces of legislation that farmers are subject to. Those are the Clean Water Act, the Pesticide Act, the Nutrient Act. The Food and Farm Protection Act was enacted in 1998. However, the Endangered Species Act was enacted in 2005-6 and therefore not included in the Food and Farm Protection Act. Farmers are exempt from all by-laws on their property as long as they follow public safety. The government did not include the Endangered Species Act in the Food and Farm Protection Act, because it disrupts the ability of the farmer to provide food for the nation. Farmers have been protected since the Magna Carta. The Ontario Federation of Agriculture [OFA] has done a huge disservice to the province by asking for an extension in their first cut of hay until 2014. I don't think that a lot of this legislation can be applied to farmers.*

*The OFA wants farmers to sign up for a Farmland Trust, which creates a conservation easement. Once a farmer has signed on to a conservation easement, he loses the protection of common law. Farmland Trusts state that Class A farmland can only be used for crops, and that eliminates the ability of the farmer to manage his own land for profitability. It means the farmers have no collateral; it means they haven't the ability to go to the bank to get a loan to plant their crops. That's what happened with the Agricultural Land Reserve in British Columbia. This is why farmers go bankrupt in green belts, and developers come in and buy the land at ten cents on the dollar.<sup>27</sup>*

To receive gas tax funds in Ontario, municipalities need comprehensive plans. Marshall thinks that the province is offloading the responsibility for enacting these plans, which leaves the municipalities open for civil litigation.

Crown patent law states that when the Crown issues letters patent, it is alienating Crown domain. It becomes the patent holder's own dominion. After 60 years, the Crown cannot take back that property, and it cannot regulate or legislate it.

The overarching right is that a Crown patent grant gives the property owner the same status as the Crown. From Crown patents flow torts of trespass and torts of nuisance, as well as riparian rights.

Marshall's work is instrumental in bringing the original intent of Canada's constitutional law and property rights to the discussion. Empowered property owners are the missing link in solving the current disarray in Canada's rural regions.

*4. Introduction of new methods of governance at the local level to deal with environmental issues. Federal and provincial regulations must reach consistency with local customs, economies and traditions. Entire regions should not be drawn down based on the current thinking in a land-use bureaucracy.*

In the United States, environmental issues and property rights with regard to regulating ministries such as the United States Environmental Protection Agency, the U.S. Forest Service, National Oceanic and Atmospheric Administration, U.S. Army Corps of Engineers and the United States Department of Agriculture have found similar areas of conflict as those found in Canada. Many agencies have regulations that apply to the same plot of land, requiring the landowner to negotiate and pay permitting fees and hire lawyers to negotiate each agency's requirements.

Equally, problems with blanket regulations across many counties and states have created an entire collection of negative unintended consequences. If nothing else, environmental mitigation is place specific, and what might work outside Sacramento, for instance, will not work in Animas, New Mexico, or in New York state, but often, innovations in environmental regulations are taken up in rural regions from coast to coast.

Empowered local communities and property owners sitting with regulators, Environmental Non-governmental Organizations (ENGOS) (local, international or national) and businesspeople would ensure that local problems are addressed and that precautionary regulations that would choke economic growth are not enacted. This would eliminate the anger and resentment in rural regions toward outsiders from well-funded international NGOs who move into rural areas and draw down the economy. While most international NGOs such as Greenpeace, the Sierra Club, The Nature Conservancy and national organizations such as Duck's Unlimited and the Nature Conservancy of Canada are seemingly not present in those communities, forensic accounting has shown, over and over again, that these are the organizations that fund the smaller conservancies

and advocacy groups that work in small rural counties and townships.

With the creation of Canada's first conservation law, the debate in Ontario's parliament is instrumental in demonstrating the intent of the law. In the debate leading up to the adoption of Ontario's *Conservation Authorities Act* of 1946, the Honourable Dana H. Porter, the Minister of Planning and Development, stated:

*"It is our view that the chief responsibility for dealing with matters which affect local areas lies upon the people who live in that locality, and that the less centralized any methods may be to deal with these problems, the better it will be for all concerned."<sup>28</sup>*

In some larger disputes, private mediation firms have managed to create successes without resorting to the Courts. That said, a responsible local government and community working with outside agents on a level playing field is the most efficient, cheapest and principled way to resolve ongoing disputes over perceived environmental harms.

### **Co-ordination**

The Owyhee Initiative, a ground-breaking innovation in rational sharing of responsibilities on public lands in Idaho, demonstrates the success of this form of government. It required an Act of the U.S. Congress, but at present in a hotly conflicted county – Jordan County in Idaho – where many international ENGOS moved in and removed grazing leases and the county became a nexus of the Sagebrush Rebellion, where ranchers across the US West went to war with the federal government, peace has been established.

All interested parties, local government, state government, business interests, the air force – Mountain Home Air Force Base is located in the county – ranchers, outdoor enthusiasts, The Nature Conservancy and the Sierra Club, sit at the table and negotiate good environmental protection. Everyone is represented, and all regulatory authorities must reach consistency with local customs and heritage without damaging the local economy.

The idea of county equality with senior government policies is based on a clause inserted into the founding documents of the American Revolution at the Second Continental Congress. That founding document recognized that the indivisible unit of government is county government and that all senior governments, when they seek to regulate the people, have to reach co-ordination or consistency with county government, because it is at the local level that most citizens have contact.

At present in Canada, if a regulating authority such as a ministry of the environment decides upon a policy and writes the regulation and rules for implementing that policy, the county or municipal government must comply, with no ability to negotiate or even object.

5. *A rethinking of the current planning ethic, moving to a more organic and open form of planning following human movement rather than prescribing what can and cannot be done before it is done.*

### Anti-planning

Across the Dominion and all through the United States and Britain, cities, large and small, as well as rural towns and counties are using New Urbanism and New Ruralism metrics and concepts in their planning. Planning is comprehensive, meaning that the use of every square inch of space is predetermined. Village concepts are promoted as human scaled, attracting tourists and new residents. They are promoted as solutions to social decay.

However, despite the appeal of the village, which came of age during very slow growth periods in human history and as such is, as articulated by Ruth Durack in a groundbreaking essay in 2001,

*a stable, self-perpetuating, self-sustaining entity. It has boundaries and a limited size, an internal organization that resists revision, a coherent scale and building character that protest the deviant form, and a fragile landscape that is vulnerable to growth.*<sup>29</sup>

The village, Durack is saying, does not welcome the future. She cites Brian Arthur, an economist from the Santa Fe Institute who works mostly with the nature of chaos. Survivability in a chaotic world means

*"... you want to keep as many options open as possible. You go for viability, something that's workable, rather than what's 'optimal.' ... What you're trying to do is maximize robustness, or survivability, in the face of an ill-defined future."*<sup>30</sup>

This idea sits in direct contrast to the prevailing idea of urban and rural villages. As Durack says:

*[The village] builds a social network that relies on interwoven destinies, censuring the separatist, the*

*non-participant, the transient. It is, by necessity, a fixed, complete and finished entity, **whose greatest enemy is the future.** Its very survival requires resistance to change, and physical and social design conspire to preserve the status quo at sometimes quite remarkable human and financial cost. [emphasis added]*

Given the rapid pace of change, the village concept, while understandably attractive to those frightened by change, is no longer suitable.

As shown by the work of Wendell Cox and his affordability studies in cities across the world, and by these papers, the planning vogue of the present is failing. The more restrictions placed on property, the higher the prices and the more expensive and restricted the neighbourhoods become.

Durack rejects

*the very idea of models, of prescribed forms, of fixed intentions, of master plans. Instead, we must adopt a way of thinking about the world that accepts unpredictability, coincidence and the accidental; that delights in diversity, multiplicity and contrast; that embraces change and the exercise of individual choice.*<sup>31</sup>

Certainly, models for endangered-species mapping have been shown to fail repeatedly.

In Canada, however, open planning was tried, once. As Durack explained:

*Probably the most direct expression of this philosophy to date is Rem Koolhaas and Bruce Mau's proposal for Downsview Park, a 320-acre<sup>32</sup> former military air base in the suburbs of Toronto. To the chagrin of many*

*landscape architects, Koolhaas and Mau won the competition for this major commission with a strategy, not a design, arguing that 'the process of landscape planning and development itself, necessarily an open-ended set of complex processes developed over time, was more significant to the urban outcome than was a detailed physical design that would be rendered redundant by subsequent social, economic and cultural developments.' It will take fifteen to twenty years before we can evaluate the wisdom of this proposition.<sup>33</sup>*

As it turns out, 15 years after its founding, the Downsview Park experiment is available for analysis. The idea of open, indeterminate planning ended up in limbo, first with the plan for the first national city park and then with a park bracketed by densified condo, shop and rental apartment complexes. Local residents who today state that they want single-family homes with yards and gardens in low-density neighbourhoods like those created in the 50s, 60s and 70s roundly dislike this idea.<sup>34</sup>

David Leatherbarrow, professor of architecture and head of the Graduate School of Architecture at the University of Pennsylvania, writes about open indeterminate planning as a more-tolerant, welcoming mode. What he calls "open topography" is like missing teeth to a planner, but in fact, these undefined spaces can satisfy unpredictable future needs.

Leatherbarrow also thinks that open, indeterminate planning invites citizen participation. Smart Growth or Vision Vancouver or Imagine Calgary or Earthcare Sustainability Thunder Bay invites citizen participation but more as audience than as full participants. The village concepts are already in place, and the plans are almost entirely pre-established. Real involvement is more than a formality, says Leatherbarrow. However, one imagines that with Downsview Park, citizens were asking for single-family homes, which meant "sprawl" to planners, who thought that citizens did not want what they should want and, therefore,

should be ignored. Yet, after many decades of scholars and environmentalists protesting sprawl and finding grievous fault with suburbs, it turns out, repeatedly, that middle-class families prefer single-family homes in heavily wooded, green suburbs. In addition, they prefer smaller cities to larger cities.

Durack, Leatherbarrow and Michael Neuman ("The Compact City Fallacy") recommend "a flexible, shifting decision-making framework that stimulates constant review and revision rather than a fixed set of rules that defy challenge."

*While a certain amount of stability or predictability is obviously necessary for society to function, attempting to specify the physical form and functional patterns of our future is potentially a prescription for disaster. What we must do, rather, is establish a process for continual reconsideration and revision of the rules, making choice the only constant and participation an unavoidable obligation.<sup>35</sup>*

That this is substantially different from today's top-down, command-and-control regulation of every use of every piece of land could not be more obvious.

## 6. Halting the rural population decline caused by overregulation by a root-and-branch reform of land-use regulation across all involved ministries

The Mercatus Center at George Mason University in Washington, D.C., in a conference held in the fall of 2012, named this shift in thinking “moving from presumption to proof” and called for the bureaucratic reform of current environmental regulation. As stated, in the United States,

*environmental regulations contain about 30 percent of the new restrictions created between 1997 and 2010. Of the approximately 275,000 additional restrictions added to CFR [Code of Federal Regulations] over this period, about 80,000 were printed in Title 40 – Protection of the Environment.*<sup>36</sup>

Again, environmental regulation is seen to disproportionately damage the wealth of low-income households. As Mercatus fellow Diana Thomas argues (and which has been exhaustively examined in the previous three papers in this series),

*[R]egulation has unintended consequences that are particularly detrimental to low-income households. Because of these unintended consequences, at a minimum all regulation should be subjected to a **cost-benefit test that considers potential regressive effects.***<sup>37</sup> [emphasis added]

Thomas recommends ministries consider the following:

1. Regulation of health, safety, and the environment often represents the preferences of high-income households but increases prices and reduces wages for all households.
2. Low-income households cannot spend as much on the private mitigation of risks that are of greater severity and probability than some regulated risks because they are forced to pay for regulation that represents the preferences of high-income households.

3. Because regulation often represents the preferences of high-income households and reduces the disposable income of low-income households, regulation has a regressive effect.<sup>38</sup>

Other recommendations from the conference Moving from Presumption to Proof are as follows:

1. Ministries should analyze the problem and alternative solutions before writing the regulation.
2. Separate economists who conduct Regulatory Impact Assessments from program offices who write regulations.
3. Require agencies to explain how their analysis of the systemic problem, alternatives, benefits, and costs affected their decisions about the regulation.
4. Require agencies to explain any other values that affected their decisions and present evidence.

Above all, going forward, there must be a recognition that environmental regulation as it is currently practised in Canada has been broadly destructive of the human community and the rural economy.

## CONCLUSION

Canada's rural regions represent a huge growth opportunity for citizens and public wealth alike. However, command-and-control planning has drawn down the rural population and the rural economy. This must be reversed if Canada is to meet its obligations with regard to pensions and health care. Our public debt, like that of all the Western democracies, is high, and our unfunded liabilities are worrisome. Canada, however, unlike many Western democracies, has the land and resources to grow the economy in order to meet those obligations.

With a small but significant adjustment to the Brundtland Report's definition, I would suggest that sustainability refers to development that satisfies the needs of the present without compromising the ability of future generations to make choices of their own.

## ENDNOTES

<sup>1</sup>Open Charities. Available online at <http://www.opencharity.ca/charity/119246544RR0001/2012-06-30>. Open Charities most-recent data from 2012:

Tax-receipted donations	15,638,494	19.13%
Non-tax receipted donations	36,516	0.04%
Donations from other organizations	6,050,219	7.40%
Revenue from federal government	36,443,107	44.58%
Revenue from provincial government	4,054,217	4.96%
Revenue from municipal government	989,113	1.21%

Government direct contributions were 50.75 per cent. The tax-receipted donations would have been 19.13 per cent, for which taxpayers would have received a 44 per cent rebate from taxes, or 8.36 per cent of revenue – assuming major donors are in the top tax bracket and account for most of the donations. Donations from other organizations mean groups like the Tides Foundation, etc. These groups get their cash from affluent taxpayers in the top tax bracket. In my view, the tax deductions would again be in the 44 per cent bracket (top marginal rate can vary by province), so 7.40 per cent of revenue is 3.25 per cent out of the taxman's pocket. Add them up and you get 50.75 per cent + 8.36 per cent + 3.25 per cent = 62.36 per cent in that particular year. Note that they do not separate out non-tax-receipted donations – a paltry 0.04 per cent.

<sup>2</sup>CBC, "Stephen Harper Reveals New National Conservation Plan," May 15, 2014. Available online at <http://www.cbc.ca/news/canada/new-brunswick/stephen-harper-reveals-new-national-conservation-plan-1.2644274>.

<sup>3</sup>Goodson, Jeff, "The Network," *Range Magazine*, Spring 2003. Available online at [http://www.citizenreviewonline.org/special\\_issues/TNC\\_3.03.pdf](http://www.citizenreviewonline.org/special_issues/TNC_3.03.pdf).

<sup>4</sup>Videos from the 2013 Ontario Endangered Species Act Conference held at the Royal Ontario Museum are available at <http://endangeredspeciesconference.com/index.php/media> and <http://endangeredspeciesconference.com/index.php/media/P5>. Most of the expert speakers – most of whom are public servants – embraced wholesale the biodiversity collapse meme.

<sup>5</sup>Ontario Endangered Species Act Conference. Available online at <http://endangeredspeciesconference.com/index.php/media/P5>.

<sup>6</sup>Dornelas, Maria, Nicholas J. Gotelli and Brian McGill et al., "Assemblage Time Series Reveal Biodiversity Change but Not Systematic Loss," *Science*, April 18, Vol. 344 no. 6181, pp. 296-299. Available online at <http://www.sciencemag.org/content/344/6181/296.abstract>.

<sup>7</sup>Interview with Margaret Hage Byfield, principal of American Stewards of Liberty, who attended the 2013 Wilderness Society Annual General Meeting.

<sup>8</sup>Irene Hoffmann, Tatiana From and David Boerma. "Ecosystem Services Provided by Livestock Species and Breeds, with Special Consideration to the Contributions of Small-Scale Livestock Keepers and Pastoralists Commission on Genetic Resources for food and Agriculture", October 2014 BACKGROUND STUDY PAPER NO. 66 REV. FAO (Food and Agriculture Organization) United Nations, available online at <http://www.fao.org/3/a-at598e.pdf>. Also, <http://oregonprogress.oregonstate.edu/winter-2013/good-bird-good-herd>.

<sup>9</sup>Ibid.

<sup>10</sup>CBC, "Greater Sage Grouse Protection Plan Released." Available online at <http://www.cbc.ca/news/politics/greater-sage-grouse-protection-plan-released-1.2450922>.

<sup>11</sup>Please see the work of Allan Savory at The Savory Institute. Available online at <http://www.savoryinstitute.com/> and "How to Fight Desertification and Reverse Climate Change." Available online at [http://www.ted.com/talks/allan\\_savory\\_how\\_to\\_green\\_the\\_world\\_s\\_deserts\\_and\\_reverse\\_climate\\_change](http://www.ted.com/talks/allan_savory_how_to_green_the_world_s_deserts_and_reverse_climate_change).

<sup>12</sup>Regulation in the 21st Century, Mercatus on Policy, Mercatus Center, No 28, 2008, page 2. Available online at: [http://mercatus.org/sites/default/files/publication/MOP28\\_RSP\\_21century\\_reg\\_web.pdf](http://mercatus.org/sites/default/files/publication/MOP28_RSP_21century_reg_web.pdf).

<sup>13</sup>Marchant, Gary, "Lessons for New Technologies," (working paper 08-26), Mercatus Center at George Mason University, August 2008.

<sup>14</sup>Mason, Miles, How Markets Will Resurrect Endangered Species, Post Scarcity Alliance, July 13, 2013. Available online at <http://www.postscarcityalliance.com/how-markets-will-resurrect-endangered-species/>. See also <http://www.genome-engineering.org/>. Megan Gannon, "Reviving the Woolly Mammoth: Will De-extinction Become Reality?" Yahoo, March 15, 2013. Available online at <http://news.yahoo.com/reviving-woolly-mammoth-extinction-become-reality-212251965.html>; Anne Trafton, "Editing the Genome with High Precision," MIT News, January 3, 2013. Available online at <http://newsoffice.mit.edu/2013/editing-the-genome-with-high-precision-0103>; Stewart Brand, "Opinion: the Case for Reviving Extinct Species," National Geographic, March 12, 2013. Available online at <http://news.nationalgeographic.com/news/2013/03/130311-deextinction-reviving-extinct-species-opinion-animals-science/>.

<sup>15</sup>Oregon Websites and Watersheds Projects Inc. Available online at <http://www.ORWW.org/>.

<sup>16</sup>Alston Chase. *In a Dark Wood: The Fight Over Forests and the Rising Tyranny of Ecology*, Houghton Mifflin, New York. 1995.

<sup>17</sup>ALR fireworks wrap up B.C. legislative session, *Times Colonist*, May 20, 2014, <http://www.timescolonist.com/news/local/alr-fireworks-wrap-up-b-c-legislative-session-1.1096752>.

<sup>18</sup>Interview with Rob Stuart, Human Environmental Group, Calgary, Alberta.

<sup>19</sup>Mulgrew, Ian, "Land Conservancy of B.C. Files for Creditor Protection," *The Vancouver Sun*, October 8, 2013. Available online at <http://www.vancouversun.com/business/Mulgrew+Land+Conservancy+files+creditor+protection/9013417/story.html>.

<sup>20</sup>Brubaker, Elizabeth, *Property Rights in Defence of Nature*, Earthscan Books, 1998.

<sup>21</sup>CTV, "Landowners Group Whips up Frenzy of Property Rights Claims," July 9, 2011. Available online at <http://www.ctvnews.ca/landowners-group-whips-up-frenzy-of-property-rights-claims-1.667890>.

<sup>22</sup>"Policies and Procedures for Conservation Authority Plan Review and Permitting Activities," May 2010. Available online at [http://www.web2.mnr.gov.on.ca/mnr/water\\_erb/CALC\\_Chapter\\_Final\\_Apr23\\_Final.pdf](http://www.web2.mnr.gov.on.ca/mnr/water_erb/CALC_Chapter_Final_Apr23_Final.pdf). Section 21 states that municipalities must acquire property before regulating it. E.F. Marshall, "Conservation Authorities: the Legislator's Intent," Ontario Landowners Association, October 2013. Available online at <http://store.ontariolandowners.ca/wp-content/themes/shopperpress/thumbs/CATLI.pdf>; Also see E.F. Marshall "Planning Ontario: the History and the Intent," Ontario Landowners Association, March 2014.

<sup>23</sup>Forest, Alison, interview with Laura Legge, Treasurer of the Law Society of Upper Canada. "I was concerned about the core courses in the law schools that were not being taught. And I'm still concerned about it. And my one concern, and it's an ongoing concern, is the lack of teaching of equity and legal history. And I tried very hard to do something about it." Interview in the *Law Society Journal*, Treasurers' Interviews, Law Society of Upper Canada, July 6, 2004. Available online at [http://www.lsuc.on.ca/uploadedFiles/PDC/CR\\_and\\_A/Virtual\\_Archive/LAURA%20LEGG%20TRANSCRIPTS\(1\).pdf](http://www.lsuc.on.ca/uploadedFiles/PDC/CR_and_A/Virtual_Archive/LAURA%20LEGG%20TRANSCRIPTS(1).pdf).

<sup>24</sup>Georgian Bluffs v. Moyer, 2011 ONSC 2481, Court File no: 09-079, Date: 2011-04-19; Mark Barnfield v. Niagara Peninsula Conservation Authority – lack of warrants; Dawson Hill v. Rideau Valley Conservation Authority – all charges dismissed due to lack of warrants for photos taken by airplane; Michael Erland v. Rideau Valley Conservation Authority – all charges dismissed due to lack of warrants for photos taken by airplane; Jason Loraine v. Rideau Valley Conservation Authority – co-charged with Michael Erland – all charges dismissed as with Erland.

<sup>25</sup>Interview series with Elizabeth Marshall, October 2013.

<sup>26</sup>Constitution of Canada, the *BNA Act*, 1867, its Interpretation, etc., p. 209.

<sup>27</sup>Interview, Marshall, op cit.

<sup>28</sup>Hansard, Ontario Legislature, March 22, 1948, p. 448-451.

<sup>29</sup>Durack, Ruth, "Village Vices: The Contradiction of New Urbanism and Sustainability," *Places*, November 2001. Available online at <http://places.designobserver.com/feature/village-vices--the-contradiction-of-new-urbanism-and-sustainability/780/>.

<sup>30</sup>Quoted in M. Mitchell Waldrop, *Complexity: The Emerging Science at the Edge of Order and Chaos*, Simon and Schuster, 1992, p. 333.

<sup>31</sup>Durack, op. cit.

<sup>32</sup>At present 572 acres.

<sup>33</sup>Waldrop, 234.5. Charles Waldheim, "Park = City? The Downsview Park Design Competition," in *Landscape Architecture* 91:3 March 2001, 82.

<sup>34</sup>Hume, Christopher, "Federal Takeover of Downsview Park Sends Plan Back to Drawing Board," *The Star*, March 22, 2013. Available online at [http://www.thestar.com/news/gta/2013/03/22/federal\\_takeover\\_of\\_downsview\\_park\\_sends\\_plan\\_back\\_to\\_drawing\\_board\\_hume.html](http://www.thestar.com/news/gta/2013/03/22/federal_takeover_of_downsview_park_sends_plan_back_to_drawing_board_hume.html).

<sup>35</sup>Durack, op. cit.

<sup>36</sup>Moving from Presumption to Proof: The Future of Regulations. Conference booklet, p. 11. Available online at <http://mercatus.org/sites/default/files/Mercatus-Regulation-Conference-Booklet.pdf>.

<sup>37</sup>Thomas, Diana, The Effects of Regulation on Low-income Households, testimony before the House Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, United States Congress, Hearing on the "Regulatory Accountability Act of 2013," July 9, 2013.

<sup>38</sup>Ibid.

