



**Journal of Environmental
Law and Practice**

Published in Association with
The Law Foundation of Saskatchewan and
The University of Saskatchewan College of Law

THOMSON
—★—™
CARSWELL

Canada's "Forgotten Forests": Or, How Ottawa is Failing Local Communities and the World in Peri-Urban Forest Protection

Stepan Wood*

The forests found in Canada's rapidly expanding urban fringes have been decimated by agricultural settlement and urban growth, yet they have been largely overlooked in Canadian forest policy debates. While these "peri-urban" forests fall mainly under provincial jurisdiction, this paper argues that the federal government has the authority and opportunity to negotiate a more active role for itself in this area. The paper assesses the federal government's track record of international commitments and domestic action on peri-urban forests, canvassing developments in six policy areas: general principles; forest conservation and management; biodiversity and endangered species; land securement and ecological gifts; climate change; and sustainable cities. In all these areas the federal government's international commitments relevant to peri-urban forests have been modest and its actions at home disappointing. The paper calls for a substantially enhanced federal role in peri-urban forest protection, with an emphasis on national coordination, strategic leadership and funding.

Même si l'établissement de fermes et la croissance urbaine ont décimé les forêts situées en périphérie des zones urbaines canadiennes, qui sont en rapide expansion, ces forêts ont quand même été pour la plupart oubliées dans le cadre du débat canadien sur les politiques forestières. Bien que ces forêts périurbaines soient généralement de compétence provinciale, on soutient dans cet article que le gouvernement fédéral a le pouvoir et la possibilité de se négocier un rôle plus actif dans ce domaine. On étudie les résultats obtenus par le fédéral relativement à ses engagements internationaux et à ses actions à l'interne en ce qui concerne les forêts périurbaines, tout en examinant les développements dans le cadre de six domaines stratégiques : les principes généraux; la conservation et la gestion des forêts; la biodiversité

* Associate Professor, Law Faculty Coordinator, LL.B./M.E.S. Joint Program, Osgoode Hall Law School, York University. I thank Neil Brooks, Stewart Elgie, Nina Hewitt, Melissa Jort, Anastasia Lintner, Leonard Munt, two anonymous JELP reviewers and the participants in the First JELP Environmental Law Conference, Saskatoon, June 4-5, 2004, for valuable feedback on earlier drafts of the article. Michelle Campbell and Michelle Dagnino provided indispensable research and editorial assistance. Any errors or omissions remain my sole responsibility.

et les espèces en danger; l'acquisition de terrains et les dons écologiques; les changements climatiques; les villes durables. Dans tous ces domaines, les engagements internationaux qui ont été pris par le gouvernement fédéral à l'égard des forêts périurbaines ont été modestes et les actions qu'il a entreprises, décevantes. On réclame au fédéral, dans cet article, qu'il joue un rôle plus important dans la protection des forêts périurbaines, surtout sur les plans de la coordination nationale, du commandement stratégique et du financement.

The forest symbolizes Canada. Covering nearly half the Canadian landscape, some 418 million hectares, forests are integral to our environment, economy, culture, traditions and history. They are critical to realizing our aspirations as a society and as a nation.¹

There has been a limited recognition of a growing "rural-urban" landscape, often dominated by small woodlots. The peripheral forest rings around urban centres are largely owned by "acreage" owners whose prime objective is to retain their natural forest community. . . . [T]hese forests have often been called "forgotten" forests.²

1. INTRODUCTION

This paper is about certain forests that have been largely neglected in contemporary Canadian forest policy debates: the highly fragmented forest remnants found in the agricultural hinterlands and suburban peripheries of many of Canada's rapidly growing cities. These "peri-urban" forests have been devastated by more than two centuries of agricultural settlement, economic growth and urbanization. Only a small fraction of the original forest cover remains in most areas that were opened to agricultural settlement.³ What were once immense, continuous forest tracts have been reduced to small, scattered forest fragments in many urban,

1 Government of Canada *et al.*, *Canada Forest Accord 1998-2003* (May 1, 1998), available online at: <<http://npsc.forest.ca/accords/accord2.html>>, (last accessed July 5, 2004).

2 David Neave *et al.*, *Canada's Forest Biodiversity: A Decade of Progress in Sustainable Forest Management* (Ottawa: Canadian Forest Service, 2002) at 31, available online at: <http://www.nrcan-rncan.gc.ca/cfs-scf/science/biodiversity/index_e.html> (last accessed July 5, 2004) [*Canada's Forest Biodiversity*].

3 In York Region, Ontario, for example, forest cover decreased from 90% to 18% of the total area since European settlement. Regional Municipality of York, *York Region Official Plan: Office Consolidation* (Newmarket: Regional Municipality of York, 1999) at 12 (copy on file with author). This is comparable to other previously forested areas of Canada that were opened to agricultural settlement. The maximum forest loss typically occurred in the late nineteenth or early twentieth century, with forest cover rebounding somewhat thereafter as some marginal agricultural lands were abandoned. See *e.g.*, Canada Man and Biosphere Program, *Landscape Changes at Canada's Biosphere Reserves* (Toronto: Environment Canada, 2000) at 42-46, 30-33 and 50 (describing historical forest cover changes near Riding Mountain, Manitoba; Long Point, Ontario; and Mont St. Hilaire, Quebec).

dons écologiques; les chantiers, les engagements fédéral à l'égard des forêts entreprises, décevantes. On plus important dans la pro-a coordination nationale, du

alf the Canadian landscape, our environment, economy, realizing our aspirations as a

ural-urban" landscape, often t rings around urban centres e objective is to retain their often been called "forgotten"

een largely neglected in e highly fragmented for- ls and suburban periph- ies. These "peri-urban" centuries of agricultural Only a small fraction of at were opened to agri- continuous forest tracts gments in many urban,

1-2003 (May 1, 1998), available last accessed July 5, 2004). *ade of Progress in Sustainable* (2002) at 31, available online at: http://www.ec.gc.ca/ty/index_e.html (last ac-

ased from 90% to 18% of the y of York, *York Region Official* (Municipality of York, 1999) at 12 ously forested areas of Canada n forest loss typically occurred st cover rebounding somewhat ned. See e.g., Canada Man and *sphere Reserves* (Toronto: Eng historical forest cover changes d Mont St. Hilaire, Quebec).

suburban and agricultural areas of Canada. In many places the rate of loss of forest cover has increased in recent decades, and even where total forest area has remained steady or increased in recent years this has often been accompanied by increased fragmentation and decreased interior forest area.⁴

The continuing fragmentation, degradation and loss of peri-urban forests have a range of negative impacts, including loss and degradation of wildlife habitat and movement corridors; increased exposure of forest species to hunting, predation, disease and invasive species; genetic isolation of forest species, which may lead to local extirpation unless species are able to disperse among forest fragments; increased soil erosion, surface runoff and flooding; impaired water and air quality; loss of shade; increased extremes of local temperatures; loss of game animals and other forest-related products; and loss of recreational, aesthetic and spiritual amenities.

The plight of peri-urban forests in Canada has been known for decades. Nonetheless, it has not excited public attention the same way that the fate of "wild" forests has. Contemporary public debates on forests in Canada centre on the large wilderness tracts that symbolize, for many Canadians, unspoiled nature and Canada itself. As a result large, relatively "wild" forests and the activities affecting them, such as large-scale commercial logging, mineral extraction, hydroelectric projects, wilderness road building and recreational development, tend to dominate the forest agenda while the problem of small-scale, continual and pervasive degradation of highly fragmented forest remnants in heavily populated, already massively altered peri-urban landscapes tends to be overlooked. Peri-urban forests are Canada's "forgotten" forests.⁵

In this article I examine a largely neglected aspect of this more or less forgotten problem: the role of federal and international laws, policies, institutions and programs in peri-urban woodland protection efforts in Canada. I argue that we should "think globally" about local peri-urban woodland protection efforts, by considering the ways in which local efforts are helped or hindered by federal and international laws, policies and programs. The paper is structured as follows. In Part 2 I survey briefly the range of local-level woodland protection initiatives, the main features

4 In Ontario's Niagara Escarpment Biosphere Reserve, for example, total forest cover increased from 43% in 1976 to 44% in 1995, but in the same period the number of forest patches and the variation in shapes and sizes of forest patches both increased while interior forest area (usually defined as >100 m from forest edge) decreased from 50% to 39% of the total forest area, *ibid.* at 21-28.

5 *Canada's Forest Biodiversity*, *supra* note 2 at 31.

of the provincial legal and policy frameworks within which these initiatives are pursued and the main obstacles to such initiatives. I then argue that the federal government has the authority and opportunity to negotiate an active role for itself in this area even if the main constitutional authority over forest issues remains with the provinces. Part 2 closes with a brief discussion of how forest issues have appeared on policy agendas at the international and national levels, emphasizing the fact that these agendas tend to ignore the particular challenge addressed by this paper: how to protect and enhance fragmented, mostly non-commercially-managed forest lands in rapidly urbanizing areas of advanced industrialized countries.

In Part 3 I evaluate critically the federal government's track record of international commitments and domestic actions on peri-urban forests. This survey is intended, first, to be a useful guide for municipalities, local conservation groups, landowners and others to the international and federal legal and policy initiatives that might have an impact, positive or negative, on local peri-urban forest protection efforts, and second, an exposé showing that the federal government has failed both Canadians and the international community in this area. In the conclusion I argue for a substantially enhanced federal role in local peri-urban forest protection focussed on national coordination, strategic leadership and funding.

2. LOCAL WOODLAND PROTECTION EFFORTS IN CONTEXT

Struggles over the fate of peri-urban forests are played out largely at the local level. Municipal governments, conservation authorities, local community groups, landowners, real estate developers, chambers of commerce, environmentalists, campers, hunters, foresters, First Nations, provincial government officials and other actors struggle and cooperate over the fate of particular patches of forest. This occurs in a range of relatively localized arenas including municipal land-use planning processes, local news media and community organizations. I will briefly survey some of the tools that have been used in local peri-urban forest protection before considering the provincial, federal and international legal and policy contexts for such initiatives.

(a) Greening Locally: Local Forest Protection Efforts

Municipal governments and other actors have experimented with a wide range of tools for protecting or enhancing peri-urban forests. Tra-

within which these initiatives. I then argue an opportunity to negotiate in constitutional authority Part 2 closes with a brief on policy agendas at the fact that these agendas ed by this paper: how to commercially-managed for- industrialized countries. Government's track record ons on peri-urban forests. e for municipalities, local he international and fed- e an impact, positive or efforts, and second, an as failed both Canadians n the conclusion I argue peri-urban forest protec- leadership and funding.

EFFORTS IN

are played out largely at rvation authorities, local opers, chambers of com- esters, First Nations, pro- uggle and cooperate over rs in a range of relatively planning processes, local ll briefly survey some of forest protection before nal legal and policy con-

Efforts

ave experimented with a ; peri-urban forests. Tra-

ditional land-use planning tools such as official plans, zoning bylaws and subdivision controls have been used to set and (to a lesser degree) imple- ment goals for peri-urban forest protection in many communities. Tree bylaws, which many municipalities have had on the books for decades, have been revived in some places to protect peri-urban tree stands against cutting. Some municipalities have also enacted bylaws restricting or pro- hibiting development of wildlife habitat, woodlands, stream corridors or other environmentally sensitive or naturally significant areas.⁶ Many have experimented with public education campaigns, forest inventory pro- grams, tree planting programs, "road tree" maintenance programs, tree designation programs (in which citizens "adopt" individual trees) and programs to promote sustainable forestry. Landowners, municipalities and conservation groups have also employed a range of tools to secure legal interests in forest lands, including conservation easements, land trusts, leases and outright transfers of title.⁷ Finally, numerous munic- ipalities have adopted comprehensive strategies setting out guiding vi- sions, policies and objectives for protection and enhancement of green lands.⁸

(b) The Provincial Context

These local forest protection initiatives exist in a broader legal and policy context which consists, for the most part, of provincial law and policy. The provinces have exclusive jurisdiction over forest resources, property and civil rights in the province as well as all matters of a "merely local or private nature."⁹ Land use planning, urban development, munic- ipal government and forest management are all generally understood to be matters of provincial jurisdiction. Municipal governments are creatures of provincial law. Whatever they seek to do in the field of forest protection, their authority must be found in provincial legislation. In addition to specific powers to protect environmentally sensitive areas, provincial

6 The authority to enact such measures is found in numerous provincial planning statutes. See *e.g.*, *Planning Act*, R.S.O. 1990, c. P.13, s. 34.

7 See *e.g.*, York Region's *Land Securement Strategy*, adopted April 12, 2001, available online at: <<http://www.region.york.on.ca/Services/Environmental/Greening+Strategy/LandSecurementStrategy.htm>> (last accessed July 5, 2004).

8 See *e.g.*, Regional Municipality of York, *Greening Strategy* (Newmarket, Ontario: Regional Municipality of York, 2001), available online at: <<http://www.region.york.on.ca/Services/Environmental/Greening+Strategy/default+greening+strategy.htm>> (last accessed July 5, 2004).

9 *Constitution Act, 1867*, ss. 92A, 92(13) and 92(16), respectively.

planning statutes typically give municipalities general authority to make bylaws for health and welfare within their territories.¹⁰ In its landmark *Spraytech* decision of 2001, the Supreme Court of Canada upheld a municipal bylaw banning the cosmetic use of pesticides within municipal boundaries as a valid exercise of such “general welfare” powers.¹¹ The Court ruled that general welfare powers authorize municipalities to regulate environmental and public health matters provided that such regulation is genuinely aimed at health or welfare within the municipality and does not conflict with valid provincial or federal laws.

The *Spraytech* decision gave a substantial boost to municipal environmental protection powers. The Supreme Court reaffirmed the proposition, found in several of its earlier decisions,¹² that environmental protection is a “fundamental value” in Canadian society and requires action by all levels of government.¹³ The majority also endorsed several other propositions with direct relevance to local environmental decision-making: first, that laws should be made and implemented at the level of government that is as close as possible to the citizens affected by such laws, consistent with effective law-making (the principle of subsidiarity);¹⁴ second, that courts must respect the judgments of elected municipal bodies about matters related to health, welfare and environmental protection within municipal boundaries and “exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils”;¹⁵ and third, that local governments should be empowered to

10 See e.g., *Municipal Government Act*, S.A. 1994, c. M-26.1, ss. 3(c) and 7; *Local Government Act*, R.S.B.C. 1996, c. 323, s. 249; *Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225, ss. 232 and 233; *Municipalities Act*, R.S.N.B., c. M-22, s. 190(2), First Schedule; *Municipal Government Act*, S.N.S. 1998, c. 18, s. 172; *Cities, Towns and Villages Act*, R.S.N.W.T. 1988, c. C-8, ss. 54 and 102; *Municipal Act*, R.S.O. 1990, c. M.45, s. 102; *Cities and Towns Act*, R.S.Q. 2003, c. C-19, s. 410; *Municipal Act*, R.S.Y. 1986, c. 119, s. 271.

11 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241. The bylaw prohibited all outdoor pesticide use within town limits except when applied in swimming pools and golf courses or for crop protection, drinking water purification or control of dangerous animals or plants. Such measures are known as “cosmetic” pesticide bans because they ban the use of pesticides for cosmetic purposes, i.e., purposes unrelated to human health, safety, agriculture or horticulture.

12 See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 16-17; *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at 1075-1076; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 at 293-297.

13 *Spraytech*, *supra* note 11 at 248-49.

14 *Ibid.* at 249.

15 *Ibid.* at 261-62, quoting *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 at 244.

general authority to make
ritories.¹⁰ In its landmark
t of Canada upheld a mu-
sticides within municipal
d welfare” powers.¹¹ The
ize municipalities to reg-
provided that such regu-
within the municipality and
d laws.

boost to municipal envi-
urt reaffirmed the propo-
² that environmental pro-
ciety and requires action
so endorsed several other
ronmental decision-mak-
emented at the level of
citizens affected by such
e principle of subsidiar-
ents of elected municipal
nd environmental protec-
e caution to avoid substi-
ns for those of municipal
should be empowered to

5.1, ss. 3(c) and 7; *Local Govern-
t*, S.M. 1996, c. 58, C.C.S.M. c.
M-22, s. 190(2), First Schedule;
Cities, Towns and Villages Act,
ct, R.S.O. 1990, c. M.45, s. 102;
Municipal Act, R.S.Y. 1986, c. 119,

Hudson (Town), [2001] 2 S.C.R.
within town limits except when
crop protection, drinking water
s. Such measures are known as
pesticides for cosmetic purposes,
ture or horticulture.

Minister of Transport, [1992] 1
S.C.R. 1031 at 1075-1076; *R. v.*

Vancouver (City), [1994] 1 S.C.R.

exceed provincial or national environmental standards.¹⁶ Finally, the ma-
jority endorsed the “precautionary principle” of international law, which
says that where there are threats of serious or irreversible damage, one
need not wait for scientific certainty before taking action to anticipate and
prevent environmental degradation.¹⁷

Emboldened by the *Spraytech* decision, many Canadian municipali-
ties have enacted bylaws banning cosmetic pesticide use. Many have also
relied on their “general welfare” powers to regulate industrial waste dis-
charges into local sewers, require pollution prevention plans from local
firms, regulate or ban smoking in public restaurants and bars and address
a variety of other environmental and public health issues.¹⁸

A range of other provincial laws and policies also have a substantial
impact on local peri-urban woodlands. Provincial governments may su-
pervise or take control of local land use decision-making in various ways,
for instance through provincial planning policies, provincial approval of
official plans, creation of special planning areas (*e.g.* for the Niagara
Escarpment in Ontario), designation of ecologically sensitive areas or
areas of natural or scientific interest, and creation of parks, conservation
areas or other protected areas. Provincial forestry, mining, agriculture,
environmental protection and endangered species protection statutes and
regulations may have significant effects on peri-urban woodland protec-
tion efforts, controlling how certain businesses may operate and certain
lands may be used. Finally, of course, there is the power of the purse.
Provincial governments have a high degree of influence over the financial
resources available to municipal governments and other actors for local
woodland protection. Provincial governments set budgets and priorities
for environment, natural resources, agriculture, municipal affairs and
finance ministries, conservation areas and provincial parks. Provincial
laws and policies determine how municipalities may use property and
other local tax revenues, for instance authorizing property tax credits for
protection of environmentally significant lands¹⁹ or limiting municipali-
ties’ ability to offer tax incentives for brownfields redevelopment. Pro-
vincial governments determine, to a large degree, both the responsibilities
of municipal governments and the resources available to them to fulfill
these responsibilities and pursue their own priorities.

16 *Spraytech*, *supra* note 11 at 261-262.

17 *Ibid.* at 266-67.

18 See *e.g.*, City of Toronto, *Municipal Code*, c. 681, art. I, adopted by By-law No. 457-
2000, *Sewer Use By-law* (July 6, 2000).

19 See *infra*, note 89 and accompanying text.

From the perspective of peri-urban forest protection, this framework of provincial laws and policies is both a help and a hindrance. In certain respects these provincial laws and policies foster or enable such initiatives, for instance by giving municipalities broad "general welfare" powers or providing special tools to designate and protect forest areas. In other respects they hinder and constrain local-level woodland protection initiatives, for instance by reinforcing a pro-development culture, removing decision-making authority from local communities or reducing municipalities' financial resources. On one hand, it is fair to say that provincial laws and policies confer on municipal governments the legal powers and practical tools they need to pursue a wide range of environmental protection objectives, including peri-urban woodland protection. On the other hand, in many places, municipal governments and local community members find it exceedingly difficult to translate these powers and tools into lasting and effective protection of peri-urban forest patches.²⁰ As one municipal forester complained, even the atypical "best-case scenario" of peri-urban forest protection "provides little grounds for optimism about the ability of local governments to ensure long-term woodland protection."²¹

One prominent obstacle is the persistence of a development-oriented culture among professional planners and in provincial administrative tribunals responsible for reviewing local planning decisions. A related obstacle is the tendency for municipal governments to see themselves primarily as service providers and only secondarily as environmental stewards or guardians of the public interest. The existence of powerful economic incentives for municipal governments to favour urban development, in the form of increased property tax revenues, is another obstacle. Often these tendencies are reinforced by provincial government policies that encourage urban sprawl, uncontrolled demographic growth and a service-delivery culture, while discouraging environmental stewardship and citizen activism.²² Finally, there is the general political climate of fiscal restraint and devolution. Since the early 1980s governments throughout the industrialized world have advocated balanced budgets, reduced public spending and delegation of responsibility to lower-level

20 Leonard Munt, former York Region Forestry Coordinator, personal communication, February 2000.

21 Melissa Jort, "Who Speaks for Trees in York Region? The Decline of Urban Forests and the Limits of Local Government," written submission to Federation of Ontario Naturalists' *Southern Ontario Woodlands E-Symposium* (October 2001) (copy on file with author).

22 Ibid.

protection, this framework and a hindrance. In certain or enable such initiatives, "general welfare" powers or protect forest areas. In other woodland protection initiatives or removing municipalities or reducing municipal fair to say that provincial limits the legal powers and of environmental protection. On the other and local community membership powers and tools into forest patches.²⁰ As one al "best-case scenario" of sounds for optimism about g-term woodland protec-

f a development-oriented vincial administrative tri- decisions. A related ob- ts to see themselves pri- darily as environmental he existence of powerful is to favour urban devel- :venues, is another obsta- vincial government pol- demographic growth and vironmental stewardship eral political climate of rly 1980s governments icated balanced budgets, onsibility to lower-level

ator, personal communication,

he Decline of Urban Forests and
Federation of Ontario Natural-
ober 2001) (copy on file with

authorities. Many municipal governments have found themselves saddled with substantially increased responsibilities at the same time that they have seen their resources reduced. In this climate serious local woodland protection initiatives, along with many other projects aimed at enhancing environmental quality and public welfare, have seemed out of reach to many communities. Although there are indications that this dual trend of "downloading" and budget cutting may have slowed or changed course since the late 1990s, municipal governments throughout Canada remain seriously strapped for cash.

To summarize, increasing numbers of municipal governments and other local interested parties are pursuing a range of innovative strategies to protect and enhance peri-urban forest fragments in southern Canada. They are pursuing these strategies in the context of a complex local and provincial policy framework which, on one hand, provides them with a relatively strong suite of powers to pursue their forest protection objectives but, on the other hand, inhibits the successful realization of these objectives in many ways.

(c) Thinking Globally: What do Federal and International Law and Policy Have to Do with It?

The purpose of the preceding discussion was not to examine the provincial legal and policy framework in any detail, but to lay the groundwork for asking a question that has been largely ignored in discussions of local-level forest protection efforts, namely: what have the federal government and international law got to do with local efforts to protect or enhance peri-urban forests in Canada?

The federal government makes a point of insisting that forest management is not its responsibility.²³ Certainly, its role in governing forests is indirect, but it is not insignificant. The provinces have ownership of forest resources and exclusive jurisdiction over land use planning and municipal government, among other things, but the constitutional division of powers in matters related to forests and environmental protection is complicated, giving federal and provincial (and, to an increasing extent, aboriginal) governments a fair amount of room to negotiate their respective roles.

23 See e.g., Natural Resources Canada, *The State of Canada's Forests 2002-2003: Looking Ahead* (Ottawa: Natural Resources Canada, 2003) at 6 [*State of Canada's Forests*].

As the Supreme Court has said repeatedly, environmental protection cuts across many different areas of constitutional responsibility.²⁴ The federal government's role in peri-urban forest protection could be grounded in numerous constitutional heads of power. In heavily settled urban and agricultural areas, the remaining forest cover is often concentrated around water bodies, rivers and streams. This presents two possible constitutional bases for federal involvement in peri-urban forest protection. First, the federal government's exclusive jurisdiction over fisheries²⁵ gives it authority to promote or require forest protection insofar as forest protection is aimed at protection of fish or fish habitat.²⁶ Second, the federal government's exclusive jurisdiction over navigation and shipping²⁷ gives it authority over activities in the peri-urban forest that threaten navigable waters.²⁸

Third, the federal government's exclusive jurisdiction over criminal law²⁹ provides the constitutional foundation for some of the federal government's most important environmental legislation, including those relating to toxic substances and endangered species, and could support an enhanced federal role in peri-urban forest protection.³⁰ Fourth, the pervasive threats to peri-urban forests might arguably be considered matters of "national concern" supporting federal intervention under its residual Peace, Order and Good Government power.³¹ This is, however, an uncer-

24 See e.g. *Hydro-Québec*, *supra* note 12 at 286; *Oldman River*, *supra* note 12 at 63-64.

25 *Constitution Act, 1867*, s. 91(12).

26 The federal government has frequently used the fisheries power to regulate forest-related activities such as logging, mining, road building and hydroelectric projects, insofar as such activities threaten fish or fish habitat. See *Fisheries Act*, R.S.C. 1985, c. F-14, ss. 35, 36; *R. v. Northwest Falling Contractors Ltd.*, [1980] 2 S.C.R. 292; *R. v. Fowler*, [1980] 2 S.C.R. 213.

27 *Constitution Act, 1867*, s. 91(10).

28 The federal government regulates a range of activities that affect navigable waters, including the construction and operation of bridges and dams. See *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22.

29 *Constitution Act, 1867*, s. 91(27).

30 Toxic substances are regulated under the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33. The previous version of this Act was upheld under the criminal law power by the Supreme Court. See *Hydro-Québec*, *supra* note 12. The federal government has also said that the criminal law power is the main constitutional basis for its new federal *Species At Risk Act*, S.C. 2002, c. 29. In *Hydro-Québec* at *supra* note 12 at 296-297, the Supreme Court held that environmental protection and fulfillment of Canada's international obligations are "legitimate public purposes" at which federal criminal law may validly be directed.

31 *Constitution Act, 1867*, s. 91; see also Peter W. Hogg, *Constitutional Law of Canada*, 2004 Student Edition (Toronto: Carswell, 2003) at 433-464. Federal regulation of ocean pollution has been upheld on the basis of "national concern." *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

environmental protection
 onal responsibility.²⁴ The
 rest protection could be
 power. In heavily settled
 est cover is often concen-
 This presents two possible
 peri-urban forest protec-
 jurisdiction over fisheries²⁵
 protection insofar as forest
 ish habitat.²⁶ Second, the
 ver navigation and ship-
 i-urban forest that threaten

jurisdiction over criminal
 r some of the federal gov-
 lation, including those re-
 ies, and could support an
 tection.³⁰ Fourth, the per-
 bly be considered matters
 vention under its residual
 his is, however, an uncer-

River, *supra* note 12 at 63-64.

is power to regulate forest-related
 hydroelectric projects, insofar as
ies Act, R.S.C. 1985, c. F-14, ss.
 80] 2 S.C.R. 292; *R. v. Fowler*,

es that affect navigable waters,
 nd dams. See *Navigable Waters*

Environmental Protection Act, 1999,
 s upheld under the criminal law
 note 12. The federal government
 constitutional basis for its new
 -*Québec* at *supra* note 12 at 296-
 tion and fulfillment of Canada's
 s" at which federal criminal law

, *Constitutional Law of Canada*,
 464. Federal regulation of ocean
 concern." *R. v. Crown Zellerbach*

tain and controversial proposition and might be considered an impermis-
 sible invasion of provincial jurisdiction.³² Fifth, the federal government
 has the constitutional authority to require environmental assessments of
 proposed projects, programs or policies that involve federal funds, federal
 lands or federal regulatory approvals.³³ This power can be and has been
 used to require environmental assessments of logging operations, hydro-
 electric dams, highways and other projects that affect forests.

Sixth, one could argue that the federal government's exclusive au-
 thority to conduct international affairs and conclude international trea-
 ties,³⁴ while not altering the constitutional division of powers, gives it the
 responsibility to exercise national leadership to ensure that Canada's
 international commitments are implemented. Taking this a step further,
 one could argue that the federal government has a general responsibility
 (or at least opportunity) to provide national leadership in environmental
 protection and promote the upward harmonization of provincial policies
 around high standards. Seventh, the federal government has the authority
 to tax and spend³⁵ and may use this power to pursue a wide range of policy
 goals, even if they affect matters within provincial legislative jurisdiction.
 The power of the federal purse may be employed to support or discourage
 a wide range of activities affecting peri-urban forests, as the federal
 government deems fit.

Finally, other possible bases for a federal role in peri-urban forest
 protection include the federal government's responsibility for the national
 economy and interprovincial trade,³⁶ national parks and other federal

32 Courts have opined that environmental problems tend to be diffuse and widespread and that treating the environment as a "national concern" would give the federal government potentially unlimited regulatory power while effectively gutting provincial jurisdiction. See *e.g.*, *Crown Zellerbach*, *ibid.* at 455-456 (per La Forest J, dissenting); *Oldman River*, *supra* note 12 at 72 (per La Forest J.).

33 *Oldman River*, *supra* note 12 at 44.

34 *Constitution Act, 1867*, s. 132.

35 *Ibid.* at ss. 91(3) (taxation) and 91(1a) (spending power).

36 *Ibid.* at s. 91(2).

lands,³⁷ aboriginal issues,³⁸ federal works and undertakings³⁹ and canals and harbours.⁴⁰ In short, the answer to "what have the feds got to do with peri-urban forest protection in Canada?" is, potentially, a great deal. They have the power and opportunity to negotiate an active role for themselves in this area even if the main authority over forest issues remains with the provinces.

(d) Forests in the National and International Spotlight

Forests and deforestation have received a great deal of attention both nationally and internationally in recent years. These issues figured prominently in the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, better known as the Earth Summit. Global forest protection has continued to be the subject of intense and controversial international negotiations since then, with Canada taking a leading role in negotiations toward an international forest treaty. Forest management practices have received increasing attention in connection with global climate change as governments argue over the extent to which, and how, sequestration of carbon by forests should be counted toward countries' greenhouse gas emission reduction commitments. Forest protection is also widely recognized as an integral element of biodiversity and endangered species protection, which are the subject of numerous international agreements.

Perhaps the most important limitation of recent international forest protection initiatives from the point of view of the present paper is that they tend to ignore the challenge of peri-urban forests in industrialized countries: how to protect and enhance fragmented, mostly non-commercially-managed forest lands in rapidly expanding, highly developed urban fringes. Instead, attention has focussed mainly on large-scale commercial forest management practices, wilderness conservation, preservation of

37 While federal forest lands are substantial, they represent a very small portion of the forest lands that are the subject of this paper. The vast majority of forests in urban, suburban and agricultural areas of Canada are found on municipal, provincial or privately owned lands. As a result, while they will be important in some individual cases, federal lands are not expected to play a major role in urban and peri-urban forest protection in general.

38 *Constitution Act, 1867*, s. 91(24). While some urban and peri-urban forests are found on Reservation lands and aboriginal land claims cover an even larger area of urban, suburban and agricultural Canada, aboriginal legal issues are beyond the scope of this paper.

39 *Constitution Act, 1867*, ss. 91(29), 92(10). Federal works include interprovincial shipping lines, canals, railways, telecommunication lines and highways.

40 *Ibid.* at s. 108.

undertakings³⁹ and canals
ive the feds got to do with
entially, a great deal. They
active role for themselves
st issues remains with the

spotlight

reat deal of attention both
hese issues figured prom-
on Environment and De-
he Earth Summit. Global
ct of intense and contro-
h Canada taking a leading
st treaty. Forest manage-
tion in connection with
r the extent to which, and
be counted toward coun-
tments. Forest protection
it of biodiversity and en-
ect of numerous interna-

acent international forest
the present paper is that
forests in industrialized
ed, mostly non-commer-
; highly developed urban
n large-scale commercial
rvation, preservation of

a very small portion of the forest
ty of forests in urban, suburban
l, provincial or privately owned
: individual cases, federal lands
ban forest protection in general.
peri-urban forests are found on
n larger area of urban, suburban
nd the scope of this paper.
include interprovincial shipping
ways.

forest-dwelling indigenous and peasant communities, international trade
in forest products and massive deforestation in developing countries.

The same is true of federal forest policy in Canada. As I hope to show
in the remainder of this paper, while the need for sustainable forest man-
agement has galvanized considerable activity at the federal level, peri-
urban forests remain largely invisible in federal forest policy.

3. THE FEDERAL GOVERNMENT'S TRACK RECORD ON PERI-URBAN FORESTS

In this section I critically evaluate the main international commit-
ments the federal government has made and the main actions it has taken
at home relevant to peri-urban forest protection. This exercise has two
objectives: first, to survey the international and federal legal and policy
initiatives that might either facilitate or constrain such local efforts, and
second, to show that the federal government has, on the whole, failed
Canadians and the international community in peri-urban forest protec-
tion. In short, while Canada has been a leader in seeking international
agreements on forests and deforestation, neither Canada nor the interna-
tional community has paid much attention specifically to the issue of peri-
urban forest fragments in industrialized countries. Where Canada has
made commitments relating to peri-urban forests on the international
stage, its actions to fulfil these commitments at home have been wanting.
Finally, even setting aside its international commitments, the federal gov-
ernment has done much less than it could do to provide meaningful support
for local peri-urban forest protection. The discussion is organized around
six subject areas: general principles; forest management and conservation;
biodiversity and endangered species; land securement and ecological
gifts; climate change; and sustainable cities.

(a) General Principles

The 1992 Earth Summit produced an unprecedented global consensus
and action plan for sustainable development. The general principles of

the Earth Summit, as embodied in the Rio Declaration⁴¹ and Agenda 21,⁴² are reflected in almost every recent environmental protection initiative, whether local, national or international. The federal government committed itself publicly to these principles at Rio and has reiterated its commitment to them repeatedly in international instruments and domestic policy pronouncements. These general principles range from an entitlement to a healthy environment⁴³ and an obligation to protect the environment for the benefit of future generations,⁴⁴ to the integration of environmental protection into all development decisions⁴⁵ and recognition of the vital role of local governments and local communities in the achievement of sustainable development.⁴⁶ When it comes to putting these principles into action, Agenda 21 specifically calls on countries to make the financial commitments necessary to give effect to its provisions.⁴⁷

While the Rio Declaration and Agenda 21 are not technically binding legal documents, they have some value to local forest protection initiatives. The Rio principles tend to be simple, elegant propositions that make effective slogans, attract near-universal agreement and allow mobilization of widespread support for particular initiatives. They are often incorporated as guiding principles in environmental policies and programs in both the private and public sectors and at all levels, from local to international. Furthermore, Canada and other countries put a great deal of effort into

-
- 41 The Rio Declaration on Environment and Development, in Report of the United Nations Conference on Environment and Development (Rio de Janeiro, June 3-14, 1992), Annex I, U.N. Doc. No. A/CONF.151/26 (Vol. I) (August 12, 1992), available online at: <<http://www.igc.apc.org/habitat/agenda21/rio-dec.html>> (last accessed July 5, 2004).
- 42 Agenda 21: Programme of Action for Sustainable Development, in Report of the United Nations Conference on Environment and Development (Rio de Janeiro, June 3-14, 1992), Annex II, U.N. Doc. No. A/CONF.151/26 (Vol. I-III) (August 12, 1992), available online at <<http://www.igc.apc.org/habitat/agenda21/index.html>> (last accessed July 5, 2004).
- 43 Rio Declaration, *supra* note 41, Principle 1.
- 44 *Ibid.* at Principle 3.
- 45 *Ibid.* at Principle 4.
- 46 *Ibid.* at Principles 20-22; Agenda 21, *supra* note 42 at Chapters 23-32. Other principles endorsed in the Rio Declaration include the precautionary principle (Principle 15), the polluter pays principle (Principle 16), public participation and access to information (Principle 10), environmental impact assessment (Principle 17), elimination of unsustainable patterns of production and consumption (Principle 8), and responsibility to cooperate to protect and restore the health and integrity of the Earth's ecosystem (Principle 7).
- 47 Although the bulk of the discussion of finances is aimed at developing countries, the developed countries, including Canada, committed themselves to maximize the availability of new and additional resources, use all available funding sources and mechanisms, facilitate increased voluntary contributions through non-governmental channels, make use of economic and fiscal incentives, and otherwise make the financial commitments necessary to give effect to Agenda 21. Agenda 21, *supra* note 42 at para. 33.2.

aration⁴¹ and Agenda 21,⁴² environmental protection initiative, federal government commitment to Rio and has reiterated its instruments and domestic principles range from an entitlement to protect the environment to the integration of environmental concerns⁴⁵ and recognition of the interdependencies in the achievement of putting these principles into practice. Efforts to make the financial provisions.⁴⁷ These are not technically binding international forest protection initiative and propositions that make them relevant and allow mobilization of resources. They are often incorporated into policies and programs in both national and international. A great deal of effort into

ment, in Report of the United Nations Conference on Environment and Development (Rio de Janeiro, June 3-14, 1992), Annex I (1992), available online at: <<http://www.unep.org/press/press.htm>> (last accessed July 5, 2004).
 Development, in Report of the United Nations Conference on Environment and Development (Rio de Janeiro, June 3-14, 1992), Annex I (1992), available online at: <<http://www.unep.org/press/press.htm>> (last accessed July 5, 2004).

Chapters 23-32. Other principles include: the right to a healthy environment (Principle 15), the right to participation and access to information (Principle 17), elimination of unsustainable consumption and production (Principle 8), and responsibility to protect the Earth's ecosystem (Principle 2). Efforts to maximize the availability of environmental resources and mechanisms, including non-governmental channels, make them relevant and allow mobilization of resources. A note 42 at para. 33.2.

negotiating the Rio Declaration and Agenda 21 and accepted them as solemn political commitments: commitments both to endorse the principles enshrined in these documents and to take concrete action to implement those principles in law and policy. Actors interested in local forest protection can employ these documents to assess the federal government's performance and to press the federal government into more effective action to honour its international commitments.

(b) Forest Management and Conservation

Forest management and conservation is the policy area that would appear to be the most relevant to peri-urban forest protection efforts. At both the domestic and international levels, however, the challenge of protecting and enhancing peri-urban woodlands has been overshadowed by other pressing issues such as large-scale deforestation, clear-cut logging, desertification and so on. National and international forest policy have, at best, paid lip service to peri-urban forests.

(i) International Commitments

The Canadian government has participated in or committed itself to numerous international initiatives for forest management and conservation. Of these, only Agenda 21 recognizes the problem of peri-urban forests. Chapter 11 of Agenda 21 is devoted to forests. This Chapter acknowledges that loss and degradation of forests through conversion to other land uses have serious adverse environmental, social and economic impacts and that the current situation demands urgent action to conserve and sustain forests.⁴⁸ Specifically, it encourages the "development of urban forestry for the greening of urban, peri-urban and rural human settlements for amenity, recreation and production purposes and for protecting trees and groves."⁴⁹ More generally, it calls on governments to protect and rehabilitate all forests, sustain and expand areas under forest and tree cover, prevent uncontrolled conversion of forests to other land uses, develop and implement national forestry action programs and promote public education and participation in forest management and protection.⁵⁰ The chapter calls on national governments to cooperate with

48 Agenda 21, *supra* note 42 at paras. 11.10 and 11.11.
 49 Ibid. at para. 11.13(h).
 50 Ibid. at paras. 11.3, 11.11-11.13.

local communities to achieve these goals.⁵¹ These commitments show clearly that Canada and the international community recognized forest fragmentation and loss in urban and peri-urban settings as a pressing global problem.

Unfortunately, this consensus has not been translated into concerted international or national action on this problem, as governments have focussed their efforts on large-scale commercial forestry issues and the intense challenges facing forests in developing countries. The 1992 Forest Principles, also adopted at Rio, are a good example.⁵² These are a set of hortatory principles intended to guide forest management and protection around the world. They are stated in general, abstract terms and tend to emphasize each country's sovereign right to determine its own forest policies. The document makes no mention of urban or peri-urban forests, although it states some general principles that might support peri-urban forest protection.⁵³

International negotiations on forest management and conservation have continued in various multilateral fora since the Earth Summit.⁵⁴ Canada has taken a leading role in this area, advocating the adoption of a legally binding multilateral forest treaty. The specific issue of peri-urban

51 See *e.g.*, *ibid.* at para. 11.13.

52 Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (The Statement of Forest Principles), in Report of the United Nations Conference on Environment and Development (Rio de Janeiro, June 3-14, 1992), Annex III, U.N. Doc. No. A/CONF.151/26 (Vol. III) (August 14, 1992), available online at <<http://habitat.igc.org/agenda21/forest.htm>> (last accessed July 5, 2004).

53 The document declares, for example, that national-level policies and strategies should provide a framework for increased efforts for the management, conservation and sustainable development of forests and forest lands; that all countries, especially developed countries, should take action to "green" their landscapes through reforestation, afforestation and forest conservation; that forests should be managed sustainably to meet the social, economic, ecological and spiritual needs of present and future generations; that forest management should be integrated with the management of adjacent areas; and that the vital role of forests in maintaining ecological processes at local, national and global levels should be recognized. *Ibid.* at Principles 2(b), 3(a), 4, 8(a) and (b).

54 Such fora include the Intergovernmental Panel on Forests, the main forum for negotiation toward a multilateral forest agreement from 1995 to 1997; the Intergovernmental Forum on Forests, which continued the IPF process from 1997 to 2000; the United Nations Forum on Forests, which was established in 2000 to continue the IPF/IFF process; the Montreal Process, an intergovernmental forum formed in 1994 to develop criteria and indicators for the conservation and management of temperate and boreal forests; the 2002 World Summit on Sustainable Development, which devoted one section of its Plan of Implementation to forests; and the G8 group of leading economies (of which Canada is a member), which launched a forest action program in 1998 to implement some IPF recommendations.

These commitments show a community recognized forest in settings as a pressing

translated into concerted effort, as governments have addressed forestry issues and the countries. The 1992 Forest Principles.⁵² These are a set of management and protection abstract terms and tend to determine its own forest ban or peri-urban forests, might support peri-urban

management and conservation since the Earth Summit.⁵⁴ Advocating the adoption of a specific issue of peri-urban

principles for a Global Consensus on Management of All Types of Forests (United Nations Conference on Environment and Development, 14, 1992), Annex III, U.N. Doc. E/CN.IYD/1992/2, available online at <<http://habitat.un.org/doc/undocfr/undocfr.asp?docID/1992/2>> (2004).

These policies and strategies should include management, conservation and sustainable use in all countries, especially developed countries through reforestation, afforestation and managed sustainably to meet the needs of present and future generations; that management of adjacent areas; and that strategies at local, national and global levels, 4, 8(a) and (b).

IPF, the main forum for negotiation since 1977; the Intergovernmental Forum on Forests (1977 to 2000); the United Nations Conference on Environment and Development (1992) to continue the IPF/IFF process; the Intergovernmental Panel on Forests (1994) to develop criteria and indicators for sustainable forest management; the 2002 World Summit on Sustainable Development (WSSD) adopted one section of its Plan of Action (Johannesburg Plan of Action) for sustainable forest management (SFM) in the context of sustainable development (of which Canada is a leader) in 1998 to implement some IPF

forest protection has, however, been overlooked almost completely in international forest negotiations since Rio.

(ii) *Federal Action*

The federal government has developed several programs relating to sustainable forestry. These programs concentrate on gathering and disseminating forest data and supporting forest-related science and technology. In general they provide little direct support to on-the-ground forest protection initiatives. Moreover, as with international initiatives, these programs focus overwhelmingly upon commercial forestry and wilderness forests rather than non-commercially-managed forest fragments. This focus is understandable given the importance of the forest industry to the Canadian economy,⁵⁵ but it ignores the needs of urban and rural residents whose primary goal is not to manage a commercial timber harvest but to protect and enhance the diminishing forest fragments in their communities.

A. The National Forest Strategy

Canada was among the first countries to develop a national forest plan. The current *National Forest Strategy 2003-2008*⁵⁶ is the fifth in a series of plans dating back to the 1980s. It was developed by a coalition of federal and provincial government officials, forest scientists, industry, aboriginal groups and civil society organizations. While the focus of the National Forest Strategy has evolved over the years to include non-commercial forest interests, the emphasis remains on ensuring the sustainability and economic viability of the commercial forest sector and forest-based communities. Until recently, peri-urban forests featured only tangentially, but there is now some reason to hope that they will be recognized as strategic priorities.

55 Canada's forest product exports were valued at \$39.7 billion in 1998, the largest in the world. The forestry sector accounts for 877,000 jobs (1 out of every 16 jobs in Canada), generating over \$11 billion in wages. Approximately 377 communities in Canada depend on forestry. Government of Canada, *Action Plans of the Federal Government in Response to the National Forest Strategy* (Ottawa: Government of Canada, 1999) at 1 [*Federal Action Plans 1998-2003*].

56 National Forest Strategy Coalition, *National Forest Strategy (2003-2008), A Sustainable Forest: The Canadian Commitment* (April 23, 2003), available online at <<http://nfscc.forest.ca/strategy.html>> (last accessed July 5, 2004) [*National Forest Strategy 2003-2008*].

The current Strategy concentrates on eight strategic themes: ecosystem-based forest management (including maintenance of forest biodiversity); sustainable forest-based communities; accommodation of aboriginal rights; diversification of the forest industry; enhancement of forest science and technology; active engagement of the public; commercial viability of private woodlots; and creation of a national forest reporting system. As with previous Strategies, the emphasis remains on commercial forestry, large forest tracts and communities economically dependent on forests. A few portions of the Strategy are, however, directly relevant to peri-urban forests. The current Strategy for the first time recognizes urban forests as a strategic priority and defines the urban forest broadly enough to include some peri-urban forests. Private woodlots, many of which are found in peri-urban settings, also feature prominently in the Strategy. Finally, some elements of the Strategy, including those dealing with ecosystem-based management and biodiversity, are tangentially relevant to peri-urban forests although this connection is seldom recognized explicitly.

Implementation of the Strategy is up to each of the signatories, acting within its own powers and responsibilities. In this section I assess the federal government's implementation of the portions of the National Forest Strategy most directly relevant to peri-urban forest protection. Unfortunately, at the time of writing the federal government had not yet released its action plans for implementing the current Strategy.

Urban Forests

The most promising innovation in the current National Forest Strategy is the inclusion of urban forests as a strategic priority.⁵⁷ In response to sustained pressure from municipalities and non-governmental groups, the Strategy recognizes that "The forest is not confined to rural or wilderness areas, but is also found within municipal boundaries. Eighty percent of Canadians live in or near the urban forest. This forest is the major connection between them and the forest's environmental benefits and services. . ."⁵⁸ The Strategy sets out several action items related to urban forests, the most important of which are to develop and implement a national urban forestry strategy, to develop guidelines and tools to help municipalities maintain and enhance their urban forest, to develop guidelines and tools to protect surrounding forests and watersheds from urban

57 Ibid. at 19-20.

58 Ibid. at 4.

strategic themes: ecosystem maintenance of forest biodiversity; accommodation of aboriginality; enhancement of forest of the public; commercial national forest reporting remains on commercial economically dependent on never, directly relevant to first time recognizes urban forest broadly enough woodlots, many of which are prominently in the Strategy. Including those dealing with , are tangentially relevant is seldom recognized ex-

of the signatories, acting in this section I assess the portions of the National peri-urban forest protection. The government had not yet current Strategy.

the National Forest Strategy priority.⁵⁷ In response to governmental groups, the need to rural or wilderness daries. Eighty percent of forest is the major environmental benefits and services items related to urban develop and implement a defines and tools to help forest, to develop guided watersheds from urban

pollution, and to identify unique and threatened habitats in and near municipalities and develop and implement strategies to ensure their conservation.⁵⁹

Implementation of these action items has barely begun. Consultations toward a national urban forest strategy are just getting underway. The federal role in the development and implementation of such a strategy is as yet unclear. Whether and to what extent the strategy will focus on peri-urban forests is also unclear, although "urban" forests are discussed in broad enough terms in the National Forest Strategy to include peri-urban forests. It may still be possible for interested parties to urge both an active federal role and the inclusion of peri-urban forests in the urban forest strategy. As to development of guidelines and support tools to help municipalities protect surrounding forests and unique habitats, these action items present an opportunity for municipalities and other actors to urge the federal government to exercise some leadership and initiative in this long-neglected policy area.⁶⁰

Private Woodlots

While private woodlots account for only 6% of Canada's forest area, they make up a significant portion of the peri-urban forest.⁶¹ They have been on the national forest agenda for years, mainly because of the serious economic difficulties faced by many private woodlot businesses.⁶² The main objective of the current and previous National Forest Strategies for private woodlots has been to ensure their economic viability. Among other things, the current Strategy calls on its signatories to create incentives for environmental protection on private woodlots, expand educational programs for woodlot owners and remove obstacles to sustainable private woodlot development with particular attention to market incentives, silviculture programs and tax policies.⁶³

59 Ibid. at 20 (Action Items 6.1, 6.2, 6.3 and 6.7).

60 Such leadership and initiative might include nationwide collection and dissemination of information on best practices, enhanced support for peri-urban forest research, and, most importantly, substantial new federal funding for local-level woodland protection efforts.

61 While 94% of Canada's forest lands are publicly owned, the private woodlots that make up the remaining 6% are concentrated in the agricultural, suburban and urban areas of southern Canada. *National Forest Strategy 2003-2008*, *supra* note 56 at 21.

62 See e.g., *National Forest Strategy 2003-2008*, *ibid.* Strategic Theme 7; National Forest Strategy Coalition, *National Forest Strategy, 1998-2003: Sustainable Forests—A Canadian Commitment*, available online at: <<http://nfsc.forest.ca/strategy.html>> (last accessed July 5, 2004), Strategic Theme 8.

63 *National Forest Strategy 2003-2008*, *supra* note 56 at 22.

The federal government has taken a narrow view of its own role in this area, opining that "private forestry is not a federal jurisdiction or responsibility."⁶⁴ It has set modest goals and its implementation of these goals has been half-hearted. Its main action has been to offer modest income tax incentives to woodlot owners. In 1999, in response to the previous National Forest Strategy, the Canada Customs and Revenue Agency (CCRA) issued an interpretation bulletin to clarify existing federal income tax rules applicable to private woodlots.⁶⁵ The bulletin offered no new incentives for sustainable woodlot management.

The two principal taxation issues addressed by the bulletin are the deductibility of woodlot-related expenses and the taxation of capital gains. Without going into detail, only expenses related to *commercial* woodlots are deductible; expenses related to woodlots that are not operated with a reasonable expectation of profit are not deductible.⁶⁶ As for commercial woodlots, expenses related to commercial tree *farms* are treated more favourably than those related to commercial *non-farm* woodlots,⁶⁷ while the deductibility of commercial tree farm expenses is limited where the tree farm is not the taxpayer's main source of income.⁶⁸ Woodlot expenses are treated the same as any other business or farming expenses, but because woodlots often take many years to produce income, these rules make some woodlot-related expenses effectively non-deductible. Private woodlot owners have lobbied the federal government without success to relax these rules and enhance the deductibility of woodlot expenses.

The CCRA's interpretation bulletin also clarifies the rules regarding taxation of capital gains on woodlot properties. Woodlots are generally subject to the same capital gains rules as other properties. Commercial

64 *Federal Action Plans 1998-2003*, *supra* note 55 at 19.

65 Canada Customs and Revenue Agency, Interpretation Bulletin IT 373R2, "Woodlots" (July 16, 1999), available online at <<http://www.ccr-a-adrc.gc.ca/E/pub/tp/373r2et/i373r2e.html>> revised by Canada Customs and Revenue Agency, Release IT 373R2-PR1, "Woodlots" (February 21, 2001), available online at <<http://www.cra-arc.gc.ca/E/pub/tp/it373r2-consolid/README.html>> (last accessed July 5, 2004) [IT 373R2].

66 *Ibid.* at ¶ 11. IT 373R2 clarifies the factors the CCRA will use to determine whether a woodlot is operated with a reasonable expectation of profit. *Ibid.* at ¶ 7.

67 The distinction between farm and non-farm woodlots turns on whether the main focus of the woodlot operation is planting, growing, managing, nurturing and harvesting forest stands (farm woodlots) or cutting and removing trees (non-farm woodlots). Farm woodlot expenses may be reported using the cash method while non-farm woodlot expenses must be reported on an accrual basis, often making deduction more difficult. *Ibid.* at ¶¶ 13, 15 and 22. See also Peter W. Hogg, Joanne E. Magee and Ted Cook, *Principles of Canadian Income Tax Law* (3d ed.) (Toronto: Carswell, 1999) at 207-209, 273.

68 *Income Tax Act*, R.S.O. 1990, C.1.2, s. 31; see also Hogg, Magee and Cook, *ibid.* at 417-419.

