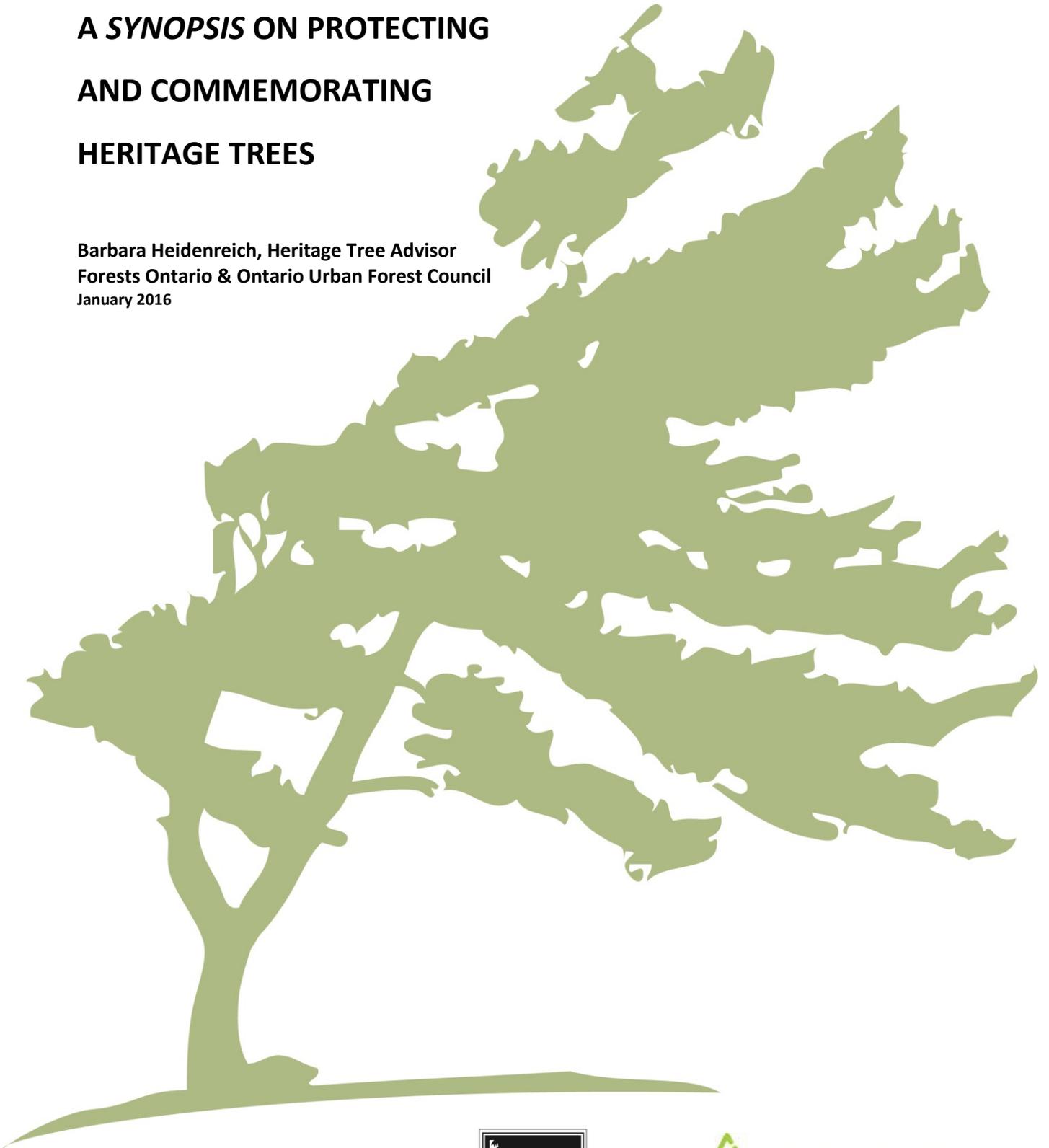


A SYNOPSIS ON PROTECTING AND COMMEMORATING HERITAGE TREES

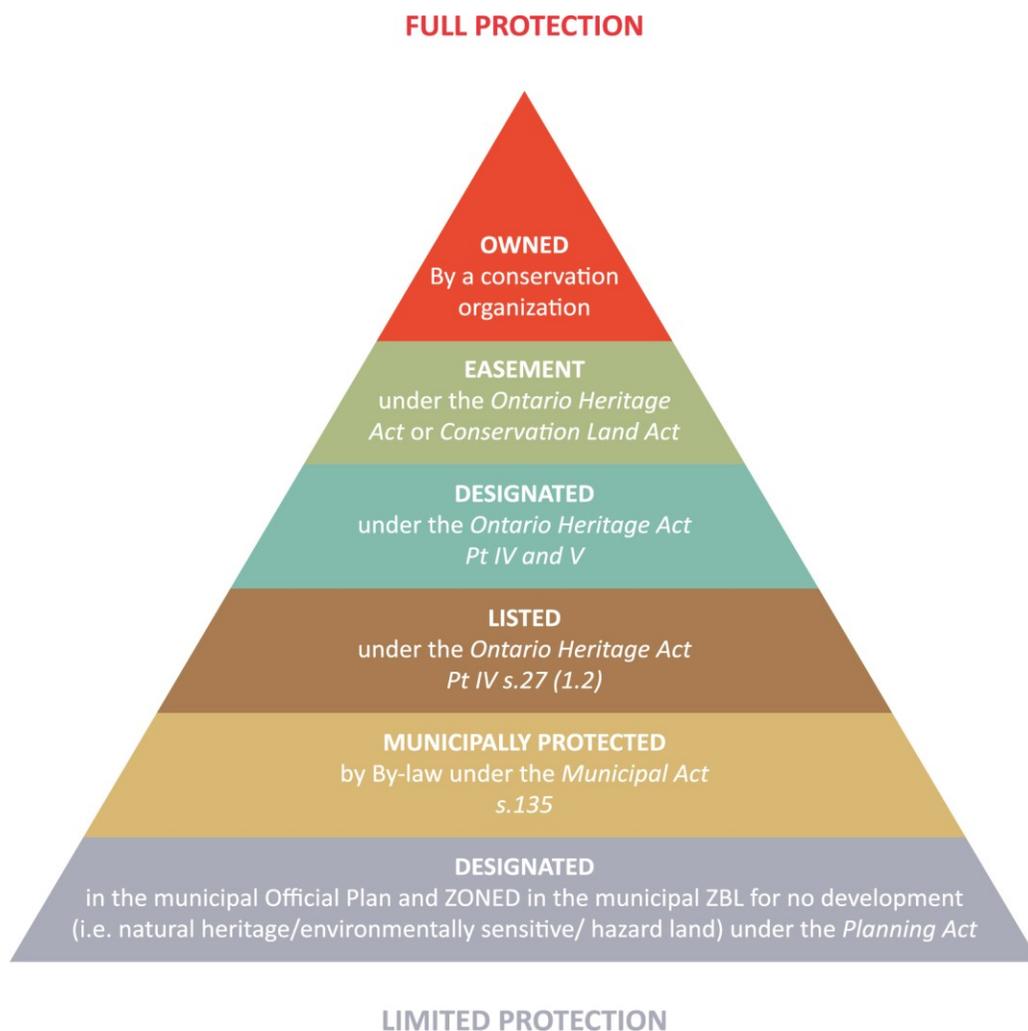
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PROTECTING HERITAGE TREES: A SYNOPSIS

This is a synopsis of "legal" **protection** options for heritage trees (and in some cases natural heritage areas) that moves from a permit to cut process under by-law provisions to full protection in perpetuity by way fee simple ownership by a natural heritage conservation organisation of the land on which the tree(s) is situated.

Heritage Tree PROTECTION Options



Trees and natural heritage areas may be **protected** using certain sections under the *Conservation Land Act (CLA)* <https://www.ontario.ca/laws/statute/90c28> the *Ontario Heritage Act (OHA)*, <https://www.ontario.ca/laws/statute/90o18> the *Planning Act*, <https://www.ontario.ca/laws/statute/90p13> the *Municipal Act*, <https://www.ontario.ca/laws/statute/01m25> . Starting with the highest level of protection...

A. OWNERSHIP by a not-for-profit charitable conservation land trust:

The highest form of protection is by **ownership** in fee simple by a qualified not-for-profit charitable conservation organization such as the Nature Conservancy or a local conservation land trust member of the Ontario Land Trust Alliance <http://olta.ca/> . These land trusts are mandated to preserve "conservation land" in perpetuity under the *Conservation Land Act (CLA)*. The Ontario Heritage Trust (a conservation agency mandated under the *Ontario Heritage Act (OHA)*) also offers this level of protection. A landowner may donate or sell a property to a charitable land trust if it has natural values that meet a land trust's securement/acquisition criteria. A charitable receipt for the land value may be offered by the land trust for a donated property. The landowner might also do a part sale – part donation (known as a "split receipt") of the land on which the tree(s) are situated.

B. CONSERVATION EASEMENT AGREEMENT

- (1) may be held by a Conservation Authority, municipality or local land trust (under the *CLA*), or
- (2) may be held by the Ontario Heritage Trust or municipality (under the *OHA*)

A **conservation easement agreement** is a legal instrument registered on title containing agreed to terms and signed by both the landowner and a qualified conservation organization. It is written to protect the natural features on the property but maintains the property in private ownership. Every easement agreement contains a series of restrictions ("covenants") which bind present *and* future landowners, restricting what they may do on the property. A **conservation easement agreement** can specify that there will be no destruction of any tree or no destruction of qualifying heritage trees. It could also specify positive obligations upon the owner to apply good heritage tree stewardship principles in tree care. The **conservation**

easement agreement is registered on title, providing "*in perpetuity*" protection of cultural/natural features on the property but the property remains in private ownership and can be sold with the covenants on title applying to all future owners. No public access to the land is implied when this tool is used. This protection cannot be revoked except by mutual consent of both parties which requires extraordinarily good reasons simply to open discussions. Monitoring and enforcement rests with the organization that holds the conservation easement agreement and a clause in the Agreement gives the organization access to the land (through an 'easement' provision) to enable monitoring to ensure compliance by the current and future landowners. As monitoring and enforcement can be costly, an endowment or stewardship funds is often sought by the organization holding the Agreement, to help defray future expenses in administration.

It is under the authority of the *Conservation Land Act*, R.S.O. 1990 that a 'conservation body' (as defined under *CLA* Section 3. (1)) such as a watershed Conservation Authority, or local not-for-profit charitable land trust may hold a ***conservation easement agreement*** over land in order to protect natural features such as the significant trees on the property. Again, ownership of the land remains with the owner of the land and this protection Agreement will be registered on the property title and rides with the property, binding all future land owners in perpetuity.

The Ontario Heritage Trust receives its power under the *Ontario Heritage Act*, R.S.O. 1990 Part II, Section 10(1)(c) and Section 22 which enable it to enter into a voluntary ***conservation easement agreement*** with a willing landowner to protect heritage attributes on a property. A municipality has the same powers under Section 37 of the *OHA* for the conservation of property of cultural heritage value or interest. If a heritage tree met the significant cultural heritage values criteria in the *OHA* Regulations 10/06 <https://www.ontario.ca/laws/regulation/060010> including the definition of "provincial significance" it would be possible to protect the heritage tree(s) using this tool.

C. DESIGNATION under the *Ontario Heritage Act* Part IV s. 29 and V:

The term **designation** has a legal meaning in Ontario in that only a municipal Council or Minister may **designate** cultural/natural heritage property.

C. (1) DESIGNATION by a Municipality under the *Ontario Heritage Act*

Under the *Ontario Heritage Act*, R.S.O. 1990 Part IV, Sections 29 to 34.4, a municipal Council may pass a by-law **designating** the private property on which a "heritage tree" is located. The municipal designation of trees may be initiated in two ways: (a) by request of the owner or (b) by request of a ratepayer to the Municipal Heritage Committee (MHC). The MHC may (but does not always) make a designation recommendation to Council. Under the *Ontario Heritage Act*, permission of the landowner is not required to move forward with designation. The land owner may object and, if the municipality passes the designation by-law, the land owner at that point may appeal the passing of the by-law to the Conservation Review Board operating under the *Ontario Heritage Act*. To be designated, at least one of the criteria outlined in the *OHA Regulations 9/06* shall be met: <https://www.ontario.ca/laws/regulation/060009> . After designation, the tree cannot be destroyed or altered (*OHA*, Section 33, 34) without the written approval of the municipality. It is important that the tree(s) be explicitly referenced in the reasons for designation where the tree is contextual to a heritage building being designated. Otherwise it may be possible for the owner to succeed in an "alteration request" that impacts the tree. However, while **designation** is a form of protection that involves recognition and some security, Council may repeal designation by-laws.

C. (2) DESIGNATION by the Minister under the *Ontario Heritage Act*

Under the *Ontario Heritage Act*, Part IV, Sections 34.5 to 34.9, the Minister of Culture may **designate** properties (permission of the landowner is not required). After designation, the tree, cannot be destroyed or altered unless the Minister consents (*OHA*, Section 34.5 (2)). This is rarely used... but anyone may petition the Minister. The Minister must discuss the request with the Ontario Heritage Trust before making a decision.

C. (3) DESIGNATION of a Heritage Conservation District (a geographic area) that includes specifically mentioned trees:

The *Ontario Heritage Act* allows for the **designation** by municipal by-law (*OHA*, Part V, Section 40.1) of Heritage Conservation Districts (HCD). Trees are generally identified as being a significant heritage feature within the scope of almost every existing Heritage Conservation District in the province. While there may not yet be a HCD that focuses only on trees, that is a possible scenario if the criteria for designation are met. HCDs start with a study (*OHA*, Part V, Section 40). This is a Council initiated study, but if there is a Municipal Heritage Committee, Council has to consult with the MHC (*OHA*, Part V, Section 40(3)). All HCDs are reviewed and approved by the Ministry of Tourism, Culture and Sport, Culture Services Unit. Within the HCD there can be no alteration or destruction of the designated heritage features, i.e. the trees.

D. LISTED under the *Ontario Heritage Act* Part IV s. 27 (1.2):

Under the *Ontario Heritage Act*, Section 27 (1.2), trees can also be **listed** on the municipal Register with or without the landowner's consent if deemed of cultural heritage value. This may afford temporary protection of up to 60 days.

E. MUNICIPALLY PROTECTED under the *Municipal Act*, Section 135 by by-law:

Trees in a municipality may be **protected** on private and public property by Council passing a Municipal Tree By-law under Section 135 of the *Municipal Act* which enables municipalities to pass by-laws that “... *may prohibit or regulate the destruction or injuring of trees*”. Such a by-law may be written to require that a permit to be issued prior to cutting down a tree. The permit may be issued simply on receipt of a fee or a more rigorous process may be required geared to tree protection based for example on the policies of an urban forest management plan which may make the removal of a tree very difficult and subject to conditions (or substantial fines if removed without a permit). A Municipal Tree By-law may include "heritage trees" (which would need to be defined specifically). Trees that qualify as heritage trees would be listed as protected on a Schedule appended to the by-law and be subject to penalties if destruction, alteration/damage violations occur.

OR

A municipality may also pass a stand-alone Heritage Tree Protection By-law under Section 135 of the *Municipal Act*. The by-law would define heritage trees, list those identified in a Schedule or Registry attached to the By-law, and it could specify that the tree cannot be damaged or destroyed and must be maintained using "good heritage tree stewardship practices". The by-law would set out penalties for contraventions. Generally, a by-law amendment requiring public circulation and approval by Council would be required to remove a tree from the Schedule/Registry. Technically this could afford a very high level of protection if the by-law is rigorous and the penalties for violations are high.

F. MUNICIPALLY PROTECTED under the *Planning Act*:

Land use planning is all about stewarding our land and resources. Each community, through their Official Plan process, sets goals on how it will develop and works out ways of reaching those goals while looking after important social, economic and environmental concerns. The interests of individual property owners are balanced with the broader social interests and objectives of the whole community. To help you understand land use planning in Ontario, there are two excellent sources of information available from the internet:

The Municipal Councillor's Guide

(2007) (ISBN 978-0-7794-5489-1 PDF) from <http://www.mah.gov.on.ca/Page5030.aspx>

The Ministry of Municipal Affairs and Housing's *Citizens' Guides to Land Use Planning*

<http://www.mah.gov.on.ca/Page338.aspx>

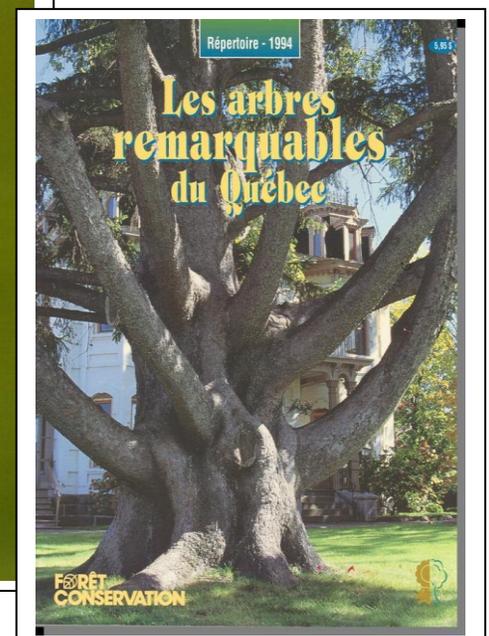
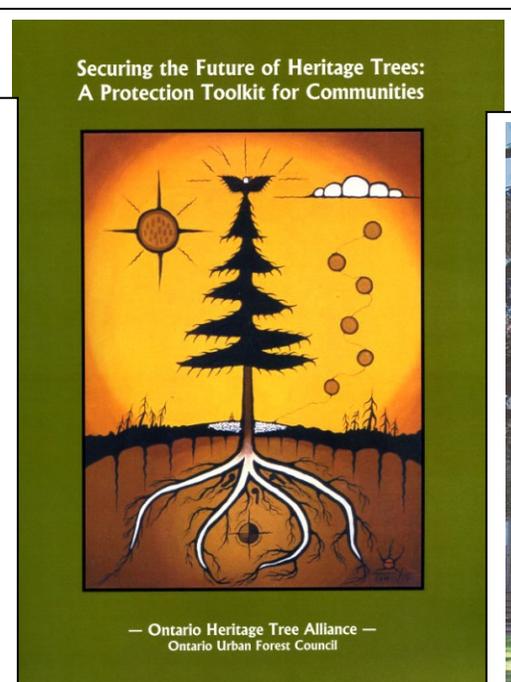
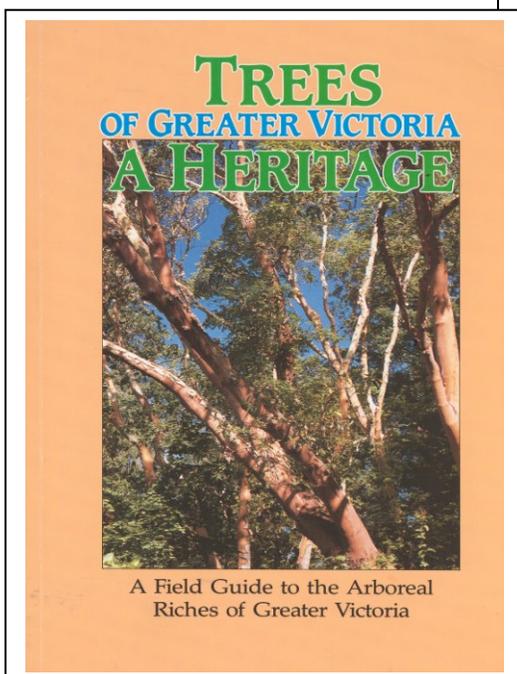
The *Planning Act* itself is available at:

http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p13_e.htm

The *Planning Act* has strong language compelling municipalities to look after their ecological systems and the **minimum** policies that **all** municipal Official Plan policies and schedules must conform with are to be found in the *Provincial Policy Statements, 2014 (PPS)* issued under Part I, Section 3 of the *Planning Act*.

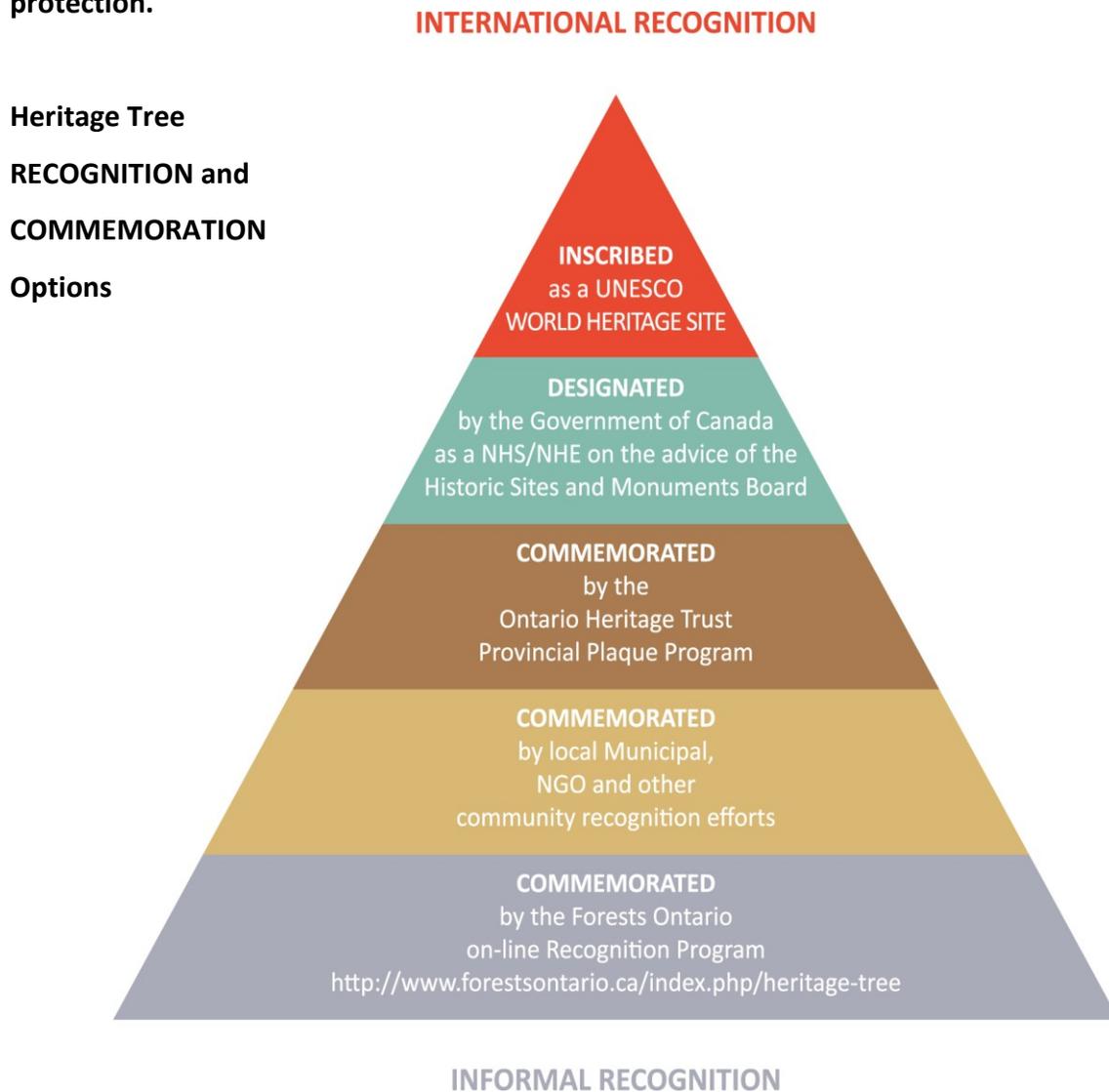
Read Section 2.1 now ! <http://www.mah.gov.on.ca/AssetFactory.aspx?did=10463> . While municipalities have to follow these natural features protection policies in their Official Plans, the PPS protects only the provincial interest and does not preclude municipalities from passing more stringent policies to protect regional and local natural values. Under Part III of the *Planning Act*, municipal Councils are required to prepare an **Official Plan**. The **Official Plan** and its implementing **Zoning By-law** are the most important tools that shape what happens on the ground in your community. Official Plans give a "vision" of how your community will look in the future. If your "vision" has natural areas, forests and heritage trees, make certain that your Official Plan defines them, identifies them and has statements or "policies" which direct Council and residents to act and make decisions in ways that protect these features. Ensure that the Maps/Schedules attached to your municipality's Official Plan "designates" (in this case an official plan term that means defined and 'identified on the map') the location of these natural features as protected. The trees and wooded areas and wetlands need to be recognized and assigned such designations as "environmentally sensitive", "natural heritage protection", "significant woodlands" in order to be protected. There are even protection tools for "trees, shrubs, hedges, plantings or other ground cover" available under the *Planning Act*, in areas subject to site plan control, which are discussed in detail in:

Ontario Heritage Tree Alliance/Ontario Urban Forest Council (OUFC).2011. *Securing the Future of Heritage Trees: A Protection Toolkit for Communities* (Section E. Legislative Tools for Heritage Trees Protection. pp. 129-198)



COMMEMORATING HERITAGE TREES: A SYNOPSIS

The programs below are ways of celebrating heritage trees from broad community based local **recognition** programs, through provincial and federal **commemoration** programs mandated by legislation. Ultimately being inscribed as a UNESCO World Heritage Site might be considered the apex. However, **NOTE: None of these recognition and commemoration options provide protection.**



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Barbara has 45 years experience in the fields of conservation and planning, working with such organizations as the Region of Durham, Canadian Institute for Environmental Law and Policy, Ontario Municipal Board(Member), Trent University, Evergreen, Ontario Heritage Trust, Forests Ontario & Ontario Urban Forest Council (Heritage Tree Advisor).