



UNIVERSITY OF
ALBERTA

ALBERTA LAND INSTITUTE

**A Guide to
Property
Rights
in Alberta**



Alberta Land Institute (ALI) is an independent, non-partisan research institute based at the University of Alberta that connects research and policy for better land management.

ALI conducts and funds interdisciplinary academic research on land-use challenges in Alberta and Canada to develop and evaluate alternative policy options that consider social, economic and environmental perspectives.



TABLE OF CONTENTS

Authors	4
Executive Summary	5
Introduction	7
Part 1: Property Rights in Alberta	8
What are Property Rights?	9
How Does the Common Law Protect Property Rights in Canada?	9
Subsurface Property Rights	10
Are Property Rights Protected in Canadian Law?	12
<i>Private Property and the Charter</i>	13
<i>Canadian Bill of Rights</i>	14
<i>Alberta Bill of Rights and Alberta Personal Property Bill of Rights</i>	14
<i>Property Rights Under International Law</i>	14
Part 2: Taking Property	15
Expropriation	16
<i>How Does Expropriation Happen?</i>	16
<i>Who Determines the Amount of Compensation and How?</i>	17
<i>Principles of Compensation</i>	18
What is a “Regulatory” or “Constructive” Taking?	19
Part 3: Property Rights in Recent Legislation	20
Property Rights and Planning Legislation	21
<i>History of Planning Legislation in Alberta</i>	21
<i>The Land-use Framework</i>	22
<i>Alberta Land Stewardship Act, 2009 (amended 2011)</i>	22
<i>ALSA, Property Rights, and Compensation</i>	23
Clarifications of Subsurface Ownership Rights	26
References	28

ALBERTA LAND INSTITUTE

A Guide to Property Rights in Alberta

Authors

Professor Eran Kaplinsky, Principal Investigator

Professor Eran Kaplinsky teaches in the areas of property law and planning law. He holds a Bachelor of Laws from Tel Aviv University, a Master of Laws from the University of Toronto, and a Doctor of Juridical Science from the University of Toronto. Professor Kaplinsky is also a research affiliate of the City-Region Studies Centre. His teaching and research interests include: land-use planning and regulation, law and economics, municipal law and property law.



Professor David Percy

Professor David Percy became Dean of the Faculty of Law in 2002 and served in this role until 2009. His teaching and research interests are in contracts, construction law and natural resources law, including oil and gas law. He is co-editor of *Contracts: Cases and Commentaries*, now in its seventh edition and used at law schools across Canada. He wrote *The Framework of Water Rights Legislation in Canada*, as well as books on *Wetlands* and *Ground Water*. Professor Percy is also a former President of the Canadian Association of Law Teachers.

The authors thank Kim Precht (University of Alberta J.D., 2013) for her invaluable and enthusiastic research support, and acknowledge their former colleague Professor Russell Brown, now Justice Brown of the Alberta Court of Appeal, for his vital role in developing this project and for his advice in bringing it to fruition. The authors are also grateful to Lee Cutforth, QC, Alberta Property Rights Advocate, and Ted Morton, Executive in Residence, The School of Public Policy, University of Calgary, for their detailed and helpful comments and suggestions.

**This document is not meant as legal advice or opinion.*

Executive Summary

What are Property Rights in Alberta? How are they Protected?

A Guide to Property Rights in Alberta describes the nature and scope of property rights held by landowners in Alberta. It provides the context necessary for an informed discussion about the current state of property rights and protections in the province. The Guide addresses issues of expropriation, the regulation of property rights and compensation. The Guide also describes changes to the property rights framework arising from legislation in the province, including in particular the *Alberta Land Stewardship Act*. This summary provides an overview of the topics covered in the Guide.

Part 1: Property Rights in Alberta

Property rights can be complex and difficult to define. Some legal experts define property as a legally protected expectation to derive an advantage from some resource to the exclusion of others. Landowners typically expect to: use and enjoy their property; develop the property as desired; exclude others from the property; and sell it to whomever they choose – all with minimal interference from the government or others.

While owning property involves a variety of rights, it also confers obligations and liabilities. The scope of these rights and obligations varies from one country to the next and even from one province to the next depending on how the law defines and protects these rights.

The common law recognizes that all Albertans have broad rights to own, use, and enjoy property. But such rights are not unlimited. For example, the law of nuisance prevents landowners from carrying out some activities that may be harmful to their neighbours. The government may also interfere with private property pursuant to legislation. For example, a municipality may pass zoning bylaws that restrict the use and development of land, and may even expropriate private property for public projects.

This part of the Guide describes the nature of property rights in Alberta and includes discussion of how property rights are protected in Canadian law.

Part 2: Taking Property

Expropriation – that is, the outright taking of private land for public purposes – triggers a right to compensation in accordance with the provincial *Expropriation Act*. On the other hand, according to the Canadian case law, if the government regulates private property, but does not acquire the land itself, there is rarely a right to compensation – even if the restrictions are very severe or result in a drastic loss of value. In this sense, Canadian law differs from the law in the United States and some other countries.

This part of the Guide discusses the process of expropriation and principles that govern the payment of compensation to the owner. The section also provides several examples that show when Albertans can expect compensation for restrictions placed on the use of their land.

Part 3: Property Rights in Recent Legislation

The recent growth of the natural resource sector – in a province where over 80 per cent of the population lives in urban centres – has resulted in competition between different land uses. This pressure on land prompted the province to develop the Land-use Framework (2008) and *Alberta Land Stewardship Act* (ALSA; 2009) to achieve long-term economic, social and environmental goals. This section of the Guide discusses some of the implications of this important legislation.

ALSA authorizes Cabinet to adopt regional plans that are legally binding on private lands and every land use authority in the province. A regional plan may restrict a landowner's rights to use or develop land, but as long as some reasonable private use of the property is left to the owner, it is likely that no compensation is payable. On the other hand, if a "conservation directive" to protect or enhance environmental, scenic or agricultural values is employed in an ALSA regional plan, the Act specifically provides a right to compensation to the title holder who is affected by the conservation directive – as if expropriation has taken place. In this regard, the Alberta's legislation is arguably more generous than the law elsewhere in Canada.

In addition to ALSA, the Guide elaborates on other issues surrounding other property legislation in the province involving subsurface and mineral rights.

Introduction

What are property rights in Alberta? How are they protected? These are simple questions, but the answers are surprisingly complex. In 2012, Alberta's Property Rights Task Force Report stated that:

A widely shared view was that property rights in Alberta need to be clearly defined. Indeed, participants had differing views about the extent of property rights that citizens currently have. Some referred to the Magna Carta and the history of common law in making their arguments. There were views expressed that citizens have no inherent right to own property and remain subject to the will of the Crown. Others expressed the belief that citizens might not own property, but still have a set of property rights. Still others said that neither the *Constitution Act, 1867* nor the *Constitution Act, 1982* provide citizens with property rights protections. The *Alberta Bill of Rights* was also mentioned, but again, participants had diverse views about what that document says and means, and whether it affords Albertans sufficient protection.

In light of these varying perspectives, people made the point that "we don't even know what we mean by property rights". This lack of fundamental clarity results in a lack of context, which makes it difficult for the public to have a proper debate on land-related issues and legislation.

Recent changes to the laws dealing with land use and property rights have raised questions about how the government might be able to affect the rights of landowners. The purpose of this guide is to explain as plainly as possible the nature and scope of property rights held by landowners in Alberta and to provide the context necessary for an informed discussion about the current state of property rights and protections in the province. It is a challenge to provide a comprehensive and clear explanation of this topic.

This guide has three main parts. In the first part, *Property Rights in Alberta*, you will find a brief overview of the legal framework within which property rights in Alberta are created and protected. The next part, *Taking Property*, deals with expropriation and regulation of property rights, and the right to compensation. In the final part, *Property Rights in Recent Legislation*, we examine some of the recent changes to Alberta's legal framework for property rights, including resource rights, after providing some historical context.

Part 1:
Property
Rights
in Alberta



Property Rights in Alberta

What are Property Rights?

When we think of property rights, we often think of ownership. This is hardly surprising: the word “property” comes from the Latin word for ownership. But property rights can be complex and difficult to define. Proprietary interests in land include not only ownership of the title to land (known as “fee simple ownership”), but also leases, rights of way, licenses, mineral rights, and more. Some legal experts define property as a *legally protected expectation* to derive an advantage from some resource to the exclusion of others. Owners of land typically expect to have the full use and enjoyment of their property and to be able to develop it with minimal interference from the state or from other. Owners expect also to be able to exclude everyone else from their property and to be able to sell it to whomever they choose and on their own terms. Owning property involves a variety of rights, as well as obligations and liabilities. The scope of these rights and obligations varies from one country to the next, and even from one province to the next, depending on how the law defines and protects these rights.

In Alberta, property and property rights are governed by the common law of Canada and by statutory law. The power of the government over private property, including the power of Parliament and the provincial Legislatures to pass laws regulating private property, is limited by the Constitution of Canada and, to a lesser degree, by Canada’s international obligations (for example, the North American Free Trade Agreement).

How does the common law protect property rights in Canada?

All private land in Alberta is held under a common law grant from the Crown (with the exception of land held under Aboriginal Title, for example, on reserves). The common law

What is the Common Law?

Canada has both “statute law” and “common law”. Statute law, as the name suggests, is legislation passed by federal parliament and the provincial and territorial legislatures. Common law is developed through the decisions of the courts. When the Alberta Court of Appeal decides a point of law, it is binding on trial courts in Alberta. When the Supreme Court of Canada – the nation’s highest court – makes a decision, it is binding on all other courts in Canada.

In the Constitutional division of powers, legislators are responsible for making laws and courts are responsible for interpreting and applying the laws. If legislators are unhappy about how the courts are interpreting or applying the law, they can override them by passing new legislation or amending existing legislation. If there is a conflict between what the common law says and what a statute says, the statute takes priority. Of course, both the courts and legislators must adhere to the Constitution when they interpret or enact laws.

recognizes that all Albertans, as subjects of the Crown, have broad rights to own, use, and enjoy property. But such rights are not unlimited. For example, the law of nuisance prevents landowners from carrying out some activities that may be harmful to their neighbours. The common law also guards property owners against unauthorized government interference. By the same token, pursuant to a valid enactment (legislation) the government may regulate, and even confiscate, private property.



This power is the modern form of the ancient Royal prerogative to take the property of the Crown's subjects, whether for the purpose of defending the realm, or more broadly in the public interest. Legislation allows, for example, a municipality to pass zoning bylaws to restrict the use of land, or a federal authority to expropriate land to expand an airport. The courts will confine government strictly to its statutory powers (and, as a general rule, will resolve any ambiguity in the legislation in favour of the property owner), but they may not question the wisdom of government action. Nor do the courts have any inherent power to direct that compensation be paid to private owners for any loss resulting from legitimate government action.

On the contrary, the courts have held that all compensation claims in Canada for the expropriation of private property are based in statute. When a landowner claims compensation for a taking of property, the courts must determine whether the Legislature intended for the statute authorizing the taking to provide compensation. The courts have ruled that compensation is not only intended when the statute says so expressly, but will also be presumed when the statute is silent on the right to compensation: the Legislature cannot fairly be supposed to intend that private property be confiscated without any compensation being provided, the courts have said. If the Legislature means to authorize a taking without compensation, it must make its intention clear.

Subsurface Property Rights

When we talk about property rights to land, we usually think about the ownership of the surface of the land. At common law, however, ownership of the surface extends to the airspace above and to the subsurface below. Ownership of land even includes the mines and minerals beneath the land with the exception of gold, silver, and any other resource reserved by the Crown. Any interest held by the landowner may be sold. For example, an owner may choose to retain the surface and subsurface, but sell or lease any or all of the minerals.



Early grants from the Dominion to the settlers of what is now Alberta included the mines and minerals. But once the nature and value of the resources underlying Alberta's fields and forests (especially, coal, oil, and gas) became understood, new grants began to except or reserve some or all of the mineral rights. The same became true for grants of land made by the Hudson's Bay Company and the Railway companies, who had acquired extensive land holdings from the government. For example, between 1904 and 1912, the Canadian Pacific Railway (CPR) reserved "coal" or "coal and petroleum" or "coal, petroleum and other valuable stone", before finally reserving all mines and minerals in the transfer of its lands. The unique distribution of mines and minerals rights in Alberta today, reflects these early grants and reservations. Today, the provincial government owns the vast majority (approximately 81 percent) of the mines and minerals in Alberta. Approximately 9% are held by the federal government, mainly in national parks and on Aboriginal lands and military reserves. The remaining 10% of mines and minerals are held under private "freehold" ownership.



A Common Law Framework to Resolve Disputes Over Subsurface Resources

To resolve disputes over title to subsurface resources that arose from the early Canadian Pacific Railway (CPR) land grants, the courts developed common law rules for interpreting the wording in each grant. Consider, for example, a farmer who held the land under a grant in which CPR reserved "coal, petroleum and valuable stone". Who owns the solution gas and the gas cap: the farmer or CPR? The court answered this question in 1953, in a case called *Borys v Canadian Pacific Railway*, establishing a four-part approach that is still used today:

- First, disputes were to be decided by the ordinary (rather than scientific or technical) meaning of the words used at the time of the reservation.
- Based on the ordinary meaning of "petroleum" and "natural gas" in the CPR reservation, the court concluded that petroleum is liquid and natural gas is gaseous.
- CPR reserved petroleum in its original subsurface condition. The ordinary meaning of "petroleum" referred to all hydrocarbons that existed in solution or in liquid form in the reservoir and so CPR owned the solution gas. However, "petroleum" did not include the gas cap, which existed in gaseous form in the reservoir. The farmer owned the cap gas.
- Finally, either the farmer or CPR could extract the resource they owned by ordinary methods—subject to whatever the conservation legislation of the time might require—even if it had a negative impact on the other party's resource.

Legislation and Subsurface Resources

The provincial legislature has enacted multiple statutes clarifying the rights of ownership and access to subsurface resources. Some examples are:

- **Law of Property Act.** Part 7 of the *Law of Property Act* contains important clarifications to mineral titles. It contains a list of substances deemed, where naturally occurring, to be minerals. It also provides that sand, gravel, clay and marl that may be recovered by surface operations are the property of the surface owner, even if mines, minerals, or precious stone have been reserved from the grant generally.
- **Mines and Minerals Act.** The *Mines and Minerals Act* deals with the management and disposition of rights in mines and minerals owned by the provincial Crown, including petroleum and natural gas leases and royalties. The Act also contains important clarifications of subsurface and freehold mineral rights, including ownership of gold and silver, and recent definitions of coalbed methane and pore space (discussed later in this guide).
- **Surface Rights Act.** At common law, the holder of the rights to mines and minerals has a right to access the surface in order to work those interests. This rule has been changed by Alberta legislation many years ago. Now, the *Surface Rights Act* requires an “operator” (a resource company) to obtain the surface owner’s consent prior to entering the surface. If consent cannot be negotiated, then to avoid the risk of sterilization, the resource company can apply to the Surface Rights Board for a right of entry order, and the Board will determine the compensation payable to the surface owner.

The distribution of subsurface resources in Alberta required the courts to develop a common law framework for resolving disputes over the ownership of mines and minerals. Many such disputes are still resolved by the courts this way, case by case. In addition, the legislature has played an important role in defining and clarifying mineral rights and regulating access to the surface by subsurface resource owners. The property rights of Alberta landowners above and below the surface are defined and redefined by legislation and the rulings of the courts as these continue to evolve.

Are Property Rights Protected in Canadian Law?

Canadians are sometimes surprised to learn that the right to property is not afforded the same constitutional protection that exists in other countries such as Australia, India, and the United States. But it is not accurate to say that property enjoys no constitutional protection. The framers of *The Constitution Act, 1867* (originally called the *British North America Act*) followed the British principle of “parliamentary sovereignty” by allocating lawmaking powers to the Parliament of Canada and the provincial legislatures, while incorporating limited checks and balances on government instead of absolute restrictions. These checks and balances included, importantly, dividing jurisdiction over private property: authority over property and civil matters in each province was given to the provinces exclusively, while Parliament was given power over bankruptcy, trade and commerce, copyright, banking, land



Example: The Validity of Recent Pore Space Legislation

In 2010, the government of Alberta amended the *Mines and Mineral Act* by adding the following section: “the pore space below the surface of all land in Alberta is vested in and is the property of the Crown in right of Alberta and remains the property of the Crown in right of Alberta...”. The effect of the legislation is to transfer to the government any private rights that existed in so-called pore space.

If the Act had been silent on the question of compensation, then under the common law principles described above, the right to compensation for the taking would have been implicit in the statute. However, the amendment goes on to expressly deny any compensation, as well as the right to bring action against the government for the taking. In a country where property rights are protected by the constitution, such as in the United States, the amendment would be unconstitutional. But under the principle of parliamentary sovereignty, and within the Canadian constitutional framework, this a valid exercise of government power.

reserved for First Nations, and other important matters. In addition, the Constitution required that legislation be approved by a Senate whose members were appointed and were, at that time, all substantial property owners. Finally, the Constitution gave the executive branch of government (i.e., the Governor General) the power, now largely fallen into disuse, to disallow any Act of the provincial legislatures.

Private Property and the Charter

The *Canadian Charter of Rights and Freedoms* does not directly protect property rights. The *Charter* was enacted as part of the *Constitution Act, 1982*, which affirmed the Constitution as the supreme law of Canada and provided that any law that is inconsistent with the Constitution is of no force or effect. The *Charter* guarantees certain individual rights against intrusion by the state and gives the courts the power to provide a remedy to anyone whose *Charter* rights are denied. For example, section 7 of the *Charter* reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

If property rights had been included in the *Charter*, certain laws restricting or removing property rights would be unconstitutional, and the courts would have been able to strike them down. But property rights were deliberately excluded from the *Charter* (the reasons for this omission are subject to some debate that cannot be summarized adequately in this guide), and subsequent proposals to amend the *Charter* by adding protection for private property have not been successful.

The *Charter* does affect property rights in other ways: section 8 protects individuals from unreasonable search and seizure of their property; section 15 guarantees equality before the law and can be used, for example, to challenge land use regulations that discriminate

based on religion, mental disability, or other protected categories; and section 26 affirms the existence of pre-*Charter* common law and other rights that existed in Canada. In addition, section 35 of the *Constitution Act, 1982* protects Aboriginal rights, including land rights, against state interference.

Canadian Bill of Rights

Canada enacted the *Bill of Rights* in 1960. Like the *Charter*, it recognizes various rights of the individual. Unlike the *Charter*, it protects a right to the “enjoyment of property, and the right not to be deprived thereof except by due process of law.” The *Canadian Bill of Rights* is not a constitutional document, however, but merely a federal statute that applies only to the federal government. Its purely procedural protections can be legally overridden by another Act of Parliament. Furthermore, the courts have held that the due process requirement is satisfied if a law is passed that authorizes the infringement.

Alberta Bill of Rights and Alberta Personal Property Bill of Rights

Enacted in 1972, the *Alberta Bill of Rights* enshrines “the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by the due process of law.” (The 1972 legislation is sometimes confused with the 1946 *Alberta Bill of Rights*, which had significantly different wording, but never came into force.) Like its federal counterpart, the *Alberta Bill of Rights* has a limited scope. It only applies to provincially enacted legislation, and can be overridden by the Legislature. The *Alberta Personal Property Bill of Rights*, enacted in 1999, is another statute that offers certain protections, but does not apply to interests in land.

Property Rights Under International Law

Canada has voluntarily accepted multiple international obligations to protect property rights against intrusion by the government. For example, Canada is a signatory to the 1948 Universal Declaration of Human Rights, which recognizes that “[e]veryone has the right to own property” and provides that “[n]o one shall be arbitrarily deprived of his property”. This obligation is generally accepted as binding in international law, but because it has not been implemented by legislation in Canada, it is not binding domestically. In addition, Canada has entered into Foreign Investment Protection Agreements (FIPAs) with many of its trade partners. Canada is, notably, signatory to the North American Free Trade Agreement (NAFTA) with Mexico and the United States. These trade and foreign investment protection agreements effectively restrict the ability of the parties’ governments to take the property of foreign investors, unless the taking is for a public purpose, on a nondiscriminatory basis, and in accordance with due process of law. They confer protections of property and compensation rights that are broader than those provided under Canadian law, but only to investors protected under each specific agreement.

Part 2: Taking Property



Taking Property

Under Canadian law as it currently stands, the outright taking of private land for public purposes ordinarily triggers a right to compensation in accordance with expropriation legislation. But if the government does not acquire the land, but merely regulates its use, or imposes other restrictions – even if very severe, and even if the result is drastic loss of value – there is rarely a right to compensation. The next two sections address these two different kinds of takings.

Expropriation

Expropriation is the taking of private land without the consent of the owner by the government or by one of its agencies in the exercise of statutory powers. Various provincial enactments authorize expropriation, including the *Municipal Government Act*, *Hydro and Electric Energy Act*, *Post-secondary Learning Act*, *Education Act*, *Irrigation Districts Act*, *Forest Reserves Act*, and others. Every expropriation authorized by the laws of Alberta is subject to the provincial *Expropriation Act*. The *Expropriation Act* sets out the process that must be followed strictly by any expropriating authority and prescribes how the owner must be compensated. The Act applies to the compulsory acquisition of not only the entire (“fee simple”) title, but also leases, rights of way, or other lesser estates or interests short of full ownership. A similar federal Act governs expropriation by the federal government.

How Does Expropriation Happen?

When an expropriating authority decides to acquire private land, it must first notify every person who has an interest in the land it intends to take. The *Expropriation Act* specifies the information that must be included in the notice of intention. The notice of intention must be given either in person or by registered mail, and published at least twice in a local newspaper.

Market Value Compensation

The starting point for computing compensation under the Alberta *Expropriation Act* is the “market value” of the land. Market value is defined in the legislation as “the amount the land might be expected to realize if sold in the open market by a willing seller to a willing buyer”. Another basis for compensation, which has been rejected in Alberta, as in the federal and most provincial expropriation statutes is “value to the owner”, which is defined as what a prudent owner, at the moment of expropriation, would pay rather than being ejected from the property. The market value approach is more objective and therefore regarded as superior. However, the special provisions in the statute are designed to address special circumstances under which a strict market value approach would result in insufficient compensation. For example, section 47 of the Act grants a homeowner additional compensation where it would be necessary to enable the owner to relocate the owner’s residence in accommodation that is at least equivalent to the accommodation expropriated.

Once the notice of intention has been given, interested persons may file a “notice of objection” to the proposed expropriation. They may question whether the taking is fair, sound and reasonably necessary to achieve the objectives of the expropriating authority. For example, an owner might argue that a right of way through his or her land should be narrower than the expropriating authority demanded. They may not, however, dispute the right of the expropriating authority to resort to expropriation, or object to the project itself: a decision to construct a new highway, school, or hospital is political in nature, and is not for a court to decide.

Any notice of objection must be made to the approving authority within 21 days of receiving notice of the intended expropriation. Section 10 sets out the requirements for a notice of objection: it must include the name and address of the person objecting, the nature of the objection, the grounds on which the objection is based, and the nature of the person’s interest in the land in question. If nobody objects to an expropriation within the 21-day period, the proposed expropriation can be approved. But if the approving authority receives a notice of objection, an inquiry officer holds a public inquiry to determine “whether the intended expropriation is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.” The inquiry officer provides a report which the approving authority must consider in its ultimate decision to approve, modify or disapprove the intended expropriation.

The *Expropriation Act* permits Cabinet to approve an intended expropriation without an inquiry only when Cabinet is satisfied that the expropriating authority requires the land urgently and that delay would be prejudicial to the public interest.

Upon approval, the expropriating authority must register its interest and notify the owner that the expropriation will proceed.

Who Determines the Amount of Compensation and How?

The *Expropriation Act* requires the expropriating authority to propose terms of compensation to the owner within 90 days of the approval of the expropriation. The proposed compensation must be based on a written appraisal, a copy of which must also be given to the owner. The owner is entitled to obtain another appraisal and legal advice, at the reasonable expense of the expropriating authority, before deciding whether or not to accept the proposed compensation.

If the owner and the expropriating authority cannot agree on the amount of compensation, the matter can ordinarily be referred to the Land Compensation Board. The Board is a “quasi judicial” (similar to a court) tribunal appointed by the province and has the authority to set compensation. Where the Crown is the expropriating authority, the owner may elect



to have compensation set by the court instead of the Land Compensation Board. In addition, the Surface Rights Board, another tribunal, can set compensation for access to the surface of land for mineral extraction, the installation and maintenance of pipelines and telephone lines, and other prescribed activities. Property owners may appeal a determination of the Land Compensation Board to the Alberta Court of Appeal and a compensation order of the Surface Rights Board to the Court of Queen's Bench.

Principles of Compensation

Where land is expropriated, the compensation to the owner is based on the market value of the land and, depending on the circumstances, damages for disturbance and for injurious affection (devaluation of the owner's remaining land, where only part of his or her land is taken), and the value of any special economic advantage that the owner enjoyed because of occupying the land. The purpose of compensation is to make the owner, as much as possible, "whole". The *Expropriation Act* sets out additional guidelines for assessing compensation for special purpose structures and for compensating business owners, tenants, and holders of security interests. It also sets out various factors that must be disregarded when determining compensation, such as the fact that the expropriation was compulsory, how the land will be used by the expropriating authority, and any changes in the value of the land that are connected with the expropriation proceedings.

Compensation for Land-use Regulation: Examples

Example 1: *Canadian Pacific Railway v Vancouver (City)*. For about a century, the CPR ran a railway crossing the west side of Vancouver. As rail operations declined, CPR asked the City to permit it to develop the abandoned rail corridor for residential and commercial uses, or alternatively, to purchase or expropriate the land. Instead, the City adopted a bylaw which froze all development and limited the use of the land to a public thoroughfare for transportation and "greenways", like heritage walks, nature trails and cyclist paths, effectively preventing CPR from making economic use of its own land.

In 2006, the Supreme Court of Canada ruled that the City was not obligated to compensate CPR, because (1) the City had not acquired "a beneficial interest" related to the land; and (2) the bylaw still allowed for some limited (if uneconomic) private uses of the land. Further, the Vancouver Charter (the City's founding statute) overrode the common law presumption of compensation.

It is uncertain just what the Supreme Court meant when it said that compensation requires an owner to show that the expropriating authority has acquired "a beneficial interest" in the land. While the authority "benefits" when land is used in accordance with its own preferences, the Court did not consider this to be sufficient.

What is a “Regulatory” or “Constructive” Taking?

A public authority pursuant to its statutory powers may regulate the use of land or restrict other property rights of the owner, and although title to the land is unaffected, the landowner may feel the impact of the regulation as acutely as if the land had been expropriated. In the United States and some European countries, the law recognizes a compensable “regulatory taking” where the regulations strip the land of all economic value, or force the owner to suffer a physical intrusion into the land, or are said simply to go “too far”.

This is not the law in Canada. Instead, the principle that the right to compensation must be based in statute means that an owner is not entitled to compensation unless the restrictions of the owner’s rights are so drastic that they should properly be regarded as an effective taking of the land within the meaning of the *Expropriation Act*. This is known as “de facto” or “constructive” taking of land.

The traditional view in Canada, however, has been that there is no expropriation unless the government acquires the title to the land from its owner. The Supreme Court reiterated this view in its 2006 decision in *Canadian Pacific Railway Co. v Vancouver (City)*. In that case it held that a de facto taking requires first, “an acquisition of a beneficial interest in the property or flowing from it”, and second, “removal of all reasonable uses of the property”. The decision leaves the law uncertain as to whether owners must be compensated for a *de facto* taking. The door may be open, in theory, for successful claims in the future, but the threshold is very high and will not be met in the ordinary case.

Compensation for Land-use Regulation: Examples

Example 2: *Alberta Land Stewardship Act*. In accordance with the recent *Alberta Land Stewardship Act* (ALSA), Cabinet may adopt regional plans that are legally binding on private lands and all development approval authorities. A regional plan may curtail the right of a landowner to use or develop his or her land, but as the previous example explains, as long as some reasonable private use of the property is left to the owner, no compensation is payable.

In contrast, where a regional plan places land under a “conservation directive” to protect or enhance environmental, scenic or agricultural values, ALSA confers an express right to compensation to the title holder whose interest or estate is the subject of a conservation directive – as if expropriation has taken place. In this regard, the legislation is generous, compared with other provinces.

Example 3: *Species at Risk Act*. The federal *Species at Risk Act* (SARA) provides another example of the Canadian approach to compensation. Under SARA, where a species has been listed by the federal government as endangered or threatened, no person may destroy any part of its critical habitat. Although the Act authorizes lands use restrictions that can be quite harsh, SARA allows compensation only where the prohibition against the destruction of habitat has an “extraordinary impact”.

Examples 2 and 3 show that in Alberta (as elsewhere in Canada), compensation is available only in accordance with statute.

**Part 3:
Property
Rights in
Recent
Legislation**



Property Rights in Recent Legislation



Property Rights and Planning Legislation

History of Planning Legislation in Alberta

Land use regulations in Alberta date back to the early 20th century. Calgary and Edmonton passed bylaws restricting development as early as 1904 and 1906, respectively. In 1912, the provincial government passed regulations controlling subdivision of land. In 1928, the *Town Planning and Preservation of Natural Beauty Act* was enacted for the purpose of protecting the natural amenities of Alberta's countryside. In 1929, the *Town Planning Act* was passed, which introduced comprehensive zoning regulations of the kind familiar today.

Regional and inter-municipal planning in the province can be traced back to the creation of a Provincial Planning Advisory Board and District Planning Commissions in 1950. Legislative amendments in 1957, and the *Planning Act* of 1963, required all local plans and regulations to conform to the applicable regional plan. The *Planning Act* of 1977 expanded the power of Cabinet to regulate the use of land outside municipal boundaries and, importantly, authorized it to designate any area in the province as a "special planning area" and within that area to prohibit or control directly any use or development of land. The 1977 legislation also gave the province the power to create regional planning areas to be under the jurisdiction of regional planning commissions composed of representatives of the municipalities in the area. The regional planning commissions operated until 1995, when they were disbanded and the regional plans were abolished.

The Land-use Framework

The recent growth of the natural resource sector – in a province where 80 per cent of the population lives in urban centres – has resulted in competition between different land uses, not all properly coordinated. Alberta has faced criticism from at home and abroad over the future of the province’s environment and economy, especially in relation to the development of the oil sands. This is the context in which the province announced in 2005 its intention to create a land-use framework. Following an extensive public consultation process, the government released the *Land-use Framework* in December 2008, identifying seven strategies to achieve the province’s long-term economic, social, and environmental goals:

1. Develop seven regional land use plans based on seven new land use regions;
2. Create a Land Use Secretariat and establish a Regional Advisory Council for each region;
3. Use cumulative effects management at a regional level to manage the impacts of development on land, water and air;
4. Develop a strategy for conservation and stewardship on private and public lands;
5. Promote efficient use of land to reduce the footprint of human activities on Alberta’s landscape;
6. Establish an information, monitoring and knowledge system to contribute to continuous improvement of land use planning and decision-making;
7. Include Aboriginal peoples in land use planning.

By itself, the *Land-use Framework* has no legal authority – it is only a policy document. A year later, the Framework was given legal effect through the Alberta Land Stewardship Act – a legislative framework to support and implement the policies set out in the *Land-use Framework*.

Alberta Land Stewardship Act, 2009 (amended 2011)

The *Alberta Land Stewardship Act* (ALSA), authorizes the provincial Cabinet to establish planning regions and adopt a statutory plan for each region. Seven planning regions have been established corresponding to the natural watersheds in the province. So far, a plan has been formally adopted for the Lower Athabasca region and a draft plan has been prepared for the South Saskatchewan region.

ALSA requires each plan to state the vision and one or more objectives for the planning region. A regional plan may also contain, among other things, land use policies, benchmarks, and actions to be taken. A plan may make or amend regulations under ALSA or other legislation, manage the surface or subsurface of land and any natural resource, authorize expropriation by the Crown, and set fines and penalties for non-compliance. In pursuit of the plan's vision or objectives, it may affect or cancel statutory consents (including permits and licenses) issued under other Acts.

What are “Statutory Consents”?

A statutory consent generally refers to any government grant of the right to use or exploit resources owned by the Crown. The term covers a large variety of government dispositions, including coal leases, licences to use and divert water, timber quotas and other dispositions under the Forests Act, grazing leases and oil and gas leases. The *Alberta Land Stewardship Act* provides in section 1 a legal definition that explains what counts as a “statutory consent” for the purposes of the Act.

Once Cabinet approves a regional plan, it becomes binding on everyone, including the provincial government and its agencies, municipalities and all land use and development authorities. The overarching purpose is to implement the *Land-use Framework* by harmonizing land use policies throughout the province. To this end ALSA takes precedence over any other provincial legislation or statutory plan.

ALSA, Property Rights, and Compensation

Like most planning legislation, ALSA conflicted with the expectations of some landowners and other interest holders, and was not well received by everyone in the province. ALSA extends the government's power to limit development of private land in the public interest through the creation of binding regional plans. ALSA also affirms Cabinet's existing powers to cancel or override any rights granted pursuant to any other legislation to exploit subsurface minerals or other Crown resources. The Act refers to these rights as “statutory consents”.



Cabinet is authorized to use its overriding power where the continued exercise of rights under statutory consents would frustrate proper planning or the protection of the province's ecosystems. These are powerful measures, but consistent with the Canadian legal tradition and the history of property rights in Alberta.

ALSA addresses the question of compensation payable to owners affected by the legislation (or by the plans or regulations

under the legislation) expressly, but the specific provisions require some clarification. Section 19 of the original Act limited compensation to those owners entitled to compensation under another statute and to those owners whose land is the subject of a conservation directive. Although the wording appeared to limit the right to compensation, the measures authorized by ALSA would almost certainly not qualify as compensable takings under Canadian law. In fact, section 19 provided express compensation for owners affected by conservation directives, thus creating a right which does not exist under common law.



Nonetheless, in 2011, several amendments were made to ALSA, partly in order to address public concern over property rights. Section 1 of the Act now states that “the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest”. Section 19 has been restated affirmatively, now recognizing “a right to compensation by reason of this Act, a regulation under this Act, a regional plan or anything done under a regional plan”. The compensation rights recognized by the original version of the legislation were maintained (that is, under the express provisions of ALSA dealing with conservation directives and as provided under another enactment), and section 19.1 was added. Section 19.1 is written to confer a right of compensation on anyone suffering “a compensable taking” as a direct result of a regional plan. The effect of this section is not entirely clear.

The critical question is *what counts as a compensable taking*? ALSA defines it as “the diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity”. The main difficulties with this definition, other than that it is circular, are that the traditional view in Canada is that there is no compensation in law or equity (all compensation claims originate in statute), and further, that unless the government acquires an interest in the land while denying the owner all reasonable private uses, there is no “taking” at all. In sum, it is likely that the legal and practical effect of sections 19 and 19.1 is only to create a right of compensation for owners whose lands are sterilized by a conservation directive. Otherwise, those sections neither expand nor restrict the right to compensation.

The 2011 amendments also create new procedural protections for holders of all statutory consents. Section 11 now states that if a regional plan affects, amends or rescinds a statutory consent, the Minister must give the consent holder reasonable notice of any proposed compensation. Any compensation will be determined under the terms of the legislation under which the statutory consent was granted: for example, the *Mines and Minerals Act*, the *Forests Act*, the *Public Lands Act* or the *Water Act*. These and similar Acts deal with compensation for cancellation in a variety of ways. Some, such as the *Mineral Rights Compensation Regulation*, allow compensation on the basis of expenditures wasted by the developer as a result of the cancellation. Others allow compensation at the discretion of the relevant Minister, and still others provide no compensation at all. As a result, there is no general rule that there will be compensation for the cancellation of a statutory consent and the position of the holder of such a consent depends on the wording of the relevant Act.

Another feature of the 2011 amendments to ALSA is section 15.1, which allows an affected title holder to apply to the Minister to vary any restriction, limitation or requirement under a regional plan. The Minister may grant a variance if it is consistent with the purposes of ALSA, unlikely to diminish the spirit and intent of the regional plan, and if refusing to do so would cause unreasonable harm to the affected title holder that was not outweighed by a public benefit. While providing some recourse to an affected title holder, this section leaves the decision of whether to grant a variance entirely in the discretion of the Minister.



Clarifications of Subsurface Ownership Rights

In recent decades, the Alberta government has amended several pieces of legislation to address some of the uncertainties over subsurface resource rights in the areas of natural gas storage and the ownership of both coalbed methane and the pore space beneath the land for the purpose of storing captured carbon. In the process of clarifying these resource rights, the government has effectively removed some people's claims to certain subsurface resources. Each of these initiatives will be discussed in turn.

In 1994, Alberta was faced with an industry trend to store produced natural gas underground. Uncertainty over how industry should obtain storage rights threatened to hamper the growth of this important sector. In order to overcome this problem, the government passed legislation which declared as a general principle that the owners of petroleum and natural gas in any land also owned the storage rights in that land. The only exception occurred where a subsurface cavern had been created through the recovery of a mineral. In that case, the storage rights with respect to the subsurface cavern belonged to the owner of the mineral that had been removed.

In recent times, the Legislature has taken a more definitive approach to clarifying mineral ownership. In 2010, the Alberta government clarified the ownership of coalbed methane. Early transfers of land from railway companies to farmers often meant that underground coal was owned by the railway company, while natural gas belonged to the surface owner. Over the past decade, as the commercial value of coalbed methane became clear, disputes over its ownership arose between the owners of natural gas (who were often surface owners) and the owners of subsurface coal. Those disputes often involved land formerly owned by the CPR (see text box on page 10). To prevent costly and uncertain litigation, the Legislature passed an amendment to the *Mines and Minerals Act* that now proclaims that “[c]oalbed methane is hereby declared to be and at all times to have been natural gas.”

What is Meant by Pore Space?

The use of the term “pore space” in the 2010 carbon capture and storage legislation is a very unusual way to describe a property interest in beneath the surface of the land. A pore usually means a minute space that cannot be observed by the naked eye. The meaning of the legislation is not initially clear and it caused great concern to some landowners, who wondered just how much land the Crown had taken when it declared that it owned all “pore space.” Regulations under the Act provide some clarification by defining “pore space” to mean “the pores contained in, occupied by or formerly occupied by minerals or water below the surface of the land”. Nevertheless, landowners wondered whether it might include, for example, minute spaces in the topsoil that had once been occupied by water. The legislation could have removed many of these fears by declaring, that the Crown owned only pore space beneath a specified depth beneath the surface of the land.

The amendment made an exception for owners of natural gas or coal who had specifically reserved or granted a right to coalbed methane before December 2, 2010. In every other case though, the legislation meant that whoever owned the natural gas also owned (and had *always* owned) the coalbed methane. This amendment went much further than the earlier gas storage legislation, not only because it was retroactive, but also because it clearly stated that a person affected by the amendment has no right to sue the government for damages or compensation. The effect of the amendment was to remove any claim that the owners of coal might also own coalbed methane with no recourse or compensation.

While the coalbed methane legislative amendments were meant to settle disputes between private parties, the *Carbon Capture and Storage Statutes Amendment Act, 2010* was passed to resolve potential disputes between private property owners and the government. Carbon capture and storage (CCS) is an important part of the province's climate change strategy, and the purpose of this amendment was to ensure that the Crown could grant legally secure rights for carbon capture and storage schemes. The amendment declared that all underground pore space was owned by the provincial Crown. Before the amendment, the owners of petroleum and minerals had probably owned at least some of the pore space in their land, and surface owners may have had a claim to pore spaces that were occupied by water. However, the amendment eliminated all competing claims to the ownership of pore space. It specifically stated that this declaration did not amount to expropriation and did not create a right to sue for damages or compensation. Unlike the coalbed methane legislation, this amendment was not intended to resolve private disputes, but to ensure that the government held all the property rights required to meet its carbon capture and storage goals.

The CCS legislation illustrates the legislature's power to indirectly diminish individual property rights without providing compensation. The Crown clearly removed any rights the mines and mineral owners, and possibly surface owners, had previously held in pore space and declared that all pore space was now owned by the Crown. This "taking" would normally have created a right of compensation to the owners whose property rights were transferred to the Crown; however, the doctrine of parliamentary sovereignty allows the Crown to override the presumption of compensation.



Helpful Resources

Information (and misinformation) about property rights abounds on the Internet. Here are some sites where you can access relevant legislation, policy documents, regional plans, and commentary:

- Free online access to Canadian legislation and case law: <http://www.canlii.org>
- The Property Rights Advocate Office: <http://www.propertyrights.alberta.ca>
- Land-use Framework & Regional Plans: <https://www.landuse.alberta.ca>
- Land Compensation Board: <http://www.landcompensation.gov.ab.ca>
- Ablawg: The University of Calgary Faculty of Law Blog on Developments in Alberta Law (sometimes discussing property rights): <http://www.ablawg.ca>

References

Academic Books & Articles

Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40 UBC L Rev 315.

Russell Brown, "Legal incoherence and the extra-constitutional law of regulatory takings: The Canadian experience" (2009) 1:3 International Journal of Law in the Built Environment 179.

Eran Kaplinsky, "Property Rights, Politics, and Community in Canada, and the Alberta Land Stewardship Act" (2012) 45 Hosei Riron 78.

David R Percy, "Attitudes Towards Resource Ownership in Alberta" (2011) CSUG/SPE 149461.

Bruce Ziff, *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010).

Government Documents

An Introduction to Land Titles, available online:
<http://www.servicealberta.gov.ab.ca/landtitles.cfm>

Understanding Land Use in Alberta (30 April 2007) Government of Alberta Publication No. I/270. Available online:
<http://www.landuse.gov.ab.ca>

Land-use Framework (December 2008)

Government of Alberta Publication No. I/321. Available online:
<http://www.landuse.gov.ab.ca>

Report of the Property Rights Task Force: Engagement with Albertans

(21 February 2013) Government of Alberta. Available online:

http://justice.alberta.ca/programs_services/about_us/prao/assets/resources.html

Legislation

The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3 (also known as the *British North America Act*)

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

Alberta Bill of Rights, RSA 2000, c A-14

Alberta Land Stewardship Act, SA 2009, c A-26.8

Canadian Bill of Rights, SC 1960, c 44

Carbon Capture and Storage Statutes Amendment Act, SA 2010, c 14

Expropriation Act, RSA 2000, c E-13

Law of Property Act, RSA 2000, c L-7

Mines and Minerals (Coalbed Methane) Amendment Act, SA 2010, c 20

Mines and Minerals Act, RSA 2000, c M-17

Surface Rights Act, RSA 2000, c S-24





Alberta Land Institute
3-173 CCIS
11455 Saskatchewan Drive
University of Alberta
Edmonton, AB T6G 2E9
AlbertaLandInstitute.ca
(780) 492-3469