

ALBERTA PROPERTY RIGHTS ADVOCATE OFFICE

2012 Annual Report

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MESSAGE FROM THE PROPERTY RIGHTS ADVOCATE

08 April 2013

It has been my privilege and honour to be appointed as Alberta's first Property Rights Advocate. I approach my duties with all humility, knowing that this is a great and challenging task, with no guiding template in the whole of Canada. But, I also know that whatever challenges arise, the task is worth pursuing with full vigour, because of the fundamental importance of property rights to all Albertans.

That importance does not depend on political argument or circumstance. For example, it has been suggested in some quarters that the Property Rights Advocate Office would not be necessary, if only certain controversial legislation did not exist. With all due respect, I maintain the opposite view.

This Office is important, not because certain legislation does or does not exist. It is important simply because property rights themselves are so important. Property rights are individual rights, and are both a measurement of, and a means toward, a free and prosperous society.

The *Property Rights Advocate Act* acknowledges the stand-alone importance of property rights, and raises them above partisan politics. It provides a mechanism for those rights to be represented and advocated in a manner that is independent and impartial.

I recognize the great trust that is placed in this Office, and undertake fidelity to that trust by serving Albertans with dignity, honour and character.

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INTRODUCTION

History

In November of 2011, the Government of Alberta commissioned The Property Rights Task Force, in response to an intense public discussion about property rights in the Province. The Task Force was given the responsibility of listening to Albertans' concerns with respect to property rights, then to bring those concerns back to the Government, along with suggestions about how the rights of property owners and land users could be strengthened.

One of the concerns reported in the Task Force Report was the need for an independent advocate to look out for the interests of landowners. In its response to the Report, the Government of Alberta, in February of 2012, committed to the creation of a Property Rights Advocate Office. The *Property Rights Advocate Act* was passed by the Legislature that Spring, and proclaimed on 18 December 2012.

The statute provides a framework to support landowners in stewarding and protecting their ownership rights. There are three general mechanisms defined in the legislation to accomplish this task.

First, is the role of distributing independent and impartial information to the public regarding the right to compensation in situations of expropriation or compensable taking. This can include assistance to the landowner for determining the best available process or resolution mechanism to use in seeking a remedy. The Office also will be able to provide information about proposed legislation and its likely effect on property owners.

Second, this Office will receive complaints from landowners relating to an expropriation or compensable taking of that person's land. We will review the complaint to determine if the expropriating authority (or the responsible authority in a compensable taking) acted inconsistently with the governing legislation. A written report of our findings will be provided, and must be taken into consideration by the Court or administrative Board dealing with the landowner's issues. This, in turn, may have a bearing on the costs payable by the expropriating authority.

Third, upon the end of each year, we will prepare an Annual Report, of which this document is the first. The Annual Report provides the mechanism for making any recommendations to the Legislative Assembly, relating to property rights, that the Advocate considers appropriate.

Foundational Principles

The *Property Rights Advocate Act* was a direct response to concerns expressed by Albertans involved in the Property Rights Task Force consultation. However, in addition to the recognition provided by the *Act* itself, private property rights also have a deep foundation in Alberta jurisprudence.

An important step in organizing the Property Rights Advocate Office was to look into that foundation and articulate the underlying principles of property rights in Alberta. Those guiding principles will represent the values held and advocated by this Office in the fulfillment of our statutory duties.

Elements of Property Rights

One of the challenges in dealing with property rights is in understanding what precisely is meant by the term “property rights”. Certainly, there exists a great volume of written material debating that question.

However, in reviewing a variety of sources, both case law and academic articles, a functional, working definition of property rights may be distilled down to three basic elements:

- **right of possession**
- **right of use**
- **right of disposition**

The extent that a property owner can operate in all of these elements represents the degree of freedom enjoyed by that owner. The extent to which that ability is compromised or restricted represents a corrosion of those rights.

But, what makes freedom in these elements a *right*, as opposed to a mere privilege?

The Miller Doctrine

For some, the failure to enshrine private property rights in the *Canadian Charter of Rights and Freedoms* is a significant weakness in the cause of property rights. While that omission is unfortunate, it is not necessarily fatal to establishing the validity of these rights in Canadian law.

Alberta Court of Queen's Bench Justice D.K. Miller provides compelling logic in his *obiter dicta* comments within a 2011 decision, stating that private property rights are not dependent on a dedicated *Charter* provision for arguing their validity. In *Van Gliessen, et al. v. Montana Alberta Tie Ltd. and the Surface Rights Board (Attorney General of Alberta as Intervener)*, 2011 ABQB 219, Justice Miller observes that there is a rich tradition of property rights in our Anglo-Canadian jurisprudence. He quotes the Supreme Court of Canada, in *Harrison v. Carswell* (1975) 62 D.L.R. (3d) 68, at p. 83:

Anglo-Canadian jurisprudence has traditionally recognized as a fundamental freedom the right of the individual to the enjoyment of property and the right not to be deprived thereof, of any interest therein, save by due process of law.

He then ties this pre-existing recognition of property rights to section 26 of the *Charter*:

The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

From these two points, Justice Miller goes on to make the following observation:

Until the lacuna of property rights in the Charter is corrected, vulnerable landowners will need to build on the rich history of common law property rights that appear to be guaranteed by s. 26 of the *Charter*.

While this observation is not firmly established as a point of law (it was not argued before Justice Miller in the case he was deciding), it does provide an intriguing – even compelling – argument for affirming the legitimacy of property rights in Alberta.

Recognizing a deep-rooted foundation for private property rights is not to say that the elements of property rights are intended to exist in absolute terms.

For example, it generally is recognized that a right of possession may be superseded by an expropriation for a lawful, government-authorized purpose. A right of use may be restricted by municipal zoning and land-use by-laws. A right of disposition may be limited by obligations under dependents' relief legislation.

However, these qualifications to private property rights are to be exceptions to the property rights rule. They do not diminish either the fundamental importance of property rights in Alberta, or the need to strictly interpret any exceptions to those rights.

The Fraser Principles

In a 2002 decision, *Love v. Flagstaff (County of) Subdivision and Development Appeal Board*, 2002 ABCA 292, Chief Justice C.A. Fraser, of the Alberta Court of Appeal, articulates a number of foundational principles relating to property rights in Alberta. While the decision dealt with municipal land use and development by-laws, the principles articulated in it extend far beyond the local concerns of municipal law. They deal with the very essence of property rights and the permitted limits on their enjoyment. Those principles may be summarized as follows:

- **private ownership of land remains one of the fundamental elements of our Parliamentary democracy**
- **respect for individual property rights is a principle firmly entrenched in the legislative planning scheme in effect in Alberta**
- **predictability in land use is important – the public must have confidence that rules will be applied fairly and equally**
- **the law must be applied consistently**
- **expropriation of private property is permitted for the public, not private, good in clearly defined and limited circumstances**
- **encroachment on individual rights, especially by private parties, should be strictly construed**

These principles require that any encroachment on property rights must be strictly interpreted, if those property rights are to have any significant meaning at all.

Property Rights Are Human Rights

Protecting private property rights is not a matter of setting off one interest group (land owners, for example) against other groups or society as a whole. **Rather, it is a matter of making society as a whole stronger through the acknowledgement and protection of property rights.** In this light, private property rights should not be seen as antithetical to human rights. To quote the late Professor Armen A. Alchian:

Private property rights do not conflict with human rights. They are human rights. Private property rights are the rights of humans to use specified goods and to exchange them. Any restraint on private property rights shifts the balance of power from impersonal attributes toward personal attributes and toward behaviour that political authorities approve. That is a fundamental reason for preference of a system of strong private property rights: **private property rights protect individual liberty.** (*The Concise Encyclopedia of Economics – Library of Economics and Liberty*)

Taken together, these principles recognize the foundational importance of private property rights to a free society. Indeed, the *Alberta Bill of Rights* articulates and confirms the right of individuals to not be deprived of the enjoyment of property, except by due process of law.

As Albertans, we must honour those rights by ensuring that any encroachments are for a limited purpose, in pursuit of a legitimate public interest, and made according to the due process of law. To a very large extent, **private property rights are both a measurement of, and a means toward, a free and prosperous society.**

ACTIVITIES

Endeavours

The time period between proclamation of the *Act* on 18 December and the end of the year left seven working days for the Property Rights Advocate Office in 2012. Although this short time frame and the holiday season in which it occurred did not produce a great number of owner-based inquiries, we did receive nine tabulated requests for information or other inquiries. All such requests were processed expeditiously, and none remained outstanding by the end of the year. Additionally, we responded to a number of media inquiries and interview requests.

We did not receive any complaints pursuant to s. 4 of the *Act*.

A significant portion of time was spent on administrative matters, related to the start-up of the new Office, including with respect to staffing needs, equipment, operational supplies, technical support and briefing for the Advocate. This will continue into 2013, but the proportion of time spent on administrative activities will diminish, as the Office processes are developed and established.

In the coming year, we will continue to respond to information requests, and certainly expect that volume to increase, as awareness of, and interest in, this Office continues to grow.

It is my intention, as the Advocate, to speak regularly to various landowner groups and other property rights stakeholders throughout the Province. I will be talking about this Office and the resource we can be for Albertans, but also listening to their concerns, for consideration in any recommendations that I may make in the 2013 Annual Report.

In planning these speaking engagements, I will rely on the interest of Albertans, and would welcome invitations from across the Province. While I cannot promise to attend every event, I will make myself as available as our resources permit. And, I certainly can commit to keeping myself as accessible as possible.

Observations

The restricted time frame in 2012 and the limited number of inquiries to our Office make it difficult to establish statistically-based conclusions. However, there were a few trends and occurrences out of our discussions with various stakeholders, even in that brief time, that do merit reference.

Municipal Land Use and Development Policies

A marked portion of the inquiries related to municipal governments and the effect of land use and development policies on land ownership rights. This trend is somewhat surprising, since much of the public discussion about property rights over the past 18 months was focused on concerns related to such things as power lines, pipelines and well-sites. The fact that municipal land use and development policies are seen as an area of concern to property owners, and as having a detrimental effect on their property rights, bears further scrutiny and observation in the year ahead.

Surface Rights as an Urban Issue

At least one correspondent to this Office expressed the view that surface rights in Alberta were being portrayed as a strictly rural concern. That view is mistaken, as the *Act* certainly makes no distinction or preference between urban and rural settings for any property rights issues.

With respect to surface rights, the concerns are just as important in an urban setting as they are in a rural one – for example, urban properties are at least as vulnerable to problems of abandoned wells as are rural properties. Indeed, the problems may be more acute for urban properties, given the smaller parcel sizes and the greater density of development.

Urban landowners can be assured that this Office will be as concerned about their property rights concerns as we are for rural owners.

Surface Rights Act and Expropriation Act Review

We have been led to believe that the Department of Environment and Sustainable Resource Development (ESRD) is making plans for a general review of the *Surface Rights Act* and *Expropriation Act*. That process will be of great interest to this Office, as many of the concerns held by landowners facing expropriation or surface rights issues are based on perceived systemic unfairness – an unfairness that can be addressed only by substantive reforms to the legislation.

As we continue to talk to Albertans throughout the year, we will both record their concerns for possible legislative review, and also encourage direct participation in the ESRD review process, once that process is established.

Sometimes Money Is Not Enough

Being able to rely upon monetary consideration to justify and compensate infringements on property rights assumes a willing seller in a free market. However, that assumption tends to overlook the reality of sentiment and emotion in land ownership. The ties to the land created by these intangible qualities may be based on generational heritage or perhaps the simple pride of a first generation's hard work and dreams won. In either case, the result is an emotional bond that cannot always be quantified or fully satisfied through market principles.

There may be no way to adequately address the dilemma that arises when the needs of the public interest meet unwilling sellers with deep emotional ties to the land. But, if the adequacy of compensation is reduced because of that intangible, emotional element, the need for proper respect is increased to an inverse degree.

In the context of a landowner's diminishing right to say "no", respect in expropriation or compensable takings is demonstrated when the process is fair, and the purpose is limited. Hopefully, the anticipated review process for the *Surface Rights Act* and the *Expropriation Act* will help to sharpen the ability of the legislation to consistently manifest that respect.

RECOMMENDATION

Under s. 5(1) of the *Property Rights Advocate Act*, the Advocate is empowered to set out in the Annual Report any recommendations relating to property rights that the Advocate considers appropriate.

It is my view that the truncated operational timeframe of this Office in 2012 does not provide a statistical basis for specific recommendations relating to the more controversial issues in the property rights discussion, such as expropriation and compensable takings. Credible recommendations should be based on more than seven days of light duty.

However, based upon my lengthy experience as a practicing lawyer, observing and responding to the needs of landowners over some twenty-five years, I can offer a particular recommendation that I believe will facilitate an element of property rights in a meaningful and practical manner.

Beneficiary Deeds

A beneficiary deed is a legal instrument that allows people to transfer real property (land) upon their death to one or more beneficiaries without the requirement of estate representatives first applying for a Grant of Probate or Grant of Administration. In essence, it would allow certain testamentary dispositions of land to beneficiaries to be processed as simply, as expeditiously and as inexpensively as transferring ownership to a surviving joint tenant.

The need for such a tool is demonstrated in situations of simple estates, often of a modest value. For example, if the estate of an elderly person consisted of a modest bank account and ownership of a home, and if that estate was being transferred to clear beneficiaries (most likely, to adult children) then the complexity and expense of applying for probate may seem disproportionate to the needs of the estate. It would be much simpler, and much less expensive, if the probate could be avoided.

In fact, under the existing Land Titles system, many landowners try to avoid a need for probating their estates by either effecting a transfer of their land into joint ownership with their intended beneficiaries, or transferring ownership to those beneficiaries but keeping a life interest for themselves. However, there are disadvantages to those tools. For one, they can be expensive. More importantly, they limit the landowners' flexibility in dealing with their land while they remain alive. If they changed their minds and wanted to sell the land, it may be difficult to reverse such strategies, if the intended beneficiary (and new joint owner) did not agree. A beneficiary deed would preclude that possibility.

The integrity of beneficiary deeds would be maintained by requiring the capacity and intentions of the landowner to be confirmed, just as they are with Wills. It would be expected that lawyers still could play a part in confirming the validity of beneficiary deeds, as well as the filing and registration of the beneficiary deeds with the Land Titles Office, upon the death of the previous registered owner.

Thus, in appropriate situations, with beneficiary deeds, landowners could effect a testamentary intent (a right of disposition), but avoid the cost and complexity of probated estate administration. And, because the beneficiary deed is revocable before death, landowners' flexibility in dealing with the land while they are alive is preserved.

The State of Montana implemented beneficiary deeds in 2007, and by my own experience as a practitioner, I can say that their system works well, with great benefit to landowners. Beneficiary deeds may not be appropriate for everyone, or in all circumstances, but they are meant as one additional tool that landowners can consider, and possibly find to be of significant practical use to them.

Upon the foregoing considerations, it is my recommendation that the Legislative Assembly study and implement the availability of beneficiary deeds as an estate planning tool in Alberta, based upon the Montana model, with the appropriate legislative and regulatory amendments being made to our existing testamentary land conveyancing regime.

The foregoing Report of the Alberta Property Rights Advocate respectfully is submitted to the Speaker of the Legislative Assembly of the Province of Alberta, pursuant to s. 5 of the *Property Rights Advocate Act*, SA, 2012, c. P-26.5, such submission being made this 08 day of April 2013.

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