



WESTERN STOCK GROWERS' ASSOCIATION

**SUBMISSION TO
THE SELECT SPECIAL COMMITTEE
FOR REAL PROPERTY RIGHTS
IN ALBERTA**

OCTOBER 2021 //



INTRODUCTION

As Canadians, we think we have property rights because we are a free and democratic nation, and it would seem a logical assumption. We make assumptions that we will be able to use and enjoy our property, develop it as we desire, exclude others from it and sell it to whomever we please with minimal interference from government or others.

However, in Canada the Constitution and the Canadian Charter of Rights and Freedoms are silent on property rights. Common law recognizes that all Albertans have broad rights to own, use and enjoy property and guard property owners against unauthorized government interference. But there are provincial statutes that affirm the Crown's right to regulate and confiscate any property for the public good. Recognition of property rights in the *Alberta Bill of Rights* would correct the omission of property rights in statute.

In the case of an outright taking of private land or property, landowners have a right to compensation in accordance with the *Expropriation Act*. In the case where government does not take the property but imposes regulations that affect value, use or enjoyment, there is very rarely a right to compensation even when the restrictions are very severe or result in drastic loss of value. This lack of compensation for regulatory takings undermines security and investment, which are anchors for business and economy in the province.

The role of the courts also plays a part in upholding property rights. The courts will confine government strictly to its statutory powers, but the courts cannot rule on if the use of those statutory powers is right or wrong. The judgment of what is in the public good falls to government, which is unsettling in some cases; if you ranch in the Springbank area of the province, for example. The courts have ruled that compensation is not only intended when the statute says so expressly, but it is also presumed when the statute is silent on the right to compensation. In other words, if the Legislature (or Cabinet) means to authorize a taking without compensation, it must make this intention clear in statute.

Property rights in Alberta need to be clearly defined. It is our hope this Select Special Committee on Real Property Rights can (at least partially) achieve that. The lack of fundamental clarity makes it difficult to develop robust policy, protect all Albertans and create an environment where the economy can enjoy some security. Ensuring compensation and access to courts through statute law when the Crown infringes on property rights in the name of the public good is a clear improvement on the level of security for Albertans.



PROPERTY RIGHTS IN CURRENT STATUTES

The Carbon Capture and Storage Statutes Amendment Act

The Carbon Capture and Storage Statutes Amendment Act (CCS) was passed in 2010 to resolve potential disputes between private property owners and government. The CCS Act 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. This really is outright theft – but legal theft, because within the Canadian constitutional framework, this is a valid exercise of government power. Remember, the courts cannot rule on the wisdom of government action and because it is stated in the *Act*, compensation is expressly denied.

Pore spaces are a function of soil structure. If soil could be equated to a building, the pore spaces are the rooms and the soil particles are the walls. If one entity owned the rooms and another entity owned the walls, the building itself is non-functional. As with the building, the current version of the *Act* is non-functional and requires clarity.

Before the CCS Act, the owners of petroleum and minerals probably owned at least some of the pore space and landowners could reasonably claim the pore spaces in the topsoil. Not owning the pore spaces in the root zone has implications for legal risks in agreements and contracts and also could limit participation in some markets.

RECOMMENDATION: Amend the Act to return the ownership of the pore spaces back to the surface landowner.

Climate Change and Emissions Management Act (2002)

When this act was first tabled, the Act granted private property rights to carbon in a sink. Section 8 stated that carbon was a surface owners' property right which lends protection from federal incursion. Section 8 was never proclaimed. Property rights add stability and security in any market. Although a property right is not necessarily required in a regulated market (as is such with carbon), it is needed in other markets that exist for carbon.

RECOMMENDATION: Re-introduce Section 8 of the Climate Change and Emissions Management Act.

Land Titles Act

Adverse possession has existed in Alberta since the province's inception but there are no convincing policy reasons for the law of adverse possession to continue in Alberta. Land titles should be secure. Period. A landowner should retain the ability to recover possession of land from an occupier, regardless of how much time has passed.

One consideration in the abolishment of adverse possession is the significant cost to parties if a dispute needs to be taken through formal court processes. Alternative dispute mechanisms may need to be instituted to ensure adequate protections for Albertans.

RECOMMENDATION: Abolish the law of adverse possession.





Alberta Land Stewardship Act (ALSA)

When ALSA first came into effect, there was widespread and extreme concern from landowners on the lack of protections for Albertans in terms of compensation and access to courts for repeal. The power granted to Cabinet for decisions that could gravely impact value, use and enjoyment of private and public lands was truly unsettling. Since then, amendments to ALSA have strived to fix these glaring oversights in the legislation but there is still work to be done.

Further amendments were introduced on October 28, 2020, through the *Property Rights Statutes Amendment Act*. Included in these amendments are changes to Section 19.1 with the addition of granting the right to compensation for holders of statutory consents when a regional plan impacts the property rights of a holder of a statutory consent. Recognizing the property rights associated with statutory consents is necessary to ensure security for all the businesses in Alberta that rely on statutory consents (i.e., dispositions) for continued viability of their operations.

Other proposed amendments to ALSA introduced in the *Property Rights Statutes Amendment Act* include repealing the clauses in Section 9(2) that allows Cabinet to pass any law they deem appropriate in service to the regional plans. Although one likes to think Cabinet would not institute law without proper robust consultation with Albertans, there needs to be protections from the folly of government. This again adds to the security of investment for Albertans.

RECOMMENDATION: Amend ALSA to protect the property rights of statutory consents and limit the power of Cabinet.

PROPERTY RIGHTS IN ECOSYSTEM GOODS AND SERVICES

Ecosystem goods and services (EGS) are the conditions and processes through which natural ecosystems and the species that make them up sustain and fulfill human life. EGS are actual life support functions. What we eat, drink, the livelihoods that we're engaged with, the foundations of all those things lie within ecosystem processes and the services that they provide. Examples of some EGS include, but are not limited to, clean water, clean air, and biodiversity in the environment. Land managers can manage for improved water infiltration and storage (clean water), carbon sequestration and storage (clean air), increased biodiversity, wildlife habitat including for species at risk. The production of EGS is a function of management applied to the land.

The government has indicated several times that it is interested in developing market mechanisms to encourage stewardship and production of EGS. Many stakeholders from a variety of sectors are interested in moving to develop and participate in such a market. This new market represents a tremendous opportunity that will ultimately diversify income while simultaneously protecting the environment for the public good. Boiled down, the reasons become compelling: increasing revenue, mitigating climate change, ecosystem conservation, and social license.

Building a framework for EGS and market-based instruments is not simply an agriculture and forestry policy framework. It provides opportunity for agriculture, forestry, First Nations, other natural resource managers as well as new business and revenues through value-added products and services.

RECOMMENDATION: As introduced in the recommendation above with carbon, property rights for EGS need to be established in statute. Doing so will bring new economic efficiencies to the task of environmental protection.



WILDLIFE CONSIDERATIONS

Wildlife in Alberta is property of the Crown, and the management of the wildlife is the responsibility of the Crown. However, the costs of sustaining the Crown's wildlife with food and shelter is borne by the landowner and/or land manager. Wildlife populations impact the amount of feed, including native forage, stockpiled forage and other feed that livestock producers need for their operation. Wildlife damage to private property in rural areas is increasing. Wildlife populations prevent livestock producers from increasing their herd size without negatively affecting the health of their rangelands. These all represent direct costs to producers; costs they have no recourse to recover. This is effectively a barrier to economic growth in Alberta. There are wildlife damage programs and wildlife predation compensation programs, but they have historically been completely inadequate in making the producer whole again, which should be the objective of any compensation scheme. Current insurance programs are problematic and participation in them does not pencil out for many producers.

Wildlife management in Alberta follows the 'North American Model for Wildlife Management'. We won't get into the fundamental problems of this model here but we continue to see increased incidents of wildlife conflict in Alberta and the current program is not sufficient in addressing or mitigating these issues. This is an indicator that this model does not work in and of itself. This government needs to address the increasing trends in wildlife predation and damage affecting livestock producers and the need to improve legislation to allow the livestock industry to better co-exist with wildlife.

Alberta law does not reward private parties who maintain habitat or take other actions that allow wildlife to thrive. The *Wildlife Act* explicitly prohibits private landowners from charging others for access to their land for the purposes of hunting big game, fur-bearing animals or game birds. Allowing landowners to charge for such access would provide an incentive to maintain good wildlife habitat on private lands and potentially diversify farm income streams. This would be considered one form of a market for EGS.

Addressing these issues will require a multi-prong solution including

- fixing compensation programs and insurance programs so they are appropriate and serviceable for producers,
- further exploring market instruments that will reward for wildlife habitat management, and
- amending legislation to support the solutions.

RECOMMENDATION: We recommend that this government work closely with livestock producers to develop specific recommendations and commit to legislative changes that will successfully address wildlife issues on farms and ranches. We also recommend this government revisit an EGS market for habitat including the application of lessons learned from previous programs.





CONCLUSION

John Locke, famous British philosopher, was the first to say that life and property of man resided in each individual, not in the church or state. Thus, private property rights are the cornerstone of all other rights and that the true role of civil government is the protection of private property under the rule of law. It will take a considerable amount of work to enshrine property rights above the authority of government and Legislature in Alberta, but the rewards are immeasurable. Recognition of property rights in the *Alberta Bill of Rights* is the logical first step. Commitment to recognizing regulatory takings as compensatory takings in statute and granting appropriate compensation and access to courts should be a consideration in all future legislation. Simply put, if the taking is deemed to be for the public good, it should be at the public expense.

