

Crown Stealing of Freehold Mineral Rights *Alberta Today, Saskatchewan Yesterday*

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Crown Stealing

- “As a good ol' red neck Albertan, I have always assumed that our provincial government would be a fierce defender of property rights. Not like say our CCF/NDP, potash hoarding neighbors to the east who have a somewhat more socialist view on property .”

(Quote from Me, in the March 2011 *Negotiator*)

- Meant as a joke, sort of.
- Highest response rate to a *Negotiator* Article, since an ill advised discussion of segregation and NOAs in January 2010 article.
- *[Note – CAPL Segregation Protocol in effect June 1, 2011]*

- Today will (mostly) not be a rant about property rights.
- Rather, we will focus on land issues that arise from these types of legislative changes to property rights.
- It is dealing with the day to day fallout of Crown stealing that creates the most work and problems for landmen.

The Estate in Fee Simple

- This is the ranting part, will be very brief

- Estate in fee simple
 - Largest and greatest estate in land granted by the Crown
 - Cannot be changed or stolen (well almost)
 - Crown always retains absolute title to land
 - One of the oldest property ideas in our legal system

■ Expropriation

- Historically, a necessary evil to allow the Crown to expropriate (take back) land for public purposes
- Today, common law rule that can only take if in the public good and if compensation paid (almost)
- Almost, since in Canada the Crown can take without compensation if they specifically state they are doing so - YUCK

- Expropriation – Some Comparisons
 - In America, due to constitutional property rights, the ability to expropriate is much more limited and compensation must be paid (only take by *Eminent Domain*)

- Expropriation – Some Comparisons
 - Leasing of Crown mineral rights is VERY different.
 - No granting of a fee simple estate
 - Subject to change by Crown without notice
 - Bad for business, but not expropriation

- Crown Lease “Change” Examples:
 - Park layered over top of existing oil sands leases
 - Oil sands leases layered over prior PNG leases
 - Deep and Shallow Reversion
 - Our fair share

- Not our issue today.

Part 1 - Alberta Today

- *Bill 24 Carbon Capture and Storage Statutes Amendment Act*
- *Bill 26 Mines and Minerals (Coalbed Methane) Amendment Act*
- both in force December 2, 2010 and now part of the *Mines and Minerals Act*

Bill 24 – Ownership of Pore Spaces

- Could be the most boring title ever written
- Big *Act* dealing with CCS. Not dealing with that aspect today.
- Only dealing with the stealing
- I believe the intention of the Act is honorable, but that does not prevent unintended consequences

Pore space

15.1(1) *It is hereby declared that*

*(a) **no grant** from the Crown of any land in Alberta, or mines or minerals in any land in Alberta, **has operated or will operate as a conveyance of the title to the pore space** contained in, occupied by or formerly occupied by minerals or water below the surface of that land,*

*(b) 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...*

- So, like it never happened, never ever:
 - Mineral owner didn't get 'em
 - Surface owner didn't get 'em

 - Crown simply never granted rights to pore spaces

■ Wow, but wait it gets better:

(4) It is **deemed for all purposes**, including for the purposes of the *Expropriation Act*, that **no expropriation occurs** as a result of the enactment of this section.

(5) **No** person has a right of action and no person shall commence or maintain proceedings

(a) to claim damages or **compensation** of any kind, including, without limitation, damages or compensation for injurious affection, from the Crown, or

(b) to obtain a declaration that the damages or compensation referred to in clause (a) is payable by the Crown, as a result of the enactment of this section.

- Sort of like saying I am not stealing your TV, just clarifying who owns it.
 - Deems no expropriation to have occurred
 - No claim for damages of any kind

■ The kicker for landmen:

Prohibition

54(1) *No person shall*

(a) win, work or recover a mineral, or

(b) inject any substance into a subsurface reservoir

that is the property of the Crown in right of Alberta unless the person is authorized to do so under this Act or by an agreement.

Why You Should Care

- Formerly, it was the fee simple mineral owner you had to deal with if you wanted to:
 - **inject** into a reservoir for pressure maintenance;
 - **dispose** of substances into reservoirs; or
 - **store** substances in a reservoir.

- If you held a CAPL freehold lease (as lessee), you were granted the right to store, dispose and inject by virtue of the lease at no cost.

- If you held a non-CAPL freehold lease you likely were not granted the right to dispose
- Encana (and other fee owners) would offer disposal agreements for a fee.

- Both types of rights and obligations are now extinguished as fee simple mineral owners no longer own the pore spaces.
 - Cannot inject or dispose via rights granted under CAPL Leases
 - Encana may not be entitled to charge disposal fees on their mineral lands

- Theoretically you must now obtain approval from the Crown as owner.

- *Note* - Not the same as ERCB injection and disposal schemes and consents. These are regulatory approvals, not owner consents. Ergo:
 - Still need an ERCB approval from Crown as regulator
 - Still need mineral owner consent (adverse impact)

- I assume the Crown as owner will be represented by *Alberta Energy* as tenure administrator

- Not sure. Have not dealt with this yet.

Bill 26 – Ownership of CBM

- Crown picks a winner between split title fee simple:
 - coal owners; vs
 - NG owners.

- Guess who they picked???

Coalbed methane

10.1(1) Coalbed methane is hereby declared to be and at all times to have been natural gas.

■ Exact same expropriation language used:

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(5) **No** person has a right of action and no person shall commence or maintain proceedings

(a) to claim damages or **compensation** of any kind, including, without limitation, damages or compensation for injurious affection, from the Crown, or

(b) to obtain a declaration that the damages or compensation referred to in clause (a) is payable by the Crown, as a result of the enactment of this section.

- The Crown picked the NG fee simple owner
- Did not pick Encana or other corporate coal owners
- No one gets to sue the Crown

- Apparently, the non-Encana parties in the ABQB CBM cases are already seeking to have the Encana cases dismissed as Encana cannot claim CBM ownership.

- Very short rant - In my view, the issue of legal ownership of property rights is a matter for the Courts and not the Legislature. Nuff said.
- Note – legislation pretty much mirrors prior legislation in BC.
- Can Saskatchewan be far behind??
- What about gasification of coal??

Not Quite Dead Yet

- “CBM” exclusions in private contracts are not affected:
 - Encana lease form CBM exclusion
 - Coal exclusion in CAPL leased substances definition
 - PSA with excluded CBM

Part 2 – Saskatchewan Yesterday

- *Oil and Gas Conservation, Stabilization and Development Act, 1973* (now in *The Crown Minerals Act*)
- If you are old enough to remember this happening, you are really old.

5 Minute Run Through the Act

- Crown stealing of fee simple mineral rights (lessor's rights)
- Effective January 1, 1974 "*deemed to be transferred to and vested in*" the Crown
- "*Producing Tract*"

- All PNG "*down to and including the producing zones*"
- Including but not limited to certain named companies (American and other large fee owners in province)

- Exception of fee lands of less than 1,280 acres (2 sections)
- Crown takes subject to existing registrations (leases remain if caveated)
- *"the lessee or other person having an interest shall continue to enjoy the benefits thereof"*

- Much confusion on implementation
- Fee Titles eventually split, but split by stratigraphic reference to “feet below mean sea level”, not base of formation
- Crown equivalent royalty and Crown lease terms (offsets, etc.), but no Crown lease actually issued

Why You Should Care

- SER checking on crown acquired shallow rights
- Deep rights lease continuation issues

- Since mid-2009 SER has begun sending out letters to lessees:
 - Requesting copies of the FH Leases; and
 - Indicating Crown leases may be voluntarily issued for the stolen shallow rights
 - Danger – may be checking to confirm that shallow rights have not terminated under the FH Lease terms

- The *Crown Mineral Act* states:

“Before the expiry of the term of a lease respecting acquired oil and gas rights, the lessee may apply to the minister ...to convert to a Crown lease”

- “Before expiry” concerns me for the current SIR review and issuance of Crown leases
- “Convert” concerns me for deep rights continuation

- Deep rights termination issue:
 - If you have shallow production only; and
 - The Crown “acquired” those shallow rights.

Can the “remaining” deep rights under the FH Lease be continued by shallow production?

- Think of all the freehold Bakken oil wells drilled under Crown expropriated leases.

- Issue comes down to whether the crown acquired shallow rights “segregated” or severed the tenure such that the existing freehold lease can only pertain to the remaining deep rights.

- I am pretty sympathetic to the argument that the deep rights must stand alone under the FH lease:
 - Shallow rights stolen
 - Lessor not really a party to the shallow rights
 - No production under the deep rights for like 35 years
 - Gets a whopping \$160/year annual rental

- Don't get me started on:
 - What the heck “XXX feet below mean sea level” means on a Mineral Title
 - How you have to sometimes look real hard at the New World Titles to notice the Crown acquired bits

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Thank you.

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EnerLaw LLP is a Calgary based commercial law firm focusing primarily on the energy industry.

