THE NEGOTIATOR

The Magazine of the Canadian Association of Petroleum Landmen
March 2011

WHY IS THE CROWN STEALING FROM FEE OWNERS?

The Changing Face of Natural Gas in Canada

Natural Gas: Industry Resilience in a Low Price Environment

The Perception Of Land: An Opinion

Mirror Mirror On The Wall, Who Is the Fairest Department of Them All?

Negotiator Notebook: Design The Negotiation

Negotiations: You Get What You Give

Why is the Crown Stealing From Fee Owners?

(Alberta Bills 24 and 26 Proclaimed into Law)

WRITTEN BY
PAUL NEGENMAN
ENERLAW

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 neighbours to the east who have a somewhat more socialist view on property. No need to even mention B.C. Yup, Alberta is the home of all that is right and just in the world. A man's (or woman's) home is his or her castle and the government respects that and keeps its hands off our stuff.

So imagine my surprise as I began to unravel the impact of *Bill 24 Carbon Capture and Storage Statutes Amendment Act and Bill 26 Mines and Minerals (Coalbed Methane) Amendment Act* (both in force December 2, 2010) on the rights of fee owners in Alberta.

Please note that *Bill 24* is a great big Act that deals in detail with carbon capture and storage matters. This article is not about that. Sorry. With respect to *Bill 24*, I will be dealing with only those portions of the *Act* that impact the fee simple ownership of pore spaces. Wow, that sounds boring even to me. Please keep reading, it's actually quite fascinating.

Estate in Fee Simple

To begin with, you need to understand the sacred (for a land lawyer) nature of an estate in fee simple. This is the estate that underlies your rights as a fee simple owner. It is these magic words in every certificate of title that mean you are the owner of the largest and greatest estate in land ever granted by the Crown to individuals. The Crown, being the owner of all things in our legal system, grants this estate to the first owner by way of a patent or grant of fee simple title. Once granted, your fee simple title can never be taken back by the Crown.

Right. Well almost. The Crown retains an absolute estate to all land (even fee simple title), but this right is supposed to be severely limited so that it can only take back fee simple land by expropriation with compensation. In the USA they call this eminent domain and it is a big deal and creates big fights whenever the government tries to expropriate privately held land for public purposes. The Canadian Crown has slightly greater rights to steal back land since we do not have a constitutionally enshrined right to private property (don't get me started), but the idea is the same.

I don't mean to sound preachy, but respecting private property rights and hence the rights of fee simple owners to the fullest extent possible is an important idea. Once any government starts to disrespect property rights, we are all in trouble. Think Venezuela. It might feel good when the government steals from your rich neighbour. Less funny when they steal from you.

Crown Land

The brightest contrast to fee simple ownership is the very limited and changeable rights you hold as lessee under a Crown mineral lease. The changes made by the Alberta government as to what interest you actually bought and paid for under a Crown Lease boggles the mind. With little more than limited consultation, the Crown has legislated deep rights reversion, shallow rights reversion, they remove "oil sands" from already issued PNG leases in a great big whack of the province, etc., etc. All without any repayment of any bonus consideration you paid to acquire these rights.

Kind of a bum deal, but that is the nature of the limited leasehold estate you acquire under a Crown lease. It is, in my view, bad for business for the government to unilaterally change the terms of agreements (Crown leases) made with lessees, but this is not the issue we are talking about today. There is no property law breach by taking back land or rights under a Crown lease. There is a property law breach in taking anything away from a fee simple owner without compensation.

Expropriation

Back a few paragraphs we discussed how the Crown retains absolute title to land even when an estate in fee simple is granted. Historically, this was necessary so that fee simple owners (such as feudal lords) did not simply create their own countries once they obtained title. This is why my house is my castle, but I cannot make it the Republic of Paul (or more likely the Republic of Jill, my wife). Good rule and I have no problems with it. In the modern world we also need to expropriate private land for the public good. Again, I have no problem with such a rule (until they want to take my house) provided that they give me fair compensation.

So, the property law rule is that the Crown always keeps the right to take back land, but it must only do so if necessary for the public good and it must pay compensation for such expropriation.

Petroland Services (1986) Ltd.
Petroleum Land Consultants Throughout Western Canada

Bus (403) 229-1500 Fax (403) 245-0074 eml. shawn.irwin@petroland.ca 1250, 396 – 11th Ave S.W. Calgary, AB T2R 0C5
www.petroland.ca

Shawn Irwin, President Representatives in: Calgary, Edmonton, Lethbridge, Carlyle, Grande Prairie, Victoria

Surface Acquisitions Pipeline Right-of-Way Reclamation Certificates Crown Sales Mineral Acquisitions Rent Reviews
Confidential Deals Damage Settlements US Land Sale Representation Public Consultant & Notification

The idea being that if it is painful to steal, perhaps the Crown will do so as seldom as possible.

Long story I know, but bear with me, we are getting to the point very soon. Be happy you learned a little bit about the history and structure of property rights in Canada. You are welcome.

Expropriation Not

So, in the case of *Bill 24* and *Bill 26*, one would expect that any action by the Crown that resulted in a mineral fee simple owner being divested of a portion of their ownership rights would result in compensation to the land owner. Well, not so sayeth the Crown. Both acts contain the exact same clause which reads as follows:

(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.

Oh I get it. The Crown didn't steal your stuff so it doesn't have to pay compensation. Why not? Because they deemed it to not be stealing. Hmmm, this might see a bit odd to you, because as we will see below, under each Act, someone's valuable estate in fee simple is certainly taken away.

This "deeming" I think is justified by the government on the basis that the *Acts* merely "clarify" ownership. Sort of like saying I am not stealing your TV, just clarifying who owns it.

What Was Stolen in *Bill 24*?

Now to the technical changes to the *Mines and Minerals Act* regarding ownership.

Under *Bill 24 Carbon Capture and Storage Statutes Amendment Act*, the Crown takes aim at "pore spaces". This is the space between rocks underground. Think of a sponge or ask a geologist. Until now, the oil and gas industry has acted on the premise that for fee simple lands, the mines and mineral fee simple owner owns the pore space. This seemed very clear for the pore spaces that are created after oil or gas is removed from a reservoir, and pretty clear for non-oil and gas bearing reservoirs. This meant that the mineral owner was the owner you had to deal with if you wanted to:

- inject back into a reservoir for pressure maintenance; or
- dispose of substances into reservoirs on fee simple lands.

Your One STOP Land Shop

Since 1999, in the regulatory consultation and land business, our team's contributions have been integral in helping our clients get...

FROM HERE

TO HERE

Serving the following Industries:
Oil and Gas, Pipelines, Electric Power Transmission, Wind Energy, Telecommunications, Transportation and Utilities

- Crown Land Sales – Planning, Posting and Confidential Name Use
- Land Assembly and Leasing of Freehold Minerals
- Seismic Permitting
- Surface Rights Acquisition, Administration and Management
- Public and Stakeholder Consultation, Project Compliance Reviews and Audits
- Real Property Purchases
- Forestry Liaison, Crown Surface Land Use and Project Planning Services
- Oil Sands Exploration (OSE) Programs and Caribou Protection Plans (CPPs)
- First Nations Consultation
- Landscape Analysis Tool (LAT) Planning and Reports
- Completion of Enhanced Approval Process
- Pipeline Construction – Landowner Liaison Field Services
- Rental Reviews, Damage Assessments and Settlements
- Preparation for and Representation at Surface Rights Board Hearings
- In-House Staff Placement

INTEGRITY LAND INC.
Professional Surface Land Consulting - With Integrity
toll free: 1.877.998.1500 | www.integrityland.com

Delivering Exceptional Land Services to Our Valued Clients Since 1999

This partially explains the ERCB consent required from the mineral owner required under injection or disposal scheme applications. It also explains why some large fee owners charge a fee if you wished to dispose of substances into reservoirs on their land.

Well, with the stroke of a pen, the government has changed what we all assumed to be the case on pore space ownership. *Bill 24* declares that:

> **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; and
>
> (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…

I believe the reason for the change was honorable. The Crown was clearing away any ambiguity with respect to the reservoirs into which CO2 is going to be pumped for the purpose of carbon capture and storage. The Crown steps up and becomes the party liable for the reservoir and the CO2 pumped into in. This will create the legal certainty required to move CCS projects along. All good, but it is still stealing.

The impact for injection and disposal schemes and ownership becomes obvious when you read the new clause 54(1) of the *Mines and Mineral Act* created under the *Bill*:

> **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.

We are not talking about the ERCB regulatory requirement with respect to injection and disposal schemes. We are talking about a new requirement to obtain consent from the Crown as owner of the pore spaces (presumably through Alberta Energy).

If I was Encana or Cenovous or anyone else who is a large fee simple owner of mineral rights in Alberta I would be pretty annoyed by this "clarification" of pore space ownership. As far as I can tell, this means that all water disposal agreements and associated fees with fee simple mineral owners are now void. It also means those parties who are disposing need to get some type of approval from Alberta Energy as owner of the pore spaces to inject or dispose into pore spaces. This has nothing to do with the purpose of the *Bill*, but it sure seems to be a consequence.

What Was Stolen in *Bill 26*?

Under *Bill 26 Mines and Minerals (Coalbed Methane) Amendment Act*, we have a slightly different kind of stealing. In this case the Crown picks a winner in the split title fee simple dispute between fee simple coal owners and fee simple mines and mineral owners, excluding coal, with respect to coal bed methane (CBM).

The *Bill* essentially cuts the knees out of a dispute that is currently before the Alberta Courts by amending the *Mines and Minerals Act* as follows:

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

Tough to get quite as worked up about this change, since the issue of whether CBM was owned by the fee simple coal owner or the fee simple mines and mineral owner, excluding coal, was unclear at law. I figure it was pretty much 50/50 who the Courts would ultimately determine owned the rights to CBM. Worse, it was going to take years to get any litigation through all the levels of Court required and in the interim CBM drilling on disputed lands could be stalled.

It does bother me though, that the government decided to enter into what is entirely a private law matter between individuals. Under our system of government, the Courts are constitutionally established to deal with private law disputes. They are seen to be an impartial arbiter of disputes as to property rights. When the government steps in and makes the change, I am not left with the same comfort. I worry that the change might have been made because more voters were on one side of the dispute rather than another. It may seem funny when the government is taking stuff away from big evil corporations. Less funny if they decide to take away your house. Especially without compensation.

Anyway, the change has been made and this now clarifies that on split title fee simple lands, the owner of the natural gas rights, excluding coal, is the owner of CBM and hence a standard PNG or NG Lease covers those rights. No need for coal certainty agreements from Encana anymore.

CBM Exclusions in Private Contract Not Affected

The above paragraph cannot be taken to mean that CBM is never going to be an issue again. Clause 10.2 of the *Bill* specifically confirms that the changes to the *Mines and Mineral Act* do not apply to private agreements. The clause reads as follows:

> 10.1(2) Subsection (1) does not affect a provision contained in any conveyance, agreement, agreement for sale, lease, licence, permit or other contract made subsequent to the original disposition from the Crown of natural gas rights in any land by:
> (a) the owner of the title to the natural gas in the land; or
> (b) any person holding natural gas rights through the owner of the title to the natural gas in the land
> that specifically grants rights in respect of coalbed methane to the owner of the title to the coal in that land, or to any person holding coal rights through the owner of the title to the coal.

Yawn. Tough to keep listening this far into an article. Fading away… Please stay with me, this is the important part.

Fee ownership is "clarified" with respect to CBM, but all the other ways we divide substance ownership after that point are not affected. This is important because we often split the ownership of substances by way of contracts. Such contracts can split CBM ownership in lots of ways, including:

- The extremely stupid and annoying exclusion of "coal" in the definition of leased substances in all forms of CAPL PNG Lease. The *Bill* does nothing to fix the problem that your lease may be defective and not grant rights to produce CBM since your granted "leased substances" exclude coal. By excluding coal from the lease the mineral owner may retain those rights separate from the lease. You still need a letter agreement with the lessor removing the coal exclusion or including CBM rights in the lease. Make sure you caveat this letter.
- Exclusions of "CBM" under Encana forms of lease are not affected. If you acquire this form of lease and drill a CBM well, you will be trespassing on the excluded Encana CBM rights.

Sale Agreements that excluded CBM still exclude it and you do not magically now own the CBM if all your vendor owned or sold to you was PNG "excluding CBM". This type of PSA was all the rage for a few years in the early 1990's. Cute little title defect we run across from time to time when you buy from a vendor whose land records show "PNG", but they only bought "PNG excluding CBM" upchain. Tee hee. This is why you do title before you buy.

So the CBM issue is not dead, and if CBM is ever worth anything again, you will still need to do your due diligence when you plan to produce CBM. It is not correct to simply think that the *Bill* makes this problem go away.

Nuff said on Alberta.

Next time we will discuss the greatest ever example of Crown stealing of mineral rights, which comes from Saskatchewan. This, of course, is the classic stealing of all large company held producing fee simple title under the *Oil and Gas Conservation, Stabilization and Development Act, 1973*. This very old stealing is becoming vogue again as companies are drilling deep oil wells under leases where the shallow rights are Crown acquired.

Service, Dependability, Efficiency and Flexibility

... ALL COME STANDARD

· Freehold Mineral Leasing
· Crown Land Sales
· Surface Land Acquisition & Regulatory Compliance

StandardLand
We make your job easier.

Suite 1300, 734 - 7 Avenue, SW Calgary, Alberta T2P 3P8 403.265.1116 www.standardland.com