

# POLICY SERIES

## Subject to Approval: Real Property Rights in Canada



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By Stephanie Farrington

## About the Author

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# Executive Summary

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Many Canadians invest heavily in real estate. Over 50 per cent of personal wealth is held in real estate, primarily, but not exclusively, home ownership.

The choice of early Canadians to remain closely tied to the British Empire had a major impact on the development of property rights in this country. Although we as a society tend to see ourselves as having more in common with the United States than with the United Kingdom, our system of land ownership, more accurately called real property ownership, does not permit the same level of rights and freedoms over the land we hold as the U.S. system affords. In the United States, landowners usually hold title to the mineral resources located beneath their land; in Canada, this is never the case.

Originally, the British monarchy held the rights to the land, and now the Canadian government holds the rights to most Canadian land. Under our system, all Canadian land is subject to the rights of the Crown (the federal government).

Laws governing real property ownership have been under provincial control since the Confederation Act of 1867. Royalties for mineral exploration are paid to the provinces, and they form a major part of provincial revenue. Landowners never profit from the discovery of mineral resources underneath their property.

Urban centres, created as residential and business hubs, were once fairly safe from expropriation that made use of the Crown's subsurface rights. However, population growth, environmental concerns and

the need to improve services have made expropriations in urban centres increasingly common.

As a preventative measure in the fight to protect their surface rights, some Canadians found it helpful to take an interest in the status of their land. A number of rural Canadians staked claims to their own land to discourage outside mining interests. Landowner and surface-rights holders associations are increasing in number across the country. High visibility can improve landowners' chances of protecting the rights they do have.

Legal action is another method that can have positive results. In order for Canadian citizens to make property rights a reality, property owners must be willing to first take on the challenge of fighting for their rights at the provincial level.

Because our country was founded on the idea of property rights being Crown rights, federal law is unlikely to change. The subject of fair compensation for expropriated land has not been tackled at the national level. However, there is a precedent for the right to fair compensation based on the First Nations Oil And Gas And Moneys Management Act.

If Canadians are to have functional property rights, they need a guarantee of fair compensation for expropriated lands. Compensation should be calculated based upon the value of the land to the expropriating authority, the tenure of the landowners and the impact on their income and not the value of the land as if it were empty or as it was when the owner purchased it.

## Canadian Perceptions of Real Property Value

We tend to think of property rights in terms of land ownership. However, the term “land ownership” is misleading, since the legal rights attached to land are variable and virtually never absolute. The correct legal term for what we think of as land ownership is actually “real property ownership.” This distinction is important.

Real property refers to surface rights to land, any buildings on the land, any mineral rights under the land and anything that is considered to be permanently attached to the land. It is important to note that “permanently attached” means permanent for the thing attached and not permanent for the land. Nothing is more durable than land itself.

In Canada, real property ownership resembles real property ownership in the United Kingdom more closely than it resembles real property ownership in the United States. It is important to use the term “real property ownership” to remind ourselves of our limited rights to the land we think of as our own. When a person buys and sells real property under current Canadian law, that person has more rights to the buildings and attachments than to the land itself.

Many Canadian families build their personal wealth and security on some form of real property ownership. According to Statistics Canada, family wealth is more concentrated in real estate than in any other investment. We trust in the security of an investment in real estate to the extent that by the time we reach our 40s, many of us will consolidate our wealth into home ownership, and many,

21 per cent, will choose to invest in real estate in addition to their own homes<sup>1</sup>. Canadians see real estate as a means of creating a secure home and as a safe investment, and much of the time, it is.

Frequently, people start small businesses with loans made on the equity in the family home. On the death of a parent, in most cases, the largest part of the estate is the family property. Farmers rely on the land to produce food and income, woodlot owners harvest trees, Canadians buy revenue property as an investment and a stable monthly income generator. Our tax law recognizes the central role property ownership plays in our lives. It allows for exemptions from the capital gains tax on the sale of a primary residence as well as income tax deductions based on some expenses we incur because of home ownership, and the preservation of ownership of our primary residence in cases of bankruptcy.

Our proximity to the United States, our shared history, our common language and our belief in the basic concept of democracy have given many Canadians the impression that our laws and rights are similar, if not practically identical, to theirs. A shared popular culture, ranging from something as innocuous and peripheral as the 1960s TV show “The Beverly Hillbillies” to the widespread acceptance of U.S. news media, has reinforced this belief by creating a shared sense of cultural and social values including the idea of absolute property ownership as a right of citizenship.

Unfortunately, the belief in an inalienable right to own land or to exercise power over real property was not in the minds of the colonial Canadians, and these rights do not actually exist under Canadian law.

1. From a report by Raj K. Chawla published by Statistics Canada. The link comes after the article.

## Early Political Influences on the Concept of Real Property Ownership within North America

To understand why we are so different and yet seem so similar to our American cousins, it is necessary to cast a glance back over our collective shoulder into the history of the creation of Canada as a nation.

When the American Colonies rebelled against the British, Canada's legal system was already taking shape. Like the pre-revolutionary American system, ours is built on the concept of the monarchy as the absolute authority and on the adoption of British common law, wherein law is made through a process of accepting and referring to fair and just decisions made by litigators over time, as the philosophical basis for the administration of justice in North America.

However, unlike the Americans who rejected the idea of the monarchy and broke away from an association with the British Empire, the Canadians chose the security of membership in the Commonwealth over independence. This reinforced the British legal view of land ownership and entrenched it even more deeply in the Canadian political landscape.

The Americans also adopted British common law as their foundation but rejected the British system of individual land ownership, because it gives the ultimate authority to the Crown or, in Canadian terms – the government. Canadians built the present system on their acceptance of their position as subjects of the Crown while the Americans built their system based on the explicit rejection of that same position. Certainly, in Canada's earliest days and even today, adopting Canadian citizenship requires swearing an oath of loyalty to the British monarchy. Our government is an authority by itself, separate from the people even though it is largely controlled by their will. We have a line of continuity with the British idea of the role of the state in the life of the individual that, unlike the United States, is unbroken.

While we tend to view the British monarch as nothing more than a figurehead, this is not exactly true. Long ago, the powers of the Crown and most of the interests of the monarchy in Canada were transferred to the Canadian government, but we do not use the term "the Crown" as an abstraction. Originally, Crown interests were the interests of the monarch. The foundation of the British Royal Family's wealth is in real property ownership. We still hold the idea of the Crown as the ultimate authority in the exercise of Canadian law. This is why any bill passed into law requires Royal Assent, or, in practical terms, the signature of the Governor-General.

In Canada, the Canadian government has assumed the role of the Crown in taking responsibility for and reaping the benefits of ownership rights that were originally the privilege of the monarchy. When Canadians find themselves stripped of their property rights, it is often because they forgot, or perhaps were unaware of, this founding legal principle.

Canadian land is not private land.

“**Canadians chose the security of membership in the Commonwealth over independence. This reinforced the British legal view of land ownership and entrenched it even more deeply in the Canadian political landscape.**”

## The Consequences of Choosing to Remain Loyal to the British Monarchy

Under the Canadian system, the right to dispose of land or benefit from its resources is always, at its heart, a right that can only be fully exercised by the Crown. Remaining loyal to the Crown gave Canadians access to the military defences to maintain independence from the United States.

The U.S. choice to declare independence meant that U.S. citizens would gain more property rights but would also lose the economic, political and military support of the British. Faced with a choice of going to war with a global superpower or joining the Empire, Canadians chose Empire. Our ancestors were accustomed to the old system, and they may not have realized they were giving up property rights in exchange for security, but that was the net effect. It may seem like an unwise choice to us, but like most political decisions, it served an important purpose at the time.

In the United States, when you buy a piece of land, it becomes yours. Within the confines of the laws governing your community (including zoning bylaws), you can do as you wish with it. You own the land, and you own what is above it, and, most importantly, you own what is below it. This idea flows directly from the fact that U.S. landowners are not subject to the rights of the Crown.

Of course, in the United States, there is still the legal concept of eminent domain, which means the needs of the community occasionally compromise the rights of the individual. Land can be expropriated in the United States, but, for the most part, it is easier to defend against expropriation because rights flow from the people up through government to the president and not, as it is in Canada, from the government down to individual citizens. U.S. property ownership is part of their founding philosophy.

In Canada, progress toward more control over land has moved from the Crown to the federal government and to the provinces. In 1867, the Constitution Act allocated power over property and civil rights to the provinces. However, it did not remove the rights of the Crown – those remained in place.



## Buying and Selling Bundles of Rights

When we buy and sell real estate in Canada, we are buying and selling a bundle of rights that allow us to make more or less full use of the land we acquire. However, no sale of real estate actually includes the sale of the whole use and benefit of the land itself. Because Canada is a country built largely on the wealth accumulated from rural pursuits such as farming, mining and, at one time, trapping, rural property owners are more accustomed to dealing with expropriation. Rural property owners in Alberta are particularly aware of this issue, because of the oil boom. Provincial revenue from the development of natural resources has always been critically important to the Canadian economy. Never before, however, has Canada seen such wealth available in the form of gas and oil. The rise of rural landowners groups is a direct result of the increasing number of expropriations and compromises faced by real property owners who find themselves sitting on top of valuable natural resources.

Canadians, for the most part, are aware that it is highly unlikely and, in most cases, illegal to mine within heavily populated areas. Urban zoning laws are enacted to support community living and, for the most part, this means respecting an individual's right to enjoy his or her home. The focus on harmonious communities means that surface rights in the city are, for the most part, widely respected, although this, too, is changing.

News stories detailing property rights struggles tend to be about farmers or cottage owners. Rural property owners do not live with the restrictions of city zoning bylaws but neither can they rely on the protections created by those rules and guidelines. It is much more likely that rural land will be the site of disputes over which real property rights are more valid – the rights attached to the surface, those attached to the resources below the surface or the environmental features of the surface.

“**The rise of rural landowners groups is a direct result of the increasing number of expropriations and compromises faced by real property owners who find themselves sitting on top of valuable natural resources.**”

Environmental features such as wetlands and natural habitats belong to the Crown, and the preservation of those features under the current climate of environmental awareness means environmental concerns usually trump surface rights.

In urban centres, growing populations mean cities must provide services to more residents. Land for the provision of these services and money to maintain them are growing municipal concerns across Canada. Meeting these needs means Canadian cities are beginning to make frequent use of subsurface rights. Proximity to an urban centre no longer guarantees that a person will be left to enjoy his or her surface rights in relative peace.

In the last decade, urban growth and an increasing environmental awareness have prompted municipal governments to exercise the rights of the Crown over urban land, sometimes expropriating the land and paying off the title holder, sometimes simply changing zoning so that a surface-rights holder can no longer exercise rights that were previously available.

For rural property owners, the emphasis on Canada's growing resource economy and a heightened sensitivity to the environmental features of the land mean property rights in rural areas are continuing to erode.



## The Struggle for Meaningful Rights to Rural Property – Specific Examples

In rural communities, the competing rights of miners and surface-rights holders have been the source of continual conflict. B.C.'s Joe Falkoski, a former miner, has spent years locked in battle with a mining company that has dug up his ranch and created an environmental hazard for him to clean up at his own expense. To add insult to injury, the company is also considering suing him, because they say he has inhibited their access to his land.

Cases where mining interests are in conflict with the interests of rural landowners have become common across the country. Canada is a resource-based economy; therefore, these cases are likely to increase in number and severity, as the price of mineral resources continues to climb.

Landowners associations are emerging as a voice for rural property rights. Over the last ten years in Ontario, the number of landowner rights organizations lobbying for the protection of privately held land has grown to 20.

If you buy a farm, you own the right to work it as a farm. With the growth of urban areas, depending on your community's ideas about growth, you may also have the right to subdivide and build on some of that land, but then again, you may not. The Ralph family of Burritts Rapids, Ontario, discovered this when the farm that had been in the family since the early 1900s was knocked dead by a triple hit. First, they lost most of their herd to the record-breaking regional ice storm of 1998. The death of the family patriarch from cancer followed in March of the same year. The final blow came with the bovine encephalitis (mad cow disease) scare of 2002. Having only the value of their land left as a legacy, the family decided to subdivide the land into three estate parcel. At the time, large residential lots were increasingly



**Burritts Rapids, Ottawa**

common in semi-rural areas surrounding Ottawa and their selling prices were high.

The community had no issue with the subdivision. However, the City of Ottawa and Parks Canada did. The Ralph farm is visible from the Rideau Canal, now a UNESCO World Heritage Site, and because of this and the heritage vista the Ralphs' rolling fields presented to boaters going by on their way to Ottawa or Kingston, the Ralphs' subdivision was stopped by the Ontario Municipal Board. The Ralphs can sell the land but they cannot subdivide. The conditions of the heritage vista add further restrictions to the use of the land, which means the property is of very little interest to any buyer.

The Ralphs discovered that preserving a view is reason enough to deny you and your heirs the right to benefit from your life's work.

## Ways and Means of Staying Informed and Prepared

Here are some measures other people have taken that might help to prevent the loss of your surface rights. They are lessons people who have been through the property-rights battle have learned. This is not legal advice.

### See and Be Seen

First, be watchful and be visible. In many cases of expropriation, the property owner did not see it coming. City councils and regional authorities move slowly, but to some extent, they must move in the public eye. Your chances of guarding your interests increase if you see what is coming down the road.

If you have most of your wealth sunk into real estate, it pays to stay on top of the activities of your municipality or any other governing body that might exercise authority over your land. The internet makes this much easier than it was even ten years ago, as most regional authorities publish their agendas, if not the minutes, of their meetings on the Web.

This may sound obvious, but the benefit to being visible is that it gives you a face. Municipal authorities are more likely to consider your interests when they see you are a real person and not just a number. This is worth something, even if it only compels them to be polite while they are expropriating your land. For practical purposes, it is easier to challenge someone's intentions than it is to interrupt an action mid-stream and try to roll back the clock. This means you have to show up occasionally and you have to say something, as democracy is participatory.

### Staking a Claim – Mineral Rights versus Surface Rights

In Northern Ontario where graphite and uranium prospecting is tearing up the political landscape, some cottage owners obtained prospecting licenses and staked mining claims to their property.

The Federation of Ontario Cottage Owners Association is in a position to say more about this option, but mining laws generally require potential prospectors to be serious about mineral exploration on the land they claim. If a mining company thinks your land is worth exploring and suspects that you are sitting on a claim in order to keep miners off it, it can have your claim revoked. However, some of the people who staked a claim on their property reasoned that having a prior claim might deter small mining companies from considering the land available for exploration.

Surface-rights holders have also staked claims on their land specifically to deter one-man mining operations. At least one case exists of one person staking a claim on a neighbour's property for reasons that were considered malicious by the surface-rights holder. In Vernon, B.C., Rob Westie's neighbour staked a claim to his 40-hectare ranch. Staking the claim gave the neighbour access rights to Westie's land. After months of having his privacy invaded and his peace shattered, Westie founded the BC Land Owners Rights Group, and he has been fighting for property rights ever since.

The cost of buying the mineral rights to property is always lower than buying the surface rights, but it does cost time and money, and you may be expected to pay an annual fee if the claim is not worked. In B.C., it costs less than 40 cents a hectare to purchase mineral rights. In Ontario, it is much higher, but you can still own the mineral rights to your land for under a dollar an acre.

In B.C., you can stake a claim over the Internet. In Ontario, you must go to the land titles office, but Ontario is reviewing its mining legislation and this may change. In a resource-based economy, more mineral exploration is always seen as better. Mining provides an opportunity for the government

to increase revenue, and it benefits the country as a whole. All mining and drilling operations in Canada pay royalties to the government. The Crown always retains some power over Canadian land; it is just good business.

## Time is Not On Your Side: Communities as Living Entities

Time needs to be considered. Communities are organic entities; they grow and change and zoning laws grow and change with them. If you buy a piece of land with all the correct zoning in place to build a house, you should be aware that the zoning might change either by use or by new discoveries about the land. What was residential 20 years ago might now be part of a watershed or wetland or have a protected species living on it. Zoning is not always durable – it can change and, as the cliché goes, ignorance of the law is no excuse. Frequently, a landowner is expected to conform to zoning laws in place not at the time of purchase but at the time building commences. When you buy to build, the safest defence of your rights as a property owner is to build when you buy.

### Seeking Change in the Courts

Canadian expropriation cases have been contested at all levels of legal authority. Sometimes the process goes on for decades. Some are settled in provincial court, and some end up in the Supreme Court of Canada. Not all succeed but some do. The government has an obligation to compensate fairly, but sometimes the idea of fair compensation has to be clarified. The Canadian statute that is often cited with regard to the right to enjoy property or to be compensated for its loss is the Canadian Bill of Rights, which was enacted in 1960 by the Diefenbaker government.

While the Bill of Rights was important, especially in laying the foundation for the Charter of Rights and Freedoms, it is widely

considered a weak document. It does not specify what “property” means, which makes it of limited value to those seeking meaningful property rights.

If your preventative measures fail, do not be discouraged. Hire a lawyer. The courts exist because no law is written in stone – there is always hope. You may not be successful in challenging the idea of land ownership, but you may be successful in challenging the municipality’s right to take your land away without fair compensation. You may be successful in other areas of the law. You will not know if you do not try. The issue of property rights is becoming more and more of a concern to Canadians, and a growing number of lawyers and politicians are willing to take on this issue. Get involved. Find help. Get the community involved.

The United Landowners of Alberta, a surface-rights holders association, is mounting a challenge to gain rights to coal-bed methane exploration under Alberta farmland. It took the combined power of the association, some creative legal minds and a scientific opinion from the Alberta Geological Survey to find a way to challenge the law. Don Bester, the association’s representative, is raising money to make their case. He obviously cannot know if they will be successful, but he is willing to try.

## A Possible Avenue to a Policy Solution

Don Bester and his group may have hit upon one crucial area where Canadian property rights could change. By using the common law to challenge provincial property legislation, Bester cleared one significant hurdle; he is dealing in specifics. Canadian property law is a provincial concern; therefore, the laws governing property must first be challenged at the provincial level. If the legal entitlement to property rights is to change, the best chance of creating meaningful legal change will be through challenges to the common law on a province-by-province basis.

Provincial law concerning real property rights does not apply to First Nations' reserves, because they are a federal concern. The First Nations Oil And Gas And Moneys Management Act makes it possible for First Nations to participate in the oil and gas industry in a manner that is similar to a province. If the right to consultation and the right to participate in revenue can be afforded to a reserve community, then it should be possible to provide the same protection to families who have held land in Canada for decades, if not generations.

However, there is no reason a federal guarantee of fair compensation cannot be given to Canadians when land is expropriated. The spirit of the Charter of Rights and Freedoms supports a climate of equal rights for all Canadians. Expropriation without fair compensation may therefore run counter to the spirit of the Charter. For this reason, a federal act would be the most useful means of ensuring meaningful property rights for people who purchase land in good faith. For example, any company or individual who makes a claim on surface rights would have to consult with the landowners who are directly affected as well as consider the landowners' tenure as a condition of doing business with them. There is a precedent for this kind of law.

“**A federal act would be the most useful means of ensuring meaningful property rights for people who purchase land in good faith.**”

Canadian farmers and ranchers have contributed to the growth and stability of this nation since before Confederation. They deserve to share in the benefits when their land becomes valuable to the province and to a mineral or oil exploration company. At the very least, a family's tenure bears consideration. Compensation that is in line with the market value of the surface rights and is in keeping with the value of the claim that is staked on what was a family's homestead, their land and often their income should be a basic legal right.

Provincial economies are built on the royalties paid by the resource industries as much or more than they are built on tax revenue. Canada is a big country with a small population and the potential for income from mineral exploration, logging and other industries based on the Crown's ownership of the land is simply too great and too pervasive to be relinquished. Oil and gas revenue has reached a point where it is certainly high enough to properly compensate the real property owners who lose their rights because of expropriation.

Canada needs compensation laws that take the life's work, the security, the history and the dignity of Canadian citizens fully into account.

The law will change only if it is challenged. Property rights will only become entrenched in Canadian law if Canadians make persistent demands to obtain them. In the end, we are not passive victims of the law. As Canadians, we get the country we make.

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