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Land Regulation, Expropriation and Appropriation Laws in Alberta

An Analysis and Review of Bills 19 and 36: *The Land Assembly Project Area Act* and the *Alberta Land Stewardship Act*

By Fergus Hodgson

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Executive Summary

- Bills 19 and 36 expand the role of government appropriation and land management in Alberta—making appropriation and management more frequent, intensive, time-consuming, and expensive. Consequently, the desired certainty and freedom associated with property will diminish.
- Current landowners will be compensated for regulatory taking, at least those carried out under Bill 36, as already occurs with outright acquisitions. This change addresses a major concern of the Alberta Property Rights Institute (APRI).
- Added consultation, while time-consuming and expensive, will provide an opportunity for greater input from landowners and the wider community into land-allocation decisions.
- Those in favour of environmental, land-use controls will have greater powers at their disposal, as well as a new agency to lobby. The Land Use Secretariat—soon to be minted by the Ministry of Sustainable Resource Development—will create a new layer of governmental planning and property regulation at the provincial level.
- The level of compensation, whether for outright appropriation or regulatory taking, is the issue most in need of address. Bill 36 compensates landowners for regulatory taking, which places the expense of regulation back on those to benefit most, general constituents (taxpayers). However, this form of compensation does not extend to Bill 19. Additionally, although referred to frequently in the bills, there are serious problems with the precision of the terms "market price" and "independent evaluation." Hence, further research and creative remedies will be needed if landowners are not to pay a disproportionate price for infrastructure and environmental regulation.
- Economic theory of public goods and externalities, insofar as it can be applied to infrastructure and land regulation, upholds the potential for private provision and independent bargaining as efficient solutions. However, the trend perpetuated by these two bills tends toward the opposite direction.

> ***"Creative remedies will be needed if landowners are not to pay a disproportionate price for infrastructure and environmental regulation."***

Introduction

As Alberta's population has grown and the province has taken on more long-term and varied infrastructure projects, disputes concerning government planning and land appropriation have occurred more often—revealing past legislation to be problematic and in need of *ad hoc* amendments.[1] Added pressure has also come from the federal government's recent stimulus make-work infrastructure projects intended for the next two years.[2] Hence, the need for speed, clarity, and predictability in the process of land appropriation and regulation could hardly be more timely.

To alleviate concerns over inadequate and outdated legislation and to prepare for the new regional planning structure, the Land-use Framework, the province presented two new bills, widely known and herein referred to as Bills 19 and 36: the *Land Assembly Project Area Act* and the *Alberta Land Stewardship Act.* Jack Hayden, the Minister of Infrastructure, and Ted Morton, the Minister of Sustainable Development, introduced the bills in the spring of 2009.[3] Each passed its third reading and Royal Assent and now awaits regulatory fitting and proclamation before coming into force. The reader can assume the bills will become law and may have already done so as of the publication of this review—the purpose of which is to give readers and legislators a template for needed changes.

Put simply, the bills expand the scope of property appropriation and regulation, and they provide for long-term planning and greater consultation with property owners. They also provide the legislative backing for the province's new regional planning commission—the Land Use Secretariat—which will administer the new Land-use Framework. Additionally, the bills include amendments to more than 25 Acts already on the books.[4]

Given the complexity and high stakes involved, this paper seeks to distil and bring together a variety of views.[5] The intent is to inform the debate and to enable a search for common ground and mutually beneficial legislative improvements.

Important Concepts Explained

Ownership, Expropriation and Regulatory Taking

Ownership, simply defined, is the power to use, exclude others from, and dispose of an item—in this case, land—and the right to acquire property is a core value in a free society.[6] Full land ownership would make an area sovereign (an obvious practical impossibility), and no one individual in Canada possesses such a strong form of property right.[7] Most commonly, the legal title used for reference to ownership is fee simple,* which grants a limited set of freedoms to the owner while the Crown retains the underlying title.[8] Hence, when one "owns" a piece of land, one has purchased specific freedoms from the governing body for the use of that land as long as property taxes continue to be paid, including the freedom to sell or bequeath the fee simple title.

Given that the purchase of land is really the purchase of freedoms over that land, expropriation is the elimination of all said freedoms against the will of the current owner. Following the same reasoning, the removal of some of those freedoms, as occurs with property regulation, is a partial or de facto form of expropriation (again, without the consent of the owner). Consequently, property regulation dimin-

* From *Black's Law Dictionary,* "fee simple" is the largest estate and most extensive interest that can be enjoyed in land (at least in the Canadian system). In its pure form, fee simple is subject to no limitation regarding duration and transfer.

ishes the allure and value of both general private property and specific targeted land titles, and this loss to landowners is known as regulatory taking. By way of the regulatory process, the freedoms that landowners paid for are taken from them. Therefore, in one sense, regulatory taking without compensation is also a breach of contract on the part of the governing body.

Regulatory taking includes environmental constraints such as greenbelt zoning. Of similar concern, and of particular relevance to Bill 19, are consulting periods. During a consulting period (limited to two years by Bill 19), properties are essentially frozen from sale and are often devalued, because the spectre of regulation hangs over them. Hence, one of the most important property freedoms, the freedom to sell, is lost.[9] One can see why landowners would seek to prevent or remedy these losses, and the lack of such compensation has been a major concern of property owners all across Canada, with the Alberta Property Rights Institute (APRI) being a recent promoter of the issue within Alberta.[10]

Regulatory taking, as an unexpected and often severe loss of one's assets, can be destructive to an individual or family's financial well-being. In a 2007 report released by the APRI, the analogy of an RRSP was used to illustrate that regulating away usage of and thus devaluing property, say by half, would be akin to having half of one's RRSP account legislated away.[11] Since many landowners invest in and count on the value of their property as a way to save for retirement, unexpected losses hit home hard.

This has happened in Canada, with counter-productive side effects in addition to the straight loss to property values. In 2005, greenbelt zoning in the Greater Toronto Area cut property values by up to 90 per cent. So great were the fears of greater Toronto landowners with respect to being included in the greenbelt or environmentally sensitive areas, many were driven to destructive action on their property—seeking to make the land less worthy of conservation. In 2005, Gordon O'Connor, an Ontario Member of Parliament, confirmed the perverse incentives created by the mere threat of regulation, noting that the response of "landowners [had] been to take matters into their own hands and remove trees and brush from their rural properties to forestall a dreaded wetland designation that would render their lands unsuitable for development."[12]

Market Price and Just Compensation

The term "market price"—usually saddled with the neutral sounding "fair"—while frequently referred to in the legislation and by the sponsoring ministers, is not easily defined. Attempts to extract a rigorous definition or calculation process from the Alberta Land Compensation Board have proven fruitless, with responses being enigmatic at best.[13] Given the confusion, this report seeks to clarify what a market price is as well as its relevance and limitations with regard to Bills 19 and 36 and whether it translates to just compensation in the instance of government appropriation.

While there are many definitions for "market" and "price," when they are put together in this context, *Black's Law Dictionary* clarifies the compound as "the prevailing price (amount of money or other consideration) at which something is sold in a specific market."[14] When applied to the Expropriation Act and the other bills, the key question is, if one were to bring a property forward for sale, what price would it be expected to realize if sold in the open market by a willing seller to a willing buyer?[15] Moreover, in the case of the regulatory taking, what decline to the

market price ought to be attributed to the imposition of the regulation?

The problem is that prices depend on how long one is willing to wait for better offers, so a single market price is difficult to measure, if not impossible. Put another way, if one were to sell a property with only one day's notice, the price gained would be significantly lower than if a six-month window were used and the seller could wait for better offers.

To complicate the matter further, there is no specific market for identical properties. Each section of land is unique, and each owner has a differing view of the property's value. The willingness of a seller therefore depends on the anticipated price, and given the prevailing offers the owner may simply be unwilling.

Remember, "market price," as utilised by Alberta legislation, purports to assume both a willing buyer and willing seller. However, this assumption is misguided and bordering on dishonest when only the buyer side (demand) is considered. In the application of expropriation, many owners are evidently not willing, so the assumption of a willing seller, regardless of the demand price, directly contradicts what we observe.

Consider the example of a landowner who values his property at $500,000. An interested buyer looks at the land and sees a value of $1.5-million. The buyer offers $1-million, so the two agree and make an exchange. Both parties, by agreeing on the price of $1-million, gained $500,000 in value. However, if you were to offer the new owner the $1-million price, he would decline, because acceptance would entail a $500,000 loss to him. Similarly, current landowners think their property is more valuable than what they estimate the going price to be—otherwise they would have already sold it or placed it on the market. Hence, if just compensation means the owner is no worse off after the appropriation (or regulatory taking), any market-price offer (or the amount equal to the regulation-imposed decline in market price), even if it is accurate, would entail a loss to the landowner and would not be just compensation. Such a conclusion should not be surprising. If landowners considered themselves to be fully compensated, they would readily accept the offers and no coercion would be necessary; they might even seek out governmental appropriation. At worst, they would be indifferent between retention and compensation. On the other hand, resistance on the part of the landowners, which appears to be the norm, shows that the offers of compensation do not cover the landowners' true costs, and they would do better if the offers were retracted.[16]

The Independence of Valuations

Since the province uses market price, as problematic and conjectural as it may be, let us consider how these offers are reached, as well as the prospect of genuinely independent evaluations. For the most part, offers appear to be based on past sales in the area and, to the province's credit, the majority of landowners forgo complications and accept first-up offers.[17]

Challenges to offers are directed toward the Alberta Land Compensation Board or a mutually agreed upon third party for an "independent" assessment, but independence is not so easy to find. Consider the Alberta Land Compensation Board: In spite of all their efforts to espouse impartiality and to appear independent, their members are appointed solely by the Minister of Sustainable Development, the Board is funded by the province, and when pressed, they are reticent regarding how they overcome the apparent conflict of interest.[18]

Landowners may propose an alternative third-party assessment, but the province must agree. Should an individual still not accept the offer, forced expropriation with court-determined compensation is the last resort, as the process can take years.

Therefore, the choice is not between a provincial assessment and an independent assessment; rather it is between the province's first-up offer and a delayed decision coming from a provincially appointed or approved third party—be it the Land Compensation Board, the courts or a private valuator. Under this light, valuations independent from provincial meddling, while an admirable ideal, are illusionary. Landowners must therefore rely on the constituency to hold the relevant minister(s) accountable for what the voters see as inaccurate valuations and unjust compensation levels.

Alberta's Property Owners and the Two Bills

Alberta Appropriation and Regulation History and Context

The road to Bills 19 and 36 has not been free of conflict, and some former landowners would assert that it has not been paved with gold either. There are plenty of examples of ill feelings and past disagreements over changes to the laws and compensation levels. For better or worse, these realities continue to charge the debate over property policies. Hence, it should come as no surprise that suspicions are stoked over new legislation. The result is that both the province and landowners may be justified in their concerns about giving too much leeway to the other side.

In one sense though, both landowners and the province share common goals. Some legislators, including Alberta's Minister of Infrastructure, Jack Hayden, are both rural landowners and provincial representatives.[19] All are members of an Alberta they hope to see prosper, economically or otherwise. Part of this process must include clarity, so participants can work together toward common goals.[20] The alternative—continual legal battles, outright defiance of laws and an ongoing arm wrestle for legislative dominance—is hardly desirable for either landowners or the province, so reasoned negotiation from the outset would appear to be in everyone's best interests.

These regrettable outcomes, however, have been occurring—hence one justification for the overarching legislative resolution. Specifically, Restricted Development Area regulations (RDAs) have been implemented questionably, and amendments have been made on an as-needed basis. The Nilsson case, described below, is just one instance of an RDA-related property rights infringement. The case illuminates the fears of both landowners and the province, and all would seek to avoid repeating this course-of-events.

Certainly, the challenges associated with land regulation and appropriation will not fade soon; the province has already slated over $24-billion for capital investments over the next three years.[22] So, the 71 per cent of Alberta already explicitly owned by government, much of it leased out, is set to increase.

The Nilsson Case

In the late 1950s, Bill Nilsson, then a young farmer, bought 160 acres and operated a farm and a cattle auction business. In 1974, Nilsson wanted to build a mobile-home park on part of his property, but the government of Alberta refused permission. It designated the area a Restricted Development Area for use as a greenbelt or parkland at some future date.

Given that he could not develop his property, Nilsson considered selling it to the government. However, the province's offer was for only $2,500 an acre compared to a government purchase price of $10,000 per acre for land on either side of his property. Nilsson refused.

Negotiations continued, but during the early 1980s recession Nilsson agreed to sell at the offered price—on the condition that he would retain the right to appeal to the Land Compensation Board. That board later awarded him $15,000 per acre in 1976 dollars. The provincial government refused to pay and went to court. Nilsson won again in 1999 at the Court of Queen's Bench, and he was awarded $9.1-million in principal and compounded interest, as well as costs—but the government continued to fight until 2003, when the Supreme Court of Canada refused to hear the province's appeal.

As it happened, the original justification for denying the trailer-park development—a greenbelt—was never real. The provincial government had in fact wanted the land for an eventual ring road and utility corridor, a fact that did not surface until evidence, including civil servant misgivings about the publicly offered reasons, and cabinet discussions that admitted full compensation should have been given, were introduced in court years later. Those facts were affirmed by the Justice in the Court of Queen's Bench trial.

The reason the government designated the land as a greenbelt or possible park and not as a possible highway and utility corridor was to avoid triggering two provincial statutes, the *Public Highways Development Act* and the *Public Works Act.* Both require compensation be given. A designation of green space or parkland —a regulatory taking—required no compensation.[21]

Additionally, if we consider that outright ownership by the government is merely the most intense end of the spectrum of land regulation, more-generous application of regulations to private land is extending government ownership beyond the 71 per cent, even if only in a milder form.[23]

Perhaps the most important recent development in Alberta land stewardship, though, and of particular relevance to Bills 19 and 36, is the province's Land-use Framework created by Sustainable Resource Development Alberta.

The Land-use Framework, developed with ample public consultation during 2006 to 2008, is an expanded and more long-term approach to government planning in Alberta. It entails a new Land Use Secretariat and seven new regions within the province for tailored planning—all overseen from the provincial level. Most importantly, it called for new legislation to implement the plans. Thus, we have one of the primary drivers for Bills 19 and 36.[24]

Figure 1: Land Ownership in Alberta

Two Important Bills: Bill 19 and Bill 36

Bill 19: the *Land Assembly Project Area Act*

According to Lyle Markovich, the province's Director of Land Planning, the "government learned a number of lessons from the predecessor legislation, the Restricted Development Area regulations, which did not contain consultation or a purchase plan."[25] In other words, when attempting to put forward plans for large, long-term projects that did not fit the profile conceived within past legislation, the province ran into a lot of landowner resistance and high court costs. By increasing transparency, setting aside areas well in advance and giving landowners a chair at the planning table, the hope is that the relevant projects will now be implemented with more ease and better tailored to the needs of the constituency.

The key, unique elements of Bill 19, including amendments, are as follows:

Section 2

- Allows the province, by way of Infrastructure Alberta, to designate land for major infrastructure projects —a Land Assembly Project Area—and, in anticipation, to regulate future development, with the understanding that a purchase will ultimately follow;[26]
- Limits the mandate to transportation infrastructure and water projects;[27]
- Requires the designated minister to release project plans in advance to landowners and to consult with the public;[28]
- Limits the consultation period to two years from when the proposal was made public, within which a decision must be made for or against a project.

Section 5

- Allows landowners, not just the provincial representatives, to trigger negotiations for an immediate sale, assuming a price can be agreed upon;[29]
- Grants the Crown the power to acquire land by either purchase or expropriation.

Section 14

- A violation of the relevant project area stipulations brings a fine of up to $100,000 and a two-year prison sentence. In the case of a corporation, the fine can be up to $1-million.[30]

While not expressed explicitly within the legislation, all rights of landowners under the *Expropriation Act* are retained.[31] This was affirmed both by the removal of Section 13 from an earlier version of the bill, which was construed to have renounced *Expropriation Act* rights, and by public reassurances on the part of the province.

Bill 36: the *Alberta Land Stewardship Act*

Bill 36 has been described by Sustainable Resource Development Minister Ted Morton as "the most comprehensive land-use policy in North America." In sponsoring this bill, Morton claims it accounts for "future development in Alberta" and "the combined impact of activities on land, air, water and biodiversity." His underlying assertion appears to be that there is a need for "stronger" regional planning on behalf of the province, over and above municipal policies, as espoused by the Land-use Framework. (Unlike Bill 19, Bill 36 relates more to property regulation than to outright appropriation.) At the same time, the relevant legislators thought past property laws needed to be updated and harmonized with the Land-use Framework, so Bill 36 was used to gather up and amend more than 25 such laws.[32]

At over 260 pages, including amendments, Bill 36 contains 10 times the number of pages as Bill 19, and much of it relates to specific industries. Hence, any review can merely touch on the aspects of utmost importance, some of which are outlined here:

Sections 3-4, 8, and 51-62

- Creates a Land Use Secretariat, headed by a yet-to-be-appointed Stewardship Commissioner, with the authority to implement the new Land-use Framework. The secretariat, to begin functioning later in 2009, will start with 15 provincial employees who will appoint and administer seven regional advisory councils.
- Gives the Lieutenant-Governor the authority to establish the roles and responsibilities of the regional advisory councils, along with their remuneration.* However, the general role of the councils is to audit the region and then propose a 10-year plan, updated on an ongoing basis, with policy recommendations for the Lieutenant-Governor.

* The term "Lieutenant-Governor" or "Lieutenant-Governor in Council" when used in the context of Bills 19 and 36, refers to the Queen's representative in Alberta. The Lieutenant-Governor gives Royal Assent to bills and also signs many other official documents, giving them the force of law. Because the Lieutenant-Governor acts on the advice of elected officials as well as the legislation presented by them, his or her main power appears to be the ability to veto actions that are seen as infringements on constitutional rights. For all intents and purposes, though, powers given to the Lieutenant-Governor are powers given to the provincial cabinet.

Section 9

- Allows the advisory councils to specify, as part of their regional plans, the forms and severity of punishment for non-compliance with the relevant directives. Hence, punishment for contravention is still to be confirmed and may develop on an ongoing basis.

Sections 15 and 20

- Brings all provincial departments, regulatory agencies, municipalities, and other government authorities under the authority of the Ministry of Sustainable Resource Development and requires them to align their decisions, plans, and bylaws with the regional plans.

Sections 35 and 38-40

- Makes Alberta the first jurisdiction in Canada to compensate landowners whose property values are affected by conservation and stewardship restrictions under regional plans. The compensation is to be equal to the decrease in the market value.
- The Land Compensation Board will determine compensation, but this may be appealed to a court-determined valuation. While not explicit in the legislation, the province and the Land Compensation Board, as with Bill 19, allow mutually agreed-upon third parties to determine appropriate compensation.

Sections 36 and 46-49

- Enables the regional plans to include conservation easements and conservation directives.*
- Gives authority to the provincial cabinet to build a basic conservation-for-pollution trading apparatus—another means of negotiation with landowners.

Sections 68-94

- Amends over 25 existing Acts to align them with the regional planning structure of the Land-use Framework. There are too many amendments for individual mention. However, these amendments do create an unambiguous consolidation of authority with the Ministry of Sustainable Resource Development.[33]

* According to *Black's Law Dictionary,* easements primarily include a right to entry (access to water, for example) and the authority to conduct acts that would otherwise be considered a nuisance, such as the storage of an item on the property.

Analysis and Discussion

New Authority and Restraint

Bills 19 and 36 give broad new planning powers to Infrastructure Alberta and Alberta Sustainable Resource Development, and a natural concern is how far these powers stretch. The legislation provides three limitations on these powers; however, only one (financial impediments) appears to carry any clout, so whether these powers will be used judiciously remains to be seen.

Bill 19 appears to restrain the realm for land-assembly project areas by simply defining them (as part of an amendment) for transport infrastructure and water projects. However, those two terms are ineffectual, as they are defined broadly enough to include "any ancillary structures" and projects related to the "conservation or management" of water.[34]

Both bills require consultation before land is assigned to a project area, and Bill 19's consultation period is limited to two years. However, the value of consultation is cryptic, even if it does sound reassuring. Consider the case where all relevant landowners dispute their inclusion in a project area or conservation directive (which could easily happen); this would not necessarily prevent the project from going ahead. The opportunity to share one's views does not translate into the power to make land-allocation decisions, so why we need to labour through the consultation process is unclear.

The two-year time constraint on consultation also appears to be relatively worthless. There is nothing stopping the province from merely re-publicising the proposal, so the process can be started over again. At that point, one might even wish the province would just put aside the consultations and get on with the job. In fact, the APRI chairman proposed shortening the consultation period to a single year (and his desire for speed would have him in favour of the Bill 19 section that allows for landowners to fast-track a sale).[35] So, unless a stand-down period applies to the relevant piece of land after the two-year consultation period, barring any new proposals, the province is not restrained, and landowners will have to rely on the judgement and restraint of the relevant officials.

Of course, landowners will now have an opportunity to seek a position within the regional advisory councils, and they would set the objectives for provincial cabinet. But aside from landowners actually taking up positions within the Land Use Secretariat or Infrastructure Alberta, the cost of compensation paid to landowners is the final and most effective restraint. The basic premise is that if the province is going to regulate or appropriate, it will have to pay landowners for doing so. Unless the province is willing to either empty its pockets or dodge adequate compensation, simple financial challenges will temper the desire to regulate landowners. This financial restraint holds for the regulatory taking of Bill 36 directives, but regulatory taking associated with the planning and consultation phases of Bill 19 is not considered.

Achieving Just Compensation

As explained earlier, if just compensation means the covering of all costs to the landowner, than mere market price, as utilized by Bills 19 and 36, is not just compensation—a sobering reality. The obvious objection to full compensation for landowners, by way of genuinely voluntary acceptance, is that such an approach would make government appropriation substantially more expensive, which may be correct. However, recall that the costs imposed on the landowners are just as real as the costs imposed on taxpayers, and the costs of expropriation currently constitute less than 0.1 per cent of the province's budget.[36]

The level of compensation across the board, including for regulatory taking, is perhaps the thorniest property rights issue to be dealt with. Obviously compensation is an expense to the province, but the alternative would be to concentrate all costs on landowners and induce counterproductive behavior. Fortunately, both bills do offer compensation for outright acquisition, and Bill 36 does acknowledge and enable compensation for regulatory taking. This appears to be a first of its kind in Canada.

The calculation process for compensation levels, however, looks set to become a more heated area of conflict. The calculation of market value is speculative enough, but compensation for regulatory taking, which comes into effect with Bill 36, will be even more unpredictable.

Landowners can challenge first-up offers and the secondary offers of the Land Compensation Board. However, section 44 of the *Expropriation Act,* which holds for both Bills 19 and 16, forbids the province from offering any premium associated with the acquisition being compulsory, and it does not allow any consideration for future uses.[37] So, when landowners do wish to contest offers, their cases are severely handicapped, and there is plenty of room for research into creative alternatives to the back-and-forth approach of offers leading to expropriation.

For example, compensation for regulatory taking could be expanded to allow leases rather than just up-front payments for permanent reductions in freedom of property. Additionally, as a way to find the most cost-effective and allocatively efficient route for an electricity line, a tender process could be advertised. Landowners in the area who are willing to sell could confidentially put forward prices they would be willing to accept, and then the governing body could simply plot the line through the lowest cost area—bargaining where there are two willing sellers. On the plus side, with mutually accepted exchanges, little to no time or money would be wasted on court or consulting costs, and projects could be completed faster.

Even with the market-price approach, though, an acknowledgment that the costs imposed go over and above market price would make Infrastructure Alberta more cautious, and it would pave the way for creative remedies.

Potential for Confusion

Over half of Bill 36's 260 pages are amendments to more than 25 prior Acts. Such legislative complexity, a burden in and of itself, provides fertile ground for confusion, and it has the potential to place landowners at a disadvantage when conflicts arise. Naturally, landowners tend not to be lawyers trained in legalese, unlike their provincially appointed counterparts from the Land Compensation Board or the courts who also determine the grounds for compensation. Additionally, if such overarching legislation is going to be passed, why not do away with the out-of-date Acts? That these Acts needed so many amendments—almost 200 pages worth—suggests that we could do without them, or at least they could be replaced in a simpler form. Rather, Bills 19 and 36 have contributed to an ever-broadening array of property legislation.

Remedies and Recommendations

- Compensation for regulatory taking could be extended beyond Bill 36 to cover the array of costs imposed by the consultation and planning stages of Bill 19 allocations.
- The losses created by forced acquisition, over and above fair market price, and the limitations associated with independent third-party evaluations could be acknowledged and, where possible, creatively remedied.
- The need for such remedies is a call for research into processes for appropriation that inflict little harm on landowners while still providing for the needs of the constituency.
- The definitions assigned to Bill 19, regarding its coverage of water and infrastructure projects, ought to be more rigorously and tightly defined.
- The limitations and expenses of the regional advisory councils could do with clarification in order to avoid misuse of power and the spreading of local expenses to the province.
- Measures could also be taken to ensure that the regional advisory councils, if they are to exist, include representatives of those most at risk of appropriation and regulatory taking.
- To maintain compensation and alleviate the pressure on landowners for first-up acceptance, assistance could be made available for legal challenges against what may be unreasonable offers.
- The Land Compensation Board's lack of independence, due to its conflict of interest with the province, is worthy of review, and one remedy could be the inclusion of members directly elected by local constituents.
- The legislation could be streamlined and simplified, and the consultation periods limited more tightly in terms of time and enforceability.

Conclusion

While the scope of the two bills is broad, common trends run through them. Most notably, they both favour an expanded and centralized role for land regulation and appropriation from the provincial government. Boosted by its new secretariat, the planning arm of the provincial government looks set to be more active, to necessitate greater expense and to consume more landowner time.

The new Land-use Framework, with its regional-planning pronouncements, will further diminish the freedom commonly associated with private property. While the diminution in freedom will be compensated for to begin with—certainly an advance on past approaches to regulatory taking—future landowners will not be able to enjoy the same freedom that private property presently promises.

The issue of compensation has many facets worthy of comment and perhaps most important is the recognition that market price is not easily defined and, so far as it can be defined, from the perspective of the landowner, it does not cover the full costs of an appropriation. This prompts the need for research into creative alternatives that tend toward voluntary acceptance from landowners and flexibility on the part of the province.

With the new powers come greater responsibility and a need for discretion on behalf of the province, particularly the relevant ministers. To temper and channel these evolving and often ambiguous powers, constituent-led monitoring and accountability organizations such as APRI will become even more important.

These bills are not the end of the story for land appropriation and regulation in Alberta. Amid the legislative complexity that exists, many facets of Alberta property law remain in need of address, and the policies of appropriation and regulation are set to expand in prominence. Fortunately, the province can make relatively simple improvements. At the same time, as this study has outlined, there are aspects that clearly warrant further research.

Appendix:

The Economic Theory on Property Rights and Infrastructure

While this is not the setting for an in-depth discussion of economic theory, a few notes regarding relevant aspects are worthy of mention. These insights do inform the discussion, even if conventions and political constraints mean they can only be applied at the margin.

The regularity of and seemingly widespread approval for government land appropriation and regulation would suggest strong economic bases for these policies. However, when examined closely, infrastructure investments fail to meet, in any rigorous fashion, the economic criteria of public goods. Additionally, negative spillovers (externalities), the primary basis for regulation of property, can be resolved most effectively by freely bargaining private parties.[38]

Strictly speaking, public goods are those that, while having consumption value, would not normally be provided by the private sector. Hence, they could be considered an example of market failure and a justification for government intervention or provision. They tend not to be provided because suppliers are unable to charge a price or exclude people (non-excludability). Everyone can consume public goods without reducing anyone's consumption, so only one provider is necessary (non-rivalry). Examples include national defence, fireworks displays and free-to-air television.

Clearly, infrastructure investments, be they road systems, electricity lines or water-treatment plants, fail both criteria. People can be and are excluded from receiving these commodities—those who do not pay their power bill or car registration will receive no service in the first instance and be subject to fines and penalties in the second. Additionally, one's use of infrastructure does diminish what is left for others. (Congestion on Calgary's roads is just one example of the finite nature of infrastructure.) Hence, whatever the primary arguments may be, the case for government provision of infrastructure does not rest on the economic notion of public goods or the inability of the private sector to deliver.

The argument for land regulation, as opposed to outright acquisition, is that private landowners, left unimpeded, will impose negative externalities on neighbours—pollution, unsightliness, habitat diminution and so forth. However, this assertion begs the question, what is the most desirable level of these negative externalities? While negative externalities are there for all to see, a blanket zero-externality approach would simply bring all activities, business, and development to a halt, given that almost all activities create some form of negative externality.

So, if there are optimal levels of externalities—where activities only go as far as the benefits outweigh the negative externalities—how do we go about achieving such outcomes? Actually, so long as property rights are defined and the transactions costs of bargaining are not prohibitive, "private economic actors can solve the problem of externalities among themselves … and the outcome is efficient."[39]

This well-established outcome is known as the Coase Theorem. To clarify this assertion, consider a situation where the benefit of a polluting activity is less than the cost of the externality. The negatively affected party will negotiate and be

willing to compensate the polluter for the cessation of his or her activity. On the other hand, if the benefit of pollution is greater than the cost of the externality, whatever the disaffected party is willing to offer will not be enough to dissuade the polluter. (To offer more, so as to restrain the polluter, would not be worth the cost.) Thus, willingness to bargain and compensate on a private basis (to send price signals) means the optimal action will be attained without the need for intervention.[40]

There are cases where the transaction costs of bargaining are prohibitive and the Coase Theorem does not apply. Usually such instances occur when the externalities are created by or dispersed over a great number of people, and bargaining between interested parties appears to be inconceivable: Acid rain and smog are clear examples. However, when we come to typical land use, where externalities are close to home and disaffected parties can be counted on one hand, bargaining is still a viable option for achieving optimal outcomes. The alternative, government decree, no matter how much consultation it is coupled with, costs taxpayers and, being subject to inflexible and often uniform rules, has little capacity to bring allocative efficiency.

For now, various forms of infrastructure are simply provided by the province, and perhaps improvements to cost-effectiveness, placement and quality are the only prospects on the table. However, with the long term in mind, the economic cases for competitive, private provision of infrastructure and limited property regulation are sound. The inference being that planning and incremental steps, where possible, ought to be in that direction. Correspondingly, shifts in the other direction, such as the formation of the new, multi-layered regulatory agency, the Land Use Secretariat, ought to be met with requests for economic justification, since they appear to be ratcheting up the approaches of acquisition and control as opposed to private provision and free bargaining among individuals.

Sources

1. Specifically, the Restricted Development Area regulations were amended. According to Lyle Markovich, Director of Land Planning for Alberta Infrastructure, the amendments were needed because the legislation justified appropriation on environmental concerns. Not surprisingly, one has a difficult time fitting roads and power lines into environmentalist arguments.
2. BBC News Americas. "Canada Unveils Stimulus Package." http://news.bbc.co.uk/2/hi/americas/7855311.stm (accessed June 29, 2009).
3. As of the publication of this review, both Bills still await proclamation. A telephone discussion with media relations for Alberta Infrastructure suggested the dates would most likely be in the fall of 2009—so November would appear to be as late as they anticipate.
The bills and their amendments can be viewed through the Alberta Legislative Assembly Web site, http://www.assembly.ab.ca/net/index.aspx?p=bills_status&selectbill=019 and http://www.assembly.ab.ca/net/index.aspx?p=bills_status&selectbill=036.
4. Government of Alberta (press release). "Bill 36, the Alberta Land Stewardship Act sets the bar for responsible regional planning: Proposed Act respects property rights and local decision-making." http://alberta.ca/home/NewsFrame.cfm?ReleaseID=/acn/200904/25803E9093830-088F-F98A-70A7DF158F1CDF66.html (accessed June 19, 2009).
5. While efforts were made to contact and utilize a range of vested parties, some groups were more forthcoming and candid with their answers than others were. I would particularly like to thank Infrastructure Alberta, the Alberta Property Rights Initiative and the province's Director of Land Planning for their generous input.
6. "ownership." Encyclopaedia Britannica, Inc., http://dictionary.reference.com/browse/ownership (accessed July 7, 2009).
7. I am aware of the differing jurisdictions in existence within Canada, particularly as they relate to the Indian bands. However, even in these areas, individuals do not possess allodial title to land, and the prospects for band members to gain fee simple title, as opposed to collective ownership, is part of an ongoing discussion regarding the role of property and band life. (Allodial ownership is without obligation, be that tax or otherwise, to any lord or superior.)
8. Real Property. "What is allodial title?" http://www.real-property-biz.com/allodial-title.html (accessed July 7, 2009).
Tax Plaza. "Allodial." http://www.taxplaza.org/allodial-tax.asp (accessed July 7, 2009).

   On an interesting side note, the fee simple title derives from feudal ownership – "dependent on [a] relationship to a lord or sovereign."
9. Alberta Infrastructure. Questions and Answers – Bill 19: Land Assembly Project Area Act. http://www.infrastructure.alberta.ca/Content/Publications/production/FAQ_Bill_19.pdf (accessed June 19, 2009).
10. The APRI Web site, http://www.apri.ca, has a wide range of media forms, along with contacts for those who want to become more involved in Alberta's property rights advocacy.
11. Milke, Mark. 2007. "Managing land-use conflicts and protecting private property in Alberta: Lessons from other jurisdictions." Alberta Property Rights Initiative, 11.

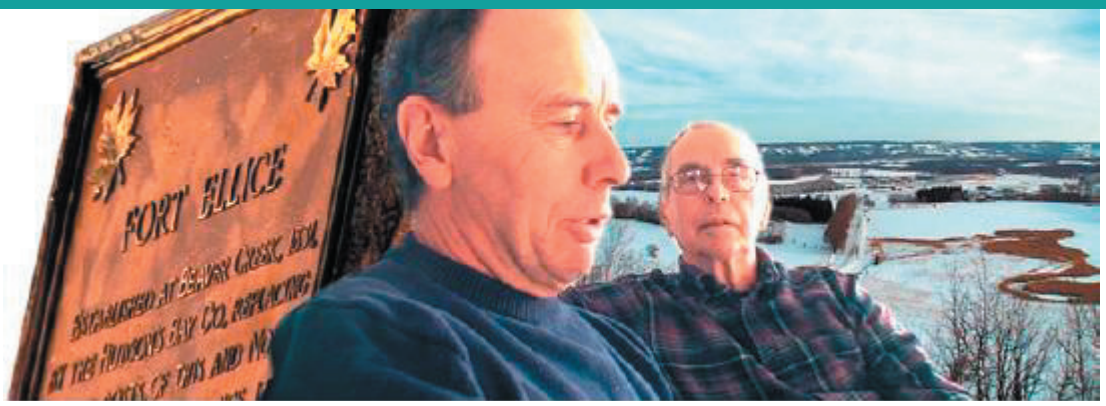
    I use "RRSP" with the understanding that the readers are familiar with the abbreviation, but to confirm the point, I am referring to a Registered Retirement Savings Plan.
12. Ibid.
13. Repeated requests to the Land Compensation Board to "clarify the meaning of 'fair market value' as your organization understands it" were met with delays, as was the case with other questions, and the final answer was the following: "The LCB makes decisions based on evidence and argument presented at hearings in accordance with its legislative mandate and the principles of administrative law." (Jill Mason, Director of the Surface Rights Board and the Land Compensation Board). Since our discussion, the LCB expanded its Web site, which now carries legislative references to the process of compensation determination.
14. Garner, Bryan (Editor-in-Chief). 2004. Black's Law Dictionary (8th Edition). St Paul, MN: Thompson West.

    There does appear to be a distinction, in more formal legal language, between market price and market value. Market value appears to entail a willing seller, while market price does not, but this peculiar distinction does not appear to have been picked up by those writing the legislation.
15. *Expropriation Act,* Section 41, http://www.qp.alberta.ca, (accessed July 7, 2009).
16. Norman Ward, Chairman of APRI, asserted that in almost all cases of appropriation in Alberta, there is not a willing seller. This pattern is consistent with appropriation in the United States, as attested by Scott Bullock, senior attorney for the Institute for Justice and documented in the Institute's eminent domain report, 2003: "Public Power, Private Gain." http://www.castlecoalition.org/pdf/report/ED_report.pdf (accessed August 13, 2009).

Sources *Cont'd*

17. Lyle Markovich (Alberta Infrastructure) confirmed the rarity of court-ordered Section 8 expropriations. He thought that no Section 8 expropriations had occurred in the last two years. Norman Ward, Chairman of the Alberta Property Rights Initiative, shared his concern regarding low offers due to valuators relying on past sale prices in the area.
18. Jill Mason, Director of the Surface Rights Board and the Land Compensation Board, was the contact, and the appointment process was confirmed via e-mail. The precise level of funding was not published in the annual reports, and it was not released to me, even after repeated requests.
19. Jack Hayden has noted his farming and rural Albertan credentials. Refer to his "Open Letter to Albertans Regarding Bill 19." http://www.infrastructure.alberta.ca/Content/Publications/production/OpenLetterBill-19.pdf (accessed June 19, 2009).
20. While foreign ownership may occur in the province, one suspects it is inconsequential, except perhaps in the larger oil and gas sector, but even foreign owners, despite not residing on the land, still want the province to be stable and prosperous – so the point of common goals remains.
21. Op. cit., p. 11.
22. Alberta Provincial Budget 2009-2010, Fiscal Plan Tables, 73. http://budget2009.alberta.ca/newsroom/charts-graphs.pdf#page=2 (accessed July 8, 2009).
23. Newsham, Helen (Head of Rangeland Integration Section, Rangeland Management Branch, Lands Division, Sustainable Resource Development). "Status of Lands in Alberta, 2006/2007." Confirmed via telephone, and e-mail received October 6, 2009.
24. Alberta Sustainable Resource Development. Land-use Framework Regions. http://www.landuse.alberta.ca (accessed October 1, 2009)
25. Markovich, Lyle (Director of Land Planning for Alberta Infrastructure) confirmed via telephone, and e-mail received on July 2, 2009.
26. Ministry of Infrastructure, Alberta. http://www.infrastructure.alberta.ca/3584.htm (accessed June 14, 2009).
27. Land Assembly Project Area Act. Section 2 (Amended). http://www.infrastructure.alberta.ca/3584.htm (accessed June 21, 2009).
28. Ibid.
29. Op. cit., p. 25.
30. Op. cit., p. 27 (Section 14).
31. Government of Alberta (press release). "Alberta Government amends Bill 19 to provide greater certainty for landowners." http://alberta.ca/ACN/200904/25713AB998FE5-FA97-2C03-1BB0B82F3A96BF1B.html (accessed June 19, 2009).
32. Government of Alberta (press release). Bill 36, the Alberta Land Stewardship Act sets the bar for responsible regional planning. http://alberta.ca/home/NewsFrame.cfm?ReleaseID=/acn/200904/25803E9093830-088F-F98A-70A7DF158F1CDF66.html (accessed July 27, 2009)
33. Schoff, Deleen (Communications for Alberta Sustainable Resource Development). Confirmed via telephone, and e-mail received July 7, 2009.
34. Land Assembly Project Area Act, Section 2 (Amended). http://www.infrastructure.alberta.ca/3584.htm (accessed: June 21, 2009).
35. Ward, Norman (Chairman of APRI) confirmed via telephone, June 2009.
36. Op. cit., p. 25.
37. Expropriation Act, Section 44. http://www.qp.alberta.ca (accessed July 7, 2009).
38. Mankiw, Gregory. 2007. Principles of Economics (Fourth Edition).Mason, Ohio, USA: Thompson South-Western, p. 210.
39. Op. cit., p. 38.
40. A transfer of property rights away from the benefactor complicates the analysis a little, and it changes the direction of compensation, but the conclusion of optimal allocation, by way of free negotiation, remains the same.

Further Reading



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