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ALSA and the property rights debate in Alberta: a certificate of title to land is not a "statutory consent"

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Cases Considered:

Alberta Land Stewardship Act, SA 2009, c.A-26.8

There is significant public debate in Alberta about a series of measures introduced and passed by the provincial government over the last 18 months. These measures include: (1) the *Land Assembly Project Area Act* (sometimes known as Bill 19, now SA 2009, c. L-2.5, yet to be proclaimed), (2) the *Electric Statutes Amendment Act*, SA 2009, c.44 (Bill 50), (3) the *Alberta Land Stewardship Act*, SA 2009, c.A-26.8 (*ALSA*), and (4) Bill 24, the *Carbon Capture and Storage Statutes Amendment Act (Alberta)*, SA 2010, c.14. I won't deal with all aspects of the debate but I do want to comment on one aspect of the debate as it relates to *ALSA*.

ALSA is likely one of the most important statutes adopted by the provincial legislature in the last couple of decades. It is powerful legislation but it needs to be. The statute is concerned above all else with landscape level planning, cumulative effects management and establishing limits and thresholds to growth and development - all as a means to foster the maintenance of healthy ecosystems and a vibrant economy. In order to do this the legislation needs to break down departmental silos within government and provide the authority to restrict the level of activities that can be carried out on the landscape. For a balanced account of the legislation see Alan Harvie and Trent Mercier, "The Alberta Land Stewardship Act and its Impact on Alberta's Oil and Gas Industry" (2010), 48 Alberta Law Review 295 – 330, as well as more presentations on *ALSA* on the Faculty of Law's website.

But the legislation is very much a work in progress. It is impossible to assess whether it has achieved its lofty and important goals until we see the first plans, those for the Lower Athabasca and the South Saskatchewan.

I want to focus here on one claim that is being made by those who see *ALSA* as an unreasonable attack on the rights of private property owners. This is the claim that a regional plan can extinguish a certificate of title to land without going through the provisions of the *Expropriation Act* (RSA 2000, c. E-13), an Act which provides procedural and substantive protections to landowners. One author closely associated with this claim is Keith Wilson, a lawyer practicing in St. Albert. I think that this claim is incorrect, but before giving my reasons for that conclusion here is the argument that underlies the claim.

The short form of the argument is this: (1) a regional plan may extinguish a "statutory consent", (2) the term "statutory consent" is broadly defined in *ALSA* and includes an "instrument", (3)

"instrument" is a defined term in the *Land Titles Act* and includes a certificate of title, *ergo,* (4) a regional plan may extinguish a certificate of title.

Since this is a law blog readers will want to see the texts that support this conclusion so here is the longer version of the argument.

(1) A regional plan may extinguish a statutory consent.

This first step in the argument rests upon s.11 of *ALSA* which provides as follows:

> 11(1) For the purpose of achieving or maintaining an objective or a policy of a regional plan, a regional plan may, by express reference to a statutory consent or type or class of statutory consent, affect, amend or extinguish the statutory consent or the terms or conditions of the statutory consent.
>
> (2) Before a regional plan includes a provision described in subsection (1), a Designated Minister must
>
> > (a) give reasonable notice to the holder of the statutory consent of the objective or policy in the regional plan that the express reference under subsection (1) is intended to achieve or maintain, and
> >
> > (b) provide an opportunity for the consent holder to propose an alternative means or measures of achieving or maintaining the policy or objective without an express reference referred to in subsection (1), including, if appropriate, within a regulatory negotiation process referred to in section 9(2)(j).

This first step in the argument must be correct.

(2) The term "statutory consent" is broadly defined in 2.2(aa) of *ALSA* and includes an instrument:

> "statutory consent" means a permit, licence, registration, approval, authorization, disposition, certificate, allocation, agreement or instrument issued under or authorized by an enactment or regulatory instrument;…

This observation is also correct.

(3) Instrument is a defined term in s.1(k) of the *Land Titles Act*, RSA 2000, c. L- 4, and includes a certificate of title:

> "instrument" means (i) a grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or exemplification of will, letters of administration, or an exemplification of letters of administration, mortgage or encumbrance, (ii) a judgment or order of a court, (iii) an application under section 75, or (iv) any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title to land;…

This observation is also correct.

Ergo (4) a regional plan may extinguish a certificate of title.

In my view this fourth and final step is a step too far. It may be a possible interpretation of s.11 but I don't think that it is an interpretation that would ever find support in a Canadian court. Here are four reasons for that conclusion.

First, the plain meaning of the term "statutory consent" is that it is an authorization to do something that would otherwise be prohibited by statute. A certificate of title (CT) is not such a beast. A CT is conclusive proof of title to a particular tract of lands as to an estate in fee simple. It is not an authorization to engage in something that might otherwise be prohibited by statute. To argue that it is is to mix and conflate ideas of property with ideas of regulation and permitting.

Second, *ALSA* does not itself define the word "instrument". There is an argument that when interpreting one statute it is possible to borrow the meaning of a term as defined in another statute but only if the two statutes are *in pari materia*, (i.e. cover the same subject matter); if they are not, such a borrowing is impermissible. It is not clear to me that *ALSA* and the *Land Titles Act* are *in pari materia*. The *Land Titles Act* (*LTA*) deals with private law issues and the property relationships between those who have private claims in relation to the same lands. The *LTA* does not deal with the broader stewardship concerns that animate *ALSA* or other environmental statutes such as the *Environmental Protection and Enhancement Act*, RSA 2000, c. E- 12.

Third, a decision to extinguish a certificate of title is an expropriation. We have an expropriation statute. It is unreasonable to interpret s.11 of *ALSA* as providing an additional and alternative means of effecting an expropriation unless that is the only possible interpretation of the *Act*. In fact that is not the case since *ALSA* expressly addresses the circumstances under which a regional plan may authorize an expropriation. Section 9 is the relevant provision:

> 9(1) A regional plan may contain provisions that the Lieutenant Governor in Council considers necessary or appropriate to advance or implement, or to both advance and implement, the purposes of this Act.
>
> (2) Without limiting subsection (1), a regional plan may
> …….
> (h) authorize expropriation by the Crown under the *Expropriation Act*, including expropriation of mines and minerals;…

In sum, I do not believe that there is any serious possibility that a court would support the claim that the statutory consent provision of *ALSA* creates another way in which the province can expropriate an estate in fee simple evidenced by a certificate of title.

Why then do well qualified commentators urge the contrary? Do they genuinely believe that a court will follow an interpretation of *ALSA* that permits drive-by expropriation? Or is this simply a political argument that aims to dilute *ALSA*'s goals and objectives, preserve the status quo (no limits to development), and to ensure that the first *ALSA* regional plans will be weak and ineffective and that *ALSA* will be a toothless paper tiger?