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Bill 1, Respecting Property Rights Act: A Damp Squib and a Good Thing Too

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Bill Commented On: Bill 1: *Respecting Property Rights Act*

The good news about Bill 1 for those with communitarian views is that Bill 1 does not change the law of Alberta one iota. The bad news about Bill 1 for those of a more libertarian persuasion is that Bill 1 does not change the law of Alberta one iota.

Here is the entire text of Bill 1 from its bizarre preambular provisions to its single operative clause:

> **Preamble**
> WHEREAS private ownership of land is a fundamental element of Parliamentary democracy in Alberta;
> WHEREAS the *Alberta Bill of Rights* recognizes and declares the right of the individual to the enjoyment of property and the right not to be deprived thereof except by due process of law;
> WHEREAS the Government is committed to consulting with Albertans on legislation that impacts private property ownership;
> WHEREAS the *Land Assembly Project Area Act* was enacted by the Legislature in 2009 and was amended in 2011 but has not been proclaimed in force; and
> WHEREAS the repeal of the *Land Assembly Project Area Act* reaffirms the government's commitment to respect individual property rights;
> THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:
>
> *Land Assembly Project Area Act Repeal*
>
> 1. The *Land Assembly Project Area Act*, SA 2009 cL-2.5, is repealed.

This post addresses two questions. First, how is it that despite all the pomp and circumstance surrounding the introduction of this Bill, legally, it changes nothing? And second, why, at least in the opinion of this author, is that a good thing?

Bill 1 does not change the law of Alberta one iota

When it comes to changes in the law, the only thing that matters is the operative clauses of the statute. Preambles are nice. They help establish context for the legislation. They may be influential in the interpretation of the operative clauses of the statute if there is ambiguity. But the only thing that matters is the operative clauses themselves and all that s.1 of this statute does is to repeal an un-proclaimed statute of the province of Alberta. There is nothing ambiguous about this provision. This statute is finished the day it enters into force. All that it does is repeal another Act that was never part of the law of Alberta. An un-proclaimed statute has no legal significance; until proclaimed it is nothing more than a declaration writ in water.

It's a good thing that Bill 1 does not change the law of Alberta one iota

Why is this a good thing? In my opinion this is a good thing because the property rights of individual Albertans, rural and urban, are already adequately protected by the common law and the statutes of Alberta. We don't need more protection. As the preamble to Bill 1 itself acknowledges, the *Alberta Bill of Rights* recognizes and declares the right of the individual to the enjoyment of property and the right not to be deprived thereof except by due process of law. The Executive branch has no prerogative power to take the property of any person and there is a presumption that the legislature does not intend to take the property of any person without the payment of compensation. The original version of the *Alberta Land Stewardship Act,* SA 2009, c. A-26.8 (*ALSA*) provided in s.37 that an owner should have a right to compensation where a regional plan prescribes a conservation directive which is designed to "permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values." *ALSA* was subsequently amended (SA 2011, c.19. adding s.19.1) to open the door to additional possible claims to compensation where a regional plan "might diminish or abrogate" a person's property interests. I have criticized that amendment (see Regulatory Chill) but the point for present purposes is that we have, over the last few years, already provided additional grounds for compensating landowners whose interests may be affected by government action, and in particular government action to protect environmental values. There is little, if any, reason for thinking that as a society we need to go further.

It is important that individuals who, as a result of government action, suffer disproportionately in the interests of the community should not bear that loss alone; they should be entitled to compensation. But that does not mean that every trivial interference with the enjoyment of our property or every diminution in property value attributable to a government decision is compensable. Why? Because we live in a society. We are not atomistic individuals. We live as part of a community. Property (and its value as Henry George, *Progress and Poverty*, reminded us) is a social construct, a product of community and society and not just individual effort and investment. If we compensated every trivial interference and very diminution in property value attributable to a government decision we would never build anything for community. Consider the following examples:

- B's property is taken (expropriated) to build a new hospital (or a school).
- C's property is taken (expropriated) to expand a provincial highway.
- D's property is taken (expropriated) to build a new runway for an international airport.
- E's property value is diminished as a result of increased road traffic or other loss of amenity values due to the construction of the new hospital (or the new school).
- F's property value is diminished as a result of increased traffic noise due to the expansion of the provincial highway.
- G's property value is diminished as a result of aircraft noise due to the new runway for the international airport.
- H's property value is diminished because city by-laws prevent further sub-division of H's property.

I think that all will agree that B, C, and D deserve compensation and indeed they will get compensation under provincial law. But generally E, F, G, and H will not have a claim to compensation. The impairment in property values that they suffer is simply a part of the price of living in a community and in a society. Consider if we were to try and compensate E, F, G and H – the cost of doing so (the transaction costs) including the cost to get the finely granulated compensation award right for owners whether they lived 10 metres, 100 metres or 500 metres from the new road (or school or hospital) would eat up the efficiency gains (the societal benefit) of constructing the utility or facility in the first place. For an important effort to work out a theory of when we *should* (and in some case should not) compensate, see (albeit in the US constitutional context) Frank Michelman's classic article, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 Harvard Law Review 1165.

And finally, consider this example:

- J's property value is diminished because J cannot clear-cut the timber on J's property because it is critical habitat for an endangered species.

In my view J does not deserve compensation. J never had the right to develop his property in a way that destroyed ecosystem values or destroyed fish habitat; and yet recent federal and provincial laws both give J at least some claim to compensation: see *ALSA*, s.19.1 & 37 and *Species at Risk Act*, SC 2002, c.29, s.64.

I, for one, am glad that this Bill does not further fuel expectations that every limitation on an owner's use of property, or every diminution in value attributable to government action, should give rise to a right to compensation.