



Standing Committee on
Resource Stewardship

Final Report

Review of the Alberta Property
Rights Advocate Office
2014 Annual Report

Twenty-Ninth Legislature
Second Session
March 2016



COMMITTEES
OF THE LEGISLATIVE ASSEMBLY

Standing Committee on Resource Stewardship
3rd Floor, Edmonton Federal Building
9820 – 107 Street NW
Edmonton AB T5K 1E7
780.415.2878

ResourceStewardship.Committee@assembly.ab.ca



STANDING COMMITTEE ON RESOURCE STEWARDSHIP

March 2016

**To the Honourable Robert E. Wanner
Speaker of the Legislative Assembly
of the Province of Alberta**

I have the honour of submitting, on behalf of the Standing Committee on Resource Stewardship, its final report pursuant to section 5(5) of the *Property Rights Advocate Act* on the **Review of the Alberta Property Rights Advocate Office 2014 Annual Report.**

Sincerely,

[original signed by]

Nicole Goehring, MLA
Chair, Standing Committee
on Resource Stewardship

c. Dr. David McNeil
Clerk of the Legislative Assembly

CONTENTS

Members of the Standing Committee on Resource Stewardship ii

1.0 Introduction 1

2.0 Summary of Committee Recommendations 1

3.0 Committee Activities..... 1

4.0 Recommendations of the Standing Committee on Resource Stewardship 3

APPENDIX: Minority Report – MLAs Aheer, MacIntyre, Loewen, Stier 5

MEMBERS OF THE STANDING COMMITTEE ON RESOURCE STEWARDSHIP

29th Legislature

Nicole Goehring, MLA
Chair
Edmonton-Castle Downs (ND)

Todd Loewen, MLA
Deputy Chair
Grande Prairie-Smoky (W)

Leela Sharon Aheer, MLA
Chestermere-Rocky View (W)

Don MacIntyre, MLA
Innisfail-Sylvan Lake (W)

Erin Babcock, MLA
Stony Plain (ND)

Eric Rosendahl, MLA
West Yellowhead (ND)

Greg Clark, MLA
Calgary-Elbow (AP)

Pat Stier, MLA
Livingstone-Macleod (W)

Thomas Dang, MLA
Edmonton-South West (ND)

Graham D. Sucha, MLA
Calgary-Shaw (ND)

Wayne Drysdale, MLA
Grande Prairie-Wapiti (PC)

Denise Woollard, MLA
Edmonton-Mill Creek (ND)

Trevor Horne, MLA
Spruce Grove-St. Albert (ND)

Anam Kazim, MLA
Calgary-Glenmore (ND)

Jamie Kleinsteuber, MLA
Calgary-Northern Hills (ND)

Substitutions Pursuant to Standing Order 56 (2.1–2.4):

Nathan Cooper, MLA^{*}
Olds-Didsbury-Three Hills (W)

David Schneider, MLA[†]
Little Bow (W)

Jon Carson, MLA[‡]
Edmonton-Meadowlark (ND)

Members also in Attendance:

Nathan Cooper, MLA[§]
Olds-Didsbury-Three Hills (W)

^{*} Substitution for Todd Loewen on January 28, 2016.

[†] Substitution for Leela Sharon Aheer on January 28, 2016.

[‡] Substitution for Eric Rosendahl on February 11, 2016.

[§] February 11, 2016.

1.0 Introduction

The *Property Rights Advocate Act*, S.A. 2012, c. P-26.5, established the Property Rights Advocate Office as part of the Ministry of Justice and Solicitor General. The Property Rights Advocate Office is tasked with distributing independent and impartial information about property rights to the public, including information to landowners and information about proposed legislation and its possible effects on property rights. Sections 5(1)-(5) of the Act provide that after the end of each year the Property Rights Advocate must prepare an annual report summarizing the activities of the Office for that year and making any recommendations in relation to property rights which the Property Rights Advocate considers appropriate. The report must be tabled by the Speaker of the Legislative Assembly, and within 10 sitting days after the report is tabled, the Government must bring forward a motion to have the report referred to a committee of the Legislative Assembly. On October 29, 2015, the Assembly agreed to Government Motion 21, which referred the *Alberta Property Rights Advocate Office 2014 Annual Report* to the Standing Committee on Resource Stewardship. In accordance with section 5(5) of the *Property Rights Advocate Act*, the Committee, in turn, “must report back to the Legislative Assembly within 60 days of the report being referred to it if it is then sitting or, if it is not then sitting, within 15 days after the commencement of the next sitting.”

This report contains the recommendations of the Standing Committee on Resource Stewardship respecting the *Alberta Property Rights Advocate Office 2014 Annual Report*.

2.0 Summary of Committee Recommendations

The Standing Committee on Resource Stewardship makes the following recommendations with respect to the *Alberta Property Rights Advocate Office 2014 Annual Report*. For additional information concerning the context and rationale for these recommendations please refer to section 4.0 on pages 3 and 4 of this Report.

- 2014.01 The Standing Committee on Resource Stewardship endorses the recommendation to amend the *Property Rights Advocate Act* to repeal the complaint mechanism established under section 4 of the Act.
- 2014.02 The Committee recommends that the Legislature not act on recommendation 2014.02 at this time and instead refer the recommendation to the Ministry of Municipal Affairs for review.
- 2014.03 The Committee recommends that the Legislature not act on recommendation 2014.03 at this time but instead refer the recommendation to the Ministry of Justice and Solicitor General for review.
- 2014.04 The Committee recommends that recommendation 2014.04 be referred to the Ministry of Environment and Parks to seek an opinion from the Ministry of Justice and Solicitor General.

3.0 Committee Activities

During its review the Committee met on January 28, 2016, and February 11, 2016. On January 28, 2016, the Acting Property Rights Advocate, Karen Johnson, gave a presentation to the Committee on the purposes of the Property Rights Advocate Office and the recommendations contained in the 2014 Annual Report. The Report was prepared by Lee Cutforth, the former Property Rights Advocate, who left the Office on December 10, 2015. During the meeting the Committee discussed the recommendations contained in the Annual Report and asked Ms Johnson a number of follow-up questions.

In its discussions the Standing Committee on Resource Stewardship acknowledged that the Acting Property Rights Advocate had only been very recently appointed and expressed gratitude for Ms Johnson’s efforts to elaborate on the comments and recommendations made by the previous Property

Rights Advocate in the 2014 Annual Report. However, the Committee also noted the challenges that exist in effectively evaluating and assessing recommendations when in-depth information regarding the recommendations is not available.

Recommendation 2014.01 – that the *Property Rights Advocate Act* be amended to repeal the complaint mechanism established under section 4 of the Act.

With regard to recommendation 2014.01 the Annual Report indicated that section 4 of the Act provides a process for a landowner “who faces an expropriation or a compensable taking of land” to file a complaint with the Property Rights Advocate, who must then prepare a report on the matter. If the Advocate finds “that the taking authority did not act in a manner that was consistent with the law authorizing the taking, then the Court or Compensation Board that is dealing with the taking must take the Advocate’s report into account when determining any costs payable by the taking authority.” According to the Annual Report the Advocate’s office has never received a complaint under section 4 of the Act, and several possible reasons were cited for this, for instance that “a finding by the Advocate under section 4 does not impose a sanction or otherwise give an effective remedy to a landowner.” The Advocate’s report serves as information that “[a]t best ... may do nothing more than duplicate information that already is or could be before the tribunal [presiding over the taking process].” Ms Johnson elaborated on this recommendation, suggesting that “some Albertans are unclear” about the intended outcomes of section 4 and therefore that the section should be repealed to “remove any doubt and confusion about the complaint process.” This recommendation generated discussion about the efficacy of the Advocate’s office given its limited scope.

Recommendation 2014.02 – that the *Municipal Government Act* be amended to incorporate an administrative or quasi-judicial dispute resolution process, to allow landowners the option of resolving disputes with their municipal governments with respect to their land or land use, without being compelled to undertake the significant investment of resources that litigating in a court of law would entail.

Respecting recommendation 2014.02, according to the Annual Report, “expanding the jurisdiction of the Municipal Government Board in this regard would provide one possible model to consider,” and “other possibilities exist.” This recommendation elicited debate about whether its intent was to broaden the scope of the Advocate to give the Advocate authority to take action (or “rule”) on property related disputes rather than just provide information to landowners with respect to avenues for dispute resolution. Ms Johnson elaborated that the Office provided “information about property rights concerns like [the issue raised in this recommendation]” to the Department of Municipal Affairs as part of its review of the *Municipal Government Act*.

Recommendation 2014.03 – that the law of adverse possession be abolished in Alberta.

With respect to recommendation 2014.03 the Annual Report noted that it is important to consider “the effect that adverse possession has on the integrity of the land registry system, and the role that this integrity plays in protecting property rights,” arguing that legislative changes should be made to strengthen the integrity of the system “and the reliability of the Title record.” Ms Johnson was questioned with respect to actions that have been taken to address issues with adverse possession, such as the amendments to the *Limitations Act* in 2007 that were made based on recommendations of the Alberta Law Reform Commission in 2003 in its report entitled “*Limitations Act - Adverse Possession and Lasting Improvements*.” Although Ms Johnson stated that she was familiar with these actions, she maintained that the legislative provisions allowing for adverse possession still exist. The Committee asked Ms Johnson how many complaints the Office had received regarding adverse possession. Ms Johnson provided a response in a follow-up document submitted to the Committee in which she stated that the Office had been contacted six times regarding adverse possession since 2012. The document also indicated that from 1990 to 2011 “there were 23 cases related to adverse possession, five of which were successful.” The Committee also inquired as to the existence of adverse possession legislation in other Canadian jurisdictions, to which Ms Johnson responded that other than Alberta the only province that still has a provision for adverse possession is Nova Scotia and that this province is in the process of phasing the provision out of its legislation.

Recommendation 2014.04 – that section 36 of the *Surface Rights Act* be amended to clarify and establish that payments ordered under the section do not conflict with the federal *Bankruptcy and Insolvency Act*.

Concerning recommendation 2014.04 section 36 of the *Surface Rights Act* relates to situations where a landowner is owed compensation from an operator under a surface lease or right of entry order made under the Act and the operator fails to make all the payments owed. Under section 36 the Surface Rights Board is authorized, where evidence of the default is provided, to require the Government of Alberta to pay compensation to the landowner. The Annual Report indicated that there are situations where the operator who has defaulted also files for bankruptcy protection under the federal *Bankruptcy and Insolvency Act* and cited a recent decision of the Surface Rights Board in *Petroglobe Inc. v. Lemke* (2014 ABSRB 401) in which this issue was addressed. In its decision the Board indicated that it “believed that ordering a payment under section 36 of the *Surface Rights Act* would create a preference in favour of the landowner as an unsecured creditor of the bankrupt company. They held that this in turn would conflict with the federal legislation, and so declined to make the section 36 payment order.” The Board subsequently reaffirmed that decision (2015 ABSRB 740).

Despite the decision of the Surface Rights Board in this matter, the Advocate argued in the Annual Report that these payments are different in nature from the “preference of an unsecured creditor by a debtor itself, as is contemplated by the *Bankruptcy and Insolvency Act*, and therefore should be distinguished from those creditor preferences that the [Surface Rights Board] is trying to avoid.” The Annual Report purported that the payments are more akin to a guarantee or indemnity by a third party that is perhaps analogous to insurance for the landowner. The Advocate suggested that a new, “more certain” remedy should be created to protect landowners in this situation “so that the nature of these payments is distinguished clearly from the nature of any payment that might conflict with the federal *Bankruptcy and Insolvency Act*.”

Ms Johnson contended that this recommendation was the most urgent of the four recommendations made in the Annual Report and that “the province must find a method to ensure a landowner is not left without his or her due compensation” because the “uncertainty of how section 36 could be applied by the Surface Rights Board can result in unfairness to landowners.” Ms Johnson was reminded that “federal paramountcy over bankruptcy is fairly well established” and that therefore “the Province couldn’t legislate in that area.” In her response she urged the Committee to seek out some kind of solution to resolve this issue.

4.0 Recommendations of the Standing Committee on Resource Stewardship

At its meeting on February 11, 2016, the Standing Committee on Resource Stewardship came to a decision on each recommendation put forward by the Property Rights Advocate Office in the *Alberta Property Rights Advocate Office 2014 Annual Report*.

Concerning the first recommendation, 2014.01, “that the *Property Rights Advocate Act* be amended to repeal the complaint mechanism established under section 4 of the Act,” the Committee agreed with the rationale provided by the Property Rights Advocate that no complaints had ever been filed under section 4 of the Act and this provision “gives people a false sense of what the Property Rights Advocate office can do for them.” Based on these considerations, **the Standing Committee on Resource Stewardship endorses the recommendation to amend the *Property Rights Advocate Act* to repeal the complaint mechanism established under section 4 of the Act.**

While considering recommendation 2014.02, “that the *Municipal Government Act* be amended, to incorporate an administrative or quasi-judicial dispute resolution process, to allow landowners the option of resolving disputes with their municipal governments with respect to their land or land use, without being compelled to undertake the significant investment of resources that litigating in a court of law would entail,” the Committee debated endorsing the recommendation. The Committee ultimately agreed that because a review of the *Municipal Government Act* is currently taking place, “it would be most appropriate

for the Ministry of Municipal Affairs to review this recommendation as part of the wider reaching review.” Based on these considerations, **the Committee recommends that the Legislature not act on recommendation 2014.02 at this time and instead refer the recommendation to the Ministry of Municipal Affairs for review.**

With regard to recommendation 2014.03, “that the law of adverse possession be abolished in Alberta,” the Committee debated whether it should recommend that the Assembly abolish the law or whether the issue should be considered further by the Ministry of Justice and Solicitor General. The Committee determined that this recommendation should be reviewed and addressed by the Ministry of Justice and Solicitor General. Based on these considerations, **the Committee recommends that the Legislature not act on recommendation 2014.03 at this time but instead refer the recommendation to the Ministry of Justice and Solicitor General for review.**

Recommendation 2014.04 states that “section 36 of the *Surface Rights Act* be amended to clarify and establish that payments ordered under the section do not conflict with the federal *Bankruptcy and Insolvency Act*.” The Committee agreed that because “the federal bankruptcy law is paramount regardless of what the province does ... the goal of the recommendation is fairly unclear, and it would be best to refer this matter to [the Ministry of] Environment and Parks so that they could seek clarity from the Ministry of Justice [and Solicitor General].” Based on these considerations, **the Committee recommends that recommendation 2014.04 be referred to the Ministry of Environment and Parks to seek an opinion from the Ministry of Justice and Solicitor General.**

APPENDIX

Minority Report – MLAs Aheer, MacIntyre, Loewen, Stier

Introduction

This submission is meant to provide some additional commentary from the four members of the Standing Committee on Resource Stewardship who have co-signed below, pertaining to the draft report prepared in March 2016 entitled “Review of the Property Rights Advocate 2014 Annual Report.”

The Standing Committee on Resource Stewardship (the committee) made recommendations in response to the four recommendations put forward by the former Property Rights Advocate in his 2014 Annual Report. Rather than make substantive recommendations to the Legislature, as the committee was tasked to do, the majority of committee members decided on three of the four recommendations simply to refer them to government ministers for review. While this is noted in the draft report, no mention is made of the motion presented by MLA Nathan Cooper (and defeated by the government members on the committee) proposing the committee engage in a review of some pressing aspects of property rights that face Alberta landowners.

Review of Draft Report Recommendations

The first recommendation (2014.01) was to remove a power from the Advocate because it had never been asked for and was of questionable use. Despite two full days of meetings, and a mandate from the Assembly to prepare a report with substantive recommendations, this is the only recommendation or motion the committee acted upon.

Recommendation 2014.02, which the committee referred to the Minister of Municipal Affairs for review, was “that the *Municipal Government Act* be amended, to incorporate an administrative or quasi-judicial dispute resolution process, to allow landowners the option of resolving disputes with their municipal governments with respect to their land or land use, without being compelled to undertake the significant investment of resources that litigating in a court of law would entail.”

While this is a sensible request that would obviously empower individual landowners facing injurious land use decisions made by their local governments, it is true that an extensive MGA review is being conducted and perhaps therefore appropriate not to be too prescriptive while that process is ongoing. That said, it is disappointing that the committee did not at a minimum recommend this sensible idea be incorporated into the upcoming MGA amendments rather than indifferently pass on the recommendation for review.

Recommendation 2014.03 was that the law of adverse possession – where a landowner can lose property simply because someone else has been using it for 10 years – be abolished in Alberta; this eminently sensible proposal was also indifferently passed on to a government minister to review, but with far less cause than 2014.02. The Committee was told that in the past two decades there were 23 cases where landowners faced claims of adverse possession, five of which were successful. While inexperienced members might be reluctant to take a stand on a somewhat obscure issue, they should have been emboldened by the fact that this common-sense shift away from very old common law had occurred in every province, with the exception of Nova Scotia, which is currently

phasing this provision out of its legislation. Despite it being clearly within the committee's mandate to recommend that the Legislature act to reassure Alberta landowners they are not vulnerable to this archaic law, the majority chose to abdicate its deliberative function and pass the matter on to the Minister of Justice to review at her leisure with no expression of support for the change.

Recommendation 2014.04 was that section 36 of the *Surface Rights Act* be amended to clarify and establish that payments ordered under the section do not conflict with the federal *Bankruptcy and Insolvency Act*. The Advocate contended that this recommendation was the most urgent of the four recommendations in the Annual Report and that the Province must find a method to ensure a landowner is not left without his or her due compensation. The Advocate's call for urgent action fell on deaf or unwilling ears on the part of the government members, who in unison once again refused to recommend anything to the Assembly other than that it refer the matter to the Ministry of Environment and Parks to seek an opinion from the Ministry of Justice and Solicitor General.

Importance of Property Rights

Property Rights are a fundamental right that need to be protected by the law. There will often be a tension between the needs of the many and the rights of the few when it comes to shared goods like public infrastructure or land planning, and the only way to ensure people are always treated fairly is to give them the right to resort to the courts.

It is important to note that the biggest tension in property rights is when decisions made by the Crown or municipalities affect individual landowners. Accordingly, it is far better for independent members of the Assembly, particularly in the less partisan atmosphere of a Standing Committee, to deliberate and remedy shortcomings in the law rather than government ministers or members of the bureaucracy.

This principle is part of what makes this committee's decisions in response to the Advocate's report so discouraging, and it is hoped that this will not become a pattern as we make our way through the next important issues that come before our committee.

In light of the fundamental importance of property rights, and the fact this committee is uniquely suited to work on improving their protection, MLA Cooper proposed a motion to have our committee review some pressing matters of concern for Alberta landowners that read as follows:

In the interest of ensuring landowners' rights to fair compensation and due process are respected, the Standing Committee on Resource Stewardship conduct a review of landowner surface rights in Alberta. The scope of the review shall include but not be limited to: landowner notification processes; landowner rights to a hearing; landowner rights to recourse to the courts when they do not accept government decisions about usage restrictions or compensation; assurances that the government devaluing of property, particularly through adjustments to statutory consents, are compensable with recourse to the courts; and, whether a landowner should be considered the owner of the pore space beneath their land.

While it was not a surprise that the members of the committee from the PC caucus voted against the motion, as their government passed the bills that offend landowners, it was disappointing to see the ND members vote unanimously against it as well, since they campaigned on a pledge to "strengthen landowners' rights" and passed a motion in the Assembly last fall to improve the surface rights of landowners.

Overview of Previous Legislative Concerns

It is important that a brief elaboration of some of the concerns that prompted this motion be put on the record in the absence of a more fulsome review.

Around 2010, Alberta's government proposed and passed a series of bills that were ostensibly about better planning for Alberta's growth. While a laudable objective, the now notorious Bills 50, 19, 36, 24, and then Bill 2 in 2012 proved to be misguided in varying degrees. One flaw they all shared was qualifying people's property rights in certain circumstances for the sake of ministerial expedience.

Bill 36 / Statutory Consents

"Bill 36" fails to protect landowners and the statutory consents upon which their livelihoods rely against centralized plans. *The Alberta Land Stewardship Act* still gives cabinet the power to rescind water licenses, grazing leases, oil leases and many more rights and permissions without guarantees of compensation or the right to appeal compensation offered. The bill stipulates that if a designated minister determines a particular action necessary, the bureaucracy or municipal government must initiate a management response. This is referred to by some legal experts as a Henry the Eighth Clause, which effectively shifts the lawmaking power from the Assembly to the Cabinet. Some of the most egregious sections of Bill 36 are as follows:

- Section 11 outlines the right of cabinet to rescind rights
- Section 19 restricts the right to compensation for landowners
- Section 13 withholds a landowner's right to the courts unless cabinet allows it
- Section 15 (1) binds municipalities, regulators and all Albertans to the Act
- Section 15 (3) withholds a landowner's right to make a claim against the government
- Section 15 (4) limits the role of the courts
- Section 17 (4) stipulates that the bill trumps all other acts

Some believe that under the new land use framework the government can decide what Albertans can and cannot do on private land in a way that has never been seen before in Alberta, and possibly in any parliamentary democracy. Prior to this legislation being enacted, Albertans, like most people in free societies, were able to be the masters of their own domain on their land so long as no activities were harmful to others or the environment. Now, Albertans are bound by legislation that outlines behaviour determined acceptable by cabinet; and even if that overturns something the government had explicitly permitted – either yesterday or generations ago – they have no guarantees for compensation.

Bill 24 – Pore Space and Carbon Sequestration

In passing Bill 24 into law the government confiscated all pore space under landowners' property and gave operators access to the surface so their experimental carbon capture scheme could go ahead without any dissent. This determination defied common law understanding of property rights extending from the center of the earth to the heavens without any recognition of this traditional right.

Bill 2 – Responsible Energy Development Act

This Act, which governs the process for energy development requiring access to private property, is argued by some to fail to adequately respect landowners' rights to notification, hearing, and appeal.

Conclusion

The decisions made unanimously by the government members, who constitute a majority on what is meant to be a committee independent from Executive Council intervention, are a troubling indication either of their collective reluctance to make decisions, their indifference to property rights issues, or pressures put on them by government leadership to leave decision-making up to the Executive Branch. Whatever the motive, Albertans were not well-served in this instance. This is unacceptable, especially considering how fundamental property rights are to our collective economic prosperity and the livelihoods of individual Albertans.

We appreciate the opportunity to attach our observations to the committee's report and sincerely hope that any criticisms are taken in good faith and lead to the empowerment of this standing committee in terms of the vital and unique role it can play in making life better for Albertans.

Submitted by:

Todd Loewen, MLA
Deputy Chair, Resource Stewardship
Grande Prairie-Smoky

Pat Stier, MLA
Livingstone-McLeod

Leela Aheer, MLA
Chestermere-Rocky View

Don MacIntyre, MLA
Innisfail-Sylvan Lake

