

Global News Documentary, 16 X 9 Program: Full Story: *When the Oil Stops*

Link: <http://globalnews.ca/video/2309220/full-story-when-the-oil-stops>

Our clients and the public should watch this documentary. Despite some inaccuracies, it is an important story, nicely-done, which identifies, but barely scratches the surface of, serious administrative law problems in Alberta:

- **Oil wells are not being abandoned, and the related sites are not being reclaimed, pursuant to environmental law (and well established case law).**

We agree that this is a massive and compounding problem that should never have arisen.

We also believe the opposite of what the landowners and lawyer interviewed in the documentary appear to believe: Blame in the main lies with surface owners and the Surface Rights Board, who have the power, in the form of the provisions of existing legislation and case law, available to them to solve these problems. Unfortunately, landowners have not availed themselves of what they are empowered with. Landowners and those who represent them have failed to properly request relief that the Surface Rights Board is bound by law to provide, and have failed to prove their cases.

- **40% of inactive wells in Alberta are not properly suspended. An official of the Alberta Energy Regulator (“AER”) apparently feels this is a minor problem or issue. We disagree.**

Ironically, the head of the Surface Rights Board interviewed, identified what the AER official interviewed has obviously overlooked. Administrative tribunals, such as the Surface Rights Board and AER, are granted discretion – decisions involving the exercise of discretion depend on the facts.

What the Surface Rights Board official failed to state is that administrative tribunals also have mandatory duties and responsibilities, related to which they no power or latitude whatsoever to exercise discretion. Simply put, mandatory tasks must be carried out to the letter of the law.

When an official of the Surface Rights Board or AER treats a mandatory task as if he has discretion in the matter, he commits an error of jurisdiction, or breaches the principles of natural justice. If this occurs, the related decision must be reconsidered on request properly made, and the related decision, order, permit, approval, or licence is rendered null and void, as if that decision had never been made.

The AER has no discretion whatsoever to allow wells to remain in an improperly suspended state.

The policy or programme the AER official referred to, said to be designed to bring operators into compliance as to suspended wells that arguably must be abandoned, is patently illegal. The policy the AER official spoke of contravenes the very provisions of law the AER has a mandate to enforce. The AER has no power, mandate, or discretion to allow improperly suspended wells to remain in a regulatory non-compliant state.

The government minister interviewed similarly has no discretion, and little say, in the matter, other than to recommend laws, or amendments to existing laws, to the Legislative Assembly.

We are a province of the rule of law. No person, including said officials, may break the law.

It would be as improper for any minister to comment or provide directions to the AER or Surface Rights Board as it would be for a minister to publicly tell a judge how to treat a criminal or civil case before the courts. As we pointed out to him in his election campaign, former Premier Prentice did this when he requested the Surface Rights Board to reconsider the Lemke case, which was covered by the documentary.

Under our system of law and government, there is to be separation between government and the adjudicative branches of government, which must be observed. For the minister interviewed in the documentary to imply discretion shall be granted, whereby government officials may ignore the law, is a contravention of law and an invitation for anarchy.

This concept is illustrated by United States Justice Brandeis' eloquent dissent in *Olmstead v. United States*, 48 s.Ct. 564 (1928):

"Decency, security, and liberty alike demand a government official shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes the law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means; to declare that government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine, this Court should resolutely set its face."

Wells in Alberta are not properly suspended or abandoned according to law, and sites are not being reclaimed, because the government appoints officials to the AER, who allow the AER to fail to carry out its mandate. This in turn creates imbalances of rights the Surface Rights Board must compensate for by law. Against AER inaction, surface owners and the Surface Rights Board must resolutely set their faces, as Justice Brandeis concluded must occur.

Through applications properly made to, and argued before, the Surface Rights Board, surface owners and this Board must compel irresponsible operators to do what the AER will not cause them to do: Become responsible and render operations regulatory compliant, to decrease compensation awarded by the Surface Rights Board, that must be paid to landowners by law. If the AER will not or cannot enforce our laws, we must hit the operator in the pocket book so to speak, until they voluntarily become compliant.

Bankrupt Companies Are Not Paying Compensation to Landowners – An Increasing Problem

The documentary contains certain inaccuracies, and dealt with very simple cases. Focus was on Section 36 of the *Surface Rights Act*. Arguably, this provision of Alberta law provides that, when the underlying minerals are owned by the Crown, the surface owner is indemnified against losses, such as failure by the operator to pay yearly amounts agreed to by way of a surface lease agreement.

We agree with the legal opinion of the lawyer interviewed. We also feel that, compared to the more serious problems our clients face, Mr. Lemke's problems and associated losses are relatively small, and are temporary, provided that:

- Mr. Lemke makes or has made an additional application to the AER, one he should have made prior to applying to the Surface Rights Board (to have the well licence amended to name the Orphan Well Programme as licensee); and,

- the Surface Rights Board makes proper findings of fact and law in other, pending, more complex cases, which are of critical importance to all Albertans.

As stated, under existing legislation (the “Statutory Scheme”) available to landowners, there are solutions to the problems identified in this television documentary, which may not have occurred to, or may not have been pursued by, those interviewed.

There is no question that lawyers and experts who represent or testify for oil and gas companies know this. Many of those who represent or testify for landowners apparently do not know this.

Assumed Entitlement to Ongoing Compensation is in Jeopardy

The 16 X 9 documentary incorrectly stated, more or less as fact, that surface owners are (entitled to be) compensated yearly until and oil or gas site has been reclaimed (until a reclamation certificate is issued by the AER, certifying the site as reclaimed). We agree.

However, as we, our clients, and a certain oil company we are engaged with are acutely aware, a matter that has been overlooked by most Alberta landowners, this *assumed* entitlement to ongoing compensation ***is in serious jeopardy. It has come under full frontal attack, which the Surface Rights Board has allowed for 38 years to date.***

What the documentary also failed to state is that, with a few exceptions, ongoing compensation is only paid when operations are conducted on the surface. The concept of ongoing compensation, until reclamation is complete, does not normally apply to buried pipelines, sites on land that are not regularly used or occupied by the oil and gas operator, and a certain urban site in Didsbury, Alberta, where various illegal surface operations were conducted, unchecked, for decades.

16 X 9, or other journalist organizations, would do well to produce a follow up to, or expand on, the documentary critiqued hereby. The media needs to focus on the fact that the yearly payments, which the landowners interviewed in the documentary obviously take for granted, are by no means assured.

An irresponsible operator has busily expended time and funds for years, trying to convince the Surface Rights Board that operators need not pay landowners for their ongoing losses, which provides at least some assurance that sites may be reclaimed and revert to the landowner as required by law.

If the Surface Rights Board allows the extreme injustices in the related Didsbury case to continue, which are now thirty eight years in duration and counting, it is more than reasonable to infer that the problems experienced, and millions of dollars of losses incurred by, the related landowner, will also be experienced by all Alberta landowners, and soon. How badly would this compound the problems 16 X 9 looked into?

It stands to reason that if an urban landowner is not compensated for millions of dollars in ongoing losses, farmers’ losses of a few thousand dollars per year shall be rendered inconsequential in comparison. Compensation paid to farmers annually, and related site reclamation, are by no means assured, and are in serious jeopardy, for reasons that go far beyond the current oil company bankruptcy problems.

The Significant Oversight of the Documentary – The Issues Investigated are Also Urban Problems

Urban voters need to realize that surface rights problems and oil and gas safety are not simply rural problems.

City residents, particularly in Edmonton, but also in other urban locations, need to know that the AER condones, and takes no action whatsoever, as to obvious trespass and illegal venting of poisonous sour gas along one of Alberta's busiest urban highways. This is occurring on Crown lands the AER manages.

The minister interviewed, who hedged on taking positions, and implied problems were caused by and inherited from the former Conservative Government, must face up to the fact that these are problems her government was elected to resolve expeditiously, and that urban voters can make the difference.

Edmonton residents need to inundate this minister with calls and emails. They should demand the obvious and immediate solutions they are clearly entitled to: *The AER must shut down illegal and unsafe operations immediately, and hire qualified staff that have regard for Alberta's laws, to ensure current problems do not reoccur.*

As is almost always the case, the documentary deals with farm or ranch land problems, or those of a minor nature, compared to unresolved urban landowner issues. Urban oil and gas operational and surface rights issues also have significance, not to mention consequences of a very different political nature.

The most outrageous and absurd contraventions of Alberta law, by irresponsible operators, the AER, and the Surface Rights Board, are in fact occurring in some of Alberta's towns and cities.

In these locations, far more lives are constantly endangered than in rural Alberta. Losses being incurred by urban surface owners and others, which the Surface Rights Board and AER have yet to properly deal with, are significantly higher than any farm loss.

Where the landowners interviewed in the 16 X 9 documentary are paid about \$3,500.00 per year (more or less equivalent to their estimated or deemed losses), urban landowners are absorbing millions of dollars in compensable damages, in contravention of Alberta and federal case law. They have been unable to convince the Surface Rights Board that they are entitled to be compensated for actual losses.

Balance of Rights

The documentary failed to mention the most important factors in surface rights matters. Primary mandates of the AER and Surface Rights Board are to balance the rights of mineral and surface owners.

The AER's mandate is to license and approve operations that create minimal losses to surface owners and occupants. The Surface Rights Board's mandate is to compensate surface owners and occupants for any remaining imbalance. (See this article: [Surface Rights Compensation – A Balancing Act.](#))

If the AER fails to carry out its mandate, which is patently the case in many if not most instances, the ability of the Surface Rights Board to compensate landowners, at least according to law, is seriously undermined and compromised. Written decisions indicate without question that, in the vast majority of cases, the Surface Rights Board simply assumes, obviously in error, that the AER is doing its job.

The 16 X 9 program claimed that the AER admits that 40% of wells are not properly suspended – this fact shows the AER and its predecessors have failed as to carrying out the mandate they are entrusted with.

The AER official stated that some improperly suspended wells may be productive in future. He overlooked that critical aspect of the statutory scheme, which dictates that when wells have not been properly suspended within one year of last production, they must be abandoned by law. Responsible operators know this, and preserve the right to future production by carrying out timely and proper suspensions.

The AER official interviewed, and the misguided organization he belongs to and defended, which we are counting on to balance environmental and industry matters, have no more discretion to ignore laws passed by the Alberta Legislative Assembly than a police officer or judge has to ignore obvious theft or murder. Indeed and on tape, the AER official condoned the exercising of AER discretion that organization does not possess. This type of discretion is not granted to our courts and judges, let alone the AER!

The AER is patently engaged in abuses of landowner's rights, which the Surface Rights Board must have regard to, and has a mandate not to condone.

It is simple common sense that owners of lands, on which 40% of all Alberta wells remain improperly suspended, on which wells that should have been abandoned by law exist, are patently entitled to more compensation than what is paid to their neighbors as to lands on which properly suspended wells exist.

The most commonly used method of determining a rate of ongoing compensation, which is highly flawed and absurd considering the foregoing, is to essentially pay a landowner a rate similar to that being paid to his neighbors. This without consideration of countless factors, such as if a well has been properly suspended or not, or is illegally licenced.

Landowners and the Surface Rights Board have been sucked into using or relying on this flawed method because they overlook the nature of operations, or the nature of the statutory scheme governing same.

Facts and Provisions of Law are Ignored by Alberta's Regulatory Bodies

With the few words spoken on video tape in the documentary, the head of the Surface Rights Board almost hit the nail on the head. Exercising of administrative tribunal discretion does depend on the facts as he correctly stated. However it also depends on the provisions of applicable law, related to the exact nature of oil and gas operations being conducted, which are consistently overlooked or not raised, by operator or landowner.

The related problems for landowners are several fold:

1. Landowners must prove their losses. However, the tools available in a civil court case are not available to them in a Surface Rights Board hearing.
2. There are no rules of evidence in Surface Rights Board hearings. Operators and their experts can and do mislead this Board. Operators do withhold critical evidence from their experts, and call no other witnesses in Surface Rights Board hearings. This is a widely used practice, employed by irresponsible operators, that landowners and their lawyers have not sufficiently caught on to.
3. The facts include the nature of the statutory scheme. The *Surface Rights Act* is not the only applicable legislation. Decisions made under many other laws and related regulations have direct effects on right of entry decisions and compensation.
4. The Surface Rights Board normally focuses on the land, rather than the nature of operations, and the laws and regulations governing the exact nature of operations, which change over time.
5. Land agents working for many oil and gas operators are not sufficiently trained. Many pay little heed to the fact that the statutory scheme requires land agents to act ethically.

Real Problems, Easily Solved

The root problems include inadequate surface lease agreement documents, and poorly drafted right of entry orders issued by the Surface Rights Board. Landowners can and must change this.

Under the statutory scheme, oil and gas operators are required to explain the nature of their operations to the landowner, including what the related regulations are, and how safety and other risks shall be mitigated. These obligations arise at the planning stage of any project, and continue until the operations are abandoned and the site is certified as reclaimed.

Problematic is that said obligations are also more or less ignored by irresponsible operators. These obligations are called “participant involvement”.

The law governing participant involvement is a binding regulation: Section 2 of AER *Directive 056*. AER stakeholder advisor employees feel Directive 56 is not a law. Rather they tell us *Directive 056* is policy.

Some AER inspectors, who we have dealt with extensively, interject their own interpretations of law, are not interested in determining the facts, fairly or otherwise, blindly defend unsafe and regulatory non-compliant operations without investigation, and have no idea that the courts have clarified these matters.

The AER essentially hands out licences for the asking, and refuses to review licences when reasonably requested by landowners to do so in writing, and when required by law to do so.

Grass Roots Balanced Solutions

A few AER employees we have dealt with are qualified. These good folks, who appear to be in the minority, have acted expeditiously to balance landowner’s rights in accordance with the statutory scheme, as Albertans are entitled to expect.

We need more of the latter type of qualified and responsible AER employees. The former misguided type must be weeded out, taken off the job and re-trained, or fired. Alberta deserves no less.

On land owned by one of our clients, the licensee of wells is a corporation that ceased to exist in 1964. The AER must, by law, amend the well licences to reflect the person with a right to work the minerals as the licensee of the well. The AER has not even acknowledged a landowner request in writing to do so. If we cannot count on the AER to carry out this simple, mandatory, statutory task, how can the AER be trusted to keep us safe or protect the environment?

By way of landowners and the Surface Rights board adhering to the laws of the land, requesting and awarding higher compensation, irresponsible operators can be brought into compliance, or eliminated.

If the NDP government will not advocate adherence to the laws of Alberta, they too need to be run out of office in a few years by voters, as their predecessors were. The Wild Rose Party needs to be an effective opposition in the meantime, and must raise these issues, until they are resolved. Wild Rose needs to prove they are “next in line”, and explore how to provide balanced solutions.

If we fail to act in the manner advocated hereby, Alberta and Alberta’s environment have no future.

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